

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 49 OF 2013

BETWEEN:

COLLEEN SIMPSON

Employee

And

CARIB HOLDINGS LTD t/a BLUE WATERS HOTEL

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel Aymer

Member

The Hon. St. Lawrence deFreitas

Member

Appearances:

Mr. Egbert Joseph and Cicely Charles of Hotel Management Association for the
Employee

Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation
for the Employer

2014: October 31

2019: January 16

JUDGMENT

Brown, P;

Background

1. The Employer is a registered company carrying on business under its trade name at its premises situate at Soldiers Bay in the Parish of St. John in Antigua.
2. The Employee commenced her employment as a Sous Chef on March 1, 2001. Her salary immediately before the termination of her employment was \$645.00 per week. In addition, she received a share of the service charge fund.



3. As one of two Sous Chefs employed by the Employer, the Employee was initially required to work routinely on a Shift System from either 7:00am to 3:00 pm (the Morning Shift) or 3:00 pm to 11:00pm (the Evening Shift). Subsequently, by a special arrangement between the parties the Employee was required to work largely on the Evening Shift for a period of almost 3 years, commencing in or about September 2003 to July 2006.
4. Prior to July 2006, the parties agreed that the Employee would take her annual vacation from August 1st to September 3, 2006.
5. In or about the month of June 2006, as part of its reorganizational activities, the Employer determined that the special arrangement with the Employee in respect of the shift system should be terminated. As a result, with effect from July 15, 2006 the Employer scheduled the Employee to resume work, routinely from time to time, on the Morning Shift.
6. By letter dated June 21, 2006 the Employer acknowledged that the ongoing "organizational changes" would affect the Employee whom it recognized as "a highly valuable employee of the company". By that letter the Employer offered to increase the Employee's "wages from \$645.20 to \$1,100.00 per week to be accompanied by an upward adjustment in severance charge so as to soften the possibility of any economic impact in the process of facilitating the necessary transition in your schedule." The Employer notified the Employee, that the weekly schedule would reflect changes in her time for reporting for duty.
7. As a result of illness commencing on or about July 9, 2006, the Employee proceeded on certified sick leave for the period July 10 to July 22 and July 23 to July 30, 2006.
8. By letter dated July 20, 2006 the Employer informed the Employee that it was "forced to delay and reschedule" her annual vacation from the period agreed earlier to "a later date that would be more convenient to the operation". The letter also required the Employee to "report back for scheduled duty on July 31, 2006".
9. Following discussions between the Employer and the Antigua & Barbuda Workers' Union, the Bargaining Agent for the Bargaining Unit of which the Employee is a member, the Employer resiled from its stated intention to delay and reschedule the Employee's annual vacation. As a result, the Employee

proceeded on her scheduled vacation leave from August 1 to September 3, 2006.

10. By letter dated August 30, 2006, issued while she was still on vacation, the Employee responded to the Employer's letters, referred to at paragraphs 6 and 8 above. In her response, the Employee (a) acknowledged the Employer's proposal as "a very good one", (b) expressed "some difficulty in acceding to the change in hours of work for now", and (c) proposed discussions for "any amicable separation which might be beneficial to both parties" and, (d) stated that her proposal "must not be construed that I am terminating the job".
11. The Employer expected the Employee to return to work on September 4, 2006 but she did not do so.
12. By letter dated September 13, 2006 the Employer referred to its offer to increase the Employee's salary by more than 70%; her lack of earlier response to its letters dated July 20th and 21st 2006; and stated that it was in no doubt that she "had agreed to accede to the change" and that it had expected her to report for work on September 4, 2006.
13. In the conclusion of that letter the Employer took the position that the Employee's actions amounted to a "repudiation" of the Employee's contract of employment and informed her of its "acceptance of constructive resignation effective September 13, 2006."

The Dispute

14. By her Memorandum of Claim filed on April 23, 2014 the Employee outlined the sequence of events stated above and contended that:

"(a) between March 2001 and August 2003 she worked on the Morning Shift.

(b) In August 2003, she consulted with the Employer's owner, Mr Randall, and its General Manager, Mr Keith Martel, in respect of an offer made to her to fill the position of Chief Instructor in the Culinary Arts Department of the Hotel Training Institute of Antigua & Barbuda.

(c) Pursuant to the encouragement of the Employer, and with the full concurrence of her supervisor, the Executive Chef, the Employee accepted the position. In order to facilitate her additional employment, it was agreed that the Employer would arrange her schedule of work so that she would be available to the Institute daily from 8:00 am to 4:00 pm.

(d) Based on her agreement with the Employer, she commenced her employment with the Institute in September 2003 and thereafter was routinely required to work exclusively on the Evening Shift except on those days when the other Sous Chef had his day off.

(e) Soon after the appointment of its then new General Manager, Mr Randall Wilkie, to replace Mr. Martel, the Employer wrote to her by letter dated June 21, 2006 informing her of a change in her work schedule commencing on July 15, 2006.

(f) In the circumstances, she “was not treated fairly” and is entitled to compensation for unfair dismissal.

15. In its Memorandum of Defence filed on June 24, 2014, the Employer disputed the Employee’s claim on the following grounds:

“(a) The Employee was hired on the basis that she would work a shift system including both Morning and Evening Shifts.

(b) It had no knowledge of the arrangement made in August 2003 but in any event, the Employee knew that the accommodation for her to work mainly on the Evening Shifts would always be subject to amendment after discussions and “some amount of reasonable notice.”

(c) In light of the accommodation granted to her, the related fact that the Employee and the other Sous Chef were earning a second income, it held discussions with the Union as the Employee’s bargaining agent.

(d) During the discussions with the Union it offered to increase the Employee’s salary and auxiliary benefits by more than 70% in an effort to compensate her for any resulting economic hardship.

(e) Although she was required to forego her previously approved annual vacation and to report for duty on July 31, 2006, it allowed the Employee to proceed on vacation and scheduled her to resume work on September 4, 2006.

(f) It was not desirous of entering into a separation agreement with the Employee as she was an integral part of its kitchen operations and her services were highly valued.

(g) It was not aware of the efforts of the Employee to speak to the General Manager between September 4th and September 13th, 2006.

(h) The Employee had repudiated the employment contract and it accepted the repudiation

(i) In the circumstances, the Employee was not unfairly dismissed.”

The Main Issues

16. The main issues arising in this Reference are:

- (1) Whether the Employee repudiated her contract of employment by constructive resignation and thereby caused the termination of her employment.
- (2) Whether the Employee was unfairly dismissed.

Repudiation and Constructive Termination of Employment

17. In the context of contracts of employment, repudiation means the conduct of one party indicating an intention to terminate the contract. In other words, repudiation occurs when one party, by its words or actions, indicates its intention not to perform the contract in the future. In order to constitute a repudiation, the party's conduct must be sufficiently clear so that it can reasonably be interpreted to mean that the party will not or cannot perform the contract in the future. (See Black's Law Dictionary, 10th Edition)
18. In cases of constructive dismissal, where an employer evinces a clear intention to be no longer bound by the contract of employment, the employee must accept the repudiation, as an essential first step, and confirm his acceptance to the employer. The acceptance of the employer's repudiatory breach of the employment agreement may lead to or take the form of a resignation by the employee.
19. The corollary which follows logically arises where an employee evinces a clear intention to be no longer bound by the contract. In such a situation, it is the employer who must accept the repudiation and confirm his acceptance to the employee. The acceptance of the Employee's repudiatory breach may take the form of a letter confirming the same.
20. In *Wayne Weaver v. St. James's Club*, Reference No. 35 of 2012, when considering the issue of constructive dismissal, this Court applied the UK case of *Woods v. VM Car Services (Peterborough) Ltd* (1981) ICR 616. At paragraph 70 of its judgment this Court identified four elements of the conduct of the

parties which together may constitute constructive dismissal. For convenience we adapt these elements as follows:

- (1) The conduct is such that it demonstrates that the employee no longer intends to be bound by the contract of employment.
- (2) The conduct must be such that it undermines, erodes or destroys the contractual relationship.
- (3) The employer's response to the employee's repudiatory breach is directly referable to the employee's conduct.
- (4) The employer must get its timing right. It must not perform its obligations too long after the breach and must not conduct itself in such a way as to waive its right and affirm the contract.

Resolving the Issues

21. In our view, paragraphs 4 and 5 of the Employer's Memorandum of Claim are very instructive in so far as the Employer pleaded, firstly, that it was in no position to either "confirm or deny" the fact that the Employee worked the Morning Shift between March 2001 and August 2003. Secondly, the Employer pleaded that it was in no position to "speak to" the special shift arrangements with the Employee and the related discussions regarding the agreement that she would be required to work largely on the Evening Shift. Thirdly, the Employer also stated that it was not aware of the Employee's efforts to speak to the General Manager between September 4 and September 13, 2006.
22. In any event, we find the correspondence passing between the parties, to be most instructive. The main ones are reproduced and analyzed as follows:
23. The First Letter dated June 21, 2006 from the Employer to Employee confirms that prior to its date there existed a settled arrangement which required adjustment in light of impending organizational changes. In the circumstances, the Employer:
 - (a) Confirmed the earlier meeting with the Employee to explain its position.
 - (b) Acknowledged:
 - (i) the Employee's high value to its business.
 - (j) the economic impact that the proposed changes would have on the Employee.
 - (c) Offered to:
 - (k) increase her weekly wages from \$645.20 to \$1,100.00
 - (l) increase her share of the service charge fund.
 - (m) give the Employee a bonus at the end of the year.

(d) Gave over three week's notice to the Employee of changes to the settled arrangement.

24. For completeness, we quote the First Letter as follows:

"21 June 2006

Ms Colleen Simpson

...

Dear Ms Simpson,

When I met with you recently, it was carefully explained that the Company needed to make certain organizational changes in an effort to improve the efficiency of the Resort's operation, to include, among other things, greater flexibility in the scheduling of all staff.

Having recognized that you would be one of the few individuals that this change would affect and the fact that you are a highly valuable employee to the Company, my discussions with you surrounded an offer by the Company to increase your wages from EC\$645.20 up to EC\$1,100.00 per week to be accompanied by an upward adjustment in service charge so as to soften the possibility of any economic impact in the process of facilitating the necessary transition in your schedule.

Additionally, it is the usual expectation at the end of the year that employees receive some form of incentive and once this is to be done, the Company is committed to giving you a meaningful bonus based on profitability and your level of productivity.

Of principle consideration in your case, was the fact that you hold the position of a Sous Chef which requires a great degree of involvement in the effective management of the Kitchen Department and it is of importance that your department head should have some measure of flexibility in scheduling your duty hours to complement an efficient operation.

In view of the above, we hereby give notice that effective 15 July 2006, the weekly schedule will reflect some changes in your time for reporting for duty and I solicit your co-operation.

Should your personal circumstances make it impossible to permit for the required operational change, you are welcome to come to my office, at

your convenience, to discuss and look at any other alternative that may be available under the present circumstances.

Yours sincerely,
Randall Wilkie
General Manager

..."

25. The Second Letter from the Employer to the Employee dated July 20, 2006, was issued during the period of the Employee's sick leave. In this letter, the Employer acknowledged that the Employee was having difficulty in the accepting the proposed change. Unfortunately, the Employer also sarcastically connected her certified sick leave, for the period July 10 to July 31, to the Employee's difficulty in accepting the proposed change.
26. Perhaps even more importantly, by the Second Letter, the Employer also communicated its unilateral decision to delay and reschedule the previously agreed annual vacation and required the Employee to return to work at the expiration of her sick leave on July 31, 2006. It is noteworthy that the Employer apologized for cancelling the Employee's scheduled vacation and stating that the circumstances were beyond its control.
27. We quote the Second Letter as follows:

"20 July 2006

Ms Colleen Simpson

...

Dear Ms Simpson,

You are aware of the Company's reorganizational efforts, with the objective to achieve a greater measure of efficiency in the overall Resort operation, including the kitchen, of which you are an integral part, given the current position held as Sous Chef.

We note that you had some difficulty acceding to the change required in your daily schedule, which took effect from July 15, and consequently, we were not so surprised when, on or around July 10th, we received a medical certificate advising absence from the latter date up to July 22 and a second certificate extending sick leave to July 31, with your vacation already scheduled from August 1 to September 3, 2006.

Unfortunately, because of the current constraints on the operation, taking into consideration your position, anticipated sick absence up to July 31 and expected one (1) month time-off for annual vacation to a later date that would be more convenient to the operation.

Therefore, you are required to report back to scheduled duty at the expiration of sick leave on Monday, July 31, 2006, for the 3:00pm shift. We do apologize for having to amend your vacation schedule but the circumstances are presently beyond our control at this time.

We invite your understanding and cooperation.

Yours sincerely,
Randall Wilkie
General Manager

..."

28. The Third Letter, dated August 30, 2006, from the Employee to the Employer in response to the First and Second Letters, was issued towards the end of her annual vacation. In this letter, after commending the Employer for its proposal, the Employee expressed disappointment over the Employer's view regarding her illness.

29. Further, by the Third Letter, the Employee referred to her concerns previously expressed and stated that because things had not really changed she was not acceding to the change for the time being. The Employee also attempted to take the discussion to a new level by stating that she was prepared to discuss a mutually beneficial separation. Perhaps most importantly, the Employee stated that her proposal must not be construed that she was terminating her employment and that it was advanced with a view to having a reasonable settlement of the matter.

30. The full terms of the Third Letter are as follows:

"30 August, 2006

Mr Randall Willkie
General Manager

....

Dear Mr Willkie,

I write in response to your letters of 21st June and 20th July.

I have been using the time-off to further consider the position of the company put forward by you and also the offer or proposals made for us to come to an amicable resolution in the matter.

I must say that the proposal is a very good one and the hotel must be commended for arriving at this position.

Further I am disappointed that the Company felt I was playing around with the matter due to my illness in July, which was extended to September. For the record, I am still fighting the illness.

I had expressed my concerns in going forward to you in a meeting. From assessment things have not really changed, it is against this backdrop that I am having some difficulty in acceding to the change in the hours of work for now.

In light of the above, I would be prepared to discuss any amicable separation which might be beneficial to both parties. I wish to state however that this decision must not be constructed that I am terminating the job, but a position put forward so as to have some reasonable settlement on this matter and that both sides could move on without any problems.

I await your earliest reply in this matter.

Yours truly,
Colleen Simpson

...

31. By the Fourth Letter, dated September 13, 2006, the Employer terminated the employment relationship by a purported acceptance the Employee's repudiatory breach of the employment contract. In this letter, the Employer acknowledges receipt of the Third Letter and expressed its concerns that it was submitted at the eleventh hour with no notice of her intention not to return to work.
32. Further, by the Fourth Letter, the Employer stated that based on its offer to increase her salary and her lack of response to First and Second Letters, it had formed the view that she had agreed to the proposed changes. Moreover, given the timing of her letter and her failure to give the Employer any time for an

appropriate response before refusing to return to work, the Employee had repudiated the employment contract by a "constructive resignation" effective September 13, 2006.

33. The Fourth Letter reads as follows:

"September 13th, 2006

Ms Colleen Simpson

...

Dear Ms. Simpson,

You were scheduled to return to work from vacation on September 4th, 2006; however, you have not reported back to work up to the time of writing this letter.

For the record, on or around August 31st, 2006 I received a letter by fax dated August 30th, 2006 purportedly under your signature, advising, among other things, that you were "having some difficulties acceding the change in the hours of work for now" and further that you "would be prepared to discuss any amicable separation which might be beneficial for both parties".

The Company, however, finds it extremely difficult to accept the action taken to submit a letter at the eleventh hour giving the Company absolute no notice of your intention not to come back to work, thus creating a disruption in the kitchen operation without any consideration for our business. We take into full context and consideration, that we have had a dialogue with you since the earlier part of June, outlining the economic necessity for the required change in working hours and gave sufficient notice to you verbally, and culminating in our letters of June 21st and July 20th, 2006.

Based on a more than reasonable offer to increase your salary and benefit more than 70% in an effort to compensate for any economic hardship that the change may have likely precipitate, and in the absence of any official written response to our two (2) letters, we were not in any doubt that you had agreed to accede to the change. Consequently, we were expecting you at work on the first mentioned date.

Given the position and level of responsibility expected of an employee holding the position you held, I am disappointed with your action to fax a

letter to the Hotel on the eve of the weekend when you were expected to report back to work, after almost two (2) months of approved and certified absence. Further, following submission of your letter, you did not allow the Company any time for an appropriate response, before opting not to come back to work.

Under the above circumstances, it is the Company's position that your actions amount to a repudiation of your employment contract and we hereby informed acceptance of constructive resignation effective September 13th, 2006.

We wish you the very best for the future.

Your sincerely
BLUE WATERS ANTIGUA
Randal Wilkie
GENERAL MANAGER

..."

34. At the trial the Employee testified as to the discussions she had with the General Manager whereby she notified the Employer of the offer to work at the Training Institute and sought permission to work on the night shift only, commencing at 3:30 pm. She said that she was encouraged to accept the offer and given the necessary permission. Based on her evidence, we find, as a matter of fact, that the special arrangement in respect of her shifts was agreed between the parties. This agreement was confirmed and reinforced by the course of conduct between the parties between September 2003 and July 2006.
35. It is clear that the Employer acknowledged the delicate and entrenched nature of the special arrangement when it consulted with the Employee and offered her a significant salary increase in its attempts to make the relevant parts of the proposed organizational changes acceptable to her.
36. The Employee also testified that prior to receipt of the First Letter, she was not aware of the offer to increase her salary. Further, she stated that prior to receipt of the Second Letter she was not aware that the Employer intended to reschedule her vacation leave. These aspects of the Employee's evidence are noteworthy. We also note that the Employer was communicating its proposals to the Union.

37. Having considered the Employee's testimony, including her demeanour in the witness box, we accept her as a sincere and credible witness. In that regard, Mrs. Karen Whitehead, the Employer's Human Resource Manager and sole witness, testified that she came into contact with the Employee from time to time during the course of her employment and found her to be "an easy person to get along with" and that she (Mrs. Whitehead) "never heard anything negative about her".
38. In the context of the overall relationship and discussions between the parties, we find it significant to note that Mrs. Whitehead, neither in her earlier position of Personal Assistant to the General Manager nor as Human Resource Manager, was never present at any of the meetings between the Employee and any of the three General Managers who were employed by the Employer from time to time. Accordingly, she was of no assistance to us in that regard.
39. In the circumstances, we accept the Employee's testimony that she spoke to the General Manager between the 4th and 13th September, 2006 and that during their conversation he told her that he would speak to the owner, Mr. Randall, to see if the Employer could make her an offer to pay her "severance". After that conversation, she said she tried to contact the General Manager and was told he would return her call but he never did.
40. In the premises, it is clear that up to the end of August 2006 the Employer continued to recognize and honour the special shift arrangement with the Employee. Moreover, the Employer continued to extend its indulgence to her prior to and during the periods of her certified sick leave and up to the end of her annual vacation on September 3, 2006.
41. Based on the evidence, the Employer received the Third Letter on or about August 31, 2006 by which the Employee made it abundantly clear that she was not resigning and did not intend to terminate her employment. The critical question then becomes: How did the parties conduct themselves afterwards, especially between September 4 and September 13, 2006? On the one hand, we find that during that period the Employee made several attempts to contact the General Manager but was unable to do so.
42. On the other hand, it appears that the Employer did nothing to reach out to the Employee or otherwise communicate with her during that period. In fact, Ms Whitehead testified that she "couldn't say if anyone (on behalf of the Employer) checked with the Employee as to why she did not go back to work"

after her vacation. In the end, the Employer merely issued the Fourth Letter, which, in our opinion, was effectively a letter of dismissal.

43. On the general issue of liability, we refer to paragraph 20 above and conclude that the Employee did not resign or otherwise repudiate her contract of employment. More particularly, we conclude that:

- (1) The Employee's conduct generally and the Third Letter in particular, did not unequivocally demonstrate that she no longer wished to be bound by the contract. Ultimately, the main thrust of her approach in that letter was to attempt to negotiate the terms of a mutually agreed amicable separation.
- (2) The Employee's conduct generally, and the Third Letter in particular, did not undermine, erode or destroy the employer/ employee relationship. What the Employee did was in furtherance of the Employer's initiative to renegotiate an adjustment in her hours of work. During the course of events, the basic contractual relationship subsisted and was not challenged.
- (3) The Employer's response in the Fourth Letter was not a response to any repudiatory breach. It was a response to the Employee's proposal for further discussions about her hours of work and ultimately towards an amicable separation package.
- (4) The timing of the Employer's response by the Fourth Letter was not right. Given that the Employee's letter (the Third Letter) was received by the Employer on December 31, 2006, we find that the Employer waited too long before responding in the manner it did two weeks later.

44. In the circumstances, we find that the Employer acted unreasonably in dismissing the Employee as it did in the circumstances. And we declare that the Employee was unfairly dismissed and is entitled to compensation.

Compensation

45. We assess compensation as follows under the respective headings:

(a) Payment in Lieu of Notice of termination

Section C 9 (3) of the Labour Code requires an employer to give an employee notice of termination at least equivalent to the interval of the employee's pay days. In this case, we are of the opinion that a period of 4 weeks would have

been reasonable. Accordingly, **we award the sum of \$2,580.80** ($4 \times \$645.20$) being the equivalent of 4 weeks pay.

(b) Loss of Protection from Unfair Dismissal:

The standard award under this heading is the equivalent of severance pay that would be payable to an employee in a redundancy situation. Under section C 41 of the Labour Code weekly paid employees are entitled to at least one day's pay for each month of employment. In this jurisdiction the standard rate for monthly paid employees is one month's pay for each year of service. The Employee worked for a period of five and a half years between March 1, 2001 and September 13, 2006. In the circumstances, we are of the view that the rate of two week's pay per year of service is appropriate. Accordingly, **we award the sum of \$7,097.20** ($\$645.20 \times 2 \times 5.5$)

(c) Immediate Loss:

We are mindful of the Employee's claim for compensation for "unfair dismissal" and "loss of earnings". However, the Employee testified that after her dismissal she continued to work at the Institute but did not seek employment elsewhere. Given the absence of any efforts by the Employee to mitigate her loss, we make no award under this heading.

Order

46. In the premises, we order:

- (1) The Employer shall pay to the Employee the total sum of \$9,678.00 as compensation for her unfair dismissal.
- (2) The said sum shall be paid no later than January 31, 2019.

Dated this 11th day of January, 2019



Hon. Charlesworth O.D. Brown
President



Hon. Samuel Aymer
Member



Hon. St. Lawrence deFreitas
Member