

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 35 OF 2000

BETWEEN:

ROGER RICHARDS

Employee

and

DREAM COMPANY LIMITED

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. Edward T. Henry
The Hon. Hubert Hood

President
Member
Member

Appearances:

Mr Clare K Roberts, Solicitor for the Employers
The Hon. Baldwin Spencer for the Employee

2000: August 24 & 25.

JUDGMENT

Unfair Dismissal – Summary Dismissal – reasons for dismissal not requested or given at time of dismissal – reasons for dismissal requested 26 days after dismissal – the Antigua and Barbuda Labour Code Sections C.2(1), C.5(1), C.6, C.7, C.9(3)(b), C.21, C.57. – Engineer and mechanic employed by hotel with no supply of electricity and water except its own generating plant and Desalination plant to maintain same and also its vehicles summarily dismissed – Employee lived in

Employer's premises and given less than 8 hours to vacate – defective written contract of employment.

- [1] **MAUNDY, P.:** This matter was referred to the Court by the Honourable S.C.O. Benjamin, Minister of Labour. In a Reference dated February 29, 2000, and filed on March 2, 2000, it is alleged that there was a Trade Dispute between the Employers and the Employee. In his Memorandum dated July 19, 2000, and filed on July 20, 2000, the Employee alleges that he was dismissed by the Employers on April 30, 1998, that the dismissal was unfair, wrongful and unjust and he is entitled to compensation. By their Memorandum dated August 17, 2000, and filed herein on even date the Employers contend that the Employee was employed under a contract of Employment, that they terminated the employment within the terms of the contract and that the Employee was not entitled to any compensation or other relief.

Historical Background

- [2] The Employee, an Antiguan national, took up employment at the K-Club in Barbuda, an hotel owned by the Employers, The Dream Company Limited, as Assistant Chief Engineer.
- [3] The hotel was not served with a public supply of electricity or water and had its own electricity generating plant and desalination plant, both of which were maintained by the Employee – he also maintained the hotel's motor vehicles.
- [4] The Employee, who used to live in Antigua, relocated to Barbuda and on December 1, 1996, took up residence in a furnished house on the hotel compound owned by the Employers.
- [5] When he commenced working at the hotel the parties signed a document purporting to be a contract of employment which stated that he would receive a salary of EC\$ 3,000.00 per month, that its duration was from "December 1, 1996, on an

annual basis in case of resignation by either party, a one month notice is required”; one day’s holiday per month plus 2 days off per week but he may be required to work 7 days per week “according to the work charge”; and that meals and accommodation were to be provided by the Employers. See Exhibit RR1.

- [6] The Employee performed his duties satisfactorily and no complaints were ever made about his work or conduct and he was never sent any warning letters or subject to any disciplinary action.
- [7] During the course of his employment the Employee once became ill and was absent from work for 2 months: during this time, however, he was paid his salary less monies he received under the Antigua and Barbuda Social Security Scheme – no evidence was adduced as to whether these monies included monies received under the Points System in operation at the hotel.
- [8] At about 9:30 to 10:30am on April 30, 1998, the Employee was carrying out his daily duties when the Area Chief Engineer, Sam, came to his Department and told him that the General Manager wanted to see him. The Employee went to the General Manager’s office where he met the General Manager and was joined by Trevor Walker and the Chief Accountant. The General Manager told the Employee that his services were being terminated and gave him a letter stating that his “contract was being terminated with immediate effect and that he would be paid one month’s salary in lieu of notice. The Employee was given until 4:30pm to get off the compound and for the remainder of the day a Security Officer followed him wherever he went and observed what he did. The Employee never asked for the reasons for his dismissal nor were any reasons given by the Employers.
- [9] Pursuant to the dismissal the Employee collected his possessions and vacated the premises, taking up residence elsewhere in Barbuda.

- [10] Immediately after the dismissal the Employee, believing he could be successful, set up his own business in Barbuda and started to practice his occupation and used to repair cars, washing machines and generators but his income from these was only EC\$ 250.00 per week. The Employee remained self-employed for 4 months after which he took up employment with the Sand Company (Sandco) at EC\$ 700.00 per week. The Employee worked at Sandco for 3 months and then went to work at J&P at a salary of \$ 900.00 per week – he still works there.
- [11] While working at Sandco and J&P the Employee earned an additional \$ 250.00 per week from private work during his spare time.
- [12] The Employee's girlfriend, Fredericke Boxfils, was Head Housekeeper at the hotel but was dismissed the day before the Employee was himself dismissed. At the meeting with the General Manager, he told the Employee that since his girlfriend had been dismissed and he held such a sensitive position in the company there were concerns as to what he may do as a result of her dismissal.
- [13] Sometime after he was dismissed the hotel's electricity and their desalination plant broke down and they were without electricity and water and the Employee was called upon to assist them, which he did, even though he did not succeed in solving the problem and another firm had to be called in to render assistance.
- [14] The hotel is not a signatory to the Collective Agreement between the Antigua Workers' Union and the Antigua and Barbuda Hotel and Tourist Association governing the conditions and hours of work of hotel employees. The company employs some staff on a twelve (12) month contract which expires at the end of twelve (12) months and is then renewed on a twelve (12) month basis (the "all year round" employees) and employs its other workers on contracts for six (6) months only.

- [15] After his dismissal, the Employee did not seek employment for four (4) months but set up in business of his own from which he earned approximately \$ 250.00 per week.
- [16] In or about August, the Employee took up employment with Sandco (the Barbuda Sand Company) at \$ 700.00 per week and later with another Barbuda based company at \$ 900.00 per week and is still there employed.

Triable Issues

- [17] Under the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, on termination of his employment, an employee is entitled to be given the reason for the dismissal and the question here is whether the failure to give the reason renders the dismissal void.
- [18] The Employers contended that the Employee was employed under a written contract for one year but that the contract provided for termination by either party on the giving of one month's notice. Also, that they were not in breach of any of the provisions of the Labour Code or any prevailing Industrial Relations practice and it has to be determined whether these contentions are correct and if so whether they rendered the dismissal fair.
- [19] Is the document signed by the parties (Exhibit RR1) at the time the Employee commenced the employment a valid "contract", did that "contract" come to an end but was renewed for another year (as a new and separate Contract), did it fall within the ambit of C.57 of the Antigua and Barbuda Labour Code, hereinafter referred to as "the Labour Code", or was it defective, invalid, unenforceable and of no substance?
- [20] Also for examination are whether the dismissal was harsh, contrary to good industrial relations, good labour practice, the national policy and whether the

reasons for the dismissal, if there are any, were such as to make the dismissal reasonable in the circumstances.

The Arguments

- [21] Mr Roberts took the view that the document signed by the parties at the time of the engagement was a valid written contract within Section C.57 of the Labour Code and was properly terminated. Counsel contended that the first contract came to an end one year from commencement and at the time of the dismissal there was in operation a new separate and distinct contract that came into effect on December 1, 1997. Also, that the Employee was under no illusion about the termination provision of the "contract".
- [22] Mr Roberts submitted that:
- (a) The reason for the dismissal was that the day before his dismissal the Employee's girlfriend was dismissed and the owners of the hotel did not consider it safe for him to continue in their employment having access, as he did, to such sensitive areas as their water and electricity supply and their motor vehicles.
 - (b) The "contract" did not infringe upon Section C.57 of the Labour Code and was valid thereunder.
 - (c) That by C.9 of the Labour Code an employer can terminate the employment of an employee by giving him Notice as there set out and this is what the employers did.
 - (d) That the Employee was given the reasons for the dismissal in that rumours of the intended dismissal reached his ears..
 - (e) If, in any event the Court were to find that the dismissal was unfair the Employee would be entitled only to the wages he would have earned during the notice period, in this case one month – Denmark Productions Limited V Bascobed Productions Limited (1969) 1QB 699.

- (f) The amount of any Award must be reduced by any mitigating circumstances by the Employee which occurred or might have occurred – *Yeptons V Eastwoods Froy Limited* (1966) WLR 104
- (g) That the Employee did not mitigate his loss.
- (h) An Employee is debarred from receiving compensation if he fails to take all reasonable steps to find alternate employment.

[23] Mr Spencer was adamant that the dismissal was unfair and contended that, inter alia:

- (i) The provision in the purported "Contract" that it was automatically renewed annually, if not terminated, was void and the original contract was still in force at the time of the termination and not a new contract purporting to have commenced on December 1, 1998.
- (ii) The letter of employment (RR1) was an attempt by the Employers to circumvent the Labour Code and is null and void.
- (iii) The reasons for the dismissal as contained in Mr Carty's letter of May 26, 1998 (Exhibit AC1) were never given and this was a breach of Section C.2(1) of the Labour Code.
- (iv) It was no defence for the Employers to say that the dismissal was fair as, in view of their dismissal of the Employee's girlfriend the previous day, they were compelled to terminate his employment as they had concerns for the safety and protection of their electricity and desalination plant and their motor vehicles, these being highly sensitive areas in which the Employee had worked.
- (v) Section C.57 of the Antigua Labour Code does not apply.
- (vi) The Employee was entitled to compensation for Unfair Dismissal, the value of his lost meals, compensation for re-location and vacation pay.

The Law

- [24] The Labour Code, in Sections C.57 (Contracts), C.58 (misconduct, qualifications, redundancy, contravention of the Law, some other reason that would cause an employee to dismiss) and C.59 provides that, as the Law stood at the time, a number of dismissals shall not be unfair and that in the case of a written contract of employment, this comes to an end on the expiry date and no claim for Unfair Dismissal arises on the effluxion of the duration of the period stated therein.
- [25] Other Sections of the Labour Code that seem to apply to the issues here in question are A.5, C.2(1), and C.10(1) as the Law then was. It is to be noted that Section 10(1) only became effective if the employee, within seven (7) days of the termination or notice thereof, requests a written statement of the precise reason for the action. The effect of non-compliance would operate as an estoppel against the Employer. However, in this particular instance the request was made on May 26, 1998, 26 days thereafter.
- [26] The Labour Code further lays down the test in ascertaining whether the dismissal was unfair. Thus, by Section C.58(2) it is provided, "The test generally for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal.
- [27] However, under our Industrial Relations Jurisprudence an employee who has completed his probationary period with an employer may not be unfairly dismissed: Thus, Section C.56 provides, "Every employee whose probationary period with an

employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."

- [28] As a general rule summary dismissals are carefully scrutinized to see whether the Employers' actions were reasonable in the circumstances, whether there was any consultation or that consultation should have been made, whether the victim of the dismissal was given an opportunity to be heard, and whether in the circumstances a written warning was the appropriate course to take. Provisions for written warnings are contained in Section C.59(2).
- [29] In addition to the foregoing the Court will look at the reasons and circumstances of the dismissal to see if they are in the best interests of good industrial relations.
- [30] Further, the rules of Natural Justice will not be ignored.
- [31] Against the backdrop of the foregoing it has to be borne in mind that an employee who caused or contributed to his dismissal will not go unscathed and an Award made in his favour will be reduced in accordance with his degree of culpability.
- [32] And on the issue of deductions the words of Sir Vincent Floissac, C.J., when delivering the Judgment of the Court of Appeal in the Jennifer Watt Case, Civil Appeal No. 2 of 1992 will be applied where an employee is found to be entitled to compensation, as mentioned in paragraph 3 supra.
- [33] Sections C.57 and C.58 provide thus:
- (a) C.57, "For the purposes of this part, an employee will not be deemed to have been dismissed unfairly if his employment is terminated at the expiration of the term specified at the time of his hire."
 - (b) Section C.58(1): A dismissal shall not be unfair if the reasons given by the Employer therefor:

- (1) relates to misconduct of the employee on the job, within the limitations of Section C.59 (1) and (2);
- (2) 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 C.59(5);
- (3) is that the employee was made redundant;
- (4) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or
- (5) is 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.

- (c) Section C.58(2) has earlier been referred to.
- (d) C.59: "An Employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the employee has:
 - (1) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.
 - (2) committed a criminal offence in the course of employment without the consent express or implied, of the employer; or
 - (3) behaved immorally in the course of his duties."

[34] As a general rule Dismissal/Summary Dismissal should not be ordered for a first offence unless it falls within one of the exceptions, viz, gross misconduct, where the Employee was caught in the act of committing a serious breach of duty or had committed a serious criminal offence. Further, there should be a thorough investigation and consultation before the termination, thereby allowing the Employee to be heard.

- [35] Where a dismissal is found to be unfair the dismissed employee is entitled to compensation under the established heads, viz, Basic Award for Loss of Protection, Immediate Loss, Manner of Dismissal if the dismissal makes him less suitable for employment or a more likely candidate for dismissal, and Future Loss.
- [36] An employee the victim of a dismissal, is under a duty to mitigate his loss by seeking similar or alternative employment and is not entitled to sit at home and “put up his feet” at the expense of the employer. In an appropriate case he is required to resort to self-employment and set up his own business. Failure to do any of the foregoing will result in a deduction from the Award.

The Decision

- [37] The facts of the case are not in dispute and it is accepted by both parties that the Employee was not dismissed on account of a breach of contract or any wrong committed by him. Indeed, the Defence of the Employers is two fold, viz:
- (a) That the Employee was employed under an annual contract which either party could terminate, by giving the other one month's notice or on the Employers giving the Employee one month's pay in lieu of notice, and
 - (b) Following the dismissal of the Employee's girlfriend the previous day, it was reasonable to dismiss the Employee as he worked in sensitive areas of the hotel operations and the owners had concerns as to the damage which he could cause to the hotel.
- [38] Antigua and Barbuda are a unitary State and the Labour Code applies equally to both even though they are separated by water. Consequently an Employer carrying on business in Barbuda is bound by the provisions of the Labour Code even though he may be a hotelier and not a signatory to the Collective Agreement between the hotel owners/operators (The Antigua and Barbuda Hotels & Tourist Association) of the State and the Bargaining Unit of the hotel employees, the Antigua Workers' Union. Consequently, such employers are not at liberty to circumvent provisions of the Code or the requirements stated therein and an agreement or contract, written or

oral, purporting so to do is no more than a nudum pactum and of no effect even if signed by both employer and employee.

[39] Referring to the letter given to the Employee at the time of the engagement, it is my view that even if a person is employed under a written contract, the requirements of Section C.5(a) of the Labour Code have to be complied with and an employer, within ten (10) days of employment is obliged to furnish an employee with a written statement setting forth the matters contained in the Section. The Section provides thus:

- (1) Every person who employs another shall, within 10 days of such employment, furnish said employee with a written statement which shall set forth -
 - (a) the general responsibilities and related duties for which the employee is being employed;
 - (b) the regular hours of work, and rest periods;
 - (c) the starting pay, and method of computing same;
 - (d) the term of employment, if other than indefinite;
 - (e) the period of probation, if any;
 - (f) the employee's leave and vacation privileges; and
 - (g) his obligation, if any, imposed under Section J.13

The document does not state the duties of the Employee or the hours of work and rest periods or the period of probation, if any.

The abovementioned document states that starting December 1, 1996, it shall be renewable on an annual basis but may be terminated by either party in giving one month's notice. And it is the issue of an annual renewal that one finds disturbing and unacceptable.

[40] By Section C.2(6) an employee has an equity in the job and an annual renewal runs contrary to this; it debars him from entitlement for Severance Pay if he has been in the employment for any period in excess of one year and this seems to be contrary to the above provision of the Code and the spirit of good industrial relations. Indeed, to permit the foregoing would be to open the floodgates and, as a famous English Judge said, it is the duty of the Courts to close them. Section C.2(6) of the Code

provides, "As an individual works at a job, he gradually earns an equity therein above and beyond his periodic wages, privilege, and allowances and the maintenance of this equity requires protection" and the "contract" is an attempt to circumvent the provision and take away the Employee's equity.

- [41] It is not disputed that an employee can make a valid and enforceable Written Contract with an employer but I do not find RR1 to be valid and enforceable.
- [42] Under the Labour Code, as the Law was then, Section C.10 apart, a dismissing employer was under a duty to inform the dismissed employee of the reasons for the dismissal and the general understanding is that at the very least some indication of the reasons had to be given at the time of the dismissal except when he was caught "red-handed" as previously stated – under the old Law the Employee could demand a written statement setting out the reasons and failure to do so would act as an estoppel to prevent the employer from leading evidence as to those reasons. However, by an amendment to Section C.10(1) the statement must be furnished within seven days whether or not requested.
- [43] The Employers seem to have taken the view that there was a contract between the Employee and themselves which commenced on December 1, 1997, and which they could terminate without liability on giving one month's notice or by making a payment of one month's pay in lieu of notice and this they did – see Exhibit AC2. This information was given on May 26, 1998, pursuant to a request by the Union representing the Employee. It is a question of fact whether the letter of reply (Exhibit AC2) can be regarded as being a reason for a dismissal.
- [44] It is to be observed that the principal reason given by the Employers is not contained in the letter of reply to the written request of Mr Anderson Carty made on behalf of the Employee on May 26, 2000. This reason first emerged during the course of the Hearing when Trevor Walker, the Assistant Manager, Administration, then the Personnel Manager, said that at the terminating meeting on April 30, 1998, the General Manager gave the reasons.

- [45] I do not find that it is reasonable or a sufficient reason to dismiss a person, and for that matter, summarily dismiss him, because his girlfriend who happened to work for the same employer was dismissed the day before and no evidence was adduced to show that the Employee was guilty of any misconduct or of such a grave and serious nature as to impact upon the Employers and make his dismissal reasonable.
- [46] This is a case of Summary Dismissal and the Court has in the past on more occasions than one expressed its concern re this method of dismissal. A Summary Dismissal can result in grave consequences for an employee as, for example, without notice and an opportunity to seek other employment or make arrangements for his affairs, an employee is suddenly put out of a job; has no income and may have liabilities, e.g. house rent to pay, School Fees and College Fees, Utility Bills, a bank loan, mortgage, instalment payments, to mention but a few.
- [47] In the present case, the Employee was living on the compound and had less than six (6) hours to find new accommodation, make arrangements for his meals and to collect, pack and remove all his belongings.
- [48] No evidence was adduced to show any faults by the Employee in the performance of his duties and no complaints about his job performance or warning letters were ever made or sent to him.
- [49] Taking all the matters into consideration I find that in the circumstances, the dismissal was unfair.

The Award

- [50] A person a victim of Unfair Dismissal is entitled to, inter alia, compensation. The Employee said that subsequent to the dismissal he carried on his own business for the first four (4) months and made an average of \$ 250.00 per week and that this having proved not to be very lucrative bearing in mind his previous earnings he took up a full-time employment with the Barbuda Sand Company, Sandco.

[51] The Award under the four established heads is as follows:

- (a) Basic Award for Loss of Protection – This Award is calculated in a similar basis as Severance Pay and in the case of a monthly paid employee is one month's pay for each year of service. The Award under this head is therefore $\$ 3,000.00 \times 1.5/12 = \$ 4,250.00$ less $\$ 360.00 = \$ 3,890.00$.
- (b) Immediate Loss – For the first 4 months after the dismissal the Employee suffered a loss of $\$ 2,000.00$ per month and when he took up employment at Sandco, this was @ $\$ 700.00$ per week. In the circumstances the entitlement is $\$ 3,600.00 \times 4 = \$ 14,400.00$.
- (c) Manner of Dismissal – No award.
- (d) Future Loss – I would fix a cut off period of 4 months from the date of dismissal and the amount of the award shall be the difference between the earnings from the old employment and that from the new. The amount of the award under this head is therefore $\$ 4,600.00$ less $\$ 3,600.00 = \$ 1,000.00 \times 4 = \$ 4,000.00$.

[52] A dismissed employee is entitled to loss of fringe benefits and in this case the Employee lived on the hotel compound and enjoyed free accommodation and meals. However, no evidence was adduced as to the value of his accommodation. However, I would accept the Employee's version of $\$ 50.00$ per day for a period of 92 days i.e. $\$ 4,600.00$ – The total Award being $\$ 26,890.00$.

[53] From the above a reduction of 20% or $\$ 5,378.00$ is being made so that the net amount payable is $\$ 21,512.00$.

Conclusion

[54] In arriving at this decision careful consideration was given to the evidence adduced, the contentions of counsel, the relevant provisions of the Labour Code, the relevant Case Law and other relevant matters including Section 10(3) of the Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992.

[55] The Employers will pay to the Employee the sum of \$ 21,512.00, payment to be made by the 30th day of November, 2000.

[56] There shall be no order as to costs.

DATED the 28th day of September, 2000


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Cyril L. Maundy
President

I concur


.....
E.T. Henry
Member

I concur


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Hubert Hood
Member