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ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 4 OF 2004

BETWEEN:

JENNIFER GERAN

Employee

and

DREAM COMPANY LTD (K-CLUB BARBUDA)

Employers

Before:

The Hon. Edward T. Henry OBE.	-	Chairman
The Hon. Ms. Glendina M. McKay	-	Member

Appearances:

Mr. George Lake of Lake & Kentish for the Employee
Ms. Sharon Cort of Cort & Cort for the Employer

2007: October 24
2008: October 28

JUDGMENT

Unfair Dismissal – Summary Dismissal – Employee employed under contract – Warning letter or letter of complaint never given to Employee – Investigation of Complaints - No severance pay paid to Employee – Mitigation – Self Employment.

[1] **Henry, Chairman** – By a Reference filed on 4th February 2004, and an Employee's Memorandum filed on the 10th February 2004, the Employee notified the Court of a Trade Dispute and claimed compensation for unfair dismissal. The Employer filed its Employer's Memorandum on 21st February 2005.

[2] At the start of this hearing the Chairman drew attention to the fact that the Court was being represented by two members only, since one of its members was indisposed. He enquired if any of the litigants were opposed to the hearing, there being no objection he referred to the next issue. He pointed out that it was a practice of the Industrial Court that parties to all disputes that came before the Court should be urged to explore all possible avenues of reconciliation. He therefore enquired if the parties now before the Court wished time to consider a resolution of the matter.

[3] Ms. Cort informed the Court that she was recently retained. She further informed the Court that she had not been able to contact the owners of the Club who were in Milan to obtain firm instructions regarding Jennifer Geran's termination. She said that the owners must have had some valid grounds for bringing the employees contract to

an end. If the Court was disposed to accept the submissions of the employee she wished to draw the attention of the Court to the decision of the Appeal Court in relation to the Jennifer Watt case. No request was made by Ms. Cort for an adjournment of this matter.

[4] After due consideration, the Chairman decided that having regard to the lengthy period over which the matter had been delayed for no plausible reason, the case should now be heard.

Historical Background

[5] During the course of the proceedings, the Employee informed the Court that she was also known as Jennifer Geran Obi.

[6] The Employee, Jennifer Geran , worked with the Dream Company Ltd. (K Club Barbuda) the Employer, under the terms of a contract which commenced on the 15th November 1998 and was due to expire on the 31st August 1999. The terms and conditions were *inter alia* that she was appointed as K Club's General Assistance and Guest Service Representative operating from V.C.Bird International Airport. The salary was set at \$3750.00 per month, including all fees, gas and parking for her car. Her position called for seven days per week engagement and a twenty-four hours on call schedule. The contract of employment bore this out and was admitted into evidence and marked JG1.

[7] By letter dated 2nd March 1999 Jennifer Geran's employment with K Club was terminated with effect from 7th March 1999,

approximately six months before her contract was due to expire. The letter of dismissal signed by one Michael Andreewitch and marked JG3 was as follows:-

“

K Club.

March 2, 1999

Dear Mrs. Obi,

We have to inform you, that we have received two heavy complaints about you from K Club guests, namely from Mr. Guelfi and from Mrs. Mann.

As a result of these complaints the owning company of K Club Barbuda, Dream Company Ltd. Antigua came to the conclusion that the employment relationship with you cannot be continued.

We therefore have to advise you that your employment with the K Club will be terminated on March 7, 1999, your last working day being Saturday March 6th, 1999.

Sincerely,

Michael Andreewitch

General Manager “

[8] The Employee in her evidence repudiated the statements mentioned in the Employer's Memorandum, namely that the

employment was a temporary one and covered only a three month period as stated in paragraph 1 thereof. She confirmed that the contract dated 14th November 1998 showed a duration period from 15th November 1998 to 31st August 1999. Further, in paragraph 3 of the Employer's Memorandum it was stated that the Employer received ***"a complaint from one of the guests that the Employee allowed Eric Burton to travel on the private jet of one of the guests, the Employer exercised its option in bringing an end to the temporary and casual employment."*** This assertion was strongly denied by the Employee who stated that at the time in question she did not know Eric Burton and could not have allowed him to travel on any aircraft owned by any member of the Club.

[9] The Employee according to the conditions of her employment was responsible for making flight arrangements for K Club guests traveling to and from the K Club in Barbuda to Antigua and also for the onward flight arrangements of guests flying to the United States. She made these arrangements while based in Antigua. Her contract had in fact stated that she was General Assistance and Guest Service Representative operating from V.C.Bird International Airport.

[10] A letter from Aldo Pinto to one Eric, in an exhibit submitted by Counsel for the Employee, (Exhibit JG2) refers to one Jennifer, who at the end of the ensuing week would be terminated. It describes Eric's attempt to get to Antigua via the Club's privately owned aircraft. Having reached Antigua, Eric then proceeded to board the privately owned aircraft of Mr. Guelfi bound for Miami. Aldo Pinto

owner of K Club, on learning this regarded it as an unbelievable story and assumed that Jennifer Obi was in collusion with Eric Burton's invasion of the privacy of the K Club guests. It was on this occasion when the privately owned aircraft arrived in Antigua from the K Club with four passengers, that Eric Burton was identified to Jennifer Obi by Orliss a staff member. She claimed that she did not know Burton until he had been pointed out to her as he came off the plane. She made no enquiries as to what he was doing on the aircraft. She welcomed the Guelfis and directed the porter to take their baggage to the private aircraft. She then went upstairs to make arrangements for their departure on their private jet to the United States of America.

[11] No previous complaints had ever been made by the Employers in writing with regards to the performance of the Employee. On one occasion Michael Andreewitch informed her verbally that Mrs. Mann was uncomfortable about delays that occurred in spite of having their own personal aircraft. In addition prior to her dismissal by letter of March 2nd 1999 the Employer never informed her of the two heavy complaints or any other complaints about her so that she would be in a position to either accept or deny them.

[12] The Court took note of the Employee's statement that she was a professional Chef and that after her dismissal she had sent out applications to various establishments but the responses she received were not to her liking. She did work occasionally, as well as catering and providing for events that required the services of a Chef. She was no longer interested in working for any business concern but preferred

to try and establish her own business. For the most part she now lived from her investments and the periodic jobs she got as a Chef.

Triable Issues

[13] The issues for determination are as follows:

- (a) Did the Employer institute any investigation of the two “*heavy complaints*” which it made against the Employee before dismissal?
- (b) Was the summary dismissal fair?
- (c) Did the Employee mitigate her loss?
- (d) What compensation is payable to the Employee if the dismissal is found to be unfair?

The Issues

Submissions on behalf of the Employee

[14] Counsel for the Employee submitted that this was a claim for unfair dismissal. He further stated that it was harsh and oppressive. There was no indication as to what was the nature of the complaints which the Employer referred to in its letter of termination. The Employer gave the Employee no opportunity to be heard with respect to the complaints. He said that no proper reasons were adduced for the dismissal and no warning letters had been served upon the Employee. A valid contract entered into by the Employee with the Employers had been breached. The Employee was not paid for the month of March 1999 and was due six months salary, i.e. 1st March to 31st August 1999. Counsel therefore sought compensation on his client’s behalf for the unexpired period of the contract and other awards under the

four established heads, i.e. Basic Award for Loss of Protection, Immediate Loss, Manner of Dismissal & Future Loss.

Submissions on behalf of the Employer

[15] Counsel for the Employer was of the view that there must have been some grave misconduct that provoked the action of dismissal taken against Jennifer Geran. She submitted that Eric Burton's invasion of the privacy of the K Club's facilities and the unauthorized trip made by him on a private aircraft must to some degree be the responsibility of the Employee. The Employee ought to have known of Burton's trip in view of the duties she was contracted to perform.

[16] Ms Cort further submitted that if any award is to be made the Court should consider what steps she took to mitigate her losses. She invited the Court to examine the Court of Appeal's decision in the case of Antigua Village Condo Corporation and Jennifer Watt. (Civil Appeal No. 6 of 1992) for guidance.

The Law

[17] The Law relating to Unfair Dismissal as contained in the Antigua and Barbuda Labour Code, Laws of Antigua and Barbuda, Cap. 27 Section C56 protects an Employee who has completed his probationary period against Unfair Dismissal. The Section provides thus:

“Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his

employer; and no employer shall dismiss any such employee without just cause.”

[18] C58 (1) states *inter alia* as follows: A dismissal shall not be unfair if the reason assigned by the employer therefore:

(a) relates to misconduct of the employee on the job, within the limitations of section C59 (1) and (2);

(b)

(c)

(d)

(e)

Provided, however, that there is a factual basis for the assigned reason.

[19] Summary dismissal is a very strong and severe measure that can be justified only in the most exceptional circumstances.

Examples of such circumstances are cited in Section C 59(1) of the Code. Further, there should be an investigation and consultation before termination thereby allowing the employee to be heard.

[20] An employee, who is dismissed is under a duty to mitigate his loss by seeking similar or alternative employment. In an appropriate case he is required to resort to self – employment and to set up his own business.

Failure to do any of the foregoing will result in a reduction of the award. Notwithstanding, it must be borne in mind that the employee

was hired under a fixed term contract, and in circumstances of unfair dismissal and breach of contract, she is entitled to the outstanding salary and perquisites that she would normally have enjoyed if her dismissal is held to be unfair.

The Decision

[21] Having been given notice of this hearing no evidence was led on behalf of the Employer. However the Court did take into consideration the claims made in the Employer's memorandum filed in the Court on February 21st, 2005. The Employer essentially submits that the Employee's dismissal was fair because after it received a complaint from one of the guests that the Employee allowed Eric Burton to travel on the private jet of one of the guests, the Employer exercised its option in bringing an end to the temporary and casual employment of the Employee. (see para. 3 of the Employer's memorandum). The decision was taken to proceed after having given the Employers ample notification, and having regard to the fact that this was a matter although filed on February 10th 2004 deserved to be heard and completed.

[22] It is a requirement of natural justice that if any allegations against an employee are alleged by an employer to have been done by an employee, then it is incumbent upon the employer to allow the employee to be aware of them so that that employee may have the opportunity to rebut them if there is evidence upon which he has in his possession. In this case the employer alleges it received two heavy complaints about the employee from K-Club guests, namely from Mr.

Guelfi and Mrs. Mann. No evidence was led as to the nature of these complaints. No opportunity was given by the Employer for the Employee to state her response to these complaints. She has the right to be heard before the Employer makes a finding against her.

[23] In any event, if one of the complaints was in relation to Eric's (Burton) arrival into Antigua in the private aircraft of the Employer, the Employee testified that her duties related to the boarding of the aircraft at V.C. Bird International Airport and in such circumstances she would not have been aware of Eric's (Burton) boarding of the aircraft in another jurisdiction.

[24] Maundy, P. in *Carlene Vigo and David Jarvis vs Swiss American National Bank*, reference numbers 27 and 40 of 1996 stated the following proposition at paragraph 18 *inter alia* as follows:

“This Court has always maintained that in cases of Industrial Relations, except perhaps in instances where an employee is caught in flagrante delicto he should be given an opportunity to be heard in keeping with the rule of Natural Justice, Audi alteram partem. Indeed, according to the Holy Scriptures, after Adam had eaten of the forbidden fruit, he was not immediately condemned but the Lord is said to have summoned his presence and said to him, “Adam, Adam, where art thou, hast thou not eaten of the forbidden fruit?” See Genesis Chapter 3, verses 9-12.

Not only must both sides to a dispute be heard but no undue pressure or coercion must be put on an employee to, e.g. admit a

wrong. By extension, all the parties to a dispute must be heard prior to a finding.”

[25] In arriving at a decision, the Court has taken into consideration all of the evidence led on behalf of the employee, has observed her demeanour, has listened to her counsel's submissions, the submissions made on the Employer's behalf, has read the Employer's Memo has considered the authorities cited, and the provisions of the Labour Code, the Industrial Court Act, Cap.214, and the relevant case law. The decision of this Court is that in all the circumstances of this case, the Employee was unfairly dismissed by the Employer.

The Award

[26] The Labour Code makes it clear that an employee is entitled to more than his contractual rights. He has an equity in his job which requires protection and he has a right not to be unfairly dismissed. This is affirmed by section 10 (3) of the Industrial Court Act. In this case the Employee was employed under the terms of a contract. Since the dismissal is deemed to have been unfair and the contract breached, it follows that she is entitled to the amount of salary she would have earned from the time of her dismissal up to the closing date of the contract. In addition she is entitled to paid leave, any other perquisites provided by the contract together with her equity.

The compensation is as follows:

For the unexpired part of the contract from March 1st to August 31st, 1999, period for which she has not been paid: March 1st to August 31st, 1999 = 6 months.

Amount due 6 x 3750.00 =	\$22,500.00
Vacation pay -	\$ 1,112.67
One extra month's pay -	\$ <u>3,750.00*</u>
	<u>\$27,362.67</u>

* See Decision in the Court of Appeal Suit No. 21 of 1993 between Universal Caribbean Establishment – Appellant and James Harrison – Respondent.

Payment

[27] Payment shall be made by the Employer to the Employee on or before the 31st day of December 2008.

Dated the 28th day of October 2008.

Edward T. Henry

EDWARD T. HENRY

CHAIRMAN

I CONCUR

Glendina M. McKay

GLENDINA M. MCKAY

