

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 17 OF 2011

BETWEEN

SHAVA LAPPS

Employee

and

JUMBY BAY RESORT

Employer

Before:

**The Hon. Philip A. Pilgrim
The Hon. Dr. Hayden Thomas
The Hon. Jessie F. Kentish**

**President
Member
Member**

Appearances:

**Mr. Charlesworth O.D. Brown - Attorney-at-Law for the
Employee**

**Mrs. Fidela Corbin Lincoln of Simon Rogers Murdoch -
Attorneys-at-Law for the Employer**

**2012: February 14
March 29**

JUDGMENT

PILGRIM , P

Background

- [1] Antigua & Barbuda is a country which depends heavily upon the tourist industry. It provides a wide range of hotels and other accommodation for the enjoyment of all. Jumby Bay Resort is engaged in the business of providing rental of estate homes and villas on Jumby Bay.

- [2] The Employee Shava Lapps resides at Johnsons Point in the parish of St. Mary in Antigua and Barbuda. He was employed at Jumby Bay Resort as a Bell Attendant or Houseman from December 07, 2009, pursuant to a contract of employment made between himself and Jumby Bay Resort dated December 05, 2009.
- [3] The Employee's job description was contained in a document headed **"Rosewood Hotels and Resorts Job Description."** It is dated November 17, 2009. He was attached to the Front Office of the Resort. His immediate supervisor was the Bell Captain/Shift Leader.
- [4] A list of duties which a Bell Attendant is required to discharge is stated in his Job Description. In addition, the terms and conditions of the Employee's employment are regulated by and incorporated in a Memorandum of Agreement made between the Antigua Hotels and Tourist Association and the Antigua Workers' Union.
- [5] Mr. Andrew Hedley is the Resort's Managing Director. Ms. Karen Henry works at Jumby Bay Resort as its Front Desk Manager. Mr. Trevor McDonald works as the Director of Operations. Mrs. Corina Edwards Sealy is employed as the Resort's Human Resources Manager. Ms. Claudine Jeffery is employed as a Front Desk Agent and Mr. Steadroy Athill is employed as a Bell Captain/Shift Leader.
- [6] On January 12, 2011 the Employee refused to perform certain duties at Jumby Bay Resort. In addition, his Employer made an allegation to him that

he uttered a statement to Ms. Henry which was thought to be offensive and inappropriate.

- [7] As a result of the matters contained at **paragraph [6)]** above, two (2) meetings were held at the Resort on January 12, 2001. At the conclusion of the second meeting the Employee was informed that further consideration would be given by the Resort of the events which occurred on that day. He was requested to stay at home until he was contacted by the Human Resources Department.
- [8] According to the Employee, on January 20, 2011 he was summoned to a meeting at Jumby Bay Resort on January 21, 2011. He attended the meeting. At the meeting he was given a letter of dismissal dated January 21, 2011. It was signed by the Managing Director. It was admitted into evidence as “JB-3”. At **paragraph [3]** on **page 2**, Mr. Hedley stated as follows:
- “Separate and apart from your refusal to do the task is (a) your disrespect shown to the front desk manager by using inappropriate language in response to her initial request; (b) your refusal to comply with a directive given to you by the resort manager through the front desk manager; and (c) the disrespect and disregard which you have shown for the authority of the resort manager”.*
- [9] The Employee submitted that he earned a basic salary of \$824.00 per fortnight plus sixteen (16) points ‘service charge’ or an average take-home pay of \$1,509.28 per fortnight.

Mitigating efforts

[10] The Employee stated that he tried to obtain alternative employment at different hotels. One of them was Jolly Harbour. He obtained employment on April 04, 2011. He works for about the same salary as he obtained at Jumby Bay Resort.

Legal proceedings

[11] The Employee commenced proceedings by filing a Reference in this Court on August 15, 2011 of the same date. He claims that his dismissal was unfair. His Employee's Memorandum of the same date was also filed on August 15, 2011.

[12] An Employer's Memorandum together with the Statements of all its Witnesses were filed on December 2, 2011.

[13] The Employee's Witness Statement was filed on December 20, 2011. A Summons dated February 08, 2012 was issued by this Court to Ms. Tatian George to appear and give evidence on behalf of the Employee.

The issues

[14] There are three (3) issues to be determined. They are as follows:

(1) Whether the reasons for dismissal relate to the conduct of the Employee?

(2) Whether under the circumstances the Employer acted reasonably or unreasonably in treating the conduct in question as a sufficient reason for dismissal?

(3) In the circumstances of this case was the Employee unfairly dismissed and if so what damages are due to him?

The Employee's submissions

[15] Counsel for the Employee filed his Written Submissions on March 06, 2012. The relevant Submissions are as follows:

(i) Once an employer has adduced evidence which shows that the employee has committed an act of misconduct, then the Court must determine whether the employer's decision to dismiss the employee was reasonable in the circumstances.

(ii) The Employee was entitled to his views that the request to sort books was not within his job description.

(iii) The Employee's refusal to perform the task was based upon two grounds; (a) that it was not part of his job description and (b) that he was extremely busy with his prescribed duties.

(iv) He would have complied with the request even on a hectic day ***"if it had been given him directly by the Employer's Managing Director. Therefore, it is not unreasonable to conclude that the Employee would***

have complied if the instructions were given to him directly by Mr. Gannon, the Resort Manager."

(v) *"Notwithstanding his firm and forthright position in respect of his view about his job description, the Employee was largely contrite, remorseful and cooperative. In that regard, Mr. McDonald corroborated the Employee's uncontroverted evidence that he was remorseful and expressed a willingness to embrace the warning letter."*

(vi) The Employer took Written Statements from Claudine Jeffery and Karen Henry, but *"he had no opportunity to present his own written statement and/or to question Ms. Henry, Ms. Jeffrey, Mr. McDonald or any other person on theirs."*

(vii) Mr. Brown also submitted at **paragraph [47]** of his Written Submissions as follows:

"In fact, the evidence given by both Mr. McDonald and Ms. Sealy are to the effect that if the Employee had mended his attitude, humbled himself, apologised to Mr. Hedley on January 21, 2011 before the dismissal letter was delivered to him, and otherwise (had) agreed to perform the pertinent task in the future, it was more than likely that he would not have been dismissed".

(viii) The Employer should have issued a warning letter to the Employee in accordance with Section C59 (2) of the Antigua and Barbuda Labour Code (the Labour Code).

(ix) The initial reprimand and warning letter which he agreed to accept were superseded by the suspension which eventually lasted nine (9) days. The Employee did not contemplate that he would be dismissed.

(x) The Employer did not act reasonably in its dismissal of the Employee.

The Employer's submissions

[16] Counsel for the Employer's Written Submissions were filed on February 29, 2012. A summary of them is as follows:

(i) The Employer has led sufficient evidence which establishes a clear link between the dismissal and the Employer's assigned reason for the dismissal, namely misconduct.

(ii) Learned Counsel cites **Union of Construction, Allied Trades and Technicians v Brian [1981] IRLR 224 (CA), British Leyland (UK) Ltd. V Swift [1981] IRLR 91 and Rolls Royce Ltd. V Walpole [1980] IRLR 343 (EAT)** and states that the action of the Employer to dismiss the Employee was reasonable in all of the circumstances of this case.

The Law

[17] C56 of the Labour Code states as follows:

“C56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his

employer; and no employer shall dismiss any employee without just cause.”

[18](a) C58 (1) (a) and (2) of the Labour Code reads as follows:

“C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) relates to misconduct of the employee on the job, within the limitations of Section C59 (1) and (2).;

(b);

(c);

(d);

(e);

Provided, however that there is a factual basis for the assigned reason.”

(b) C58 (2) states as follows:

“(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal”.

[19] C58 (1) (a) must be read in conjunction with C59 (1) (a), which states as follows:

“C59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

(b)

(c)”

Misconduct

[20] Blackstone’s Employment Law Practice, 2010, Oxford University Press, (USA) describes the term misconduct at **paragraph [30.35]** as follows:

“Generally, misconduct amounts to behaviour which is unacceptable in the employment context”.

Orders by an employer

[21] (a) An employee may commit an act of misconduct if he refuses to obey a lawful and reasonable instruction from the employer. The nature of the refusal and the importance of the order will determine whether the misconduct is minor or gross.

- See Blackstone's (op cit) at paragraph 30.41, citing **Union of Construction Allied Trades and Technicians v Brian** [1980] IRLR 224 (CA)

(b) In the first instance judgment reported at [1980] IRLR 357 (EAT) **Talbot J** on behalf of the Employment Appeal Tribunal stated as follows at page 359:

“What has to be considered, when the reason for dismissal is the refusal to obey an order, is what was the order that was required to be carried out; that is a consideration of the employers’ conduct, and the employers’ requirement”.....Whereas in this case the reason for dismissal was the refusal to obey a lawful order, it seems to us plain that there must be considered, not only the nature of the order but the circumstances surrounding the giving of that order. and, also, the reason for not carrying out that order.”

The importance of the contract of employment

[22] (i) In **Farrant v The Woodroffe School** [1998] I.C.R. 184 (EAT), Judge Peter Clarke asked an important question at page 193 Letter F. It was as follows:

“The question is therefore when and in what circumstances is the contract of employment determinative or otherwise relevant to the matters raised by section 98? What is its significance?”

(ii) Section 98 of the Employment Rights Act 1996 (UK) raises the matters set out at Section C58 (1) of the Labour Code.

[23] (a) Judge Peter Clarke answered that question by quoting **Phillips J in Redbridge London Borough Council v Fishman [1978] I.C.R. 569 (E.A.T.)** at **page 574**, when in the course of the judgment he stated as follows:

“In truth, we think that the industrial tribunal perhaps paid too much attention to the contractual position. The jurisdiction based on paragraph 6 (8) of Schedule 1 to the Trade Union and Labour Relations Act 1974” – now Section 98 (4) of the Employment Rights Act 1996 – “has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrariwise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by paragraph 6 (8), they are not of the first importance.”

(b) Judge Peter Clarke at **page 195** Letter C of **Farrant (op cit)** in response to the quote from Phillips J (op cit) stated as follows:

“We do not think that we could improve on that analysis of the significance of the contractual position in cases such as this”.

[24] In **Redbridge** the employee was engaged as a full-time permanent teacher in charge of the resources centre at a large London Comprehensive School.

The employee was told to work almost full-time at the centre and only to do sufficient classroom teaching to enable her to keep in touch with practical requirements.

- [25] In 1975 a new head teacher was appointed. She favoured more traditional teaching methods. She asked the employee to teach twelve (12) English lessons in addition to the performance of her work at the resources centre. She agreed to do so in order to help the English Department.
- [26] The employee was subsequently asked to teach eighteen (18) periods and continue to work at the resources centre. She refused to do so. She argued that to teach these periods would result in her being unable to do justice to her actual appointment.
- [27] There were discussions, and correspondence about the situation but the employee made no headway, and she was instructed to carry out the assignments to teach eighteen (18) English periods. She refused to do so and was eventually dismissed for refusing to obey the reasonable instructions of the headmistress.
- [28] The employee claimed in the industrial tribunal that she was unfairly dismissed. That body held that she was being required to do work which was different from that which she was employed to do, that she acted reasonably in refusing to teach eighteen (18) English periods and that the dismissal was unfair.

[29] On appeal the E.A.T. dismissed the local authority's appeal. The E.A.T. held that although a head teacher was entitled to require teachers to do work other than that for which they had been engaged provided that the request was reasonable, the employee had been specifically engaged as director of the resources centre, and her teaching commitment was ancillary to that end, and in those circumstances the local authority had not acted reasonably and the dismissal was unfair.

- See the headnote at page 563 of the judgment

[30] In **Farrant (*op cit*)** the employee commenced employment with the respondent school as a laboratory technician under a contract of employment which required him to spend most of his time in the science laboratory but some time in helping service the craft design and technology area. Subsequently as part of the re-organization of the technical support services, he was required to transfer from the science department and divide his time between other departments. He refused to accept a new job description and was dismissed for gross misconduct.

[31] An industrial tribunal dismissed his complaint of unfair dismissal on the ground that, although the school was in breach of the applicant's contract of employment in removing him from laboratory work altogether, it had given him ample warning and had carried out sufficient consultation before dismissing him. In these circumstances the school had acted reasonably.

[32] His appeal to the E.A.T. was dismissed. The E.A.T. held that in these circumstances the lawfulness of the instruction, though relevant, was not

decisive of the reasonableness of the dismissal and that his dismissal was fair.

[33] In **Brandon and Goold v Murphy Bros [1983] IRLR 54 (E.A.T.)** a national union agreement was incorporated in the employees' contract of employment to provide two consecutive holidays at the commencement of the New Year. The employer operated a small bakery business. It had an important contract with a large company accounting for about one-third of their total output. The employer proposed to open its business on New Year's Day in order that its obligation to provide fresh bread would be met. Two employees refused to work and were dismissed. Their dismissals were held to be fair.

[34] On appeal their appeals were dismissed. Although in accordance with their contracts they were not bound to work on New Year's Day, in the circumstances of that case, the Employer's act to dismiss them was held to be reasonable.

The first issue

Whether the reason for dismissal relates to the conduct of the Employee?

[35] Mr. Lapps in his evidence stated that he was employed as a Houseman at a private home on Jumby Bay. According to his Attorney-at-Law his job description contains a list of thirty-three (33) responsibilities the last of which is a requirement that the Employee perform "***All other duties as required***".

[36] Mr. Lapps recalled January 12, 2011. He was performing his *“usual duties on a hectic day”*. In his Witness Statement he gave the following evidence at paragraph [6] thereof:

“On January 12, 2011, while performing my usual duties on a hectic day, I was told by Ms. Karen Henry, the Front Desk Manager that Mr. Ed Gannon, the Resort Manager, wanted “a bellman” to go to sort some books at two restaurants, remove those which were not good and replace them with books from a third restaurant. I refused to comply on the grounds that this task was not part of my job description and that I was extremely busy with my prescribed duties”.

[37] In his evidence to this Court Mr. Lapps was given the usual permission to amplify any matter contained in his Witness Statement. He started with paragraph [6]. He stated as follows:

“I was required to go to two restaurants, sort out some books, decide which are old, go to the library and replace those books in the two restaurants. I refused based on my job description and that I was extremely busy. My contention was that the task at that time was unreasonable because I had a busy day. I did not convey this to Ms. Henry who told me Mr. Gannon wanted a bellman to perform the task”.

[38] Mr. Lapps stated that this initial communication between Ms. Henry and himself took place about 1030 hours on January 12, 2011. He further stated that Ms. Henry telephoned him about 1125 hours on the same date. She enquired from him whether he had completed the task. He told her that he

was busy and that he had already given her his answer. He is not answerable to Ms. Henry.

[39] Mr. Lapps made reference to **paragraph [5]** of Karen Henry's Witness Statement. He said that he had not used the words "**bull shit**" to her in his refusal to perform the task. He also denied using the term "bull shit" referred to at paragraph 5 of Claudine Jeffery's Witness Statement and at paragraph 5 of Trevor McDonald's Witness Statement.

[40] (a) In response to Counsel for the Employer Mr. Lapps stated *inter alia* as follows:

"Ms. Henry told me to discard old books. She did not tell me to transport books from the Front Desk to the beach bar. She told me to transport books from the estate house to the pool grill and the beach bar".

(b) He stated further as follows:

"It is part of my job description to carry out any reasonable requests for the comfort of guests. If a guest asked me to bring books from the estate house to the beach bar, it would not be part of my job description but I would do it".

(c) He further added:

"Had I been asked on another day when I was not that busy, I would have done it. It is for the Employer to decide what it wants done and when it is to be done as opposed to my

deciding when such tasks are to be done. I did not ask why the request of me was made”.

- [41] Ms. Tiffany Roberts gave evidence on behalf of the Employee. She resides at Paynters in St. George. She is employed by Jumby Bay Resort as a Front Desk Supervisor.
- [42] She recalled January 12, 2011. She was present at the Front Desk along with Karen Henry, Claudine Jeffery and Tatian George when Mr. Lapps had a conversation with Ms. Henry. Ms. Roberts stated that when the conversation was taking place she was using the telephone. This act prevented her from hearing the conversation which took place between Ms. Henry and Mr. Lapps. Her evidence was quite frankly uneventful. It did not assist this Court to determine the nature and content of the conversation between the relevant parties.
- [43] The first person who gave evidence on behalf of the Employer was Claudine Jeffery. Her Witness Statement was adopted as her evidence.
- [44] In answer to Mr. Brown, Attorney-at-law for the Employee, Ms. Jeffery stated that Ms. Henry's request to Mr. Lapps that Mr. Gannon required a 'bell hop' to go to the pool grill and discard some old books was a general request. Apart from this request Ms. Jeffery recalled that Ms. Henry told Mr. Lapps to take books from the pool grill and verandah, discard the old books as well as to place some books at the beach bar.

- [45] Ms. Jeffery in her Witness Statement stated that after Ms. Henry made the request to Mr. Lapps, he said that that request was *“bull shit”* and that he would not perform the task.
- [46] The second witness for the Employer was Ms. Karen Henry. She resides at Pares Village. She is employed by Jumby Bay Resort as the Front Desk Manager. She commenced working in this capacity from October 08, 2010.
- [47] Ms. Henry’s Witness Statement was adopted as her evidence. She recalled the morning of January 12, 2011. At about 0845 hours on that same date Mr. Ed Gannon instructed her to request a bell attendant to check the book shelves at the Verandah Bar and Pool Grille. These are restaurants located on the Employer’s premises. The bell man was required to discard old books and to transport books from the Front Desk to the beach bar.
- [48] At about 0930 hours while conducting a staff briefing at the Front Desk with employees Claudine Jeffery, Tatian George, and Tiffany Roberts, Ms. Henry stated that she saw Mr. Lapps approaching the Front Desk. She informed the Employee of the above mentioned request and that he should execute the tasks.
- [49] In answer to Mr. Brown Attorney-at-Law for the Employee, Ms. Henry stated that this initial conversation could not have taken place at 10:30 a.m. In this conversation Ms. Henry stated Ms. Lapps told her that her request was *“bull shit”* and that she should inform Mr. Gannon that he would not perform the requested task. He did not tell Ms. Henry that he was having a busy day. He walked away.

[50] Ms. Henry in her Witness Statement stated that she contacted Mr. Gannon. She informed him *“that the Employee had refused to do the requested task and that the other bell attendant was busy”*. She was advised by Mr. Gannon to check later to ensure that the Employee had completed the task.

[51] Ms. Henry contacted Mr. Lapps at about 1100 hours on the same day. She enquired of him whether or not he had completed the requested task. He asked her whether she had not heard him the first time. He restated that he would not perform the assigned task.

Discussion

[52] A Job Overview is stated in the Employee’s Job Description. It is as follows:

Job Overview

“To perform duties relating to arriving and departing guests - in particular transporting guest luggage to (and) from guest rooms, storing luggage, escorting guests throughout the Resort, delivering guest messages. Responsible for attending to immediate needs of each guest upon arrival and follow through attention throughout stay”.

[53] What follows this ‘Job Overview’ is a list of ‘Responsibilities’. Some of these duties are as follows:

- *“Ensure that standards are maintained at a superior level on a daily basis.*

- *Anticipate guests' needs, respond promptly and acknowledge all guests, however busy and whatever time of day.*
- *Be familiar with all Resort services and features, local attractions and activities and respond to guest inquiries accurately. Do not give out wrong information.*
- *Accommodate all guest requests expeditiously and courteously. Follow up with designated Resort personnel to ensure completion of request.*
- *Prepare cold towels in accordance with the number of guest arrivals.*
- *Deliver messages, faxes, newspapers, flowers, other sundry items, packages to guests and carry out any other requests in order to ensure their comfort.*
- *Ensure all guest luggage is placed on the ferry, never misplace it or leave it unattended.*
- *All other duties as required."*

[54] It is clear from a reading of the 'Job Overview' and the 'Responsibilities' stated in the Employee's Job Description that his primary duties related 'to arriving and departing guests' and to cater to the 'needs of each guest upon arrival and follow through . . . throughout' (their) stay at Jumby Bay Resort.

[55] Quite naturally a complete list of all the duties which a Bell Attendant may discharge is an evolving matter. This is the reason why the term 'All other duties as required' appears at the bottom of the list.

[56] Was the order by Ms. Henry to Mr. Lapps part of his Job Description? No item appears on the Employee's Job Description list deals with books. In answer to Counsel for the Employer Mr. Lapps stated that if a guest required him to bring books from the estate house to the beach bar he would perform this task even though it did not form a part of his job description. However, whether or not the performance of this task was or was not a part of his contract though not irrelevant, is not of the first importance.

[57] There are two (2) matters which need to be considered in an examination of the first issue. The first was raised by Mr. Brown, Attorney-at-law at **paragraph [34]** of his Written Submissions. He stated as follows:

“The request was for “a bellman” to perform the task. The request, at its source was not directed to the employee per se. Accordingly, the Employee was entitled to doubt in his own mind as to why he in particular was selected by Ms. Henry the Front Desk Manager to be the recipient of the request. It is not too wild a speculation to suggest that the Employee might have reacted differently if the task was specifically assigned to him”.

[58] This submission is unmeritorious for the following reasons. Firstly, in his evidence in chief Mr. Lapps stated to the Court as follows:

“I was required to go to two restaurants, sort out some books, decide which are old, go to the library and replace those books in the two restaurants. I refused based on my job description and also that I was extremely busy. My contention was that the task which I was asked to perform at that time was unreasonable because I had a busy day and I was behind in my duties.”

[59] Secondly, in answer to Mrs. Fidela Corbin Lincoln, of Simon Rogers Murdoch, Attorneys-at-law for the Employer he stated as follows:

“Ms. Henry told me to discard old books She told me to transport books from the estate house to the pool grill and the beach bar”.

[60] Thirdly, the evidence is also replete elsewhere which supports the findings that Ms. Henry made the request to Mr. Lapps to perform the duty with regard to the books. In any event, even if Mr. Lapps was of the view that the term “bellman” was used to him by Ms. Henry, all of the evidence points to the conclusion that his response to Ms. Henry was in very clear terms that he understood that he was the ‘bellman’ who was ordered by Ms. Henry to perform the duty.

[61] The second matter which I shall now consider is that according to Mr. Lapps he was *“extremely busy”* with his prescribed duties which rendered him unable to perform the task assigned to him.

[62] When Ms. Henry enquired of Mr. Lapps if he had completed the task, he did not inform her that he was busy. He acknowledged in his evidence that he should have pointed out his busy schedule to Ms. Henry.

[63] What was the order which the Employee was required to be carried out? The requirements of that order are stated by the Employee at **paragraph [58]** above. No evidence was led by either party which stated whether or not this was the first occasion on which the Employee was required to perform this task. There is therefore no evidence of custom.

- [64] No evidence was led by the Employer to show whether or not the performance of this order was important on January 12, 2011. On the other hand no **credible** evidence was led by the Employee to demonstrate if in fact he was unable to perform the task given to him by Ms. Henry.
- [65] Mr. Lapps gave two reasons for his failure to perform the order given to him by Ms. Henry. In the circumstances of this case I hold that the true reason for his failure to perform the task was his view that it did not form a part of his Job Description. I do not believe the reason for his non-performance of the task to be that of his being extremely busy. Mr. Lapps was very resolute and indeed passionate that he had no intention of performing the task assigned to him on January 12, 2011. He not only informed Ms. Henry of this on the first occasion, but informed her to let Mr. Gannon, no less a person than the Hotel Manager, be aware of his stand. Mr. Lapps repeated this to her on the second occasion. For if this reason is eliminated, there still remains the overarching reason namely, that the task was not a part of his Job Description.
- [66] Ms. Henry gave evidence that the journey from the Verandah to the Pool Grill via the use of a golf cart by Mr. Lapps would have taken him three to five minutes.
- [67] In his evidence Mr. Lapps in response to Counsel for the Employer stated that it was for the Employer to decide what and when it requires a particular task to be performed as opposed to his making a decision when such a task is to be done. He did not know why the Employer made the request to him and he did not ask why.

- [68] An employer in the circumstances of this case must be able to decide which orders it requires an employee to perform. This order must however be a reasonable one. In light of Mr. Lapps' evidence at **paragraph [67]** above, I hold that it was his duty to carry out the task which the Employer assigned to him.
- [69] If the execution of this task prevented him from performing his other duties, in these circumstances his Employer would not have been able to legitimately blame him for the non-performance thereof. He could have raised the matter as a grievance with his trade union representative in accordance with Clause 26 of the Memorandum of Agreement. The Employee did not avail himself of this opportunity.
- [70] I also hold that in the circumstances of this case Mr. Lapps did use the term ***"bull shit"*** as a part of his reply to Ms. Henry to inform her of his refusal to perform the task which was assigned to him.
- [71] In the circumstances of this case I therefore hold that the reason for his dismissal related to the conduct of the Employee and in particular (a) his refusal to perform the duty which was assigned to him by Ms. Henry on January 12, 2011, and (b) his reply to Ms. Henry.

The second issue

Whether under the circumstances the Employer acted reasonably or unreasonably in treating the conduct in question as a sufficient reason for dismissal.

The Law

[72] (a) Ian Smith and Gareth Thomas authors of Smith and Wood's Employment Law, Ninth Edition Oxford University Press, New York 2007 at page 510 state *inter alia* as follows:

“ dismissal for misconduct is also a prime area for the application of the principle that the function of the tribunal is to decide upon the reasonableness of the action taken by the employer; not simply to substitute their views for his; in a case as heavily dependant upon its facts as a misconduct case, there may well be a considerable area of discretion in which several solutions might have been reasonable and as long as dismissal was within that area the employer is not to be penalised for choosing it in preference to any lesser measure”.

(b) The authors at paragraph [72] (a) above cited **Trust Houses Forte Leisure Ltd. v Aquilar** [1976] IRLR 251. At page 254 Phillips J stated *inter alia* as follows:

“It was to be recognized that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. There may well be cases where reasonable managements

must take either of two decisions: to dismiss, or not to dismiss. It does not necessarily mean, if they decide to dismiss, that they have acted ‘unfairly’ because there are plenty of situations in which more than one view is possible”.

[73] In **British Leyland (UK) Ltd. v Swift** [1981] IRLR 91 (CA) Lord Denning MR states the test at page 93 (No. 10).

[74] In all but the most blatant case of misconduct or incapability the employer must institute some **‘proper investigation of the ground of his complaint against the employee and come to proper, tenable conclusions if he is to convince the tribunal that he had reasonable grounds for any belief which he is putting forward as a reason for the dismissal’.**

- See Smith and Wood’s op cit at page 501.

[75] In **Polkey v Dayton Ltd.** [1988] I.C.R. 142 at page 162 Lord Bridge of Harwich stated at Letter H as follows:

“Thus, ... in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;”

Inquiry of procedural steps

The first meeting held on January 12, 2011

[76] As a consequence of Mr. Lapps’ failure to perform the assigned task, the Employer convened a meeting to discuss the matter with him. This took

place at Jumby Bay Resort on January 12, 2011. Mr. Lapps stated that this meeting occurred at about 1150 hours. It is Ms. Henry's evidence that the meeting took place at about 1240 hours.

- [77] Those present at this first meeting were Mr. Steadroy Athill, the Employer's Supervisor, Mr. Trevor McDonald, Ms. Karen Henry and Mr. Lapps. It is the Employee's evidence that he informed the meeting that to discharge the assigned task was not within his job description, but on a daily basis he performs tasks which are not within his job description. He repeated that this is done every day.
- [78] The Employee further stated that in his opinion he ***"handled the conversation with Ms. Henry and Mr. McDonald badly and (he) told Mr. McDonald this"***. It was his opinion that he would receive a warning as a consequence.
- [79] In this first meeting Mr. McDonald put some matters to Mr. Lapps which were reported to him by Ms. Henry. The first matter dealt with the Employee's refusal on two occasions to discharge the task which Ms. Henry had previously assigned to him. According to Mr. McDonald Mr. Lapps confirmed to him in the meeting that he did not execute the tasks on those occasions when he was required to do so by Ms. Henry as he was of the view that they did not form part of his Job Description.
- [80] The second matter put to Mr. Lapps by Mr. McDonald was that he had said to Ms. Henry to tell Mr. Gannon that he was not performing the assigned

task. In his evidence Mr. Lapps confirmed to Mr. McDonald that he told Ms. Henry to so inform Mr. Gannon.

[81] The third matter put by Mr. McDonald to Mr. Lapps was that he would be issued with a letter of warning. This was confirmed by Mr. Lapps.

[82] (a) Mr. McDonald also stated that after he informed Mr. Lapps of the written warning Mr. Lapps told him that, he was prepared to receive a suspension, a warning letter or whatever but would continue to refuse to perform the task if requested again.

(b) To this statement Mr. Lapps did not agree with Mr. McDonald.

[83] Ms. Henry attended this first meeting. She is of the view that it commenced at about 1240 hours. She confirms Mr. McDonald's testimony at **paragraphs [79 - 82]** above.

[84] At the meeting Ms. Henry stated that Mr. Lapps did use the term "bull shit" to her as he refused to perform the assigned tasks. This was denied by Mr. Lapps.

[85] Mr. Lapps in response to Counsel for the Employer stated that in the first meeting Mr. McDonald did not inform him what Ms. Henry had alleged Mr. Lapps had said to her. According to Mr. Lapps, Mr. McDonald did not inform him of Ms. Henry's statement to Mr. McDonald that he had refused to perform the task which she had assigned to him. In light of the matters set out at **paragraphs [79] and [80]** above I do not believe Mr. Lapps.

Moreover Mr. Lapps, when pressed by the Employer's Attorney-at-Law stated that in this first meeting Mr. McDonald enquired from him what took place, and he gave a response to Mr. McDonald. According to Mr. Lapps, Ms. Henry gave her account and he Mr. Lapps responded as a consequence of having been given an opportunity to do so.

The second meeting held on January 12, 2011

[86] All was not well at the conclusion of the first meeting. Mr. Lapps stated that he *"was again summoned to meet with the Operations Manager at the Human Resources Department. At this meeting Mrs. Corina Edwards-Sealy, the Human Resources Manager asked (him) to explain what happened. (He) again explained to her what had occurred and maintained (his) position. In turn, Mrs. Edwards-Sealy enquired whether (he) did not do things outside (of his), job description, to which enquiry (he) responded that (he) did so every day. At the end of the second meeting (he) was told to take the rest of the day off and that (he) would receive a call "later" from the Human Resources Manager".*

-See paragraph [11] of his Witness Statement.

[87] In response to the Employer's Attorney-at-Law Mr. Lapps stated that in this second meeting he met with Ms. Sealy and Mr. McDonald. He informed the Court he was aware of the allegations which were made against him. He responded to those allegations.

[88] A second meeting was convened at Jumby Bay Resort on January 12, 2011. It is Mrs. Edwards-Sealy's evidence that based upon certain factors which

included Mr. Lapps' stated opinion "*that he would continue to refuse to perform the requested tasks since he did not deem the tasks to be within his job description*", she convened this second meeting.

-See paragraph [4] of her Witness Statement.

[89] According to her the meeting was held "*in the afternoon of the 12th January 2011 with Mr. McDonald and the Employee in (her) office*".

[90] It is her testimony that certain allegations against Mr. Lapps were put to him. These were "*that he had refused to carry out the requests conveyed to him, had used inappropriate language to Ms. Henry in the presence of other employees and he continued to refuse to carry out the task even after being advised by Mr. McDonald that the said tasks were within his job description*"

- See paragraph [5] of her Witness Statement

[91] (a) Mrs. Edwards-Sealy at **paragraph [6]** of her Witness Statement set out Mr. Lapps' response to the allegations referred to at **paragraph [90]** above. She stated *inter alia* as follows at paragraph:

"6. The employee responded that he was busy that day and acknowledged that bell attendants were on occasion required to perform tasks not specifically stated in their job description".

(b) At **paragraph [7]** of Mrs. Edwards-Sealy's Witness Statement she stated *inter alia* as follows:

"7. Mr. McDonald asked the Employee whether he had used the words "bull shit" and he replied he could not remember but might

have muttered them under his breath as he was walking away from Ms. Henry”.

(c) At **paragraph [8]** of her Witness Statement she stated as follows:

“8. At the end of the meeting I informed the Employee that the matter will be considered further and that he should go home until contacted by human resources”.

[92] In her evidence Mrs. Edwards-Sealy in reply to Mr. Charlesworth Brown, Attorney-at-Law for the Employee stated that the main reason for the Employee’s dismissal was ultimately that he would not budge from his position of refusing to carry out the task requested of him by a member of management and in particular a request from the Resort Manager through Karen Henry.

[93] According to Mrs. Edwards-Sealy, Mr. Lapps had been given ample opportunity to change his position and also reflect upon it. Ultimately however, he simply refused to change his position to perform the task. According to her, Mr. Lapps was prepared to bear any consequences. Mrs. Edwards-Sealy further stated that the task assigned to Mr. Lapps was to be performed within his normal assigned hours of work.

[94] Mrs. Corina Edwards-Sealy stated that Mr. Lapps informed her that he would have performed the tasks if he was required to do so by Mr. Hedley. Mr. Brown in his Written Submissions at **paragraph [16]** stated the matter in this way:

“Towards the end of the second meeting, in answer to another direct question from Ms. Sealy, the Employee stated that (he) would have performed the required task if requested to do so by Mr. Andrew-Hedley, the Employer’s Managing Director”.

[95] Mr. McDonald in his evidence stated that Mr. Lapps’ final words to him namely that he would still refuse to perform the assigned task if asked again to do so whether he was given a letter of warning, be suspended or receive some other form of discipline prompted him to refer the matter to the Human Resources Department.

[96] According to Mr. McDonald the reason why Mr. Lapps was dismissed was his continued refusal to perform the same task if it was assigned to him on another occasion.

[97] This second meeting ended with Mrs. Edwards-Sealy informing Mr. Lapps that the matter would be given further consideration. He was advised by Mrs. Edwards-Sealy to return to his place of residence until contacted by the Human Resources Department.

The event January 21, 2011

[98] Mr. Lapps was not given a formal letter of warning. Mr. Lapps stated that on January 20, 2011, he *“was summoned to a meeting at the Human Resources Department on the following day January 21st, 2011”*. According to Mr. Lapps when he *“turned up for the scheduled meeting*

(he) was given a letter dated January 21st, 2011 by which (his) services were terminated on the grounds of serious misconduct”.

-See paragraph [14] of his Witness Statement.

[99] At this meeting were Mr. Lapps, Mr. Hedley, Mr. McDonald and Mrs. Edwards-Sealy.

[100] Mr. McDonald’s account of that meeting in reply to Mr. Brown, Attorney-at-Law for the Employee was to the effect that Mr. Hedley discussed the matter with Mr. Lapps. Mr. Lapps informed Mr. Hedley that he would not perform the task if he was requested to do so again. Mr. Hedley informed Mr. Lapps that his contract of employment would be terminated. Mr. Hedley gave to Mr. Lapps his letter of dismissal.

[101] Mrs. Edwards-Sealy’s account of what transpired at this meeting was given in reply to Mr. Brown, Attorney-at-Law for the Employee. She informed the Court that Mr. Hedley did not just present the letter to Mr. Lapps. He engaged Mr. Lapps in a discussion which concerned the incident of January 12, 2011. According to her, when Mr. Hedley enquired of Mr. Lapps why he did not carry out the assigned task Mr. Lapps still maintained that it was not part of his Job Description. In addition if he was asked again to do so in the future, he would not perform that task.

Findings

[102] The Employer initiated two meetings to deal with the Employee’s refusal to carry out the order given to him by Ms. Henry on January 12, 2011. The

circumstances which concerned the Employer were clearly outlined to him. He understood the nature of those matters. He was given ample opportunity to put his case to the Employer. He did so. He maintained that the task was not within his job description and that he was busy on that date.

[103] Mr. Lapps has demonstrated no respect for his superiors, namely Ms. Henry or Mr. McDonald. It appears that he felt that he was superior to them. He would only have performed the task if the Managing Director had told him to do so. This is arrogance, intransigence and disrespect of the highest order. His action involved no point of real principle.

[104] This was a reasonable order which was made of him. If such a reasonable order can be performed by an employee only in circumstances when he receives it from the Managing Director, then this would cripple the operation of that enterprise.

[105] Mrs. Edwards-Sealy in response to Mr. Brown, Attorney-at-Law for the Employee said that she took statements from four persons. She did not show them to Mr. Lapps. According to her it is not the policy of the Employer to show an employee those statements. She did not take a statement from Mr. Lapps. These statements ought to have been shown to Mr. Lapps.

[106] The issue therefore arises what did Mrs. Edwards-Sealy take into consideration prior to the dismissal of Mr. Lapps. The answer to this is stated by Mrs. Edwards-Sealy at **paragraph [9]** of her Witness Statement. She stated as follows:

“9. In making a determination of the appropriate disciplinary action we considered the information provided by Ms. Henry, Mr. McDonald, Mr. Athill, Ms. Jeffery, the Employee, the Employee’s Job Description, the Collective Labour Agreement in force with the Antigua and Barbuda Workers Union and the Labour Code”.

[107] The evidence of Ms. Henry, Mr. McDonald and Ms. Jeffery was contained in their Witness Statements. Those Statements all contained the relevant evidence which Mr. Lapps knew prior to his dismissal. The contents of those Statements were put to Mr. Lapps in both meetings. He was given an opportunity to respond to them and he did. I am satisfied that he was given a fair hearing.

[108] Mr. Lapps was given an opportunity from January 12, 2011 to January 20, 2011 to reflect upon the matter. He refused to change his opinion. Although the Employer informed Mr. Lapps that he would be issued a formal letter of warning none was issued to him. This period was of a sufficient length for him to recognise that the matter was of a real serious nature which could result in his dismissal.

[109] It is quite possible that in a particular set of facts two perfectly reasonable employers may take different courses of action with regard to an employee. It is not my responsibility to substitute my view for that of the Employer in this case. I am required to be satisfied that the Employer’s decision to dismiss the Employee fell within a range of reasonable responses.

[110] I end by citing the words of Mr. J.D. Hughes of the Employment Appeal Tribunal in **Rolls-Royce Ltd. v Walpole** [1980] I.R.L.R. 343, at page 347 No. 17:

“What else in all the circumstances could the employers do? It may be that another reasonable employer might have given this particular employee in these circumstances a third chance, ... Be that as it may, the two of us are quite satisfied that the employers’ response in the circumstances of the present case to dismiss the employee was well within the range of responses which reasonable employers could have taken, having regard to equity and the substantial merits of the case, ... as a sufficient reason for dismissing him”.

[111] In the circumstances of this case I am satisfied that the Employer acted reasonably in treating the conduct in question namely the Employee’s refusal to discharge an order to him from Ms. Henry on January 12, 2011, as a sufficient reason for his dismissal.

[112] The Reference is dismissed. There shall be no order as to costs.

Dated the 29th day of March, 2012



PHILIP A. PILGRIM
President

I agree



DR. HAYDEN THOMAS
Member

I also agree



JESSIE F. KENTISH
Member

