

IN THE INDUSTRIAL COURT

REFERENCE NO. 29 of 1995

BETWEEN:

ALISTER GREEN

and

HALF MOON BAY HOTEL

Before:

Mrs. Nelleen Rogers Murdoch – Chairman
Ian Shoul – Member
Genevieve Benjamin – Member

Appearances:

Justin L. Simon, later Mary White for the Employee
Joyce Kentish of Lake & Kentish, for the Employer

Unfair dismissal - Constructive dismissal - Alteration of terms of payment from monthly to hourly - Whether breach of a fundamental term – Whether sufficient to entitle employee to claim constructive dismissal - Re-organization of work force - Redistribution of tasks – Whether redistribution and reorganization sufficient for employee to claim constructive dismissal – Summary dismissal – Employee allegedly told “Get to hell off my property” – Whether employee is dismissed – Employer’s letter one day later stating employee not dismissed – Effect of letter on alleged dismissal.

Facts:

1. The Employee was first employed at the Half Moon Bay Hotel in 1982. Sometime in or around March 1992 the management of the hotel changed and the Employee was then employed under the management of CHMS management company. He continued to be employed by CHMS until September, 1995 when Hurricane Luis struck Antigua. Between September, 1995 and December, 1995 the hotel was closed but the Employee continued to be paid. In December, 1995 the Employee was laid off from his employment from 20th December, 1995 to June, 1996.

2. At the time he was laid off, CHMS ceased operating the hotel and the operation of the same was taken up by Mrs. Natalia Querard a director of the company which owned the hotel and who had in fact been operating the hotel since September, 1995 after Hurricane Luis.
3. Despite being laid off, after discussions with Mrs. Querard, the Employee continued, in employment at the hotel. This employment continued until 3rd November, 1998 when the Employee ceased employment with the hotel.

Claim:

4. The Employee claims compensation for unfair dismissal, and or for constructive dismissal arising out of the Employer's decision to alter his pay calculation from monthly paid to hourly paid, and out of her alleged statement to him in a meeting to "Get to hell off her property".

Employee's evidence:

5. The Employee's evidence is that he was employed by Mrs. Querard at Half Moon Bay Hotel in the capacity of maintenance manager with general responsibility for the cleaning up and maintenance jobs at the hotel. Since there were no guests at the hotel after the hurricane the duties were somewhat decreased, nevertheless he was in charge of all maintenance etc.
6. His salary was \$4,750.00 which was the same rate of pay he got from CHMS. In addition to this sum he was paid his severance for his years of service with CHMS at the rate of \$1,000.00 per month until his severance was paid in full. Later this salary of \$4,750.00 was increased by \$750.00 to \$5,500.00 per month which salary he received until his employment ceased.
7. Some time in October, 1998, the Employee was advised by Mrs. Querard's son that the sum of \$3,000.00 had been deposited to his bank account in respect of his salary up to 19th October, 1998 as he was to be paid at an hourly rate effective 20th October, 1998. The Employee objected to this, and advised Mr. Querard the he would take the matter up further with Mrs. Querard who was then absent from the island.

8. On her return to the hotel the Employee discussed the matter with Mrs. Querard and she advised him that the decision to change his salary to an hourly rate was her decision and that it was being carried out by her son. He asked Mrs. Querard to change her decision but she refused to after which he said "What can I do?" and he continued working. The Employer never told him what his rate of pay would have been, and gave him no details but simply stated she was sticking to her decision.
9. On 3rd November shortly after this incident Mrs. Querard held a staff meeting to which all staff were invited. This meeting was the usual Tuesday staff and management meeting.
10. There was a briefing that morning at which the Employer informed the staff that there were going to be several changes. She advised that the meals hours will be ½ hour for both breakfast and lunch rather than the ½ hour breakfast and the 1 hour lunch from before. She also advised that checking out and washing up time would be cut out so that the 15 minutes allowed for cleaning up before leaving the premises would be changed. Employees now had to down tools at 4:00 p.m. rather than 3:45 p.m.
11. The staff was also advised that the workforce would be divided into two groups, group A and group B. She advised group A of its responsibility and advised Group B of its responsibility. The Employee was not assigned to either group and was told that he could join any one of the groups. No one was appointed to be the manager of either group, and both groups were told that they were to report either to Mrs. Querard or her son directly.
12. Prior to this meeting all jobs to be completed were discussed with the Employee and he would delegate the jobs to the appropriate members of staff according to their skill and ability as he knew it.
13. The Employee stated that after advising of the changes Mrs. Querard invited comments as she usually did at these meetings. He stated that he indicated that if there were going to be changes he wished first to see several changes, among them (1) payment of the employees' Social Security contributions; (2) payment of the

employees' Medical Benefit contribution; (3) payment of the Education Levy contribution; and (4) payment to the employees of holiday pay that was due to them.

14. In response Mrs. Querard answered that the Employee could take a permanent holiday as far as she was concerned and when he stated that he was not bothering with her she advised him that she would deal with him after the meeting. He states that there was no further discussion with him at the meeting.
15. At the end of the meeting members of staff dispersed to their various stations and the Employee went to a bar area several feet from where the meeting had taken place. Mrs. Querard and her son came over and Mrs. Querard told him that he was inciting the staff. He responded that she was disrespecting him and belittling him in the meeting, after which she told him "You are fired".
16. The Employee also stated that the Employer told him "Get to hell off my property", and that when he advised her that he was not leaving until he got his money – by which he meant his holiday pay and his severance for the time he worked for her, she advised him that she had no money for him.
17. The Employee then left the property and returned the next day with a letter "AG3" from his attorney Mr. Donald Halstead. He delivered the letter to the receptionist and he has not returned to the property since.

Employer's Evidence

Four (4) witnesses gave evidence for the Employer, Paul Newsom, Elvis Black, Natalia Querard and Constantine Querard.

Paul Newsom's evidence

18. The witness stated that he was employed at Half Moon Bay Hotel doing maintenance. Mrs. Querard is his employer. He was a security guard prior to Hurricane Luis in 1995 and was promoted to water sports manager but since that he began to work in maintenance. Mr. Green was his immediate supervisor when he worked in maintenance.

19. He could recall the staff meeting of 3rd November, 1998 and the exchange that took place between Mrs. Querard and the Employee.
20. Mrs. Querard did what she normally did at staff meetings i.e. discuss her concerns and then ask for comments. He could not recall what triggered the discussion but the issue of Social Security, holiday pay etc. came up and the Employee was the one who raised it in the meeting. He too intervened in the matter after which things started to get a little heated between the Employee and Mrs. Querard.
21. The discussion between the Employee and Mrs. Querard got to the point where the Employee stated that as far as he saw it he could use his vacation right now and that Mrs. Querard in return replied that as far as she was concerned the Employee could take a permanent vacation.
22. The meeting ended shortly thereafter and he returned to his work area with the other employees but the Employee did not return. He also stated that the Employee's car had been on the premises prior to the meeting but that it was not in its usual spot after the meeting.
23. Prior to the meeting he was aware that both lunch and breakfast was ½ hour each and that had been the position since he worked with CHMS. At the meeting that morning the Employer reminded staff members of the allotted time.
24. At the meeting the Employer had divided the staff into two groups one which she named "grounds staff" and she named a supervisor for the grounds staff called Glendon Fordyce. The person in charge of grounds and maintenance was Mr. Green, grounds and maintenance was one area and Mr. Green was in charge of that area. At the meeting he still understood Mr. Green to be in charge of overall grounds and maintenance. He understood that there was a supervisor in charge of grounds but understood that the supervisor would still have to answer to Mr. Green.
25. He never heard the Employer saying at the meeting that Mr. Green would no longer be in charge of grounds and maintenance nor did

he hear the Employer at the meeting tell Mr. Green that he was fired from his job, neither did he hear her tell him "Get to hell off my property".

Elvis Black's evidence.

26. Mr. Black stated that he had worked at Half Moon Bay since 1985 but not continuously. There had been two breaks each for a year when the hotel closed in 1992 and again when the hotel closed in 1995 after Hurricane Luis. In 1993 when he went back after the first closure, CHMS was operating the hotel. When he went back after the second break Mrs. Querard was his employer. He worked then as a maintenance mechanic. This has always been his job.
27. He could recall the staff meeting in November, 1998. He could not recall everything that happened but some of it he could. He remembered Mrs. Querard opening the meeting as she always did. He also recalled that there was talk about Social Security and Medical Benefits contributions. Paul Newsom was making a point on these matters and the Employee, Mr. Green came in somewhere along the line to support the point which was being made by Paul Newsom.
28. He could not recall exactly who had brought up the issues of Medical Benefits and Social Security as it was a long time ago. He however recalled that both the Employee and Mr. Newsom spoke on the matter. He also recalled that after Mrs. Querard finished the first person to speak was the Employee.
29. The Employee at some point spoke on the topic of holiday and asked about his holiday. He did not recall exactly what transpired but he recalled that the Employee told Mrs. Querard that he would like his holiday. In response Mrs. Querard stated that the Employee could take his vacation and could take a permanent vacation. This exchange between Mrs. Querard and the Employee went on until the meeting came to a close.

30. Mrs. Querard also spoke on the matter of the time taken by employees for lunch and that the staff was divided into two work groups, group A and group B. There were times when the employees went over the allotted time by 10 or 15 minutes and Mrs. Querard was trying to inform the employees that they should get back to work immediately after the lunch break.
31. The lunch break was $\frac{1}{2}$ hour and the breakfast break was $\frac{1}{2}$ hour with breakfast from 7:00 a.m. – 7:30 a.m. and lunch from 12:00 noon to 12:30 p.m. It was not the first time in a meeting that Mrs. Querard had reminded staff of the times for lunch and breakfast. The lunch and breakfast had both been $\frac{1}{2}$ hour when he had worked previously with CHMS.
32. He recalled Mrs. Querard dividing the staff into two groups A and B, A being responsible for grounds and B being responsible for maintenance. His immediate supervisor was Mr. Green. When Mrs. Querard divided the groups he was put in the maintenance group B. He understood Mr. Green to be his immediate supervisor with respect to maintenance. He did not recall if the named supervisor was said but that Mr. Glendon Fordyce was appointed in charge of grounds. He said that he understood that Mr. Green was to be the supervisor in charge of everyone and that they were all to report to him.
33. He also stated that the staff was told that cleaning up time was after signing out at 4:00 p.m. He could not recall if this had been said at a previous meeting, but stated that employees would begin to clean up as early as 3:45, sometimes 3:30pm., and break up at 4.
34. The witness stated that he did not hear Mrs. Querard tell Mr. Green that there were to be changes in his conditions of employment or that he could take it or leave it. He however stated that Mrs. Querard did use the term take it or leave it to Mr. Green and that it was said concerning the meal times that she was offering.
35. When the issue of vacation pay came up he did not hear Mrs. Querard tell Mr. Green to get to hell off her property. He also could not recall her telling him that he was not assigned to either group A or B.

36. During the meeting Mr. Green's voice was loud, although he could not state that he was "in a passion". He also stated that Mrs. Querard who never speaks loudly, was speaking normally, he never heard her voice raised.
37. After the meeting, he went immediately to the workshop. He did not know where the Employee went nor did he see him in conversation with Mrs. Querard. The Employee came to the workshop about 10 or 15 minutes after the meeting ended and got into his car and drove off. He does not know where the Employee was during the 10 or 15 minutes.

Evidence of Mrs. Natalia Querard

38. The witness stated that she is the managing director of the company which owns the Half Moon Bay property. The hotel is not running or operating as a hotel since Hurricane Luis. Her function in Antigua is to take care of the property, any legal action, the supervision and development of plans, drawings and funding.
39. After Hurricane Luis a reduced number of employees was retained but everyone's job description was different because of the hurricane. All employees were aware of the changes.
40. When she took over the hotel there were several debts outstanding, among them debts to Social Security, Medical Benefits and Education Levy. Both employer/employee contributions were being paid by the hotel and arrangement for this payment had been made with the various Departments. The Employee was well aware of this as she had advised him of this repeatedly.
41. The Employee was the supervisor of maintenance. After the hurricane in 1995 she kept him on and paid his salary and also his severance as he had advised her that it had not been paid.
42. She stated that problems with the Employee began in relation to his work attendance toward the middle of 1996. He had started construction on his house and it was taking up much of his time. He had asked for time off to supervise the laying of the foundation,

the pouring of the concrete and several other stages of construction. He was permitted to do this initially when his absence or lateness was of short duration. However, after a time the Employee was absent for longer periods sometimes for up to one day without notice. The result was that it was damaging to the hotel in the sense that there was no supervisor on site to deal with emergencies and matters that came up and the staff as a result of his absence was without supervision or instruction.

43. She spoke to the Employee repeatedly over the last two years of his employment about the fact that he was expected to work a five day week from 7 – 4 Mondays to Fridays. The Employee always promised to improve, and he would show improvement for a time, usually for about one week, and then revert to the lateness and unauthorized absences.
44. She admitted that she never wrote to the Employee about his absences and the effect it was having on the business although she spoke to him about it on several occasions.
45. In June or July, 1998 the Employee's severance payments had been completed and the company paid him interest on the severance to maintain him at the same salary level. Thereafter when the Employee requested a loan she agreed to increase his salary from \$4,750.00 to \$5,500.00 per month on the condition that he put in a forty hour week. She advised the Employee that if he failed to put in the forty hour week he would be paid the equivalent of \$5,500.00 on an hourly basis.
46. The Employee indicated that he would work the 40 hours and requested that he continued to be paid monthly.
47. The Employee however failed to put in a forty hour week. His absences became persistent again when she travelled overseas and she spoke to her son Constantine Querard and instructed him to implement her decision to pay the Employee at the hourly rate. This Mr. Querard did around 20th October, 1998 so that the Employee was paid a salary of \$3,000.00, the amount due to him at the monthly rate up to 19th October, 1998. He was advised that thereafter he would be paid hourly.

48. She stated that when she returned to Antigua the Employee requested her to change her instructions concerning the hourly rate and she told him she would change it when she saw him work 40 hours per week.
49. After the conversation in June or July 1998 she did not speak to the Employee about his non-attendance or of the plan to change the basis of payment. When she first spoke to the Employee about the change in method of calculating his pay he requested her to change it and did not agree to it being done. Once it was done however the Employee did not protest about it.
50. She referred to the incident on 3rd November, 1998. It involved the usual weekly staff meeting held on Tuesday. She gave the employees reminders about their work periods and about the lunch and breakfast break of ½ hour. All employees were allotted ½ hour breaks for breakfast and lunch and this applied to the Employee as well.
51. She did not inform the staff that there would be changes in the breakfast and lunch break. She did remind them about the established practice on breakfast and lunch. She also raised the issue of check out and clean up time since she felt that 3:00 – 3:15 was not an appropriate time to down tools.
52. After she had raised her concerns she invited comments around the table as she usually did and no one commented until the Employee who stated that as long as she was not providing the staff with all the benefits to which they were entitled, then she could not hold them to the standard of performance she required.
53. She reminded the Employee that all staff knew of the conditions and that they were working at the premises because they wanted to. She stated that the Employee then got very heated and pounded his fists on the table. Mr. Paul Newsom then came in and spoke in a conciliatory tone and asked about the status of the benefits. The Employee kept insisting that she was not fair, and stated that he needed a vacation. The witness stated that in response to this she replied that as far as she was concerned it could be a permanent vacation.

54. The meeting went on for a short time thereafter and it eventually ended. She did not become angry or agitated or upset during the meeting.
55. After the meeting neither she nor her son met with the Employee at any time. She had concluded when the meeting ended, that the Employee had gone back to his job although she did not see where he had gone. She never told the Employee in the meeting when he protested the alleged changes to his conditions of employment that he could take it or leave it. She also did not tell him in that meeting that he was fired when he requested the vacation due to him.
56. The Employee did not at the meeting request compensation from her for his years of service, neither did she tell him to get the hell off her property. She neither used those words nor similar words and there was nothing that was said at the meeting or after that could be construed as a dismissal.
57. There was no meeting with the Employee after the staff meeting. During the meeting he was shouting about his need for a vacation and she did suggest that they discuss it privately afterwards, but the Employee refused, stating that these were matters for everybody's concern.
58. She did not see the Employee for the rest of the day or indeed the next day or any other day on the property.
59. She stated that she received a letter from the Employee's attorney the next day. The letter was dated either the 3rd or the 4th November. She was advised that the letter had been delivered by the Employee. The envelope contained four (4) type written pages, two being a letter from the Employee's attorney (AG3), and the other two pages being a statement from the Employee signed by the Employee.
60. The letter asserted that the Employee had been fired wrongfully and demanded that he be reinstated. She responded immediately to the letter in writing. (Exhibit "AG4" dated 5th November, 1998). In the letter she stated clearly that she had not terminated the

Employee's services and that his job was there for him to perform. She immediately advised that reinstatement was not an issue, and explained that the Employee's issues at the job were his non attendances and the solutions she had sought to put into place to address that problem.

61. On several occasions after writing the letter at meetings etc. she made it clear that the Employee had not been terminated and that his job was there for him to do.
62. She stated that during the course of his employment it was the practice of the hotel to keep gate logs for security purposes. These gate logs showed who entered and left the premises and when. They were kept by the security officer on the compound and applied to all persons who had access to the premises without exception.
63. During his employment the gate log showed for the six month period prior to November 3rd 1998, that the Employee had consistently failed to work a 40 hour work week. His average pattern for the period was between 20 and 30 hours per week.
64. The Employee did not report his absence from the property to her. The normal procedure was for him to report that he was in when he arrived and for her to advise him of the tasks to be performed. On many occasions he failed to report in, and when she called him on the radio, he often did not respond. On these occasions she would be advised by the security officer that he was not on the premises.
65. Although she never wrote to the Employee about his absences, she repeatedly spoke to him about it and when he was absent so regularly that it became a problem, she sought to address it as best she could, without resorting to other discipline because she regarded the Employee as an important member of the team. She therefore tried to influence his attendance by tying his salary closer to his attendance, as this seemed the most equitable way of resolving the problem. It put the solution to the problem within his control.

66. The proposal to link his salary to his attendance was discussed with the Employee before it was done some time during the summer. The Employee had stated that he would improve his attendance and wanted to show that he could without the measure that she suggested. She agreed to give him another opportunity but advised him that it was his last chance but he lapsed again and fell back to his old ways of absenting himself from the premises. His absence was brought to her attention during her absence from the island and she made the decision to implement the change. This her son put into effect.
67. The Employee asked her to rescind the decision on her return to the island, but she declined as she could not rely on his promises to improve. She told him that the decision did not decrease his income, it in fact increased it, but that the Employer would no longer pay for his absences. His salary was increased to \$5,500.00 per month at the hourly rate so that if he worked the full 40 hours required he would get the full \$5,500.00 per month instead of the \$4,750.00 which he previously earned.

Evidence of Constantine Querard.

68. The witness stated that he was a director of the company since 1995 as well as an employee since September 1st 1996. His duties included assisting in sales and making efforts related to the re-opening of the hotel. He also did some of the accounting, and preparation of business plans and where possible assisted with the daily operations of the property. This latter task included staff supervision and instructions.
69. He was at a staff meeting on November 3rd 1998. The meeting was the usual staff meeting on Tuesdays. The matters that were discussed were reminders to staff to conduct themselves in the right way. Lunch breaks and breakfast breaks were discussed with staff being reminded that each was ½ hour. They worked from 7:00 a.m. to 4:00 p.m. with a one hour break for meals. Since staff sometimes took more than the allotted time they had to be reminded. He did not recall this issue being a point of contention at the meeting it was part of the regular reminder.

70. Staff allocation and responsibilities were also dealt with, basically clarifying the role that various staff played in the maintenance of the facility. Previously an employee Owen George, a gardener who had since left the hotel, had been supervising landscaping and maintenance of the grounds. He had not been replaced so that there was no one but himself and his mother Mrs. Querard, or the Employee who could work in a supervisory capacity over the grounds. Since he and Mrs. Querard were busy in the office this restricted their ability to supervise the grounds, and the Employee's responsibilities both on and off the compound prevented him from being able to spend time as well on the grounds so that the grounds suffered.
71. At the meeting, Mr. Glendon Fordyce was assigned to replace Owen George as he was good skill wise in this area. The employees were at this time divided into two groups but, their division did not change the Employee's status as supervisor. The overall maintenance of the property as a whole remained his responsibility. He stated that the mechanical aspects of the property maintenance could be dealt with part time, but the physical appearance of the grounds was vital to their efforts to re-open the hotel and this was a full time job. Since they were not receiving full time response from the Employee the property suffered.
72. The Employee was not told in the meeting that he was no longer in charge of supervision of the property and none of the duties and responsibilities that he had previously performed were taken away.
73. He recalled that Social Security and Medical Benefits were discussed at the meeting. These issues came up from time to time in meetings and were brought up this time by the Employee. At this meeting the Employee again brought up the issue stating that employees were not receiving all their benefits and that the Employer was doing wrong by him and all of the staff. An answer was given to the Employee which was a repeat of what had previously been stated in staff meetings, that the Employer had been in talks with the authorities on Social Security and Medical Benefits and Education Levy and that the matter had been receiving attention. The Employee knew this from before.

74. Other employees participated in this discussion such as Paul Newsom, Elvis Black and Glendon Fordyce. Initially the tone of the meeting was regular, relatively pleasant. It got more severe when the Employer finished and invited comments and the Employee protested the changes and raised the issue of the Employer's bad faith. He viewed the ½ hour breaks as changes and complained generally about working conditions. The Employee was basically angry and agitated for reasons which the witness stated he suspected were outside of what had occurred in the meeting. No one else appeared to be agitated, and he (the witness) raised his voice only after the Employee had raised his voice, and was being very loud and banging on the table. The Employee interrupted the Employer while she was attempting to respond to his question. He (the witness) raised his voice to inform the Employee that he had asked a question and that he should give the Employer an opportunity to respond.
75. The Employee also raised the question of holiday pay towards the end of the meeting when the other matters had been addressed. The Employee stated that he would now want to take his vacation that was owed and the Employer made a sarcastic response that he had already been on vacation taking into consideration his numerous absences.
76. He did not recall the Employer saying that the Employee could take a permanent vacation, but that he would not deny she said it as this was four years ago.
77. To the best of his recollection it was not true that the Employee was fired at the meeting which only reaffirmed his status and his responsibilities. He did not recall the Employee being told that he could join in any group he wished to join after the groups were announced. He also did not recall the Employer telling the Employee to get to hell off her property. That was not said.
78. At the end of the meeting, staff was milling around and he and the Employer headed towards the office. He stated that the Employee came up to them still clearly agitated, and told them that they had no right to be doing what they were doing and that they did not know who they were dealing with. The Employee was reminded

that the Employer was in regular communication with all the Government offices. The Employee insisted that they did not know who they were dealing with and then walked away.

79. No one told the Employee at that time that he was fired from his job. In fact both he and the Employer assumed that when the Employee walked away that he went to do his job. He denied that the Employer ever told the Employee to get to hell off her property and stated that if it had been said it would have been overheard by someone since the Employee and the Employer were never alone at any point.
80. He recalled that there had been a change in the method of payment of the Employee. This change was brought about by the Employee's numerous absences from the job. The basic remuneration did not change and on the basis of his presence on compound he had the ability to earn even more. He had already implemented the change that had been decided by the Employer and that had been discussed with the Employee on several occasions previously because of his pattern of absences.
81. The staff was generally good but that when the Employee was absent, the staff used his absence to do very little as the Employee was not there to give them instructions or supervise them. The Employer was therefore paying several people for doing very little because of the Employee's absence and the Employer therefore had to speak to the Employee about it.
82. He stated that about 6 to 8 weeks prior to implementing the changes the idea was discussed with the Employee. The Employee, who had detailed knowledge of all things mechanical on the property was told that the Employer would work with him if he could not be on the property as required to reschedule his hours. The Employee stated during these discussions that this was not necessary and that he would improve his attendance on the property. After these discussions the Employee improved for about one week and then reverted to his periodic absences. At least 2 or 3 times prior to implementing the change the Employee was spoken to but despite his assurances, he did not improve his attendance.

83. The change which was implemented was simply to pay the Employee his monthly salary at an hourly rate so that he would be paid for the amount of hours he actually worked. The Employee's salary had been \$4,750.00 and was increased by \$1,000.00 per month for a period of time to cover his severance payments over a period of 12 or 13 months. When the severance payments ceased the Employee's salary was again increased as he needed to show the bank a greater salary than \$4,750.00.
84. In October 1998, he deposited the sum of \$3,000.00 in respect of the Employee's salary as that was the equivalent of his monthly salary so far in that month. The basic salary that he used was \$4,750.00. He also stated that the hourly rate took effect from the payment of that cheque which he thought was about 20th October. He stated that from the 20th October, the hourly rate took effect.
85. He spoke to the Employee when he deposited this sum to the Bank and advised him that in the future, as had previously been indicated, he would be compensated on an hourly basis. The Employee asked why and the witness reminded him of the previous discussions and his promises to improve his attendance record. This conversation took place outside the office and he then went into his office with the Employee and showed him the gate log records which showed the actual hours he had been on the premises for that month. Per the gate log records, the Employee had been on the premises for 20 hours in the relevant week. For the previous week the log showed 19 hours. He told the Employee that he could not expect the Employer to pay someone for work not done. He reminded the Employee that his salary had not been decreased and that the Employer was aware of the change. The Employee told him that as the Employer was the real boss that he would discuss the matter with her when she returned.
86. He also did a graph chart of the Employee's attendance on the property from data which was prepared while he was employed. His graph was prepared after he showed the Employee the data. (The graph was submitted as CQ1 showing the Employee's

attendance for the 30 week period commencing on April 13th 1998 and ending on November 3rd 1998).

87. The graph was made using the record which the Employer had from the gate log. According to the graph and the gate log for the week ending from 19th to 26th October, the week after the hourly rate was implemented, the Employee worked 29 hours 35 minutes although he was paid for a period of 37 hours. The witness could not recall why that was done.
88. For the week from October 26th to November 3rd the Employee had been paid \$571.00. This was 18 hours pay although the gate log showed that he had worked 10 hours and 25 minutes. The witness could not recall why the extra pay had been made to the Employee.
89. The witness also stated that when he had in his earlier evidence stated that after the full staff meeting, he and the Employer were followed by the Employee that there was no meeting between them. The Employee followed them, made his comments outside the office for about 40 – 45 seconds and when he was finished he walked away.

Issues

90. Based on the evidence the main issues to be decided are as follows:
 - (1) Was the Employer's action in October, 1998 in changing the method by which the Employee was paid, a breach of the employment contract, and if so was the breach sufficient to amount to a constructive dismissal of the Employee?
 - (2) Did the Employer in a meeting on 3rd November tell the Employee "get to hell off my property" or "you're fired" and did these words amount to a dismissal of the Employee?
 - (3) What is the effect of the Employer's letter of 5th November, 1998 to the Employee's solicitor in response to his solicitor's letter of 3rd November, 1998?

Employer's submissions

91. The Employer submitted that the change from monthly rate to hourly rate based on the Employee's absences was a change in form rather than in substance. Counsel submitted that since the Employee was required under the contract to work a 40 hour week or 8 hour day and since the Employer was entitled to discipline the Employee for consistently failing to do as his contract required, the decision to pay him at the hourly rate caused no detriment to him, since he would receive his full salary if he worked a 40 hour week as was required under his contract.
92. The court should accept the Employer's evidence that the decision was taken to preserve the employment relationship without loss to either party, rather than to take drastic action of terminating the Employee for his unexplained and unauthorized absences.
93. In view of the fact that the change resulted in no detriment to the Employee it could not be regarded as a fundamental change in the basic condition of employment sufficient to give the Employee the right to assert that he had been constructively dismissed.
94. On the question of whether the Employer had told the Employee to get to hell off her property, Counsel submitted that the court should reject the Employee's evidence and accept that of the Employer on the issue since the Employee had stated in his evidence in chief that these statements were made to him, not in the general meeting on November 3rd 1998, but after the general staff meeting. By contrast, the letter from his solicitor of 3rd November, 1998, his instructions to his solicitor, and both his memorandum and the amended memorandum asserted that the dismissal had taken place in the general staff meeting. Further, the Employee had put forward no evidence to show that this second meeting took place and in fact the said meeting was denied by the Employer and all the Employer's witnesses.

95. Counsel submitted that if such words were in fact spoken the Employee would have been entitled to consider himself dismissed, but that no such words or other equivalent were spoken to give the Employee a reasonable belief that he had been dismissed.
96. With respect to the November 5th 1998 letter from the Employer to the Employee's solicitor in response to a letter dated 3rd November, 1998 from the Employee's solicitor, counsel for the Employer submitted that the said letter was an affirmation by the Employer that the Employee had not been dismissed, and that his job as maintenance manager was still there to be done providing he was prepared to give "*quid pro quo*" and put in an honest days work for an honest day's pay.
97. Counsel submitted that the claim which the Employee made concerning changes to the Employee's terms and conditions of employment in the staff meeting of November 3rd 1998, was untrue since the matters complained of had been in existence for some time prior to the meeting, and further, that the division of staff into two groups in no way affected the Employee's role as supervisor to both groups of workers.
98. Further, the Employee's conduct, after his salary had been changed from monthly to hourly after October 20th 1998, showed clearly that he knew of the change, and the reason for the same, since he accepted the decision of the Employer on her return to Antigua after the same had been implemented, and made no further protestation about the same until after the meeting of November 3rd 1998.

Employee's submissions

99. Counsel for the Employee submitted that the Employer was a successor employer to the Employee and that prior to the staff meeting on 3rd November, 1998 the Employee's substantive post was that of maintenance manager. She submitted that the allegations of absenteeism which were supported by the gate log be disregarded as unsubstantiated since the gate log was self serving and lacking in credibility. As such, the prejudicial effect of the same outweighed its probative value.

100. The purported alteration of the Employee's salary in October, 1998 was wrongful and that his salary for the relevant period in October, 1998 should be adjusted. Counsel submitted that the evidence of the Employer relative to the second meeting on 3rd November, 1998 be disregarded as being evasive of the issue. The Employee was in fact dismissed at a second meeting by being told to get the hell off my property. On the totality of the evidence the Employee was dismissed from his employment and the dismissal was unfair.
101. The Employee having mitigated his loss was entitled to compensation, under the heads of severance, notice pay, vacation pay, the adjustment to the October salary, immediate loss, manner of dismissal and interest on severance from the predecessor employer. She also claimed benefits in respect of gas and the use of the Employee's vehicle for work purposes.

Law

102. The general law relating to constructive dismissal and breach of contract by alteration of fundamental terms applies to the present case and will be cited where appropriate.

Discussion

Issue #1 (A)

Was the Employer's decision to pay the Employee his monthly paid salary at an hourly rate a change in the basic conditions of his employment?

103. It was conceded by the Employer that the Employee earned at 3rd November, 1998 a salary of \$5,500.00. The Employer also stated in evidence, clarified by the witness Constantine Querard in his cross examination, that the deposit of \$3,000.00 that was made on the Employee's behalf in respect of his salary on October 19th was his salary to that date, based on his monthly rate of \$5,500.00.

104. The Employer's evidence is that the change was brought about by concerns about the Employee's persistent absenteeism and his failure to work the 40 hour week that had been a condition of his employment. Evidence in the form of the gate log was led to show that the Employee averaged well below the 40 hours per week ranging between 10 hours and 38 hours.
105. Further the evidence of the Employer (denied by the Employee) is that the issue of the absenteeism though not reduced to writing was discussed several times with the Employee.
106. A review of the gate log for the three months prior to July, 1998 (i.e. May - July, 1998), when the Employer stated she discussed the matter with the Employee shows that during the period the Employee failed for the 13 weeks, to work a full forty hour week. The log shows that out of 10 forty hour weeks, the Employee averaged approximately 29.5 hours per week and that out of the remaining 3 thirty two hour week for the period, the Employee averaged approximately 22 hours per week.
107. A review of the gate log for the period August, 1998 to October, 1998 also shows that for a period of 11 weeks the Employee did not on a single occasion work the full hours for any one week. Out of 9 forty hour week the Employee averaged 29 hours approximately. For the 32 hour week in the period, he worked 24 hours, and for the 24 hour week in the period he worked 21 hours.
108. The Employee took issue with the log and asserted that for the period under consideration there were at least 3 days when the log extracts could not be located, and on at least one occasion the Employee was recorded as absent when in fact it was a public holiday.
109. The court has noted that on at least two occasions when the Employee was noted as absent he was in fact paid for the period, although Mr. Constantine Querard in his evidence stated that he could not recall why the Employee had been noted as absent on the days in question.
110. The court is of the view that even accepting the absence of the record for the days complained of by the Employee, it is nevertheless clear that the Employer's concern about the

Employee's absenteeism was justified and that her assertion that he regularly failed to work a forty hour week is proven on the evidence she provided.

111. This court accepts, on considering a totality of the evidence, that the Employee knew of the Employer's concerns regarding his absence from the premises and that as stated by the witness Constantine Querard, it was brought to his attention prior to the implementation of the decision in October, 1998 to pay him at the hourly rate.
112. This court has had regard particularly to the Employee's evidence regarding his conversation with the Employer to rescind her decision to pay him in that manner and her refusal so to do. His evidence is that when she refused he said, "What can I do?" and left it like that. This court thinks it unlikely that the Employee would have reacted in this calm and accepting manner if the matter of his absenteeism, and the decision to change his salary rate had not previously been discussed with him.
113. Further the court has noted that the Employee stated that he knew that the security at the gate kept the gate log but he was unaware that they were really recording the arrival and departure of the staff. This court finds it difficult to accept that the Employee, who was employed in the capacity of supervisor on the premises, came and went regularly to and from the premises, knew that the security kept a gate log, but did not know that the arrival and departure time of the staff was entered in the log.
114. This court finds that the decision to pay the Employee his basic salary at the hourly rate was a change in his conditions of employment. Having regard to the condition that the Employee was to work 40 hours per week as was required under the contract, the court finds that the change was not to his detriment or one about which he could legitimately complain as it simply demanded that he fulfill his condition of the contract and would result in no loss once he did so. The court further finds on a totality of the evidence, that despite the fact the Employer admitted that no written warning was ever issued to the Employee regarding his absenteeism, that the matter was nevertheless discussed with the Employee prior to implementation of the decision in October 1998, and that at the date of the implementation the Employee was well

aware of and accepted, if not the hourly rate, at least the reason why it was being imposed.

Issue #1(B)

Was this change in the employment a change in a fundamental term to entitle the Employee to claim that he was constructively dismissed?

115. The term of the employment relating to payment of salary is a fundamental term of the contract and any change in such a term to the detriment of the Employee and without his consent is a breach of such a term. This court has found that the change was not to the Employee's detriment providing he performed in accordance with the requirement under the contract i.e. a 40 hour work week, and that the Employee was previously informed of the changes. Notwithstanding that the Employee may not have actually consented neither did he actively disagree.
116. This court therefore finds that the Employer was reasonably justified, in view of the Employee's absences to make the change which was not to his detriment, and which, as was stated in evidence gave both parties an option to continue the work relationship on a basis which was fair to both parties and without the need to resort to disciplinary measures.
117. We therefore find that the change was not such to entitle the Employee to claim that he had been constructively dismissed.

Issue #2

Did the Employer unilaterally alter the terms and conditions of the employee in the staff meeting of November 3rd 1998?

The Break periods

118. The evidence of the Employee is that the Employer at the meeting indicated that the breaks would now be ½ hour for breakfast and lunch and that there would be no break of 15 minutes for washing up before closing off at the end of the day.
119. In contrast, the evidence of the Employer was that ½ hour break for lunch and breakfast was the norm and that the statement on this issue in the meeting was a reminder to staff who had not been

adhering to the allotted time. The Employer's evidence was supported by the evidence of all the witnesses called on her behalf. In fact one witness, Elvis Black who had previously worked with the Employee with CHMS stated that the ½ hour break for breakfast and lunch has been in place since prior to Hurricane Luis in 1995, so that it was a reminder to staff and not a change as asserted by the Employee.

120. The court accepts the Employer's evidence on this point.
121. With respect to the sign out period the Employee asserted that staff was entitled to 15 minutes before 4:00 p.m. to break off to wash up before signing out. His evidence is that this was changed by the Employer on 3rd November when she advised that staff should down tools at 4:00 p.m. then wash up to leave. The Employer gave no evidence on this point and was not questioned about it on cross examination.
122. Both Elvis Black and Paul Newsom, witnesses for the Employer, stated that the Employer did state that downing tools would be at 4:00 p.m. Both witnesses stated that staff was in the habit of downing tools to wash up prior to 4:00 p.m. but neither stated whether it was an entitlement or just a staff practice. In fact Mr. Newsom stated that there was no specific time for clean up.
123. If this court gives the Employee the benefit of the doubt, and accepts that the 15 minutes to clean up was a previous entitlement, then we must conclude that the term was altered at the staff meeting on 3rd November, 1998. However this court is not prepared to find that this alteration is such as would be sufficient to entitle the Employee to claim a dismissal or a constructive dismissal since the term was not so fundamental to the Employee's performance that its breach would bring the working relationship at an end.

The two groups A & B.

124. The Employee's evidence is that two groups were named and that he was told he could join either group. Further that his supervisory role was taken away from him. The Employer's evidence supported by both witnesses for the Employer was that the groups were named and that Glendon Fordyce was put as supervisor of grounds and both groups were still to report to the Employee.

Mr. Black and Mr. Newsom both stated that they understood that the Employee was to continue to be their overall supervisor in charge of the two named groups. The court does not therefore accept that the Employee's supervisory role was altered in the meeting or that his employment in this regard had been changed.

Issue #3

Did the Employer dismiss the Employee during the staff meeting on November 3rd 1998?

125. The Employee's evidence is that the Employer told him during the course of the meeting when he raised issues of Social Security, Medical Benefits and vacation pay and when he mentioned his vacation, that he could take a permanent holiday. This evidence by the Employee was not denied by the Employer who admitted that she stated that in view of the Employee's numerous instances of absenteeism she felt he had already been on vacation.
126. The Employer's evidence, and this is corroborated by the witnesses for the Employer, is that at no time during the meeting with staff did she either state to the Employee "You're fired" or indeed "Get to hell off my property". In fact her evidence is that nothing that was said at the staff meeting to the Employee could be construed as a dismissal.
127. The evidence from both sides is that the meeting became somewhat tense and heated after the Employer asked for comments and the Employee began to speak. The Employer, and witnesses called on the Employer's behalf stated that the Employee became heated, that his voice was raised, that he was speaking loudly and that he banged his fist on the table. The evidence of the Employee is that the Employer was disrespectful to him and had belittled him in the presence of staff under his normal supervision.
128. It is significant that in his evidence at trial the Employee makes no allegation that the Employer dismissed him during the staff meeting in the presence and hearing of other staff, although this assertion was made by his attorney in his letter of November 3rd 1998 immediately following on the meeting (AG3). The letter alleges that the Employer told the Employee he will have to take a permanent holiday and accused him of inciting the other

employees. When the Employee denied this he was told in the meeting he was fired.

129. Likewise, in the Employee's memorandum filed on 17th December, 1999, the Employee alleged that the Employer had made certain unilateral changes to his terms and conditions, had removed him from his supervisory role, and that when he protested, the Employer had stated "take it or leave it", and upon him requesting his vacation pay and his compensation for his years of service she told him "Get the hell off of my property". He then left the property having considered himself dismissed. (See paras. 4, 5 and 6 of the Employee's Memorandum).
130. In the Amended Memorandum filed on behalf of the Employee on 4th May, 2001, the Employee maintained the same position, and it was only at trial that he gave evidence of a meeting after the staff meeting between himself the Employer and her son, during which he alleges the Employer told him "Get the hell off my property".
131. The court has also noted that in his initial letter to his solicitor which was inadvertently enclosed with his solicitor's letter of 3rd November and delivered by the Employee to the Employer, (NQ6) the Employee makes no allegation of a second meeting with the Employer and her son. During the course of the trial, the Employee's counsel objected to the admission of this document based on privilege. The document was admitted by the court after submissions and the Employee did admit that the signature on the letter of instruction looked like his, although he stated it must have been forged since the document did not exist on November 3rd 1998.
132. On the totality of the evidence, and particularly based on the Employee's oral evidence at trial, it must be concluded that the Employer did not during the staff meeting on 3rd November, 1998 tell the Employee "You're fired" or "Get the hell off my property", or indeed as asserted by the Employer, anything that could be construed as a dismissal.
133. A question that however arises from the evidence is whether the Employer dismissed the Employee after the general staff meeting, in a meeting between the Employer, the Employer's son and the Employee by telling him "You're fired", or "Get to hell off my property"?

134. It is doubtless that if the Employer in fact said these words, or its equivalent to the Employee that he would have been justified to consider himself dismissed. The Employee stated that these words were said in a meeting after the general staff meeting. Both the Employer and Constantine Querard deny that there was any meeting after the general staff meeting. The witnesses Paul Newsom and Elvis Black both deny seeing the parties together after the general staff meeting as they reported back to their station. It is apparent from the evidence that what the court describes as "an encounter" took place after the general staff meeting between the Employer, her son and the Employee. According to the Employee, he was leaning on the bar when the Employer told him he was inciting the other staff. He repeated that she had disrespected and belittled him in the meeting and she then said "You're fired". She also told him "Get to hell off my property", at which time he demanded his holiday and severance payment which the Employer refused to give.
135. The evidence for the Employer per Mr. Querard, is that he and Mrs. Querard were confronted by the Employee after the meeting and told they did not know whom they were dealing with and that they were never given an opportunity to respond, as the Employee walked away when he was finished.
136. In view of the matters discussed in relation to the general meeting with staff on November 3rd 1998, this court has great difficulty accepting that a meeting took place as described by the Employee after the general meeting and that the Employee was dismissed by the Employer with the words alleged. The Employee's version of the events is uncorroborated, and as Mr. Querard stated in evidence, had the exchange taken place as alleged, it would have been overheard by other staff, as it took place in the bar area which is an open area.

The Employer's letter dated November 5th 1998.

137. Even if the court were to accept the evidence of the Employee as to his dismissal by the Employer at a meeting after the general staff meeting on 3rd November, 1998, the effect of the Employer's letter of November 5th 1998 is to be considered.

138. The Employer's letter is written in response to a letter from the Employee's solicitor alleging that the Employee had been dismissed and claiming reinstatement. The Employer's letter in response states that "Your client was not fired. He walked off the property after a staff meeting held Tuesday November 3rd 1998, therefore "reinstatement" is not an issue. He knows it and so do eighteen other individuals who were present at our last meeting".
- The letter goes on to recite the Employer's version of what transpired in the meeting of 3rd November, 1998 and in the penultimate paragraph states "As far as I am concerned, Alister Green has a job at Half Moon Bay which needs doing".
139. The general tone and tenor of the letter, even assuming that the Employee's version of the event is correct, is that the Employee was not dismissed, and that his job was still held at the hotel so long as he was prepared to work a 40 hour week for the salary he was to receive.
140. In the context of the staff meeting and the "encounter" between Employer and Employee after the meeting, it can be said that the parties were tense or angry and that things may have been said on both sides in the heat of the moment. The Employer's letter however, made clear that she did not consider the Employee to be dismissed, even after he failed to turn up to work after the meeting on 3rd November, 1998.
141. In the context of dismissals done in the heat of the moment when tempers are raised, the law has long recognized that a cooling off period is permitted, to allow parties to consider their position. The Employer's letter of November 5th 1998, even if the court accepts the Employee's evidence, shows clearly that in the cooling off period, the Employer would have relented and was prepared to consider that the Employee was not dismissed.
142. The Employee was specifically asked about this letter on cross examination, and stated he was aware of the contents of the letter and that he did not report to work, as he was told by his attorney that the letter did not address the issues raised and was not a reinstatement letter. He therefore never reported for work as he continued to consider himself dismissed.

Decision

143. Based on the reasons above this court finds as follows:

- (1) That the Employer's decision to pay the Employee his monthly salary at an hourly rate was a change in his basic employment conditions, but that the change was not to his detriment. Since the Employer was justified, based on the Employee's employment record to make the change, rather than dismiss the Employee, and since the Employee had been given notice of the change, it was not a change which would entitle the Employee to consider that he had been constructively dismissed.
- (2) That the Employer did not in the staff meeting of 3rd November, 1998 make unilateral changes in the Employee's terms and conditions of employment, when she required the ½ hour breakfast and lunch break. That these requirements were in fact a reassertion of conditions that existed previously and were known or ought to have been known to the Employee.
- (3) That the Employer did not in the staff meeting of 3rd November, 1998 or in the alleged meeting thereafter tell the Employee that he was fired or dismissed or use words that could reasonably be construed by the Employee as a dismissal.
- (4) That even if as asserted the Employer dismissed the Employee in the "encounter" after the general staff meeting on 3rd November, 1998, the Employer's letter of 5th November, 1998 in response to the Employee's solicitor's letter makes it clear that the Employer did not consider that the Employee was dismissed.

Award

144. It was submitted on behalf of the Employee that the Employer was a successor Employer and that the Employee was therefore entitled to be paid interest on the severance which was due to him from the previous Employer. It is not doubted that the Employee's employment continued with the Employer uninterrupted from the

previous employment and that by agreement between the parties the Employee received his severance from the previous employment spread over a period of months. In these circumstances the Employee would pursuant to section C45 of the Labour Code have been entitled to interest on his severance pay. Since the evidence is that the Employer paid severance to the Employee she must be taken to have accepted liability for the same and must also accept liability for the interest. The evidence of both sides however is that some time during the period the Employee was paid additional amounts on his salary and that these payments were in respect of interest owed on his severance. We therefore find that the Employee is not entitled to any further interest on the severance as claimed.

145. Counsel for the Employee also claimed benefits for gas and for use of the Employee's personal vehicle for work related purposes. No evidence was led at trial to suggest that the Employee was by the terms of his contract to be compensated for the same, and no evidence was led to substantiate the claim, so no award is made in respect of this claim.
146. The Employee gave evidence that he was entitled to vacation for the period December 20th 1995 when he was employed by the Employer until November 3rd 1998 when his employment ceased as he had not been given either vacation or vacation pay over the period. Since this vacation entitlement accrued prior to the termination of the employment the employee is entitled to vacation pay for the period.
147. No evidence was led by either side as to the Employee's annual vacation entitlement so that the court is unable to quantify the amount to be so awarded. We however direct that the said vacation pay be calculated and that the same be paid to the Employee within 14 days of the judgment.

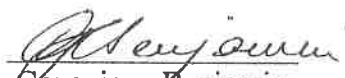
Conclusion

148. The Employee was not dismissed by the Employer on 3rd November, 1998 and as such he is not entitled to compensation from the Employer save and except for vacation pay in respect of vacation accrued and not taken up to November, 3rd 1998, the last day of his employment.

There shall be no order as to costs.

Dated the 20th day of October, 2004.


N. Rogers Murdoch
Chairman


Genevieve Benjamin
Member


Ian Shoul
Member