

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/1 of 2021

BETWEEN:

JEANNETTE JOSEPH & JULIET FERRIGON

Employee

and

CARLISLE BAY RESORT

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samantha May-Francis

Vice President

Appearances:

Mr. Kem K. Riley, President of Antigua & Barbuda Workers' Union, Representative for the Employee

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

2023: March 27

April 21, 27

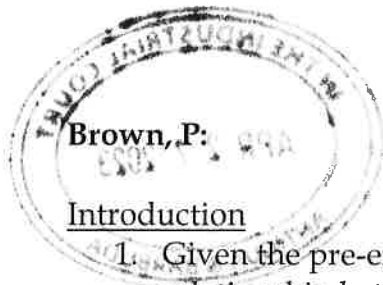
JUDGMENT

Rectified Pursuant to Section 25 (3) of the Industrial Court Act 214.

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This Judgment was first delivered orally in open Court on April 21, 2023 and transmitted electronically by email to the parties on April 26, 2023. After the transmission, the Court informed itself that the awards in paragraph 32 (b) of the Judgment under the heading "Loss of Protection" were erroneously calculated in accordance with the minimum rates for severance pay specified under section C 41 of the Labour Code. This corrected Judgment brings those awards in line with the more advantageous rates stipulated in Clause 16 of the Collective Agreement between the parties - duly acknowledged by them in these proceedings - which was in full force and effect at all material times.

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Introduction

1. Given the pre-existing common law principles governing the employment relationship between “master and servant”, an employee’s right not to be unfairly dismissed was empathically established by section C 56 of the Antigua and Barbuda Labour Code. Further, section C 58 of that Act also definitively provides for the determination of the issue as to whether or not an unfair dismissal occurred.
2. Fundamentally, the first statutory requirement is that the employer must state the reason for dismissal such as misconduct or poor performance, so that it falls within the several categories under section C 58 (1) and prove the factual basis in the stated reason. Perhaps most importantly, the Employer must pass the test of reasonableness as provided under section C 58 (2) by proving that it acted reasonably in the prevailing circumstances.
3. In certain circumstances where an employee is guilty of **serious** misconduct, such as when he commits a criminal offence or conducts himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue, the employer becomes entitled to summarily dismiss him pursuant to section C 59 (1).
4. The revolutionary nature and effect of the Labour Code as a whole was underscored in several sections including Section C 10 of the Act. That section, apart from requiring the employer to provide a written statement of the reasons for the dismissal, also conclusively binds the Employer, at trial, to the contents of that statement.
5. As a part of its overall revolutionary thrust, Divisions G, H, I, J, K in the Labour Code underscores the sacred role of trade unions in certain employment relationships. In particular, it recognizes their role as bargaining agents negotiating and entering into binding collective agreements on behalf of its members who fall within particular bargaining units.
6. In relation to the determination of whether or not an unfair dismissal occurred, the onus or evidentiary burden is on the Employer to prove that the dismissal was not unfair.

Background Facts

7. As named in the Reference, the Employer is a seaside resort providing accommodation and related leisure and recreational facilities and services to its guests. It is a 5-star resort owned by Harcourt Development a private company

trading as Harcourt Development and carrying on business in several jurisdictions including Ireland and Canada. Its principal place of business in Antigua is situate at Carlisle Bay in the village of Old Road, St. Mary, Antigua.

8. As part of its efforts to maintain its high standards, the Employer employs security officers, including the Employees to secure its guests and property on its premises. The First Employee and Second Employee commenced their employment on December 5 and December 8, 2003, respectively as security officers. At the date of their dismissal on July 10, 2018 after almost 15 years of service, they held the positions of Security Supervisor and Security Officer, respectively earning \$1,532.00 and \$976.00 plus 1.5 and 1 service charge points per fort-night.
9. At all material times, there was a subsisting Collective Agreement covering the period January 2016 to December 2018 between the parties which, to a large extent, governed the employment relationship. Under the heading "Grievance Procedure and Settlement of Disputes", the Agreement includes a Disciplinary Code under Clause 26. According to that Code, the applicable disciplinary action for the offence of "Failure to perform duties" range from a reprimand on the first occasion to dismissal on the fourth occasion. In relation to the offence of "Failure to observe safety rules, the appropriate disciplinary actions ranged from a warning to dismissal on the third occasion.
10. On June 30, 2018 the Employees were on duty in their respective capacities during the 8.00am. to 4.30pm. shift when a robbery occurred on the Employer's premises sometime before 12.30pm.
11. On June 30, 2018 and July 1, 2018, respectively the Employees provided the Employer with separate Incident Reports giving their individual accounts of what happened at or near the Main Gate to the premises where they were both stationed at the material times.
12. On July 05, and July 06, 2018, respectively, without any advance notice of the requirement of their participation in the Employer's investigation of the robbery and or that any disciplinary action was being contemplated against them, the Employees were each individually summoned to a meeting. At the start of each meeting, in the absence of the other, each of them was told that the purpose of the meeting was to "recap" what happened on the day of the robbery.
13. At the end of the respective meetings on August 05 and 06, 2023, the First Employee was told that the Minutes would be typed for her signature. The Second Employee was thanked for writing her report and doing the recap, and told that she would be informed when the minutes were ready for her signature.

14. By letters respectively dated July 10, 2018, the Employees were dismissed with immediate effect. In the interim - over the two periods between the date of the robbery and between the interviews and the date of dismissal - the Employees continued to perform their duties as required on the dates they were scheduled to work in accordance with the published duty roster. Apart from submitting the reports and attending the interviews, the Employees had no formal interactions with the Employer in relation to the robbery, their Incident Reports or the recaps done during the interviews.
15. The relevant parts of the respective dismissal letters are largely identical and read as follows, with selected parts highlighted by us for emphasis:

" ...

Re: Termination of Employment

As you are aware, an **in-house investigation** has been carried out to examine the circumstances and facts surrounding the robbery that took place at the Carlisle Bay Resort on Saturday 30th June 2018.

As part of that investigation, you submitted a **written report** that was received on 4th July 2018. This was followed by an **interview** of yourself on 6th July 2018. Present at that interview was John Campbell, Nicole Hector, yourself and the undersigned.

Having concluded the investigation and taking into consideration the contents of your written report and information from the above-mentioned interview, **we have come to the following conclusions that are of significance:**

1. In breach of your duty to stop all incoming traffic to Carlisle Bay Resort, identify the occupants, and confirm their right to be on the compound, you allowed Kathy-Ann Isaac to drive a car on to the compound, a car you admitted you were not familiar with, without stopping the said car, identifying the occupant and verifying that the occupant was duly authorized to be on the compound.
2. In breach of your duty to restrict Line Staff from parking on the compound, you allowed Kathy-Ann Isaac to park her car in an area you knew or ought to have known she, as a Line Staff, was not permitted park on 30th June 2018 or at all. This was even after you had identified her and knew and/or ought to have

known she rightfully ought to have parked in the area specifically designated for Line Staff.

The purpose, of those rules, and you being given the duty to enforce and ensure that they are upheld, is to protect the security of the property and the persons within.

As a direct consequence of your failure to apply the established procedures designed to uphold these rules, Kathy-Ann Isaac was able to facilitate an armed robbery on the hotel. By the grace of God no one sustained injury. However, we cannot tolerate nor be seen to be tolerating lapses in Known and established security protocols given the industry that we are in.

Your failures amount to breaches of the Disciplinary Code. In particular, a failure to perform your duties and your failure to observe safety rules. In our view, this is a gross dereliction of duty and under which in all reasonableness we cannot be expected to continue the employment relationship.

Accordingly, you are hereby dismissed for the above stated reasons with immediate effect.
..."

Analysis

16. For the purposes of determining liability for unfair dismissal, a convenient starting point is Section C 10 of the Labour Code, referred to at paragraph 4 above. It is clear that the Employer had two reasons for the dismissal. Firstly, the alleged breach of duty to stop incoming traffic; identify the occupants; and confirm their right to be on the premises. As a consequence of the alleged breach, the Employees allowed Ms. Isaac to drive a car, with which they were not familiar onto the premises without stopping it and without identifying her in order to verify that she was authorized to be on the premises.
17. The second reason stated in the dismissal letter is the Employees alleged breach of duty to "restrict Line Staff from parking on the compound". As a consequence of this breach Ms. Isaac was allowed to park on the compound even after the Employees had identified her and knew that she ought to have parked in another area designated for Line Staff.
18. Moreover, having cited the two precise reasons, the Employer asserted that the failures amounted to breaches of the Disciplinary Code - "a failure to perform your duties and your failure to observe safety rules". From that launching pad, it appears that, without more, the Employer then took a quantum leap to the

conclusion, that as the direct consequence of the Employees' alleged breaches, Ms. Isaac was able to facilitate the criminal act of armed robbery.

19. Further, it appears that, having taken the initial quantum leap, the Employer sought to invoke section C 59 (1) as its basis for summary dismissal by concluding that the Employees' failures amounted to a "gross dereliction of duty" based on which it could not "in all reasonableness" be expected to continue the employment relationship.
20. In the circumstances, having regard to the provisions of the Disciplinary Code, Section C 58 (1) of the Labour Code and the occurrence of the robbery it may be safe to conclude that the Employees might have been potentially liable to disciplinary action depending on the reasonableness of the Employer subsequent actions under the circumstances.
21. Given the statutory provisions referred to above, our approach towards the determination of the factual bases under section C 58 (1) must necessarily start with the consideration of reasons recited in the dismissal letter. Going forward with that approach, we are obligated to determine if the Employees' conduct amounted to serious or gross misconduct to the extent that the Employer could safely rely on section C 59(1) and summarily dismiss them. Further and most importantly, we are required to apply the overarching test of reasonableness' pursuant to section C 58(2) in order to finally determine if the dismissals were unfair.
22. Given the Employer's express reliance on the Employees' reports and the transcripts of the interviews, our inquiry into the factual basis for the dismissal requires us to pay careful attention to the contents of those four documents. In our estimation, both Employees were credible witnesses. As to the main reasons recited in the dismissal letter, given its evidentiary burden, more extensive and compelling evidence was required from the Employer, not only as to what the precise duties of the Employer were, but also in relation to the actual procedure which the Employees were required to follow.
23. In her written and oral testimony Mrs. Gore-Biesheuvel did not sufficiently amplify the bald statement in her witness statement regarding the long standing issue of unauthorized vehicles being allowed on the Employer's premises. Thus, in relation to the reasons stated in the dismissal letter, we accept the Second Employee's account that when Ms. Isaac, with whom the Employees were very familiar, approached the gate to enter the compound, she stopped the vehicle, got out of it and openly engaged in a casual conversation with the First Employee. Afterwards she got back into the vehicle and drove into the compound.

24. That account, which we accept, tends to nullify or at least seriously undermine the first stated reason for the dismissal. In any event, in our opinion, the alleged failure to perform their duties in that regard could not reasonably amount to a "gross dereliction of duty" such as to justify the summary dismissals. If the Employer's assertion that Ms. Isaac facilitated the robbery is correct, then it would be safe to surmise that she skillfully duped the Employees into believing that her approach to and entry upon the compound was routine and innocent.
25. As to the second reason, we accept the combined testimony of the Employees as being more convincing than the limited evidence of Mrs. Gore-Biesheuvel. As a result, we find that it was common practice among Security officers to allow both Maxine and Ms. Isaac to enter the premises from time to time on Saturdays and park near the Accounts Office in the absence of other workers who normally used that space on week days. By extension, we accept that common practice as being, at least, tacitly approved by the Employer.
26. Moreover, in relation to the reasons recited in the dismissal letter, we also find that the preponderance of the evidence favours the Employees. In relation to the situation immediately after the robbery and before the Second Employee opened the gate at gunpoint, both Employees identified Ms. Isaac driving Maxine's vehicle towards them at the Main Gate. The First Employee approached the vehicle when it stopped and started a conversation with Ms. Isaac at which point they were confronted and threatened by the gunman. In the circumstances, in the face of the real and present danger of serious physical injury or death, the Second Employee had no choice but to open the gate and allow Ms. Isaac to drive away.
27. In the premises, being handicapped by the limited evidence of Mrs. Gore-Biesheuvel, the Employer has failed to establish good factual bases for the reasons assigned to justify the summary dismissals. Having arrived at that conclusion, we are strongly inclined to move to the next logical step and declare that the Employees were unfairly dismissed.
28. Notwithstanding that inclination, we feel obligated to apply the test of reasonableness by considering all the facts and surrounding circumstances and determine if the Employer acted reasonably or unreasonably. Reasonableness is a question of fact. It is inextricably bound up with the settled principles of natural justice, procedural fairness and good industrial relations. We do not think it necessary to detail the several components of reasonableness.
29. In our opinion, the potential liability to disciplinary action should have remained suspended pending the outcome further reasonable actions which the Employer

should have taken in the circumstances. For present purposes, it will suffice to identify the following six aspects of the Employer's unreasonableness:

- a. The Employer omitted to conduct a full and proper fact-finding investigation which should have necessarily included the active participation of and the sharing of information with the Employees. The evidence shows that this was not done;
 - b. Having completed its in-house investigation, the state of affairs required the execution of a fair, open and transparent disciplinary procedure. That procedure, which the Employer did not adopt, required it to inform the Employees in writing of the outcome of its investigation and putting to them its conclusions and accusations, as the case may be, in relation to their breaches of the particular items of the Disciplinary Code;
 - c. If it acted reasonably, as it was required to do, the Employer should have informed the Employees who were rostered and continued to perform their duties, that disciplinary action against them, including the possibility of their dismissals, was being contemplated;
 - d. The Employees should have been informed specifically of the Employer's conclusion that their breaches were respectively considered to be "a gross dereliction" of their duties to the extent that their failures allowed Ms. Isaac to facilitate the robbery;
 - e. The Employees should have been given an opportunity get independent legal or other advice and the particular opportunity to be heard, directly or through their legal or other representative, and allowed to mount their defence;
 - f. Having regard to the existence of the Collective Agreement and the then continuing active involvement of the Union, the Employer should have maintained its engagement with Mr. Riley. In particular, the Employer's blunt refusal to meet with the Union for further discussions, on the ground that its position would not change, was also most unreasonable, given the letter and spirit of the Agreement.
30. In passing, we note our appreciation of the closing submissions of Learned Counsel and the Employees' Representative. Mr. Marshall's citing of the judgments in **Ref. No. 58 of 2002 Cecile Norde v Jewellers Warehouse/ on appeal Jewellers Warehouse vs Cecil Norde** and **Ref. No. 12 of 2010 Leonart Matthias v Antigua Commercial Bank/ on appeal Leonart Matthias v Antigua Commercial Bank** are easily distinguishable and as such were not as helpful as

he intended them to be. Both those cases involved direct and deliberate actions of the employees and did not turn on the employer's reliance on particular offences with the sanctions in the agreed Disciplinary Code under a collective agreement. As far as judgments go, the decision in **Ref. No. 14 of 2012 Ira Looby v the West Indies Oil Company** is far more instructive. Needless to say, each case turned on its own facts. At the end of the day, Mr. Riley's submissions were more persuasive.

31. In the final analysis, the Employer failed the test of reasonableness. Accordingly, we are constrained to declare that the Employees were unfairly dismissed and are entitled to compensation which we assess as follows:

Compensation

32. We assess compensation under the following headings:

JEANNETTE JOSEPH

a. Notice Pay

Having regard to her 15-year tenure, we award this Employee the sum of **\$2, 298.00** $\{[(1532 \times 26) \div 52] \times 3\}$ the equivalent of 3 weeks' pay under this heading.

b. Loss of protection

We award the sum of **\$37, 993.60** $[(153.2 \times 12 \times 4) + (153.2 \times 15 \times 4) + (153.2 \times 20 \times 7)]$ being the equivalent of severance pay at the rates stipulated under Clause 16 of the Collective Agreement, had she been dismissed because of redundancy.

c. Immediate Loss

We award the sum of **\$13, 277.33** $\{[(1532 \times 26) \div 12] \times 4\}$ being the equivalent of her full wages for the 4 months immediately after her dismissal.

In addition, we also award the sum of **\$7,037.33** $\{13, 277.33 - [(18,720 \div 12) \times 4]\}$ being the difference between her wages of \$360.00 weekly in her new employment in the ensuing 4 months and the amount she previously earned.

d. Fringe Benefits

The Employee earned 1.5 points per fortnight or 3.25 $[(1.5 \times 26) \div 12]$ points per month. We fix the value of each point at \$175.00. Accordingly, we award the sum of **\$4,550.00** $[(3.25 \times 175) \times 8]$ representing the amount she would have earned as her share of the service charge fund over the 8 month period after her dismissal.

JULIET FERRIGON

a. Notice Pay

We award the sum of **\$1,464.00** the equivalent of 3 weeks' pay under this heading.

b. Loss of protection

We award the sum of **\$24,204.80** under this heading

c. Immediate Loss

We award the sum of **\$8,458.67** the equivalent of her full wages for the first 4 months immediately after her dismissal

In addition, we award the sum of **\$2,218.67** being the difference between her former wages and the amount she earned in her new employment for the ensuing 4 months.

d. Fringe benefits

This Employee earned 1 point per fortnight or 2.17 points per month. Valuing each point at \$175.00, we award the sum of **\$3,038.00** as compensation for her loss for the 8 month period immediately after her dismissal.

Order

33. In the premises, we order that:

1. The Employer shall pay the total sum of **\$65,156.26** to the First Employee, as compensation for her unfair dismissal, no later than May 31, 2023.
2. The Employer shall pay the total sum of **\$39,384.14** to the Second Employee, as compensation for her unfair dismissal, no later than May 31, 2023.

Dated this **27th** day of April 2023



Charlesworth O.D. Brown
President



Samantha May-Francis
Vice President

