

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2011/0413

BETWEEN:

MELVIN DAVID ANDERSON

Claimant

-and-

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] COMMISSIONER OF POLICE

Defendants/Ancillary Claimants

-and-

[1] GLENNIS SIMON
[2] MONCY DUNCAN

Ancillary Defendants

Appearances:

Dr. David Dorsette for the Claimant
Mrs. Carla Brooks-Harris for the Defendants

2013: March 11
April 15
August 15

JUDGMENT

[1] **Remy J.:** By Claim Form filed on the 23rd June 2011, the Claimant MELVIN ANDERSON claims against the First Named Defendant the Attorney General and the Second Named Defendant the Commissioner of Police the following remedies:-

1. Damages for breach of contract.
2. A declaration that the Claimant remains a member of the Police Force or alternatively, was constructively dismissed.

3. Damages for salaries withheld from September 2004 to July 2005.
4. Damages for loss of earnings from July 2005 to July 2007.
5. Damages for loss of opportunity for promotion.
6. Entitlement to all holidays withheld for the period 1995-2005 and continuing.
7. Entitlement to all pension and gratuity benefits.
8. Process service - \$100.
9. Court fees - \$245.
10. Attorney cost.
11. Interest.
12. Such further or other relief as the Court may see just.
13. Costs

PLEADINGS

- [2] In his Statement of Claim the Claimant avers that he enlisted in the Royal Police Force of Antigua and Barbuda in January 1991. In or about September 1999, he applied for and obtained duty leave from the Police Service Commission to pursue studies in Computer Information Systems in the U.S.A. He executed two bonds "confirming the granting of the duty leave." While in the USA, and on completion of his Bachelor's Degree, he applied for and obtained a further extension of time to pursue an MBA degree. He received his monthly salary of \$2,500.00 until August 2004 when his salaries "were stopped abruptly."
- [3] Mr. Anderson further avers that he has not been paid the salary due to him from September 2004 to July 2005 while on extended duty leave. He states that upon his return to Antigua upon completion of his studies, due to the treatment by the Police Administration, he was prevented from seeking employment within the state and remained unemployed for a period of two years with no income from the Government of Antigua and Barbuda. He pleads that he is entitled to his salary from August 2005 to July 2007 and that in addition to his salary; he is entitled to all other pecuniary benefits that are due to him to include his holiday pay. The Claimant claims that he is entitled to a Declaration that he remains a member of the Police Force.
- [4] By their Defence filed on July 26th, 2011, the Defendants deny the Claimant's claim. They counterclaim that the Claimant is in breach of the bonds executed on the 13th August 1999 and on

the 1st August 2003. Their Counterclaim is for the sum of \$152,400.00 being the amount due as damages for breach of the said bonds.

- [5] The Claimant filed a defence to the counterclaim on 25th August, 2012 in which he pleaded that the Defendants are not entitled to the \$91,440.00 or \$60,960.00 for the executed bonds.
- [6] On 15th September, 2012, the Defendants filed a reply to Defence to the Counterclaim in which they confirm what was stated in the Defence and Counterclaim.

EVIDENCE

- [7] The Claimant Melvin Anderson testified on his own behalf and called no witnesses. He relied on the evidence of his sworn Witness Statement which he stated was true and correct save and except that he now resided at a different address than that stated in the Witness Statement. In his Witness Statement, Mr. Anderson stated as follows: He is a financial Examiner at the Financial Service Regulatory Commission. He enlisted in the Police Force in 1991 and throughout his tenure in the force he was dutiful, diligent and faithful; participating in activities as well as work. In 1999, in response to a proposal made to the Force, he applied for a three year study leave in order to pursue a Bachelor's Degree in Computer Information Systems at Essex County College. The leave was from August 15th, 1999 to August 14th, 2002. He was to receive his full salary for the duration of the leave and was required to execute a bond with two sureties. The primary condition of the bond was that he was required to return to Antigua upon completion of his studies and work for the government of Antigua and Barbuda for three years.
- [8] Mr. Anderson stated that at the conclusion of the first two years of the leave he applied for and was granted an extension to his leave. He executed a bond for the extension. The bond was valued at EC\$91,440 and from September 2002 and August 2004. The initial requirement to return and work for the government for three years persisted. In order to receive the extension he was required to provide supporting documentation from the University. The bond was updated in response to the extension. It reflected the change from Essex County College to Long Island University and an increase in the cash component in the bond. The work obligation for three years remained the same. Mr. Anderson stated that during college breaks, on visiting Antigua, he regularly visited the Police Department and the St John's Fire Station. He was told by the head of

the Fire Department that he was ready for promotion and this was substantiated by correspondence dated April 20th, 2003.

- [9] Mr. Anderson added that in September 2004 his duty leave came to an end and that, without notice, his salary was withheld upon instruction by the Police Commissioner. He then provided the Commissioner of Police with a letter requesting a further extension of his leave in order to complete his degree and documentation reflecting the fact that he was enrolled in Master of Business Administration degree program from which he would graduate in May 2005. In correspondence dated October 29th, 2004, he fully apprised the Commissioner of Police of his progress. In correspondence signed by the Commissioner of Police, the Commissioner expressed his serious concerns about the relevance of the program and Mr. Anderson's intention and capacity to contribute to the Force upon completion of his degree. The same concerns were corresponded to the Police Service Commission.
- [10] Mr. Anderson stated that he submitted all the documentation to support his application for an extension for leave to the Commissioner. The Commission submitted the request and his letter containing allegations to the Police Service Commission. In November 2004, in response to a notice placed in the station diary, he attended a meeting at the office of the Police Service Commission. He met with all the appointed Commissioners and was made to answer many questions after which the Commission adjudicated on the matter. Following the deliberation he was granted the extension which was confirmed by a letter dated February 8th, 2005. The said correspondence was sent to the Commissioner of Police.
- [11] According to Mr. Anderson, during the period of leave from 1999 to 2004 he was paid a monthly salary of \$2,500. He realized that the Police Administration stopped paying his salary without reason or communication to him. In the aforementioned correspondence dated February 8th, 2005, the Chairman of the Police Service Commission wrote to the Permanent Secretary to inform them that the request had been approved. The salary was never reinstated. He wrote to the Commissioner of Police to request reinstatement of the salary or an explanation. The Commissioner never replied. He completed his graduation exercise, returned to Antigua and visited the Police Headquarters to report for work. He met with the Assistant Commissioner Davidson Whyte. The Commissioner, Delano Christopher, refused to meet with him.

- [12] Mr. Anderson stated that he sought legal advice from Marshall & Co. and an exchange of correspondence between the Attorney General and the law office resulted. The Attorney General raised concerns that Anderson had dismissed himself from the Force. At no point did the Commissioner of Police institute disciplinary proceedings. He was never formally charged or given an opportunity to defend himself. He remained unemployed and was effectively barred from seeking employment in another government entity. He applied to and was successful in getting a job with the Inland Revenue Department but was informed that he was still on record as an employee of the Police Force and therefore could not be employed. He made several attempts to resolve the situation and to be heard by the Police Administration. He visited the Police Headquarters and discussed the matter with the Police Administration on many occasions and spoke with the Permanent Secretary responsible for the Force, Mr. Isaac.
- [13] Mr. Anderson added that he endured significant hardship in this period; made worse by the fact that he is a single parent of two children. In 2007 he got a job as a lecturer at ABIT. He then got a job at the Financial Services Regulatory Commission. He has worked there for in excess of three years. According to Mr. Anderson, he has therefore satisfied the obligations of his bond as both institutions are part of the Government. Correspondence from the Board of Education dated December 3rd, 2012, confirms this. His salary was never reinstated. He adds that there is justification for withholding it for three months; thereafter an official procedure would have to be instituted to continue withholding the same, and to his knowledge, this was never done and his salary continues to be withheld. He adds that, to date and to his knowledge he has never been formally dismissed or discharged from the Force. No disciplinary procedures have ever been instituted to prosecute him for any disciplinary offences. There are no pending investigations and his salary was never reinstated. He has been denied the benefit of his salary, vacation, and years of service.
- [14] Under cross-examination, Mr. Anderson's response to several of the questions put to him by Learned Counsel Mrs. Carla Brooks-Harris was that he "could not recall". In fact, Mr. Anderson testified that he "could not recall" several important issues. For instance, although Mr. Anderson pleaded that he returned to Antigua and visited the Police Headquarters to report for work on completion of his "graduation exercise", he testified that he "could not recall" when he returned to Antigua. Further, he "could not recall" when he returned to Antigua in 2004.

- [15] The first witness to give evidence on behalf of the Defendants was Ms. Aldean Willet. In her witness statement filed on 18th June, 2012, Ms. Willet stated that she is attached to the Police Headquarters and has been the Supervisor in the Accounts Department since 2010. One of the duties carried out by the department is to process the salary sheets of all Police Officers. Ms. Willet states that she has reviewed the records of the Claimant. She avers that the Claimant was paid from September 1999 to November 2004.
- [16] Under cross-examination, Ms. Willet testified that according to her records, Mr. Anderson was "paid up to September 2004."
- [17] The next witness for the Defendants was Mr. Everton Jeffers. In his witness statement filed on June 04, 2012, Mr. Jeffers stated that he is a personnel officer in the Police Force and that he is responsible for maintaining the personnel files of the officers in the Force. He has reviewed the files of the Claimant and states that the Claimant did apply for leave and an extension of leave, that he signed two bonds and was to report for duty on August 14th, 2004. The records show that he did not report for duty at the end of his leave. On June 29th, 2004 the Claimant wrote to the Commissioner of Police to ask for a letter to assist in the Claimant getting an internship with the New York Police Department. A letter dated 18th October, 2004, expressed concern that the Claimant had not reported for duty and inquired about his whereabouts. On October 29th, 2004, the Claimant wrote the Commissioner requesting an additional year to complete his studies.
- [18] On November 4th, 2004 the Claimant wrote to the Commissioner of Police to request a formal letter addressed to the New York Police Department. There is no record of a reply by the Commissioner to this request. On January 17th, 2005, the then Acting Commissioner of Police wrote a letter expressing concern about the loyalty and commitment of the Claimant. He also approved the extension of duty leave to complete his degree, from September 2004 to July 2005, on condition of signing a bond with two sureties. It was later discovered that the Claimant had obtained his Bachelor's degree from Long Island University in 2003, and at the time of the request for an extension he was enrolled in a Masters Degree program. There is no record of him advising the Police Administration that he was enrolled in a Masters program. He was never granted leave to pursue a Masters Degree program. There is no record of the Claimant reporting for duty in August 2005, at the end of his duty leave, or that he was denied the opportunity by the Commissioner or anyone, to report for duty.

[19] Under cross-examination, Mr. Jeffers testified Mr. Anderson did not report for duty and it is on that basis that his salary was stopped. When questioned about the vacation leave which Dr. Dorsett indicated was "owed" to Mr. Anderson, Mr. Jeffers responded :- ' You don't pay people for leave; you take the leave.'

FINDINGS OF FACT

[20] Before making my findings, I will first recap the salient undisputed facts in this matter:-

- (a) The Claimant joined the Royal Police Force of Antigua and Barbuda in January 1991. Between 1991 and 1999, he worked at Coolidge and St. John's Fire Stations as a Constable of Police.
- (b) On or about September 1999, the Claimant applied for and was granted duty leave in order to pursue a course of study in Computer Information Systems at Essex County College in Newark, New Jersey.
- (c) On August 13th 1999, the Claimant executed a bond for \$91,440.00 E.C. in respect of duty leave from 15th August 1999 to 14th August 2002. On 1st August 2003, he executed a second bond in the amount of \$60,960.00 E.C. This bond was for a further period of two years, namely, from the 14th August 2002 to 14th August 2004; it was subject to the same conditions as the previous bond.
- (d) While in the U.S.A., the Claimant applied for and obtained a further extension of time to complete his studies. He applied for the said extension of time in October 2004 and January 2005.
- (e) In February 2005, the Claimant was granted the extension of his duty leave from September 2004 to July 2005.
- (f) The Claimant did not execute a bond for this further extension.
- (g) The Claimant is presently employed as a Financial Examiner at the Financial Service Regulatory Commission.

[21] The Court has had the opportunity to see and hear the witnesses as they gave evidence at the trial, and to observe their demeanor. The Court finds that the witnesses namely Ms. Willet and Mr. Jeffers gave their evidence in a straightforward manner. The Court found them to be credible witnesses. The Court was not similarly impressed with Mr. Anderson. His memory appeared to be very selective; in particular the number of times throughout his testimony that he "could not

recall" important details militated against his credibility. Mr. Anderson's whole demeanor on the witness stand was one of arrogance and nonchalance.

[22] The Court finds that the Claimant has been less than forthright with the Police authorities. This is evident from the following facts:-

- (a) The Claimant has regularly failed to advise the Second Defendant or the authorities that he would not be reporting for duty when required to do so on completion of his duty leave. He has elected to ignore the requirement of his reporting for duty in a timely manner, and has made application for extensions of his duty leave after the date when the said leave had expired.
- (b) For example, it is undisputed that the Claimant was first granted an extension of his duty leave from the 14th August 2002 to 14th August 2004. He was therefore required, under the terms of the two Bonds which he signed, to report for duty on 14th August 2004 or at least the 15th of August, 2004. According to the evidence before the Court, prior to that date, the Claimant failed to inform the authorities that he would not be reporting for duty on the appointed date. Neither did he seek permission or approval from anyone to absent himself from duty on that date.
- (c) As stated above, the evidence discloses that it was not until October 2004 and again in January 2005 that the Claimant applied for an extension of his duty leave which expired on the 14th August 2004. There is no documentary or other cogent evidence before the Court that the Claimant sought any permission for extension of his duty leave between the period August 2004 and October 2004. Neither is there any proof of any formal correspondence or other compelling evidence that the Claimant offered any excuse for his failure to do so.
- (d) The Claimant has exhibited documents with respect to his academic qualifications. These documents show that:-
 - i) The Degree of Bachelor of Science was conferred on Melvin David Anderson (the Claimant) on the 26th September 2003.
 - ii) Another Certificate dated 12th May 2004 (5/12/04) reads as follows:-

"Long Island University
Brooklyn Campus
UNIVERSITY HONORS PROGRAM

acknowledges that

MELVIN ANDERSON

has fulfilled all academic requirements for the Programma Honorum Generalum and is entitled to all distinctions pertaining to and reserved for the Honors Class of 2004"

- (e) It is evident from the above documents that the Claimant had obtained and therefore completed his Bachelor's Degree on the 26th day of September 2003 and that he had obtained another Certificate (Honours Programme) on the 12th May 2004. Yet Mr. Anderson requested and obtained an extension of his duty leave from September 2004 to July 2005 to "complete his degree." The evidence also shows that the Claimant applied for the extension of that duty leave in October 2004.
- (f) The documentary evidence also discloses that on the 12th May 2005, Mr. Anderson had already completed his Master's Degree Programme.

[23] Amazingly, Mr. Anderson did not return to Antigua at the end of May 2005; he did not return at the end of June 2005; he did not return at the end of July 2005 which was the date of the expiration of his extended duty leave . Mr. Anderson did not write to the Commissioner of Police at the end of July 2005 advising him that he would not be returning to Antigua to resume duties at that time, or even offering an explanation of his failure to do so. .

[24] The Claimant avers that he received a monthly salary until August 2004 when his salaries "were stopped abruptly." Further, that "while on study leave in or about November 2004...he realized that the Police Administration stopped paying him without any reason or communication with him." In the view of the Court , the Claimant is being disingenuous. He is and was very well aware that , at the time when he claims his salaries were "stopped abruptly without any reason", that he had not yet applied for an extension of his duty leave and had not returned to Antigua to take up his duties. He was therefore absent without excuse and without lawful authority.

[25] At the trial Mr. Anderson was cross-examined about why he did not report for duty at the end of his duty leave, as extended. In the view of the Court , his response is very telling . Mr. Anderson stated : " To the best of my recollection, July was the end of my leave , so August was the following month when I would have been required to return." Learned Counsel for the Defendants suggested to Mr. Anderson that he accepted that his leave ended in July, so the next

day for reporting for duty would be at least the first week in August. Mr. Anderson's response was:-

" There wasn't a definite date; but the month of August would have been the general expected time in light of all the circumstances."

[26] When questioned further as to what these " circumstances " were, Mr. Anderson's response was :-

"I was not being paid my salary, so there were some obvious financial constraints."

[27] Mr. Anderson had testified earlier that he reported for duty "in August 2005." When questioned by Learned Counsel Mrs. Carla Brooks-Harris , as to exactly what date in August, Mr. Anderson responded: " the latter part of August." Mrs. Brooks-Harris pressed him further and asked , "What do you mean the latter part of August,; the 28th, the 15th?" Mr. Anderson 's response was " I don't recall the exact date , but the latter part of August." Mrs. Brooks-Harris did not relent. She pressed further, " Clearly the date should be in your mind as to when you reported for duty. So you cannot be specific as to when you returned?". Mr. Anderson was unruffled ; he simply replied , " That is a long time ago; so , no ma'am."

[28] In spite of the attempts of Mr. Anderson to prevaricate, the Court is of the considered view that he (Mr. Anderson) failed to report for duty at the end of his duty leave in July 2005; he also failed to report for duty on the 1st August 2005; or at any time during the first week of August 2005; or at any time in August 2005. Further, the evidence before the Court discloses that by letter dated 15th August 2005 and bearing his signature, Mr. Anderson wrote to the Commissioner of Police , not with any explanation or excuse regarding his failure to report for duty at the end of July 2005/ 1st August 2005, but requesting "an urgent review" of the matter (of his salary) and " re-instatement of his salary." Significantly, the address indicated on the said letter is as follows:-

"50 Legion Street
Brooklyn, NY
11212 Apt 6 G
United States of America."

[29] The above letter provides further evidence that, as of the 15th August 2005, Mr. Anderson was still resident in the U.S.A. and therefore did not report for duty in Antigua as of that date. In any event, it is trite law that he who alleges must prove. Mr. Anderson has not provided the proof that he returned to Antigua in August 2005. In fact he has stated that he "cannot recall" when he returned. Therefore, the Court, in the absence of evidence from Mr. Anderson, must accept the evidence of the Defendant, namely that Mr. Anderson did not return to Antigua in August 2005 and did not report for duty at that time. Under cross-examination, Mr. Anderson testified that he never wrote to the Commissioner that he would be reporting to work at the latter part of August, or that he would not be reporting for duty during the first part of August. The Court concludes, based on the evidence before it, that Mr. Anderson's failure to report for duty at the appointed time was without authority, unjustified and deliberate.

[30] Mr. Anderson has also pleaded that he remained unemployed and was effectively barred from seeking employment in another Government entity. He avers that he applied to and was successful in getting a job with the Inland Revenue Department and was informed that he was still on record as an employee of the Police Force and therefore could not be employed. Mr. Anderson, however, provides no evidence that this is so. There is no application letter exhibited; neither is there any letter from the Inland Revenue Department to substantiate what he is alleging.

ISSUES

[31] The issues which fall to be determined by the Court are as follows:-

1. Whether the Defendant has breached the contract of employment with the Claimant.
2. Whether the Claimant remains a member of the Force, or was constructively dismissed or he abandoned his post and thereby terminated his employment.
3. Were salaries unlawfully withheld from September 2004 to July 2005?
4. Is the Claimant entitled to damages for loss of earnings from July 2005 to July 2007 at the rate of \$2,500.00?
5. Are the Defendants entitled by way of counterclaim, to EC\$152,400 for breach of the two bonds?

SUBMISSIONS OF COUNSEL

[32] The Court will now consider the submissions as they relate to the issues to be determined.

[33] The Court is of the view that issues #1 and #2 can be conveniently dealt with together , namely:-

- (1) WHETHER THE DEFENDANT BREACHED THE CONTRACT OF EMPLOYMENT WITH THE CLAIMANT; and
- (2) WHETHER THE CLAIMANT WAS CONSTRUCTIVELY DISMISSED OR WHETHER HE ABANDONED HIS POST AND THEREBY TERMINATED HIS EMPLOYMENT

[34] Learned Counsel for the Defendant Mrs. Carla Brookes –Harris has submitted as follows:-

- (a) The Defendants were justified in stopping the salary because at the time the salary was stopped the Claimant was not authorized to be on duty leave beyond August 15th, 2004. Further, the Claimant never executed a bond for the duty leave from September 2004 to July 2005 therefore the payment of salary could not be made and was not unlawfully withheld.
- (b) The Claimant never reported for duty as alleged, and he was not denied an opportunity to report for duty. The Claimant could not identify the day he reported for duty and correspondence between the Claimant and the Commissioner of Police suggest that he was in New York until at least the 15th of August, 2005. Initial correspondence from the Claimant's attorney never mentions that the Claimant reported for work. The Claimant evinced an intention to no longer be bound by his contract of employment, dismissed himself from employment and had abandoned his job.
- (c) The Claimant has not performed any duties as a police officer since the expiration of his duty leave and therefore does not remain a member of the Police Force of Antigua and Barbuda.
- (d) The Claimant is not entitled to vacation as the Police Act Regulation 16 says that vacation will only be granted in respect of resident service.

[35] The rival submissions of Learned Counsel for the Claimant, Dr. Dorsett, are as follows:-

- (1) The manner in which a constable, such as the Claimant, may withdraw from the Police Force is governed by Section 16 of the Police Act (and more particularly Section 16(3) of the Police Act) which provides as follows:-

“16 (1) No subordinate police officer or constable shall during the period of his probation or any extension thereof be at liberty to withdraw himself from the Force unless he obtains the permission of the Commission to do so.

(2) No Police Officer whose appointment to the Force has been confirmed shall be at liberty to withdraw himself from the Force until the expiration of at least one calendar month from the time when he gives notice in writing of his intention to do so to the Commission.

(3) Subject to the foregoing provisions of this Section the modes by which a Police Officer may leave the Force are as follows:-

(a) on dismissal or removal in consequence of disciplinary proceedings;

(b) on compulsory retirement;

(c) on voluntary retirement;

(d) on retirement on account of injuries received or diseases contracted in discharge of duty;

(e) on retirement following upon the findings of a Medical Board;

(f) on resignation;

(g) on expiry or other termination of an appointment for a specified period;

(h) on the abolition of office;

(i) on attaining the prescribed age of retirement.”

(4) None of the conditions specified under Section 16(3) of the Police Act have materialized with respect to the Claimant and accordingly as a matter of law the Claimant has not withdrawn from the Police Force and remains a member of the same and continues to be in the service of the Government of Antigua and Barbuda (GOAB.)

[36] It is undisputed that the Claimant has not been formally dismissed or removed in consequence of disciplinary proceedings; he has not retired ; he has not resigned and has not reached the age of retirement. The Court therefore agrees with the submission of Dr. Dorsett that Section 16(3) of the Police Act does not apply.

[37] Can it be said that the Claimant has not “withdrawn himself” from the Police Force, for the purposes of Section 16(2) the Police Act ? The Claimant contends that the Defendants are guilty of breach of contract and or that they constructively dismissed him from his duties. The Court will address the issue of constructive dismissal later in the judgment.

[38] The law is settled that a breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing. Where one party has breached the contract and the breach has given to the other party the right to terminate performance of the contract, that party is not in breach of contract in refusing to continue with performance because he is given a 'lawful excuse' for his non-performance. Although the breach can take the form of words (such as an express refusal to perform the terms of the contract) , it need not do so and can be evidenced by the conduct of one party in disabling himself from performing his obligations under the contract or by performing defectively.

[39] It is for the party alleging the existence of the breach of contract to prove that a breach has occurred. In the instant case, therefore, the Claimant has the onus of proving that the Defendants breached the contract of employment. The relief claimed by the Claimant includes (a) Damages for salaries withheld from September 2004 to July 2005; (b) Damages for loss of earnings from July 2005 to July 2007. In short, the Claimant alleges that the Defendants were in breach of their obligation to remunerate him during those periods.

[40] With respect to (a) damages for salaries withheld from September 2004 to July 2005, Learned Counsel for the Defendants Mrs. Carla Brooks-Harris has submitted as follows:-

- (i) The Claimant was paid his monthly salary from 1999 to October 2004.
- (ii) The Claimant was not paid from November 2004 because his absence from work was unauthorized. His duty leave expired in August 2004 and no extension of leave was granted to him.
- (iii) The Claimant applied in October 2004 and January 2005 for an extension of his duty leave.
- (iv) The letters written by the Claimant in January 2005 and August 2005 were not an inquiry about his salary payment, but rather applications for extension of his duty leave.
- (v) In February 2005 the Claimant was granted an extension of his duty leave from September 2004 to July 2005.

- [41] The Court finds that although Ms. Willet testified under cross-examination that according to her records Mr. Anderson was paid up to September 2004, she provided no evidence of such records to the Court. The Court therefore accepts the Claimants evidence that he was paid up to August 2004.
- [42] The Claimant was certainly in breach of contract in failing to report for duty in September 2004, since his duty leave expired in August 2004. He was therefore absent from duty without lawful authority. His failure to report for duty without lawful authority clearly could have been taken as a repudiation of his contract, entitling the Defendants to accept the said repudiation and terminate his contract. However, by granting the Claimant an extension of his duty leave from September 2004 to July 2005, the Defendant re-affirmed the contract. The Court is therefore of the view that the Claimant is entitled to have his salary for the period September 2004 to July 2005 re-instated, since he was granted an extension of his duty leave from September 2004 to July 2005.
- [43] With respect to (b) damages for loss of earnings from July 2005 to July 2007, the Court has made a finding that the Claimant did not in fact report for duty, as required, in August 2005. Reporting for duty means that the Claimant was to make himself available at his place of work to receive orders or assignments of work. The Court has already found that the Claimant did not report for duty on the 1st August 2005 after his duty leave expired. The Court has further found that as of the 1st August 2005, the Claimant had not applied for any further extension of his duty leave, nor had he submitted any excuse for not reporting for duty or for being absent from duty.
- [44] The Court has found that the Claimant was absent without lawful authority or lawful excuse. By virtue of Section 16(2) of the Police Act, a Police Officer, in the position of the Claimant, becomes legally entitled to withdraw himself from the Police Force if he gives one calendar month's written notice of his intention to do so to the Police Service Commission. Once that period of notice has expired, the law gives the Police officer an unconditional right to withdraw from the Police Force. The Claimant did not give notice that he wished to withdraw himself from the Force. He states that the Defendant breached their contract of employment with him, since they failed to pay him his salary for the period August 2005 to July 2007.

- [45] The Court must now consider whether the Claimant is entitled to be paid salaries for the period August 2005 to July 2007. In light of the foregoing, the Court is of the view that the Claimant's failure to report for duty without notice is a repudiatory breach, entitling the Defendants to accept the said breach.
- [46] The Claimant states that he was constructively dismissed by the Defendants. In general terms, once an express or an implied term of a contract of employment has been breached by an employer to such an extent that there is evidence that the employer has committed a fundamental breach of contract or shows an intention no longer to be bound by the contract, the employee is entitled, as a matter of law, to treat the contract as at an end. This is what is commonly referred to as "constructive dismissal." - **Mc Clements v Precision Industrial Services Ltd** (12th April 2002).
- [47] Mrs. Carla Brooks – Harris disagrees that the Claimant was constructively dismissed. She contends that the Claimant abandoned his employment. Learned Counsel contends that there was neither breach of contract nor constructive dismissal by the Defendants. She cites the case of **Western Excavating (ECC) LTD v Sharp (1978) 1 All ER 713**, in which the Court of Appeal held that in order to claim constructive dismissal four conditions must be met:
1. There must be a breach of contract by the employer.
 2. The breach must be sufficiently important to justify the employee resigning.
 3. The employee must leave in response to the breach and not for an unconnected reason.
 4. The employee must not delay too long in terminating the contract in response to the breach.
- [48] In light of the above authority, Mr. Anderson cannot claim to have been constructively dismissed. A claim of constructive dismissal entitles the employee to resign and claim constructive dismissal. There is no evidence before the Court that Mr. Anderson formally resigned from his employment. On the contrary, he contends that he was unable to obtain employment during the period 2005 to 2007 because he was told that he was still in the employment of the Government. Mr. Anderson claims that he is still a member of the Police Force of Antigua and Barbuda. Any suggestion therefore that Mr. Anderson was constructively dismissed is without merit.

- [49] The Court endorses the submission of Mrs. Harris that the Claimant abandoned his employment. In the case of **Huggins Neal Nicholas and Attorney General and The Teaching Service Commission** (HCVAP 2008/018), the Court of Appeal had to consider whether the Appellant in that case had abandoned his job. The Court held that “Abandonment connotes a voluntary relinquishment of the performance of the duties of an office with the actual or imputed intention on the part of the office holder to abandon and relinquish that office.” The Court held that in the circumstances of that case, a finding that the Appellant had abandoned his job when he went to study in the United Kingdom could not be justified and was not sustainable.
- [50] The Court is of the view that the facts of the Huggins case are distinguishable from the instant case. In the Huggins case, criminal charges had been filed against the Claimant; he was suspended as a result. The criminal charges against him were subsequently dropped; he was however unable to execute the functions of his office because of the failure to re-instate him to his job. The Court of Appeal found that, as long as the suspension of the appellant continued, he was effectively unable to perform his duties as a teacher.
- [51] The Court is of the view that, in the instant case, the Claimant has provided no cogent evidence that he was prevented from taking up his appointment on the due date, namely the end of July 2005. The Claimant could not have been prevented from taking up his appointment on the expiration of the duty leave since he failed to turn up for duty at that date as required. The Court does not accept the evidence of Mr. Anderson that he visited the Police Headquarters to report for work when he completed his graduation exercise as alleged. Mr. Anderson has provided no evidence that he did so; he also alleges that the Commissioner Ms. Delano Christopher refused to meet with him. No evidence of this is provided. Significantly, Mr. Anderson does not state on what date or dates that the Commissioner refused to meet with him. The Court is of the view that, based on the evidence before it, the only finding that can be made is that Mr. Anderson “voluntarily relinquished the performance of his duties” and that he did so with the actual or imputed intention to abandon and relinquish the said office.
- [52] It is the submission of Learned Counsel Dr. Dorsett that the Claimant remained a Police Officer after the expiration of his duty in August, 2005 and should be paid his salary from August, 2005. He states that the Claimant returned to Antigua in August, 2005. Two years after he returned to Antigua he applied for and obtained employment as a part-time lecturer (see paragraph [36] of the

Claimant's witness statement at page 80 of Trial Bundle I). The Claimant is also entitled to his salary from August, 2005 to July, 2007. In summary, Dr. Dorsett contends that the Claimant is entitled to his salary of \$2,500.00/month from September, 2004 to July, 2007, a period of 35 months in the sum of \$87,500.00.

[53] In the view of the Court, the Claimant is not entitled to loss of earnings from August 2005 to July 2007. He did not report for duty at the end of July 2005 ; he did not report for duty even in August 2005. In fact, in the memorandum dated 18th June 2009, referred to hereunder, Deputy Commissioner Campbell states " He (Anderson) has not worked for the Royal Police Force of Antigua and Barbuda since the completion of his studies in 2005."

[54] In his Statement of Claim, Mr. Anderson claims, inter alia " Entitlement to all holidays withheld for the period 1995- 2005 and continuing." Dr. Dorsett submits that , in addition to his salary the Claimant is entitled to all other pecuniary benefits that are due him to include his holiday pay. He submits further that the Claimant is entitled to the sum of \$16,846.16 by way of annual vacation .

[55] Learned Counsel Dr. Dorsett contends that Deputy Commissioner Philip Campbell in his memorandum of 18th June, 2009 has indicated that the Claimant is entitled to 146 days of annual leave. Learned Counsel proceeds to compute the amount owed to Mr. Anderson by way of holiday pay as follows:-

"A year consists of 52 weeks. If the Claimant is on regular duty 5 days per week he would be on regular duty for 260 days per year. The Claimant's annual salary is \$30,000.00 (12 months at \$2,500.00/month). The Claimant is entitled to holiday pay of \$16,846.15

$(\frac{146}{260} \times \$30,000.00 = \$16,846.15).$

260"

[56] The "memorandum referred to in paragraph 55 above,, is from Deputy Commissioner of Police Philip Campbell and is addressed to the Officer in charge of the Accounts Department. Paragraph 2 of the said Memorandum states " I am in the process of trying to resolve Const. Anderson's status. In order to come to some sort of an agreement, I need to know his salary history between 1999 and the current date." The memo goes on to say " According to his file, this

member also has an accumulation of 146 days annual leave. . Can you determine the cost of a payout of that leave at 2005 salary levels (date he finished study leave.) "

- [57] The above memo does not state, as contended by Dr. Dorsett that Mr. Anderson is "entitled" to 146 days of annual leave; it states that , according to his file, Mr. Anderson " has an accumulation of 146 days annual leave.'
- [58] The Court notes, however , that while Dr. Dorsett has indicated how he arrived at his calculation , Mr. Anderson himself has provided no cogent evidence to the Court either in his pleadings or his Witness Statement, to substantiate his "entitlement" to the said "holidays withheld" as claimed in his Statement of Claim.
- [59] Learned Counsel for the Defendants submits that the Claimant is not entitled to the vacation leave as he was on duty leave. Learned Counsel contends that , according to Regulation 26 of the Police Act, vacation leave shall only be granted in respect of resident service on duty.
- [60] As noted above, Section 26 of the Police Regulations states: "Vacation leave shall only be granted in respect of resident service on duty.' The Regulations do not define "resident service on duty.' I am persuaded , however, by the submission of Learned Counsel for the Defendant on that issue. I therefore make no award under this head.
- [61] The Claimant also claims " damages for loss of opportunity for promotion." According to Dr. Dorsett, the last staff report (pages 16 and 17 of Trial Bundle II) indicates that the Claimant was considered by his superiors to be an officer who "is now ready for promotion". Dr. Dorsett contends that "clearly, the Claimant was not a delinquent officer." Learned Counsel submits that " on a balance of probabilities the Claimant would have been promoted with an increase in salary had it not been for the reproachable conduct of the 2nd Defendant in frustrating the upward mobility of the Claimant. On account of the 2nd Defendant's intransigence the Claimant has been deprived of all chance of obtaining a promotion to which he would have been entitled, based on the recommendation of his supporting and him successfully obtaining a Bachelor's and Master's degree, and accordingly is entitled to recover substantial damages (*Chaplin v Hicks* [1911] 2 KB 786)." Learned Counsel contends that unless it is established that the Claimant's prospects for promotion were nought, the Claimant is entitled to damages for loss of chance, and the Court must

evaluate the prospects *"Kitchen v Royal Air Force Association* [1958] 1 WLR 563 at 576-577, per Parker LJ).

[62] Dr. Dorsett opines that "clearly, the Claimant was not a delinquent officer.' The Court respectfully disagrees. In any contract of employment, there is an implied duty of loyalty and good faith on the part of both the employer and the employee. The Court is of the view that the Claimant, by his conduct as stated above, has demonstrated a persistent disregard for the obligations of his employment and in particular of his responsibility to honour the terms of his bond and to report for duty in a timely manner. In the view of the Court, all the Claimant's actions were deliberate and carefully calculated to benefit only himself. The Court is of the further view that Mr. Anderson's conduct can only be interpreted at the very least as indiscipline and a callous disregard for authority. The absence of any form of apology or explanation for his absence from duty when required does not speak to professional conduct. The Court has noted the contents of the Internal Minute Sheet emanating from Assistant Commissioner of Police Davidson Whyte to Deputy Commissioner Campbell, dated 2nd June 2009 (a document put in evidence by the Claimant). In the view of the Court, Paragraph 2 of this Internal Minute Sheet is very enlightening and instructive. Mr. Whyte states therein, "It is interesting to find how this constable (Mr. Anderson) was able to use what appeared to be a legitimate opportunity to manipulate the system."

[63] There is no evidence before it from which the Court can or should infer that the Claimant is entitled to "substantial damages" due to the fact that the 2nd Defendant "had deprived him of the promotion to which he would have been entitled," as alleged by Dr. Dorsett. The facts of **Chaplin v Hicks** referred to by Dr. Dorsett (see paragraph above) are as follows:- the Defendant, by a breach of contract in conducting a contest, deprived the Plaintiff, one of 50 finalists, of the opportunity to compete for one of the 12 prizes. Although there could be no precision in calculating the value of her lost chance, she was entitled to substantial damages. The Court in that case held that the Plaintiff was entitled to recover damages for the lost opportunity. The Court is of the view that the facts and circumstances of the instant case are clearly distinguishable from those in **Chaplin v Hicks**. In the circumstances of the instant case, the claim for loss of damages for "loss of opportunity for promotion" or "loss of chance" is unsustainable.

[64] The Claimant also claims "entitlement to all pension and gratuity benefits." The Claimant has presented no evidence to the Court to substantiate this claim. Accordingly, no award is made under this head.

DEFENDANTS' COUNTERCLAIM

[65] The Defendants in their counterclaim claim three items of relief:

- (a) The sum of EC 152,400.00 being the amount due as damages for breach of two Bonds executed on 13th August 1999 and 1st August 2003.
- (b) Interest .
- (c) Costs.

[66] In their Defence, the Defendants plead that the Claimant made certain representations which were false. They state that the Representations were false and that the Claimant was in breach of the bond in that:-

1. The Claimant did not need an extension of time to complete his Bachelors Degree.
2. The Claimant completed his Bachelors Degree in 2002.
3. The Claimant received his Bachelors Degree in September 2003.
4. The Claimant at all material times was enrolled in a Masters Program.
5. The Claimant obtained a Masters of Business Administration in 2005.
6. The Claimant failed to honor the Agreement under the Bonds executed on August 13th, 1999 and August 1st, 2003.
7. The Claimant failed to report for duty in July 2005 and ought to have known that he was required to return to work to work off the Bonds.

[67] The undisputed evidence is that the Claimant executed two bonds with the Government of Antigua and Barbuda. On the 13th August 1999, the Claimant executed a bond of \$91,440.00 . The bond was "conditioned to be void should the said Melvin Anderson shall continue in the service of the Government of Antigua and Barbuda in any capacity no less remunerative than the post now held by him for a term of not less than three (3) years to be computed as commencing from the actual expiration of the period of duty leave hereinbefore mentioned or any extension thereof."

[68] On the 1st August 2003, the Claimant executed a second bond in the amount of \$60,960.00 . This bond was subject to the same conditions as the first bond.

[69] It is the submission of Learned Counsel for the Defendant that the Claimant breached the bonds. She posits: "The question is, did the Claimant continue in the service of the Government of Antigua and Barbuda for at least three years commencing from actual expiration of the period of the duty leave?" It is the contention of Learned Counsel that the answer is "a resounding No." Learned Counsel submits:-

- (a) The Claimant has not reported for duty on the expiration of his duty leave and as such has failed to perform the conditions set out in the Bonds.
- (b) The Claimant has not adduced any evidence to establish that he has worked in the Government Service for at least three years.

[70] Learned Counsel Dr. Dorsett disagrees. He submits that the Claimant is not in breach of the Bonds. At paragraph 8 of his Submissions, Dr. Dorsett states :- "By Minute dated 8th February 2005, the Commission indicated that it had approved an extension of the Claimant's duty leave from September 2004 to July 2005 to enable him to complete his degree requirements.' Dr. Dorsett contends that the Claimant is not in breach of the Bonds because he continues in the service of the Government of Antigua and Barbuda (GOAB) , and in particular he remains a member of the Police Force. At paragraph 14 of his Submissions , Learned Counsel states:-

"In order for the Defendants to establish that the Claimant is in breach of the bonds they must show that the Claimant did not remain in the service of the GOAB for a period of three or more years after the expiration of his duty leave."

[71] Dr. Dorsett further contends, inter alia, at paragraph 11 of the Submissions:-

"..... The intent of the bond is clear. Once the Claimant remains in the service of the GOAB for a term of not less than three (3) years after the expiry of the bond the Claimant is not required to repay the sum secured by the bond."

[72] However, this is precisely what the bond does NOT state. What is stated in the bond is , firstly, that once the Claimant "SHALL CONTINUE in the service of the GOAB;" it does not say once the Claimant REMAINS in the service of the GOAB, as contended by Dr. Dorsett. The language of the bond is clear : "shall continue"; not "remains" . In the view of the Court , in the context of the Bond, "shall continue " and "remain" are not conterminous. There is a distinction . The following is by way of illustrating the said distinction. Dr. Dorsett contends that the

Claimant remains a member of the Police Force on the basis that none of the conditions contained in Section 16(3) of the Police Act have materialized – (see paragraph 35 above). Supposing, for purposes of this discussion, that the Claimant had remained in the USA (or anywhere else for that matter) for 3 years after the expiration of his duty leave (i.e. after July 2005), without having resigned or having retired. Supposing further, that the Defendant did not inform the Claimant that he was dismissed because they had no indication of his (the Claimant's) whereabouts. Could it be said that the Claimant had REMAINED in the service of the GOAB, for purposes of the Bond? Further , even if it could be argued that he had REMAINED in the service of the GOAB, could it be said that he SHALL HAVE CONTINUED in the service of the GOAB? I think not.

[73] Lord Hoffman in the case of **Attorney General of Belize v Belize Telecom Ltd.** , to which Dr. Dorsett referred in his Submissions, stated:-

“ The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended . IT IS THE MEANING WHICH THE INSTRUMENT WOULD CONVEY TO A REASONABLE PERSON HAVING ALL THE BACKGROUND KNOWLEDGE WHICH WOULD REASONABLY BE AVAILABLE TO THE AUDIENCE TO WHOM THE INSTRUMENT IS ADDRESSED.....IT IS THIS OBJECTIVE MEANING WHICH IS CONVENTIONALLY CALLED THE INTENTION OF THE PARTIES, OR THE INTENTION OF PARLIAMENT, OR THE INTENTION OF WHATEVER PERSON OR BODY WAS OR IS DEEMED TO HAVE BEEN THE AUTHOR OF THE INSTRUMENT.”

[74] The law is settled that the Court cannot write its own contract to replace that which parties have agreed to . However , as stated by the learned writers of *The Construction of Contracts* (2nd edition, page 79, paragraph 1.154)¹, “ the aim of the exercise of construction of a contract or

¹ *The Construction of Contracts*
Interpretation, Implication and Rectification
2nd Edition

other document is to ascertain the meaning which it would convey to a reasonable business person." The Court is therefore of the view that no reasonable business person, or indeed non-business person, would conclude that the Claimant had continued in the service of the Government in the scenario referred to in paragraph 72 above.

- [75] The Court further notes that what the Bond goes on to state is that the term of three years for which the Claimant Mr. Anderson "shall continue in the service of the Government of Antigua and Barbuda" is to be computed as commencing from the actual expiration of the period of Duty Leave hereinbefore mentioned or any extension thereof." At the risk of repetition, and as Dr. Dorsett has taken great pains to contend, "the bond must be taken to mean what it says". The Claimant did not have the option of deciding when the term of three years was to commence. That term was to commence from "the actual expiration of the period of duty leave or any extension thereof." The actual expiration of the duty leave was July 2005, the date of expiration of his extended duty leave. The term of three years for which Mr. Anderson was to continue in the service of the Government was, for the purposes of the bonds, to commence on that date.
- [76] The Claimant states that he has worked in the Government of Antigua and Barbuda for three years. Learned Counsel for the Defendant contends that the Claimant has not adduced any evidence to establish that this is so. I agree. The Claimant's evidence is that, as far as he's concerned, he has fulfilled his bond. He states that this is because, inclusive of being a Police Officer he has in fact worked gainfully or otherwise with the Government of Antigua and Barbuda; that he has been gainfully employed in the Government service. When asked whether there were any documents to show that he is "otherwise employed in the Government service", Mr. Anderson replied that he had "no such documents in his (trial) bundle. "In particular, Mr. Anderson's evidence is that he worked at ABIIT however he has produced no letter of appointment, salary slip or other documentary evidence that this is so.
- [77] It is trite law that he who alleges must prove. The finding of the Court is that Mr. Anderson has failed to prove that which he has alleged.

- [78] The Court endorses the submission of Mrs. Carla Brookes-Harries that the Claimant did not continue in the employment of the Government from August 2005 which was when his duty leave expired and has therefore failed to perform the conditions of the Bonds.
- [79] In his Submissions, Dr. Dorsett had opined that the relief sought by the Defendants hinges on the Defendants being able to establish that there has been a breach of the bonds signed by the Claimant. The Court has so found...
- [80] Dr. Dorsett also submits that the Defendants in their pleadings have made several allegations about misrepresentation though they have claimed no relief with respect to the same. He contends that the allegations in any event do not establish a case of misrepresentation. I agree. In any event, having found that the Claimant has breached the bonds for the reasons stated above, it is not necessary to address the issue of misrepresentation.
- [81] In the circumstances, the Court finds that the Defendants have succeeded on their Counterclaim and are entitled to the relief claimed.

ORDER

MY ORDER IS AS FOLLOWS:-

1. Judgment is hereby entered for the Claimant against the Defendants on the Claim as follows:
 - (a) The Defendants shall pay to the Claimant the sum of \$27,500.00 E.C. for salaries withheld for the period September 2004 to July 2005.
 - (b) Interest on the above sum of \$ 27,500.00 at the rate of 5 % per annum from the 23rd day June, 2011 of (the date of filing the claim form) to the 15th day of August 2013 (the date of judgment).
 - (c) Prescribed costs in accordance with rule 65. 5, Civil Procedure Rules 2000 (CPR).
2. That there be Judgment for the Defendants on their Counterclaim as follows:-
 - (a) The Claimant shall pay to the Defendants the sum of EC \$152,400.00 E.C. being the amount due as damages for breach of the two bonds executed on 13th August 1999 and 1st August 2003.

- (b) Interest on the above sum of EC \$152,400.00 at the rate of 5 % per annum from the 26th day of July, 2011 (the date of filing the defence and counterclaim) to the 15th day of August 2013 (the date of judgment).
- (c) Prescribed costs in accordance with rule 65, Civil Procedure Rules 2000 (CPR).

Jennifer A. Remy
High Court Judge