

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 18 of 2003

BETWEEN:

**DUPERT PHILLIP
NATALIE STEVENSON
SANDIE PHILLIP**

Employee

- and -

COURTS (ANTIGUA & BARBUDA) LIMITED

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. Hubert Hood
The Hon. Genevieve Benjamin

President
Member
Member

Appearances:

Kathleen Kentish, Attorney-at-Law, for the Employees
Hugh Marshall Jr., Barrister-at-Law, for the Employers

2003: July 2
2005: July 4, 5 & 6

JUDGMENT

Unfair Dismissal - 3 managers of a company dismissed when restructuring - person who signed dismissal notice not a citizen of Antigua & Barbuda - claim for compensation, Notice Pay and Severance Pay - mitigation - no alternative job offer or other consideration made to the parties, all of whom had held

executive positions with the company for many years and were well experienced and capable.

[1] Maundy, P.: This is a claim by 3 former Employees, Dupert Phillip, Natalie Stevenson and Sandie Phillip against Courts (Antigua & Barbuda) Limited for compensation for Unfair Dismissal, Severance Pay and Costs.

[2] The Employees worked for the Employers:

(a) Dupert Phillip from August 8, 1985 to April 2003 as Credit Manager.

(b) Natalie Stevenson from September 9, 1985 to April 4, 2003 as the Floor Manager

(c) Sandie Phillip from September, 1988 to April 3, 2003 as the Assistant Accountant

and were dismissed without Notice and with immediate effect - See Exhibits NS1, NS2 and NS3.

[3] The case for the Employers is set out in their Memorandum dated June 24, 2003, in which they assert that the dismissals were fair and necessary as the company was overstaffed resulting in unnecessary duplication of duties and management was forced to introduce a program of further redundancies aimed at enhancing the company's overall performance and efficiency.

Historical Background

[4] The Employees were very bitter at the dismissals which they regarded as crude and harsh treatment especially after their length of service since they had always performed their duties faithfully and efficiently and

sought redress under the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, as amended. The matter was firstly heard by the Labour Commissioner and was referred to this Court, the parties having failed to arrive at a settlement.

Triable Issues

- [5] The matters here for determination seem to be:
- (a) Were the dismissals of any of the Employees unfair?
 - (b) Were the Employees entitled to Holiday Pay, Notice Pay, or any other award?
 - (c) Were the Employers bound to offer the Employees alternative employment rather than dismissal?
 - (d) Were the Employees entitled to Notice or payment in lieu thereof, costs or any other relief?

The Arguments

- [6] On behalf of the Employers, Mr Marshall contended that:
- (1) The company was being re-organised to save costs and so the dismissals were unavoidable.
 - (2) The re-organisation between 2000 and 2002 resulted in several job losses and these were unavoidable.
 - (3) The terminations of the three employees in April 2003 were part of further terminations for the same reason and were not unfair but justifiable.
- [7] The reason for the termination was restructuring and this ground meets both Sections C.58 of the Labour Code (Laws of Antigua & Barbuda

Revised Edition, 1992) as a redundancy and section C.58(e), some other substantial reason.

- [8] Section C.3 of the Code defines redundancy as a situation in which by retrenchment, work which an employee was last employed to perform has ceased or diminished.
- [9] The Employees were doing work which in part or in whole was being duplicated by persons “below them” whom they supervised and by persons “above them” who supervised them and to whom they reported.
- [10] Counsel submitted that a restructuring of management with a view to reduce operational costs is a substantial reason that entitles an employer to lawfully terminate employees and that is what the employer did here.
- [11] On the issue of reasonableness Mr Marshall asked the Court to find that notwithstanding that a termination falls within one or more of the legitimate categories in the Labour Code it may still be unlawful if it fails the test of reasonableness set at Section C.58 (2) of the Labour Code - this is a factual test which seeks to identify whether the employer acted reasonably and fairly. Evidence of witnesses is generally self-serving, thus he invited the Court to examine the testimonies of the Employees very closely.
- [12] The Employees were all aware of the restructuring process between St Kitts and Antigua, and knew there were other persons prior to their termination date were terminated and also that the terminations included a total of about six persons.

- [13] The issue that Vernon Solomon who signed the termination letter and did not have a work permit (Antigua) rendered the dismissals invalid would mean that the Employees did not have to accept the dismissals and could have continued working. In fact, each of the Employees accepted the dismissals and the consequences upon the dismissals. Thus, they cannot now assert that the dismissals are void. In any event the issue of the validity of Vernon Solomon's work permit cannot determine whether the dismissals have complied with Section C.58 of the Labour Code. If the Court finds that the dismissals are fair the issue of computation of severance arises. The evidence is that none of the Employees was included in the Collective Agreement and is not, therefore, entitled to severance as provided in the agreement.
- [14] The Employees, Dupert Phillip and Sandy Phillip were not Managers nor were they part of Management, accordingly they cannot be severed on computations reserved by practice within the industry for management; their computation must be in accord with the provisions of the Labour Code i.e. not less than one day per month worked.

Mitigation

- [15] Mr Marshall stated that the Employees, Sandy Phillip apart, took no reasonable steps to mitigate their loss resulting from the dismissal and were under a duty to do so and consequently are not entitled to compensation for the period when they were unemployed.
- [16] A dismissed employee is under a duty to take reasonable steps to obtain new employment or start his own business.

- [17] In her Memorandum Natalie Stevenson does not plead anything in terms of mitigation. It is only in Cross Examination some sort of evidence of an alternative job was given. No documentary evidence of applications for alternative appointment was tendered. Her testimony is that for over one year she has been in a temporary position with BWIA earning a lesser sum than when employed with Courts - the Employee has failed to show that she took reasonable steps to find new alternative employment.
- [18] Mrs Kentish did not agree with Mr Marshall and asked the Court to reject his submissions and find that, inter alia, the Employees were unfairly dismissed, were part of management, are entitled to Holiday Pay, Notice Pay, Loss of Earnings and Costs.

The Law

- [19] Reference has been made to the Law relating to this case and these may appear to be:
- (i) Section C.56 of the Labour Code provides thus, "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."
 - (ii) Section C.58(1) sets out the instances when a dismissal will not be unfair, viz:
 - (a) relates to misconduct of the employee on the job, within the limitations of Section C.59 (1) and (2);
 - (b) relates to the capability or qualifications 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 on the employer's part) of a requirement of law; or
- (e) 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, that there is a factual basis for the assigned reason.

- (iii) Section C.58(2) of the Act lays down the test to be applied in deciding whether or not a dismissal was unfair and provides that it is whether or not, under the circumstances, the employer acted unreasonably but, 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.
- (iv) Section C.40: Every employee whose terms of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy
- (v) 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.

Decision

- [20] The parties agreed to the contents of an Interim Order made on July 9, 2003, which is thus binding upon them and the Employers cannot at this stage refuse liability. The principal remedy for an unfair dismissal is

compensation and the Employers paid and the Employees received the monies of the agreed Interim Payment as follows:

- (a) Dupert Phillip - \$ 41,965.02
- (b) Natalie Stevenson - \$ 94,107.50
- (c) Sandie Phillip - \$ 81,328.50

25% to be paid on or before July 4, 2003

50% to be paid on or before October 30, 2003

25% to be paid on or before December 5, 2003

- [21] Much discussion took place re possible entitlement to Holiday Pay, Overtime Pay, but according to Mr Marshall these were all paid at the signing of the Interim Agreement. However, the additional 3 days and 4 days worked in the case of should be honoured and the Employees duly paid.
- [22] Mr Phillip took no steps to find new employment during the period of his dismissal and thus failed to take reasonable steps to find new employment or self employment which is the duty of a dismissed employee. However, he is entitled to an additional amount of \$ 19,722.00 Severance Pay.
- [23] With regard to the other Employees they cannot rely on the provisions of the Collective Agreement as they do not fall within its terms - they were members of management and thus outside of the Agreement.
- [24] It is always a matter of concern when an Employer terminates the services of an Employee without Notice and the issue becomes more serious where the Employee was long serving and without fault. To work for 16 years without a serious complaint shows the calibre of the Employees and even

though the Law does not provide that an Employer, in these circumstances is obliged to offer the Employees alternative employment the unwritten rules of natural justice and good industrial relations demand that Employers, before a dismissal should have dialogue with the Employee and endeavour to find him alternative employment.

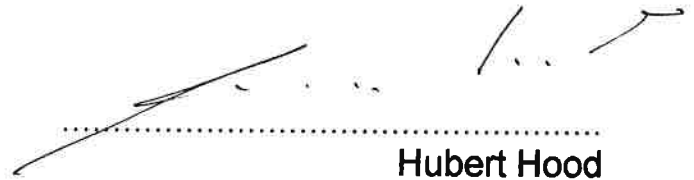
[25] Even though the dismissals were not proved to be unfair the Employees were dismissed, in my opinion, in circumstances that are harsh, oppressive and not in accordance with the principles of good industrial relations practices and make an award in the sum of \$ 10,000.00 to each of the dismissed Employees, under Sections 10(4) and 10(5) of the Industrial Court Act, Cap. 214.

[26] Both Counsel asked for Costs but it must be remembered that under the Industrial Court Act, costs should only be ordered in exceptional circumstances. I am not satisfied that this is a proper case for an award of Costs and the applications are declined. Payment to be made by January 6, 2006.

DATED the 4th day of November , 2005


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Cyril L. Maundy
President

I concur

A handwritten signature in black ink, appearing to read 'Hubert Hood', written above a horizontal dotted line.

Hubert Hood
Member

I concur

A handwritten signature in black ink, appearing to read 'Genevieve Benjamin', written above a horizontal dotted line.

Genevieve Benjamin
Member