

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 18 of 2018

BETWEEN:

STACEY KING-MARTIN

Employee

And

FINANCIAL SERVICES REGULATORY COMMISSION

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Judith Dublin

Member

Appearances:

Mr. Septimus A. Rhudd of Rhudd & Associates, Attorneys-at-Law for the
Employees

Dr. David Dorsett, Ph.D. of Watt, Dorsett, Hewlett Law, Attorneys-at-Law for the
Employer

2020: November 17
November 27

DECISION

Brown, P:

Introduction

1. These proceedings were commenced by a Notice of Reference filed on April 12, 2018. In accordance with the provisions of the Industrial Court Procedure Rules 1980, it referred to the existence of a trade dispute between the parties under section 19 of the **Industrial Court Act, Cap. 214** (the Act). That commencement was an irregularity. Under Rule 12 of the Industrial Court Procedure Rules 2015 (the 2015 Rules), the commencement should have been by way of a Reference of Complaint pursuant to section 7 (1) (c) of the Act.

2. Rule 35 of the 2015 Rules follows Part 15 of the Civil Procedure Rules 2000 of the Eastern Caribbean Supreme Court, which is similar to Part 24 Civil Procedure Rules 1998 in the United Kingdom, in providing for the grant of summary judgment in cases where, on paper, one party has no real prospect of succeeding on a claim or the other party has no real prospect of successfully defending a claim. Thus, at first blush, an Employer may defeat an Employee's claim without a trial pursuant to Rule 35.

The Application

3. By its application filed on July 26, 2018 the Employer applied for an order that summary judgment be entered in its favour. In asserting that the Employee has no real prospect of success, the Employer relies on the following grounds:
 - (a) Having stated that constructive dismissal is the issue in dispute, the Employee has not alleged or otherwise shown that there was a repudiatory breach of the employment contract.
 - (b) If there was a repudiatory breach, which the Employer denies, the Employee subsequently affirmed the employment contract.
4. The application is supported by a short affidavit sworn by the Employer's Chief Executive Officer, Brenda Sheppard, in which she restated the grounds but did not elaborate on or give particulars of them. The affidavit did not include any details in respect of facts alleged in the Employee's Memorandum of Claim. Moreover, neither the Memorandum itself nor any of the eleven (11) supporting documents attached to it were exhibited with the affidavit.

The Employer's Submissions

5. In the introduction to his submissions, learned Counsel, Dr. Dorsett set out the chronology of events starting with the commencement of the Employee's employment in 1997 and culminating in February 2017 with the Employer's letter stating that it had "no choice but to accept that the Employee has terminated her employment."
6. In advancing the Employer's case, Dr. Dorsett quoted Rule 35 as well as an excerpt from the headnote to **Didier v Royal Caribbean Cruises Ltd (2016) 89 WIR 277** which laid down the "test" for the entry of summary judgment. In that excerpt it was emphasized that "that filing of affidavit evidence was a crucial part of the summary judgment procedure and formed the basis for the court's applications of the legal test for entry of summary judgment". Further, it was stated that: "In disposing of the claim summarily, the court would essentially

consider the legal issues in the case, determine, on the balance of probabilities and in light of the affidavit evidence addressed by the parties, whether one party or the other had no real prospect of succeeding on the claim and enter judgment accordingly.”

7. In his submission regarding the suitability of the summary judgment procedure Dr. Dorsett further quoted an excerpt from **Wespac Building Corporation v. MM Kembla New Zealand Limited [2000]** which was approved in **Jones v AG [2003] UKPC 48** that: “Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and legal issues.”
8. The next leg of Dr. Dorsett’s submission involved his emphasis on the “acid test” for constructive dismissal as stated by the Privy Council in **Grewals (Mauritius) Ltd. v. Koo Seen Lin [2016] UKPC 11** at paragraph 15. That test requires the objective judgment of the employer’s conduct to determine if he had in fact repudiated the contract.
9. Learned Counsel also referred to and quoted from the landmark judgment in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** the fountainhead for the settled law of constructive dismissal: Where the Employer is guilty of conduct going to the root of the contract showing that he no longer intends to be bound, the employee is entitled to treat himself as being discharged. If the employee accepts the employer’s repudiatory breach and terminates the contract, he is constructively dismissed.
10. The final leg of Dr. Dorsett’s submissions involved the application of the law of constructive dismissal to the instant case. Here, he embarked on an attack of the bases of the Employee’s claim of constructive dismissal. In doing so, he relies on a combination of facts, as gleaned from the Employees Memorandum of Claim and significant omissions therefrom. In making this part of his submissions, learned Counsel also referred to some of the several letters attached to the Employee’s Memorandum but which were not exhibited with the affidavit in support.

The Employee’s Submissions

11. In his response to the Employer’s submissions, learned Counsel, Mr. Rhudd first highlighted the Employer’s failure to “particularize those aspects of the Employee’s Memorandum and the attached supporting documents in order to properly ground its application. He submitted that in light of the express requirement for affidavit evidence under Rule 35 (5), Ms. Sheppard’s bare affidavit could not suffice for the intended purpose.

12. Further, Mr. Rhudd underscored and buttressed his submission by referring to **Didier's case** on which Dr. Dorsett earlier relied. Learned Counsel emphasized that as "a crucial part of the procedure" the required affidavit evidence must be sufficient to enable the Court to use that evidence as the basis for the application of the "legal test for entry of summary judgment". In that regard, he submitted that the affidavit evidence of the Employer is "woefully deficient" in that Ms. Sheppard provided no evidence to form the required basis.
13. Moreover, Mr. Rhudd referred to Sections 7, 10 and 11 of the **Industrial Court Act** and relied on the decision of the Court of Appeal and in **Antigua and Barbuda Transport Board v Anderson Carty ANULTAP 2015/0006** which emphasized that this Court is obliged to "expeditiously inquire into, investigate and hear every dispute and all matters affecting the merits of such dispute". In that vein, Mr. Rhudd submitted that it was mandatory for this court to first hear and then justly determine all matters brought before it. Accordingly, he further submitted that even if Ms. Sheppard's affidavit was sufficiently expansive to meet the requirements for summary judgment procedure, this court would still in any event, be "duty bound" to convene a hearing into the dispute between the parties in accordance with the statutory provision. In his view, contrary to that of Dr. Dorsett, the hearing of this application is not "a hearing as required under the Act".
14. Significantly, Mr. Rhudd also submitted that, in light of issues raised on the Memorandum of Claim, the summary judgment procedure "is not suitable for these types of industrial relations matters and would defeat the objective of the Act."

Resolution

15. Conceptually, there is no doubt about the nature and potential effect of the summary judgment procedure. It is a powerful, and perhaps draconian, tool. However, as stated in the **Didier case**, the filing of an affidavit evidence is crucial. As we understand it, this involves both the mention of the point of law as well as the evidence likely to be addressed at trial. There must be sufficient evidence in support of the application pursuant to Rule 35 (5) which would allow the court to determine whether the Employee has no real prospect of succeeding on her claim. Accordingly, it was necessary for Ms. Sheppard's affidavit to include sufficient evidence to facilitate that determination.
16. Based on our assessment, we agree with Mr. Rhudd's submission that her affidavit evidence is "woefully deficient" for the required purpose. And we reject Dr. Dorsett's position that the Employee's failure to respond to the affidavit is detrimental to her case. In that regard, it is noteworthy that in both

his oral and written submissions Dr. Dorsett found it necessary to recite and cite selected facts and documents disclosed as part of the Employee's case, none of which were mentioned in Ms. Sheppard's affidavit. In the circumstances, we adopt Mr. Rhudd's submission that those facts should properly and more appropriately have been included in Ms. Sheppard affidavit with specific references to parts of the Employee's Memorandum and her exhibits.

17. In our opinion, apart from our consideration of the legal issue, we find that the Employer has failed to discharge its evidentiary burden of adducing sufficient evidence on which it would rely to render its application successful. The brevity of the affidavit militates against the required determination of whether the Employee has no real prospect of succeeding on her claim.
18. In our estimation, the single most decisive submission made by Mr. Rhudd is to the effect that, in light of the clear statutory mandate of this Court and the decision of the Court of Appeal in the **Transport Board case**, the summary judgment procedure may not be suitable for the instant case. And it may not be available at all in the Industrial Court. In that regard, we note Mr. Rhudd's reliance on the dictum of the Court of Appeal in **Sundry Workers v. State Insurance Corporation ANULTAP/0002** that "the functions of the Industrial Court are not purely judicial". In addition, we also note the dictum of the Court of Appeal as quoted by the Privy Council in **Eastern Caribbean Amalgamated Bank v. Kenny Byron [2019] UKPC 16** that, in exercising its powers, the Industrial Court "must give effect to the ethos and philosophical approach mandated by Sec 10 (3)" of the Act. As we understand them, the ethos and philosophy underlying the establishment Rules of this Court also militate against the summary judgment procedure.
19. For the compelling reasons stated above, we would dismiss the application for summary judgment and order that the matter shall proceed to trial. To that end, we also order that the Employer do file its Memorandum of Defence within 14 days after the date of this decision. Thereafter, the matter shall proceed in accordance with the 2015.

Dated this 27 day of November 2020


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Charlesworth O.D. Brown
President


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Judith Dublin
Member

