

**ANTIGUA & BARBUDA**

**IN THE INDUSTRIAL COURT**

**REFERENCE NO: 10 OF 1999**

**BETWEEN:**

**ROBERT HOFFMAN**

Employee

**and**

**STANFORD FINANCIAL GROUP LIMITED**

Employers

**Before:**

Cyril L. Maundy  
E.T. Henry  
H. Hood

President  
Member  
Member

**Appearances:**

Charlesworth O. Browne, Barrister-at-Law, for the Employee  
Justin L. Simon, Barrister-at-Law, for the Employers

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2001: April 17, 18 & 19  
May 28  
August 13, 14 & 16

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**JUDGMENT**

Unfair dismissal - General Manager and Editor in Chief of newspaper recruited from California to head new newspaper – purchase of printing press for upwards of US \$1,000,000.00. Printing press defective and never worked – uncertainty whether appointment was for specific period (5 years) or indefinitely – huge capital investment of over US \$2,000,000.00 and after almost 2 years company still making a loss

(EC \$500,000.00) per month. At first owner of Company (R. Allen Stanford) pleased with quality of newspaper but later found publication unsatisfactory – employee refused entrance to his office on return from short holiday – employee sent on extended vacation – position of General Manager removed from Employee and given to Linda Wringfield – employee's duties reduced to editor only – forensic audit made of company and defects in management discovered – employment terminated while employee on vacation.

[1] **Maundy, P.:** By a Reference dated April 22, 1999, the Employee filed a Notification of the existence of a Trade Dispute between himself and Stanford Financial Group Limited.

[1(a)] In his Memorandum dated the 21<sup>st</sup> day of August, 1999, and filed on the 26<sup>th</sup> day of the said month and year, the Employee contended that, inter alia, his dismissal was unfair and claimed compensation for Unfair Dismissal and Costs. In their Memorandum filed on April 26, 1999, the Employers denied that the Dismissal was unfair and that the Employee was entitled to any relief.

### **Historical Background**

[1(b)] The Employee, the owner and editor of a small newspaper in Bear Valley, California (Bear Valley Voice), was recruited by the Employers to found and operate a newspaper (the Antigua Sun) in Antigua, The Employee had 37 years in the newspaper business.

[2] By letter dated November 15, 1996, further to an interview in Houston, Texas, the Employee was offered the position which he accepted – himself and his wife were relocated to Antigua where the newspaper was founded, as a weekly, with himself as General Manger and Editor-in-Chief – See Exhibit RH1.

- [3] Approximately US\$ 2,000,000.00 or EC\$ 5,000,000.00 was invested in the project and the Employee was instructed to produce a first class newspaper and the best in the Caribbean.
- [4] At first the Employers were satisfied with the quality of the newspaper but later found it below the standard desired and on August 4, 1994, wrote to the Employee expressing concern and disappointment and informed him that he was getting one last opportunity to get the newspaper back on track. The Employee's appointment as General Manager of the publishing company, Antigua Sun Limited, was revoked and one Linda Wingfield was appointed to this position and C.E.O. of the company – all matters relating to the administration, management and finances were now to be handled by Linda Wingfield. Also, a forensic audit was to be carried out by an Accounting Firm in Miami, O.D. Siedman – See RH2.
- [5] During his tenure in the offices the Employee worked an average of 14 – 16 hours per day, 7 days per week and did not have a vacation for almost 2 years.
- [6] In August, 1998, the publication was increased to 3 days weekly and eventually a daily.
- [7] By letter dated August 20, 1998, R. Allen Stanford wrote to the Employee expressing dissatisfaction with the newspaper and the way he had been spending the company's money. Mr Stanford instructed the Employee to improve the quality of the newspaper, to exercise more care in the spending of the company's money and that the newspaper has to make a profit.

- [8] The Employee went to Trinidad for a short holiday. On the morning of September 7, 1998, when he went to his office he was prevented from entering by a Security Officer acting on instructions from the Employers.
- [9] By letter from Linda Wingfield dated September 6, 1998, the Employee and his wife Lesly were put on further vacation and told not to report for work during the period 6 – 19 of the said month.
- [10] By letter dated September 17, 1998, by Mona Quintyne, the Director of Human Resources, the Employee was dismissed with immediate effect on the grounds that:
- (a) An investment of US\$ 2.7 million was used to generate only US\$ 427,000.00 in revenue, of which nearly US\$ 200,000.00 remained uncollected.
  - (b) Advertisements have repeatedly been run in the newspaper without corresponding invoices.
  - (c) Failure to obtain competitive bids on purchasers of major equipment.
  - (d) Cash advances repeatedly made to persons without proper documentation.
  - (e) Loans and advances were made to staff members against company policy
  - (f) The financial failure of side ventures such as the “cricket special” and the “hurricane manual”, including failure to get deposits from customers appearing in these publications.
  - (g) Personal negligence on his part with company equipment, such as loss of a laptop computer valued at over US\$ 3,000.00
  - (h) Poor editorial judgment such as:
    - (i) placement of a diamond de-valuation story above an advertisement for diamonds, thereby causing ill-will with the customer
    - (ii) revelation of the family name of a rape victim on the front page of the newspaper, contrary to requirements of law, thus exposing the Antigua Sun to a potential fine.

- (i) Disregard of a direct order from the Chairman to keep out of the Printing Plant business, when your responsibilities were reduced to editorial and production only, at the Antigua Sun.
- (j) Misrepresenting Mr Tony Bagalue as the International Marketing Manager, providing business cards and letterheads for his use, and authorising him to enter into contracts on behalf of the Antigua Sun.
- (k) Misleading superiors regarding your purchase of the Planeta sheet fed press, by stating that Mr Charles Lloyd witnessed the operation of the press in question, when in fact no such event ever took place.
- (l) Advising employees to disregard instructions from the staff Accountant and Administration Coordinator regarding documentation of travel expenses, and further advising them to dispose of such documentation.

- [11] It is to be observed that the dismissal took place while the Employee was still on vacation abroad and, in fact, it was only when he returned home and found the dismissal letter that he learnt that his services had been terminated and with immediate effect. The Employee was not given an opportunity to answer the allegations against him or time to seek new employment. Also, it was only a week after the dismissal that Mr Stanford telephoned the Employee at his home and for the first time made the allegation re Sun Marketing, i.e. while on holiday in Trinidad he had entered into negotiations with one Tony Bagalue to produce an aircraft in-flight magazine in breach of his contract with the Employers.
- [12] After the dismissal the Employee went to Trinidad to seek employment and after approximately 3 weeks he gained employment with the Associated Press as the Eastern Caribbean correspondent at US\$ 1,500.00 per month. After so employed for five months the Employee obtained a position in St Croix as Editor of the St Croix Avis, a daily newspaper, as from February, 1999, @ US\$ 20,000.00 per annum and bonus of US\$ 16,000.00.

[13] The Employee did not have any chance of finding work in Antigua as there was no avenue here for an editor.

[14] All accounting for the company was done in Houston and the Employee never saw the Accounts.

### **Triable Issues**

[15] The principal issues for determination in this matter are:

- (a) Was the dismissal Unfair?
- (b) What was the significance of the summary dismissal and failure to give the Employee an opportunity to respond to the allegations made against him?
- (c) Did the Employee negotiate a contract to publish an in-flight magazine for the airline while in the Employers' service in breach of his contract and was this sufficient to render the dismissal fair?
- (d) Was the Employee guilty of the mis-administration alleged?
- (e) Did the Employee fail to mitigate his loss?
- (f) Can the Employers rely on matters that were not known to them at the time of dismissal and which came to their knowledge afterwards as grounds for the dismissal?
- (g) Was the Employee employed under a five year contract or for an indefinite duration?
- (h) Did the Employee cause or contribute to the dismissal?
- (i) Was the Employee guilty of Incompetence in the management of the finances of the company (loans etc)?

## **The Law**

- [16] The Law relating to Unfair Dismissal is set out in the Antigua & Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, hereafter referred to as "the Labour Code", supplemented as it is by Case Law and the Rules of Natural Justice. The Labour Code does not deny an Employer the right to dismiss but sets out the instances when he may dismiss with impunity and the consequences if there is an Unfair Dismissal. The rights of an employee are set out in the Labour Code and both employers and employees are expected to act within its perimeters at all times.
- [17] The Court has had to make a decision on a situation where a dismissal was ordered without the employee being given an opportunity to be heard and on Summary Dismissals generally.
- [18] The relevant sections of the Labour Code are: Sections C.56, C.57, C.58 and C.59: Section C.56 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."
- [19] Examples of where the Code gives rights of dismissal to the Employer who may dismiss without penalty are under Section 56 the Employer may dismiss with impunity where the Employee has not completed his probation or there is just cause for the dismissal.
- [20] Sections C.57, C.58 and C.59(1) permit the employer to terminate the services of an employee without liability in the specific circumstances stated therein. These Sections provide thus:

C.57: 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."

C.58(1), 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.

[21] By Section C.58(2): 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.

[22] 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.

## The Arguments

[23] Mr Simon urged the Court to find that the dismissal was not unfair and contended that, inter alia:

- (a) The Employee was only entitled to 10¼ days vacation
- (b) The Employee was not employed under a fixed term contract for 5 years but for an indefinite period.
- (c) The dismissal is fair and relates to the Employee's inability in performance of his duties.
- (d) The Employee committed a breach of Clause 3 of the Employment Agreement in that during the period of his employment he attempted to enter into a business venture with one Anthony Bagalue under the name of Sun Marketing and Communications Inc.
- (e) Reasons other than those stated in the dismissal letter can be used to justify a dismissal, provided the dismissal letter is not a statutory requested letter under Section C.10(1) of the Labour Code and the principal reason for the dismissal is not stated in the Dismissal letter.

[24] In support of his contentions Mr Simon referred the Court to:

- (1) Section C.10(1) of the Labour Code.
- (2) Cook V Thomas, Linnel & Sons Limited (1977) ICR771
- (3) Loundes V Specialist Heavy Engineering Limited (1997) ICRI
- (4) Colin Plumber V Harmony Hall Limited, Reference No 8 of 1989

[25] Mr Brown did not share the views of Mr Simon and contended that the dismissal was unfair; he submitted that, inter alia:

- (a) The employment was for a 5 year duration and not indefinitely

- (b) The Employers committed a breach of the rules of Natural Justice in dismissing the Employee without giving him an opportunity to be heard or answer or attempt to answer the allegations made against him.
- (c) The Employee, in his evidence, denied all the allegations made against him, including and especially those contained in the Seidman Report and his evidence was uncontroverted.
- (d) An employer cannot introduce as reasons for dismissal matters that were not available and of which he had no knowledge at the time of dismissal – an employer cannot, after a dismissal, rely on reasons which he was not aware of at the time of the dismissal.

[26] In support of his contentions Counsel cited:

- (i) Leroy Hodge V Cedar Valley Golf Club, Reference No 7 of 1991
- (ii) Earl V Slater (1973) IAER145
- (iii) Davis & Sons Limited V Atkins (1977) 3AER40 (HL)

### **Decision**

[27] It has to be emphasized that in all matters that come before it, it is the abundant duty of the Court to consider the evidence adduced as supplemented by the relevant legislation, Case Law and authorities in determining which of the parties is at fault and whether the alleged dismissal is or is not fair. The importance of this is that if no evidence is adduced in controversion of that of a party or his evidence is not challenged, the Court, mutatis mutandis, will be persuaded to accept such evidence, despite any brilliance displayed by Counsel, especially in Cross-examination.

[28] In this instance, the major, and to some extent, the principal allegations of the Employers seem to be those contained in the Siedman Report. But it must be noted that the maker of the Report, and Linda Wingfield was not the maker thereof, never

Sun was but two years old; that a circulation of 6,000 was required before the newspaper could start making a profit and due to the small population the circulation was but 3,000 only. Also, that the newspaper was of first class quality during his stewardship and which quality is presently wanting.

- [33] With regard to the Contract, the Employee denied attending a meeting in Trinidad and entering into negotiations to acquire an interest as a partner in a company there (Sun Marketing Limited) to print an in-flight magazine for an airline. It is not disputed that the Employee ever went to Trinidad: he visited the country while on vacation, and it is possible that he did have the meetings alleged but he did not actually accept any position or produce the magazine or any other printed matter. Indeed, the talks broke down so how could he have committed a breach of his Contract of employment? Indeed, when an employee, while employed by a company, seeks employment with another, is this a breach of an express or implied term in his contract of employment? Would not such a contract constitute a prohibition against the concept of freedom of speech and a right to work?
- [34] I find it difficult not to conclude that the Contract of employment was for a 5 year duration. Apart from the fact that the Employee said he understood the Contract was to be for a period of 5 years after which a new Contract would be entered into with new terms and conditions. A new Contract meant new employment. Further the Employers were the authors of the Contract and in keeping with the general rule the maker of a document is bound by the words therein and any difficulties of interpretation of a document operates against the maker.
- [35] This Court stands bound by its decision in *Leroy Hodge V Cedar Valley Golf Club*, Reference No 7 of 1991 and reiterate that an employee is not only entitled to be given the reasons for his dismissal at the time of dismissal (See Section C.10(1)) of the Labour Code but has the right to be given an opportunity to be heard and to answer

came forward to give evidence. And the Employee denies the contents of the Report, and does so in toto!

[29] The Employee testified that he did not act on his own judgment in the purchase of the printing press, as alleged, and that before the purchase he had an engineer, Lloyd, to carry out an examination of it and had acted on his advice. Also, the purchase was approved by Allen Stanford, the Chairman and owner of the Company – there was no evidence in contravention of the statement.

[30] Indeed, as for the spending spree or frolic in the sum of US\$ 2,700,000.00 which it is alleged the Employee had embarked upon without being accountable to anyone, one notes the Employee's evidence that approval for spending the Company's money had to be obtained from Mr Stanford's office in Houston, Texas, that the Accounts were kept there, he never saw the accounts and it is difficult to conclude that Mr Stanford gave US\$ 2,700,000.00 to someone of whom he had no personal knowledge of his business acumen and operated a small town newspaper, to spend as he wished; this is not the modus operandi of a successful businessman and indeed it is doubtful if any businessman which operated this way would be successful or remain in business for long.

[31] The Employee denied any wrongdoing with regard to the loans allegation or with regard to Mr Bagalue whom he said was never employed by him but did freelance assignments only. Again, this evidence was not controverted.

[32] Much was said by Mr Simon about Mr Stanford's expectations of the newspaper, its intended quality and it is interesting to note that the Employee's reply to the allegations, which were not challenged, are that Mr Stanford never informed him, except towards the end, that the newspaper had to make a profit, that normally it takes an average newspaper approximately 5 years to show a profit and the Antigua

the allegations made against him. The power of an employer to tell an employee he is “fired” without giving any reasons or an opportunity to respond have now been superseded and although neither the Labour Code nor Case Law prohibits an employer from pursuing such a route the Law will penalise such an employer by making him liable to pay compensation/damages, which at times can be substantial. I would agree that failure to give a dismissed employee an opportunity to be heard does not ipso facto make the dismissal unfair but it is an issue that should be seriously investigated in such cases.

[36] Mr Simon cited the Judgment of Lord Hoffman in Privy Council Appeal No. 51 of 1995, and any observation of the Privy Council is always given priority and full respect. But it seems to me that his Lordship's observation was made obiter dicta and the general issue was not argued before the Court. Indeed the issue before the Court was whether the Employers had complied with Section C.10(1) of the Labour Code, as it then was and had given the Employee a written statement setting out the reasons for the dismissal as requested by his Solicitor.

[37] It seems to me that there is a distinction between reasons sufficient for a dismissal known to the Employer at the time of the dismissal but which were not communicated to the Employee until after the dismissal and reasons that would make a dismissal fair but were not known by the Employee at the time of dismissal but of which he learnt after the dismissal. I am not persuaded that the latter would be sufficient to render a dismissal fair. In fact, this could lead to situations where without any sufficient reason an employer could dismiss and after doing so set out on an excursion to find reasons. Of course, the situation could perhaps be different where the employee is caught “red handed” or accepts the dismissal as a result of guilt or otherwise.

- [38] At one stage it was being considered whether the Employee had contributed to the dismissal in travelling to Trinidad and negotiating a contract to do private work in breach of his contract of employment but this came to light after the dismissal and should not be used against him in retrospect.

### **The Award**

- [39] A victim of Unfair Dismissal is entitled to damages/compensation under the established heads and it is to these I will now turn:

(a) **Basic Award**:- The Award under this head is, in the case of a monthly paid employee, one month's pay for each year of service. The Employee worked for the Employer from November 15, 1996, to September 17, 1998, (1 year and 10 months) when he was dismissed with immediate effect and his basic salary at the time was US\$ 4,166.67 per month. The Award under this head is therefore,  $US\$ 4,166.67 \times 1 \frac{5}{6} = \$ 7,638.89$ .

(b) **Immediate Loss**:- The Employee has still not found a position in which his earnings are similar to that prior to dismissal and was unemployed until 2 – 3 weeks later when he accepted a job in Trinidad as the Associated Press Eastern Caribbean correspondence @ US\$ 1,500.00 per month.

It is true that, as was held in Reference No. 7 of 1991; Colin Plummer V Harmony Hall Limited that in mitigation of his loss in the case of an employee recruited from abroad compensation for Immediate Loss should be based on the period of time during which he could obtain employment there, rather than another country; it is doubtful whether the Employee would have obtained new employment in a shorter time in his homeland. In the circumstances the award here will be the equivalent of 3 weeks pay i.e.  $US\$ 4,166.67 \div 4 \times 3 = US\$ 3,125.01$ .

(a) **Manner of Dismissal**: I make no award.

(d) **Future Loss:** Awards under this head consist of a guesstimate and the difference between the Employee's salary at the time of dismissal and his earnings from his future employment and for this I would fix a cut off period of 6 months – no evidence was adduced as to what was the average monthly earnings of someone in the Employee's position working in the United States. Had he not been dismissed the Employee's earnings for six months would have been  $\text{US\$ } 4,166.67 \times 6 = \text{US\$ } 25,000.02$ , his actual earnings for the period was, at his last appointment. Following the dismissal the Employee, for the first six months following, worked in Trinidad @  $\text{US\$ } 1,500.00$  per month and thereafter in St Croix as editor of a local daily newspaper @  $\text{US\$ } 40,000.00$  per annum ( $\text{US\$ } 3,333.33$  per month) so that the amount payable under this head is  $\text{US\$ } 4,166.67$  less  $\text{US\$ } 3,333.81 \times 6 = \text{US\$ } 5,000.04$ .

[40] The parties were at variance as to the Employee's vacation entitlement and whether this was 10 days or 25 ½ days and in the absence of any conclusive evidence I would fix the period as 15 days. The Employee's vacation pay is therefore  $\$ 208.33 \times 15 = \$ 3,125.00$ .

[41] The Employee has had to travel to Antigua to pursue his claim and incur expense in order to establish his claim and I think this is a proper instance for an award of costs and this I do in the sum of  $\text{US\$ } 2,000.00$ .

[42] The Employee was summarily dismissed without notice. He and his family were living in a foreign land with no roots and far from home. Also, without warning, he was locked out and humiliated by a security officer who barred his entrance to his office and escorted him off the compound. Further, he was not given an opportunity to answer the allegations made against – the forensic audit took place while he was on vacation. I believe this is also an instance where Exemplary Damages should be awarded and I do so in the sum of  $\text{US\$ } 10,000.00$ .

[43] The Employee is also entitled to Notice Pay in the sum of US\$4,166.67.

[44] The sum total of the award is US\$35,055.62.

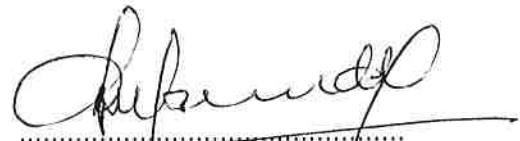
### Conclusion

[45] In arriving at a decision close scrutiny was given to the evidence adduced, the Labour Code, the Industrial Court Act, Cap. 214, Laws of Antigua & Barbuda, Revised Edition, 1992, and all other relevant matters and at the end, to my mind, the Dismissal was Unfair.

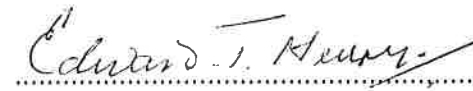
[46] The Employers shall pay to the Employee the sum of US\$ 35,055.62 (EC\$94,650.17) payment to be made by the **16<sup>th</sup> day of November, 2001.**

[47] I must emphasize that the Court's hands are virtually tied when a party literally offers no evidence in a case.

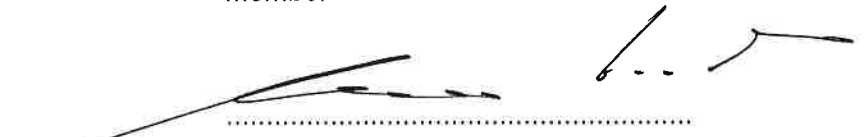
DATED the 16<sup>th</sup> day of October, 2001

  
Cyril L. Maundy  
President

I concur

  
Edward T. Henry  
Member

I concur

  
Hubert Hood  
Member