

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

Reference No. 16 of 1999

BETWEEN:

STEADMAN BARZEY - Employer

and

AGA DISTRIBUTORS LTD. - Employee

Before:

Mrs. Nelleen Rogers Murdoch - Chairman

Miss Genevieve Benjamin - Member

Appearances:

Mr. Keithlyn Smith with Senator Lionel Gomes of
- Antigua Workers Union for the Employee

Mr. Clare K. Roberts
- Solicitor for the Employer

2001: April 18, 19

JUDGEMENT

Unfair dismissal - probation - employee with 2 years service - transfer of responsibilities after complaints - dismissal for refusal to perform duty under new responsibilities - summary dismissal - whether dismissal unfair - whether employee was on probation.

FACTS:

1. The Employee was employed by the Employer as a driver/maintenance man in August, 1995.
2. In April, 1997 the Employee's duties and responsibilities were redefined after complaints about the Employee's behaviour and attitude and after, the Antigua Workers Union, on the Employee's behalf, met with the Employer to discuss the issues that had arisen.
3. In said April, 1997 less than two weeks after the Employee's functions were redefined, the Employee was summarily dismissed after he refused to perform a task which he was requested to perform.

CLAIM:

4. The Employee claims that he was unfairly dismissed and claims compensation for the unfair dismissal.

EMPLOYEE'S EVIDENCE:

5. The Employee's evidence is that he was employed by the Employer in August, 1995 as a driver. He was instructed by Mr. Walter Armstrong Sr. the General Manager and owner of the Employer company that his responsibilities were to drive the company vehicle to deliver chemicals. He also stated that he was requested by Mr. Armstrong Sr. to take out the garbage. The Employee was the son in law of the General Manager Mr. Walter Armstrong.
6. The Employee stated that he was given no job description when he commenced the employment but was told by Mr. Armstrong that he was a driver. He further states that sometime after he commenced the employment he was given a memo which indicated that his position was that of driver.
7. The Employee stated that some time in 1997 he was told by Mr. Armstrong Sr. that he was no longer to drive the company vehicle and that he was going to be assigned gardening duties, to cut the lawn and to do landscaping. He stated that at this time he was given a job description entered into evidence and marked "SB2" which contained several functions relating primarily to the tasks of a gardener/handyman.

8. The Employee said that he went to the Antigua Workers Union after this incident and requested their assistance, as a result of which a meeting was held between the Employer's senior personnel and the Union. The Employee indicated that after this meeting he was given a letter by Mr. Armstrong which letter was explained to him by Mr. Lionel Gomes of the Union. He explained that this was necessary as he does not read properly. He also indicated that there were several things in the letter with which he did not agree, and in particular the fact that the letter stated that he was on probation. He stated that prior to the letter, the issue of probation never arose in the meeting between the Employer and the Union and that he never agreed to be placed on probation. This letter the Employee identified and it was entered and marked in evidence as "SB1".
9. The Employee stated that he had gone to the Union as he was unhappy about "SB2". Mr. Gomes of the Union represented him in a meeting with the Employer, after which a letter was given to him which defined his new terms and conditions. He stated that this second letter was also explained to him by Mr. Gomes but that he did not remember what it said. "SB1".
10. In his evidence, the Employee stated that he had been hired as a driver and that he assisted with picking up the garbage. He stated in the new job description in "SB2" he was given the position of gardener/handyman/maintenance man.
11. He stated that prior to the change in his job description in April, 1997, he performed the general functions of a handyman in addition to being a driver for the company. He stated that among other things he did the garbage removal and the maintenance. He also stated that he was responsible for the maintenance of the lawn at the company's premises at Paynters and that there was another lawn at McKinnons where the general manager lived, which lawn he did on weekends when requested by Mr. Armstrong as he was a member of the family. He stated that maintaining the lawn at McKinnons was not part of his job description and that he did so when requested only because the general manager was family he being married to the general manager's daughter. The Employee stated that he was never paid to do the lawn at McKinnons on weekends, and that it was never part of his job function.
12. The Employee stated that the relationship between himself and the general manager (his father in law) became somewhat strained as the general manager, did not think that the Employee was a suitable husband for his daughter. He stated

that in April, 1997, the production manager requested him to cut the grass at McKinnons and that he refused to do so. He stated that Mr. Armstrong questioned him as to why he was refusing, and he indicated that he was refusing as it was not part of his job function.

13. The Employee gave evidence that the day after the incident he returned to work and went to the general manager's office where he was met by senior personnel of the company. He stated that he was given a letter by the general manager. He stated that no discussion took place at that meeting. He was simply given a letter and told he no longer worked there.
14. The Employee stated that he took this letter to the Union where he was advised that he had been dismissed.
15. Mr. Malcolm Daniel, retired President of the Antigua Workers Union who gave evidence for the Employee indicated that he knew the Employee and that he attended one meeting at Paynters with the Employer on behalf of the Employee in 1997.
16. He stated that the meeting was on the subject matter of the job description that had been given to the Employee. He stated that the document entered in evidence and marked "SB 2" was the job description that the Employee had brought to the Union and asked for assistance. He said at the meeting with the Employer at Paynters he pointed out several items on "SB2" which he felt should have been deleted from the job description, as he felt that the Employee's work load was too heavy. He said he personally had made marks on "SB2" and confirmed that the items on "SB2" which had an "X" on them were the said items which he Mr. Daniel had marked an "X" on as items to be deleted from the job description. These he said were discussed in the meeting at Paynters.
17. He further stated that in the meeting the Employer indicated that he wished to remove driving from the Employee's responsibilities as he had received several complaints about him. Mr. Daniel indicated that he requested Mr. Armstrong to furnish proof of the complaints that Mr. Armstrong had received about the Employee but that the Employer was unable to provide any proof. He stated that in that circumstance he left the matter as it was and did not agree that the Employee should be relieved of his responsibility to drive the company's vehicles.

18. Mr. Daniel also was very clear that although at the meeting the Employer made reference to complaints which he had received about the Employee, there was no discussion of the Employee being placed on probation, and stated emphatically that if such a suggestion had been made he would have strongly objected to it as the Employee had already been in the employment for some time.

EMPLOYER'S EVIDENCE

19. The Employer's evidence was given by Mr. Walter Armstrong Jr. who is also an employee and acting general manager of the Employer company. He gave evidence that he knew the Employee and that the Employee was his brother in law, having been married to his sister. He stated that it is the company's policy to give all employees on the date they commenced employment a job description and that he believes this policy was followed in the Employee's case although he did not do it himself.
20. He stated that the Employee was originally employed as a driver and messenger, that the job entailed doing errands and making deliveries to customers. He also said the Employee was responsible under his original job description for washing vehicles, maintenance and cleaning. He stated that the job functions were those of driver/handyman and that the Employee from the onset performed those functions that fall under the description of a handyman.
21. The witness stated that at the time the Employee commenced employment, the Employer had a primary driver in its employment, but that on occasion, the workload was too much so it became necessary to have a relief driver, which position the Employee filled in addition to his handyman functions.
22. The witness stated that the document admitted and marked "SB2" which the Employee stated he received in 1997 prior to the meeting with the Union and senior management of the Employer was in fact the original job description that was given to the Employee on the day he commenced the employment. The position offered therein is that of gardener/handyman, maintenance man.
23. The witness stated that at the meeting with the Union in April, 1997, the Union raised concerns about the number of duties listed in the job description "SB2" as the Union felt those were too many duties listed for a person in

the Employee's position. In addition the witness stated, that it was as a result of this meeting with the Union that "SB1" was written. He pointed out that the Union representatives had marked those duties on "SB2" which they wished to see removed from the list of duties, and that the company accommodated the Union's wishes and that "SB1" was a reflection of the agreement between the Union and the company as to what the Employee's duties were to be in the future.

24. The witness further stated that "SB1" was given to the Employee and contained in paragraph 5 a statement indicating that the Employee was on 12 weeks probation. He stated that the Employee was placed on probation after discussion with the Union and that this probation was accepted by the Employee and the Union at the time. He stated that by the time of the writing of "SB1", the Employer company had formed the opinion that the Employee was unable to do certain things because of his incapacity to read and understand and that the probationary period was put into place because the Employer wanted to protect themselves from getting into a more serious situation because of the Employee's attitude.
25. The witness stated that after the issue of "SB1", the Employee performed the functions which were contained in "SB1" i.e. gardening, cleaning vehicles and garbage removal without complaint.
26. He further stated that some time shortly after the issue of "SB1" the Employee was requested by the production manager, to perform gardening duties on the lawn in McKinnons and that the Employee refused. The witness stated that the Employee gave no explanation for his refusal, he simply stated that he would not do the lawn at McKinnons.
27. The witness further stated that the production manager, the administrative manager, and the witness himself all spoke with the Employee and pleaded with him to do as he had been requested, but that he continued in refusal without explanation, even when he had been reminded that he was on probation at the time. He stated that the Employee never indicated that he was refusing because he felt that mowing the lawn at McKinnons was not part of his duties.
28. The witness stated that the company did not want to do what was necessary but that obviously the company had to do it. He stated that a letter of dismissal was written to the Employee "SB3" confirming the Employee's dismissal effective

3:00 p.m. on 18th April, 1997. He said the letter was given to the Employee on 19th April, 1997 when he reported for work.

ISSUES:

29. There are three main issues arising from this case:

- (1) Whether the Employee was on probation at the time he was dismissed;
- (2) Whether the Employee was entitled to refuse to do as he was requested, as not being within his job description;
- (3) Whether his refusal to perform the task, assuming the same was in his job description was sufficiently serious to justify a summary dismissal.

LAW

30. The law on the matter is to be found in the Antigua Labour Code, sections C58 (1) and (2) and C59(1) which provide as follows: -

“C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor .

- (a) relates to misconduct of the employee on the job within the limitation of section C59 (1)and (2) ;.....

(2) The test generally for deciding whether or not a dismissal was unfair is whether or not under the circumstance the employer acted unreasonably or reasonably.....”.

“C59 (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 his 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-

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.....”

DISCUSSION

- 31. This matter is a simple one. The Employee was employed from August, 1995 to April, 1997 when he was summarily dismissed. There is no dispute about these facts. The Employee stated that he was given no job description at the commencement of the employment although he was told by the then general manager, his father in law that he was a driver. He stated that he was subsequently requested to do other jobs including gardening and handyman work.
- 32. No job description was submitted in evidence by the Employer to refute the Employee's statement that he was given no job description. The Employer referred to "SB2" which was undated and unsigned and headed "Job Description" as the job description that was given to the Employee at the commencement of the employment. The Employee stated however that "SB2" was given to him after he had commenced and been in the employment for some time, and after the Employer required him to cease driving.
- 33. This court prefers the Employee's evidence on this point particularly as the Employer's witness himself stated that the Employee had originally been hired as a driver/messenger, and that the job entailed doing errands and making deliveries to customers. "SB2" is more consistent with the evidence that it was given to the Employee after the Employer requested him not to drive the vehicle, no doubt because the Employer alleged in the 1997 meeting with the Union that he had received complaints about the Employee.
- 34. It is clear from the evidence on both sides that certainly prior to the termination the Employee's duties included that of a handyman/gardener/maintenance man as well as that of driver, as these tasks are included on both "SB1" and "SB2".

35. The evidence on both sides is that some time in April, 1997 an incident occurred which prompted the Employee to seek the assistance of the Union. This he did and he was thereafter issued a letter "SBI" from the Employer referring to the discussions which had taken place with the Union, and assigning him the responsibilities of "gardening, cleaning of vehicles, garbage control and removal, security duties as prescribed and any other related duties as necessary." This letter also states in the penultimate paragraph that starting on April 9th 1997 the Employee is on twelve weeks probation after which his attitude and performance would be closely monitored.
36. Both the Employee and the Union representatives who gave evidence on his behalf deny that the discussions in April 1997 involved or included any aspect of probation. In any event if they did there is no evidence in the letter or no record presented by the Employer to prove that the Employee or indeed the Union on his behalf, had agreed that his employment would be regarded as having recommenced after the discussions.
37. The Employer provided no evidence to suggest that whatever had occurred prior to the meeting with the Union in April 1997, was misconduct on the part of the Employee that was sufficient ground for a dismissal, and that the Employee was given new duties and functions and placed on probation in lieu of a dismissal.
38. Mr. Malcolm Daniel, the witness for the Employee from the Union, who represented the Employee at the meeting, stated that there was no discussion or issue of probation at the meeting. The witness for the Employer, although he asserted that the Employee was placed on probation in April, 1997 so that he commenced his employment anew, provided no documentary evidence in the form of a letter or other correspondence or otherwise that was written to the Employee concerning misconduct prior to the April, 1997 meeting, to substantiate the allegation of misconduct sufficient to justify termination. In fact the Employer in its evidence provided not even a single disciplinary letter in support of its claim of the numerous complaints it received about the Employee's performance and the Employer's dissatisfaction with the same.
39. The Employer in fact in its evidence stated clearly that very shortly after the employment commenced in 1995 it became obvious to the Employer that the Employee could not read and as a result needed assistance with his job. This being

the case, it seems to the Court that there would have been an even more pressing obligation on the Employer to ensure in its dealings with the Employee, that they were communicated in such a way to ensure that the Employee clearly understood. Written communication in such a case should be clearly explained, and or the Employee told that he should take the writing to some one to assist his understanding, and where as in this case, so far reaching a decision as to recommence his employment was being taken, some written notation of his agreement or the Union's agreement should have been made.

40. In the absence of some written agreement this court cannot find that there was any agreement for the Employee to be placed on probation after the meeting with the Union in April 1997.
41. It is also not denied that the Employee refused to perform gardening duties at McKinnons on April 18th, 1997, that the production manager had requested him to perform. The Employee stated that this duty was not within his job description, while the Employer stated to the contrary.
42. The evidence on both sides indicates that the Employee was advised that his job description included doing the lawns and gardening. There is no clear evidence from either "SB1" or "SB2" that doing the gardening included doing the garden at McKinnons.
43. This court is prepared, based on "SB1", the letter of April 9th 1997 which was written to the Employee after the meeting in April 1997, and based on the evidence in "SB2" which was discussed with the Union who represented the Employee, and who did not object to the inclusion of gardening and mowing the lawn as part of the Employee's job description to find that the duties of gardening were within the Employee's job description. Given that the Employee indicated that he had prior to April 1997, done the lawn at McKinnons without complaint, this court is also prepared to find that doing the lawn at McKinnons was also within the Employee's job description.
44. Having so found, the question then to be asked is whether the Employee's refusal to perform this task was sufficient to result in summary dismissal, i.e. whether the Employer acted reasonably in dismissing him for this reason.

45. The Employee's refusal is misconduct within the Labour Code, as he can not legally refuse to perform a task within his job description. The refusal however cannot be considered misconduct so serious that it clearly demonstrates that the employment relationship cannot reasonably be expected to continue.
46. The evidence shows that this is a single incident of misconduct (the Employer presented no evidence to prove to the contrary), after the Employee had been employed for a period of two years. Such an incident is clearly not misconduct so serious that the Employer clearly cannot take any other course but termination.
47. This court has declined to find that the Employee was on probation at the time of the dismissal so that the dismissal cannot be justified as being within the probationary period. The Employer has therefore failed to satisfy the requirements of sections C58 (2) of the Labour Code as it cannot be said to have acted reasonably in dismissing summarily after a single incident of misconduct as alleged against the Employee.

CONCLUSION

48. The Employee was not on probation at the time of his dismissal. That the alleged misconduct is not misconduct sufficient to entitle the Employer to dismiss summarily. That the Employee was unfairly dismissed and is entitled to be compensated for the unfair dismissal.

AWARD

COMPENSATION

49. The employee is entitled to be compensated for the unfair dismissal under the established heads of, a basic award for loss of protection of employment, immediate loss, manner of dismissal and future loss.

LOSS OF PROTECTION OF EMPLOYMENT

50. This award is in respect of the Employee's years of service at the rate of one day per month for total months of service. The Employee was employed from August, 1995 to April, 1997 a total of 21 months. His basic salary was \$500.00 per week so that his daily rate was \$100.00. The Employee is therefore entitled to the sum of \$100.00 x 21 i.e. the amount of **\$2,100.00** under this head.

IMMEDIATE LOSS

51. The award for immediate loss is for the period from the time of the dismissal until the date of the hearing. It also includes notice pay. The Employee was dismissed summarily so he is awarded notice pay in the amount of \$1,000.00 based on his evidence that he was paid fortnightly. Further the Employee was dismissed in April, 1997 and the matter was heard in April, 2001 exactly 4 years. The Employee's evidence is that he sought employment when he was dismissed but has found nothing permanent or suitable or nothing that pays him the same. The Employee was however employed as a driver/handyman/gardener, and this court anticipates that he could find comparable work appropriate to his skills within a reasonable time. The Employee is therefore to be compensated under this head for a period of 6 months. The total award under this head is therefore \$13,000.00 plus \$1,000.00, i.e. **\$14,000.00**.

MANNER OF DISMISSAL

52. The Employee was not dismissed in a manner that made him less available or attractive for future employment so no award is made under this head.

FUTURE LOSS

53. The Employee's evidence is that he made several attempts to find a job but cannot. The Employee cannot read well so that it is difficult to imagine him obtaining a job in the future that pays him \$500.00 per week. Based on the finding of **Jennifer Watt v Antigua Village Condo**, an award for future loss should generally not exceed "the equivalent of six months salary." In the present case the court thinks it is appropriate that the full six months should be granted. The Employee will therefore be awarded the amount of **\$13,000.00** under this head.

54. The Employer is therefore ordered to pay to the Employee the sum of **\$29,100.00** as compensation for unfair dismissal by the 15th August, 2002.

COSTS

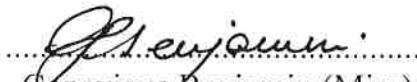
55. There shall be no order as to costs.

Dated the 15th day of July, 2002.



N. Rogers Murdoch (Mrs.)
Chairman

I concur



Genevieve Benjamin (Miss)
Member