ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 11 of 2001

BETWEEN:

BWIA INTERNATIONAL AIRWAYS LIMITED

Appellant

and

ROXANNE WARNER PAYNE

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Joseph Archibald Q.C. — Justice of Appeal [Ag.]

Appearances:

Mr. Justin Simon for the Appellant
Miss Ann Henry for the Respondent

2001: June 6;
September ,17.

JUDGMENT

[1] **REDHEAD J.A:** This is an appeal from the decision of the Industrial Court whereby the Industrial Court found that the respondent was unfairly dismissed and ordered the appellant to pay compensation to her in the sum of $50,091.00 by 24th May, 2001 and interests from 12th April, 2000.

[2] The respondent began employment with the appellant 's company on 15th January, 1990 as a Customer Service Representative.

[3] A letter written by the Area Manager, Mrs. Valerie Jeffery to the respondent on 31st March, 1998 complained of the following:-

"1. She lacked knowledge of Airport procedure specially in the area of ticketing.

2. Her record of service showed that the course she was offered and sent to by the appellant did not bear any fruit and in the case of five specified courses her results were as follows:-

(a) IBIS [2] basic Airport Courses in October, 1990. The instructor described her results as very "disappointing";

(b) Fares and Ticketing Principles and Procedures, May 1991, she gained a mark of 46%

(c) In her appraisal form for 1993, Clarence Homer, manages Air Ports, noted that she failed two attempts at IBIS training which seriously hampered her level of efficiency in guiding the Ground Handling Agents.

(d) Fares and Ticketing Level 1 Course, March 1997, the respondent received a mark of 35%. The said letter continues-

(e) You do not seem to have increased your basic (and outdated) knowledge of airport procedures/ticketing etc. and this seriously hampers tour ability to perform effectively and efficiently in guiding and assisting our Ground Handling Agents.

Per our most recent discussion on 4th February, 1998, the company is unable to utilize you in the position of Customer Service Representative as you are the only Customer Service Representative not yet qualified in Weight and Balance Procedures and, with the automation of all airport procedures effective 1st January, 1998 you do not even have a basic understanding of the procedures and are totally unable to function in the required capacity.

This letter therefore confirms our discussion, and your agreement that you have been unable to grasp the basic airport procedure vital to the execution of your duties. This letter serves as one (1) month's notice of our intention to terminate your services effective 30th April, 1998.

A cheque in the amount of $10, 434.00 comprising a gratuity in lieu of pension, computed as per company policy, will be available on that date, at which time you are requested to return all company's belongings in your possession i.e any unused RCAS, ID card uniform item etc……"

[4] Miss Henry, solicitor for the respondent, wrote to the Area Manager on April 3, 1998 requesting **precise** reasons for the dismissal of the respondent.

[5] In prompt response to Miss Henry's letter the Area Manager wrote on 3rd April, 1998 inter alia:-

"…..my letter of termination dated 31st March 1998, enunciates reasons for Mrs. Rosanne Warner-Payne's termination services with BWIA."

[6] The respondent's employment was in fact terminated on 30th April, 1998. She brought an action in the Industrial Court and as I have said the Industrial Court found in her favour. Six ground appeal were filed on behalf of the appellant.

1. The Industrial Court misdirected itself in holding that the Employers demonstrated lack of competence or knowledge of the Employer's fares and ticketing procedures, I do not constitute sufficient grounds of summarily terminating the Employee's employment;

2. The Industrial Court misdirected itself in holding the areas of responsibilities in which the Employee was found deficient were only ancillary and not essential to the duties listed in the Employee's for description, and its finding is contradictory of the evidence given;

3. The Industrial Court erred in law in finding that on the totality of the evidence adduced that the employer having determined the Employee's incompetence and her failure to improve acted unreasonably in dismissing the Employee;

4. The Industrial Court misdirected itself in law and in fact in awarding the Employee compensation for loss of protection on the basis of one month's salary for each year of past employment given the employee's employment status, and the absence of a collective agreement or individual contract term to that effect;

5. The Industrial Court erred in law in awarding the Employee compensation for the manner of her dismissal in light of the established legal principles under which such an award is made and the lack of evidence to substantiate such an award;

6. The compensation awarded the Employee for loss of fringe benefits, that is travel concessions, was excessive in the circumstances.

The Industrial Court found that when the respondent began her employment with the appellant's company she was provided with a job description. The court found that there were no breaches or complaints in relation to the respondent's job functions, and in fact she received complimentary letters for the efficient manner in which she carried out her functions. The Industrial Court also found that the three areas in which it was alleged that the respondent was deficient were not set out in her job description.

The respondent attended courses made available, by her employers. She was not successful at these courses.

The Industrial Court found it alarming that the appellant did not even on one occasion bring the respondent performances on the courses to her attention and indicate that they viewed her failure seriously with a warning that they may lead to the termination of her employment.

Section C.58(1) of the Labour Code stipulates:

> "A dismissal shall not be unfair if the reason assigned by the employer therefor-
> (a) -
> (b) relates to capability or qualification of the employee to perform work of this kind he was empowered to do within the limitation of Section C 59(3)
> (c) –
> (d) –
> (e) –

Section C 59(3)-

> "whereas an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the written warning is given and state the action the employer intends to take in the event of repetition; and thereafter, if the employee does not, during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in satisfactory manner, the employer may terminate the employment of the said employee."

[7] The Industrial Court accepted that a written warning is not obligatory but in the interest of fairness and good industrial relations a warning ought to have been given.

[8] I agree particularly in light of the finding by the court that the courses which she failed were not directly related to her job description.

[9] Moreover it was never suggested at anytime to the respondent that she was incompetent in what she was doing. In my judgment therefore it seems to me to be grossly unfair to the respondent to use her failure of the courses as justification for her dismissal. From the chronology of events and courses attended by the respondent as outlined in the letter of dismissal it appears to me that the last course taken by the respondent was from 3rd-7th March, 1997. One full year after the letter of dismissal. Nothing was said to the respondent regarding that course. In fact one year had elapsed then the appellant purported sacked her. The other courses were taken as far back as 1993, 1992, 1991 and 1990.

[10] Learned Counsel submitted in his skeleton argument-

> "The Employer's evidence that the Employers CEO had suggested the possibility of a severance package on her voluntary departure and that this should be discussed with the Area Manager ought to be rejected as highly unlikely; the absence of testimony from the employer notwithstanding."

[11] It is quite obvious from the record that the Industrial Court accepted the evidence of the respondent on this issue as it ought to, the evidence being uncontroverted and there must have been some other reason for dismissing the respondent other than her job performance.

[12] The Industrial Court found that:

> "In her job appraisal for January to December, 1997 it was said that the employee was in need of further training in Ticketing Weight and Balance and World Tracer Baggage. But although a knowledge of these would enhance her duties they were not part of the duties set out in her job description and she had an overall rating of 55% placed her in an "acceptable" position."

[13] The respondent said in her evidence that she wanted to resign because of stress of the job and approached the Area Manager, Valerie Jeffery to discuss the matter and seek a package. Miss Jeffrey told the respondent that she was not entitled to a package if she voluntarily resigned. The respondent raised the issue with the substation in Barbados and at the Head Office in Trinidad who answered in the affirmative, but when the respondent related this to Miss Jeffery, she still refused. Finally the respondent took up the matter with the CEO, who agreed that she was entitled to the package, and instructed Mrs. Jeffery to meet with her and work it out.

[14] Miss Jeffery met with the respondent and worked out a package but two days she wrote to the respondent terminating her employment.

[15] In light of this evidence which the Industrial Court accepted, the court could not have come to any other reasonable conclusion than in the circumstances the Employers acted unreasonably and that the dismissal was unfair. As having regard to the evidence one is driven to the conclusion that the respondent was punished for insisting on a "package" for voluntarily resigning.

[16] Learned Counsel for the appellant referred to the following cases among others:-
Polkes v Dayton Services, Ltd (1987) 3 ALL ER 974 at 983
Cooks v Thomas Linnell & Sons Ltd (1977) 1CR 771
Lowndes v Specialist Heavy Engineering Ltd. (1977) ICR1

[17] In **Cooks** it was held, inter alia, that the employer's had acted reasonably in treating the employee's lack capacity as a sufficient reason for dismissing him; that when responsible employers come to the conclusion over a reasonable period of time, that a manager was incompetent, that was some evidence of his in capacity to perform his job.

[18] In **Lowndes** it was held that a failure to follow a fair dismissal procedure generally, but not necessarily, rendered the dismissal unfair and that it was a factor to be considered by the Industrial tribunal in deciding whether the employers had acted reasonably.

[19] Cooks case is not helpful to the appellant because in the instant case it was not lack of the respondent's capacity to do the work she was employed to do that she was fired, but for insisting on the package.

[20] Finally, Learned Counsel, Mr. Simon referred to:

Polkey v Dayton Services Ltd (1987) 3 ALL ER 974 at 983/84

He contended that the Employee's annual appraisals and course results provided a sufficient basis on which a reasonable employer would have dismissed an employee.

[21] Learned Counsel, for the appellant, attacked the award. First of all he says that the sum should be $45,091.00 because the court's tabulation mistakenly recorded $50,091.00 whereas the correct figure should be $45,091.00. I agree.

[22] Mr. Simon also argued that the respondent was awarded $12,250.00 by way of fringe benefits representing ten (10) tickets. He contended that the travel concessions was discretionary. That it was not an entitlement. Moreover the respondent had received ten (10) travel tickets for the year and had already utilized five (5) therefore, the award should only be in respect of the five tickets returned. I agree. Therefore, this should be reduced to $6,125.00.

[23] The Industrial Court made a deduction $14,000.00 "pursuant to the decision of the Court of Appeal in the Jennifer Watt case: (Antigua Village Condo Corporation v Jennifer Watt, Civil Appeal No. 6 of 1992)-

In that case Sir Vincent Floissac .C.J delivering the judgment of the Court of Appeal when he was dealing with loss of future earning said:-

> "Third fairness and justice dictate that in any award of damages or compensation for loss of future remuneration expected to be earned in a weekly or monthly installments spread over a period of time, there must be a substantial discount for the award is an accelerated lump sum payment in realization of a mere expectation."

[24] This principle is applicable in cases where a lump sum payment is made, in respect of anticipated loss of future earnings, a discount is always made.

[25] The Industrial Court therefore acted on a wrong principle when it made a deduction of $14,000.00 on "the Jennifer Watt case" that amount will be therefore restored.

[26] The amount will be varied as follows:-

The sum of $50,091.00 adjusted to		$45,091.00
The award of $12,250.00 for fringe benefits reduced to	……..	$ 6,125.00
The sum of $14,000.00 restored	………	$ 14,000.00
Total		**$65,216.00**

[27] The judgment will be varied to the sum of $65,216.00. There will therefore be judgment for the respondent in the sum of $65,216.00. Interest at the rate of 6 percent per annum on that sum from 12th April, 2001 until payment.

Albert J. Redhead
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice

I Concur

Joseph Archibald Q.C.
Justice of Appeal [Ag.]