

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT OF THE BAHAMAS
COMMONLAW AND EQUITY SIDE
2016/CLE/gen/FP/00277



BETWEEN
STACY CULMER
Plaintiff

AND
EXPERT CUSTOMS BROKING LTD.
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. James Roosevelt Thompson for the Plaintiff
Mr. Harvey Tynes, QC and Tanisha Tynes-Cambridge for the Defendant

TRIAL DATES: September 19, 2018

CLOSING SUBMISSIONS: December 13, 2018

JUDGMENT

Hanna-Adderley, J

Introduction

1. This is an action by the Plaintiff against the Defendant for its summary dismissal of the Plaintiff without notice and damages for wrongful dismissal. The action was commenced by way of an Originating Summons and Affidavit in Support of the Plaintiff filed herein on September 15, 2016. The Court by a Directions Order filed May 8, 2018 ordered pursuant to Order 28, Rule 8 of the Rules of the Supreme Court ("RSC") the Plaintiff to file and serve a Statement of Claim and the Defendant to file and serve its Defence. The Plaintiff subsequently filed her Statement of Claim on June 29, 2018. She therefore states that her claim as against the Defendant is for damages for wrongful dismissal. She claims that at all material times she was an employee of the Defendant commencing June 19, 1995; that she was employed as a Senior Broker at a salary of Two Thousand and Forty Dollars

(\$2,040.00) per month; that on November 9, 2015 the Defendant wrongfully and without just cause terminated the said employment summarily and with[out] due notice. She seeks damages in the amount of \$26,520.00, interest and costs.

2. The Defendant entered its Memorandum of Appearance on October 17, 2016 and filed its Defence on July 19, 2018. The Defendant in its Defence denies the Plaintiff's claim and denies that the Defendant determined the Plaintiff's employment; that on or about November 6, 2015 a letter dated November 2, 2015 was given to the Plaintiff describing the reorganizational structure of the Defendant; that on November 9, 2015 the Plaintiff requested a meeting with management and stated that she was unable to work under these conditions and thereafter the Plaintiff absented herself from her place of employment. The Defendant further denies that the Plaintiff suffered the alleged loss or any loss or damage.
3. Essentially, the issues to be determined in this action are whether the Defendant by letter dated November 2, 2015 addressed to the Plaintiff and effective November 9, 2015 terminated the Plaintiff's employment, or whether by the Plaintiff's actions on November 9, 2015 she repudiated her contract of employment with the Defendant.

Statement of Facts

The Plaintiff's Case

4. The Plaintiff's evidence is contained in her Witness Statement filed on September 19, 2018 and it is her evidence in part that she was employed with the Defendant from June 19, 1995 to November 13, 2015 as Senior Customs Broker at a weekly salary of Five Hundred and Ten Dollars (\$510.00). She states that it was on November 6th, 2015 that she received a letter dated November 2, 2015 and not on November 2, 2015 as indicated in her Affidavit. Further, that by the November 2, 2015 letter at paragraph 2 she was informed that her job as Senior Customs Broker will no longer be available and a new job description of Customs Broker without the word Senior was her new position and that some of her duties as Senior Customs Broker would be carried out by the Managing Director. She also states that she did on several occasions thereafter state to the Defendant that she was not prepared to work under the new terms of employment.

5. Mr. Tynes, QC during cross-examination put her Affidavit in Support filed herein to her and for completeness a summary of the same is hereby set out as follows. The Plaintiff's evidence in her Affidavit in Support of the Originating Summons is that she is a former employee of the Defendant Company and was employed in the supervisory position of Senior Broker. She states that she was responsible for ensuring that all shipments were collected, distributing items to brokers and supervising all brokers, overseeing operations with customers and brokers and that she was in that supervisory position for the past ten years. She further states that on or about November 2, 2015 she received a letter dated the same from the Managing Director purporting to change the fundamental terms of her contract, in particular that she was being demoted from being a Supervisor/Manager to an ordinary employee and that that term would severely impact her severance pay if terminated as she was employed with the company for over twenty years. She states that she left the office disturbed and immediately proceeded to the Labour Board for legal advice, that she was advised that the company could not unilaterally change the terms of her contract and that she should return to work and inform the Company that she did not agree with the change. Further, she returned approximately two hours later at which time the Defendant informed her that she was terminated and was trespassing, that she continued to work for another week by answering the phone, answering e-mails and assisting customers and that the Managing Director allowed her to continue to work for the Company for that week. She also states that at no time did she state that she was not returning or was resigning. However, on Friday, November 13, 2015 she reviewed [received] a letter from the Managing Director and observed the other employees receiving their salary but she did not receive her salary and it was at that time she was advised by the Labour Department not to return. She further states that to date she has been unable to obtain similar employment.
6. During cross-examination by Mr. Tynes, QC her evidence in part was that her complaint was that the Defendant had changed the terms of her employment, the terms in the contract were changed but that she was never told "we don't need you anymore; you're fired." After being referred to the November 2, 2015 letter she stated that that letter was the basis upon which the terms of her employment were changed, that certain duties she performed would be ceded to the Managing Director, that she would be doing less work, that the letter said that her salary would not be affected at this time, that that was a

concern for her because it might happen later. She also stated that she wondered what the problem was because the change of position was not explained properly to her, why she was being relieved of those duties. Further, she stated that on more than two occasions she stated to the Company that she was not prepared to work under the new terms of employment. It was her evidence that she proceeded to the Department of Labour seeking advice and after speaking with them at first she stated they did not tell her to go back to work but then stated that they did tell her to go back to work which she did. She also stated that she was not gone for a couple of hours, that she did not tell the Managing Director or anyone else that she was leaving to go to the Department of Labour, and that she just walked off the job and went to the Department of Labour. Further, that on her return from the Department of Labour she was told by the Managing Director that as far as he was concerned she no longer worked there and that she was trespassing.

7. During re-examination by Mr. Thompson her evidence in relation to the November 2, 2015 letter was that she took the sentence "Your new post would be that of a custom broker" to mean that something new was happening to her and that there was no doubt in her mind that management was changing the terms of her employment to something new prior to that letter.

Defendant's Case

8. The Defendant called one witness, Anthony Adderley in support of its case and his evidence-in-chief is contained in his Witness Statement filed September 18, 2018. At paragraph 2 of his Witness Statement he stated that he admits the contents of the first four paragraphs of the Plaintiff's Affidavit filed September 15, 2016 but denied paragraphs 5 through 14. His evidence was that he is the Managing Director of the Defendant and that on or about November 1, 2015 he introduced a reorganizational structure to the Company, that he wrote a letter dated November 2, 2015 to the Plaintiff advising her of the reorganization but the letter was not given to her until November 6, 2015. Further he stated that on November 9, 2015 the Plaintiff requested a meeting with him at 9:45 am and during that meeting the Plaintiff stated that due to her new status she cannot and will not work under the conditions as stated in the November 2, 2015 letter and the meeting lasted for approximately thirty minutes. He stated that at approximately 11:00 a.m. on November 9, 2015 he was informed by the Assistant Manager at the Defendant

Company that the Plaintiff had left the premises and advised that she was unable to work under those conditions and about 12:30 p.m. that same day he noticed that the Plaintiff had returned to the premises. His evidence is that he was later advised by the Assistant Manager that an officer at the Department of Labour, Ms. Tasha Rolle had telephoned their office in an attempt to contact him, that he returned the call at approximately 2:00 p.m. and informed Ms. Rolle that the Plaintiff had quit her job during their meeting earlier that day. He also stated that on Wednesday, November 11, 2015 he met with the Plaintiff along with the Assistant Manager, Ms. Francillon Martinborough and advised the Plaintiff that she had terminated her employment; that on November 11, 2015 around 11:00 a.m. he and the Plaintiff met again when she stated that she did not quit her job. He further stated that although the Plaintiff had terminated her employment on Monday, November 9, 2015 she continued to visit the office of the Defendant until Friday, November 13, 2015; that she was not authorized to perform any duties on behalf of the Defendant during the period November 9, 2015 to November 13, 2015; that she was not assigned any duties as a Customs Broker nor was she authorized to perform any duties as a Customs Broker on behalf of the Defendant.

9. During cross-examination by Mr. Thompson, Mr. Adderley's evidence in part was that the reorganizational structure was to make the company more profitable, that the changes to the Plaintiff's responsibilities did not save the company money because he would be doing those tasks and she would be getting paid her same salary. He also stated that he was aware that people in managerial positions are paid different severance than line staff and that the idea of severance never came to mind because they never intended to get rid of anyone however if she was laid off, based on the post she would have held she would have received a different severance rate. Mr. Adderley admitted that in his letter the Plaintiff was receiving a new post and agreed that it was changed as it was clear in his reorganizational structure, that the changes were in the job description he gave, that her job description was not totally new and was only new in some aspects. He did not accept that that was an alteration of the terms of her employment as she would still be doing the same work she had done before. He did state that it may be considered that a change to a new job is the same as altering the terms of her employment. There was an exchange between Mr. Thompson and Mr. Adderley as to whether he had changed the terms of her employment in some aspects. That exchange is shown below:-

"11. Q. You didn't answer my question. The question was this, a change to a new job, is that not the same as altering the terms of her employment?

A. It may be considered.

Q. So you agree it altered the terms of her employment?

A. It may have.

Q. Before, she was doing some management post now she is not doing that, you would be doing that. You didn't regard that as a certain change in terms of her employment?

A. In certain areas, yes.

Q. So your evidence therefore that you did change the terms of her employment in some aspects?

A. Certain aspects of it.

Q. The answer is yes then?

A. I'm sorry?

Q. The answer is, yes?

A. In certain aspects of it.

Q. In certain aspects you did change the terms of her employment?

A. In certain aspects because she was doing some of the same things she was doing before sir.

Q. I wish I could get a yes or no answer. Are you saying that in certain aspects you did change some aspects of her employment, is that correct?

A. Yes.

[Transcript dated September 19, 2018, page 26, lines 11-32, page 27, lines 1-5]

25. Mr. Adderley's evidence continues that the Plaintiff did not agree to the change and she made it quite clear, that he laid out the conditions for her and that if she did not accept them she could have left. He also stated that he proceeded to treat her as if she had terminated her employment and that he did not get any legal advice on his action. Further, he stated that there are no benefits given to supervisory staff compared to line staff and in this case the supervisory position was merely distributing documents to the junior people and that would be the only thing different because they were all brokers and senior broker.

Agreed Bundle of Documents

26. The parties made reference to several letters during the course of their evidence. For ease of reference the Court has reproduced the said letters below.

a. Letter to the Plaintiff from the Defendant Managing Director dated November 2, 2015

"November 2, 2015

Stacey Culmer

Senior Customs Broker

Re: **Reorganizational Structure**

As you are undoubtedly aware, the Island of Grand Bahama and in particular, the city of Freeport, has been victims of a stagnant economy for some time. As a result of the foregoing, numerous business establishments have been negatively impacted and Expert Customs Broking Ltd. is no exception.

Expert Customs Broking Ltd. must now embark upon additional measures to improve its profitability. Expert Customs Broking Ltd. will commence this process by advising that effective November 9, 2015 it will no longer maintain the post of Senior Broker. Your new post would be that of a Customs Broker.

The functions previously performed by the Senior Broker will be ceded to the Managing Director. Henceforth this would provide you with additional time to further assist with the preparation of additional Customs Entries.

It is expected that your present salary will not be impacted at this time.

The functions previously performed by the Senior Broker will be ceded to the Managing Director. Henceforth this would provide you with additional time to further assist with the preparation of additional Customs Entries. We envisage that this organizational change would assist in improving our profitability.

Please find enclosed your new job description.

Managing Director

c.c: Francillion Martinborough

Assistant Manager

Enclosure:"

b. Job Description of Plaintiff dated November 2, 2015

"November 2, 2015

Stacey Culmer

Customs Broker

Re: Job Description

Kindly note that effective November 9, 2015 you will be answerable to the Managing Director. Additionally your new job description will be as follows:

1. The preparation of all customs documents (Entries etc.) necessary to effect the customs clearance of all shipments for which you were assigned.
2. To ensure that all customs documents (Entries etc.) are prepared and submitted to Bahamas Customs in a timely manner.
3. Where necessary, to liaise with Bahamas Customs to determine the status of customs documents which were submitted for clearance.
4. Where necessary, to assist clients in tracking their goods so as to determine the estimated time of arrival into the country.
5. Where necessary, to liaise with all freight carriers to assist in the customs clearance of those shipments for which you were assigned.

6. Where necessary, to assist in any other assignments due to matters of exigency.

Please be guided accordingly.

Managing Director

c.c: Francillion Martinborough

Assistant Manager"

c. Letter from the Managing Director to the Plaintiff dated November 9, 2015

"November 9, 2015

Stacey Culmer

Customs Broker

Re: Dereliction of Duty

Please be advised that on November 9, 2015, I was informed by Ms. Francillion Martinborough, our Assistant Manager, that at 8:53 am you contacted her via telephone to inform that you would be in office later as you were busy addressing an emergency.

Upon return to the office, you requested to meet with me and I obliged. The meeting was held at my office at approximately 9:45 am.

You immediately proceeded to inform me that you had an opportunity to peruse my letter directed to you dated November 2, 2015 which addresses the Reorganizational Structure at Expert Customs Broking Limited.

You further advised that based on the content of the referenced letter, Expert Customs Broking Limited had in fact made your post of Senior Customs Broker redundant and as a result, you were no longer employed at Expert Customs Broking Limited. Additionally, you informed that you were demoted and also faced the possibility of a salary reduction at any time. **You stated emphatically that as a result of these changes you cannot and will not work under those conditions.**

I reminded you that you were not made redundant and further drew your attention to the fact that Expert Customs Broking Limited was merely engaged in a Reorganizational

Structure. Moreover, you were reminded that your present salary would not be affected at this time.

Notwithstanding my explanation, you informed me that your lawyer advised that you were made redundant and as a result, you are no longer employed at Expert Customs Broking Limited. You further informed that your lawyer stated that Expert Customs Broking Limited is now duty bound to compensate you accordingly.

You were requested to address your concerns to me in writing to which you responded that there is nothing to write as you were already fired and that you would like to know when you can expect your redundancy compensation. You were further reminded that you were not fired. **You again repeated that you cannot and will not work under the conditions as set out in my letter to you. You were informed that if that is your decision then you ought to proceed accordingly.** Our meeting concluded at approximately 10:15 am and you left my office.

At approximately 11:00 am on the referenced date, Ms. Martinborough met with me to discuss a business matter and upon completion, I asked if you were still in the office. Ms. Martinborough informed that you had left the office at approximately 10:30 am.

Your actions therefore confirmed your assertions that you were not prepared to work under the conditions relative to our Reorganizational Structure. Furthermore, your actions seriously compromised our operations as the assignments that you were mandated to fulfill at that time were not able to be completed so as to meet the requirements of our clients. This negatively impacted our operations which undoubtedly resulted in loss of time, revenue and a possible tarnished reputation.

Ms. Martinborough was asked to provide a written account of her interaction with you at the time of your departure. A copy of which is enclosed for ease of reference.

At approximately 12:30 pm you were observed on the premises. I invited you into my office and asked why were you back at the office. You advised that you work here. **I reminded you that earlier in the day you informed me that you cannot and will not work under the conditions relative to our Reorganizational Structure.**

At approximately 2:00 pm I returned a Telephone call to Ms. Tasha Rolle, an employee at the Department of Labour at Freeport Grand Bahama. Ms. Rolle advised that her call to me was to address a complaint against Expert Customs broking Limited which was raised by a female who gave her name as Stacey Culmer. Ms. Rolle indicted that you alleged that your position was made redundant and that you were further concerned that your salary would be decreased. She further stated that upon perusal of my letter to you, she advised that you were not fired or made redundant and recommended that you go back to your job. It is therefore against this backdrop that you perhaps sought to heed the advice of Ms. Rolle and thought that you should attempt to right the ship.

In conclusion, you clearly stated numerous times during November 9, 2015 that you cannot and will not work under the conditions as stated in my letter to you relative to the subject. In fact, you clearly confirmed your intent by leaving your place of employment due to the fact that you were not prepared to work under such conditions.

As a result of your actions, Expert Customs Broking Limited has adopted the position that, you terminated your employment at Expert Customs Broking Limited effective November 9, 2015. Therefore, your presence at the premises of Expert Customs Broking Limited other than for business, or upon invitation, shall be deemed to be trespassing. Further, where trespassing has been determined, Expert Customs Broking Limited shall address same accordingly.

Managing Director

c.c: Francillion Martinborough

Assistant Manager"

d. Letter from Assistant Manager to Managing Director of Defendant dated November 11, 2015

"November 11, 2015

Mr. Anthony Adderley

Managing Director

Re: Stacey Culmer-Customs Broker

This refers to your letter dated November 10th, 2015 which relates to the caption.

Please note that on Monday November 9th 2015, Mrs. Culmer contacted me via my cell phone at 8:53am and said that she have an emergency and that she would be in later.

Apparently Mrs. Culmer returned to the office during the period when I was away on company business.

Later in the morning around 10:30am Ms. Culmer stopped by my office and told me that she is leaving because her position was made redundant and she will not be working under those conditions. She further stated that she will drop off the office keys later and that she will call me. Mrs. Culmer said that she was on her way to see her lawyer.

Mrs. Culmer returned again around 12:30pm and stopped by the kitchen where I was having lunch and said that she just came from the labour board and said that Mrs. Rolle is trying to reach you or Mr. Adderley. She said Mrs. Rolle is burning up Mr. Adderley's phone and he would not answer. I told her that Mr. Adderley may not have been able to receive her call as he was out of office to a meeting. Mrs. Culmer said that she told Mrs. Rolle that the reason Ms. Martinborough may not have answered was because she is probably out to lunch. Mrs. Culmer further told me that Mrs. Rolle advised her to return to work.

Francillon Martinborough

Assistant Manager

e. Letter from Plaintiff to Managing Director of Defendant dated November 13, 2015

"November 13th, 2015

Mr. Anthony Adderley

Managing Director

Expert Customs Broking Ltd.

Freeport, Grand Bahama

Dear Mr. Adderley,

In reference to your letter dated November 2nd, 2015, you stated that the position of Senior Customs Broker which I held for more than ten years was being eliminated and I would now hold the position of a Customs Broker which is a line staff position. While you said my salary would not be impacted at this time, I was never paid off for the years I held that senior position.

On Friday November 13th, 2015 I received another letter from you dated November 9th, 2015, stating that I told you that as a result of these changes I cannot and will not work under those conditions, which is **ABSOLUTELY NOT TRUE**. I also refute your claims that I said my lawyer advised me that my position was made redundant and that I am no longer employed at Expert Custom Broking Ltd. In fact, I reported to work every day since the release of your first letter dated November 2nd, 2015 as usual.

On the morning of November 9th, 2015 I contacted Ms. Francillion Martinborough, the Assistant Manager and told her I would be late due to an emergency situation. I arrived at work sometime after nine and met with you regarding the reorganizational structure. Shortly after that meeting, I took a break to seek legal advice on the matter and returned to the office before 12 noon. At no time did I ever tell you or Ms. Martinborough that I resigned and I never received a letter stating that my services were terminated, however you stated verbally and in in your letter I received on November 13th, that I am trespassing by coming to work.

As an employee for the past twenty one years I have given exceptional service to Expert Customs Broking Ltd. and since the company no longer wishes to engage my services I would like to be fully compensated for my years of service.

Respectfully,

Mrs. Stacey Culmer
Senior Customs Broker"

Findings of fact

27. After considering the evidence of the parties inclusive of each respective parties testimony and the contents of the Agreed Bundle of Documents filed September 14, 2018, these are my findings of fact.
28. There is no dispute that the Plaintiff's claim is based on an allegation of wrongful dismissal. As the Defendant in its Defence admitted the contents of the first 4 paragraphs of the Plaintiff's Affidavit, I accept that the Plaintiff is a former employee of the Defendant Company; that she was employed in the supervisory position of Senior Customs Broker; that she was responsible for ensuring that all shipments were collected, distributing items to brokers and supervising all brokers, overseeing operations with customers and brokers and that she had been in that supervisory position for the past ten years.
29. There is no dispute that the Plaintiff had been employed with the Defendant for a total of 21 years.
30. There is no dispute and I accept that by Office Memo No. 1/2015 dated November 2, 2015 and addressed to All Staff the Defendant advised the staff that effective November 9, 2015 the Defendant would be introducing new daily operational procedures; that the memo superseded all previous memos and verbal instructions; that the post of Senior Customs Broker would be eliminated upon commencement of the new procedures; that the responsibilities of the Senior Customs Broker position will be addressed by the Managing Director; that the change in staff structure will provide additional time for the Senior Broker to further assist in the preparation of entries and any other assignments determined by the Managing Director or in his absence the Assistant Manager; that the staff complement would consist of one Managing Director, one Assistant Manager/Accountant, three Customs Brokers, one accounts Clerk, one Dispatcher/Filing Clerk.
31. There is no dispute and I accept that by letter dated November 2, 2015 from the Assistant Manager of the Defendant and addressed to the Plaintiff, he advised the Plaintiff that effective November 9, 2015 the Defendant will no longer maintain the post of Senior Broker and that her new post would be that of a Customs Broker; that the functions previously performed by the Senior Broker will be ceded to the Managing Director; that

her present salary would not be impacted at that time; that they envisage that the organizational change would assist in improving their profitability and a copy of her new job description was enclosed with the said letter.

32. I also accept that on November 9, 2015 the Plaintiff met with the Managing Director in reference to the November 2, 2015 letter, that during that meeting she advised him that she was not prepared to work under the new terms of employment, that following that meeting she left the premises to seek advice from the Department of Labour, that after receiving the advice she returned to the Defendant's premises. I accept that on November 11, 2015 the Managing Director along with the Assistant Manager met with the Plaintiff whereby they advised her that she had terminated her employment on November 9, 2015 and that the Plaintiff continued to work on the Defendant premises in her employee capacity from November 9, 2015 to November 13, 2015.

Issues

33. The Plaintiff contends that the issue to be determined in this action is whether the Defendant by letter dated November 2, 2015 sought to unilaterally vary the Plaintiff's employment contract and as such the Defendant repudiated the Plaintiff's employment contract.

34. However, the Defendant contends that the issue to be determined in this action is whether it was the Plaintiff or the Defendant who repudiated the Plaintiff's contract of employment as a Customs Broker.

35. While both parties have provided the Court with the issues which they deem are to be determined in this action, having made my findings of fact above, as I see it the issues for determination by this Court in this action are whether the Defendant by letter dated November 2, 2015 addressed to the Plaintiff and effective November 9, 2015 terminated the Plaintiff's employment or whether the Plaintiff by her actions on November 9, 2015 repudiated her contract of employment with the Defendant.

Submissions

36. Counsel for the Plaintiff, Mr. James Thompson relies on the Plaintiff's Skeleton Arguments filed September 19, 2018 and the Plaintiff's Closing Submissions filed November 19, 2018. Mr. Thompson submits in part that the Defendant sought to unilaterally vary and alter the

terms of the Plaintiff's employment. He submits that it is not disputed that the Defendant employed the Plaintiff as a Senior Customs Broker and by itself decided to employ the Plaintiff as a Customs Broker and thereby whatever legal difference a Senior Customs Broker would have received, she would no longer receive. Further, that the Plaintiff no longer having managerial duties meant that the Plaintiff would not be entitled to the legal benefits available under the Employment Act applicable to those in senior management and that this amounted to an alternative of the terms of employment by the Defendant without the Plaintiff's consent. He also submits that the Defendant by variation terminated the contract to employ the Plaintiff as a Senior Customs Broker and as such was wrongful as the Plaintiff did not consent and is entitled to damages for the breach of contract. In response to the Defendant's Closing Submissions, Mr. Thompson also contends that the legal argument in this case is not the distinction of warranties and conditions of contract but is whether one party to a contract can unilaterally vary the terms of a contract.

37. Counsel for the Defendant, Mr. Harvey Tynes, QC relies on the Defendant's Closing Submissions filed November 2, 2018. Mr. Tynes, QC in assessing the instant case notes that in this action the Plaintiff claims damages for wrongful dismissal from her employment by the Defendant as a Senior Customs Broker and that the Defendant denies that it terminated her contract of employment and that by letter dated November 6, 2015 the Defendant informed the Plaintiff of organizational changes whereupon the Plaintiff informed the Defendant that she was not prepared to work under the new conditions. It is his submission that in this case the Plaintiff alleges that the Defendant repudiated her contract of employment and the Defendant alleges that it was the Plaintiff who repudiated her contract of employment with the Defendant. Therefore, he submits that the primary issue to be determined by the Court is who repudiated the Plaintiff's contract of employment as a Customs Broker.

38. Mr. Tynes, QC provides in his submissions the law as to the classification of the terms of a contract. He states that they are classified as being either conditions which is a term of the contract which is essential to the contract and warranties which are terms that are subsidiary or collateral. Further, that a breach of a condition is regarded as a repudiation of the contract by the party who commits the breach and such breach entitles the innocent party to treat himself as discharged from further performance under the contract or treat

the contract as still binding and claim damages from the party who commits the breach. However, a breach of a warranty does not entitle the innocent party to treat himself as discharged from further performance under the contract but to claim damages only. He refers the Court to the cases of **Poussard v Spiers (1876)** 1 QBD 410 and **Bettini v Gye (1876)** 1 QBD 183 to demonstrate the difference between a warranty and condition. In **Poussard v Spiers (supra)** a singer was hired to perform during the entire run of an operatta but the singer did not arrive until one week of the run, when a substitute had been taken on. The Court found that the singer's obligation to appear as from the first night was a condition, the breach of which entitled the show's producer to dispense with her services. However, in **Bettini v Gye (supra)** a singer was hired to perform during an entire season, had agreed to arrive six days in advance of the first night for rehearsals but was three days late. The Court determined that the clause relating to rehearsals was not central to the main purpose of the contract and was regarded as a condition. Therefore, the singer's breach of the clause relating to the rehearsals did not allow the producer to treat the contract as repudiated but only to recover damages for whatever loss hadv been suffered.

39. Mr. Tynes, QC also identified to what he says are the facts that are not in dispute. These facts are:-

- a. That prior to November, 2015 the Plaintiff had been employed with the Defendant as a Senior Customs Broker for some twenty years;
- b. That on November 2, 2015, the Defendant's Managing Director wrote a letter to the Plaintiff under the caption "Reorganizational Structure" containing the advice found at paragraphs 2 to 5;
- c. That the Plaintiff admitted in cross-examination that after receiving the letter she told the Managing Director on several occasions that she was not prepared to work under "the new terms of employment" (para 6 of Plaintiff Witness Statement; page 13, lines 20 to 32 of Transcript dated September 19, 2018);
- d. That the Plaintiff admitted that she then left the premises where she was employed; she did not have permission to leave; nor did she tell anyone she was leaving. That she further admitted that she proceeded to the Department of Labour

and that upon her return sometime later she was told by the Managing Director that she no longer worked there and that she was trespassing (Transcript dated September 19, 2018, page 16, lines 12 to 21).

- e. That the Plaintiff admitted that before receiving the letter dated November 2, 2015 her duties as Senior Customs Broker included the completion of forms on behalf of customers and in addition as a "Senior Broker" she assisted other Brokers in completing forms (Transcript dated September 19, 2018 page 16, lines 26 to page 17 line 1).
 - f. That on the evidence adduced at the trial, the function of assisting other brokers was the limited extent of the Plaintiff's "supervisory duties" as a Senior Broker and that she led no other evidence of duties which she performed as a "Supervisor".
 - g. That the Plaintiff accepted the suggestion of Counsel that to the extent some of her former duties would be carried out by the Managing Director she was being required to do less work and if the Plaintiff was not required to complete additional forms after "ceding" those duties to the Managing Director she would be doing less work for the same pay (Transcript dated September 19, 2018, page 8 lines 2 to 12).
 - h. That she also admitted that her complaint had nothing to do with the fact that she would no longer be called "Senior Customs Broker." (Transcript dated September 19, 2018, page 9 lines 14 to 17).
40. He submits that on the evidence before the Court the Plaintiff has failed to identify a "condition" of her contract which was breached by the Defendant thereby giving her the right to treat herself as discharged from further performance of her obligations under the contract. Further, that on the evidence before the Court, the Plaintiff failed to identify a "warranty" of her contract which was breached by the Defendant thereby giving her the right to claim damages against the Defendant. However, he submits that the Plaintiff repeatedly telling the Managing Director that she was no longer prepared to work under the "new conditions", then leaving the premises without permission, without indicating why she was leaving or where she was going, the Plaintiff repudiated the contract in its entirety. **See Pepper v Webb (supra)**. Additionally, he asserts that such repudiation on

the part of the Plaintiff entitled the Defendant to treat itself as discharged from further performance under the contract. It is his submission that the Defendant accepted the Plaintiff's repudiation and informed the Plaintiff that the Defendant regarded itself as discharged from further performance upon the Plaintiff's return from the Department of Labour by indicating to the Plaintiff that the Defendant regarded the Plaintiff as a person who no longer worked for the Defendant and as a trespasser. Therefore, he submits that the Defendant lawfully brought the Plaintiff's contract of employment to an end.

Analysis and Conclusions

The Law

41. The Plaintiff in her Statement of Claim alleges that her claim against the Defendant is for its summary dismissal of the Plaintiff without notice and damages for wrongful dismissal. The Defendant has contended that the basis of the Plaintiff's claim is who repudiated the contract of employment first and as submitted by Counsel for the Defendant, he asserts that it was the Plaintiff.
42. The employer-employee relationship is governed by the simple principles of contract law. There must first be an offer which is given by the employer and acceptance of that offer by the employee (followed to by consideration, intention to create legal relations). Once a contract of employment has been formed, the employers and employees have their respective obligations to one another such as an employee's duty to act in good faith, to obey the lawful instructions of and to serve his/her employer faithfully and an employer's duty is to pay remuneration and provide a safe working environment, to name a few. However, as with any other contract, contracts of employment may have a fixed term for termination included in the contract or may be discharged by performance, mutual agreement, impossibility of performance or by the death of either the employer or employee. **See Halsburys 4th Edition, Volume 16. Employment, para 572.** There are instances whereby an employee can breach a contract which includes an employee absenting himself/herself from work without just cause or excuse, leaving his employment without just cause or excuse before the expiration of the agreed term or without giving due notice; where the employee wrongfully repudiates the contract, refusing to be bound by it in the future; it is immaterial whether his repudiation is express or implied from his conduct, provided his intention to repudiate is clear. **See Halsbury's 4th Edition,**

Volume 16. Employment, para 579. An employer however commits a breach of contract if he wrongfully dismisses an employee before the expiration of the term for which he is employed and it must be shown that the employee must have been employed for a period fixed or determinable upon notice and dismissed before the expiration of the period or without the requisite notice and his dismissal must have been wrongful, without just cause or excuse on the part of the employer. **See Halsburys 4th Edition, Volume 16. Employment, para 649**

43. In **Marriott v. Oxford and District Co-Operative Society Ltd. (No. 2) [1969] 3 WLR 984** the Court considered whether a statement in a letter dated January 24, 1967 to the Appellant that the Respondents were not going to abide by an essential term of the contract as to wages and status and was, on its true construction, a termination of the contract of employment by the respondents within section 3 (1) (a) of the *Redundancy Payments Act, 1965* Act. The brief facts of the case are that the appellant, William Gerald Marriott, had been employed since 1959 as an electrical supervisor by the respondents, Oxford and District Co-operative Society Ltd. On January 24, 1967, the respondents informed the appellant by letter that his salary and status would be reduced from January 30. The appellant protested, but continued to work for the respondents for some weeks. He applied to the industrial tribunal for a redundancy payment. In a decision given in London on June 29, 1967, the tribunal found that the January letter was a termination of the contract of employment within section 3 (1) (a) of the *Redundancy Payments Act, 1965*, but that he was not entitled to a redundancy payment because in the letter the respondents had made an offer to re-engage him within section 3 (2) (b) of the Act. The Divisional Court (Lord Parker C.J., Widgery and Chapman JJ.) reversed that decision on December 6, 1967 (1967) 3 K.I.R. 620 (from which there was no appeal), holding that an "offer in writing" under section 3 (2) (b) was not sufficient unless it contained all the particulars specified in section 2 (4), and remitted the case to the tribunal to decide whether there had been a variation or a rescission of the contract of employment. The tribunal, in their decision of April 8, 1968, found that there had been a consensual variation, that the contract of employment had not been terminated and that the appellant was not entitled to a redundancy payment. The appellant's appeal from that decision was dismissed by the Divisional Court (Lord Parker C.J., Ashworth and Willis JJ.) on December 4, 1968 [1969] 1 W.L.R. 254, which held that it could not be said that the tribunal were

wrong in concluding that there had been a consensual variation and not a termination of the contract of employment. The Court on the appeal determined that the appellant had never agreed to the new terms and was entitled to a redundancy payment. Further Lord Denning, M.R. at page 987 recounted the contents of the second letter sent to the Appellant by the Respondents and found that that letter was not an offer but a dictation to him of the terms on which he was to work, it gave him no option. Further he states in contemplating whether the appellant was entitled to redundancy payment pursuant to Section 3(1)(a) of the Redundancy Payment Act and found :-

“Seeing that the letter was not an offer, the next question is: was it a termination of the contract of employment by the employer within the meaning of section 3 (1) (a) of the Act? I think it was. This letter in effect told the man: “We are not going to perform our existing contract with you. We are going to reduce your grading as foreman and we are going to pay you £1 a week less, whether you like it or not.” That statement was a breach of contract: see *Withers v. Reynolds* (1831) 2 B. & Ad. 882; *Hochster v. De La Tour* (1853) 2 E. & B. 678. It was what lawyers call a repudiation of the contract. It evinced an intention no longer to be bound by the contract. If Mr. Marriott had accepted the repudiation and said “I will not agree to this reduction in my wages,” [1969] 3 WLR 984 at 988 and left at the end of the week, the contract would clearly have been terminated by the employer, and he would be entitled to redundancy payment. There can be no doubt about it. Does he lose his redundancy payment simply because he stayed on for three or four weeks whilst he got another job? I think not. **He never agreed to the dictated terms. He protested against them. He submitted to them because he did not want to be out of employment. By insisting on new terms to which he never agreed, the employer did, I think, terminate the old contract of employment.** The case falls within section 3 (1) (a) of the Redundancy Payments Act, 1965. The man is entitled to redundancy payment.” (**emphasis mine**)

44. Although **Marriott v Oxford (supra)** dealt with redundancy, the principles of repudiation of a contract as elucidated by Lord Denning therein, are just as relevant or applicable to breach of a contract of employment in the instant case.

Conclusions

45. Considering my findings of fact herein and the case law above I conclude that the Defendant repudiated the Plaintiff's contract of employment by letter dated November 2, 2015, not received by her until November 6, 2015 and effective as of November 9, 2015. Moreover, the language of the letter made it explicitly known to the Plaintiff that her post of "Senior Customs Broker" was to be eliminated and that she would have a **new** post of Customs Broker. Further, a copy of her **new** job description was enclosed with the same letter (**emphasis mine**). The evidence of the Defendant was that the Plaintiff received this letter on November 6, 2015 (which incidentally was a Friday) and on November 9, 2015 the Plaintiff met with the Managing Director to state that she could not work under the new terms. Additionally, the evidence of the Managing Director of the Defendant during cross-examination was also that if she did not like the new terms she could leave. This evidence to my mind, shows that by penning the letter dated November 2, 2015 addressed to the Plaintiff, the Defendant not only varied but ended the Plaintiff's contract as a Senior Customs Broker to become effective on November 9, 2015 and advised her that her new position was that of Customs Broker. Similar to **Marriott v Oxford**, the Plaintiff's "status" in the instant case was to be changed, from that of a Senior Customs Broker to a Customs Broker, a change that could have negatively impacted her remuneration at some future date which from her evidence was of great concern. While the evidence of the Defendant was that "her present salary would not be impacted **at this time**" the Plaintiff's evidence and I accept that her concern was that such a change in remuneration would occur later. Given the reason indicated by the Defendant in its letter to the Plaintiff dated November 2, 2015 the purpose of the reorganization was a result of the stagnant economy of Grand Bahama and it was done as a means to improve the Company's profitability. It is therefore not difficult to conclude or understand the Plaintiff's concern regarding the "new terms" in the said letter. Ultimately, any contract requires that there must be an offer and an acceptance and I find in the circumstances that the November 2, 2015 letter was not an offer by the Defendant to vary the Plaintiff's contract of employment, but it was a dictation of the new terms under which she was to work.
46. Mr. Tynes, QC's contention is that the Plaintiff has failed to identify a condition or warranty of her contract that was breached by the Defendant that gave her the right to treat herself

as discharged from further performance of her obligations under the contract and give her the right to claim damages against the Defendant. However, the evidence before the Court was that the Plaintiff objected to the Defendant changing the terms of her employment, removing her from supervisory to line staff and querying if such a change would affect her salary later on. Therefore, the Plaintiff's statement that she could not work under the new terms of employment cannot in the circumstances be construed in the way in which Mr. Tynes, QC submits was clearly demonstrated in the cases of **Bettini v Gye** and **Poussard v Spiers**. Mr. Tynes, QC's contention completely ignores the contents and effect of the November 2, 2015 letter to the Plaintiff. Further there is no clear evidence that Plaintiff absenting herself from the job for any appreciable period of time had a detrimental financial impact on the Defendant company as alleged by the Defendant in the November 9, 2015 letter. Therefore, I conclude that although the evidence of the parties was that the Plaintiff had not received the letter until November 6, 2015 the Defendant terminated the Plaintiff's employment by the letter dated November 2, 2015 to be made effective on November 9, 2015.

47. I also conclude that the letter dated November 9, 2015 by the Managing Director to be self-serving. The letter refers to the contents of the Assistant Manager's letter dated November 11, 2015 so clearly it could not have been written on November 9, 2015 the date the letter was dated. It was not disputed or challenged that the Plaintiff remained on the premises and continued to work (i.e. continue her duties as employee) for the week of November 9, 2015 to November 13, 2015 without any removal by the Defendant. To my mind, if the Defendant genuinely terminated the Plaintiff as stated in paragraph 14 of his letter dated November 9, 2015 then why would the Defendant allow her to remain on the premises and conduct business transactions on behalf of the Company without any attempt to have her removed. I also conclude that the Plaintiff's letter to the Defendant on November 13, 2015 was self-serving in an attempt to save her job despite her not agreeing to any changes which she clearly stated in her viva voce evidence and Witness Statement was the case.

48. I also conclude that notwithstanding the contents of any of the letters written subsequent to the November 2, 2015 letter, the said contents of these letters do not change the import and effect of the November 2, 2015 letter on her employment whereby the Defendant

unilaterally changed the terms of her contract of employment thereby terminating her employment.

Disposition

49. Having read the pleadings, having heard the viva voce evidence of the parties, having read the Submissions of Counsel, I therefore give Judgment for the Plaintiff for wrongful dismissal in the sum of \$26,520.00 pursuant to Section 29(1)(c) of the Employment Act calculated as follows:

- (i) Pay in lieu of Notice $\$510.00 \times 4 \text{ weeks (4 weeks)} = \$2,040.00$;
- (ii) Notice pay $\$510.00 \times 4 \text{ weeks} \times 12 \text{ years (48 weeks)} = \$24,480.00$; and
- (iii) Interest at the Statutory Rate.

Costs


50. The Plaintiff has been successful in this action. Therefore, costs usually follow the event and I see no reason to depart from that general principle. Costs are awarded in favour of the Plaintiff to be paid by the Defendant to be taxed if not agreed.

51. On one final matter that of the delay in delivering this Judgment the Court reserved the delivery of its Judgment to a date to be fixed regrettably, the disruption caused by the extensive renovation to the Garnet Levarity Justice Centre and the disruption caused by Hurricane Dorian and the Covid 19 pandemic are events which greatly interfered with the production of transcripts and the Court's writing schedule. I apologize profusely for the delay in this matter.

Stay Application

52. Counsel for the Defendant made an application for a stay of the Judgment pending an appeal however Counsel for the Plaintiff objected to the Defendant's application. The Court denied the application as no grounds were laid before the Court to ground the stay application.

Dated this 29th day of March, A.D. 2022


Petra M. Hanna-Adderley
Justice