

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 11 of 2021

BETWEEN:

AKEELE THOMAS

Employee

and

CARLISLE BAY RESORT

Employer

Before:

The Hon. Samantha May- Francis

President

The Hon. Charlene Selkridge

Member

The Hon. Alando Michael

Member

Appearances:

Mr. Kofi Massiah of the Antigua and Barbuda Workers' Union, Representative for the Employee

Mr. Jonathan Marshall, of Marshall & Co, Attorneys-at-Law for the Employer

2025: October 7

2026: February 6

The Employee was hired as Chef and mainly scheduled on the overnight shift, Employer determined that its overnight kitchen service was no longer financially viable, Employee unable to transition to day shift as he had secured a permanent day job, Employer temporarily laid off the Employee, Employer did not roster Employee at the end of temporary lay-off, Employee returned to work and fell ill on the day of return which illness continued for an extended period, Employer did not roster Employee at the end of certified sick leave; Employee did not return to work after last sick certificate, Employee claims unfair dismissal, Employer's defence is that Employee abandoned his job

JUDGMENT

May-Francis, P



Introduction

1. By a Reference filed April 7, 2021, the Employee brought a claim of unfair dismissal against the Employer.
2. At the trial, the Employee was represented by Mr. Kofi Massiah of the Antigua and Barbuda Workers' Union (the Union), the Bargaining Agent pursuant to the Collective Bargaining Agreement between the Union and the Antigua and Barbuda Hotels Association, of which the Employer is a member.
3. Mr. Jonathan Marshall of Marshall & Company represented the Employer.
4. The Employee gave evidence on his own behalf. The Employer called its Human Resources Manager, Ms. Nicole Hector, as a witness.

Background

5. The Employee alleges that the Employer hired him on March 23, 2015. According to the Employee, from the inception, his designation was that of an "overnight Chef," whose hours of work were from 11:00 p.m. to 7:00 a.m., and he earned \$474.40 fortnightly, plus one service charge point.
6. He claimed that on March 28, 2019, the Employer informed him that the overnight shift would be discontinued effective April 1, 2019. He alleges that the Employer, through its then Human Resource Manager, Ms. Charmaine Gore-Beisheuvel, insisted that he works another shift, despite having been hired as an "overnight Chef".
7. On April 8, 2019, having conveyed that he was unable to work a day shift as he worked in construction during the day, he received a letter temporarily laying him off until October 7, 2019. He contended that at that time, he was the only Employee on lay-off. Thereafter, he alleges that he was removed from the schedule. Since then, he has not been rostered and therefore filed the instant Reference for unfair dismissal.
8. On the other hand, the Employer denied dismissing the Employee and says the Employee abandoned his job. The Employer admitted to hiring the Employee as a Chef but denied hiring the Employee as an "Overnight Chef". The Employer alleged that they accommodated the Employee's preference to work the overnight shift. According to the Employer, when the Employee was placed on temporary lay-off from April 8 to October 7, 2019, it was because the overnight shift was no longer financially viable, and secondly considering that he had a day job the Employer desired to provide the Employee some time to organise himself and to advise the Employer whether he would resign as he had indicated or whether he would continue to work but on a day shift.

9. The Employer accepted that on April 8, 2019, the Employee was the only Employee on lay-off at the time, but explained through its witness that the other chefs who worked overnight had all accepted other shifts during the day, and in any event, by that time, the overnight kitchen service had been discontinued. It is further alleged that during the period October 7, 2019 and January 30, 2020, the Employee, when scheduled to work, submitted sick certificates on eight occasions. Thereafter, the Employee failed to return to work after his sick certificate expired, despite several attempts by the Employer to reach him.

The Evidence

10. The Employee, in his written and oral evidence, contended that he was employed as an "Overnight" Chef. Further, it was not for the Employer to unilaterally change his hours of work.
11. There were deficiencies in the evidence on both sides, more so on the Employee's part, whose credibility and reliability we questioned.
12. On the one hand, the Employee claims to have been unfairly dismissed. On the other hand, he accepted that the Employer never indicated any intention to dismiss him. Similarly, he gave evidence that he had applied for an "Overnight" Chef position, but the documentary evidence did not support his contention. Then, under cross-examination, he admitted that nothing in the employment contract supports his claim that the Employer had engaged him solely for the overnight shift.
13. We also found the Employee's evidence was contradictory. In his written testimony, he stated that his supervisors asked him to work the day shift. However, during his oral testimony, he gave evidence that he was never offered an alternative shift. Additionally, the Employee gave evidence that he was fit to resume work after his sick leave ended in March 2020, but admitted that he did not return, allegedly due to the Human Resource Department's failure to roster him.
14. Overall, we found Ms. Hector to be a credible witness, though at times she was unable to assist the Court with pertinent evidentiary issues. She had not been involved in the decision or process to lay-off the Employee, and we accept her evidence that the former Human Resource Manager handled the Employee's lay-off and therefore could not provide much assistance in that regard. Likewise, she was unsure of whether the Employer had scheduled the Employee to work after his sick leave expired in March 2020. Her unchallenged evidence, as we understood it, was that the Employer was not sure of what the Employee intended to do.
15. We also noted that Ms. Hector was not significantly challenged in her factual account that the Employee had indicated his intention to resign and that he was unavailable to work the day shift. Further, the Employee had submitted eight (8) sick certificates, and at the end of his sick leave in March 2020, the Employer made several attempts to reach the Employee, but was unsuccessful.

The issues

16. The issues to be determined involved the questions:
- (i) Was the Employee employed as an “Overnight Chef”?
 - (ii) Was there a dismissal of the Employee by the Employer?
 - (iii) Was the Employee unfairly dismissed?
 - (iv) Or did the Employee abandon his job?
 - (v) Is the Employee entitled to compensation?

Burden of Proof

17. The Employee contends that he was unfairly dismissed. The Employer contends there was no dismissal. The burden is always on the employer who dismissed an employee to prove that the dismissal was fair. However, where there is a dispute over whether a dismissal occurred, the onus is on the employee to prove it. The standard of proof is on the balance of probabilities. The burden is, therefore, on the Employee in this Reference to prove that the Employer dismissed him.

Analysis

18. We have reviewed the Employee’s employment contract, and we prefer the Employer’s evidence. Relying on the documentary evidence, it is our considered view that the Employee was hired as Chef, but that the Employer, over the years, obliged the Employee’s requests to be placed on the overnight shift.
19. The Employee did not challenge the Employer’s evidence that, due to low occupancy, the overnight shift was no longer viable. The Court therefore accepts that this was indeed the situation existing at the time. The Employer’s decision to cease the night shift and to absorb the chefs who predominantly worked on the overnight shift onto other day shifts was reasonable in the circumstances of this case.
20. We next considered whether the Employee was dismissed. We reminded ourselves that the burden of proof in this Reference rests on the Employee to prove the dismissal, as the Employer did not admit the dismissal.

Resolving the Issues

Did the Employer dismiss the Employee?

21. Settled is the law that before an employer must bear the burden of proving that the dismissal was fair, the employee must first establish by cogent evidence that he was dismissed. Logically, if there is no dismissal, there can be no question of the dismissal’s fairness.
22. The facts deduced from the evidence is that in the first instance the Employee was temporarily laid off, he subsequently went on certified sick leave, during the extended sick leave period, he was compensated for the majority of the period,

despite being on extended leave the Employer took no steps to deem the Employee unfit to perform his duties; all support a finding that the Employer still considered the Employee employed.

23. From the parties' evidence and testimony, we could not answer the questions: when was the Employee dismissed, and how was he dismissed?
24. Therefore, having regard to the burden of proof and the facts of this case, we have concluded that the Employee's claim that he was unfairly dismissed is not adequately grounded and cannot be sustained, as there is no evidence of his dismissal. The Employer's failure to roster on its lonesome cannot constitute overt evidence of dismissal. There were no other bases for the alleged dismissal. In the final analysis, this Reference on the facts and evidence does not establish a prima facie case that the Employee was dismissed from his employment.

Did the Employee Resign?

25. The effect of a resignation is profound because an employee who resigns has not been dismissed and ordinarily has no unfair dismissal remedy. However, an Employee's resignation must be unequivocal.
26. Ms. Hector gave evidence that the Employee in April 2020 had intimated that he would resign around the time the lay-off was being conducted. The Employee, she says, had made no contact with the Employer during the temporary lay-off to communicate his position regarding his resignation. In fact, the evidence shows that the Employee returned to work on October 7, 2020, before falling ill on that date. The Employee also continued to submit his certified sick notes to the Employer, which, based on the evidence, was last submitted around March 2021.
27. **We reflected on the authority of *Milton Pringle v The Hon. Molywn Joseph and Others* [2017] ECSCJ No. 188; where the Justices of Appeal, in setting aside the decision of the Court below, made it clear that "...evinced an intention to resign could not be translated into a resignation".** In that case, it was determined that the first instance Judge had erred when it was determined that the non-receipt by the Minister of an instrument in writing by the Appellant indicating the Appellant's resignation was unnecessary in resolving the issue of whether the Chairman had in fact resigned.
28. Having adopted the rationale of the Justices of Appeal and based on the facts of this Reference, the Employee did not resign.

Was the Employee constructively dismissed?

29. It is a fundamental principle of fairness that claims before a Court of Law are to be decided within the boundaries of the pleadings. We note that the Employee's Reference did not raise the issue of constructive dismissal; however, through his written submissions, Mr. Massiah, on behalf of the Employee, is essentially asking

the Court to consider a claim that the Employer constructively dismissed the Employee, having failed to roster him on the conclusion of his medically certified sick leave.

30. Should we now consider a claim for constructive dismissal, having not been raised in the Reference, would be to deprive the Employer of the opportunity to have addressed the issue in the evidence at trial. Additionally, it is noteworthy that no application was made for the Employee to amend his Reference. Accordingly, we find that the Employee is not permitted to claim constructive dismissal.
31. In case we are wrong, a brief, judicious review of the facts will be conducted. However, from the onset, it must be stated that bare allegations of constructive dismissal, when uncorroborated by the evidence on record, cannot be given credence. Therefore, whether an Employee has been constructively dismissed is a question of fact. The evidence must show that the employee involuntarily resigned due to the employer's conduct or breach that rendered his continued employment impossible, with no other viable recourse but to terminate his employment.
32. We reflected the well-known case of **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** where the Court of Appeal held as cited by Lord Denning – “**an employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.**”
33. We therefore considered whether the Employee had ‘resigned’ in response to a fundamental breach of contract on the part of the Employer. The burden of proof is again on the Employee. However, the Employee led no evidence to suggest that he had resigned from this employment in response to the Employer's repudiatory breach of the employment contract. To further reinforce the Court's position, the Court relied on the case of **Nottinghamshire County Council v Meikle [2004] EWCA Civ 859, 2004 IRLR 703, CA**, the Court of Appeal held that what was necessary was that the employee resigned in response, at least in part, to the fundamental breach by the employer.

Did the Employee abandon his job?

34. The Employer raised a defence that the Employee abandoned his job. It is a condition of every employment contract that an employee must attend work. When an employee fails to comply with that term, she or he will be taken to have abandoned or repudiated the contract, entitling the employer to treat it as at an end.
35. Whether there has been abandonment will depend on all the circumstances based on the facts unique to each Reference. The test is whether, viewing the circumstances

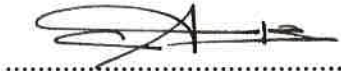
objectively, a reasonable person would have understood from the Employee's words and actions that the Employee had abandoned the contract of employment.

36. We have examined the evidence and facts of this case. We are of the considered view that a reasonable employee, whether directly or through his Representative, would have made contact with his employer either by telephone, text, or in writing to clarify whether he had been dismissed and if so, when and on what basis.
37. We also considered that the Employee had been on extended sick leave, having had his sick leave extended on eight (8) occasions; the possible uncertainty that may have existed for the Employer about the Employee's fitness for work and the fact that he had initially intimated that he could not work the day shift a fact which is accepted by the Employee in his Memorandum and conceded to by Mr. Massiah in his closing submission on behalf of the Employee.
38. It is noteworthy that Mr. Massiah submitted, and this submission was supported by the evidence of the Employee and that of Ms. Hector, that during the period from October – March 2021, there was active dialogue with the Employer and the Union concerning the Employee in relation to other matters. This was significant in objectively determining the Employee's conduct, given the apparent lack of documentary evidence of the Employee's assertion that he requested and/or expressed his intention to return to work, as well as the Employer's denial of that request or failure to roster him. Additionally, despite the active dialogue between the Employee's Representative and the Union, the Employee provided no updates on his medical situation.
39. We also considered the Employer's conduct; there was no documentary evidence from the Employer or the Union regarding the Employee's return to work. Ms. Hector says that, based on the Employee's previous communication that he was unavailable for the day shift and the Employee's failure to revert to indicate that he intended to return to work, the Employer formed the view that the Employee had abandoned his job.
40. The question that arises is whether, having regard to the circumstances presented in this Reference, the Employer acted reasonably in assuming that the Employee had abandoned his job?
41. On the Employee's own admission, he submitted no other medical certificates after March 2020. Whether out of ignorance or indifference, the Employee gave no instructions to his Union Representatives to make inquiries about his return to work.
42. While we accept that another employer faced with a similar situation may have acted differently, we cannot conclude based on the facts of this case that the Employer acted unreasonably in assuming that the Employee abandoned his job. We are of the view that the Employer's conclusion that the Employee abandoned his job was reasonable, having regard to the facts and circumstances of this Reference.

43. We therefore agree with Mr. Marshall that the Employee's conduct objectively showed abandonment.
44. Having decided that there was no dismissal, there being no claim for a determination of constructive dismissal, and that the Employee had abandoned his job, the issue of compensation is now of no consequence.
45. This Reference is hereby dismissed.

Dated the 6th day of February, 2026


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Samantha May-Francis
President


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Charlene Selkridge
Member


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Alando Michael
Member