

ANTIGUA AND BARBUDA
IN THE INDUSTRIAL COURT

REFERENCE NO. 79 of 2000

BETWEEN:

JUDITH BRAMBLE

Employee

and

ST. NICHOLAS PRIMARY SCHOOL

Employer

Before:

N. Murdoch (Chairman)
Hurbert Hood (Member)
Ian Shoul (Member)

Appearances:

Tecla Henry Benjamin for the Employee
John Fuller for the Employer

2002: November, 4th
November, 6th
[2006: June, 27]

Judgment

Unfair dismissal – employee a teacher at a private school – employee dismissed summarily for alleged breach of school policy regarding extra tutoring – whether policy existed in school, whether employee had notice of policy and was in breach thereof – whether breach as alleged warranted summary dismissal.

Facts:

1. The Employee was employed as a teacher at the St. Nicholas Primary School from November, 1995 to July, 2000. On 21st July, 2000 the Employee was advised by the headmistress of the school that her services with the school were no longer required because the Employee had breached the school's policy. The Employee denied the existence of the policy as alleged by the headmistress and further denied that she was in a breach of the alleged policy.

Employee's evidence:

2. The Employee was a teacher of the school for five years. During that period she had been asked to do private tutoring of students by parents of individual children and for some period of her employment by the former headmistress of the school. She was not aware of any policy which precluded her from giving private tutoring since the said policy was not written and her past experience was that school policy was always written and presented so that it could be read. Since no such policy was written at the school she was unaware of any policy regarding after school tutoring.
3. She had given private tutoring during her employment to a specific child in Grade IV which she taught at the request of the child's parents previously as the child had reading problems. These problems had been discussed with the child's mother and a private arrangement had been arrived at for after school tutoring.
4. She did not in agreeing to tutor this student believe that she was deliberately going against the school's policy. She assisted this child who had gone through Grades 1 – 3 and had difficulty reading. The matter of policy only had an impact on her when she received her letter of dismissal stating that her actions had been in breach of school policy.
5. Her dismissal letter referred to school policy which was contained in a memorandum dated October, 13th 1999. She admitted receiving and reading the memorandum and admitted that it addressed the school's policy relating to after school private tutoring of students. She asked other teachers who themselves were not aware of the policy.
6. The policy referred to in the memo of October 1999 had not previously been discussed, and there was, prior to the memo and afterwards, private tutoring going on in the school with pupils of the school. This was conducted at school on the school's premises after school hours.
7. The after school tutoring to which she referred involved two classes which were both private, one which tutored dance and the other sports. Both classes were classes for which students paid in addition to the normal school fees. The students for these classes were from all classes in the school and the tutors were staff members. This private tutoring took place both before and after 13th October, 1999 and none of the teachers involved was ever dismissed for private tutoring on the compound.

8. Prior to 21st July, 2000 she received no warning oral or written with respect to private tutoring and the first notice was contained in the dismissal letter she received on 21st July, 2000. In discussing her dismissal with the principal of the school, it was indicated that the mother of the student she had tutored was dissatisfied with the tutoring.
9. Prior to 21st July, 2000, she had been approached by the previous headmistress and requested to give private tutoring to several students. This tutoring was conducted with the child after school off the compound at the child's home. She was also requested to tutor another child the following year and this was done at the child's home. These requests were made in 1997 and 1998 and she tutored for the whole school year on both occasions.
10. The previous headmistress left the school in July, 1999 and the new headmistress took over in September, 1999. There was never to her knowledge a policy during the previous headmistress's time at the school and she never saw any written policy or reasons regarding the policy against private tutoring. She had also tutored other children at the school during this time.
11. She was on a contract with the school that required one term's notice. She was given no notice on 21st July when she was dismissed. She was employed for 5 years and her last salary was \$3,528.00. She had never been disciplined by the school or received any letters or notes indicating that her performance was unsatisfactory. She found employment after she had been dismissed full time in September, 2001. Prior to that she was employed part time in May, 2001 to June, 2001 earning \$80.00 per week. For the period she earned a total of \$480.00. Her present salary is \$4,000.00 per month. During the period she was at home i.e July, 2000 to October, 2001, she gave private tutoring at home and was paid \$200.00 per week for this from October, 2000 to May, 2001.
12. On cross examination the Employee admitted receiving the memorandum dated 13th October, 1999 on or around the said 13th October, 1999. She did not reply to the memo. The teachers discussed the memo and expected to have a meeting about it. There was however no discussion with anyone in authority at the school on the memo. She did not speak to the new headmistress about the policy outlined in the memo nor did she speak to anyone on the Board about it.

13. She did however discuss the matter with the headmistress and another teacher in the school prior to the issue of the memo but never advised the headmistress that she intended to do private tutoring. She and the other teacher had asked the headmistress in the conversation in September, 1999 whether they could do private tutoring at school on the premises. The headmistress stated that the former head did not approve of private tutoring on the premises so that she would enquire about it and revert to the teachers.
14. She received the memorandum of 13th October, 1999 but she did not agree with the alleged policy. It was not a policy and she did not agree with the directive in the memo regarding private tutoring. She asked the headmistress whether it was legal to say that there was to be no tutoring of students after school hours as she did not believe it was legal. This discussion took place in September, 1999 before the memo was issued.
15. After receiving the directive in the memo she decided to go ahead with private tutoring in the second term and privately tutored a student in her class. She had no discussion with the headmistress or anyone on the Board of Trustees on the matter. She thought it through and decided to ignore the directive in the memo as she was sure she was not doing anything wrong.
16. She accepted that she challenged the authority of the headmistress and the Board in doing this. She had been given permission in the past by the previous headmistress and also there was tutoring going on in the school. She felt that it was unfair for the restriction to relate only to her.
17. During her employment she tutored several children at the request of the former headmistress but before September, 1999 she never tutored any student other than those recommended or directed to her by the headmistress.
18. She disagreed that the fees charged by the school were the life blood of the school. She further disagreed that parents of children who were not privately tutored by her from her class would perceive that those who were tutored were gaining an unfair advantage. She also did not agree that there could be a perception that she would favour the children who were privately taught.
19. The after school tutoring to which she referred which was being conducted on the school's premises in two private classes were dance and P.E. These she said were part of the school curriculum courses. She equated these

with music and art, although she agreed that there were extra activities open to everyone and anyone in the school.

20. Her act of tutoring the students after October, 1999 was not a deliberate act of insubordination against the principal and the Board and there were two students but she did not know if this could be perceived by persons who knew that it was an act of insubordination.
21. She supplemented her income from the private tutoring. Each student was tutored twice per week and from it she earned a little more than \$400.00 per month. The tutoring that she did after hours was not on the school compound neither was it during school time. School hours were 8:30 to 3:30 and tutoring took place after that. She also was not given any rules or regulations of the school when she went there.
22. In response to questions put to her by the court the witness stated that the people who taught after class at school i.e. dance and sports were paid a lot more and were paid directly by the parents for their time.

She admitted that there was a communication problem between her and the headmistress of the school. The headmistress taught both dance and sports after school and was being paid for it. She felt that it was therefore unfair of the headmistress to tell her not to do what she was doing. She did not think the headmistress was approachable, thus communication was a problem. She had met the headmistress teaching there when she first went, and she was a colleague. The headmistress became principal afterwards and regular staff meetings were held once per week with all staff generally attending meetings.

Employer's evidence:

Evidence was given for the Employer by Mrs. Kanika Simpson Davis the headmistress of the school.

23. She was principal of the school for 4 years since September, 1999. Prior to that she had been a teacher at the school for several years, since September, 1994. In September, 1999 the Employee and another teacher informed her they wished to tutor children in their classes who needed extra help. She had been aware of a policy in the school regarding tutoring of children in their own class and had been aware of it since September, 1994. The other teachers in the school were also aware of the policy. This included the Employee when she joined the school as the policy was still in effect when she joined the school. It was a practice to

discuss the progress of individual students at staff meetings. The headmistress would ask or request other teachers to assist children who were not in their class who needed extra help. This extra tutoring was not usually open to the class teacher.

24. She became aware that exceptions were made to the policy in September, 1999. The exception involved a child who had been seen by a specialist who recommended that the extra help be given by the class teacher. In September, 1999 she also became aware of another exception involving the Employee when the parents of the child advised her of it. Prior to September, 1999 she was not aware of any other exception to what she knew to be the school's policy.
25. When she was asked by the Employee and the other teacher about the matter she contacted the former headmistress who was then in the UK and clarified the matter. She then raised the matter with staff at a staff meeting at which all staff including the Employee was present. The Employee expressed her disagreement at the meeting. In light of the disagreement, she agreed to consult with the Board of Trustees and to revert to the staff. Having raised it with the Board she reverted to the staff by memo of dated 13th October, 1999 reminding the staff that it was against school policy for teachers to tutor students in their own class after school. The policy was not only limited to tutoring on the premises.
26. In July, 2000 she became aware that the Employee had been tutoring a student in her class for two terms. This information was given to her by the student's mother, who was dissatisfied with the child's school report, during a meeting to discuss the child's progress. She consulted with the Board on the matter and a decision was taken to dismiss the Employee.
27. She was accustomed to have regular staff meetings and held them weekly between September, 1999 and December, 1999. Around 13th December, 1999 she had a special meeting with the Employee as she had held meetings with the teachers individually at the end of each term. The issue of team work within the school was raised generally with the Employee not specifically within the context of the tutoring issue. At this meeting the Employee did tell her that she found her unapproachable.
28. The school policy was based firstly on the need to safeguard teachers professionally from charges of unfairness and bias in their teaching; and secondly to preserve good standards of teaching in the classroom by not having teachers be perceived as profiting financially from after school tutoring in core curriculum subjects privately taught.

The clubs at school offering extra curricular activities were different. They offered club activities in areas which enhance the school's curriculum and are group activities not one on one private lessons or tutoring. These are not academic subjects or examination subjects.

29. On cross examination Mrs. Davis admitted to knowing of a specific case of a student who had been tutored by the Employee on the request of the former headmistress. This was as a result of a specific request based on the recommendation of a specialist who had evaluated the child. She was unaware of other children receiving private tutoring and her discussions with the former headmistress on the matter were focused on the one specific student whom the headmistress identified as a special case based on the recommendation of a specialist.
30. The policy was not a written policy although it had been in effect and had been observed by teachers in the school up to September, 1999. When the Employee and another teacher raised the issue in September, 1999 she specifically clarified it with both the former headmistress and the Board and committed it to writing in the October, 13th 1999 memo. She was not aware that the former headmistress made policy and then changed it. The policy was not changed in the case of the specific child who the former headmistress drew to her attention. This child was an exception to the policy because of her specific situation and the evaluation that had been made by the specialist.
31. She was not aware that the student being tutored by the Employee in 2000 had the same issues as the child for whom the former headmistress had made the exception although the child's mother had visited her once as headmistress about the child's needs.

She was unaware who had made the policy and could not say that the person who instituted the policy then breached it. She had no knowledge or information regarding exceptions to the policy except in the case of the specific student that the former principal discussed with her.

32. After a discussion with the mother of the child who was being tutored by the Employee at the end of the term, she consulted with the Board and the Employee was dismissed thereafter. She called the Employee after the meeting with the Board. She did not speak with the Employee after the discussion with the parent although that may have been the fair thing to do.

33. The policy in question applied to all teachers in the school. The memo of October 13th 1999 had two parts. It addressed the issue of tutoring in the class and also the issue of tutoring in private. The issue of the school premises was never an issue.
34. She denied that she as headmistress had privately tutored students on the school premises contrary to the stated school policy or that she charged a fee for so doing. She admitted that she offered dance classes after school and operated a sports club after school and was paid a fee for so doing. The students were not specifically chosen by her.
- Both dance and sports were open to anyone in the school. She earned an additional \$600.00 per term with the extra curricular activities working 2 months out of every term. These subjects dance, social arts, physical education and music were the after school activities. Some teachers graded on physical education although it was not part of the school curriculum
35. The decision to dismiss the Employee was taken after she discussed the matter with the Board and not on her own and it involved the Employee's breach of the school's policy. Prior to this matter the Employer had no issues with the Employee neither had there been any cause to write to her regarding discipline or any other matter.

ISSUES

36. (a) Whether there was a policy at the school regarding the teaching of extra lessons
- Whether the Employee had knowledge of the policy
- Whether the Employee breached the policy.
- (b) If the Employee breached the policy whether the same was misconduct sufficient to permit the Employer to dismiss the Employee.

(a) The Existence of the policy.

37. The evidence discloses that the matter of private tutoring had been discussed in the school by Mrs. Davis with the teachers. Mrs. Davis makes this clear in her evidence. The Employee also does not deny that the issue was discussed. The Employee questioned the existence of a

policy as she stated that a policy should be written, should be established practice and notice of the same should be given to those affected.

38. An examination of the evidence shows that the matter regarding the teaching of extra classes was addressed and discussed on more than one occasion and that on one occasion Mrs. Davis had written to members of staff about the matter. It is also clear from the evidence that the Employee had notice of the decision regarding the teaching of extra lessons. The court does not consider it relevant that she did not view it as a policy, since it was a directive of which she had notice and by which she was required to abide.
39. What is also clear from the evidence is that although the Employee had clear knowledge of the matter she disagreed with it and from her evidence it seems apparent that she resented the directive since she felt that the headmistress herself was permitted to engage in after school activities with students from which she earned income and that the privilege of engaging in after school activities with students which earned income should not be restricted to the headmistress.

In her evidence she stated clearly that she did not agree with the headmistress as she felt it was unfair and as such she did not consider that she was obliged to abide by the decision.

40. Since it seems clear from the evidence that the Employee engaged in the after school tutoring knowing that a decision had been made against it, this court concludes that she knowingly breached the policy regarding after school tutoring.

(b) Whether the breach was sufficient to warrant summary dismissal?

41. The evidence shows that the Employee was given no warning letter nor did the school engage her in a discussion after it was discovered that she had been engaged in after school tutoring. Pursuant to section C58 of the Labour Code, an Employer is entitled to dismiss an Employee for misconduct which is such that it is clear from the same that the employment relationship cannot reasonably be expected to continue. Should the Employee's misconduct not be so serious that the employment could be reasonably continued, the Employer is obliged by the Labour Code Section C59 to issue appropriate warning letters advising the Employee of the misconduct and advising what further action would be taken in the event of a repetition of the misconduct within a certain time.

42. This court is of the view that the Employee made a clear and conscious decision to engage in after school tutoring of students having notice of the decision about it because she felt that it was unfair and she disagreed with it. This court however finds that the said misconduct was not such that it would have entitled the Employer to dismiss the Employee summarily. The evidence from both sides was that the Employee had prior to the incident been a "good" teacher and that there had been no prior history of disciplinary matters relating to her. This Court therefore concludes that the Employee was unfairly dismissed by the Employer.
43. The court is however mindful that in arriving at its decision it is entitled wherever it finds that a dismissal is unfair to determine to what extent the Employee has contributed to the dismissal. In the instant case the Employee gave evidence that she considered the headmistress Mrs. Davis to be remote, aloof and unapproachable so that she did not take any steps to resolve the issue with the headmistress. She also considered the decision to be unfair so that she did not believe that she was required to obey the same and that she knowingly made the decision to ignore the decision since she felt it was unfair.
44. The court has considered the reasons given in evidence for the decision regarding after school tutoring and the distinction which was drawn between the after school tutoring of core subjects and of extra curricular activities such as dance and sports which was offered by the headmistress.
45. This court accepts the view of the Board as described by Mrs. Simpson that it was essential to the discipline of the school and the authority of the head that decisions regarding matters at the school be followed by members of staff even where as in the present case an Employee may have believed the decision to be unfair. We find from the Employee's evidence that she was very aware of the fact that her actions undermined the authority of the headmistress, but that she continued in any event because she resented what she considered a change of direction regarding the after school activities from the time the new headmistress took over the school.
46. The court also finds that the Employee's feelings that the decision was unfair, and her belief that the new head was unapproachable caused her to deliberately disregard the decision. In the circumstances we believe that the Employee contributed to her dismissal by her action and as such any award due to her should be reduced in the circumstance by 60% per cent.

47. The evidence is that the Employee was employed at the school for 5 years from November, 1995 to 21st July, 2000. Her last salary was \$3,528.00. The Employee was given no notice regarding the termination so that she is entitled to compensation under the following heads.

- (a) **Immediate Loss:** which includes notice and loss of income from the date of termination to the date the Employee obtains employment or date of trial whichever is earlier.

The Employee was entitled by the terms of her contract to notice of three months in respect of a termination. Since the Employee was given no notice she is awarded three months salary in lieu of notice \$10,584.00 discounted by 60% for a total of **\$4,233.60**.

The employee also gave evidence that she first found employment in September, 2001 having been unemployed full time since July, 2000. During this period she stated she mitigated her loss although she provided no written evidence of the same. The court however accepts that she engaged in private classes at home from October, 2000 to May, 2001 and earned \$800.00 per month from the same, a total of \$7,200.00. In addition for the period May, 2000 – June, 2000 she earned a total of \$480.00 monthly part time at another school. Her total earnings for this period is \$7,680.00 instead of the amount she would have earned. We therefore award the maximum of 6 months immediate loss discounted by 60% for a total of **\$8,467.20**.

- (b) **Loss of Protection:** The Employee was employed for a period of 4 years and 9 months having commenced the employment in November, 1995. She is therefore entitled to severance for 57 days. The Employee's daily rate is \$162.83 so that severance is **\$9,281.31**.
- (c) **Future Loss:** The Employee gave notice that she found full time employment in September, 2001 at a salary of \$4,000.00 which is approximately \$500.00 more than she earned before. No award is therefore awarded for future loss.
- (d) **Manner of dismissal:** No award is made under this head as the manner of dismissal did not render the Employee less attractive to future employers.

The employee is therefore awarded a total of **\$21,982.11** in respect of her claim.

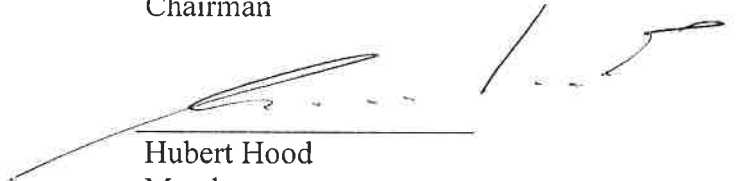
This sum is to be paid to the employee within one (1) month of the date of judgment.

Dated the 27th day of June, 2006.



Nelleen Rogers Murdoch
Chairman

I concur



Hubert Hood
Member

I concur



Ian Shoul
Member