

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 17 OF 2001

BETWEEN:

DAFFODIL LOCKHART

Employee

and

**THE ANTIGUA & BARBUDA HOTEL TRAINING CENTRE/
THE ANTIGUA & BARBUDA HOSPITALITY INSTITUTE**

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. Edward T. Henry
The Hon. Hubert Hood

President
Member
Member

Appearances:

G. Collins, Attorney-at-Law, for the Employee
M. Paige, Attorney-at-Law, for the Employers

2002: February 28
March 1, 4, 6 & 7

JUDGMENT

Unfair Dismissal – redundancy – Instructor of ten years standing severed –
Training centre for prospective hotel employees replaced by Hospitality
Training Institute – Entrees to Institute require minimum qualifications – no
entry qualifications were required for admission to the Hotel Training Centre –
level of courses at the Institute substantially higher than what was available at
the Hotel Training Centre – qualifications of Employee below requirements for

Institute – Employee's subject to be taught at Institute but at a substantially higher level for which Employee is not qualified.

1. Maundy, P.: By a Reference dated September 29, 2001, the Employee filed a Notification of the existence of a Trade Dispute between herself and the Employers and in her Memorandum dated September 27, 2001, she sought:
 - (a) A declaration that she was unfairly dismissed
 - (b) Reinstatement to her former position or similar or otherwise suitable position with the Employers
 - (c) Payment for loss of salary retroactive to the date of dismissal
 - (d) Resumption of all benefits retroactive to the date of dismissal

Alternatively:

- (a) Damages for loss of protection of employment
 - (b) Damages for Immediate Loss of income
 - (c) Damages for Future Loss of income
 - (d) Damages for Manner of Dismissal
 - (e) Such further or other relief as the Court may deem fit pursuant to Section 10 (3) of the Industrial Court Act, 1976 (Cap. 214) Laws of Antigua and Barbuda, Revised Edition, 1992.
2. In their Memorandum dated December 14, 2001, and filed on January 11, 2002, the Employers contend that the Employee became redundant and was only entitled to compensation for Redundancy.
3. On September 13, 1989, the Employee commenced working with the Employers as a Restaurant and Bar Instructor at a salary of \$ 1,788.00 per

month. In the foregoing capacity, the Employee taught Restaurant and Bar, Hygiene and Safety.

4. The Employers were an arm of the Ministry of Tourism, Energy and Supply, now the Ministry of Tourism and the Environment and the Employee was a Non-Established Worker.
5. The Antigua and Barbuda Hotel Training Centre, hereinafter referred to as "The Centre" was set up for and conducted a one year training course for persons leaving school without any CXC or other academic qualifications or training to be trained for work in hotels.
6. Under a project financed by the Commission of European Communities, hereinafter referred to as "the European Union" it was decided to close the Centre and replace it with an Institute of higher and advanced learning in hospitality to be named The Antigua and Barbuda Hospitality Institute, hereinafter referred to as "The Institute". The funding was provided by the European Union – See Exhibit MO4. The Institute was to have a minimum admission requirement viz, a CXC qualification or its equivalent.
7. Before the change over, the Employers engaged two consultants to evaluate the staff and make recommendations as to whether they were sufficiently equipped to work in the proposed Institute or whether they could be trained so to do.
8. Prior to the evaluations the consultants held counseling sessions with the staff, including the Employee, to apprise them of the proposals and receive their views.

9. The Employee had been performing her duties at the Centre for approximately 10 years, had undergone several training courses and held a number of qualifications, but none at degree level or equivalent – See Exhibit DL3.
10. The consultants that did the evaluations were firstly, Miss Bernice Critchlow-Earle of Barbados, who recommended the Employee for training and Miss Shirleen Nibbs, President and CEO of Nibbs & Associates. Some of the staff were found to possess the necessary knowledge and skill for work in the new Institute while others were recommended for training. However, Miss Nibbs found that 4 members of staff were not properly equipped and were not suitable for training, among them was the Employee who was told that she was required to have a Degree.
11. Pursuant to the recommendations of the second consultant, the Permanent Secretary in the Ministry sought to relocate the Employee but no vacancies were found and by letter dated December 14, 1999, the Employee was declared redundant, terminated and offered Severance and her other entitlements. The Employee accepted her outstanding vacation entitlement but declined to accept Severance contending that she was Unfairly Dismissed and entitled to Compensation/Damages for same. The matter went before the Labour Commissioner for conciliation but this failed and so it was referred to the Court.
12. At the Institute, the subject Restaurant and Bar, was going to be replaced by Food and Beverage and the Employee was not competent to teach most of the contents of the new syllabus and was not qualified to do so; under the Job Description for the post the holder of the post was required to be a graduate with at least a Bachelor's Degree in Hotel Administration/Business

Administration/Tourism and the duties were far in advance of those of the Restaurant/Bar Instructor – See Exhibits MO6 and MO2.

Triable Issues

13. The principal issues for determination seem to be whether:
- (i) The Employee was dismissed and if dismissed was the Dismissal Unfair.
 - (ii) Whether the finding of the Consultant, Shirleen Nibbs, that the Employee did not have the necessary qualifications, knowledge, skill and aptitude to teach Food and Beverage in the new Institute was correct.
 - (iii) Whether reasonable steps were taken to re-deploy or re-locate the Employee

The Arguments

14. Mr Collins asked the Court to find that the Employee had been dismissed, that the dismissal was unfair and that the Employee was entitled to reinstatement, compensation and damages as above referred to. Mr. Collins contended that, inter alia,
- (i) The three witnesses for the Employers, Shirleen Nibbs, Muriel O'Marde, the Director and Lorna Simon, the then Permanent Secretary in the Ministry gave evidence tending to show that the Food and Beverage course at the Institute is to be of a different nature from the course taught by the Employee at the Centre and that her tasks or functions would be diminished but they misunderstood the meaning of redundancy. Mr. Collins accepted that the said witnesses each testified that the Employee did not possess the qualifications or

requirements to become the new Food and Beverage Tutor at the Institute.

- (ii) The reason for dismissal as stated in the letter of December 14, 1999 (Exhibit DL4) is misconceived in Law since the Employee could not be "severed for reasons of redundancy" as a result of being unqualified or displaying a lack of skill, knowledge and ability or exhibiting a particular attitude/aptitude.
- (iii) The conditions set out in Section C56, C58(1) & C59(1) & (2) of the Labour Code, Cap. 27, Laws of Antigua & Barbuda Revised Edition, 1992, hereinafter referred to as the Labour Code, were not satisfied.
- (iv) There was no misconduct on the part of the Employee.
- (v) The requirements for a redundancy as set out in Section C3 of the Labour Code were non-existent.
- (vi) The Employee was never told the reasons why she was not recommended to receive a scholarship for further training or the criteria for selection for further training or her skills, knowledge and abilities (attitude) were in question and was only told that she did not have a Degree, a Bachelor's Degree at the minimum.
- (vii) Miss O'Marde indicated that the Employee was not qualified to hold the position of Food & Beverage Instructor and so too did Miss Simon in her evidence but under the objectives of the project and the requirements of the financing agreement, it was the Employer's obligation to train the Employee and funds were provided for this.

15. In support of his contentions Mr. Collins cited:

- (i) North Riding Garages V Butterwick (1967) IALLER 644
- (ii) Hindle V Percival Boats Ltd. (1969) IALLER 836
- (iii) Murray and Another V Foyle Meats Ltd. (1999) 3ALLER 769
- (iv) Roxanne Warner – Payne V BWIA International Airways Ltd.

16. Counsel for the Employers, Marsha Paige did not share Mr. Collins view and submitted that there was no dismissal, a fortiori, unfair dismissal, but that the Employee was made redundant and only entitled to her severance pay.
17. Mrs. Paige contended that, inter alia:
 - (a) Prior to the termination the Employers made the Employee aware of the proposed creation of the Institute and held meetings at which the proposals were made known to her. Also there were counseling sessions with the staff by persons including Shirleen Nibbs. Also, by her own admission, a counseling session was held by Miss Nibbs with the Employee and she was told that in the proposed Institute her position as Restaurant and Bar Instructor would cease to exist.
 - (b) At no time did the consultant have the mandate or authority to assure the Employee that she would not lose her job and at no material time was the Employee given any assurance that her job would not be affected by the coming on stream of the Institute.
 - (c) In creating the Institute the Employers exercised their prerogative to so do and upgrade the qualification requirements for the various academic positions at the Institute.
 - (d) The Employee was never in possession of the requirements to fill the post of Food & Beverage Instructor and did not possess the necessary qualifications, knowledge, skill or aptitude.
 - (e) The decision to make the Employee redundant was based on a report presented to the Employers by the consultant Shirleen Nibbs who was specially recruited to make an assessment and evaluation of the staff; also, that she could not have been de-ployed or re-located.

- (f) The Instructor teaching Food & Beverage and related courses would at the least have to have a Bachelor's Degree in that field and the Employee did not have this qualification.
- (g) The termination is valid under Section C 58(1)(C) of the Labour Code.
- (h) The Employee did not make reasonable efforts to mitigate her loss and did not take reasonable steps to find alternative employment subsequent to her termination.
- (i) Judicial notice should be taken of the absence of any rejection letters from the places that the Employee claims that she sought employment.
- (j) Re-instatement was not available to the Employee.
- (k) The Employee was 55 years of age at the time of the termination and this could have influenced the Employers in deciding to terminate her services.
- (l) The Employee was at all material times legally terminated because her position as Restaurant Bar Instructor at the Centre had become redundant.
- (m) In support of her contentions Counsel cited, in addition to the References to the Labour Code, *Ccx V Wildt Mellor Bromley Limited* (1978) ICR 736.

The Law

18. The Law relating to Unfair Dismissal is contained in Section C.56, C.57 & C.58 of the Labour Code. By Section C 56 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.

19. C.57 concerns employees engaged under contract.

20. Section C 58 (1) Provides that a dismissal shall not be unfair if the reason assigned by the employee therefor:
- (a) Relates to misconduct of the employee in the job within the limitations of Section C.59 (1) & (2).
 - (b) Relates to the capacity or qualification 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 the employers part) of a requirement of law; or
 - (e) 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.

21. Section C 58 (2) lays down the test to be applied in determining whether a dismissal is reasonable.

Decision

22. This matter has been the subject of a most exhaustive "contest" although to my mind the issues for resolution are quite clear. One notes that the Employee's memorandum consists of 15 pages of foolscap and her counsel's submission consists of 21 pages, the cases and authorities cited apart. All the witnesses for the Employers testified that the Employee was not qualified for the post of Food & Beverage Instructor, that Restaurant and Bar was being incorporated into the Food and Beverage Course and the person who would

teach Restaurant and Bar would also have to teach Food and Beverage, was required to have a Degree as above stated, that Restaurant and Bar was not a substantial part of Food and Beverage.

23. In arriving at a decision the Employers did not act on their own opinion of the Employee but relied on the evaluation of the expert in the field, Mrs Bernice Critchlow-Earle and later Shirleen Nibbs. Although Mrs Critchlow-Earle recommended the Employee for training this was not accepted in the later study carried out by Shirleen Nibbs. The Court was not told how thorough was the evaluation undertaken by Mrs Critchlow-Earle but according to the evidence Miss Nibbs was very meticulous in her study and even had a one-on-one counseling session with the Employee.
24. The Employee did not adduce any witnesses or evidence in addition to her testimony why she should not have been recommended or why the recommendation of Shirleen Nibbs should not have been accepted.
25. Of the two consultants involved the evidence is that Miss Nibbs was the more highly qualified and the Employers decided to accept her recommendations and were free so to do.
26. It is generally agreed that for the purposes of good industrial relations, an Employer, before terminating the employment of someone in his employ should firstly endeavour to have such a person re-located, deployed or otherwise incorporated into the business and not to throw her out of employment, especially since such an employee may have commitments, financial obligations to meet, e.g. school fees, mortgage repayments, house rent, motor car loans to repay. It was the evidence of Muriel O'Marde that there was no other position that the Employee could fill and Lorna Simon

stated that she tried to see if the Employee could be absorbed in any other Division of the Ministry but this was no so.

Conclusion

27. In arriving at a conclusion careful consideration was given to the evidence adduced, the submissions of Counsel, the relevant provisions of the Labour Code and the Industrial Court Act, 1976, Cap. 214, Laws of Antigua and Barbuda, Revised Edition 1992, and the authorities cited. After careful consideration I find that the Employee was made redundant and that there was no Unfair Dismissal.
28. It is hereby ordered that the Employer shall pay to the Employee her entitlement on Redundancy, viz, \$ 13,105.56 and the other payments set out in the Employer's letter of March 1, 2002, exclusive of the vacation payment (\$ 20,881.00), payment to be made by the ^{7th} 30th day of June 2002. There shall be no Order as to Costs.

DATED the 7th day of June, 2002


Cyril L. Maundy
President