

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 19 OF 2002

BETWEEN:

DOHNA HAMILTON

Employee

- and -

ANTECH LIMITED

Employers

Before:

The Hon. Cyril L. Maundy

The Hon. Althea Crick

The Hon. St. Lawrence de Freitas

President
Member

Member

Appearances:

Keithlyn Smith, for the Employee

Stacey Anjo, Attorney-at-Law, for the Employer

2006: February 27 & 28
March

JUDGMENT

Summary dismissal of Employee on allegation that she gave herself an increase in salary without authorisation – allegation denied – Managing Director denied that he signed or authorised salary cheque for increase or that anyone else was authorised to grant increase – no supporting witnesses.

- [1] **Maundy, P.:** By this Reference the Employee, Dohna Hamilton, seeks compensation for Unfair Dismissal, from the Employers, Antech Limited, a construction company.
- [2] The Employers denied that the Employee was Unfairly Dismissed and contended that for a number of months leading up to the dismissal the Employee had been paying herself a salary increase without permission or authorisation and she was guilty of misconduct of the kind which warranted summary dismissal.

Historical Background

- [3] The Employers had three businesses, a rum shop, Henderson's Limited where he imported and sold mainly galvanise sheeting and steel rods and a construction company of which he was the Managing Director; he was the Managing Director of all three.
- [4] On February 19, 1996 the Employee took up employment with the Employer as Executive Secretary and over the years her duties included:
- (a) Payroll concluding etc.
 - (b) Monthly Reports etc.
 - (c) Project Invoicing etc.
 - (d) Petty Cash Control etc.
 - (e) General Bookkeeping
 - (f) Co-ordination
 - (g) Maintaining employment records (See Exhibit DH1).
- [5] The Employee's duties increased over the years and in 1998 included:
- (a) Customer Service, i.e. Answering the telephone, updating customers, arranging meetings, preparing job estimates, customer queries and liaison with supervisors.
 - (b) Accounting and administration:

Preparing Invoices.

- (c) Office Duties, e.g. Collecting, sorting and distributing mail, typing, general correspondence and minutes.

- [6] On January 29, 1999, the Employee was instantly dismissed by the Employer with immediate effect and without Notice on the grounds that since September, 1998, she had unlawfully and without authorisation increased her salary to \$ 3,500.00 per month. (See DH8) For every cheque that was issued a voucher had to be prepared and initialled by the Employee and this was then attached to the cheque and sent to Mr Anjo for signature. Mr Anjo said he was the only person authorised to sign cheques. Mr Anjo used to sign blank cheques for the purchase of materials and supplies and leave them with the Employee whom he described as honest and trustworthy.
- [7] The Employee carried out her duties admirably and without complaints from the Employers throughout her tenure of office. She was paid monthly by cheque.
- [8] When she took up the employment the Employee was given a salary of \$ 1,800.00 per month and by September, 1998, this had been increased to \$ 2,500.00 per month. By letter dated September 9, 1998, the Employee asked for an increase in salary from \$ 2,500.00 per month to \$ 4,000.00 per month, at the same time setting out her increased duties and responsibilities – See Exhibit DH2. After she sent the letter Mr Anjo informed the Employee that from then onwards she would have to report to the new manager, Stephen Joseph as he had just purchased Henderson's Limited and would not be involved in the running of Antech Limited anymore. Mr Joseph took over management of the company (Antech Limited) and the Employee discussed the matter with him. The Employee said that Mr Joseph increased her salary to \$ 3,500.00 per month and this was to be paid to her from then onwards. Mr Anjo said that although Mr Joseph was appointed Manager of Antech Limited he had no authority to grant increases of salary or sign cheques, that he was still the Managing Director and the sole person authorised to sign cheques. Mr Anjo also said that he spoke to Mr Joseph who

denied he signed any cheques for the Employee. Mr Joseph was not called to give evidence and thus we were deprived of the opportunity for him to clarify the situation. The new salary was \$ 3,500.00 per month – she was given a cheque for \$ 1,600.00 in September as there was not sufficient funds to pay the Employee in total and on October 9, she was given a cheque for \$ 1,527.54, the balance after statutory deductions for Medical Benefits, Social Security and Education Levy.

- [9] In December, 1998, the Employee was given a cheque for \$ 3,127.54 signed by Mr Joseph – see Exhibit DH6. In January, 1999, while preparing the payroll, Mr Anjo came to the office, asked to see the payroll and on seeing her cheque asked the Employee about her salary. Mr Anjo accused the Employee of giving herself an increase and asked who had authorised it. Mr Anjo then went to his office and summoned Mr Joseph to a meeting. The Employee was then summoned to the meeting. Mr Joseph denied he had given the Employee the increase. Later that day Mr Anjo sent the Employee a faxed message from Henderson's Limited to say that her salary was to be \$ 3,000.00 per month, her working hours increased and she would have to report for work on Saturdays from 8:00am to 2:00pm – See DH7 – this was on January 26, 1999.
- [10] The Employee did not agree with the reduction in her salary stated by the Employers nor the change in her hours of work and went to see the Labour Commissioner. The Labour Commissioner spoke to the Employers on the telephone. On the following day Mr Anjo dismissed the Employee and wrote her a letter to this effect – See Exhibit DH8.
- [11] The Employee said that in the case of salaries she initialled the vouchers, prepared the cheques and sent them to the signatory for signature and once, when the company was short of funds she withdrew \$ 8,000.00 from her personal account at one of the local banks and lent it to the company without security – the money was repaid and was interest free – See Exhibit DH9.

- [12] After her dismissal the Employee sought new employment from several places including Halcyon Cove Hotel, Hawksbill Hotel, Canadian Imperial Bank of Commerce, Barclays Bank, CDC and finally got a job at Carib Aviation, V.C. Bird Airport in May, 1999, at \$ 1,600.00 per month. The Employee worked at Carib Aviation until September, 2000, when she went to work at the Bank of Nova Scotia at an average salary of \$ 2,700.00 per month – her present salary is \$ 3,600.00 per month.
- [13] Mr Joseph had the power to hire and to fire and at times when being paid the Employee was given a blank cheque signed by either Mr Anjo or Mr Joseph.
- [14] The cheques in question (September, October, November and December, 1998) all bore the signature of Mr Anjo and increases in salary were usually done orally. The Employee prepared between four and eight cheques each week and these including her own were signed by Mr Joseph (when he was manager).

Triable Issues

- [15] The issues here for determination appear to be whether:
- (a) The dismissal was fair?
 - (b) The Employee gave herself the increase in question?
 - (c) The increase in salary was authorised, and if so, by whom?

The Arguments

- [16] Mr Smith, in his submission, asked the Court to:
- (a) Reject Mr Anjo's evidence that he did not authorise the increase in salary to \$ 3,500.00 per month or authorise Mr Joseph to give any such increase.
 - (b) Accept the evidence of the Employee that Mr Joseph and the Employee agreed that she was to be paid an increase in salary to \$ 3,500.00 per month from

September, 1998 and Mr Anjo advanced no convincing testimony that Mr Joseph did not have any authorisation to grant the increase.

- (c) Reject the request by the Employers for the refund of \$ 5,000.00 as unlawfully and fraudulently taken by the Employee on the ground that this has not been proved and the Exhibits JA6, JA7 and JA8 found in the Employee's file are not conclusive proof that the files or the vouchers were those of the Employee.
- (d) There has not been any convincing evidence by the Employers as to the authenticity of the file given in evidence or of the vouchers.
- (e) There is no evidence to support the contention of the Employers that the Employee fraudulently used the open cheques signed by Mr Anjo and left with her to buy supplies and not to pay salaries.
- (f) The Employee's evidence that at one time she advanced an interest free loan to the company while they were experiencing a financial crisis.
- (g) Mr Anjo was not a credible witness – he testified that all increases in salary to the Employee were made in writing but this is so in but one increase, viz, that from \$ 1,800.00 per month to \$ 2,200.00 per month – there were other increases but these were not given in writing and documented.
- (h) If Mr Anjo believed the Employee had given herself the increase and acted fraudulently he would have terminated her employment with immediate effect.
- (i) The Employers increased the Employee's duties unilaterally.
- (j) The real reason for the dismissal was the Employee's decision to contest the reduction in salary from \$ 3,500.00 per month to \$ 3,000.00 when they sought the advice of the Labour Commissioner.
- (k) The burden of proof was on the Employers and the Employers' evidence was neither strict, persuading nor convincing and should not be accepted.

[17] In support of his contentions Mr Smith cited Cable & Wireless (West Indies) Limited V Dalmar Hill (Reference No. 2 of 1974) where it was stated that, under the sub-heading "Burden of Standard of Proof ", "Since Summary Dismissal constitutes a strong measure the standard of proof should be strict, persuasive and convincing. Further,

notwithstanding the fact that this is a matter of a civil nature requiring a standard of proof on the balance of probabilities since the matters to be proved were of a grave and weighty nature they would expect the evidence to be correspondingly cogent and weighty in nature and contents."

[18] Counsel for the Employer disagreed with Mr Smith and asked the Court to dismiss the Reference. Counsel contended that, *inter alia*,

- (a) The dismissal was based on the averment that the Employee unilaterally and without the company's consent increased her salary from \$ 2,500.00 per month to \$ 3,500.00 per month.
- (b) The Employers' claim is based on Section C.58 (a) of the Labour Code and if the Court accepts that there was not any authorisation for the salary increase it should succeed.
- (c) It was the Managing Director, Mr Anjo, only, who could grant increases and he remained in that position throughout the Employee's employment and never authorised any such increase – his evidence was never challenged.
- (d) Salary increases were not normally granted by word of mouth but in writing.
- (e) It has not been established or averred that the signed blank cheques were signed or initialled by Mr Anjo.
- (f) Mr Anjo was due to travel to St Lucia in September, 1998 to be married and thus a large number of cheques were pre-signed and left with the Employee for the purchase of construction materials.
- (g) Mr Joseph was not authorised to grant salary increases and this was not within his portfolio or terms of employment as Manager of the Company.

The Law

[19] The Law relating to Unfair Dismissal and termination of employment is contained in the Antigua & Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992 (hereinafter referred to as "the Labour Code") as supplemented by the

Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda 1976, and it to these that I will now turn my attention. The relevant sections of the Labour Code seem to be:

- (i) Section C.56 which provides thus, "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."
- (ii) Section C.58(1) sets out the instances when a dismissal will not be unfair, viz:
 - (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.

[20] Section C.58(2) of the Act lays down the test to be applied in deciding whether or not a dismissal was unfair and provides that it 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.

[21] Section C.10 (3) of the Industrial Court Act "Notwithstanding anything in this Act or in other rule of Law to the contrary the Court in the exercise of its power 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 regard to the principles and practices of good industrial relations and in particular, the Antigua and Barbuda Labour Code.

[22] C9. (1) An employer may, without advance notice, terminate the employment of any person who has engaged in misconduct related to his work within the limitations of section C59 (1) or (2).

- (2) With respect to a person who has been engaged for a specified term of employment of less than one week's duration, the employer need give no further notice of his intention to terminate said employment at the end of the specified term, unless the terms of his employment specify otherwise.
- (3) In all other cases, the employer must give advance notice to the affected employee of an intention to terminate that person's employment, as follows
 - (a) with respect to an employee within his probation period, an employer must give at least 24 hours advance notice of his intention to terminate said employee's employment.
 - (b) with respect to all other employees, the period of said advance notice shall be at least equivalent to the interval of time between the affected employee's paydays;
 - (c) in no case need the period of said advance notice exceed 30 days unless an employment contract calls for a longer notice period.
- (4) Having given due advance notice to terminate employment, an employer may terminate the employment prior to the effective date of termination under the notice, provided that he pay the employee a sum equivalent to that which he would have paid if the employee had worked throughout the period.

- (5) If the employer has not exercised the option provided in subsection (4), he may require the employee to render his normal services until the effective date of termination under the notice, at the regular wage last being received by said employee:

Provided, however, that during said period the involved employee shall be entitled as far as is practicable, to a reasonable amount of time off without loss of pay in order to seek other employment.

- (6) An employer having given due advance notice to terminate employment and not having exercised the option provided in subsection (4), shall be discharged of any obligation to pay the involved employee's regular wage if and when said employee voluntarily quits his employment prior to the effective date of termination under the notice.

Decision

- [23] In their evidence the Employers do not deny that they dismissed the Employee as alleged but contends that the dismissal was not unfair; further the mode of dismissal, i.e. summary and without Notice was justified being, in the least, misconduct within Section C.59 of the Antigua and Barbuda Labour Code/the Labour Code. Section C.59 of the Code pronounces against summary dismissals generally and lays down the procedure to be followed in the event of a dismissal. The Court is very mindful of the foregoing and will examine allegations of breach where it considers it fair so to do. The Employers acted under the belief, they attested, that the Employee had abused her position and the trust and confidence which the Employers had reposed in her and her good record as a good and faithful servant by giving herself the salary increase without authorisation and dishonestly ciphering off to her own use a total of \$ 5,000.00 of her Employer's monies.

- [24] It is to be observed that the Employer in his evidence said he had the highest regard for this Employee and prior to this incident never had a single serious complaint against her

– in fact, he showered praises on her particularly in relation to the interest free loan she made to them on that occasion when they had a financial crisis.

[25] The Court has voiced the seriousness with which it views Summary Dismissals especially since the Employee had no time to find new employment or self-employment, and in all probability will have to continue to meet her financial obligations e.g. she might have mortgage payments to meet, school or University fees or a motor car loan to repay, to mention but a few probabilities. And, of course, the job market in Antigua and Barbuda is not wide open at present but very competitive with many school leavers and others unable to find employment.

[26] The Employee adamantly denied the Employers' allegations or that she had acted in any way dishonest and that it was true that the increase in salary was authorised by Mr Stephen Joseph when he took up the position of manager of the company. Mr Joseph, as it stands, plays an important role in this matter and from the outset the Court has been at a loss as to why he was not called to give evidence. At the opening of the Hearing Counsel for the Employers informed the Court that Mr Joseph would not be coming to give evidence but did not indicate why and this came literally as a bombshell as the opinion was that since he was at the centre of the "puzzle" he was perhaps the best person to unravel it. The Court waited in anxious expectation to see if Mr Smith was going to burst the bubble by calling Mr Joseph to testify but this was not to be and thus we are at a loss. It is to be observed that the Employee, although she maintained that the increase in salary was authorised by Mr Joseph, admitted that at the meeting with Mr Anjo, Mr Joseph and herself, Mr Joseph said he did not authorise the increase – this is not "best evidence" and I do not know if it was the truth or something said by Mr Joseph to "save his skin". But the Employee despite being fully aware of what could result if the Court accepted this statement as true nevertheless made it and drew it to the Court for consideration – she is an intelligent lady and does not appear to be unaware of the merit of her evidence.

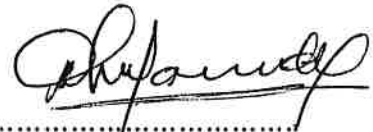
- (c) Manner of dismissal – The Employee held a trusted management position and the accusations would make it more difficult to obtain a similar position or prone to dismissal if she held one. In the circumstances I would award \$ 15,000.00.
- (d) Future Loss – The Employee is presently earning \$ 3,600.00 per month and thus does not qualify for any award under this "Head".
- (e) Notice Pay – The Employee is entitled to one month's pay in Lieu of Notice - \$ 3,500.00.

Conclusion

- [29] I find that the dismissal was unfair and the Employers shall pay to the Employee the sum of \$ 50,000.00 in full and final settlement of the claim, payment to be made by

- [30] There shall be no Order as to Costs.
- Payment to be made by January 31, 2007.*

DATED the 13th day of December, 2006



Cyril L. Maundy
President

I concur



Althea Crick
Member

I concur



St Lawrence de Freitas
Member