



TRINIDAD AND TOBAGO
TRADE DISPUTE NO. 328 OF 2004

IN THE INDUSTRIAL COURT

BETWEEN

**BANKING, INSURANCE AND GENERAL
WORKERS' UNION - PARTY NO. 1**

AND

DEVELOPMENT FINANCE LIMITED - PARTY NO. 2

CORAM:

His Honour Mr. Addison M. Khan - President

APPEARANCES:

Mr. Kerwyn Garcia,)
Attorney at Law) **for Party No.1**

Mr. Krishna Sukdeo,)
Attorney at Law) **for Party No.2**

Dated: December 7, 2005

JUDGMENT

The issue giving rise to the dispute

The issue, which has given rise to this trade dispute, is the dismissal by the Development Finance Limited ("the Company") of Susan Merritt ("the worker"). The Banking, Insurance and General Workers' Union, ("the Union") alleged that the Company dismissed the worker in circumstances that were harsh and oppressive or contrary to the principles of good industrial relations practice.

Written Evidence and Arguments

Both parties presented written Evidence and Arguments to the Court in accordance with s. 8. (5) of the Industrial Relations Act, Chap. 88:01 ("the Act"). I also heard oral evidence presented on behalf of the Union and the Company. I deliver this judgment on the whole of the material before me, including the written Evidence and Arguments, the oral evidence adduced and the final written submissions of the parties.

The letter of dismissal

The Company terminated the worker's employment by letter dated January 15, 2004 ("the letter of termination"). The letter of termination stated, so far as relevant for present purposes,

"Further to the Company's intimation that the Financial Services Division (FSD) has been re-structured, your present job of Operations Supervisor no longer exists. The Company offered you the position of Operations Supervisor with SME Finance. You have indicated that your physical condition does not permit you to accept the post.

In the circumstances, we hereby give you forty five (45) days notice that you will be made redundant effective 29th February, 2004. You will receive notice pay until the end of February 2004 and a severance payment for your 15 ¼ years of service ...

We enclose our cheque for \$55, 589. 57...

Please be advised that you are not required to report for work after today."

At the time when the Company gave the worker the letter of termination, the worker was employed as an Operations Supervisor at a monthly salary of \$5,291. 00.

Report of trade dispute

The Union reported the worker's dismissal as a trade dispute to the Minister of

Labour by letter dated May 19, 2004 and the Minister certified the dispute to be unresolved by issuing a certificate dated November 29, 2004.

Summary of the undisputed material facts

The following facts are not in dispute between the parties:

(i) On March 10, 2003, the Company's Managing Director, One Mr. Pemberton, presented a Note to the Board of Directors on the restructuring of the Company's Loan, Finance and DMMS departments. The Note was entitled "Structuring of Operations (Loans, Finance, CDN MS" ("the Restructuring Note").

(ii) An unsigned memorandum dated November 10, 2003 addressed to all staff by the Managing Director of the Company ("the unsigned memorandum") stated *inter alia* under the heading "Financial Services",

"FSD has become "Financial Services, SME Finance" and is responsible for loan accounting, loan and credit administration, personnel administration, property services and general administration. This unit is headed by Ms Forde-Reid and **will be staffed by the "FSD" staff who are not assigned to FRSC**" (my emphasis).

(iii) The unsigned memorandum contained the names of the staff assigned to the new FRSC unit (i.e. Gregory Spicer, Marvin Marcelle, Charlene Young, Yvette O'Brien and Derek Barrow, all former workers in the FSD unit). The worker was the only one who was left out of the new FRC unit.

(iv) By an unsigned letter dated November 24, 2003, the Company's General Manager, Prakash Dhanraj, wrote to the worker as follows:

"Further to our meeting of Friday 21st November, 2003, please find attached a copy of your new list of duties.

Please sign and return as agreeing.

This is being provided to you on behalf of your new Manager Ms Giselle Forde-Reid who is on maternity leave.

Your desk will now be located on the Ground Floor South effective November 27th, 2003."

A list of duties accompanied the unsigned letter, the first of which was

1. Responsible for the order and tidiness of the Vault in the absence of the Vault Attendant. This includes filing documents, accessing files from cabinets and replacing files. Responsibility for ensuring that files are returned intact and kept in the vault overnight in all circumstances” (“Duty No. 1”).

(v) The worker replied to Dhanraj’s unsigned memorandum by letter dated November 24, 2003, in which she stated,

“With respect to our conversation on Friday 21st November, 2003 re: new duties, in particular ‘accessing files from Cabinet and replacing files’ and my medical problem, please find attached Medical letter from Dr. Gregory Chen, my doctor.

With respect to your memo dated 24th November, 2003 I will relocate as stated effective 27th November, 2003 (my emphasis). However, I will sign list of duties when recognition is given to my medical problem.”

Attached to the worker’s letter to Dhanraj was an undated medical certificate from Dr. Gregory Chen, B.Sc. (Hons) M.B.B.S, Physician/Surgeon, which stated that the worker had been suffering with scoliosis for a number of years and should not be allowed to lift or pull heavy objects.

(vi) The Company had received medical certificates from Dr. Gregory Chen during the years 1999 and 2000 concerning injuries to the worker’s lower spine and pelvis (1999) and lower back (2000) in respect of which the worker obtained short sick leave.

(vii) The Personnel Committee met with the worker to discuss her representations concerning her medical condition. The Company’s Notes of this meeting held on December 5, 2003 showed that the worker requested that recognition be given to her medical condition. The worker informed the committee that her medical condition as stated in the doctor’s letter prevented her from bending or stretching and she would not be able to access files from the vault. The worker stated that she had no other problems with any of the other duties listed in her new portfolio. The Personnel Committee questioned whether the worker had done filing in her previous position at FSD. The worker confirmed that she had done filing in her previous job but the filing was not as intense as what will be required for working in the vault. The Personnel Committee pointed out that filing in the vault would only be required when the existing vault attendant is absent. The worker stated that she was unwilling to perform that duty. The worker informed the Personnel Committee that in the past she had assisted in filing in the vault when the vault attendant was absent but she suffered a great deal of pain and that she did not want to undertake that duty. She had no objection to filing documents in the vault provided that she was not required to access or replace files.

(viii) The Personnel Committee referred the matter to one Carol Potter and a further meeting was held on January 12, 2004. Carol Potter, Giselle Forde-Reid and the worker were present at this meeting. At this meeting, the worker again stated that she had no problem doing any of the other duties listed save for accessing and replacing files from the cabinets. Potter stated that when the Company assigned a worker a job it had to be accepted in its entirety and the worker could not determine what part of the job was acceptable. Potter also told the worker that if she did not accept the position in SME she would be made redundant.

(ix) By the letter of termination, the Company ended the worker's employment.

(x) At the time of the worker's termination, the Company had on its establishment a vault attendant, who was on extended sick leave. The procedure when the vault attendant was on duty was as follows:

- The vault attendant would retrieve files requested and place them on a table accessible to the person requesting them;
- The person requesting a file would return the file to the table after use;
- The vault attendant re-filed the files used.

Comparison of worker's previous and new duties

A comparison of the worker's previous and new duties is instructive for determining whether or not Duty No. One in her revised list of duties was a fair, just and reasonable one in the light of her status as a Supervisor and/or whether it constituted suitable and comparable employment.

Duties as Operations Supervisor, Financial Services Division as at November 2003	Duties as Operations Supervisor, SME Finance with effect from December 1, 2003
<ul style="list-style-type: none"> • Receive all expenditure forms for all cheques payable, enter A/c Folio Numbers for the respective accounts, prepare cheques, give to Y. O'Brien for approval and then on for signatures. When cheques are signed they are logged into a book and sent out to the respective companies/ individuals. Prepare all disbursement cheques. • Receive all incoming cheques for DFL, stamp and enter into log book. • Prepare Citibank Deposits for US 	<ul style="list-style-type: none"> • Responsible for the order and tidiness of the Vault in the absence of the Vault Attendant. This includes filing documents, accessing files from cabinets and replacing files. Responsibility for ensuring that files are returned intact and kept in the vault overnight in all circumstances (Duty No. 1) • Timely faxing of DFL client statements before the 20th of the Month • Maintain a schedule of insurance renewals for DFL clients. Send

<p>cheques received and give to Mr. Lalchan for delivery to Citibank.</p> <ul style="list-style-type: none"> • As cheques are prepared they are to be entered on to Great Plains on a weekly basis: both TT cheques and US cheques and D/A. • Prepare weekly Reserve Reporting Form to Central Bank every Wednesday and ensure this form reaches Central Bank by the due date. • Prepare PAYE and Health Surcharge forms to Board of Inland Revenue by the 5th of each month ensuring that payments are reached on time. • File all correspondence for FSD. • Ensure Attendance Register for the department is done on a weekly basis and given to Mrs. Pereira by the following Monday. • Maintenance of Petty Cash Float and reimburse float when necessary. Disburse funds when necessary. • Maintain a Spreadsheet on all motor vehicle expenses on a monthly basis and pass to Mrs. Forde-Reid on a monthly basis. • Check all gas bills and prepare for payment and pass to Ms. Young for authorisation. • Keep record of all purchase orders going out. • Facilitate in typing any other correspondence upon request by the Manager of the Division when necessary. • When Ms. Leid is away... facilitate the preparation of receipts for all incoming cheques/cash 	<p>reminders to clients and follow-up receipt of renewals and inform the Manager Loan Operations where renewals have not been received.</p> <ul style="list-style-type: none"> • Follow up on the receipt of Audited Financial Statements for DFL clients. To send reminders to clients and follow up receipt and inform the Manager Loan Operations where statements have not been provided. • File all correspondence for SME Finance. • Facilitate SME Finance staff in typing or formatting any other correspondence. • Ensure Attendance Register for SME Finance is done on a weekly basis and given to Ms. Perreira by the following Monday. • Ensure adequate supplies of stationary and office supplies for SME Finance. • Handle incoming calls to SME Finance including taking and delivering messages to SME Finance Staff. • Providing Administrative support to SME Finance Managers for SME Finance events. • Providing Administrative support to DFL Managers in DFL Group events.
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It will be noted from the above lists of duties that, in her former position in the FSD department, the worker's duties were clerical and administrative whereas there was a mixture of clerical,

administrative and manual duties required of her in the SME department, a highly unusual combination of duties by the standards of good industrial relations practice.

The Company's submissions and my decisions thereon

- The Company submitted that, pursuant to the restructuring of the FSD, the position of Operations Supervisor became redundant and that the worker was re-deployed and offered a comparable job. This submission cannot, however, be supported on the facts. A mere redistribution of duties does not create a redundancy situation and, in any event, I find on the facts that the Company never intended that any of the workers affected by the restructuring exercise was to be made redundant or retrenched from the Company's service. If redundancy had in fact occurred, then it was the Company's obligation under the Retrenchment and Severance Benefits Act, 1985 ("the RSBA") to give the required notice and information to the worker immediately after the restructuring exercise had been completed, i. e. at the time when the Managing Director issued the unsigned memorandum. The Company, however, gave no such notice or information to the worker. Moreover, it is abundantly clear from the Managing Director's unsigned memorandum that the Company never intended to make any of its workers redundant and I so find. Far from being made redundant, however, the Company transferred the worker to the position of Supervisor, SME in a position that required the worker to perform administrative, clerical and manual duties (See Duty No. 1). In the circumstances, I find that the Company's insistence on the worker performing Duty No. 1 was unfair and unjust and unreasonable and contrary to the principles and practices of good industrial relations and that the new duties that were assigned to her did not constitute suitable and comparable employment.
- The Company also submitted that the worker's duties were not severable and that the worker was not entitled to elect what functions she wanted to perform. I hold that it is contrary to the principles of good industrial relations practice for the Company to have required the worker to perform the manual and menial duties of being responsible for the "order and tidiness of the vault in the absence of the vault attendant".
- The Company submitted that Dr. Chen was unable to provide the evidential basis for his diagnosis. The Company, however, presented no medical evidence to challenge Dr. Chen's diagnosis that the worker was suffering from scoliosis. In the absence of medical evidence to the contrary, I accept Dr. Chen's finding that the worker suffered from scoliosis.

- The Company also submitted that Dr. Chen did not indicate what, in his medical opinion, was considered heavy for the worker to lift. I find that, if the Company had any doubts concerning Dr. Chen's medical opinion, it could have sought particulars from the worker or obtain other medical opinion. The Company did not, however, do so.
- The Company submitted that the failure of the worker to accept the new employment amounted to a material breach of her contract of employment. I find that the worker did not refuse to accept the new employment. She accepted the employment but pleaded with the Company to consider the effect the onerous duties described in Duty No. 1 was likely to have on her health but the Company rejected her plea.
- The Company also submitted that it was entitled to terminate the worker's employment consequent upon her ill health. The Company, however, did not terminate the worker's employment for that reason.
- The Company submitted further that the worker was not entitled to severance benefits. I agree with this submission. I have already held that there was no redundancy, that the worker's assignment to the SME Division amounted to a transfer.
- The Company also made a number of other submissions but, in my opinion, none of them can be sustained or upheld and I reject them.

My findings on the evidence

On the whole of the evidence, I find

- (1) The worker had a clean and excellent record of service prior to the Company's termination of her service. The Company commended her on several occasions and gave her high ratings in her appraisals.
- (2) The restructuring exercise amounted to a re-organising of the Company's Financial Services Division in which the worker's duties were re-distributed to other workers.
- (3) In effecting the restructuring exercise, the Company did not intend that any worker or workers were to become surplus to its organisation.
- (4) The Restructuring Note did not state that the worker's position was going to be redundant as a result of the new structuring of the departments concerned.

- (5) The Managing Director's assertion and assurance to all staff in the undated memorandum (supra) that the new Financial Services SME Finance unit ("the SME department") "will be staffed by the 'FSD' staff who are not assigned to FRSC" showed plainly that the Company did not intend that any of its staff members should be displaced or made redundant as a result of the re-structuring exercise.
- (6) The inclusion in the unsigned memorandum of the names of the staff assigned to the new FRSC unit (i.e. Gregory Spicer, Marvin Marcelle, Charlene Young, Yvette O'Brien and Derek Barrow, all former workers in the FSD unit) coupled with the Managing Director's statement therein that **the SME department was to be staffed by the 'FSD' staff who are not assigned to FRSC**" showed unmistakably that the worker was to be re-assigned to the re-named Financial Services SME Finance unit. Moreover, there was no indication whatever in the unsigned memorandum that the worker's position had become redundant and, therefore, the two organisational charts which the Company presented were in direct contradiction to the very clear statement in the unsigned memorandum that the new Financial Services SME Finance unit **"will be staffed by the 'FSD' staff who are not assigned to FRSC"** (my emphasis).
- (7) The worker was the only one who was left out of the new FRC unit and, therefore, by the Managing Director's assertion in the unsigned memorandum she was to be re-assigned to the new SME department.
- (8) At the time of the worker's transfer to the SME department, the vault attendant was on extended leave and unlikely to return to work.
- (9) The vault attendant's a position was, therefore, an established one on the Company's payroll.
- (10) Instead of making temporary arrangements for filling the vault attendant's position, the Company insisted that the worker perform the duties of the vault attendant. This was an uncaring, callous, uncompassionate and oppressive exercise of managerial discretion. Just as no right thinking organisation would require a General Manager to perform janitorial duties, just so is it unthinkable for a person of the worker's status and position as a supervisor in the organisation to be required to perform the manual duties of a vault attendant. It was not only demeaning to the worker but also contrary to the principles and practices of good industrial relations to require the worker to perform those duties.
- (11) Whether the Company knew or had knowledge beforehand that the worker was suffering from scoliosis is immaterial. The fact is that the worker presented the Company with a medical certificate explaining her medical condition. Any humanitarian employer would have carefully considered the

worker's medical condition instead of dismissing it so cavalierly as the Company did in this case. This was not the case of a worker who was medically unfit to perform her duties and was seeking alternative employment. This was a case where the worker was quite willing to and capable of performing all the duties in her list of duties save for the unreasonable one of having to perform the duties of a vault attendant in addition to her supervisory and administrative duties.

- (12) The letter of termination was based on the false premises that: (a) the worker's former position had become redundant when there was merely a restructuring and redistribution of functions (b) surplus labour had resulted but the Company's Managing Director gave the assurance that no staff affected by the restructuring would be displaced ; and (c) the worker had stated that her physical condition did not permit her to accept the post. What the worker was objecting to quite rightly was the requirement to make her perform the duties of the vault attendant, having regard to her medical problem. She made it quite clear that she was willing to do all the other duties and in fact, she had assumed the position since November 27, 2003.

My order

The worker joined the Company's service on December 1, 1988 and served the Company competently and diligently until her unfortunate dismissal by letter dated January 15, 2004. The Company dismissed her when she raised with the Company her legitimate concerns about her being required by the Company to perform duties which should quite properly be performed by a vault attendant. The Company dismissed the worker's concerns even though she presented a medical certificate certifying that she was suffering from scoliosis and should not be allowed to lift or pull heavy objects. I find that the Company's decision to terminate the worker's services in all of the circumstances of this case, harsh and oppressive and in violation of the principles and practices of good industrial relations.

I, therefore, hereby order the Company to forthwith reinstate the worker in the position of Operations Supervisor, S.M. E. Finance, i.e. the position she held immediately before the Company terminated her services, on the following conditions:

- The worker is to be re-instated without loss of status, rights, privileges, perquisites, seniority, salary, promotional opportunities, overtime allowances, gratuities, bonuses and all other benefits of whatsoever kind or nature which she would have received had the Company not terminated her employment.
- On and after her reinstatement, the Company will not require the worker to perform the following duties or any similar duties, that is, the duties of being responsible for the order and tidiness of the vault, including accessing files from cabinets and replacing files in cabinets or for personally returning files to the vault or any other duties involving manual or other physical activity which would aggravate the worker's medical condition of scoliosis and the Company must amend the worker's list of duties dated November 27, 2003 accordingly.
- The Company will pay the worker not later than December 21, 2005 in respect of the period of time she was prevented by the Company from working the amount of \$75000.00 as damages. In arriving at this amount, I have taken into consideration among other factors, that the worker obtained other employment after the termination of her services, albeit as a secretary.

Union's application for costs and interest

Finally, in respect of the Union's application for costs and interest, I hereby order the parties, in default of agreement thereon, to present their submissions in writing on or before January 16, 2006. Exchange of these submissions will be effected on

or before January 23, 2006 and the application for costs will be heard on February 21, 2006 at 9.30 a.m.

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Addison M. Khan,
President, Industrial Court