

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 8 OF 1999

BETWEEN:

HOLLY PETERS

Employee

and

ANTIGUA LOTTERY COMPANY LIMITED

Employers

Before:

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

President
Member
Member

Appearances:

Ms E. Ann Henry & M/s Velox for the Employee
Mr Radford Hill & Miss Denise Jonas for the Employers

1999: September 8, 9
October 12
November 15, 16, 17
2000: March 1, 15.

JUDGMENT

Unfair Dismissal – Summary Dismissal – Job Description – General Manager – theft of company's funds by employees – instructions of Chairman not implemented by General Manager – Unsatisfactory Management – employees borrowing from the Petty Cash – Use of telephone for personal and private matters – General Manager collecting travelling allowances even though provided with company car – written

warning – the Interpretation Act, Cap 224 – maladministration discovered after dismissal – General Manager's opposition to Chairman's wish to increase new games – failure to reach targets and objectives – contribution and causation – mitigation.

- [1] **MAUNDY, P.:** By a Reference dated and filed on March 26, 1999, E. Ann Henry, Solicitor for the Employee notified the Court that there was a trade dispute between the Employers and the Employee, and by Memorandum dated and filed on the 26th day of April, 1999, that, inter alia, the Employee was Unfairly Dismissed by the Employers on October 22, 1997, and that she was therefore entitled to compensation for Unfair Dismissal.

Historical Background

- [2] On May 5, 1995, the Employee commenced working with the Employers, the Antigua Lottery Company Limited, St. John's, Antigua, as General Manager; her salary was \$ 4,000.00 per month with travelling allowances of \$ 500.00 per month. At her appointment the Employee's terms and conditions of work and areas of responsibility were discussed with Robert Washington, the Chairman of the Board of Directors, on behalf of the Board and they agreed upon these but she was not given a Job Description. Neither Mr Washington nor any of the Board members resided in Antigua and the Employee was made responsible for the day to day operations of the Antigua Lottery. The Employee had to report to Mr Washington and the Company was entirely dependent upon her for the smooth and efficient functioning of the business.
- [3] The Company did not have any Manual or Handbook for its employees although there was a Manual that dealt with lottery draws.

- [4] Prior to taking up the position with the Employers the Employee worked with a number of reputable establishments and held a number of responsible and in some cases high management positions, going back to 1983 as follows:
- (a) Upon leaving school in 1963 she worked with the Royal Bank of Canada in Antigua until 1983.
 - (b) Between 1983 and 1987 she held a managerial position with the Royal Bank of Canada in Toronto – she was Manager of the Word Processing Pool of six persons. After three months she was promoted to Assistant to the Director of Domestic Operations, a department with a staff of approximately 170 persons.
 - (c) She was Quality Control Officer of the Processing and Documentation Department.
 - (d) In 1987 she was recruited in Canada and brought back to Antigua as Personal Assistant to the Managing Director of the Royal Antiguan Hotel; she later became the Training Officer and was promoted to Group and Convention Services Manager and finally Sales Manager, with responsibility for the Caribbean Area. On two occasions during the absence of the Managing Director the Employee was put in charge of the entire hotel.
- [5] No system was in place when the Employee took up her duties and it was she who created one. Also, during her tenure in office there was a growth in sales: the Jackpot was increased from \$ 10,000.00 to \$ 160,000.00, and there was an increase in the number of agencies. The Employee used to work for between 10 and 12 hours per day.
- [6] Up to about 1997 the Employee's relationship with the Chairman was quite pleasant but then the tide began to turn – the Lottery was seven months old when she was made General Manager.

- [7] For some time leading up to the dismissal Mr Washington complained to the employee about a number of matters and the relationship between them deteriorated and became very tense with regard to:
- (a) The telephone – The Chairman stipulated that the telephone was not to be used to make personal overseas telephone calls except in an emergency – See Exhibit HP 22. The Employee permitted the staff to make overseas calls provided they paid for them but payment was not always made thus causing expense to the Company – See HP4.
 - (b) The Float – The Employee permitted the operation of a system whereby anyone could borrow money from the float and give an IOU in return, pending reimbursement – the Employee herself used the system.
 - (c) Travelling allowance – when she took up the appointment the Employee was not provided with any transport by the Company but was paid a monthly travelling allowance of \$ 500.00. Subsequently the Company acquired two (2) motor cars and one was allocated to the Employee for business use. It was discovered that the Employee continued to pay herself the travel allowance and make all the charges for the gasoline to the Company even though the car was also used for personal matters.
 - (d) Thefts of money and other acts of dishonesty were rampant among the staff and so much so that the Director of Finance had to send a Memo to all members of staff when on May 10, 1997, \$ 8,894.70 disappeared from the cash received that day from the Agents – See SM1.
 - (e) The Employee failed to achieve the agreed figure of 50 Agents including 2 from Barbuda.
 - (f) After ordering the dismissal of Marinella Simpson for theft of Company's money by her superior officer, the Employee re-instated her and threatened the officer with dismissal. Marinella confessed to the theft and returned the funds.
 - (g) Going on vacation at a time when it was inappropriate i.e. sales were down in instant tickets and 3D, moral was low, the office was in need of direction and leadership. Also, failure to inform the Chairman that the major computer

was down, the Hotline had not worked for weeks and the media, advertising and communication programme was essentially dormant – See Exhibit HP 23. Other breaches were discovered after dismissal.

- (h) Failure to follow instructions from the Chairman and to exceed the agreed Budget, hold monthly/weekly management meetings, keep minutes thereof and submit same to the Chairman – See HP26 – After the dismissal some other delinquencies were discovered.
- (i) Performance – Although the Employee was instrumental in putting a system in place after she was appointed, prepared Job Descriptions for the staff and was to some extent responsible for the increase in the Jackpot, her overall management performance was unsatisfactory – her attention was taken up with the Lotto at the expense of the 3D and instant games which Mr Washington described as the most important and the things that “paid the rent”. There was tension, mistrust and disharmony between the staff and the Employee.

[8] On October 20, 1997, the parties had a meeting and Mr Washington informed the Employee that they could no longer work together and requested her resignation. Mr Washington offered the Employee a package in the form of \$ 5,500.00 per month for October, November, December, 1997, and January and February, 1998; also, another \$ 5,000.00 if the Employee did not obtain employment by April 20, 1998 – See HP9. The offer was not accepted.

[9] On October 21, 1997, the parties had a meeting on the matter in the presence of the Employee's Solicitor, Donald Halstead, and two others, Senator Tim Hector, a journalist and editor of a popular local newspaper, and Mikeda Mikael, but of no avail and finally on the following day, the Employee was dismissed on the grounds of:-

- (a) Failure to provide the necessary management, leadership and directions to:
 - (i) prevent clear examples of petty theft, theft and stealing from the company by its employees

- (ii) enable the company to meet its mutually agreed financial goals as set forth in its January, 1997 Cash Flow Statement and revisions made thereto in August, 1997
 - (iii) secure and maintain the appropriate number of agents selling lottery products in Antigua and Barbuda
 - (iv) supervise properly the management team of the company
 - (v) create and maintain an acceptable environment conducive to sound, clear and efficient management decisions, accountability and esprit de corps in the office and overall operations of the company.
- (b) Failure to provide the normal and customary standards of communication and understanding between the General Manager and Chairman of the Board to reach its basic objectives and performance.
 - (c) Failure to provide the normal and customary standards of management systems and direction to the company to enable it to reach its basic objectives and performance

Triable Issues

- [10] In her Memorandum the Employee denied the allegations of the Employer and said that they are unsubstantiated and baseless and thus this will have to be determined.
- [11] Sections C.57 and C.59 of the Antigua and Barbuda Labour Code, Cap 27, Laws of Antigua and Barbuda, Revised Edition, 1992, hereinafter referred to as the Labour Code, sets out the circumstances in which a dismissal will not be unfair and thus these provisions will of necessity have to be looked at to see if the dismissal was unfair.
- [12] Also for examination is whether the dismissal was harsh and the matters complained of were not sufficiently serious to warrant dismissal but should have been the

subject of a written warning within Section C.59(2 – 5) of the Labour Code. Further was this a proper case for a Summary Dismissal?

The Arguments

- [13] In the Employers' Memorandum the allegations of the Employee were denied and the Employers stated that the Employee, though helpful, was incapable of performing the duties of General Manager satisfactorily and failed to do so despite Mr Washington drawing her attention to her deficiencies and shortcoming and giving her adequate opportunity to improve her performance. This view was reiterated in Counsel's final submission where he also dealt with the failure to provide the Employee with a Job Description which he said was not of any real significance as the Employee knew her terms and conditions of employment and there was no dispute as to these.
- [14] Counsel for the Employers, Mr Hill, referred to certain specific matters and submitted that, inter alia:
- (a) The Employee knew of the company's policy forbidding the use of the office telephone for private overseas calls except in an emergency – See Exhibits HP6, HP25, HP22 and HP23 and the fact that following termination it was discovered that the Employee was indebted to the company in the sum of \$ 1,590.33 for unpaid overseas calls.
 - (b) The system of borrowing money from Petty Cash by the Employee and others and giving IOU's in place and repaying whenever the borrower felt like it.
 - (c) The employee failed to carry out instructions from the Chairman with regard to the holding of management meetings and the submission of weekly reports – See Exhibit RW1 and HP25
- [15] Finally, Counsel asked that the Court should accept the opinion of Mr Washington expressed in his Cross-Examination when he said that he had formed an opinion of

the Employee's ability to manage the company and over a period it became quite clear that she did not have the skills, knowledge and background to manage a lottery company. Further, the Employee failed to offer the Employer a satisfactory explanation for her lack of performance.

[16] During the Employee's stewardship stealing from the company became a feature and went on unchecked.

[17] A written warning was not appropriate in the instant and was optional and not mandatory.

[18] In support of his contentions Counsel cited:

- (a) Cook V Thomas Linnell & Sons Limited ICR(1977) P.774(C-G), P.775(A-D)
- (b) James V Waltham Holy Cross Urban District Council (1973) ICR404 (B-G)
- (c) Lowndes V Specialist Heavy Engineering Limited (1976) ICR P5 (C-D & G-H)

[19] Ms Henry did not share Mr Hill's views and contended that, inter alia:-

- (a) Mr Washington had many areas of dissatisfaction and many concerns regarding Mrs Peters' performance as General Manager but up to October 22, 1997, he had an open mind and was willing to continue working with her, he had no intent to dismiss.
- (b) The reasons for the dismissal do not fall within C.58 of the Labour Code and the Employer did not act reasonably in dismissing the Employee.
- (c) After taking up the appointment the Employee worked hard and used her best endeavours to make a success of her work as General Manager.
- (d) At the time of her appointment Mr Washington knew that the Employee had no experience in Lottery operations but appointed her General Manager without training and providing her with a Manual dealing with Lottery Draws only.
- (e) The memoranda sent to Mrs Peters by Mr Washington dealt with the "tos" and "fros" and the "ups" and "downs" which were expected to be found in a business in its early stages of operations.

- (f) There has not been any hint from Mr Washington that he was dissatisfied with the Employee; so dissatisfied that he would terminate her employment – he never wrote to her to this effect or communicated this to her.
- (g) The first thing that the Court has to do is to seek to establish the true reason for the dismissal.
- (h) Mr Washington formed no intent to dismiss until he attended the meeting with Mr Halstead, Senator Tim Hector and Makeda Mikel on October 21, 1997.

The Law

- [20] Section C.56 of the Labour Code protects an Employee against Unfair Dismissal 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."
- [21] Sections C.57, C.58 and C.59(1) permit an Employer to terminate the services of an employee without liability in the specific circumstances stated therein. These sections 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) it provides, "The test generally for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably 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."

(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."

[22] 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.

- [23] 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.
- [24] Where an Employee is entitled to an award of compensation for Unfair Dismissal there should be a substantial discount as a lump sum payment is more beneficial than a number of small payments made over a period of time and an award should not consist of an aggregation of sums awarded under a number of heads. I am aware of the words of Sir Vincent Floissac, the former Chief Justice of the Supreme Court of the Organisation of Eastern Caribbean States when delivering the Judgement of the Court of Appeal in *Antigua Village Condo Corporation V Jennifer Watt*, Civil Appeal No. 2 of 1992, pages 3 and 4, when he said, "The legislative intention clearly expressed in Section 10(3) of the Act is that an award (including an award of compensation for unfair dismissal) should be fair and just and that the fairness and justice of the award should be determined by reference to the interests of the employer, the employee and the community as a whole, the principles enshrined in the Code and the principles and practices of good industrial relations. Accordingly, an award of compensation for unfair dismissal should be held to be unfair and unjust if the award is a mere aggregation of the amounts of the losses suffered or likely to be suffered by the employee under various heads of loss and if the amounts of the heads of loss are calculated without due regard to the interests of the employer and the community as a whole and without making those reductions, deductions, discounts, allowances and mitigations which the principles of compensation in general and the principles and practices of good industrial relations in particular require to be made in protection of those interests and on behalf of the general fairness and justice of the award."
- [25] 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.

- [26] 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

- [27] The testimony in this Reference has been most voluminous and has been accompanied with a virtual preponderance of Exhibits, most in the form of letters (memoranda) from Mr Washington to the Employee.
- [28] It is quite clear from the evidence and the reading of the various memoranda from Mr Washington to the Employee that he was most dissatisfied with the functioning of the business under her management.
- [29] As harsh as it may appear it is widely known that the overall responsibility for a ship or a business is that of the captain or the man at the top when the ship flounders or problems are found in the business. Here we have a situation where a series of wrongs were discovered in the business, some being committed by the General Manager, the one who is dependent upon for leadership and in whom someone living on distant shores had entrusted his business and investment – See Exhibit RW12. These have not been denied.
- [30] Without taking into account the matters discovered after the dismissal, i.e. the gasoline issue, the borrowing from the Petty Cash, retention of company monies re travelling, matters for concern included, though not limited to, repeated thefts of money, in one instance \$ 50,000.00, failure to promote the games that "paid the rent" and thus the oxygen of the business, overruling a dismissal for a theft of monies admitted by an employee and threatening disciplinary action against the

member of Management who ordered the dismissal, failure to achieve the agreed target of 50 agents, failure to function within budgetary allocations and exceeding such allocations and going on vacation at a most inappropriate and ill-judged time.

[31] But there was another most alarming factor, a breakdown of relationship and moral between the Employee and her staff – she no longer had confidence in them and vice versa and the Chairman no longer had his trust in her.

[32] Given the above situation what would be reasonable for a Chairman of a company who resided outside the State and relied on his General Manager to do to save his company and his investment? In the circumstances it seems to me that any Chairman would immediately take such steps that are reasonable in the circumstances to save his company and to this extent I would find that Mr Washington acted reasonably in dismissing the Employee and that the dismissal was not Unfair.

[33] On the issue of giving the Employee a written warning in lieu of dismissal, it is my view that section C.59(2) is not obligatory and the Employer has an option whether or not to do so. But the circumstances are sufficiently serious to warrant dismissal and went beyond the question of issuing a written warning. It should be observed that under Cap. 224 (43) “may” is permissive and “shall” is imperative.

[34] Although Counsel for the Employee does not seem to have referred to it, this is a case of a Summary Dismissal and the Court has from time to time expressed concern at this type of dismissal, such dismissals are not unlawful and there are occasions when they may be resorted to with impunity; I think this is so here.

[35] From the stream of complaints and memoranda from Mr Washington the Employee ought to have realised that there was gross dissatisfaction with her management and thus dismissal should not have taken her by surprise or “flat footed”. And the Employer went to extremes to make the dismissal as painless and practicable by

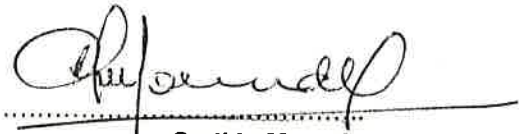
offering to continue payment of the Employee's salary monthly for six (6) months while she sought new employment.

Conclusion

[36] In arriving at a decision I took into consideration the evidence adduced, the statutes cited, in particular, the Labour Code and the relevant provisions of the Industrial Court Act, the authorities cited and all the other relevant matters and to my mind the Reference cannot be maintained and is hereby dismissed.

[37] It is hereby ordered that the Reference be dismissed and that there shall be no order as to Costs.

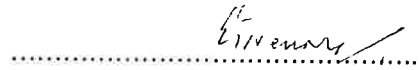
DATED the day of , 2000


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Cyril L. Maundy
President

I concur


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Hubert Hood
Member

I concur


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E.T. Henry
Member