

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 50 OF 2015



BETWEEN:

DEBORAH LAKE

Employee

and

ANTIGUA COMMERCIAL BANK

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Judith Dublin

Member

Appearances:

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

Mr. Septimus A. Rhudd of Rhudd & Associates, Attorney-at-Law for the Employer

2016: November 15

2019: July 05

JUDGMENT

Brown, P;

Background

1. The Employer is a financial institution with its Head Office and principal place of business situate at the corner of St. Mary Street and Thames Street in the City of St. John's.

2. At all material times, the Employee was a member of the recognized collective bargaining unit represented by the Antigua & Barbuda Workers Union. As such, her employment was subject to the terms of the Collective Agreement in force from time to time between the Employer and the said Union.
3. The Employee commenced her employment with the Employer on 10th July, 1986. Her last position was Customer Relations and Sales Representative in which she earned an annual salary of \$50,136.00.
4. During the first 8 years her tenure the Employee held the positions of Clerk, Cashier, Clearings Clerk and/or Customer Service Clerk. With effect from 01st March, 1994 she was "seconded" to the Employer's subsidiary, Antigua Commercial Bank Mortgage & Trust Company Ltd. In its letter confirming the "secondment", the Employer advised the Employee that she was being "transferred" and that the "movement" was a "lateral one" with no salary adjustments.
5. Upon her "secondment", the Employee was assigned the position of "Insurance and Securities Analyst". In August 1995, the Employee's position was again changed to that of Securities and Loans Analyst. Despite her request for a transfer in November 1996, the Employee remained on "secondment" to the Employer's subsidiary until 01st October, 1999 when she was "transferred" to the Employer's Head Office. As was the case at the commencement of her "secondment", there was no adjustment of her salary and benefits.
6. Upon her redeployment back to the Employer's Head Office in 1999 the Employee's position was again changed to that of Customer Service Clerk. Subsequently from October 2004 the Employee's position was "re-aligned" and changed to that of a Customer Relations and Sales Representative with effect from 5th April, 2004.
7. By letter dated 22nd March, 2005 the Employee emphasized that she was still at entry level" after 19 years of employment and applied to the Employer for a "voluntary separation package". We reproduce the substantive content of that letters as follows:

"22nd March, 2005

*Wayne Carbon
Human Resource Executive*

...

Dear Sir,

After nineteen years working in the Organization in various departments and in different capacities, without any blemished appraisal: I am still at entry level in the Bank and from my viewpoint cannot foresee any speedy change in my circumstance.

I am hereby applying to for a voluntary separation package from the Bank.

Your favorable response in this regard will be greatly appreciated.

*Yours truly
Deborah Lake-Christopher "*

8. In response to the Employee's letter, by letter dated 19th April, 2005 the Employer rejected her application and noted her concerns as follows:

" April 19, 2005

Mrs. Deborah Lake-Christopher

...

Dear Mrs. Lake-Christopher:

Re: Request for Voluntary Separation

We acknowledge receipt of your letter of March 22, 2005.

We have given careful consideration to your request; however, we regret we are unable to accede.

We also note your concern about the level of the position you occupy; However, we view the position of Customer Relations and Sales Representative as a very important part of the Bank's operations. We think you have a future with A.C.B. once you continue to apply yourself."

We regret the delay in responding.

*Yours truly,
Wayne Carbon*

"

9. By letter dated 26th September, 2005 the Employee renewed her application for "severance" and requested an appointment to discuss the matter. The substantive parts of her letter are as follows:

" 26th September, 2005

*Mr. Gladston Joseph
General Manager*

...

Dear Sir

I refer to your letter dated 19th April, 2005 in response to my request for severance.

I however, am requesting again that the Bank consider my application for severance.

I am also requesting an appointment to negotiate further on this matter.

I would appreciate your urgent response.

Thanks for your consideration.

*Yours sincerely,
Deborah R. Lake (Ms.)*

..."

10. The Employer responded to the Employee's second application by letter dated 29th September, 2005 as follows:

"September 29, 2005

Mrs. Deborah R. Lake Christopher

...

Dear Mrs. Lake-Christopher:

Referring to your letter dated September 26, 2005, we have noted your request, however, our response is the same as outlined in our letter dated April 19, 2005.

Yours truly,

G.S. Joseph
General Manager

..."

11. By letter dated 11th October, 2005 the Employee further particularized her concerns in relation to her 19 year tenure at "entry level" and resubmitted her application for a separation package. That letter reads:

" October 11, 2005

The Manager
Antigua Commercial Bank

...

Dear Mr. Joseph,

Subsequent to my letter of March 22, 2005 my situation remains unchanged. In view of what I have been through, the response by the Bank has not convinced me that I am valued in the organization, because none of my efforts (both through the Union and on my own) as to why I have never been promoted, has ever been satisfactorily addressed. This letter is another attempt to have this question answered and to again submit my request for a voluntary separation package.

I have a long history of somehow being overlooked for promotion. This is not to say that I consider myself more apt for promotion than anyone else, but each time applicable promotions become available there seems to be infringements of some rule, convention or agreement that pose as obstacles to me being promoted.

I was seconded to the Mortgage and Trust in 1994 as the Security and Insurance Analyst. This is a very responsible position, but I was not promoted. It may be argued that this may have been an entry level secondment, but both Dawn Daley and Gillian Hurst were recruited into the Trust without any banking experience and took up positions higher than entry level even though my job was more responsible than theirs.

In May 1997 eight persons at my level were promoted to B' Signer. Only one had more years of service in ACB than I, four had the equivalent years as I had, three had less, but none had worked in more departments than I at the time. The vacancies were not advertised as is

required by the Collective Agreement so that I could put forward my name to be considered as a candidate for promotion. I felt that I had as good a chance as any: for in the Collective Agreement promotion was according to skill, competence, efficiency, job ability and all things being equal –seniority. The decision to promote these persons was made by April 14, 1997 and only one month prior, on March 12th a vacancy for Loans Acquisition & Administration Rep was advertised, yet one month later when it was most likely that I would have been promoted, curiously, the process suddenly changed.

My name is one of the names on a list of promotion discrepancies being discussed with the Union during negotiations. The negotiations began before the restructuring. When the restructuring began most of the vacancies were advertised, but I was not considered competent enough through another series of infringements. The selection was done via an interview process and (in violation of the labour code) I did not have a job description, and for years I was not given an appraisal (in accordance with the Collective Agreement) instruments that would have been integral to strengthening and supporting my resume, since the interviews were done by persons who were not familiar with me or my work ethic and experience.

The restructuring is complete and from all appearances, in order to dampen my chances further, I still am without a job description or job classification--- probably the only person in the Bank with that status. After nineteen years and the many subtle occurrences that have hampered my development, it is difficult for me to trust the Bank and share in its enthusiasm for my future. I am therefore re-representing my case for a separation package.

*Yours truly,
Deborah R. Christopher*

..."

12. Three days later, by letter dated 14th October, 2005 the Employee tendered her resignation with effect from 13th November, 2005. The full text of her letter is as follows:

" 14th October, 2005

*Mr. Gladston Joseph
Manager*

...

Dear Mr. Joseph

I tender my resignation with effect 13th November, 2005.

At Antigua Commercial Bank I had many challenges and made lasting friendships. Nevertheless, the time has come for me to pursue other opportunities.

*Yours sincerely
Deborah Lake (Ms.) "*

The Employee's Case

13. The Employee's Memorandum of Claim was filed on 06th November, 2015.
Excerpts from it are as follows:

- "1. The Employee, Deborah Lake, was employed by the Employer in 1986, and worked in at least eight (8) different "entry" level positions for nineteen (19) years without the benefit of being considered for promotion based on her experience and outstanding performances.*
- 2. The Employee was never given a negative performance appraisal by the Employer and, therefore, it was difficult for her to understand why she was never considered for upward mobility in the Company.*
- 3. Several other employees, over whom she had seniority in tenure, were elevated to higher positions in the Bank although she had more experience and better qualifications.*
- 4. The Employer introduced a manipulative restructuring system that was discriminatory and disadvantageous to the Employee, since it placed her in a category where she was considered to be equal to other employees who were many times her junior.*
- 5. The Employee consistently made representation to her superiors and to senior officials within the Human Resource Department.*
- 6. The Employee's concerns and complaint were ignored by the Employer for many years.*
- 7. The Bank from time to time would consider and approve requests from Employees for voluntary separation.*
- 8. The Employee became extremely demotivated and frustrated on the*

job as a result of the way she was being treated by the Employer and considered applying for voluntary separation.

- 12. As consequence, the Employee made a second application to the Bank for voluntary separation by letter of October 11th, 2005, and again her request was denied by the Employer without explanation.*
- 13. The Employee was placed in a situation where she felt that she had no other choice than to tender her resignation because of the Employer's conduct and behaviour towards her.*
- 14. Therefore, she wrote accordingly to the Employer by letter of November 14th, 2005, and claimed unfair dismissal by virtue of the Employer's unfair, bias and discriminatory actions.*
- 16. The Employee contends that the Employer's treatment and discriminatory conduct towards her in the matter is an unfair labour practice and is the principal reason that forced her to resign from the job.*
- 17. Accordingly, she contends that she was constructively and unfairly dismissed by the Employer and is therefore entitled to compensation."*

The Employer's Case

14. The Employer's Memorandum of Defence was filed on 26th November, 2015. The main averments are contained in paragraphs 10, 12, 15 and 16 which read as follows:

"10. As to Paragraphs 10 and 11 of the Employee's Memorandum, the Employer will contend that it was justified in adopting the position that it took in relation to the Employee. The Employer will contend that its actions at all material times accorded with good and established industrial relations practices and that any complaints or "grievance" complained of by the Employee was without merit and ill-founded.

12. Save that the Employee tendered her resignation, by letter dated October 14, 2005, the contents of Paragraph 13 are denied. The Employer intends to rely on the said resignation letter for its full force and effect.

15. Insofar as Paragraph 16 is concerned, the Employer denies that its treatment of, and conduct towards, the Employee was unfair or

discriminatory in any other ways breached good and accepted industrial relations practice. The Employee will be put to strict proof of her averments contained therein.

16. *The Employer denies that the Employee was constructively or unfairly dismissed by the Employer. The Employer will contend that the Employee tendered her resignation in circumstances that were entirely voluntary and is therefore not entitled to the remedies sought. The Employer will contend further that the Employee's claim should be dismissed with costs in favour of the Employer."*

The Main Issues

15. The main issues in this Reference are:
- (1) Whether the Employee was constructively dismissed?
 - (2) Whether the Employee was unfairly dismissed?
 - (3) Whether the Employer committed unfair labour practices?

Resolving the Issues

Issue 1: Constructive Dismissal:

16. The doctrine of constructive dismissal is not new to this Court. It refers to a situation where an employer does not expressly dismiss an employee but is otherwise guilty of a repudiatory breach of the contract of employment which goes to the root of and destroys the employer/employee relationship. Repudiatory breaches often occur where an employer offends one or more of the implied terms of the contract of employment. One well known implied term is that establishing the fundamental requirement for mutual trust and confidence between employer and employee. On the ground of such a repudiatory breach, an employee may be entitled to treat himself as being discharged from any further performance of the employment contract.
17. Accordingly, constructive dismissals have often been held to be unfair dismissals in situations where the Employer acted unreasonably in breaching the implied term of trust and confidence. Similarly, a dismissal may be held to be not unfair where the Employer dismisses an employee who is guilty of the breach of that implied term.
18. On the one hand, Reference No 16 of 1998: **Edward Smith v. Stanford Financial Group Limited** and Reference No. 35 of 2012: **Wayne Weaver v. St. James's Club** demonstrate instances where the Employers acted in breach of the implied term

of trust and confidence which entitled the employee to walk away or resign and claim constructive and unfair dismissal.

19. On the other hand, Reference No. 68 of 2013: **Michelle Longford v. International General Enterprises Ltd.** and Reference No. 54 of 2014: **Oriel Walter v. Photogenesis** demonstrate situations where the employee's breach of that implied term justified the employers' actions in dismissing the employees.
20. Based on first principles, there can be no doubt that an employee is entitled to be treated fairly and reasonably. Moreover, prolonged unfair and unreasonable treatment may themselves lead to the erosion or destruction of an employee's trust and confidence in the employer. It is the employer's repudiatory breach of the implied contractual term which grounds a claim of constructive dismissal and could, in turn, potentially lead to a successful claim of unfair dismissal.
21. Given the facts of this case as outlined in paragraphs 1 to 12 above, it is paramount to consider whether the Employer acted in breach of the implied term of trust and confidence. As a first step to that end, it is crucial to consider whether the Employee met the threshold for establishing that she was constructively dismissed. If the threshold is met, we will then consider the particulars of the alleged repudiatory breach.
22. In the **Weaver case** this Court applied the landmark judgment in **Western Excavating (ECC) Ltd. v. Sharp** [1978] 1 All ER 713 and identified the prerequisites for a successful claim of constructive dismissal as follows:

"... 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. "*

23. In any event, in relation to prerequisites listed above, it cannot be over-emphasized that the Employee must (a) communicate to the Employer what he considers to be the repudiatory breach; (b) communicate to the Employer his acceptance of the repudiation to bring the employment contract to an end; (c) leave the employment in direct response to the breach; and (d) promptly claim constructive dismissal.

24. The Employee's letter dated October 11, 2005 clearly sets out the facts on the bases of which she found it "difficult" to trust the Employer. In our opinion, the Employee had potentially valid and sustainable grounds for believing that the Employer acted in breach of the implied term of trust and confidence. However, it was necessary for her to bring her conclusion in that regard to the attention of the Employer; assert that that conduct amounted to a repudiation of the contract of employment, and; state emphatically and unequivocally that she accepted the repudiation and considered the employment relationship to be at an end.
25. The oral and documentary evidence leaves no doubt that on that date, by the same letter, the Employee pursued a separation package. There were two previous written requests for a voluntary separation package. None of the three requests in March, September and October 2005 alleged that the Employer was guilty of a repudiatory breach and that the Employee accepted the same as discharging her from further performance of the employment contract.
26. To the contrary, after each of her requests for a voluntary separation package, the Employee continued to work thereby reaffirming the employment contract while awaiting the Employer's response. In effect, the Employee made no attempt to unilaterally end the employment relationship. As such, up to October 11, 2005 the Employee's actions were inconsistent with her claim herein of constructive dismissal. Clearly, after each request, she continued to accept her salary and other benefits without any express protest or conditionality.
27. As to the Employee's decision to resign, her letter dated October 14, 2005 effectively further reaffirmed the employment contract going forward to November 13, 2005. Moreover, the resignation letter was not, or at least was not stated to be, in response to or a reaction to the Employer's repudiatory conduct. In fact, within the four corners of the resignation letter, there is no discernable nexus between its contents and the alleged breach on the part of the Employer. Given her previous emphasis on obtaining a mutually agreed separation package, there was no unequivocal assertion that the resignation was in response to the Employer's alleged repudiatory conduct discharging her from any further performance of the employment contract.
28. In the circumstances, upon the application of the principles laid down in the **Western Excavation case** and applied in the **Weaver case**, we conclude that the Employee did not meet the required threshold. There was no constructive dismissal. The Employee voluntarily resigned from her employment. Accordingly, we are inclined to dismiss her claim. However, we believe that it is important to make brief comments about the issues of unfair dismissals and unfair labour practices.

Issue 2: Unfair Dismissals

29. We note that a constructive dismissal is not necessarily an unfair dismissal. If a constructive dismissal had been established, we would be obliged to consider the particulars of the Memoranda and the related conduct of the parties as disclosed in the oral and documentary evidence. Ultimately, taking all the circumstances into consideration, the statutory test of reasonableness under section C 58 (2) of the Labour Code would have to be applied. In the circumstances, since there was no constructive dismissal, it is not necessary to apply that test. As a result, by reason of matters aforesaid, the second issue falls away and needs no further consideration.

Issue 3: Unfair Labour Practices:

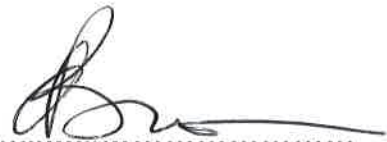
30. As to unfair labour practices, we are mindful that neither the Labour Code nor the Industrial Court Act provide a definition or explanation for that term. As a result, that issue like the other two, would have to be dealt with in the context of this Court's limited jurisdiction and its statutory powers.
31. As recently held in Reference No. 26 of 2013 **Icilma Piggott-Francis v. First Caribbean International Bank**, in the absence of substantive statutory provisions, a claim of Unfair Labour Practice, per se, is not sustainable by itself. However, allegations of unfair labour practices would be considered in the same vein as allegations of the denial of natural justice under the wide umbrella of the principles and practices of good industrial relations, to which we are expressly and specifically required to have regard.
32. It is clear that the Employee had ample grounds for complaining to the Employer and raising the issue of "Unfair Labour Practice" in these proceedings. As determined in the **Piggott-Francis case**, we are constrained by our statutory jurisdiction and powers. In the absence of a statutory right to fair labour practices, or the statutory right not to be subjected to unfair labour practices, which exists in some jurisdictions like Canada, South Africa and the United States of America, we are in no position to provide a remedy therefor even if we came to the conclusion, which we did not, that the Employer was guilty of unfair labour practices.
33. On the face of it, while the disclosed labour practices of the Employer would have formed a critical issue to be considered, we do not find it necessary to do so in light of our finding that there was no constructive dismissal. Suffice it to say, it excites our interest that an employee could work in an institution like that of the Employer for 19 years without promotion and be rejected on three

applications for a voluntary separation package. The state of affairs during the Employee's tenure and the end situation immediately before she resigned do not bode well for good industrial relations practices. For the avoidance of doubt, we state no opinion and make no judgment on the exercise of the Employer's discretion, which is a matter exclusively within its purview.

Conclusion

34. In the premises, we declare that the Employee was not constructively dismissed. And she is not entitled to any compensation for unfair dismissal. Accordingly, we order that her claim be and is hereby dismissed with no order as to costs.

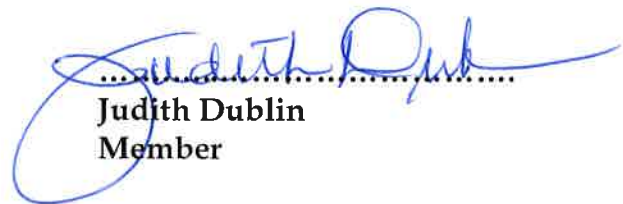
Dated this ^{05th} day of July, 2019



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Charlesworth O.D. Brown
President



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St. Lawrence de Freitas
Member



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Judith Dublin
Member

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