

IN THE INDUSTRIAL COURT

ANTIGUA AND BARBUDA

REFERENCE NO 10 OF 2020

BETWEEN

DAYTON SALMON

Employee

IAIN MELLOWS
(Trading as SWOLLEM CONSTRUCTION)

Employer

Before:

The Hon. Samantha May-Francis

Vice- President

The Hon. John R. H. Benjamin

Member

The Hon. Dalma A. McCoy

Member

Appearances:

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

Ms. Safiya Roberts of Roberts & Company, Attorneys for the Employer

2023: April 27

2024: March 28

Employee commenced employment in March 2012, whether the Employee abandoned his job in 2016; did the Employer re-engage the Employee in 2016 or did his employment continue; whether a redundancy existed which warranted the temporary lay-off of the Employee; whether the selection process was unfair and resulted in the constructive dismissal and unfair dismissal of the Employer; outstanding statutory entitlements and compensation if any due to the Employee

JUDGMENT

Background

1. The Employer is a building contractor. In 2014, he formally started trading under the trade name Swollem Construction.



2. The Employee commenced employment in March 2012. His responsibilities included painting, masonry and carpentry work. He earned a daily wage of \$170.00 and worked a forty-hour (40) work week from Monday to Friday, earning \$850.00 per week.
3. In June 2016, the Employee was approved for vacation. During his vacation, he travelled to his native Jamaica. The Employee remained in Jamaica for two (2) months, extending his vacation beyond the one (1) month approved by the Employer.
4. Upon his return, the Employee was permitted to resume his duties, and the employment relationship continued until April 2, 2019, when the Employer informed the Employee that he was being laid off with immediate effect. The Employer did not provide the Employee with a date of recall.
5. Subsequently, the Employer advised the Employee to return to work, but the Parties dispute the date the Employer requested the Employee return. Nonetheless, the Employee did not return to work but advised the Employer through his Representative, Mr. Anderson Carty, by letter dated May 5, 2019, demanding compensation for unfair dismissal.
6. By Reference filed on January 24, 2020, the Employee commenced a claim against the Employer claiming constructive dismissal, unfair dismissal, payment of outstanding vacation, and public holiday pay.

The Employee's Evidence

7. The Employee's evidence is that the Employer engaged him in March 2012 as a permanent Employee. His evidence is that in 2016, having been approved for vacation, he was delayed in his return as he constructed a residence in Jamaica. His evidence is that although he did not communicate directly with the Employer, through his wife and a coworker, Alfred, he kept the Employer informed of the circumstances and his anticipated return date. He testified that upon his return, he resumed his duties without issues over his extended vacation. He was not reprimanded, and the Employer did not advise him that he had determined that he had abandoned his job.
8. The Employee further gave evidence that in April 2019, he was assigned to work on constructing a pier, 'the Hammer Cove Project'. He does not know the terms on which the Employer had been engaged, that is, whether the Employer had a labour-only contract or was responsible for purchasing material. However, by his evidence, he confirmed that there was a shortage of material due to local unavailability, which ceased the work temporarily. However, he contends that

work which he could perform was available at the primary location at Jolly Harbour. Instead, the Employer chose to lay him off from work.

9. His evidence is that he was just as skilled as the others who remained and had seniority of tenure. As such, he contends that the Employer should have applied a fair selection system for the lay-offs. He deemed that there existed no redundancy and his lay-off was unfair, so he was constructively and unfairly dismissed.
10. He gave evidence that after being laid off, he visited the Union. The Union set up a meeting with the Employer. The meeting apparently never occurred, but the Employer subsequently called asking if he "wanted to come back to work". He did not consider this a recall but rather a reinstatement, the Employer having constructively dismissed him. His evidence is that he told the Employer to speak to his Representative, Mr. Carty, but the Employer never did, and he did not return to work.
11. He also testified that since he was laid off, he inquired about his entitlements, particularly vacation and holiday pay. The Employer informed him that in June 2016, when he took the extended vacation, he was considered to have abandoned his job and was rehired in August 2016.

The Employer's evidence

12. The Employer gave evidence that the Employee was engaged in 2012 and re-engaged in August 2016. In his evidence, he stated that he was not aware of the provisions of the Antigua and Barbuda Labour Code, which required him to issue a statement of employment. As such, the contract of employment was an oral one. He was also unaware of the relevant provision of the Labour Code, which protects an employee from loss of pay on public holidays, provided that the employee complies with Section C15 of the Labour Code.
13. His evidence is that it was a term of employment that the Employee would only have been engaged when work was available and would only be paid for the days actually worked. He testified that as soon as he learned of the legal requirement to pay the Employee on public holidays, he began to do so in 2018.
14. In relation to the dispute which arose in April 2019, the Employer's evidence is that he was contracted to build a boardwalk for the 'Hammock Cove Project'. His evidence is that on April 2, 2019, having reported for work, the materials had not arrived, and, therefore, his team, the Employee included, was unable to work. His evidence is that he and his team returned to Jolly Harbour and that the Employee worked on finishing the painting on a project for the rest of the day. However, due to the unavailability of work at Jolly Harbour and the materials for the 'Hammock

Cove Project' not being available, a redundancy situation arose, necessitating the temporary lay-off of the Employee. As such, he temporarily laid off the Employee and another employee after considering the nature of the work available and the skills and experience needed to perform the work.

15. He testified that on Friday, April 26, 2019, the issue with the material for the 'Hammock Cove Project' had been resolved. He met the Employee in Jolly Harbour and told him to return to work on Monday, 29th April 2019. The Employee said he was unsure whether he wished to resume his employment and said he would call him on Saturday, April 27, 2019, to communicate his position. The Employer stated he did not hear from the Employee, nor did the Employee show up for work. Instead, a few days later, he received a letter from Mr. Anderson Carty stating that the Employee was demanding compensation and threatening to commence a claim for unfair dismissal.

16. The Employer denies having constructively and unfairly dismissing the Employee.

Issues

17. With regard to the Memoranda and the written submission of the Parties, the issues to be determined are:

- (i) When did the Employee commence employment?
- (ii) Did a redundancy exist?
- (iii) Was the Employee constructively and unfairly dismissed?

Resolving the Issues

Issue 1- Commencement of Employment

18. The Employer does not dispute that he first engaged the Employee in March 2012. He contends that the Employee abandoned his job in July 2016, and his re-engagement in August 2016 constituted a re-hire.

19. The Employee contends that in 2016, he requested an extension of his vacation, and the Employer approved the extended time. During cross-examination, the Employee admitted that he had had no direct communication or discussion with the Employer.

20. Considering the evidence of the Employee, it would have been reasonable for the Employer to have concluded that the Employee abandoned his job. However, the jurisprudence requires the Employer to make reasonable attempts to contact the Employee, before concluding that the Employee abandoned his job. It is instructive that the Employer provided no evidence of any attempt to contact the Employee.

Further, there was no evidence forthcoming from the Employer that upon the Employee's return, he communicated to the Employee that he considered him to have abandoned his job in 2016.

21. To this end, the evidence does not support a finding that the Employee abandoned his job. We believe the Employee's evidence that he occasionally communicated with the Employer through his wife and work colleague. The Employer did not dispute the Employee's evidence in that regard. We, therefore, conclude that the Employee commenced his employment in March 2012, and there was no break in his employment.

Issue # 2- Did a Redundancy exist

22. Regarding the facts of this case, the question arises whether the Employer was temporarily terminated pursuant to section C 42 of the Code. Based on evidence from the parties, it is clear that materials were unavailable for the 'Hammock Cove Project'. It is also clear that the Employer treated the Employee as having been laid off. It appeared that, in some aspects, the Employee accepted that there was a temporary redundancy. However, as we understand it, his contention is that the Employer's selection process for lay-off was unfair, ultimately leading to him advancing a claim for constructive dismissal and unfair dismissal.
23. Having considered this case, we conclude that a temporary redundancy caused by the unavailability of material resulted in the temporary cessation of work on the Hammock Cove Project.
24. The Employee contends that the Employer was unfair in his selection process. He contends that there was work available at Jolly Harbour, where other workers continued to be engaged at the North Finger. Additionally, based on his seniority, he should have been considered for retention. His evidence is that the Employer did not disclose the selection process applied to choose his position for temporary termination. He contends that he was sent home because of the Employer's erroneous conclusion that he could not swim. His evidence was that he could work in water chest-high and was accustomed to working while suspended over very deep water.
25. In its memorandum, the Employer highlighted the Employee's inability to swim and not being able to work on boat lifts as the reason he was selected for temporary lay-off. Additionally, the Employer contends that the work at Jolly Harbour had already been allocated and no additional manpower was needed. We accept the Employer's evidence that the other workers engaged at Jolly Harbour were more experienced in boat lifts than the Employee. We preferred the evidence of the Employer whom we found to be a reliable witness that the selection process, given

the nature of the industry and the circumstances which then prevailed to include the work available and skillsets of those assigned to do that work in comparison to the Employee, that the Employee's position was fairly selected for temporary termination.

Issue 3- Constructive Dismissal and Unfair Dismissal

26. The concept of constructive dismissal is grounded in an employer's breach of an implied term imposed by law for mutual trust and confidence between the employer and the employee.
27. By letter dated May 5, 2019, a month after the Employee was laid off, the Employee's Representative, Mr. Carty, in communicating the basis on which the Employee considered himself to have been "unfairly dismissed", wrote to the Employer complaining that the Employer did not **"meet the legal requirement to a written statement of or any document that would guide the employment relationship"** and that he failed to pay the Employee vacation entitlement or issue a weekly pay slip. He further stated that the Employer breached **"the law in failing to give any lawful notice or to confirm the decision in writing"**. He also challenged the selection process adopted by the Employer. He went on to state that **"he advised that you recently contacted him and asked if he would be willing to come to work but that he refused since he considered himself dismissed"**. He also threatened to file a complaint with the Labour Commissioner for unfair dismissal should the Employer not settle the matter.
28. In the context of section C 58 of the Labour Code, it is important to note that not all dismissals are unfair. Though the Employee has advanced a claim of constructive dismissal, we note that in the May 5, 2019 letter, the Employee did not claim that he considered himself constructively dismissed. His claim was one of unfair dismissal. As a matter of fact, there was no communication to the Employer from the Employee that he was resigning because he had considered that the Employer had conducted himself in a manner that destroyed or seriously damaged the relationship of trust and confidence between employer and employee and had considered himself constructively dismissed before the filing of his Reference on January 24, 2020.
29. This Honourable Court in Reference No. 35 of 2012: **Wayne Weaver v. St. James's Club**, held 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 to waive his right and thereby affirm the contract**

- 30. Having considered the facts of this case, the Employee failed to communicate to the Employer that he considered himself constructively dismissed. In any event, based on the evidence, the Employee did not meet the requirements as set out in the Weaver Case, and therefore, in our view, there is no constructive dismissal.
- 31. The question that remains is whether the Employee was unfairly dismissed. The evidence suggests that the Employee was placed on temporary layoff with no date of recall. Section C42 (2) (b) provides that if no date of recall is given, the Employee shall be entitled to severance payment after three (3) months of the date of termination. The Employee accepted the Employer's evidence that the Hammock Cove project ceased temporarily due to lack of materials and that the Employer asked him to return to work on Monday, April 29, 2019. He, however, refused.
- 32. A redundancy existed due to the lack of materials and the unavailability of other work. As already determined, the selection process was fair based on the prevailing circumstances.
- 33. The Employee further contends that the Employer failed to issue a letter to the Employee stating that he was temporarily laid off. While we accept this as best practice having regard to the nature of the industry, we do not consider the Employer's action to be fundamental to the extent that this would suggest that the Employer acted outside the provisions of Section C42 of the Antigua and Barbuda Labour Code. Our same reasoning is applied to the Employee's contention that the Employer failed to provide the Employee with a written statement of employment in accordance with Section C5 of the Labour Code.
- 34. We find that the Employee failed to return to work after the Employer recalled him within the time permitted by Section C42 and that there was no unfair dismissal.
- 35. In the circumstances, the Employee is not entitled to compensation for constructive dismissal and unfair dismissal.

Outstanding Entitlements

- 36. The Employee claims that the Employer failed to pay him accrued vacation and public holiday pay from March 2012 to April 2019. The Employer accepted that he owes the Employee for both vacation pay and public holiday pay. The Employee

did not contest the evidence of the Employer that he received public holiday pay from 2018 after being advised that public holiday pay was due and payable to all employees as set out in the Labour Code.

37. In the premises, the Employee is entitled to be paid the sum of **\$23,850.00** for the following:

- (a) Vacation pay from March 2012 to April 2019 in the sum of **\$14,500.00** (85 days x \$170.00 daily rate)
- (b) Public Holiday Pay from March 2012 to December 2017 in the sum of **\$9,350.00** (11 days per annum x \$170.00 daily rate x 5 years)

Order:

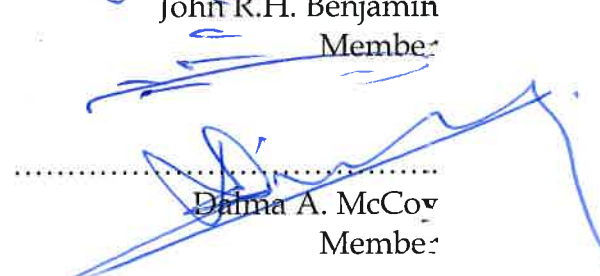
38. By reason of the matters aforesaid, we order as follows:

- (i) The Employer shall pay the Employee statutory entitlements for accrued vacation pay and outstanding public holiday pay in the aggregate sum of **\$23,850.00**.
- (ii) The Employer shall make payment to the Employee no later than April 30, 2024

Dated the 28th day of March 2024


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Samantha May-Francis
Vice President


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John R.H. Benjamin
Member


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Dalma A. McCoy
Member