

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 4 OF 1999

BETWEEN:

LESLEY HOFFMAN

Employee

and

STANFORD FINANCIAL GROUP LIMITED

Employers

Before:

Cyril L. Maundy
E.T. Henry

President
Member

Appearances:

Charlesworth O. Browne, Barrister-at-Law, for the Employee
Justin L. Simon, Barrister-at-Law, for the Employers

1999: February 24
March 08
April 06
May 07
August 09
2001: October 22, 23 & 24

JUDGMENT

Unfair Dismissal – Employee and her husband founder members of Newspaper – newspaper started production as a Weekly and later became a bi-weekly and subsequently a Daily – Employee, Managing Editor of Newspaper and her husband, Editor-in-Chief and General Manager – Employee and her husband recruited from

Bear Valley, California, and employed under a written Contract – Employee's husband dismissed on September 17, 1998. Employee demoted and her office and the bulk of her work given to a previous subordinate to whom she was made to report – Employee dismissed on the grounds that her position had been eliminated and her duties combined with those of another and transferred to him – Employee did not try to find employment in Antigua but accompanied her husband to Trinidad and later to St Croix where she gained permanent employment in March, 1999 – Employee had been very active in recruiting competent staff and during her tenure the staff increased from 2 to about 17 – Employee not accused of any wrongdoing or given an opportunity to be heard or any Notice of dismissal.

[1] **Maundy, P.:** By a Reference filed on the 11th day of February, 1999, the Employee notified the Court of a Trade Dispute between herself and the Employers.

[2] By her Memorandum dated the 22nd day of April, 1999, and filed on the 26th day of the said month, the Employee contended that she was unfairly dismissed on October 17, 1999, and claimed compensation for Unfair Dismissal. For their part, by their Memorandum dated and filed on May 6, 1999, as amended by Memorandum dated and filed on September 1, 1999, the Employers denied that the Employee was Unfairly Dismissed and was entitled to any compensation.

Historical Background

[3] The Employee and her husband, Robert Hoffman, owned and published a weekly newspaper in Bear Valley, California, the Bear Valley Voice, and were recruited by the Employers to found and set up a newspaper in Antigua, the Antigua Sun. Further to an interview they entered into a Contract with the Employers and were assigned to Antigua. The Employee was appointed Managing Editor of the newspaper and her

husband Editor-in-Chief and General Manager of the Company that owned the newspaper, Antigua Sun Limited, which was afterwards incorporated – See LAH1.

- [4] The Employee agreed to work under a contract with a commitment for a minimum of five years. See LAH1
- [5] At the Antigua Sun the Employee supervised Louis Daniel, Mitzy Allen and Colin James, well known local journalists, among others who were her subordinates – she reported directly to her husband, the Editor-in-Chief and General Manager of the Company.
- [6] The Employee commenced working with the Employers on December 16, 1996, and was dismissed on October 8, 1998 – See Exhibit LAH4. The Employee's husband had been dismissed on September 17, 1998, and Vernon Khelawan appointed Editor-in-Chief, Louis Daniel as News Editor and Linda Wingfield as CEO.
- [7] At the time of her dismissal the Employee's salary was US\$ 35,000.00 per annum or US\$ 2,916.67 per month.
- [8] During the period of her employment the Employee never had any discussions with the Employers about her being relieved of her employment.
- [9] By Memorandum from Mona Quintyne, Director of Human Resources, to the Employee dated October 7, 1998 – See LAH4 – the Employee's position was eliminated and she was given the position of Barbuda Editor, however, almost before she took up the position it too was eliminated and the Employee was told that the newspaper had no alternative position for which she was suited – her services were terminated on the grounds that the duties which she formerly performed had been absorbed into other positions or no longer exist – See Exhibit LAH4 – in fact, her

duties were divided between the new Editor-in-Chief and the News Editor – See LAH4.

- [10] By Memorandum dated October 7, 1998, from Linda Wingfield, the Chief Executive Officer, Senior Vice President and Director of Operations, the staff was informed that the Employee's position as Managing Editor had been eliminated and her duties split between the General Manager and the Chief Editor, Vernon Khelawan – there was no News Editor. By another Memorandum of the above date the Employee was appointed Barbuda Editor effective immediately – See LAH 2.
- [11] As Managing Editor her duties were vital to the newspaper but she was asked to vacate her office which was taken over by a former subordinate, Louis Daniel; she was made to report to him.
- [12] The Employee's duties were never diminished or ceased to exist but for all practical purposes transferred to others within the establishment.
- [13] The Employee was distressed and hurt by the dismissal and did not seek any further employment in Antigua but travelled to Trinidad with her husband – they had a number of friends in Trinidad.
- [14] In Trinidad the Employee tried to find employment and made applications to:
- (a) The Trinidad Guardian
 - (b) The Trinidad Express
 - (c) Newsday
 - (d) MEP Publishers

The applications were unsuccessful and the Employee was forced to do freelance work from which her entire earnings were approximately US\$ 1,600.00 over a 4 month period.

[15] The Employee's husband worked in Trinidad until mid-February, 1999, when he obtained a position in St Croix with the St Croix Avis.

[16] Some time in early March, 1999, the Employee joined her husband in St Croix and had a job for the first time after the dismissal. The Employee worked with the St Croix Avis until going to Santa Paula, California, in 2000, to take up employment with the Ventura County Star where her husband is a Copy Editor and she is a Proof Reader.

Triable Issues

[17] The issues here for determination are:

- (a) Was the dismissal Unfair or was there just cause and was there a factual basis, was it reasonable in the circumstances?
- (b) Was there a redundancy situation?
- (c) Was the Employee guilty of misconduct of such a kind as to demonstrate that the Employer/Employee relationship could not be expected to continue?

The Arguments

[18] The parties were adamant in their views and each Counsel strongly argued in support of his case.

[19] Mr Brown asked the Court to find that the dismissal was unfair and contended that, inter alia:

- (a) The Employee was never accused or found guilty of any wrongdoing, any defect or incompetence in her work, any misconduct or infringement of the Labour Code or other Law or any of the practices of good industrial relations

but had been summarily dismissed without as much as a Warning and without Notice.

- (b) No redundancy situation existed at the time of the dismissal and the Employers cannot rely on that ground to justify the dismissal.
- (c) The Employee was employed under a Contract separate and apart from her husband, Robert Hoffman, who had been earlier dismissed and that his dismissal was no justification for the dismissal of the Employee.
- (d) The treatment meted out to the Employee was harsh, humiliating, demoralising and contrary to the established rules and practices of good industrial relations.
- (e) The Employers could not rely on Sections C.56, C.58(1)(c), C.58(2) of the Labour Code or Section 10(3) of the Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992.

[20] Counsel for the Employers did not agree with Mr Brown and asked the Court to find that the dismissal was fair and contended that, inter alia:

- 1. The Employee had a fixed term contract for five years as her employment contract stated that the Company required a minimum five year commitment from her.
- 2. The Employers exercised their lawful right to transfer the Employee without any loss of pay and the Employee accepted the transfer as evidenced by her Memo of October 7, 1998 (Exhibit LAH3) seeking clarification and her oral testimony that, "On October 8, 1998, I came in to work at 8:00am approximately and I immediately began making arrangements to fulfil my new duties."
- 3. The documentary evidence indicates the elimination of the position of Barbuda Editor was subsequent to October 8, 1998, and before that position was made functional.

The decision was subsequent to an important telephone conversation between Allen Stanford and the Employee within the earshot of Linda Wingfield, the CEO of Antigua Sun Limited, the owners of the newspaper and Mona Quintyne, the Director of Human Resources re Mr Stanford's discovery of a draft Memorandum of Understanding (Exhibit LW1) which positioned Robert Hoffman, the Employee's husband and a previous employee in a conflict of duty and interest situation – the Memorandum showed Mr Hoffman as an official of a competitive printing company and that he agreed to do work for it while employed by the Employers.

4. The above discovery in conjunction with the Employee's evasiveness when questioned about the Memorandum of Understanding constituted sufficient justification for her dismissal in light of the following:
 - (a) Robert Hoffman and the Employee were employed as a husband and wife team and occupied the most senior management positions in the Antigua Sun.
 - (b) Robert Hoffman had been dismissed the previous month and the issue of trust, confidence and confidentiality given the Employee's position as Managing Editor was therefore of paramount concern.
 - (c) The Memorandum of Undertaking certainly raised an issue of conflict at the time of Robert Hoffman's employment and the Employee's response upon enquiry that it had nothing to do with her, as stated by Linda Wingfield and her inability to recall the details of the conversation with Mr Stanford whom she admits was very angry clearly points to an issue of credibility on her part.
5. The issue for determination is whether it was practicable to employ Robert Hoffman's wife, given her managerial position and what would a reasonable employer do in the circumstances.

[21] In support of his contentions Mr Simon cited:

- (i) Kelman V Oram (1983) IRLR432, Pg 232 of Anderman's The Law of Unfair Dismissal.
- (ii) Berridge V Benjies Business Centre (1996) 49WLR 64 & 67
- (iii) Frances Taggart V Robert Ross t/a Ross University, Reference No 9 of 1989
- (iv) Colin Plummer V Harmony Hall (Antigua) Limited, Reference No 13 of 1990.

[22] Out of a preponderance of caution, Mr Simon submitted that should the Court find that the dismissal was unfair then the issue of Immediate Loss must be addressed. Counsel thought the issue of mitigation is of importance in this connection and emphasized that the Employee was recruited from California, U.S.A., along with her husband and her letter of employment provided for their relocation to California.

[23] Mr Simon stated that by operation of Law the Employee could not obtain alternative employment in Antigua or Trinidad without a Work Permit and admitted that she made no attempt to seek employment in California or any part of the United States. Instead she began her search for work in Trinidad from October 31, 1998, because her husband had moved there. Finally, said Mr Simon, the search for alternative employment was at all times linked to and dependent upon her husband's current place of employment.

The Law

- [24] The Law relating to Unfair Dismissal is set out in the Labour Code thus:
- (a) Section C.56 permits an employer to dismiss if there is just cause.
 - (b) Section C.57 provides that an 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.
 - (c) Section C.58(1) provides that a dismissal shall not be unfair if the reason assigned by the employer therefor:

- (i) relates to misconduct of the employee on the job within the limitations of Section C.59 (1) and (2).
- (ii) relates to the capabilities or qualifications of the employee to perform work of the kind he was employed to do within the limitations of Section C.59(5).
- (iii) 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
- (iv) 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, there is a factual basis for the assigned reasons

[25] Section C.58(2) lays down the test generally for deciding whether or not a dismissal is unfair, whether or not the employer acted unreasonably or reasonably and provides that 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.

[26] By Section C.59(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 reasonably be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the employee has:

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.
- (b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer, or

(c) behaved immorally in the course of his duties.

[27] Of course, in all instances of unfair dismissal any infringement on the rules of natural justice will be looked at and so also the principles and practices of good industrial relations. And there is also the obligation imposed on the Court by Section 10(3)(b) of the Industrial Court Act, 1975, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992, by which in deciding an issue the Court is required to 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 Labour Code.

Decision

[28] In some fields of litigation, even though the evidence is heavily against a defendant, he, and for that matter, counsel appearing on his behalf may be minded to pursue the matter, at times with the utmost vigour, in the hope that somewhere along the line a chink will appear in the Plaintiff's/prosecution's armour which could be pursued to the advantage of his client and result in a dismissal or acquittal. To my mind Industrial Relations are not practised thus and the theory that operates, the relevant Laws acknowledged is, what is in the best interests of good industrial relations. Counsel or other representative of the "pugilists" do have their part to play but their eloquence or lack of it, by itself, should not cause a decision to be given in the positive when it should not or in the negative, when it should not.

[29] To my mind this is an instance where the evidence is weighted heavily in favour of the Employee. This was a case of Summary Dismissal and the Labour Code does not, except in certain specific instances permit Summary Dismissal – the Act lays down that dismissals contrary to its provisions, the rules of natural justice and the

established practices of good industrial relations are punishable by, inter alia, the payment of compensation/damages.

- [30] The Court will always look carefully at instances of Summary Dismissal which, if looked at and scrutinised closely and carefully, can be harsh and vicious in the eyes of the victim. Indeed, to really fully comprehend the magnitude of such dismissals, an attempt may be made to compare them with the position of the family members of the victims of those who perished in the events of September 11, 2001, in the United States of America. The unexpected and unprovoked death of the passengers aboard the aircrafts that ploughed into the towers of the World Trade Centre and the Pentagon left several households without a parent, without a breadwinner, wives without their loving husbands and vice versa, children without a father or in some cases without a mother or both, interrupted the employment of many and a whole catalogue of other ills. And so it is with Summary Dismissal: not only the shock and stress that it could cause to an employee but it can affect his entire lifestyle e.g. his house rent or mortgage payments will still have to be met, and so also his motor car payments and furniture payments. A father will still have to support his children, buy them food, clothes, pay school or college fees and pay the other expenses common in households of today. And, of course, there will be the task of finding new employment which can be difficult where the employee has no professional training or experience, is beyond a certain age or will have to undergo retraining.
- [31] It is noted that wisely Mr Simon did not pursue the contention that the dismissal was a result of redundancy or there was just cause, and the factual basis for same which he alleged cannot be maintained. Indeed, I find it very difficult to see how the dismissal could be deemed fair. The Employee was employed as the Managing Editor of the newspaper and out of the blue and without Notice, her employment was terminated, her duties were given to another, she had to relinquish her office, a subordinate was promoted as her superior, he took over her office and she was made to report to him;

she was made Barbuda Editor and even before she physically took up the appointment it was eliminated. And all this happened to someone with whom the Employer never at any time complained about her work performance or any wrongdoing in her employment.

- [32] The fact that the Employee's husband was dismissed by the Employers some time prior to that of the Employee did not make the dismissal fair even though a wife is expected to follow her husband.
- [33] This case is almost similar to that case where another employee and his wife worked for the same company and lived on the company's hotel compound. The Employee's wife was dismissed and the Employers used this as a ground for dismissal of the husband. This Court held that the dismissal was unfair and this was later affirmed by the Court of Appeal – See Roger Richards V Dream Company Limited (Reference No 35 of 2000).
- [34] I am mindful that a dismissed Employee is under a duty to mitigate his loss. Also, as was held in Colin Plummer's Case; an Employee recruited from abroad must seek new employment from that country. The Employee defaulted in seeking employment in Trinidad and later St Croix although it would appear that her reason for not returning to California to seek new employment was because she decided to stay with her husband.
- [35] Even though the Employee and her husband were, for all practical purposes, recruited as a team and controlled publication and administration of the newspaper, they were given separate Contracts and the dismissals were not simultaneous.
- [36] In arriving at a decision careful scrutiny was given to the evidence adduced and the demeanours of the witnesses as they gave their evidence. There was not much that

could be refuted as the core factors seem uncontroverted. Cognisance was taken of the relevant provisions of the Labour Code, the Industrial Court Act, 1976, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992, the cases cited and works of authority and after due consideration I am of the view that the dismissal was unfair and the Employee is entitled to compensation for Unfair Dismissal.

The Award

[37] An Employee the victim of Unfair Dismissal is entitled to compensation under the established heads and compensation in this case is as follows:

- (a) **Basic Award for Loss of Protection**:- The Award under this head is similar to that of severance and in the case of a monthly paid employee is one month's pay at his last basic salary for each year worked. The Employee worked for the Employers from December 16, 1996, and was dismissed on October 9, 1998. At the time of dismissal the Employee's basic salary was US\$ 35,000.00 per annum, thus her entitlement under this head is US\$ $2,917.67 + 5/6$ of US\$ 2,917.67 = US\$ 5,349.06.
- (b) **Immediate Loss**:- Although in Trinidad the Employee tried to find employment she had to resort to freelance and did not obtain permanent employment until she joined her husband working at The Avis in St Croix, U.S.V.I. The Employee admitted in evidence that she was delayed in entering St Croix since she was not a US citizen and had to wait until her documents allowing her to enter the island and work there had been processed. Further, the Employee did not return to California to seek employment and the decision in Harmony Hall Limited V Colin Plummer, Reference No 8 of 1989 applies.
- (c) **Manner of Dismissal**: I make no award.

(d) **Future Loss**: In the normal course of things and should she not have been inhibited by Work Permit restrictions in Trinidad and U.S. Visa restrictions, I believe the Employee would have been able to find comparative employment within six months and in the circumstances she will have to bear the loss and a claim for Future Loss cannot prevail.

[38] At the time of her dismissal the Employee was paid US\$ 11,902.25 as compensation for her years of service, Notice Pay and Vacation Pay and this amount must be deducted from the Award. However, the dismissal was harsh, crude and without just cause and had a grave and disturbing effect on the Employee and, in the circumstances, I believe this is an instance where Exemplary Damages are justified and would so award in the sum of US\$ 30,000.00 – indeed she testified of the stress, shock and humiliation she had to suffer and all through no fault of her own. Under the Labour Code, Employees are not to be fired at will as hitherto.

[39] This Court will award Costs in exceptional circumstances and in the present case the Employee had to travel to Antigua from California, pay for accommodation and retain Counsel to pursue her rights and, to my mind, these are sufficient to justify an award of Costs and I would do so in the sum of US\$ 6,000.00 – in the present disturbing atmosphere of aircraft hijacking she had to suffer the risk of air travel to Antigua and back to California.

[40] The claim for fringe benefits has not been made out.

Conclusion

- [41] The dismissal was unfair and the Employers shall pay to the Employee the sum of US\$29,446.81 plus vacation pay of US\$2,917.67 payment to be made by the 18th day of January, 2002.

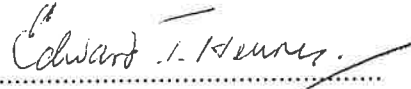
DATED the 13th day of December, 2001



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Cyril L. Maundy
President

I concur:



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Edward T. Henry
Member