

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 29 OF 2012

BETWEEN

LESTON JACOBS

Employee

and

**PERMANENT SECRETARY, MINISTRY
OF INFORMATION BROADCASTING
TELECOMMUNICATIONS SCIENCE &
TECHNOLOGY**

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Samuel R. Aymer

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Ms. Samantha Marshall and

Ms. Saska Diamond - Attorneys-at-Law for the Employee

Ms. Carla Brookes-Harris – Crown Counsel - Attorney-at-Law for the Employer

2013: June 18

2013: October 17

JUDGMENT

PILGRIM, P

Introduction:

- [1] The Ministry of Information, Broadcasting, Telecommunications, Science & Technology is one arm of the Government of Antigua & Barbuda. Its Head Office is located at Coolidge Business Complex, Airport Road, St. George's in Antigua. (I shall sometimes afterwards refer to it simply as "the Ministry").

- [2] The Ministry employs various persons in its many offices. One of these offices is ABS Radio and Television.
- [3] Leston Jacobs was born on July 24, 1982. He resides at Potters Village, St. George's in Antigua. He was employed with the Ministry as a Technical Officer from November 01, 2001 to May 14, 2010. He was attached to ABS Radio, a section of the Ministry.
- [4] His job entailed the making of recordings, commercials and attending to outside broadcasts. He stated that he worked with at least 10-12 Technical Officers. He was paid a gross monthly salary of EC \$2,339.00. After the usual statutory deductions were made he worked for a net monthly salary of EC \$2,100.00.
- [5] In the month of November 2009, Mr. Jacobs was arrested and subsequently charged with a criminal offence of possession of firearm and ammunition.
- [6] At all material times Ms. Cecily Philip was employed as the Permanent Secretary in the Ministry. She is now employed as the Permanent Secretary in the Ministry of Health, Social Transformation, Consumer Affairs & Local Government.
- [7] By letter from Ms. Philip dated May 14, 2010, Mr. Jacobs was "*dismissed from the Government service effective 14 April, 2010*". By letter from Ms. Philip dated June 15, 2010, "*the effective date of termination is 14th May, 2010*". The letter of dismissal is contained in this judgment at paragraph 25.

Employee's mitigation attempts

- [8] The Employee gave evidence that he is a qualified electrician, an entertainer and a musician. He works as an entertainer during the Carnival season. Outside of the Carnival season he works in Barbuda and other Caribbean

countries. He sings calypsos. He stated that he is the present Caribbean Calypso King. His stage name is "Young Destroyer".

- [9] Mr. Jacobs stated that he earns less money as an entertainer as compared with his former job as a Technical Officer. He gave no evidence of his earnings as an entertainer.
- [10] Mr. Jacobs stated that he "*made hundreds of attempts to seek employment in construction and messenger jobs, wrote letters but [he does] not have any to show to this Court*".

Legal proceedings

- [11] Mr. Jacobs was dissatisfied with his dismissal. An Employee's Reference was filed on his behalf dated October 05, 2012. In that Reference Counsel for the Employee identified as an issue to be determined by the Court whether the Employee was unfairly dismissed.
- [12] An Employee's Memorandum dated October 05, 2012 was filed on October 08, 2012. An undated Witness Statement of the Employee and one of his mother Ms. Bridgette Jacobs were both filed on October 08, 2012.
- [13] An Employer's Memorandum dated December 13, 2010 was filed on December 18, 2010. An Amended Employer's Memorandum dated January 09, 2013 was filed on the same date.
- [14] A Witness Statement of Ms. Cecily Philip dated March 01, 2013 was filed on the same date.
- [15] Mr. Jacobs and Ms. Jacobs both gave evidence in support of the Employee's case. Ms. Philip gave evidence in support of the Employer's case.

The legal issues

- [16] [1] **In the circumstances of this case did the Employee's conduct justify the Employer's dismissal of the Employee by letter Dated May 14, 2010?**
- [ii] **Did the Employer act reasonably in its dismissal of the Employee?**
- [iii] **In the event that the Employee was unfairly dismissed what is the measure of damages which is due to him?**

Some of the Employee's Submissions

- [17] Legal submissions by Ms. Marshall were dated and filed on July 01, 2013. Much of Counsel's submissions were a repetition of the evidence given by both parties. Later on in this judgment I shall examine this evidence.
- [18] Ms. Marshall submitted that the Employer's reasons for dismissal did not fall within the category of any of the grounds identified under Section 58 (1) (a) – (d) of the Labour Code.
- [19] Learned Counsel also made reference to **Iceland Frozen Foods Ltd. v Jones [1983] ICR 17** and **Polkey v AE Dayton Services Ltd. [1987] IRLR 503**. As a consequence of a citation of these cases, Ms. Marshall submitted that the Court must consider the facts to determine if the dismissal of the Employee was reasonable by the Employer for the reasons stated in the letter of dismissal dated May 14, 2010.
- [20] It is Ms. Marshall's submission that upon an examination of all the facts and case law, the Employer has failed to satisfy the Court that it acted reasonably in the dismissal of the Employee. In this regard, the Employee was unfairly dismissed. He is entitled to compensation.

- [21] Learned Counsel also put forward other submissions. I shall make reference to them later on in this judgment.

The Employer's Submissions

- [22] Ms. Carla Brookes-Harris, Attorney-at-Law for the Employer submitted that the Employee's dismissal was fair and that such dismissal was within the range of responses of a reasonable employer.

The first issue

In the circumstances of this case did the Employee's conduct justify the Employer's dismissal of the Employee by letter dated May 14, 2010?

Further submissions by Ms. Marshall

- [23] Learned Counsel for the Employee made reference to Section C10 (3) of the Antigua & Barbuda Labour Code. That section states as follows:
- "An employer who furnishes a statement or certificate required by subsection (1) or (2) respectively, shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal as covered by Part 5 herein of his liability for severance pay covered by Part 4 herein."*
- [24] Ms. Marshall also drew the Court's attention to Section 58 (1) of the Labour Code. This Section deals with certain grounds for dismissal which do not render the dismissal to be unfair. It is Ms. Marshall's submission therefore that the Employer's reasons for dismissal clearly do not fall within the category of any of the grounds identified in Section 58 (1) of the Labour Code.
- [25] (a) The letter of dismissal was produced by the Employee. It was admitted into evidence on his behalf. It is marked LJ-2. It states as follows:

"May 14, 2010

Dear Mr. Jacobs,

I regret to inform you that your employment as a Technician at ABS Radio with the Government of Antigua and Barbuda more particularly with the Ministry of Information, Broadcasting, Telecommunications, Science and Technology is terminated forthwith.

You will recall that on 15th December, 2009, you were granted permission to proceed on vacation from 1st December, 2009 to the 29th January, 2010. At the end of your vacation leave you did not report for duty and have since not reported to work for a period of three (3) months. Please be advised that this type of behaviour has placed an unfair burden on your co-workers and negatively impacted on the Ministry's operation.

You are further advised that your long absence from work has affected your employment relationship in a negative way and can no longer be tolerated. Accordingly, you are hereby dismissed from the Government service effective 14th April, 2010.

Yours sincerely,

C. Philip

Permanent Secretary

Ministry of Information, Broadcasting

Telecommunications, Science and Technology"

- (b) The Permanent Secretary by letter dated June 15th 2010 did further indicate "that the effective date of termination is 14th May, 2010".

- [26] (a) Both Counsel for the Employee and the Employer cited **Matthewson v R B Wilson Dental Laboratory Ltd. [1988] IRLR 512 (EAT)**. While this case shall be more appropriately mentioned at paragraphs [27] to [29]

below, a similar question arose as to whether or not the Industrial Tribunal had correctly identified the reason for the Employee's dismissal in that case as conduct within Section 57 (2) (b) of the then Employment Protection (Consolidation) Act 1978 (UK.)

(b) Section 57 (1) and (2) (b) and (3) of the UK Act as it then stood stated as follows:

(1) "In determining for the purposes of this Part whether the dismissal of an Employee was fair or unfair, it shall be for the Employer to show (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal, and

(b) that it was a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(2) In subsection (1) (b) the reference to a reason falling within this subsection is a reference to a reason which –

(a) ...

(b) related to the conduct of the employee, or

(c) ...

(d) ..."

(3) "Where the employer has fulfilled the requirements of subsection (1), then, ... the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

[27] Lord Mayfield in writing the judgment of the **EAT** mentioned at page 513 of the **Matthewson's** case (op cit) stated *inter alia* as follows:

"Counsel for the appellant submitted that the Industrial Tribunal had failed to indicate a reason for dismissal based on the evidence. Further, the conduct complained of was not conduct within the meaning of

the conduct complained of was not conduct within the meaning of Section 57 (2) (b) of the Employment Protection (Consolidation) Act 1978 in that it did not reflect in some way on the employer/employee relationship. (Thompson v Alloa Motor Co. Ltd [1983] IRLR 403). In any event, such conduct was not related to the appellant's suitability for employment. Such conduct was not an automatic reason for dismissal. He referred to paragraph 15 of the Code of Practice which relates to criminal offences outside employment. In any event, there had been insufficient inquiry before a decision had been reached..."

- [28] Lord Mayfield at page 513 in reply to learned Counsel's submission stated *inter alia* as follows:

"This Tribunal is not able to agree with the submissions... In our view, it is plain when the decision is read as a whole that the Industrial Tribunal had before them various aspects of the matter, namely, involvement in the use of prohibited drugs; the intervention of the police; the admission by the appellant that he had purchased and was in possession of cannabis; the possible influence on other members of staff; and the suitability of continuing to employ the appellant in the job for which he was employed."

- [29] In **Matthewson** the employer took immediate steps to dismiss the employee before the criminal trial had commenced.

Discussion

- [30] At paragraph 4 (1x) of Ms. Marshall's Written Submissions learned Counsel described the nature of the charges which the Employee faced in the following manner:

(1x) *"Within this case the Employee was charged with the **serious offences** of possession of ammunition and firearm. As a result, he was detained in custody and thereby prevented from attending work for a*

period of approximately 5 months. For 40 days within that period he was able to obtain vacation leave.”

(The emphasis is the Court’s)

- [31] The matter of the Employee’s being arrested, charged, incarcerated, and his appearance before a Court was first raised by the Employee. At paragraph 3 of the Employee’s Memorandum he stated as follows:

“In or about the (month of) November, 2009 (the) Employee was charged and subsequently remanded in to the custody of Her Majesty’s Prison for approximately, 6 months. Hence, despite the Employee’s willingness to attend work (,) circumstances were such that denied him the ability to do so.”

- [32] At paragraph 5 of his Witness Statement Mr. Jacobs stated *inter alia* as follows:

“As soon as I was arrested I communicated with my mother, Bridgette Jacobs, ... I asked my mom to go and explain to the Permanent Secretary at the Ministry (of) Information and Broadcasting, and to inform (her) of my unfortunate circumstances and to enquire as to what could be done to allow me some time off until I could resolve the matter.”

- [33] At paragraphs 7 and 8 of Ms. Bridgette Jacobs’ Witness Statement she stated as follows:

“7. Ms. Cicely Philip is someone whom I knew very well.

8. I did make contact with Ms. Cicely Philip and informed her of the circumstances related to my son’s arrest. She said to me that she was aware of the situation and that she sympathized with me.”

- [34] At paragraph 10 of Ms. Jacobs’ Witness Statement, she stated as follows:

“After Leston’s initial application for bail was denied, I then again made contact with Ms. Cicely Philip informing her of what transpired. I

then asked her what could be done in relation to the retention of my son's employment and salary. She said that he could not get a salary under the current situation since he has not been to work; however, the only thing that she could advise is that my son could make an application for vacation – which would allow my son to receive vacation pay."

[35] The Employee obtained vacation leave from his employment with effect from December 01, 2009 to January 29, 2010. This leave was approved by Ms. Philip.

[36] It is Ms. Jacobs' testimony at paragraph 12 of her Witness Statement that she spoke with Ms. Philip about 2 or 3 days prior to the expiration of Mr. Jacobs' vacation leave. According to her, Ms. Philip told her that her son "was innocent until proven guilty and that we should wait to see what the result of his trial (would be)."

[37] At paragraph 9 of Ms. Jacobs' Witness Statement she stated as follows:

"Ms. Philip further stated that (she) understood the situation, and that he is innocent until proven guilty. She went on to say that as far as she is concerned, Leston still works at ABS. I then informed her that he was to make an application for bail and that I will keep her updated as things develop."

[38] Ms. Jacobs gave evidence in this matter. In her evidence she stated that she signed a Witness Statement in October 2012. According to her the contents of it are true.

[39] In answer to Ms. Carla Brookes-Harris, Attorney-at-Law for the Employer, Ms. Jacobs stated that she contacted Ms. Philip the following day after her son was arrested. She spoke with her via the telephone. According to Ms. Jacobs, on or about November 30, 2009, Ms. Philip informed her that she

was aware of the situation, which meant the arrest and charge of her son for the offence of being in possession of ammunition and a firearm.

- [40] Ms. Jacobs did admit that Ms. Philip never stated that she sympathised with her. According to Ms. Jacobs, Ms. Philip did state that Mr. Jacobs is innocent until proven guilty.

- [41] Ms. Philip gave evidence in this matter. She has been employed in the public service for more than 39 years. In answer to Ms. Marshall, Attorney-at-Law for the Employee, Ms. Philip initially stated that she did not have knowledge that he was incarcerated. According to Ms. Philip, in December 2009 Ms. Jacobs did not inform her that her son was imprisoned.

- [42] Ms. Philip further stated that in December 2009 she did not inform Ms. Jacobs that the Employee was innocent until proven guilty.

- [43] Ms. Philip further stated that Ms. Jacobs contacted her and told her that her son was not at home when a search warrant was executed by the police. On another occasion Ms. Philip stated to Ms. Jacobs that every person is innocent until proven guilty.

- [44] Ms. Philip in further reply to Ms. Marshall, Attorney-at-Law for the Employee, stated that she had a conversation with the Employee and Ms. Jacobs on April 26, 2010. According to Ms. Philip, Ms. Jacobs did not inform her that he had obtained bail. Neither in a prior conversation did the mother inform her that her son had obtained bail.

- [45] Ms. Philip further stated that on April 26, 2010 she did not inform either party that she would contact the ABS Station Manager. On April 26, 2010 she did not inform Mr. Jacobs that he was no longer employed with ABS. According to her on April 26, 2010, Mr. Jacobs was still employed with ABS.

[46] Ms. Philip further stated that she knew at sometime that the Employee was charged with the crime of gun and ammunition offences. She learnt this from the news before Mr. Jacobs came to her office on April 26, 2010. She was aware that Mr. Jacobs was in prison for the above named offences just about the time when Ms. Jacobs made a telephone call to her in or about March 2010.

[47] On April 26, 2010 Ms. Philip stated that she knew that Mr. Jacobs was released from prison. He did not tell her that a trial took place and he was free. Ms. Philip was aware that Mr. Jacobs was on bail for the above stated offences.

Findings

[48] It is really not significant whether or not Ms. Philip became aware on November 30, 2009 that Mr. Jacobs was charged with the above offences. What is important is her state of knowledge when she dismissed the Employee by letter dated May 14, 2010.

[49] On May 14, 2010 Ms. Philip was aware that Mr. Jacobs was charged with **“serious offences of possession of ammunition and firearm”**. These are his Counsel’s own words. Ms. Philip was also aware of the fact that Mr. Jacobs had recently obtained bail from the High Court with respect to the above **“serious offences”**.

[50] No evidence was produced by the Employee or his mother at the meeting of April 26, 2010 of the next date of hearing of the **“serious offences”** for which the Employee was charged. As a consequence, on May 14, 2010 there is no evidence that Ms. Philip was aware of the next date of hearing in the Magistrate’s Court. The Magistrate would be required to conduct a trial before the matter is transmitted to the High Court for a further hearing. This process takes some time before completion.

[51] In these circumstances Ms. Philip bore no responsibility in law or for good administrative practice to await the outcome of any trial before she took the decision on May 14, 2010 to dismiss the Employee. In this regard I reject the evidence of Ms. Jacobs to be untrue at paragraph 12 of her Witness Statement where she stated that Ms. Philip told her that **“we should wait to see what the result of his trial (would be)”**.

[52] On May 14, 2010 Ms. Philip was naturally aware that Mr. Jacobs’ arrest and charge involved the intervention of the police.

[53] The letter of dismissal stated *inter alia* as follows:

“At the end of your vacation leave you did not report for duty and have since not reported to work for a period of three (3) months. Please be advised that this type of (behaviour) has placed an unfair burden on your co-workers and negatively impacted on the Ministry’s operation.”

[54] In answer to the Court, Ms. Philip stated that about 8 co-workers had previously worked with the Employee. In addition, there were not enough persons to work the shifts on which the Employee worked in his absence. The working hours were 8 a.m. to 12 noon, 12 noon to 4 p.m., 4 p.m. to 8 p.m. and 8 p.m. to 12 midnight.

[55] Ms. Philip also stated that due to the Employee’s absence this caused the other co-workers to work longer hours. The Technical Operators were unable to function efficiently.

[56] The letter of dismissal also stated *inter alia* as follows:

“You are further advised that your long absence from work has affected your employment relationship in a negative way and can no longer be tolerated. Accordingly, you are hereby dismissed from the Government Service effective 14th (May), 2010.”

- [57] The Employee's "**long absence from work**" would have involved the above charges for "**the serious offences**" and his suitability for employment in the job for which he was employed.
- [58] Ms. Philip gave evidence that she took into consideration before dismissing the Employee the morale of the staff and the institution, namely ABS. No evidence was given however by any staff member.
- [59] How the criminal charges, his incarceration, the initial failed bail hearing, and the subsequent successful bail hearing would have affected his employment relationship with the Employer in a negative way is in the area of the Employee's participation in the outside broadcasting of ABS.
- [60] As a result of the Employee's status as an entertainer and calypso singer in a small society, it is reasonable to state that he was well-known.
- [61] In addition, it is also fair to state that his arrest and initial imprisonment was the subject of news departments. Ms. Philip stated that she was aware of the charges "**from the news before he came to me on April 26, 2010**".
- [62] These are all matters which Ms. Philip was well aware of on May 14, 2010.

Conclusion

- [63] This Court is unable to agree with Ms. Marshall's submission at paragraph [24] above. It is the Employee himself along with his mother who have provided this Court with the evidentiary ammunition (no pun on that word intended) which supports in large measure the reasons for the dismissal in Ms. Philip's letter dated May 14, 2010.
- [64] Ms. Philip certainly took into consideration several factors before she decided to dismiss the Employee. These included (a) the "**serious offences**", (b) the nature of those offences being firearm and ammunition in nature, (c)

the Employee's incarceration, (d) his first failed bail hearing, (e) his successful bail hearing, (f) the clear absence of a date of hearing of the criminal charges, (g) the inability to state with any certainty when the criminal process would have been completed, (h) the unfair burden placed upon his co-workers, and (i) the suitability for the Employee to be employed in the position which he held.

[65] 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 C 59 (1) and (2);

(b);

(c);

(d);

(e);

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

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.”

C 58 (1) (a) must be read in conjunction with C 59 (1). C 59 1 (a) 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)

[66] In the circumstances of this case I hold that the Employee’s conduct justified the Employer’s dismissal of the Employee by letter dated May 14, 2010 in accordance with Section 58 (1) (a) of The Labour Code.

The second issue

Did the Employer act reasonably in its dismissal of the Employee?

[67] Ms. Marshall, Attorney-at-Law for the Employee makes two (2) submissions. Firstly, learned Counsel states according to her what **“is the law as outlined in the Halsbury’s Laws of England (4th Edn) Vol 16 paragraph 337”** as follows:

“Criminal offences outside employment should not be considered as automatic reasons for dismissal regardless of whether the offence has any relevance to the duties of the individual as an employee. The main consideration should be whether the offence is one that makes the individual unsuitable for his or her type of work or unacceptable to other employees; and employees should not be dismissed solely because a charge against them is pending or because they are absent through having been remanded in custody.”

[68] Secondly learned Counsel also stated at paragraph 4 (xvi) as follows:

“Accordingly, in looking at all the facts and the case law as referred to herein, the Employee humbly submits that the Employer has failed to satisfy the Court that they acted reasonably in the dismissal of the Employee, accordingly the Employee was unfairly dismissed and is therefore entitled to compensation.”

[69] I do not consider that the statement cited by Ms. Marshall at paragraph 337 of **Halsbury’s op cit** represents a proper statement of the law to determine how this Court should examine whether criminal offences outside employment should or should not be considered as automatic reasons for dismissal. My reasoning is set out at paragraphs [70] to [76] below.

[70] Firstly, the statement in **Halsbury’s** at footnote No. 12 replicates the **United Kingdom’s Code of Practice and Procedures in Employment** at paragraph 15 (c). It is also stated in the **2004 Advisory, Conciliation and Arbitration Service (ACAS) 2004 Code of Practice**. In **Selwyn’s Law of Employment 17th Edition, authored by Astra Emir**, published in 2011 by Oxford University Press, the writer states at pages 5 and 6 *inter alia* as follows:

“A failure on the part of any person to observe a code shall not of itself make him liable to any proceedings, but in any proceedings before an employment tribunal or the Central Arbitration Committee the code will be admissible in evidence, and any relevant provision shall be taken into account in determining the issue...”

[71] Secondly, the footnote at No. 12 in the **Halsbury’s op cit** states *inter alia* as follows: “ As to the ACAS Code of Practice and the status of the advisory handbook see paragraph 561 ante”.

[72] (a) At paragraph 561 of **Halsbury’s op cit** it states ***inter alia*** as follows:

“Compliance with the ACAS Code of Practice is particularly important in the context of unfair dismissal. However, failure to comply with it

does not necessarily render a dismissal unfair since there may be good reason in a particular case for non-compliance.

(b) **Halsbury's at paragraph 561 cited Lewis Group v Wiggins [1973] ICR 335 (N.I.R.C.) and Retarded Children's Aid Society Ltd. v Day [1978] ICR 437 (CA).** In both of these cases the Courts took into consideration the Code of Practice. They however declined for certain reasons not to follow it.

(c) At page 338 of the Lewis Group case op cit Sir Hugh Griffiths stated *inter alia* as follows:

"But even in a case in which the code of practice is directly in point, it does not follow that a dismissal must as a matter of law be deemed unfair because an employer does not follow the procedures recommended in the code....."

The code is, of course, always one important factor to be taken into account in the case, but its significance will vary according to the particular circumstances of each individual case."

[73] I therefore hold that while the United Kingdom's Code of Practice may be persuasive in Antigua and Barbuda as a good practice to emulate, it does not represent the law which must guide me to determine any matter which this Court may be called upon to decide.

[74] Thirdly, the learned author of **Selwyn's Law of Employment** (op cit) aptly states the law at paragraph 17.139 at page 477. He states *inter alia* under the rubric "**Conduct outside the employment**" as follows:

*"If the employee is charged with a criminal offence, then clearly the employer will need to make a decision about whether the employment can continue, in advance of a hearing in the criminal courts. The employee should be interviewed (strictly, this is not part of the disciplinary procedure, because no breach of internal discipline has occurred), and invited to explain the position. If he intends to plead not guilty then **ideally** he should be suspended until the outcome of the criminal proceedings."*

(The emphasis is the Court's)

[75] However, there is no legal obligation that an employer must suspend an employee whenever that employee is charged with the committal of a criminal offence. In **Conway v Matthew, Wright & Nephew [1977] IRLR 89 (E.A.T)** the claimant was a night watchman. He was charged by the police with maliciously causing damage to the complainant's property. The Company investigated the matter and after checking with the police that the charge against Mr. Conway was still outstanding, dismissed him. Subsequently, all criminal charges against him were dropped. It was argued that the company should have suspended him pending the outcome of criminal proceedings. Mr. Conway claimed that he was unfairly dismissed but his claim was dismissed by an industrial tribunal. He appealed.

[76](a) The head note of the Report at page 90 states **inter alia** as follows:
"Nor had the respondents acted unfairly in not suspending the appellant from duty until such time as any criminal proceedings brought against him were finalised, rather than dismissing him. This is not a course which it is reasonable to expect an employer to follow in every case for, if it were applied universally, it would mean that, in many cases, employees had to be retained on suspension for many months until the particular offence with which they were charged was finally disposed of..."

(b) The employee's appeal was dismissed. His dismissal was held to be fair.

[77] If therefore Ms. Marshall, Attorney-at-Law for the Employee grounds her submission at paragraph [68] above on the basis of that quotation in **Halsbury's** at paragraph [67] above, then for the reasons stated at paragraphs [70] to [76] above, I am unable to agree with her.

[78] Ms. Marshall Counsel for the Employee, makes some further submissions at paragraph 4 (xi) as follows:

“What if indeed these were legitimate concerns of the Employer; this Court must consider why wasn’t the Employee presented with a letter indicating the Employer’s concern or a termination letter long before the 26th day of April, 2010 when the Heads of Department (are) alleged to have made such a decision.”

[79] I caution Ms. Marshall however that the evidence is that the parties met at the Ministry on April 26, 2010. As well it is Ms. Philip’s testimony that the Heads of Department meeting took place prior to April 26, 2010.

[80] In these circumstances, Ms. Philip exercised a discretion not to dismiss the Employee prior to meeting with him on April 26, 2010. There is no fault in the exercise of the discretion in the manner that she did. I find no merit in Ms. Marshall’s submission.

[81] Ms. Marshall Counsel for the Employee submits at paragraph 4 (xii) as follows:

“Clearly such would have been a reasonable action to take, if any such decision was taken. The mere fact, that the Employer did nothing, failed to act during the Employee’s absence so as (to) indicate the Employer’s concerns and to continue to consider the Employee as employed up until the date of termination are all evidence of unreasonable actions taken by the Employer, fuelled merely by the concern of the charges for alleged offences which were laid against the Employee.”

[82](a) A matter of this nature arose to be considered in **Refund Rentals Ltd v TC McDermott [1977] IRLR 59 (E.A.T.)**. In this case Mr. McDermott was dismissed from his job as a television field service engineer. He was then subsequently prosecuted and acquitted. The Industrial Tribunal held that his dismissal was unfair in view of the length of time between the incident itself and the dismissal. Had he been dismissed 3 or 4 weeks after the incident, this may have been fair. However, to wait for 10 weeks to do so,

was unfair. The Employer appealed. Mr. Justice Cumming-Bruce who wrote the judgment stated **inter alia** at page 63:

“The delay of ten weeks was obviously unfortunate; it clearly should have been avoided. The employers are open to legitimate criticism for failing to be more decisive and energetic in overcoming such difficulties as did during the ten weeks sometimes make it troublesome to arrange a confrontation, and one can appreciate the distress and anxiety and sense of grievance of the applicant when, having first thought that an imputation on his character had been made and then dropped, he found that not only had it not been dropped but that it had been so resurrected as to culminate in his dismissal for dishonesty. When all that is said, the employers are open to criticism on the grounds that I have mentioned, but it does not follow that in all the circumstances they were unreasonable in treating the ground of dismissal as a ground for dismissal.”

(b) The Employer’s appeal was upheld in that case.

- [83] I do not consider the period between April 26, 2010 and May 14, 2010 a matter of 18 days to be of such unreasonable length between having a discussion and the Employee’s dismissal.
- [84] Ms. Philip did not state the date of the Heads of Department meeting. It took place sometime prior to April 26, 2010.
- [85] In the circumstances of this case for the reasons stated at paragraphs [82] to [84] above, I find no merit in Counsel’s submission at paragraph [81] above.
- [86] Ms. Marshall made reference to **Iceland Frozen Foods Ltd v Jones [1983] ICR 17 and Polkey v AE Dayton Services Ltd. [1987] IRLR 503**. In the Iceland case I accept Lord Browne-Wilkinson’s statement of the law at pages

"We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by Section 57 (3) of the Act of 1978 is as follows:

- (1) the starting point should always be the words of Section 57 (3) themselves;*
- (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
- (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
- (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer must reasonably take one view, another quite reasonably take another;*
- (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer must have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."*

[87] A meeting took place on April 26, 2010 at the office of Ms. Philip. Mr. Jacobs made reference to that meeting at paragraph 11 of his Witness Statement. He stated as follows:

"On meeting with the Permanent Secretary, we had a pleasant discourse and I was then instructed to return home and advised that I would be contacted as to when to report for duty. The Permanent Secretary never informed me at the time that I would have been terminated."

[88] In his evidence Mr. Jacobs stated that he met with Ms. Philip on April 26, 2010. His evidence is as follows:

"I went to Ms. Philip to tell her I am now free to work. She informed me that I was innocent until proven guilty and she would speak with ... the ABS Station Manager and as soon as he prepared a schedule she would get back to me."

[89] Mr. Jacobs' version of that conversation with Ms. Philip is not supported by his mother's evidence. At paragraph 15 of her Witness Statement she stated as follows:

"... we visited her at her office as to make enquiries as to the official status of his employment. She said that she would have to talk with (the ABS Radio Station Manager) for clarification and that she would then get back to my son."

[90] In her evidence in answer to Ms. Carla Brookes-Harris, Ms. Jacobs stated *inter alia* as follows:

"I met the Permanent Secretary on April 26, 2010 with my son at her office at 8:00a.m. At the meeting my son told the Permanent Secretary that he got bail and that he wished to find out about his job status. The Permanent Secretary said that she would have to speak with (the ABS Radio Station Manager). She said she would get back to us."

[91] In Ms. Philip's evidence she denied Mr. Jacobs' reference to her having to speak with the ABS official with respect to scheduling.

[92] I find on the evidence that Ms. Philip did not inform Mr. Jacobs of any conversation which she would have with the ABS official relative to a work schedule.

[93] If I had held Ms. Philip's position maybe I would have made sure that another employee of the Ministry meet with the two parties and myself on April 26, 2010. This would have facilitated proper note taking.

[94] Maybe I would have well made sure that a note of the meeting of the Heads of Department of ABS had been kept to record their views of the Employee.

[95] Of course having met with him on April 27, 2010 I may have dismissed him earlier than May 14, 2010.

[96] Having regard to all the circumstances of this case, however, I hold that the Employer's actions to dismiss the Employee fell within the band of reasonable responses which a reasonable employer might have adopted.

[97] The Employer acted reasonably in its dismissal of the Employee. In these circumstances his dismissal was fair.

The third issue

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

[98] In light of the findings at paragraphs [66] and [96] to [97] above, the Employee is entitled to no damages.

Dated the 17th day of October, 2013

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

PHILIP A. PILGRIM

President

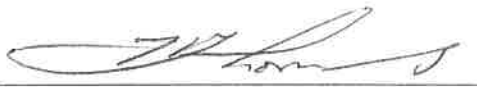
I agree:

A handwritten signature in black ink, appearing to read 'Samuel R. Aymer', written over a horizontal line.

SAMUEL R. AYMER

Member

I also agree:

A handwritten signature in black ink, appearing to read 'Dr. Hayden Thomas', written over a horizontal line.

DR. HAYDEN THOMAS

Member

