

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 35 OF 2002

BETWEEN:

ALEXANDER HUGHES

Employee

and

ANTIGUA BREWERY LIMITED

Employers

Before:

The Honourable Cyril L. Maundy
The Honourable Edward T. Henry
The Honourable Hubert Hood

President
Member
Member

Appearances:

Justin L. Simon, Barrister-at-Law, for the Employers
Keithlyn Smith of Antigua Workers Union, for the Employee

2004: February 26 & 27
March 1 & 2

JUDGMENT

Unfair Dismissal – Employee alleged to have been found sleeping on the job after prior written warning for same – Employee denies he was ever sleeping and contended that he suffers from hypertension and went to “breeze off” as he was feeling unwell and although he was sitting with his eyes closed at the time he was not sleeping – Employee dismissed for sleeping on the job after previously warned in writing for so doing – Summary Dismissal.

- [1] **Maundy, P.:** This is a claim by the Employee, Alexander Hughes against Antigua Brewery Limited for compensation for Unfair Dismissal. The matter was firstly heard by the Labour Commissioner who made a number of recommendations but these were not accepted and so it was referred to the Industrial Court.
- [2] The Employee's contention is contained in his Memorandum filed on January 2, 2003, where he alleged that the dismissal was unfair and contrary to the provisions of the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, hereinafter referred to as "the Labour Code".
- [3] In their Memorandum dated and filed on February 25, 2003, the Employers denied that the dismissal was unfair; they contended that the Employee never denied that he was sleeping when confronted and the allegation of being sick was for the first time mentioned at a meeting with his Union immediately subsequent to the dismissal.

Historical Background

- [4] The Employee commenced working with the Employers on June 13, 1995, as a forklift operator and was later made a mechanic in the Maintenance Department. As a mechanic the Employee used to drive various vehicles of the company.
- [5] By letter dated July 19, 2002 (Exhibit AH2), the Employee was dismissed on July 19, 2002, on the ground that he was found sleeping on the job. On two previous occasions it was alleged, which he denied, that the Employee was found sleeping on the job and on the second of those occasions was given a

warning letter informing him that should he again be found sleeping on the job his services would be terminated.

- [6] The Employee used to work a 6:30am to 3:30pm day and on the day before the dismissal he arrived at work at 6:00am. At about 7:30am he began to feel ill and went down to some mangroves near the company's desalination plant which was near the sea and about 120 yards from his workstation, put down a large piece of board and went to lie down on his back; the Employee said he suffered from Hypertension and went to "breeze off"; also that he had twice been hospitalised for his illness – the Employers had no knowledge of the illness.
- [7] No official of the Employers was on duty at the time whom he could inform and the only person he informed was Avery James, a co-worker who was present.
- [8] While "breezing off" the Employee said his eyes were closed and when he opened them he saw the Technical Officer, Reinhard Graef, a few yards in front of him; the Employee shouted "Mr Graef, Mr Graef," but Mr Graef did not respond. Also, that he stayed there for about another twenty minutes before going back to the workshop. At the workshop the parties saw each other but neither of them said anything to the other. Later in the said day, Vanroy Gardiner, the Administration and Personnel Officer called the Employee to his office and informed him that he had a complaint from Mr Graef that he saw him sleeping on the job down by the mangrove during working hours. The Employee denied he was sleeping at the time he was seen by Mr Graef and stated that he had had a headache and went down to the mangrove area to have some fresh breeze to see if it would revive him. Mr Gardiner informed the Employee that he would investigate the matter.

- [9] On the following day, July 19, 2002, Mr Gardiner again summoned the Employee to his office where he met Mr Graef. Mr Graef again informed Mr Gardiner that he had seen the Employee lying on a piece of board down by the mangrove and sleeping but again the Employee insisted that he saw Mr Graef when he came by him and that although his eyes were closed at the time he was not sleeping.
- [10] Mr Gardiner then told the Employee he would then have to put him on suspension without pay for a week. The Employee then went back to the workshop to collect his overalls and his tools and while there and as he was explaining what happened to a co-worker Mr Gardiner passed by and saw him. Mr Gardiner told the Employee he did not want him in the workshop and started to shout at him. Mr Gardiner then went to Mr Graef's office and returned to his office with the Employee's file and told him to come to see him. The Employee went back to Mr Gardiner's office and Mr Gardiner told him he was waiving the Suspension and he was dismissed – later on in the day the Employee was served with a letter of termination – see Exhibit AH2.
- [11] By letter dated May 1, 2002 (Exhibit AH1), the Employee was previously alleged to have been found sleeping at the steering wheel of a truck that he was driving and which was parked at the time and being loaded and given a written warning of termination if he was again found sleeping on the job. At the meeting of July 19, 2002, the Employee refused a request from Mr Gardiner to repeat his version of what happened the day before stating that he had said it before, he was no little boy and was alleged to have used

indecent language to Mr Gardiner – see Exhibit AH2 – no evidence was adduced to support the last allegation which was denied.

- [12] Apart from the warning above, the Employee never received any warnings in relation to his job or complaints about his performance.
- [13] At the time of dismissal the Employee was earning \$ 584.80 per week and approximately \$ 700.00 per month in overtime.
- [14] After the dismissal the Employee sought employment at various places including LIAT (1974) Limited, Galley Bay Hotel, Antigua Distillery Limited, Maiden Island and Antigua Concrete Services Limited – at the last two places he worked for two weeks at each @ \$ 600.00 per week (\$ 1,200.00). To date the Employee has not found any employment and has to eke out a living by working as a Mechanic from his home; from this he earns approximately \$ 300.00 per week.

Triable Issues

- [15] The triable issues in this case appear to be:
 - (a) Was the Employee asleep on the job on April 26, 2002, and again on July 18, 2002, when he was found lying down with his eyes closed, as alleged, down by the mangrove about 120 feet away from his workstation?
 - (b) Was the Employee asleep when he was found at the steering wheel of the parked truck he was driving and which was, at the time, being loaded by a forklift?
 - (c) Was the dismissal reasonable?
 - (d) Did the Employee adequately mitigate his loss?

- (e) Did the Employee contribute to the dismissal and, if so, to what degree?
- (f) Was the dismissal in accordance with the terms of the Collective Agreement between the Employers and the Union representing the employee?

The Arguments

[16] Mr Simon was adamant that the dismissal was fair and contended that, inter alia:

- (a) There were two instances prior to July 18, 2002, when the Employee was found sleeping on the job and he was given a warning letter on May 1, 2002, that his services would be terminated if that conduct were repeated and he never denied the allegations.
- (b) The issue of the Employee's illness surfaced for the first time at the meeting with Mr Gardiner and Mr Gomes on July 19, 2002.
- (c) When confronted by Mr Gardiner the Employee did not say he had been feeling unwell but rather that he was on his break – the break was usually of fifteen minutes duration but the Employee said he was at the mangrove for not more than an hour and a half while Mr Gardiner said it was approximately 2 ½ hours.
- (d) An employee has a duty to inform his employer that he was leaving the job and that he was not feeling well before he did so.
- (e) The issue before the Court is whether the Employer acted reasonably in dismissing the Employee as set out in *Anderman on Unfair Dismissal* pp 149 – 150.
- (f) Should the Court find that the dismissal was unfair, the efforts of the Employee to find new employment or even self-employment were

limited and thus no award should be made for Future Loss or Immediate Loss; Mechanic work is a skill which is in demand.

[17] Mr Smith asked the Court to find that the dismissal was unfair and submitted that, inter alia:

- (a) Even though on July 18, 2002, the Employee had left his workstation and gone down to the mangrove area without the permission of anyone in authority, his immediate boss (Mr Pilgrim) and the other officers were not present at the time but he informed his co-worker, Avery James, that he was, at the time, having a headache and that he was going to "breeze off."
- (b) When Mr Graef saw the Employee at the mangrove on July 18, 2002, the Employee had his eyes closed but he was not sleeping as he would have discovered had he touched him or spoken to him.
- (c) When he received the warning letter the Employee did not accept the sleeping allegation but gave the letter to his 24 year old daughter with instructions to make a denial of the allegations but apparently this was not done.
- (d) The dismissal was contrary to the procedure set out in the Collective Agreement between the Antigua Workers' Union on behalf of the Employees and the Employers.
- (e) The warning letter of May 1, 2002, was unjust, unfair and not lawful and the alleged offence of July 18, 2002, would be, at the most, a first warning letter within the ambit of the Collective Agreement and the maximum penalty was Suspension for 10 days.
- (f) "Sleeping on the job" falls within loitering under the Collective Agreement and is not punishable by dismissal but by a maximum of 10 days suspension without pay.

The Law

[18] The Law relating to Suspension and Dismissal is set out in the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, ("the Labour Code") as follows:

- (a) An employer may suspend an employee but a Suspension for an indefinite period shall be unlawful.
- (b) By Section C 56 every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by the employer and no employer shall dismiss any such employee without just cause.

[19] Section C 58 (1) provides that a dismissal shall not be unfair if the reason assigned by the employer therefor:

- (a) Relates to misconduct of the employee in the job within the limitations of Section C.59 (1) & (2).
- (b) Relates to the capacity 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 the employers 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.

- [20] 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.

Decision

- [21] This is a Summary Dismissal made without any Notice by the Employers and although summary dismissals are permissible in certain specific instances, e.g. where the Employee is caught in flagrante delicto or the wrong complained of was grave and serious, as a general rule, such dismissals are treated with reserve by the Court, as in *Ronald Silencieux V Antigua Lottery Company*, Reference No. 37 of 2000. This case, in my view, demanded careful consideration especially since the Employee did not admit that he was asleep on the job on the occasions alleged, viz, April 26 and 29, 2002, and July 18, 2002. No evidence was adduced to support the testimony of and the allegation by Mr Graef that the Employee was asleep down at the mangrove and secondly while sitting at the steering wheel of the truck as it was being loaded on April 29, 2002, as reported by Mr Hofman, the Technical Director. To my mind it is possible for a person to have his eyes closed and still be awake although if a person is lying down with his eyes closed it is reasonable to conclude that he is sleeping. The Employee did not adduce any supporting testimony to the effect that he was not sleeping on the days in question, thus the decision as to whose evidence should be accepted is one for the Court. Mr Graef could have been mistaken in believing that the Employee was asleep and as to the allegation of sleeping while at the steering wheel of the

truck seems very curious as the truck was being loaded with refuse to be taken to the disposal site.

I do not think that the fact that the Employee did not formally deny the allegation of sleeping while sitting at the steering wheel of the truck on April 29, 2002, makes the allegation true – silence is not admission. Here again there was no supporting testimony by either the Employee or employers and it should be noted that Mr Hofman approached him from the rear and this begs the question whether his vision was clear and his conclusion correct.

[22] It appears that the Employers terminated the employment without reference to the Collective Agreement negotiated by the Antigua Workers' Union on behalf of the employees and signed by both sides – See Exhibit AH3. The dismissal letter made no reference to the Collective Agreement nor did Mr Gardiner make any reference to it when he made the decision to dismiss or at any time. The paramount objective of a Collective Agreement is to ensure that the various issues among the parties are clearly documented so as to permit the smooth running of the employer's business and that the employee's terms and conditions of service are clearly set out and so also the punishment imposable for breaches by the employee. Collective Agreements have been shown to bring about harmony in the work place and prevent dislocation, strikes and industrial action and it is indeed serious for an employer to ignore these documents when considering the punishment for a wrong.

The Collective Agreement, Clause 21, deals with the issue of discipline and sets out the punishment that the Employer may impose in the event of a breach. Thus, Clause 21 appendix I states as follows:

- (a) Absence from the job without justifiable reason – for the first offence there should be a written warning and ten days suspension without pay for the second offence.

(b) By Appendix 1 (4) termination is only permissible if there has been an absence from his job on three consecutive occasions by the Employee.

[23] It is noted that the Employee, following the dismissal, continued his business at home from which he earned but a little more than 50% of his wages and sought other employment but unsuccessfully. In his hunt for a new job the Employee made applications but only three, and the places applied to were LIAT (1974) Limited, Galley Bay, Antigua Distillery and a few small places; apart from Maiden Island and Antigua Concrete Services where he worked for a total of four weeks @ \$ 600.00 per week. I would not say as Counsel for the Employers asked us to hold, that the Employee preferred to sleep and "sit around" at home rather than make genuine efforts to find employment or build up a substantial business. However, it must be observed that there is a constant demand for mechanics in the private sector and with a reasonable effort I am of the view that the Employee should have been able to expand his business at home and attract sufficient customers to realise weekly earnings of more than \$ 584.80. Although he sought to mitigate his loss and did make efforts to do so these were not sufficient or reasonable in the circumstances. A dismissed employee is under a duty to take reasonable steps including the starting up of his own business, to mitigate his loss – see *Antigua Village Condo Corporation Limited V Jennifer Watt* (Civil Appeal No. 6 of 1992) Pages 5 to 10. where Sir Vincent Floissac, Chief Justice, summed up the position thus, inter alia, "An unfairly dismissed employee is obviously entitled to compensation for immediate loss of earnings (i.e. loss of earning between the date of the dismissal and the date of the trial or judgment). That head of compensation includes the amount to which the employee is entitled by way

of salary or wages in lieu of notice. But during the pre-trial period, the employee is under a duty to take proper and reasonable steps to obtain other suitable employment and thereby to mitigate the loss of earnings during that period.”

- [24] It has already been stated that if the Employee was in fact sleeping on the two occasions in question, as alleged, that the Employers erred in resorting to dismissal as this was contrary to the provisions of the Collective Agreement but this does not mean that the Employee was without sin. I believe it was not unreasonable to assume that the Employee was asleep on the two occasions in question and, to my mind, an Employer who sees an Employee lying down on the job or sitting in the truck of which he is the driver with his eyes closed to assume that he is asleep. Of course, it is not everyone who sits or lies down with his eyes closed is necessarily asleep but such a conclusion is not unreasonable. Consequently in behaving as he did and causing Mr Hofman and Mr Graef to so conclude and found the basis of the dismissal I would hold that the Employee contributed to the dismissal and did so to the extent of 50 per cent – both Mr Graef and Mr Hofman should have taken some step to assure themselves that the Employee was genuinely asleep.

The Award

- [25] The victim of an unfair dismissal is entitled to compensation under the established heads as follows:
- (a) **Basic Award**: The Award under this head is similar to Severance pay and consists of one day's pay at his basic wage for each month of service in the case of a weekly paid employee and, in this instance,

as per the Collective Agreement is \$ 116.96. We note that his weekly income was \$ 584.80 per week:

- (i) June 1995 to May 1999 @ 12 days per year = 48 days x \$ 116.96 = \$ 5,614.08
 - (ii) June 1999 to May 2002 @ 15 days per year = 45 days x \$ 116.96 = \$ 5,263.20
 - (iii) June 2002 to July 2002 @ 2 days = 2.5 x \$ 116.96 = \$ 292.40
- Grand Total = \$ 11,169.68.

- (b) **Immediate Loss:** We believe that with due diligence the Employee should have been able to find new employment or self-employment with a similar income (\$ 584.80 per week) within 16 weeks and thus the Award here is \$ 9,356.80.
- (c) **Future Loss:** The award here would be the difference between the earnings from his self-employment and the old employment which I would estimate at approximately \$ 200.00 per week for 16 weeks or \$ 3,200.00. The foregoing is subject to a deduction of \$ 500.00 for the lump sum payment so that the net amount is \$ 2,700.00.

Sub total:\$ 23,226.48

Notice Pay (1 week):\$ 584.80

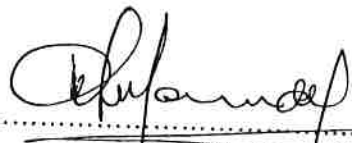
Total:\$ 23,811.28

From the above must be deducted 50% (\$ 11,905.64) being the Employee's contribution so that the sum payable is \$ 11,905.64.

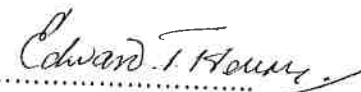
Conclusion

- [26] Having considered the evidence presented, noted the demeanours of the witnesses, the provisions of the Collective Agreement and taking into consideration all the relevant factors including Section 10(3) of the Industrial Court Act, Cap. 214, I endeavoured to arrive at a conclusion that was fair, just and equitable and in the best interests of the parties, good industrial relations and the community at large and would conclude that the dismissal was unfair. However, the Employee contributed to it by fifty per cent (50%) and failed to satisfactorily mitigate his loss and thus the Award is reduced accordingly.
- [27] In *Ronald Silencieux V The Antigua Lottery Company* this Court referred to the possible contra effects of Summary dismissals and employers should give more consideration to this course of action and thus prevent unexpected hardship to such victims. It is hereby ordered that the Employers shall pay to the Employee the sum of \$ 11,905.64, payment to be made by May 7, 2004. There shall be no order as to costs.

DATED the 7th day of April, 2004


Cyril L. Maundy
President

I concur


Edward T. Henry
Member

I concur


Hubert Hood
Member