

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 3 of 2004

BETWEEN:

HENSON BARNES

Employee

- and -

**LEILA SIMON, JAMES ADAMS & MALCOLM EDWARDS
as Trustees of the UNITED PROGRESSIVE PARTY**

Employers

Before:

The Hon. Cyril L. Maundy

President

The Hon. Hubert Hood

Member

The Hon. Genevieve Benjamin

Member

Appearances:

E. Ann Henry, Attorney-at-Law, the Employees

Ken Kentish, Attorney-at-Law, for the Employers

2005: December 12

JUDGMENT

Retired Civil Servant aged 68 years employed as Office Manager of Secretariat of Political Party and dismissed by letter dated October 1, 2002 after a little more than two years of service – Employee aged 68 years at time of employment – Employee a founding member of the party – at the time of the dismissal he was Office

Manager of the Secretariat of the Party – Employee given a cheque for \$ 6,500.00 – no complaints or Warnings against his performance given to the Employee nor Notice of Dismissal.

- [1] Maundy, P.: This is a claim by the Employee, Henson Barnes, against the Trustees of the United Progressive Party, Leila Simon, James Adams and Malcolm Edwards, for Unfair Dismissal.

Historical Background

- [2] The Employee, a retired Civil Servant, age 68 years, was employed as Office Manager of the Secretariat of the Party in April 2000 at a salary of \$ 1,500.00 per month and was laid off on the grounds of Redundancy and subsequently dismissed. He was a founding member of the Party and was still a member at the time of his dismissal.
- [3] By letter dated October 5, 2001, the Assistant General Secretary of the Party gave financial constraints (See Exhibit HB4) as the reason for the redundancy.
- [4] Upon receipt of the said letter of dismissal the Employee wrote to the Assistant General Secretary on October 9, 2001, indicating his willingness to continue working as Office Manager at no costs to the party until financial recovery is achieved and shortly thereafter at an executive meeting of the party it was decided that the lay-off was ultra-vires the constitution of the Party and it was decided to refer the matter to the management and the Personnel Committee for recommendations.

[5] The Employee continued his employment and received his remuneration regularly and on time. By letter dated January 10, 2002, issued by the General Secretary the Employee's employment was terminated on the grounds that his position had been made redundant effective February 10, 2002.

[6] Employee was paid the sum of \$ 6,500.00 as follows:

- (a) 2 months salary for 2 years = \$ 3,000.00
- (b) 2 years vacation entitlement = \$ 1,500.00
- (c) 1 month Notice Pay = \$ 1,500.00
- (d) 10 days Holiday Pay for January 2000 = \$ 500.00

[7] The Employee contends that his termination was unfair, that there was no true redundancy situation and even if the Court found that there was a redundancy situation the Employers did not act fairly in terminating the employment and ask the Court for:

- (a) A declaration that he was Unfairly Dismissed.
- (b) An order that he be reinstated without loss of wages and benefits since the date of the purported dismissal.
- (c) Such further and other relief as the Court thinks just.
- (d) Costs.

Triable Issues

[8] The issues here for determination appear to be whether:

- (a) The dismissal was unfair?
- (b) The Employee mitigated his loss?

- (c) The Employee is eligible for any compensation?
- (d) The Employee is entitled to costs?

The Arguments

- [9] Counsel for the Employee contended, pursuant to the decision in the Norton Tool Metal case and the Jennifer Watt case, a dismissed employee is entitled to compensation if the dismissal is unfair. Also, Immediate Loss is the head of the compensation for consideration by the Court and has to be looked at. The new employment found by the Employee was of a higher rate than his previous employment and that the obligation on the Employee to mitigate his loss is not absolute.
- [10] Counsel for the Employers contended that the only real issue was that of "Quantum", that the dismissal was unfair and the Employee was entitled to compensation. However, Counsel stated that the award must be fair and just not only to the Employee but also to the Employer in accordance with the rules of Natural Justice and the provisions of the Labour Code; the issue should be a balancing act and the Employers should not have to pay for the Employee's failure to mitigate his loss. Finally, said counsel, no award should be made for Immediate Loss of earnings or Future Loss.

The Law

- [11] The Laws relating to Unfair Dismissal is contained in the Labour Code, Cap. 27, Laws of Antigua & Barbuda, Revised Edition, 1992 and the Industrial

Court Act, Cap. 214, Laws of Antigua & Barbuda, Revised Edition, 1992 as follows:

(a) Sections C.56 & C.59 of the Labour Code provides thus, “ Every employee whose probationary period with an employer has ended shall have the right no to be unfairly dismissed by the employer and no employer shall dismiss any such employee without just cause.” (1) “And 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

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;
- (b) committed a criminal offence in the course of employment, without the consent, express or implied, of the employer; or
- (c) behaved immorally in the course of his duties.

(2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of the warning is given and state the action the employer intends to take in the event of

- (a) a repetition of the misconduct; or
- (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.

(3) The action to be taken under subsection (2) may include suspension without pay for such periods as may be specified in the written warning.

(4) Where within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning.

(5) Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the written warning is given and state the action the employer intends to take in the event of repetition; and, thereafter, if the employee does not, during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of said employee” respectively and by Section 10 of the Industrial Court Act “ (1) The Court May in relation to any matter before it -

- (a) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination;
- (b) without prejudice to and addition to its powers under section 7 (2), award compensation on complaints brought and proved before it by a party for whose benefit the order or award was made regarding any breach or non-observance of an order or award or any term thereof (other than an order or award or for the payment of damages or compensation)

(2) The Court shall make no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise, and the Court of Appeal shall in disposing of any appeal brought to it from the court make no order as to costs, unless for exceptional reasons the court Appeal considers it proper to order otherwise.

(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall -

- (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
- (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regards to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.”

Decision

[12] Counsel for the Employee conceded that she would not insist on compensation for Future Loss and Mr. Kentish conceded that the dismissal was unfair and thus the Employee is entitled to damages (compensation). Indeed, Mr Kentish’s hands were tied as he failed to file an Employers’ Memorandum thereby resulting in a major weakness in his case. Counsel are again advised that the provisions of the Labour Code must be complied with and failure to file a memorandum can have a serious effect(result).

- [13] It is well established that on proof of Unfair Dismissal the Employee will, as a general rule, be entitled to compensation, the only vexed issue being that of quantum. No claim is made for Notice Pay nor unpaid Holiday Pay and it must therefore be assumed that the awards made were correct; in fact, none of them is challenged.
- [14] Regarding the claim of Immediate Loss (of earnings), following the dismissal the Employee remained unemployed for 19 months and, thus, suffered a loss of \$ 1,500.00 x 19 = \$ 28,500.00, but, is this the amount to which he is entitled bearing in mind the rule that a dismissed employee is under a duty to mitigate his loss by seeking new employment or self-employment. The evidence by the Employee is that he did not seek any new employment or try to start his own business and, thus, the request for further compensation is denied.
- [15] I do not think there should be any variation of the offer made to the Employee and do not order any further award.

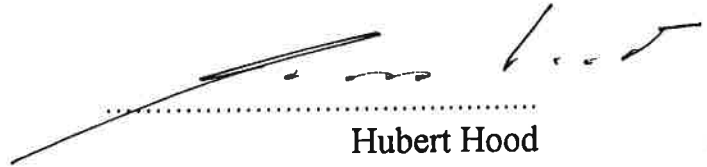
[16] There shall be no Order as to Costs.

DATED the day of February, 2006



Cyril L. Maundy
President

I concur



Hubert Hood
Member

I concur



Genevieve Benjamin
Member