

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 1 OF 1999

BETWEEN:

CALVERT AARON

Employees

and

CLUB ANTIGUA

Employers

Before:

Cyril L. Maundy
Hubert Hood

President
Member

Appearances:

Mr Ralph Francis for the Employee
Mr Dexter Wason for the Employers

2000: February 23
March 1, 15.

JUDGMENT

Unfair Dismissal – Summary Dismissal – Employee with almost 17 years service summarily dismissed – warning letter or letter of complaint ever given to Employee – No severance pay paid to Employee – mitigation – self-employment – substantial reduction in wages.

[1] **MAUNDY, P.:** By a Reference filed on January 15, 1999, and Memorandum filed on the 15th day of January, 1999, the Employee notified the Court of a Trade Dispute and claimed compensation for Unfair Dismissal.

Historical Background

- [2] The Employee commenced his employment with the Employers on February 23, 1981, as a general clerk and eventually became Purchasing Officer.
- [3] On June 11, 1998, the Employee was called into a meeting and was given a letter terminating his employment on the ground of gross misconduct in that he blatantly lied before the Minister of Labour at a meeting on June 3 and 4, by then saying that he did not call out Robinson Tonge to work on December 24, 1996, and that he was not aware that he was reporting for duty on that day. See Exhibit CA1.
- [4] In December, 1996, the Employers terminated the employment of Lestroy Francis and Robinson Tonge based on evidence given to them by the Employee. According to the Employers, as set out in a letter to the Employee dated June 11, 1998, the two employees were suspended for improper handling of goods from the storeroom. Tonge came to work on his day-off (December 24, 1996) and was seen driving the Food & Beverage Van. A meeting was held on December 24, 1996, to investigate the delivery of some food items to the Flamboyant Kitchen and at the meeting the Employee told the General Manager that he did not instruct Tonge to report for duty on that day. The Head storekeeper, Ellingworth George, told Tonge to come to work on the said day. At the proceedings before the Labour Minister on May 19, 1996, the Employee stated that he had not instructed Mr Tonge to come to work on December 24, 1996, and that he was aware that Tonge would be reporting for duty – See Exhibit CA1.
- [5] After the termination the Employee tried to find employment and made applications to various places including Jolly Beach Hotel, Mango Bay and Pineapple Beach and worked at Pineapple Beach for a week. The Employee never got a job with an hotel (Pineapple Beach excepted) the hotel or at all and was compelled to start his own business which he did in January, 2000.

- [6] Almost four weeks after the meeting with the Minister of Labour, the Employee was called to a meeting with the General Manager, Stephen Georges, and the Personnel Manager, Mr Thompson, who told him that the evidence he gave at the meeting with the Labour Minister was against Management, that he had lied, and that he could not work with him anymore. On the following day the Employee was called to another meeting and his services were terminated.
- [7] The Employee filed a complaint for Unfair Dismissal with the Labour Commissioner but they failed to resolve the matter and so it was transmitted to the Minister of Labour where the efforts to achieve an adjustment and settlement again failed and the matter was thence referred to this Court.

Triable Issues

- [9] The issues here for determination seem to be:
- (a) Was the dismissal fair?
 - (b) Was there a Summary Dismissal?
 - (c) Did the Employee mitigate his loss?
 - (d) What compensation is payable to the Employee if the Dismissal is Unfair?

The Arguments

- [10] The Employee testified that he never lied to the General Manager or Mr Thompson at the meeting in question or at all and he never, at any stage, changed his story and that what he told the Minister was precisely what he had said at the Hearing before the Labour Commissioner.

The Law

- [11] The Law relating to Unfair Dismissal as contained in the Antigua and Barbuda Labour Code, Laws of Antigua and Barbuda, Revised Edition, 1992, hereinafter

referred to as "the Labour Code" and Section C.56 protects an Employee who has completed his probationary period (the first 90 days of employment) against Unfair Dismissal. The Section provides thus:

"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."

[12] Under the Section the Employer has to show that there was just cause for the dismissal.

[13] In Section C.58(1) certain dismissals shall not be unfair. Thus, the Section provides that: A dismissal shall not be unfair if the reasons 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.

[14] 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 an investigation and consultation before the termination, thereby allowing the Employee to be heard.

- [15] 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.
- [16] Again Section 59(1) of the Labour Code permits an employer to terminate an employee's employment 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. The Subsection further states that such misconduct includes, but is not limited to, situations in which the employee has:
- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue
 - (b) committed a criminal offence in the course of employment, without the consent, express or implied, of the employer; or
 - (c) behaved immorally in the course of his duties.
- [17] It is an established rule that if an employee causes or contributes to his dismissal the award will be reduced by the extent of his degree of causation or contribution.
- [18] 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

- [19] The Employers failed to appear to give any evidence and so as a result the Court was obliged to proceed ex parte, something that they were most reluctant to do. The decision to proceed was taken, after having afforded the Employers more than adequate opportunity to appear. Thus at a Call Over in October, 1998, Counsel appeared for the Employers and with consent the matter was set down for hearing on February 28, 2000. On February 28, 2000, the matter commenced and was adjourned to March 1, for continuation. On March 1, 2000, Counsel for the Employers obtained an adjournment for two weeks on a submission that he had been retained only a few days before the hearing started and he had not been able to contact any representatives of the Employers to get proper instructions. Also, the Employers' principal witness, Mr Thompson, was abroad. Mr Francis strongly opposed the application but after considering the matter it was decided to grant the adjournment and give the Employers an opportunity to be present.
- [20] On the resumption of the Hearing on March 15, 2000, Mr Wason advised the Court that he was not able to find anyone to represent the Employers, which was in liquidation and/or a change of ownership and thus he would not object for the matter being heard ex parte. Both Counsel waived the right of address.
- [21] The Court, having heard the evidence of the Employee and no evidence from the Employers, examined that evidence to see if, inter alia, the contentions of the Employee were proved, the Dismissal was Unfair and the Employee was entitled to compensation for Unfair Dismissal; it so found. The Court was also satisfied that the Employee had mitigated his loss by seeking employment subsequent to the dismissal.

The Award

[22] An employee the victim of Unfair Dismissal is entitled to compensation under the four established heads and in this case the compensation is as follows:

- (a) Basic Award for Loss of Protection – Under this head the award would be one month's pay for each year of service or greater part thereof and is as follows $\$4,000.00 \times 18 = \$72,000.00$
- (b) Immediate Loss – I note that the Employee found employment at Pineapple Beach Hotel in late December @ \$ 400.00 per week even though he worked there for one week only and then left. Also, that he started his own business in January, 2000. Under this head we usually apply a cut off period of 4 – 6 months generally and here the period is fixed at 4 months so that the amount of the Award is $\$4,250.00 \times 4 = \$17,000.00$.
- (c) Manner of Dismissal – We make no award.
- (d) Future Loss – Under this head the award takes the form of a guesstimate and is the difference between the Employee's last basic wage and the imaginary earnings had there not been a dismissal which in this case is fixed at \$ 1,000.00. Again there must here be a cut off point which is fixed at 6 months and the Award therefore is $\$1,000.00 \times 6 = \$6,000.00$.

The total award is therefore \$ 95,000.00.

[23] From the above Award a deduction of 20% or \$ 19,200.00 will be made in keeping with the Court of Appeal's directive in Jennifer Watt V Antigua Village Condo Corporation, Civil Appeal No. 6 of 1992 so that the net amount payable is \$ 76,000.00.

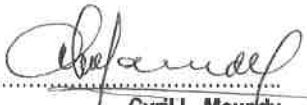
Conclusion

[24] The Dismissal was Unfair, the Employee mitigated his loss and is entitled to compensation for Unfair Dismissal in the sum of \$ 76,000.00.

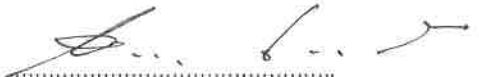
[25] The Employers will pay to the Employee the sum of \$ 76,000.00, payment to be made by the 31st day of May, 2000.

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

DATED the 14th day of April, 2000


Cyril L. Maundy
President

I concur


Hubert Hood
Member

I concur


E. T. Henry
Member