

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 25 OF 1999

BETWEEN:

HORACE HELPS

Employees

and

ANTIGUA SUN LIMITED

Employers

REFERENCE NO: 26 OF 1999

BETWEEN:

LOUIS DANIEL

Employees

and

ANTIGUA SUN LIMITED

Employers

Before:

The Hon. Cyril L. Maundy

The Hon. E. T. Henry

The Hon. Hubert Hood

President
Member
Member

Appearances:

E. Ann Henry & Harold Lovell, Barrister-at-Law for the Employees

S. Richards-Anjo, Barrister-at-Law for the Employers

2000: September 19, 20, 21

JUDGMENT

Unfair Dismissal – Summary Dismissal – changes made by Chief Editor and Chief
Executive Officer to feature article written by Sub-Editor – alleged “sick out” by half

of the editorial staff of a newspaper who failed to report for work on the ground of sickness on 2 days – excerpts of letter from Chief Executive Officer to Employees critical of their behaviour and inviting them to resign and other information about the dispute published by Caribbean News Agency and local, regional and international press – contract of secrecy and non-disclosure – alleged breach of trust and the duty of confidentiality.

- [1] **MAUNDY, P.:** By two References dated August 6, 1999, and filed on August 20, 1999, Solicitors for the Employers notified the Court of a trade dispute between the Employees and the Employers. In the Memoranda dated September 15, 1999, and September 10, 1999, respectively and filed on September 20, 1999, the Employees allege that they were dismissed by the Employers, that their dismissals were unfair and that they are entitled to compensation for Unfair Dismissal.

Historical Background

(a) Horace Helps

- [2] The Employee, a journalist, commenced working with the Employers on August 2, 1998 as Sub-Editor, and was dismissed on March 31, 1999. At the time of the dismissal he was Chief Sub-Editor. The Employee's duties were set out in his Letter of Appointment (Job Description) as follows:
- (a) He had to report to the Managing Editor.
 - (b) He was required to work 40 hours per week, as scheduled.
 - (c) His monthly salary was EC\$ 4,500.00, paid bi-monthly, with the appropriate Antiguan taxes deducted.
 - (d) The company provided him with a furnished apartment in a respectable area for one year.
 - (e) The company provided him with the use of a company car for the first six months of his employment.
 - (f) His probationary period was for a duration of three months.

- (g) He could be transferred to any other position within the company or to any other affiliate of the Stanford Group of companies located in, and operating within the state of Antigua and Barbuda.
- (h) He was entitled to fifteen (15) working days vacation after completion of his first year of service.
- (i) He was required to abide by the rules and regulations of the company established through policies, procedures and guidelines.
- (j) He was entitled to participate in the Company's Group Life and Health Insurance Plan at the existing employee rate after completion of probation and upon official enrolment.
- (k) He was given a uniform or a clothing allowance upon satisfactory completion of probation and was required to adhere to the Company's Dress Code.

Before joining the Employers the Employee had spent 18 years in journalism as a Freelance writer, Sports Editor, Reporter, News Editor and worked for the Jamaica Gleaner, the Jamaica Broadcasting Corporation, Radio Jamaica, the Sunday Gleaner, the Jamaica Observer and CBM Television (Jamaica).

- [3] On March 7, 1999, two days before the General Election, the Employee, then the Chief-Sub-Editor of the Antigua Sun, a newspaper owned and published by the Employers, hereinafter refereed to as "The Sun" discussed a story he had written with the Editor-in-Chief Vernon Khelawan; the story had been earlier read and passed by Louis Daniel, the News Editor, but Mr Khelawan thought it was politically delicate and put it on hold pending clearance from R. Allen Stanford, the Chief Executive Officer of the Company and their lawyers. At a later meeting with Mr Khelawan, Mr Khelawan said that R. Allen Stanford had reservations and was not keen on publication of the article as it was.

The Company had a four man group consisting of Mr Khelawan, the Editor-in-Chief, Timothy Payne, the Feature Writer and the Employees who met every afternoon to decide what went into the newspaper. All the parties except Mr Khelawan agreed

upon publication of the article – Mr Khelawan had made a telephone call to Mr Stanford who thought it was political. Mr Khelawan said that the story could be carried, not as a Main, but as a Secondary story. The story was not carried on March 8, 1999 – the printed text written by the Employee was not published although it was his understanding on the previous day (the Sunday) that it would. The Court was not provided with a copy of the Article nor was its nature disclosed although the inference is that it was of a political nature and publication was being made a day before a General Election.

- [4] The Employee did not report for work on March 8th and 9th on the ground that he was sick and so too did about 50% of the staff. The Employee went back to work on March 10th, 11th, and 12th (Wednesday, Thursday and Friday) and on the 13th there was a staff meeting held by Mr Stanford re the alleged “sick out”. Mr Stanford expressed shock and unease at the alleged “sick out” and said that he was disappointed in the Employee – he sent him on 2 weeks paid leave to consider his position – he had asked the Employee for his resignation – see HH4. At the time, two members of the editorial staff, Colin James, the Sports Editor, and Joanne Hillhouse, the Features Writer, contributed to a website, “The Source” and the former also wrote for CANA.
- [5] The Employee refused to resign, returned to the job and worked for the next three days. Finally, on March 31, 1999, he was dismissed on the ground that he was directly or indirectly responsible for revealing information which only himself and the Employers were privy to in breach of his Contract of employment amounting to misconduct of so serious a nature that the Employers had no recourse but termination of his employment – See Exhibit HH6.
- [6] At a meeting on Monday, March 29, 1999, it was alleged that the Employee had leaked information to the local, regional and international media in breach of his contract of employment.

it should be pointed out that Source carried a report of the meeting with Mr Stanford under the caption, "Angry Antigua Sun Owner tells workers as it is." – See HH2. An article appeared in the Daily Observer of Antigua and Barbuda on Wednesday, March 22, 1999, on the matter. On March 22, 1999, CANA carried a report about the incident and an article about the Employee's leave of absence was also published in an edition of the Jamaica Observer.

- [7] After the termination the Employee made applications for employment to a series of about nine different places including the Caribbean Council for the Blind, the Caribbean Media Corporation, Barbados and the Jamaica Lottery Company but without success and had to work as a Freelance Journalist.

(b) Louis Daniel

- [8] Louis Daniel commenced working with the Employers on April 1, 1997, as a Staff Reporter and eventually became News Editor and, like Mr Helps, was dismissed on March 31, 1999, on similar grounds – See Exhibit LD6.
- [9] On March 7, 1999, the Employee edited an article by Mr Helps and approved it but as said before, although approved by the Editorial Committee, it was viewed with concern and after a conversation with Mr Stanford, the Editor-in-Chief, Mr Khelawan decided not to publish it as a feature article but as a secondary article with a number of changes – Mr Helps had written the article to be published as the feature article of March 8, 1999.
- [10] The Employee did not go to work on March 8th and 9th, 1999, the days of the alleged "sick-out" but reported "sick", however, he worked on the 10th and 11th and on Friday, the 12th he travelled to Barbados to represent the newspaper at a meeting of Cable & Wireless/CANA Media Conference. The Employee returned to work on Sunday the 14th, March, 1999, and was informed that Mr Stanford had given him two

weeks leave of absence to consider his position in relation to the newspaper as he was most disappointed in him.

- [11] On Wednesday 17th March, 1999, the Employee received a letter from Mr Stanford addressed to Mr Helps and himself in which he expressed his disappointment in them and asked them to resign – See HH4. The Employee refused to resign – See Exhibit LD5.
- [12] The Employee returned to work on March 27, 1999, and while there he was summoned to a meeting with the Director of Human Resources of the Stanford Group of Companies, Mona Quintyne, and the Editor-in-Chief. At the meeting, like Mr Helps, he was asked a number of questions about the “sick out” and meeting and re information that had appeared in the local, regional and international press including CANA. The Employee said that he had not given any information to any of the foregoing and only had a conversation with Rickie Singh of the Caribbean Media Workers Association, an organisation which championed the cause of journalists throughout the Caribbean but did not disclose any of the contents of the Stanford letter of March 15, 1999 (HH4).
- [13] After the dismissal the Employee sought employment and sent out applications to various places and on July 26, 1999, obtained a job with the Caribbean Council for the Blind – on February 1, 2000, he went to work at the Caribbean Secretariat in Guyana.

Triable Issues

- [14] This is another instance of a summary dismissal and the principal questions are whether that was an appropriate punishment, assuming the Employees had committed the wrongs alleged. Also, whether the Employees, or any one of them, were directly or indirectly responsible for revealing information to which only the Employers and themselves were privy, whether the Employees were in breach of

their contract of employment amounting to misconduct of so serious a nature that the Employers could not reasonably be expected to take any course other than termination. Also to be considered is whether this was a situation where suspension or a Written Warning was an appropriate remedy.

The Arguments

- [15] Counsel made their submissions in writing and Mrs Anjo was adamant that the Employers had acted without fault. Counsel submitted that, inter alia:
- (a) "The Employees' actions eroded the implied contract term relating to trust, confidence and good faith which exists between Employer and Employee by publishing or causing to be published, information relating to the relationship with the Employers in an attempt to embarrass the Employers and sensationalize issues relating to their employment with the Employers to the Employee's benefit and to the detriment of the Employers."
 - (b) "The Employee were guilty of misconduct of so serious a nature that the Employers had no alternative but to terminate the employment."
 - (c) "The dismissals were fair in that they were for a substantial reason of a kind which would entitle a reasonable Employer to dismiss."
 - (d) "An Employee may be terminated where he is guilty of misconduct of so serious a nature in relation to his employment that the Employer could not reasonably be expected to take any course of action, other than termination."
 - (e) "It is open to the Court to find that if misconduct justifying dismissal has taken place but it is not possible to identify who was responsible beyond the fact that it must have been one of two, it can be legitimate for the Employer to dismiss both."
 - (f) The Employers do not have to correctly label the reasons for dismissal but must rely on fact. If the facts were sufficiently known to the Employees then the wrong label does not affect the point. The Employers are only bound by

reasons which constitute statutory reasons having regard to the Antigua and Barbuda Labour Code.

- (g) The Court may find that the Employees were dismissed for "some other substantial reason" even though that reason was not specifically pleaded, where the different grounds relied upon are really different labels and nothing more.
- (h) Even where the Law requires that there should be a factual basis for the Employer's decision to dismiss, in certain circumstances the genuine belief of the employer may constitute "some other substantial reason" justifying the dismissal – Hargreaves on Industrial Relations and Employment Law, Feb 2000, Edition D – pp 824 and D1894, Harper V National Coal Board (1980) IRIR360 as per Ld Mc Donald

[16] Mrs Anjo urged the Court to make a number of inferences, viz:

- (a) The Employees were instrumental in causing ten (10) employees of Antigua Sun Limited to fail to report for work claiming that they were sick on the 8th day of March, 1999, when they were not in fact sick and that the employees failed to report for work on the 8th and 9th days of March, 1999, claiming to be sick when they were not.
- (b) The action taken by the workers at the Antigua Sun Limited on the 8th and 9th days of March constitute what is known in ordinary parlance as a "sick out" and was misconduct of a kind which would cause a reasonable employer to dismiss an employee in the circumstances.
- (c) The evidence of Giselle Isaac was unchallenged and she was a credible witness.
- (d) That the Employees falsely stated that they did not attend a meeting at the home of Wesley Francis in Potters re the "sick out" on March 8, 1999.
- (e) That the Employees caused the workers to "sick out" on March 8th and 9th, 1999, in protest re publication of Mr Helps' article.
- (f) That the evidence of the Employees is not credible and should not be accepted.

- (g) That the Employees, either by themselves or with each other, did cause publication of information relating to the action taken by the Employers re the "sick out" and falsely told a representative of CANA that the Employers intended to deny them the right to work.
- (h) The Employees caused damage to the Employers in that many news stories were carried which were unfavourable to the Employers.
- (i) Louis Daniel committed a breach of the implied term of mutual trust, confidence and good faith which should exist as between employer and employee.
- (j) The Employers carried out a fair and full investigation before deciding to dismiss.

[17] In support of her submissions Mrs Anjo cited the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition 1992, and the following cases and works of authority:

- (a) Monie V Coral Racing Limited (1980) IRLR 464
- (b) Brooks V Olyslager OMS (UK) Limited (1998) IRLR 590
- (c) Abermathy V Mot, Hay and Anderson (Lord Denning MR)
- (d) Margaret Berridge and Dave Edwards V Benjies Business Centre – Privy Council Appeal No 5 of 1995
- (e) Winston James V St. John's Development Corporation – Ref No 28 of 1992
- (f) Hannan V TNT-IPEC (UK) Limited (1986) IRLR 165
- (g) McCrory V Magee t/a Heatwell Heating Systems (1983) IRLR 414
- (h) Harveys on Industrial Relations and Employment Law Feb 2000 Edition D 852 – 861
- (i) Facenda Chicken Limited V Fowler (1986) IRLR 69, 74

[18] Counsel for the Employees asked the Court to find that the dismissals were unfair and contended that, inter alia:

- (i) There was no evidence that, even if, which is denied, the Employees had committed the actions complained of, these actions had not at any time

- eroded the confidence and trust between themselves and the Employers or caused the Employers damage.
- (ii) R. Allen Stanford had placed the matters that were subsequently published in the public domain as early as March 13, 1999.
 - (iii) The newspaper articles referred to in his evidence by Vernon Khelawan merely restated matters that were known to approximately 20 persons who had attended the meeting.
 - (iv) The articles carried by the Internet publication, the Source, showed that the dispute was already available to the public and accessible to the world wide public.
 - (v) Where an employee relies on one reason in his pleadings (Memorandum) he may not pray in aid the concept of mis-labelling in order to contend that his reason for dismissal falls within the acceptable reasons under the statute (the Labour Code).
 - (vi) No evidence of the contract which the Employees are alleged to have broken was never given and consequently the Court has no basis on which it can make a factual determination as to whether there was or was not a breach of contract.
 - (vii) No evidence was adduced on which the Court could reasonably infer that there was a breach of the implied duty of fidelity by the Employees.
 - (viii) The content, tone and tenor of Mr Stanford's Memorandum of March 15, 1999, carried an implied threat that the Employees should either resign or be dismissed and the issue of breach of the Employment Contract and the Declaration of Secrecy were only raised after the Employees refused his request to resign; they declined to jump and were pushed (over the cliff).

The Law

- [19] The Law relating to Unfair Dismissal is set out in the Antigua and Barbuda Labour Code, Cap 27, Revised Edition, 1992 Laws of Antigua and Barbuda, hereinafter referred to as "the Labour Code" which lays down the fundamental rule that an

employee earns an equity in his job that requires protection and that once he has completed his probation, the first three months, he may not be dismissed without just cause, that there must be a factual basis for the reason for the dismissal and that the Employer must have acted reasonably. The Code gives instances where an employer may dismiss without liability, and the relevant Sections are:

Section C.59 (1) and (2), viz, where;

- (a) It relates to the capability and qualifications of the employee to perform work of the kind he was employed to do, within the limitations of Section C.59 (5);
- (b) It is that the employee was made redundant;
- (c) It 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
- (d) 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.

However, as an alternative to dismissal, in an appropriate case, an employer may give the employee a written warning, as set out in Section 59(2) of the Labour Code.

- [20] Summary Dismissals – An employer may, without notice, terminate the employment of any person for misconduct related to his work within C.58(1) or (2) but as a general rule the employer must give advance notice to an employee of an intended termination as follows, i.e. at least 24 hours where he has not completed his probation period and in respect of other employees (Contracts apart) the advanced notice shall be at least equivalent to the interval of time between the affected employee's pay days – payment in lieu of notice can be made – See Section C.9.
- [21] In keeping with the rule of Natural Justice as found in the maxim audi alteram partem, both parties to a dispute must be heard and thus the employer is under a duty to give an employee involved in a trade dispute an opportunity to present his case without fear, intimidation and/or coercion.
- [22] Where there are allegations of misconduct by an employee then apart from a situation where the employee is caught "red-handed" or admits the wrong, an

employer is under a duty to carry out an investigation. Also, such investigation must be thorough and complete.

Decision

[23] This Court has repeatedly expressed the view that Summary Dismissal should be the exception rather than the rule and resorted to only in the extreme e.g. where there is a blatant breach of contract of employment resulting in serious damage or loss to the employer, where the employee has committed or found in the commission of a serious crime or guilty of conduct so serious as to lead a reasonable employer to the conclusion that the employment relationship cannot be expected to continue. In this regard my attention is drawn to *Quality Builders Limited V William Russell*, Civil Appeal No of 19 (unreported) where the Court of Appeal overruled a finding of this Court and set aside a substantial Award to an employee who wrote a highly critical letter littered with sarcasms and insinuations to his employers. The finding was overruled even though the effect was that, *inter alia*, an employee who had worked for an employer for twenty (20) years did not recover any compensation at all.

[24] It is to be observed that although the whole series of events were triggered off by the alleged "sick out", this was not given as the reason for the dismissals, lurking as it was in the background. The reasons for the dismissals are those stated in the dismissal letter and not elsewhere and these are set out by Mona Quintyne in her letter dated March 31, 1999, and are that the Employees had revealed information to which only they and the Employers were privy and thereby put the same into the public domain, in breach of their contract of employment and amounted to misconduct entitling the Employers to dismiss – See Exhibit LD6.

[25] It is acknowledged that matters relating to the alleged "sick out" published by "The Source", CANA, the Daily Observer of Antigua and other regional and international news media had been leaked to them but the evidence adduced does not show that the Employees or either of them were the persons who made the disclosures to the news media in question – the Employees never admitted that they were the ones;

no one testified that the Employees had and no documentary evidence in support of the allegations was adduced. And, from the evidence adduced I do think it would be reasonable to conclude that the Employees were responsible for the leaks and thus committed a breach of their Employment Contract and their Declaration of Secrecy. The Court acknowledges that an Employee owes a fiduciary duty to his employer and is bound by the rule of confidentiality and non-disclosure but these rules relate to, principally, trade secrets and business connections (customers) but a "gag order" is not acceptable. And the purported "Declaration of Secrecy" and the secrecy provisions in the Employment Agreement are objectionable on the grounds that, inter alia, they are unlimited in area and in time – they seem to apply to the whole wide world and for indefinite duration.

This Court is generally reluctant to make inferences, especially inferences that could be decisive to the outcome of the matter before it and believes that the best route is for a party to prove his case rather than leave the Court to infer "guilt" or no "guilt", liability or no liability.

It should be remembered that even though a document bearing a heading Employment Agreement and another, The Antigua Sun Limited, Declaration of Secrecy, were admitted as part of Exhibit HH1, no evidence was led on them and no Cross or other Examination made.

It is somewhat unclear as to whether the Employment Agreement was valid and enforceable, but even if it is, and it is undeniable that information had been leaked. I have not been persuaded that it was the Employees who leaked the information – no evidence was given to establishing this, it was not admitted by the Employees or any of them, the matter became public knowledge at the meeting held by Mr Stanford on March 13, 1999, and could have been leaked by any of the thirty (30) persons who attended that meeting.

There are doubts whether the Declaration of Secrecy is of any significance. There are strong doubts whether it is valid and enforceable. To succeed the Employers have to show that the Employees were responsible for the leaks.

The grundnorm of the dismissal is misconduct.

[26] For the reasons abovementioned I find that the dismissals were Unfair.

The Award

[27] A person the victim of an Unfair Dismissal is entitled to compensation under the four established heads and in the case of these Employees the position is as follows:

- (a) Basic Award for Loss of Protection: The Award here is similar to cases of Severance Pay and is one day's pay for each month worked, in the case of a weekly paid employee and one month's pay for each year in the case of a monthly paid employee. Mr Helps worked with the Employers for 7 months and 29 days and at the time of his dismissal his basic salary was approximately \$ 5,000.00 per month so that his entitlement under this head is $\frac{2}{3}$ of \$ 5,000.00 = \$ 3,333.33.

Mr Daniel worked for the Employers from April 1, 1997, to March 31, 1999, i.e. 23 months and at the time of his dismissal his salary was \$ 6,500.00 per month so thus, his entitlement under this head is \$ 12,458.33.

- (b) Immediate Loss: Subsequent to the dismissal, Mr Helps never succeeded in finding new employment and had to set up business as a freelance journalist from which he earned \$ 1,080.00 per month (US\$ 400.00). I would fix a cut-off period of 4 months so that his entitlement is \$ 5,000.00 x 4 less \$ 4,320.00 = \$ 15,680.00.

In the case of Louis Daniel, he obtained new employment on July 6, 1999 @ \$ 4,500.00 per month. I would fix the cut off point at 4 months so that the entitlement under this head is \$ 6,500.00 x 4 = \$ 26,000.00

- (c) Manner of Dismissal: No Award – it has not been shown that the termination rendered the Employees more likely for dismissal or less employable.

- (d) Future Loss: An Award under this head consists of a guesstimate and is the difference between the Employees' last earnings and his imaginary future earnings. In the case of Mr Helps the monthly loss suffered was \$ 3,920.00 so that the quantum of the Award is \$ 3,920.00 x 4 = \$ 15,680.00. As far as Mr Daniel, he had no income at all for 4 months and when he found employment on July, 1999, this was at a loss of \$ 2,000.00 per month. I

would fix the cut off period at 4 months so that the amount of the Award is \$
 $2,000.00 \times 4 = \$8,000.00$.

- (e) Perks: As a result of the dismissal Mr Helps lost
- (i) the monthly payment of his car.....4 months @ \$ 500.00 = \$ 2,000.00
 - (ii) the payment for his apartment.....4 months @ \$ 1,000.00 = \$ 4,000.00
 - (iii) Allowances..... 4 months @ \$ 500.00 = \$ 2,000.00
 - (iv) for travelling on assignments 4 months @ \$ 140.00 = \$ 560.00
- \$ 8,560.00
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In the case of Louis Daniel the amount is:

- (i) Clothing Allowance.....4 months @ \$ 500.00 = \$ 2,000.00

[28] The sum total of the Award is therefore:

- (1) Howard Helps
- (a) Basic Award.....\$ 3,333.33
 - (b) Immediate Loss.....\$ 15,680.00
 - (c) Future Loss.....\$ 15,680.00
 - (d) Perks.....\$ 8,560.00
- \$ 43,253.33
 =====

- (2) Louis Daniel
- (a) Basic Award.....\$ 12,458.33
 - (b) Immediate Loss.....\$ 26,000.00
 - (c) Future Loss.....\$ 8,000.00
 - (d) Perks.....\$ 2,000.00
- \$ 48,458.33
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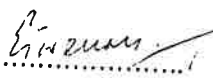
Conclusion

- [29] In arriving at the decision 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, Cap. 214, Laws of Antigua and Barbuda, 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.
- [30] I am satisfied that the Employees mitigated their loss and make no deductions for not so doing but a deduction of 20% will be made in furtherance of the fact that the lump sum payment is more profitable to them than payment of a smaller sum over a period of time, as stated by the Court of Appeal in Antigua Village Condo corporation V Jennifer Watt, Civil Appeal No. 2 of 1992.
- [31] It is hereby ordered that the Employers shall pay the sum of \$ 34,602.66 to Horace Helps and \$ 38,766.66 to Louis Daniel, payment to be made by January 19, 2000.
- [32] There shall be no Order as to costs.

DATED the 19th day of December, 2000


Cyril L. Maundy
President

I concur


E.T. Henry
Member

I concur


Hubert Hood
Member