

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 4 of 2014

BETWEEN:

JOYANN CANOVILLE

Employee

and

DICKENSON BAY HOTEL MANAGEMENT LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. St. Lawrence de Freitas

Member

Appearances:

Mrs. Dennise Jonas Parillon of Jonas Parillon & Co, Attorney-at-Law for the Employee

Ms. E. Ann Henry QC of Henry & Burnette, Attorney-at-Law for the Employer

2015: October 1

2018: May 11

JUDGMENT

Brown, P:

Background:

1. The Employer is a duly incorporated company carrying on business as Red Lane Spa at its hotel premises situate at Dickenson Bay in Antigua and Barbuda.
2. The Employee was first employed by the Employer on June 3, 2004 as a Spa Receptionist and was promoted to the position of Spa Supervisor in February 2005.
3. During the course of the employment, the Employee became dissatisfied in respect of the amount of commission paid to her on a monthly basis, her working conditions and the amount of work she was required to perform.



4. By an undated letter, delivered to the Employer by email on or about December 26, 2009, the Employee tendered her resignation which the Employer accepted by letter dated January 4, 2010.
5. The Employee commenced these proceedings by Reference filed on February 21, 2014 in which she stated that the disputes between the parties were "unfair dismissal, unfair working conditions and unfair retention of the Employee's wages by the Employer".

The Employee's Case

6. By her Memorandum of Claim filed on May 12, 2014, the Employee claimed "compensation for unfair dismissal, unfair working conditions, unfair deductions and retention of the Employee's wages, all outstanding wages... and ... further or other relief ..." in respect of her employment with the Employer between June 3, 2004 and December 26, 2009 as a Spa Supervisor.
7. According to the Employee:
 - (a) It was a term of the employment agreement that 5% of the net spa sales referred to as the "5% gratuity" would be distributed between herself, on the one hand, and the other spa staff, on the other hand, in the ratio 2:3.
 - (b) On that basis, the Employee was paid her salary in full inclusive of her "2% gratuity" prior to January 2005.
 - (c) Several unresolved "errors and deductions" on the part of the Employer, noted by the Employee and reported to the Employer, resulted in several instances when she was overpaid or underpaid between January and December 2005.
 - (d) The Employee received her correct salary from January to August 2006 but the preceding errors were never rectified.
 - (e) Further errors and deductions were made by the Employer between October 2006 and May 2008 but the same were never rectified.
 - (f) As a result of the Employee's several attempts to have the "errors and deductions" corrected, the Employer threatened to force her to "leave the job".

- (g) Following the appointment of a new Financial Controller in June 2008, the Employee was paid her correct wages but the previous discrepancies remained unresolved.
- (h) Following the Employee's absence from work on maternity leave, she returned to work in January 2009 at which time the Employer insisted that she work six days per week, instead of the customary five days, and that she should take on additional managerial responsibilities.
- (i) As a result of increasing pressure brought to bear on the Employee, including the additional work load and the Employer's refusal to provide her with any assistance, the Employee collapsed at work suffering from a "stroke in evolution".
- (j) As a result of her illness the Employee was hospitalized for five days after which the Employer continued to pressure her with additional responsibilities including: working an extra day each week, working at night as the Employer's Duty Manager and carrying out additional job functions as Cleaner, Receptionist, Therapist and Spa Manager.
- (k) On December 26, 2009 the Employee reported for work at 9:00a.m and found the spa office dirty and in disarray. Faced with an overwhelming state of affairs, including guest complaints, the Employee was forced to stop working and write to the Employer complaining that she had been unfairly constructively dismissed.
- (l) The bases of the Employee's claim of unfair constructive dismissal are:
- Frustrating unfair working conditions of not being paid her proper wages;
 - Being forced to perform duties outside her job description;
 - Being forced to perform duties of terminated staff members;
 - Not being provided with adequate support staff in the spa;
 - Being pressured to take on additional responsibilities despite "being stretched to the limit"

The Employer's Case

8. In its Memorandum of Defence, the Employer's disputed the Employee's claim and contended that the Reference should be dismissed. To that end, the Employer admitted that the Employee was promoted to the position of Spa Supervisor on February 14, 2005 but denied her contentions in respect of rates of pay.

9. Further, the Employer conceded that as a result of inadvertence, the Employee was not paid in strict accordance with her terms of employment and that it erroneously failed to rely on the formula set out in the employment contract for calculating gratuity. In fact, she was paid at the rate of 2% of the gross revenue less ABST and UVI booking fees.
10. The Employer also asserted that the Employee was in fact overpaid by the sum of \$11,879.83 and rejected her claims of under-payment.
11. Further, the Employer denied any knowledge of the matters complained of by the Employee relating to her efforts to resolve the issues surrounding her wages and the pressures under which she was forced to work as they were never brought to its attention prior to the commencement of these proceedings.
12. The Employee's resigned by email dated December 26, 2009 without making any of the several complaints contained in her Memorandum of Claim. By letter dated January 4, 2010 the Employer accepted the resignation.
13. The Employee's claim for additional gratuity was not made until one year after her resignation had been accepted.
14. At no time prior to the commencement of these proceedings did the Employee contend that she had been constructively and unfairly dismissed.

The Main Issues

15. The main issues disclosed in the Memoranda are:
 - (1) Whether the Employee was constructively and unfairly dismissed.
 - (2) Whether there was a net underpayment of gratuities to which the Employee was entitled and if so, what quantum of damages is payable to her.

Issue 1: Whether the Employee was constructively and unfairly dismissed.

16. In the **Reference No. 35 of 2012, Wayne Weaver v. St. James Club**, when resolving that identical issue at paragraph 69 of the Judgment, this Court considered the cases of **Woods v. WM Car Services (Peterborough) Ltd [1981] ICR 666**, and extracted the following dictum of Browne -Wilkinson J which underscored the pertinent implied term in the contract of employment.

"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 or 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..."

17. Further, paragraph 70 of the said judgment reads:

"In the leading case of Western Excavating case, also cited by Mr. Carty, it was established that a constructive dismissal will be fully constituted when:

- (1) the conduct is such that it demonstrates that the Employer no longer intends to be bound by the contract of employment;**
- (2) the repudiatory conduct must be such that it undermines or erodes or destroys the contractual relationship;**
- (3) the employee's response to the employer's repudiatory breach is directly referable to the employer's conduct;**
- (4) the employee must get his timing right. He must not work too long after the breach and must not conduct himself in such a way as to waive his right and thereby affirm the contract;"**

We will apply those five (5) criteria in this Reference to determine the main issue.

18. The first question is whether the matters complained of demonstrated that the Employer no longer intended to be bound by the employment contract. In this regard, the Employee testified that she was receiving the correct wages up to January 2005 but after that month there were discrepancies throughout 2005. At paragraph 13 of her Witness Statement she stated:

"From January 2005 however, I observed that errors were being made in my wages that I was being paid in that sometimes I would be underpaid and sometimes I would be over paid"

19. The Employee further testified that from January to August 2006 she was paid her correct salary. She gave further evidence that she was underpaid for the months of September to December 2006. Thereafter, there were over payments and underpayments throughout 2007 and the first half of 2008. However, she continued that she was paid her correct wages from June 2008 up to the end of her employment.

20. The Employee also testified that sometime in or about April 2008 she approached the new Financial Controller and at his request, she supplied him with a report concerning the discrepancies. At paragraph 46 of the Witness Statement she said that thereafter she was paid at the correct commission.

21. On the Employee's evidence, it is clear that "errors" occurred resulting in discrepancies in the calculations of her wages. Although the Employer's sole witness stated that she was not aware of the issues regarding the Employee's remuneration, we are mindful that at paragraph 5 of its Memorandum the Employer admitted that though inadvertence the Employee was not paid in strict accordance with the terms of her employment agreement:

"It is conceded by the Employer that, by reason of its own error, it does not rely on the formula for calculating the gratuity as set out in the contract."

22. We find that "errors" and "discrepancies" occurred in the calculation of the Employee wages. However, on careful consideration of the evidence in that regard, we do not find that the Employer is guilty of repudiatory conduct. In other words, we do not conclude that the Employer no longer intended to be bound by the contract of employment.
23. As to the conduct complained of in relation to Employer's efforts to expand the Employee's workload and otherwise treat her unfairly, the same could have potentially amounted to the Employer's repudiation of the contract of employment. However, upon consideration of the Employee's conduct as a whole, there was no attempt to treat that component of the Employer's conduct as repudiation. In any event, she did not respond appropriately and in a timely manner.
24. Although the Employer may be blameworthy for adversely affecting the working relationship, the Employee took no stance and/or communicated no such position to the Employer in a timely manner to convey to the Employer that she considered the employment relationship to have been irretrievably undermined, eroded or destroyed. In our opinion, although there was a potentially good basis for an allegation of repudiatory breach, the Employee did not get her timing right. The evidence shows that she worked too long before asserting her position. In effect, by her conduct, she had affirmed the employment contract.
25. In any event, the Employee's brief resignation included no allegation of the Employer's repudiatory breach. In other words, her resignation was not unequivocal and directly referable to the Employer's conduct. The full text of the Employee's undated letter of resignation, as communicated by email dated December 26, 2009, is as follows:

**"Joyann Jonas-Canoville
Judges Hill St. Georges
Antigua**

Dear Mrs. Percival,

I hereby tender my immediate resignation. It was indeed an opportunity you have given me to become a supervisor of the spa of Sandals. It was an experience that would be cherished. In my tenure I have grown... and quite significantly so. I have learned to be professional, to be alert, filled with ideas, have a vision and be yourself. Being an employee at Sandals has indeed brought me to a new level. It was an experience I will never forget.

My best wishes and God's blessings. May you prosper as your soul prospers. Be in Good health.

Regards,
Joyann Canoville"

26. In the circumstances, we conclude that nature and timing of the Employee response to the Employer's alleged repudiatory breach was such that it undermined the validity of her claim and effectively precluded its success. As a result. We find that there was no unfair constructive dismissal.

Issue 2: Whether there was a net underpayment of gratuities to which the Employee was entitled and if so, what quantum of damages is payable to her.

27. As to the second issue, we note the Employer's admission at paragraph 4 of its Memorandum that "the Employee was not paid in strict accordance with the terms of her employment." Further, the Employer conceded that it erroneously applied a formula different to the one set out in the employment contract. We also note that the assertion that the Employee was overpaid by the sum of \$11,879.83.
28. In her Witness Statement Veronica Carlos, the Employer's Human Resources Manager stated that she had no knowledge of the Employee's role as "Spa Supervisor" prior to October 1, 2004. Further, at paragraph 5 of her witness statement, she stated that "I am not aware of any issues which the Employee had with the Employer or with her remuneration as they were not brought to my attention in my said capacity"
29. Notwithstanding the testimony of Ms. Carlos as to her knowledge of matters of which the Employee complained, the Employer is deemed to have had knowledge of the state of affairs prevailing at all material times. In that regard,

we accept the Employee's evidence that she complained to her supervisors or other senior members of staff.

30. As to the payments received by the Employee, although the Employer disputes the Employee's claim for unpaid wages and commissions between January 2005 and May 2008 and asserts that she was substantially overpaid, the testimony of the Employer's sole witness was not convincing in that regard.
31. In the circumstances, we find that there is a net amount due to the Employee and assess the amount due to her as follows:
 - (a) Under paragraph 14 of her Witness Statement , for the year 2005, there was a total net underpayment \$4667.20
 - (b) Under paragraph 18 of her Witness Statement, for the year 2006, there was a total underpayment of \$8,867.67.
 - (c) Under paragraph 29 & 30 the Employee's Witness statement, for the year 2007 there was total net underpayment \$31,116.33
 - (d) Under paragraph 31 the Employee's witness statement, for the year 2008, there was a net total net underpayment \$12,549.45
32. It is obvious that the Employee painstakingly put together the lists of the payments she received as well as short payments and overpayments. Her record is derived in part from the records of the Social Security Scheme and the records that she was required to prepare at the end of each month, which in turn were used to generate reports on total sales revenue, to which she had access.
33. We summarize the evidence before us and weigh them in the balance. On the one hand, the Employee provided extensive particulars of the payments she received in showing over payments and short payments; she complained of not being paid at the correct rate. Importantly, she testified that she was paid her correct salary from January to August 2006. Further she stated that she was paid her correct salary from June 2008 right up to the end of her employment in September 2009.
34. On the other hand, in its Memorandum the Employer admits that the Employee was not paid in accordance with her employment contract. Moreover, the Employer conceded that by reason of its own error, it did not rely on the formula as set out in the contract.
35. Taking the evidence of both parties as a whole in respect of the payments made to the Employee according to her employment contract, we find on a balance of probabilities that there was in fact a net underpayment to the Employee. The question flowing from that finding is: Is the Employee entitled to the net amount

of \$52,624.50 as claimed, being the net amount short-paid to her during the course of her employment?

36. Learned Queen's Counsel submitted that by virtue of the Limitation Act the Employee's Claim for amounts due to her for more than six years before the commencement of these proceedings, on February 21, 2014, is statute barred. In considering that submission, we are mindful of this Court's decision in **Reference No. 17 of 2010 Dale Abraham v. Hawksbill Hotel**, in which it was held that the Limitation Act 1997 created no limitation for commencement of unfair dismissal claims.
37. In this Reference, as stated at paragraph 42 of her Memorandum, "the Employee claims compensation for unfair dismissal, unfair working conditions, unfair deductions from and retention of the Employee's wages, all outstanding wages due to the Employee".
38. It is clear that the claim in respect of outstanding wages can stand on its own and is not contingent upon the claim of unfair dismissal. Accordingly, given the statutory six-year limitation period, Abraham's case cannot operate to sustain the Employee's claim for "outstanding wages" due to her prior to February 2008.
39. According to the Employee's testimony, which we accept, the underpayments made to her in 2008 are as follows:

February 2008	\$3,994.45
March	4,570.34
April	1,696.10
May	<u>2,288.56</u>
Total	\$12,549.45

40. In the premises, we are constrained by the Limitation Act to award the sum of \$12,549.45 only to the Employee as the total amount due to her as accrued commissions up to the date of the termination of her employment.

Order

41. It is hereby ordered that:-

- (1) The Employee's claim for compensation for unfair dismissal is dismissed.
- (2) The Employer shall pay to the Employee the sum of \$12,549.45 as outstanding commissions due to her.

- (3) The said sum of \$12,549.45 shall be paid by the Employer to the Employee no later than June 15, 2018.

Dated the 11th day of May, 2018



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Charlesworth O.D. Brown
President



.....
Dr. Hayden Thomas
Member



.....
St. Lawrence de Freitas
Member

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