

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 14 OF 2015

BETWEEN

RASLYN JACOBS

Employee

And

VERANDAH RESORTS LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Judith Dublin

Member

Appearances:

Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee

Mrs. Stacey-Ann Saunders-Osborne of S. Saunders-Osborne Legal Services for the Employer

2015: December 14

2019: October 18

JUDGMENT

Brown, P;

Background Facts

1. The Employee's employment with the Employer at its hotel commenced on 19th October 2007. At the date of her dismissal on 24th December 2014 she worked as a Room Attendant earning \$395.00 per week plus a two-point share of the Employer's gratuity fund.

2. The Employee's dismissal was grounded on the Employer's conclusion that she was guilty of offence 25.5.18 – Failure to observe safety rules which leads or could have reasonably led to harm or injury – of the Disciplinary Code attached as Appendix 1 to the governing Collective Agreement then in force between the Employer and the Antigua and Barbuda Workers' Union (the Union).
3. The relevant bands of offences and the agreed sanctions are expressed in the Disciplinary Code as follows:

'25.5.7	Failure to observe safety rules	1 st Occasion	Warning
25.5.8	...	2 nd Occasion	Suspension
...		3 rd Occasion	Dismissal
25.5.11	Sleeping or appearing to be asleep on the job	1 st Occasion	Suspension
...			
25.5.18	Failure to observe safety rules which leads, or could have reasonably led to harm or injury	2 nd Occasion	Dismissal
...			

4. The letter dated, 24th December 2014, by which the Employee was dismissed reads:

"24th December 2014

Ms. Raslyn Jacobs

...

Dear Ms. Jacobs,

It was reported that on the 23rd December, 2014 that as the housekeeper assigned to room (#134) you left a "nestle water bottle" on the bathroom counter for a period of two days. The guest assuming it was her husband who left the bottle with water there took a few sips from it to take her medication. Upon tasting the substance the guest spat it out realizing that it was diluted bleach.

As a result you were summoned to a meeting with the following persons present, Mr. Phillipe Piacentini, General Manager, Mrs. Myriam Brown, Rooms Division Manager, Mrs. Ermine Hector,

Housekeeping Manager, Mr. Lionel Bramble, Duty Manager, Human Resources Trainee Michele Mings and myself.

At the meeting you denied leaving the water bottle containing the diluted bleach in the guests' room and requested that the cart be checked as your defence. However, what is indisputable you were the only housekeeper in charge of cleaning that room for five (5) consecutive days, not alternating with any other housekeeper.

Therefore only one inference can be drawn, that you mistakenly forgot the water bottle containing bleach in the guests' room. Further, you have an unfortunate history of a similar occurrence in October, 2008 where you left a dove shampoo bottle containing bleach in a guests room for two days, which the guest used causing damage to her hair and eyes.

This is gross negligence and had the guest ingested this diluted bleach, the resort would have been liable for all medical consequences thereafter.

In light of the foregoing, management decided to terminate your employment from the hotel effective Wednesday 24th December, 2014. However, after you spoke with the Chief Executive Officer regarding your future at the hotel, you were offered a position in the Laundry Department as a new employee. To which you emphatically and rudely declined.

Consequently you will be paid to and including 22nd December, 2014 for time already worked unused vacation, years of service and any other monies due and owing to you. These monies will be paid through your bank account in the usual manner.

- Kindly return all Uniforms, as well as any other company property which may be in your possession, to the Personnel Department. Failure to do so will result in any outstanding wages owing to you being withheld until all Company property has been returned.

Yours truly,

.....

Rashida Jonas ...
Relations Administrator"

The Proceedings

5. Being dissatisfied with her dismissal, the Employee commenced these proceedings claiming compensation for unfair dismissal.
6. By her Memorandum of Claim and Witness Statement the Employee denied leaving the water bottle with bleach in the guest's room as alleged in the dismissal letter. In addition, the Employee also made the following assertions:
 - (a) After she worked as usual on 22nd December 2014 she returned her trolley - with all cleaning apparatus and containers issued to her - to the house keeping storage area.
 - (b) Upon her return to work on 24th December 2014 after her scheduled day-off she was summoned to a meeting where the allegation of misconduct was put to her by the Employer's Relations Administrator, Ms. Rashida Jonas, who stated that on 23rd December 2014 the guest reported to the Duty Manager that the Housekeeper left a water bottle containing diluted bleach in her room for 2 days.
 - (c) The Relations Administrator also informed the Employee that the Room Attendant who cleaned the room on the Employee's day off stated that she had seen the water bottle in the guest's room.
 - (d) All the bottles she used in the performance of her duties were issued by the Executive Housekeeper.
 - (e) She invited the management team at the meeting to accompany her to the storage area to examine her trolley with all the cleaning apparatus, including the bottles she used. The management team declined her invitation.
 - (f) Upon declining her invitation, she was asked to wait outside the meeting room and was recalled soon afterwards. Upon her return, Ms. Jonas reminded her of the 2008 incident and told her that her services would be terminated.
 - (g) The General Manager told her that she would receive all outstanding monies due to her, including her severance pay.
 - (h) She was never shown any physical or other evidence of the "nestle water bottle" or its contents.
 - (i) When she returned home after her dismissal, the Employee received a telephone call from Ms. Jonas offering to transfer her to the laundry department. The Employee declined the invitation.
7. The Employer's response to the Employee's Claim is contained in its Memorandum of Defence in which it disputed the claim on the following grounds:

- (a) The housekeeper who cleaned the room on the Employees day off “was able to corroborate the guest’s allegation...”
- (b) The Employee exclusively had been assigned to that room for 19th December 2014 to the 22nd December 2014.
- (c) Notwithstanding her denial “the Employer would not ignore the overwhelming evidence against the Employee...” including her breach of the rule in July 2008.
- (d) “After considering and weighing all there facts, the Employer was satisfied that the Employee was guilty of misconduct by failing to observe the Employer’s health and safety rules which could have resulted in harm or injury to the guest and which demonstrated that the Employer / Employee relationship could not be reasonably expected to continue”
- (e) As a result the Employee was dismissed by letter dated 24th December 2014.
- (f) After her dismissal the Employee appealed to the Employer’s Chairman who, as a “gesture of goodwill”, offered the Employee a position in the laundry department.
- (g) In addition, through her Union Representative, the Employee also appealed against her dismissal. Following negotiations, it was agreed between the parties that the Employee would be paid an ex gratia payment in the sum of \$7,943.52 in full and final settlement of the matter.
- (h) It was understood and agreed that the ex gratia payment was not intended to prejudice the Employer’s position that the Employee had been dismissed with good cause.
- (i) Based on the ex gratia payment, the Employee is “estopped” from claiming compensation in these proceedings.

Issues

8. The main issues for determination are:

- (1.) Did the Employer have a good factual basis for its conclusion that the Employee was guilty of misconduct by failing to observe the Employer’s health and safety rules?
- (2.) Did the Employer act reasonably or unreasonably in the actual circumstances which existed when it dismissed the Employee?
- (3.) Was the Employee “estopped” from pursuing her claim of unfair dismissal by reason of her acceptance of the “ex gratia payment”?

Discussion and Resolution

9. The standard of proof in civil matters is proof on the balance of probability or proof on the preponderance of the evidence. Such proof does not necessarily depend on the number of persons giving the evidence. On the contrary, what matters most is whether the evidence is reliable and convincing.
10. There is no doubt that the Employer's case is grounded on the oral report made by one Mrs. Mayhew - the guest occupant of Room #134, on 23rd December, 2014 - that the Employee left a "nestle water bottle" containing "diluted bleach" on the bathroom counter of her room for 2 days, namely the 21st and 22nd December, 2014.
11. In so far as it is relied upon by the Employer to prove that what the guest said is true, that report constitutes hearsay information. Accordingly, it is to be treated with circumspection and is susceptible to be rebutted or undermined by the direct evidence adduced at trial. In any event, the weight to be attached to that hearsay information is subject to the Court's assessment of its reliability. That, in turn, depends on the veracity and cogency of the Employer's evidence which is grounded on that information.
12. As to the direct evidence given at trial, Ms. Patsy Greene, Housekeeping Supervisor, testified on behalf of the Employer that she was assigned to clean the room on the Employee's day off and when doing so she observed the bottle on the counter but did not remove it. Apart from seeing the bottle, which we accept she did, Ms. Greene is of no assistance to us in respect of the content of the bottle or whether the Employee left it there.
13. Ms. Ermine Hector, the Executive Housekeeper, testified on behalf of the Employer that the Employee was assigned to the room for four consecutive days immediately before her day-off on 23rd December, 2014. That evidence, which we accept as being credible, by itself does not preclude all or any other persons from having access to the room and leaving the bottle there.
14. Mr. Lionel Bramble, the Employer's Duty Manager, also testified on its behalf. It is noteworthy that neither in his report nor in his written and oral testimony did Mr. Bramble refer to any attempt by him to ascertain who, apart from the Employee, might have had access to the room at any material time. He made no mention of Ms. Greene. At the end of the day, Mr. Bramble's evidence did not enhance the reliability and weight of the guest's report.
15. Ms. Myriam Alfred-Brown, the Rooms Division Manager, also testified on behalf of the Employer. Her testimony clearly shows that she received the information

about the guest report from a second or third hand source. The evidence given by Ms. Alfred- Brown, like that of the other witnesses for the Employer, did not enhance the reliability of Ms. Mayhew's oral report.

16. In the final analysis, the 6 witnesses for the Employer were not able to establish the veracity of the guest's oral report. As a result, its reliability was left in such serious doubt that we cautiously assigned little weight to it.
17. Mr. Philippe Piacentini, the General Manager, also testified on behalf of the Employer. He too received the report about the guest from a second-hand source. In his investigation of the report, he "sniffed" the contents of the bottle and concluded that it contained bleach. Mr. Piacentini convened the investigatory meeting on 24th December 2014 at which the Employee denied the allegation against her. Nevertheless, the Employer believed that she was not being truthful and became "satisfied that the Employee was guilty of misconduct by failing to observe the Employers health and safety rules which could have resulted in harm or injury to the guest and which demonstrated that the Employer/Employee relationship could not be reasonably expected to continue."
18. In considering the reliability and assigning the weight of the hearsay evidence, we paid close attention to the evidence of the Employee. Generally, we find her to be a credible witness. In particular, we find that, apart from the 2008 incident, her job performance was generally satisfactory. Moreover, we find that, in light of the 2008 incident, the Employee was generally mindful of and complied with the Employer's health and safety rules.
19. Our assessment of the Employee's general attitude and work performance immediately before her day off on 23 December 2014 was corroborated by the Employer's evidence. In that regard, Mrs. Hector testified that she provided the employee with containers for storing the cleaning products and had no idea why the Employee would pour bleach into a water bottle. Importantly, Mrs. Hector also testified that the Employee was quiet and reserved. that she worked well; that she was a good employee; and that the Employer had no problems with her.
20. Given the developments which occurred on 23rd December 2014 while the Employee was absent from the premises, she had no prior knowledge of what was alleged against her. However, she was suddenly confronted with the allegations by no less than 6 members of the Employer's management team.
21. When the allegation was put to her, the Employee denied that she left the offending bottle in the guest's room. Under cross examination at trial, she testified: "I know I didn't leave the bottle there. I told them what I had, how many bottles I had and what I had in those bottles". She maintained her denial

and testified that when she requested that her cart be checked to corroborate her position, the Employer "flatly refused" to do so.

22. In the circumstances, we find that the Employer's evidence of the Employee's alleged misconduct - based on the hearsay information - was unreliable. The factual basis for its conclusion that the Employee was guilty of misconduct or "gross negligence" or breach of the safety rule is tenuous at best. As a result, we are inclined to resolve the first issue in favour of the Employee. We will now turn our attention to the second and third issues.
23. The application of the statutory test of reasonableness under section C 58 (2) of the Labour Code requires consideration of fundamental principles and practices of good industrial relations. We have already noted that the Employee had no prior knowledge of the allegation against her when she was summoned the meeting on December 24, 2014. In that regard, Mr. Piacentini testified that he carried on investigation about the report received from the guest. He stated "after completing (his) investigation he summoned the Employee to the meeting with the purpose being to "investigate the matter under Article 25.5.18 of the Collective Agreement"
24. It is useful to reproduce paragraphs 11 to 14 of the General Manager's Witness Statement as follows:
 11. "The Employee was advised that the purpose of the meeting was to Investigate the matter under Article 25.5.18 of the Collective Agreement - Failure to observe safety rules which leads, or could have reasonable led to harm or injury.
 12. During the meeting, the Employee denied leaving the Nestle water bottle with diluted bleach in Room 134.
 13. Even though the Employee denied leaving the Nestle water bottle in Room 134, the consensus amongst management was that there was overwhelming evidence against the Employee which suggested that she was not being truthful in the meeting. The Employee was the only Housekeeper in charge of cleaning the room during the period that the Guest reported that the Nestle water bottle was left on the bathroom counter. Another room attendant, Patsy Greene, who was assigned to Room 134 on the 23rd December, 2014, was able to confirm that she observed that Nestle water bottle while cleaning the room. My inspection of the Nestle water bottle confirmed that it contained diluted bleach as reported by the guest. It was also noted on the Employee's file, that on 13th July, 2008, the Employee similarly failed to observe safety rules by

storing bleach in a Dove shampoo bottle and leaving it in a guest's room which resulted in the guest using it on her hair.

14. After considering and weighing all the facts, management was satisfied the Employee was guilty of misconduct by failing to observe the Employer's health and safety rules which could have resulted in harm or injury to the guest and which demonstrated that the Employer/Employee relationship could not be reasonably expected to continue".
25. Based on the foregoing evidence given by Mr. Piacentini , it was clear that:
 - a) By 24th December, 2014, the Employer had completed its investigation without the involvement of the Employee;
 - b) The Meeting on the 24th December, 2014 was not investigative in nature;
 - c) In light of the Employee's denial of the allegations against her, the Employer carried out no further investigation but instead relied on the already formed "consensus amongst management" that the Employee was guilty of misconduct;
 - d) In reaching its conclusion about the Employee's guilt, the Employer took into consideration the July 2008 incident when the Employee failed to observe the safety rules.
26. In the process of its investigation, the Employee had no opportunity to confront the guest; to see the water bottle and its contents; or to confront Ms. Greene. She received no formal statement of the offence alleged against her and had no adequate opportunity to exculpate herself.
27. In our view, the "investigation" was neither thorough nor impartial. In the process, the Employer disregarded some of the fundamental rules of natural justice and good industrial relations practices.
28. In our opinion, having regard to all the circumstances, it was unreasonable for the Employer to conclude that the state of affairs "demonstrated that the Employer/Employee relationship could not be reasonably expected to continue." In coming to that conclusion we are mindful of paragraph 12 of the Employer's Memorandum asserting that the Employee's dismissal was in accordance with "the Collective" Agreement Disciplinary Procedures" and the " Antigua and Barbuda Labour Code."
29. As to the Labour Code, Section C59 (1) provides for summary dismissal in instances of "serious" misconduct in situations in which the employee has

“Conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.....”

In our estimation, given the bands in the Disciplinary Code within which the offence falls, it was not reasonable to rely on that section to justify the dismissal. Moreover, in order to succeed under this section, the Employer must meet the required standard of proof by eliciting sufficiently cogent and weighty evidence. In our estimation, the Employer has failed to discharge that burden.

30. As to the Collective Agreement, we consider the Employer’s labelling of the Employee’s conduct as “gross negligence” to be unreasonable in light of the agreed sanction of a “warning”, as applied in 2008, on the 1st Occasion of that offence. Moreover, there is significant inconsistency in the treatment meted out to the Employee in relation to the later alleged offence. According to Ms. Mings, the 2008 offence resulted in “more serious injury”. By dismissing the Employee, the Employer appears to have reversed the seriousness of the offences. Further, the Employer unreasonably treated the alleged offence as the 2nd Occasion justifying a dismissal which should have been effected only after a suspension.
31. Moreover, considering the timeline, we accept Mr. Riley’s evidence to the effect that the earlier potential of the 2008 disciplinary action to be relied upon as the basis for later disciplinary was already spent. We agree with him that it was not proper for the Employer to refer to the July 2008 incident to justify the dismissal.
32. For the foregoing reasons, we find that the Employer’s actions in dismissing the employee in the circumstances was unreasonable. In other words, a reasonable employer acting reasonably would not have dismissed the employee in those circumstances. Accordingly, we resolve the second issue also in favour of the Employee.
33. As to the third issue: whether an estoppel was created, our starting point towards its resolution is the dismissal letter. From it, we note the following sequence of events according to the Employer:
 - after the decision to dismiss the Employee was taken, she spoke to the Employer’s CEO;
 - as a result the Employer offered the Employee a position in the laundry Department as a new employee;
 - the Employee “rudely declined” that offer;
 - “consequently” the Employer committed itself to pay the Employee for “up to and including 22nd December 2014 for time already worked, unused vacation, years of service and other monies due and owing” to her

34. In relation to the alleged conversation between the Employee and the Employer's Chief Executive Officer and his offer to her of a position in the laundry department, we note that in its Memorandum the Employer asserted that the Employee pleaded to the "Chairman, Mr. Robert A. Barrett". Be that as it may, we accept the Employee's evidence that: "After I received the dismissal letter, I did not speak to Mr. Barrett...I was not offered anything, I did not plead with anyone". More instructively, the Employee testified that it was Ms. Jonas who spoke to her about a vacancy in the laundry department and expressed the Employer's desire to transfer her there.
35. In its Memorandum of Defence, the Employer asserts that by reason of its payment of the sum of \$7,943.52 which it considered to be an ex gratia payment, the Employee is "estopped from seeking the relief that she has sought...".
36. In relation to this issue, we emphasize the sequence of events as stated in the dismissal letter, that after the Employee "rudely declined" the offer to work in the laundry, the Employer committed itself to pay "her years of service". We interpret the term "years of service" to be payment equivalent to severance pay. In that regard, the Employer's letter dated 12th January 2015 set out her "severance for first 5 years", "severance for last 30 months" and her "total severance due". In our view, the sum which the Employee received under cover of the letter dated January 1, 2015, is in fact what the Employer had committed to pay the Employee in the dismissal letter.
37. Accordingly, on that documentary evidence above, we are inclined to conclude that no estoppel was created by reason of the alleged negotiation with Mr. Kem Riley, the Industrial Relations Officer of the Union. For the avoidance of doubt, we will rely on Mr. Riley's evidence which we consider to be wholly credible.
38. According to Mr. Riley, after the Employee's dismissal he requested a meeting with the Employer. In his words, the purpose of the meeting was "either to have her back to work or get compensation". At the meeting, at which the Employer's General Manager and its Relations Administrator were present, the latter directed his attention to the last page of the dismissal letter which referred to severance payment. Mr. Riley testified that when he enquired of the Employee whether she agreed, she responded by saying, "give me my money". Thereafter, the meeting ended.
39. Further, Mr. Riley testified that once the Employee expressed her desire to receive her money, he had no reason to pursue anything else stated in the letter. Moreover, he testified that the Employee never made any submission to him regarding the precise amount to which she was entitled. Under cross

examination, Mr. Riley also stated that it was an error on his part not to read the dismissal letter in its entirety before attending the meeting. He emphasized that it was Ms. Jonas who pointed out to him that the Employer had already committed to pay the Employee her severance entitlement.

40. In relation to her overall compensation in the circumstances, Mr. Riley testified that it was his opinion that the Employee should be paid further compensation in addition to her severance pay. We agree with that opinion.
41. In the circumstances, we reject the Employer's position in respect of the creation of an estoppel. We find that the Employee was entitled to pursue her claim herein for compensation for unfair dismissal
42. In the final analysis, it is our opinion that the Employee was unfairly dismissed and is entitled to compensation. In addition to the sum of \$7,943.52 which she received as "severance pay", we award the following amounts.
 - a. Notice pay
Under this head, we award the sum of \$395.00 in lieu of notice, being the equivalent of one week's pay.
 - b. Immediate Loss
An award under this head turns on proof of the Employee's efforts to mitigate her loss. In this case, we have no or no sufficient evidence to fully ground an award. However, we note that at the date of dismissal, the Employee was approximately 56 years old. That fact is likely to have influenced prospective employers. In the circumstances, we award the nominal sum of \$5,135.00, being the equivalent of 13 weeks' wages.
 - c. Fringe benefits
By the documentary evidence of her pay slips as attached to the witness statement of Ms. Mings, the Employer's Human Resources Assistant, the Employee received "2 points service charge" weekly in the sum of \$289.75 for a 40 hour work week. In the circumstances, all things being equal, we award the sum of \$3,766.75, being the equivalent of 13 weeks service charge.
43. Having regard to the evidence before us and the closing submissions of the parties, we make no further award of compensation or costs.

Order

44. It is hereby ordered that:

- (1) The Employer do pay to the Employee the total sum of \$9,296.75 as compensation for her unfair dismissal.
- (2) Payment of the said sum shall be made no later than 31st October 2019.

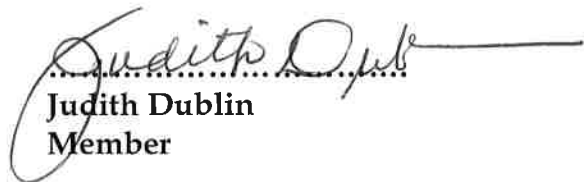
Dated 18th day of October, 2019



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Charlesworth O. D. Brown
President



.....
St. Lawrence deFreitas
Member



.....
Judith Dublin
Member

— by A. J. J. J.