

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 8 OF 2010

BETWEEN:

CORTEZ JEREMIAH

Employee

and

OBSERVER RADIO LTD.

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. M. Althea Crick

Member

The Hon. M. Glendina McKay

Member

Appearances:

**Mr. Egbert Joseph of Hotel Management Association for the
Employee and**

**D. Raimon Hamilton of Dane Hamilton & Associates,
Attorneys-at-Law for the Employer**

2011: July 21

2012: January 19

JUDGMENT

PILGRIM, P

INTRODUCTION:

Background

[1] Observer Radio Ltd. is the holder of a radio license for different radio frequencies. It operates two radio stations. They are Observer Radio and Hitz FM.

- [2] Prior to August 2009 both radio stations operated from different offices in the Ryan's Building. This is located at High Street in the City of St. John in Antigua and Barbuda. Sometime after August 2009 both radio stations operated from one office in the Ryan's Building.
- [3] Mr. Jeremiah resides at Scotts Hill in the parish of St. George in Antigua and Barbuda. He was born on November 15, 1978. At the date of trial he was thirty-two (32) years of age.
- [4] The Employee commenced employment with The Observer Group on May 01, 2008. He initially performed the duties as a Sales Representative. He was promoted to the position of Traffic Officer on September 01, 2009 for Observer Radio. This promotion is confirmed by a letter of appointment from the Employer to the Employee. It is dated August 30, 2009. It was admitted as Exhibit "CJ-5". In that letter the Employee earned a gross monthly salary of EC\$3,000.00 payable in two instalments on the 15th and the last day of every month.
- [5] Prior to November 06, 2009, Ms. Teresa Pinnock performed the functions as a Traffic Officer for Hitz FM. By letter dated November 06, 2009 her position was made redundant. The reason adumbrated by the Employer was *"the reorganization of the sales and traffic departments of The Observer Media Group effective the 1st September, 2009, and in keeping with our efforts to streamline the entire operation"* This letter was admitted as "CJ-4".

- [6] Mrs. Heather Nanton is employed as the Human Resources Manager of Observer Radio. On November 06, 2009 Mrs. Nanton directed Mr. Jeremiah to perform the traffic functions for Hitz FM Radio. These were previously performed by Ms. Pinnock. The main duty of a Traffic Officer was to download or produce an advertising log for the radio station.
- [7] Mrs. Nanton's directive to Mr. Jeremiah took place in a meeting between the Employee, Mr. Julian Rogers and herself on November 06, 2009. Mr. Rogers is the General Manger of the Employer.
- [8] At the meeting Mr. Jeremiah expressed certain concerns with regard to Mrs. Nanton's directive to him. Mr. Rogers made certain statements to Mr. Jeremiah. Mrs. Nanton also made certain statements to Mr. Jeremiah.
- [9] Mr. Jeremiah continued to work until Friday, November 06, 2009 at 4:00 p.m. However, he did not perform the advertising log functions for Hitz FM Radio on Friday, November 06, 2009 for the period Friday, November 06, 2009 to Monday, November 09, 2009.
- [10] According to Mr. Jeremiah one meeting took place on November 06, 2009. Its duration was from about 10:00 a.m. to 1:00 p.m.
- [11] Mr. Jeremiah put forward three reasons why he did not perform the advertising function for Hitz FM Radio. Firstly, according to him it was not a part of his contract of employment. Secondly, neither Mrs. Nanton nor Mr. Rogers addressed his concerns on or before the close of business at 4:00

p.m. on Friday, November 06, 2009. Thirdly, he was not aware of the password for Hitz FM Radio.

- [12] As a consequence of Hitz FM's failure to reproduce the advertisements from Friday, November 06, 2009 to Sunday, November 08, 2009, it is the evidence of Mr. Rogers that the Employer lost about EC\$6,000.00 in advertising revenue. Some advertisements were incapable of being reproduced at a later date.
- [13] By letter dated November 09, 2009 from the Employer to the Employee the Employee was dismissed for his failure to perform the log function for Hitz FM Radio. His action was described as *"a serious dereliction of duty"* which left the company *"with no alternative but to terminate (his) employment with immediate effect"*. The Employer issued a cheque to Mr. Jeremiah for \$1,651.54 *"which represents six (6) days salary for November, 2009, plus six (6) days unused vacation"*. The letter of dismissal was produced and marked as **Exhibit "CJ-1"**.

Employee's Mitigation Efforts

- [14] In October 2010 Mr. Jeremiah obtained employment with North Coast Hardware as a Sales Representative. He worked for **"a few months at this job"**. He obtained *"a better position at Jumby Bay Hotel as a Storeroom Clerk from January 2011 working for \$1,600.00 net"*.

Legal Proceedings

- [15] As a consequence of being dismissed Mr. Jeremiah commenced legal proceedings by causing a Reference to be filed in this Court. It is dated June 14, 2010. In that Reference the Employee claims that he was unfairly dismissed.
- [16] The Employee's Memorandum was filed on July 09, 2010. His Witness Statement was filed on July 29, 2010.
- [17] The Employer's Memorandum was filed on October 2, 2010. The Employer's two (2) Witness Statements were both filed on May 13, 2011.
- [18] Mr. Jeremiah gave evidence on July 21, 2010 in support of his case. Mrs. Heather Nanton and Mr. Julian Rogers for the Employer both gave evidence on July 21, 2010.

The Issues

[19] The issues are as follows:

- (i) Whether in the circumstances of this case did the Employee's conduct amount to misconduct which justified the Employer to summarily dismiss the Employee?**
- (ii) In the event that the Employee was unfairly dismissed what is the measure of damages which is due to him?**

The Employee's Submissions

- [20] Mr. Joseph on behalf of the Employee filed his Written Submissions on August 04, 2011. In summary Mr. Joseph merely repeated the evidence given before this Court.
- [21] Mr. Joseph submitted that Mr. Jeremiah was given the password which enabled him to perform the log functions for Hitz FM for the period August 28, 2009 to September 25, 2009. During this period another employee who performed this function was absent from work due to illness.
- [22] Mr. Joseph also referred to the Employee's concerns which he expressed in a meeting of November 06, 2009. According to Mr. Joseph no one who represented the Employer addressed these concerns before the close of business on November 06, 2009.
- [23] Since no one returned to Mr. Jeremiah and he was not in possession of the password for Hitz FM Radio the Employee was unable to perform the job function for Hitz FM Radio for the period after September 25, 2009 to the weekend of November 06, 2009.
- [24] It is Mr. Joseph's submission that Mr. Jeremiah was unfairly dismissed thereby entitling him to an award of damages.

The Employer's Submissions

[25] The Written Submissions of Mr. D. Raimon Hamilton of Dane Hamilton & Associates, Attorneys-at-law for the Employer were filed on August 19, 2011. Mr. Hamilton submits *“that when an employee is summarily dismissed for misconduct, the test for deciding whether the dismissal is unfair is contained in Section C58 (2) which must be read in conjunction with C59 (1).”*

[26] According to Mr. Hamilton *“Summary dismissal of an employee is a strong measure to be justified in exceptional circumstances. This is a question of fact to be decided in each case on the case’s own facts.”*

[27] Mr. Hamilton further submits as follows:

“Where an employee does something that is incompatible with the due or faithful discharge of his duties to the employer; he may be guilty of misconduct, and may be dismissed summarily. It is sufficient for the employer that the conduct of the employee was such that it was seriously inconsistent or incompatible with his duty in the business in which he is engaged”.

Mr. Hamilton cites **Nicole Potter v Jeweller’s Warehouse Ref No. 38 of 2003**, a decision of this Court in support of his submissions.

[28] It is Mr. Hamilton’s submission that having regard to all of the facts of this case, the Employee’s conduct on November 06, 2009, *“was such as to completely undermine the trust and respect that ought to exist as an element of the employment relationship. In the circumstances the*

Employer was justified in dismissing the Employee summarily and the Reference ought to be dismissed”.

The Law

[29] (i) The relevant provisions of the Labour Code which relates to the circumstances of this case are Sections C56, C58 (1) (a) and (2) and C59 (1) (a).

(ii) The Law with respect to misconduct is carefully set out in a number of cases. One of them is the **Nicole Potter** case (*op cit*) a decision which I wrote in 2008. The relevant **paragraphs are [34] to [43] and [45] to [46]**.

[30] In summary, an employee owes to his employer an implied duty of care in carrying out his duties. In addition to his duty of care there does exist between the employee and the employer a fiduciary relationship of trust and confidence.

[31] The extent of the degree of trust and confidence is to be determined by the character of the employer, the employee's function in the institution, and the degree of trust required of the employee *vis-à-vis* the employer.

[32] The employee's behaviour may amount to misconduct when it reaches a level that is *“so serious that the employer cannot reasonably be expected to take any course other than termination”*.

-See Section C59 (1) of the Labour Code.

[33] (i) The test for misconduct has been described by **Lord Maugham** in **Jupiter General Insurance Co. v Shroff [1937] 3All E.R. 67 at page 74B** as follows:

“[W]hether the misconduct was not such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and therefore to justify immediate dismissal.”

(ii) The question whether the misconduct proved establishes the right to dismiss the employee is a question of fact.

[34] The evidence which is necessary to justify summarily dismissal has been described as *“cogent and weighty in nature and content”*.

-See **Cable & Wireless Ltd. V Hill and Others (1982) 30 W.I.R. 120**, at page 129, per **Berridge J.A.**

The First Issue

Whether in the circumstances of this case did the Employee’s conduct amount to misconduct which justified the Employer to summarily dismiss the Employee?

[35] Mr. Jeremiah in answer to Mr. Joseph stated that as the Traffic Officer of Observer Radio, he was aware that the duties which he performed were similar to those which were performed by the Traffic Officer for Hitz FM Radio.

- [36] Mr. Jeremiah further stated that if he was required to perform the Traffic Officer's functions on Hitz FM Radio he would be required to obtain a separate log-in identification and password.
- [37] During his period of employment with Observer Radio he was taught how to log in to the Hitz FM data base by Mr. Julian Rogers.
- [38] Mr. Jeremiah received the log in details for Hitz FM from Mr. Julian Rogers on August 25, 2009. He used these log in details to execute certain functions at Hitz FM for the period August 28 to September 25, 2009. Ms. Pinnock who was the Traffic Officer for Hitz FM had obtained a leave of absence due to illness for that period. Both of them worked in the same office.
- [39] According to Mr. Jeremiah his core functions included downloading or the production of an advertising log. In answer to Mr. Hamilton, Mr. Jeremiah stated that one of his functions as Traffic Officer is to use icons to put advertisements in their proper positions. This allows the generation of an advertising log. If this is not done the advertisements would not be played on the following day.
- [40] On a prior occasion Mr. Jeremiah was requested to perform the Traffic Officer's duties for Observer Radio when he was initially employed as a Sales Representative. He was given the password for Observer Radio. He performed those functions. On this occasion he was not paid for the performance of these functions.

- [41] According to Mr. Jeremiah he first met Mr. Rogers in February/March 2008. Mr. Rogers mentioned to him that his remit included the restructuring of the radio station.
- [42] Mr. Jeremiah also had a conversation with Mr. Rogers in August 2009. In that conversation Mr. Rogers informed him that the Traffic Office, Sales Office and other departments were being restructured.
- [43] Mrs. Heather Nanton is the Employer's Human Resources Manager. A meeting was held with her, Mr. Rogers and the Employee at the Employer's workplace on November 06, 2009. The meeting lasted for about three (3) hours ending about 1:00 p.m.
- [44] During the meeting Mr. Jeremiah was told by Mrs. Nanton of Ms. Pinnock's redundancy. He was requested by Mrs. Nanton to carry out the traffic operations for Observer Radio and Hitz FM. It was decided that Mr. Jeremiah was a fit and proper person to perform both functions as most of the work for Hitz FM was automated.
- [45] Mr. Jeremiah in answer to Mr. Hamilton stated that in the meeting of November 06, 2009 he expressed reservations in relation to the amount of functions which he was required to perform. In that meeting according to Mr. Jeremiah, issues of training and the natural log function were discussed.
- [46] It is Mr. Jeremiah's evidence that Mr. Rogers informed him that he would address his concerns. It was his testimony that the log function had to be prepared for Observer Radio. For Hitz Radio the log has to be generated.

- [47] Mr. Jeremiah stated that he completed his duties for Observer Radio. He did not think that he had the responsibility to execute the traffic functions for Hitz FM for Friday, November 06, 2009. He was not aware that there were traffic functions to be performed for Hitz FM. He was not in possession of the information to log in to Hitz FM.
- [48] Mr. Jeremiah completed his tasks at 4:00 p.m. on November 06, 2009. He waited for someone from his employer to get back to him before the end of the work day. No one did. It is his evidence that he did not try to find out anything from Mr. Rogers or Mrs. Nanton. He did not try to ascertain if the logs for Hitz FM were completed.
- [49] In Mrs. Nanton's evidence she referred to Mr. Jeremiah's concerns at **paragraph [45]** above. It is also her evidence that Mr. Jeremiah was never informed in that meeting of November 06, 2009 that his concerns would be addressed before the close of business on that day. It was her understanding that Mr. Jeremiah would perform the functions as Traffic Officer for Observer Radio and Hitz FM.
- [50] Mrs. Nanton was informed on Monday, November 09, 2009 by the station manager that no advertisements were aired on the prior weekend ending November 08, 2009 or for the morning of November 09, 2009. Mrs. Nanton spoke with Mr. Jeremiah. He informed her that the performance of these functions were not his responsibility. The company dismissed Mr. Jeremiah by letter dated November 09, 2009. It issued a cheque to him for \$1,651.54 which represents six (6) days salary for November 2009 plus six (6) days for unused vacation. The company described Mr. Jeremiah's failure to perform

the log function for Hitz FM as **“a serious dereliction of duty which left it with no alternative but to terminate his employment with immediate effect”**.

- [51] Mr. Julian Rogers gave evidence. His testimony is that on 6th November 2009 Mr. Jeremiah was in possession of the password for Observer Radio and Hitz FM. According to Mr. Rogers the passwords to both radio stations are changed by the Information Technology Consultant. That individual obtains instructions to do so from Mr. Rogers. It is Mr. Rogers' testimony that after September 2009 the passwords were not changed before late November 2009.
- [52] At the meeting of November 06, 2009 it is Mr. Rogers' evidence that Mr. Jeremiah expressed certain reservations about the natural log functions. This is an end of the month function. It relates to the billing cycle. This would not prevent Mr. Jeremiah from performing the Hitz FM traffic duties.
- [53] Mr. Rogers informed Mr. Jeremiah that the Employer had already identified someone to train him when it was necessary to do so. It is also Mr. Rogers' testimony that Mr. Jeremiah did not inform him that he would not perform the log functions for Hitz FM for the weekend of November 06 to November 08, 2009.
- [54] In answer to Mr. Joseph, Mr. Rogers stated that the Traffic Officer and himself are the two persons who know the passwords for the radio stations. He also informed the Court that the company had lost about \$6,000.00 as a

consequence of Mr. Jeremiah's failure to perform the log functions for Hitz FM for the period November 06 to November 08, 2009.

Some observations

- [55] Mr. Jeremiah in reply to Mr. Hamilton stated that he was aware that if the Hitz FM log was not done, the advertisements would not have been played. This would result in the advertisers requesting a refund of the money which they previously paid to the company. The company would lose revenue.
- [56] On the two prior occasions when Mr. Jeremiah performed the log functions he told the Court that he did not inform the company that he was not employed to perform those functions.
- [57] In answer to Mr. Joseph, Mr. Jeremiah informed the Court that he did have a duty to ask for the Hitz FM password. However he did not do so.
- [58] I have heard the evidence of Mr. Jeremiah and Mr. Rogers with respect to whether or not the Employee was in possession of the password for Hitz FM. I find that it was more likely than not that Mr. Jeremiah had the log in details for Hitz FM. However, he chose not to perform the traffic duties for Hitz FM.
- [59] The concerns raised by Mr. Jeremiah at **paragraph [46]** were legitimate and fundamental to his continued performance of the duties which the company requested him to perform. However, it is very clear that the company was

not in a position to address these concerns before the close of business on November 06, 2009.

[60] I hold that neither Mr. Rogers nor Mrs. Nanton informed Mr. Jeremiah that either of them would return to further address his concerns before the close of business on November 06, 2009.

[61] Mr. Jeremiah knew or ought to have reasonably known that the discussions which he participated in with Mrs. Nanton and Mr. Rogers had been brought to a satisfactory conclusion. The company reasonably expected him to perform the log functions for Hitz FM for the period November 06, 2009 to November 08, 2009.

[62] It is also reasonable to hold that as Mr. Jeremiah knew the financial implications of his failure to perform the Hitz FM log functions, then this fact behoved him to either (a) request from Mrs. Nanton or Mr. Rogers the Hitz FM password or (b) state quite clearly to any of them that he was either unable or unwilling to perform those duties.

[63] Mr. Jeremiah's recognition of and his failure to perform his *"duty to ask for the Hitz FM password"* resulted in financial loss to the company. Mr. Jeremiah held a crucial position with the company. His actions generated revenue for his Employer who paid his salary. If he does not place the advertisements with the radio station this result in a loss to the company.

[64] In these circumstances Mr. Jeremiah's actions prejudiced the safe and proper conduct of the business of the company. I hold that his actions were so

serious that the Employer could not reasonably be expected to take any course other than to summarily dismiss him.

The Second Issue

In the event that the Employee was unfairly dismissed what is the measure of damages which is due to him?

[65] In light of my findings and conclusions at **paragraph [64]** above this issue does not fall to be considered. The Employee's Reference is hereby dismissed. There shall be no order as to costs.

Dated the 19th day of January, 2012

A handwritten signature in black ink, appearing to read 'P. A. Pilgrim', written over a horizontal line.

PHILIP A. PILGRIM

President

I agree.

A handwritten signature in black ink, appearing to read 'M. Althea Crick', written over a horizontal line.

M. ALTHEA CRICK

Member

I also agree .

A handwritten signature in black ink, appearing to read 'M. Glendina McKay', written over a horizontal line.

M. GLENDINA MCKAY

Member

