

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 66OF 2000

BETWEEN:

CARLENE STEWART

Employees

and

JANET HARRIS

Employer

REFERENCE NO: 67 OF 2000

BETWEEN:

JENNIFER WILLIAMS

Employees

and

JANET HARRIS

Employer

REFERENCE NO: 68 OF 2000

BETWEEN:

JANET THOMAS

Employees

and

JANET HARRIS

Employer

Before:

The Hon. Cyril L. Maundy

The Hon. E. T. Henry

The Hon. Hubert Hood

President

Member

Member

Appearances:

Eleanor Clarke, Barrister-at-Law, for the Employees
Charlesworth Samuel, Barrister-at-Law, for the Employer

2000: October, 9, 10, 11, 12

JUDGMENT

Private fee paying junior school – two teachers “laid off” because of down turn in students and financial difficulties – recall date not given – teachers not recalled – teachers at home for slightly over three months awaiting recall – teachers did not try to contact Employer – claim for arrears of salary and Severance pay – third teacher granted permission to take a day off to see her doctor – doctor granted her four days sick leave – grant of sick leave communicated to Employer – Employer denies being told of sick leave – Employee dismissed for being absent from her duties for four days without a written excuse or a medical certificate – no request for Medical Certificate made by Employer – later dated duplicate Medical Certificate later offered to Employer and refused – Summary Dismissal – Compensation.

- [1] **MAUNDY, P.:** These References and the facts and circumstances concern the same Employer and Employees and so it was agreed to have them consolidated and heard together. The References were signed and filed on March 2, 2000, by Clarke & Clarke, Solicitors for the Employees.
- [2] The Employees’ Memoranda were filed on March 2, 2000, and that of the Employer on May 17, 2000.
- [3] In her Memorandum Carlene Stewart contends that, inter alia, she performed her duties in an able, honest and efficient manner, that by letter dated 31st August, 1998, she was temporarily terminated by the Employer, effective from September 30th.

1998, was not recalled and seeks a declaration that the temporary termination amounted to redundancy and that she was entitled to Severance Pay and her salary for the months of July and August, 1998.

[4] Similarly, in her Memorandum, Janet Thomas, another teacher at the said school, Greensville Primary School at Lionel Hurst and Temple Streets, St. John's, Antigua, was temporarily terminated effective from September 30th, 1998. Miss Thomas seeks a declaration that, inter alia, the temporary termination amounted to redundancy and that she was entitled to Severance Pay and her salary for the months of July and August, 1998.

[5] Unlike the abovenamed, Janet Thomas was dismissed for irresponsibility and in her Memorandum, she seeks, inter alia, a declaration that the dismissal was unfair and compensation for Unfair Dismissal.

Historical Background

[6] The Employer was the Principal and owner of a private school known as Greensville Primary School situated from time to time at Lionel Hurst Street and Temple Street, St. John's, Hudson Street, St. John's, and Rose Street, Ottos, St. John's, all in Antigua, and the Employees were teachers at the school. The school taught children between the ages of 2 and 16 years.

[7] The Employer stated that in September, 1998, the enrolment went down from 130 to 55 as the school was too far to get to and because of the economic climate then prevailing she was unable to retain her full staff and a decision was taken to lay off (temporary terminate) Miss Stewart and Miss Thomas. In pursuant of the said decision, the Employer wrote to the two Employees, laying them off and stated that they would be recalled as soon as the situation improved – See Exhibits CS1 and JT1 – the lay offs were to start as from September 30, 1998, and the letters stated that the Employees would be notified when they were to return to work – no recall

date was given. It is to be observed that the above letters are dated August 31, 1998, but were not served upon the Employees until September 30, 1998; also, they were not given any notice of the intended lay offs.

- [8] The Employees did not share Mrs Harris' views about a downturn in enrolment and said that attendance and enrolment at the school remained intact.
- [9] Upon the temporary termination the two Employees stayed at home for slightly over three months awaiting a recall but they were never recalled. In January, 1999, Carlene Stewart obtained new employment, and it was not until August 31, 1998, that Miss Thomas found employment; she started to work at the Ministry of Information.
- [10] Regarding Mrs Williams, she was dismissed on September 30, 1998, on the grounds that she had been absent from her duties without a written excuse, had not produced a Medical Certificate and was guilty of irresponsible behaviour – See JW2. According to the Employee and which is denied by the Employer, on September 22, 1998, she was not "feeling well" and asked the Employer to give her the following day off to go to see a doctor. The Employee was given the day off and when she went to see the doctor he gave her off until the 28th. The Employee contended that she had received a Medical Certificate from the doctor she had visited, Dr Moulon, and took it to Mrs Harris, who refused to sign it or accept it – the original Certificate was given to the Social Security Department with a claim for benefits and a duplicate supplied – see Exhibit JW1. The Employee worked the whole of the 29th and was dismissed at 1:00pm on the following day.
- [11] None of the Employees was ever the subject of disciplinary action by the Employer, nor were any of them ever given a warning letter for any matter affecting their duties, nor were any complaints ever made re their job performance.

Triable Issues

- [12] With regard to Carlene Stewart and Jennifer Williams, the issues are whether there was a temporary dismissal and if so, whether this was for a specified or unspecified period and the quantum of their entitlement? Whether the Employees are entitled to Notice Pay and salary for July and August, 1998. Further, whether there should be any deduction from any lump sum awarded.

Jennifer Williams is a case of Unfair Dismissal and so the triable issues are different and are whether, the Employer acted reasonably, was there just cause and a factual basis for the dismissal, did she mitigate her loss, should there be a deduction in the event of a lump sum payment.

The Arguments

- [13] Counsel for Carlene Stewart and Janet Thomas conceded that they were temporarily terminated (laid off) and laid off without a date for recall and in the circumstances they were entitled to Severance Pay under Section C.42 of the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised edition, 1992, hereinafter referred to as "the Labour Code".

With regard to Jennifer Williams, Mr Samuel submitted that the dismissal was fair, that the Employee had abandoned her job, that she was not entitled to any compensation, further that no salaries were due to all the Employees as claimed or at all.

- [14] Miss Clarke accepted the temporary dismissals but did not share Mr Samuel's view and was adamant that Jennifer Williams had not abandoned her job. Counsel submitted that Mrs Williams was unfairly dismissed and is entitled to compensation for Unfair Dismissal, that she had not abandoned her job and was also entitled to her salary for July and August, 1998.

The Law

[15] The Law relating to Unfair Dismissal is set out in the Labour Code, which in Section C.56 prohibits an employer from dismissing an employee who has completed his probation without just cause. There must, in addition, be a factual basis for the dismissal.

[16] Section C.57 (Contracts) gives the employer the right to dismiss in certain specific circumstances and in other cases where the dismissal was based on reasonable grounds – Section C.58(1), the principal “dismissal section” provides as follows: “A dismissal shall not be unfair if the reason given by the Employer therefor:

- (a) relates to misconduct of the employee on the job, within the limitations of Section C.59 (1) and (2);
- (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 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 on the employer's part) of a requirement of law; or
- (e) 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.”

Section C.58(2) lays down the test for determining whether or not a dismissal was unfair.

Further, by Section C.59(1) “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 conducted himself in such a manner as to

clearly demonstrate that the employment relationship cannot reasonably be expected to continue.

[17] As an alternative to dismissal, which should be used (resorted to) where and only where all else has failed, the Code in Section 59 (2) provides an alternative and permits the employer to serve the offending employee with a written warning where the wrong committed is not sufficiently serious to warrant dismissal.

[18] In the same way as it protects the employee the Code is also of enormous assistance to the employer and permits him to dismiss without penalty, as per Sections 57, 58 and 59.

The Code gives the employee an equity in his job that is in need of protection and, as a result, if he intends to dismiss, the employer is under an obligation to give the employee advanced Notice of the intended dismissal – failure to give advanced Notice of a dismissal makes the Employer liable for payment in lieu of Notice (one week in the case of a weekly paid employee and one month in the case of a monthly paid employee) – See Section C.9. The Employee is thus protected. In the case of a Summary Dismissal. It may be observed that an employee who has not completed his probation, the first three (3) months is entitled to 24 hours Notice – See Section C.9(3)(a).

Decision

[19] When the Hearing began the parties were given an opportunity to see if they could reach an out-of-Court settlement but they all wanted their day in Court. The invitation was handed out on no less than two occasions during the Hearing and although certain matters were agreed upon the gap was so wide that that route had to be abandoned and eventually the matter was heard in toto.

The Court had an opportunity to see the parties in person, note their demeanours and observe their reactions as they gave their evidence and finds it extremely difficult to understand how, on the same facts, they could give blatantly different

testimony, e.g. the Employer was adamant that her teachers were never paid for the month of August in any year while the Employees said it was the custom. Again, which was denied, Mrs Harris insisted that she paid the Employees their salary for July, 1998. Finally, Mrs Harris testified that she never gave Jennifer Williams the 23rd day of September, 1998, off, in order that she could go to see her doctor, that she was never told that the doctor had put her (Jennifer Williams) on sick leave until September 28, 1998, and that when she returned to work on September 29, 1998, Mrs Williams handed her a Medical Certificate given to her by her doctor and she ignored her, refused to accept it or to sign the section reserved for completion by the employer resulting in the Employee being unable to make a claim under the Government's Medical Benefits Scheme.

A major weakness in Mrs Harris' case is that she failed to produce any documentation in support of e.g. salaries paid and received or when, and the enrolment at the school during the period leading up to when she claimed that there was a roll call of 155 and 135. The Employees never produced any receipt or other acknowledgement of payment.

With respect to Carlene Stewart and Janet Thomas, although their counsel asked the Court to find that theirs was a case of Redundancy, to my mind they both fall within the ambit of Section C.42 of the Labour Code and were temporary terminations. Section C.42(2)(b) provides that:

"if no date of recall is given at the time of the termination", as is the case here, "severance pay shall be payable, when and if, after three months from the termination, the employee shall not have been recalled."

Under the said sub-section the employee is entitled to interest @ 10% per annum on the amount of severance pay due and is payable for the interval between the original termination date and the date of actual payment. Carlene Stewart worked with the Employer for two years so that her entitlement is, based on a rate of one month's pay for each year of service being a monthly paid Employee, the rule followed by the Court, i.e. \$ 2,000.00 plus interest @ 10% per annum from October 1, 1998, until payment. Janet Thomas is entitled to \$ 1,200.00 x 7 = \$ 8,400.00 plus interest @ 10% per annum as in the case of Carlene Stewart.

i do not believe that the issues of mitigation, causation, contribution, Notice Pay or deduction by the Court apply in instances of temporary termination – these apply in cases of Unfair Dismissals.

[20] In the case of Jennifer Williams I accept her evidence that she sought permission from Mrs Harris to take the day off on September 23, 1998, to go to see her doctor, that the doctor gave her sick leave until the 28th, that she did obtain a Medical Certificate from her doctor and offered it to Mrs Harris who refused to accept it. It should be observed that there was no evidence that Mrs Harris had at any stage or ever requested a Medical Certificate from the Employee and as the Law stood at the time, an employee was not obliged to submit a Medical Certificate, no matter the length of his illness, unless one was requested by the employer – See Section C.16; a Medical Certificate is now mandatory whether requested or not after two days of illness.

What I find extraordinary is that the Employee was allowed to resume her duties on the 29th and should have nevertheless been held to have abandoned her job? Also, the period of absence was but four days and her absence, although it created difficulties, and indeed some inconvenience as her class had to be amalgamated with another for tuition, it did not render functioning of the school impossible.

It appears that in alleging that the Employee had abandoned her job the Employer was invoking Section C.58(e) of the Labour Code and asserting that that was “a substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the Employee held.” And one is mindful of the words of Lord McDonald in *Harper V National Coal Board* (1980) IRLR260 when commenting on similar words in the English Labour Legislation “Obviously an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain. But if the employer can show that he had a fair reason in mind at the time that he decided upon dismissal and that he genuinely believed it to be fair this would bring the case within the category of “another substantial reason”. However, as said above, I do not

find that there was an abandonment by Mrs Williams." The letter of dismissal was written prior to Mrs Williams' return to work.

[21] I am not satisfied that the Employee abandoned her job and in the circumstances I find the dismissal unfair.

[22] As earlier indicated the evidence re the Employees entitlement to salary for July and August, 1998, is in direct conflict and neither of the parties produced any documentary or other evidence e.g. an eyewitness in substantiation of her contention. It would, in my view, be positively unfair to order the Employer to pay the Employees a second time for work for which they had hitherto been paid. On the contrary, it would not be fair, just or equitable to deprive the Employees of their salaries for work which they have already done. What then must the Court do in a situation such as this? No authorities were cited to the Court re this situation nor has my research unearthed any and in the absence of any authority to the contrary I would invoke Section 10(2) and (3) of the Industrial Court Act, Cap. 214 and determine the issue on the basis of what is fair and just, having regard to the interests of the persons concerned. Acting in accordance with equity, good conscience and the substantial merits of the case and having regard to the principals and practices of good industrial relations and in particular the Labour Code, I would award the Employee's one month's salary each only.

The Award

[23] A person the victim of an Unfair Dismissal is entitled to damages under the established heads and the Awards are as follows:

- (a) Basic Award for Loss of Protection – This Award is similar to Severance Pay and this Employee, having worked for two years, is therefore, entitled to $\$1,000.00 \times 2 = \$2,000.00$.
- (b) Immediate Loss – the Employer was unemployed for three months and her entitlement is thus $\$1,000.00 \times 3 = \$3,000.00$

- (c) Manner of Dismissal – I make no Award as it is not shown that the dismissal made the Employee less employable or more likely to be dismissed.
- (d) Future Loss – This is a guesstimate and consists of the difference between the Employee's last earnings and her estimated earnings during the cut off point. In this particular instance the Employee started her own school in January, 1999, and although no evidence was led as to the enrolment or her salary, there is, however, evidence that there are two teachers in addition to herself and this suggests a fair number of students. Equally, no evidence was adduced as to the fees charged to the students and one is left to assume her likely salary which I would hazard a guess as approximately not less but rather more than her last salary so that no award is being made under this head.
- (e) Notice Pay of \$ 1,000.00.

[24] I do not find that the Employee had caused or contributed to the dismissal as in instructing Mrs Stewart to inform the Employer as to the sick leave granted by the doctor; she acted reasonably in the circumstances.

[25] In *Antigua Village Condo Corporation Limited V Jennifer Watt*, Civil Appeal No. 6 of 1992, the Court of Appeal held that compensation for Unfair Dismissal should not consist of a mere aggregation of sums under a series of heads but that a substantial deduction should be made as a lump sum payment is more beneficial to the Employee than a series of lesser payments made over a period of time. Thus, I would fix the amount of the deduction as \$ 1,000.00.

Conclusion

[26] In arriving at the above decisions I carefully scrutinized all the evidence of the parties, noted their demeanours, carefully considered the statutes cited and, in particular, the Labour Code and the Industrial Court Act, Revised Edition, 1992, the

relevant case Law and works of authority and at the end of the day arrived at a decision which i believe is reasonable in the circumstances.

[27] The Employer will pay to the Employees:

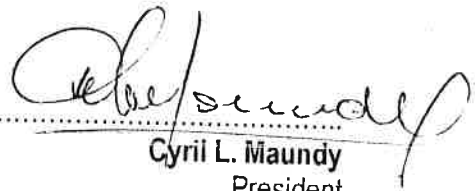
- (i) Carlene Stewart.....\$ 2,000.00 + \$ 1,000.00 - \$ 300.00 = \$ 2,700.00
- (ii) Janet Thomas\$ 8,400.00 + \$ 1,200.00 - \$ 960.00 = \$ 8,640.00
- (iii) Jennifer Williams\$ 6,000.00 + \$ 1,000.00 - \$ 1,000.00 = \$ 6,000.00

payment to be made as follows:

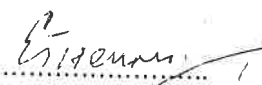
- (i) Carlene Stewart (\$ 2,700.00): \$ 1,000.00 on January 31, 2001; thereafter \$ 200.00 per month as from February 28, 2001 until paid in full.
- (ii) Janet Thomas (\$ 8,640.00): \$ 2,000.00 on or before January 31, 2001 and \$ 300.00 per month from February 28, 2001, until paid in full.
- (iii) Jennifer Williams (\$ 6,000.00): \$ 2,000.00 on or before January 31, 2001, and \$ 300.00 per month commencing on February 28, 2001, until paid in full. Award bears interest @ 10% per annum on a reducing balance basis.

There will be no Order for costs in the case of Jennifer Williams.

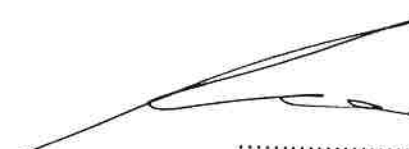
DATED the 19th day of December, 2000


Cyril L. Maundy
President

I concur


E.T. Henry
Member

I concur



Hubert Hood
Member