

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 67 of 2015

BETWEEN:

RUTHLYN THOMAS

Employee

and

JUMBY BAY RESORT LTD

Employer

Before:

The Hon. St. Lawrence de Freitas

Chairman

The Hon. John Benjamin

Member

The Hon. Samuel Aymer

Member

Appearances:

Ms. Joy Dublin of James, Dublin & Associates, Attorneys-at-Law for the Employee

Ms. Fiona Murphy of Simon Rogers Murdoch, Attorneys-at-Law for the Employer

2016: November 21

2017: February 16

2018: November 09

JUDGMENT

De Freitas, C

1. By Reference dated 30th of November, 2015 the Employee Ms. Ruthlyn Thomas (hereafter referred to as **Ms. Thomas or the Employee**) who lives at Parham Town, Antigua, and has filed a complaint to the court that she was constructively and unfairly dismissed by Jumby Bay Resort Ltd., her Employer, and that she is entitled to compensation.
2. Jumby Bay Resort Ltd (hereafter referred to as **the Company or the Employer**) operates a private all-inclusive 5-star luxury hotel and spa on Long Island an off-shore island of Antigua in Antigua and Barbuda.

Proceedings

3. The Employee filed her Memorandum on the 6th January 2016. In her Memorandum she contends *inter alia* that her dismissal, constructively or otherwise, was unfair and that she is entitled to compensation for notice pay, for loss of protection, for immediate loss and future loss and for retirement contribution.
4. The Company filed its Employer's Memorandum on the 28th of January 2016. It maintains *inter alia* that the Employee was never constructively or otherwise dismissed.
5. By its Memorandum, the Employer asserts that on the 25th March 2015 it received a medical report from Dr. K. K. Singh indicating that the Employee has been "disabled in the functioning of a waitress" and he further recommended that the Employee "retire from waitress job for the rest of her life".
6. The Employer further asserts that it wanted, and did seek a second opinion on the Employee's medical condition. It referred the Employee to Dr. Sean Marquez whose office is in Barbados. The Employer further asserts that it received the said overseas medical evaluation from Dr. Sean Marquez's office in its entirety on the 2nd December, 2015
7. The Employer maintain that it had to await the result of the overseas medical evaluation together with the necessary legal opinion before making an informed decision on the determination of the Employee's employment.

Application

8. The Employee through, her counsel filed an application together with an Affidavit in support on November 18th, 2016, asking the Court for an order that "Summary Judgment be entered in favor of the Employee in respect of liability with damages to be assessed".
9. Thus, on November 21st, 2016, the date set for the trial of the Employee's claim, as a preliminary matter the court heard arguments by learned counsel Ms. Joy Dublin, on behalf of the Employee, in respect of the said application. She asked that the application for summary judgment be granted for the Employee. She asserted that the Industrial Court (Procedure) Rules gave the Court the authority to proceed on its own, with or without the application, to issue the said summary judgment, notwithstanding that the application had been filed on November 18th 2016, (Friday afternoon) and the full trial of the Employee's claim had been scheduled for Monday 21st November 2016.

10. Learned Counsel, Ms. Fiona Murphy on behalf of the Employer submitted that the filing of the application on Friday November 18th 2016 was short notice and did not give the Employer sufficient time to prepare its objections to the Application so that hearing of the Application would therefore be unfair.
11. The Court after hearing both arguments agreed with the submission of Ms. Murphy and ordered that the application be dismissed and that the substantial matter be heard.

The Evidence

12. The Employee's evidence is that she commenced working with the Employer on or about October 2010. The evidence is that her last remuneration was EC\$848.00 per week, and that she also received a 16-point service charge with an average value of \$112.60 fortnightly based on a 40-hour week.
13. The Employee's further evidence is that on the 29th June 2014 while using the bathroom at her workplace she slipped and fell, hitting the right side of her head and her left hip. The Employee, by her witness statement, said that she remembers being in and out of consciousness and was subsequently taken to the Mount St. John's Medical Centre (the hospital). At the hospital she was given the necessary assistance and advised that she should have an MRI done. On the same day, the 29th June 2014, she was given three (3) days sick leave and discharged from the hospital.
14. The evidence is that the Employer instructed her to report to Dr. Belizaire (the Company's doctor). The evidence also indicates that following Dr. Belizaire's visit the Employee was further referred to Dr. Hamilton Georges, several therapists and other medical practitioners to include Dr. K.K. Singh, Orthopedic Surgeon.
15. It is undisputed that during this period of examinations, the Employee had attended approximately 65 sessions of physiotherapy and received some 11 sick leave certificates, amounting to in excess of 10 months away from her job. Further, during this said period all of her medical costs, including the several physiotherapy sessions, were paid for by the Employer or its insurers on their behalf, and the Employer also continued to pay the Employee's wages.
16. Dr. Singh's final medical report was dated 17 March 2015 and was received by the Employer on or about 25th March 2015. That report states *inter alia*: "Looking at the entire clinical picture and duration of sick leave for an entire eight months since June 2014, I strongly recommend for her to be **compensated for her permanent disabilities** at present and to **retire from waitress job** for the rest of her life". (emphasis the Courts)

- 17.** The Employer, in conjunction with their Insurers, Bryson's Insurance Co., made arrangement for further medical evaluation in the matter and made the necessary appointment with Dr. M. Sean Marquez, Diplomate of the American Board of Electrodiagnostician, whose practice is in Barbados. The appointment was for 8th June 2015. By its memorandum the Employer state that the Employee was advised of the date of the appointment in Barbados on the 6th May 2015 but the evidence is that on the 3rd June 2015 the Employee advised the Employer that she would not submit herself to further evaluation and she did not make herself available to meet the appointment scheduled for 8th June 2015, sighting several reasons for her refusal as evidenced by correspondence between her Attorney, the Employer and their Insurers.
- 18.** On June 16th 2015 the Employer's Insurers advised the Employee by letter to her Attorney that the "Employer would invoke his rights as provided by Section 18, 19, and 20 of the Workmen's Compensation Act Cap. 475. This resulted in the suspension of the Employee's salary as of the 19 June 2015.
- 19.** The Employer admits that on the 22 June 2015 the Employee attempted to return to work even though she was not scheduled to work. The evidence is, that she was asked to return home by the Employer's Human Resources Director, citing the fear that, in light of the contents and recommendation of Dr. Singh's Report and under all the circumstances, allowing her to return to work might expose the Company to further liability.
- 20.** Thereafter, the Employee agreed to submit to further medical examination and a new date (12th October 2015) was agreed between the parties for the Employee to be medically evaluated by Dr. Marquez in Barbados. The evidence is that the Employee did submit herself to the evaluation on that occasion.
- 21.** It is undisputed that the Employee's wages were not reinstated even after the Employee was finally evaluated by Dr. Marquez and the Employee has alleged that such failure constitutes a repudiatory breach of the employment contract sufficient to ground a claim for constructive dismissal.
- 22.** The Company on the other hand has contended that the failure to reinstate the Employee's wages cannot ground a constructive dismissal claim because the Company was entitled to take reasonable time to review Dr. Marquez's report before deciding how to proceed in accordance with its rights under the Workmen's Compensation Act. (Cap 475). The Employer contended that before it could reasonably complete such a review, the Employee brought the claim herein for alleged constructive dismissal. There is no evidence that the issue of reinstating wages was ever discussed or raised by either the Employer or the Employee after the Employee agreed to be examined by Dr. Marquez. There was no termination letter from the Employer, neither was there a resignation letter from the Employee claiming Constructive Dismissal.

Matters to be Determined

23. The matters to be determined by the Court are as follows:

- Was there a breach of the employment contract by the Employer?
- If yes, then was the breach sufficiently serious to amount to a repudiation of the employment contract and amount to a constructive dismissal?
- Was the Employee unfairly dismissed?
- If the Employee was unfairly dismissed, what compensation should be paid to her, if any?

The Law

24. The Antigua and Barbuda Labour Code at Section C56 states:

C56. "Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause".

In addition the Industrial Court Act (Cap 214), Sec. 10 (3) b states:

"(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) -----

(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."

25. The Workman's Compensation Act, Cap 475, as amended at Section 18 (1) (2) and (4) provides:

(1) If so required by the Employer, submit himself for examination by a medical practitioner provided and paid for by the employer.

(2) The workman shall when required, attend upon that medical practitioner at the time and place notified to the workman by the employer, provided such time and place is reasonable.

(3) -----

(4) If the workman refuses or willfully neglects to submit himself to such examination or in any way willfully obstructs or unnecessarily delays such examination, his rights to compensation and to take or prosecute any proceedings under this act in relation to compensation, shall be suspended until such examination has taken place.

Analysis of the Facts and the Law

26. There is no dispute that the Company took all necessary steps to ensure that the Employee received the necessary medical and physiotherapy treatment. That during such treatment the Employee remained on sick leave for in excess of ten months and continued to be paid her wages by the Employer or their insurers, until about 19 June 2015 when they suspended such payment in reliance upon sections 18, of the Workmen's Compensation Act (475). It is also undisputed that the Employer was entitled to so suspend payment of wages.

27. Thereafter, it was only after further discussions between the parties, which included discussions with representatives of the Labour Department, the Employee subsequently agreed to make herself available to be evaluated by Dr. Marquez in Barbados on the 12th October 2015.

Dr. Marquez's Medical Report.

28. Dr. Marquez produced two reports namely: "Medical Report" dated 12 October 2015 and "Medical Report Addendum" dated 19 October 2015. They were addressed to Bryson's Insurance Agency (the Employers' Insurers). An internal stamp on both reports indicated that they were received by Bryson's on November 30, 2015. The Employer received the reports on 2 December 2015.

29. These Reports, after reciting Dr. Marquez's qualifications, gave an exhaustive and detailed analysis of the Employee's medical history and then continued to detail the various technical studies that Dr. Marquez performed together with the results and conclusions determined by him. In what appears to be an addendum (Test date: 10/13/2015), Dr. Marquez, after having outlined the Patient' (Employee's) complaints and after having indicated that she "is not currently taking any medication" continued to state as follows: Under the Heading "**EMG & NCY Findings**"

"All nerve condition studies (as indicated in the following tables) were within normal limits.

All F Wave latencies were within normal limits.

H-reflexes were normal bilaterally.

All examined muscles (as indicated in the following table) shows no evidence of electrical instability."

Under the Heading "Impression":

"Normal Study."

(The tables referred to under the heading "EMG & NCY Findings" were attached as part of the report)

- 30 The report seems to suggest that there was no physical evidence of the Employee's alleged injuries. The report also suggests that the degenerative changes reported are of no clinical relevance and more likely than not are age-related. Dr. Marquez also noted that the Employee's "back pain was likely due to the presence of her obesity....." However, Dr. Marques commented that, *"she is nevertheless convinced that they exist and thus is rendered incapable of performing her duties as a server"*
- 31 In detailing the Employee's Past Medical & Psychosocial History, Dr. Marquez made reference to a previous visit to his office by the Employee on the 22 October 2001. He indicated that at that time she had been referred to his office by Dr. K.K Singh and the Mill Reef Club where she had worked at the time.
- 32 In reference to his 2001 examination of the Employee, Dr. Marquez indicated that "At that time I diagnosed a chronic strain of the lateral malleolus of the right ankle (chronic ankle sprain) but my role was to rule out the possibility of any concurrent nerve injury". Dr. Marquez went on to indicate *inter alia* that in 2001 an EMG/Nerve Condition Study ".....was normal" and that in 2001 an MRI study of the right ankle was "also essentially normal". He also reported that in 2001 he had submitted a consultation letter to Dr. Singh and to the Mill Reef Club in respect of the Employee. However, there is no evidence that the Employee had ever disclosed this prior injury or prior medical treatment to the Employer and there is no reference to it in any of the medical reports other than Dr. Marquez' report.

Employee's Submissions

- 33 Learned counsel for the Employee in her submission asked: "Was the employer entitled to suspend the payment of the Employee's Salary?" She submitted that the Employer acted contrary to good industrial relations practice when it made the decision to cease payment of the Employee's salary and further submitted that in any event "the Employer was only entitled to withhold payment of the Employee's salary up until October 12, 2015 when the examination took place." Ms. Dublin further contended that once the Employee had subjected herself to the examination, remuneration ought to have resumed.

34 Counsel then referred the Court to the following legal sources:

- a. **Halsbury's Law of England 4th Edition, Para 616**, which states that "an Employee is treated as dismissed -----if----- the Employee terminates the contract with or without notice in circumstances such that he is entitled to do so without notice by reason of the employer's conduct";
- b. **The Laws of Unfair Dismissal by Steven D. Anderman** as it relates to the law of constructive dismissal;
- c. The case of **Edward Smith v Stanford Financial Group** (No. 16 of 1998) a matter decided in this Court. This matter also looks at the issues of constructive dismissal; and
- d. The cases of **Robinson v Crompton Parkinson Ltd. [1978] ICR 428, Woods v WM Car Services (Peterborough) [1982] ICR 693, and Northern Textiles Limited v Andrew [1979] IRLR 84** which deal with the issue of damaging the relationship of confidence and trust between an employer and an employee.

Employers' Submissions

- 35 Learned counsel for the Employer submitted that the Company maintains an insurance policy that provides coverage for any employee that may be injured during the course of their employment. Under the policy line staff employees are paid 75% of their average weekly salary while on sick leave for any alleged on-the-job injury. The policy also covers medical expenses throughout the period of illness in accordance with the Workman's Compensation Act (CAP 475)
- 36 Learned counsel, having set out the details and the circumstance of the accident at the workplace, continued to detail the several medical professionals that treated or evaluated the Employee, to include the physiotherapy secessions she attended. Counsel for the Employer pointed to the fact the Employer's insurers covered all of the Employee's medical costs. She also emphasized that the insurers also paid the Employee's wages throughout the entire period prior to 19 June, 2015, and all overseas travel, and related expenses. That there was no intent not to be bound by the essential terms of the employment contract
- 37 Counsel for the Employer asked the Court to consider that during this period the Employee submitted some eleven (11) medical leave certificates amounting to some ten (10) months and one week absence from work during the period 8 July 2014 until 15 May 2015. (see Para 15 above)

- 38 Counsel also drew the Court's attention to the final report of Dr. K. K Singh as set out in Para. 16 above,
- 39 Under the heading of "Authorities", Learned Counsel for the Employer referred the Court to several other decided cases as a part of her written submissions. These cases mainly address the doctrine of constructive dismissal and the law relating to wrongful dismissal.
- 40 Importantly, counsel for the Employer also emphasized that while the Employer was assessing the further implication and awaiting legal advice, the Employee filed her Reference in the Industrial Court. She submitted that the Company was entitled to a reasonable time after receiving Dr. Marquez's report to consider it and take legal advice on it before reinstating the Employee's wages

Constructive Dismissal

- 41 Constructive Dismissal occurs where, although it is the employee who appears to terminate the employment by walking out, it can be said that the real reason for termination was in some way the prior conduct of the employer. The employer's conduct would have to have been so grave that it constituted a repudiatory breach of the contract of employment. **Industrial Law**, I.T. Smith & J.C. Wood (second edition) pgs. 215-216.
- 42 In his *judgment*, Lord Denning MR, in **Western Excavating (ECC) Ltd v Sharp** said "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any other performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".
- 43 To form the basis for a constructive dismissal claim, the failure by the employer must be of 'sufficient materiality'. There must be an intention no longer to honor the existing contractual obligation. **[The Law of Unfair Dismissal]** by Steven D. Anderman at pg. 79.
- 44 Brown P. In the matter of Wayne Weaver vs. St. James's Club, a matter decided in this court, opined that the four requirements that are stipulated in the Western Excavation ECC Ltd. vs Sharp that is required to establish constructive dismissal are:
- the conduct is such that it demonstrates that the Employer no longer intends to be bound by the contract of employment (Paras. 42, 43 and 50). That
 - the repudiatory conduct must be such that it undermines, erodes or destroys the contractual relationship. (Para 49). That

- the Employee's response to the Employer's repudiatory breach is directly referable to the Employer's conduct. (para. 41) That
- 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. (para. 22 and 52).

Decision

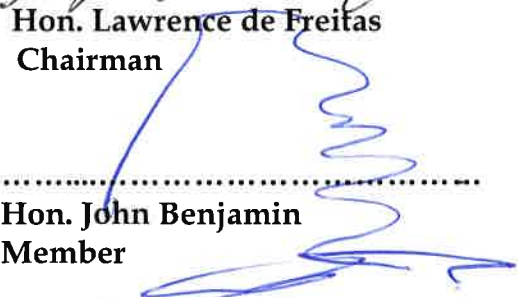
- 45 In arriving at a decision in this matter careful consideration was given to the evidence of all parties concerned. Special consideration was given to the relevant sections of the Antigua and Barbuda Labour code, Cap 27 and the Industrial Court Act, Cap 214 and other authorities. In addition, we were able to observe the demeanor of the witnesses.
- 46 The Employee submitted herself to the evaluation by Dr. Marques on October 12, 2015 and the Doctor's report was received by the Employer's Insurers on November 30, 2015 and by the Employer on December 2, 2015. The employee filed her reference in the Court on the same day (December 2, 2015) asking the court to consider "whether the Employee has been constructively and unfairly dismissed".
- 47 In the circumstances, we find that the Employer had no, or no sufficient time to address the several issues that arose in Dr. Marquez report. In addition to his lengthy report, they included a reference the doctor made to an evaluation he was asked to make on Ms. Thomas, by a previous employer, the Mill Reef Club in October, 2001. There was also Dr. Singh's final report, where he recommended that the employee be retired as a server.
- 48 The Court accepts the Employer's submission that while they were assessing the further implication and awaiting Legal advice, the Employee filed her Reference in the Industrial Court.
- 49 The Employee's wages were not reinstated after the Employee was finally evaluated by Dr. Marquez. The Employer has an obligation to pay contractually agreed remuneration, however section 18(4) of the Workman's Compensation Act, affords statutory protection to an Employer where the Employee refuses or willfully neglects to submit to an examination pursuant to the said section 18. Thus, the Employee's wages should have been reinstated once she had been examined by Dr. Marquez on 12 October, 2015. Failure to reinstate wages promptly after that date was a breach of the employment contract because the Employer can only rely on the statutory protection of section 18(4) "until such examination has taken place".

- 50 However, the question remains whether such failure was a repudiatory breach or a breach of sufficient materiality to ground a claim for constructive dismissal?
- 51 Under the circumstances as expressed in Paras. 26 and 36 above, the Court cannot accept that this neglect or failure amounted to an intention by the Employer not to be bound by any of essential term of the existing contractual obligation.
- 52 The Court finds that the Employee was not constructively dismissed, or dismissed at all. It follows that there can be no finding of unfair dismissal.
- 53 The Court notes that there was no letter of resignation on the part of the Employee, nor did the Employee walk off the job as is customary in constructive dismissal claims (at all material times she was on sick leave) She however, filed a Reference with the Court claiming constructive dismissal thereby indicating that there was no longer a continuing obligation to her Employer – she had simply abandoned her employment,
- 54 It is the order of the Court that the Employer pay the Employee that portion of her wages, from the 12th October 2015 (the date she submitted herself for evaluation by Cr. Marquez) up to and including the 2nd December 2015 (the date she filed the reference with the Court).
- 55 The Employer shall pay the above award (Para 54) on or before 30th November 2018.
- 56 There shall be no order to costs.

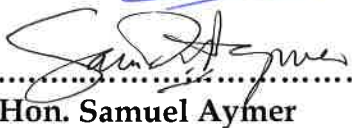
Dated the day of November, 2018



.....
Hon. Lawrence de Freitas
Chairman



.....
Hon. John Benjamin
Member



.....
Hon. Samuel Aymer
Member

