ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.29 OF 2004

BETWEEN:

JEWELLERS WAREHOUSE

Employer/Appellant

and

CECILE NORDE

Employee/Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Gerald Watt, QC, with him Dr. David Dorsett for the Employer/Appellant
Mr. Hugh C. Marshall Jr., with him Mrs. Cherissa Roberts-Thomas for the Employee/Respondent

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2006: March 6; 7;
November 27.

JUDGMENT

[1] RAWLINS, J.A.: This is an appeal against a decision in which the Industrial Court held that the appellant, Jewellers Warehouse,[1] unfairly dismissed the respondent, Mrs. Nordé. Consequently, the Industrial Court awarded Mrs. Nordé compensation in the sum of $160,030.77.

[1] Hereinafter referred to as "Jewellers".

The relevant facts

[2] Jewellers and related companies employed Mrs. Nordé from 1989 to November 2001 when she was summarily dismissed. She was promoted to Store Manager in November 1996. In that capacity, her duties included the opening, closing and everyday running of the store; staff training; the display of merchandise and ensuring that the cash taken for the day was correct and banked. She was responsible for the general management of the store and its inventory. She was also responsible for the care and security of the inventory of merchandise; for cataloging the inventory and for ensuring that the items were placed on public display in the show-cases and not kept in the vaults.

[3] Other employees, including an Assistant Store Manager, worked under Mrs. Nordé's supervision. They took the merchandise from the vault in the morning and put them into the display cases and returned them to the vault at the end of the day. They took a physical count of the merchandise in the morning and also in the evening after the store closed and the items were placed in the vault. A physical count of all of the merchandise was also conducted every quarter with the assistance of the staff. It was Mrs. Nordé's duty to ensure that these employees carried out their duties efficiently and in accordance with set policies and procedures. The Assistant Manager was totally responsible when she (Mrs. Nordé) was not on duty. Mrs. Nordé was in turn responsible to Ms. Sue Ross, Jewellers' Island Manager.

[4] Apparently, Mrs. Nordé performed her duties efficiently, at least until 1998, when, by letter dated 17th September 1998, Ms. Ross wrote to her highlighting various breaches of procedure and policy. Ms. Ross wrote a number of letters to her, subsequently, which complained of alleged breaches of the company's policies in relation to inventory control by Mrs. Nordé. These culminated in a letter dated 28th September 2001, which warned Mrs. Nordé that an immediate improvement was expected in order for her to retain her position.

[5] There followed a letter which terminated Mrs. Nordé's employment with Jewellers with immediate effect. In that letter, which was dated 6th November 2001, Ms. Ross complained mainly of alleged poor inventory management and control and lack of management. It is worthy of note, in passing, that Jewellers were at pains during the trial to make it clear that they did not suspect Mrs. Nordé of any dishonesty.

[6] Jewellers appealed against the decision of the Industrial Court mainly on the ground that the Industrial Court erred in that it failed to hold, on an abundance of evidence, that Jewellers was entitled to dismiss Mrs. Nordé, summarily, under Clause C58(1)(b)[2] of the Antigua and Barbuda Labour Code,[3] because she was incapable of performing the work that she was employed to do. The appeal therefore requires this Court to consider the ambit of Clause C58(1)(b) of the Code. First, however, it is necessary to put the appeal into perspective.

The appeal in perspective

[7] In the Industrial Court, Mr. Watt, QC, learned Counsel for Jewellers, sought, in addition to incapability, to rely on misconduct for which section C58(1)(a) provides, as a ground for the dismissal of Mrs. Nordé. The Industrial Court stated[4] that since section C10 of the Code conclusively binds an employer by the reasons which the employer gives for dismissal, misconduct could not be used as a ground for the dismissal of Mrs. Nordé because no allegations of misconduct were included in any communication to her. This question is not a subject of this appeal, but, in passing, I am constrained to express some doubt that section C10 is authority for the statement by the Industrial Court. Mr. Watt did not press this issue seriously before this Court. In any event, no ground was stated in the appeal, which sought to challenge the decision of the Industrial Court on that

[2] See the reproduction of this provision in paragraph 16 of this judgment.
[3] Cap. 27 of the Revised Laws of Antigua and Barbuda, 1992, hereinafter referred to as "the Labour Code".
[4] At paragraph 22(d) of the judgment.

ground of misconduct. Ground 10 of the appeal, however, seeks to impeach the decision of the Industrial Court on the ground that that Court erred when it failed to find, on the abundance of the evidence, that Jewellers was entitled to dismiss Mrs. Nordé summarily for incapability under section C58(1)(b) of the Code.

Appeal from factual findings

[8] Mr. Watt agreed that essentially, the appeal seeks to impeach the fact-finding of the Industrial Court. According to Mr. Watt, Jewellers is not asking this Court to overrule the Industrial Court's finding of fact in the face of conflicting testimony, or to substitute its own findings for the findings of that Court. Instead, he said, the Industrial Court failed to draw any, or the proper inferences from the facts before it and failed to evaluate the facts before it properly.

[9] Mr. Marshall, learned Counsel for Mrs. Nordé, submitted that this Court cannot entertain this appeal because section 17 of the Industrial Court Act[5] does not permit appeals from the facts as the Industrial Court finds them.

[10] The side-note to section 17 states "Appeal on point of law". However, side-notes have no bearing on statutory interpretation. Legislation is to be construed in the context in which the words that are the subject of interpretation are used.

[11] Section 17(1) of the Industrial Court Act sets out the only grounds on which a party may appeal as of right against a decision of the Industrial Court. Under section 17(1)(a), a party may appeal on the ground that the Industrial Court had no jurisdiction in the case. However, this Court may only entertain an appeal on this ground if the party had formally objected to the proceedings before the Industrial Court made the order or award appealed against. Section 17(1)(b) permits an appeal on the ground that the Industrial Court exceeded its jurisdiction in the matter. Section 17(1)(c) permits an appeal on the ground that the order or award

[5] Cap.214 of the Revised Laws of Antigua and Barbuda, 1992.

of the Industrial Court was obtained by fraud. Section 17(1)(d) permits an appeal on the ground that a decision or finding by the Industrial Court is erroneous in point of law. Section 17(1)(e) permits an appeal on the ground that "some other specific illegality, not hereinbefore mentioned, and substantially affecting the merits of the matter, has been committed in the course of the proceedings".

[12] Mr. Watt submitted that section 17(1)(e) of the Industrial Court Act permits an appeal against facts as found by the Industrial Court. In my view, where as in the context of this case, an employer, pursuant to the proviso to section C58(1)(b) of the Code,[6] is to provide a factual basis for the reason assigned for the dismissal of an employee on the ground of incapability, a finding that is based on no evidence or a finding that does not construe the evidence in accordance with the correct legal principles or provisions would amount to an illegality, which could substantially affect the merits of the case. This Court could not allow that illegality to stand. I am confirmed in this view by the approach of this Court in the case Antigua Commercial Bank v Mary White.[7]

[13] In the Mary White case, the Industrial Court awarded $268,000.00 compensation to Mrs. White for unfair dismissal by the Bank. This Court reduced the award to $226,529.30, *inter alia*, by striking out the award that the Industrial Court made for loss of pension rights. This was done because this Court found that there was no evidence upon which the Industrial Court could have properly made this particular award. In so finding, Bishop JA stated:[8]

> "There was no evidence on which this Court could properly have made an award for loss of pension rights. There was no indication whatever from the terms of employment, that Mary White would have been entitled to any such rights and she did not provide cogent testimony discharging the burden of proving such a loss. This Court was not in a position to do other than make an unwarranted guess about a period for which Mary White was likely to remain in employment without a pension scheme, as seemed to have been done by the Court below, when it indicated that it was guided by the Mono Pump case (supra), in its consideration of this head."

[6] This is reproduced in paragraph 17 of this judgment.
[7] Antigua and Barbuda Civil Appeal No. 1 of 1988, hereinafter referred to as "the Mary White case".
[8] At paragraph 3 of page 48 of the judgment.

[14] It would therefore be a vitiating illegality under section 17(1)(e) of the Industrial Court Act, where the Industrial Court finds facts or draws inferences for which there is no evidential basis, if the facts so found substantially affect the merits of the matter. It would also be a vitiating illegality where the Industrial Court does not consider the facts in the light of the applicable principles or statutory provision. The illegality would be an error committed in the course of the proceedings for the purposes of section 17(1)(e), since the proceedings would only be at an end after judgment is delivered and the Court is *functus*.

[15] The requirement in section 17(1)(e) that the vitiating illegality must be one "substantially affecting the merits of the matter" means that the illegality must have adversely affected the central issue or issues around which the appeal revolves. However, similarly to the common law principles, the jurisdiction to allow an appeal pursuant to section 17(1)(e) is exceptional and should only be exercised in those exceptional circumstances. Even outside of section 17(1)(e), this Court could not permit a decision to stand, where, for example, there is no evidence upon which a reasonable tribunal could have arrived at that decision or where the factual conclusions are clearly at variance with the evidence. The burden is upon the appellant to satisfy this Court that it should exercise its exceptional jurisdiction to reverse the impugned decision.

[16] In its true perspective, the thrust of Jewellers' appeal is that if the Industrial Court had properly construed the evidence, particularly the complaints contained in the letters which it (Jewellers) wrote to Mrs. Nordé between 1998 to 2001, that Court would have found that her dismissal was fair because she was "irredeemably incapable" of performing the work which she was employed to do. This Court is required to determine whether, considering the evidence in the light of section C58(1)(b) of the Code, there is sufficient ground for interfering with the Industrial Court's decision that Jewellers unfairly dismissed Mrs. Nordé.

The ambit of Clause C58(1)(b)

[17] Section C58(1) sets out various grounds on which the dismissal of an employee could be fair. Section C58(1)(b) and the proviso to C58(1), which is also relevant for the purposes of this case, state:

> "C58(1). A dismissal shall not be unfair if the reason assigned by the employer therefor
>
> (a) ….;
>
> (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section C59(5);
>
> (c) …;
>
> (d) …; or
>
> (e) …:
>
> Provided, however, that there is a factual basis for the assigned reason."

[18] Because of the cross-reference with section C59(5), it is necessary to reproduce the latter, which states:

> "C59(5). Where 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 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 a satisfactory manner, the employer may terminate the employment of the said employee."

[19] The question that arises is whether it is mandatory for an employer who wishes to terminate the employment of an employee under section C58(1)(b) of the Code to follow the procedure set out in section 59(5). Standing on its own, section 59(5) is directory and not mandatory. At first blush this sub-section appears to confer on an employer a discretion either to give or not to give the written warning to an employee who is not performing efficiently. However, because of the rules of natural justice there is no option but for an employer to give a written warning.

[20] When read with section C58(1)(b) of the Code the requirements of section C59(5) are mandatory in that where incapability is given as the basis for termination, the

requirements of section C59(5) of the Code must be satisfied if a dismissal for incapability is to be encompassed "within the limitations of section 59(5)". The written warning must describe the nature of the incapability that is alleged. It must also state the action that the employer intends to take in the event of repetition. The action for which the employee is dismissed must be a repeat of the matter or matters complained of in the warning letter.

[21] As far as time requirement is concerned, section C59(5) permits an employer to terminate the employment of an employee, if during the period of 3 months after receipt of the written warning, the employee does not demonstrate that he or she is able to perform and has performed his or her duties in a satisfactory manner. This, however, does not require an employer to await the expiration of the 3 months after the warning letter before issuing a termination letter in a case, for example, in which alleged injurious or wrongful acts by an employee are repeated.

Did the Industrial Court err?

[22] As far as its judgment is based on the issue of incapability, the Industrial Court did not analyze the evidence in the light of section C58(1)(b) as read with section C59(5) of the Code. That Court did not consider whether, for the purposes of the proviso to section C58(1) of the Code, there was a factual basis for Jewellers' assertion that Mrs. Nordé was no longer capable of performing the work that she was employed to do in a satisfactory manner. It did not consider whether Jewellers met the warning, repetition and time requirements of section C59(5) of the Code. The Court simply stated[9] that while it accepted the evidence of the parties, it found it difficult to understand why after a period of about 11 years with Jewellers, 3 of these as manager, "and not found wanting", Mrs. Nordé should come "under fire" and "painted as being irredeemable (sic) incapable to perform her tasks". The Industrial Court also noted[10] that in her evidence, Mrs. Nordé said

[9] At paragraph 34 of its judgment.
[10] At paragraphs 35 and 36 of its judgment.

that the complaints and allegations against her related to checks that were made when she was absent on vacation, due to illness or otherwise, and for which she was not responsible. The Court believed Mrs. Nordé and thought that these were satisfactory explanations that exonerated her.[11]

[23] The Industrial Court then proceeded to consider the principles that might apply where a downturn in sales is advanced as a ground for termination.[12] This was however irrelevant, because no such ground was advanced for the termination of Mrs. Nordé's employment. Rather, it was Mrs. Nordé who alleged that Jewellers may have terminated her employment in order to cut their wage bill after the events of 11th September 2001 caused a downturn in sales. This allegation remained in the realm of speculation throughout the proceedings. The Industrial Court further proceeded to consider warnings,[13] but expressly in the context of section C59(2), rather than in that of section C59(5) of the Code. This was in error because section C59(2) relates to misconduct rather than to incapability, which is the sole ground of appeal.

[24] The Industrial Court then referred to a suggestion that employers sometimes terminated the employment of senior staff in order to avoid paying high wages and condemned the practice.[14] This statement was speculative. The Court stated, finally,[15] before calculating the quantum of compensation:

> "In arriving at a decision I carefully reviewed and analyzed the evidence of the parties and noted their demeanours. I considered the authorities cited and the provisions of the Labour Code, the Industrial Court Act, Cap. 214 and the relevant case law and endeavoured to arrive at a decision that is fair, just, equitable and in the best interest of good industrial relations and the community as a whole and find that the dismissal was unfair."

[11] See paragraph 37 of the judgment.
[12] In paragraph 37(e) of its judgment.
[13] In paragraph 37(f) of its judgment.
[14] In paragraph 39 of its judgment.
[15] In paragraph 40 of its judgment.

The Industrial Court did not analyze the facts in order to determine whether, on the evidence, Jewellers had unfairly dismissed Mrs. Nordé for incapability within the meaning of sections C58(1)(b) and 59(5) of the Code. In the premises, the Industrial Court failed to consider the facts dispassionately and accordingly erred.

[25] I could suggest that this case should be remitted to the Industrial Court for that Court to consider the evidence by reference to sections C58(1)(b) and 59(5) of the Code. However, inasmuch as the evidence was already before this Court, and in the interest of time, I shall proceed to make this determination.

Was Mrs. Nordé unfairly dismissed for incapability?

[26] The provisions of sections C58(1)(b) and 59(5) of the Code require the court to make 2 broad inquiries in order to determine whether that Mrs. Nordé was unfairly dismissed. The first is whether Jewellers' warning letter(s) or letter of dismissal met the warning and notice of intended action in the event of repetition requirements. The second is whether during the 3 months following Mrs. Nordé's receipt of the warning letter(s) she demonstrated that she was able to perform and in fact performed her duties satisfactorily.

Warning and notice of intended action

[27] The reason for dismissal would be irrelevant, within the requirements of section C59(5) of the Code, unless it was given in a prior letter issued no more than 3 months prior to the termination letter. Additionally, the prior letter must have contained a warning and an indication of the consequences, including possible termination, if Mrs. Nordé repeated the shortcomings which formed the bases for the reasons for the warning in the prior letter. Jewellers were required to give Mrs. Nordé a reasonable time within the 3 month period to demonstrate that she was able to perform and had performed her duties satisfactorily. In my view the period between the September 2001 letter and the termination letter was a reasonable

time, given that Jewellers' business deals with valuable merchandise. The previous letters which fell within the 3 month period were those dated 14th August 2001 and 28th September 2001. In her letter of 14th August 2001, Ms. Ross demanded an immediate improvement in Mrs. Nordé's inventory control, but made no statement regarding the consequence for repeated breach.

[28] In the September 2001 letter, Ms. Ross complained about the sale of a ring at Jewellers at a 50% discount sale price. The ring was sold at a time when Jewellers had that sale. The ring was in fact for the stock of Columbian Emeralds International, a related company, which did not have a sale. The ring was therefore sold in the discount sale in error. In the September letter, Ms. Ross agreed that the error did not originate at the store level. She opined, however, that the discounted sale of the ring would not have occurred had Mrs. Nordé and her staff been vigilant in checking the prices of items and were not negligent in following inventory procedures. The letter stated that her inability to manage the inventory, which was documented in numerous letters over the past year was adversely affecting revenue and constituted a substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position of store manager. In conclusion, the letter stated:

> "The error cost the company $847.50 at a time when business is already at an all time low, and once again shows your negligence when it comes to controlling your inventory. An immediate improvement is expected in order for you to retain your position."

[29] In the termination letter dated 6th November 2001, Ms. Ross recalled that on 24th October 2001 senior management personnel of Jewellers conducted the quarterly store visit. The President of the company asked to see the back-up stock of silver. It appeared that Mrs. Nordé was unable to open the vault and took more than 10 minutes to use the combination to the vault. When the vault was finally opened there was an amount of jewelry in it which was not represented in the showcases. The letter continued:

> "Our inventory will never sell from the vault as neither the customer or the sales associates would be aware that it was available. With business at a

> critically low level this is totally unacceptable. During the last year your negligence with inventory control has been documented on numerous occasions and it is felt that the exceptionally low figures in your store are a direct link to your lack of management. Your inability to manage the inventory is having an adverse effect on the revenue that the store has been able to generate and constitutes a substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position of store manager. Accordingly, we are left with no alternative but to terminate your services with immediate effect. We wish you success in your future endeavors."

[30] Before the Industrial Court, Mr. Marshall detailed the reasons which the November 2001 letter gave for the termination of the employment of Mrs. Nordé as follows:

i. When Senior Management visited the store on 24th October 2001, Mrs. Nordé seemed to be unable to open the vault for a period exceeding 10 minutes.

ii. The amount of jewelry that was stored in the vault was not represented in the showcase.

iii. During the last year Mrs. Nordé's negligence with inventory control was documented on numerous occasions.

iv. The exceptionally low figures (revenue) in the store were a direct link to her lack of management.

v. Mrs. Nordé's inability to manage her inventory was having an adverse effect on the revenue of the store.

[31] This, with respect, was an artificial and disjointed detailing of the reason. For the purpose of section C58(1)(b) of the Code, the reasons proffered for the dismissal could be identified holistically. In my view, the reason detailed at (v) above encapsulates the other allegations. The crux of the allegations is poor management by Mrs. Nordé, and, in particular, inability to manage her inventory, which, according to the letter, was documented on numerous occasions during the past year.

[32] Poor inventory control and poor management were the breaches alleged against Mrs. Nordé in the September 2001. These were also the essential allegations

contained in the termination letter. In the September 2001 letter, Jewellers demanded an improvement if Mrs. Nordé were to retain her position. This was, in effect, a lay-person's warning that her employment could have been terminated in the event of a repetition of the breach complained of. On the face of it, therefore, there are bases upon which the warning and repetition requirements of section C58(1)(b) as read with section C59(5) of the Code were satisfied.

[33] The critical question then, is whether Jewellers had could have determined that at the time of her dismissal, Mrs. Nordé had not demonstrated that she was able to perform and had performed her duties in a satisfactory manner.

The test

[34] Because employers should not be unreasonably impeded in the efficient management of their business, courts have consistently held that the question whether an employee is capably performing his or her duties is to be determined on a subjective test. That test was succinctly stated in David Lashley & Partners Inc v Bayley[16] as follows:

> "If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonable held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent. … In other words, the test … is a subjective one … it is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent."

[35] In my view, the same rationale and, consequently, the same principles are applicable where the court is required to determine, on the basis of section C59(5) of the Code, whether an employee has demonstrated that he or she is able to and has performed in a satisfactory manner. In this case, therefore, the question is whether Jewellers, as a reasonable employer, honestly and reasonably believed that Mrs. Nordé was incapable and had not demonstrated at the time of her

[16] (1992) WIR 44, at page 46h-j, relying on the test set out in Selwyn's Law of Employment (6th Edition), paragraph 8-114.

dismissal that she was able to perform and had performed her duties in a satisfactory manner. Mrs. Nordé would have been unfairly dismissed if there is evidence of unreasonableness or bad faith on the part of Jewellers.

Applying the test

[36] In her evidence in the Industrial Court, Mrs. Nordé denied that she was responsible for the error complained of in the termination letter because Head Office made the original mistake. According to Mrs. Nordé, she brought the mistake to the attention of Head Office and she corrected it by re-tagging the ring for the price of $1,695.00 on instructions which she received from Head Office. However, the person who sold the item re-tagged it at US$847.50 and it was sold at half that price.

[37] In her evidence at the trial, Mrs. Nordé said that on 24th October 2001 she was at work but had an emergency. The result was that she left early that morning and returned at about 4:30 in the afternoon. The President of the company said that he understood that she had "tons of silver" in her vault and asked her to open it. She had some difficulty opening the vault because someone had interfered with the combination. After it was opened, the President took out some trays with silver bracelets, took them to the area where the bracelets were displayed and pointed out 1 or 2 bracelets that were not in the display case. He said that they should be put on display, but told her that her store looked wonderful and that she should continue to do a good job and get the figures up.

[38] Ms. Ross insisted, on the other hand, that the ring should have been tagged at US$3,900.00. It would then have sold for US$1,695.00. Instead, it was tagged for US$1,695.00 and sold for US$847.50. She further stated that the loss on the sale of the ring could have been averted if Mrs. Nordé had exercised better inventory and management control. This is the same complaint that Ms. Ross had made in the warming letter, and had repeatedly stated over a period of time.

[39] Bad faith was not pleaded and there is no evidence of it in the case. In relation to the question of reasonableness, the central allegation contained in the warning letter was the essence of the reason that Jewellers gave for terminating Mrs. Nordé's employment. It is an allegation that was chronicled in numerous letters to Mrs. Nordé. In all of the circumstances of this case, it is my view that Jewellers, as a reasonable employer, could have honestly and reasonably held the belief that Mrs. Nordé had not demonstrated at the time when they terminated her services that she was able to perform and had performed her duties satisfactorily. The result is that I find that the employment of Mrs. Nordé was fairly terminated on the ground of inability to perform her duties. I would therefore allow the appeal, set aside the judgment of the Industrial Court and make no award as to costs since there are no special circumstances to warrant it under section 10(2) of the Industrial Court Act.[17]

Hugh A. Rawlins
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

[17] Cap. 214 of the Laws of Antigua and Barbuda, Revised Edition, 1992.