# ***SUPPLEMENT TO***


**ANTIGUA AND BARBUDA**

**OFFICIAL GAZETTE**

OF THURSDAY 22nd October, 2020

**Vol. XL — ISSUE NO. 77**

# INDUSTRIAL

# COURT

# JUDGEMENTS

THE ANTIGUA AND BARBUDA OFFICIAL GAZETTE

# SUPPLEMENTARY

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# NOTICES

**ANTIGUA & BARBUDA**

**IN THE INDUSTRIAL COURT**

**REFERENCE NO. 44 OF 2016**

**BETWEEN**

**PHILMORE ATHILL**

**Employee**

**And**

**BRITT ANTIGUA LIMITED**

**Employer**

**Before:**
**The Hon. Charlesworth O.D. Brown** **President**
**The Hon. John Benjamin** **Member**
**The Hon. Judith Dublin** **Member**

**Appearances:**
**Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee**
**Mr. Charlesworth C. M. Tabor, Attorney-at-Law for the Employer**

**2017: November 11**
**2020: July 10**

## JUDGMENT

**Brown, P;**

1. The Employer was duly incorporated in Antigua & Barbuda as a unit of Café Britt, a specialty travel retailer with over 50 stores in 5 countries. It operates a retail store at the V.C. Bird International Airport with a bonded warehouse which is subject to the control of the Comptroller of Customs.

2. The Employee commenced his employment with the Employer on December 11, 2009 as it Restock Supervisor. His last monthly salary was $3,651.20 plus a monthly commission of $208.00 and a garbage disposal allowance of $400.00. Up to January 15, 2015, his duties included the provision of Customs brokerage services and his regular hours of work were 6:00 a.m. to 12:00 p.m.

3. The Employee was dismissed by letter dated September 07, 2015, the relevant part of which reads:

> " …
> Dear Mr. Athill
>
> Subject: Employment
>
> Britt Antigua Limited is restructuring its warehouse and inventory operations to increase productivity and efficiencies. Under the new structure the volume of inventory will be significantly reduced, hence activities will be less and thus require fewer employees. On account of the restructuring your current position as

RESTOCK SUPERVISOR is now redundant. The redundancy means that your employment with Britt Antigua Limited as of September 7, 2015 is terminated.
…"

4. It is important to note that upon his dismissal the Employee was paid one month's salary in lieu of notice, his "severance" entitlement of $11, 627.67 and his vacation entitlement.

5. Having regard to his statutory right not to be unfairly dismissed, the two main issues arising from the dismissal are:

   (1) Whether a genuine redundancy situation existed at the time of the Employee's dismissal.
   (2) Whether the Employer acted reasonably when it dismissed the Employee.

The Opposing Cases

6. The chronology of events according to the Employee and the grounds of his claim of unfair dismissal, as expressed in his Memorandum of Claim and witness statement, may be summarized as follows:

   *(a)* Prior to June 01, 2015, the Employee warned the Employer that it was in "persistent breach" of certain Customs Regulations. The Employer refused to correct the breach as a result of which "constant conflict" ensued between the Employee and the Employer's Operations Managers. Despite his stated objection, the Employer repeatedly forced the Employee to breach the Customs Regulations.

   *(b)* By letter dated June 01, 2015 the Employer unilaterally changed the Employee's hours of work. He objected to the change after which the Employer treated him in a "rather indifferent manner".

   *(c)* In a letter dated June 26, 2015 the Employer notified the Employee that they were removing the responsibility for customs brokerage from his duties "effective January 15, 2015". The Employee formed the view that that action by the Employer was in response to his stance regarding the alleged breach of the Customs Regulations. On the same date, the Employee also received a warning letter regarding his unauthorized modification of a document.

   *(d)* By letter dated July 7, 2015 the Employee pointed out the specific provision of Customs Act 1993 of which the Employer was in breach. By a separate letter also dated July 07, 2015 the Employee objected to the issuance of the warning letter and requested that it be removed from his file.

   *(e)* By letter dated August 20, 2015, the Employer thanked the Employee for his letter regarding the breach and stated that it was "in the process of restructuring and re-organizing its warehouse department to include procedures and processes to be in compliance with the Antigua and Barbuda Customs Regulations".

   *(f)* By letter dated August 21, 2015 the Employer wrote to the Employee complaining of a "negative difference" of US$ 24,605.52 and US$977.00 in its physical inventories for "7th - 9th August, 2015" and "October 16, 2014" and concluded that the same was "a significant infraction" of his duties and contrary to "company policy". By the same letter the Employee was suspended with pay for 14 days commencing August 24, 2015 to facilitate an investigation.

   *(g)* The Employee contended that the said letter of suspension contained a "material error" by referring to him as "Restock Supervisor", which position had been earlier made redundant, rather than his correct title of "Warehouse and Logistics Supervisor".

   *(h)* The Employee heard nothing from the Employer during the 14 days of his suspension. Upon his return to work on September 8, 2015 a letter of dismissal dated September 07, 2015 was delivered to him. In it, the Employer stated that his position of "Restock Supervisor" was made redundant and that his services were terminated with effect from September 07, 2015.

   *(i)* The Employee contends that a redundancy situation did not exist at the time of his dismissal and that his services were terminated because of his refusal to be a party to the continued breach of the Customs Regulations.

7. The Employer's case, as set out in its Memorandum of Defence and supported by the witness statement of Dr. Errol Samuel, may be summarized as follows:

*(a)* "The Employee was made redundant since the Employer no longer operated the bonded warehouse." As part of its restructuring and re-organizing its warehouse, the company ended the operation of a bonded warehouse as a consequence of which the Employee's services were no longer necessary.

*(b)* "With respect to the suspension, this resulted from the Employee's insubordination to management and an apparent discrepancy in the physical inventory at the warehouse."

*(c)* Nothing of significance turns on the title of the Employee's position. Whatever the job title was, he was "the Supervisor of the warehouse with the termination of the operation of the bonded warehouse…supervision of its operations would become unnecessary hence the redundancy."

*(d)* Before the termination of his customs brokerage services the Employee had flexible hours of work. Afterwards, he was required to be at the store during standard working hours from 9:00 a.m. to 5:00 p.m.

*(e)* The Employee's allegations of the Employer's breach of Customs Regulations commenced only after he was relieved of his duties of Customs Brokerage.

*(f)* During his suspension, the investigation commenced. However, as a result of the Employer's new global operations, which included the establishment of a central warehouse in Panama, there was no need for the Employee's services. Accordingly, goods from Antigua Warehouse was shipped back to Panama on 12th August, 2015.

*(g)* It was as a result of the change in the Employer's operations that the position of Warehouse and Logistics Supervisor became redundant and there was no position to which the Employee could be assigned.

*(h)* "While this development and the circumstances surrounding the manner in which Mr. Athill was made redundant are quite unfortunate, there was really no other course of action that was available to the company. Established redundancy procedures were followed. There was no comparable position in the company that fits Mr. Athill's competence and experience." Accordingly, the Employee's suspension and dismissal through redundancy cannot be challenged.

The Approach towards Resolution

8. This Court's approach towards the resolution of issues arising in claims of unfair dismissal involving redundancy was reconfirmed in its recent Judgment in References No. 17 of 2015: Patricia Julian v. Antigua & Barbuda Transport Board and No 33 of 2015: Hudson Joseph v Antigua & Barbuda Transport Board which were heard together. The legal framework as established by the Antigua & Barbuda Labour Code, judicial precedents and the Industrial Court Act was outlined. We do not think that it is necessary to repeat it here. Suffice it to say, we will pay particular attention to the Employer's burden of proving that both the suspension and the dismissal were not unfair.

9. The substance of the Employee's lengthy witness statement is largely a mirror reflection of his Memorandum. It formed the basis of the chronology stated at paragraph 5 above. In his oral testimony, he amplified selected aspects of his statement and otherwise maintained his position.

10. After confirming the content of his witness statement, the Employee attacked the nub of the employer's ground for his dismissal. He testified that the Employer "still operates a bonded warehouse today and at the time of my dismissal up to today". Under cross examination, he maintained that, "It is not true that Britt no longer requires a bonded warehouse."

11. Evidence was given on behalf of the Employer by Dr. Errol Samuel, the President of Profiles Consulting Incorporated which provides the Employer with consultancy services. In that capacity, Dr. Samuel asserted that although he was not employed by the Employer as one of its managers, he was in a position to give evidence on its behalf because he had sufficient knowledge of the Employer's operations in respect of its human resources, industrial relations and accounting services. In his relatively short witness statement, he did not respond to or address many of the assertions in the Employee's witness statement.

12. Not surprisingly, the evidence of the Employee conflicted with that of Dr. Samuel. In particular, the latter stated that "Because of new facilities the company no longer needed a bonded warehouse. There was no need for a bonded warehouse as originally set up."

13. Further, Dr. Samuel testified that he "did not know" and was in no position to state the duties of the Warehouse Supervisor. Although he agreed that the position was different to that of Restock Supervisor. According to Dr. Samuel the whole operation of the Employer's business involved a "back & forth" in the positions. He testified that it was difficult to apply labels to the position of the Employee. However, in response to a suggestion put to him under cross-examination, he agreed that the Employee was the "Warehouse Supervisor" and had signed documents as such. Most instructively, Dr. Samuel testified that "I agree the Employee did not hold the position of Restock Supervisor. I would say that the Employer got it wrong. The position of Warehouse Supervisor is not redundant." He also testified that he could not say if the "names" of those positions were used interchangeably.

14. In the circumstances, we are inclined to conclude that the Employer's reliance solely on the testimony of Dr. Samuel was misguided. In our estimation, he was in no position to provide the required cogent evidence to establish the existence of a redundancy situation and thereby discharge the evidentiary burden on the Employer. However, we are obliged to carefully consider the following aspects of the closing submissions which were grounded on the documentary evidence before us.

The Closing Submissions

The Position of Warehouse Supervisor

15. In his closing submissions Mr. Carty contended that although he was hired as "Restock Supervisor" in 2009, the Employee was promoted sometime in 2011 to the position of "Warehouse and Logistics Supervisor". On the other hand, in his closing submissions Learned Counsel, Mr. Tabor, contended that the "job titles were used interchangeably and the duties were the same".

16. In order to resolve the obvious conflict, bearing in mind the Employer's evidentiary burden, we carefully considered the oral and documentary evidence. Firstly, we note that in its undated document entitled "Standard Procedure for Product to be returning to Warehouse" the Employer referred to separate areas as "At the Store" and "At the Warehouse". In the latter, there is a clear reference to the "Warehouse Supervisor" while in the former there were several references to the "Restock Supervisor".

17. Further, in several of its letters the Employer referred to the Employee as Warehouse Supervisor and often required his signatures as an endorsement in that capacity. That is evident in its letter dated 1st June, 2015 and two others dated 26th June, 2015 the Employer expressly required the Employee's endorsement as "Warehouse Supervisor". Moreover, in two of his letters dated 7th July, 2015 the Employee signed in his capacity of "Warehouse Supervisor".

18. Secondly, by its letter dated 17th February, 2013 the Employer confirmed the Employee's employment as Warehouse and Logistics Supervisor. Most strikingly, in its letter dated 9th June, 2015 by which it revised the Employee's job responsibilities, the Employer stated you will continue in your substantial position as Warehouse Supervisor as per your contract dated 11th December, 2009.

19. In his oral testimony, the Employee gave convincing details of the logical differences between the posts of Restock Supervisor and Warehouse and Logistics Supervisor. His evidence was in stark contrast to that of Dr. Samuel (referred to at para. 12 above) who testified that as a consultant and advisor to the Employer, he acknowledged the specific duties of the Restock Supervisor but testified that "I do not know the duties of the "Warehouse Supervisor". However, he admitted that the positions were different but stated that he was in no position to "argue or deny" that the Employee's descriptions were in fact true.

20. Taking the evidence as a whole, we find that the Employee's true position at the date of his dismissal was in fact Warehouse Supervisor.

The Bonded Warehouse

21. In his "statement of facts" Mr. Tabor emphasized at the onset that "the Employee was dismissed as a result of redundancy since the Employer no longer operated a bonded warehouse." Again, in considering that submission, we noted the oral and documentary evidence before us.

22. According to the Employee while giving evidence at the trial, "the Employer still operates a bonded warehouse today – at the time of my dismissal up to today". On the other hand, Dr. Samuel testified that "Because of the new facilities,

the company no longer needed a bonded warehouse because it had international operations it would bring things straight from Panama and keep them at the store. There was no need for a bonded warehouse as originally set up."

23. In order to resolve the clear contradiction, we considered the express documentary evidence in the Employer's letter dated 6th November, 2015, two months after he alleged occurrence of the redundancy. In that letter to the Comptroller of Customs the Employer stated: "we are doing an inventory of our warehouse to be verified by Customs shortly so we can compare the Customs entries to paid duties on the remaining stock in our warehouse and so begin the process of operating the warehouse as duty paid". According to that letter, (a) the Employer was then doing an inventory, (b) which inventory would have to be verified by customs (c) the Employer would then compare the custom entries to paid duties (d) thereafter, the Employer would begin the process of operating the duty paid warehouse.

24. On the evidence, the question of the operation of the bonded warehouse was not as "crystal clear" as submitted by Mr. Tabor. On the balance of probability, we find that the Employer was still in fact operating its bonded warehouse at least up to 22nd November, 2017, over two years after the Employee's dismissal.

25. In his Submissions, Mr. Tabor urged the Court to find that there was a "diminution" of the tasks which the Employee performed. However, we note that the Employer has not proved that the work which the Employee was last employed to perform had in fact "substantially diminished".

26. In effect, the Employer has failed to prove the existence of the restructuring process much less that it had the necessary effect of "substantially diminishing" the work which the Employee was last employed to perform.

Breach of the Customs Act

27. In his closing submissions Mr. Carty submitted that the Employee's refusal to continue to breach the Customs regulation was the "catalyst" that led to his dismissal. In that regard, the evidence shows that the issue of the Employer's breach of the Customs (Control and Management) Act 20 13 was first formally raised by the Employee in his letter dated July 7, 2015.

28. In its response to that allegation, by letter dated August 20, 2015 the Employer did not deny the allegations. To the contrary, the Employer stated that as part of its restructuring and reorganizing process it would include procedures and processes in its warehouse department in order "to be in compliance" with the "Customs Regulations".

29. We find that the Employee's allegation was substantiated by the copy of the receipt dated September 9, 2015 for the payment of the fine of $25,000.00 imposed by the Customs and Excise Department on the Employer under the Act for "Fraudulent Evasion" and "Removing Locks, Seals and Marks".

Reasonableness

30. In his written Submissions, Mr. Tabor reminded the court of the test of reasonableness under Section C 58(2) of the Labour Code and referred to the principles outlined in the case of **Williams v Compair Maxam Ltd** [1982] UK EAT 372. In particular, he referred to the requirements for a warning; consultation; selection criteria; and alternative employment.

31. It is noteworthy that Dr. Samuel accepted the suggestion put to him under cross examination that the Employer's business had expanded. He could not say what the floor space was in 2009 when operations started or the increased size when the operations were relocated in 2015. He conceded that at the latter date the Employer had more facilities.

32. Further, in addition to its expanded operations, we will also take into consideration the several components of the Employer's business ranging from duties and responsibilities "at the store" and "at the warehouse". In that regard, we note Dr. Samuel's testimony that: "no one had any discussions with the Employee regarding redundancy. No redundancy procedures were followed."

33. Learned Counsel, Mr. Tabor, submits that in the circumstances of this particular case, the Employer's failure to give a warning of redundancy or to consult with the Employee did not render the dismissal unfair. On the facts of this case, we reject that submission for the following reasons.

34. The dismissal on the ground of redundancy followed significant changes in the duties and responsibilities of the Employee. They included the increases in his emoluments, the unilateral change in his working hours, the

discontinuance of his customs brokerage services; the expansion of the business; the change in operations involving the closure of the bonded warehouse.

In our view, all of the above are critical bases for giving reasonable notice of and consulting with the Employee about redundancy and the possibility of alternative employment.

35. Further, as to reasonableness, we have noted the timing of the dismissal. It came at the end of the period of the two week suspension when the Employer expressly stated its intention to undertake an investigation. The Employee was specifically required to make himself available for interviews during the suspension period. Moreover, the Employer expressly anticipated his cooperation with the investigation during the period August 24, 2015 to September 7, 2015.

36. We note the wide scope of the Employee's duties as "Restock Supervisor" as quoted in the Employer's letter dated August 21, 2015 included:

    - " Physical Control of all shipments either imports or exports, and
    - Manage all administrative/logistics features of the company's internet systems (inventory, queries, devolitions)."

    Needless to say, we find it difficult to accept that all those duties and the relevant work could have "substantially diminished" as submitted by Learned Counsel.

37. The Employee's dismissal occurred on precisely the last day of his suspension for a reason totally unrelated to that for which he was suspended without any word as to the outcome of the investigation and without any invitation for the Employee to have an input therein. That action by the Employer is glaringly unreasonable. Further and in any event, as to the abruptness of dismissal, in our estimation, it is most unlikely and improbable that the developments leading to the Employer's declaration of redundancy could have developed within that relatively short two week period of the suspension.

38. In the final analysis, the Employer has failed to prove the "cause" that there was a genuine restructuring of its "warehouse and inventory operations". Moreover, it has failed to prove the "effect" that the "volume of inventory (was) significantly reduced resulting in the requirement for "fewer employees". Ultimately, the Employer failed to prove that the Employee's position of "Restock Supervisor" became redundant because the work that he was last employed to perform ceased or substantially diminished.

Resolution

39. For the reasons stated above we would resolve this Reference in favor of the Employee on the ground that the Employer has not discharged its evidentiary burden in that it failed:

    *(a)* to establish a genuine restructuring process.
    *(b)* to prove that the effect of any reorganization was the substantial diminution of the work that the Employee was employed to perform;
    *(c)* To act reasonably in dismissing the Employee in the manner it did in the circumstances.

40. Based on our final analysis, we declare that the Employee was unfairly dismissed and is entitled to compensation.

<u>Compensation</u>

41. We award compensation under the following heads;

    *(a)* Pay in lieu of Notice:

    As Notice Pay, we award the sum of $3,651. 20, being the equivalent of one month's salary.

    *(b)* Loss of protection from Unfair Dismissal:

    An employee who is paid monthly and is unfairly dismissed is entitled to a basic award for the loss of protection at the rate of one month's pay for each year he worked. Since the Employee worked from December 2011 to September 2015, **we award the sum of $20,994.40** ($3,651.20 x 5.75).

*(c)* Immediate Loss:

Under this head **we first award the sum of $14,604.80** being the equivalent of his salary for a period of 4 months immediately after his dismissal. **In addition, we award the sum of $3,651.20**, the equivalent of 50% of his salary for the following 2 months. **The total award under this head is $18,256.00.**

*(d)* Fringe benefits

Under this head we award the sum of $1,248.00, being the equivalent of 6 months commission.

*(e)* Exemplary Damages:

Although the Employer attempted to justify the dismissal on the ground of redundancy, it made no attempt to directly refute the Employee's evidence that he was dismissed 'for his refusal to be party to the continued breach of Customs Regulations". In the circumstances, we accept the Employee's assertion and accept Mr. Carty's submission that the Employee's refusal to continue to breach the Regulations was the catalyst that led to his dismissal. At the end of the day, we find that the manner and circumstances of the dismissal were harsh and oppressive. For the stated reasons, **we award exemplary damages in the sum of $20,000.00.**

**Costs**

In our opinion, the circumstances of dismissal generally and the breach of the Customs Regulations in particular comprise exceptional reasons justifying an award of costs. We fix the quantum of costs at $2,500.00

**Order**

42. In the premises, we order that:
    (1) The Employer do pay to the Employee
    *a)* the total sum of $48,870.73 as compensation for his unfair dismissal.
    *b)* Costs in sum of $2,500.00
    *c)* Payment of the aggregate sum of $51,370.73 must be made on or before July 31, 2020.

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**ANTIGUA AND BARBUDA**

**IN THE INDUSTRIAL COURT**

**REFERENCE NO. 74 of 2016**

**BETWEEN:**

**BERNADETTE FENTON**

**Employee**

**And**

**EASTERN CARIBBEAN AMALGAMATED BANK**

**Employer**

**Before:**
**The Hon. Charlesworth O.D. Brown** **President**
**The Hon. John Benjamin** **Member**

**Appearances:**
**Mr. Vere C. Bird III of Edgehill Chambers, Attorney-at-Law for the Employee**
**Mrs. Stacy A. Richards-Roach and Kemar Roberts of Richards & Company, Attorneys-at-Law for the Employer**

**2020: August 06**
**2020: September 07**

**JUDGMENT**

**Brown, P;**

**Background**

1. These proceedings were commenced by the filing of the Employee's Reference of Complaint on November 21, 2015. In it she qualified the name of the Employer by adding the phrase ``(Formerly Bank of Antigua) ´´ and identified the main issue in dispute to be Unfair Dismissal.

2. By an application filed on February 9, 2017 the Employer applied for an order striking out the Employee's Claim as an abuse of the court process because she had no reasonable cause of action against the Employer. Upon consideration of the application, the President directed that the Employee was at liberty to file an affidavit and submissions opposing to the application.

3. At the hearing of the application on February 27, 2017, despite Counsel's strong submissions on behalf of the Employer, the Court declined the application and granted leave to the Employee to amend the heading of her Reference. Subsequently, pursuant to an application filed by her on March 20, 2017 the Employee was granted leave to amend her statement of claim.

4. On April 4, 2017 the Employee filed an Amended Reference of Complaint, an Amended Memorandum and an Amended Witness Statement. In each amended document the phrase "(Formerly Bank of Antigua) ´´ was deleted from the headings. No other amendment was made to the name of the Employer.

The Preliminary Submissions

5. Not surprisingly, at the commencement of the trial Mrs. Stacy Richards-Roach, Counsel for the Employer, raised a preliminary point. She submitted that by virtue of the judgments of the Court of Appeal and the Privy Council, any liability which might have arisen from the Employee´s dismissal could not have passed to the Employer as a successor-employer or otherwise under the Purchase and Assumption Agreement between the Employer and the Eastern Caribbean Central Bank (the Central Bank).

6. In that regard, Counsel noted that the Employee's amended pleadings were filed after the judgment of the Court of Appeal in which common ground emerged that the Employer was not a successor- employer. That common ground represented the Court of Appeal's approval and appellant's unqualified acceptance of the earlier determination of that issue by this Court in Reference No. 26 of 2010, Kenny Byron v Bank of Antigua and the Employer (the Byron case).

7. In making her preliminary submissions, Learned Counsel emphasized the clear distinction between the Byron Case and this Reference. In the former, the employee´s statutory right to redundancy pay had crystalized spontaneously at the date of his declared redundancy. In this Reference, the Employee is merely pursuing a claim of unfair dismissal by reason of which she has no right to any payment unless and until judgment is delivered in her favor at a future date. In the circumstances, Learned Counsel urged the Court to find that there was no possibility that the Employee could succeed on her claim as presently pleaded or otherwise contended.

8. As to the Purchase and Assumption Agreement, since the Employee had been dismissed since January 29, 2010, she was not an employee with a "subsisting contract" on October 12, 2010 when the Central Bank, as vendor, entered into the Purchase and Assumption Agreement with the Employer for the transfer of subsisting contracts to the Employer under Clause 6 of that Agreement.

9. Since she was not an employee at the date of the Agreement between the Central Bank and the Employer, the Employee's contract was not transferred to the Employer. Accordingly, unless she had an entitlement to any payment from the Bank of Antigua which had accrued or crystalized by October 12, 2010, she could not be a beneficiary under Clause 3 (1) of the Agreement whereby the Employer agreed to "...pay, perform and discharge all debts and liabilities of the Bank on the final balance sheet and in the supporting books and documents."

10. In the final analysis, it was the Employer's position that it had no liability to the Employee either in a capacity as successor-employer or under the Purchase and Assumption Agreement between the Employer and the Central Bank. Thus, in light of the judgments in this Court, the Court of Appeal and the Privy Council, it was not surprising that

Mrs. Richards-Roach was very confident of success on her preliminary submissions and stood by the same after the trial.

11. In response, learned Counsel for the Employee, Mr. Vere Bird III, submitted that notwithstanding the judgments in the Byron case on appeal in the Court of Appeal and the Privy Council, the Employee was desirous of the opportunity to prove that she was in fact an employee of the Employer. Moreover, he submitted that, in the interest of justice, this Court should proceed with the trial and then determine the claim after all the evidence was before the Court.

12. Upon noting that Mr. Bird's apparent lack of familiarity with the judgments of the appellate courts in the Byron case, and out of an abundance of caution, we deferred our ruling on the preliminary submissions and proceeded to trial. After a short trial, both sides filed closing submissions.

The Trial

13. On the one hand, the salient parts of the Employee's evidence towards proof of her employment relationship with the Employer are as follows:

    *(a)* On February 20, 2009, the late Sir K. Dwight Venner, then Governor of the Eastern Caribbean Central Bank, addressed the staff of the Bank of Antigua informing them that "the bank is now called Eastern Caribbean Amalgamation Bank" (the Central Bank);

    *(b)* On March 16, 2009, she was paid her net salary "with an ECAB payment slip";

    *(c)* By July 2009, several managers of the Bank of Antigua had become employees of the Employer;

    *(d)* Having been incorporated on July 16, 2009, the Employer's first Annual Returns for that year showed the address of its principal place of business to be the same as that of Bank of Antigua;

    *(e)* At all material times the Employer was in control of the building occupied by Bank of Antigua and was managing all of its staff.

14. On the other hand, the salient parts of the Employer's evidence, as given by its Finance Manager, Ms. Donna Cort, are as follows:

    *(a)* The Central Bank first intervened in the affairs of Bank of Antigua on February 20, 2009 when there was a run on the bank;

    *(b)* Prior to the incorporation of the Employer, the operations of the Bank of Antigua were overseen by The Eastern Caribbean Amalgamated Financial Company Ltd.

    *(c)* The Employer came into existence as a legal entity on July 16, 2009;

    *(d)* The Employer acquired the assets of Bank of Antigua on October 18, 2010;

    *(e)* The Employer commenced its banking operations on October 18, 2010;

    *(f)* The Governor of the Central Bank addressed the staff of the Employer on October 18, 2010.

15. Having carefully weighed the evidence of the Employee with that of Ms. Cort in respect of the pertinent chronology of events, we find the latter to be more convincing. Accordingly, where there is conflicting testimony in terms of the involvement of the Central Bank in the affairs of Bank of Antigua and the emergence of the Employer, we prefer that of Ms. Cort

16. In his submissions after trial, Mr. Bird did not respond directly or fully to Mrs. Richards-Roach's subsisting preliminary submissions. Given the nature and potential effect of those submissions, he surprisingly omitted to deal with them in light of the evidence adduced at trial and the judgments of the Court of Appeal and the Privy Council. Instead, he placed much emphasis on the fact that the Employee's evidence was largely "unchallenged".

17. At the trial, Mrs. Richards-Roach's polite refusal of the opportunity to cross-examine the Employee must be taken in context. In the circumstances, Mr. Bird's assertion that the Employee's evidence was "unchallenged" must be considered from the perspective of the subsisting preliminary submissions. The Employee's case would therefore turn on *(a)* her ability to prove that, notwithstanding the logical soundness of the Employer's preliminary submissions, she was in fact employed by the Employer, or *(b)* she was entitled to a payment which had previously accrued or crystallized and to which she was entitled under clause 3 (1) of the Purchase and Assumption Agreement.

Conclusion

18. In light of the content of the dismissal letter and the other evidence adduced at trial, and having particular regard to the absence of any cogent or convincing testimony from the Employee to the contrary, we find that:

    (1) The Employee was employed exclusively by the Bank of Antigua and was dismissed by that Bank on January 29, 2010. At no time was she an employee of the Employer.

    (2) The Employee is not entitled to any accrued or crystallized payment under the Purchase and Assumption Agreement between the Central Bank and the Employer.

19. For the reasons stated above, we declare that the Employee was not unfairly dismissed by the Employer. And we order that her claim be dismissed with no order as to costs.

**Dated this day of September 2020**

**Charlesworth O.D. Brown,**
*President*

**John Benjamin,**
*Member*

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**ANTIGUA AND BARBUDA**

**IN THE INDUSTRIAL COURT**

**REFERENCE NO. 26 of 2015**

**BETWEEN:**

**ROSEMARIE TAYLOR**

**Employee**

**And**

**GALLEY BAY INVESTMENT LIMITED**
**t/a**
**GALLEY BAY HOTEL**

**Employer**

**Before:**
**The Hon. Charlesworth O.D. Brown** **President**
**The Hon. Hayden Thomas** **Member**
**The Hon. Megan Samuel-Fields** **Member**

**Appearances:**
**Anderson Carty, Antigua & Barbuda Tradesmen & United Workers' Federation for the Employee**
**Mrs. Stacey-Ann Saunders-Osborne of S. Saunders Osborne Legal Services, Attorneys-at-Law for the Employer**

**2017: May 22**
**2020: July 31**

**JUDGMENT**

**Brown, P;**

**The Opposing Cases**

1. In this Reference the Employee claims compensation for "Breach of Employment Agreement" and "Unfair Dismissal". In response, the Employer denies that an employment relationship existed by reason of which the claim must fail.

2. In her Memorandum of Claim the Employee contends that after being interviewed by four (4) officers including the General Manager, Mr. Chris Ghita, the Employer, through its Personnel Officer, Delciere Waterfall, offered her employment in the position of Laundry Supervisor with effect from January 12, 2015 subject to her acquisition of a work permit. She obtained the Work Permit at a cost of $3,000.00 after which Ms. Waterfall "reconfirmed" her employment on the said starting date and stipulated that she should report from work at 8:00am wearing "black and white".

3. On January 12, 2015 while the Employee was at home preparing for work, Ms. Waterfall informed her by telephone that the Employer had changed its mind about hiring her. As a result, the Employee contends that the Employer's action in changing its mind "amounts to a breach of agreement which would give rise to a claim of unfair dismissal."

4. In its Memorandum of Defence the Employer acknowledges that it offered employment to the Employee in the position of Laundry Supervisor on two (2) conditions:

   *(a)* that she would obtain the work permit

   *(b)* that she had answered all the interview questions forthrightly and the same would be confirmed by her former employer.

   According to the Employer, if the Employee failed to meet any of those two conditions its offer and her acceptance thereof would be withdrawn.

5. On the information received by "feedback" from the former employer, St. James's Club, the Employer determined that the Employee had failed to make full disclosure as a result of which it lost confidence in the Employee as being suitable for the position. Therefore, the Employer resiled from entering into a formal contract with her as would have been the case if the conditions were fully met.

6. Further, or in the alternative, the Employer contends that if an employment relationship existed, the termination occurred within her probation period in which case the Employee was not entitled to a letter of termination under section C 10 of the Antigua & Barbuda Labour Code.

Resolution

7. The evidence which we accept, discloses that, as far as Ms. Waterfall was concerned, the Employee was "quite impressive" during the interviews to the extent that there was no reason why she would not get the job. Accordingly, an offer was made by her which the Employee accepted.

8. Notwithstanding that offer and acceptance process, it is clear that during and after the interview process, Mr. Ghita was still making enquiries. That fact was acknowledged by the Employee in her oral testimony. She said that all the preliminary steps including her application for her work permit were conducted before the interview with Mr. Ghita which came after those with Mr. Williams and Ms. Waterfall. During that interview, Mr. Ghita asked her for the name of a person he could call for information about her previous employment at St. James's Club. The Employee directed him to call "Marsha Moss".

9. It is noteworthy that Mr. Hesketh Williams, Human Resources Director of the Employee's former employer, chaired the first interview session with the Employee. He is deemed to have known the details of the circumstance under which the Employee was dismissed from her previous employment. It appears that he expressed no objections to the Employee's employment. Be that as it may, it is clear that the final decision regarding the hiring of the Employee was

solely in the hands of Mr. Ghita. In the circumstances, we find that his "due diligence "exercise was being carried out contemporaneously with Ms. Waterfalls conversations with and offer of employment to the Employee.

10. It emerged that when Mr. Ghita received the information on which he was waiting, he made the decision not to hire the Employee. In the words of Ms. Waterfall, "things changed". Although no details were given, it appears that Mr. Ghita came to the conclusion "that the Employee was not truthful during the interview process".

11. We find that the offer/acceptance process, and the information given to the Employee about the actual "starting date" were part of the normal procedure which were at all times subject to the approval of the General Manager. It stands to reason that the proverbial buck stopped with him. The ultimate responsibility for the hiring of the Employee was squarely in his hands. In the circumstances, he had the power to countermand any earlier decision taken and instructions given to the Employee about reporting for duty and so on. In that regard, it appears that Ms. Waterfall had no direct instructions or approval from him to communicate with the Employee as she did.

12. The evidence of Mr. Ghita is that the Human Resources Department had the responsibility for doing all the vetting before the matter of the hiring of the Employee came to him for "final approval". Based on the report he received from that Department, he said "I did not clear her for hire". He said that based on the information received he decided not to hire the Employee. He testified that he was not aware that the Employee had been called out to work at a specific time, wearing black and white.

13. Before stating our final conclusion, we recall the judgment of this Court in Reference No. 36 of 2014 **Derrick Nicholas v Allied Hotel and Resorts**. In that case, the employer delivered a written job offer to the employee. The written offer specified a starting date as well as the salary and fringe benefits which he would receive. Approximately 15 days before the proposed start date, the company notified the employee that it had withdrawn the offer. In the end, this Court upheld the Employer's contention that there was no employment relationship to ground Mr. Nicholas' claim.

Conclusion

14. On the facts of this case, we find that no employment agreement was consummated between the parties. Despite the purported "offer" and "acceptance" the employer/employee relationship remained suspended and never crystallized. The purported "offer" and "acceptance" were wholly superseded by the General Manager's decision not to hire the Employee.

15. In the circumstances, the Employee's claim is hereby dismissed with no order as to costs.

16. Finally, notwithstanding the dismissal of her claim of unfair dismissal the Employee should be reimbursed for the cost of the work permit in the sum of $3,000.00 plus a reasonable sum for the "black and white" outfit she acquired in preparation for work.

**Dated this day of July, 2020**

**Charlesworth O.D. Brown,**
*President*

**Hayden Thomas,**
*Member*

**Megan Samuel-Fields,**
*Member*

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**ANTIGUA AND BARBUDA**

**IN THE INDUSTRIAL COURT**

**REFERENCE NO. 6 of 2015**

**BETWEEN:**

**ROSEMARIE TAYLOR**

**Employee**

**And**

**ST. JAMES'S CLUB ANTIGUA LIMITED**

**Employer**

**Before:**
**The Hon. Charlesworth O.D. Brown** **President**
**The Hon. John Benjamin** **Member**
**The Hon. Megan Samuel-Fields** **Member**

**Appearances:**
**Anderson Carty, Antigua & Barbuda Tradesmen & United Workers' Federation for the Employee**
**Mrs. Stacey-Ann Saunders-Osborne of S. Saunders Osborne Legal Services, Attorneys-at-Law for the Employer**

**2017: May 08**
**2020: July 31**

**JUDGMENT**

**Brown, P;**

**Background**

1. The Reference commencing these proceedings, filed on February 20, 2015, identifies the issues in dispute between the parties as unfair suspension and unfair dismissal.

2. The Employer carries on business as a hotelier at its premises at Mamora Bay, in the Parish of St. Paul. In the course of its business the Employer entered into contracts with Virgin Atlantic Airlines and British Airways whereby it was required to have selected rooms in a state of readiness for use by the crews of those airlines from time to time.

3. The Employee's employment was governed in part by the Collective Agreement then in force between the Employer and the Antigua and Barbuda Workers' Union. That Agreement included provisions under Article 25 for progressive disciplinary actions against employees who were guilty of breaches of the stipulated Disciplinary Code.

4. In her position as Housekeeping Supervisor, the Employee reported to and was supervised by Ms. Telicia Thomas, Junior Assistant Manager. Her duties and responsibilities included the obligation to ensure that selected rooms were in a state of readiness from time to time, for use by crew members of the said airlines.

5. Prior to the Employee's dismissal on October 7, 2014 the Employer had taken several disciplinary actions against her over the period February 2011 up to the date of her dismissal. The more recent disciplinary actions include the following six (6) warnings in 2014:

    - January 24, 2014 – written warning of suspension or termination.
    - April 1, 2014- written warning of suspension.
    - June 3, 2014- verbal warning of stronger disciplinary actions.
    - August 7, 2014- written warning of termination.
    - September 12, 2014- written warning of termination.
    - September 19, 2014- suspension and written warning of termination.

**The Opposing Cases**

6. The Employee's case is set out in her Memorandum of Claim and supported by her witness statement. The main grounds for her contention of unfair dismissal are set out in sequence as follows:

    *a.* The Employee was first employed on April 15, 2000 as a Room Attendant and later promoted to Housekeeping Supervisor, which position she held up to the date of her dismissal on October 7, 2014. She

earned the sum of $499.20 in addition to which she received a 1.75-point share of the service charge which amounted to approximately $300.00 weekly.

*b.* On September 15, 2014, Ms. Telecia Thomas, the Employer's Assistant Manager, to whom the Employee reported, instructed or directed her to contact one of her colleagues, who was then off-duty, and request that she work overtime to meet the staff requirements for a particular shift on the night of September 18, 2014. The Employee undertook to contact her off-duty colleague and adjust the work schedule in order to ensure that the required rooms were ready for the arrival of the Virgin Atlantic Crew the following morning.

*c.* Following her initial unsuccessful effort to contact her off-duty colleague, the Employee forgot to follow-up. On her return to work on September 18, 2014 following her days off on the preceding two days, the Employee was summoned to a meeting with Ms. Thomas who confronted her with her failure to comply with the instructions. In response, the Employee explained that she had simply forgotten.

*d.* Based on the explanation given, Ms. Thomas advised the Employee that she would receive a letter of warning. However, when the matter was referred to the Human Resources Department, a meeting was held and the decision was taken by Ms. Melissa Farley, the Personnel Assistant, that the Employee would be suspended for two (2) weeks for failure to perform her duties.

*e.* On October 5, 2014, when the Employee returned to work after her suspension, she was working alongside another Supervisor Ms. Camilla Richards who informed her that guest rooms 125 and 126 were ready for occupancy. In reliance on that information the Employee, in turn, informed the "Front Desk" that those rooms were in a state of readiness.

*f.* On October 7, 2014 the Employee was summoned to a meeting with Mr. Hesketh Williams, the Human Resources Director, who informed her of a guest complaint regarding the said rooms. At the meeting the Employee relied on what Ms. Richards told her. However, Ms. Richards denied telling her that the rooms were ready.

*g.* By letter dated October 7, 2014 the Employee was dismissed. In the letter of dismissal, the Employee was held accountable since she was the one ultimately responsible for the readiness of the crew rooms on the day in question. The Letter also cited a number of flaws in the Employee's performance which resulted in previous disciplinary actions against her. Excerpts from the letter of dismissal are as follows:

> "Dear Ms. Taylor,
> ...
>
> What is clear from the exchange between you both is that since neither of you checked the rooms, it must be concluded that they were not checked; such a situation is just as bad as if the room had been checked and the flaws overlooked.
>
> Ms. Taylor, you admitted that you were the one ultimately responsible for the crew rooms that day, and therefore must be held accountable for what went wrong. During the past few months, a number of flaws have been found in your performance which necessitated disciplinary action to be taken against you, the most recent of which resulted in your suspension on September 19, 2014. The letter indicated that the next offence could result in your termination. We cannot allow the name of the resort to continue to receive bad publicity due to the inefficiency of our supervisors. In light of that and the current situation your service with St. James's Club and Villas is terminated with immediate effect"
>
> …
>
> Hesketh Williams
> Human Resources Director"

7. On the other hand, by its Amended Memorandum of Claim as supported by its witness statements, the Employer contends that the dismissal was not unfair for the following reasons:

*(a)* As Housekeeping Supervisor, the Employee's main duties were to assist Ms. Thomas in ensuring that all guest rooms were kept in a state of readiness to the established company standard so that it could properly discharge its contractual obligations.

*(b)* Prior to September 15, 2014 the Employee had been given a reprimand and warnings of suspension and termination in respect of the proper performance of her duties.

*(c)* Between September 15, 2014 and September 18, 2014, the Employee failed to execute specific instructions or directions given to her by Ms. Thomas.

*(d)* As a result of the Employee's failure, the Employer found itself in breach of its contract with Virgin Atlantic, from which contract it derived significant earnings.

*(e)* The suspension of the Employee on September 18, 2014, like all previous disciplinary actions taken against her, was in accordance with Disciplinary Procedures and the Disciplinary Code established in the Collective Agreement.

*(f)* On October 5, 2014, the Employee had failed to perform her duties satisfactorily in that she failed to inspect the rooms and confirm their state of readiness as she was required to do.

*(g)* As a result of the Employee's failure, the Employer found itself in breach of its contractual obligations to British Airways with the consequential risk of significant financial loss.

Key Findings and Resolution

8. In our opinion, the documentary, written and oral evidence before us favour the Employer. In particular, where specific parts of the Employee's evidence conflict with the corresponding parts of evidence given on behalf of the Employer, we accept the latter as being more convincing. In the final analysis, we find that:

   (1) In taking disciplinary actions against the Employee, the Employer acted substantially in accordance with the agreed Disciplinary Code and the Disciplinary Procedures set out in the Collective Agreement.

   (2) As a result of the Employee's failure to diligently carry out the instructions of the Assistant Manager and perform her related duties, selected Rooms were not prepared to the established standard by 9:00am on September 19, 2014 to meet the Employer's contractual obligations to the Virgin Atlantic Crew.

   (3) As a result of the Employee's failure to diligently perform her duties on October 5, 2014, Rooms 125 and 126 were not prepared to the established standard and left in a state of readiness for use, in accordance with the Employer's contractual obligations to the British Airways Crew who were scheduled to arrive the following morning.

9. In our view, the most critical question at this juncture is whether it was reasonable for the Employer to suspend the Employee on September 18, 2014 and dismiss her on October 7, 2014 in the respective prevailing circumstances.

10. We have noted above that the Employer acted substantially in accordance with Article 25 of the Collective Agreement. In that regard. We paid attention to the bands of offences and the progressions of the disciplinary actions which the Employer was entitled to take. The band of offences which includes "Failure to perform duties" allows for dismissal on the fourth occurrence of any particular offence. Importantly, we note that Clause 25:1 provides that the Employer is not necessarily bound to follow the order of progression from the first to the fourth occasion. Clearly, that provision leaves some degree of latitude within which the Employer might exercise its discretion. In any event, it is clear that the letter of suspension warned the Employee of the possibility of her dismissal if there was a repetition of the offences which she had previously committed.

11. Moreover, we note the Employer's reference to its previous disciplinary actions against the Employee. In our opinion, although the weight of previous infractions diminish significantly after the statutory six month period established by section C 59 (1) of the Labour Code, it was not unreasonable for the Employer to take them into account when weighing its options as to whether or not to dismiss the Employee.

12. In approaching our final conclusion, we remain mindful of the Employee's contention that her failure to carry out the instructions of the Assistant Manager does not, per se, equate with poor performance. We also remain mindful of the Employee's contention that in in the Assistant Manager's opinion after the September incident, a letter of warning would have been sufficient. On the facts of this case, both of those contentions are without decisive merit, given the nature of the Employer's business, its contractual obligations to its guests, the duties of the Employee in her position of Housekeeping Supervisor and her actions and omissions.

13. Ultimately, we are obliged to consider whether the Employer's actions in suspending and dismissing the Employee fall within a band of reasonable responses which a reasonable employer would take in the circumstances. We are mindful that there is a band of reasonableness within which, in similar circumstances, one employer might decide to suspend and dismiss while another might decide to administer a less severe form of disciplinary action. On the facts of this case, we are of the view that the Employer's action in dismissing the Employee falls squarely within an acceptable "range of reasonable responses." Accordingly, having regard to all the circumstances we are inclined to conclude that neither the suspension nor the dismissal was unfair.

14. For the reasons stated above, we declare that the Employee was neither unfairly suspended nor unfairly dismissed. As a result, we would dismiss her claim in its entirety and make no order as to costs.

**Dated this day of July, 2020**

**Charlesworth O.D. Brown,**
*President*

**John Benjamin,**
*Member*

**Megan Samuel-Fields,**
*Member*

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**ANTIGUA & BARBUDA**

**IN THE INDUSTRIAL COURT**

**REFERENCE NO. 14 OF 2015**

**BETWEEN**

**RASLYN JACOBS**

**Employee**

**And**

**VERANDAH RESORTS LIMITED**

**Employer**

**Before:**
**The Hon. Charlesworth O.D. Brown** **President**
**The Hon. St. Lawrence de Freitas** **Member**
**The Hon. Judith Dublin** **Member**

**Appearances:**
**Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee**
**Mrs. Stacey-Ann Saunders-Osborne of S. Saunders-Osborne Legal Services for the Employer**

**2015: December 14**
**2019: October 18**

**JUDGMENT**

**Brown, P;**

Background Facts

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

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

3. The relevant bands of offences and the agreed sanctions are expressed in the Disciplinary Code as follows:

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

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

> **"24th December 2014**
>
> **Ms. Raslyn Jacobs**
> **…**
>
> **Dear Ms. Jacobs,**
>
> **It was reported that on the 23rd December, 2014 that as the housekeeper assigned to room (#134) you left a "nestle water bottle" on the bathroom counter for a period of two days. The guest assuming it was her husband who left the bottle with water there took a few sips from it to take her medication. Upon tasting the substance the guest spat it out realizing that it was diluted bleach.**
>
> **As a result you were summoned to a meeting with the following persons present, Mr. Phillipe Piacentini, General Manager, Mrs. Myriam Brown, Rooms Division Manager, Mrs. Ermine Hector, Housekeeping Manager, Mr. Lionel Bramble, Duty Manager, Human Resources Trainee Michele Mings and myself.**
>
> **At the meeting you denied leaving the water bottle containing the diluted bleach in the guests' room and requested that the cart be checked as your defence. However, what is indisputable you were the only housekeeper in charge of cleaning that room for five (5) consecutive days, not alternating with any other housekeeper.**

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

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

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

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

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

**Yours truly,**

**Rashida Jonas …**
**Relations Administrator"**

The Proceedings

5. Being dissatisfied with her dismissal, the Employee commenced these proceedings claiming compensation for unfair dismissal.

6. By her Memorandum of Claim and Witness Statement the Employee denied leaving the water bottle with bleach in the guest's room as alleged in the dismissal letter. In addition, the Employee also made the following assertions:

*(a)* After she worked as usual on 22nd December 2014 she returned her trolley - with all cleaning apparatus and containers issued to her - to the house keeping storage area.

*(b)* Upon her return to work on 24th December 2014 after her scheduled day-off she was summoned to a meeting where the allegation of misconduct was put to her by the Employer's Relations Administrator, Ms. Rashida Jonas, who stated that on 23rd December 2014 the guest reported to the Duty Manager that the Housekeeper left a water bottle containing diluted bleach in her room for 2 days.

*(c)* The Relations Administrator also informed the Employee that the Room Attendant who cleaned the room on the Employee's day off stated that she had seen the water bottle in the guest's room.

*(d)* All the bottles she used in the performance of her duties were issued by the Executive Housekeeper.

*(e)* She invited the management team at the meeting to accompany her to the storage area to examine her trolley with all the cleaning apparatus, including the bottles she used. The management team declined her invitation.

*(f)* Upon declining her invitation, she was asked to wait outside the meeting room and was recalled soon afterwards. Upon her return, Ms. Jonas reminded her of the 2008 incident and told her that her services would be terminated.

*(g)* The General Manager told her that she would receive all outstanding monies due to her, including her severance pay.

*(h)* She was never shown any physical or other evidence of the "nestle water bottle" or its contents.

*(i)* When she returned home after her dismissal, the Employee received a telephone call from Ms. Jonas offering to transfer her to the laundry department. The Employee declined the invitation.

7. The Employer's response to the Employee's Claim is contained in its Memorandum of Defence in which it disputed the claim on the following grounds:

*(a)* The housekeeper who cleaned the room on the Employees day off "was able to corroborate the guest's allegation… "

*(b)* The Employee exclusively had been assigned to that room for 19th December 2014 to the 22nd December 2014.

*(c)* Notwithstanding her denial "the Employer would not ignore the overwhelming evidence against the Employee…" including her breach of the rule in July 2008.

*(d)* "After considering and weighing all there facts, the Employer was satisfied that the Employee was guilty of misconduct by failing to observe the Employer's health and safety rules which could have resulted in harm or injury to the guest and which demonstrated that the Employer / Employee relationship could not be reasonably expected to continue"

*(e)* As a result the Employee was dismissed by letter dated 24th December 2014.

*(f)* After her dismissal the Employee appealed to the Employer's Chairman who, as a "gesture of goodwill", offered the Employee a position in the laundry department.

*(g)* In addition, through her Union Representative, the Employee also appealed against her dismissal. Following negotiations, it was agreed between the parties that the Employee would be paid an ex gratia payment in the sum of $7,943.52 in full and final settlement of the matter.

*(h)* It was understood and agreed that the ex gratia payment was not intended to prejudice the Employer's position that the Employee had been dismissed with good cause.

*(i)* Based on the ex gratia payment, the Employee is "estopped" from claiming compensation in these proceedings.

Issues

8. The main issues for determination are:

(1.) Did the Employer have a good factual basis for its conclusion that the Employee was guilty of misconduct by failing to observe the Employer's health and safety rules?

(2.) Did the Employer act reasonably or unreasonably in the actual circumstances which existed when it dismissed the Employee?

(3.) Was the Employee "estopped" from pursuing her claim of unfair dismissal by reason of her acceptance of the "ex gratia payment"?

Discussion and Resolution

9. The standard of proof in civil matters is proof on the balance of probability or proof on the preponderance of the evidence. Such proof does not necessarily depend on the number of persons giving the evidence. On the contrary, what matters most is whether the evidence is reliable and convincing.

10. There is no doubt that the Employer's case is grounded on the oral report made by one Mrs. Mayhew - the guest occupant of Room #134, on 23rd December, 2014 - that the Employee left a "nestle water bottle" containing "diluted bleach" on the bathroom counter of her room for 2 days, namely the 21st and 22nd December, 2014.

11. In so far as it is relied upon by the Employer to prove that what the guest said is true, that report constitutes hearsay information. Accordingly, it is to be treated with circumspection and is susceptible to be rebutted or undermined by

the direct evidence adduced at trial. In any event, the weight to be attached to that hearsay information is subject to the Court's assessment of its reliability. That, in turn, depends on the veracity and cogency of the Employer's evidence which is grounded on that information.

12. As to the direct evidence given at trial, Ms. Patsy Greene, Housekeeping Supervisor, testified on behalf of the Employer that she was assigned to clean the room on the Employee's day off and when doing so she observed the bottle on the counter but did not remove it. Apart from seeing the bottle, which we accept she did, Ms. Greene is of no assistance to us in respect of the content of the bottle or whether the Employee left it there.

13. Ms. Ermine Hector, the Executive Housekeeper, testified on behalf of the Employer that the Employee was assigned to the room for four consecutive days immediately before her day-off on 23rd December, 2014. That evidence, which we accept as being credible, by itself does not preclude all or any other persons from having access to the room and leaving the bottle there.

14. Mr. Lionel Bramble, the Employer's Duty Manager, also testified on its behalf. It is noteworthy that neither in his report nor in his written and oral testimony did Mr. Bramble refer to any attempt by him to ascertain who, apart from the Employee, might have had access to the room at any material time. He made no mention of Ms. Greene. At the end of the day, Mr. Bramble's evidence did not enhance the reliability and weight of the guest's report.

15. Ms. Myriam Alfred-Brown, the Rooms Division Manager, also testified on behalf of the Employer. Her testimony clearly shows that she received the information about the guest report from a second or third hand source. The evidence given by Ms. Alfred- Brown, like that of the other witnesses for the Employer, did not enhance the reliability of Ms. Mayhew's oral report.

16. In the final analysis, the 6 witnesses for the Employer were not able to establish the veracity of the guest's oral report. As a result, its reliability was left in such serious doubt that we cautiously assigned little weight to it.

17. Mr. Philippe Piacentini, the General Manager, also testified on behalf of the Employer. He too received the report about the guest from a second-hand source. In his investigation of the report, he "sniffed" the contents of the bottle and concluded that it contained bleach. Mr. Piacentini convened the investigatory meeting on 24th December 2014 at which the Employee denied the allegation against her. Nevertheless, the Employer believed that she was not being truthful and became "satisfied that the Employee was guilty of misconduct by failing to observe the Employers health and safety rules which could have resulted in harm or injury to the guest and which demonstrated that the Employer/Employee relationship could not be reasonably expected to continue."

18. In considering the reliability and assigning the weight of the hearsay evidence, we paid close attention to the evidence of the Employee. Generally, we find her to be a credible witness. In particular, we find that, apart from the 2008 incident, her job performance was generally satisfactory. Moreover, we find that, in light of the 2008 incident, the Employee was generally mindful of and complied with the Employer's health and safety rules.

19. Our assessment of the Employee's general attitude and work performance immediately before her day off on 23 December 2014 was corroborated by the Employer's evidence. In that regard, Mrs. Hector testified that she provided the employee with containers for storing the cleaning products and had no idea why the Employee would pour bleach into a water bottle. Importantly, Mrs. Hector also testified that the Employee was quiet and reserved. that she worked well; that she was a good employee; and that the Employer had no problems with her.

20. Given the developments which occurred on 23rd December 2014 while the Employee was absent from the premises, she had no prior knowledge of what was alleged against her. However, she was suddenly confronted with the allegations by no less than 6 members of the Employer's management team.

21. When the allegation was put to her, the Employee denied that she left the offending bottle in the guest's room. Under cross examination at trial, she testified: "I know I didn't leave the bottle there. I told them what I had, how many bottles I had and what I had in those bottles". She maintained her denial and testified that when she requested that her cart be checked to corroborate her position, the Employer "flatly refused" to do so.

22. In the circumstances, we find that the Employer's evidence of the Employee's alleged misconduct - based on the hearsay information - was unreliable. The factual basis for its conclusion that the Employee was guilty of misconduct or "gross negligence" or breach of the safety rule is tenuous at best. As a result, we are inclined to resolve the first issue in favour of the Employee We will now turn our attention to the second and third issues.

23. The application of the statutory test of reasonableness under section C 58 (2) of the Labour Code requires consideration of fundamental principles and practices of good industrial relations. We have already noted that the Employee had no prior knowledge of the allegation against her when she was summoned the meeting on December 24, 2014. In that regard, Mr. Piacentini testified that he carried on investigation about the report received from the guest. He stated "after completing (his) investigation he summoned the Employee to the meeting with the purpose being to "investigate the matter under Article 25.5.18 of the Collective Agreement"

24. It is useful to reproduce paragraphs 11 to 14 of the General Manager's Witness Statement as follows:

> 11. "The Employee was advised that the purpose of the meeting was to Investigate the matter under Article 25.5.18 of the Collective Agreement – Failure to observe safety rules which leads, or could have reasonable led to harm or injury.
>
> 12. During the meeting, the Employee denied leaving the Nestle water bottle with diluted bleach in Room 134.
>
> 13. Even though the Employee denied leaving the Nestle water bottle in Room 134, the consensus amongst management was that there was overwhelming evidence against the Employee which suggested that she was not being truthful in the meeting. The Employee was the only Housekeeper in charge of cleaning the room during the period that the Guest reported that the Nestle water bottle was left on the bathroom counter. Another room attendant, Patsy Greene, who was assigned to Room 134 on the 23rd December, 2014, was able to confirm that she observed that Nestle water bottle while cleaning the room. My inspection of the Nestle water bottle confirmed that it contained diluted bleach as reported by the guest. It was also noted on the Employee's file, that on 13th July, 2008, the Employee similarly failed to observe safety rules by storing bleach in a Dove shampoo bottle and leaving it in a guest's room which resulted in the guest using it on her hair.
>
> 14. After considering and weighing all the facts, management was satisfied the Employee was guilty of misconduct by failing to observe the Employer's health and safety rules which could have resulted in harm or injury to the guest and which demonstrated that the Employer/Employee relationship could not be reasonably expected to continue".

25. Based on the foregoing evidence given by Mr. Piacentini , it was clear that:

    *a)* By 24th December, 2014, the Employer had completed its investigation without the involvement of the Employee;

    *b)* The Meeting on the 24th December, 2014 was not investigative in nature;

    *c)* In light of the Employee's denial of the allegations against her, the Employer carried out no further investigation but instead relied on the already formed "consensus amongst management" that the Employee was guilty of misconduct;

    *d)* In reaching its conclusion about the Employee's guilt, the Employer took into consideration the July 2008 incident when the Employee failed to observe the safety rules.

26. In the process of its investigation, the Employee had no opportunity to confront the guest; to see the water bottle and its contents; or to confront Ms. Greene. She received no formal statement of the offence alleged against her and had no adequate opportunity to exculpate herself.

27. In our view, the "investigation" was neither thorough nor impartial. In the process, the Employer disregarded some of the fundamental rules of natural justice and good industrial relations practices.

28. In our opinion, having regard to all the circumstances, it was unreasonable for the Employer to conclude that the state of affairs "demonstrated that the Employer/Employee relationship could not be reasonably expected to continue." In coming to that conclusion we are mindful of paragraph 12 of the Employer's Memorandum asserting that the Employee's dismissal was in accordance with "the Collective" Agreement Disciplinary Procedures" and the " Antigua and Barbuda Labour Code."

29. As to the Labour Code, Section C59 (1) provides for summary dismissal in instances of "serious" misconduct in situations in which the employee has "Conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue……."

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

30. As to the Collective Agreement, we consider the Employer's labelling of the Employee's conduct as "gross negligence" to be unreasonable in light of the agreed sanction of a "warning", as applied in 2008, on the 1st Occasion of that offence. Moreover, there is significant inconsistency in the treatment meted out to the Employee in relation to the later alleged offence. According to Ms. Mings, the 2008 offence resulted in "more serious injury". By dismissing the Employee, the Employer appears to have reversed the seriousness of the offences. Further, the Employer unreasonably treated the alleged offence as the 2nd Occasion justifying a dismissal which should have been effected only after a suspension.

31. Moreover, considering the timeline, we accept Mr. Riley's evidence to the effect that the earlier potential of the 2008 disciplinary action to be relied upon as the basis for later disciplinary was already spent. We agree with him that it was not proper for the Employer to refer to the July 2008 incident to justify the dismissal.

32. For the foregoing reasons, we find that the Employer's actions in dismissing the employee in the circumstances was unreasonable. In other words, a reasonable employer acting reasonably would not have dismissed the employee in those circumstances. Accordingly, we resolve the second issue also in favour of the Employee.

33. As to the third issue: whether an estoppel was created, our starting point towards its resolution is the dismissal letter. From it, we note the following sequence of events according to the Employer:

    - after the decision to dismiss the Employee was taken, she spoke to the Employer's CEO;
    - as a result the Employer offered the Employee a position in the laundry Department as a new employee;
    - the Employee "rudely declined" that offer;
    - "consequently" the Employer committed itself to pay the Employee for "up to and including 22nd December 2014 for time already worked, unused vacation, years of service and other monies due and owing" to her

34. In relation to the alleged conversation between the Employee and the Employer's Chief Executive Officer and his offer to her of a position in the laundry department, we note that in its Memorandum the Employer asserted that the Employee pleaded to the "Chairman, Mr. Robert A. Barrett". Be that as it may, we accept the Employee's evidence that: "After I received the dismissal letter, I did not speak to Mr. Barrett…I was not offered anything, I did not plead with anyone". More instructively, the Employee testified that it was Ms. Jonas who spoke to her about a vacancy in the laundry department and expressed the Employer's desire to transfer her there.

35. In its Memorandum of Defence, the Employer asserts that by reason of its payment of the sum of $7,943.52 which it considered to be an ex gratia payment, the Employee is "estopped from seeking the relief that she has sought…".

36. In relation to this issue, we emphasize the sequence of events as stated in the dismissal letter, that after the Employee "rudely declined" the offer to work in the laundry, the Employer committed itself to pay "her years of service". We interpret the term "years of service" to be payment equivalent to severance pay. In that regard, the Employer's letter dated 12th January 2015 set out her "severance for first 5 years", "severance for last 30 months" and her "total severance due". In our view, the sum which the Employee received under cover of the letter dated January 1, 2015, is in fact what the Employer had committed to pay the Employee in the dismissal letter.

37. Accordingly, on that documentary evidence above, we are inclined to conclude that no estoppel was created by reason of the alleged negotiation with Mr. Kem Riley, the Industrial Relations Officer of the Union. For the avoidance of doubt, we will rely on Mr. Riley's evidence which we consider to be wholly credible.

38. According to Mr. Riley, after the Employee's dismissal he requested a meeting with the Employer. In his words, the purpose of the meeting was "either to have her back to work or get compensation". At the meeting, at which the Employer's General Manager and its Relations Administrator were present, the latter directed his attention to the last page of the dismissal letter which referred to severance payment. Mr. Riley testified that when he enquired of the Employee whether she agreed, she responded by saying, "give me my money". Thereafter, the meeting ended.

39. Further, Mr. Riley testified that once the Employee expressed her desire to receive her money, he had no reason to pursue anything else stated in the letter. Moreover, he testified that the Employee never made any submission to him regarding the precise amount to which she was entitled. Under cross examination, Mr. Riley also stated that it was an error on his part not to read the dismissal letter in its entirety before attending the meeting. He emphasized that it was Ms. Jonas who pointed out to him that the Employer had already committed to pay the Employee her severance entitlement.

40. In relation to her overall compensation in the circumstances, Mr. Riley testified that it was his opinion that the Employee should be paid further compensation in addition to her severance pay. We agree with that opinion.

41. In the circumstances, we reject the Employer's position in respect of the creation of an estoppel. We find that the Employee was entitled to pursue her claim herein for compensation for unfair dismissal

42. In the final analysis, it is our opinion that the Employee was unfairly dismissed and is entitled to compensation. In addition to the sum of $7,943.52 which she received as "severance pay", we award the following amounts.

    *a.* Notice pay
    Under this head, we award the sum of $395.00 in lieu of notice, being the equivalent of one week's pay.

    *b.* Immediate Loss
    An award under this head turns on proof of the Employee's efforts to mitigate her loss. In this case, we have no or no sufficient evidence to fully ground an award. However, we note that at the date of dismissal, the Employee was approximately 56 years old. That fact is likely to have influenced prospective employers. In the circumstances, we award the nominal sum of $5,135.00, being the equivalent of 13 weeks' wages.

    *c.* Fringe benefits
    By the documentary evidence of her pay slips as attached to the witness statement of Ms. Mings, the Employer's Human Resources Assistant, the Employee received "2 points service charge" weekly in the sum of $289.75 for a 40 hour work week. In the circumstances, all things being equal, we award the sum of $3,766.75, being the equivalent of 13 weeks service charge.

43. Having regard to the evidence before us and the closing submissions of the parties, we make no further award of compensation or costs.

Order

44. It is hereby ordered that:

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

**Dated 18th day of October, 2019**

**Charlesworth O. D. Brown,**
*President*

**St. Lawrence deFreitas,**
*Member*

**Judith Dublin,**
*Member*