SUPPLEMENT TO

ANTIGUA AND BARBUDA

OFFICIAL GAZETTE

OF THURSDAY 5th September, 2019

Vol. XXXIX — ISSUE NO. 64

INDUSTRIAL

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JUDGEMENTS

THE ANTIGUA AND BARBUDA OFFICIAL GAZETTE

SUPPLEMENTARY

VOL: XXXIX **Thursday 5th September, 2019** **No. 64**

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COMMERCIAL NOTICES

Published by the Ministry of Justice & Legal Affairs
Ryan Johnson, Editor of the Official Gazette
ryan.johnson@ab.gov.ag / antiguagazette@gmail.com
Government Complex, P.O. Box 118, Parliament Drive,
St. John's, Antigua.

Printed at the Government Printing Office,
Antigua and Barbuda, By Noel F. Abraham,
Ag. Government Printer.

— By Authority, 2019

[Price $9.25]

PUBLICATION WITHIN THE OFFICIAL GAZETTE

The Official Gazette, the official newspaper of the Government of Antigua and Barbuda, is published every Thursday either online or in print form at the Government Printery.

Notice Submissions and Style

Notices for publication and related correspondence should be addressed to Mr Ryan Johnson, Editor of the Official Gazette at the following email addresses: **ryan.johnson@ab.gov.ag / antiguagazette@gmail.com**
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Mr. Ryan Johnson
Editor of the Official Gazette
Ministry of Justice & Legal Affairs
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The deadline for submitting notices for publication in the principal edition is midday Monday on every week for all commercial and Government notices, in the week of publication.

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The deadline for cancelling notices in the principal edition is 12.00 midday Wednesday. Please call the Gazette Office immediately to cancel a notice, and confirm by email.

Advertising Rates

Publication Fee $106.20 Eastern Caribbean Dollars.
Annual Subscription Fee: $215 Eastern Caribbean Dollars

*Advertising rates are not negotiable.

Antigua and Barbuda Official Gazettes are published directly online at www.gazette.gov.ag

All editions are also available on subscription from the Antigua and Barbuda Government Printery, St. John's, Antigua (telephone: (268) 562-5168/ (268) 462-0518).

NOTICES

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 7 OF 2015

BETWEEN:

DAMIEN O'CONNOR LYNCH

Employee

and

KENNY GARDNER t/a VCNG CLOTHING STORE

Employer

Before:
The Hon. Dr. Hayden Thomas **Chairman**
The Hon. Samuel R. Aymer **Member**
The Hon. Judith Dublin **Member**

Appearances:

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

Mr. Justin L. Simon, Q.C. for the Employer

2016: November 3
2019: July 24

JUDGMENT

THOMAS, C.

Background

1. The Employer Kenny Gardner operated a business trading as VCNG Clothing Store on Radcliffe Street, St. John's.

2. The Employee was employed by the Employer as a salesman at the Employer's business establishment with effect from October 11, 2008. He worked for $500.00 per week of six days. The Employee was assisted part-time from 2011, by another salesperson, Frederick Walker who is also a teacher by profession. According to the Employer, from time to time the two Employees were left by him "to run and manage the store in his absence".

3. Prior to going on a trip overseas, the Employer on August 31, 2014, took an inventory of the goods in the store in the presence of the two Employees and the Employer's two sons. He travelled on September 1, 2014 and returned on September 16, 2014. The Employee was given the keys for the store and was left in charge during the Employer's absence.

4. On September 17, 2014, the day after the Employer returned, he conducted a second inventory in the presence of the two employees. This was done in order to reconcile sales during his absence. However, before completion, the

Employee requested and was given time off to sit a "taxi exam" at Dutchman's Bay but he did not as expected return to the store. He subsequently said that his cell phone battery went dead so that it was difficult for him to communicate.

5. The Employer tried to reach the Employee by telephone several times before and after the close of business on the said date of September 17, 2014 but was only able to make contact about 7:52 p.m. The Employer at the time informed the Employee of discrepancies found in the inventory in an amount of some $11,223.00 but when told about it the Employee gave no explanation for the loss.

6. The Employee was accused of stealing the goods and was told that the police would have been called to investigate the matter. He was also asked by the Employer to hand over the store keys. The Employer was told that they were left in a vase in the store. According to the Employee's Memorandum, he "interpreted the words and instructions from the Employer as a clear act of dismissal" and that in any event, the fact that he was accused of stealing by the Employer would be tantamount to constructive dismissal.

7. The Memorandum further stated that the police subsequently went to the Employee's home and executed a search but that no item belonging to the Employer was found. The police advised the Employee to discuss the matter with the Employer since he (the Employee) was ultimately responsible for managing the store in the Employer's absence and had to take responsibility for anything missing even if he did not take them.

8. The Employee said that he returned to the Employer's business as advised by the police, on September 19, 2014 and held discussions with his Employer. The Employee "partly took responsibility for some of the purported losses." His co-worker also partly took responsibility. Settlement discussions, however, broke down when the purported loss was said to have been increased by the Employer to $250,000.00 and the matter was pursued by the Employer with the police. No details were given as to how this amount was arrived at.

9. The Employee claimed that up to October 7, 2014 he did not receive any written statement from his Employer with respect to his employment and therefore sought representation. His representative wrote to the Employer on that date claiming that he was unfairly dismissed.

10. Discussions were subsequently held and the Employer maintained that the Employee stole goods from his store while he was overseas and "would not rest the matter until both employees go to jail for stealing his goods from the store".

11. The Employee also claimed that he was owed vacation for several years but the Employer refused to pay him "because he said that he stole from him and he was not going to give him any money."

12. The Employer, on the other hand, in its Memorandum stated that the Employee has never returned to the store. "He was sent a letter dated October 16, 2014 by registered post advising him that the Employer considered him to have abandoned his job due to his failure to report for duty since September 18, 2014.

13. The letter stated:

> ***"Dear Mr. Lynch:***
>
> ***Upon my return from a two-week family vacation, on September 17th, 2014 you were asked to assist in conducting the inventory so as to compare the sales with the inventory that was taken prior to my leave.***
>
> ***While conducting the inventory it was revealed that there had been a significant shortage to which you agreed. You were asked to offer an explanation for the missing items. You did not offer an explanation.***
>
> ***Frederick was called in and while discussing the matter with him you indicated that you had a test for your Taxi license and that you will come back. However, you never returned. I called you on more than three occasions in the afternoon but that proved futile. When I called you at about 9:00 pm, you answered. I told you that about $11,000.00 of inventory was missing and how was that possible. Your response was***

that you did not know. You were told that since you were the one in charge and do not have any explanation for the missing items the matter will be left for the police to investigate. Your response was "do what you have to do". You were then told to bring in the keys for the store. You indicated that you left the keys at the store already.

You have not reported for duty since then, or offered any explanation as to why you could not report for duty.

Having stated the above I am convinced that you no longer have any interest in your job and have concluded that you have abandoned your position at VCNG.

I take this opportunity to wish you all the best in your future endeavors.

Sincerely,

(Sgd.) Kenny Gardner

General Manager, VCNG".

14. A Certificate of Posting for a registered letter at the General Post Office and dated October 17, 2014 was also copied on to the letter.

15. The Employer's Memorandum confirmed that the matter was reported to the police and both employees were later questioned by the police. The police actually searched the Employee's home for the missing items and money but found nothing. Statements were made and recorded and the police charged them with "conspiracy to defraud and with larceny."

16. The Employer denied dismissing the Employee but averred instead that he abandoned his job. The Employer states "that the conduct of the Employee in failing to give a reasonable explanation for the Employer's loss during the period when both employees had sole charge of the store, with the Employee acting as the Manager would justify his termination."

Issues

17. The main issues were the following:

i)Were the inventories taken properly?
ii) Did the Employee abandon his job as claimed by the Employer?

iii) Was the Employee constructively or otherwise unfairly dismissed by the Employer as claimed by the Employee?

iv) If the Employee was unfairly dismissed, what is the level of compensation due to him?

v) Was the Employee owed for vacation leave?

Legal Parameters

18. Under the caption "Unfair Dismissals", C 56 of the Antigua and Barbuda Labour Code (the Labour Code) 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."

19. Section C 58 (1) sets out good cause for dismissal. It 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) …… or
(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:
Provided, however, that there is a factual basis for the assigned reason."

20. Section C 58 (2) states:

"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."

21. Section C 59 (1) makes provision for termination due to misconduct thus:

"An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

(b) committed a criminal offence in the course of his employment, without the consent, express or implied, of the employer; or

(c) ***behaved immorally in the course of his duties."***

The First Issue: Were the inventories taken properly?

22. When asked by the Employer's counsel at the trial how the inventory was taken, the Employee gave evidence that at the first inventory he, Frederick Walker, the Employer and his two sons were each asked to count a section of the store. A list was then compiled. When the Employer returned from overseas, a second inventory was taken. He and the Employee started the inventory but the Employee requested and received permission to leave before its completion in order to go for a test at Dutchman's Bay to obtain a taxi license.

23. The Employer reported similarly. His version was that the first inventory was conducted on Sunday August 31, 2014 the day before he travelled. He said "I asked each of them to count a section of the store. We all came together at the end of the inventory and everyone was shown what inventory was in the store." On his return from overseas a second inventory was taken on September 17, 2014. It commenced with the Employer and Employee alone but the Employee left before its completion in order to go for a Taxi Exam. The Employer said that at the time there were missing items and most of them were counted in the Employee's presence. According to Counsel for the Employer, "At the time of the Employer's departure, the Employer had registered an $8,000.00 loss in respect of goods missing for which no cash was recorded as having been received on sale. His total loss amounted to $11,023.00." He said that he had expected to give the Employee the final inventory but he did not return to work.

24. In his closing submissions, the Employee's representative argued that the Employer did not conduct a proper inventory. He queried, "Having regard to the two (2) inventories conducted by the Employer, can it be reasonably concluded that the Employee would have known what was the exact quantity of items left in the store before the Employer's departure and what items and cash the Employer met on his return?"

25. In our view, one would normally have expected that all the parties concerned would have been present throughout while the inventory was being taken and signed to indicate accuracy of the documents before the handover to the Employee and after the Employer's return. It is noted, however, that the Employee did not at the time query the quantity of items left in the store prior to the Employer's departure and therefore accepted responsibility. It would have also been better if he had remained at the store to fully participate until the end of the second inventory. In short, while there may have been flaws with the taking of the inventories, no issues were raised at the material times and therefore the Employee cannot now evade responsibility. In any event, the Employee did in fact accept some responsibility as indicated in Paragraph 18 of his Witness Statement where he said, "I felt that perhaps I should take some degree of responsibility for any items that might have been indeed missing solely because I was the one left in charge and may not have been altogether vigilant during my employer's absence."

The Second Issue: Did the Employee abandon his job as claimed by the Employer?

26. In the Employer's letter dated October 16, 2014 addressed to the Employee (Paragraph 13 above) the penultimate paragraph stated "……..I am convinced that you no longer have any interest in your job and have concluded that you have abandoned your position at VCNG." The Employer's conclusion was based, according to the letter, on the following reasons:

    a) The Employee did not return to the store after he left on September 17, 2014 to take a test for his taxi license even though he said that he would have gone back.

    b) The Employee was called by the Employer on more than three occasions in the afternoon "but that proved futile".
    c) The Employer tried again about 9:00 p.m. The Employee then answered and he was told that some $11,000.00 of inventory was missing and how was that possible, but his response was that he did not know. The Employer then said he would contact the police to investigate the matter and the Employee said "do what you have to do."

    d) The Employer then asked the Employee to bring in the store keys and was told that they were left at the store. There is no evidence to indicate that the Employer asked the Employee to return to work. Indeed the evidence given by the Employee at the trial was that the Employer said he did not want him there.

    e) The Employer told the Employee that as he had not reported for duty since, or offered any explanation as to why he could not report for duty, he concluded that he had abandoned his job.

27. The Employer gave evidence that the letter referring to job abandonment was sent by registered post on October 17, 2014. However, the Post Office stamp on the envelope indicated that it was returned unclaimed on 19th November, 2014. The Employee said that up to the time of trial he had not received the letter.

28. To summarize, the Employee gave certain explanations as follows:

    a) He was unable to return before the end of the workday and sent a WhatsApp message to Mr. Walker and the Employer's sons to inform the Employer that he was unable to make it back to work on the afternoon in question. He said that his telephone battery charge was low at the time which affected his communication. The Employer said that he did not receive any message.

    b) The Employer in a telephone conversation informed the Employee of discrepancies in the inventory and the Employee said that he was not aware of discrepancies or how it happened. The Employer, however, said that he held the Employee responsible. The Employer was upset and viewed the situation as theft from the store. According to the Employee while on the telephone, he asked the

Employer whether he could come to the store to discuss the matter but he said that he did not want the Employee back in his place. The Employer then asked for the keys and decided to report the matter to the police around September 19, 2014. The Employee said that he regarded these as acts of his dismissal. On that same day, the Employee, Mr. Walker and their mothers went to the store to hold discussions concerning the situation. These discussions fell apart and the police subsequently laid charges against the Employee and Mr. Walker but to date there has been no further proceedings on the matter.

c) The Employee's representative Mr. Carty, wrote a letter to the Employer on October 7, 2014 outlining the sequence of events leading to what he referred to as termination. Clearly, he did not at the time regard the situation as abandonment of the job by the Employee. This issue of termination will be discussed further.

29. After examining the situation in detail we have arrived at the conclusion that the Employee did not abandon his job as claimed by the Employer. Rather, he was terminated because of what was considered to be theft based on the loss of inventory and cash during the period September 1 to 16, 2014 while the Employer was overseas on vacation and left the Employee in charge of the store.

The Third Issue: Was the Employee constructively or otherwise unfairly dismissed by the Employer?

30. Undoubtedly, the Employer terminated the services of the Employee due to what was alleged to be theft by the Employee of inventory and cash during the Employer's absence overseas. This was inferred when the Employer told the Employee that he was not wanted back at the store. The main consideration must now be whether or not in the circumstances this dismissal was unfair.

31. In paragraph 19 above, reference is made to Section C. 58 of the Labour Code which sets out good cause for dismissal and test for measuring same. Reference is also made to Section C. 59 re termination for misconduct or failure to perform duties in a satisfactory manner. The Employee's representative pointed out – and we agree - that there was no due process carried out in that the Employer did not invite the Employee to attend a disciplinary hearing at which the alleged misconduct and evidence of same would have been put to him.

32. It is well known that in our legal system "a man is innocent until he is proven guilty". One possible alternative course of action by the Employer could have been suspension of the Employee without pay while the matter was being fully investigated or until the criminal court had completed its hearing. It is also noted that the Employer did not fully comply with Section C. 10 of the Labour Code which requires one to furnish the Employee within seven days of termination, a written statement of the precise reason for the termination.

33. Taking all the circumstances of the case into consideration, we conclude that the Employee was unfairly dismissed by the Employer.

The fourth Issue: If the Employee was unfairly dismissed, what is the level of compensation due to him?

34. It is an established principle of this Court that an unfairly dismissed person is awarded compensation under certain specific heads. The Employee's Representative in his written submissions, claimed compensation under Loss of Protection, Notice Pay, Vacation Pay, Immediate Loss, Future Loss, Manner of Dismissal and Exemplary Damages. The claims have been considered and we make the following awards:

Loss of Protection

35. This is similar to severance pay. The Employee worked from October, 2008 to September 2014 i.e. 6 years or 72 months. C 41 of the Labour Code recommends severance pay at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer. His daily wage amounts to $83.33. Therefore his severance is calculated to be 72 x $83.33 = $5,999.76.

Notice Pay

36. The Employee is entitled to one week's pay in lieu of notice. This is equivalent to $500.00.

Immediate Loss

37. The Court sought to determine whether the Employee took adequate steps to mitigate his loss. He mentioned that he was now self-employed, among other things, fixing stereos in his yard. No details were provided of amounts earned. Taking everything into consideration, we have decided that an award of three months wages under this head is reasonable. The Employee's monthly salary amounted to $2,166.67. Therefore the amount due is $2,166.67x3= $6,500.01.

Future Loss

38. We are not satisfied that any award is payable under this head.

Manner of Dismissal

39. We make no award under this head.

Exemplary Damages

40. We are not of the view that any award should be made under this head.

Vacation Pay

41. The Employee in his written and oral evidence testified that since his employment he only received vacation pay for 2 years in respect of 2012 and 2013 respectively and this has not been denied. We, therefore, award vacation in respect of the other 4 years. It is calculated to be 8 weeks @ $500.00 per week i.e. a total of $4,000.00 under this head.

42. The total award amounts to $16,999.77.

43. We have, however, taken into consideration the admission by the Employee of partial responsibility for some of the Employer's loss bearing in mind that he was left in charge during the Employer's absence. We have also taken into account that the Employee showed little or no interest in the matter when he left while the inventory was being taken according to him to take an exam for a taxi license. That could surely have been re-scheduled. On these bases, we have decided to discount the award by 75%. The net award is, therefore, $4, 249.94.

44. There is no Order with respect to costs.

The amount of $4,249.94 should be paid by the Employer to the Employee on or before August 30, 2019.

Dated the 24th day of July, 2019.

Dr. Hayden Thomas
Chairman

Samuel Aymer
Member

Judith Dublin
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 50 OF 2015

BETWEEN:

DEBORAH LAKE

Employee

and

ANTIGUA COMMERCIAL BANK

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
Mr. Septimus A. Rhudd of Rhudd & Associates, Attorney-at-Law for the Employer

2016: November 15
2019: July 05

JUDGMENT

Brown, P;

Background

1. The Employer is a financial institution with its Head Office and principal place of business situate at the corner of St. Mary Street and Thames Street in the City of St. John's.

2. At all material times, the Employee was a member of the recognized collective bargaining unit represented by the Antigua & Barbuda Workers Union. As such, her employment was subject to the terms of the Collective Agreement in force from time to time between the Employer and the said Union.

3. The Employee commenced her employment with the Employer on 10th July, 1986. Her last position was Customer Relations and Sales Representative in which she earned an annual salary of $50,136.00.

4. During the first 8 years her tenure the Employee held the positions of Clerk, Cashier, Clearings Clerk and/or Customer Service Clerk. With effect from 01st March, 1994 she was "seconded" to the Employer's subsidiary, Antigua Commercial Bank Mortgage & Trust Company Ltd. In its letter confirming the "secondment", the Employer advised the Employee that she was being "transferred" and that the "movement" was a "lateral one" with no salary adjustments.

5. Upon her "secondment", the Employee was assigned the position of "Insurance and Securities Analysist". In August 1995, the Employee's position was again changed to that of Securities and Loans Analyst. Despite her request for a transfer in November 1996, the Employee remained on "secondment" to the Employer's subsidiary until 01st October, 1999 when she was "transferred" to the Employer's Head Office. As was the case at the commencement of her "secondment", there was no adjustment of her salary and benefits.

6. Upon her redeployment back to the Employer's Head Office in 1999 the Employee's position was again changed to that of Customer Service Clerk. Subsequently from October 2004 the Employee's position was "re-aligned" and changed to that of a Customer Relations and Sales Representative with effect from 5th April, 2004.

7. By letter dated 22nd March, 2005 the Employee emphasized that she was still at entry level" after 19 years of employment and applied to the Employer for a "voluntary separation package". We reproduce the substantive content of that letters as follows:

> ***"22nd March, 2005***
>
> ***Wayne Carbon***
> ***Human Resource Executive***
> ***…***
>
> ***Dear Sir,***
>
> ***After nineteen years working in the Organization in various departments and in different capacities, without any blemished appraisal: I am still at entry level in the Bank and from my viewpoint cannot foresee any speedy change in my circumstance.***
>
> ***I am hereby applying to for a voluntary separation package from the Bank.***
>
> ***Your favorable response in this regard will be greatly appreciated.***
>
> ***Yours truly***
>
> ***Deborah Lake-Christopher "***

8. In response to the Employee's letter, by letter dated 19th April, 2005 the Employer rejected her application and noted her concerns as follows:

> ***" April 19, 2005***
>
> ***Mrs. Deborah Lake-Christopher***
> ***…***
>
> ***Dear Mrs. Lake-Christopher:***
>
> ***<u>Re: Request for Voluntary Separation</u>***
>
> ***We acknowledge receipt of your letter of March 22, 2005.***
>
> ***We have given careful consideration to your request; however, we regret we are unable to accede.***
>
> ***We also note your concern about the level of the position you occupy; However, we view the position of Customer Relations and Sales Representative as a very important part of the Bank's operations. We think you have a future with A.C.B. once you continue to apply yourself."***
>
> ***We regret the delay in responding.***
>
> ***Yours truly,***
> ***Wayne Carbon***
> … "

9. By letter dated 26th September, 2005 the Employee renewed her application for "severance" and requested an appointment to discuss the matter. The substantive parts of her letter are as follows:

> ***" 26th September, 2005***
>
> ***Mr. Gladston Joseph***
> ***General Manager***
> ***…***
>
> ***Dear Sir***
>
> ***I refer to your letter dated 19th April, 2005 in response to my request for severance.***
>
> ***I however, am requesting again that the Bank consider my application for severance.***
>
> ***I am also requesting an appointment to negotiate further on this matter.***
>
> ***I would appreciate your urgent response.***
>
> ***Thanks for your consideration.***
>
> ***Yours sincerely,***
> ***Deborah R. Lake (Ms.)***
>
> ***…"***

10. The Employer responded to the Employee's second application by letter dated 29th September, 2005 as follows:

> ***"September 29, 2005***
>
> ***Mrs. Deborah R. Lake Christopher***
> ***…***
>
> ***Dear Mrs. Lake-Christopher:***
> ***Referring to your letter dated September 26, 2005, we have noted your request, however, our response is the same as outlined in our letter dated April 19, 2005.***
>
> ***Yours truly,***
>
> ***G.S. Joseph***
> ***General Manager***
>
> ***…"***

11. By letter dated 11th October, 2005 the Employee further particularized her concerns in relation to her 19 year tenure at "entry level" and resubmitted her application for a separation package. That letter reads:

> ***" October 11, 2005***
>
> ***The Manager***
> ***Antigua Commercial Bank***
> ***…***
>
> ***Dear Mr. Joseph,***

Subsequent to my letter of March 22, 2005 my situation remains unchanged. In view of what I have been through, the response by the Bank has not convinced me that I am valued in the organization, because none of my efforts (both through the Union and on my own) as to why I have never been promoted, has ever been satisfactorily addressed. This letter is another attempt to have this question answered and to again submit my request for a voluntary separation package.

I have a long history of somehow being overlooked for promotion. This is not to say that I consider myself more apt for promotion than anyone else, but each time applicable promotions become available there seems to be infringements of some rule, convention or agreement that pose as obstacles to me being promoted.

I was seconded to the Mortgage and Trust in 1994 as the Security and Insurance Analyst. This is a very responsible position, but I was not promoted. It may be argued that this may have been an entry level secondment, but both Dawn Daley and Gillian Hurst were recruited into the Trust without any banking experience and took up positions higher than entry level even though my job was more responsible than theirs.

In May 1997 eight persons at my level were promoted to B' Signer. Only one had more years of service in ACB than I, four had the equivalent years as I had, three had less, but none had worked in more departments than I at the time. The vacancies were not advertised as is required by the Collective Agreement so that I could put forward my name to be considered as a candidate for promotion. I felt that I had as good a chance as any: for in the Collective Agreement promotion was according to skill, competence, efficiency, job ability and all things being equal –seniority. The decision to promote these persons was made by April 14, 1997 and only one month prior, on March 12th a vacancy for Loans Acquisition & Administration Rep was advertised, yet one month later when it was most likely that I would have been promoted, curiously, the process suddenly changed.

My name is one of the names on a list of promotion discrepancies being discussed with the Union during negotiations. The negotiations began before the restructuring. When the restructuring began most of the vacancies were advertised, but I was not considered competent enough through another series of infringements. The selection was done via an interview process and (in violation of the labour code) I did not have a job description, and for years I was not given an appraisal (in accordance with the Collective Agreement) instruments that would have been integral to strengthening and supporting my resume, since the interviews were done by persons who were not familiar with me or my work ethic and experience.

The restructuring is complete and from all appearances, in order to dampen my chances further, I still am without a job description or job classification--- probably the only person in the Bank with that status.

After nineteen years and the many subtle occurrences that have hampered my development, it is difficult for me to trust the Bank and share in its enthusiasm for my future. I am therefore re-representing my case for a separation package.

Yours truly,
Deborah R. Christopher

…"

12. Three days later, by letter dated 14th October, 2005 the Employee tendered her resignation with effect from 13th November, 2005. The full text of her letter is as follows:

" 14th October, 2005

Mr. Gladston Joseph
Manager

…
Dear Mr. Joseph

I tender my resignation with effect 13th November, 2005.

At Antigua Commercial Bank I had many challenges and made lasting friendships. Nevertheless, the time has come for me to pursue other opportunities.

Yours sincerely
Deborah Lake (Ms.)"

The Employee's Case

13. The Employee's Memorandum of Claim was filed on 06th November, 2015. Excerpts from it are as follows:

"1. ***The Employee, Deborah Lake, was employed by the Employer in 1986, and worked in at least eight (8) different "entry" level positions for nineteen (19) years without the benefit of being considered for promotion based on her experience and outstanding performances.***

2. The Employee was never given a negative performance appraisal by the Employer and, therefore, it was difficult for her to understand why she was never considered for upward mobility in the Company.

3. Several other employees, over whom she had seniority in tenure, were elevated to higher positions in the Bank although she had more experience and better qualifications.

4. The Employer introduced a manipulative restructuring system that was discriminatory and disadvantageous to the Employee, since it placed her in a category where she was considered to be equal to other employees who were many times her junior.

5. The Employee consistently made representation to her superiors and to senior officials within the Human Resource Department.

6. The Employee's concerns and complaint were ignored by the Employer for many years.

7. The Bank from time to time would consider and approve requests from Employees for voluntary separation.

8. The Employee became extremely demotivated and frustrated on the job as a result of the way she was being treated by the Employer and considered applying for voluntary separation.

12. As consequence, the Employee made a second application to the Bank for voluntary separation by letter of October 11th, 2005, and again her request was denied by the Employer without explanation.

13.The Employee was placed in a situation where she felt that she had no other choice than to tender her resignation because of the Employee's conduct and behaviour towards her.

14.Therefore, she wrote accordingly to the Employer by letter of November 14th, 2005, and claimed unfair dismissal by virtue of the Employer's unfair, bias and discriminatory actions.

16. The Employee contends that the Employer's treatment and discriminatory conduct towards her in the matter is an unfair labour practice and is the principal reason that forced her to resign from the job.

17. Accordingly, she contends that she was constructively and unfairly dismissed by the Employer and is therefore entitled to compensation."

The Employer's Case

14. The Employer's Memorandum of Defence was filed on 26th November, 2015. The main averments are contained in paragraphs 10, 12, 15 and 16 which read as follows:

> **"10.** ***As to Paragraphs 10 and 11 of the Employee's Memorandum, the Employer will contend that it was justified in adopting the position that it took in relation to the Employee. The Employer will contend that its actions at all material times accorded with good and established industrial relations practices and that any complaints or "grievance" complained of by the Employee was without merit and ill-founded.***
>
> ***12. Save that the Employee tendered her resignation, by letter dated October 14, 2005, the contents of Paragraph 13 are denied. The Employer intends to rely on the said resignation letter for its full force and effect.***
>
> ***15. Insofar as Paragraph 16 is concerned, the Employer denies that its treatment of, and conduct towards, the Employee was unfair or discriminatory in any other ways breached good and accepted industrial relations practice. The Employee will be put to strict proof of her averments contained therein.***
>
> ***16. The Employer denies that the Employee was constructively or unfairly dismissed by the Employer. The Employer will contend that the Employee tendered her resignation in circumstances that were entirely voluntary and is therefore not entitled to the remedies sought. The Employer will contend further that the Employee's claim should be dismissed with costs in favour of the Employer."***

The Main Issues

15. The main issues in this Reference are:

    (1) Whether the Employee was constructively dismissed?
    (2) Whether the Employee was unfairly dismissed?
    (3) Whether the Employer committed unfair labour practices?

Resolving the Issues

Issue 1: Constructive Dismissal:

16. The doctrine of constructive dismissal is not new to this Court. It refers to a situation where an employer does not expressly dismiss an employee but is otherwise guilty of a repudiatory breach of the contract of employment which goes to the root of and destroys the employer/employee relationship. Repudiatory breaches often occur where an employer offends one or more of the implied terms of the contract of employment. One well known implied terms is that establishing the fundamental requirement for mutual trust and confidence between employer and employee. On the ground of such a repudiatory breach, an employee may be entitled to treat himself as being discharged from any further performance of the employment contract.

17. Accordingly, constructive dismissals have often been held to be unfair dismissals in situations where the Employer acted unreasonably in breaching the implied term of trust and confidence. Similarly, a dismissal may be held to be not unfair where the Employer dismisses an employee who is guilty of the breach of that implied term.

18. On the one hand, Reference No 16 of 1998: **Edward Smith v. Stanford Financial Group Limited** and Reference No. 35 of 2012: **Wayne Weaver v. St. James's Club** demonstrate instances where the Employers acted in breach of the implied term of trust and confidence which entitled the employee to walk away or resign and claim constructive and unfair dismissal.

19. On the other hand, Reference No. 68 of 2013: **Michelle Longford v. International General Enterprises Ltd.** and Reference No. 54 of 2014: **Oriel Walter v. Photogenesis** demonstrate situations where the employee's breach of that implied term justified the employers' actions in dismissing the employees.

20. Based on first principles, there can be no doubt that an employee is entitled to be treated fairly and reasonably. Moreover, prolonged unfair and unreasonable treatment may themselves lead to the erosion or destruction of an employee's trust and confidence in the employer. It is the employer's repudiatory breach of the implied contractual term which grounds a claim of constructive dismissal and could, in turn, potentially lead to a successful claim of unfair dismissal.

21. Given the facts of this case as outlined in paragraphs 1 to 12 above, it is paramount to consider whether the Employer acted in breach of the implied term of trust and confidence. As a first step to that end, it is crucial to consider whether the Employee met the threshold for establishing that she was constructively dismissed. If the threshold is met, we will then consider the particulars of the alleged repudiatory breach.

22. In the **Weaver case** this Court applied the landmark judgment in **Western Excavating (ECC) Ltd. v. Sharp** [1978] 1 All ER 713 and identified the prerequisites for a successful claim of constructive dismissal as follows:

> ***"… a constructive dismissal will be fully constituted when:***
>
> ***(1) the conduct is such that it demonstrates that the Employer no longer intends to be bound by the contract of employment;***
> ***(2) the repudiatory conduct must be such that it undermines or erodes or destroys the contractual relationship;***
> ***(3) the employee's response to the employer's repudiatory breach is directly referable to the employer's conduct;***
> ***(4) the employee must get his timing right. He must not work too long after the breach and must not conduct himself in such a way as to waive his right and thereby affirm the contract. "***

23. In any event, in relation to prerequisites listed above, it cannot be over-emphasized that the Employee must (a) communicate to the Employer what he considers to be the repudiatory breach; (b) communicate to the Employer his acceptance of the repudiation to bring the employment contract to an end; (c) leave the employment in direct response to the breach; and (d) promptly claim constructive dismissal.

24. The Employee's letter dated October 11, 2005 clearly sets out the facts on the bases of which she found it "difficult" to trust the Employer. In our opinion, the Employee had potentially valid and sustainable goods for believing that the Employer acted in breach of the implied term of trust and confidence. However, it was necessary for her to bring her conclusion in that regard to the attention of the Employer; assert that that conduct amounted to a repudiation of the contract of employment, and; state emphatically and unequivocally that she accepted the repudiation and considered the employment relationship to be at an end.

25. The oral and documentary evidence leaves no doubt that on that date, by the same letter, the Employee pursued a separation package. There were two previous written requests for a voluntary separation package. None of the three requests in March, September and October 2005 alleged that the Employer was guilty of a repudiatory breach and that the Employee accepted the same as discharging her from further performance of the employment contract.

26. To the contrary, after each of her requests for a voluntary separation package, the Employee continued to work thereby reaffirming the employment contract while awaiting the Employer's response. In effect, the Employee made no attempt to unilaterally end the employment relationship. As such, up to October 11, 2005 the Employee's actions were inconsistent with her claim herein of constructive dismissal. Clearly, after each request, she continued to accept her salary and other benefits without any express protest or conditionality.

27. As to the Employee's decision to resign, her letter dated October 14, 2005 effectively further reaffirmed the employment contract going forward to November 13, 2005. Moreover, the resignation letter was not, or at least was not stated to be, in response to or a reaction to the Employer's repudiatory conduct. In fact, within the four corners of the resignation letter, there is no discernable nexus between its contents and the alleged breach on the part of the Employer. Given her previous emphasis on obtaining a mutually agreed separation package, there was no unequivocal assertion that the resignation was in response to the Employer's alleged repudiatory conduct discharging her from any further performance of the employment contract.

28. In the circumstances, upon the application of the principles laid down in the **Western Excavation case** and applied in the **Weaver case**, we conclude that the Employee did not meet the required threshold. There was no constructive dismissal. The Employee voluntarily resigned from her employment. Accordingly, we are inclined to dismiss her claim. However, we believe that it is important to make brief comments about the issue of unfair dismissals and unfair labour practices.

Issue 2: Unfair Dismissals

29. We note that a constructive dismissal is not necessarily an unfair dismissal.
If a constructive dismissal had been established, we would be obliged to consider the particulars of the Memoranda and the related conduct of the parties as disclosed in the oral and documentary evidence. Ultimately, taking all the circumstances into consideration, the statutory test of reasonableness under section C 58 (2) of the Labour Code would have to be applied. In the circumstances, since there was no constructive dismissal, it is not necessary to apply that test. As a result, by reason of matters aforesaid, the second issue falls away and needs no further consideration.

Issue 3: Unfair Labour Practices:

30. As to unfair labour practices, we are mindful that neither the Labour Code nor the Industrial Court Act provide a definition or explanation for that term. As a result, that issue like the other two, would have to be dealt with in the context of this Court's limited jurisdiction and its statutory powers.

31. As recently held in Reference No. 26 of 2013 **Icilma Piggott-Francis v. First Caribbean International Bank**, in the absence of substantive statutory provisions, a claim of Unfair Labour Practice, per se, is not sustainable by itself. However, allegations of unfair labour practices would be considered in the same vein as allegations of the denial of natural justice under the wide umbrella of the principles and practices of good industrial relations, to which we are expressly and specifically required to have regard.

32. It is clear that the Employee had ample grounds for complaining to the Employer and raising the issue of "Unfair Labour Practice" in these proceedings. As determined in the **Piggott-Francis case,** we are constrained by our statutory jurisdiction and powers. In the absence of a statutory right to fair labour practices, or the statutory right not to be subjected to unfair labour practices, which exists in some jurisdictions like Canada, South Africa and the United States of America, we are in no position to provide a remedy therefor even if we came to the conclusion, which we did not, that the Employer was guilty of unfair labour practices.

33. On the face of it, while the disclosed labour practices of the Employer would have formed a critical issue to be considered, we do not find it necessary to do so in light of our finding that there was no constructive dismissal. Suffice it to say, it excites our interest that an employee could work in an institution like that of the Employer for 19 years without promotion and be rejected on three applications for a voluntary separation package. The state of affairs during the Employee's tenure and the end situation immediately before she resigned do not bode well for good industrial relations practices. For the avoidance of doubt, we state no opinion and make no judgment on the exercise of the Employer's discretion, which is a matter exclusively within its purview.

Conclusion

34. In the premises, we declare that the Employee was not constructively dismissed. And she is not entitled to any compensation for unfair dismissal. Accordingly, we order that her claim be and is hereby dismissed with no order as to costs.

Dated this day of July, 2019

Charlesworth O.D. Brown
President

St. Lawrence de Freitas
Member

Judith Dublin
Member

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 **Chairman**
The Hon. Samuel Aymer **Member**
The Hon. John Benjamin **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 day of June, 2019

Hon. Dr. Hayden Thomas
Chairman

Hon. Samuel Aymer
Member

Hon. John Benjamin
Member