

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/68 of 2018

BETWEEN:

TOY-ANNE BAILEY

Employee

And

HALCYON COVE ANTIGUA by REX RESORTS

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samantha May-Francis

Vice-President

Appearances:

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

Mrs. Nelleen Rogers of Murdoch of Simon Rogers Murdoch, Attorneys-at-Law for the Employer

2021: December 02

2022: November 24

2024: March 22

Claim of constructive and unfair dismissal- Employer reducing pay package received by Employee over 20 month period on ground that amount reduced was paid in error- Employee remaining on the job during conciliatory process and resigning 5 months later- Resignation largely based on matters arising during conciliation process - Whether Employee constructively or unfairly dismissed - Tests to be applied.

JUDGMENT

Brown, P

Background and Undisputed Facts

1. At all material times the Employer, a registered corporate entity, conducted business as prominent hoteliers providing rooms and related hospitality services for its guests at its premises situate at Dickenson Bay, St. John's Antigua. As its name suggests, the business was managed exclusively by Rex Resorts, an international corporate entity, with its head office in the United Kingdom.
2. The Employer's administrative procedures provided for instances where cash advances are made and salary increases granted to its staff, subject to the



completion of the pertinent forms and written authorization by competent members of the management team. In cases where a cash advance is processed, the settled procedure required the submission of a Cash Advance Form signed by the employee. Where a change in an employee's status, such as when he /she is promoted, the procedure required the submission of a Status Alteration Form signed by the employee and the General Manager.

3. The Employee commenced her employment with the Employer on December 15, 2005, and last held the position of Cost Control Clerk or Cost Controller with a salary of \$2,775.00 plus additional pay, equivalent to 7 service charge points, from the Employer's service charge fund. She reported to Renato Wilson, the Employer's Accountant, who also served as Personnel Manager and the head of his department. The Accountant reported to Riaan Thiart, the General Manager, who was at the apex of the Employer's organization in this jurisdiction. He, in turn, reported to the relevant officers at the regional or international head offices.
4. Commencing in or about June 2016, in addition to her regular salary, the Employee received the sum of \$725.00 per month. In terms of paperwork, the Employer's records showed that the increase was first processed as a cash advance for which the Employee applied and signed the appropriate form. Subsequently, the Accountant notified the Employer that that sum was in fact an increase in the Employee's salary.
5. A Status Alteration Form, dated June 27, 2016, was prepared by the Accountant showing that the Employee's salary had been increased from \$2,775.00 to \$3,500.00 with effect from June 1, 2016. The space on that form for the Employee's new position was left blank. However, the express condition was stipulated that: "Position to take effect, once Markede is fully trained". The form was signed by the Accountant in his capacities as Head of Department and Acting Personnel Manager but it was not signed by the General Manager and / or the Employee herself.
6. Both the General Manager, Mr. Thiart, and the Accountant, Mr. Wilson, left the employment of the Employer between July 2016 and November 2017. In the latter month, a new General Manager, Arlene Marsh, was appointed. Upon reviewing the Employer's records, Ms. Marsh concluded that a "grave error" had been made as there was no justification for the payment of the additional amount on a monthly basis by way of a salary increase or otherwise. Further, the new General Manager concluded that neither her predecessor nor the Employer's Head Office had approved the increase.
7. Based on her conclusions, by letter dated March 2, 2018, Ms. Marsh wrote to the Employee informing her that the payments of the additional sum were made

"through a grave error" as they were "unauthorized and unjustified". Most importantly, the Employer informed the Employee that her salary would "be reverted to the previous rate of \$2,775.00 per month plus 7 service charge points", and that she would be required to repay the total sum of \$14,500.00 by which she was overpaid. The full text of that letter is as follows:

" ...

Dear Toy-Anne,

Re: Unauthorized Payment of Salary Increase

It has recently come to management's attention, that in or around June 2016, you applied for and received a cash advance of \$25.00 which you signed in your capacity as control clerk attached to the accounts department.

Management has been advised that in July 2016 when the amount of advance was deducted from your salary, the payroll Clerk was advised by Mr. Renato Wilson, the company's former accountant, that the money you had earlier received was not a cash advance, but was in fact an increase in your salary.

The company's records indicate that prior to this date your salary was \$2,775.00 monthly +7 points, and that thereafter your salary was increased by the sum of \$725.00 to \$3500.00 monthly + 7 points.

Management has noted with concern that an Employee Status Alteration Form which purportedly authorized this change, was completed on 27 June 2016 with an effective date of 1 June 2016 by former company accountant. Management has also noted that Mr. Wilson signed this form as Head of Department and also in his capacity as Personnel Manager. Contrary however to company procedure, the form was not signed by the General Manager, and more critically the form was not signed by you as required. Management has also noted that the reason given for the transfer/promotion/ increase on the form is as follows: Position to take effect once Markede is fully trained.

In its investigation of this matter, management has been made to understand that there was a plan or proposal that Markede was to be trained in cost control by you, and that such training was started but was never completed. Markede is presently attached to the front office department, and does not work in cost control.

In the result, during the period of June 2016 to January, 2018 a period of 20 months, you have received the sum of \$14,500.00 as salary increase that

has not been approved by the company, and for which no appropriate justification has been provided. Management also has grave concerns about the receipt of these funds by you in view of the fact that the Employee Status Alteration Form was never signed by you.

Management has considered that in all the circumstances you will not be requested to repay the \$14,500.00 that you have received, which is not approved by management and which was unauthorized and unjustified. You are however, advised, that since the increase was unauthorized and unjustified, management has concluded that the payments have been made to you through a grave error, and that in the circumstances, management has no choice but to rectify the same.

You are therefore advised that with effect from 28 February 2018 your salary will be reverted to the salary of cost controller at the rate of \$2,775 per month + 7 points, as per the terms and conditions of your contract of employment.

..."

8. The Employee took issue with the Employer's position as expressed in that letter and sought advice on the matter. Eventually, by letter dated April 21, 2018, the Employee's Representative, Mr. Carty, took the position that the Employer "*had acted unlawfully in causing my client to suffer less advantageous conditions of employment by your unilateral decision to decrease her salary*". He continued by asking the Employer "*to reverse this action on or by April 30th 2018, with reinstatement of her salary and appropriate retroactive payment*". The final paragraph of that letter warned the Employer that if it failed to comply a complaint would be filed "immediately" with the Labour Commissioner.
9. Subsequently, while the Employee remained in her employment, the matter was referred to the Labour Department for conciliation. As a part of the conciliation process, a hearing was convened on June 9, 2018 but it did not result in a resolution of the matter. After the first hearing, a letter addressed "To whom concerned" dated July 3, 2018, was issued by Mr. Thiart and there was an exchange of emails between himself and Ms. Marsh on July 24, 2018.
10. While still remaining on the job and with the Labour Commissioner's report pending, the Employee wrote to the Employer by letter dated August 13, 2018, over five months after the additional payment had been stopped, giving notice that she would be resigning her position with effect from September 5, 2018, immediately after her vacation ended. Most importantly, for the first time, she contended that she was constructively and unfairly dismissed. The resignation letter reads as follows:

" ...

Dear Madam,

Re: Resignation/Constructive Dismissal Claim

I refer to your letter dated 2nd March 2018, in which I am falsely accused of serious misconduct, to include what I interpret to be an accusation of financial fraud and deception, simply on the basis that is a Status Alteration Form on my file that I learnt, from your letter, was not signed by me or the former general manager and which effectively granted me a salary increase. You stated as a matter of "fact" that the salary increase was "unauthorized and unjustified" even in the face of support and irrefutable evidence from Mr. Riaan Thiart, the former general manager, whose contact information you have.

Additionally, I was shocked by your statement at the recent meeting at the Labour Department on June 28th, 2018, when you proceeded to remove any doubt after having confirmed your position that the salary increase was fraudulently given to me by the former accountant and general manager, without requisite approval; this statement has been interpreted by me to mean that you have unreasonably and irrationally concluded I am somehow involved in a form of criminal activity to defraud the Company along with these individuals, who were the most senior managers of the Hotel and my superiors.

Further, my representative subsequently sent a copy of an email dated 3rd July 2018, directly from Mr. Thiart, confirming that he had in fact, approved the promotion/salary increase and yet your lawyer has written to the Labour Commissioner to say that the Company does "...not accept the authenticity of the document (email from Mr. Thiart)", although his current contact number and email address is stated in the document.

In the circumstances, you have made it completely untenable for me to return to work with the Company after expiration of vacation leave, which ends on September 5th, 2018. I have sought appropriate advice in this matter and I am now contending that your action is an act of constructive dismissal and I will accordingly be making an unfair dismissal claim against the Company.

..."

11. By letter dated September 5, 2018, the Employer, while awaiting the recommendations from the Labour Commissioner, denied that the Employee had

been dismissed, constructively or otherwise, and anticipated her return to work on September 6, 2018 upon completion of her vacation leave.

12. By letter dated September 20, 2018, the Employee's Representative referred to statements made by the Employer during the conciliation hearing and stated:
"My client could but, reasonably, interpret and conclude that your action and statement is an accusation of deception, fraud and collusion of wrongdoing

For your information, the matter previously ventilated before the Labour Department had to do with the question as to whether or not it could be reasonably concluded that my client does not have a legitimate entitlement to the salary increase; this recent claim is for constructive /unfair dismissal."
13. By letter dated November 27, 2018, the Employer announced that it was in receipt of the Labour Commissioner's report dated November 13, 2018 and informed the Employee that unless she reports for work by November 30, or provide a valid explanation for her absence, it would conclude that she had abandoned her employment.
14. The Employee failed or refused to return to work by November 30, or at any time after the expiration of her vacation on September 5, 2018.

The Proceedings

15. The main issue identified in the Employee's Reference of Complaint filed on December 03, 2018, is Constructive and Unfair Dismissal. In her Memorandum of Claim, she averred that the Employer's conduct went to the root of the employment relationship in that it destroyed the confidence and trust necessary for its existence. In particular, the Employee contended that the Employer's action "gave sufficient and good cause for her to resign and claim that she was constructively and unfairly dismissed".
16. In disputing the Employee's claim, the Employer's main averment its Memorandum of Defence is that the Employee was not constructively and unfairly dismissed and that she had abandoned her employment by refusing to return to work on November 30, 2018 or at all.
17. At the trial, the Employee testified on her own behalf and tendered a bundle of exhibits which were admitted into evidence. On the other hand, although it had filed two witness statements, no one testified on behalf of the Employer. In the

circumstances, the background and undisputed facts summarized above are all grounded on the Employee's testimony and the documents on which she relied.

Constructive Dismissal

18. 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. Such an implied term is incidental to every contract of employment. In the landmark judgment in **Woods v WM Car Services (Peterborough) Ltd (1981) ICR 666**, Browne-Wilkinson J. stated:

"In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee..."

19. Whether or not an employee can succeed in a claim of constructive dismissal turns on the breach of that implied term. In the leading case of **Western Excavating (ECC) Ltd. v Sharp [1978] 1 All ER 713**, it was established that such a breach will entitle an employee to quit his job and treat himself as being fully discharged from any further performance of the employment contract. Over the ensuing years, the courts in the United Kingdom have distilled several tests to determine if a constructive dismissal occurred.

20. Accordingly, in **Reference No. 35 of 2012: Wayne Weaver v. St. James's Club**, this court 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"**

21. In the context of section C 58 of the Antigua and Barbuda Labour Code, it is important to note that not all dismissals are unfair. It follows that not all constructive dismissals are unfair. Accordingly, in order to succeed on her claim, it is necessary to establish that the Employee was dismissed both constructively and unfairly, under the circumstances. The actions of both parties must be considered and judged objectively. Needless to say, as the single overarching principle, reasonableness will be our lodestar.

The Nature of the Employer's Conduct

22. The Employer has a duty not to conduct itself in a manner, without reasonable or proper cause, likely to destroy or seriously damage the relationship of trust and confidence between the parties. The imposition of a salary reduction without the consent of the employee is, at first blush, a potentially good ground for establishing constructive dismissal. However, at least two fundamental questions arise. Firstly: What is the contractual salary to which the Employee was entitled? And, secondly: Was there any reasonable and proper cause for the Employer to reduce the amount which the Employee had been receiving over the previous 20 months?
23. In this case, by its letter to the Employee dated March 2, 2018, the Employer asserted that the Employee's true contractual salary was \$2,775.00 and that a "grave error" had been made which resulted in the payment of an additional sum of \$775.00 per month during the 20-month period from June 2016 to January 2018. Further, the Employer stated that in the absence of any or any sufficient paperwork, the increase in her pay was "unauthorized and unjustified" and that it had no choice but to "rectify" the error with effect from February 28, 2018.
24. The preceding paragraph means that, as far as the Employer is concerned, it had reasonable and proper cause to reduce the sum of \$3,500.00 which the Employee had been receiving in error. To the contrary, the Employee maintained that the latter amount was her true salary and the Employer had no basis for reducing it.
25. Based on the testimony of the Employee and documentary evidence before us, we find that the Employee's contractual salary was never properly varied. That conclusion is evident from the following: the precondition of training of Markede was never met; the Status Alteration Form was not signed by the General Manager and/or herself; and no new position was identified for the Employee to fill. In the circumstances, we are inclined to find that there was no fundamental breach of the proper contract of employment under which the Employee was employed.
26. Consequently, we are further inclined to find that the Employer had a reasonable and proper cause to reduce the pay which the Employee had been receiving as at the end of February 2018. Having carefully and objectively considered its conduct, we find that the Employer evinced no intention not to be bound by contract of employment as properly documented in its records. We are similarly inclined to find that the Employer's conduct, intentional or unintentional, did not amount to a fundamental breach of the contract of employment.

The Effect of the Employer's Conduct

27. The next test to be applied is whether or not the Employer's conduct, considered and judged objectively, so undermined, eroded or destroyed the employment relationship that it justified the Employee's resignation. Again, at first blush, it is evident that the Employment relationship was not so adversely affected.
28. The evidence discloses that the Employee's first reaction was to get advice. Obviously, she did not resign or absent herself from work immediately or within a short time afterwards. The undisputed facts show that over 7 weeks had passed when her Representative wrote to the Employer. Up to that point on April 21, 2018, there was no assertion that the Employer's action amounted to a repudiatory breach of the contract. Instead, the Representative's letter spoke of the Employer's action causing the Employee to "suffer less advantageous conditions of employment". He then requested that the Employer "reverse" its action by April 30, 2018, failing which the matter would be referred to the Labour Commissioner "to run its logical legal course" until settled in favour of the Employee. There was no assertion that the "salary reduction" resulted in the Employer's repudiation of the employment contract. Moreover, rather than asserting constructive dismissal, the Employee evinced her intention to remain employed while pursuing a settlement of the dispute in her favour.
29. Thereafter, the matter did run its logical legal course while the employment relationship subsisted and the Employee continued to benefit therefrom over the period of almost 5 and a half months (March 2, to August 13, 2018) before she alleged constructive dismissal. The Employee's approach to and stance on the matter themselves militate against any finding of the erosion or destruction of the employment relationship. However, the outcome of the next test in relation to the Employee's response is perhaps most instructive.

Direct Reference to Employer's Conduct

30. The next test to be applied is whether or not, under the circumstances, the Employee's action of resigning is directly referable to the conduct of the Employer. A careful and objective assessment of the undisputed facts is most telling. Focusing on the resignation letter dated August 13, 2018, it is abundantly clear that the Employee's resignation was largely motivated by factors other than the Employer's action in stopping the payment of the additional sum of \$725.00 or, as she interpreted it, reducing her salary.
31. The second obvious factor influencing the Employee's decision to resign, as revealed in that letter, is the General Manager's statement made during the conciliation hearing at the Labour Department on June 28, 2018, to the effect that the increase which the Employee received "was fraudulently given to her by the former accountant and general manager". The Employee made it clear that she

interpreted the statement to mean that the Employer had concluded that she was “involved in a form of criminal activity to defraud the company”.

32. The third, obviously new, factor revealed in the resignation letter is the Employer’s response to Mr. Thiart’s “To whom concerned” letter dated July 3, 2018. The Employer’s response was that it “did not accept the authenticity of the document” which it received from the Employee’s Representative. It is noteworthy that Mr. Thiart stated in that letter that the Employee had “approached him to assist” her in the dispute which had materialized since March 2, 2018 at the latest.
33. It was the combination of those three factors which informed the Employee and moved her to resign as she did on August 11, 2018. Two of the three factors arose from and crystallized during the course of the conciliation hearing at the Labour Department. It is trite to state the universal position that matters stated or disclosed during a conciliation process are without prejudice and cannot be relied upon to establish, amend or support a party’s claim or defence established before the commencement of that process.
34. In the circumstances, on the facts of this case, we conclude that the Employee’s resignation was not directly and exclusively referable to the Employer’s action of reducing the monthly payments to her. Thus, an important condition for a successful claim of constructive dismissal was not met.

Timing of Employee’s Response

35. It is obvious from the undisputed facts summarized above, that the Employee’s action of resigning occurred August 13, 2018, and was stated to take effect on September 5, 2018, over 6 months after her pay package was reduced. In relation to this component of constructive dismissal, some pertinent questions may be stated as follows: Did the Employee wait too long to resign? What actions did she take in the interim? Ultimately, adopting the structure of and some key words used in section C 58 (2) of the Labour Code, the test to be applied here is whether or not, under the circumstances, the Employee conducted herself in such a manner as to affirm the contract of employment?
36. The length of the delay, per se, is not the sole decisive factor. However, it is an important component. In **the Weaver case**, the employer’s then alleged repudiatory breach in the form of a physical assault, occurred in the wee hours of January 1, 2010. Within a week after the incident, notwithstanding communications between them, the employee informed the employer that he would not return to work and that he considered himself constructively and unfairly dismissed. Taking all relevant matters into consideration, it was held that that employee was constructively and unfairly dismissed.

37. In the more recent case of **Reference No. 18 of 2018: Stacey King-Martin v. Financial Services Regulatory Commission**, the employee took issue with the employer's action of restructuring its business and eliminating her old position in or about May 2015. Subsequently, she communicated and negotiated with the employer over a period of several months until November 2016 when she first contended that she had been constructively and unfairly dismissed. She remained in her employment until January 2017. Eventually, after the careful consideration of all relevant matters, it was held that the dismissal was not unfair.
38. Naturally, those two cases had markedly different factual matrices. However, they highlight the component of timing of the employee's acceptance of the employer's alleged repudiatory breach. The foregoing summary of undisputed facts outline firstly establishes that when the alleged breach by the Employer occurred at the end of February 2018, the Employee elected to remain employed and thereby affirm the contract of employment while pursuing a settlement of the dispute before the Labour Commissioner.
39. Secondly, the allegation of constructive dismissal was first made belatedly in August, 2018, over 5 months after the offending action of the Employer took place. During that five-month period, the Employee benefitted from her continued engagement under the employment agreement. Further, it is even more instructive that even at the point where she first claimed constructive dismissal the Employee asserted her entitlement to the benefit of the contract until the expiration of her vacation leave entitlement. In other words, in her very resignation letter the Employee confirmed her entitlement to the benefit of the employment contract a full six months after the alleged repudiatory action by the Employer.
40. In light of the foregoing, we are inclined to also find that the Employee's timing was bad. Her delayed and ill-timed reaction, rather than being an acceptance of a repudiatory breach, turned out to be an affirmation of the employment contract.

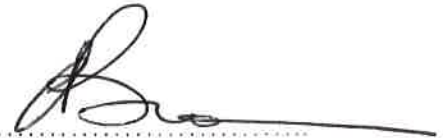
Conclusion

41. In the final analysis, upon our careful and objective assessment of the oral and documentary evidence, we conclude as follows:
- (1) The Employer had reasonable and proper cause to:
 - (a) come to the conclusion that the additional monthly sum of \$775.00 - which the Employee received for the several months immediately before March 2018 - had been paid to her in error.
 - (b) reduce the sum of \$3,500.00, previously received by the Employee, by \$775.00 with effect from February 28, 2018.

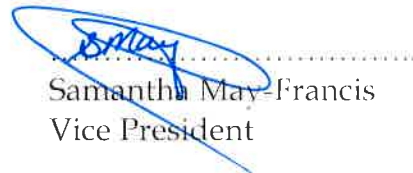
- (2) The Employee did not in a timely manner or at all accept or otherwise treat the Employer's action in stopping the monthly payment of \$775.00 as a repudiatory breach of the employment agreement.
- (3) In attempting to properly ground her assertion of constructive dismissal, the Employee improperly relied on subsequent extraneous or exogenous matters arising in the course of the without prejudice conciliation proceedings.
- (4) By her conduct after March 2, 2018, the Employee failed to get her timing right and effectively affirmed her contract of employment with the Employer.

42. In the premises, we find that the Employee was not constructively and unfairly dismissed as alleged or at all. To the contrary, she abandoned her employment with effect from November 30, 2018. Accordingly, we dismiss her claim in its entirety.

Dated this 22nd day of March 2024.



Charlesworth O. D. Brown
President



Samantha May-Francis
Vice President