

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 23 of 2011

BETWEEN:

BERLINDA DOWE	Employee
and	
CARLISLE BAY RESORT	Employer

Before:

The Hon. Philip A. Pilgrim	President
The Hon. Samuel R. Aymer	Member
The Hon. Hayden Thomas	Member

Appearances:

Mrs. Alincia Williams Grant of Williams Grant Inc.
- Attorney-at-Law for the Employee
Ms. Joy Dublin -
Attorney-at-Law for the Employer

2013: June 21

2014: November ____

JUDGMENT

PILGRIM P. [Read by Samuel R. Aymer]

BACKGROUND

1. Ms. Berlinda Dowe is forty-two (42) years of age. She resides at Piggotts Village, St. George in Antigua. She was formerly

employed with Carlisle Bay Hotel as a Housekeeping Supervisor from November 14, 2003 to November 13, 2008. The Employee's evidence is that she earned a basic weekly wage of \$678.00 and an average of \$260.00 per week for service charge.

2. According to the Employer, Carlisle Bay Resort is the name by which the company Carlisle Bay Resort Ltd. carries on its business in Antigua & Barbuda. It is a five-star hotel and a member of the Campbell Grey Group of Hotels. The Resort is located at Old Road, in the parish of St. Mary in Antigua.
3. Paragraph 2 of the Employer's Memorandum which was filed on December 03, 2011 states as follows:

"As a five-star hotel and a member of the Campbell Grey Group of Hotels, the Employer is obliged to maintain the highest standards in the tourism industry and do all reasonable and lawful things to maintain its integrity".

4. The matter of an employee's discipline is regulated by a Disciplinary Code. The Employer puts it this way at paragraph 4 of its Employer's Memorandum.

"The Employer's said policy objectives are reflected in its established Disciplinary Code which governs

the nature and extent of the disciplinary action that may be taken against its employees for selected offences”.

5. (a) A copy of this Disciplinary Code was made a document in the proceedings by the Employer. Clause 37 under the heading entitled **“Misdemeanours”** states as follows:

“Conviction for any criminal offence whether or not it was committed in the course of employment. N.B. Arrest for any charged criminal offence will result in automatic suspension pending the outcome of the case.”

- (b) According to Clause 37 if an employee is convicted for any criminal offence in either of the two circumstances at 5 (a) above the penalty to be imposed by the Employer is Summary Dismissal.
6. It is the Employer’s evidence that the Disciplinary Code was brought to the attention of the Employee at the commencement of her employment with the Resort and she agreed to be bound by it.
7. According to Ms. Dowe in answer to Mr. Charlesworth Brown the then Employer’s Attorney-at-Law, the Employee stated that she

got the Disciplinary Code and she understood its contents. She did not sign the document. She was aware of Clause 37 of the Disciplinary Code.

The incident of December 01, 2007

8. Something happened on the Resort's premises on December 01, 2007. There is no divide between the two parties about what took place. This development is referred to in the documents filed on behalf of the Employee and the Employer.
9. Ms. Dowe's Witness Statement was filed on October 11, 2011. Her unchallenged version of the events from December 01, 2007 to December 11, 2007 appears at paragraphs 4 to 8 of that document. It is as follows:

"4. On Saturday the 01st day of December 2007, after I reported to work for the 3 pm shift, two police officers from the Bolans Police Station, advised that they had been sent to pick me up. After I informed the Executive Housekeeper, Ms. Alizia Benjamin of the developments, I left the premises with the Police.

5. Later that week I was charged with an offence that was unrelated to my work duties and

functions. I was scheduled to return to work on Tuesday the 4th December 2007 but was unable to attend as I had to appear before Magistrate Fung on the said day in relation to the charges brought against me.

6. Prior to me appearing at the St. John's Magistrate Court, I did telephone my work place and spoke with Ms. Benjamin informing her that I was still at the Police Station and requested a change in schedule with one of the other supervisors, to accommodate my appearance at Court.
7. After appearing before Magistrate Fung on the 5th day of December 2007 for the purpose of obtaining bail, I again telephoned my place of work and spoke with Ms. Benjamin. I was advised by her that she would return my call as she needed to speak with the Human Resources Manager on the matter.
8. Approximately thirty (30) minutes thereafter, she called and told me to report to work on the

following Tuesday that being the 11th day of December 2007. I reported to work the said day and first visited the Human Resources Department where I had a brief meeting with Mrs. Charmaine Gore-Biesheuvel, the Human Resources Manager, and Ms. Benjamin.”

The meeting of December 11, 2007

10. A Witness Statement of Charmaine Gore-Biesheuvel for the Employer was filed on June 06, 2013. She described what happened at a meeting between herself and Ms. Dowe. Her version of what occurred in that meeting was not materially challenged by Ms. Dowe. Paragraphs 8 to 9 state as follows:

“8. On or about December 11, 2007, at a meeting commenced by the Employer, the Employee confirmed that she had been arrested. The Employer then suspended her with immediate effect pending the outcome of her trial, in accordance with the said Rule 37.

9. At the said meeting, the Employer particularly requested that the Employee present official documentation stating the outcome of her case

on the basis of which decisions about her employment would be taken.”

11. (a) The Employee’s Memorandum was filed on October 11, 2011. At paragraph 3 of that document Ms. Dowe makes a reference to the meeting of December 11, 2007. She adds a component which was missing from the version as stated at paragraph 10.8 above. The Employee stated as follows:

“By letter dated the 11th day of December 2007, the Employer suspended the Employee forthwith and without pay, effective the 11th day of December 2007, pending the outcome of the legal proceedings which were unrelated or associated to her job functions. A copy of the suspension letter is appended hereto and marked “BD 1”.

- (b) Exhibit “BD 1” in its entirety reads as follows:

Events after December 11, 2007

12. (a) In the meeting of December 11, 2007 Ms. Dowe stated in her Witness Statement at paragraph 11 inter alia as follows:

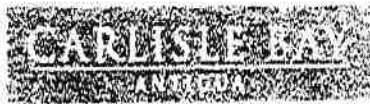
“Mrs. Gore-Biesheuvel further requested that I should provide her with correspondence of my court appearances, which I did forward to her office once I was in receipt of same.”

- (b) Ms. Dowe in answer to Mr. Brown’s cross examination of her stated:

“I sent the two letters to the hotel.”

The two (2) adjournments

13. The Employer’s Memorandum contains two Exhibits. The first is CBR-1. This is the Disciplinary Code. The second is CBR-2. The latter is comprised of two letters. The first one is dated March 26, 2008 from a Police Prosecutor addressed to the Human Resources Manager Carlisle Bay Hotel. The matter against Ms. Dowe was adjourned to July 16, 2008.



16/12/07

Belinda Dowe
Pigotts Village
Antigua

11th December, 2007

Dear Ms. Dowe:

Today you were called into a meeting to confirm whether or not the police had charged you with an offense as you were taken off the property by the police on Saturday 1st December, 2007. You did verify that you were indeed charged by the police and that your case would be heard in March, 2007. It was explained to you that in accordance with the disciplinary code you would be suspended pending the outcome of the legal proceedings against you.

Your suspension is effective today 11th December, 2007.

Once your case has been heard, please present documentation from the police/court stating the outcome of your case to the Human Resources Manager. Decisions about your employment with Carlisle Bay will be based on the documentation received from these establishments.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "C. Gore-Biesheuvel".

Charmaine Gore-Biesheuvel
Human Resources Manager

14. The second letter written by the same Police Prosecutor is dated July 16, 2008. It stated that the next Court date was November 05, 2008.

The Employer's response

15. The Employer received both of the letters referred to at paragraphs 13 and 14 above. What it did next is chronicled in Mrs. Gore-Biesheuvel's Witness Statement at paragraphs 11 and 12. She stated as follows:

"11. On November 13, 2008, having kept the Employee's position open for approximately one year with no completion date in sight, the Employer determined that it could no longer hold her position open and notified her accordingly. By the notification letter, the Employer advised the Employee of the provision in the Labour Code limiting her suspension to four weeks and requested that she inform the Employer of the criminal proceedings against her.

12. In the circumstances, the Employer contends that the Employee's employment was terminated by the operation of law."

The letter of November 13, 2008

16. (a) By letter from the Employer to the Employee dated November 13, 2008 Mrs. Gore-Biesheuvel informed Ms. Dowe that her **"employment was terminated at the end of (her) four week suspension. However we kept your position opened awaiting the outcome of your case."**
- (b) Exhibit "BD 2" in its entirety reads as follows:

BD2

Ms. Berlinda Dowe
Pigotts Village
Antigua

November 13th, 2008

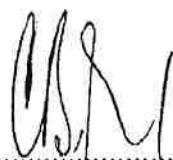
Dear Ms. Dowe,

On December 11th, 2007 under rule 37 of the Disciplinary Code you were suspended pending the outcome of the criminal investigations.

Under the Antigua and Barbuda Labour Code (Section B3) suspensions must not be in excess of 4 weeks. As a result, although you were not formerly notified, your employment was terminated at the end of your four week suspension. However, we kept your position opened awaiting the outcome of your case. We have been notified of the several adjournments, the latest being to November 18th, 2008. Regrettably we are no longer able to keep your position open.

Please inform us of the outcome of your case.

Yours sincerely,
Carlisle Bay Resort Ltd.



Charmaine Gore-Biesheuvel
Human Resources Manager

cc: Senator Chester Hughes
President
Antigua & Barbuda Worker's Union

A member of
*The Leading
Small Hotels
of the World*

Carlisle Bay, Old Road, St. Mary's, Antigua, West Indies

Tel: +1 268 484 0000 Fax: +1 268 484 0001 Email: info@carlisle-bay.com www.carlisle-bay.com

A CANNELL GRAY HOTEL

Mitigation attempts

17. The Employee in her Witness Statement stated that she tried to secure permanent employment elsewhere. She was unable to obtain employment until sometime in October 2008. No indication was given either of the nature of her present employment or the wages which she earned.

Legal proceedings

18. Ms. Dowe commenced legal proceedings by filing a Reference in this Court. It is dated October 11, 2011. I have already made reference to the other documents filed on her behalf and those which were filed in support of the Employer's case.

A few preliminary matters

19. A number of submissions were made by Joy Dublin Attorney-at-Law for the Employer in her Written Submissions filed on August 16, 2013. The Submissions are as follows:

(a) The duty to return to work

At paragraph 19 of Counsel's submissions she writes as follows:

"At no time during the suspension period or subsequently, did the Employee write or complain to the Employer and/or return to work and/or took any

steps whatsoever to assert her position that in her view she had been or was being constructively dismissed.”

(The emphasis is Counsel’s and not mine.)

20. Ms. Dublin’s submission at paragraph 19 (a) above has no merit. In addition, that statement by Counsel also shows and I so find that she is not aware of the nature and extent of the duties which an employer may be called on to discharge after it has placed an employee upon suspension in accordance with a disciplinary provision.
21. Ms. Dublin cited no legal authority or textbook reference in support of her submission at paragraph 19 (a) above.
22. There is a textbook entitled **“Selwyn’s Law of Employment”**. It is authored by **Astra Emir**. The 17th edition was published by **Oxford University Press, UK in 2012**. At paragraph 12.69 the writer states *inter alia* as follows:

“IF AN EMPLOYEE IS ABSENT FROM WORK BECAUSE HE IS SUSPENDED, THERE IS NO OBLIGATION FOR HIM TO RETURN TO WORK UNTIL THE SUSPENSION IS LIFTED.”

(Hassan vs. Odeon Cinemas)

(The emphasis in capitals is mine.)

23. **Hassan** is reported at [1998] ICR 127, [EAT]. In **Hassan's** case the **EAT** was required to decide what was the effective date of termination of the applicant's contract of employment.
24. At page 130 of the judgment **Judge Peter Clarke** was required to decide the merit of the applicant's legal submissions. This is what he said:

"We now turn to the submissions advanced by Mr. Carter in support of the appeal.

(1)He first submitted that by failing to attend work after 23 September 1995 the applicant was not in fundamental breach of his contract of employment. He was suspended from employment by the employers. It follows that he was not obliged to attend for work until that suspension was lifted. It never was.

We think that submission must be right and in this connection we bear in mind the distinction between suspension pending a decision to dismiss, where the contract of employment subsists – see *Bird vs. British Celanese Ltd.* [1945] K.B. 336 and a suspension following dismissal, pending appeal,

where it does not _ ...". It is also reported at [1945]

1 All E.R. 488 (CA)"

25. The word **"suspension"** or **"suspend"** was given judicial consideration in the **Bird** case op cit. At page 491 of the **ALL E.R.** judgment, **Scott LJ 4** stated as follows:

"The clause operates in accordance with its terms; the whole contract is suspended, in the sense that the operation of the mutual obligations of both parties is suspended: the workman ceases to be under any present duty to work and the employer ceases to be under any consequential duty to pay. That is the natural meaning of the word "suspend" when applied to a condition of employment, and I think it is also its legal meaning."

26. I therefore hold that **in its natural and legal meaning, when Ms. Dowe was suspended by the Employer by letter dated December 11, 2007, she was under no commonsense and/or legal duty to either write, complain and/or return to work until the suspension had been lifted.**

**(b) The framing of the issues and the Employer's
understanding of what the Employee is claiming – is
constructive dismissal a factor in this case?**

27. Ms. Dublin at paragraph 11 of her Written Submissions asserts that the Court should consider whether the Employee was constructively dismissed.
28. The general thrust of Ms. Dublin's submissions and the cases in support of them relied on the need to determine the issue of constructive dismissal. This then was the golden thread which resonated from paragraph 11 to the end at paragraph 38. Paragraphs 1 to 8 deal with the evidence. Paragraphs 9 and 10 mention the pleadings.
29. At paragraph 31 of Ms. Dublin's submissions Learned Counsel states as follows:
- “Neither the Memorandum nor the Witness Statement of the Employee identifies any particular repudiatory conduct of the Employer on the basis of which the Employee claimed constructive dismissal”.**
30. At paragraph 14 of her Written Submissions, Ms. Dublin states as follows:

“The Evidence of the Employee contains no statement, assertion, allegation or complaint of constructive dismissal or any act or conduct on the part of the Employer which should be construed as constructive dismissal.”

(The emphasis is Counsel’s. It is not mine.)

31. Ms. Dublin cited a passage from **Halsburys Laws of England, 4th edition at paragraph 616, Western Excavating vs. Sharp [1978] 1 ALL E.R. 713, Woods vs. V.M. Car Services Ltd. [1982] ICR 693**, one other case, and a textbook reference in support of her submission that the Employee was not constructively dismissed.
32. Apart from two statements in Ms. Williams Grant’s Written Submissions filed on July 08, 2013, which referred to the matter of constructive dismissal, the gravamen of Counsel’s Written submissions made reference to **whether or not the Employee was unfairly dismissed having regard to Section C 58 (1) (a) of the Labour Code and the issue of fairness.**
33. Several passages of the Employee’s pleadings are crystal clear. Let us start with the Reference. In that document she asserts as follows:

“The issue in dispute between the Parties is that of Unfair Dismissal.”

34. I next examine the Employee’s Memorandum. While at paragraph 4 Ms. Williams Grant commences the sentence with the words **“The Employer contends”**... it is obvious that Counsel means **“The Employee contends”**.... The paragraph should therefore read inter alia as follows:

“The Employe(e) contends that this provision is unlawful and contrary to Section C 59 (1) of the Antigua & Barbuda Labour Code ...”

35. At paragraph 9 of the Employee’s Memorandum Counsel states as follows:

“The Employee contends that she was constructively dismissed and or that the said dismissal was wrongfully and or unfair and contrary to Section C 56 of the Antigua & Barbuda Labour Code.”

36. At paragraph 5 of the Employee’s Memorandum Ms. Williams Grant has taken as an issue the matter of the indefinite suspension of the Employee. Counsel states that this is contrary to Section B 3 of the Labour Code.

37. I shall deal with Ms. Williams Grant's submissions later in this judgment. It suffices to state here however that **the Employee has not asserted in any serious way that she was constructively dismissed**. To be constructively dismissed, the Employee would have been required to perform some act which shows that she is entitled to treat herself as discharged from the contract as a consequence of some conduct by the Employer which went to the heart of the contract. This is not the Employee's pleaded case.

38. With the greatest respect to Ms. Dublin, the facts of this case do not support any submissions that the Employee's contention is that she was constructively dismissed. To do so, would be to apply legal principles which are frankly unsupported by the facts of this case.

39. I hold that Ms. Dublin's submissions relative to constructive dismissal are, for the reasons outlined at paragraphs **32 to 36** above, are wholly unmeritorious.

(c) No allegation that the Employer had acted in breach of any particular duty to the Employee

40. At paragraph 32 of Ms. Dublin's Written Submissions Learned Counsel states in part as follows:

“There was no allegation that the Employer had acted in breach of any particular duty to the Employee”.

41. I refer Counsel to paragraph 36 above. A mention of an act which is said to contravene Section 59 (1) and in this case sub. paragraph (a) refers to a breach of Section C 58 (1) (a) of the Labour Code. This deals with misconduct.

42. So in addition to Section C 56 of the Labour Code, the Employee has claimed that the actions of the Employer amount to her being unfairly dismissed.

43. The invocation of Article 37 of the Disciplinary Code by the Employer triggered the commencement of disciplinary action, quite naturally taken by the Employer in the circumstances of this case.

44. At paragraphs 5 and 7 of the Employee's Memorandum, the Employee has taken issue with the letter of November 13, 2008 written by the Employer to the Employee. At paragraphs 9 and 10 of the Employee's Memorandum it is the Employee's assertion that she was unfairly dismissed.

45. (a) I have found **Securicor Guarding Ltd. vs. R [1994] 1RLR 634 [EAT]** to be helpful to determine whether Ms. Dublin's submission has any merit.

- (b) In that case, Learned Counsel for the employer Securicor submitted at page 634 of the report as follows:

“that this is not a case of misconduct at all ... It was something which put the company in a serious position, an embarrassing position. But this, although it was a disciplinary enquiry, was not a case of misconduct.”

- (c) **Judge Hull QC.** at page 635 of the Report held in reply to Counsel’s submission as follows:

“The answer to that is that it is quite apparent from reading what is said in the disciplinary agreement, which was entered into by the company with the unions and was intended to be acted on, that misconduct was to be the subject of disciplinary enquiries. It is quite plain that when there is a reference to a disciplinary enquiry, misconduct is the subject of the disciplinary enquiry.”

46. It appears to me and I so hold that for the reasons set out at paragraphs [41] to [45] above, the Employee has raised the concept of misconduct to be determined by this Court.

In these circumstances there is no merit in Ms. Dublin's submission at paragraph 40 above.

The Issues

47. I hold that the issues which fall for consideration are as follows:
- (a) **Whether the Employee having been charged by the Police on or about Monday, December 03, 2007 with committing a criminal offence on December 01, 2009 amounted to misconduct in accordance with Section C 58 (1) (a) of the Labour Code?**
 - (b) **Whether or not the Employer acted reasonably or unreasonably in treating the reason as sufficient to dismiss the Employee?**
 - (c) **If the Employee is held to be unfairly dismissed what damages are due to her?**

The Employee's submissions

48. Ms. Alincia Williams Grant Attorney-at-Law for the Employee made several submissions. I shall not repeat many of them. In doing so, I mean no disrespect to her. I shall summarise those which I consider to be relevant to a determination of the three (3) issues.

49. While Counsel for the Employee mentioned the terms **“constructively dismissed”** and **“terminated constructively”** in two (2) of her submissions, the general thrust of her arguments supported with some cases, was that the Employee was (a) dismissed contrary to Sections C 56 and C 58 of the Labour Code.
50. Learned Counsel states that in accordance with Section B 3 of the Labour Code **“it is expected that during the four (4) week period of suspension the Employer will decide what decision it will be making with respect to the Employee – if he is to be terminated or not, and communicate the decision to the Employee.”**

Was the Employee dismissed?

51. Ms. Dublin Attorney-at-Law for the Employer submits very forcibly that **“The Employer did not dismiss the Employee.”** According to Learned Counsel **“The Employee’s employment was terminated by the operation of law.”**
52. This reasoning of the concept of a dismissal in this case to be **“by the operation of law”** is indeed novel. An understanding of this term appears from a reading of two documents.

53. Firstly, the letter of November 13, 2008 by the Employer to the Employee states inter alia that Ms. Dowe's **"employment was terminated at the end of (her) four week suspension."**

54. Secondly, as there had been a lapse of more than four weeks as set out in Section B 3 of the Labour Code, the Employer asserts at paragraph 12 of the Employer's Memorandum as follows:

"In the circumstances, the Employer contends that the Employee's employment was terminated by the operation of law".

55. No legal cases or authorities were cited in support of the submissions at paragraph 53 and 54.

The matter of suspension: is there a remedy?

56. The term **"suspension"** is defined in Section B 3 of the Labour Code in the following manner:

"Suspension means temporary layoff from work for not more than four weeks with or without pay as a penalty or pending investigation of the employee's alleged misconduct".

57. It cannot be, if it is right to simply submit that as the Employee's **"employment was terminated at the end of (her) four week suspension", therefore, "the Employee's employment was terminated by the operation of law" and stop there.**

58. It is therefore necessary to examine the nature of the concept of the term **“suspension”** as defined in Section B 3.
59. In accordance with an understanding of the term **‘suspension’** as defined in **Section B 3 of the Labour Code** an employee has a right not to be suspended **“for not more than four weeks”** pending investigation of **“the employee’s alleged misconduct”**. In this case the employee was suspended for an indefinite period commencing December 11, 2007 **“pending the outcome of the legal proceedings against (her)”**. What if any, did this suspension have on the employment contract between the two parties?

The Labour Code

60. The Labour Code was enacted on September 19, 1975. The case of **Universal Caribbean Establishment and James Harrison Civil Appeal No. 21 of 1993** is a very early high judicial authority which expressed the Court’s understanding of the value of the Labour Code to the new emerging industrial relations climate in Antigua. **Byron C.J [Ag.]** (as he then was) at page 3 of the judgment stated inter alia as follows:

“The Labour Code was an innovative and important enactment, which made substantial changes to the

industrial law of Antigua. It declared a national policy underlining the legislation and which included the proposition that as an individual works he gradually earns equity in his job above and beyond his wages, an equity that deserves protection. In particular it created a new right not to be unfairly dismissed. This right had not been known to the common law. The code created new and comprehensive material for dispute resolution.”

61. Section A 2 (a) of the Labour Code states as follows:

“It is the intent of the Legislature, to bring together, in so far as is practicable, all legislation applicable to employment, employment standards, and industrial relations in Antigua and Barbuda that

(a) employers and employees can more expeditiously ascertain information as to their rights and responsibilities”.

62. Section A 10 of the Labour Code states as follows:

“To the extent that there may be conflict between any provision of this code and any existing law not specifically repealed in one or another of the Divisions herein, the

applicable provision of this Code, as of its effective date, shall prevail over said provision of existing law”.

63. So the Labour Code was a ground breaking piece of legislation. It may be said to have codified all of the rights, responsibilities and duties of employees and employers in one piece of legislation for all persons including those **“persons inside and outside of Antigua & Barbuda considering the investment of funds in enterprises to be based in Antigua & Barbuda”**

- See Section A 2 (b) of the Labour Code.

64. The Labour Code does not contain a specific section which renders a dismissal to be unfair if an employee is suspended for in excess of four weeks. The question therefore that arises is whether or not the Labour Code affords to the Employee a remedy as a result of being placed on suspension for an indefinite period.

A matter of statutory interpretation

65. How is the word **“suspension”** in Section B 3 of the Labour Code to be interpreted? Does a breach of it by the Employer in this case create a remedy for the Employee?

66. I derive some assistance in this regard from the classical authoritative textbook **“Statutory Interpretation” by FAR**

Bennion, Fourth Edition, 2002, Butterworths, United Kingdom. At page 52 the author states as follows:

“COMMENT

..... The remedies, if any, available for a breach of statutory duty depend on the legislative intention. This may be that there shall be a special remedy laid down either by the enactment creating the duty or a related enactment, or that a general remedy shall apply. An applicable special or general remedy may be civil. The legislative intention may be that there shall be no legal remedy.”

67. **FAR Bennion** under this **COMMENT** also opined inter alia at page 52 as follows:

“[T]here is a presumption that a legislative command does carry a sanction, in accordance with the maxim ubi jus ibi remedium (where there is a right there is a remedy). Thus Coke said that ‘whensoever an act of parliament doth generally prohibit anything’ the party aggrieved shall have his action ‘for his private relieve.’

68. **Volume 44 (1) of the Fourth edition of Halsbury’s Laws of England at paragraph 1360** puts the matter this way:

“Even where the breach of duty does not constitute such a tort, and no remedy is specified in the enactment creating the duty, a remedy will normally be available under the general law.”

69. In **Thornton vs. Kirkless MBC [1979] 2 ALL E.R. 349 (CA)** the Court was required to decide whether the claimant had a cause of action in a circumstance where the legislation did not provide a remedy for its breach.

70. **Roskill LJ** in his judgment at page **358** stated inter alia as follows:

“[W]here the statute imposes a duty on a public authority or on anyone else for the benefit of a specified category of persons, but prescribes no special remedy for breach of duty, it can normally be assumed that a civil action for damages will lie.”

71. The Court in that case held that the authority having breached the statute, the claimant had a cause of action in damages which he could pursue.

72. Ms. Williams Grant cited **Claudette Higgins vs. Dr. Yele Akande University of Health Sciences Antigua School of Medicine, Ref. No. 3 of 1998**, a decision of this Court, in support of a

submission that the Employee's suspension beyond the four (4) week period was in breach of Section B 3 of the Labour Code and therefore amounted to a dismissal.

73. Learned Counsel also submitted that the letter of November 13, 2008 from the Employer to the Employee **“effectively confirmed that the Employee was terminated and as such the Employee could do nothing other than to treat the employment as having ended.”**
74. The mutual obligations of both parties in this case were suspended indefinitely. The right of an employee under the Labour Code not to be suspended for more than four (4) weeks pending the investigation of alleged misconduct was a new and innovative right.
75. In light of the evidence and the legal authorities I hold that in this case the Employer owed a duty to the Employee not to suspend her for beyond four (4) weeks in keeping with Section B 3 of the Labour Code.
76. I also hold that the Employer breached its duty to the Employee when it suspended the Employee indefinitely pursuant to its letter to her dated December 11, 2007. I further hold that the letter of November 13, 2008 by the Employer to the Employee

constitutes a clear and unmistakable letter of dismissal which retrospectively took effect from January 08, 2008 - four (4) weeks after December 11, 2007.

77. In addition I also further hold as a consequence of the matters contained at paragraphs 74 to 76 above, that a breach of the Employee's right not to be suspended beyond four (4) weeks created a remedy which crystallized on November 13, 2008 to claim that she was unfairly dismissed. Whether or not the claim has any merit is a matter which I shall now address.

The first issue

Whether the Employee having been charged by the Police on or about Monday December 03, 2007 with committing a criminal offence on December 01, 2007 amounted to misconduct in accordance with Section C 58 (1) (a) of the Labour Code?

The Law

78. C 56 of the Labour Code states as follows:

“C 56. 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.”

79. C 58 (i) (a) and (2) of the Labour Code reads as follows:

“C 58 (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.

(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 the employer 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."

80. C 59 (1) (a) of the Labour Code reads as follows:

"C 59. (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)

Discussion

81. The author of Selwyn's Law of Employment op cit at paragraph 17.138 under the heading entitled **"Conduct outside the employment"** states *inter alia* as follows:

“The problem arises here is, what has it got to do with the employer what an employee does outside his working hours. The answer will depend on a number of factors, including the nature of the employment, the position held by the employee; the nature of the incident and its effect on the employer; on customers, or fellow employees, and so on. If it can be said that the conduct in question has an adverse effect on the employer’s business then a dismissal may be fair.”

82. Ms. Dublin, Attorney-at-Law for the Employer in her Written Submissions stated *inter alia* at paragraph 16 as follows:

“The conduct for which the Employee was charged affected other employees.”

83. Was Ms. Dublin’s statement a reflection of the evidence? Put another way is it true? Nowhere in the Employer’s Memorandum or in the Witness Statement of Mrs. Gore-Biesheuvel for the Employer do I find a scintilla of evidence to support Counsel’s submission. It was never addressed in either of those two documents.

84. Moreover, I would have expected Mrs. Gore-Biesheuvel to address this matter when she gave evidence. A careful examination of the record reveals that she gave no evidence of what impact, if any did the Employee's arrest have on other employees.
85. The Employee was employed as a Housekeeping Supervisor. It is to be presumed that she supervised the work of some other employees. No evidence was led by the Employer that any of the Employee's subordinates or any other employee did not wish to work with her at all or for any reason whatsoever.
86. Mrs. Gore-Biesheuvel became the Human Resources Manager of the Employer from July 24, 2006. She was therefore in a very good position to state in what manner the business of the Employer suffered adversely as a consequence of the arrest of the Employee on December 01, 2007.
87. No evidence was led by the Employer to state the nature of the criminal offence for which Ms. Dowe was charged by the Police. Was it for theft, an offense against the person, burglary, fraud, or any other matter?
88. It is trite law that an employee who is charged with the committal of a criminal offence has many avenues open to him so that in his defence he may be proven to be not guilty of the charge.

89. **However, the outcome of a proceeding in a Criminal Court does not affect in any way the right of an employer to dismiss an employee after he has been suspended if the situation so warrants. The two (2) standards of proof are different.**
90. What continues to matter at this stage of the discussion is, what did the Employer do after it suspended the Employee for alleged misconduct.

Decision

91. The Employer has led no evidence in this case to show that Ms. Dowe's arrest on its premises on December 11, 2007 had any effect whatsoever on her ability to discharge her duties as a Housekeeping Supervisor on or after December 11, 2007.
92. Similarly, the Employer has led no evidence to show that Ms. Dowe arrest on the Employer's property on December 11, 2007 negatively impacted in any form or fashion the hotel's **"image and reputation as a leading five star Resort in Antigua & Barbuda"**, its **"integrity"**, its **"ambiance of tranquillity"** or in any other manner whatsoever.
- See paragraph 2 of Mrs. Gore-Biesheuvel's Witness Statement.
93. It appears to me and I so hold that in accordance with the letter of dismissal dated November 13, 2008, the sole reason for Ms.

Dowe's dismissal was according to the Employer **"the several adjournments"** which did not bring the criminal charge to an end. The Employer was not prepared to wait any longer after November 13, 2008 especially as it had been given no clear date when the criminal proceedings against her would have been concluded.

94. In the circumstances of this case and for the reasons outlined at paragraphs 86 to 93 above, I hold that Ms. Dowe's being charged with the committal of a criminal offence without more did not amount to misconduct in accordance with Section 58 (1) (2) of the Labour Code.

The second issue

Whether or not the Employer acted reasonably or unreasonably in treating the reason as sufficient to dismiss the Employee?

The need for inquiry/investigation

Legal submissions

The Employer

95. Ms. Dublin, Attorney-at-Law for the Employer made no legal submissions relative to a determination of the above issue.

The Employee

96. Learned Counsel for the Employee also made the following submissions which may be summarised as follows:

(I) The Employer is required to conduct a proper and thorough investigation prior to terminating the Employee;

- Samuel Leonard Dulcie Richards and Eion Laurie vs. Sandals (Antigua) Ltd. Ref. Nos. 5,6,& 7 of 1999.

(II) The Employer failed to apply any procedural fairness. It failed to act reasonably in all the circumstances relative to the Employee's arrest.

The Law

97. **John Bowers Q.C.** in his textbook op cit states inter alia at **paragraph 13.158** as follows:

"There are no hard and fast rules governing an employer's investigations of criminal offences"

98. At **paragraph 13.160 John Bowers Q.C.** stated inter alia as follows:

"The employer, not the tribunal, is the proper person to conduct the investigation into alleged misconduct. The function of the tribunal is to decide whether that

investigation is reasonable in the circumstances and whether the decision to dismiss in the light of that investigation is a reasonable response.”

Discussion

99. I note that the Employer obtained **CBR-2** - the letter from the Police Prosecutor dated March 26, 2008. This made reference to the adjournment of the Employee's case to July 16, 2008 for committal proceedings.
100. There is no evidence that firstly for the period of 3½ months from December 11, 2007 to March 25, 2008, the Employer commenced disciplinary proceedings to deal with **“the Employee's alleged misconduct”**.
101. It appears that the Employer's inactivity in this regard continued unabated for another 7 ¾ months from March 27, 2008 to November 13, 2008. I note that the second adjournment was contained in the Police Prosecutor's letter dated July 16, 2008.
102. The Employer's reasons for its dismissal of the Employee are clearly stated in its letter of dismissal dated November 13, 2008. Firstly, the Employer cites **“the several adjournments”** presumably of Ms. Dowe's case in the Magistrate's Court.

Secondly, the last adjournment of which the Employer was aware was **“to November 18, 2008”**.

103. The evidence is that the letter of dismissal is dated November 13, 2008, five days prior to the next adjournment to November 18, 2008. So the Employer knew on or before November 13, 008 that an adjournment was imminent. At this stage the Employer states that it was **“no longer able to keep (Ms. Dowe’s) position open”**.

104. Mrs. Gore-Biesheuvel in her evidence stated that she knew the criminal proceedings came to an end. She knew what the outcome was. She was not aware of the outcome however, on November 13, 2008, for it was merely adjourned to November 18, 2008.

Some decided cases

105. Some decided cases from this jurisdiction and English case law have been very helpful to assist me in the determination of the second issue.

106. (a) The first is **Harris Ltd. vs. Harrison [1978] I.C.R. 1256 (EAT)**. In that case the headnote states that the employee was charged with theft after certain of the employer’s

products had been found in his house. I take the following facts from the judgment of Phillips J at page 1260;

“The employee was charged on November 19, 1976, and released on bail. The surrounding circumstances, and the account of what was said and done, made the case one where any employer would have been deeply suspicious about the employee’s behaviour and inclined to believe that he was guilty of the offence alleged. On November 19, 1976 the employers suspended him on pay “in view of the investigations currently being carried out.” On December 6, 1976, the employers wrote to him, in part, as follows:”

“In view of the nature of the information available to us which resulted in your suspension from duty on November 19, 1976, it is employment’s decision that your suspension should continue until the matter is resolved”.

“On February 1, 1977, the employers learnt that the employee had elected trial by jury, and had been committed for trial, and that the ensuing trial was not likely to take place for some time. On February 22, 1977, the employers

without further communication with the employee wrote to him as follows:"

(b) What followed was the letter of dismissal dated February 02, 1977 which took effect from February 01, 1977.

107. Enter **Phillips J** at **pages 1260 and 1261:**

"It seems to us that it was obviously the duty of the employers, having suspended the employee on pay, before deciding to change their mind and to dismiss him without waiting the result of the trial, first to make some inquiry of him."

108. **Phillips J** also had some wise words of advice for the employers Counsel in that case. I commend them to both Counsel for the Employer and Employee in this case. At page **1261** the Learned Judge states inter alia as follows:

"It was suggested by Mr. Reynolds that there was nothing that the employers could have done, and that it would have been improper for them to have communicated with the employee without prejudice to his ensuing trial. We do not agree with this, ... and in any event there was no reason in the world why they should not have communicated with his solicitors. Presumably, until February 2, 1977, the

employers had decided that suspension was the appropriate course to take, and their change of mind must have been influenced by the delay which was likely to continue for some months before the trial ... was completed. One can fully understand their difficulties in that regard, and, had they sought to discuss the matter with the employee and/or his solicitors, no doubt the matter could have been trashed out, and it would have been difficult to say, according to the information which was thus elicited, that they had acted unfairly.”

109. (a) The second case is **Clarke vs. Trimoco Group Ltd. [1993] I.C.R. 237 (E.A.T)**. In that case, the employee worked for the employers who operated a number of petrol stations. On March 05, 1990 the employers suspended him without pay until the outcome of charges brought against him by the Police was decided. In May 1990 following a second adjournment of the criminal proceedings, the employee was dismissed for gross misconduct, namely falsifying company financial records.

- (b) The Industrial Tribunal dismissed his complaint. It held that although he had not been interviewed by the employers between his suspension and dismissal, he had failed to utilise the employer's grievance procedure. As a consequence, the employers acted reasonably.
- (c) The employee appealed to the E.A.T. His appeal was allowed. The headnote reads as follows:

“ALLOWING the appeal, that the rules of natural justice required that the employee should have been given an opportunity of giving an explanation for his conduct; that the industrial tribunal had erred in law in equating the availability of a grievance procedure with affording an employee an opportunity of defending himself against a serious charge of dishonesty; that further, the industrial tribunal in finding that the employers had acted reasonably within the meaning of Section 57 (3) (Section 58 (2) of the Labour Code) had given no consideration to the adequacy of the procedure adopted by the employers in relying solely on a police investigation but had concentrated unduly on the employers' belief

and the basis on which it was founded; so that, accordingly, the case would be remitted for reconsideration by a different industrial tribunal.”

- (d) A few quotations of the reasoning in that case is apt. **Knox J.** formulated the second issue in this way at page 245:

“[C]an the dismissal without an interview of, or contact with, an employee, by the officer of the employers responsible for the decision to dismiss, after 25th January 1990, be fair, given that it was specifically stated on behalf of the employers in the letter of March 1990 that the employee was suspended without pay, “*until such times as the outcome of the court case is known*” and that at that stage a decision would be taken whether he should remain with the employers whereas he was dismissed before the outcome of the court case was known.”

- (e) The employee’s view of the suspension of March 05, 1990 was commented upon by **Knox J.** at page 248. The Learned Judge stated *inter alia* as follows:

“On the first occasion, 5 March, Mr. Booker’s letter was crystal clear in saying that the disciplinary issue would await the outcome of the court case, and in those circumstances it seems to us perfectly proper and understandable for the employee to take the view that he would keep his powder dry for the court case and defend himself there.”

- (f) The employers entitlement to rely on the police investigations was commented upon by **Knox J.** at page **249**. The Learned Judge stated *inter alia* as follows:

“It the employers are entitled, as we believe they are, to rely on the investigations carried out by the police on the basis that the fruits of those investigations were communicated to the employers and known to be such by the employee..... by the same token the employers are fixed with knowledge that the employee [was] denying liability to the police. It therefore seems to us impossible to sustain the case that

this was one of those cases so plain that no opportunity of explanation need be offered.”

- (g) With respect to the need to set up an internal disciplinary procedure **Knox J.** stated *inter alia* at page **250** as follows:

“In the present case there were no internal disciplinary procedures whatsoever. In our view the industrial tribunal, in finding that the employers acted within the range of reasonable responses of an employer concentrated unduly upon the employers’ belief and the basis on which it was founded and, apart from equating the availability to an employee of a grievance procedure with the giving by the employer of an opportunity to state the employee’s explanation, which for the reasons already given we consider to be wrong in law, there was no consideration given to the adequacy of the procedure adopted of relying solely on an employer’s belief in the employee’s conduct and

yet an unfair dismissal is clear beyond argument:

For these reasons we consider that the industrial tribunal's decision was fatally flawed”

Findings

110. In this case the adjournments of the Employee's case in the Magistrate's Court leads me to hold that the Employee would have pleaded not guilty to the offence for which she was charged. The Employer having been made aware of these adjournments would have been stuck with knowledge that the Employee had pleaded not guilty to the charge. In these circumstances, the Employee had every right to depend on the Employer's undertaking to her that she would not be dismissed **“pending the outcome of the legal proceedings against (her)”**.

111. During the period of suspension it was incumbent upon the Employer to establish its own independent investigation. During cross examination Mrs. Gore-Biesheuvel stated *inter alia* as follows:

“The hotel conducted an investigation which was brought to the attention of the Human Resources Department. It

dealt with what I knew the Employee was charged for in the Magistrates Court. I conducted the investigation. Regrettably we are no longer able to keep your position open means that we could no longer leave the position of Housekeeping Supervisor open and we needed a Housekeeper Supervisor to fill this position. The position was filled. As at November 13, 2008 I considered that the Employee was terminated because we could not keep the position open any longer and the criminal proceedings had kept on being extended. As part of my investigation I did not call the Employee to be a part of it. I decided not to have the Employee to be a part of the investigation. I did not disclose the outcome of my findings as a result of the investigations to her prior to November 13, 2008".

112. Mrs. Gore-Biesheuvel did not disclose the nature or adequacy of the **"investigation which was brought to the attention of the Human Resources Department"**. In any event no findings as a result of that event was ever put to the Employee before she was dismissed.
113. I hold that the Employer did not carry out any proper or adequate investigation or disciplinary proceedings outside of possible

dismissal, further to the Police proceedings to determine if the Employee was guilty of the alleged misconduct.

Natural justice

The Law

114. As far back as 1999 in **Vigo and Jarvis vs. Swiss American Bank Refs. Nos. 27 and 40 of 1996**, a decision of this Court, **Maundy P.** stated the proposition of natural justice at page 18 inter alia as follows:

“The Court has always maintained that in cases of Industrial Relations, except perhaps in instances where an employee is caught in flagrante delicto, he should be given an opportunity to be heard in keeping with the rule of Natural Justice, Audi alteram partem. Indeed according to the Holy Scriptures, after Adam had eaten of the forbidden fruit, he was not immediately condemned but the Lord is said to have summoned his presence and said to him, “Adam, Adam, where are thou, has thou not eaten of the forbidden fruit?” See Genesis, Chapter 3, Verses 9 – 12”.

115. **Rawlins J.A. (ag.)** (as he then was) stated the formulation in **The Epicurean Ltd. and Medeline Taylor Civ, App. No. 4 of 2003** at paragraph [33] on page 10 in the following manner:

“The principals of natural justice are well known, trite and ancient. It is said that rules that required a fair hearing before impartial adjudicators can be traced to ancient times, were known in medieval precedents and reached a *“high water-mark”* in their development in Dr. Bonham’s case (1610) & Co. Rep. 113b. Indeed, we were reminded that, although disobedience was obvious, even Adam and Eve were given an opportunity to speak in their defense before they were cast out from the Garden of Eden”.

116. In the Epicurean case, the employee was charged in June 1996 by the Police with theft of money from her employer. By letter of June 28, 1996 the employer suspended the employee without pay pending the outcome of the Police case. The charge was dismissed on August 21, 1996.

117. In the Epicurean case Rawlins JA in an interesting obiter dicta stated inter alia at paragraph 32 on pages 9 and 10 as follows:

“This brings up the issue of natural justice. I pause to note that Ms. Taylor was suspended on 28th June 1996, without pay, pending the outcome of the Police proceedings. There was no indication that the suspension was for the purpose

of disciplinary proceedings, outside of possible dismissal, further to the Police proceedings”.

118. The principle embodied in this obiter dicta remark may have prompted **Maundy P.** to state earlier in the judgment at paragraph 35 (a) on page 12 as follows:

(a) **“An employer may suspend an employee but a suspension for an indefinite period shall be unlawful.”**

119. At paragraph 32 of Ms. Dublin’s Written Submissions, Learned Counsel stated inter alia as follows:

“The Employee did not protest any particular action by the Employer...”

120. This submission is similarly akin to that made by the employer in the **Clarke** case (op cit) at page 249 of the judgment. The reply of **Knox J.** to that submission appears at page 249.

“He only mentioned in the grievance procedure in cross-exam when he said: “I would have invited you both but it seemed impossible that anything you could say would change our minds. You did not give effect to the grievance procedure.” That seems to us to be a claim that because the grievance procedure was not operated, he, ... was justified in treating the case as one where no opportunity to give an

explanation need to be given. This seems to us, in the context of known denials of liability on the part of the employee to be flying in the face of the well established requirements of natural justice.”

Discussion

121. In this case, it is accepted by both parties that the Employee was charged with the committal of a criminal offence. There is also clear acceptance by both parties that on at least two occasions the matter was adjourned. Ms. Gore-Biesheuvel refers to **“several adjournments”** in the letter of dismissal dated November 13, 2008. Elsewhere at paragraph 110 I made reference to the Employee’s plea of not guilty to the criminal charge in the Magistrate’s Court.

122. (a) No evidence was presented by the Employer that this was one of **those rare cases where there is no possibility of the employee giving any explanation of the conduct alleged or where it is plainly admitted so that there may be no cause to ask for an explanation:**

- **See Knox J in the Clarke case op cit at page 248.**

(b) The facts of the present case are quite plainly not in either of those exceptional categories.

Findings

123. I hold that before the Employer changed its mind not to await the outcome of the criminal trial and before it dismissed the Employee, it was incumbent upon the Employer to state the nature of any charges which it proposed to make against her. The Employer ought to have invited her to put up a defence to the charges. Put another way, Ms. Dowe ought to have been given an opportunity to be heard so that she could state her case.
124. In the **Harris** case op cit the **EAT** held that to dismiss the employee in circumstances where no inquiry was made of him was unfair.
125. In the **Clarke** case, op cit the **EAT** held that the rules of natural justice required that the employee should have been given an opportunity of giving an explanation for his conduct. In this absence, the decision of the industrial tribunal was wrong.
126. In the **Epicurean** case **Rawlins JA** stated inter alia at paragraph 35 on page 10 as follows:
- “The Epicurean did not carry out any proper investigation. Ms. Taylor was not given any notice of charges. She was not invited to put up a defence. The company took her livelihood in clear breach of the rules of natural justice. She was**

unfairly dismissed under the Labour Code as well as in both the rules of natural justice.”

127. I hold that the Employer’s failure not to (a) institute disciplinary proceedings against the Employee; (b) proffer misconduct charges against her; and (c) afford her an opportunity to state her case against those charges, was a clear violation of the rules of natural justice.

128. For the reasons outlined from paragraphs **[76, 94, 113 and 127]** above I hold that the Employer acted unreasonably in treating the reason as sufficient to dismiss the Employee. The Employee was unfairly dismissed under the Labour Code as well as in breach of the rules of natural justice.

The third issue

If the Employee is held to be unfairly dismissed what damages are due to her?

129. An employee whom the Court holds was unfairly dismissed is entitled to certain awards under specific established headings. They are as follows:

(a) Basic award

Ms. Dowe worked for the Employer for five (5) years. Her weekly wage was \$678.00 plus an average of \$260.00 per week

for service charge. Her entitlement under this heading is $\$938.00 \div 5 \times 60$ or **\$11,256.00**.

(b) Immediate loss

The Employee was suspended without pay from December 11, 2007 to November 13, 2008. She was not paid during that period. The Employer should compensate her firstly for the entire period during which she was wrongfully suspended. This is 46 weeks at the rate of \$938.00 per week or \$43,148.00.

Secondly, the Employee led no evidence of mitigation. I hold that a period of five (5) months would have been reasonable for her to find suitable alternative employment. This amounts to 23 weeks since November 13, 2008. The figure arrived at is $\$938.00 \times 23$ or \$21,574.00.

The full sum awarded under this heading is **\$64,722.00**.

(c) Manner of dismissal

No award is made under this heading.

(d) Notice pay

The sum awarded under this heading is **\$938.00**.

The matter of costs

Abuse of process

130. In a matter before this Court entitled **Benjamin and the Port Authority Ref. No. 14 of 2009** I made an award of costs against the employee. The principles are the same for an award against an employer.

131. At paragraph 136 of that judgment I stated as follows:

“The matter of costs is governed by Section 10 (2) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda. It is settled law that this court normally makes “no order as to costs in any dispute before it, unless for exceptional reasons the court considers it proper to order otherwise.”

132. The principles which I examined in the Benjamin case (op cit) I shall apply to the facts of this case. At the risk of being repetitive a summary of those principles is as follows:

1. The Court may make an award for costs against a party in the following circumstances:

(a) Where there is a clear authority or authorities laid down by this Court or any other court which has stood the test of

time in favour of a proposition, of which parties who appear before this Court ought to be aware.

(b) Where, as in this case the Employee was totally justified to retain Counsel to appear on her behalf.

(c) Where there is an abuse of process if there is a breach of paragraph 132 (1) (a).

The facts

The matter of constructive dismissal

133. The law of constructive dismissal arises in circumstances where an employer commits an act or a series of acts which forces the employee to terminate his contract of employment with the employer. In these circumstances a citation of constructive dismissal cases is relevant.

134. In this case however the Employer committed no act which caused the Employee to terminate her contract of employment. Ms. Dowe did not cease her employment with Carlisle bay Resort.

135. This case involved the Employee being arrested on the hotel's premises on December 01, 2007. She was suspended in accordance with the Disciplinary Code.

136. What took place and what should have taken place after December 01, 2007 had absolutely nothing to do with the doctrine of constructive dismissal.
137. In these circumstances a citation of cases and to base an entire defence substantially on the doctrine of constructive dismissal **was a waste of the Court's resources and an abuse of the process of this Court.**

The matters of suspension, investigation and natural justice

138. It is settled law that when an employee has been charged by the Police with a criminal offence and there is in effect a disciplinary code, as in this case, legal issues of (a) suspension, (b) investigation and (c) natural justice must invariably arise for determination.
139. The legal authorities cited elsewhere in this judgment support my opinion at paragraph 138.
140. I am fortified in my finding that Ms. Dublin is not aware of the law which governs natural justice principles. For example at paragraph 18 of her Written Submissions, Learned Counsel states as follows:

“The further inference may be drawn that if the criminal trial had been dismissed in favour of the Employee prior to

November 13, 2008, the Employer would have reinstated her to her position”.

141. **Rawlins JA** in the **Epicurean** case at paragraph 36 on page 11 dismisses Ms. Dublin’s assertion in the following manner:

“This, of course, does not mean that the company could not have carried out its own investigation outside of Police action and dismissed Ms. Taylor if her actions caused the loss. Such an investigation, however, must be done in accordance with legal principles that guide fair procedure.”

142. It is unclear why Counsel in this case did not articulate principles of law which dealt with the matters contained at paragraph 137 above. These principles are well known.
143. To have made some submissions in accordance with the principles of natural justice but which I may have distinguished is very acceptable. For Counsel to have wasted the Court’s time with making totally irrelevant submissions without having addressed the real issues is unacceptable.
144. If I do not make an order for costs against the Employer this Court would be failing in its responsibility to maintain high standards.

145. Accordingly, for the reasons set out at paragraphs 133 to 144 above, I consider it proper to make an Order for costs against the Employer.

146. In these circumstances I hold that the Employer shall pay costs to the Employee in the sum of \$5,000.00. The full sum payable by the Employer to the Employee is \$76,916.00 plus \$5,000.00 or \$81,916.00 on or before 31st December 2014.

Dated the 21st day of November 2014



PHILIP A. PILGRIM
President

November 02, 2010 to November 01, 2013

I agree.


SAMUEL R. AYMER
MEMBER

I also agree.


DR. HAYDEN THOMAS
MEMBER