

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 17 OF 2002

BETWEEN:

BARRYMORE JOSEPH

Employee

and

JOLLY BEACH RESORT LIMITED

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. Ian Shoul
The Hon. Genevieve Benjamin

**President
Member
Member**

Appearances:

E. Ann Henry, Attorney-at-Law, for the Employee
Mr. Lake, Attorney-at-Law, for the Employers

2004: June .7, 8
2005: January 10, 11

JUDGMENT

Pastry chef employed by hotel - Employment agreement provided that, inter alia, the Employee's employment will be secure and that the Employee had a right not to be unfairly dismissed - as part of his job functions Employee was required to train a number of junior pastry chefs - Employee and some other members of staff decided to join the Hotels Management Association and this they did - Employee and two others were placed on temporary lay off without any fixed period. Employee severed and paid \$ 7,291.60 as severance pay.

- [1] **Maundy, P:** By this Reference the Employee, Barrymore Joseph, claims from the Employers compensation for Unfair Dismissal, immediate loss of earnings up to the date of dismissal, Loss of Future earnings, Loss of Job Security, Manner of Dismissal, Costs and such further and other relief as the Court may deem just.
- [2] The Employer denies that they are liable and contend that, inter alia,
- (a) terms were included into the contract by operation of law including terms in respect of "trust and confidence" and the right not to be unfairly dismissed.
 - (b) It was an implied term that the employment contract was governed by the provisions of the Antigua and Barbuda Labour Code, Cap. 27 Laws of Antigua and Barbuda Revised Edition 1992, as amended.
 - (c) As to paragraphs 11, 12 and 13 of the Employers Memorandum, three months had expired from the commencement of "temporary lay-off" and as a result the employment of the Employee had been terminated by the operation of law and he became entitled to Severance Pay only.
 - (d) That on the expiration of the time stipulated in the Labour Code it discharged its obligations to pay Severance.
 - (e) The Employee was not entitled to the reliefs sought or at all.

Historical Background

- [3] The Employee had for a period of time been working for the Employers at the Jolly Beach Hotel, St Mary's, Antigua, and by letter dated June 16, 2000 he was given the post of Pastry Chef - See Exhibit BJ1 and BJ2 - the latter contained the Employee's terms and conditions of service which gave his starting date as May 16, 2000. The Employee's

services were terminated on October 10, 2001. He had been temporarily terminated since June 15, 2001 - See Exhibit BJ3.

- [4] By letter dated November 27, 2001, the Employee was sent his final payment of \$ 7,291.60 as Severance Pay - See BJ4.
- [5] Prior to taking up the employment in January 2000, the Employee was working at the Odyssey Resort in St Lucia as a Pastry Consultant.
- [6] The Employee ceased work at the Odyssey in St Lucia on December 29, 1999, and was approached by Trade Winds Hotel and the Employers who offered him employment. The Employee discussed the matter with the Food and Beverage Manager who told him that his job would be secure; the manager bought him an airline ticket to Antigua and told him he was to start work on January 4, 2000. The Employee resigned from his job in St Lucia and came to Antigua. The parties entered into a fixed term contract, the employment was to be permanent and commenced on January, 2000. The parties entered into a fixed term contract, thus the employment was to be permanent.
- [7] There was never any complaint about the Employee's performance or conduct.
- [8] In May 2001 the Employee joined the Antigua Trades and Labour Union, the Management Division together with Alrick Shaw and Steve Williams, two fellow employees. Shortly after joining the Union the Employee received the letter of lay off from Friday, June 15, 2001 - See exhibit BJ1 - the Employer never consulted the Employee nor discussed the matter with him. There were six persons who worked with the Employee but none of them was laid off. Following the dismissal the Employee had a meeting to discuss the matter with Executive Chef,

Nevell Simon, and the Assistant Manager, Trevor McDonald - but no settlement was obtained. By letter dated May 15, 2001, the Employers informed the Employee that he was being severed on the grounds that their occupancy level was very low - he was told that if business improved he will be asked to resume his employment.

- [9] Subsequent to the severance the Employee tried to find new employment and sent resumes to different hotels including Carlisle Bay, Jumby Bay, Hawksbill, Royal Antigua Hotel, Sunsail Hotel and Odyssey Hotel in St Lucia where he previously worked. Unable to obtain any employment the Employee decided to start his own business and negotiated a loan of \$ 200,000.00 from a bank. After payment of monthly repayments to the bank and rental of his business place the Employee said he was left with only about \$ 1,000.00 per month - his recurring expenses are about \$ 8,000.00 - the loan was originally for \$ 150,000.00 @ 14% for a period of 7 years and the Lease for 2 years @ \$ 4,000.00 - See Exhibits BJ7 and BJ8.

- [10] Before going to Club Odyssey the Employee worked at Sandals Resort as a Pastry Chef - he also worked for three years at Covenant Bakery and a Pastry Shop, which was owned by his family as the Pastry Chef.

Triable Issues

- [11] The principal issues here for determination appear to be whether:
- (a) The Employee was unfairly dismissed.
 - (b) The Employee is entitled to compensation for Unfair Dismissal.
 - (c) The purported Severance was valid and lawful.
 - (d) The Employee is entitled to Notice Pay.
 - (e) The Employee mitigated his loss.

The Arguments

[12] The parties decided to make written submissions and in support of his submission Mr Lake cited:

- (a) Antigua Workers Union V Joseph Dew et al
- (b) Sundry Workers V Kings Casino Limited (Civil Appeal No. 28 of 2001).
- (c) Cyril Grunfield in his text and quotation the law of redundancy 3 Edition pg 131 where he states:

"Motive may be important in the law of unfair dismissal but not in the law of redundancy, pure and simple. If a business' requirements to carry out work of a particular kind have diminished only because of a need to make economics, dismissal for this reason may be as much a case of dismissal for redundancy as if it were because of a more efficient way of organising or because of the introduction of new products or technologies. The proposition follows logically, from the statutory definition of redundancy which has been interpreted to include the situation in which a business' employee requirements to carry out work of a particular kind has ceased or diminished."

[13] For the Employee Miss Henry took a different view from that of Mr Lake and contended that, inter alia:

- (a) Section C.42(2)(b) of the Labour Code and all the Sections falling under part 4 of Division C of the Code make provision for the law concerning redundancy and meaning of severance payment.
- (b) A termination purporting to fall within Section C.42 must flow from circumstances of the redundancy of the employment whether that redundancy is short lived (temporary) or permanent

- (c) The rationale for the Code treating both the short lived (temporary) and the permanent redundancy is to be found in the fact, taking account of the nature of employments in the nation of Antigua and Barbuda and the significance of the Hotel Industry in the economy that a workplace would from time to time experience a sharp reduction in work for its employees - in the off season with few guests in the house a hotel would have considerably reduced needs for certain categories of workers.
- (d) The Code imposes on the employer the obligation to establish the existence of the redundancy and other circumstances.
- (e) To be liable the Court has to be satisfied that not only did a redundancy situation exist but that the Employer dealt with the Employee in conformity with the requirements of the Law, both Statutory and Case Law.
- (f) There is evidence that a redundancy situation existed.
- (g) It was only in November 2001 that the Employer, for the first time signaled that the financial circumstances played a role in the decision to put the Employee on temporary termination (layoff).
- (h) The Employer never communicated to the Employee that the low occupancy levels was impacting on the demands of the pastry department.
- (i) There was no evidence as to the financial circumstances which would have dictated that the Employer responded to the low level of occupancy by terminating staff.
- (j) The Employer has failed to show that a redundancy situation existed and there is not sufficient evidence to conclude that the Employer was facing serious financial difficulties or that the level of occupancy was such as to warrant making any of the employees and particularly this employee, redundant.
- (k) It was not the principle to consider the policy "last in first out"

when making the selection for termination and even if the principle was not applicable in this case it demonstrates the cavalier manner in which the Employer approached the whole issue of redundancy.

- (l) Up to May 31, 2001, the Employee was given absolutely no indication on what was to come on that day even though the decision to terminate was taken in April.
- (m) The Employee was given only two (2) weeks notice, no opportunity to seek alternative employment in other departments of the hotel and was the only person in his department to have been made redundant.

[14] In support of her contentions Counsel cited:

- (i) Peter Tonge V St James Club, and reviewed the law from Laurel Humphreys V Antigua Gases Limited through Peter Tonge V St James' Club Limited to Linda Richardson V Deep Bay Development Limited.

The Law

[15] The matter arising in this Reference requires consideration of certain provisions of the Antigua and Barbuda Labour Code/the Labour Code, to wit:

Section 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."

Section C 41: Severance pay shall consist of at least one day's pay, at the employee's basic wage, for each month or major fraction thereof of

his term of employment with his employer and any predecessor-employer.

Section C 42(2) (b) If the termination be stated as temporary, no severance pay need be remitted to the terminated employee at the time of termination if no date of recall is given at the time of termination, severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled;

Section C.59 (1) deals with the issue of misconduct and provides that: "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."

Section C.59(2) deals with written warnings in lieu of dismissal and provides thus: "Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of:

- (a) a repetition of the misconduct, or

- (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.

Section C.59(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.

Section C.59(4) Where within six (6) months of the receipt of the written warning under subsection (2) the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning.

Section C.59(5) Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the written warning is given and state the action the employer intends to take in the event of repetition; and, thereafter, if the employee does not, during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of the said employee."

C5. (1) Every person who employs another shall, within 10 days of such employment, furnish said employee with a written statement which shall set forth

- (a) the general responsibilities and related duties for which the employee is being employed;

- (b) the regular hours of work, and rest periods;
- (c) the starting pay, and method of computing same;
- (d) the term of employment, if other than indefinite;
- (e) the period of probation, if any;
- (f) the employee's leave and vacation privileges; and
- (g) his obligations, if any, imposed under section J.13.

(2) With respect to persons currently employed on the effective date of this provision, each employer shall, within ten days after such effective date, furnish each of said persons with a written statement which shall set forth:

- (a) the general responsibilities and related duties for which the employee is currently employed;
- (b) the regular hours of work, and rest periods;
- (c) the current pay, and method of computing same;
- (d) the remaining term of employment, if other than indefinite;
- (e) the remaining period of probation, if any; and (f) the employee's leave and vacation privileges.

(3) With respect to either a newly engaged employee or one already employed as of the effective date of this provision, each employer shall either post a copy of any current agreement between the employer and a trade union setting forth the working conditions of such employee or he shall give said employee a copy thereof.

(4) Whenever, subsequent to the giving of a statement under subsection (1) or (2), the employer, whether by necessity or otherwise, desires to change, in any relevant respect, the general responsibilities and related duties of the involved employee as set forth in said statement, he

shall, at or about the time he effectuates any such change, furnish the said employee with a new written statement amending and making appropriate revisions in the original statement, and whenever, subsequent thereto, the employer desires to make additional changes in any relevant respect, he shall, prior thereto, furnish said employee with a written statement further amending the last one furnished; but nothing therein shall be construed as permitting an employer to change working conditions in violation of section C6 or C7.

C.11. (1) An employee who has been engaged for a specified term of employment and who intends to quit his employment at the end of the specified term need give no advance notice of such intention unless the terms of his employment contract specify otherwise.

(2) All other employees must give advance notice to their employers of an intention voluntarily to quit employment, namely:

- (a) an employee, during his probation period, shall give at least 24 hours advance notice of such intention;
- (b) with respect to any other employee, the period of said advance notice shall be at least equivalent to the interval of time between the affected employee's paydays; except that, in no case need the period of said advance notice exceed 30 days unless an employment contract specifies otherwise.

(3) Failure of an employee to give sufficient advance notice as required herein may subject him, at the employer's option, to dismissal prior to the date that he intended voluntarily to quit by the number of hours or days by which the employee's notice fell short of the required period of advance notice. .

(4) Having' received due advance notice from his employer of an intention to terminate his employment, an employee may not, unless said employer has exercised his option to terminate said employment earlier than the intended time and to pay wages in lieu thereof under the provisions of section C 9(4), quit his employment prior to the effective date of the notice under pain of losing his pay for the lost time.

Decision

- [16] I find it difficult to understand why the Employers could have decided upon severance of the Employee. Of course, it is very easy to make allegations of poor occupancy levels and the fears of high expense,, neither the Employee nor the Court being in a position to fully investigate and analyze/verify these. I am, however, mindful of the Court of Appeal's decision in the Jennifer Watt Case where it did not allow these to prevail.
- [17] This is an instance of severance without Notice or date of recall both of which are not prohibited under the Labour Code but the Code creates penalties for so doing. The action by the Employers occurred within a short time of the Employee having joined the Antigua Trades & Labour Union, which he has a right to do under the Labour Code and it thus begs the question whether this was what orchestrated the "move". And it is important to note the lengths to which the Employers went to obtain the services of the Employee (they paid his airline expenses form St Lucia to Antigua) and told him that his employment was secure.
- [18] I do not believe that it is in the best interests of Justice and good industrial relations that an employer should be permitted to sever an employee especially one of the calibre of the Employee and the holder of an impeccable record, without Notice and with payment of a month's

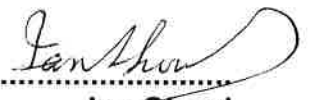
salary. To my mind the amount paid is grossly inadequate and bearing in mind the difficulties the Employee had to undergo before he was able to create new employment. I believe that the Employee, with reasonable efforts, should have been able to find new employment or start his won business within five months and would award five months equivalent salary (i.e. \$ 35,000.00), payment to be made by November 24, 2005.

- [19] The foregoing sum shall be paid by the Employers to the Employee together with Costs in the sum of \$ 2,000.00 - the treatment of the Employee was harsh and contrary to the rules of Natural Justice and good Industrial Relations.

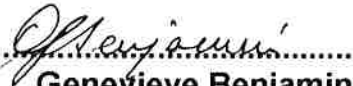
DATED the day of , 2005


Cyril L. Maundy
President

I concur


Ian Shoul
Member

I concur


Genevieve Benjamin
Member