

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 21 OF 2000

BETWEEN:

BEVERLYN HENRY

Employee

and

MARKET POINT SUPERMARKET LIMITED

Employers

Before:

The Hon. Cyril L. Maundy

President

The Hon. Edward T. Henry

Member

The Hon. Genevieve Benjamin

Member

Appearances:

Lenworth Johnson, Attorney-at-Law, for the Employers

Keithlyn Smith, of the Antigua & Barbuda Workers Union, for the Employee

2002: November 4, 5 & 6

JUDGMENT

Unfair Dismissal – Summary Dismissal – Warning – Accounts Clerk and Supervisor took a day off from work without permission – Employee believed permission to take the day off was not required as she was not being paid for same – no previous problems with Employee.

Historical Background

- [1] Maundy, P.: This matter concerned a Trade Dispute between the parties and was referred to the Court by the Minister of Labour, Mr S.C.O. Benjamin.
- [2] In her Memorandum dated May 15, 2000, and filed on May 17, 2000, the Employee alleged that she was Unfairly Dismissed by the Employers on September 4, 1997, and claimed compensation for Unfair Dismissal.
- [3] In their Memorandum dated September 27, 2000, and filed on the said date the Employers denied that the dismissal was unfair and alleged that the Employee was guilty of an intolerable usurpation of the authority of the General Manager and that this was inconsistent with her status as an employee and this could not be allowed under any circumstances.
- [4] The Employers operate a supermarket in St John's and on February 17, 1994, the Employee commenced working with them. On September 4, 1997, the Employee was summarily dismissed on the ground that she was guilty of an intolerable usurpation of the authority of the General Manager.
- [5] The supermarket operated a shift system and, as part of her duties, the Employee would inform the person who prepared the work schedule, Miss Nakeishai Joseph, whenever a member of staff was going to be unavailable for a shift.
- [6] At the time of the dismissal the Employee was an Accounts Clerk and Supervisor. The Company was managed by Belgrove Gregory, a part owner,

whose sister, Ada Browne, was, unknown to the Employee, also a part owner – Ada Browne visited the supermarket from time to time but the Employee was not aware of her status or interest.

The Employee worked a six day week and was the prominent person in the operations: whenever anything went array she would be called upon even if she was at home or it was nightfall.

- [7] On Saturday, August 30, 1997, the Employee went to a family wedding and did not report for work. However, prior to doing so she had some time before informed Miss Joseph that she was not going to be at work on that day. The Employee did not request or obtain the permission of Mr Gregory to take the day off and thought she was not obliged to do so as she was not being paid for the day. Also, she said that Mr Gregory knew that she was going to the wedding.
- [8] The Employee used to make and sell cakes and supply souvenirs for weddings.
- [9] The Employee was not scheduled to work on Sunday, August 31, but reported for work on Monday, September 1, 1997, and while working was summoned to his office by Mr Gregory who wanted to know why she did not report for work on the Saturday. Mr Gregory accused the Employee of using his time to fix her business but this she denied and argued that as she was not being paid for the time she believed she could take the day off. Finally Mr Gregory told the Employee to go and seek advice and ascertain whether she was justified in taking the day off without his permission.

[10] It does not appear that the Employee was ever given a Job Description or was ever told she had to obtain Mr Gregory's permission before she could take any time off from the job.

[11] The Employee worked the Monday, the Tuesday and the Wednesday and while at work at about 10:00am on the Thursday, Mr Gregory called her to his office and asked her if she had sought the advice as he intimated. The Employee replied in the affirmative and told Mr Gregory that she was not wrong. The Employee went back to work and later went to lunch. On her return from lunch Mr Gregory was sitting in the Employee's office. He called her over to him and gave her a letter terminating her employment with immediate effect.

Triable Issues

[12] The matters here for determination in my view appear to be whether:

- (a) The Dismissal was Unfair
- (b) A warning was not an appropriate remedy
- (c) The Employee contributed to the dismissal
- (d) The Employee erred in concluding that since she was not being paid for the day off she was not required to seek permission if she wanted to take the time off.

The Arguments

[13] Mr Johnson, on behalf of the Employers, asked the Court to find that the Dismissal was not unfair and contended that, inter alia:

- (a) The employment relationship could not reasonably be expected to continue
- (b) The Court should infer from the evidence that the time the Employee took off was to pursue her commercial business in providing cakes and souvenirs for a wedding as part of her personal business
- (c) As a mature person the Employee should have known that she needed permission to absent herself from work
- (d) By her act the Employee had changed the terms of her employment
- (e) The Court should ask itself how could the Employers operate business if the Employee were allowed to take time off whenever she cared or only come to work when she cared
- (f) Mr Gregory acted reasonably in the circumstances in taking the decision to dismiss and the Employee's conduct was an intolerable contravention
- (g) In the alternative, the Employee's actions fell within the ambit of Section C.58(1)(e) of the Antigua and Barbuda Labour Code (hereinafter referred to as "the Labour Code") and the above reasons relating to Section C.59(2) apply, i.e. the Employee's position and stance were new terms and conditions of employment expressed after she had received advice is a term so radical in nature that it constituted a fundamental breach of the said employment relationship
- (h) Section C.59(2) is not applicable as the conduct complained of was sufficiently serious to warrant dismissal and not a mere warning

- (i) Even if the Employee did not receive a Job Description she knew what her duties were.

[14] Mr Smith differed from Mr Johnson and asked the Court to find that the dismissal was unfair. Mr Smith contended that, inter alia:

- (a) The Employers did not adduce any evidence to show that they suffered any loss or disruption as a result of the Employee having taken the day off
- (b) The Employee did not attempt to create any new terms and conditions of her employment
- (c) The reasonable course for the Employers was to send the Employee a warning within Section C.59(2) of the Labour Code. It was the first incident of its kind by the Employee.
- (d) The Employers acted hastily in dismissing the Employee
- (e) The Employee was entitled to payment for her "years of service" and such awards as the Court considers fair, just and reasonable.

The Law

[15] The Law relating to Unfair Dismissal is contained in Section C.56, C.57 & C.58 of the Labour Code. By Section C 56 every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by the employers and no employer shall dismiss any such employee without just cause.

[16] Section C 58 (1) Provides that a dismissal shall not be unfair if the reason assigned by the employer therefor:

- (a) Relates to misconduct of the employee in the job within the limitations of Section C.59 (1) & (2).
- (b) Relates to the capacity or qualification of the employee to perform work of the kind he was employed to do within the limitations of Section C. 59(5).
- (c) Is that the employee was made redundant.
- (d) Is that the employee could not continue to work in the position he held without contravention (on his or the employers part) of a requirement of law; or
- (e) Prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held.

Provided however that there is a factual basis for the assigned reason.

- [17] Section C 58 (2) lays down the test to be applied in determining whether a dismissal is reasonable.

Decision

- [18] To my mind the issues here for determination are quite clear and I am surprised that the matter was subject to such lengthy examination. Provision of a Job Description would have been of some assistance to the Court but failure by the Employers to provide same is not detrimental to their cause although the conditions of the Labour Code are to be complied with by all.

- [19] It appears that the dismissal was not for the fact that the Employee had taken the day off from work without firstly obtaining permission from her superior, Mr Gregory, but as admitted by Mr Gregory himself, because she believed she

was entitled so to do since she was not being paid by the Employers for the time. Mr Gregory of the Employers took grave exceptions to the Employee's views and terminated her employment with immediate effect.

- [20] The Labour Code does not prohibit dismissal by an Employer and there are express instances when a dismissal can be done with impunity but an employee who has completed his probationary period has a right not to be unfairly dismissed or to be dismissed except for a just cause and the dismissal is required to be based on reasonable grounds.
- [21] This Court has said from time to time that Dismissal should be an ultimate punishment to be applied when all else has failed. Indeed the Labour Code can be said to so state as can be inferred from reading Section C.59(2) where it is stipulated that when the wrong committed is not sufficiently serious to warrant dismissal the Employee may be given a written warning with a life span of six (6) months.
- [22] Counsel for the employers sought to persuade the Court to find that the Dismissal was fair but after much consideration, taking all the circumstances into account, the provisions of the Labour Code and the Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992, I do not find that a case has been made out to this effect and thus I find that the Dismissal was Unfair.

The Award

- [23] A person the victim of an Unfair Dismissal is entitled to compensation under the established heads and the compensation here is as follows:
- (a) Basic Award – Under this head the Employee is entitled to one month's pay at her latest basic wage for each year of service or substantial part thereof. At the time of the dismissal the Employee's basic wage was \$ 1,500.00 per month and she had been in the employ of the company from February 17, 1994, and was dismissed on September 4, 1997. Thus, the award under this head is \$ 1,500.00 x 4 = \$ 6,000.00.
 - (b) Immediate Loss – After the dismissal the Employee tried to find employment and made application to a number of businesses but without immediate success. The Employee was unemployed for five months before obtaining a job at Willy D Enterprises in the sum of \$ 650.00 per week. Of the five months she was out of work approximately three were spent in Antigua and the remainder on vacation in the United States and thus the award will be limited to loss of pay for three months, i.e. \$ 4,500.00.
 - (c) Vacation Pay – At the dismissal the Employee was owed two weeks Vacation Pay or \$ 750.00 and was indebted to the Employers in the sum of \$ 200.00.
 - (d) There shall be no award under the heads of Manner of Dismissal or Future Loss.

Conclusion

- [24] The Dismissal was Unfair and the Employers shall pay to the Employee the sum of \$ 11,250.00 less \$ 200.00 = \$ 11,050.00, payment to be made by

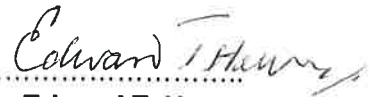
the 20th day of December, 2002
There shall be no Order as to Costs.

DATED the 15th day of November 2002



Cyril L. Maundy
President

I concur



Edward T. Henry
Member

I concur



Genevieve Benjamin
Member