THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: **AXAHCV2003/0060**

Between

JENNY LINDSAY

Claimant

And

WEBSTER DYRUD MITCHELL (A Partnership)
JOHN DYRUD
PALMAVON JASMINE WEBSTER

Defendants

Before:
Justice Cheryl Mathurin

Appearances:

Mr. John Fuller for the Claimant.

Mr. John Carrington QC with Ms. Rayana Dowden for the Defendants.

2016: June 26th; 27th; 28th;

July 22nd, December 20th

JUDGMENT

[1] **MATHURIN, J.;** The Claimant (**Ms. Lindsay**) was hired as Head of the Litigation Department in the law Firm of Webster, Dyrud and Mitchell (**WDM**) commencing 27th May 2002. The second and third Defendants are Mr. Dyrud and Ms. Webster, partners in WDM. The terms and conditions of

Ms. Lindsay's employment were encompassed in a written Contract of employment (**the Contract**) agreed by the Parties and signed after negotiation between them on the 24th May 2002. The Contract stated that Ms. Lindsay would be subject to a probationary period of six months from the commencement of employment on the 27th May 2002. The employment relationship came to an end less than a year and a half later on the 3rd September 2003 when Ms. Lindsay left the Firm claiming that the conduct of WDM was such that it would be unreasonable to expect the relationship of employee/employer to continue.

[2] Ms. Lindsay alleged dissatisfaction on several bases including breaches of express and implied terms of her contract of employment. The gamut of her claim is laid out in the Amended Statement of Claim where Ms. Lindsay sets out several instances from June of 2002 to September 2003 which she states eventually culminated in her accepting the repudiatory conduct of WDM and that she considered that her Contract had come to an end as a result. In her witness statement of February 6th 2015, Ms. Lindsay gave evidence of the various incidents which culminated in her leaving the Firm and claiming that there was a constructive dismissal by the Defendants.

Constructive Dismissal

[3] Lord Denning in **Western Excavating Ltd. v Sharp** (1978) 1 QB 761 at page 769 concluded that the proper test to be applied in cases of constructive dismissal is as follows *"Where an employee complains that they have been constructively dismissed, it is necessary for them to prove that they terminated the Contract in circumstances such that they were entitled to terminate it without notice by reason of the employer's conduct. The conduct must therefore be repudiatory and sufficiently serious to enable the employee to leave at once. On the other hand it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial which cumulatively amount to a repudiatory breach of the implied term of the Contract of employment that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee."*

[4] There are from this judgment thus established four main elements to constructive dismissal, which are as follows:

a. A repudiatory breach on the part of the employer. This may be an actual or anticipatory breach, but must be sufficiently serious to justify the employee resigning.

b. An election by the employee to accept the breach and treat the contract as at an end.

c. The employee must resign in response to the breach

d. The employee must not delay too long in accepting the breach, as it is always open to an innocent party to waive the breach and treat the contract as continuing.

[5] From the authorities relied on by Counsel it is also clear that there are many ways in which an employer can commit a breach of contract and what matters is that the employer's breach is fundamental in that it goes to the heart of the contract of employment, leaving the employee with no choice but to resign.

[6] Several examples as to what may be considered a breach by an employer are laid out in the authorities and can include for example the imposition of radically different terms of employment; harassment or humiliation of an employee, failure to properly support an employee during difficult working conditions, excessive disciplining of an employee, imposing a change in the employees place of work at short notice, imposition of a reduction in salary or wages, falsely accusing staff of misconduct or incapability, victimization or bullying of an employee or discrimination.

[7] Ms. Lindsay alleges several of these breaches in realisation of her decision to consider herself as constructively dismissed.

Long Hours

[8] Ms. Lindsay claims she worked long hours from the inception, even after probation and review. Notably, she stated that she decided to stay on at the Firm in any event. Ms. Lindsay also stated that she thought she was entitled to be paid overtime for all the work that she did but that WDM refused stating it was not an option. Ms. Webster countered that WDM never required Ms. Lindsay to work overtime. Further, overtime was not a term of the Contract.

[9] Ms. Lindsay however presses her entitlement and claims that she is statutorily entitled to overtime in accordance with the **Fair Labour Standards Act (FLSA)** which is the basis for entitlement to

overtime payments. Ms. Lindsay notwithstanding this claim accepts and asserts that she was employed by WDM as Head of Litigation and Principal Advocate which was a senior management position and that she was the manager in charge of Litigation.

[10] In my view, Ms. Lindsay's position in the Firm was not one that attracted the entitlement to the statutory overtime claimed. The overtime provisions under the FLSA specifically exclude persons above the first line supervisory positions. The FSLA also requires that overtime rates if any be included in any written Contract of Employment. Ms. Lindsay on her own case places herself outside of the entitled category of employees. Additionally there was no express term in the Contract that addressed or contemplated overtime. Accordingly the claim for overtime cannot be sustained.

[11] Further, occupying a position which was clearly understood to be a senior managerial one, it is unfathomable to expect that Ms. Lindsay did not appreciate that she would be required to put in the necessary amount of time to discharge her responsibilities and that doing so, for the reasons stated, did not carry overtime. Accordingly the claim for overtime cannot be sustained and neither do I agree that this complaint can be considered as a ground for the alleged constructive dismissal as Ms. Lindsay alleges as she had no statutory or contractual right to overtime.

Salary Review

[12] Ms. Lindsay states that Mr. Wiggin was the principal negotiator on behalf of WDM for her Contract of employment. She states that Mr. Wiggin verbally agreed to a review of her salary at the end of her probation. This is referred to in an email between Mr. Wiggin and Ms. Lindsay dated April 14th 2002 where she stated "*Therefore by way of a reasonable compromise, I would be happy to agree an initial basic salary of US$80,000.00 per annum with a salary review at the 6 month stage after the probationary period has concluded and my position with the Firm confirmed."*

[13] Mr. Wiggin responded and in the reply email stated that *"the figure you are suggesting is therefore very substantially above the effective after-tax BVI rate you mention, notwithstanding the fact that (although we recognize your potential) you are as yet quite inexperienced in High Court Advocacy.*

We would very much like you to join us and believe that you will be productive. However, the philosophy behind our proposals is to link a significant part of the remuneration package to productivity. We are, however, willing to increase the basic salary offer to $65,000.00."

[14] The negotiations with reference to salary were reflected in section 2 of the Contract signed by Ms. Lindsay on the 24th May 2002. There is accordingly a reasonable presumption that the written contract was intended to include all the terms of the Contract. Indeed the conduct of both parties, specifically the fact that the terms of the Contract were reviewed comprehensively before it was signed, suggests that the Contract contained all of the terms of her employment by which both parties were to be bound.

[15] Section 4 of the Contract states that "*The Employee will be subject to a probationary period of 6 months from the date of commencement of employment with the Firm. Please note that this period will be extended to account for any periods of leave without pay. At the satisfactory conclusion of such period the terms hereunder will be reviewed, without any prior commitment by the Firm to the outcome of such review."*

[16] It is not in dispute that the review would have included one of salary. It is not entirely clear from the evidence of both parties however that a review was conducted and concluded after the end of the probation period. It appears that there were several aborted attempts at the salary review which was, on the documentary evidence, never completed.

To illustrate, Ms. Webster stated in an email of 7th February 2003 that;

> *"We agreed that we would aim for completing your salary review by end of January…*
>
> *I had hoped that we would conduct the review this morning and asked Polly to circulate the relevant fee earner reports earlier this week to facilitate the discussions. I understand from Polly these were copied to you and that she has requested your comments on the reports."*

Further in a memo from Ms. Webster to Ms. Lindsay on the 10th April 2003 referring to a meeting and pending issues, Ms. Webster pointed out that

> *"We agreed that we would meet to complete the Review once you had an opportunity to bring your time recording up to date. You said you needed a full day to do this but were*

tied up to the time of your planned departure on Saturday. You agreed to provide Polly with the additional information you have in the meanwhile and would let me have the information as well. You will advise of a date that suits you to progress when you return."

[17] Ms. Lindsay responded to the memo on the 5th May 2003 stating that;

"I believe that you have referred to this under your heading, "Financial Review". I believe this is the same matter because John said he wanted to see the raw figures. I did not agree with Polly's schedule showing the amount of fees I had collected and the amount of time I had worked. Moreover when we met in February 2003, I asked that the figures for 2001 to be compared with my figures to compare the year when you had 3 attorneys in post to the later year when you had two, then only one person. This in my view would, at least, provide some objective comparisons."

[18] Notwithstanding these exchanges, the evidence from both parties as to whether or not the salary review was ever discussed or completed does not support such a conclusion. Ms. Lindsay however maintains that she was not credited for work done and as a result her figure of billed and collected fees used by WDM dropped below the basic target. It seems to me that if this were the case, Ms. Lindsay had the opportunity to remedy this defect and was indeed asked to address this at least months before leaving the Firm. There is no evidence that she did this.

[19] Further, the review and appraisal seemed contingent on the receipt of that information and it seems that there was a clear willingness on the part of WDM to adjust the salary review date to accommodate the information being provided. No progress seems to have been made. In this regard, I accept the evidence of WDM that they were unable to conduct a financial review as Ms. Lindsay contested the figures for her financial performance and never brought her own time recording up to date so that the figures could be revised if necessary. This effectively stymied the review since in my view, it is only reasonable that a salary review would necessarily include an assessment of Ms. Lindsay's performance in the Firm.

[20] I find it difficult therefore to accept in the circumstances that there was a breach of the terms of the Contract sufficiently significant or at all. An inference could be drawn that the review clause contemplated a completed process. However if this is the case, a necessary inference would also have been the cooperation and effort of both parties. The evidence here does not establish

conduct so as to justify Ms. Lindsay considering this as a basis for her having been constructively dismissed. In any event, having regard to the relevant clause, there is no argument that had the review been completed, there was a contractual obligation upon WDM to make any changes based on same. It was expressly provided that there was no prior commitment to the outcome. There could therefore, in my view, have been no reasonable expectation based on the Contract or the evidence for any adjustment with or without the review.

Appraisal

[21] The parties agreed that there was a partial appraisal in June 2003. Ms. Lindsay asserts that the appraisal was unfair stating that she was handed the appraisal forms on the day of the appraisal and that the scores she received were either satisfactory or below satisfactory. She asserts that without any explanation, she had gone from "*an excellent recruit to someone they now considered poor."* Ms. Lindsay also states that the manner of the appraisal was demeaning and that Ms. Webster raised her voice often and that the appraisal was highly prejudicial. Ms. Webster on the other hand stated that the main concern with Ms. Lindsay was that she was uncooperative. She says she sat with her at the appraisal which she thought was an excellent opportunity to improve her confrontational attitude and difficult behavior.

[22] The documents that were submitted in the core bundle indicate a partial appraisal in that there is no indication in several areas of the appraisal sheet as to the score allotted and there was no rating as to Ms. Lindsay's overall performance. I note however from the copious notes made on the **Qualified Staff Appraisal Form** dated the 12th June 2003, that there was clear participation by Ms. Lindsay which in my view contradicts the allegation that there was no explanation as to the scores on the partial appraisal. Further Mr. Dyrud, the partner who attended the appraisal did not agree that Ms. Webster was hard on Ms. Lindsay or raised her voice or behaved in a demeaning way. He states that the discourse between them was stressful and tense. In any event the appraisal was never concluded and there is no indication why but this had not changed up to the time of Ms. Lindsay's departure.

Failure to pay Bonus

[23] Ms. Lindsay claims that WDM failed to pay her a bonus in accordance with the terms of the Contract. WDM denies this and states that Ms. Lindsay was not entitled to a Contractual bonus.

Section 2 of the Contract states that **"***The Employee may also be entitled to bonus payments in accordance with the provisions set out in the Schedule hereto."*

The Schedule – The Bonus Payments referred to in Clause 2.

At the end of each period of twelve months' employment or at such other intervals as may be mutually agreed, the Employee shall be entitled to such (if any) sums, in addition to the salary specified in Clause 2, as shall be arrived at in accordance with the following principles;

1. *If the Employee has* ***worked and collected*** (my emphasis) *fees at the rate of not less than 1,150 chargeable hours per year ("the Basic Target"), she will be entitled to a sum equal to 20% of the total of fees collected (after deduction from such total fees collected of the incentive payments attributable to the Litigation Department, payable to members of the litigation team as hereafter defined):*
   a. *By herself in excess of the Basic Target; and*
   b. *By other members of the litigation team in excess of such proportion of their Basic Target as shall be attributable to their work in the Litigation Department.*
2. *For the purposes of this Schedule the expression "litigation team" shall mean the Employee and any other salaried fee earners of the Firm recording chargeable time in respect of work attributable to the Litigation Department."*

[24] Ms. Lindsay in evidence stated that how the bonus was to be paid was never actually finalized. She said she did not agree to the method of how the bonus was to be calculated. The evidence however, is that Ms. Lindsay's concerns on the issue of bonus were addressed by Mr. Wiggin before she signed the Contract in the email of the 14th April 2002.

Ms. Lindsay stated in that email;

> *"I have carefully considered your figures and I can inform you I agree with your formula based upon 1150 chargeable hours per annum and the hourly rate of US$225.00. However, I can inform you that my calculations for my individual commission for hours in excess of 5 hours a day do not reflect your own. I calculate US$10,350 commission when I apply 20% to US$51,750 and not US$18,937 as per your calculations. I would be obliged if you would explain how you arrive at US$18,937.."*

[25] Mr. Wiggin responded;

> *"As I mentioned, the way in which the figure was calculated is apparent from the Excel spreadsheet cells concerned. You are correct that 20% of your own excess over basic would amount to $10,350.00. But that is not the basis for the calculation. As mentioned in the offer letter, the percentage to which you will be entitled relates to "20% of the total fees collected (less your team member's incentive payments) by yourself and the other members of your team (at present Deborah and Samantha) in excess of a defined annual amount" [emphasis supplied]. The idea is that you should be rewarded not only for your own performance but also for effectively leading your troops to perform well. My figures were, therefore, I believe correct."*

[26] Ms. Lindsay states that fees collected personally by her in accordance with work undertaken by her was US$277,855.79 and that as such she was entitled to a bonus. Ms. Lindsay relied on documents prepared by Ms. Kumara relating to billing and collections, receipts and slip listings. Ms. Lindsay also asserts that in June of 2003 it was agreed that her target would be reduced. She stated that Ms. Pollyanna Kumara, who was the Accountant at WDM, was at the meeting when this was decided. Ms. Kumara however did not recall the reduction of the bonus target being discussed at any meeting that she attended. Ms. Lindsay also insisted that she was not credited for US$90,000.00 collected from NBA when upon review of the **Analysis of Receipt per Jenny** document attached to the Claim, the evidence clearly showed that not to be the case upon review.

[27] Turning therefore to the Contract, in accordance therewith, the basic target that Ms. Lindsay would have to meet would have to have been US$258,750.00. This represented 1150 hours per annum at the rate of US$225.00 per hour. In particular, the Contract required that the basic target was one that had to be actually worked and collected. In this respect, Ms. Kumara explained the documents relating to the basic target to the court in her evidence. She explained the concept of billable value which reflected potential fees as opposed to billed value which represented fees actually collected.

[28] Ms. Kumara further stated in paragraph 6 her witness statement that;

> *"The total amount of receipts on account of work by the Claimant and her team during the period of her employment amounted to US$180,464.09, that is US$233,056.99 less the*

portion of receipts related to work prior to her joining the Firm, US$44,798.80, costs of US$7,794.10 and inclusive of US$96,600.00 which the Claimant stated was not included. The Schedule to the Claimant's Contract stated that she is entitled to a bonus if she worked and collected 1150 chargeable hours per year. The Claimant worked and billed, in her own right, during the period of her employment US$182,901.69 amounting to 812.80 hours using her chargeable rate of US$225.00 per hour, and collected US$70,270.47 plus the US$96,600.00, a total of US$166,870.47. Since the Claimant billed only 812.80 hours and did not exceed her basic target hours of 1150, she was not entitled to a bonus during the period of her employment."

[29] Ms. Lindsay however stated that she was not sure if billable slips were not the same as collected fees and she stated that she had never completed her own billing but did what she could in the circumstances.

[30] Having perused the documents, it does not appear in the **Analysis of Receipts for Jenny**, that the basic target was met. It also appears that even if the bonus target was reduced by the 20% as alleged by Ms. Lindsay, she still would not have met that basic target and hence would not have been entitled to a bonus. In the circumstances, Ms. Lindsay cannot in my view rely on the non-payment of a bonus that she was not entitled to, as a basis for what she alleges was a constructive dismissal.

Breach of Implied Terms

[31] Ms. Lindsay also asserts that the implied terms of the Contract of good faith, mutual respect and confidence were breached when WDM failed to forewarn her about the problems in the litigation department. Ms. Lindsay however also gave evidence that she prepared a report on the problems in the department on the 10th June 2002 about two weeks into her probation and that a second associate also left during the time of her probation. Notwithstanding this, Ms. Lindsay stated that she turned around the Litigation Department and that the department was carrying in itself.

[32] Ms. Lindsay relied on **Cecilia Deterville v Foster & Ince Services (St. Lucia) Ltd; Claim SLUHCV2009/0811** wherein it was stated by Belle J as follows**;**

"[25] The House of Lords per Lord Birkenhead was of the view that the trust and confidence required in the employment relationship can be undermined by an employer or indeed an employee in several different ways. The conduct must of course impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at the circumstances.

[26] This is an objective test. Loss of confidence in the employer is not essential – although the time when the employee learns of the misconduct and his response to it may affect his remedy.

[27] In some circumstances the employee may treat the employer's conduct as a repudiatory breach, entitling him to leave. But he may choose to stay. The extent to which staying would be more that an election to remain, and would be a waiver of the breach for all purposes, depends on the circumstances."

[33] In this regard, I am not satisfied that Ms. Lindsay has established that failure to forewarn her about the problems in the Firm amounted to a breach entitling her to repudiate the Contract. She was well aware of these problems from the outset as can be seen in her report prepared in June 2002. She nevertheless continued on in the post well after her probation period and more than a year after the report. Additionally, if, as alleged the problems in the department were still in existence at the time of the amended job description of October 2002 by which Ms. Lindsay considered she was bound, it must have been that she did not regard this as sufficiently interfering with her obligation to meet the objectives and targets of the department. In any event on her own evidence, the problems did not prevent Ms. Lindsay from turning around the department to the state where she alleges it was carrying itself.

[34] If indeed Ms. Lindsay did consider this a sufficient breach of the implied terms of her contract of good faith, trust and confidence, I am mindful of the words of Lord Denning in **Western Excavating Ltd;**

> *"But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

[35] It is clear that unless an employee promptly resigns as a result of the breach of contract, they will be deemed to have accepted the breach, and will not subsequently be able to regard the breach as a fundamental breach of contract. In the circumstances outlined, I am of the view that given Ms. Lindsay's clear understanding and acceptance of the challenges of the Firm from as far back as June of 2002, she is unable now to rely on this to treat herself as constructively dismissed.

Unilateral change to Contract of employment

[36] Ms. Lindsay in her pleadings states that WDM by email of 31st March 2003 informed her that they had employed Mr. John Cato. She stated his role would significantly impact the department and that he would be closely responsible for the development of the Nevis practice. Ms. Lindsay asserts that this amounted to a unilateral change of the Contract as her job description stated that she would "*Provide oversight (mainly remote) of the Firm's developing Nevis Office."*

[37] Ms. Lindsay provides background when she states in her pleadings that on the 14th April 2002 she received an email from Mr. Harry Wiggin, who she says was the principle negotiator of the Contract. It contained an offer letter, draft Contract and a job description which she said was amended and presented to her around the 4th October 2002. The relevant clause at paragraph 22 of the draft states that one of Ms. Lindsay's duties would be *"To oversee the development of the Nevis Office in accordance with the business plan, objectives and targets"* Further there is Clause 4 of the amended draft which states that she would *"Assist in the administration and conduct of the recruitment procedures in order to meet the targets and objectives identified in the business plan."*

[38] Ms. Lindsay referring to her job description which she states was amended in October 2002 relies on an email from Ms. Penny Lyttle who was in charge of drafting the job description. On the 4th of October 2002 Ms. Lyttle stated;

> "*Ok, the job description (for want of a better label) is a total gathering in of all the information I have on practice management and the outcomes from management meetings with Pam and John. Clearly you own personal objectives are separate and there are some*

tasks in there that don't belong in a "job description". Think of it more as a list. It is going to form the basis for defining the other roles so I have also attached a diagram that reflects Pam's wishes in that respect. As I told you this morning, I am now putting together a similar list of duties and responsibilities for Deloria. If there are any glaring inaccuracies then do let me know, otherwise I am just going to work with it for now…"

[39] Ms. Lindsay stated in evidence in chief that she was not involved in the retention of John Cato but that she discovered he was involved with the Firm in July or August 2002. Ms. Lindsay asserted that in August of 2002 she became aware that WDM had entered into an arrangement with John Cato from Nevis without her being consulted. The evidence is that initially WDM assisted Mr. Cato by acting as Anguillan agents in respect of matters. Pursuant to a request from Ms. Lindsay about the nature of the arrangement Mr. Cato responded as follows;

"Thanks for reminding me…

This is a matter that I have to clarify with Ms. Webster. We had spoken initially, and she had told me that I could use the Firm as an "umbrella" so to speak… I have since gotten over that hump, but since Pam got the work permit for me, I thought perhaps I should play it safe by doing everything through the Firm. That's the score.

I do not want – the very last thing I want – is that Pam or anyone else to think that I am imposing on the Firm's generosity. So, the upshot is, when Pam comes back, I will have a chat with her."

[40] Ms. Lindsay alleged that Mr. Cato's arrangement with the Firm was impacting her negatively as he did not show up for some of his hearings which she did not know about and that this caused crisis to the litigation department in that measures had to be taken by the Department to deal with applications when she was not aware of the matters. Ms. Lindsay expressed these concerns with respect to the conduct of several matters in which Mr. Cato had an interest. As it turned out, several emails were exchanged to the effect that Mr. Cato was not adhering to the terms of an arrangement he had with WDM. All documents in matters in which he was involved in Anguilla were to be filed through WDM who retained a right to perusal of the documents for compliance and conformity. Ms. Lindsay alleges that this arrangement impacted on the litigation department as matters continued to be filed in the name of WDM and concerns as to the arrangement continued

to persist in terms of court attendance and costs. She states that this caused confusion and mayhem to her department.

[41] The evidence by Ms. Lindsay on cross examination however showed that Ms. Anderson who according to her was not in the litigation department, was the one who dealt with most of Mr. Cato's matters and that she was only called once to review a notice of appeal as to conformity. It is not clear and neither has it been sufficiently established how the arrangement caused "confusion and mayhem" to the litigation department or put it into crisis. This evidential deficit is more acute in light of the fact that the department did not seem to have conduct of Mr. Cato's matters.

[42] Ms. Lindsay also claims that she was not consulted and did not participate in the eventual retention of Mr. Cato on a subsequent short term Contract. Ms. Lindsay at paragraph 17(f) of her statement of claim stated that;

> *"On or about 27 March 2003, some eight months after Mr. Cato had initially commenced some arrangement with the Firm the Second and Third Defendants stated in a meeting that Mr. Cato would be assisting them and sought the Claimant's feedback. At that stage, the partners never informed the Claimant that they had already retained Mr. Cato by Contract. By email on 31 March 2003 the Third Defendant informed the claimant amongst other things that Mr. Cato was formally contracted by the First Defendant Partnership. That Mr. Cato's role would significantly impact the department; that he would be closely responsible for the development of the Nevis Practice for which the Claimant was initially employed amongst other things."*

Ms. Lindsay took this to amount to a unilateral change of her Contract of employment as this role was in accordance with her job description as amended.

[43] WDM states however that a draft revised job description for Ms. Lindsay had been prepared, the terms of which were not agreed prior to 2nd September 2003, the termination date. In any event Webster asserts that they had sought Ms. Lindsay's input with reference to the appointment of Mr. Cato for some time before he was actually appointed but such input was not forthcoming. In the Defence filed herein, WDM stated that;

"…*at a meeting held on or about 16 January 2003 the issue of the use of the services of Mr. John Cato as Counsel was discussed with the Claimant and the Claimant undertook to make proposals in relation thereto by the end of January 2003. By the end of March 2003, the Claimant had not yet provided the promised proposal. The Defendants engaged Mr. Cato on a temporary basis effective 1st April 2003."*

WDM further states that there was no inconsistency between the roles of the Claimant and Mr. Cato in respect of the Nevis Office.

[44] Emails dated the Thursday 27th March 2003 seem to support the assertion that at some point before the hiring of Mr. Cato the input of Ms. Lindsay was sought. An email of March 27th 2003 at 2:31 pm from Ms. Webster to Ms. Lindsay states "*Please can I have the feedback you promised by the end of the day today".* Ms. Lindsay responded that she would not be able to until the following week and required that 15 questions be addressed before she could provide any input on the three month appointment.

[45] In response Ms. Webster stated that they had been waiting for suggestions for at least 2.5 months as to how to set up a work routine that could include Mr. Cato and that she had committed to settling office arrangements that weekend. Ms Webster also stated;

"We don't require an extensive report from you, just your views as to how you think he should be incorporated into our work routine as Senior Counsel given the issues you raised in the past and our urgent need for litigation support. We also wanted to find out from you the *matters (if there are any) we can immediately assign to him and your thoughts as to how he can best provide assistance to you during this initial period.*

If you can't find the time to deal with it by the end of the day but can before noon tomorrow we would very much appreciate your input."

[46] Ms. Lindsay stating in an email in response said that;

"*I note your comments, though you are aware it is not my delay at all. I have been trying to understand the arrangement with John Cato for some time now and certainly longer than 2.5 months. Actually I have been seeking clarification since August/September 2002. At*

first I was told there was no arrangement. Now it seems there is an arrangement. On this basis I cannot give my suggestions based on something I don't know..

It is therefore incumbent and prudent of me to have a clear understanding of this arrangement for the sake of the smooth running of the department. Obviously, the clearer I am now, the more informative and lucid my suggestions would be."

In cross examination however Ms. Lindsay did admit to being asked to give feedback in January 2003 but says it was on an arrangement she did not know about even though Mr. Cato told her and despite being copied on matters which Mr. Cato was doing with the firm.

[47] On the 31st March 2003 Ms. Webster answered the questions detailing Mr. Cato's role for the three month period and responded the concerns raised by Ms. Lindsay. Ms. Webster stated;

"*I accept that as Senior Counsel JC's role will significantly impact upon the Litigation Department and the Firm. Considering that we have recently had to outsource work that JC is clearly qualified to do and given that you have been continuously raising the need for professional support, we consider this an excellent opportunity to strengthen the Firm's overall position.*

"We plan to engage him in any Caribbean matters as we envisage that in the longer term, if the initial arrangement works well, he will be closely responsible for the development of the St. Kitts/ Nevis Practice."

[48] Further, the response to the 15 questions clearly outline that Mr. Cato's obligations would be to the Partners and Mr. Wiggin but Ms. Lindsay's input was needed to facilitate if the litigation department would be able to make use of that limited resource. The evidence clearly shows through the various emails before the stint, that Ms. Lindsay was aware of the initial arrangement with Mr. Cato as not only did he explain it to her but she was also copied on most of the matters which went through Ms. Anderson. It is noteworthy that at that time Ms. Webster was noncommittal as to Mr. Cato's role beyond the three months. She stated that "*We are hoping that we will have a long-term relationship but our planning has not matured beyond this immediate opportunity."*

[49] In the round it is difficult however to see how having a senior attorney working in the Nevis practice for could impact on Ms. Lindsay providing oversight to the office branch. It may have been that

Ms. Lindsay would have to have had oversight of work done in Nevis. That must however have been anticipated as her role as Head of Litigation and as part of the plan to develop the office in Nevis. In any event, the evidence is that Mr. Cato would have been closely responsible for the development of the Nevis Practice only if the initial arrangement of three months worked out well. While the evidence as to what happened after the three month stint is not entirely clear, Ms. Lindsay in examination in chief did state that the Partners fired Mr. Cato. Moreover, as previously stated, there was no indication that the review of material required by Ms. Lindsay in this period was frequent or extensive.

[50] Additionally, Ms. Lindsay also stated in cross examination that she did not know if Mr. Cato had a role in the Nevis Practice and that there was nothing that Mr. Cato did that interfered with her role in the Nevis Office. In my view, it seems to be much ado about nothing. This was clearly a short term measure to address some of the shortcomings of the department and the ultimate decision as to the hiring of staff was that of the Partners and not that of Ms. Lindsay. It is my view therefore that in the circumstances claimed, Ms. Lindsay has failed to establish a unilateral breach of the Contract by WDM. Further she has also failed to establish how the Firm hiring Mr. Cato in the circumstances as proved, goes to the root of the contract so as to be considered a repudiation of the Contract.

Mrs. Camille (Dolly) Cato

[51] Ms. Lindsay stated that on or about 15th January 2003, it was agreed that a locum solicitor and barrister would be brought on at WDM as an associate in April 2003. Ms. Lindsay states Mrs. Cato was brought in without her involvement but she resolved to work with her and show her what was to be done. Ms. Lindsay states that no associate was recruited by April 2003. She adds that on 28th July 2003, WDM informed Mrs. Cato that she was being transferred to the Nevis Office and would continue there from 18th August 2003. Ms. Lindsay says that this was a unilateral change of her Contract as Mrs. Cato was required to vacate her position in the department on 30th July 2003 without her knowledge as she was off island. Ms. Lindsay stated she was given no notice of this which would significantly alter her workload, the running of the department and cause crisis management.

[52] Ms. Lindsay states that the bulk of the recent work assigned to Mrs. Cato was not done because of Ms. Webster and Mr. Dyrud's actions in transferring Mrs. Cato. She states that this action usurped her authority and demeaned the service to the Firm's clients because the department would be further significantly undermanned and under resourced. Ms. Lindsay said these actions were disrespectful and undermining of her position and authority.

[53] WDM states that Ms. Lindsay knew that Mrs. Cato would remain at the Anguilla for 6 months commencing 16th January 2003 and adds that any crisis in the litigation department would have been caused or contributed by Ms. Lindsay's failure to effect a proper handover of work prior to her departure. They add that in the end only one of three bundles in a matter was filed late as a result of Mrs. Cato's departure. Counsel states that Ms. Lindsay was aware of Mrs. Cato's imminent departure and relies on her email of 21st February 2003 in which she stated;

> *"Isn't Camila the locum who is to assist in the interim 6 months by covering all aspects of litigation including court attendance when I am not available? From what you and John said you expected her to attend court event though she has shown some reticence."*

This seemingly is at odds with her witness statement wherein which she stated "*No one, not even the locum herself was sure how long she would remain in post."*

[54] Mrs. Cato also stated in her witness statement that "*The morning I started with WDM it was agreed with Pam and Jenny that I would work along with Jenny Lindsay. It was also discussed at that time with Pam and Jenny that I would work in Anguilla for six months and then move to Nevis."* In evidence she also stated that she would not have expected Ms. Lindsay to be surprised in light of previous discussion that she would be leaving. Mrs. Cato adds that "*It is not correct that the bulk of the work allocated to me was not done."* Further at paragraph 11 of her witness statement, Mrs. Cato stated;

> *"I am not aware of any court dates being missed by WDM. I am aware of missing a deadline for the filing of witness statements in one matter (I think Zoe Hodge) but the other side (John Benjamin) had missed deadlines too and we arranged for a consent order to be filed. My recollection is that I attended Court for that matter… During my employment in*

the Anguilla office I assisted on numerous litigation files and no other deadlines were missed."

[55] Whereas Mrs. Cato's departure may have caused the Litigation Department some difficulty as alleged by Ms. Lindsay, I am not persuaded that Ms. Lindsay was taken unawares as she claims or that there is sufficient to persuade the Court without more that there was any reason why Ms. Lindsay concluded that Ms. Cato would be remaining on in light of the only indication being given that Mrs. Cato would be there for 6 months. It is therefore difficult to see how Ms. Lindsay can rely on this as conduct going to the root of her contract or conduct undermining and disrespectful of her position as to amount to a unilateral breach of the Contract warranting her belief that she was constructively dismissed.

The last straw

[56] Ms. Lindsay pleads that the last straw was when she states that Ms. Webster, in an email of 2nd September 2003 accused her of telling lies and caused her considerable embarrassment. The email stated as follows;

"*Delora was able to put together the information I requested based on the information you provided. It is important to note that the matters took substantially less time to review, and were substantially less alarming than your protracted correspondence indicated. Furthermore your contention that you were unaware of Dolly's impending departure is, I am afraid, untrue.*

In addition, despite the extreme urgency you attributed to these matters, you have still not found it possible to make yourself available for even the relatively modest time that would be required to progress the issues.

These factors, among others, only go to show what an enormous and unnecessary waste of time has occurred and that a more constructive approach is necessary for the benefit of all concerned. I hope that, following the meeting which the Labor Commissioner is to attend (about which I have written to you separately), we can resolve these ongoing issues."

[57] Ms. Lindsay pleads that she was of the view that the email was extremely disrespectful and undermining of her position as Head of Litigation. Ms. Lindsay responded;

> *"I note your comments. I have been treated with scant regard, as have the Firm's clients. It seems to me that you have no intention of alleviating these matters at all. You have significantly undermined my position, you have embarrassed me and you have failed to meet your Contractual obligations. Indeed, so fundamental are your breaches of my Contract of employment that I have been summarily dismissed from my position as Head of Litigation."*

[58] Ms. Webster responded that her messages were designed to resolve the problems and to lay new foundations with the help of the Labor Commissioner. She wrote that she could not understand how that could be construed as a constructive or any type of dismissal.

[59] By way of immediate background, the deciphering of a barrage of emails between Ms. Lindsay and Ms. Webster may assist. Ms. Lindsay alleged that the abrupt removal of Mrs. Cato from the Firm to the Nevis office left matters assigned to her incomplete. She wrote on 25th August 2003;

> "*There are quite a number of matters that Camilla was dealing with before she left Anguilla,(sic) though was unable to complete and which were not dealt with in her absence and for which I must now enroll your assistance. Owing to Camilla's (sic) was relocation to the Nevis Office after a 2 week period on unplanned holiday whilst the litigation department was left unmanned a number of court dates have expired including the preparation of trial bundles and applications."*

[60] Ms. Webster in response asked *"Please let me have the list of matters, the due dates and particulars of the various tasks by the end of today. Thank you."* Ms. Lindsay then responded that "*So far as your request, this information is in the memos that were prepared with the files for you and I would ask you to refer to those memos and the files direct."*

[61] That this was not what Ms. Webster wanted or expected is evident from her response.

> *"Jasmine just brought in a number of files that apparently you asked her to pass to me. I've asked her to return them to you until we can agree the next step.*

Please provide me a LISTING of the outstanding matters with the particulars I requested earlier, by the end of the day. Once I know the matters requiring priority treatment we can review the actual files and decide how to allocate the work between us. Certainly I don't expect to be dealing with any matter that you currently have conduct of other that n those matters requiring crisis management on account of Camilla's relocation. From my discussions I am expecting these to be few.

I would also like to receive an update as to the matters you are personally focusing on at the moment and an indication of your own work plans until September 15; that way I can better appreciate what our resources are and can evaluate the need for us to supplement."

[62] It seems however that Ms. Lindsay did not appreciate Ms. Webster's role as Managing Partner in charge of litigation or as her direct supervisor. It seems clear from Ms. Webster's emails in reply however, that she was trying to assist in response to Ms. Lindsay's earlier request for assistance.

"*I would like to comply fully with your request however and, unfortunately, I am battling to get matters dealt with, which concern complex issues… With respect, I don't know how another listing would assist in these matters as it appears that there is one list already together with a set of notes from Camilla and memos from me. The time it would take to relist on a fourth occasion would in my opinion be too time consuming given the urgency of the matters I am currently dealing with. Clearly the information is to be seen on the files.*

I am currently crisis managing a number of matters and I certainly do not wish to prejudice any more of our clients or embarrass the firm by not doing what is necessary to be done.

When Camilla was moved to Nevis I expect you had a clear strategy and knew what you would be faced with as the supervising partner of the litigation department. Had you come to me, the Head of Litigation, I would have advised you what was outstanding prior to the decision to move Camilla to Nevis then a structured move could have been agreed without the need for crisis management. As it was, you did not approach me at all and I remain in the dark. I would certainly like you to let me know what your strategy is so that I can attempt to assist."

That Ms. Lindsay was not very happy with WDM's decision was evident from the tenor of the mail being exchanged. She concluded by listing her workload which she stated had to be completed as soon as possible.

[63] With admirable restraint in my view, Ms. Webster responded;

> *"You asked for my assistance with certain unnamed matters you say we were not in compliance with because of Camilla's departure. I have now spent over an hour today trying to understand what those matters are from you and exactly what needs to be done to avoid problems, without success. Neither Camilla, Delora nor Jasmine appear to know the matters you are referring to…*
>
> *What are the matters you are referring to? I do not expect to wade through bulky paper files to sort this current problem when I have other time pressures"*

[64] Ms. Lindsay's response;

> *"I would ask you to read my memos. Like you, I have pressing matters and as I have already waded through the files to give you the information you require then I would expect that you would meet me halfway, read the memo's and look at the files."*

[65] Added to these issues was the fact that Ms. Lindsay wanted to meet immediately (Tuesday August 26th) whereas Ms. Webster indicated her availability to meet on the following Monday to which Ms. Lindsay stated she was not amenable as she had scheduled an important matter but that *" If you insist on the review during this crucial period of crisis then I would ask you to provide me with a written letter"* absolving her from responsibility in the event work is completed and that the court be informed.

[66] On cross-examination Ms. Lindsay stated she had a difficulty with the meeting that Ms. Webster proposed as she thought Ms. Webster should not undermine or usurp her position. Her view was that in light of the situation, Ms. Webster's proposal for the meeting on Monday was unreasonable and that it was not up to Ms. Webster to determine the timing of the meeting in the circumstances.

[67] Ms. Lindsay was of the view that Ms. Webster was already fully apprised of the state of the department and she did not see the utility of preparing the list as requested. Eventually Delora Anderson was able to put together the information and Ms. Webster wrote Ms. Lindsay stating;

> *"I'll work with Delora today to access where we are with the urgent matters and let you know our thoughts as to how we might help after we have considered our options and resources.*

Ms. Lindsay on cross examination did not think her response and action was being insubordinate although it was the third request in one day for that information from Ms. Webster in order for her to assist. This was the tone of the emails exchanged between the parties which culminated in the offending email referred to in paragraph 56 above which Ms. Lindsay considered the last straw.

[68] On cross examination Ms. Lindsay was of the view that Ms. Webster was undermining her when she asked to help with the outstanding matters as she said Ms. Webster was meeting with persons outside of the department. I assume this to be Ms. Delora Anderson who Ms. Lindsay says was not part of the department according to what Ms. Webster had previously told her. Objectively looking at the series of emails leading to Ms. Lindsay stating that she had been summarily dismissed, I cannot see how this could amount to conduct which could have caused serious damage to the relationship of employer and employee so as to amount to a repudiatory breach of Ms. Lindsay's contract.

[69] It seems to me that Ms. Lindsay was in clear disregard of the repeated requests of the repeated demands of her employer for specific information in a specific manner and Ms. Webster having pursued the information otherwise based on the recalcitrance of Ms. Lindsay, concluded that she, as Managing partner in charge of litigation, was not of the view that the matters were as urgent as previously indicated. This seems to me to be the basis of the letter from Ms. Webster referred to at paragraph 56 above and in light of all the exchanges, I cannot but agree with Ms. Webster's conclusion on the 2nd September 2003;

> *"These factors, among others, only go to show what an enormous and unnecessary waste of time has occurred and that a more constructive approach is necessary for the benefit of all concerned."*

Evidence Act Notice

[70] In closing submissions it is stated that Ms. Lindsay relied on her own witness statement. Ms. Lindsay also filed and included in the Trial Bundle witness statements of Roy Horsford, Caroline Davis and Stephenie Brooks. With each of these statements she filed a document called an **Evidence Act Notice** to the effect that she was relying on those witness statements to be read in evidence pursuant to section 30 of the Evidence Act as the witnesses were out of the jurisdiction. Ms. Lindsay states in submissions that "*In spite of the importance of the witness evidence, the application to have them admitted was refused."*

[71] I failed to appreciate how Ms. Lindsay expected that the filing of this notice with the witness statements without more would suffice "*to have them admitted".* That there is a clear misconception of the dictates of the **Civil Procedure Rules 2000** is evident. A contrary conclusion may have been possible had these witness statements not previously been raised before the Master in an application considered on the 20th April 2015. Ms. Lindsay had applied for these witnesses to give evidence by way of video link. The application was refused by Master Glasgow who stated;

> *"The affidavit evidence in this regard is not persuasive. Other than the assertion that the witnesses reside overseas there is nothing to suggest why they cannot appear… There is a date set for pretrial review in about 8 days. In my view any further delay in this matter to bring further applications or to ventilate matters that could have been dealt with much earlier is a less than appropriate approach to the disposal of claims. Accordingly this relief is refused.* ***The Claimant may renew this request at pretrial with adequate evidence****."*

[72] No such application was made and neither was any additional evidence or supplemental evidence filed. In the normal course of things one would have anticipated that such an application or leave to file such an application at that stage. This would have been the subject of an inter partes hearing which would require some submission and authority which would permit the court to considering a step outside of the general rule. This was not done. Rather Counsel sought to introduce and have these statements read into evidence without any evidence having been considered by the Court or otherwise. This was objected to and in my view, rightly refused. To

include this in closing submissions in such a fashion to suggest that Ms. Lindsay is in some way deprived of being able to further her case with important evidence, when this defect is of her own doing, is disingenuous to say the least.

[73] The evidence as considered above by which Ms. Lindsay alleges that there were breaches by WDM going to root of the implied and express terms of the contract, in my view have not been established. As such, the claim by Ms. Lindsay that she has been constructively dismissed cannot be sustained and is accordingly dismissed.

Counterclaim

[74] WDM has counterclaimed damages for the breach of Ms. Lindsay's contract of employment. WDM claims that Ms. Lindsay was confrontational and aggressive during the course of her employment, that she failed to obey the lawful and reasonable orders of her employer and that she failed to give the contractual three months' notice of her intention to terminate her contract.

[75] Additionally WDM claims that Ms Lindsay was overpaid in that she was paid in advance on the 28th August 2003 and terminated her contract without notice on the 3rd September 2003. As such, WDM is entitled to be reimbursed for the overpayment less the last two days in August 2003 and the couple days in September amounting to US$4,667.00. In her Defence Ms. Lindsay makes no admissions to this allegation.

[76] In examination in chief Ms Lindsay admitted she was paid to the 30th September and did not refund the money but states she was not overpaid. In closing submissions Ms. Lindsay states that she did not repay and that;

> *"It was for good reason, as the Claimant is entitled to 3 months' pay in lieu of her salary if she were victorious on her claim. Even if the Claimant lost, she would be entitled to 3 months payment in lieu of notice pursuant to the contractual rights and the statutory provisions. Therefore, in the circumstances the sum is not refundable."*

[77] I am of the view that Ms. Lindsay, not being successful in her claim is not entitled to 3 months' notice. I fail to appreciate the rationale of the submission that if she did not succeed she would still be entitled to the three months' notice. WDM accepted her failure to return to work as a repudiation of the contract and as such she is not entitled to 3 months' notice or salary. In the

circumstances Ms. Lindsay is obligated to return the overpayment of salary in the sum of US$4667.00 and I so order.

[78] WDM claims that Ms. Lindsay took an excess of 8 days' vacation leave over her entitlement of 25 days for the period she worked. Ms. Lindsay denies this is so. The contract at clause 8 states that;

> *"The employee will be entitled to annual paid holiday leave of 20 working days exclusive of Saturday, Sunday and public holidays, to be taken in full in each calendar year without carry-forward and at times to be agreed in advance. The employee will become entitled to annual paid holiday after working for the Firm for an aggregate of at least 238 days during a period of 12 months."*

WDM has led not evidence to support how many days Ms. Lindsay worked for after her first year of employment which would be the basis of assessing how many days she would have been entitled to at the time of her departure. WDM has not referred to any record of vacation or given the court any indication as to when the alleged 33 days of vacation was taken. This information Ms. Webster claims was given to her by the accounts department but Ms. Pollyanna Kumara who is the finance director of WDM did not substantiate this. WDM baldly claims US$2000 for this excess without any basis and as such the Court is not satisfied that WDM has established this claim and it is accordingly refused.

[79] It is noteworthy that in the correspondence from Ms. Webster to Ms Lindsay dated the 15th September 2003 it was stated as follows;

> *"We note that you have taken the decision to resign abruptly from your position in the Firm in breach of the terms of your contract. We accept this repudiation of contract and reserve our rights in relation thereto accordingly."*

It is clear to me therefore that it was accepted by WDM that the breach of the contract which they accepted as the repudiation of the contract on Ms. Lindsay's part was with reference to her failure to give the 3 months' contractual notice and she was so advised. Additionally, Ms. Webster stated in her witness statement that "*The claimant failed to give the First Defendants 3 months' notice of*

resignation to which the first defendant was entitled. We seek an award of damages for breach of this contractual obligation."

[80] It is trite that WDM must prove the damages occasioned by the breach of contract. Apart from the bald statements that Ms. Lindsay was in breach, WDM has not quantified the loss resulting from this breach either in the witness statements or in evidence in chief of WDM's witnesses. WDM has not pointed out any loss as a result of the breach.

[81] Counsel submits that **National Coal Board v Galley [1958] 1 WLR 16 AT 29** as the authority for the proposition that WDM is entitled to damages for the failure to give the three months' notice. In that case however the Court of Appeal reversed an award of damages where the Respondent failed to establish as a question of fact what loss of input did the absence of the Appellant charged with the breach of contract entail? In this matter, WDM has led no evidence that they suffered any loss pursuant to Ms. Lindsay's departure. It may be that the abrupt loss of the head of litigation would have placed WDM in some sort of a quandary but no such evidence has been led leaving a stark claim of a breach of contract for which I find WDM to be entitled to a nominal award recognising the breach and no more.

Costs

[82] This matter has commanded thirteen years of the resources of the court with a barrage of applications equally by both parties, hampering the speedy resolution of this relatively normal employment contractual matter, would be sufficient grounds to make no order as to costs but in the event that I am wrong, I consider the filing of at least 30 applications in the matter excessive. I note the complete lack of cooperation between attorneys, represented by attorneys, all officers of the court and I find this to have contributed significantly to longevity of the matter. This recalcitrance has strained the limited resources of the court when I consider that it has engaged every Master, Judge and the Court of Appeal from 2003 to the date of this judgement.

[83] Abuse of the process the court was manifest given that most applications were scheduled to be determined at the monthly sitting of the Master. There was no apparent cooperation in the preparation of the bundles, a tool designed for the assistance of the court. This resulted in copious amounts of noncompliant, unstructured material. Even on the return of restructured bundles, there

was no separate bundle of agreed or not agreed documents, no chronology in the documents making the constant searching through noncompliant bundles cumbersome and unnecessary. The inclusion of material which is improper without the leave of the Court and without a necessary application was additionally vexatious.

[84] Having regard therefore to all the circumstances and the conduct of parties before and during proceedings, I am of the view that each party in these proceedings should therefore bear their own costs and I so order.

Conclusion

[85] The Order of the Court is as follows;

(a) That the Claim is dismissed.

(b) That the Claimant reimburses WDM in the sum of $4,667.00 with statutory interest from the date of judgment.

(c) That the Claimant pays nominal damages in the sum of US$500.00 to the Defendant for breach of contract.

(d) That each party bear their own costs.

Cheryl Mathurin

High Court Judge