BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 4 of 2006

BETWEEN:

BARBADOS FARMS LTD. **APPELLANTS**

CASTLE FARMS LTD.

PATRICK ALLEN

AND

ISILMA SCANTLEBURY **RESPONDENT**

BEFORE: The Honourable Frederick L.A. Waterman, The Honourable Sherman R.Moore, Justices of Appeal, and The Honourable W. LeRoy Inniss, Justice ofAppeal (ag.)

2006: October 25

2007: April 25

Mr. Mitchell D. Codrington, inassociation with Miss Traece Codrington for the Appellants.

Mr. Steve Gollop for theRespondent.

DECISION

Introduction

WATERMAN, J.A.: This appeal is from adecision made by the Severance Payments Tribunal on 1 March 2006 in which the Tribunalawarded the respondent $22,541.90 as severance under the Severance Payment Act(Cap 355A) (the Act). The ground of her application to the Tribunal for aseverance payment was that her services as a maid were no longer required. From the decision the appellants haveappealed to the Court of Appeal on the grounds that (a) the Tribunal was wrongin law and came to the wrong conclusion when it misdirected itself as to thefacts and the relevant law; and (b) the Tribunal took into account irrelevantconsiderations in reaching its decision.

The Facts

[2] Therespondent was employed by the appellant, Castle Farms Ltd. from 3 March 1975 in the capacityof casual labourer. Castle Farms Ltd. isthe parent company of Barbados Farms Ltd. At the material time the third appellant, Patrick Allen, was the managerof Castle Farms Ltd. and lived in the Farm House with his wife and son.

[3] Therespondent, during the course of her employment, was classified as an “A” classworker. As such her duties includedplanting sugar cane, fertilizing crops, weeding and selling vegetables in theplantation yard. In the plantation settingit was customary for a selected female “A” class worker to be transferred fromthe field to the manager’s house to perform the functions of maid. The respondent was transferred from herposition as an ‘A’ class worker to the position of maid as a result of theillness of Mr. Allen’s maid who subsequently died. She held that position for about two yearsuntil Mr. Allen retired on 31 July 2004.

[4] Theevidence further revealed that when the manager, Mr. Allen, retired and the newmanager, Mr. Gregson Jordan, brought on his own maid to work for him, theposition of maid in the manager’s house was no longer available to therespondent. Nothing was said to therespondent by Mr. Allen before he retired and she was never re-assigned by theappellants on Mr. Allen’s retirement.

[5] Onor about 26 July 2004she sent to the plantation for her holiday pay and it was paid on her behalf toa Mr. Clarke by Mr. Coward, the Senior Supervisor Paymaster. The respondent and the appellants were awarethat holiday pay is normally paid by the plantation in December of every yearyet they paid the respondent in July. The respondent did not return to work after Mr. Allen retired.

[6] Thereis a conflict in the evidence as to whether the respondent, while performingthe functions of maid, did other duties which she would normally have performedas an “A” class worker.

The Tribunal's Reasons for Decision

[7] The Tribunal's reasons for decision were asfollows:-

"The issue is whether when Mr. Allenretired from his position as manager of the Farm and he vacated the house on the31 July 2004there was a dismissal within the meaning of the Severance Payments Act. In other words, did the departure of Mr.Allen create a situation where the position of a maid had now ceased andconsequently there was no work for the applicant in this capacity?

However that may be, to determinewhether there was a dismissal in the instant case one must look at the facts ofthe case. Miss Scantlebury was assignedto the house to perform the functions of a maid. Notwithstanding the fact that a maidperforming the only functions as a maid was paid at a lower rate than an "A" classworker is of no importance in this case for the sole reason that MissScantlebury as an "A" class worker could not be expected to receive a lower payand in fact was paid the higher wage.

Her period of assignment as a maid wasfor approximately two years when Mr. Allen retired. The applicant was paid her full wages and wasgiven her vacation pay. This was the endof July and the evidence shows that vacation is normally taken inDecember. Could there not be areasonable inference that since Mr. Allen had retired and that Mr. Jordan hadbrought on his maid that there was a severance of the applicant from herposition or a dismissal therefrom?

In the instant case, when the positionof the maid was no longer available no offer was made to the applicant. Nothing was said to her at all.

To avoid liability the employer mustsatisfy a tribunal, not beyond reasonable doubt, but on a balance ofprobabilities that the dismissal was not due to redundancy, that it was due toa non-redundancy case. It is clear thatthe onus was now on the employer to show that there was no such dismissal. But no one instructed the applicant to returnto her position and no one could show that there was a refusal of an offer ofemployment as an "A" class worker. Noone either orally or in writing advised the applicant that she should return towork and continue her position as an "A" class worker. The respondent is saying that she should havereturned to work. There was work there,but she was assigned as a maid though being paid as an "A" class worker andthat position was taken by someone else. She was not told anything. Thesilence is significant.

The respondent has not satisfied theTribunal that given the dismissal of the applicant on the 31 July 2004, which is our finding,that it has discharged the burden of showing that the dismissal was other thanfor redundancy. It is for these reasonsthat we are of the view that the applicant is entitled to a Severance Paymentfor the period of time that she has so qualified being 29 years. The award is in the sum of $22,541.90."

The Issue

[8] Theissue to be determined in this appeal is whether the respondent was dismissed andif the Court finds that she was dismissed, whether she is entitled to aseverance payment under the Act.

Submissions of Counsel

[9] Onappeal, Mr. Codrington for the appellants submitted that the respondent'semployment was never terminated. She wasnever given a notice of termination. Sherequested her holiday pay from Mr. Coward and it was paid to her. She did not return to work after 29 July 2004 and thereforerepudiated her contract.

[10] Counsel further submitted that the respondent had no contract withMr. Allen but with Castle Farms Ltd. Heremployer heard nothing from her after she left on 29 July. Counsel contended that there was noobligation for an employer to contact an employee who had simply walked off thejob.

[11] Counsel in support of his submissions sought to rely on the caseof Wardv Walcott (No. 201 of 1984 of the Barbados National Insurance Tribunal Reports:Severance Payments 1982 – 1989). In the case, the employee was hired in 1979 as a labourer and was subsequently,some two years later, asked to work during the crop season as a loader/operatorand in the out-of-crop season as a mason and handyman and tractor driver. He stated that he was dismissed in 1984 onthe ground of redundancy. However, therespondent said that this was not so; that the applicant sought holiday pay inJune 1984 and that he was told that his holiday pay was normally given inDecember, he asked for his 26th part. The respondent said that he interpreted thisaction as meaning that the applicant was terminating his employment and he senthim a cheque which the applicant cashed. It was held that an employee is only entitled to severance if he canshow that he has been dismissed; or he can bring himself within the terms ofsection 16 (1)(c) of the Severance Payments Act. In this case, the applicant could neither show that he had been dismissed northat the provisions of section 16(1), which provided that the employee isentitled to terminate his contract by reason for the employer's conduct,applied. He had not been justified inleaving his employment, and had not been dismissed. He was not eligible for severance payment.

[12] Counsel also cited the case of Boyce v Dunscombe Estates Ltd. (No.508/304 of 1989 of the Barbados National Insurance Tribunal Reports: SeverancePayments 1990 – 1993). The factsof the case were that in his application, the applicant, an agriculturallabourer who had been employed by the respondent for twelve years, stated thaton 25 February 1989the respondent's manager informed him that he had "too many people". The applicant did not return to work afterthat day. The respondent's managerstated that he did not dismiss the applicant, and that the applicant never gavehim any reason for his departure. It washeld that according to the evidence, the applicant had terminated hisemployment. He had neither beendismissed nor given notice of dismissal and therefore the employer had not repudiatedhis contract. His claim would bedismissed.

[13] Counsel for the respondent, Mr. Gollop, submitted that theTribunal made certain findings of fact that (a) the respondent's substantiveposition was that of maid and she was also required to sell vegetables on rareoccasions; (b) once Mr. Allen had retiredand Mr. Jordan had brought his

own maid there was no work for the respondent todo as maid; (c) subsequent to the respondent having received the weekly pay dueto her and her holiday pay she was told nothing by the management of theplantation; (d) accordingly, the respondent was dismissed for the purposes ofthe Act.

[14] Finally, Counsel submitted that an appellate court will notlightly set aside the decision of a lower court where that decision is basedprimarily on its assessment of the facts. Mr. Gollop relied on the well-known case of Benmax v Austin Motors Limited (1955)1 All E.R. 326.

[15] We need not, in this case, restate the well established principleof law that an appellate court will disturb a decision or finding of fact inthe court below only where there is no evidence at all or only a scintilla ofevidence to support the finding. Thismatter was dealt with by this Court in Ramsey v. St. James Hotel Services Ltd.(Magisterial Appeal No. 4 of 1999) (unreported decision of 26 June 2002) in which SirDavid Simmons CJ reiterated the principle and set out the relevantcases.

[16] After a careful consideration of the evidence in this case and theTribunal's reasons for decision we find nothing compelling us to interfere withthe Tribunal's findings of fact or the inferences drawn therefrom.

Wasthe respondent constructively dismissed?

[17] In the case before us, in order for a severance payment to bepayable, the respondent has to show that she was dismissed. The dismissal of an employee may be oral, inwriting or by conduct. In consideringwhether an employer's conduct amounted to a breach of the contract which entitledthe employee to terminate his/her employment upon the ground of constructivedismissal, the following two questions must be answered affirmatively –

1. Hasthe employer breached the contract of employment?

2. If there has been a breach of the employmentcontract, is it such a serious and deliberate breach that it amounts to arepudiation of the contract by the employer?

The Law

[18] In answering these questions, the Court must carefully scrutinisethe employer's conduct and determine whether the employer is responsible forsome conduct which objectively constitutes a fundamental change in theemployment contract or a unilateral change of a significant nature, evincing anintention on the part of the employer not to continue the employment contractupon its previous terms. Some situationswhich have been held to amount to a significant breach going to the root of thecontract are demotions, reductions in remuneration and benefits and changes instatus, power and authority of the employee. However, it is not every instance where these changes occur that leadsto constructive dismissal. The Courts must scrutinise the conduct of theemployer to determine whether it is of such a nature and degree as to satisfythe test of constructive dismissal.

[19] The dicta of Lord Denning M.R. inWestern Excavating (ECC) Ltd. v. Sharp [1978] 1 All ER 713 at 717are worth repeating here:

"Ifthe employer is guilty of conduct which is a significant breach going to theroot of the contract of employment, or which shows that the employer no longerintends to be bound by one or more of the essential terms of the contract, thenthe employee is entitled to treat himself as discharged from any furtherperformance. If he does so, then heterminates the contract by reason of the employer's conduct. He isconstructively dismissed."

[20] Further, in Re Rubel Bronze and Metal CompanyLimited and Vos. [1918] 1 K.B. 315, the court said at 323:

"Dismissal may be effected by conductas well as words. A man may dismiss hisservant if he refuses by word or conduct to allow the servant to fulfil hiscontract of employment. The refusal mustof course be substantial in the sense that it is not a mere repudiation of someminor rights or of non-vital provisions of the contract of employment. The question is ever one of degree. If the conduct of the employer amounts to abasic refusal to continue the servant on the agreed terms of the employment,then there is at once a wrongful dismissal and a repudiation of the contract."

[21] In the present case, on the particular facts, the Tribunal foundthat the actions and conduct of the appellants were such as to cause therespondent to conclude that she had been dismissed from her employment.

[22] Although not stated explicitly, it appears that the Tribunalaccorded more weight to the evidence of the respondent than to the witnesseswho gave evidence on behalf of the appellants. In addition, the following facts assisted the Tribunal in reaching itsdecision, namely, (i) the appellants did not contact the respondent subsequentto her failure to return to work after 29 July 2004; (ii) the appellant paid tothe respondent her vacation pay in July, with no comment, despite the fact thatvacation pay is normally paid in December; (iii) the new manager employed bythe appellants arrived with his own maid and therefore caused the respondent toconclude that there was no work for her in the capacity of maid; (iv) Mr. Allendid not advise the respondent with respect to her continued employment; and (v)for the respondent to return to the field as an "A" class worker would havebeen a demotion which she would have been entitled to refuse. These facts and circumstances are beyondquestion and constitute constructive dismissal.

[23] In the result, the appeal is dismissed. The Tribunal's award that the appellants payto the respondent $22,541.90 as severance under the Act is affirmed. Interest of 6% is payable from the date ofthe Tribunal's award. The costs of theappeal to the respondent is to be agreed or taxed.

Justice ofAppeal

Justiceof Appeal Justice of Appeal (ag.)