IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 003 of 2012
BB Civil Appeal No 2 of 2006

BETWEEN

SANDY LANE HOTEL CO. LIMITED **APPELLANT**

AND

BRIGITTE LAURAYNE **RESPONDENT**

Before The Honourables **Mr Justice A Saunders**
Mme Justice D Bernard
Mr Justice J Wit
Mr Justice D Hayton
Mr Justice W Anderson

Appearances

Mr Satcha Kissoon and Ms Joia Reece for the Appellant

Mr Bryan L Weekes and Mr Philip McWatt for the Respondent

JUDGMENT
of
Justices Saunders, Bernard, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Hayton
on the 21st day of February 2013

Introduction

[1] This is a sad case where emotional feelings appear to have clouded rational judgment. The case concerns an action for wrongful dismissal, in the form of constructive dismissal, brought by the Respondent, Mrs Brigitte Laurayne, against the Appellant, Sandy Lane Hotel Limited. The action, instituted in September 2004, was dismissed on 27 April 2006 in the Magistrates' Court for District 'E' Holetown, but an appeal was allowed and damages awarded by the Court of Appeal on 15 April 2010 following a hearing on 29 October 2009. Notice of Appeal was filed by the Hotel with this Court on 9 July 2012, the Record filed on 9 October 2012 and a Case Management Conference held on 6 November 2012. A Notice of Cross-Appeal was filed by Mrs Laurayne relating to the damages awarded by the Court of Appeal. This Court heard the appeal on 21 January 2013. In view of the earlier excessive delays and the clear merits of the appeal, this Court immediately allowed it (so that the cross-appeal on damages became futile), stating that written reasons would follow. These are those reasons.

[2] In determining whether or not an employee has discharged the burden upon her of proving that she was constructively dismissed by virtue of a fundamental alteration to her duties, the Chief Justice in his judgment below at [17] rightly emphasised that the courts are concerned with "an area of the law that is especially fact-sensitive, how the courts decided the issue of constructive dismissal on the particular facts before them", when applying the following correct general principles laid down by him at [18].

> "First, it is always necessary to pay attention to and analyse the terms of the employment contract. Secondly, it must be appreciated that the employer-employee relationship is seldom static. As a prerogative of management an employer must be afforded some measure of freedom and latitude to make changes with a view to the reorganising and restructuring of his business. Thirdly, what an employer cannot do, however, is to vary the terms of the contract of employment to such an extent that they can no longer be said to represent those under which the employee agreed to work: *Johnston v Northwood Pulp Ltd* (1968) 2 O.R. 521. Fourthly, the test to determine whether a change in the employee's duties is sufficient to constitute a fundamental breach of the contract of employment is an objective one: *McKilligan v Pacific Vocational Institute* (1981) B.C.L.R.

324 and *Orth v MacDonald Detwiller & Associations Ltd* (1986) 16 C.C.E.L. 41."

What were the crucial facts?

[3] Unfortunately, in applying these principles we have no written contract to analyse, though it appears that a 4 September 1995 letter of employment of Mrs Laurayne had been before the Magistrate, though not part of the Record before the Court of Appeal or this Court. There is thus available only the oral evidence of her contract of employment given by Mrs Laurayne and the then General Manager of the Hotel, Mr Colm Hannon, who had left the employ of the Hotel when he gave evidence, and the findings of the Magistrate as to all evidence. Evidence as to other relevant matters was given by Mrs Laurayne and Mr Hannon and also by Mr Eric Mapp, the Hotel's Resident Manager.

[4] The Magistrate's written reasons for her decision of 27 April 2006 were only provided in 2009 after she received notice on 29 January 2009 that they were needed for an appeal. Some criticism was levelled at the quality of her written decision. It did not deal with the law on the subject, the filed documents in the case not having been located, and the analysis and evaluation of the summarised evidence in the eleven page decision was alleged to lack rigour. Her fact-finding could certainly have been fuller and crisper. It must be said, however, that the law on the subject is uncontroversial and the Magistrate neatly summed up the evidence that was led and made it clear that she preferred the evidence of Mr Hannon to that of Mrs Laurayne, though conflicts were very few. No objective appraisal of the evidence can suggest that the Magistrate was wrong to prefer Mr Hannon's evidence and her decision is entirely consistent with the evidence that was given.

[5] In these circumstances we do not agree with counsel for Mrs Laurayne that the Magistrate's decision could be equated with the circumstances in *Lovell v Rayside Construction Limited*[1], where the Magistrate had only written eleven lines in four

[1] BB 2010 CA2, unreported 4 March 2010.

perfunctory paragraphs so that, in dealing with the appeal, the Court of Appeal had found it was required to engage itself in the fact-finding exercise.

[6] In any event, when examining the fact-finding of the Magistrate most matters are not in dispute by the parties. In October 1995 Mrs Laurayne commenced as Manager of Leisure at the Hotel when she was qualified in Early Childhood Education. Her duties involved managing the children's programme, the pool and the tennis and fitness facilities. Extensive refurbishment of the Hotel facilities and development of a spa resulted in Mrs Laurayne in May 2001 becoming 'Director of Leisure and Spa' or 'Director of Spa and Leisure', the two titles being used interchangeably in the evidence before the Magistrate. Following the usage in the Court of Appeal we will use 'Director of Leisure and Spa'. The leisure side included extensive management responsibility for a children's centre, the beach, the pool, water sports and tennis. The spa side included management responsibility for a fitness facility and for massage and beauty treatments, together with retail sales for products used in massages and beauty treatments.

[7] Mrs Laurayne had no qualifications in respect of the specialist work going on in the spa, but during the closure of the Hotel for refurbishment she had worked with the spa consultants involved in developing the spa, had visited several spas in the United States of America and become a member of the International Spa Association, attending its annual conferences. She complained that her expanded duties caused her stress. In 2002 the Hotel therefore employed an Assistant Director of Leisure and an Assistant Director of the Spa, though the latter only dealt with the aerobics and fitness side of the spa (for which she was qualified) as opposed to the massage and beauty side, leaving Mrs Laurayne more directly involved in managing the latter side. Assistant Directors ranked as Level 2 employees reporting to their Director, ranked as a Level 1 employee. As such an employee, Mrs Laurayne reported only to Mr Hannon as the General Manager.

[8] In June 2004 Mrs Laurayne's salary was $10,000 per month with an annual performance bonus available of 15% of her annual salary. Indeed, she had received the full $18,000 bonus for 2003 in January 2004. Also in that month Mrs

Laurayne, together with two other Level 1 employees and Mr Hannon, was enrolled by the Hotel in a Master's degree programme for the mutual benefit of employer and employee. Mr Hannon stated that Mrs Laurayne was a "very good manager".

[9] Later in 2004 there were some problems with therapists and operational issues surrounding the spa and some discussion about them between Mr Hannon and Mrs Laurayne. At the same time, as indicated in the evidence of Mr Mapp, who was doing the Master's degree with Mrs Laurayne, the two were complaining that their work for this degree was putting them under stress when considering the demands of their jobs, normally spending twelve hours a day six days a week performing their Hotel duties. It was during this period that, to improve the standards and quality levels in the spa, Mr Hannon took the decision to employ a specialist on the massage and beauty side of the spa, which could only have the effect of lightening Mrs Laurayne's burdens. This specialist was to deal with the therapists and beauticians on a day-to-day basis and so would take over some of Mrs Laurayne's work, but come in at Level 2, reporting to her as the Level 1 Director. The other Level 2 Assistant Director would continue to deal with aerobics and fitness.

[10] The Hotel via Mr Hannon wanted Mrs Laurayne to continue as Level 1 Director of Leisure and Spa with her existing salary and bonus possibilities, and continuing to be responsible wholly for the spa and leisure budgets, recruiting employees for her department and ultimately being responsible for the good or bad performance of her department. The technical competence of the new specialist Assistant Director, coupled with Mrs Laurayne's experience and skills as a manager, was intended to lead to Mrs Laurayne's department, in particular the spa side of it, performing better than before.

[11] It is clear that Mrs Laurayne, having been closely involved in the "hands on" running of the spa side, was not at all happy with this decision to employ the specialist. Mr Hannon gave her the CVs of three applicants for the new specialist post. Later, she returned them, saying she would not assist in the interviews.

According to her she "thought that it was inappropriate to ask someone to look at curriculum vitaes (sic) for their own position when they had not actually resigned". However, as Mr Hannon pointed out to her, overall management was to be left to her. Thus she was only losing her day-to-day involvement in managing the non-fitness side of the spa.

[12] Mrs Laurayne admits that she "was never told that [she] would be replaced as Director of Leisure and Spa"; she admits that her "job as a Level 1 manager was not in jeopardy" and that "Mr Hannon told me that they did not want to lose me at Sandy Lane". Mr Hannon "explained that he had made it clear to the Plaintiff that her terms and conditions of employment would remain the same and…the change was being done to help her and to improve the overall Spa Department". It is to be noted that the stress of having to fit in studying for a Master's degree (see [9] above) would also be alleviated if Mrs Laurayne no longer had "hands on" involvement as to massages and beauty treatments in the spa.

[13] The evidence given before the Magistrate by Mrs Laurayne and Mr Hannon diverge over Mr Hannon's evidence (whose evidence the Magistrate believed) that "Mrs Laurayne told me that if I appointed a Spa Manager she wanted nothing to do with the Spa". Earlier, when cross-examined on that issue, Mrs Laurayne denied having told this to Mr Hannon. In any event, Mr Hannon looked into the possibility of accommodating the unhappy Mrs Laurayne in other areas of the Hotel. He explored the possibility of a new Level 1 post to deal with Quality Assurance but found that this was not possible because this should be covered by the relevant current Level 1 heads of departments. He then arranged for Mrs Laurayne to speak to Mr Mapp about a position as Front Office Manager. On 2 July 2004 Mr Mapp spoke with her and offered her that position if she wanted it. She did not as it was only a Level 2 post.

[14] Thus, as the Magistrate found, the position was that Mrs Laurayne as Director of Leisure and Spa could continue exactly as before both with the leisure side and with the aerobics fitness part of the spa side. As concerns the massage/beauty treatment part of the spa she would remain fully responsible in overall control

with a new Level 2 spa specialist taking over day-to-day responsibility for that part, but reporting to her as Level 1 Director. Her title and pay and overall responsibility would continue as before. She thus had the option to continue as Director of Leisure and Spa, which Mr Hannon hoped she would take up. However, so as not to lose her, if Mrs Laurayne wished for a quieter life she could opt for the Front Office Manager post.

[15] As it happens, no specialist was appointed and Mrs Laurayne continued as Director of Leisure and Spa until 5 July 2004 when she left work, indicating that she was not well. Later, when Mr Hannon inquired about not having seen her report to duty and not having been advised about a reason for absence he was told that her office desk had been cleared. A letter from Mrs Laurayne's attorney dated 7 July advised him that she had ceased her employment with the Hotel, having considered herself constructively dismissed.

Was Mrs Laurayne constructively dismissed?

[16] The Court of Appeal upheld Mrs Laurayne's counsel's primary submission at [26] that the Hotel had broken the implied term that "the employer will not make a substantial change in the status and duties of an employee to such an extent as to strike at the heart of the contract". It found that she had established "the gravamen" of her case "that removal of her responsibilities for the spa meant that she was effectively demoted". Thus, she had established that she had been constructively dismissed.

[17] The Court at [27] accepted it as well-established that indicia of demotion are changes in reporting function, changes in title and changes in substantive duties, resulting in loss of prestige and status. No change in reporting functions was alleged. Surprisingly, the Court held at [29] that "when Mrs Laurayne's work colleagues found out about the change in her title, they may reasonably have concluded that she was demoted. She would have lost prestige and status by reason of the change and there is little doubt that she would have been embarrassed". As appears from [10] above, the Hotel wanted her to continue as

Director of Leisure and Spa and, as appears from [11] and [12] above, there is no evidence whatsoever to support the Court's view that a change of Mrs Laurayne's title was to be imposed.

[18] The Court went on at [30] to consider whether the proposed unilateral change in her spa duties "denuded her contract of substantial content" as submitted by her counsel. Unfortunately, in expounding the background facts the Court overlooked the facts that complaints of stress by Mrs Laurayne as Director of Leisure and Spa had led to her being provided with an Assistant Director to help with leisure and an Assistant Director to help with the spa. The former assisted with the children's centre, the beach, the pool, various water sports and tennis. The latter, qualified only on the aerobics and fitness side of the spa facilities, assisted only with that side, leaving Mrs Laurayne to continue with "hands on" management of the rest of the spa.

[19] The Court held "that stripping her of virtually all her accustomed functions in relation to the spa effectively altered the substance of her job function. She lost supervisory responsibility for 35 members of staff…. In our judgment, the removal of a substantial part of her job struck at the root of the contract". However, it seems likely that, in overlooking the leisure side of Mrs Laurayne's managerial responsibilities, the Court was too ready to draw the inference that the thirty-five staff members worked only in the spa from the slight ambiguity in Mrs Laurayne's evidence and in the Magistrate's findings. Even if that inference was correct, the Court ought to have considered the number of staff likely to be involved in the important leisure side of Mrs Laurayne's job. It appears also that the Court was influenced by the "illuminating" acceptance of Mr Hannon in cross-examination that the new specialist with international expertise would be a Level 2 person "reporting to a Level 1 who would have had absolutely no international expertise in spas". There is nothing illuminating or remarkable in this. It is common for a manager with expertise in management to have responsibility for persons reporting to him or her who have specialist technical

expertise that the manager does not have. Indeed, the management expertise and the technical expertise should complement each other.

[20] The Court was also at [31] influenced against the Hotel by its offer of "a non-existent position", the Quality Assurance post mentioned at [13] above, and "a lower position", the Level 2 post of Front Office Manager. In view of the facts that Mrs Laurayne was regarded as amongst its best long-standing employees with a 100% bonus and enrolled in a Master's degree programme and a senior employee that the Hotel did not want to lose, the offer of the Level 2 position can be explained as a fall-back to assist Mrs Laurayne *if* for some reason she wished to take it up rather than continue as Director of Leisure and Spa with a specialist Assistant Director (Spa) as the Hotel wished.

[21] The Court adverted to two Barbados cases and some Canadian cases, but rightly emphasised at [17] that they were to be understood as turning upon their own different peculiar facts, hence the detail in [3] to [15] above. *McKeever v Crane Estate Ltd*[2] is clearly distinguishable. The plaintiff general manager would be placed in a radically different position if his area of command was to be restricted to food and beverage and the financial controller was to be removed "from the plaintiff's supervisory ken". In *Courts (Barbados) Limited v Mary Inniss*[3] the plaintiff lost her title as branch manager, an office of her own and her daily supervisory role over staff in having an ill-defined role as a relief or training manager assisting in various branches and sometimes taking orders from other managers and performing filing duties or price comparisons. In both cases there were clear demotions. We do, however, endorse the statement in *Inniss* at [19], "Actions for constructive dismissal must be founded on conduct viewed objectively by the employer and not the subjective perception of that conduct by the employee".

[2] (1990) 25 Barb LR 130.
[3] Magisterial Appeal No 7 of 2002, unreported 29 Nov 2005.

Conclusion on Mrs Laurayne's primary claim

[22] Despite Mrs Laurayne's odd perception of the situation, we have no doubt that there was no substantial removal of part of her job as Director of Leisure and Spa so as to strike at the root of her contract and enable her to consider herself constructively dismissed. Upon appointment of the intended specialist in spa treatments as Assistant Director responsible for the "hands on", day-to-day running of the massage and beauty treatment part of the Spa, Mrs Laurayne, continuing as Director of Leisure and Spa, would remain responsible for the spa budget, spa policy, attending meetings as a Level 1 head of department, recruiting employees and the efficient running of the massage and beauty treatments directly dealt with by the new Assistant Director. The latter would have been reporting to Mrs Laurayne, who reported to the General Manager. This would reflect the established position for Leisure (where Mrs Laurayne as Director was assisted by an Assistant Director) and for the aerobics fitness side of the spa (where Mrs Laurayne was assisted by an Assistant Director).

[23] Apart from the useful "hands on" assistance to be provided by the new Assistant Director (Spa), counterbalanced by Mrs Laurayne's responsibility for such person's performance of the relevant duties, Mrs Laurayne's position, title, other duties, responsibilities, role, salary and benefits and place of work all remained the same. Her status could be said to be enhanced by having another Level 2 employee responsible to her.

[24] Indeed, though we do not need to decide this, there is a case for saying not only that there was no fundamental breach justifying a constructive dismissal, but that there was no breach. After all, Mrs Laurayne joined the hotel as Manager of Leisure and developed with it as it developed into what counsel termed "a five diamond hotel", going on to take over as a leisure activity the spa side and becoming Director of Leisure and Spa. As the level of business developed, her role was enlarged, taking on responsibility for two Level 2 Assistant Directors to help her enhance not just the Hotel's leisure side but also the aerobics fitness part of the spa, though diminishing her own direct involvement with staff. A new

Assistant Director was then proposed to help her to improve the standard and quality of the spa experience concerned with massages and beauty treatments, though limiting her own direct involvement. This seems a natural development for Mrs Laurayne and for the Hotel which has a reputation as the premier hotel in Barbados.

[25] In this respect, the following dicta of Warner J in *MacKinnon v Acadia University*[4] have relevance though, unlike this case, he was able to analyse contractual terms to help towards his finding of an implied term.

> "It is normal and logical that in any institution, private or public, profit or non-profit, the handful of top administrators are expected to be generalists and more flexible in their contribution to their institution; said differently, those in leadership positions are expected to contribute to the big picture as part of a team to ensure the success of the institution, and with that comes a comparative responsibility to respond in a flexible manner in their job. Flexibility in job functions, provided the employee has the appropriate skill sets, is an implied term in the employment of a senior employee."

Mrs Laurayne's subsidiary claim

[26] Counsel for Mrs Laurayne supported his main case with a submission that the Court of Appeal had considered unnecessary to discuss since it had already held that Mrs Laurayne had been constructively dismissed. This submission was that the Hotel had breached a fundamental implied term of her contract imposing upon it the duty to maintain the trust and confidence which Mrs Laurayne had reposed in it. Such a breach, counsel submitted, amounted to a repudiation of the contract which she had accepted, entitling her to damages for wrongful dismissal. He cited Browne-Wilkinson J (as he then was) in *Woods v WM Car Services (Peterborough) Ltd*[5]: "the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd v Austin* [1978] IRLR 332 and *Post Office v Roberts* [1980] IRLR 347."

[4] (2009) 76 C.C.E.L. 3d 273 and [2009] Carswell NS 484 at [92].
[5] [198]1 ICR 666 at 670-671.

[27] As will have been seen from our rejection of Mrs Laurayne's primary constructive dismissal claim, the Hotel's conduct as a whole, judged sensibly and reasonably, could not possibly be described as conduct that Mrs Laurayne could not be expected to put up with.

Disposition of the appeal

[28] As Mrs Laurayne's claim has failed there is no need to deal with the question of what damages should be payable at common law or by statute. At the end of the hearing we stated that the appeal was allowed with costs here and below to be agreed between the parties and paid by Mrs Laurayne to the Hotel. Failing such agreement, however, the parties were to have liberty to make written submissions on the issue of costs, such submissions to be made before 15 February 2013. The parties have informed us that they have agreed costs so that, by consent, this Court orders that Mrs Laurayne pay the Hotel's costs here and below in the sum of $82,500.

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The Hon Mr Justice A Saunders

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The Hon Mme Justice D Bernard The Hon Mr Justice J Wit

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The Hon Mr Justice D Hayton The Hon Mr Justice W Anderson