

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/18 of 2018



BETWEEN:

STACEY KING-MARTIN

Employee

And

FINANCIAL SERVICES REGULATORY COMMISSION

Employer

Before:

The Hon. Charlesworth O.D Brown

President

The Hon. Hesketh A. Williams

Member

Appearances:

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

Mr. David Dorsett, PH.D. of Watt, Dorsett & Company, Attorneys-at-Law for Employer

2022: October 27

2023: February 02

December 15

Constructive dismissal - Employee holding position of Senior Registry Clerk granted study leave to pursue higher education - Employee's position realigned and reclassified as IBC Administrative Officer pursuant to Employer's express statutory mandate - Whether employee demoted or rendered redundant - Employee terminating employment and claiming constructive dismissal - Whether Employee constructively and unfairly dismissed.

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JUDGMENT

Brown, P

Introduction

1. The Employer is a statutory body established by the International Business Corporations Act, Cap 222 of the Laws of Antigua and Barbuda and continued under Financial Services Regulatory Commission Act No. 5 of 2013 (the FSRC Act). It is engaged in the supervision and regulation of corporations carrying on international business. Under section 39 of that FSRC Act, it was bestowed with express powers and obligations to restructure its operations and reclassify its staff between January and May 2015.

2. The Employee commenced her employment with the Employer on or about June 02, 1997, in the position of Registry Clerk. After her second promotion in 2005, she held the position of Senior Registry Clerk in the Employer's Registry Department. With effect from May 11, 2015, as part of a wider restructuring process, her position was reclassified as IBC Administrative Officer, which position she continued to hold up to January 16, 2017 when she failed or refused to report for work after approved leave of absence.
3. In these proceedings, the Employee contends that she was constructively dismissed and is entitled to compensation. Her assertion of having been constructively dismissed was first made on her behalf by her Attorneys-at-Law, Rhudd & Associates, in their letter dated November 21, 2016. The same assertion was repeated in their follow-up letter dated January 12, 2017 and finally stated in a subsequent letter dated February 16, 2017.
4. The Employer disputes the Employee's claim of constructive and unfair dismissal. Thus, the main issue in this Reference is whether or not the Employee was constructively dismissed. Naturally, the resolution of that issue turns on the law in relation to constructive dismissal and its application to the particular facts of this case. Accordingly, we will briefly set out the law and the facts towards the desired resolution.

Constructive Dismissal

5. A constructive dismissal arises where an employer, engages in repudiatory conduct which breaches a fundamental term of the employment agreement and the employee accepts the repudiation thereby bringing an end to the employment relationship. Based on her statutory right not to be unfairly dismissed, if an employee is constructively dismissed, she may be entitled to compensation.
6. In his closing submissions, learned Counsel Dr. David Dorsett zoomed in on the two defining authorities. Firstly, in the more recent case of **Grewals (Mauritius) Ltd v Koo Seen Lin (2016)** UKPC 11 at (15), the Privy Counsel stated:

"When constructive dismissal is in question, the acid test is not whether the employer intended to dismiss; it is whether he has by his conduct, objectively judged, repudiated the contract. If he has, the employee is entitled, by accepting the repudiation, to treat the conduct as constructive dismissal."
7. Secondly, in the earlier landmark judgment in **Western Excavating (ECC) Ltd Sharp [1978]** CR 221 at 226A-C, the United Kingdom Court of Appeal stated:

“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 further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

8. Over the years, this Court has, when appropriate, applied those stated principles in its judgments, including those in **Ref. No 1 of 1986 Roming Michael v Dews; Ref. No. 16 of 1998 Edward Smith v. Stanford Financial Group Limited; Ref. No. 35 of 2012 Wayne Weaver v. St. James’s Club; and Ref. No. 50 of 2015 Deborah Lake v. Antigua Commercial Bank.** In the premises, we will summarize the facts as we find them and, in sequence, determine if (a) the Employer committed a repudiatory breach of the employment agreement; (b) the Employee accepted the repudiation in a timely manner; (c) the Employee communicated her acceptance to the Employer thereby asserting her position that she had been constructively dismissed; and (d) the Employee quits her employment on that basis.

Chronology of Facts

9. The evidence in these proceedings came from only two witnesses, the Employee herself and Mrs. Brenda Sheppard, the Employer’s Chief Executive Officer. Our findings of fact, for present purposes, may be summarized as follows:

(a) January 2012

After working since June 1997, and being promoted to the position of Senior Registry Clerk in 2005, the Employee was granted study leave for the period January 2012 to June 2014.

(b) May 2015

In or about the early part of 2015, the Employer embarked on a programme of restructuring its operations and reclassifying its staff pursuant to the express provisions of the FSRC Act. The Employee’s position of “Senior Registry Clerk” was thereby aligned to that of “IBC

Administrative Officer" and her previous position was effectively extinguished. The change took effect from May 11, 2015.

- (c) After May 11, 2015, in light of her 18 year-year tenure and the combination of her acquired work experience and her then newly acquired university qualification, the Employee perceived that the new alignment diminished her status and resulted in her demotion. As a result, she protested orally against the realignment but did not communicate her position in writing to the Employer.

(d) September 2016

On or about September 28, 2016, the Employee was granted a "small" salary increase retroactive to August 1, 2016, "in consideration of her seniority and long service". That increase did not pacify the Employee and she pursued "further oral engagement" with the Employer. However, despite the intervention of the Employee's Trade Union's Shop Steward, the Employer remained firm in its position that she had not been demoted.

(e) November 2016

By letter dated November 21, 2016, Rhudd and Associates wrote to the Employer formally communicating the Employee's stance that the elimination of her position of Senior Registry Clerk meant that "her former employment became redundant". Further, the letter stated that the Employee was "no longer of the view that the company values her employment or her service". Most significantly, the Employee noted that she then considered herself as having been constructively dismissed. In addition, by that letter the Employee inquired whether the Employer was willing to formally sever her and "pay her off for her years of service".

(f) December 2016

By letter dated December 5, 2016, the Employer rejected the Employee's request for severance pay. Moreover, the Employer provided the Employee with firm and comprehensive responses to the issues raised by the Employee's Attorneys-at-Law. The pertinent responses may be summarized as follows:

- i. Its restructuring process was firmly grounded in its statutory mandate. The Union's Shop Steward had engaged the Employer on behalf of the Employee pursuant to the Collective Agreement then in force. Although it found that the Employee's complaint was without merit, the Employer, without any admission of fault or

liability, offered and the Employee accepted a salary increase in consideration of her seniority and long tenure.

- ii. In pursuit of its statutory mandate, the Employer had effected a change in the Employee's job title without causing the redundancy of her position.
- iii. The allegation of demotion was without merit since there was no diminution of the Employee's status or contractual benefits.
- iv. In relation to the issue of constructive dismissal, the Employer pointed to conditions which would be prerequisite to ground a claim for constructive dismissal, none of which existed at the material time. The Employer denied that there was any breach, "in fact or in law", of the terms of the Employee's employment contract.
- v. As to the Employee's expectation of a promotion, the Employer's stated position was that neither the contract of employment, the FSRC Act nor the Collective Bargaining Agreement gave rise to any legitimate or reasonable expectation on the part of the Employee that she would have been promoted on the basis of her then newly acquired qualification.
- vi. In relation to the Collective Bargaining Agreement then in force, the Employer's stated position was that since the Employee had failed to follow the agreed procedures and those "prescribed by law" it could not accede to her request for severance pay.

(g) January 2017

In response to the Employer's letter dated December 05, 2016, by letter dated January 12, 2017, the Employee maintained that as a result of the restructuring process, she had been left in the untenable position where she considered herself as "having been constructively dismissed by the Commission since her job has been eliminated".

In response, by letter dated January 17, the Employer, in turn, asserted that the Employee's position was untenable since it was not supported by facts. More importantly, the Employer noted that since claiming constructive dismissal in November 2016, the Employee continued to work for the employer and accepted her salary. Moreover, she had communicated no oral or written notice of her intention to terminate her employment.

Further, the Employer pointed out the Employee's unexplained absence from work for the two consecutive days of January 16 and 17, 2017, and enquired whether the Employee intended to return to work or had resigned. Notably, the Employer committed itself to "continue to be open to reasonable discussions" based on the facts.

(h) February 2017

By letter dated February 9, 2017, addressed directly to the Employee, the Employer noted that the Employee continued to affirm the employment contract after her initial claim in November 2016, that she had been constructively dismissed. In particular, the Employer requested a statement from the Employee in respect of her unauthorized absences and/ or her termination of her employment.

In their brief response to the Employer's letter to her Employee, her Attorneys-at-law by letter dated February 16, 2017, reiterated that the Employee "considers herself constructively dismissed" and advised of her intention to commence these proceedings.

By letter dated February 24, 2017, the Employer accepted the letter dated February 16, 2017 from her Attorneys-at-Law as a "termination notice" from the Employee, and reminded her of her related duties, including her duty to immediately return all of the Employer's property in her possession.

Discussion

10. The above-stated core facts of this matter are not in dispute. Accordingly, we will resolve the main issue as to whether or not the Employee was constructively and unfairly dismissed by applying the legal principles to the facts.
11. As acknowledged by both Counsel, this Court has from time to time determined that dismissals in breach of section C 56 of the Antigua and Barbuda Labour Code, which protect an Employee from unfair dismissal, may occur constructively. The relevant common law principles as applied in the several cases mentioned above, are well settled.
12. In the absence of a complaint of a breach of an express term or condition of the employment contract – learned Counsel Mr. Rhudd submitted – the starting point is the recognition of the fundamental implied term in every contract of employment that the parties will treat each other with "mutual respect, trust, confidence and courtesy". In the normal course of things, the mutual duty to

behave reasonably to each other will cause an employer to refrain from conducting itself “in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust” between them.

13. At paragraph 70 of the **Weaver case**, which involved the employer’s clear breach of the fundamental implied term for mutual trust and confidence, this Court stated:

“In the leading case of Western Excavating...it was established 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 as to waive his right and thereby affirm the contract;”**

14. Accordingly, the first question to be answered for present purposes is: What was the repudiatory conduct, if any, which demonstrated that the Employer no longer intended to be bound by the employment contract?
15. The repudiatory actions, as alleged by the Employee, were summarized in the penultimate paragraph of Mr. Rhudd’s closing submissions as follows:
- (a) Reclassifying the Employee’s job;
 - (b) Assigning new job functions to her;
 - (c) Phasing out her former position;
 - (d) Failing to recognize her advanced training; and
 - (e) Failing to take her complaints seriously.

From the Employee’s perspective, those actions resulted in a breach of the fundamental implied term for mutual trust and confidence.

16. In considering those actions, we recognize that an employer has an exclusive discretion to arrange and conduct its affairs as it sees fit. Moreover, we are particularly mindful of the pertinent provisions of the FSRC Act and the historical context in which they were made. From that perspective, we find that the Employer’s letter dated December 5, 2016 (summarized at paragraph 9 (f) above) sets out comprehensive answers which clearly justify the Employer’s actions. Ultimately, the Employer was merely discharging its statutory mandate

to revise its organizational framework, restructure its operations and reclassify its staff.

17. There is no evidence before us which impeaches or calls into question the validity and integrity of the process adopted by the Employer. In the circumstances, the Employer's actions pursuant to the FSRC Act cannot amount to a repudiatory breach of any express or implied term of the employment agreement such as to ground a claim of constructive dismissal.
18. Given that conclusion, the second question, as to whether the Employer's conduct undermined, eroded or destroyed the employment relationship, is moot and redundant. In other words, since the Employer's conduct, about which the Employee complained, was not repudiatory, it could not so adversely affect the employment relationship as to ground a claim of constructive dismissal.
19. Thirdly, the question as to the Employee's response to the Employer's repudiatory breach is also moot and redundant. It follows that the Employee's response to the reclassification of her position by claiming that it led to her constructive dismissal was unfounded and misguided. In any event, the Employee's termination of her employment is not properly referable to any repudiatory breach on the part of the Employer.
20. Fourthly, as to the timing of the Employee's response to the perceived repudiatory breach, it is clear that, apart from not being properly grounded, her actions leading up to and including her termination of her employment, lacked linearity and were ill-timed. In that regard, the chronology outlined above shows that although the changes took effect in May 2015, her claim of constructive dismissal was not made until November 2016. When first made, the claim was couched in terms of either her demotion or the existence of a redundancy situation.
21. When the claim of constructive dismissal was first made, the Employee, paradoxically, preserved her employment status, called on the Employer to sever the employment relationship and favour her with redundancy pay for her years of service. The assertion of constructive dismissal and the request for severance pay are inherently inconsistent. In any event, the Employee's position, as late as it was, was not founded on a precise repudiatory breach, committed by the Employer, which the Employee accepted.
22. Further, up to the date of her second complaint of constructive dismissal made on January 12, 2017, which was also erroneously founded on the elimination of

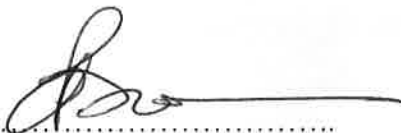
her position, the Employee remained on the job. In effect, she consciously affirmed the contract of employment and continued to enjoy all related benefits, rights and privileges. The evidence shows that she took no affirmative step to "accept" the alleged repudiation and end the employment relationship until on or about January 16, 2017.

23. But even when the Employee apparently took the decision to end the employment relationship, her actions were equivocal to the extent that the Employer was left enquiring as late as February 9, 2016 as to the reasons for her absence from work. As it turned out, the Employer was not advised of the Employee's final position as to her constructive dismissal until it received the letter dated February 16, 2017 from her Attorneys-at-Law.

Conclusion

24. In arriving at our final conclusion, we took into consideration the opposing submissions of Counsel. On behalf of the Employee, learned Counsel, Mr. Rhudd, urged us to have special regard for the "context and special circumstances" and find that the Employee was constructively dismissed. However, in our estimation, it was the FSRC Act which created the overarching context and special circumstances which compelled the Employer to restructure its operations as it did.
25. We have also noted Mr. Rhudd's reliance on the **Weaver case** in attempting to justify the Employee's delay in claiming constructive dismissal. In that regard, suffice it to say, the factual matrix in the one case is easily distinguishable from that in the other.
26. As to the Employer's closing submissions, learned Counsel, Dr. Dorsett emphasized the Employee's failure to make appropriate averments. and to discharge her evidentiary burden. That submission is convincing. In the final analysis, we are persuaded that, upon the application of the law of constructive dismissal to the facts of the case, the Employee's claim should fail. Accordingly, we dismiss the claim herein with no order as to costs.

Dated this 15th day of December 2023.


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Charlesworth O. D. Brown
President


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Hesketh A. Williams
Member

