

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 63 OF 2013

BETWEEN:

MORVIN PETERSON

Employee

and

LIAT (1974) LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel R. Aymer

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Mr. Egbert Joseph and Ms. Cicely Charles of Hotel Management Association for the Employee

Ms. Kathleen Bennett and Ms. Amaya Athill Attorneys-at-law of Lake & Kentish for the Employer

2014: November 17

2016: December 02

JUDGMENT

Brown, P:

Background

1. The Employer is a company incorporated under the laws of Antigua and Barbuda. Its principal place of business is situated at the VC Bird International Airport in Antigua. The company carries on business as Leeward Islands Air Transport or LIAT providing airline services to several destinations in the Caribbean.
2. The Employee commenced his employment with the Employer on July 1, 1992. His services were terminated after 19 years and 4 months on November 24, 2011 at which time he held the position as Navitaire Manager earning a monthly

salary of EC\$7,299.00 and a monthly travelling allowance of EC\$500. He received no job description during the course of his employment.

3. In or about December 2010, the Employer conducted an investigation into the creation and use of its "credit shells", an internal accounting system for the payment of air fares by passengers and the holding of their credit balances. The investigation revealed that the Employee access code to the system had been used to facilitate improper transactions. As a result of its findings the Employer suspended the Employee pending further investigations and a disciplinary hearing.
4. Following the suspension and the disciplinary hearing, the Employer issued a written warning dated January 20, 2011 to the Employee. In that letter it found the Employee guilty of misconduct for failing to comply with the company's policy. Moreover, the Employer concluded that the Employee had exercised poor judgment. The Employee was warned that the Employer would not tolerate a repetition of his misconduct. By the warning letter, he was barred from performing his Navitaire administrative duties. Attached to the written warning was a Performance Improvement Plan which the Employee was required to implement with effect from January 21, 2011.
5. Upon acceptance of the said written warning the Employee noted in manuscript at the foot or end thereof that he was accepting it "without prejudice" and that he was "in total disagreement with its terms and claims".
6. By a letter of termination dated November 24, 2011 the Employee's employment was terminated. In that letter the Employer alleged that:
 - (a) The Employee had not addressed the tasks assigned to him in a "professional and a businesslike manner"
 - (b) His performance was generally "slow and uncooperative"
 - (c) During the period of May 17 to June 3, 2011 he "deliberately failed to follow specific instructions given to him by the Employer's Chief Financial Officer."
 - (d) The Employer found his "attitude and behaviour" to be inconsistent with his role as Manager of the Reservations Systems.
 - (e) There was a "clear breakdown in the relationship between both parties" and the employment relationship could not reasonably be expected to continue.
 - (f) In full and final settlement of all possible claims that the Employee could have, the Employer offered the following:
 - (i) The sum of \$151, 456.58 as compensation for his termination inclusive of the agreed three (3) months' pay in lieu of Notice.

(ii) All benefits to which he was entitled and his accrued vacation.

7. The Severance package eventually offered by the Employer included the following:
 - Severance Pay- \$151, 456.58
 - \$24, 451.30 as pension fund contributions
 - Interest on pension fund contributions - \$1,773.61.
8. The said severance package was not paid to the Employee until October 31, 2013, approximately two (2) years after the termination, at which time the Employee was accompanied by his Union Representative and acknowledged receipt of the cheque for the said total sum "under protest".

The Memoranda

9. In his Memorandum of Claim, the Employee substantially recited the salient points of the background facts. In particular, at paragraph 8 of his Memorandum the Employee asserted that he was "unable to find the precise reason" for his dismissal in the letter of dismissal. Moreover, in the final paragraph of his Memorandum the Employee further contended that his dismissal was not "handled properly" and was "cruel, harsh and unfair".
10. In its Memorandum of Defence the Employer contends:
 - The Employee was solely responsible for "reopening of flights" and the creation of "credit shells"
 - The Employer experienced a high level of fraud associated with the use of its credit shells.
 - The Employee had facilitated the misuse of the credit shells system by another Employee.
 - The Employee showed absolutely no willingness to abide or complete any of the tasks assigned to him under the Performance Improvement Plan.
 - The Deed of Final Settlement and Release signed by the Employee released the Employer from all and any further obligations.

11. The following main issues arise from the pleadings:

- (1) Whether the letter of termination dated November 24, 2011 contains a statement of the precise reason for the dismissal.
- (2) If the precise reason was given, whether the Employer acted reasonably in treating that reason as sufficient for dismissing the Employee.

- (3) Whether the Employee is entitled to compensation for unfair dismissal.
- (4) Whether the Deed of Final Settlement and Release fully and finally released and discharged the Employer from the payment of compensation in these proceedings.

The Legal Framework

- 12. Under Section C10 of the Antigua and Barbuda Labour Code (the Labour Code) an employee is entitled to receive a written statement of the precise reason for his dismissal. That section provides:

"C 10 (1) Upon termination by an employer of an employee's employment subsequent to the expiration of the latter's probation period, the employer shall, within seven days of termination or notice thereof, furnish to such employee a written statement of the precise reason for termination."

- 13. Section C 56 establishes an employee's right not to be unfairly dismissed. That section provides:

"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 such employee without just cause."

- 14. Subsection (1) of section C 58 provides the statutory categories of good causes for dismissal which may potentially provide justification therefor. That subsection reads:

C 58 (1) A dismissal shall not be unfair if the reason as assigned by the employer therefor

(a) Related to misconduct of the employee on the job, within the limitations of section C59 (1) and (2)

(b) ...

(c) ...

(d) ...

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

- 15. Subsection 2 of section C 58 establishes the test of reasonableness which each employer must pass in order to justify a dismissal. That section provides:

"C 58 (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."

16. Given an employee's right not to be unfairly dismissed, once an employer admits that he dismissed an employee, the burden is on him to prove that the dismissal was not unfair. If the employer fails to prove on a balance of probabilities that he had good cause for the dismissal and that he acted reasonably the employee will be deemed to have been unfairly dismissed. See **Reference No. 9 of 1988 Wesley Wade v. St. James' Club Ltd.**
17. The fundamental or primary threshold for justifying a dismissal is the provision of a written statement of the precise reason therefor under section C 10 of the **Labour Code**. The second requirement, in sequence, is that the stated reason must be one which is valid under section C 58 (1). Thirdly, the employer must establish with cogent evidence that there is a factual basis for the assigned precise reason within one of the categories of just cause. In other words, in order to succeed in establishing that a dismissal was not unfair, the just cause and its factual basis must not only have been foreshadowed in the termination letter but must have been precisely stated.
18. The fourth and final mandatory requirement, in sequence, to be met by an employer, is proof that he acted reasonably having regard to all the relevant circumstances. In other words, he must pass the test of reasonableness under section C 58 (2). Needless to say, each case turns on its own peculiar facts.
19. It follows that unless and until the fundamental or primary threshold is met by the written statement of the precise reason, any attempt by an employer to justify a dismissal will be futile. That result is embodied in the following provisions of section C 10 (4) of the Labour Code:

C 10 (4) An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to the facts which might have been recited in said statement or certificate, in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable.

Whether the letter of termination dated November 24, 2011 contains a statement of the precise reason for the dismissal.

20. The letter of termination dated November 24, 2011 is as follows:

"24th November 2011

Mr. Morvin Peterson

c/o LIAT (1974) Ltd
V.C. Bird International Airport
Antigua

Dear Mr. Peterson,
Re: Notice of Termination of Employment

We refer to the meetings held with you in December 2010 and January of 2011 during which the Company's investigation into audit procedures was discussed with specific regard to the creation and use of Credit Shells (CS) for the payment of bookings on which a number of persons travelled.

Following that meeting you received a written warning letter of 20th January 2011 and a performance improvement plan with identified tasks was developed for you. During the currency of the plan you reported to the Chief Financial Officer (CFO) through your immediate Supervisor, Mr. Andy Benjamin.

I am informed by the CFO and Mr. Andy Benjamin, that in their discussions with you, you indicated that in your view you had done nothing wrong and in the subsequent months have demonstrated your resentment of the disciplinary action taken by the Company by not addressing the tasks assigned in a professional and businesslike manner. Your performance was slow, uncooperative and between the periods of May 17, 2011 to 3rd June 2011, you deliberately ignored specific instructions given to you by Mr. Benjamin.

As you are aware, the Company's Airline Reservations System (Navitaire) is a vital component in the performance of the airline and is the heart of LIAT's financial transactions. We find your attitude and behavior to be inconsistent with your role as Manager of the Reservations System and LIAT's efforts to improve the access controls as well as other issues concerning the integrity of the system. In our view, there is a clear breakdown in the relationship between both parties and the employment relationship cannot reasonably be expected to continue.

The Company has decided to terminate your employment having regard to the matters stated herein. We are prepared to offer you the following terms in full and final settlement of all claims, if any, that you may have as a result of this decision in connection with your employment with the company or its termination.

1. The Company will pay you EC\$151,456.58 by way of compensation for the termination of your employment. Any statutory liability will be yours.
2. Included in this sum is an amount for three (3) months pay in lieu of notice in accordance with the 'Termination Agreement' clause of your employment agreement.
3. You will receive all benefits to which you are entitled and your accrued vacation.
4. Please return to the Company all property of, or relating to the business of the Company, that is in your possession. This includes but is not limited to:
 - a) Laptop
 - b) Identification cards
 - c) Keys

All outstanding attendance awards and annual benefits for the calendar year must be utilized by 31st December, 2011.

We wish you every success in your future endeavours.

Yours faith fully,

Ilean Ramsey
Director, Human Resources

Cc: Brian Challenger, CEO (Ag)
Julie Reifer-Jones, Chief Financial Officer
Andy Benjamin - IT Manager

I have read and understood the contents of this letter

Morvin Peterson

Date _____

Witness

Date _____

21. The first three paragraphs of the dismissal letter leave no doubt that the Employer was concerned about the Employee's work performance. Its concern led to the issuance of a warning letter and the institution of a "performance improvement plan" in January 2011.
22. In paragraph 3 of the letter, the Employer stated that the Employee "demonstrated" his "resentment" of the disciplinary action "by not addressing

the tasks assigned in a professional and businesslike manner". Further, the Employer stated that the Employee's performance was "slow, uncooperative". In particular, the Employer complained that "between the periods of May 17 to 3rd June 2011, (the Employee) "deliberately ignored specific instructions given to (him) by Mr. Benjamin."

23. It appears from those three paragraphs of the dismissal letter that the Employer vaguely skirted around at least two potentially good categories of reasons for the dismissal of the Employee:
 - (a) Poor performance involving the Employee's failure to produce the required work, meet specified deadlines or maintain quality standards and so on.
 - (b) Misconduct involving insubordination or a failure to obey or follow particular instructions from a particular superior employee and so on.
24. In relation to poor performance, it is noteworthy that the performance improvement plan, which the Employee was required to follow was implemented 10 months earlier. Based on the provisions of section C 59 (3) of the Labour Code and the limited content of the warning letter, we conclude that the plan was spent on the expiration of three months after it was implemented in January 2011. Accordingly, the Employer could not rely on it at the date of dismissal.
25. In relation to misconduct as a potential good cause, there is no reference to any clear, precise or particular act of insubordination or other misconduct on the part of the Employee. There is no mention of any particular instruction or order which the Employee failed to follow or perform.
26. For the stated reasons, there is no discernable statement of the precise reason for the dismissal either in relation to poor performance or misconduct in the first three paragraphs of the dismissal letter.
27. Moving to the rest of the dismissal letter, at paragraph 4 the Employer states that it found the Employee's "attitude and behavior to be inconsistent with (the Employee's) role as Manager in its reservations System". Again, apart from using vague generic terms of "attitude" and "behavior", the Employer makes no effort to give particulars or state precisely what is the underlying bases for its general statement. Instead, the Employer takes the quantum leap and comes to its conclusion that there was "a clear breakdown in the relationship between the parties and the employment relationship cannot reasonably be expected to continue"

28. It appears that that last clause of the paragraph was lifted without proper basis, from the provision of section C 59 (1) (a) of the Labour Code which relates to a situation when an employee is guilty of gross or serious misconduct. In the circumstances, since the Employer identified no misconduct, much less serious or gross misconduct, its use of that statutory clause is of little or no assistance in helping us to identify the precise reason for the dismissal.
29. Based on our foregoing analysis of the dismissal letter, we will for convenience adopt the words of Mr. Egbert Joseph the Employee's Representative, as used in the Employee's Memorandum: **"In the letter of termination dated 24th November 2011, we are unable to find the precise reason for Mr. Peterson's dismissal"**
30. In that regard, and for the reasons stated before, we are fortified in our view by Miss Athill's confusing closing submission, as Counsel for the Employer, that "The poor performance was therefore secondary and additional to the misconduct, in that, the performance improvement plan was the Company's way of determining whether the Employee could be trusted again so as not to perpetuate further acts of misconduct."
31. For the avoidance of doubt, we reiterate our conclusion that the dismissal letter discloses no statement of the precise reason for the dismissal of the Employee. In the circumstances, the Employer has failed to meet the fundamental or primary threshold for proving that the dismissal was not unfair. Accordingly, we find that the Employee was unfairly dismissed. This result logically leads to the disposal of issues 1 and 3 identified at paragraph 11 above. The Employee is entitled to compensation, to which we will return shortly.
32. Given our conclusion regarding the fatal omissions of the dismissal letter, the second issue identified at paragraph 11 above is rendered redundant and requires no further attention.

Whether the Deed of Final Settlement and Release fully and finally released and discharged the Employer from the payment of compensation in these proceedings.

33. The Employee's signature of the Deed of Final Settlement and Release, made on October 31, 2013, was without prejudice to his right to commence these proceedings. In that regard, we note that before signing the Employee informed the Employer that he was signing "to receive and was receiving" the cheque "under protest." We also note that the said Deed was signed on the 31st October, 2013.

34. In relation to the Employee's oral declaration that he was signing "under protest", he had earlier made the same declaration in writing by inserting these words on the actual deed first presented for his signature. His evidence in that regard, which we wholly accept, is that when he first went to collect payment, the Employer's Human Resources Director, Ms. Ilean Ramsey, refused to approve payment of the severance package to him on the ground that he had added his written protest. The Employee's testimony on this point is fully supported by Affidavit of Cicely Charles, sworn on November 29, 2013 and her oral testimony given on the trial.
35. In the circumstances, the foundation of the Deed, as reflected in the recitals, were substantially eroded if not wholly destroyed. As a result, the deed did not reflect a meeting of the minds of the Employer and the Employee. In other words, there was no consensus *ad idem* between the parties. Accordingly, there was nothing to bar the commencement of these proceedings by Reference filed on November 25, 2013.
36. In any event, the terms of the Deed were unilaterally determined by the Employer. There was no prior consultation with the Employee. He was merely required to sign the document as a prerequisite for the Employer's delivery of the severance package to him. In those circumstances, the terms of the Deed were not binding and did not fully and finally release and discharge the Employer from any further liability.
37. For the foregoing reasons, we resolve this third issue in favour of the Employee.

Compensation

38. In both the Memorandum of Claim and Witness Statement, the Employee claimed compensation under the heads of Unfair Dismissal, Manner of Dismissal, Loss of Earnings and Vacation Pay. We have considered his claim and determined that the following amounts be awarded.
- (a) Payment in lieu of Notice.
We note that under the Employment Agreement, the Employee is entitled to three months' notice of termination of his services. Since he did not receive the required notice, **we award the sum of \$21,897.00 (\$7,299 x3) under this head.**
- (b) Loss of Protection from Unfair Dismissal.
This measure of compensation is the equivalent of severance pay which would have been payable to the employee under section C 41 of the Labour Code. Since the Employee worked as a monthly paid worker for 19 years and

4 months, we award the sum of \$141,114.00 (\$7,299 x 19.33333) under this head.

(a) Immediate Loss

The Employee last salary was \$7,299.00 per month. We are mindful that, subject to his efforts to mitigate, the Employee is entitled to compensation under this head for the loss he suffered immediately after his dismissal. However, his evidence was not sufficient to allow us to make a full and accurate assessment of his loss.

The Employee testified that two years passed before he found a new job in November 2013 at the Antigua & Barbuda Airport Authority (ABAA) where he earns approximately \$2,000.00 less than what he earned from the Employer. He also testified that in the interim, he had applied for jobs at other places, including Caribbean Airlines and Airport Services. The Employer did not challenge this part of the Employee's testimony.

Given his expertise and specialized work experience with the Employer, we conclude that if he made diligent efforts, the Employee should have been able to find reasonable alternative employment no later than six (6) months after his dismissal. Accordingly, we award the sum of \$43,794.00, being the equivalent of six (6) months' salary.

In addition, doing the best we can with the limited evidence, we conclude that the Employee should have found new employment by the seventh month after dismissal paying him a salary approximate to that which he was being paid by ABAA in November 2013. In the circumstances, we award the additional sum of EC\$12,000.00, being the difference between his salary previously paid by the Employer and that paid in his new employment in the sum of EC\$2,000.00 for a further period of six (6) months. **The total award under this head is \$55,794.00.**

(b) Future Loss

On the facts of this case, especially having regard to our award under immediate loss, we made no award under this head.

(c) Manner of Dismissal

The evidence discloses no basis for an award under this head.

(d) Fringe Benefits

The Employee was paid a monthly travel allowance of \$500.00. His unfair dismissal deprived him of the allowance. There is no evidence that he earned a similar allowance from ABAA. In the circumstances, **we award the sum of**

EC\$6,000.00, being the equivalent of this monthly allowance for twelve (12) months.

(e) Payment in lieu of Vacation

Although in the termination letter the Employer undertook to pay the Employee's entitlement for accrued vacation, there is no evidence that the amount was actually paid. However, the Employee himself provided no oral testimony or documentary proof as to the actual amount due to him in lieu of accrued vacation. In the circumstances, we make no award under this head.

(f) Pension Fund Contributions

The evidence discloses that the Employee was entitled to the sum of \$24,451.30 plus interest thereon of \$1,773.61. Accordingly, **we award the total sum of \$26,224.91 under this head.**

39. Upon his dismissal, the Employee was paid the sums of \$151,456.58 as severance payment, \$24,451.30 as Pension Fund contributions and \$1,173.61 as interest on his Pension Fund contributions, all of which make a total of \$177,081.49. The total amount awarded above under the several heads is \$251,029.91. Therefore, **the Employee is entitled to the difference of \$73,948.42**

Order

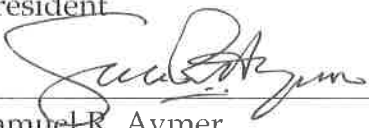
40. By reason of matters aforesaid, we make the following Order:

It is ordered that:

- (1) The Employer do pay the total sum of \$73,948.42 as the outstanding balance of his compensation for his unfair dismissal.
- (2) The Employer shall pay the said sum of \$73,948.42 to the Employee no later than Jan 6, 2017.
- (3) No order as to Costs.

Dated 02nd December, 2016


Charlesworth O.D. Brown
President


Samuel R. Aymer
Member


Hayden Thomas
Member

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