

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF. NO. 31 OF 2015

BETWEEN:

RAMONA KETTLE

Employee

And

VERANDAH RESORTS LIMITED

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. Judith Dublin

Member

The Hon. John Benjamin

Member

Appearances:

Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Union,
Representative for the Employee

Mrs. Stacey-Ann Saunders-Osborne of S. Saunders Osborne Legal Services, Attorney-at-Law for the Employer

2015: December 10
2016: October 21

JUDGMENT

Brown, P:

Background

1. On December 12, 2007 the Employee commenced her employment with the Employer as a Waitress at its Verandah Resort. She worked in that position for approximately 6 years until her transfer to the Front Desk in December 2013.
2. The Employee's transfer in December 2013, was a result of her application, for the higher position of Receptionist at the Front Desk. She was required to



undergo training and did not receive any increase in pay until October 9, 2014. At the date of termination of her services in February 2015 she earned \$405.00 per week plus an average of \$350.00 weekly representing a two-point share of the Resort's Service Charge.

3. It was a practice at the Resort for employees' pay-slips to be left in a cash pan held at the Front Desk for collection by individual employees. Under the Employer's confidentiality code, unauthorized employees were prohibited from reading or divulging information from the pay-slips of other employees.
4. In or about January 2015 an issue arose regarding the Employee's knowledge about the precise amount of salary paid to her colleague, Ralph Gonsalves. The Employee had earlier said to Mr. Gonsalves that he must be a Supervisor because he earned more than she did even though they did the same work. The Employee sought an explanation from Mrs. Alfred- Brown, the Employer's Rooms Division Manager. When asked by Ms. Brown how she obtained the information about Mr. Gonsalves' salary, the Employee refused to reveal her source.
5. The matter was discussed with the Employee in a meeting on February 23, 2015 in the presence of Ms. Josette Josiah, Shop Steward; the Rooms Division Manager; Mr. Gonsalves; Michele Mings, Human Resources Assistant; and Ms. Rashida Jonas, Relations Manager.
6. At the meeting, the Employee refused to divulge the source of her information regarding the difference in pay between herself and Mr. Gonsalves. Following this refusal, the Relations Manager called the General Manager, Mr. Philippe Piacentini, by phone and he soon afterwards joined the meeting.
7. After receiving an update on what transpired at the meeting, the General Manager advised the Employee that she was in breach of the Employer's confidentiality code and that the Resort no longer trusted her to work at the Front Desk in her capacity as Receptionist, especially given that the Receptionist is one of the guardians of confidential guest information. He gave the Employee two clear options:
 - a) She could revert to her former position as Waitress without any loss of pay, or
 - b) She could accept a payout inclusive of severance pay.
8. The Employee left the meeting to consult with her advisor(s) on the matter. She returned to the meeting and advised the General Manager that she would not accept the option of going back to the Waitress position as this would amount to

a demotion in status. The General Manager reiterated that he would not allow her to continue working at the Front Desk.

9. The Employee then asked for permission to leave the meeting again to have further consultations with her advisor(s). Upon re-entering the meeting she advised the General Manager that she wanted to remain at the Front Desk as Receptionist, and would not consider going back to the Restaurant to work as a Waitress. She also advised him that since the hotel no longer wanted her to work at the Front Desk she was prepared to accept her severance pay, in addition to one (1) year's salary as her severance package.
10. In response, the General Manager said, "We can take care of that" and the Relations Manager said "Hmmm... okay".
11. After the meeting, the Employee went to the area of the Restaurant where she received a telephone call from the Rooms Division Manager enquiring as to her whereabouts. The Employee received no instructions to continue her shift as Receptionist or otherwise to return to her post at the Front Desk.
12. The Employee never reported to work at the Front Desk or elsewhere on that day or subsequently.
13. The Employer never recalled the Employee to work at the Front Desk or elsewhere on that day or subsequently.
14. On February 26, 2015, the Employee received a letter from the Employer accusing her of gross misconduct, gross disrespect, gross dishonesty and gross insubordination.
15. By letter dated February 26, 2015 the Employee's Representative wrote to the Employer complaining that the Employee had been unfairly dismissed.
16. The Employee commenced these proceedings by Reference filed on May 21, 2015. Her Memorandum of Claim was filed on June 10 2015. She contends that she was constructively and unfairly dismissed.

The Employee's Case - An Overview

17. The main thrust of the Employee's claim is that she was constructively and unfairly dismissed. In his closing submissions, the Employee's Representative submitted that the constructive dismissal took place on February 23, 2015, under circumstances deemed as harsh, oppressive and amounting to an act of unfair dismissal. His submission was based on the following:

18. At the disciplinary meeting held on February 23, 2015, the Employer asserted that the Employee would not be allowed to continue working in her position of Receptionist and offered her the option of returning to the position as Waitress or accepting a separation package. The Employee rejected the first option and decided to accept a separation package comprising severance pay, retroactive pay increase for one year, (the period of time she remained at her old salary following her transfer), plus one year's salary.
19. Based on the responses of the General Manager and the Relations Manager, the Employee formed the view that it was agreed that she would receive a separation package . Accordingly, she broadcasted to a number of staff in the Restaurant area, and specifically, to two guests then resident in the hotel, that her position with the hotel had been terminated. Based on her understanding of the outcome of the meeting, the Employee never returned to the reception desk to resume her duties on that day or the following day.
20. When the Employee left the meeting she was under the impression that the meeting had ended and that the Employer would have proceeded along the pay-off route. The Shop Steward representing the Employee at the meeting reported that she too was under the impression that the matter was resolved and the meeting had ended.
21. The Employee's firm position was that she could not have been expected to return to work in light of the General Manager's pronouncement that the Employer lost confidence in her.
22. On February 26, 2015, the Employee was surprised when she received a purported letter of dismissal dated February 25, 2015. The letter accused the Employee of committing a number of gross infractions and engaging in gross misconduct, dishonesty and gross insubordination. That letter caused the Employee to form the view that the Employer withdrew the severance (separation) option and purported to terminate her employment.
23. The Employee's Representative contended that, given its contents, this letter is intended to be a letter of dismissal under circumstances that were harsh and oppressive. He also maintained that the Employer constructively dismissed the Employee when its General Manager stated on February 23, 2015 that they no longer trusted her and gave her the difficult options from which to choose.
24. The second limb of the Employee's case related to her claim for back-pay, following her promotion to the Receptionist position. Her Representative argued that her transfer was not formalized with the requisite salary and benefits

increases until after a year following the transfer. He noted that within six weeks of assuming the new position she began operating a shift on her own. The Employee's Representative contends that confirmations in new positions should be done within three months, the normal probationary period allowed by the Antigua & Barbuda Labour Code. In that regard, the Rooms Division Manager did not do the appraisals within the settled timelines and at the normal frequency established by the Employer itself.

The Employer's Case – An Overview

25. The Employer sought to establish that the action of the Employee was a clear demonstration that she had abandoned her job.
26. The Employer conceded that the Employee had stated that she would not return to work as a Waitress and that she was prepared to accept a severance package, one year's salary and one year's back pay.
27. The Employer however contended that the Employee left the meeting prematurely without the parties arriving at an agreement.
28. After the meeting, the Employee left the hotel premises without resuming her duties. On the next day, she attended the hotel to meet with guests for matters which were not related to her employment.
29. Having not returned to resume her shift duties and given that on the following day she did not report for work at the scheduled time but was seen in the company of the two guests on the hotel compound, her Employer contended that she effectively abandoned her job.
30. As a result, by letter dated February 25, 2015, the Employer purported to accept the Employee's abandonment of her employment.
31. The Employer does not accept that the Employee was constructively dismissed. Moreover, the Employer does not accept that the Employee was terminated by its said letter to her.

Issues

32. The main issues arising for determination in this Reference are:
 - (1) Whether the Employer had any or any reasonable basis for taking disciplinary action against the Employee.
 - (2) Whether the Employee was constructively dismissed.

- (3) Whether the Employee abandoned her job.
- (4) Whether the letter dated February 25, 2015 was a letter of termination.
- (5) Whether the Employee is entitled to any retroactive pay.

Whether the Employer had any or any reasonable basis for taking disciplinary action against the Employee.

- 33. A point raised by the Employee's Representative was that on February 23, 2015 when the disciplinary meeting was held, the Employer had absolutely no grounds for taking any disciplinary action against the Employee.
- 34. The Employer had only a complaint from another employee suggesting that perhaps the Employee had breached the Employer's confidentiality code because she told him that his salary was bigger than hers. The inference here was that because the Employee had access to the pay slips of other employees that she obtained the information from the cash pan where the pay slips were kept. The evidence presented in the case however showed that the other employees who worked at the Reception Desk as well as employees in the Accounts Department also had equal access to the pay slips.
- 35. No or no sufficient evidence was offered to prove that the Employee had breached the Employer's confidentiality code. The Employee's contention was that she overheard someone speaking in an area adjoining the Reception area.
- 36. It appears that the Employer lost trust and confidence in the Employee because of a weak inference at best. The Employer carried out no or no proper investigation to find out if the Employee had in fact breached the confidentiality policy. In the circumstances. We find no proper basis for the initiation of disciplinary proceedings against the Employee.
- 37. Clearly, the Employer's conduct was unreasonable. Based on the mere weak inference of a breach of confidentiality, the Employer offered the Employee they said two options: either accept a demotion or the termination of her services. In our opinion, the Employer embarked on a course of conduct which was likely to embarrass or unreasonably punish the Employee. The disciplinary proceedings were harsh and unjustified in the circumstances. Accordingly, we resolve this first issue in favour of the Employee. The Employer had no reasonable basis for taking disciplinary action against her.

Whether the Employee was constructively dismissed.

- 38. Quite apart from the express terms, there are certain implied terms which are necessary for the validity of a contract. Of employment when an employer

conducts himself in such a manner that it destroys or seriously damages a fundamental implied term, the affected employee becomes entitled to terminate the contract. Such a termination by the Employee could amount to an unfair constructive dismissal.

39. The concept of constructive dismissal came up for consideration in the United Kingdom case of **Woods v WM Car Services (Peterborough) Ltd. [1981] ICR 666, Employment Appeal Tribunal**. In that case Browne-Wilkinson J, delivering the judgment of the Tribunal, stated:

“...in our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee... To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that in effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it ... The conduct of the parties has to be looked at as a whole and its cumulative impact assessed...”

40. When considering constructive dismissal a crucial question to be answered is whether the employer’s conduct was sufficient to justify the employee’s conclusion that the employer no longer wished to be bound by the contract of employment. Generally, this is a question of fact. In this Reference we answer the question in favour of the Employee. In our opinion, the Employer’s position taken at the disciplinary meeting on February 23, 2015 was such that it conveyed its intention to terminate the employment relationship.
41. We find that, in effect, the Employer was proposing to impose the disciplinary penalty of either demotion or termination which was out of proportion to the alleged offence. In any event, we are of the opinion that the Employer’s conduct was effectively a declaration that it no longer wished to be bound by the terms of the contract.
42. Based on the Employer’s conduct, especially the position it took at the meeting on February 23, 2015, we uphold the Employee’s prompt response to accept the Employer’s repudiation of the contract of employment, consider herself discharged and refuse to return to work on that day or at all.

Whether the Employee abandoned her job.

43. Having determined that the Employee was constructively dismissed on February 23, 2015, it is not necessary to consider this issue in detail. For the avoidance of doubt, suffice it to say that the Employee did not abandon her job. No opportunity arose for her to do so. It is clearly disingenuous, illogical and unreasonable for the Employer to contend that she did.

Is the letter dated February 25, 2015 a letter of termination?

44. It is even more disingenuous, illogical and unreasonable for the Employer to write to the Employee in the terms contained in its letter dated February 25, 2015. Again, it is not necessary to consider this issue any further in light of our conclusion above that the employee was constructively dismissed. It is enough to say that the letter is inherently inconsistent and contradictory. Save that it highlighted the unreasonableness of the Employer's conduct, it was of little or no value in our core determination that the Employee was unfairly dismissed.

Whether the Employee is entitled to any retroactive pay.

45. The evidence discloses that the Employer was tardy in its formal assessment of the Employee's performance in her new position. It appears that the Employer failed to meet its own standards. No performance reports were tendered at the trial to attempt to justify the Employer's delay of twelve months before it could confirm the Employee in her new position. In that regard, we note that the Employee was able to work on her own as Receptionist after approximately two months in the new position.
46. In the circumstances, we fix the period of six months as the maximum time that the Employee could possibly have been reasonably deprived of her increment. As a result, we find that she is entitled to retroactive pay from the seventh month after her transfer up to the date of her dismissal.

The Award

47. In the premises, we award compensation as follows:

(1) Payment in lieu of Notice (Notice Pay)

Under this head we award the Employee the sum of \$405.00 being the equivalent of her weekly salary.

(2) Loss of Protection from Unfair Dismissal

Based on the formula in the Collective Agreement for the calculation of severance pay, the Employee is entitled to twelve (12) days pay per year at the rate of \$81.00 per day for the first 4 years from December 12, 2007 to December 11, 2011 in the sum of \$3,888.00 (4 x 12 x \$81.00) In addition, she is also entitled to fifteen (15) days pay per year at the rate of \$81.00 per day for the next 3. 21 years of service from December 12, 2011 to February 23, 2015 in the sum of \$3,900.15 (3.21 x 15 x 81). Accordingly, we award the total sum of \$7,788.15 under this head.

(3) Immediate Loss

Under this head, we award the Employee her full salary for a period of 6 months or 26 weeks up to August 2015 in the sum of \$10,530.00 (\$405 x 26). In addition, we award the difference between the Employee's previous salary and that which she earned at Trade Winds, \$105.00, for an additional period of 17 weeks in the sum of \$1,785.00. As a result, we award the total sum of \$12,315.00 under this head.

(4) Future Loss

Based on the evidence, we limit the period of future loss to 6 months or 26 weeks at the difference between her salaries before and after the dismissal. Accordingly, we award the sum of \$2,730.00 (\$105 X 26) under this head.

(5) Fringe Benefits

(a) Loss of Health Insurance Contributions by the Employer

On the basis of Clause-21(7) (1) of the Collective Agreement, we accept the Employee's claim for loss of health insurance benefit at the rate of \$70 per month for a period of 12 months. Therefore, we award the sum of \$840.00 under this head.

(b) Loss of Service Charge

The average weekly amount paid by the Employer as service charge was \$200.00. We award this amount for a period of 6 months or 26 weeks in the sum of \$5,200.00. In addition, we award the difference between the Employer's average rate and Trade Winds' rate, \$50.00, for the additional period of 17 weeks in the sum of \$850.00. The total awarded under this head is \$6,050.00.

(c) Loss of Meal Allowance

On the basis of Section 22 of the Collective Bargaining Agreement, we award the sum of \$1,560.00 to cover the estimated cost of meals she would have received if not dismissed. In that regard, we accept the total daily meal cost of \$12 for two meals per day, five work days per week for 26 weeks ($\$12 \times 5 \times 26$).

(d) Loss of Thrift Fund Contributions by Employer

Based on Section 21A under Clause 21.3, we recognize that the Employer paid 2.5% of the Employee's weekly pay into her thrift fund. Given her last weekly rate of \$405, we award the equivalent of 52 weeks contribution in the sum of \$526.50 under this head. In the absence of supporting evidence, we reject the Employee's claim for the alleged amount withheld by the Employer's from its contributions.

(6) Costs

As to costs, we are mindful of the provisions of Section 10(2) of the Industrial Court Act Cap 214, which permits an award of costs grounded on exceptional reasons:

- i. In our opinion, the Employer should have known that it had no viable case against the Employee's claim of unfair dismissal.
- ii. In the absence of any cogent evidence to support a case for the institution of disciplinary action against the Employee, the options which she were offered rendered the Employer's conduct exceptionally harsh and contrary to good industrial relations practice.
- iii. In the circumstances, the Employer should have known that its contention that the Employee abandoned her job was unsustainable.
- iv. We consider the Employer's letter dated February 25, 2015 be a wholly unnecessary and inappropriate attempt to put a blemish on the Employee's record of the Employees employment.

On those bases, we award Costs in the sum of \$5,000.00.

Order

48. We order that:

1. The Employer do pay to the Employee compensation and costs as follows:

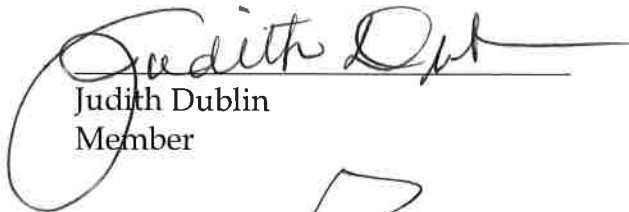
(1) Notice of Pay	\$ 405.00
(2) Loss of protection from unfair dismissal	7,788.15
(3) Immediate Loss	12,315.00
(4) Future loss	2,730.00
(5) Fringe Benefits	
(a) Loss of Service charge	6,050.00
(b) Loss of insurance	840.00
(c) Loss of thrift fund contributions	526.50
(d) Loss of meal allowance	1,560.00
(6) Costs	<u>5,000.00</u>
Total	<u>\$ 37,214.65</u>

2. The Employer shall pay to the Employee they said total sum of \$37,214.65 no later than November 30, 2016.

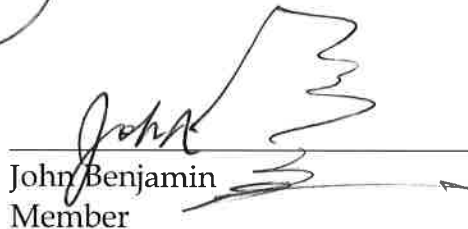
Dated the 21st day of October 2016



Charlesworth O. D. Brown
President



Judith Dublin
Member



John Benjamin
Member

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— *[Signature]*

— *[Signature]*

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