

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 9 of 2003

BETWEEN:

DANA STEVENS

Employee

- and -

THE INDUSTRIAL DEVELOPMENT BOARD

Employers

REFERENCE NO: 10 of 2003

BETWEEN:

LAUREL MERCHANT

Employee

- and -

THE INDUSTRIAL DEVELOPMENT BOARD

Employers

REFERENCE NO: 21 of 2003

BETWEEN:

ETHLYN SIMON

Employee

- and -

**THE INDUSTRIAL DEVELOPMENT BOARD,
THE MINISTER OF GOVERNMENT RESPONSIBLE
FOR INDUSTRY AND THE ATTORNEY GENERAL**

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. Edward T. Henry

President
Member

Appearances:

Charlesworth Brown, Attorney-at-Law, for Dana Stevens and Laurel Merchant

E. Ann Henry, Attorney-at-Law, for the Ethlyn Simon
Carla Brooks Harris, Attorney-at-Law, and Veronica Moe, Attorney-at-Law, for the
Employers

2005: June 6, 8 & 9
2006: February 14
2007: February 15, 20 & 21
2010:

JUDGMENT

General Manager of statutory authority and other employees refused order of Employers to go on leave and locked out of their office – General Manager failed to attend meeting of the Board and to hand over the office keys – General Manager questioned on affairs of the Authority – Employees locked out for three days and left employment – Employees accept Employers' cheques for period denied access to their office – Employees refused invitation to return to work – Employers deny Employees were Constructively Dismissed.

- [1] Maundy, P.: These References were filed as separate claims but the parties agreed that they be consolidated and heard as one whole. The Employees, Ethlyn Simon, Dana Stevens and Laurel Merchant, seek compensation from the Employers for Constructive Dismissal, Exemplary and Aggravated Damages and Costs.
- [2] The Employers deny that the Employees were constructively or otherwise dismissed and are entitled to any compensation or other relief.
- [3] The Government of Antigua and Barbuda constructed and built a number of "factory shells" at Coolidge Industrial Park, Coolidge, Antigua, for lease/rent to persons to carry on business and the Employees were employed by the Government via the Industrial Development Board (the Board) to manage and operate its affairs. The Board was created by the Industrial Development Board Act, Cap 215, and fell under the Ministry of Trade but was responsible for its day to day affairs.

Historical Background

- [4] Ethlyn Simon – this Employee was employed by the Government of Antigua and Barbuda as a non-established worker with effect from mid September 1986 – she was employed in the Ministry of Economic Development and subsequently seconded to the Industrial Development Board in December, 1986, as Manager. No Board was in place in 1986 when the Employee was appointed. A new Board was appointed by the Honourable Cabinet in about January, 1987. The procedure was that Cabinet would appoint the Board – the decision was left to the Minister responsible for Economic Development and Tourism or the Ministry of Trade and Industry. The Permanent Secretary, at the time, Mr Lauchland Lake, would write to Miss Simon informing her of the Cabinet Decision and provide the names of the members of the new Board. Before the new Board was appointed the Employee was the one in charge and the one who made the day to day decisions; she was assisted by Dana Stevens, the Administrative Officer and Laurel Merchant, the Office Assistant.
- [5] Mr Hilroy Humphreys was the original Minister in charge of the Board and on his resignation from Government in August 2002 his place was taken by Mr Gaston Browne. Mr Browne informed the Employee that a Board had been appointed. About this time the Employee's mother died and she took some of her vacation and did not return to work until August 26, 2002.
- [6] The Employee did not receive any communication from the Permanent Secretary as to those who comprised the new Board but on August 12, 2002, she received a letter from Miss Yearwood which stated that she was the new Chairperson and inviting her to a meeting on that said day. Miss Simon informed Miss Yearwood that it was not possible to attend the meeting as she had to go to her mother's funeral and was on vacation. Miss Yearwood told Miss Simon the names of the members of the new Board and said it was okay, the Board would meet without her.

- [7] The Employee returned from vacation on August 26, 2002, but was not aware that there was a Board meeting on that day as she did not receive the usual Notice, Agenda and minutes of the last meeting – she only became aware of that meeting on August 28, 2002. After receipt of the letter of August 28, 2002, the Employee called Mr Lake who informed her that Miss Yearwood was a Senior Officer in the Ministry of Economic Development. The Employee had not seen the Gazetting nor had a copy of her Instrument been sent to the Employee.
- [8] The Employee attended the meeting scheduled for September 9, 2002, but when she got there she was the only person present – the others had already left when she arrived. After September 9, 2002, the Employee was invited to another meeting at which everyone was present – this was on September 23, 2002.
- [9] At the meeting the Employee was asked questions about the Board including the Officers, her salary and the rents from the Industrial Estate. The Employee said that she could not remember the numbers of the bank accounts but told the Board the name of the bank where the accounts were kept. The Employee said that after a while she excused herself and left but the evidence of Miss Yearwood was that the Employee became angry at the questions, started to curse and walked out of the meeting.
- [10] By letter dated September 25, 2002, the Board wrote to Miss Simon informing her that the members were not pleased with her attitude and that she should hand over the keys and proceed on vacation immediately. Miss Simon refused to go on vacation or surrender the keys. A few days later the Board had the locks changed and no one could access the building. The Board was subsequently transferred to another Ministry with an Acting Manager and the building demolished.
- [11] Dana Stevens – this Employee formerly worked at the Statistics Division of the Ministry of Economic Development as from May, 1979, and became a staff member of the Industrial Development Board on January 1, 1988, and Administrative Officer in

October, 2002; her last salary was \$ 2,332.69 per month (See Part 3 of her Memorandum).

[12] Mrs Stevens went to St Croix on vacation and on her return to office to resume work on the morning of October 21, 2002, she met Miss Merchant outside – the door was chained and padlocked. Mrs Stevens asked Miss Merchant what was going on and then used her key for the lock that was originally on the door to try and open the door but it did not open. About 8:30am Miss Simon arrived for work. The parties waited outside the building for about 2 hours during which time the Minister of Government responsible for the Board, the Honourable Gaston Browne, drove by and a number of members of the public passed by and made remarks about them as they did so; they said they were locked out because they had stolen money from the Board; also, that they should get a crowbar and remove the chain and padlock on the access door.

[13] The Employee reported for work on the following day but again she was unable to enter the premises and returned home. On October 22, 2002, the Employee spoke to Mr Messiah, General secretary of the Antigua and Barbuda Workers Union and thereafter went to instruct her lawyer; on the said day she received a letter from Miss Yearwood dated October 18, 2002, in which she signed as Chairperson of the Board and asked her to report for work – See Exhibit DS1 – the Employee had no prior knowledge of Miss Yearwood and referred the letter to her lawyer with instructions to reply, which he did – See Exhibit DS2. Prior to the above the Employee did not know Miss Yearwood nor her position; the matter was referred to the Labour Commissioner on December 5, 2002, the Employee received a letter from Miss Yearwood – see Exhibit DS3. The Employee never returned to work.

[14] At the Board the Employee was responsible for making up salaries, kept all the accounting records, was a signatory to 2 accounts and Miss Simon had to travel from time to time and on such occasions the Employee took over the management of the Board – normally she reported to Miss Simon.

- [15] Mrs Stevens went to the office on three days and found it closed and did not go back thereafter.
- [16] Laurel Merchant – this employee took up employment with the Industrial Development Board in November, 1986, as an Office Attendant and her last salary was \$ 226.58 per week – she had worked at the Central Board of Health from July 1978. The Employee reported to Miss Simon and in her absence Mrs Dana Stevens. Miss Merchant had custody of the entrance doors to the office and was responsible for messages, telephone calls and other incidental duties; she was allowed to carry home the keys – she was the first to arrive in the mornings and had to open the office.
- [17] On reporting for work on the morning of October 17, 2002, a carpenter sent by the Ministry of Public Works, Mr Tittle and Miss Yearwood, whom she did not know, came to the office and asked for Miss Simon. Miss Yearwood and Mr Tittle left but returned at about 1:30pm and Mr Tittle proceeded to remove the lock from the entrance door. Miss Simon was present on the second occasion and objected to the action and called the Police. Inspector White came and settled the issue as Mr Tittle had been sent by Public Works Department to change the locks. Mr Tittle removed the old lock and installed a new lock. Miss Stevens was present while all the above was in process. Like Miss Simon and Mrs Stevens the Employee reported for work daily for three days thereafter and was unable to access the office whereupon she did not return.
- [18] Pursuant to being unable to continue her job the Employee concluded that she was constructively dismissed and sought new employment but was not successful – she applied at David Shoul's store, Sammy's Supermarket and finally started working for her son, Everton Waldron in July 2002 as a Domestic at \$ 150.00 per week. The Employee had accumulated 100 days vacation.
- [19] Several letters passed between the Employers and Employees including one in an envelope with the Stamp of the Ministry of Trade dated October 21, 2002, advising Mrs Stevens and Laurel Merchant that there was a dispute between the General Manager

and the Employer and that the office would be closed "until further notice" – the letters were delivered to their homes.

[20] By letters dated December 13, 2002, the Employer wrote to Laurel Merchant and Dana Stevens enclosing a cheque for 8 weeks wages in each letter and inviting them to report for work on January 6, 2003 – the Employees accepted the monies and said they regarded the invitation to return to work as an offer of new employment and that they had been unfairly dismissed and the monies were being accepted as part of their compensation entitlement for Unfair Dismissal.

[21] On December 12, 2002, a meeting was held by the Labour Commissioner in an effort to resolve the dispute but without success and so the matters were referred to the Court.

Triable Issues

[22] The principal issues here for determination appear to be:

- (a) Whether the Employees abandoned their jobs or were constructively dismissed?
- (b) Whether Miss Simon was obliged to go on vacation when instructed by the Board so to do?
- (c) Whether in preventing access to the office so that the Employees were unable to continue their employment was a repudiation of the contracts with the Employees?
- (d) Whether there was a breach of the implied term of mutual trust, confidence, and respect of the Employees, between the Employers and the Employees?
- (e) Whether the Employers were guilty of harsh, crude, unconscionable, abusive, oppressive and unreasonable behaviour?
- (f) Whether the Employees were entitled to any Vacation Pay, Notice Pay and other monies claimed by them?

The Arguments

[23] Mr Brown adopted the submissions of Ms Henry and contended that:

- (a) Laurel Merchant and Dana Stevens were unlawfully dismissed by the Employers who committed a breach of certain fundamental terms of their contracts of employment.
- (b) The Employers are liable for the Employees' benefits and entitlements which accrued to them when they were employed with the Employers' predecessor Employers.
- (c) The Employees are entitled to Compensation, Aggravated and Exemplary Damages and Costs.
- (d) The Employers conducted themselves in a most unreasonable, harsh, crude, abusive and oppressive manner.
- (e) The Employers acted in bad faith as at least six months prior to the changing of the locks they knew that the office was marked for demolition and had decided to relocate to the Ministry of Trade but did not relay this to the Employees.

[24] In support of his submissions Mr Brown referred the Court to:

- (a) Sections C.57, C.58 and C.59 of the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992.
- (b) Edward Smith V Stanford Financial Group Limited – Reference No. 16 of 1998
- (c) Civil Appeal No. 20 of 1990 LIAT (1974) Limited V Leonard Tomlinson
- (d) Reference No 4 of 1999 – Leslie Hoffman V Stanford Financial Group Limited.
- (e) Civil Appeal No. 2 of 2002 – Stanford Financial Group Limited V Leslie Hoffman
- (f) Woods V W.M. Car Services (1982) ICR666
- (g) Western Excavating V Sharp (1978) ALLER713
- (h) Steven Anderman: The Law of Unfair Dismissal 2nd Edition 63 - 73 and 82 - 94
- (i) Halsbury's Laws of England 4th Edition 1976 Vol. 16, para 615 and 616.

[25] Finally, Mr Brown claimed for Dana Stevens, the sum of \$ 300,487.50 computed as follows:

- (a) 17 days accrued Vacation @ \$ 107.66 = \$ 1,830.22
- (b) Notice Pay (23 years of Service) – 4 Months @ \$ 2,332.69 = \$ 9,330.76
- (c) Loss of Protection (May 1979 to October 21, 2002) 23 x \$ 2,332.69 = \$ 53,651.87
- (d) Immediate Loss – 18 Months @ \$ 2,332.69 = \$ 41,988.42
- (e) Manner of Dismissal – 6 Months Pay @ \$ 2,332.69 = \$ 13,996.14
- (f) Exemplary Damages - \$ 100,000.00
- (g) Payment in Lieu - \$ 2,332.69
- (h) Pension (under Cap. 310 of non-established Pensions Act) - \$ 2,000.00
- (i) Gratuity - \$ 75,357.40

[26] The amount claimed for Laurel Merchant was \$ 197,500.00 computed as follows:

- (a) 114 days accrued Vacation @ \$ 50.00 = \$ 5,700.00
- (b) Notice Pay (23 years of Service) – 16 weeks @ \$ 250.00 = \$ 4,000.00
- (c) Loss of Protection (July 1978 to October 21, 2002) 25 years x \$ 1,000.00 = \$ 25,000.00
- (d) Immediate Loss – 16 months @ \$ 1,000.00 = \$ 16,000.00
- (e) Future Loss – 12 months @ \$ 400.00 = \$ 4,800.00
- (f) Manner of Dismissal – 6 Months Pay @ \$ 1,000.00 = \$ 6,000.00
- (g) Exemplary Damages - \$ 100,000.00
- (h) Payment in Lieu – Pre Retirement Leave – 4 weeks @ \$ 250.00 = \$ 1,000.00
- (i) Gratuity - \$ 1,000.00 per month = \$ 35,000.00

[27] Ms Henry adopted the submission of Mr Brown and, on behalf of Miss Simon, contended that, inter alia, Miss Simon did not abandon her job but was constructively dismissed by the Employers. Counsel contended that, inter alia:

- (a) The Employers repudiated the Contract of the Employee.
- (b) The Employers committed a breach of the fundamental implied term of the Contract and conducted themselves in such a manner that the relationship of the Employers and Employee could not reasonably have been expected to continue.

- (c) Miss Stevens had no prior notice of the meeting of August 26, 2002.
- (d) Miss Simon was not obliged to go on vacation for 185 days or at all when ordered to do so.
- (e) The changing of the lock was a deliberate abuse of power by the Employers and repudiated the contract.
- (f) The Vacation Leave was not by mutual consent as required by the Antigua and Barbuda Labour Code.
- (g) There is no evidence that the Employees or anyone else on their behalf had access to the office after the lock was changed.

[28] Ms Henry adopted the authorities cited by Mr Brown and added:

- (a) Section C.6 and C.18 of the Labour Code.
- (b) Hawley V Blue Waters Beach Hotel (2000)
- (c) Section 10(1) of the Industrial Court Act, Cap. 214.

[29] Ms Henry asked the Court to award the Employee the sum of \$ 705,622.63 computed as follows:

- (a) Vacation Pay - \$ 46,425.75
- (b) Salary September 1st to 17th \$ 3,140.00
- (c) Notice Pay (23 years of Service)
- (d) Loss of Protection (September 1986 to October 21, 2002) Months
- (e) Immediate Loss
- (f) Manner of Dismissal – 6 Months Pay @ \$ 3,140.00 = \$ 13,996.14
- (g) Pension (under Cap. 310 of non-established Pensions Act) - \$ 2,000.00
- (j) Gratuity - \$ 75,357.40

[30] Counsel for the Employers, Carla Brooks-Harris denied the allegations of Ms Henry and Mr Brown, asked the Court not to accept their submissions and contended that, inter alia:

- (a) The evidence adduced does not support the allegations of the Employees and the actions of the Employees taken in isolation or collectively do not amount to a breach of the implied terms in their contracts.
- (b) The lock was changed because the General Manager, Miss Simon, had pertinent information in respect of the financial matters and records of the Board which she failed to disclose or provide to the Employers.
- (c) Miss Simon, who was sent on vacation had in her possession the key to the building and failed to hand it over to the Employers who had no access to the building and needed access thereto.
- (d) Only one lock was changed – Miss Simon had the key for the second door before that lock was changed and the door padlocked.
- (e) It is but one door only to which the Employers changed the lock and placed a chain and Miss Simon had a key for the other door.
- (f) The Employers never intended to terminate the employment contracts and made efforts to apprise the Employees of the situation and the chairman wrote letters to Mrs Stevens and Miss Merchant informing them that they were having a problem with Miss Simon and will be contacted to resume their duties as soon as the matter was resolved. Neither Mrs Stevens nor Miss Merchant sought to ascertain from the Employers any information re the office and what had happened.
- (g) There is not any evidence that the Employers no longer intended to be bound by the Contracts.
- (h) The Employees were not dismissed and were asked to return to their jobs – they were paid their arrears of wages and, in failing to do so, abandoned their jobs.
- (i) Mrs Stevens and Miss Merchant were not employed by the Government of Antigua and Barbuda but by the Industrial Development Board, a creature of statute established by Section 3 of the Industrial Development Board Act, Cap 215 – they are not non-established workers – evidence was adduced to support their contentions that they had resigned or transferred from the Government services to the Industrial Development Board. Miss Stevens had resigned from

the government service where she was a non-established worker (See DS9) – her employment with the two bodies was not continuous but was broken.

- (j) There is no provision in the contracts of employment that the Industrial Development Board will be answerable for the liabilities of their predecessor employers.
- (k) The Employees failed to mitigate their loss.
- (l) The Employers did not commit a fundamental breach of her contract in sending Miss Simon on vacation.
- (m) This is not a fit and proper case for an award of Exemplary Damages, Aggravated Damages or Costs.

[31] In support of her contentions Counsel cited:

- (a) Western Excavating V Sharp (1978) ALLER713
- (b) Wood V W.M. Car Services (1981) ICR666
- (c) Section A5 of the Antigua and Barbuda Labour Code Amendment Act No 16 of 1998
- (d) Section 3 of the Industrial Development Board Act, Cap. 215
- (e) Section C.18(3) of the Antigua and Barbuda Labour Code, Cap. 27
- (f) Dantzler West Indies Limited V Romig Michael, Civil Appeal No. 7 of 1998

The Law

[32] The Law relating to these matters are to be found in :

- (a) Sections C.6, C.57, C.58 and C.59 of the Antigua and Barbuda Labour Code.
C.6: "An employer shall not provide employment, and an employee may not accept employment, under terms and conditions which do not conform to the provisions of this Code."
C.57: "For the purposes of this Part, an employee will not be deemed to have been dismissed unfairly if his employment is terminated at the expiration of the term specified at the time of his hire."

C.58: "(1) A dismissal shall not be unfair if the reason assigned by the employer therefor-

- (a) relates to misconduct of the employee on the job, within the limitations of section C59(1) and (2);
- (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section 59(3);
- (c) is that the employee was redundant;
- (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or (e) is some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

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

(2) 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."

C.59: ".(1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to, situations in which the employee has-

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;
- (b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer; or
- (c) behaved immorally in the course of his duties.

(2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate

his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of repetition; which action may include suspension without pay for such period as may be specified in the written warning; and, thereafter, if the employee is, within six months following the receipt of the written warning, guilty of misconduct in or in relation to his work which is the same or substantially the same as the misconduct in respect of which the written warning was given, the employer may terminate the employment of said employee or take such other action as may have been specified in the written warning.

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

- (b) The Industrial Development Board Act, Cap. 215
- (c) The Non-Established Pensions Act, Cap. 310
- (d) Halsbury Laws of England Ed. 1976, Vol. 16, para 615-616
- (e) Sections 9 and 10 of the Industrial Court Act, Cap. 214.

Section 9 (1): In the hearing and determination of any matter before it, the Court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the Court may inform itself on any matter in such manner as it thinks just and may take into

account opinion evidence and such facts as it considers relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto.

(2) A party to any trade dispute or other matter may be represented at proceedings before the Court-

- (a) by any official of a trade union;
- (b) by any official or an organization of employers or workmen in Antigua and Barbuda; or
- (c) by a legal practitioner

Section 10 (1): The Court may in relation to any matter before it-

- (a) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination;
- (b) without prejudice to and in addition to its powers under section 7 (2), award compensation on complaints brought and proved before it by a party for whose benefit the order or award was made regarding any breach or non-observance of an order or award or any term thereof (other than an order or award for the payment of damages or compensation).

(2) The Court shall make no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise, and the Court of Appeal shall in disposing of any appeal brought to it from the Court make no order as to costs, unless for exceptional reasons the Court of Appeal considers it proper to order otherwise.

(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

- (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;

(b) act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.

(4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of an employee, order the re-employment or re-instatement (in his former or a similar position) of any employee, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such re-employment or re-instatement, or the payment of exemplary damages in lieu of such re-employment or re-instatement.

(5) An order under subsection (4) may be made where, in the opinion of the Court, an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.

(6) The opinion of the Court as to whether an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to sub-section (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever.

(7) Where, in any proceedings for the non-observance of an order or award or the interpretation or application of a collective agreement, it appears to the Court that an employee of the employer has not been paid an amount to which he is entitled under such an order or award or such an agreement the Court, in addition to any other order, may order the employer to pay the employee the

amount to which he is entitled and any such amount shall be deemed to be damages and be recoverable in the manner provided by Section 13.

Decision

[33] I am most surprised that this matter should have escalated to such heights and was not resolved without being referred to this Court. I accept that the Employees were barred from entering their office by the Employers and this was done without Notice or warning but the Employees never reported for work after 3 days and the unpleasantness which they had to bear but this was not harsh unconscientious behaviour resulting in repudiation of the contracts of employment/alternatively, that in so doing the Employers committed a breach of the fundamental implied term of mutual trust, confidence and respect between Employer and Employee, the Constructive Dismissal. The doctrine of Constructive Dismissal does not appear to be specifically dealt with in the Labour Code but is laid down by statute in the United Kingdom (See 55(2)(c)) and discussed at length by Steven Anderson in his book, 'The Law of Unfair Dismissal, Second Edition, 1985, pages 62 to 90. The matter has also been the subject of adjudication in the Court of Appeal (English) which seems to suggest that there should be a contractual repudiation of the contract of employment. In the Western Excavating Case, Lord Denning suggested two separate tests for determining whether or not the conduct complained of constituted contractual repudiation, viz, whether the acts were in breach of a particular implied term and the employer failed to perform one of the essential terms of the contract or where the employer was guilty of conduct which was a significant breach going to the root of the contract of employment. It should be noted that I believe that for the purposes of this jurisdiction and as a result of the differences between the prevailing factors and way of life in this jurisdiction I would invoke the test of unreasonable conduct by the Employer and take all the surrounding circumstances into account in arriving at a decision.

[34] As to the allegations of breach of trust, the obligation to provide work for an employee, breach of the mutual trust and respect owed by an employer to an employee, it is my

considered view that these must be looked at behind the backdrop of the circumstances prevailing in this case. The Employers testified that all the information and workings of the Board including the finances, were in the hands and control of Miss Simon, who was assisted by Mrs Stevens and Miss Merchant. They were the only ones who knew where the accounts of the Authority were kept, the status of these accounts and Miss Simon and Mrs Stevens were the sole signatories to those accounts. For some time no Board had been in existence and the Employees had no superior to report to and with the formation of a new Board the Employers were duty bound to ascertain the working and status of the Board and I accept this was what they had in mind when they had the meeting with Miss Simon on August 26, 2002. I further accept that their reason for asking Miss Simon to go on leave was in order to obtain the access keys from her and to carry out a full investigation of the affairs of the Authority, as there were several issues that had remained and which Miss Simon had not given them all the information they required. It is not proved that when they locked the door the Employers did not know that Miss Simon had not taken her vacation. There was no intention to repudiate the contracts with the Employees or commit any breach thereof. And it is to be observed that further to the blocking of the access door the Employees never sought to find out from the Employers the reason or purpose for doing so, or their intention in so doing or what message they were sending. The Employees, after three days, simply refused to report for work and are now seeking redress for Constructive Dismissal. The Court has taken notice of two of its previous decisions on this subject, *Stanford Financial Group Limited V Smith and Hawley* and *Blue Waters Beach Hotel Limited*.

- [35] I am not persuaded that there was an intent by the Employers to deny access to the building or to terminate the employment of Mrs Stevens or Miss Merchant and this is manifested in their letter to them of December 13, 2002, asking them to report for work together with their unpaid wages for the eight weeks when they did not work; and the Employees accepted the monies and tried to explain away their action by asserting that the monies were compensation for Unfair Dismissal and the invitation was an offer of new employment. Changing of the lock on the access door was the only way by which the Employers could access the building and it impacted negatively and unintentionally

on Mrs Stevens and Miss Merchant – it has not been shown that the intent was to cause them embarrassment, distress, humiliation, public ridicule and a breach of good industrial relations practices as contended or at all.

[36] I would accept that there is an obligation on the part of an Employer to pay his salary to an Employee or any portion thereof at the agreed interval but do not accept that failure to do so, ipso facto, constitutes a breach of contract. Indeed, it is well known that many monthly paid employees in this jurisdiction do not receive their salaries until several days after the agreed date and it would open the flood gate of litigation if employers could be sued and be liable for breach and/or repudiation of contract – the Courts would be flooded with suits.

[37] The Employers had made efforts to apprise the Employees of the padlocking of the office and, as said before, the Chairman wrote letters and they were sent to Mrs Stevens and Miss Merchant advising them that the Employers were having problems with the General Manager and that they would be contacted to resume duties as soon as the problems were resolved – See Exhibit DS1 and LM1. Further Lauchland Lake, the Permanent Secretary of the Ministry within which the Authority fell, testified that he spoke to Miss Merchant and advised her to speak to the Chairman of the Board. I am persuaded by the view of the Court in *Wood V W.M. Car Services* (1981) ICR666 where at P.66 it was said, “The circumstances of constructive dismissal so infinitely varies that there can be and is no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact, in this case, the Industrial Tribunal.”

[38] Section A5 of the Labour Code defines the meaning of non-established worker and I do not find that Mrs Stevens or Miss Merchant fall within this definition – the Employees said that they were originally employed by the Government of Antigua and Barbuda and were seconded to the Board but before taking up employment with the Board they had resigned from the Government service as is evident from Exhibit DS9 – Mrs Stevens originally said that she had worked with the Government of Antigua and Barbuda since 1979 but in Cross-Examination when her letter of resignation was shown to her she

admitted she had resigned from the service. There is no provision in the contracts of employment that the Board would accept the liabilities of their predecessor employers.

[39] I accept that Section C.18(3) of the Labour Code was infringed by the Employers when they unilaterally instructed Miss Simon to go on leave but do not accept that this was in the circumstances of the case sufficient repudiation of her contract of employment to constitute a dismissal. Indeed in accumulating as many as 185 days vacation, it suggested that she had not been taking her vacation, a factor which usually renders an employee not as effective in the performance of her duties as she would have otherwise.

[40] My attention was drawn to the decision of the Court of Appeal in Dantzley West Indies Limited V Romig Michael, Civil Appeal No. 7 of 1998, where the Court of Appeal overruled a decision of this Court and held that the failure to give to the respondent a Job Description on his transfer from Manager of the Supermarket to Manager of Dew San Limited may very well be an offence against the Labour Code but such failure was of little avail to the respondent in the matter of conduct going to the root of the contract and in my view this too is the position in this case.

Conclusion

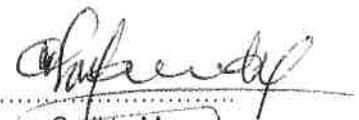
[41] In arriving at a decision I carefully considered the evidence before the Court and the demeanours of the witness, the cases and authorities cited, the relevant provisions of the Labour Code, the Industrial Court Act, with special reference to Section 10(3) and 10(2), the Industrial Development Board Act, Cap. 215, Anderson on Industrial Relations and Smith on Industrial Relations (with special reference to Constructive Dismissal), and endeavoured to arrive at a decision that is fair, just and reasonable and in the best interests of good Industrial Relations. After due consideration I do not find that there was a dismissal, a fortiori a Constructive Dismissal and thus the References are dismissed. Further I do not find that there should be an award for Exemplary

Damages, Aggravated Damages or other claims. I do however find that the Employees are entitled to their holiday pay and arrears of salary as follows:

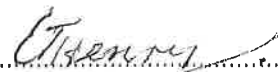
- (a) Mrs Simon: 165 days or 5.5 months @ \$ 3,140.00 = \$ 17,270.00
- (b) Mrs Steven: 17 days @ \$ 107.66 = \$ 1,830.22
- (c) Laurel Merchant: 114 days @ \$ 50.00 = \$ 5,700.00

[42] It is hereby ordered that the Employers shall pay to the Employees the sums abovementioned, payment to be made by 15th December 2010. There shall be no order as to costs.

DATED the 8th day of November , 2010


Cyril L. Maundy
President

I concur


Edward T. Henry
Member