

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 2 of 2007

BETWEEN:

CHARMAIN EPHRAIM

Employee

and

CARIB HOLDINGS LIMITED T/A BLUE WATERS HOTEL

Employer

Before:

The Hon. M. Althea Crick

Chairperson

The Hon. Genevieve L.I. Benjamin

Member

The Hon. Oscar A. Frederick

Member

Appearances:

**Mr. Egbert Joseph of Hotel Management Association for the
Employee and Mr. Anderson E. Carty for the Employer**

2008: October 15, 23, 29

2008: November 18

2009: August 20

JUDGMENT

Unfair Dismissal – Employer claims dismissal on grounds of redundancy.

- [1] By Reference filed on June 1, 2007, Mr. Egbert Joseph, acting for the employee, notified the Court of a trade dispute between the Employee and the Employer and by Memorandum filed on January 18, 2008, submitted that the Employee's dismissal for redundancy is unfair.

- [2] The Employee also contended in the said Memorandum that (a) at the time of her termination a redundancy situation did not exist, (b) she should be paid compensation for unfair dismissal (c) she should be paid for loss of earnings and loss of benefits as a result of her termination. These included travel allowance, annual bonus and medical insurance.
- [3] The Employer (the Hotel), filed its Memorandum on October 23, 2008. In it the Employer claims, that (a) during 2005 the hotel was experiencing low occupancy and in fiscal year 2005-2006, a review of the operation was conducted with a view to rationalizing the manpower requirements and other needs of the hotel. This exercise was aimed at achieving some degree of economic viability and sustainability. In addition, for some considerable period before the decision to dismiss, the duties of the Employee had been re-organized. This resulted in some diminution in her duties
- [4] The Employee gave evidence on her own behalf and the Employer called one witness, Ms. Karen Whitehead, Personnel and Administrative Manager.

HISTORICAL BACKGROUND

- [5] The Employee, Charmain Ephraim, was employed by Blue Waters Hotel – the Employer – as Assistant Manager, Front Office on October 4, 1999. She was issued a job description (Exhibit KW2) which outlined her Scope of Work and Specific Responsibilities.

[6] Scope of Work:

1. *“To be responsible for the day to day efficient running of the departments listed, ensuring the standards of service and presentation are maintained and that all guests needs in respect of these departments are met.*
2. *To undertake Duty management shifts as per the weekly schedule.*
3. *To undertake any other responsibilities or duties that may from time to time be requested by the General Manager”*

Specific Responsibilities – Departments:

1. Reception
2. Guest Services
3. Housekeeping
4. Sports and Leisure
5. Personnel

[7] Some of her specific duties included overseeing, co-ordinating and training front office workers. She was also responsible for guest services/weddings, housekeeping, water sports, gym, beauty salon and spa, taxi operation and staff transportation. Some time later, her duties were increased to include responsibility for special occasions – Christmas and New Year entertainment, Easter activities and any Independence celebration programme.

[8] In March 2006, the Hotel employed a new General Manager, Mr. Randall Wilkie. In April 2006 Ms. Marina Bonta was employed as Assistant Manager, in a vacant post.

[9] By letter dated September 29, 2006 the Employee’s services were terminated. The letter of termination reads thus:-

“29 September 2006

*Ms. Charmain Ephraim
Cedar Valley
St. John’s*

Dear Ms. Ephraim,

In today's increasingly competitive environment, prudent management would require that the Company review its operation, from time to time, in a continual effort to fully rationalize resources, so as to constantly promote greater efficiency in all the areas, given those economic considerations that could easily make or break our business.

Over the last few months, the Resort has continued to face some major economic challenges, which have been reflected in a fluctuation of occupancy levels and compounded by a general increase in the overall cost of doing business, in addition, a projection of occupancy levels for the next few months, show that business will continue to be slow, requiring sustained austerity measures so as to remain economically viable, until such time as our fortunes change. You would further be aware of the recent renovation and refurbishing project undertaken by the Company, requiring huge capital expenditure to modernize the Resort, in order to stay competitive in the Industry.

As result of these challenging economic considerations, a management review of the major areas of the operation, including the Front-of-Office, was recently carried out, and part of this exercise involved the rationalization of each position in the department, to establish if we are satisfying the ever-evolving demands and requirements of the business.

A careful appraisal of the position of Assistant Manager – Front-of House, clearly suggests that there is substantial diminution in the job content as outlined in your job description, which is precipitated by the fact that the areas for which you hold responsible, are adequately supervised and manned by competent personnel and no longer require direct attention or involvement at your level.

By virtue of the above, we can no longer rationalize the need to sustain your employment in the position of Assistant Manager – Front of House, since it would be uneconomical to continue to do so and therefore, a decision has been taken to retrench the post, declaring it redundant with immediate effect.

Consequently, you are entitled to the following terminal benefits, for which a cheque of the total amount owed, is enclosed:

<i>• Severance Pay -</i>	<i>EC\$46,095.00</i>
<i>• Notice Pay (1 month's pay in lieu) -</i>	<i>EC\$ 6,585.00</i>
<i>TOTAL</i>	<i>EC\$52,680.00</i>

The Company rather regrets having to take this course of action. We wish to thank you for services rendered to the Resort over the period of employment and offer best wishes for the future.

Yours sincerely,

'Signature'

*Randall Wilkie
General Manager"*

THE EMPLOYEE'S CASE

- [10] The Employee gave evidence. She stated that she resides at Cedar Valley Gardens. The signature to a Witness Statement which was filed on her behalf on September 15, 2008 is hers. The contents are true and correct.
- [11] In her evidence she stated, *inter alia*, ***“I was part of the monthly head of department meetings. Each head of department had to relay what was happening in their respective department and, if there were any updates by the general manager or financial comptroller, that would be discussed. There were never any discussions about financial problems at the hotel. I was aware that the hotel was refurbishing; there was refurbishing and expansion which I believe was for the betterment of the company.”***
- [12] She went on to state that on September 29, 2006 she was scheduled to carry out the functions of duty manager. When she reported to work at 4:00 p.m., she was called to the office by Mr. Wilke. In his presence was Mr. Anderson Carty. They told her that her position was made redundant with immediate effect. She was told to gather any personal items she might have. She was given a letter and told that her job was made redundant forthwith. She was told to remove anything she had at her desk. She was asked not to use her computer. No one discussed her redundancy with her.

- [13] Under cross examination by Mr. Carty, the Employee testified that her job title was Assistant Manager Front Office and not Assistant Manager as stated in her Memorandum. Her responsibilities were as listed in her Memorandum. She received a job description in 2004. There was a clear distinction between her position as Assistant Manager- Front of Office and that of Deputy General Manager. She knew the position of Deputy General Manager was advertised in a newspaper. In April, a new Assistant Manager was employed.
- [14] Still under cross examination, the Employee stated that the supervisors for housekeeping, water sports and front office would attend heads of department meetings. Throughout her tenure these persons attended heads of department meetings. The financial comptroller also attended. There was also an executive meeting which supervisors did not attend. In the heads of department meetings, the financial comptroller did not go into details about the hotel's finances. They were discussed at the executive meetings which she attended. However, the Employee stated that for the period between 1999 and 2006 problems with the hotel's finances were not discussed at executive meetings.
- [15] She continued, stating that on a number of occasions the hotel had to shorten a work week, but she was never asked to lay off anyone. Employees were asked to be mindful of cutting cost. This cost cutting was done routinely on an annual basis. This was done during the slow period - May to July. Business would start picking up from August at the start of the season. Blue Waters also had good occupancy, better than other hotels. A rate adjustment which was made had nothing to do with whether the hotel was doing well or not.

[16] Under further cross examination by Mr. Carty, the Employee explained that she understood financial problems to mean ***“people have to be made redundant, the staff would have to be reduced.”*** However, staff having to work a short work week was not perceived as a financial problem. Companies do these things to make a profit, to maintain the business. The hotel closed the plant for renovation. On the two occasions that it was closed, it was for renovation purposes. In 2004 and 2005 upgrades were made to the hotel. She did not understand that the company was experiencing competition in the market and therefore had to upgrade and undertake significant capital expenditure. The hotel closed in order to make a better product and for expansion. She understood the hotel was doing well enough to expand. She agreed that the hotel did not add additional rooms, and it did not increase its room capacity during her tenure of employment.

[17] In response to Mr. Carty’s questioning, she stated that she would oversee the departments by addressing the discipline of employees, signing work schedules, giving directions on how the operations should run on a daily basis and basically coordinating the efforts of the operations of the departments. These responsibilities were basically maintained throughout her tenure. She also did duty assignments as did all senior managers. The company had no personnel manager. Depending on the seriousness of the matter, the General Manager would make a decision. She would write warning and suspension letters and refer them to the General Manager. This never changed during the latter part of her employment.

[18] Under re-examination, Ms. Ephraim stated that, ***“No one offered me alternative employment. Every year we did a reduction in work week; I did***

not have to wait on the General Manager to give me instructions; it depended on the occupancy. I never saw a Profit and Loss statement showing that the company had a loss. During the executive meetings, there was never any discussion about financial problems and the need to retrench staff. Prior to the meeting on September 29, 2006, management had no discussion with me about the possibility that my position would be made redundant. I was not told about being given time to seek another job.”

- [19] On the question of the involvement of the new Assistant Manager in her duties as Assistant Manager, Front House, the Employee explained that, on some occasions, written information was sent to the front office by this individual without her being aware of it. She was of the view that, since she was responsible for that department, she should have been aware that these documents were going to the department. There were times when she would have a plan for late guests, and then she would find that the new Assistant Manager would already have had a plan. She would have approved a housekeeping schedule, and then it would be passed on to the Assistant Manager for approval again; she would see evidence that the Manager had made changes. No one had told her that her duties had changed. She was also responsible for making the duty manager's schedule, but then it was passed on to the Assistant Manager for approval; the schedule would go from the General Manager's desk to the assistant's. In her capacity as Assistant Manager - Front House, site inspections were done by her; this task was taken from her and given to Marina, the Assistant Manager, without any explanation. Site inspections are an integral part of hotel operations.

- [20] Mr. Carty was permitted by the Court to question the Employee on her evidence relating to the Assistant Manager, Ms. Marina Bonta. In response, the Employee explained that Ms. Bonta was responsible for the foreign agents who arrived but very few were non-English speaking.

THE EMPLOYER'S CASE

- [21] Karen Whitehead gave evidence. She stated that she resides at Royal Gardens in St. John's. The signature to a Witness Statement which was filed on her behalf on November 11, 2008 is hers and the contents are true and correct.
- [22] She further gave evidence that when she joined Blue Waters hotel, Ms. Ephraim was Front of House Manager. Ms. Ephraim was responsible for front office, guest services, housekeeping, guest activities. There was a supervisor in charge of the front desk. If there were any matters of concern they would be dealt with through the front desk manager. All the departments did not require the same attention. Most of Ms. Ephraim's time was spent with the front office guest services area. The Executive House keeper was responsible for the department, but Ms. Ephraim would work with the department to order from overseas and in getting things prepared for the General Manager to look at. Ms Ephraim also had to do a bit of co-ordination with the other departments.
- [23] She continued, stating that there was one employee in the gym. The employee would co-ordinate with Mrs. Ephraim. She would ensure that the person was there for the day. All the activities for the day were posted. Her duties with the Water sports Department were similar to her other department duties.

- [24] She stated, *"At the monthly meeting we would be advised of occupancy forecasts, comparisons with what is happening with other hotels on the island, what measures we should take to keep cost down, what we should do to keep our guests coming back. Prior to 2006, the financial comptroller would give broad outlines of the financial status of the hotel. After 2006, a lot more financial information was given. The information would be room sales, cost of sale, food and beverage. Depending on what the figures were like, the General Manager would call for the department to take action. Mostly the feedback was fair, mostly it was fair. In the earlier part of the year, in season, it was better. I was able to get an understanding of the fiscal situation of the company."*
- [25] Further, under examination in chief, Ms. Whitehead stated that when the occupancy was down the hotel would try to conserve energy, close room blocks, reduce staff hours, conserve electricity, conserve paper, conserve in the kitchen and the rooms. The hotel last closed in the months of September and October in 2005. This was the start of the 2006 financial year. Staff were notified earlier in the year of the closure and requested to take vacation during the closure period. Staff were given an opportunity to put their names on the list to return as labourers. During the closure, significant capital outlay took place.
- [26] She further testified that guest services and duty managers carried out site inspections. Ms. Marina Bonta also carried out duty management assignments. Because of her language skills, Ms Bonta was assigned to guests and tour agents who did not speak English.

- [27] Under cross examination by Mr. Joseph, Ms. Whitehead explained that it was her responsibility to record what is said at meetings. If expenses were up, Ms. Ephraim would be asked to find ways to cut costs. The overall responsibility for cutting costs was with the General Manager, but each department would have to find ways to cut costs.
- [28] The witness was shown Exhibit KW2, a copy of Ms. Ephraim's job description. In response to Mr. Joseph's questions, she explained that the supervisor of each department now handles first level disciplinary matters. All of her job description functions, which fall under the caption "**Personnel**" and are listed from 5.1 to 5.3, were subsequently performed by department supervisors. The General Manager approved the schedules which the Assistant Manager – Front House previously approved. The reception function is still being carried on. All these functions are now carried out by the supervisor. The then supervisor has assumed these functions. These functions under guest services still exist; housekeeping functions still exist, so do sports and leisure. All these functions on the job description are still going on at the hotel.
- [29] In response to further questioning, Ms. Whitehead stated that financial statements used to be presented at executive meetings, but she could not determine, from the weekly information, if the company made a profit or loss. The function of site inspections, she explained, still exists.
- [30] Under re-examination by Mr. Carty Ms. Whitehead testified that *"the front desk supervisor's responsibilities have not changed since Ms. Ephraim left. No one has taken over the responsibilities of Ms. Ephraim since she left. There may have been short over laps when one person takes over from*

another. Since the departure of Ms. Ephraim this position has not been filled.”

- [31] In response to clarification sought by the Court, Ms. Whitehead stated that hotels were closed for refurbishment to maintain and improve the product. The period chosen for the closure was the slow period – September, October. No one else was made redundant. The position of Assistant Manager, Front House has not been filled, but the supervisor continues to perform these duties.

RELEVANT ISSUES

- [32] The substantive issues are as follows:
- i) Did a redundancy situation, as defined in Section C3 of the Antigua and Barbuda Labour Code, exist at the time of dismissal?
 - ii) Was the dismissal fair in keeping with Section C58 of the Antigua and Barbuda Labour Code?
 - iii) In the event that a redundancy situation did not exist, did the dismissal meet the Code’s criteria of some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held?
 - iv) If the dismissal is found to be unfair, what is the measure of damages that should be paid to the Employee?

THE EMPLOYEE’S SUBMISSIONS

- [33] The following submissions were made by Mr. Egbert Joseph on behalf of the Employee: - They may be summarized as follows.

- i) the functions which Ms. Ephraim performed as Assistant Manager, Front House, were still available at the hotel and never ceased or diminished;
- ii) Audited financial statements of the hotel were never presented or discussed at Heads of Department or Executive meetings. The closure of the hotel was for renovations in order to keep the property in good condition and to upgrade the facilities in anticipation of increased business for the coming years.
- iii) Ms. Ephraim was made redundant immediately, and no alternative employment was ever offered to her. Given the employment of Ms. Marina Bonta in April of 2006, Ms. Ephraim should have been offered alternative employment;
- iv) Ms. Ephraim's dismissal was unfair;
- v) The Court in its deliberations should consider;
 - Jennifer Watt vs Antigua Village Condo Corp, Civil Appeal No. 6 of 1992
 - Antigua and Barbuda Labour Code 1975 (CAP 27), Sections C56, C58 (1), C15 (2) (3), C3, F6 b (i, ii), C2 (f).

THE EMPLOYER'S SUBMISSIONS

[34] Mr. Anderson Carty made the following submissions on behalf of the Employer. They may be summarized as follows.

- i) the position of Assistant Manager, Front of House, was of a **“particular kind”** since the Employee was the only person holding such title and carrying out such duties and responsibilities.

- ii) the hotel after completing its renovations, undertook an initiative to re-organize the management team.
- iii) after careful appraisal of all Executive managerial positions, the Employer gave cause and dismissed the Employee
- iv) the Employee attended Executive and Heads of Department meetings and participated, and implemented austerity measures within her department.
- v) no substantially equivalent employment opportunity became available at the time of the termination of the Employee's services; no other alternative position or vacancy existed at the time.
- vi) since the date of termination, the hotel has neither employed nor promoted anyone to the position of Assistant Manager, Front House.
- vii) the precise reason for the termination of the services of the Employee was redundancy brought about by retrenchment.
- viii) a re-organization of a workforce may result in a redundancy
- ix) the absence of a replacement for the Employee "creates a diminution in requirement"
- x) alternatively, even if re-organization falls outside the statutory definition of redundancy, it may still provide a substantial reason of a kind to justify dismissal
- xi) if an appraisal is made of the requirement of a business for employees to carry the work that an employee performed, and the work is redistributed over the remaining staff, the reallocation could result in dismissal on grounds of redundancy
- xii) it is now *"an established principle that tribunals will not inquire into the factual justification for the employer's conclusion that his requirements have diminished"*.

Did a redundancy situation, as defined in Section C3 of the Antigua and Barbuda Labour Code, exist at the time of dismissal?

- [35] Section C3 of the Antigua and Barbuda Labour Code defines redundancy as follows,

“a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, an employer’s going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished” and Section C58 – (1) of the Antigua and Barbuda Labour Code states as follows:,

“A dismissal shall not be unfair if the reason assigned by the employer therefore

- a);*
- b);*
- c) is that the employee was made redundant;*
- d);*
- e);*

Provided, however, that there is a factual basis for the assigned reason.”

- [36] The words of Lord Denning M.R. in **Johnson v Notts Police [1974] I.C.R. 170 (CA)** provide an appropriate starting point for the examination of this issue.

“It is settled that an employer is entitled to re-organize his business so as to improve its efficiency and, in so doing to propose to his staff a change in the terms and conditions of their employment: and to dispense with their services if they do not agree..... The question in every case is: was the change due to a redundancy situation, or not?”

[37] The Employer submits that there was a retrenchment of the Employee's position of Assistant Manager, Front of House. Indeed, in its letter of dismissal, the Employer states, *"a decision has been taken to retrench the post". The Oxford dictionary defines the word retrench thus, "(1) to reduce costs or spending in response to economic difficulty, (2) to make redundant in order to reduce costs."*

[38] The evidence is that the hotel closed on two occasions, in 2004 and 2005 to maintain and improve the plant. In fact, according to the Employer's witness when the hotel closed in 2005, staff were notified earlier in the year of the closure and requested to take vacation during the closure period. They were also given an opportunity to put their names on a list to return as labourers. The austerity measures which the hotel undertook are considered a normal occurrence between April and September within the hotel industry. The Employee said, *"Every year we did a reduction in the work week; I did not have to wait on the general manager to give me instructions; it depended on the occupancy."* Under cross examination the Employee stated, *"Yes on a number of occasions we had to shorten a work week; I was never asked to lay off anyone. Employees were asked to be mindful of cutting cost. This cost cutting was done routinely on an annual basis. This was done during the slow period - May to July, it depends. Business would start picking up from August to the start of the season. Blue Waters also had good occupancy better than other hotels."* None of these claims by the Employee was refuted by the Employer.

[39] Ms. Karen Whitehead, witness for the Employer, said in examination in chief, *"After 2006, a lot more financial information was given (at executive meetings). The information would be room sales, cost of sale, food and beverage. Depending on what the figures were like, the general manager would call for the department to take action. Mostly the feedback was fair,*

mostly it was fair. In the earlier part of the year, in season, it was better. I was able to get an understanding of the fiscal situation of the company.”

[40] The Employer attempted to make the case on two counts that the hotel was experiencing “*major economic challenges*”. Firstly, Mr. Carty submitted that the hotel had to close its doors for several months. However, Ms. Whitehead – stated that this was done “*for refurbishment to maintain and improve the product*”. Secondly, Mr. Carty submitted that austerity measures had to be undertaken. The Employee however stated that this was a routine exercise which was undertaken each year and was never construed as a “*financial problem*”. This was not challenged by the Employer. The Employer failed to make the case on both counts.

[41] The Employment Appeal Tribunal, in **Ladbroke Courage Holidays Ltd. v Asten** [1981] I.R.L.R. 59 (E.A.T.), held *inter alia*, as follows.

“There was no error of law in the Industrial Tribunal’s Statement that if an employer seeks to rely on business re-organization or economic necessity as a reason for dismissal, he should produce evidence to show that there was a re-organization or that there was some need for economy and that it is material for the Tribunal to know whether the company was making profits or losses.”

[42] No evidence was led by the Employer to support the dire economic straits alluded to in the Employee’s letter of dismissal. No financial data or analyses were presented to convince the Court that the Employer was, at the time of the dismissal, experiencing economic challenges.

[43] Another criteria to be met within the definition of redundancy as stated in the Antigua and Barbuda Labour Code is that of the cessation of, or substantial diminution in, the work a person was last employed to perform. The Employer

has based its case on the argument that the work the Employee was last employed to perform was substantially diminished. What is the evidence?

[44] The Employee, under cross examination, listed her duties and confirmed that the duties stated in her job description were performed by her. She stated that there were occasions when some of her duties were performed by the newly employed Assistant Manager, Ms. Marina Bonta - *“I may have a plan for late guests and then I would find that the new assistant manager would already have had a plan. I would have approved a housekeeping schedule and then it would be passed on to her for approval again. I would see evidence she had made changes. No one had told me that my duties had changed. I was also responsible for making the duty manager’s schedule and then it was passed on to her for approval”*. The Employer’s witness, Ms. Whitehead, gave evidence that work which the Employee performed had been distributed to other employees. The Employee, for example, was responsible for making the list for overseas orders for the various departments, but with the departure of the Employee, Ms. Whitehead states under cross examination, *“Myself, Ms. Bonta now prepare the list for overseas orders; this function still exists.”* When shown Exhibit KW2, the Employee’s job description, Ms. Whitehead states, *“All these functions on the job description are still going on at the hotel”*. Her further evidence is that the Reception related functions, as stated on the Employee’s job description, were now being performed by a supervisor; the Personnel functions were being performed by the supervisors of departments.

[45] In addressing the question of whether or not a re-distribution of work which an employee last performed constitutes a diminution under the Antigua and Barbuda Labour Code definition of redundancy, we have looked to **Jennifer Watt vs Antigua Village Condo Corp**, Civil Appeal No. 6 of 1992. In this

case the work which the employee last performed was re-distributed among other employees and her position was declared redundant. Then President Cyril Maundy, in the case of **Leslie Emanuel and Royal Bank of Canada**, reference No 3 of 1994, stated *inter alia* as follows_ *“It is interesting to note that in the Antigua Village Condo Corporation V. Jennifer Watt.....(which went to the Court of Appeal) the Appellate Court did not interfere with the finding of the Industrial Court that there was no redundancy but a dismissal on the ground that the Employee’s position had become redundant where her functions had been assigned to other Employees, was unfair.”* This position was also held in the case of **John Molyneaux v Cove Hotels (Antigua) Limited**, Reference No 11 of 1991.

[46] While it is true that in the cases cited in paragraph 45 the Labour Code had not yet been amended to include diminution of work as part of its definition of redundancy, we hold that there is no difference between a claim to cessation resulting from a re-distribution of work and a claim to diminution resulting from a re-distribution of work. No evidence was led to show a diminution in the work which the Employee was last employed to perform.

[47] Byron C.J. in **Sundry Workers (Veronica Joseph and Others) and Kings Casino Ltd. (Civil Appeal No 28 of 2001)** stated.

“.....I think that the main point of relevance in this case is that it is pellucid that for a redundancy there must be the cause and the effect. The effect being that the work has ceased or substantially diminished. In the Industrial Court reference No 20 of 1988 Antigua Workers Union v Antigua Gases it was pointed out that the definition seems to contemplate the removal of superfluous workers. This could occur even where the tasks or work still exist but the employer requires fewer workers, or there is less work for

existing workers. It is also clear that it could occur where a force majeure, such as a hurricane, causes a situation that substantially affects the workload and no workers or fewer workers are required. Although in this regard the Labour Code makes provision for temporary laying off in such circumstances where the diminution in work is not permanent. This brings me to point out, however, that the existence of a cause, such as the hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably and the dismissal must be shown to have resulted from the cessation of work or the substantial diminishing of work as result of the hurricane.” (Bold emphasis is that of the Court.)

- [48] Having considered the submissions made by both parties, the evidence adduced and authorities cited, we are satisfied that the Employer has failed to persuade this Court that a redundancy existed at the time of the dismissal of the Employee.

ISSUE NO. 2

Was the dismissal fair in keeping with Section C 58 of the Antigua & Barbuda Labour Code?

- [49] We now turn our attention to Section C58 (1). It states as follows.

“ The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably 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".

- [50] What were the circumstances surrounding the retrenchment? The Employer claims that the hotel was experiencing financial challenges, reviewed its staffing needs, improved its plant to make it more competitive, re-distributed the work of one of its employees and dismissed the employee.
- [51] There are several tenets on which a determination of reasonableness in a redundancy case is normally based – warning, consultation with the employee, objective selection criteria, fair selection in accordance with the criteria and the offer of alternative employment. We shall address each in turn.
- [52] The evidence is that the Employer never discussed the need for retrenchment, the management review of the operations or the appraisal of her position with the Employee. Good industrial relations and indeed the law of natural justice mandate that the Employer should at least have made the Employee aware of the review being undertaken in relation to its staffing needs and the loss of jobs that could result. Did the Employer act reasonably in simply calling the Employee into a meeting and dismissing her on the spot?
- [53] The Employer contends that the Employee attended Executive meetings and should have been aware of the hotel's financial difficulties since financial data was discussed at such meetings. Even the Employer's witness stated that the financial information shared in the year of the dismissal, 2006, showed the hotel was doing **"fair"**. There were no alarm bells; austerity measures were routine, undertaken as they were each year during the **"slow"** period, a norm for the hotel industry.

Was it reasonable to expect the Employer to alert the Employee - a member of the Executive management team, an employee who had received high praise for her outstanding work - of a staff needs review, of possible loss of work, to offer the Employee other alternatives to dismissal? We think the answer is yes.

- [54] Justice H,S.R. Moe in **Linda Richardson and Deep Bay Development Co. Ltd.** states, *inter alia*,

“In circumstances like redundancy a good employer would give as much warning as possible to the employee so that the employee may be aware that the axe is about to fall long before it actually does fall. This also gives the employee an opportunity to seek alternative employment.”

The Employee was given no warning of an impending redundancy; no meeting was held with the Employee about the potential redundancy. We do not agree with the Employer that the discussions at the periodic executive and heads of department meetings, as outlined in the evidence, filled the criteria of warning the Employee “that the axe is about to fall’.

- [55] In considering the question of consultation, we turned to **Justice Peter Clarke in Mugford v Midland Bank PLC [1997] I.C.R. 399 (E,A.T)**. At pages 406 letters H and H and page 407 letter A, Justice PC stated, *inter alia*, as follows.

“ (1) Where no consultation about redundancy has taken place with either the trade union or the employee, the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.”

[56] In its letter of dismissal the Employer referred to a management review of the major areas of operation which was undertaken and a rationalization of each position in the Front-of-Office department. It also made reference to an appraisal of the position of Assistant Manager – Front-of-House. While there was no challenge by the Employee to the management review and rationalization exercise undertaken, we are of the view that some account of the process, be it in the form of minutes of meetings or a written report of the findings, would have assisted the Court in determining if the process was indeed transparent and fair. In the absence of such evidence the Court is unable to arrive at a conclusion on the objectivity of the criteria used in the selection process and the fair application of that criteria.

[57] The Employee’s evidence is that the Employer offered her neither alternative employment nor time to seek other employment. The Court looked to **Sir Hugh Griffiths’ statement, in Vokes v Bean [1974] I.C.R. 1 (N.I.R.C.)**. At page 4 letter E the learned judge state *inter alia* as follows:

“These employers made no offer of help to the employee before they

dismissed him, nor did they allow time off to seek work. As the employee reasonably complained: "It's more difficult to find employment if you have been summarily dismissed than if you are seeking a new job while still in employment."

[58] It is a well established practice that before making an employee redundant, an employer should make a genuine effort to seek alternative employment for the employee. In the circumstances, it was incumbent upon the Employer to demonstrate to the Court that every effort was made to ascertain whether alternative employment could have been obtained for the Employee or that alternatively the effort would have been futile given a set of circumstances. There is no evidence to persuade the Court that the Employer addressed its mind to the problem of alternative employment. Sir Hugh Griffiths clearly articulates, in **Vokes v Bean (op cit)** the Court's position and provided us with our conclusion on this matter. At page 5 letter E, Mr. Justice Griffith stated, *inter alia*, as follows:

"If the employers had made all reasonable attempts to place the employee in the group and had failed, then the time might have come when it would be reasonable for them to regard the redundancy as sufficient reason for the dismissal, but until that moment had come the Tribunal were entitled to take the view that it was not reasonable to dismiss for redundancy and accordingly that it was unfair."

[59] Having considered the facts and the circumstances in this case, we are convinced that even if there existed a redundancy situation the Employer did not act reasonably in dismissing the Employee.

ISSUE NO. 3

In the event that a redundancy situation did not exist, did the dismissal meet the Code's criteria of some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held?

[60] The Employer submits that if the dismissal does not meet the Labour Code's test for redundancy, it meets the Labour Code's *".....some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:"* (Section C58/sub-section 1(e)).

[61] On this issue we find Justice Browne-Wilkinson to be extremely helpful. In **Murphy v Epsom College** [1983] 1RLR 395, at page 399 Mr. Justice Browne-Wilkinson stated *inter alia* as follows:

"In Gorman v London Computer Training Centre Ltd. (1978) I.R.L.R. 22, this Appeal tribunal held that it was not necessary to 'plead' some other substantial reason in the full technical sense of the word. However, in our judgment in the light of the Nelson case it is probably necessary that the matter should be expressly ventilated in the Industrial Tribunal before it reaches a decision on the matter so that the parties can have a full and proper opportunity to deploy their case on the matter. Natural justice requires that the party should not have a case decided against him on a ground on which he has not had an opportunity to be heard.

It is therefore not safe for us to approach this case on the basis that the reason for dismissal was either redundancy or some other

substantial reason. It is accordingly necessary for us to consider whether, on the facts of this case, Mr. Murphy could properly be held to be redundant.”

- [62] No evidence was let in this case apart from the issues which were cited in the letter of dismissal. In this letter the Employer clearly states its reason for termination; namely that “...*a decision has been taken to retrench the post, declaring it redundant with immediate effect.*” In the circumstances of this case no “other substantial reason” existed for the Employee’s dismissal.

CONCLUSION

- [63] In arriving at our conclusion we have considered, *inter alia*, the demeanour of the witnesses, the cases and authorities cited and the arguments presented by both sides. We have sought to act in accordance with equity, good conscience and the substantial merits of the case, having regard to the principles and practices of good industrial relations. We took into consideration the Antigua and Barbuda Labour Code and the Industrial Court Act, Cap 214 of the Laws of Antigua and Barbuda to arrive at a decision which is fair and just having regard to the interests of the persons immediately concerned and the community as a whole.

- [64] We have concluded that a case of redundancy did not exist at the time of the Employee’s dismissal. In addition, the Employer did not act reasonably in dismissing the Employee. Consequently, the dismissal was unfair.

ISSUE NO. 4

If the dismissal is found to be unfair, what is the measure of damages should be paid to the Employee?

THE AWARD

[65] A person who has been unfairly dismissed is entitled to compensation. The following established heads have been used in computing the award.

(i) **BASIC AWARD**

The Employee commenced work on October 4, 1999. Her last salary was \$6,585.00 per month. Her employment was terminated on September 29, 2006. She is therefore entitled to **\$46,095.00** i.e. (7 yrs x 6,585.00)

(ii) **IMMEDIATE LOSS**

(a) An employee is required to make all efforts to mitigate his/her loss. The Employee applied to several business places in an effort to secure work. She was interviewed by the Free Trade Zone and Kennedy's Club. She was also promised interviews at Hodges Bay Club and Cross Roads, but they did not materialize. On May 15, 2007, she received a five month temporary employment with Mill Reef Club at a salary of \$5,600.00 per month. Upon her completion of this contracted period she was employed permanently at a monthly salary of \$6,500.00.

(b) We are satisfied that the Employee attempted to mitigate her losses, and we award her seven and a half months' compensation, the time it took her to obtain employment. She is therefore entitled to **\$ 49,387.50**.

(iii) **FUTURE LOSS**

(a) In the **Antigua Village Condo Corporation and Jennifer Watt Civil Appeal No 6 of 1992**, Sir Vincent Floissac stated,

“Compensation for loss of future earnings should be predicated on the probability that the earnings from future employment or self-employment will be less than the earnings from the terminated employment. The loss is the difference between the two earnings and not the total amount of the prospective earnings from the terminated employment.”

(b) In the **Antigua Commercial Bank v Mary White Civil Appeal No 1 of 1988**, Bishop J.A. explained,

“The head loss of future wages provides little difficulty when the employee has obtained other employment. There can be a determination of the difference between the current and the former remuneration. If the current remuneration is less than the former, it will form part of the loss, and then the length of time such a situation is likely or expected to last is estimated for the purpose of the calculation.”

(c) The Employee worked at a management level within the hotel industry. Given her management skills acquired over her seven years with the hotel, we would set the duration for computing her award as eight months. The Employee's first employment after her dismissal was for a five month period at a rate of \$5,600.00 per month, a difference of \$985.00 between her last salary at the hotel and the salary earned at this first employment. (\$6,585 - \$5,600). Her second employment, which immediately followed her first, was at a salary of \$6,500.00 per month, a difference of \$85.00. (\$6,585 - \$6,500) If a 5

percentum reduction is applied the sum is **\$4,921.00** under this head. (\$985 x 5 + \$85 x 3x.95).

(iv) **MANNER OF DISMISSAL**

Maundy P in **Leslie Emanuel v Royal Bank of Canada, Reference No. 3 of 1994**, in addressing the issue of manner of dismissal stated, *“It has to be shown that the Employee was made less acceptable to potential Employers or exceptionally liable to selection for dismissal....”* We do not find this to be the case, and therefore make no award under this head.

(v) **FRINGE BENEFITS**

(a) **Holiday pay in lieu of days worked:** The Employee contends that she is entitled to compensation for those days that she worked on public holidays. She states under cross examination, *“The practice at Blue Waters was if you worked on a public holiday you would get back the time. There was flexibility for managers’ working hours. I never really asked back for these times. I never made it an issue. It was up to my discretion to take the time and it was not convenient so I never took the time.”* However the Employee provided no evidence to support her claim that she worked on the public holidays claimed. Consequently, we make no award for this benefit.

(b) **10% year end bonus for 2005 and 2006:** The Employee did not present evidence to show that bonus was an automatic or contracted entitlement. It is noteworthy that she was unsure of the mechanism for computing this benefit: *“Ever since I started, I got a bonus, from 2000, though it was not based on a formula. Generally, a bonus is paid based on productivity and profit, but I do not know how the hotel arrived at its bonus.”* In light of this uncertainty and the appearance that this benefit was at the largesse of the Employer, we do not make an award under this claim.

(c) **Transportation allowance:** The Employee's evidence is that transportation allowance took the form of gas for her motor vehicle. Since this form of remuneration is tied to the actual usage of the vehicle we not find it reasonable to make an award under this head.

(d) **Thrift Fund:** In July 2006, the Employer commenced a contributory thrift fund in which both employer and employee each contributed 2½ % of the Employee's monthly salary. We find that, given the circumstances of her dismissal, she is entitled to both the employer and employee portions of the contributions for the months of July, August and September 2006, a sum of \$ 987.75.

(e) **Notice Pay:** The Employee is entitled to one month's pay - \$ 6,585.00 - in lieu of notice and we so award.

(f) **Vacation Pay:** No award is made since the Employee had received all vacation due to her at the time of dismissal.

(vi) **EXEMPLARY DAMAGES**

We make no award under this head.

[66] **TOTAL SUM DUE**

The total amount of the award is therefore:

Basic Award	46,095.00
Immediate Loss	49,387.50
Future Loss	5,180.00
Manner of Dismissal	.00
Fringe Benefits	
- Holiday pay in lieu of days worked	.00
- 10% year end bonus for 2005 and 2006	.00
- Transportation allowance	.00
- Thrift Fund	987.75

Vacation Pay	.00
Exemplary Damages	.00
Cost	<u>.00</u>
	107,976.25
Less: Amount paid at time of dismissal	<u>(52,680.00)</u>
Net Compensation	<u>55,296.25</u>

The Employer shall pay to the Employee the sum of **\$55,296.25** on or before the 15th day of September, 2009. There shall be no order as to cost.

Dated the 20th day of August, 2009



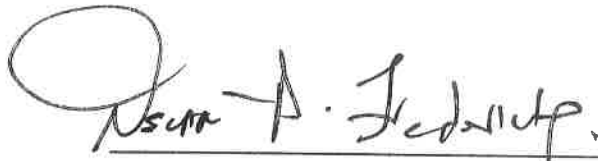
M. ALTHEA CRICK
Chairperson

I agree



GENEVIEVE L.I. BENJAMIN
Member

I also agree



OSCAR A. FREDERICK
Member

