

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 1988

BETWEEN:

DANTZLER WEST INDIES LIMITED - Employer/Appellant

and

ROMIG MICHAEL - Employee/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice  
The Honourable Mr. Justice Bishop  
The Honourable Mr. Justice Moe

Appearances: S.P.Christian for the Appellant  
J. Simon for the Respondent

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1988: Nov. 28, 29,  
1989: Feb. 27.

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JUDGMENT

MOE, J.A.

The Industrial Court by a majority decided that the respondent was constructively dismissed by the appellant on the 31st day of October 1985; that the dismissal was unfair and that the respondent is entitled to compensation in the sum of \$20,000.00 to be paid, together with \$7,500 an agreed amount of bonus payments, by not later than 29th February 1988. The appellant has appealed against that decision save that there is no challenge to the award of the bonus payments. The respondent seeks a variation of the decision to a finding of constructive dismissal on 15th July 1984 and for a higher figure of compensation.

Background

The appellant is a Bahamian Corporation registered in Antigua and carrying on the business of merchants and traders. One of its operations here is called Joseph Dew, departments of which are, the Head office, a Supermarket, a Lumber department and a wholesale department. For a period, another operation of the appellant was Dew San Ltd. a company formed in 1984 to manufacture and sell sanitary ware articles. The respondent was employed at Joseph Dew from June 1961, worked in the Personnel Division at the Head office, and at various times held the position of Manager of the Lumber Department, Manager of the Supermarket. It was while the respondent was Manager of the Supermarket that Dew San Ltd. was established.

Sometime in March 1984 the respondent was called to the Head office and offered the position of Manager of Dew San Limited. There

/was no....

was no discussion on the terms and conditions of that employment. He was told acceptance of the offer would mean progress for him. He accepted subject to conditions being worked out. He took up duties at Dew San Limited on the 16th July 1984. He performed duties different; from those he did at the Supermarket; his hours of work were different; both his base salary and travelling allowance were more. It was not established how much vacation and sick leave he was entitled to per year.

The respondent took the position that his conditions of employment had not been established and between September 1984 and January 18th, 1985 he made several requests to Directors of the appellant to clarify these conditions. It is important to be more detailed at this point as to what transpired hereafter. Up to that date no one had said to the respondent anything about the terms and conditions of the employment at Dew San including the matter of salary increases.

On 18th January 1985 the respondent gave the appellant two weeks to resolve the matter. On 30th January 1985 there being no resolution the respondent requested and had a meeting with two directors of the appellant Co. when he told them that he was dissatisfied that nothing had been done and he would be handing in the keys for the factory at Dew San.

On 1st February 1985 the respondent reported for work at the Head Office where he was told there was no employment for him. He was directed to return to Dew San Ltd. and was handed back the keys thereto. He returned to Dew San Ltd.

Thereafter correspondence flowed between the respondent and the General Manager of the appellant; the respondent setting out in his letters what he saw his position to be and the General Manager in his letters stating what was the appellant's view of the respondent's position.

The following paragraph from a letter of the respondent puts the position taken by the respondent:

"I was asked to manage Dew San Limited from 26th July 1984, a new Company registered under the Laws of Antigua and a separate and distinct legal entity. It is my considered contention that my employment by Dew San effectively terminates my employment with Dews. I should, in the circumstances be compensated for my years of service with Dews."

The following excerpts show the stand taken by the appellant:  
From a letter dated February 6, 1985 -

"It has been made abundantly clear to you that irrespective of the success or failure of the operations conducted under the style of Dew San Ltd., you are an employee of Joseph Dew Division

/of Dantzler.....

of Dantzler-West Indies Ltd., enjoying all rights and privileges of such status, and this was accepted by you without reservations.

The Company reserves the right to utilize your services in any part of its operations. Under the circumstances, consideration cannot be given to your request for compensation for your years of service with Dews. You are still employed by Dews and I believe you are happy to be."

From a letter dated March 6, 1985 -

"We again confirm that Dew San Ltd. is an integral part of Joseph Dew Division of Dantzler-West Indies Ltd. Consequently, you are entitled to all rights and privileges which you are accustomed to enjoy in any one of the departments in St. John's. In particular, your years of service with the Company are considered to be unbroken. You therefore need have no fear in this regard.

Turning to your question concerning your standing in the Company, we feel you will be pleased to know that you are fourth from the top, and that you are held in high esteem."

On the 10th September 1985 the Secretary of the Appellant Company sent a request by letter to the respondent to return to Head office and assist with the Inventory. He complied and replied in writing that he considered himself freshly retired.

By letter dated the 21st October 1985 the respondent tendered his resignation as Manager of Dew San Limited effective 31st October 1985. He commenced employment with another employer on 3rd November 1985.

#### Termination of Employment

The approach of the respondent is that his employment with Joseph Dew was terminated on 16th July 1984 when he was transferred to Dew San Ltd. a legal entity separate and distinct from Joseph Dew. His contention is that he accepted the position at Dew San expecting or on the understanding that terms and conditions would be worked out. He then refers to the steps taken by him in seeking a clarification of his position at Dew San and the position taken by the appellant in this regard which he saw as providing no clarification. The conduct of the appellant subsequent to the 15th July 1984 was therefore relied upon as a basis for saying that the appellant dismissed the respondent. This approach was unacceptable. The fact is that the respondent freely and voluntarily accepted a transfer from one operation to another operation of the appellant. On that transfer he continued being paid by the appellant and being under the control and direction of the Company. His employment with the appellant Company continued until he resigned by letter on the 30th October 1985.

/The Law...

The Law

The respondent having resigned and thus terminated his employment with the appellant, for there to be constructive dismissal there must be shown conduct on the part of the appellant/employer which amount to a repudiation by the appellant of the contract of employment. See *Western Excavating (ECC) Ltd. v Sharp* (1978) Q.B. 761.

The Offending Conduct

The Industrial Court found that the appellant was in breach of its duty under the Labour Code of Antigua & Barbuda in not furnishing the respondent with a job description when he was transferred as Manager of Dew San Limited. Secondly that the appellant was in breach of the duty of confidence and mutual trust which was at the root of the contract of employment between it and the respondent and that the respondent's requests for clarification of his position seemed never to have been considered by the Board of the appellant. Thirdly that at one stage the respondent was so frustrated that at a meeting with two directors of the appellant Company, he gave them two weeks to clarify his position failing which he would hand in the keys to Dew San Ltd. He actually did so.

The Tribunal further found that by 10th September 1985 when the respondent was asked by letter of that date to return to Head office to assist with the Inventory the confidence and mutual trust between the parties had sunk to such a low ebb the respondent no longer relied on the Director's word and would act only where they were set out in writing. Fifthly it appears that from the respondent's statement he was fed up with the general behaviour of the appellant and the conditions with regard to his employment, the Tribunal took it to mean the appellant's behaviour caused him to become frustrated and to resign his position.

The Appeal

The burden of the appellant's complaint is that there is no evidence showing conduct on the part of the appellant which amounted to a repudiation or going to the root of its contract with the respondent. The contention is that the respondent was given all he could be given in clarification of his position; that the frustration about which he complains was caused by his unreasonable insistence that he was dismissed in July 1984, and entitled to compensation from that date. The respondent in referring to conduct of the appellant after July 1984 to support the decision of constructive dismissal on 30th October 1985 stated that the failure of appellant Joseph Dew to give a job description on the transfer to Dew San brought about the problem.

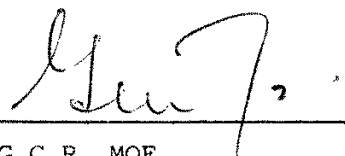
/Conclusion....

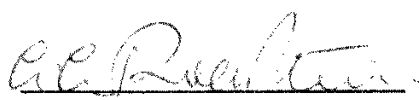
I must first observe that it cannot be rightly said that the respondent's requests for clarification were not considered. The flow of correspondence from the appellant to the respondent included statements as to his position with the appellant. The excerpt from the letter of March 1985 is an example. The fact that the appellant did not give answers satisfactory to the respondent or in keeping with his view of the legal position is not a sufficient basis for saying that the appellant was guilty of a breach of his contract with the respondent or that it evinced an intention no longer to be bound by it. A similar consideration is applicable to the matters of confidence and trust and frustration. The respondent may very well for his part have lost confidence in his employer and become frustrated because he was not getting answers which he would have liked to have but again this does amount to behaviour on the part of the employer repudiating the contract.

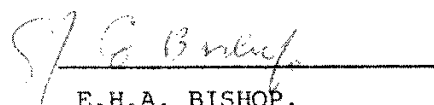
The failure to give to the respondent a job description on his transfer from Manager of the Supermarket to Manager of Dew San Ltd., may very well be an offence against the Antigua Labour Code. But such a failure is in my view of little avail to the respondent in the matter of conduct going to the root of the contract. The facts are that, despite not being given a written statement as required, the respondent was fully aware that he was Manager of Dew San Ltd., that he had full management of the plant, what his hours of work were, what his salary was, what his duties were and what his travelling allowance was. It was never stated whether his sick and vacation leave were the same as Manager of the Supermarket or otherwise. But there is no evidence of other clarification on terms and conditions of employment as Manager which ought to have been given as would entitle one to say that the appellant had repudiated its contract with the respondent.

The conduct of the appellant disclosed on the evidence which the Tribunal considered as amounting to a constructive dismissal does not in my view show conduct which evinced an intention not to be bound by its contract with the respondent nor amounted to a repudiation of it. The finding of the Tribunal cannot be supported. The question of assessment of compensation does not arise. I would uphold the appeal, set aside the decision of the Tribunal and order that the respondent was never dismissed (constructively) or otherwise) by the appellant and is not entitled to any compensation.

/G.C.R.....

  
G.C.R. MOE,  
Justice of Appeal

  
L.L. ROBOTHAM,  
Chief Justice

  
E.H.A. BISHOP,  
Justice of Appeal.