

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 37 OF 2000

BETWEEN:

RONALD SILENCIEUX

Employee

and

ANTIGUA LOTTERY COMPANY LIMITED

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. E. T. Henry
The Hon. G. Benjamin

President
Member
Member

Appearances:

E. Ann Henry, Barrister-at-Law, for the Employee
R.W. Hill, Barrister-at-Law, for the Employers

2002: September 30, 2002
October 1, 2 & 8

JUDGMENT

Unfair Dismissal – lottery company with outside agents with machines programmed to a central computer – draw cannot take place unless machines of all the agents are closed – machine of an agent not closed as

all times, that the machines of the agents of which there were about fifty (50), were closed at the stipulated time at the end of the day's sales, that the information in the machines was fed into the central computer at the company's office and that the draw then took place on the days and at the times scheduled; it was his responsibility to see to the successful conclusion of the lotto draw.

- [3] If a machine was not closed the draw could not take place, a forced draw apart and at such a time there could not be a winner nor could sales for a new draw be commenced. Also, if a draw failed to take place ticket holders would show concerns and express suspicions of fraud and deceit by the company. Further, repercussions would be felt in the other islands covered by the lotto, e.g. St. Kitts and Sint Maarten.
- [4] To effect the Lotto draw the numbers would be drawn under supervision of the representative of a firm of independent Auditors and once the winning numbers were known they would be given to the Employee who would feed them into the central computer (server) which would then determine whether there were any winning tickets. At this stage the draw was deemed concluded.
- [5] The machine at the agent's location prints the ticket when a sale is made, stores the information until the "cut off" period (9:00pm) at which time each machine would dial in to the Central Computer at the Lotto office and transfer the data at which stage, as earlier intimated, the machine would be closed for the draw.
- [6] It was the responsibility of the person on duty in the Computer room to ensure that the machines were closed.

- [13] Later the said evening the Employee received a telephone call from Neil Gonsalves who told him that since they could not find the agent he would have to come in the following day (a Sunday) to conclude the draw – the Employee said that he did not think this was possible as the agent was not on the island.
- [14] While on the telephone speaking to Deon the Employee asked to speak to Mrs Gonsalves but did not get to do so as she was on the telephone speaking to the Chairman of the company, Robert Washington; he asked her to call him later but she did not.
- [15] Deon did not tell the Employee at what particular time the following day he required his services and he did not give any indication as to what time during the following day he would be available.
- [16] In his last conversation with Deon, Deon told the Employee that he would go to the office on the following day (the 27th), find the agent and do the draw.
- [17] On Sunday, December 27, 1998, there was only the 3D Draw. Deon went out to work to do the 3D Draw and called the Employee between 6:00 and 7:00pm and told him that he still could not find the agent.
- [18] The Employee did not go to the office at all on the 27th.
- [19] On Monday, December 28, 1998, the Employee was on the 2:00pm shift and when he went to work Mrs Gonsalves gave him a letter and told him she had been asked to put him on suspension as the draw had not been concluded as per schedule; he was suspended indefinitely – See Exhibit RS5.

- [25] During the period of his tenure with the company the Employee was never accused of, warned or disciplined for want of performance, dedication, lack of commitment or other unsatisfactory matters relating to the performance of his duties except that in July, 1996, he was suspended for a month in connection with a draw that was not concluded. The Employee was blamed by the General Manager for the non-conclusion of the draw although he was not at fault – he had just returned from vacation and, unknown to him, someone had changed the combination on the briefcase (the ball box) before going off duty. The Employee did not have a car nor did the company and he did not know he could have rented a car and gone to find the colleague who had changed the combination to the lock. At the time Mr Washington said the suspension was not fair but he did not overrule it; by December, 1998, the warning was spent.
- [26] On the morning of Monday, December 28, the Employee called the office and Deon informed him that the draw had been completed.
- [27] The Employee had been suspended for an indefinite duration and dismissed without Notice or payment in lieu of Notice; it was a Summary Dismissal and the Employee was never questioned by Mr Washington or Mrs Gonsalves and asked to give an account of his actions.
- [28] The letter of termination stated that the reasons therefor were:-
- (a) Insubordination;
 - (b) Total disregard by the Employee for his responsibilities or duties as the Director of Systems of the Antigua Lottery Company;
 - (c) Because of his misrepresentations and lies he caused the company to be unable to complete (conclude) its Leeward Islands Lotto draw

- [32] After the above Mrs Gonsalves went back to continue her business and then left and went to the Airport – she did not speak to Deon or the Employee that night.

Triable Issues

- [33] In light of the evidence adduced the issues for determination appear to be whether:
- (a) the Suspension was lawful or unlawful
 - (b) the dismissal was unfair
 - (c) the quantum of any possible compensation
 - (d) this is an appropriate case for an award of costs if it is found that the dismissal was unfair
 - (e) the Employee is entitled to any "Notice Pay"
 - (f) The Employers acted reasonably
 - (g) There was a sufficient investigation by the Employers.

The Arguments

- [34] Mr Hill, in his final submission asked the Court to find that the dismissal and the suspension were not unfair but, if at the end of the day it was found that they were, the Employee should be held to have contributed to same and to have done so by as much as 50% so that any award made in his favour should be reduced by this amount. Counsel contended that:
- (a) The conduct of the Employee was of such a kind as to show that the employment relationship could not continue and culminated at a point where it was no longer acceptable.

- (d) In his evidence Deon Phillip said that on the night of December 26, 1998, he tried to contact the agent but this was not possible and on the following morning the Employee told him to go and check to see if the terminal was closed and he did so but it was still open.
- (e) No evidence was presented to the Court in substantiation of the allegation by Mr Washington of impermissible and improper conduct or insubordination by the Employee. Deon Phillip testified that he was sent to the office by the Employee to conclude the draw and did so go but was unsuccessful. The allegation of lack of responsibility is not established.
- (f) The Memo that Mr Washington said Deon wrote to the company advising them the Employee never gave him concrete instructions to conclude the draw on the Sunday was never produced.
- (g) There is no evidence to support the allegations in Mr Washington's letter of January 6, 1999 (RS8)
- (h) The letters and warnings that were alleged to have been thrown at the Employee by the Employers during the course of his tenure were never adduced in evidence and cannot be relied on.
- (i) It was never put to the Employee in Examination-in-Chief or otherwise that it was at 3:30pm and not 2:55pm that he called and spoke to Mr Washington at the office.
- (j) Failure to feed the private address of the agent into the computer was not a sufficient reason for the dismissal.
- (k) The Employee is entitled to the Basic Award and his earnings for the period January 1 to January 6, 1999.
- (l) The Employee did not contribute to the Suspension or to the Dismissal.

The Decision

- [39] With regard to the Suspension, the Law is clear that a suspension for an indefinite period is unlawful and thus the letter of Mrs Gonsalves dated December 28, 1998 (RS5) to this effect is null and void. And it is to be observed that the Chairman of the Board was fully cognisant of the contents of the letter and it was written at his dictate, the signatory acted as a mere 'conduit'.
- [40] Dismissal is always a vexed question and perhaps one can firstly refer to an issue of which both counsel were equally silent on, viz, investigation and whether there was any investigation by the Employers prior to the dismissal and if there were, was it thorough and, at the least, reasonable and satisfactory. And this was a Summary Dismissal!
- [41] This Court has said repeatedly that before taking a decision to dismiss, an employer should carry out an investigation and give the employee an opportunity to present his case; where the Employee was caught flagrante delicto excepted. The same rule applies equally to issues of Suspension. In this particular case the Employee was never given an opportunity to present his case either before the Suspension or before the Dismissal, there was no investigation. The meeting of January 5, 1999, was not part of an investigation.
- [42] In his testimony Mr Washington stated that failure to hold a draw as scheduled would have several adverse implications and repercussions to the company but no evidence was adduced in support thereof. The Court does, of course, regard the integrity of the company as a matter of prime importance and would not wish to give any other impression but there must

meeting was still on schedule and was referred to Mr Washington. For his part Mr Washington was adamant that it was at 3:30pm.

- [46] The allegation that the Employee was guilty of unacceptable and impermissible conduct and an adverse attitude is very serious and this Court will frown upon any such behaviour by an employee. But there is an old rule that stipulates that that which is alleged must be proved, exemptions apart, and there has not been any proof or any sufficient proof of these.
- [47] I scrutinised the evidence very closely and so also the submissions of counsel with special regard to the issue of contribution to the dismissal by the Employee and have not been persuaded where it could be concluded that he did so contribute: to me the question seems to be, what was it his duty to do and what did he not do that was his duty to do?
- [48] In arriving at a decision I also carefully examined the evidence, noted the demeanours of the witnesses and the parties as they gave their testimony and took into account the Decisions of the Court of Appeal in *BWIA v Roxanne Payne*, Civil Appeal No. 14 of 2001, *Dream Company Limited v Roberts* Civil Appeal No. 20 of 2000, as well as the Decisions from this Court. Also considered were the relevant sections of the Labour Code and Sections 10(3) and (4) of the Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992, and several works of authority. At the end of the day I find that the Suspension and the Dismissal were Unfair.
- [49] The Labour Code does not prohibit an employer from terminating the services of an employee and there are instances where an employer may terminate with impunity. But the employee has rights and part of the functions of the Code is for the protection of those rights, at the same time taking into consideration the provisions of Section 10 (3) and (4) of the Industrial Court Act.

earnings from the new employment were greater than those of the previous employment the issue of Future Loss is negated. But there shall be an award for Basic Loss and the Award here shall consist of one month's pay for each year of service, i.e. \$ 14,000.00.

Also the Employee is awarded one month's pay in lieu of Notice (as per Section C.9 (4) of the Labour Code), and his wages for January 1 – 6, 1999, \$ 677.40, as in addition to being unlawful it was not stated or proved that the Suspension was without pay and he was not paid for this period.

Conclusion

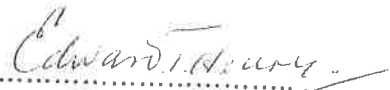
- [55] The Suspension was unfair and unlawful and the Dismissal unfair and the Employers shall pay to the Employee compensation in the sum of \$ 18,177.40 payment to be made by the 30th day of November, 2002. There shall be no order as to Costs.

DATED the 22nd day of *October*, 2002



Cyril L. Maundy
President

I concur



Edward T. Henry
Member

I concur



Genevieve Benjamin (Miss)
Member