

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 4 OF 2008

BETWEEN:

HOLLY RALPH

Employee

And

CURTIS RYAN t/a THE NEW 18 KARAT NIGHT CLUB Employer

Before:

The Hon. Genevieve L. I. Benjamin

Chairman

The Hon. St. Lawrence de Freitas

Member

The Hon. M. Glendina McKay

Member

Appearances:

Mr. Cosbert Cumberbatch, Attorney-at-law for the Employee

No appearance for the Employer

**2010: January 26
August 19**

JUDGMENT

Benjamin, Chairman

INTRODUCTION

Mr. Curtis Denmore Ryan operates a business known as “**The New 18 Karat.**” It became operational from January 2, 2002. Mr. Ryan carries on the business as a night club at Church Street in the City of St. John in the State of Antigua and Barbuda. The Employee, Ms. Holly Ralph, worked on weekend nights as a cashier

at The New 18 Karat. She was employed in this capacity for approximately eighteen (18) months. She was summarily dismissed on June 15, 2006.

LEGAL PROCEEDINGS

[1] A Reference and the Employee's Memorandum were both filed by the Employee's Attorney-at-Law on April 02, 2008.

[2] In her Memorandum the Employee claimed unfair dismissal and compensation as follows:-

- “(a) Three (3) weeks pay in lieu of notice;*
- (b) Severance to be calculated and paid in line with equity;*
- (c) Five weeks pay entitlement for loss of earnings;*
- (d) An entitlement to two months pay for unfair and/or unlawful dismissal;*
- (f) Costs.”*

[3] A Witness Statement by the Employee was filed on January 22, 2010.

[4] There was no appearance by the Employer or by someone representing him on either of the days on which the Hearing was scheduled. The Court noted on January 26, 2010, that during the period April 02, 2008 and January 05, 2010, eight notices were issued from the Registrar of the Court to the Employer. The Court received no communication whatsoever from the Employer. In the circumstances the case was heard *ex parte* on January 26, 2010.

EMPLOYEE'S EVIDENCE

- [5] Ms. Holly Ralph (**hereinafter sometimes referred to as “*the Employee*” or “*Ms. Ralph*”**) gave sworn evidence. She stated that her full name was Holly Rosmund Ralph. She lives at T.N. Kirnon Street in Villa in the Parish of St. John in the State of Antigua and Barbuda.
- [6] Ms. Ralph stated further that on April 02, 2008, a Memorandum was filed in her name. On January 22, 2010 she caused to be filed in this Court her Witness Statement. It is also dated January 22, 2010. She confirmed that the Witness Statement was her Evidence-in-Chief.
- [7] The Employee gave evidence that she was employed by The New 18 Karat nightclub during the month of December, 2004, as a gate cashier. She was uncertain if her employment commenced on the 4th or 6th of December, 2004. She worked on Friday and Saturday nights during the hours of 11 00 pm to 5.00 am. On Sundays she worked from 11.00 pm to 3.00 am. Her last day at work, was June 14, 2006. She stated that her salary was \$325 00 weekly. (*See the Witness Statement at paragraph 2.*)
- [8] It was her evidence that Mr. Curtis Ryan was the owner of the nightclub. Mr. Brent Baptiste was the manager, who worked ***“as an employee, servant and or agent of The New 18 Karat Nightclub and acted for and on behalf of the said Nightclub and its owner Mr. Curtis Ryan in an administrative, managerial, and operational capacity.”*** (See the Employee's Witness Statement at paragraph 6.)

- [9] The Employee gave the following details of her work: Upon reporting to work her first duty was to collect a roll of numbered tickets and a float of \$200. She then entered a ticket booth from inside the club. This was her work station. She remained there until the end of her shift. Patrons to the club were checked by a security guard before approaching her booth to purchase an entry ticket. For an exchange of \$20 she sold entry tickets through a slot in her booth. These tickets were presented by patrons to another security guard, who was stationed immediately beyond her booth. That guard was required to partly tear the ticket and drop it into a box or drum. Beyond this security guard two police officers were stationed.
- [10] Continuing to explain her duties, Ms. Ralph said that she was required to record the number of the first ticket sold and at hourly intervals to record the number of the last ticket sold. This system, she said, allowed the club to monitor the number of persons within the club and to ensure that this number did not exceed 500. At the end of her work shift the supervisor, Mr. Brent Baptiste, accompanied by a security officer, collected her records and cash. In doing so the supervisor signed her records to signify agreement with the starting and closing ticket numbers.
- [11] In responding to questions from the Court, the Employee stated that only she, as cashier, would be in the booth. The security guards and police officers were stationed outside of the booth. The box or drum into which the partly torn tickets were dropped by the second security guard was also outside. One door only was used for entry and exit by patrons.

[12] The Employee stated that this system was always followed during the time that she worked for The New 18 Karat Nightclub.

[13] Ms. Ralph gave evidence that on June 15, 2006, she received a telephone call from Mr. Brent Baptiste. He asked her to come to the office. When she went to the office she received a letter of dismissal of the same date. Prior to this she had not received any warning or notice of termination of her services. The letter of dismissal was admitted into evidence as Exhibit “HR-1”. It was written on the letter-head of **The New 18 Karat**. It reads as follows:

*“Holly Ralph
Lower Gambles
St. John’s*

15 June 2006

Dear Ms. Ralph,

Over the past months, and as you are quite aware, there has been a decline in business at the New 18KT. However, Saturdays nights have maintained its capacity of customers, whilst the tills at the gate, and the bar did not tally; and so we decided to conduct an internal investigation.

On Saturday, 10 June 2006, it was observed during the period when Steve Morgan left the gate and went inside for a while, that you were given tickets that were sold to previous customers by Andre Hughes to resell to customers. This action led to more vigilance and alertness throughout the entire night and produced every business’s worst nightmare. This was verified when the reused tickets came up with a lower sequence number than the preceding tickets issued.

Effective immediately, we are forced to terminate your employment with the New 18KT Nightclub.

Furthermore, we ask that you come forward to resolve this matter immediately in house, or we will be forced to take legal actions against you. We promise to do all in our power to recover the lost revenue from you and whoever else is involved with this gross misconduct.

Sincerely,

*(Sgd) B. Baptiste
Brent Baptiste
Manager*

Cc: Curtis Ryan”

- [14] Ms. Ralph said that she noted from the dismissal letter that she was accused of re-selling used tickets. Upon receiving the letter and noting the accusation she inquired as to whether the letter was intended for her. She said that she told Mr. Baptiste that she was being accused of something of which she had no knowledge. It was her evidence that she had never before received an indication of such an allegation; neither had she been challenged for performing such acts. She was unaware of any investigation into such an allegation. She denied that she had ever re-sold used tickets.
- [15] The Employee stated that she had worked for eighteen months and that upon termination she received no payments whatsoever. She claimed that during

her employment she had not received any vacation leave or payment in lieu thereof.

[16] Ms. Ralph went on to state that she obtained another part-time job approximately eight months after her termination, but that for six of those eight months she did not seek such employment. She confirmed that she had always enjoyed a full-time day job.

[17] The Employee reiterated her claims of Unfair Dismissal, Severance pay, Pay in lieu of notice and Holiday pay.

[18] In response to the Court, the Employee stated that she had been employed pursuant to a verbal agreement between the two parties. She had never received a job description from the Employer.

[19] The Employee was questioned by the Court concerning her claim to have been in receipt of a weekly wage of \$325 while working for the Employer. It was noted from the document she produced of copies of eleven weekly pay slips, "HR-2", that her weekly basic wage fluctuated between \$120 and \$480 during the period January to April 02, 2005. Ms. Ralph could provide no explanation for the differences. She could not recall what her agreed hourly rate of pay was. She did recall that the Club did not operate when major local activities were scheduled. She gave the examples of such events which caused the Club not to open as Carnival, special functions at Shirley Heights or public performances by guest artistes.

- [20] The Employee confirmed that both Steve Morgan and Andre Hughes, who were mentioned in the dismissal letter **“HR-1”**, were security guards. She had no knowledge, as to whether either or both persons continued to be employed by the Club after her dismissal.
- [21] The Employee again confirmed that she was not involved in any internal investigation, which, according to the letter of dismissal **“HR-1”** was carried out. She could not speak to the relationship between the ***“tills at the gate, and the bar”*** referred to in the first paragraph of the same letter.
- [22] (a) Ms. Ralph told the Court that she queried the last paragraph of the dismissal letter, which reads –
- “Furthermore, we ask that you come forward to resolve this matter immediately in house, or we will be forced to take legal actions against you. We promise to do all in our power to recover the lost revenue from you and whoever else is involved with this gross misconduct.”***
- (b) She said that Mr. Baptiste responded to her query by telling her, ***“Mr. Ryan is not here and this is the decision that was made.”*** She added that she received no further communication from the Employer, and ***“was not called upon to return any monies to the Club.”***

THE EMPLOYEE'S SUBMISSION

[23] Mr. Cosbert Cumberbatch filed Written Submissions on behalf of the Employee on March 22, 2010. At **paragraph [3]** of his submissions he stated as follows:

“The allegation against the Employee is not very clear but it seems that it was being alleged that the employee, while working as a cashier was re-selling used tickets and thereby depriving the business of revenue.”

[24] At **paragraph [6]** of his Written Submissions Mr. Cumberbatch stated as follows:

“The Employee was summarily dismissed on grounds that were not clearly set out. Summary dismissal is permissible only in special types of cases e.g. an employee caught stealing or employee assaulting supervisor, willful disobedience to orders, dishonesty, gross negligence etc. Outside of those cases, summary dismissal is not justified.”

[25] The Attorney-at-Law submitted that *“summary dismissal is not only against the Laws of Antigua and Barbuda but is contrary to good industrial practice”* The Employee's evidence is uncontroverted, he stated, and there is no reason why it should not be believed. He noted that the Employer has shown no interest whatsoever in the case. He has not filed a Memorandum despite requests to do so by the Registrar of the Industrial Court. He did not attend any of the hearings of the Court.

[26] Mr. Cumberbatch submitted that “*Sections 56, 57 and 58 of the Antigua and Barbuda Labour Code*” should be taken into consideration by the Court.

THE ISSUES

[27] The main issues for the Court’s determination are:-

- (i) Was the dismissal of the Employee fair or unfair?
- (ii) If the dismissal was unfair, what are the benefits to which the Employee is entitled?

THE LAW

[28] The Law governing the issues in this case is contained in certain relevant sections of the Antigua and Barbuda Labour Code, Cap.27 of the Laws of Antigua and Barbuda (**hereinafter referred to as “*the Labour Code*”**) and the Industrial Court Act, Cap. 214 of the Laws of Antigua and Barbuda (**hereinafter referred to as “*the Industrial Court Act*”**).

THE FIRST ISSUE

Was the dismissal of the Employee fair or unfair?

[29] The Court considered first the reason for the dismissal. In the absence of the Employer or his representative the only source from which to obtain a reason was the letter of dismissal “**HR-1**”. The Court agrees with Mr.

Cumberbatch in his submission referred to at **paragraph [24]** above, that the letter of dismissal lacks clarity. This letter speaks to different issues:-

- (i) A decline in business;
- (ii) The non tallying of the tills at the gate and the bar;
- (iii) An observation on June 10, 2006, that the *“Employee (was) given tickets that were sold to previous customers to resell to customers.”* The *“reused tickets came up with a lower sequence number than the preceding tickets issued.”*
- (iv) A loss of revenue experienced by the Employer for which the Employee was held to be responsible – at least in part.

[30] The Court finds that the letter **“HR-1”** falls short of providing a specific reason for the dismissal. The letter of dismissal makes an accusation that the Employee was re-selling tickets thereby depriving the Employer of revenue.

[31] In the absence of the Employer or his representative or any documentation from him, the Court is unable to give any consideration to the financial aspects suggested in the letter of dismissal.

[32] In an effort to exercise absolute fairness to the Employer the Court attempted to obtain a reasonable understanding of the basis for the dismissal. The Court therefore considered keenly the details contained in the letter of dismissal **“HR-1”**. The second paragraph of this letter provides some insight. Someone or some group of persons, whose identity has not been disclosed, observed that while one security guard was absent another security guard gave used tickets to the Employee *“to resell to customers”*.

This observation alerted the Employer to employ increased vigilance, which resulted in the Employer realizing that tickets ***“with a lower sequence number”*** appeared after tickets with a higher number. This seems to be the essence of the reason for the dismissal as provided in the letter of dismissal.

[33] We now consider the evidence before this Court. The Employee was stationed alone in a booth surrounded by five security officers, three (3) security guards and two police officers. If one officer was absent and another was involved with the Employee in unlawful activities there were three remaining security personnel to safeguard the Employer’s business, to accost the offending person(s) and to catch him/them red-handed. Was it one of these three persons who observed the delivery of used tickets to the Employee? The Court does not know.

[34] In his submissions on behalf of the Employee, Mr. Cumberbatch stated that the Employee relied on sections C56, C57 and C58 of the Labour Code. We now consider the provisions of these sections:

“C56. 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 employee without just cause.

C57. For the purposes of this Part, n employee will not be deemed to have been dismissed unfairly if his employment is terminated at the expiration of the term specified at the time of his hire.”

[35] C58 of the Labour Code states as follows:

“C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(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.

(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably 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.”

- [36] The Court now turns to a consideration of the “*factual basis*” for the dismissal. In the letter of dismissal “**HR-1**” the Employer stated that it was observed that the Employee was given used tickets to resell to customers. The letter omitted to state whether or not it was also observed that the Employee did re-sell those tickets. The Employer appeared to believe that he had proof that the Employee did re-sell the tickets when, according to the letter of dismissal, tickets with a lower sequence number appeared after tickets with a higher sequence number.
- [37] Mr. Baptiste said that internal investigations were conducted. The Court has not been provided with any evidence of such investigations. The Employee has given evidence that she had no knowledge of them, that she had not been questioned about receiving used tickets for re-sale or of re-selling such tickets. The accusation in the dismissal letter was such a surprise to her that it caused her to inquire of Mr. Brent Baptiste if the letter was meant for her. This is the only evidence before the Court. The Court has not been provided with factual evidence to ground the dismissal.
- [38] (a) The Biblical story of man’s first transgression relates that even God gave Adam and Eve an opportunity to defend themselves when he asked Adam what he had done. Unless an employee is caught in the very act any reasonable employer would properly investigate the relevant circumstances, present the evidence to the suspected offending employee and give that employee an opportunity to state his/her case and defend himself/herself.

- (b) An authority for this proposition is **Caryle Anthony and BBR Sportive Ltd. Ref. No. 11 of 2005**. In that case Pilgrim President stated as follows at **paragraph [62]** of the judgment.

“It is a basic principle of natural justice that an employee who is accused of committing an offence of misconduct is deserving of a fair hearing before that employee is dismissed.”

- (c) In addition Rawlings J.A (ag) (as he then was) made similar remarks in **The Epicurean Ltd. vs Madeline Taylor Civil Appeal No. 4 of 2003** at **page 10, paragraph [33]** of the judgment.

[39] No evidence was led which indicates that the Employer investigated the circumstances of which he accused the Employee of doing. In addition there was no evidence that the Employer gave the Employee an opportunity to defend herself. In the absence of the production of factual evidence the Court has decided that the Employee was unfairly dismissed.

THE SECOND ISSUE

If the dismissal was unfair, what are the benefits to which the Employee is entitled?

[40] An employee who has been unfairly dismissed is entitled to compensation under certain established heads.

Basic Award

[41] In his submissions on behalf of the Employee Mr. Cumberbatch referred to sections C40 and C41 of the Labour Code. These sections provide:

“C40 Every employee whose term of employment with an employer and his predecessor has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy.

C41 Severance pay shall consist of at least one day’s pay, at the employee’s latest basic wage, for each month or major fraction thereof of his term of employment with his employer and any predecessor-employer.”

[42] The Basic Award is calculated on the same basis as severance pay.

[43] In “HR-2” the Employee submitted copies of eleven (11) pay slips which she had received during the period January to April 02, 2005. These showed her basic salary fluctuating between \$120 and \$480. As this was during the earliest months of her employment the Court accepts that her weekly basic salary could have stabilized at \$325, the figure given in her evidence and in all submissions on her behalf. She worked three (3) nights weekly. The Employee’s daily (or nightly) pay therefore was \$325.00/3 or \$108.33.

[44] The Employee worked for the Employer from early December, 2004, to June 15, 2006 – 18 full months. She is therefore entitled to a Basic Award of \$108.33 x 18 or \$1,949.40.

Immediate Loss

- [45] An employee who is unfairly dismissed is entitled to compensation for loss of earnings for such relevant period as the Court thinks fit. Of course, an employee is under an obligation to make every effort to mitigate his/her loss in a timely manner. Such evidence must be produced to the Court.
- [46] Ms. Ralph gave evidence that for six months after the dismissal she made no effort to obtain replacement employment. When she commenced the search it took her two months to find such employment. No documentation was produced in evidence.
- [47] The Court finds that to sit idle for six months before commencing efforts to find alternative employment nullifies a claim for Immediate Loss. No award is made under this heading.

Future Loss

- [48] There shall be no award under this heading as the Employee gave evidence that she obtained replacement employment shortly after she commenced efforts to obtain such employment.

Manner of Dismissal

- [49] Notwithstanding the questionable nature of the dismissal with an accusation which is tantamount to dishonesty, the Employee obtained new employment within two months of her search. No award is made under this heading.

OTHER AWARDS

Notice Pay

[50] Section C9 of the Labour Code deals with the employee's notice of termination. Sub-section 3 (a) provides for notice to employees within their probation period. Sub-section 3 (b) provides:-

“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 pay day;”

[51] As a weekly paid worker the Employee is entitled to one week's pay, or \$325.00 under this heading.

Vacation Leave

[52] It is noted on the pay slips copied at “HR-2” that provision is made for vacation pay. The Employee gave evidence that she did not receive vacation leave and that she did not receive pay in lieu of vacation leave while she worked for the Employer.

[53] The Labour Code provides at C 18 (1):

“Each employee who has successfully passed his probationary period shall be entitled to, and each employer shall give him, vacation leave without loss of at least the basic wage, including the cash equivalent of payments in kind, he would have received had he not taken the leave, in an amount of at least one day per month of employment.”

[54] Such vacation leave amounts to 12 working days annually or two calendar weeks for employees working a six-day work week. The Employee, having worked for the Employer for 18 months, is entitled to three (3) weeks pay in lieu of vacation leave (\$325.00 x3) amounting to \$975.00.

CONCLUSION

[55] In arriving at our conclusions the Court took into consideration, the evidence of the Employee and her demeanour, the submissions of her representative, the written pleadings, The Labour Code and the Industrial Court Act. In the absence of the Employer the Court questioned the Employee most keenly:

[56] The Court has acted in accordance with equity, good conscience and the substantial merits of the case, having regard to the principles and practices of good industrial relations. A summary of the awards which are due to the Employee is as follows.

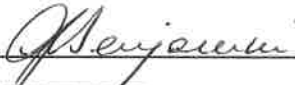
SUMMARY OF AWARDS

[57] Basic Award	-	\$1,949.40
Notice Pay	-	325.00
Vacation Leave	-	<u>975.00</u>
TOTAL		<u>\$3,249.40</u>

[59] The Employer shall pay to the Employee the sum of **\$3,249.40** on or before **the 30th day of September, 2010.**

[60] There shall be no order as to costs.

Dated this the 19th day of August, 2010.



GENEVIEVE L. I. BENJAMIN

Chairperson

I agree



M. GLENDINA McKAY

Member

I also agree



ST. LAWRENCE deFREITAS

Member