

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 65 OF 2013

BETWEEN:

KERISSA SMITH

EMPLOYEE

And

CARLISLE BAY ANTIGUA t/a CARLISLE BAY RESORT

EMPLOYER

Before:

The Hon. Dr. Hayden Thomas

The Hon. Samuel Aymer

The Hon. John Benjamin

Chairman

Member

Member

Appearances:

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

Mr. Hugh Marshall Jnr. of Messrs. Marshall & Co., Attorneys - at - Law for the Employer

2018: April 27

2019: June 07

JUDGMENT

Thomas, C:

Background

1. The Employer is a Company registered under the laws of Antigua and Barbuda and carries on business as a five star hotel providing all-inclusive hotel services to its guests. It is situated at Carlisle Bay, Old Road, Antigua.



2. The Employee commenced employment with the Employer as a Spa Receptionist on December 1, 2003 and earned a weekly wage of \$484.00 plus a share in the Gratuity Fund. Her employment was terminated by the Employer on August 18, 2008.
3. As Spa receptionist, her duties included the recording of appointments for spa treatments, details of which will be discussed later.
4. Employees who were engaged in a year's continuous service were offered the benefit of a 24- hour familiarization stay at the hotel along with a guest of his or her choice. According to the Employer, this was done in order for employees to experience the hotel from the guest's perspective, which in turn would improve understanding of the different aspects of the hotel's service and product and assist the future performance and knowledge of the teams.
5. The Employee's Representative filed a Reference with the Court on November 28, 2013 claiming Unfair Dismissal.

The Employee's Case

6. The Employee submitted a Memorandum to the Court on January 20, 2014. It provided the following information:
 - (i) *On or about August 8, 2008 the Employee applied for a "Staff Familiarization Stay" at the hotel on August 16, 2008 and it was approved. She was permitted to bring along one guest.*
 - (ii) *She checked in at the hotel with her guest around 7:15 p.m. on the said date. She had a discussion with a colleague spa receptionist - Randy Isaac - and was told after making inquiries that "there was a 7:45 p.m. opening in the spa diary and so she could come in for a half hour massage". She went to the spa at 7:45 p.m. and did a foot spa (foot rub/massage).*
 - (iii) *The Employee reported for duty at the hotel as scheduled at 12:30 p.m. on August 18, 2008 and made preparation to commence work. As she did so, however, the spa manager, Ms. Michelle Bunbury informed her that she was required to attend a meeting at the office of Mr. Daniel Brown, the Rooms' Division Manager. Also present at the meeting were Ms. Charmaine Gore-Biesheuvel the Human Resources Manager and Ms. Leisa McDonald.*

- (iv) *Mr. Brown opened the meeting by asking the Employee about a booking in the spa diary - in her handwriting - for guests Mr. and Mrs. Wilkerson for August 16 2008 at 5:30 p.m. The Employee acknowledged making a booking for the Wilkersons but that it was for a couples' massage.*
- (v) *The Manager stated that the booking as recorded in the spa diary showed that the guests had booked "a Demi-facial, a Half-back massage and a West Indian massage." Ms. Smith told the Manager that she was not responsible for those bookings since the guests' request to her was for a couples' massage only. He said that the booking did not show a couples' massage although it was for the same date and time - August 16th, 2008 - at 5:30 p.m. She suggested that perhaps the guests may have made a change with one of the other spa receptionists.*
- (vi) *The Manager then asked the Employee why she did not record the room number and her explanation was that the guests came to the spa shortly before her shift ended and that she was in a hurry not to miss the staff bus which would take her home.*
- (vii) *The Employee further explained that after the guests left the spa she realized she did not take their room number. She had, however, made a mental note before she left work and would check the system for the number since she had the name. The Employee said that immediately after she had recorded the guests' booking in the spa diary, she hurriedly typed a confirmation/reminder letter and logged it on to the bellman's list for delivery that evening as per the spa procedure but that she had forgotten to do so. She, therefore, apologized for this error.*
- (viii) *The Manager informed the Employee that the guests did not show up for their booking and so "the Hotel was out of pocket because they had called out a therapist, etc. and had to pay for services not performed." The Manager told her that the hotel was going to charge her for the cost incurred as a result of her error. According to the Employee, the Manager Ms. Bunbury intervened and told Mr. Brown that the booking was actually in the handwriting of another receptionist, one Peggy. The Employee subsequently checked the spa appointment book after the meeting and saw that the cost for treatment was \$842.21. She emphasized that she had never before been questioned by the Employer for any alleged disciplinary infraction.*

- (ix) *The Employee said that she was later summoned by the spa manager to attend another meeting in the HR department. When she got there all the parties from the first meeting were present. She was asked about a spa booking for a Mr. and Mrs. Zachariah on August 16, 2008. She said that the spa manager told the HR Manager that she believed "that I book the treatment for myself and my partner and forged the name as a cover up".*
- (x) *The Employee strongly denied making such booking for herself and/or partner and reminded the meeting that she never arrived at the hotel before 7:00 p.m. She said that she had a foot rub/massage at 7:45 p.m. The Employer had, however, claimed that the booking for Mr. and Mrs. Zachariah was for 5:30 p.m. on August 16, 2008, the same date and time for the Wilkerson booking and that they were apparently outside guests. The Employee was adamant that she had absolutely nothing to do with that booking and indeed it was not her handwriting.*
- (xi) *The spa manager accused the Employee of making the booking and erasing it sometime between the 11th and 15th of August. He came to that conclusion since her colleague (Randy Isaac) returned from vacation at that time and never saw any name Zachariah in the book.*
- (xii) *The Employer issued the Employee a letter of termination on the same day August 18, 2008. She said that she and her Union remained confused "as to exactly which incident - or if it was both - may have led to the Employer's decision to terminate and, by extension, the basis for the precise reason given (dishonesty), since the Employee was never at the hotel at 5:00 p.m. on August 16th. She actually arrived at the hotel between 7:00 p.m. - 7:15 p.m."*
- (xiii) *The Employee and her Union claimed that the dismissal was "grossly" unfair.*

The Employer's Case

7. The Employer confirmed that the Employee was approved for a Staff Familiarization stay at the hotel along with a guest of her choice on August 16, 2008. The Employer said that it could not confirm as to the individual selected by the Employee to accompany her.

8. The Employer restated its policy that during the Staff Familiarization Stay all amenities and specifically Spa treatments are only available to the employee and guest if there is an opening or a vacant booking in the schedule. The policy is that paying guests were given preferential treatment.
9. The Employer pointed out that the Employee knew that services provided by the spa were on semi-private contract from independent contractors sourced from outside the hotel and once a booking is made the Employer has to pay an appointment fee to these contractors. The fee is payable whether or not the appointment is kept by the guest. In this particular case the Employee received a foot rub/massage which was performed by Physiotherapist Dale Gardner.
10. The Employer said that a meeting was held where the Employee was asked to provide an explanation for what were considered to be discrepancies with respect to guest bookings made for spa treatment on August 16, 2008 at 5:30 p.m. It said that these were recorded by the Employee. It was stressed that the Employee knew the procedure that whenever a booking was being made by an in house guest the room number should be recorded and a confirmation letter issued which would be added to the bellman's list for delivery.
11. An investigation revealed that contrary to what the Employee stated, no confirmation letter had been logged for distribution by the bellman. Moreover, the guests for whom the booking was scheduled were no longer guests at the hotel at the time the appointment was scheduled.
12. The Employer emphasized that the Employee was fully aware of the mandatory procedure for booking spa appointments and was aware of the obligation for remuneration of the spa therapists once a booking was made.
13. The Employer alleged that the Employee manipulated the spa treatment booking system in a way to ensure "that a therapist and appointment slot for spa treatment would be available for her and her guest's use on Staff Familiarization Day." The Employer regarded this as dishonesty which amounted to gross misconduct and it led to termination of the Employee's employment on 18th August, 2008.
14. The Employer contended that the Employee was not unfairly dismissed.

The Issues

15. The main issues to be determined are:
1. Was the investigation prior to the dismissal of the Employee fair and proper?
 2. Was the Employee unfairly dismissed?
 3. If the Employee was found to be unfairly dismissed, what is the level of compensation that should be paid to her?

The Law

16. Section C 56 of the Antigua and Barbuda Labour Code (The Labour Code) establishes the statutory right of an employee not to be unfairly dismissed. It states:

"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".

17. Section C 58 (1) of the Code states:

"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."

18. C 58 (2) states as follows:

"(2) The test, generally, for deciding whether or not a dismissal was unfair is whether

or not, under the circumstances, the employer acted unreasonably or reasonably, but even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

19. C 59 (1) states:

“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 that the employment relationship cannot reasonably be expected to continue;*
- (b) committed a criminal offence in the course of employment, without consent, express or implied, of the employer; or*
- (c) behaved immorally in the course of his duties.”*

20. C 59 (2) states:

“Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action which the employer intends to take in the event of

- (a) a repetition of the misconduct; or*
- (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.”*

Issue No. 1: Was the investigation prior to the dismissal of the Employee fair and proper?

21. The Employer organized two meetings with the Employee on August 18, 2008 in order to investigate the circumstances leading to spa treatments obtained during her Staff Familiarization Stay at the Resort on August 16, 2008. We now examine these to determine whether the investigation could have been considered to be fair, proper and reasonable.
22. The main accusation made by Mr. Daniel Brown the Rooms' Division Manager, was that the Employee did not follow standard procedure with respect to documentation of bookings for spa treatments. In the instant case, she failed to register the room number of Mr. and Mrs. Wilkerson and moreover, she did not as she claimed give the bellman a letter of confirmation for input in the spa log book. There was no record in the Employer's computerized reservation system.

This meant there was no information which would allow the collection of any cancellation fees incurred.

23. At the meetings held on August 18, 2008, Ms. Smith was questioned as to the reasons why she failed to follow the proper procedures regarding the Wilkerson booking. She admitted her error but gave as an excuse that the booking was made when she was in a hurry to catch the bus prior to its departure at the end of her workday. She, however, claimed that she had prepared and logged a confirmation letter in the Bellman's log for delivery by him. On investigation, no evidence was found to support this claim. It was confirmed by the spa receptionist that the Employee did receive a foot massage at the spa on August 16, 2008.
24. The Employer stated that while examining the Wilkerson booking in the spa log it was noted that the names Mr. and Mrs. Zachariah had been erased and replaced with the names Mr. and Mrs. Wilkerson. Mr. Brown alleged that the handwriting was that of the Employee. On the other hand, the Employee denied that the handwriting was hers. It was further pointed out by Learned Counsel for the Employer in his written submission that:

- (i) *"There was no record of any guest by the name of Wilkerson residing in the resort on the 16th August, 2008.*
- (ii) *On the 16th day of August 2008, the Employee had attended the Resort during her Staff Familiarization Stay with her guest a Mr. Zachariah (whom the Employer knew was the partner of the Employee... ..)*
- (iii) *The Employee attended the spa for a treatment on the evening of the 16th of August 2008, fully aware that a therapist would be available for her use as she had made the Wilkerson's booking, who as it turned out were not guests of [the] Resort at the time in question."*

25. The following points were emphasized:

The Employee was given the opportunity to explain her actions in failing to follow the Employer's proper procedure. This failure resulted in her having a spa therapist available for her use during her Familiarization Stay. No proper or reasonable explanation was given by the Employee which could have been reasonably accepted. It was submitted that the investigations were made in a fair and proper manner.

26. For completion, it should be noted that the Employee's Representative pointed out that the Employee did not go to the spa at 5:30 p.m. according to the Wilkerson

booking, but at 7:45 p.m. following her arrival. She went at that time when she was told by the spa representative that there was an opening. She refuted the allegation of manipulation of the booking system for her benefit. She denied the accusation of "dishonesty".

27. The question arises as to the reasonableness or otherwise of the Employer's belief that the investigation was conducted in a fair and proper manner. Counsel for the Employer in his final written submission stressed "As regards to what may be deemed as a fair and proper investigation the test is whether in all the circumstances the reasonable employer would regard the investigations carried out as adequate." As to whether or not the investigation conducted by the Employer prior to the dismissal of the Employee was fair and proper, the case was cited by the Employment Appeal Tribunal (U.K) in the case of *Home Stores Ltd. v Burchell* [1978] IRLR 37. The following was noted:

"It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion".

28. In the instant case, the employment of the Employee was terminated on the ground of "dishonesty". This was done following an investigation which led to a reasonable suspicion of guilt. The investigation was launched after it was realized that the Wilkersons had failed to attend the spa as previously scheduled and the fact that there was no information recorded which would allow for "the collection of the cancellation fees incurred" had the standard booking procedure been properly followed.
29. The Employee admitted her failure in recording the room number. She also failed to present the Bellman's logbook which she said had the confirmation letter for the Wilkersons. When the Employer was eventually able to check the log book there was no record of a confirmation letter given to the Bellman. Moreover, the Employer found that their computerized reservation system had no record showing that the Wilkersons were guests at the hotel on August 16, 2008, the date they were "supposedly scheduled" for spa treatments.

30. It was noted that these guests left the Resort since August 11, 2008. These failures clearly led to a feeling of mistrust by the Employer. It was actually confirmed that the Employee received a foot massage at the spa on August 16, 2008 during the time slotted for the Wilkersons. Examination of the matter, according to the Employer, also revealed that the Wilkerson bookings initially made in the name of Mr. and Mrs. Zachariah had been replaced with Mr. and Mrs. Wilkerson and that these bookings were in the handwriting of the Employee. The Employee, however, denied these allegations. It should be emphasized that the Employee was given reasonable opportunities to respond to the allegations but failed to present reasonable explanations. Taking everything into consideration, we are of the view that the investigations were conducted in a fair and proper manner which gave her the opportunity to fully exculpate herself but she was unable to make use of it.

Issue No. 2: Was the Employee unfairly dismissed?

31. Reference was made earlier to Sections C 58 (1) and (2), also to C 59 (1) (a) and (c) of the Labour Code outlining good cause for dismissal. (See Paragraphs 17-19 above). Having carried out what was considered to be a reasonable and proper investigation, the Employer genuinely believed that the Employee committed the misconduct under investigation. Some of the reasons for this belief were summarized in Paragraph 24 above and are in keeping with tests recommended in the case cited earlier of **British Home Stores v Burchell** for concluding that a dismissal is fair.

Other considerations which led to the Employer's decision were that:

- (a) The Employee had been employed by the Employer for over four years and was aware or should have been aware that spa therapists were independent contractors and had to be paid a fee when called out to perform treatments.
- (b) The Employee knew that hotel guests were to be afforded priority treatment over employees on Familiarization Stays and moreover, spa therapists were not called out to provide treatments to employees on Familiarization Stays.
- (c) The Employer believed that the bookings were made by the Employee in order to ensure priority treatment on August 16, 2008. During cross examination, Mr. Brown, the Rooms' Division Manager emphasized that a therapist called out at 5:30 p.m. would not leave the spa at exactly 5:30 p.m. and so the slot would be made available.

32. The Employer was of the opinion that the Employee's actions pointed towards dishonesty and that no employer would reasonably continue to employ such a person.
33. We agree that in the circumstances of the case the dismissal was fair and in keeping with Section C 58 (1) (a) of the Labour Code. We therefore feel compelled to dismiss this Reference.

Issue No. 3: If the Employee was found to be unfairly dismissed, what is the level of compensation that should be paid to her?

34. Since the Employee was not found to have been unfairly dismissed, it follows that no compensation is payable over and above sums already paid to her following termination.
35. There is no order as to costs.

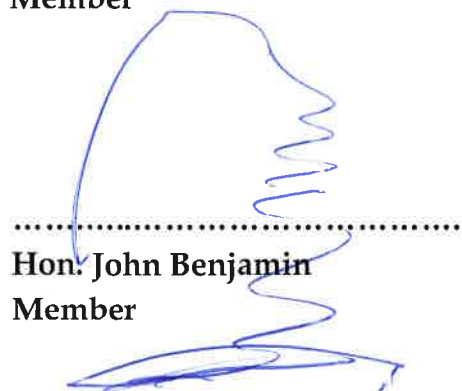
Dated this 7th day of June, 2019



Hon. Dr. Hayden Thomas
Chairman



Hon. Samuel Aymer
Member



Hon. John Benjamin
Member

