ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 of 2003

BETWEEN:

THE EPICUREAN LIMITED

Appellant

And

MADELINE TAYLOR

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton for the Appellant
Mr. Gerald Watt, QC, for the Respondent

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2004: May 26, 27
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JUDGMENT

[1] RAWLINS, J.A. [AG.]: This case came on an Appeal from a Judgment that the Industrial Court handed down on 7th March 2003 on Reference No.56 of 1996. The Reference was brought on behalf of the Respondent, Ms. Taylor. She sought compensation from the Appellant, the Epicurean, on the ground that she was unfairly dismissed. The Industrial Court found in her favour and awarded her the sum of $47,909.00. The Court ordered the Epicurean to pay this sum to Ms. Taylor by 31st March 2003. The Industrial Court made no order as to costs. The Epicurean may also be referred to in this Judgment as “the company” or “the supermarket”.

[2] The Epicurean appealed the whole decision contained in the Judgment of the Industrial Court. In that appeal, it challenged certain findings of fact that the Court made. It has also challenged certain statements that the Industrial Court made in the Judgment that are under the heading "HISTORICAL BACKGROUND". The Epicurean also asked this Court to find that the Industrial Court erred in law when it found that Ms. Taylor was unfairly dismissed and that she was entitled to compensation. By way of relief, the Epicurean seeks Orders to set aside the findings and decision of the Industrial Court. Alternatively, it seeks an Order that there should be a rehearing of the complaint de novo before a Tribunal that is differently constituted from the Tribunal that gave the Judgment.

The Facts

[3] Ms. Taylor was employed by the Epicurean, which, among other things, owns and manages a supermarket. Her employment with the supermarket commenced on 5th June 1990. The business was then located at Old Parham Road. The supermarket was subsequently relocated at the Woods Mall at Friars Hill Road, St. John's, Antigua.

[4] Ms. Taylor was employed by the Epicurean as an accounts clerk. Her duties included the preparation of deposits that represented the daily takings of the supermarket. The system by which she reconciled accounts at the end of a day changed from a manual system that the supermarket operated at Old Parham Road, to a computerized system at the Woods Mall.

[5] Under the Old Parham Road system, a cashier paid out of the daily takings the cost for goods that vendors supplied to the supermarket. The cashier prepared a "payout slip" that reflected the amount that was paid out to each vendor. A cheque in equal amount replaced the amount on the "payout slip" at the end of the day. This enabled the accounts clerks to reconcile or balance the actual amount of

money that was in the deposit bag with the amount on a "Z" report at the reconciliation stage.

[6] In the computerized cash register system, which was introduced at the Woods Mall location, the cash register has a pay out button. This was pressed to permit immediate cash payments to vendors when they sold goods to the supermarket. The machine reflected the amount that was paid out by the cashiers on paid out slips. Cheques were then issued to the accounts clerks by part owner/manager of the Epicurean, Donna Pietracupa at the end of the day to cover the amounts that they paid out to the vendors. This was for the purpose of reconciliation. The cheques were made payable to cash.

[7] It appears that neither Ms. Taylor nor her fellow accounts clerks, nor Ms. Pietracupa and her fellow accounts clerks understood the new system, which automatically reconciled the payments to vendors, thereby rendering it unnecessary to reimburse the cash for the amounts paid out. Indeed, it was those very cheque payments that caused the overages and led to the confusion on the part of Ms. Taylor and her fellow accounts clerks. The problem was reported repeatedly to Ms. Pietracupa, who failed to resolve the issue and was, no doubt innocently, complicit in perpetuating the problem.

[8] The cheques had to be deposited at the Bank. However, in respect of its accounts for October 1995 to January 1996, the supermarket found, as far as it is relevant to this case, that the sum of $40,000.00 was missing. It appears that supermarket's investigations into the missing funds came at the instigation of Karen Zambetti who was an accountant in the employment of the Epicurean at the time.

[9] In subsequent discussions that Ms. Taylor had with Ms. Pietracupa and Ms. Zambetti, Ms. Taylor admitted that she had in fact realized that her deposits were sometimes over by the amount that was paid out. She said that she did not

understand why this happened. She indicated that she simply forced the deposit to balance with the computer reported figures, and then passed any overages or short falls to another deposit or added them to the petty cash fund.

[10] The $40,000.00 that the Epicurean missed was never accounted for or located in the system. The Police were called in to investigate the matter when the issue of a deficit was again raised in March 1996. The Police questioned Ms. Taylor and changed her for theft in connection with the missing funds in June 1996. In a letter dated 28th June 1996, the Personnel Manager of the Epicurean informed Ms. Taylor that she was suspended from her employment, without pay, pending the outcome of the Police case. A Magistrate dismissed her case on 21st August 1996.

[11] By letter dated 22nd August 1996, Solicitors for Ms. Taylor informed the Epicurean that the case was dismissed. They asked the Epicurean to pay her salary for the period 28th June 1996 to 21st August 1996. They also indicated that Ms. Taylor was awaiting a decision as to the date on which she should return to work.

[12] By letter dated 17th September 1996, the Personnel Manager of the Epicurean informed Ms. Taylor that her employers noted that the case was dismissed. She stated, however, that the Epicurean had investigated the entire matter and were of the view that the shortfall of cash receipts in excess of the $40,000.00 occurred during the period of her stewardship and could only be explained on the ground of gross negligence or theft.

[13] The letter stated, further, that in the circumstances, the relationship of employee/employer could not reasonably be expected to continue. Therefore, the Epicurean terminated Ms. Taylor's employment with effect from 28th June 1996. This was the date on which she was suspended pending the outcome of the case in the Magistrate's Court. The company also terminated the employment of the

other 2 accounts clerks who were in its employment at the time, in what was, in effect, a "blanket dismissal".

[14] Mr. Watt, QC, learned Counsel for Ms. Taylor, has contended that her dismissal was unfair and contrary to the provisions of the Antigua and Barbuda Labour Code, Cap. 27 of the Laws of Antigua and Barbuda, Revised Edition, 1992 ("the Labour Code"). He also contended that her dismissal was harsh, oppressive and contrary to good industrial relations and natural justice. He further contended that the manner in which she was dismissed was abrupt and offensive and caused her distress; especially as the Police case against her was dismissed. He insisted that her employers had no justifiable reason for terminating her employment.

Legal Considerations

[15] Three main legal considerations arise on this appeal. I shall consider, first, the approach that this Court should take where facts as set out or found by the Industrial Court are challenged. The second consideration focuses on the law that relates to unfair dismissal, and third, the issue of natural justice. If the appeal is unmeritorious, questions that relate to compensation and costs will then arise.

The Challenge on finding of facts

[16] In his Skeleton Arguments, Mr. Watt sets out the basic principles that should guide this Court when it considers challenges to facts that a Tribunal, which heard the evidence, set out or found. They are well settled principles.

[17] Mr. Watt cited the Supreme Court Practice UK 1999 paragraph 59/1/141 as an authoritative statement of the applicable principles. The commentary deals with the principles upon which a Court of Appeal acts. It commences under the rubric "Appeals against decisions of questions of fact". It states that on an appeal in an action tried by a Judge alone, the burden of showing that the Trial Judge was wrong in his decision as to the facts lies on the Appellant.

[18] The passage states, further, that if the Court of Appeal is not satisfied that the trial court was wrong, the appeal would be dismissed. It cites as authority for these statements Lord Esher, M.R., in Colonial Securities Trust Co. v Massey [1896] 1 Q. B. 38, at page 39. The principles also state that great weight is due to the decision of a Judge of first instance whenever, in a conflict of testimony the demeanor and manner of witnesses who have been seen and heard by the trial court are material elements in considering the truthfulness of those statements.

[19] The statement continues by reminding us that having not seen the witnesses, appellate Judges are put in a permanent position of disadvantage compared to trial Judges. It states that unless it can be shown that the trial court failed to use or palpably misused its advantage, for example, by failing to observe inconsistencies, or indisputable facts or material probabilities, the Court of Appeal should not take the responsibility for making findings of fact.

[20] Mr. Watt submitted, however, that it is accepted that this Court is entitled to evaluate the evidence in the same way as the trial Court and to draw the proper inferences from the evidence. He insisted, that nowhere in the Appellant's Grounds does the Appellant aver that the Industrial Court failed to draw the proper and correct inferences from the evidence adduced. He cited as authority Benmax v Austin Motor Co. Ltd. [1955] 1 ALL ER 326.

[21] In Grenada Electricity Services Limited v Isaac Peters, Civil Appeal No. 10 of 2002, this Court considered the appellate approach to appeals on facts. At paragraph 7, Sir Dennis Byron, C.J. noted that section 35 of the Eastern Caribbean Supreme Court Act. Cap. 336 confers power on this Court to find facts and to draw inferences. He distilled from the authorities the principles on which an appellate court would reverse the findings of fact of a trial judge. He reminded us that the power is exercised in different ways according to the circumstances.

[22] The Chief Justice stated that an appellate court would usually be reluctant to differ from the finding of fact of a trial judge where the finding turned solely on the credibility of one or more witnesses. He however noted that there is an important limitation, which requires the court to draw a distinction between a specific fact and finding of fact, which in reality is an inference from facts specially found. The court, he said, must distinguish between the perception and evaluation of facts. In the view of the Chief Justice, it is in the finding of specific fact, or the perception of facts that the court is called on to decide on the basis of the credibility of witnesses. When this is the position, he said, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving testimony.

[23] On the other hand, the Chief Justice stated that where what is in dispute is the proper inference that is to be drawn from facts, or the evaluation of facts, the appellate court is in as good a position as the trial judge to draw inferences or to evaluate the facts. I think that this is applicable in this case.

[24] Mr. Watt further submitted that this Court should strike out Ground (vi) of the Appeal pursuant to Part 62.4(6)(b) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("the Rules"), because that ground is stated in vague and general terms. Ground (vi) is stated as follows:

> "The Court erred and was wrong in law in finding that the Employee/Respondent was unfairly dismissed."

Findings

[25] I do not even think that it is necessary to consider striking out ground (vi) of the Appeal. The critical question is whether, even if the Court erred in some respects in the facts that it set out or found, there were facts that may be found from the evidence to impeach the decision of the Industrial Court. That is, facts that should have precluded the Industrial Court from finding that Ms. Taylor was unfairly dismissed. On the evidence that was presented before the Industrial Court I think not. I see no reason for allowing this appeal on the challenge that the Appellant

made on facts that the Industrial Court found. I therefore move to consider the issue whether the Industrial Court erred in law in finding that Ms. Taylor was unfairly dismissed.

[26] During the course of the hearing, it was suggested that this is not a case of petty pilferage. The Court indicated that the question of who was responsible for making the deposits at the Bank is critical. The evidence is not clear or conclusive, but it appears that the accounts clerks were responsible for this. We are of the view that the deposit sheets and balance sheets could have assisted in a determination as to whose action might have been impeachable. This is also not clear on the evidence that was given at the trial in the Industrial Court. These sheets are not before us. Apparently, they were not admitted in evidence in the Court below.

Was Ms. Taylor dismissed unfairly?

[27] In this jurisdiction, the legal principles that relate to unfair dismissal are grounded in statute. They are contained, in particular, in Clauses 56, 58 and 59 of the Labour Code. Clause 59(1)(a) provides that an employer may terminate the employment of an employee who is guilty of serious misconduct in relation to his or her employment. That is, if the misconduct is so serious that the employer cannot reasonably be expected to take any course other than termination. Such conduct includes but is not limited to situations in which the conduct clearly demonstrates that the employment relationship cannot reasonably be expected to continue.

[28] Additionally, guidelines that relate to "blanket dismissals" are set out in the case Whitbread & Co. PLC v Thomas and Others (1988) I.C.R. 135, at pages 139H–140C. In this case, the Industrial Appeal Tribunal set our four conditions on which a "blanket dismissal" by an employer could be justified.

[29] The four conditions were stated as follows:

> "1. An act whether by (commission or omission) has been committed which if committed by and identified individual

> would justify his or her dismissal. 2. The tribunal are satisfied that the act or acts were committed by one or more of a group, all of whom can be shown to be individually capable of having committed the act complained of. In this context "commission" includes "omission." 3. The tribunal are satisfied that there has been a proper investigation by the employer to identify the person or persons responsible for the act (of "commission" or "omission"). If those three matters are satisfied, then: 4. an employer who cannot identify which individual was responsible is entitled to dismiss all members of such group, even where it is possible or indeed probably that not all were guilty of the act."

[30] I accept these as the applicable principles that relate to "blanket dismissals." They accord with sound principles of fairness and reason. I agree with the submission that Mr. Watt made, that in order to justify the dismissal of Ms. Taylor and her two (2) fellow accounts clerks, the Epicurean must prove to the satisfaction of the Court that it carried out a sufficiently thorough investigation. It must also satisfy the Court that as a result of such an investigation, it reasonably believed that more than one person could have committed the act that caused the loss of the $40,000.00. The Epicurean must further satisfy the Court that it acted reasonably in identifying the group of employees who could have committed the act that caused the loss. It must also satisfy the Court that the belief that it held that they were responsible for the loss was based on solid and sensible grounds.

[31] Mr. Hamilton, learned Counsel for the Epicurean, submitted that the company carried out a number of investigations in this case. The evidence does not disclose that these were thorough investigations. In fact, they merely amounted to discussions. What is more, the evidence does not disclose that prior to any of the "investigations" Ms. Taylor was told that disciplinary action could have been taken against her if the company found that she caused the loss by negligence or theft.

[32] This brings up the issue of natural justice. I pause to note that Ms. Taylor was suspended on 28th June 1996, without pay, pending the outcome of the Police proceedings. There was no indication that the suspension was for the purpose of

disciplinary proceedings, outside of possible dismissal, further to the Police proceedings.

Natural justice

[33] The principles of natural justice are well known, trite and ancient. It is said that rules that required a fair hearing before impartial adjudicators can be traced to ancient times, were known in medieval precedents and reached a "high water-mark" in their development in Dr. Bonham's case (1610) 8 Co. Rep. 113b. Indeed, we were reminded that, although their disobedience was obvious, even Adam and Eve were given the opportunity to speak in their defence before they were cast out from the Garden of Eden.

[34] In this case, there is an implicit acceptance that there was a shortfall of $40,000.00 in the accounts of the Epicurean's balances for the months October 1995 to February 1996. The Police were called in to investigate. They charged Ms. Taylor and the other accounts clerks with criminal offences relating to the missing funds. The case was tried by a Magistrate and dismissed. Ms. Taylor indicated that she was ready to return to work. In response, she received a letter that informed her that the company had carried out an investigation into the missing funds and found that the loss was caused by her negligence or theft, and, therefore, the relationship of employer/employee could not reasonably be expected to continue.

[35] The letter that informed her that her services were terminated with effect from 28th June 1996 was written in September 1996. Her employment was terminated retrospectively. The Epicurean did not carry out any proper investigation. Ms. Taylor was not given any notice of charges. She was not invited to put up a defence. The company took her livelihood in clear breach of the rules of natural justice. She was unfairly dismissed under the Labour Code as well as in breach of the rules of natural justice.

[36] This, of course, does not mean that the company could not have carried out its own investigation outside of Police action and dismissed Ms. Taylor if her actions caused the loss. Such an investigation, however, must be done in accordance with legal principles that guide fair procedure.

[37] Premised on the foregoing, we are satisfied that there was sufficient evidence on which the Industrial Court could have found that the Epicurean unfairly dismissed Ms. Taylor. We are also satisfied that the Industrial Court correctly awarded her compensation for unfair dismissal. We therefore consider the quantum.

Compensation

[38] We have considered the 4 heads under which the Industrial Court made the compensatory awards. That Court awarded Ms. Taylor $16,209.00 under the head "Basic Award: Loss of Job Protection." This award is akin to severance payment. Under this head, she is entitled to one month's salary for each year of employment. She worked with the company for 6 years and 15 days. Her monthly salary was $2,500.00. In calculating her entitlement under this head, the Industrial Court used the formula $2,500.00 x 6 15/31. In error, this represents 6½ years. The Court should have used the formula $2,500.00 x 6 15/365. The sum should be $15,102.74, instead of $16,209.00.

[39] For the reasons that the Industrial Court gave we agree with the sums of $22,500.00 that it awarded for Immediate Loss. We also agree with the sum of $5,000.00 that it awarded under the head of Manner of Dismissal. We further agree with the award of $4,200.00 for Future Loss. The sum of the figures contained in paragraphs 24 and 25 is $46,802.74. This would be the adjusted entitlement of Ms. Taylor.

[40] However, Mr. Hamilton submitted that there is good authority upon which the award should be discounted. He cited the case Carlene Vigo v Swiss American Bank and David Jarvis v Swiss American National Bank of Antigua (Industrial

Court Ref. Nos. 27 and 40 of 1996.) He also cited Juliet Harley v Blue Water Hotel (Industrial Court Ref. No. 17 of 1995).

[41] In Juliet Harley, the Industrial Court awarded $30,837.54 to the employee whom it found was unfairly dismissed. The Court then noted, at pages 16-17 of the Judgment, that in Antigua Condo Corporation v Jennifer Watt, Civil Appeal No. 2 of 1992 (Antigua), this Court recommended that compensatory awards for unfair dismissal would be unfair and unjust and inimical to good industrial relations if they are simply an aggregation of the losses suffered by the employee, without, inter alia:

> "…making those reductions, deductions, discounts, allowances and mitigations which the principles of compensation in general and the principles and practices of good industrial relations in particular require to be made in protection of those interests and on behalf of the general fairness and justice of the award."

[42] I accept the submission that Mr. Hamilton made on these authorities. Lump sum compensatory payments are usually discounted. I therefore discount the award to which Ms. Taylor is entitled by $4,000.00. The Epicurean shall therefore pay her compensation for unfair dismissal in the sum of $42,802.74.

[43] As far as costs are concerned, the compensation to which Ms. Taylor is entitled has been varied, but only to make a minor adjustment. The appeal has been effectively dismissed. I do not accept that the Labour Code precludes me from granting costs to a deserving party that prevails before this Court. I do not accept, in principle, that an employee who incurs costs before this Court to successfully defend an appeal should be required to meet these costs from the compensation that is awarded. The Appellant, the Epicurean, will therefore be ordered to pay to the Respondent, Ms. Taylor, prescribed cost on this appeal in the sum of $8,132.00.

ORDER

[44] In the foregoing premises, the Order on this appeal is as follows:

1. The Appeal by the Epicurean, which was filed herein on 8th December 2003, against the Judgment of the Industrial Court that was given on 7th March 2003 is dismissed.
2. The Appellant shall pay to the Respondent, Ms. Taylor, the sum of $42,802.74, as compensation for unfair dismissal, within one (1) month from today's date.
3. The Appellant shall also pay to the Respondent prescribed cost on this appeal in the sum of $8,132.00.

Hugh A. Rawlins
Justice of Appeal (Ag.)

I concur

Brian Alleyne, SC
Justice of Appeal

I concur

Michael Gordon, QC
Justice of Appeal (Ag.)