COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 93 of 2022

B E T W E E N

BRADFORD GRAND BAHAMA LTD

Appellant

AND

BRADLEY B. LORD

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P.**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA

APPEARANCES: **Mr. Keith Major with Ms. Karen Brown, Counsel for Appellant**

The Respondent appeared Pro Se.

DATES: **15 March 2023; 17 May 2023**

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Civil appeal – Employment – Wrongful dismissal – Unfair dismissal - Termination of employment – Leave of absence refused – Employee refused to return to work – Repudiation of employment contract - Repudiatory breach of employment contract – Employee voluntarily terminating employment contract - Employer accepting repudiation of employment contract

The respondent was employed by the appellant company for 17 years. While on paid vacation leave, the respondent wrote the appellant requesting a 3 month leave of absence without pay stating "family emergency and persisting pivotal matters beyond his control" as reasons in support. A chain of emails followed. The appellant advised the respondent that his leave of absence request was denied and that he should return to work on 19 April 2021. The respondent failed to return to work on 19 April 2021. The appellant then advised the respondent that failure to attend work on the 26 April 2021 would be construed as voluntarily termination of his employment contract. The respondent failed to attend work on the said date and was terminated.

The responded reported a trade dispute with the Minister of Labour. As the dispute could not be resolved the matter was referred to the Industrial Tribunal. The Tribunal found that the respondent was wrongfully and unfairly dismissed and awarded damages to the respondent. The appellant now appeals that decision.

Held: Appeal allowed. The decision, together with the awards of the Vice President are quash and set aside.

per Barnett, P: An employee who fails to report to work as required, and notwithstanding the expressed instructions of his employer to do so, commits a repudiatory breach of his employment contract which, if accepted by his employer, terminates the employment contract.

The respondent's termination was neither wrongful nor unfair.

London Transport Executive v Clarke [1981] ICR 355 considered

per Crane-Scott JA: Having regard to the evidence and the law of repudiatory breach, the Tribunal's finding that a reasonable person, considering all the circumstances of this case, "would not conclude that the [Respondent's] words and/or conduct evinced a clear and unequivocal intention to end his employment" is plainly wrong and cannot be sustained.

Freeport Aggregates Limited v. Carlton Chatelain IndTribApp No. 166 of 2019 considered
Rodgers v. Bahamas Electricity Corporation [2000] BHS J. No. 271 mentioned

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JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an appeal by Bradford Grand Bahama Limited ("the appellant") against the decision by Honourable Helen Almorales-Jones, Vice President of the Industrial Tribunal, Northern Region awarding damages to its former employee, Bradley Lord ("the respondent") for wrongful and unfair dismissal.

2. The respondent was employed by the appellant since 21 April 2004. At the time his employment came to an end he held the position of a storeroom clerk.

3. On 25 March 2021 the respondent went on vacation. That vacation was for two weeks and he was expected to return to work on the 15 April 2021, having regards to the Easter public holidays which occurred during his vacation.

4. On 12 April 2021 the respondent made a request for a 3 month leave of absence without pay. The request was by email in the following terms:

> **"Good Afternoon Mrs. Bain, Howard,**
>
> **The attached is a request for a Leave of Absence without pay for the reasons of Family Emergency and Pressing urgent pivotal Matters.**

I will greatly appreciate your consideration of my request due to matters beyond my control.

I again apologize for any inconvenience.

Warm regards.
Bradley B. Lord"

5. The same day the appellant replied. The email in response said:

"Good afternoon Bradley,

We are requesting a reasonable explanation for the request for a leave of absence.

Are you sick, or is a family member sick, we would need better documentation to support this request as this is not is typical at Bradford Marine.

Warm regards,
Nicole Sweeting-Bain
Office Manager"

6. The respondent did not reply to that email.

7. On 15 April 2021 the appellant again wrote to the respondent. The email was in the following terms:

"Good morning Bradley,

We did expect you back to work today as your vacation has ended.

The leave of absence request has not been approved and we have not received any additional information from you as requested below.

Please be advised we expect your return to work tomorrow.

Warm regards,
Nicole Sweeting-Bain
Office Manager"

8. The respondent then replied on the same day as follows:

"Good Day Mrs. Bain,

Apologies.
Just seeing this email. In regards to the request, it is a family private matter.
A temporary leave beyond my control.

Regards and Blessings"

9. The appellant replied:

"Good afternoon Bradley,

Thank you for the email. Please be advised as noted in our conversation the form has not been approved.

We expect to see you at work tomorrow.

Warm regards,
Nicole Sweeting-Bain
Office Manager"

10. The respondent replied on the 16 April 2021. He said:

"Good Morning Mrs. Bain,

As per my submission, I am still not able to make it in to work at this time due to matters beyond my control, and I am presently not on the island.

Warm Regards"

11. The appellant replied the same day in the following terms:

"Good morning Bradley,
As previously noted in my email, please be advised today is the second day of not showing up to work. Your return date to work was April, 15, 2021. We will expect to see you work on Monday, April 19, 2021.

Warm regards,
Nicole Sweeting-Bain
Office Manager"

12. The respondent replied on the same day and said:

> **"Mrs. Bain,**
>
> **As it relates to (sic) return date as per our discussion. There were two paid holidays that landed within my vacation period.**
> **1. Good Friday, April 2nd**
> **2. Easter Monday, April 5th**
>
> **My initial Vacation Period was from March 24th to March 14th (being the last vacation day). But due to the 2 Holidays that fell in my vacation cycle, as a traditional regular practice, it would have extended 2 days, rendering my return date to Monday, April 19th.**
>
> **Notwithstanding my submission for vital temporary Leave."**

13. On 19 April 2021 the respondent wrote to the appellant as follows:

> **"Good Morning Nicole /Howard,**
>
> **As per documented Temporary Leave submission, submitted April 12th, 2021, I am unable to make it to work at this time due to matters beyond my control.**
> **Warm Regards"**

14. The appellant replied by email on 20 April 2021 and said:

> **"Good morning Bradley,**
>
> **As previously noted in the email (attached for your reference) on April 15, 2021 at 11:45 am, I advised you, your request for leave of absence <u>was not</u> approved. And again on April 16, 2021 at 10:30 am you were advised the leave of absence <u>was not</u> approved.**
>
> **Your vacation time end (sic) April 18, 2021, and your return to work was expected on Monday, April 19, 2021. As of today, Tuesday, April 20, 2021 you still have not reported to work. Therefore, you have been officially off for two days with a none (sic) excused absent from work.**
>
> **We will see you to work tomorrow, Wednesday, April 20, 2021.**

Warm regards,
Nicole Sweeting-Bain
Office Manager" [Emphasis added]

15. On Friday, 23 April 2021 a flurry of emails were exchanged. At 10:04 am the appellant wrote:

> **"Good morning Bradley,**
>
> **Notwithstanding your approved vacation leave having ended on April 16, 2021, you failed and refused to return to work as scheduled on April 19, 2021; and to-date you continue to absent yourself from work, without excuse or approval.**
>
> **As previously indicated to you on April 15, 2021, the Company has not approved your request for a leave of absence and you were required to return to work with effect from April 19, 2021.**
>
> **Should you not return to work by Monday, 26 April 2021, the Company shall consider that by such refusal, you have terminated your contract of employment with the Company.**
>
> **Warm regards,**
> **Nicole Sweeting-Bain**
> **Office Manager"**

16. Then the respondent replied at 2:14pm on the same date and said:

> **"Good Afternoon Mrs. Bain,**
>
> **I gave an explanation as to my absence along with the temp absence form submission and stayed in contact.**
>
> **I would never intentionally refuse to show to work as I value my employment and company, and respect company policies. But I gave explanation that it was reasons beyond my control.**
>
> **I would never intend to deliberately jeopardize my employment, especially being a long time employee, employed with the company for at least 17 years since 2004 and I am the sole provider of my family, whom are struggling financially and in a very rough place right**

now due to circumstances. Despite lack of sustainability, it is the only income I have to support my family and I would never intentionally jeopardize that.

Again, apologies, per reasons beyond my control"

17. Later, on the same date the appellant replied at 3:29pm in the following terms:

"Good afternoon Bradley,

The Company empathizes with you and your family during the circumstances referenced in your email below. However, as stated, should you not return to work by <u>Monday, 26 April 2021,</u> the Company shall consider that you have terminated your contract of employment with the Company.

We trust that you will govern yourself accordingly.

Warm regards,
Nicole Sweeting-Bain
Office Manager" [Emphasis added]

18. On Monday, 26 April 2021 at 7:32 am the respondent wrote to the appellant and stated:

"Good Morning,

As per circumstances beyond my control, I am still not able to make it to work at this time.
Apologies.

Warm Regards, and Have a Blessed Day.

Bradley B Lord."

19. The appellant the replied at 10:00am on 26 April 2021 and said:

"Dear Bradley

As per our email of April 23, 2021, the Company now considers that you have voluntarily terminated your contract of employment with the Company by your persistent failure and / or refusal to report to work.

We wish you every success in your future endeavours.

Warm regards,
Nicole Sweeting-Bain
Office Manager"

20. On 16 May 2021 the respondent reported a trade dispute to the Minister pursuant to section 68 of the Industrial Relations Act. The dispute was not resolved and the Minister referred the dispute to the Tribunal.

21. The Originating Application was filed on 3 September 2021. It said:

> **"Grounds for my application is unfair dismissal due to emergency leave of absence. While on vacation I submitted an emergency leave of absence, which is granted according to company employer per contractual policy. I was denied this even after explaining the situation. I notified and called in daily to work on my days of absence. Until one day I received a notification of termination from the company. I was given no compensation or severance for years of employment for 17 years. I was never given an official document of a terminated contract or official contract status of termination, but was just sent an email from office administration stating my employment and contract was terminated"**

22. The appellant filed a Defence. It said:

> **"On or about 12 April 2021, the Applicant submitted a request for three (3) months unpaid leave of absence, citing "family Emergency and pressing urgent pivotal matters" as the reason for his request. On or about 15 April 2021, the Respondent informed the Applicant that his request was not approved and that the Applicant was expected to return to work on 15 April 2021. After numerous directions from the Respondent, that the Applicant return to work and the Applicant's persistent refusal to return to work, on 23 April 2021, the Respondent informed the Applicant that should the Applicant not return to work on 26 April 2021, the Respondent would consider the Applicant's refusal/ failure to attend at work, a voluntary termination of employment by the Applicant. On 26 April 2021, the**

Applicant failed / refused to attend at his place of work, thereby terminating his contract of employment. The Respondent accepted such termination by the Applicant."

23. The matter was heard by the Tribunal.

24. On 26 May 2022 the Vice-President gave her Ruling. She ruled as follows:

"169. The Tribunal found that the Respondent did not meet its burden under Section 33 of The E.A. and the Applicant has proved, on a balance of probabilities, that the Respondent wrongfully and unfairly dismissed him.

170. The Applicant held a line staff position and is therefore entitled to $ 10,849.80 as compensation for Wrongful Dismissal [pursuant to Section 29(2)(b)(i) and (ii) of The E.A.], calculated as follows:-

2 weeks' basic pay for Notice pay:
Salary: $ 13.91 per hour x 30 hours per week: $ 417.30 per week

$ 417.30 per week x 2 weeks) = $ 834.60; plus

2 weeks' basic pay for each year of service, for a maximum of 24 weeks (12 years):

$417.30 x 24 weeks = $ 10,015.20.

171. He is entitled to $ 21,282.30 as compensation for Unfair Dismissal [pursuant to Section 46 of The E.A.], calculated as follows:-

3 week's basic pay for each completed year of service, Reckoning backwards from the date the Applicant was terminated (26 April, 2021) up to the date his employment commenced (21st April, 2004) for a maximum of 18 months' pay:

17 years of service x $ 1,251.90 ($ 417.30 x 3 weeks) = $ 21,282.30.

> **172. To avoid duplicity, the Tribunal cannot award the Applicant compensation for both his claim for Wrongful and Unfair Dismissal. It would ordinarily award an employee the greater sum, in this case the entitlement for award for $ 21,282.30. However, the Tribunal agrees with the Respondent's submission that the Applicant's conduct, namely his failure to articulate what was the "Family Emergency and Pressing urgent pivotal Matters" that grounded his request for 3 months unpaid leave, contributed to the Respondent's decision to terminate his services.**
>
> **173. The Tribunal therefore exercises its discretion under Section 58 of The L.R.A. to remit 30% of the Applicant's entitlement for Unfair Dismissal to account for his contribution to his dismissal and awards him the sum of 14,897.61 as compensation for Unfair Dismissal, plus interest on the award at the rate of 6% per annum, commencing from the date of judgment until the award is paid in full."**

25. The appellant has appealed that decision. The Notice of Appeal contains a plethora of grounds, but in our judgment the appeal can be determined on ground 5. That ground is:

> **"5. The Learned Vice-President, ….. erred in law and in fact in arriving at the determination that the Respondent was both wrongfully and unfairly dismissed, which represents a determination that a reasonable Tribunal properly applying the law and considering the facts would not have made;"**

26. In our judgment, the Tribunal clearly erred in law when it found that the respondent was wrongly or unfairly dismissed.

27. The facts are not disputed. The respondent went on vacation. As his vacation was coming to an end, he requested 3 months unpaid leave. He was asked to give a reason for the request. His replies were contemptuous of his employer. He simply said "**a private family mater**". When asked to give more specifics he refused to do so. He was told that his request for leave was refused and that he must return to work. He refused to do so. The appellant then told the respondent that it "**considers that you have voluntarily terminated your contract of employment with the Company by your persistent failure and/or refusal to report to work**"

28. The appellant gave the respondent ample opportunity to explain why he was unable to report to work. He simply refused to give a reason which could be regarded as acceptable to any employer. The respondent was obliged to report to work at the end of his vacation. He was not entitled to any leave, paid or unpaid, either by contract or by any statutory right.

29. An employee who fails to report to work as required and notwithstanding the expressed instructions of his employer to do so, commits a repudiatory breach of his employment contract, which if accepted by his employer, terminates the employment contract.

30. This issue with a similar fact situation was considered by the English Court of Appeal in **London Transport Executive v Clarke** [1981] ICR 355. The facts of the case are summarised from the headnote:

> **The plaintiff sought permission form his employers to take 6 weeks unpaid leave in order to go to Jamaica on family business. The defendant refused the plaintiff's request for leave and the plaintiff, alleging that the refusal was due to racial discrimination, went to Jamaica where he stayed for seven weeks. In the plaintiff's absence, the defendant wrote to the plaintiff requesting an explanation for his absence and stating that if he did not reply they would assume that he no longer wished to be employed by the defendant. The defendant subsequently wrote to the plaintiff informing him that his name had been removed from their books. On his return from Jamaica the plaintiff produced a medical certificate issued in Jamaica covering the period of his absence from work. His application to get his job back was refused. The plaintiff then commenced an action and claimed unfair dismissal. The Employment Tribunal upheld the claim for unfair dismissal. London Transport appealed to the Court of Appeal. London Transport argued that the plaintiff, by not turning to work resigned his job. The Court of Appeal disagreed. It held that if an employee breaks his contract, the employer has two options. He can either accept the breach and treat the contract as being at and end, or refuse to do so and treat the contract as still subsisting. If he accepts the breach, the employer terminates the contract. The Court held that in that case that the plaintiff had been dismissed and had not resigned. But the Court of Appeal went on to say that in all the circumstances of the case the Tribunal's finding that the employers should have waited until the**

employee returned from Jamaica so that they could interview him before reaching a decision as to whether to dismiss him, and that the dismissal was therefore unfair, was a finding which outraged common sense and was one which no reasonable tribunal could have reached. Accordingly, the Court of Appeal held that the employers has acted reasonably in treating the employee's conduct as sufficient reason for dismissing him.

31. In the circumstances, we are satisfied that this appeal should be allowed and the Tribunal's finding that the respondent was wrongfully and unfairly dismissed must be set aside. The respondent is the author of his own misfortune. His response to the request for reasons why he could not return to work were completely unacceptable. He did not claim that he or any member of his family was sick. He simply said that he could not return to work "**for reasons beyond his control**". He provided nothing that said what those reasons were. In my judgment, no reasonable employer can be criticized for accepting the repudiatory breach by the respondent of his employment contract and terminating the employment. The termination was neither wrongful nor unfair.

32. The appeal is allowed and the decision of the learned Vice-President is set aside. As this is an appeal from the Industrial Tribunal there is no order as to costs.

The Honourable Sir Michael Barnett, P

33. I agree.

The Honourable Mr. Justice Jones, JA

Concurring judgment delivered by The Honourable Madam Justice Crane-Scott, JA

34. I have read in draft the Judgment prepared by the President with which I completely agree. I however wish to add the following observations in further support of the decision we have taken, which is to allow the appeal, quash the Tribunal's decision together with the awards made, and further, to dismiss the respondent's claims for wrongful and unfair dismissal.

35. At its core, the trade dispute between the appellant and the respondent in this case centered on the question as to how the respondent's employment came to an end. That question

involved a pure finding of fact by the Vice-President to be made against the background of the evidence and the prevailing law.

36. On the one hand, the respondent claimed that his employment was terminated by the appellant who had wrongfully/unfairly dismissed him on 26 April 2021.

37. On the other hand, in its amended Defence, the appellant raised two alternative defences. Firstly, the appellant said that based on the "deemed resignation" clause in Clause 6 of the Employee Handbook and its email of 26 April 2021, it had accepted (as it had a right to do) the respondent's repudiation of his employment contract when he failed to report for work for 3 consecutive days. Alternatively, the appellant claimed that the respondent's employment ended when they summarily dismissed him in accordance with the Employment Act.

38. It is not uncommon for deemed "voluntary resignation/retirement/termination clauses" or "deemed job abandonment clauses" such as the one at Clause 6 of the appellant's Handbook to be included in an employee's contract of employment, or in an Employee Handbook and even in an Industrial Agreement. See for example **Rodgers v. Bahamas Electricity Corporation** [2000] BHS J. No. 271, where a similar provision was contained in an Industrial Agreement.

39. As this Court (differently constituted) said in **Freeport Aggregates Limited v. Carlton Chatelain** IndTribApp. No. 166 of 2019, properly understood, such a provision may enable an employer, in the appropriate circumstances, to treat the employee's unexplained absence from work as a repudiation of the employment contract enabling the employer to "recognize" or "accept" the absence from work as the employee's voluntary resignation, retirement or job abandonment as the case may be.

40. However, whether such a provision or clause can be relied upon by the employer in any given case, requires a finding of fact by the court based on the evidence before it as to whether the provision formed part of the relevant contract of employment or Industrial Agreement as the case may be, or whether the employee was otherwise made aware of the relevant Handbook.

41. At paragraph 120 of her written Decision, the learned Vice-President found that the respondent could not use Clause 6 of the Employee Handbook to deem the respondent's absence from work for 3 consecutive days a voluntary resignation of the employment contract because:

> **"[120]… it did not prove that it gave the Respondent a copy of the Handbook; the Handbook expressly stated that it did not constitute and employment contract; and the Respondent gave his Supervisor proper notification of his absence from work for over 3 consecutive days and over 4 calendar days**."

42. While the Tribunal was entitled to make this finding of fact, the repudiatory breach issue did not end there. This is because the evidence before the Tribunal strongly established that the respondent had repudiated his own employment contract and that the repudiation had been accepted by the appellant.

43. As our judgment amply demonstrates, the law is that even in the absence of such a provision, the evidence in a given case may establish that an employee has repudiated his employment contract by, for example, absenting himself from work notwithstanding his employer's express instructions to him to report to work and in circumstances where the repudiatory breach by the employee can be accepted by the employer as having brought the contract to an end. In such circumstances, the employee cannot be found to have been wrongfully or unfairly dismissed, but ought instead, to have been found to have terminated his own employment.

44. The email thread reproduced between paragraphs 4 through 19 above clearly demonstrated that despite the initial stand-off between them which occurred between 12 April 2021 and 26 April 2021, the appellant acted unambiguously on 23 April 2021 by giving the respondent a final deadline by which he was required to report for work. In this regard, the evidence showed that the respondent was explicitly informed that should he "**not return to work by Monday, 26 April 2021, the Company shall consider that you have terminated your contract of employment with the Company.**" [See paragraph 15 above]

45. As appears from its final email to the respondent reproduced at paragraph 19 above, on 26 April 2021, immediately following the respondent's email notification that he would once again not be able to report to work that day as directed, the appellant (as it was now lawfully entitled to do) promptly accepted the respondent's repudiatory breach and treated the contract as having been voluntarily terminated by him with effect from 26 April 2021.

46. In the face of the foregoing evidence and the law of repudiatory breach, the Tribunal's finding at paragraph 121 that a reasonable person considering all the circumstances of this case, "**would not conclude that the [Respondent's] words and/or conduct evinced a clear and unequivocal intention to end his employment**" is plainly wrong and cannot be sustained.

47. It is for all these reasons that I agree with the President that this appeal must be allowed and the Tribunal's decision quashed in its entirety.

The Honourable Madam Justice Crane-Scott, JA