ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 2001

BETWEEN:

SIMONE ROSEAU

Employee/ Appellant

and

ROBERT SHOUL
T/a TROPIC WEAR

Employer/Respondents

Before:

The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr.Albert Redhead	Justice of Appeal
The Hon. Mr. Joseph Arichibald	Justice of Appeal

Appearances:

Mr. G. A. Watt, Q.C. for the Appellant and Mr. A. Fearon with him
Mr. J. Simon for the Respondent

2001: June, 8
July, 16.

JUDGMENT

[1] REDHEAD J.A: The appellant Mrs. Simone Roseau, was employed by the respondent as manager of his boutique, Tropical Wear. She began working for the respondent in September, 1992. Prior to her employment with the respondent she was employed as manager for four years in a duty free store called “La Perfumery”.

[2] About five [5] months or so after she began working for the respondent the appellant testified that:

> "Mr. Shoul told me that local sales were pretty high and what we could do about it. I understood him to mean changing the sales from local to duty free or selling to locals at the duty free price.
>
> Mr. Should complained to me about the duties he had to pay to customs. He told me that he was paying too much duty to customs on the local sales; and asked me if any of the other stores had a system or a way of evading the payment of duty to customs because nobody else complains. I told him that it was up to him whether he wanted to follow the other stores. I told him the system that I knew of viz to fabricate documents from local dutiable sales to duty free or sell to local duty free.
>
> We then followed up with the new procedure. At the end of each day, we would scam through all the sales, whatever had the highest duties could be changed back to duty free and put a fictitious name, departure date, airline or ship name and sign at the bottom of the invoice. If the sales were large this exercise would take hours. Mr. Shoul was present several times when this exercise was done. It was done in his presence.
>
> A new programme was installed by Mr. Shoul's son to make it easier to do customs warrants…. Previously we had to write to do them by hand – The computers remained the same re the duty."

[3] This evidence was uncontroverted as the respondent declined to give evidence.

[4] On 29th December, 1995 the respondent wrote to the appellant dismissing her from her employment. That letter of dismissal gave the reasons for the dismissal. The letter reads in part as follows:-

> "Dear Simone,
>
> It is with much regret that I have decided to terminate your employment following my investigation into the performance of your duties particularly in respect of sales records. The reasons for my decisions are as follows:-
>
> 1. Your failure to give receipts to the local customers thus destroying my audit system for effective double checking of your sale reports/invoices;
>
> 2. Your falsified sales invoices to reflect duty free sales when in fact they were duty-paid sales;

3. Your failure to verify warrants for the month October were properly processed which resulted in monies being paid to customs for in excess of duty actually due and payable; and

4. Your failure to follow my repeated verbal instructions as to the disposal of U.S currency collected on sales and completing warrants on time.

I have as a result lost the necessary confidence and trust in you as store manager and cannot continue your employment in the circumstances."

[5] I make the observation how could he honestly and reasonably advance as a reason that he lost the confidence and trust of the appellant because of the reasons he outlined above? When the uncontroverted evidence is that he instigated encouraged it. He was the driving force, behind her dishonesty which , in my opinion having regard to the contents of his letter of dismissal, was his main and sole reason for dismissing the appellant. Take for instance ground 2 – your falsified sales invoices to reflect duty free sale in fact they were duty paid sales. I am at a loss how the appellant could in conscience put forward such a ground for dismissal, having regard to what I have said above and moreover, when the evidence is that he alone received the monies that should have been paid to government.

[6] In my opinion, one could not fail to draw the inescapable conclusion that having regard to the fact that the appellant knew the respondent was working at another establishment "Le Perfume" and that he recruited her from there, that he employed her in his boutique for that very purpose of cheating the revenue. I am forfeited in that view when the appellant approached the respondent and said according to the respondent:

"(he) asked me if any of the other stores had a system or a way of evading the payment of customs because nobody else complains."

[7] In my opinion, common sense dictates that the kind of fraud which was perpetrated on the Inland Revenue as described by the appellant it was prudent not to, or made it difficult for the appellant to give receipts to local customers and as being one (No. 1) of his reasons for dismissal of the appellant.

[8] In my opinion, having regard to the reasons for dismissal put forward by the respondent I come to the unmistakable conclusion that the respondent was dishonest in his dealing with the appellant.

[9] The appellant brought a claim in the Industrial Court alleging unfair dismissal.

[10] The Industrial Court found in favour of the appellant and held that the dismissal was unfair. The Industrial Court consequently awarded $10,000.00 for exemplary damages and $15,000.00 for the manner of dismissal, $33,750.00 for immediate loss and $19,500.00 for basic award, making a ground total of $78,250.00

[11] But the Industrial court said:-

> "From the above amount and keeping with the adopted pattern I would order a deduction of the sum of $19,563.00 or 25%. The appellant has appealed to this court as a result of these awards."

[12] In her grounds of appeal, the appellant complained that:-

1. The Industrial Court erred in Law when it discounted and/or reduced the Employee's entire compensatory award by 25%.

2. The Industrial Court erred in Law when it discounted the compensatory award by, mistakenly applying the principle laid down in Civil Appeal #6 of 1992 Antigua Village Condo Corporation and Jennifer Watt which precedent applies only to awards in respect of loss of future earnings.

3. The Industrial Court erred in Law when it proceeded to discount the compensatory award even though it specifically found that there was no loss of future earnings and made no award in this regard.

4. The Industrial Court erred in Law when it awarded the sum of $10,000.00 in respect of Exemplary damages which was far too low, taking into

consideration the harsh and oppressive nature of the dismissal and the legal rational for the award of damages under this head of damage.

[13] The respondent has cross-appealed. In his cross-appeal he alleged that:

1. The Industrial Court misdirected itself in holding that the respondent was unfairly dismissed.

2. That the Industrial Court failed to give any or sufficient weight to the evidence which indicated that the respondent was engaged in two separate systems and distinct systems of reporting sales and that she was in fact terminated for an illegal system of accounting without the knowledge and/or consent of the appellant.

3. Further or in the alternative the Industrial Court in making the awards in respect of compensation for loss of statutory protection and immediate loss failed to give any consideration to the respondent's knowledge and her initiation and implementation of the illegal system of accounting.

4. The Industrial Court awarded compensation in the manner of dismissal in view of the evidence that the respondent was in fact engaged in the falsification of sale invoices and her knowledge and awareness from the onset from the illegality of that course of conduct.

5. That the Industrial Court award of exemplary damages is wrong in law and contrary to common law principles and the application of the ex turpi causea rule.

6. that the Industrial Court in light of the evidence adduced failed to exercise its powers in relation to S. 10(3) of the Industrial Court Act Cap.214 which imposes a statutory obligation that the Court act in accordance with equity and good conscience and having regard inter alia to the community as a whole.

[14] I deal first of all with the cross appeal.

[15] Mr. Simon, Learned Counsel, argued strenuously that the issue for determination is whether an employee is entitled to compensation to an alleged unfair dismissal where the employee's contract is tainted with illegality in respect of its performance.

[16] Mr. Simon referred to the Common Law principle that an illegal contract is void and the Court will not enforce an illegal contract.

[17] He referred to S.C.59 of the Antigua and Barbuda Labour Code Cap. 27, which reads in part as follows:

> (1) An 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 be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the employment has
>
> (a) –
>
> (b) committed a criminal offence in the courts of employment without the consent, express or implied, of the employer, or
>
> (c) –"

[18] Mr. Simon further argued that the question that has to be asked is whether the above section alters the common law principle of ex turpi causa. It is in my opinion that it is beyond doubt that defrauding the Inland Revenue is a criminal offence. It is also unquestionable that the activity which the employee was engaged in i.e., defrauding the Inland Revenue is a criminal offence. It is also

unquestionable that this was done with the prompting, encouraging by and complicity of the employer, the respondent, for his benefit.

[19] The respondent testified:

> "Mr. Shoul complained to me about the duties he had to pay to Customs on local sales, and asked me if any of the other stores had a system or a way of evading the payment of duty to Customs because nobody else complains. I told him that it was up to him whether he wanted to follow the other stores. I told him the system that I knew of viz to fabricate documents from local dutiable sales to duty free or sell to locals duty fee."

[20] Mr. Watt, learned Queen's Counsel for the respondent argued that a distinction must be drawn between a contract which is illegal and a contract for the performance of an illegal act for instance a contract to defraud the Inland Revenue.

[21] Mr. Watt argued that the contract that the respondent had with the appellant was to manage his store at Heritage Quay and this was a legal contract.

[22] Mr. Simon learned Counsel referred to Harvey on Industrial Relations and Employment Law 1977 at paragraph 77 it is there stated:-

> "Contracts may be held illegal and void at Common Law as being contrary to public policy on a variety of grounds. In employment cases, the issue has usually arisen in relation to contracts illegal on the grounds that they defraud the Revenue. The rule is that if the illegality is apparent on the face of the contract, or the contract is such that it cannot be performed without illegality on the part of either or both contractors then the contract is illegal and void ab initio and most importantly, the fact that either or both parties are innocent of any fraudulent design is quite inmaterial."

[23] In my judgment there cannot be any argument to the contrary that a statute will alter the common law. It is quite clear therefore that the ex turpi causa principle cannot take precedence over S.C.59(1) of the Antigua Labour Code. Moreover in the instant case this was not a contract which was void ab initio.

[24] In Coral Leisure Group Ltd. V. Barnett 1981 ICR 503- where the employee complained to the Industrial tribunal that he had been unfairly dismissed. The employee alleged that although he had not realized it when he was first employed his job involved finding prostitutes for punters and paying for them out of funds provided by the employers. On the employer's application to determine whether, in view of the employee's claim that his contract of employment was for an immoral purpose he was entitled to enforce such a contract by claiming unfair dismissal. The tribunal held that they had to examine each case to assess whether or not, as a matter of public policy, the employee was entitled to a remedy and that they had jurisdiction to hear the claim.

[25] On the employers' appeal against the decision on the preliminary issue it was held dismissing the appeal, that a contract for sexual immoral purpose was an illegal contract and could not form the basis of a claim for unfair dismissal….but on the facts as pleaded procuration of prostitutes was neither part of the employees contract nor part of his purpose for entering into the contract, and since an illegal or immoral act done in the course of performing an otherwise lawful contract was not sufficient to prevent its enforcement, the employee was entitled to rely on his contract of employment for the purpose of bringing a claim for unfair dismissal and the Industrial Tribunal had correctly held that they had jurisdiction to hear his complaint.

[26] In Hewcastle Catering Ltd. V. Ahmed and Elkamah (1991) 1 RLR 437 1992 (reported in Harvey paragraph 80) 1 RLR 626.

> "Waiters at a club were involved in a scheme devised by the manager for fraudulently evading VAT on services provided to customers who chose to pay in cash. Although involved in the scheme, in fact the waiters derived no benefit from it. When the scheme was discovered and the waiters gave evidence to the Customs and Excise they were dismissed. The employers contended that their contracts of employment were illegal with the consequence that they could not claim compensation for unfair dismissed. Bedlam, L.J. followed the approach taken in Euro-Diam Ltd. V. Bathhurst 1988 2 AER 23, holding that the ex turpi causa defence would not succeed "where the defendants' conduct in participating in an illegal contract on which the plaintiff sues is so reprehensible in

> comparison with that of the plaintiff that it would be wrong to allow the defendant to rely upon it. On the facts of the case, if the public in its conscience weighed the effect of the waiters' conduct against that of the employer who not only perpetrated the fraud but involved the employees in it and then sacked them for telling the truth to the Customs and Excise, per Bedlam, L.J. I entertain no doubt what the result would be. No do I have nay doubt about how the public would consider a policy which was intended to discourage fraud being perpetrated by those whose obligation it is to pay taxed on the one hand, whilst apparently permitting an employer to dismiss his employees for assisting with enquiries and so deterring investigation of the offence on the other."

[27] Having regard to the authorities referred to above I am satisfied that the Industrial Court was correct in its decision when it held that the dismissal of the appellant was unfair.

[28] I now address the question of the award which was made in favour of the appellant. The employee has appealed against the following parts of the judgment.

1. The discounting and/or reduction of the entire compensatory award from $78,250.00 to $58,687.00.

2. The application of the discount principle as delivered in Civil Appeal No.6 of 1992 Jennifer Watt v. Antigua Village Condo Corporation.

2. The unfairness and appropriateness of the award in respect of exemplary damages pursuant to S. 10(4) r (5) of the Industrial Court Act of the Laws of Antigua and Barbuda 1992.

3. Mr. Simon argued that the Industrial Court award of exemplary damages is wrong in law and contrary to common law principles.

[29] Section 10 of the Industrial Court Act mandates the court in awarding damages to the employee to act in accordance with equity and good conscience and having

regard inter alia to the community as a whole. This allows the Court a certain amount of flexibility in awarding damages.

[30] Having regard to the manner of dismissal of the respondent which was very harsh, I am of the view that the award of exemplary damages was not too high. I do not therefore see a justification for interfering with that award one way or the other. I also do not agree with Mr. Simon that the said award was wrong in law and contrary to common law principles.

[31] I am of the view, that the main quarrel learned Senior Counsel has with the award, is that the discounting of the total award by 25% is wrong in principle. The Industrial Court in making this deduction said:-

> "From the above amount and in keeping with the adopted pattern I would order a deduction of $19,563.00 or 25%."

[32] Mr. Watt, Learned Queen's Counsel, contended that the "adopted pattern" refers to the legal principles that the Court has been consistently applying since the decision of the Court of Appeal in Jennifer Watts v. Antigua Village Condo Corporation.

[33] In that case Sir Vincent Floissac, C.J. delivering the judgment of the Court of Appeal when he was dealing with the loss of future earnings said:

> "Third, fairness and justice dictate that in any award of damages or compensation for loss of future remuneration expected to be earned in a weekly or monthly installments spread over a period of time, there must be a substantial discount for the award is an accelerated lump sum payment in realization of a mere expectation."

[34] This principle in my opinion is not confined to loss of future remuneration expected to be earned in cases of unfair dismissal. It is also applicable for instance in personal injury cases where a lump sum payment is made in respect of anticipated loss of future earnings; a discount on the award is always made. It is a common sense principle which makes good sense. A lump sum is paid up front. This lump

sum can be utilized or invested and the lump sum is based on a mere expectation which may never be earned for a variety of reasons. (See Alphonso v Ramnath C/A 1/96).

[35] In my opinion these are some of the reasons why a deduction is made. It stands to reason if there is no compensation for future loss there could not be any deduction from the award made by the Industrial Court. In the premises the deduction of 25% made by the Industrial Court was based on a wrong principle.

[36] I would therefore allow the appeal in so far as the quantum awarded to the appellant by the Industrial Court. The award is varied from $58,687.00 to $78.050.00.

[37] The cross appeal of the respondent is hereby dismissed.

[38] Costs to Simon Roseau fit for Counsel to be taxed if not agreed, in the appeal and cross appeal.

Albert J. Redhead
Justice of Appeal

I Concur

Satrohan Singh
Justice of Appeal

I Concur

Joseph Archibald, Q.C.
Justice of Appeal [Ag.]