

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 52 OF 2000

BETWEEN:

JASON LAKE

Employee

and

**BLUE CAP ENTERPRIZE LIMITED
T/A TRANS CARIBBEAN MARKETING**

Employers

Before:

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

President
Member

Appearances:

Keithlyn Smith for the Employee
Craig Christopher, Attorney-at-Law, for the Employers

2002: July 11, 12 & 29

JUDGMENT

Unfair Dismissal – abandonment of job – Employee on returning to work after being laid off for three months unable to clock in as no time card had been prepared for him and was not given any instructions – Employers discontinued Saturday work while Employee was laid off but this was unknown to him – Employee did not report for work on the Monday and sent a message to this effect – Employee reported for work on the next day but was

not given anything to do and went to see his Union representative – on the following day the Manager informed the Union representative that the Employee had abandoned his job – in a letter written on October 8, 1997, the day after, the Employee was alleged to have abandoned his job he was dismissed.

Historical Background

- [1] **Maundy, P.:** By a Reference dated February 1, 2000, the Honourable Minister of Labour, Mr S.C.O. Benjamin, notified the Court of a Trade Dispute between the Employee and the Employers, the issue being one of Unfair Dismissal.
- [2] In his Memorandum dated July 19, 2000, and filed on July 20, 2000, the Employee denied that he had abandoned his job and alleged that he was unfairly dismissed by the Employers on October 8, 1997, and urged the Court to award him damages/compensation for unfair dismissal and any other award that the Court deems just and fair in the circumstances.
- [3] In their Memorandum dated and filed on August 1, 2000, the Employers denied that the Employee was ever dismissed but that he had abandoned his job.
- [4] The Employee commenced working with the Employers as an International Beverage Industry Technician, repairing and, servicing coffee machines in October, 1994, and was dismissed on October 8, 1997.
- [5] In June, 1997, the Employee was given a letter by the Manger, Robert Lam, stating that he was being laid off for 3 months, i.e. from July 5, to October 3.

- [6] On October 4, 1997, a Saturday, the Employee reported for work and went to the Maintenance Department to see the Manager, Robert Lam. The Manager could not be found and so the Employee went to see the Maintenance Supervisor, Gregory Solomon, to find out if Mr Lam had left any instructions for him and whether he was available. The Employee was told that Mr Lam would be at work that morning and so he went to the Waiting Area to wait for him.
- [7] After waiting and not seeing Mr Lam the Employee went back to Mr Solomon and asked him what to do. No punch card (Time Card) had been made out for the Employee. Mr Solomon instructed the Employee to go to the Receptionist and ask her to make out a Punch Card for him, which he did; the Supervisor signed the card to show he had come out to work. Mr Solomon then informed the Employee that the working hours had changed since he was laid off and only the Manager and the Supervisor worked on Saturdays under the new arrangements.
- [8] On the following Monday, October 6, 1997, the Employee was not feeling well and did not report for work, however, he left a message to this effect with the clerk in the Maintenance Department, Wendy Julian, for Mr. Lam – the message was relayed to Mr Lam that afternoon. On Tuesday, October 7, 1997, (the day after) the Employee reported for work but was unable to locate the Manager. Mr Solomon did not put the Employee to work or communicate with him.
- [9] After waiting for some time the Employee became frustrated – no punch card was originally made out for him, no one had put him to work and the

Employee became concerned and told Mr Solomon he was going to seek advice; he then left.

- [10] The Employee went to see Anderson Carty, the Industrial Relations Officer of the Antigua and Barbuda Workers Union.
- [11] On Wednesday, October 8, 1997, the Employee did not report for work but once again went to see Mr Carty who informed him that he spoke to Mr Lam about the matter and was told that the Employers said that he had abandoned his job.
- [12] On Wednesday, October 8, 1997, the General Manager, Robert Sikorski, wrote a letter to the Employee stating that since the end of the lay off he had not contacted his Manager or the General Manager with regard to his intention and they had concluded that he had abandoned his job – the Employee was told that his name had been removed from the employee files and that he was no longer employed by the company – See Exhibit JL1.
- [13] Mr Carty tried to have a meeting with the company to discuss the matter but his request was refused, the General Manager stating that he preferred to go to Court. The matter was referred to the Labour Commissioner and finally to this Court.

Triable Issues

- [14] From the evidence adduced the matters for determination appear to be whether:
 - (a) the Employee had abandoned his job?

- (b) in the circumstances it was reasonable for the Employers to reach the conclusion they did?
- (c) was there a dismissal?
- (d) if there was a Dismissal, was it fair?

The Arguments

[15] Mr Christopher asked the Court to find that the Employee had abandoned his job and that there was no dismissal, a fortiori, Unfair Dismissal. Counsel contended that:

- (a) The Employee reported for work on Saturday, October 4, but his department had ceased working on Saturdays and was closed and so he was asked to report on the following Monday.
- (b) On the following Monday the Employee did not report for work but claimed to have sent a message to the Employers.
- (c) On Tuesday, October 7, the Employee did not report for work on time but attended the office and indicated that he would not be working as he had business to attend to and has not reported for work since that day.
- (d) The termination letter was prepared on October 8, 1997, sent out on October 13, and delivered on October 16, 1997.
- (e) When he came back to work after the lay-off period, the Employee was working as a Security Guard at Sandals (Antigua) Limited and had difficulty in holding two jobs.
- (f) Under Section C.16(1) of the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, hereinafter referred to as "the Labour Code" a Medical Certificate has to be presented to his Employers if an Employee is sick for 3 consecutive days and this was never done by the Employee.

- (g) At the time the letter of dismissal was written it was so done on the basis that the Employee was absent from work for 3 consecutive days, i.e. 6th, 7th and 8th of October, 1997, and the Employers were not aware of any message sent by him about his absence.
- (h) The first contact with the company made by Mr Carty was on October 29, 1997, and there was no earlier dialogue between them.
- (i) The position is governed by Sections C.58(1) and C.59(1) of the Labour Code.
- (j) The Employers had not acted unreasonably in the circumstances.

[16] In support of his submissions Mr Christopher cited *Western Engraving (ECC) Limited V Sharp* (1978) 1AIIER713 at P.717(H).

[17] Mr Smith was positive that the Employee had been unfairly dismissed and in his submission, he asked the Court to find that the Employee did not abandon his job, that there was a Dismissal and that the Dismissal was Unfair. Mr Smith contended that, inter alia:

- (a) There was not any evidence that the Employee worked at Sandals while employed by the Employers although, if he did so, there was no evidence that there was any conflict of interest and a person can have two jobs. Further, the Employee was laid off without pay for 3 months and had a pregnant wife and a home to maintain; he was also faced with the expenses of a birth.
- (b) Mr Carty's evidence should be accepted and between October 8 and 9, 1997, Mr Carty was told by Mr Lam that the Employee had abandoned his job. On the said day Mr Carty spoke to the General Manager and asked for a meeting and was told to take him to Court.

- (c) Mr Lam had spoken to Mr Sikorski on either the 7th or 8th of October, 1997, as otherwise the latter could not have obtained the information contained in the said letter.
- (d) Dismissal was an ultimate weapon and in instances of breach of discipline in the workplace there are other steps that can be put in place e.g. a meeting to discuss the problem, suspension without pay.
- (e) The Employers acted too hastily in concluding that the Employee had abandoned his job.

The Law

- [18] 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 employer and no employer shall dismiss any such employee without just cause.
- [19] C.57 concerns employees engaged under contract.
- [20] 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.

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

- [22] I have not been able to find any definition of "abandonment" in the Labour Code and this word will be given its normal and general meaning.

The Decision

- [23] One finds it extraordinary that the Employee could have been said to have abandoned his job when he reported for work the Saturday and the Tuesday and left a message on the Monday informing the Employers that he, to all intents and purposes, was unable to come out to work. Further, I find the Employee's evidence that on Tuesday, the 7th of October, 1997, he genuinely felt frustrated and went to see his Union representative for advice as it appeared that the company had not made any provisions for him to continue his employment. No punch card was made out for him even though the company was aware of the date of his return to work and one wonders if there is any merit in the statement by Mr Sikorski that the cards were made out on Mondays and so the Employee's card was going to be made out on the 6th. Why was the card not made out on the previous Monday?

- [24] What is further disturbing is that on the Saturday when he reported for work no one gave any instructions to the Employee as to what he was to do and as a result he had no work to do. The Manager, Mr Lam, who was the one who

gave him instructions was not available and Mr Solomon, his Supervisor, gave him no assistance. This too was the pattern on the Tuesday and this, in my view, would cause any reasonable man in the Employee's position to become disturbed and wonder if the Employer was "getting rid" of him.

[25] I believe it was but only normal that the Employee should have gone to his Union representative to seek advice and for the Union representative to contact the company to ascertain the true position.

[26] I believe that Mr Carty did contact Mr Lam and have dialogue with him on either the 7th or 8th of October of the said year and that at this stage Mr Lam stated that the Employee had abandoned his job.

[27] I appreciate and accept that an Employer cannot be expected to close down his business and wait on an Employee to take up his job but the Employee reported for work on 2 out of the 3 days when he was required so to do and sent a message on the day when he did not do so how can he then be said to have abandoned his job? Could not the Employers have engaged a substitute to continue the Employee's duties until the issue was resolved? Would not this have been in the best interests of good industrial relations? It is my view that the Employers should have allowed a longer time to elapse and endeavour to ascertain whether the Employee intended not to return to or continue his job before deciding to dismiss. And the contents of the dismissal letter clearly shows that Mr Lam and Mr Sikorski had discussed the matter prior to the writing of the letter.

[28] It is to be observed that both Mr Lam and Mr Solomon were scheduled to be called as witnesses but neither was so called and, therefore, the references

by Mr Sikorski to things that they said was all hearsay, though admitted in evidence. As for Mr Sikorski, it was the hearsay evidence of the two abovenamed gentlemen that he relied on and asked the Court to find that the Employee had abandoned his job.

- [29] In arriving at a decision I carefully examined the evidence adduced, noted the demeanours of the parties and carefully considered the provisions of the Labour Code and the Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992, and the other relevant matters. I do not accept that the Employers acted reasonably in the circumstances and find that the Employee did not abandon his job and that he was unfairly dismissed.

The Award

- [30] A victim of an Unfair Dismissal is entitled to compensation, and this will be granted in keeping with the established heads as follows:

- (a) **Basic Award:** The Employee worked with the Employers from October, 1994, to October 8, 1997 and at the time of the dismissal his wage was \$ 350.00 per week for a six day week or \$ 58.33 per day. Under this head the Employee is entitled to one day's pay for each month of service and the award is, therefore, $\$58.33 \times 36 = \$2,099.88$.
- (b) **Immediate Loss:** Subsequent to the dismissal the Employee did not find any permanent employment until December, 1999, and during the interim period he did gardening and other odd jobs from which he realised approximately \$100.00 per week and at Sandals (Antigua Limited), as a Security Guard at a wage of \$400.00 per week. From his interim employment the Employee earned more than he would have

earned from his permanent employment and could not therefore be said to have suffered any immediate loss and thus no award will be made under this head.

- (c) Manner of Dismissal: I make no Award
- (d) Future Loss: I make no award. ***

Conclusion

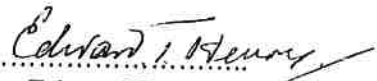
- [31] The Employee's dismissal was unfair and he is entitled to compensation in the sum of \$2,099.88 and it is hereby ordered that the Employers shall pay this sum to the Employee, payment to be made by the 15th day of Sept. 2002. There shall be no order as to costs.

DATED the 15th day of August, 2002



Cyril L. Maundy
President

I concur



Edward T. Henry
Member