

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.: 3 OF 2011

BETWEEN:

SONIA BENTA JOSEPH

Employee

and

GEOTECH COMPANY LIMITED

Employer

Before:

The Hon. Philip Pilgrim

President

The Hon. M. Althea Crick

Member

The Hon. M. Glendina McKay

Member

Appearances:

**Mr. Samuel James of the Antigua and Barbuda Free Trade Union for
the Employee**

Mr. Charlesworth Brown Attorney-at-Law for the Employer.

2012: July 25

November 16

JUDGMENT

PILGRIM P.

INTRODUCTION

- [1] Geotech Company Limited is incorporated pursuant to the laws of Antigua & Barbuda. It is in the business of making different types of quarry material, general marl filling, concrete cylinders, and asphalt.

- [2] Sonia Benta Joseph resides at Jennings in Antigua & Barbuda. She commenced employment with the Employer as its Secretary Administrative Assistant on March 09, 1999. The Employer states that as at June 28, 2007 the Employee had taken over some activities which were previously performed by the former Office Manager. The Employee performed her duties at the Employer's place of business. This is located at St. Mary's Street in St. John's. She earned a basic salary of \$2,750.00 per month. In 2008 ten (10) days vacation leave was due to her.
- [3] The Employer owns land at Burma Road. This is situated in the parish of St. George's. The company's quarry works are performed at this location.
- [4] It is the Employee's evidence that in or about September 2007 she was invited by the Chairman of the Employer's Board of Directors to visit the company's quarry location. According to the Employee, the Employer had intentions of selling its property at St. Mary's Street. It proposed to move its business to Burma Road.
- [5] The Employee testified that she visited the quarry sometime in September 2007 at the invitation of the Employer's Chairperson. At the quarry she saw lots of dust. She smelled fuel. These conditions caused her to experience a sinus attack. According to her, she telephoned the Employer's office and reported this attack. She stated that she was unable to return to work after this experience. The Chairperson was not at the Burma site when the Employee stated she visited that location.

- [6] The Employee stated that on April 18, 2008 she again visited the quarry. She was accompanied by a relative. She visited the office which she stated was the quarry manager's office. According to her, no air-conditioned units were located in this office. All of the windows and doors were opened. She stated that she experienced another sinus attack.
- [7] It was the Employee's testimony that stones are crushed at the quarry and there are heavy duty vehicles which are stationed in the quarry. According to her, a mechanic shop exists at the quarry. The Employee's evidence is that a 20 foot container was used by the company to prepare an office.
- [8] The company organized a meeting in late February or early March 2008. The purpose of this meeting was to inform staff members of the company's move to the Burma Road location. This meeting took place at St. Mary's Street.
- [9] Mr. Arthur Bostic is the General Manager of the company. He attended the meeting. It is the Employee's evidence that she informed him of the dusty conditions at the Burma site and the negative impact which this posed to her health. Upon hearing this, Mr. Bostic informed her that the company would create another path to the office. He also informed her that construction of the office would be located on the southern side. This was a far distance away from the dusty area.
- [10] It is the Employee's testimony that at the same meeting she informed Mr. Bostic of the existence of her sinus problems. According to her these sinus problems would become worse as they did in September 2007.

- [11] The company was managed by a different General Manager prior to Mr. Bostic's appointment. Mrs. Sonia Benta Joseph testified that she informed the former General Manager of the existence of her sinus problems. As a result, she obtained permission from the former General Manager to allow the cleaner to clean the office before she arrived to discharge her responsibilities.
- [12] By letter dated June 16, 2008 Mr. Bostic wrote to the Employee. In effect she was informed that with effect from the same day she would be ***"based at the company's Quarry site at Parham"***. (This was admitted as **"SBJ-13a"**).
- [13] The Employee received SBJ-13a before 0800 hours on June 16, 2008. She sought and obtained medical attention the same day. The physician issued a Medical Certificate which was valid for one week. Subsequently, the Employee received another Medical Certificate. This extended her leave to June 30, 2008. These two (2) Medical Certificates were admitted as **"SBJ-14 & 15"** respectively.
- [14] The company wrote to the Employee by letter dated June 26, 2008. In that letter the General Manager stated as follows:

"Dear Mrs. Joseph,

Please be advised that your salary for the month of June 2008 has been prepared and ready for collection at our head office.

Also, please be mindful of your promise to deliver the keys for the locked drawers and remote control for the security system. We would appreciate your continued co-operation.

Please be guided accordingly.

Very Truly Yours

Arthur Bostic

(This letter was admitted as “**SBJ-18**”)

- [15] By letter dated July 07, 2008 the Employee returned the items to the Employer which were requested by the Employer from her in its letter dated June 26, 2008. She also requested that her salary presumably for the month of June 2008 be paid to her husband. (That letter was admitted as “**SBJ-17**”).
- [16] The Employee also received a Medical Report from Evans Moulon MD. It is dated June 30, 2008. It was submitted to the Employer. (It was admitted as “**SBJ-16**”).
- [17] The Employee testified that on June 30, 2008 she spoke with Mr. Bostic via the telephone. She informed him that she expected to hear from him in connection with the Moulon Report of June 30, 2008. It is her testimony that Mr. Bostic responded by informing her to send the company’s keys to him.
- [18] According to the Employee as a consequence of Mr. Bostic’s request she wrote a letter to him. It is dated July 07, 2008. In that letter she forwarded to the company (a) keys for the gate, (b) a key for the desk drawer and (c) an electronic key for the security system. (This was admitted as “**SBJ-17**”).

- [19] After writing “**SBJ-17**” the Employee states that she received no further communication from the company. She performed no further duties for the Employer since her return to work on June 16, 2008.

Efforts at mitigation

- [20] The Employee stated that in September 2008 she applied for vacancies which existed at the St. John’s Community First Credit Union, Newway Cleaning and other business places between 2009 – 2010.
- [21] The Employee obtained employment at Antigua Motors Ltd. on January 03, 2011 as an Administrative Assistant. She earns a monthly salary of \$2,300.00.

Legal proceedings

- [22] It is against this background that the Employee commenced legal proceedings against the Employer. She filed a Reference on March 29, 2011. Several issues are canvassed therein. However they may all be subsumed under the rubric of unfair dismissal.
- [23] The Employee’s Memorandum and Witness Statement were filed on March 29, 2011. The Employer’s Memorandum was filed on February 20, 2012.
- [24] The Employee gave evidence on July 25, 2012. Mr. Arthur Bostic for the Employer also gave evidence on that day.
- [25] Written Submissions for the Employee were filed on September 17, 2012. The Employer’s Written Submissions were filed on October 12, 2012.

The issues

[26] The issues for determination are as follows:

- (i) **Whether the Employee was dismissed by the Employer and if so, was the dismissal due to any prolonged illness in accordance with Section C58 (1) (e) of the Labour Code?**
- (ii) **Whether the Employer acted reasonably or unreasonably in treating the reason as a sufficient reason why the contract of employment was terminated.**
- (iii) **Did the Employee terminate the contract of employment with the Employer so as to justify being constructively dismissed and if so was this termination communicated to the Employer?**
- (iv) **In the circumstances of this case if the Employee was unfairly dismissed, what damages are due to her?**

The Employer's Submissions

[27] Mr. Brown Attorney-at-Law for the Employer submits that since no Medical Certificates were obtained by the Employee after the expiration of her sick leave on June 30, 2008, the Employee had effectively abandoned her employment with the Employer. In effect the Employer did not dismiss the Employee.

-See paragraphs [3] and [10] of his Written Submissions.

[28] Learned Counsel also submitted that the Employee was not constructively dismissed. He cited **Woods v W.M. Car Services Ltd. [1981] ICR 666 (E.A.T)** and **Walker v Josiah Wedgwood & Sons Ltd. [1978] I.C.R. 744 (E.A.T)** in support of his submission.

-See paragraphs [18] and [27] of his Written Submissions.

- [29] As a consequence of his Submissions Mr. Brown states that the Reference should be dismissed with costs to the Employer.

The Employee's Submissions

- [30] Mr. James for the Employee submits that *“by requiring her to work under conditions adverse to her health, the Company effectively dismissed her from its employ”*. To report to the Burma site would prove to be *“enigmatic of her health”*.

-See page 4 of his Written Submissions.

- [31] Mr. James also submits that the company being aware of her medical condition could not have reasonably expected her to report to the Quarry, the very nature of which....would have been hazardous to her health. He further contends that it was the company's duty to make enquiries of her having received the Dr. Evans Moulon's Medical Report dated June 30, 2008. The case of **Ref. No. 17 of 2004 Kimberly Marcia Lewis v Trade Winds Hotel Ltd. [2004]** a decision of this Court is cited in support of these submissions.

-See page 7 of his Written Submissions.

- [32] Mr. James submitted that the Employee was unfairly dismissed. She is entitled to recover damages under the established heads.

The first issue

Whether the Employee was dismissed by the Employer and if so, was the dismissal due to any prolonged illness in accordance with Section C58 (1) (e) of the Labour Code?

[33] Section C56 of the Labour Code grants a right to an Employee not to be unfairly dismissed without just cause in circumstances where the employee's probationary period has ended.

[34] Section 58 (1) (e) and (2) of the Labour Code states as follows:

“C58 (1) A dismissal shall not be unfair if the reason assigned by the Employer therefor

(a)

(b)

(c)

(d)

(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held: Provided, however, that there is a factual reason 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."

[35] I wrote the **Kimberly Marcia Lewis** decision (op cit). At **paragraph [61]** of that decision I wrote *inter alia* as follows:

"In a normal case it is expected that an Employer would consult with an employee before it takes a decision to dismiss an employee upon grounds of ill health. Apart from considerations of general courtesy the main reason why consultation is necessary is to facilitate "a discussion so that the situation can be weighted up, bearing in mind the employers' need for the work to be done and the employee's need for time in which to recover his health."

-See **Spencer v Paragon Wallpapers Ltd [1977] I.C.R 301** at page 307 per **Phillips J**;

[36] At **paragraph [62]** of the **Kimberly Marcia Lewis** judgment, I stated as follows:

"Another reason why the consultative process between the two parties must take place before dismissing an employee for ill health reasons is that it affords the Employer an opportunity to ascertain and establish the true medical position. Such steps should however be sensible in the hope that facts and circumstances which were previously unknown may very well emerge to throw new light upon the situation."

-See **East Lindsey District Council v Daubney [1977] ICR 566**.

[37] The principles which may be extrapolated from the case law which deals with this issue under consideration are as follows:

- (i) **The employee must have become ill;**
- (ii) **The employee's illness must be discernible;**
- (iii) **There must be a connection between the employee's illness and the workplace;**
- (iv) **The employee must communicate the nature and extent of his or her illness to the employer.**
- (v) **"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position."**
-per Phillips J. in East Lindsey Council (op cit) at pages 571 and 572.
- (vi) **The employer must have dismissed the employee due to the state of the same illness.**

Discussion

[38] On neither of the two occasions in September 2007 or on April 18, 2008 when the Employee visited the Employer's property at Parham when she claimed that she suffered a sinus attack due to what she termed to be bad conditions at that site did Mrs. Benta Joseph seek medical advice.

[39] In answer to Mr. Charlesworth Brown, Attorney-at-Law for the Employer the Employee stated that she has experienced sinus and allergy problems for

the past 23 years. Her further evidence is that there is nothing which the company has in writing that she communicated with Mr. Bostic or the company concerning her allergy or sinus problems.

[40] The Employer wrote a letter to the Employee dated May 09, 2008. In that letter she was advised by Mr. Bostic, to proceed on vacation with effect from May 27, 2008. (This letter was marked “**SBJ- 10**”).

[41] The Employer wrote another letter to the Employee dated June 02, 2008. It was written by Mr. Bostic. The Employee was informed that she was expected to return to work on June 16, 2008. (This letter was marked “**SBJ- 11**”).

[42] The Employee returned to work on June 16, 2008. She was presented with a letter dated June 16, 2008. It was written by Mr. Bostic. He advised the Employee that with effect from the same day she would be based at the Company’s Quarry site at Parham. (This letter was marked “**SBJ – 13a**”).

[43] The Employee gave evidence that when she received the letter of June 16, 2008 she went to her doctor. The Employee presented a copy of a Medical Certificate for the Employer from Dr. Evans Moulon’s office. It is dated June 16, 2008. In the doctor’s opinion after having examined the Employee and by reason of her illness she was fit to resume work on June 23, 2008. (This Certificate was admitted and marked “**SBJ-14**”).

[44] On June 23, 2008 the Employee again visited Dr. Moulon’s office. He issued a second Medical Certificate for the Employer. Having examined the

Employee and by reason of her illness Dr. Moulon stated that she would be fit to resume work on June 30, 2008. (This Certificate was admitted as “SBJ-15”).

- [45] Dr. Moulon issued a letter or Medical Report dated June 30, 2008. It states as follows:

“TO WHOM IT MAY CONCERN

Re: Sonia Benta Joseph

Sonia Benta Joseph has been a patient under my care since May 29, 1999. She is (known) to suffer from Allergic Rhinitis Senusitis.

To this end she has always been advised to avoid things which will trigger off her allergy.

This (includes):-

smoke

dust

aerosol (insecticide) sprays

petrol

Any environmental condition which exacerbates her allergic condition will prove enigmatic to her health.

Please be guided accordingly.

Yours truly,

*Evans S. Moulon MD
Attending Physician”*

- [46] Mr. Bostic stated in evidence that the Medical Report of June 30, 2008 was brought to the company by the Employee’s husband. After this the Employer heard nothing from the Employee.

- [47] A meeting was convened by the Employer at the St. Mary’s Street office in late February or early March 2008. The Employee attended the meeting. She stated that she informed Mr. Bostic of the experience which she encountered

at the Burma plant in September 2007. According to her she informed Mr. Bostic that since the Quarry was so dusty she was concerned about her health. Mr. Bostic told her that another path to her office would be utilized. He further informed her that going through the quarry to obtain access to her office would have posed no difficulty. The construction of the office would have been on the Southern side. This would have been far away from the dusty area.

[48] In his evidence Mr. Bostic stated that he was unaware that the Employee experienced sinus problems.

[49] Mr. James in support of his submissions cited the **Kimberly Marcia Lewis** case (op cit).

[50] At **paragraph [2]** of the **Kimberly Marcia Lewis** case I stated as follows:

“Sometime on or about of March 12, 2003 whilst she was working as a cook, Mrs. Lewis slipped on the Employer’s kitchen floor. As a consequence, she injured her right shoulder. She notified her employer. On the following day, March 13, 2003 she sought medical attention.”

[51] Armed with the final Medical Report from the employee’s medical advisor, the employer dismissed the employee.

[52] In that case I held for the employee because there was insufficient consultation by the employer of the employee’s medical condition before it took the decision to dismiss the employee.

[53] The **Kimberly Marcia Lewis** decision is generally unhelpful in this case for the Employee for the following reasons. Firstly, the nature of the injury which the employee incurred in that case namely one to ***“her right shoulder”*** was clearly identified and attributed to the employee’s workplace.

[54] The Employee stated at **paragraph [36]** of her Witness Statement as follows:

“I did not abandon my job. I believed based on my Medical Condition and experience that reporting for duty at the Quarry presented an imminent and serious danger to my health.”

[55] How is the company to be made aware that its workplace at Burma ***“presented an imminent and serious danger to (her) health”***.

[56] It could have been made aware that this was so if a proper foundation by the Employee was laid. According to the Employee she and a relative visited the Burma location on two (2) separate occasions. The Employee had a responsibility to visit the Burma site with a credible member of the Employer’s management. The nature of any difficulties which she experienced at Burma ought to have been identified by her and explained to the Employer. She failed to do so.

[57] In the circumstances of this case I therefore hold that the Employee presented no credible or other evidence which satisfies me that the Burma work site was detrimental to her health.

[58] The second reason why **Kimberly Marcia Lewis** is distinguishable from the facts of this case is in the area of the Medical Reports. In that case the employee continued to receive Medical Reports which explained her absences from work. These absences were due to the same medical illness to the right shoulder which was stated in the Medical Certificates.

[59] In this case the Employee stated that she still remained sick on June 30, 2008. She admitted that on June 30, 2008 she obtained no further leave of absence due to her illness. She continued to state in answer to Mr. Brown as follows:

“I got no further sick leave. I got no further Certificate because the doctor knew that I could not work under the conditions at Burma. I could not afford to pay the \$100.00 to the doctor all the time for the same illness.”

[60] No specific illness that is known to me was identified in either of the two Medical Certificates which were presented by the Employee. In the first one dated June 16, 2008 the Employee was said to *be “suffering from 322”*. In the second one dated June 23, 2006 she was said to be *“suffering from 01-56”*.

[61] It is fatal to the Employee’s case to state that whilst *“she still remained sick on June 30, 2008”*; she *“obtained no further leave of absence due to her illness.”* It is inexplicable that none was received from the doctor because he knew that she could not work under the conditions at Burma. The two (2) medical certificates did not state that her illness was due to her sinus

problems. So how am I to infer that she was ill on June 30, 2008 when she presented no medical certificate to justify that this was so?

[62] In the circumstances of this case I hold that the Employee presented no Medical Certificate after June 30, 2008 which identified any illness of which she was suffering from and which justified her failure to report for duty at the Burma site on July 01, 2008.

[63] In the circumstances of this case I hold that it was reasonable for the Employer to expect the Employee to report for duty at the Burma site on June 30, 2008. The Employer however had a duty to make an enquiry of the Employee to ascertain why she failed to report for duty at the Burma site on June 30, 2008. However, there was an overriding responsibility for the Employee to inform the Employer of her failure to engage the Employer with regard to the general nature of Dr. Moulon's report dated June 30, 2008.

[64] The third reason why **Kimberley Marcia Lewis** is distinguishable from the facts of this case has to do with the outcome of that case. The employee was dismissed in that case. In this case the Employee did not return to perform her duties at the expiration of her medical leave of absence.

[65] In the circumstances of this case I hold that the Employee never returned to work for the Employer at the Burma work site after June 30, 2008. The answer to the first issue is that the Employee's contract of employment was terminated when she failed to turn up for work after June 30, 2008. She was not dismissed by the Employer.

The second issue

Whether the Employer acted reasonably or unreasonably in treating the reason as a sufficient reason why the contract of employment was terminated.

[66] The Employer was not in possession of any evidence from the Employee to the effect that she was suffering from a sinus difficulty. As the Employer's Administrative Assistant it was her responsibility to have her medical challenge documented and filed with the Employer.

[67] It is most unfortunate that the Employee sought to create a nexus between the Medical Certificates dated June 16, 2008 and June 23, 2008 and the Medical Report dated June 30, 2008. There is no evidence that conditions of smoke, dust, insecticide, sprays, petrol, or any environmental problems existed at Burma. If in fact they did, the Employee did not bring them to the Employer's attention.

[68] I see no difficulty whatsoever which would have precluded a discussion between the two parties with regard to any medical difficulties which the Employee experienced. This could have been initiated by either party. That the Employee remained off her job without the required Medical Certificate certainly was not in her best interest.

[69] In the circumstances of this case I hold that the Employer acted reasonably in treating the reason as a sufficient reason why the contract of employment was terminated.

The third issue

Did the Employee terminate the contract of employment and if so was this termination communicated to the Employer?

Discussion

[70] In the letter from the Employer to the Employee dated June 16, 2008 Mr. Bostic informed the Employee that she *“will report to Charleston Looby, Quarry Manager or any other person as advised, and shall perform duties and tasks consistent with the role, responsibilities and functions of an Administrative Assistant.”* A number of duties were identified by Mr. Bostic which she was expected to perform.

[71] The Employee made a very clear statement in her Witness Statement at **paragraph [30]**. She stated as follows:

“I did not report for duty at the Quarry because I was fearful that my health was at risk.”

[72] This was the significant reason given by her for her failure to return to work at the Employer’s workplace located at Burma after June 30, 2008. However, the Employee also put forward another reason why she did not present herself to work at Burma after June 30, 2008.

[73] The Employer became aware for the first time on March 29, 2011 that the Employee was claiming to have been constructively dismissed by the Employer after she failed to report for duty after June 30, 2008. The first semblance of this appeared in the Reference filed on March 29, 2011.

[74] In her Witness Statement which was filed on March 29, 2011, the Employee stated at **paragraph [37]** as follows:

“I further believe that management’s decision to assign me at the Quarry was calculated and designed to force me to leave the job. The re-assignment was also made to humiliate me and served as a demotion. Under these circumstances, I believe I was constructively and unfairly dismissed.”

[75] So 2.75 years after the events of June 30, 2008 the Employee claimed for the first time on March 29, 2011 that she was constructively dismissed.

Legal Submissions

[76] Mr. James for the Employee submits that by its failure to communicate with or make enquiries of the Employee, the Employer effectively withdrew the Employee’s employment. He cited **Alcan Extensions v Yates [1996] IRLR 327 (EAT)**.

[77] In the **Alcan** case (op cit) Mr. Yates and sixty one (61) other respondents were all employed by the appellants at their factory in Banbury as press crew men. The head note to the case states that in 1994 the employers wanted to introduce radical and fundamental changes to the Employee’s contracts of employment. Accordingly, the employers sent letters to the employees to commence a continuous working shift pattern with effect from January 14, 1995.

[78] In response, Mr. Yates and the other fellow employees sent a reply to the employers. It stated that they regarded the changes as amounting to a

fundamental breach of contract and tantamount to dismissal. They stipulated that they would work the new system under protest, reserving their rights to claim unfair dismissal and redundancy payments. They subsequently did lodge unfair dismissal claims, while continuing to work under protest.

[79] The industrial tribunal held as a preliminary issue that the employees had been dismissed by the employers. In reaching that decision the tribunal applied the principle in **Hogg v Dover College [1990] ICR 39 EAT**. The principle is that where an employee's contract of employment has been wholly withdrawn from him and replaced with a totally different contract of employment to his detriment, the employee may accept the employer's conduct as repudiatory. In this way the employee is constructively dismissed.

[80] The employer's appeal in the **Alcan** case was unsuccessfully appealed to the Employment Appeal Tribunal (EAT).

[81] In the **Walker** case cited by Mr. Brown the Tribunal found that the **Employment Appeal Tribunal** held that the employee ought to have indicated to the employers that he regarded their conduct as a repudiation of their contractual obligation and that that was his reason for leaving, and that since the employee had not done so, he was not entitled to compensation in any event.

[82] In the **Woods** case cited by Mr. Brown, the Employment Appeal Tribunal held that none of the employer's actions amounted to a repudiatory breach of contract. The employee was held not to be constructively dismissed.

The Law

[83] What is a constructive dismissal? This concept is unknown to the Labour Code. It is governed by section 95 (1) (c) of the **Employment Rights Act 1996**, United Kingdom. The concept is described in **Harvey on Industrial Relations and Employment Law Volume 1**, at paragraph [401] as follows:

“A termination of the contract by the employee will constitute a dismissal if he is entitled to terminate it because of the employer’s conduct. This is colloquially and widely known as a ‘constructive dismissal’.”

[84] **Harvey** (op cit) lays down four (4) conditions which the employee is required to satisfy. There are as follows:

1. **“There must be a breach of contract by the employer. This may be either an actual breach or anticipatory breach.**
2. **That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving**
3. **He must leave in response to the breach and not for some other, unconnected reason.**
4. **He must not delay too long in terminating the contract in response to the employer’s breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.”**

[85] In **Weathersfield Ltd v Sargeant [1999] I.C.R. (CA) 425**, at pages 431 and 432 **Pill L. J**, stated *inter alia* as follows:

“I reject as a proposition of law the notion that there can be no acceptance of repudiation unless the employee tells the employer, at the time, that he is leaving because of the employer’s repudiatory conduct. Each case will turn on its own facts and, where no reason is communicated to the employer at the time, the fact finding tribunal may more readily conclude that the repudiatory conduct was not the reason for the employee leaving. In each case it will however, be for the fact - finding tribunal, considering all the evidence, to decide whether there has been an acceptance..... Acceptance of a repudiation of a contract of employment will usually take the form of the employee leaving and saying why he is leaving but it is not necessary in law for the reason to be given at the time of leaving. The fact finding tribunal is entitled to reach its own conclusion, based on the “acts and conduct of the party”, as to the true reason.”

[86] In **Smith and Wood’s Employment Law**, ninth edition authored by **Ian Smith and Gareth Thomas**, Oxford University Press, England, 2007, the authors state *inter alia* at page 481 as follows:

“Although the theory behind constructive dismissal is that it is the employer who terminates the contract for statutory purposes, in practice it will usually be the employee who takes the final step by resigning and walking out, thus showing that he has accepted the employer’s repudiation as concluding the contract. If the employee does not take such action, or does so after a delay, there is the danger (particularly in cases where the employer’s conduct consists of a unilateral proposal to change

the terms of employment) of this being construed as an agreement by the employee to a variation in the contract; if this is so there is no constructive dismissal, even if the employee later resigns. To avoid this danger, the employee should make up his mind quickly whether to leave.....” citing in summary Lord Denning in *Western Excavating Ltd. v Sharp* [1978] ICR 221 at 226.

[87] The terms of the contract of employment which were outlined in the letter from the Employer to the Employee dated June 16, 2008 do not appear to be a radical departure from the Employee’s former contract of employment. However, there are some differences.

[88] Even although some differences do exist I am required to decide firstly whether the Employee did terminate the contract. What is the evidence? It is contained at **paragraphs [38] to [44]** of the Employee’s Witness Statement. Those paragraphs state as follows:

“38. The employee was awaiting further instructions from the company in so far as the medical report is concerned.

39. In response to the company’s letter of June 26, 2008 the employee handed over all keys and the security remote via letter dated July 7, 2008.

40. The company never responded to the medical report of June 30, 2008.

41. The company never communicated to the employee in relation to the medical report and how it affected their decision to assign her to the quarry.

42. The company never wrote to the employee about her failure to report for duty.

43. The company never wrote to the employee notifying her of consequences of her continued failure to report for duty.

44. The company never wrote to the employee about their conclusion that she abandoned her job.”

[89] Here is the Employee who claims to be constructively dismissed. If the Employer's action is sufficiently important to the Employee to justify her termination of the contract then it is her duty to do so. The most efficacious way of doing this is that she ought to have legitimately protested such action either in the form of a letter, working under a short protest or by virtue of a resignation. She performed none of these actions.

[90] In the circumstances of this case I hold that the Employee did not terminate the contract of employment with the Employer **so as to justify being constructively dismissed.**

[91] But even if the Employee did terminate the contract of employment (which I hold she did not) did she communicate her termination to the Employer?

[92] The Employee had the opportunity to communicate her termination of the contract to the Employer. Instead, her own Witness Statement at **paragraphs [38] to [44]** clearly shows that instead of communicating her acceptance of the Employer's repudiation of the terms of the former contract, she merely waited on the Employer to communicate with her.

- [93] The Employee tendered into evidence a letter from the President of the Antigua Trades and Labour Union to Mr. Arthur Bostic dated October 30, 2008. Not one mention of her possible resignation or a communication of constructive dismissal was stated by the President of that Trade Union to the Employer. (This letter was admitted as “SRT-19”).
- [94] Was the Employee’s claim that she was constructively dismissed which was referred to in the Reference and her Witness Statement communication to the Employer of her acceptance of the end of the contract of employment? I have found **Rai v Somerfield Stores Ltd. [2004] IRLR 124 (EAT)** to be helpful. In that case Mr. Rai was originally employed by Somerfield Stores as a delivery driver. In June 2000, he was demoted to the position of store assistant. After his demotion, he never returned to work. His absence was uncertified and he made no attempt to communicate with his employers.
- [95] The headnote to Rai continues to reveal that the employers urged him to return to work by April 09, 2001 and stated that if he failed to do so on or before that date he would be treated as having resigned. He did not return to work. The employers treated his employment as having been terminated as of April 09, 2001.
- [96] On April 06, 2001 the employee presented an application claiming *inter alia* unfair dismissal. Mr. Rai’s case was that at a meeting on March 08, 2001 the employers treated him “*in a very rude and abusive manner by Somerfield’s representative or representatives and that he could not go back to work and therefore regarded his contract of employment as over in the light of that conduct on the part of Somerfield.*”

-See Judge J Burke Q.C. at page 127.

[97] At page 127 Judge J Burke Q.C. stated *inter alia* as follows:

“The tribunal rejected any claim based on constructive dismissal, not because they did or did not accept any evidence relating to what happened on 8 March (which indeed may not have been put before them at all) but because they found..... that, on Mr. Rai’s own evidence, he took no steps and no action to show that he was treating his complaints against Somerfield as amounting to a dismissal; in other words, he had not communicated to Somerfield his acceptance of any repudiatory conduct on their part”.

[98] The employee’s appeal to the Employment Appeal Tribunal was dismissed. At paragraph [44] Judge J Burke Q.C. made reference to **Edwards v Surrey Police [1999] IRLR 456** with regard to how an Employee who claims to have been constructively dismissed must communicate that acceptance to an employer.

[99] In the Edwards case the headnote at page 456 states *inter alia* as follows:

“Before a contract of employment can be terminated, there must have been communication by words, or by conduct, such as to inform the other party to the contract that it is at an end. An employee alleging constructive dismissal therefore, must communicate to the employer the fact that they are terminating their employment. Unless there has been a proper communication by the employee of the fact that they are regarding themselves as no

longer employed, whether by words or conduct, their employment relationship has not terminated.”

[100] In the circumstances of this case I hold that the Employee did not communicate any termination of the contract of employment by her to the Employer. In addition I also hold that her mention of the term ‘**constructive dismissal**’ in the Reference and the Witness Statement did not constitute any similar communication to the Employer.

The Fourth Issue

In the circumstances of this case if the Employee was unfairly dismissed what damages are due to her?

[102] In all of the circumstances of this case the Employee’s Reference is dismissed. There shall be no order as to costs.

Dated the 16th day of November 2012



PHILIP A. PILGRIM

PRESIDENT

I agree

M. ALTHEA CRICK

MEMBER

I also agree



M. GLENDINA MCKAY

MEMBER