

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 9 of 2012

BETWEEN:

SAGICOR LIFE INC.

Appellant

AND

PATRICK HILL

Respondent

Before: The Hon. Justice Sherman Moore, CHB, The Hon. Madam Justice Sandra P. Mason and The Hon. Madam Justice Kaye C. Goodridge, Justices of Appeal

2013: April 24

June 19

2017: August 23

Mr. Patterson Cheltenham QC, Mr. Alrick Scott, Ms. Karen Prescott and Ms. Jewel Garner for the Appellant

Mr. Clement Lashley QC and Ms. Honor Chase for Respondent

DECISION

MOORE JA:

Introduction

[1] Before us is an appeal from the decision of the Severance Payments Tribunal (the Tribunal) whereby it was held that the respondent, Mr. Patrick Hill, (Mr.

Hill) was constructively dismissed by his employer, the appellant, Sagicor Life Inc., (Sagicor), and was therefore entitled to a severance payment under the **Severance Payments Act Cap. 355A (Cap. 355A)**.

Background

- [2] On 13 October 1986, Mr. Hill entered into a contract of employment as an insurance representative with Life of Barbados Ltd (LOB). This contract was called a Life of Barbados Representatives Agreement (LOBRA). Thirteen other representatives were employed by LOB under similar LOBRAs.
- [3] Under his LOBRA, Mr. Hill agreed to sell life insurance policies and annuities on behalf of LOB. Under his LOBRA, also, Mr. Hill agreed that his income would be derived from commissions and bonuses on such sales.
- [4] On 31 July 2003, Mr. Hill received a letter from Sagicor informing him of the planned amalgamation of Sagicor and LOB and of the agreement between Sagicor and LOB that the obligations under the LOBRA would be assumed by Sagicor. The letter read as follows:

“Dear Agency Manager:

In anticipation of the planned amalgamation of Sagicor Life Inc and Life of Barbados Limited by the end of this year, both companies have agreed that the obligations under the contracts of all Salesmen and Agents of Life of Barbados Limited will be assumed by Sagicor Life Inc. effective September 1, 2003.

This proposed action will put you in the same position as if the two companies had already amalgamated.

Under this new arrangement, Sagicor Life Inc. undertakes to preserve all the rights and privileges to which you are entitled and to honour all contractual and statutory obligations, of whatever nature, under your existing contract with Life of Barbados Limited.

In order to facilitate a smooth transition, we should be very grateful if you would, no later than August 15, 2003, return your existing Salesmen's or Agent's licence issued by the Supervisor of Insurance to Mr. Henry Inniss. This will enable us to replace your licence with a new one authorizing you to solicit business on behalf of Sagicor Life Inc. In this regard, it should be noted that the Supervisor of Insurance has sanctioned the transfer of your licence to Sagicor Life Inc. to facilitate the sale of the rebranded products of Sagicor Life Inc.

A Sagicor suite of products comprising policies with the greatest volume of sales on the rate books of both companies has been developed and will be made available to you. New commission schedules for products not previously sold by Life of Barbados Limited will be added on the same basis that Life of Barbados Limited is currently authorized to do under your contract.

The committee set up to streamline processes and procedures, including commission and bonus payments, continues to work to ensure the smooth integration of the Agencies Forces of both companies.

Work is progressing towards the planned legal day one of the amalgamation of Sagicor Life Inc and Life of Barbados Limited on December 31, 2003 and we are happy to report the successful completion of the operational integration of the two companies.

...

Yours sincerely

Sagicor Life Inc.
Dodridge D Miller
President & Chief Executive Officer"

[5] For convenience, we refer to this letter as the Sagicor Offer.

[6] Mr. Hill continued to work as an insurance representative for LOB until 31 December 2003 when, according to him, the amalgamation of LOB and Sagicor occurred. Consequently, Mr. Hill claims that on this date, his contract with LOB was terminated. Nevertheless, he continued to work with Sagicor until the hearing of this appeal.

[7] In the meantime, Mr. Hill, along with the other thirteen LOB agents with LOBRAs, contended that the rebranded suite of products of Sagicor, which they had been asked to sell, changed the terms and conditions of their contract with LOB, resulting in a reduction in their income. Accordingly, on 2 October 2003, Mr. Hill, along with the other thirteen LOB agents with LOBRAs, through their counsel, Mr. Clement Lashley QC, wrote to Sagicor and advised that they had been dismissed by LOB and that they were entitled to make a claim for severance payment. The letter read as far as relevant as follows:

“My clients have expressed concern in regard to their status, their security and general well being following the take-over of Life of Barbados Limited by Sagicor.-

Indeed, their first concern is in respect of their conditions of service with Sagicor. My clients are aware of the law in this regard when there is a change of ownership. They are well aware that the new owners, on takeover of the business of Life of Barbados must not place them in a situation where the terms and conditions of their contract of service differ from the corresponding provisions of their previous contract.

My clients are satisfied, after careful consideration of the proposals contained in the offer of new employment of Sagicor Life Inc., when compared with the conditions of service to which they were accustomed with Life of Barbados Limited that the offer of new employment by Sagicor does not satisfy the requirements of the Severance Payments Act in the circumstances of the takeover of the business of Life of Barbados Limited, so as to avoid a dismissal by Life of Barbados Limited rendering Life of Barbados liable to paying a severance payment.

My clients also wish to draw to your attention the Insurance Act of Barbados 1996-32 as it relates to them. This Act requires that all Life Insurance salesmen must be registered under the Act and the Life Insurance salesman could not be registered for more than one company. These agents were registered to sell life assurance and annuities with Life of Barbados Limited.

It is noted that at a meeting of 11th July 2003 with the Supervisor of Insurance and Sagicor, approval was granted for salespersons with Life of Barbados Limited to sell re-branded products of Sagicor on confirmation that none of the former products of Life of Barbados except those re-branded as Sagicor's, were to (sic) offered in the marketplace.

The effect of all this is that my clients would have no choice but to sell Sagicor's products at this time. In addition, in its circular to the Life of Barbados agents dated the 22nd September, 2003, the agents were advised that all applications for new business must be submitted on Sagicor's application forms only.

It is clear that following the events which have taken place that my clients have been dismissed by Life of Barbados and having regard to the observation expressed above in regard to the offer by Sagicor of a new contract of employment, my clients have no alternative but to claim their severance payment.

I look forward to an early response on this very urgent matter.

In the meanwhile, my clients have no choice but to register in accordance with the Insurance Act and will perform their functions with Sagicor but will reserve all their legal rights in this matter.”

[8] Sagicor responded through its counsel, Mr. Barry Gale QC, by letter dated 27 October 2003, in the following terms:

“I have perused your letter of the 2nd October 2003 and have been instructed by our client as follows:

- (1) That your clients’ terms and conditions of the contract of service with Life of Barbados has (sic) not changed in any manner.
- (2) Your clients are governed by the provisions of their existing contract and our clients are not aware of any new contract entered into between themselves and your clients.
- (3) My clients are unaware of any offer of new employment to your clients by Sagicor Inc. or Life of Barbados Inc. or a termination of your clients’ original contract of service to which the requirements of the Severance Payments Act is (sic) applicable.”

I have had an opportunity to peruse the Insurance Act and advise that the decision to approve the sale of rebranded products was based on Section 83 of the said Act. I further advise that on the instructions of the Supervisor of Insurance the Certificate of Registration of the sales agents were (sic) to be amended to reflect the sale of the rebranded products.

Further I am instructed that the sales agents (including your clients) did submit their certificates to be amended accordingly.

In light of these circumstances I have advised my client that the provisions of the Severance Payments Act is in no way applicable to them and your clients have no basis at law for a claim of Severance

Payments against them, as their contract of service was in no way determined, terminated or were the terms and conditions changed.”

[9] On 26 January 2004, Mr. Lashley QC rejoined as follows:

“It is my submission further that in all the circumstances, there was a termination of my clients’ contract of employment by LOB. I refer to the Severance Payments Act, Cap. 355A. On the takeover by Sagicor, it was Sagicor’s duty to ensure that the terms and conditions of the agents were at least similar to those Terms and Conditions as existed with LOB.”

[10] Sagicor denied that the representatives were entitled to severance payment on the basis that they were independent contractors and not employees of Sagicor. And so, in 2006, Sagicor instituted proceedings in the High Court seeking a declaration as to the nature of the employment relationship between itself and four categories of its workers, including the category of sales representatives, within which Mr. Hill and the thirteen other representatives fell. On 12 October 2007, **Sir David Simmons CJ**, sitting as a judge of the High Court, held that Mr. Hill and the thirteen other representatives were employees of Sagicor.

REFERENCE TO THE TRIBUNAL

Application and Notice of Appearance

[11] On 5 December 2008, Mr. Hill filed an originating application with the Severance Payments Section of the National Insurance Office seeking a decision of the Tribunal as to whether he had a right to a severance payment pursuant to **section 3 (1) of Cap. 355A**. Mr. Hill pleaded “reduction in

earnings” as his reason for the application. The thirteen other representatives filed similar claims and it was agreed by counsel on both sides that the evidence of Mr. Hill and any legal arguments made in support of his claim, would be deemed to be given on behalf of all applicants since they stood in the same position as employees of Sagicor.

[12] On 20 April 2009, Sagicor filed a notice of appearance indicating that it intended to resist the originating application of Mr. Hill and contended that Mr. Hill was not entitled to a severance payment for the following reasons:

“1 ...

2. By terms of the Agreement between the Applicant and the Respondent dated 13th October, 1986, the following terms were provided:

“4. COMMISSIONS

The company shall during the continuance of this agreement, pay in full satisfaction of all claims to remuneration by the Representative commissions as hereinafter specified in Schedule A attached hereto on premiums paid in cash to the company under policies of Assurance personally effected by the Representative and issued by the Company.

5. MISCELLANEOUS COMMISSION PROVISIONS

(a) All commissions provided herein shall be subject to revision by the Company at any time with respect to any Assurance effected hereunder subsequent to the date on which the Company announces any such revision.”

3. The Respondent will contend that in the premises there is no difference in the terms of engagement between Sagicor Life Inc, the new employer and the Appellant.

4. To the extent, which is conceded, that the Respondent revised the commission schedule of the Applicant, it acted pursuant to the terms of the existing contract. Accordingly, the Respondent will further contend that none of its actions individually or collectively constituted a basis to ground an entitlement to severance under the Severance Payments Act, Cap. 355A...”

Evidence before the Tribunal

[13] In Mr. Hill’s affidavit, sworn on 15 July 2009, he deposed, inter alia, the following:

“I say that the terms and conditions of the contract with the Respondent are now varied in such a way that I and other Representatives have been disadvantaged for the following reasons:

- 1) Some advisors have not been given a new contract. Neither have they been sent any addendum to their former Life of Barbados (LOB) contracts which they still possess. New compensation package resulting in reduced income.
- 2) Commissions have been reduced.
- 3) There has been restructuring of bonus which is part of the representatives’ contracts resulting in reduced payments to most qualified advisors.
- 4) All policies are now non par policies. This means that the preference of the buying public to purchase dividend bearing policies no longer exist. The result is reduced sales, reduced commissions and income.
- 5) Pension commission contract reduced in October, 2003 from 10% and 20% to 2%. This was replaced in 2007 to

15% across the board without retrospective effect one week after judgment was given in High Court Suit No. 1052 of 2006 – Sagicor Life Insurance v. Patrick Hill et al.

- 6) Former agency managers have had their term life coverage reduced without any consultation or notification.
 - 7) There has been the abolition of Junior Estate Plan which paid a 60% commission and in its place a Junior Life Saver paying the Representatives 40% commission.
- ...

Since we were taken over by Sagicor the Bonus Structure has been changed...”

[14] Mr. Eon Phillips, a Manager of Marketing Support within LOB at the time of the amalgamation with Sagicor, gave affidavit evidence on behalf of Sagicor relative to the products of LOB including the commission structures for the agents such as Mr. Hill.

[15] Mr. Anthony Bowen, the Executive Vice President of Sagicor, also gave affidavit evidence on behalf of Sagicor in relation to the bonus structure, new compensation package and policies and other products offered by Sagicor to Mr. Hill, which he alleged affected his income.

[16] Mr. Frank Odle, a sales representative with Sagicor gave affidavit evidence on behalf of Mr. Hill in response to matters deposed to by Mr. Bowen in his, Mr. Bowen’s affidavit.

Tribunal’s Decision

- [17] On 13 September 2011, the Tribunal delivered its decision in which it held that Sagicor had breached the LOBRA contract of employment, and that Mr. Hill, and the thirteen other representatives, were entitled to a severance payment. The Tribunal gave four principal reasons for its decision.
- [18] The first was that the Sagicor Offer did not satisfy the requirements of **section 4(4) of Cap. 355A**. This was so because the Sagicor Offer did not make a suitable offer of continued employment given the proven negative impact that the Sagicor suite of products had on the income of Mr. Hill.
- [19] The second was that there was an implied term in Mr. Hill's LOBRA that his commission income would not be varied without consultation or to his detriment whether directly or through a change of product. The business efficacy of the arrangement under which he worked demanded this.
- [20] The third was that, having continued to work for Sagicor since the beginning of 2004, Mr. Hill must be deemed to have been engaged under new conditions of service under protest, subject to the payment of severance for the period of employment prior to 2003.
- [21] The fourth reason was that, if there was acquiescence on the part of Mr. Hill in continuing to work under the less favourable terms, then equally there was acquiescence on the part of Sagicor in allowing the Applicant to continue to work well knowing that he had maintained since October 2003 that he was entitled to a severance payment.

THE APPEAL

The Notice of Appeal

[22] By notice of appeal filed on 3 October 2011, Sagicor appealed the decision of the Tribunal to this Court. Nine grounds are set out in its notice of appeal.

They are as follows:

“1. (a) The finding of the Tribunal that the offer of employment made by the Appellant to the Respondent was not the same contract as existed with LOB was wrong as a matter of fact and law. In particular, the Tribunal failed to take into account that the Respondent was not employed expressly or impliedly to sell specific products, but to solicit applications for life assurance and annuities offered by the Appellant.

(b) Alternatively, if the Appellant’s offer was of a new contract of employment (which is denied), the Tribunal erred as a matter of fact and law in holding that the offer of new employment was unsuitable, that there was a refusal of the Appellant’s offer of new employment by the Respondent and that the refusal was reasonable, when there was no evidence or insufficient evidence to support such findings. Instead, the Tribunal ought to have held that the Respondent accepted the Appellant’s offer of new employment by continuing to work in excess of six years after the alleged dismissal.

(ii) There was no evidence or insufficient evidence to justify the Tribunal’s conclusion that there was acquiescence on the part of the Appellant. The conclusion by the Tribunal that there was acquiescence on the part of the Appellant constitutes a serious procedural error, in that the Tribunal came to such a conclusion when the issue was not raised or argued before the Tribunal and it is an issue on which the Appellant ought to have been granted an opportunity to be heard on (sic). The denial of the opportunity to be heard on the issue of acquiescence caused the decision of the Tribunal to be unjust.

(iii) The finding of the Tribunal that the replacement of the Pension Provider Plan with the Millennium Saver Plan had a negative and severe impact on the earnings of the Respondent and other representatives of the Appellant was wrong as a matter of fact and law because:

(a) the Tribunal failed to take into account at all or sufficiently the material variables which were likely to impact commissions earned by the Respondent;

(b) there was no evidence or insufficient evidence to make such a finding; and

(c) the Tribunal failed to evaluate properly or at all the evidence of Frank Odle and gave excessive weight to the same.

(iv) The finding of the Tribunal that the Respondent worked under a new contract of service under protest since the beginning of 2004 was wrong as a matter of fact and law because there was no evidence, or alternatively, insufficient evidence on which the Tribunal could have made such a finding.

(v) The Tribunal erred and misdirected itself in not making specific findings of fact as to the specific date of the Respondent's alleged termination and the specific terminating event.

(vi) The Tribunal erred in law in not considering or construing or applying clause 5 (a) of the LOB Representatives Agreement, which was a central and foundational issue in the case, which was never mentioned in the judgment. Had the Tribunal considered and properly construed and applied clause 5 (a), it ought to have held that, on a true construction, clause 5 (a) empowers the Appellant (a) to rationalize the rate book of LOB, and in the process to eliminate any product offered by LOB and (b) to revise commissions.

(vii) The Tribunal erred as a matter of fact and law in holding that there was an implied term in the Respondent's contract of employment that his commission income would not be varied

without consultation or to his detriment. In making such an erroneous holding, the Tribunal failed to construe, properly or at all, the LOB Representatives Agreement and to take into account relevant and well-established principles of interpretation or canons of construction and all the surrounding facts and circumstances.

(viii) The Tribunal erred in law in holding that it was not necessary for the Respondent to prove a constructive dismissal in the sense that the term is understood at common law.

(ix) The decision of the Tribunal is against the weight of the evidence and in particular, that the Tribunal gave excessive and unjustified weight to the evidence of Frank Odle which was demonstrated to be unhelpful, unreliable and one dimensional.”

The Issues

- [23] The grounds of appeal stated in Sagicor’s notice of appeal raise a number of issues. In our view, two provisions in **Cap. 355A** are particularly important in approaching these issues. These are **section 3 (1) (a)** and **section 4 (4)**. **Section 3 (1) (a)**, under which Mr. Hill was seeking to recover severance payment, stipulates that a precondition to such a payment is that Mr. Hill must show that he was “dismissed by his employer because of redundancy”. **Section 4 (4)** disentitles Mr. Hill to a severance payment if before the date of his dismissal, if he proves such a dismissal, Sagicor had offered him to renew his contract or to reengage him under a new suitable contract.
- [24] When the grounds of appeal raised by Sagicor and the written submissions to, and oral submissions before this Court are considered in light of **section 3 (1) (a)** and **sections 4 (3), 4 (4), 9 (2) and 16 (2)**, it is evident that this appeal turns

on only two broad issues. The first is whether Mr. Hill was constructively dismissed and therefore whether the **section 3 (1) (a)** requirement of proof of “dismissal” was satisfied. The second is, assuming there is proof of a “dismissal”, whether **sections 4 (3), 4 (4), 9 (2) and 16 (2)** apply and consequently Mr. Hill is disentitled to severance payment.

[25] We pause here to note that ground nine raises a question of evidence and this Court has no jurisdiction to deal with evidence taking into account the provisions of **section 39 of Cap. 355A**.

[26] Given the foregoing, we propose to deal with the issues raised in the grounds of appeal under the two broad heads of whether Mr. Hill was constructively dismissed and whether Mr. Hill was disentitled to a severance payment because of the operation of **sections 4 (3), 4 (4), 9 (2) and 16 (2)**. Accordingly, we will consider the following issues raised in Sagicor’s grounds of appeal as aspects of whether Mr. Hill was constructively dismissed. These issues are: (i) whether Mr. Hill had to prove constructive dismissal; (ii) whether the Tribunal correctly construed clause 5 (a) of the LOBRA and whether there was an implied term of non-variation in the LOBRA; (iii) whether the Sagicor suite of products caused a reduction of Mr. Hill’s income thereby constituting constructive dismissal; (iv) whether Mr. Hill continued to work under protest; and (v) whether Sagicor acquiesced in Mr. Hill continuing to work. The questions of (vi) whether the Sagicor Letter was different from the LOBRA

or offered unsuitable employment thereby constituting constructive dismissal of Mr. Hill; and (vii) whether the tribunal erred in not making specific findings in respect of the alleged termination will be considered as aspects of the question whether Mr. Hill is disentitled to severance payment.

[27] We deal with these issues hereafter under the rubric “Court’s Analysis and Conclusions”. Before doing so, however, we consider it advantageous to set out the relevant statutory law applicable to this appeal.

THE STATUTORY LAW

[28] **Section 3 (1)** of **Cap. 355A** provides that an employee who has been employed for the requisite period (104 weeks) is entitled to a severance payment where *inter alia* he is dismissed because of redundancy. This is the only ground for a severance payment that is relevant in this case.

[29] **Section 3 (3)** provides a presumption of dismissal for redundancy as follows:

“(3) For the purposes of this Act, an employee who is dismissed shall be deemed

(a) to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to

(i) the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease to carry on that business in the place where the employee was so employed; or

(ii) the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out

work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish;...”

[30] An employee is not entitled to a severance payment in the circumstances set out in **subsections (3) and (4) of section 4**. Those subsections are as follows:

“(3) An employee is not entitled to a severance payment because of dismissal if before the relevant date the employer has offered to renew his contract of employment or to re-engage him under a new contract, so that

- (a) the provisions of the contract as renewed or of the new contract, as the case may be, as to the capacity and place in which he would be employed and as to the other terms and conditions of his employment would not differ from the corresponding provisions of the contract as in force immediately before his dismissal; and
- (b) the renewal or re-engagement would take effect on or before the relevant date,

and the employee has unreasonably refused that offer.

(4) An employee is not entitled to a severance payment because of dismissal if before the relevant date the employer has made him an offer in writing to renew his contract of employment or to re-engage him under a new contract so that in accordance with the particulars specified in the offer the provisions of the contract as renewed or of the new contract, as the case may be, as to the capacity and place in which he would be employed and as to the other terms and conditions of his employment would differ wholly or in part from the corresponding provisions of the contract as in force immediately before his dismissal, but

- (a) the offer constitutes an offer of suitable employment in relation to the employee; and

- (b) the renewal or re-engagement would take effect on or before the relevant date or not more than 4 weeks after that date,

and the employee had unreasonably refused that offer”.

[31] Pursuant to **section 9 (1) and (2)** and **section 16 (1) and (2)**, where the new owner renews the employee’s contract, the employee is deemed not to have been dismissed. **Section 9 (1) and (2)** provide:

“9. (1) The provisions of this section shall have effect where –

- (a) a change occurs (whether by virtue of a sale or disposition or by operation of law) in the ownership of a business for the purposes of which a person is employed, or of a part of such a business; and

- (b) in connection with that change the person by whom the employee is employed immediately before the change occurs, in this section referred to as the “previous owner”, terminates the employee’s contract of employment, whether by notice or without notice.

(2) Where, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be, (in this section referred to as “the new owner”), renews the employee’s contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, subsection (2) of section 16 shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the previous owner (without any substitution of the new owner for the previous owner)”.

[32] **Section 16 (1) and (2)** provide:

“16. (1) For the purposes of this Act, an employee shall, subject to Part II, be deemed to be dismissed by his employer if:

(a) ...

(b) ...; or

(c) the employee terminates that contract without notice in circumstances (not falling within subsection (4) of section 8) such that he is entitled so to terminate it by reason of the employer's conduct; or

(d) ...

(e) ...

(2) An employee shall not be deemed for the purposes of this Act to be dismissed by his employer if his contract of employment is renewed or he is re-engaged by the same employer under a new contract of employment; and

(a) in a case where the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he is employed, and as to the other terms and conditions of his employment, do not differ from the corresponding provisions of the previous contract, the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract; or

(b) in any other case, the renewal or re-engagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of that employment or after an interval of not more than four weeks thereafter."

[33] **Section 19 (1) and (2)** provide as follows:

"19. (1) Where in accordance with any enactment or rule of law

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(a) any act on the part of an employer; or

(b) any event affecting an employer (including, in the case of an individual, his death),

operates so as to terminate a contract under which an employee is employed by him, that act or event shall for the purposes of this Act be treated as a termination of the contract by the employer, if apart from this subsection it would not constitute a termination of the contract by him.

(2) Where subsection (1) applies and the employee's contract of employment is not renewed, and he is not re-engaged under a new contract as mentioned in subsection (2) of section 16, he shall for the purposes of this Act be taken to be dismissed by reason of redundancy if the circumstances in which the contract is not renewed and he is not re-engaged as mentioned in subsection (2) of section 16 are wholly or mainly attributable to one or other of the facts specified in paragraphs (a) and (b) of subsection (2) of section 3."

COURT'S ANALYSIS AND CONCLUSIONS

Was Mr. Hill Constructively Dismissed.

[34] The respondent has sought to answer the need to show "dismissal" pursuant to **section 3 (1) (a)** by arguing that the respondent was constructively dismissed. The difficulty in this argument was recognised by the Tribunal at paragraphs 52, 53, 54 and 59 of its DECISION as follows:

"52. The Applicant claimed that he was constructively dismissed by Sagicor on December 31, 2003.

53. The evidence however shows that up to the time of hearing in 2010 the Applicant

continued to sell products for Sagicor and to receive income from the company in the form of commissions.

54. A constructive dismissal arises where an employee treats the employment contract as being at an end due to the conduct of his employer. In the case of **Western Excavations (ECC) Ltd. v Sharp (1978) 2 W.L.R 344** it was held that a constructive dismissal occurs where the employer demonstrates conduct which amounts to a significant breach going to the root of the contract, or which shows that the employer no longer wishes to be bound by one of the essential terms of the contract.

59. What troubled this Tribunal however was whether it was possible for a person to maintain a case of constructive dismissal while still working for their employer for any period akin to 6 years.”

[35] Indeed, at paragraph 63 of its DECISION, the Tribunal described the challenge for the respondent in showing “dismissal” as a “hoary horse chestnut”. We agree with the Tribunal’s view with respect to the proof of constructive dismissal on the facts of this case. This is best illustrated by a consideration of what is constructive dismissal.

[36] In **Courts (Barbados) Limited v Inniss Magisterial Appeal No. 7 of 2002**

this Court said at para 18:

“Constructive dismissal occurs where the employee terminates the contract of employment, with or without notice, as a direct result of the conduct of the employer which objectively constitutes a fundamental change in the employment or a unilateral change of a significant nature, evincing an intention on

the part of the employer not to continue the employment contract upon its previous terms.”

- [37] The said principle of law is expressed in **Halsbury’s Laws of England (4th Ed) Vol. 39** at para **44** thus:

“In a contract of employment there is an implied term that an employer will not, without reasonable and proper cause, conduct himself in a manner calculated as likely to destroy or seriously damage the relationship of confidence and trust between employer and employee... the implied term of trust and respect in the contract of employment has been held to have overriding effect, that is to say that, even where the employer has express power to act in a particular way under the terms of the contract, he must exercise that power in the light of his overall duty of trust and respect, with the result that, if he does not do so, the employee may be contractually entitled to leave and claim constructive dismissal, in spite of the employer’s claim that he was merely exercising his contractual rights.”

- [38] It is undoubted that the foregoing is an articulation of the well-established principle of law that “an employee is entitled to terminate his contract of employment without notice by reason of the employer’s conduct if (i) the employer has acted in repudiatory breach of the employment contract; (ii) the employee accepts the repudiation; and (iii) the employee has not elected to affirm the contract for any length of time without leaving his employment (see **Western Excavating (ECC) Ltd. v Sharp [1978] QB 761**); per **Norman Rossiter v Pendragon Plc [2002] EWCA Civ 745 (Rossiter v Pendragon)**).
- [39] Against the foregoing backcloth, we now turn to the issues concerning constructive dismissal raised by Sagicor in this appeal.

Whether Mr. Hill had to prove constructive dismissal

[40] This is the first issue raised by Sagicor in its grounds of appeal. In that ground of appeal, Sagicor claimed that “the Tribunal erred in law in holding that it was not necessary for the respondent to prove a constructive dismissal in the sense that the term is understood at common law.”

[41] **Section 16 of Cap. 355A** provides that an employee shall be deemed to be dismissed by his employer in five circumstances. Where the employee is seeking a decision from the Tribunal that he is entitled to a severance payment, the onus is upon the employee to show that the reason for his dismissal falls within one of those five circumstances. Accordingly, since the respondent alleged that he was dismissed by Sagicor, it was incumbent upon him to prove that he was dismissed from his employment with Sagicor. We therefore agree with the contention of Sagicor that the Tribunal was wrong in law in holding to the contrary.

Whether the tribunal correctly construed clause 5 (a) of the LOBRA and whether there was an implied term of non-variation in the LOBRA

[42] On this issue, counsel for Sagicor contended that clause 5 (a) of LOBRA is an overarching issue in the case as there cannot be a dismissal under the Act where the employer has not violated his contractual powers. Put differently, if an employer is contractually justified in making any change to the employment contract, it cannot amount to a dismissal under the Act or at

common law. In support of that principle, counsel relied on paragraphs 5 and 33 of **Rossiter v Pendragon** where the court said:

“[5] The tribunal sitting at Reading, by a decision sent to the parties on 10 February 1999, agreed with Pendragon. They held that Mr. Rossiter was not constructively dismissed under the Employment Rights Act 1996 or under the 1981 Regulations but had resigned voluntarily. They held that the right to claim constructive dismissal could only arise if there had been a dismissal following upon breaches of contract and expressed the view that if there had been no breaches of contract, no cause of action could arise in respect of constructive dismissal under the 1996 Act, nor could there be an automatically unfair dismissal under regulation 8 (1) of the 1981 Regulations. They said that in respect of unfair dismissal under the 1996 Act and dismissal under the 1981 Regulations it must be a condition precedent that there should be a dismissal.

[33] When one turns to the language of regulation 5(5), in my judgment it is made quite clear that no new right was thereby intended to be created. The regulation preserves rights which arise “apart from these Regulations”. The only right to claim constructive dismissal which arises apart from the 1981 Regulations is the right of the employee to resign when faced with a repudiatory breach of contract by the employer. If there were to be a right to claim constructive dismissal by reason only of a substantial change in working conditions to the employee’s detriment, without there being a breach of contract, that would be a new right. That right would not arise apart from the 1981 Regulations, but only by reason of the 1981 Regulations. The language of regulation 5(5) was plainly chosen so as to implement article 4(2) of Directive 77/187. It was also, in my judgment, intended to be consistent with section 95(1) (c) of the 1996 Act. Only conduct by the employer amounting to a repudiation of the contract would entitle the employee to terminate the contract “without notice”.

[43] Counsel also submitted that even if the introduction of the Sagicor suite of products resulted in substantial detriment to the respondent by way of less

commissions earned, that alone would not amount to a constructive dismissal. The Tribunal was bound to consider whether it arose from a repudiatory breach of the contract by the employer. If there was no repudiatory breach of the contract by the employer, there could be no dismissal. In effect, the Tribunal must find some repudiatory breach of the employment contract.

[44] In our judgment, Sagicor's case before the Tribunal was that it had the contractual power under clause 5 (a) of the LOBRA to make changes to the LOBRA. Unfortunately, the Tribunal failed to consider whether Sagicor's act was sanctioned by LOBRA, and if yes, whether such a lawful act pursuant to the LOBRA could give rise to an entitlement to a severance payment in any circumstances under the Act.

[45] The principal basis of the Tribunal's decision seems to be that there was a change in the terms of Mr. Hill's employment effected by the rationalisation of the rate books of the two companies, which in itself resulted in the elimination of certain products previously offered by LOB (principally the Pension Provider Plan) and the introduction of other products. This was the only change made at the time of the amalgamation and before the alleged dismissal on 31 December 2003. All parties agreed that the LOBRA governed the relationship between the respondent and LOB before the amalgamation and also governed the relationship between the appellant and the respondent after the amalgamation.

[46] Clause 5 (a) of LOBRA provided:

“(a) All commissions provided herein shall be subject to revision by the Company at any time with respect to the date on which the Company announces any such revision”.

[47] In our view, by virtue of this sub-clause, first LOB, and then Sagicor, was authorised to determine the type of policies to be sold and to assign a commission value to each policy. It allowed Sagicor to vary the existing rate book and new suite of products whether or not this variation resulted in a reduced rate of commission. Indeed, it appears from the evidence that this was how LOB interpreted that clause. For instance, Mr. Eon Philips testified that LOB made such a variation without the consent of the representatives who later protested the variation. In our view, because of the legal nature of an amalgamation, the rights of LOB to vary the rate of commission pursuant to clause 5 (a) became those of Sagicor upon the amalgamation of those two companies.

[48] We note further that the representatives of LOB, later Sagicor, did not receive a fixed income. Their income depended entirely on their own industry. The evidence disclosed that some representatives decided to sell certain policies and not others. If there was, indeed, a reduction in income they were not blameless.

[49] When clause 5 (a) is considered in the circumstances of this case, it is impossible to imply a term in the LOBRA that the rate of commission could

not be varied to result in a reduction of income of Mr. Hill and the other representatives. It follows, therefore, that Sagicor did not repudiate the employment contract with Mr. Hill by preparing and offering a new suite of products. Accordingly, we hold that there was no constructive dismissal of Mr. Hill by Sagicor.

Whether the Sagicor suite of products caused a reduction of Mr. Hill's income

[50] This issue is also relevant in determining whether Sagicor was guilty of a repudiatory breach of Mr. Hill's contract of employment.

[51] In approaching this issue, we would observe that, generally speaking, the question of the cause of a reduction in pay is straightforward. It may result, for instance, from a salary cut or from a reduction in the number of hours of employment. The question of the cause of a reduction in pay becomes somewhat more complex where, as in this case, the respondent's earnings are determined entirely by his/her effort as he was paid in accordance with the "Commission Schedule" to the LOBRA. It was therefore incumbent upon the respondent to adduce evidence that, as he claimed, the Sagicor suite of products caused a reduction in his salary amounting to him being constructively dismissed under the Act.

[52] Counsel for Sagicor argued before us that there was no evidence before the Tribunal or elsewhere to support either the respondent's contention that Mr. Hill had suffered a reduction in earnings or to establish a causal link between the offer of renewed employment or new suite of products in 2003 and the alleged reduction in earnings. In amplification of this contention, counsel pointed out that the time of September to December 2003 was too short a span of time on which to base a decision. Indeed, counsel further pointed out that Mr. Hill had claimed a dismissal since 2 October 2003, but not on the basis of a reduction in earnings. In any case, counsel argued, the global amount for the year did not explain when the alleged dip occurred, whether in the early part of the year or later.

[53] Counsel hypothesised that, were there a reduction in commissions earned, there are so many variables that it would be impossible to attribute the reduction wholly or mainly to the suite of products. He insisted that the variables which were likely to impact the respondent's commissions earned include the following:

- i. the respondent's determination that he would only sell some of the products in the suite and not others. A causal link between the new suite introduced in 2003 and any reduction in commissions could only be established where there was an attempt to sell all the products in the suite. Indeed, the respondent's conduct meant that he excluded a certain market for particular products and that he had not provided clients with a full range of products from which

they could choose, but presented them with limited options;

- ii. most of the respondent's clients were over forty years, from whom he sought repeat business, and a market in which he felt comfortable;
- iii the respondent targeted a particular market, that was dwindling and chose to sell some but not all of the products in the suite;
- iv. the type of product to be sold by the respondent;
- v. the respondent's training and expertise;
- vi. the commissions generated from policies and commissions earned;
- vii. the goodwill of the buying public towards the respondent; and
- viii. the respondent's drive and sense of purpose.

[54] In any event, contended counsel, the evidence of Mr. Odle as to the causal relationship between the suite of products and the reduction in the respondent's income was wholly unhelpful, and the Tribunal ought to have so held. In fact, argued counsel, Mr. Hill accepted under cross-examination, that Mr. Odle conceded at page 20 of his evidence on 26 February 2010, that he never analysed the entire suite of products and that there had never been an analysis by Mr. Hill or anyone on his behalf of the entire suite of products to determine whether the suite of products introduced in 2003 resulted in reduced commissions for the agents. Therefore, counsel concluded, any reduction in earnings cannot be properly attributable to the suite of products.

[55] Counsel noted that Mr. Hill alleged that between a quarter and a third of the policies he sold were pension plans, namely, the Pension Provider Plan, while he was engaged by LOB. This was discredited under cross examination. Further, claimed counsel, the evidence of Mr. Eon Phillips refuted any suggestion that pension plans were a major seller. He gave evidence that:

“it might be possible but I think during that time there was a lot of concern by people generally about the returns from pension plans and, obviously, they were looking for pension plans that would give them the better return. And I know for a fact that Life of Barbados, the agents at Life of Barbados were challenged – complained about the competition with RASP and Millennium Saver. Those kinds of plans where there were no commissions and LOB started looking at some of those plans. That did not go far after the whole issue of the Mutual take-over came.”

[56] Therefore, counsel concluded, there was no reliable evidence that the suite of products resulted in any reduction in commissions earned, as opposed to Mr. Hill’s deliberate decision not to offer all the products in the suite to customers or his calculated decision to target a dwindling aged market mainly or to canvass mainly repeat customers or to any of the other variables.

[57] Counsel for Mr. Hill maintained that there was ample evidence before the Tribunal on which it could base its decision that there was a causal link between the reduction in Mr. Hill’s income and Sagicor’s new suite of products.

[58] We agree with Mr. Lashley QC that the Tribunal did address its mind to establishing a link between the change in products and the alleged reduction

in earnings by the representatives. In that regard, the Tribunal, at paragraph 46 of its DECISION said:

“This manner of proceeding on the part of the applicant is an important matter in the circumstances where it is accepted that the sales representative’s own industry, commitment and effort is what will secure his financial success”.

However, we are of the view that the evidence before the Tribunal was not sufficient to support the Tribunal findings in relation to Mr. Hill’s constructive dismissal on the basis of “the proven negative impact that the new suite of products had on the income of the Applicant”.

Whether Mr. Hill continued to work under protest

[59] Here, counsel for Mr. Hill contended that Mr. Hill continued to work under protest. Indeed, this question becomes relevant because, assuming that the fact that Sagicor repudiated their contract of employment is proved, Mr. Hill and the other representatives must also prove that they accepted that repudiation even though they continued to work.

[60] In our view, the English Employment Appeal Tribunal decision in **Robinson v Tescom Corporation [2008] IRLR 408 (Robinson)** is very helpful in approaching this issue. That case held that an employee, following a dismissal, may continue to work under a varied contract under protest. Importantly, however, according to **Robinson** at **para. 7**, such an employee must make it clear that he is not accepting the change and that he is working

under protest. The crucial question in the case before us therefore is whether Mr. Hill ever made it clear that he was not accepting the change and that he was working under protest.

[61] Counsel for Sagicor has argued that Mr. Hill never made it clear to Sagicor that he was working under protest. First, counsel pointed to the letter of 2 October 2003, in which according to counsel, Mr. Lashley QC “expressed concern” but never made it clear whether the alleged “new offer” was either accepted or rejected. Secondly, counsel pointed to the evidence of Mr. Hill before the Tribunal where he stated that he had a choice to resign but was advised not to do so and that he claimed a severance but continued to work with the employer on terms adjusted under clause 5 of the contract. Finally, counsel pointed to the evidence of Mr. Hill under re-examination, where he stated that he elected to stay under duress.

[62] Counsel concluded by asserting that there are two very important points to be made with respect to the claim of working under protest or duress, which militate against the finding of such a fact. First, counsel contended, the fact was that there was nothing in writing to the effect that Mr. Hill or any one was working under protest or duress; that it was never communicated to Sagicor; and that to justify a finding that Mr. Hill was working under protest, he would have had to indicate that specifically. Secondly, counsel argued, the claim that he was working under protest or duress was an extremely late claim. The

law is and has always been wary of late claims – the later the claim, the less credibility to be attached to it. The only reasonable inference from the timing of the claim is that it was made in an attempt to salvage the case. Therefore, no credibility ought to have been attached to it. It was not raised in any affidavit or letter, and was raised for the first time in excess of six years after the alleged terminating event(s).

[63] In response to counsel for Sagicor, Mr. Lashley QC contended that the evidence before the Tribunal was replete with the persistent expressions of concern between the former LOB representatives and Sagicor with respect to the new conditions of service “which was thrust upon them”. In this regard, counsel adverted to Sagicor’s letter of 31 July 2003 to the respondent; his letter of 2 October 2003 in response; Mr. Gale’s letter dated 27 October 2003; and his, Mr. Lashley QC’s, rejoinder by letter dated 20 January 2004.

[64] Counsel also pointed to the evidence of Mr. Frank Odle before the Tribunal on 12 February 2010 where Mr. Odle testified as follows:

“Faced with the change sir, we did not accept a change in terms of our contract and what we did firstly, we approached the Union and the lawyers to deal with that. So we never accepted a change. The question now sir, as to why I did not seek my fortune elsewhere. I am a trained, skilled, qualified insurance man and it would be suicidal for me sir, to abandon the Life Insurance career at that time”.

[65] Looking at the evidence before the Tribunal, it is our view that Mr. Hill’s contention that he continued to work under protest after the amalgamation

is contradicted by his own evidence that it would have been suicidal for him to abandon the insurance industry at that time. We do not find anything in that evidence that Mr. Hill ever made it clear to Sagicor that he was not accepting the alleged change to the LOBRA and that he was working under protest.

Whether Sagicor acquiesced in Mr. Hill continuing to work

[66] The Tribunal found that “if there was acquiescence on the part of the Applicant in continuing to work under the less favourable terms, then equally there was acquiescence on the part of Sagicor in allowing the Applicant to continue to work well knowing that he has since October 2003, maintained that he is entitled to a severance payment”. This finding by the Tribunal is raised by Sagicor as an issue tangential to the broader question of whether Mr. Hill accepted any repudiation of his contract of employment by Sagicor.

[67] Here, counsel for Sagicor contended that it was the Tribunal, not Mr. Hill that explained or justified the respondent’s continuing on the job for six years on the basis of acquiescence. Counsel represented that Mr. Hill’s continuing to work was an issue identified by Sagicor to the Tribunal as fundamental to the case. Accordingly, Sagicor, not having an opportunity to make submissions on that fundamental issue, the Tribunal ought not to have made a decision on this point which was not argued before it.

[68] Counsel relied on **Oscar Lovell v Rayside Construction Limited, Magisterial Appeal No. 16 of 2004 (unreported decision of 2010)** in support of his submission. In that case, **Mason JA** said at **para 63**:

“The rules of natural justice require that a person accused of any infraction or abuse must be given the opportunity to defend himself against such accusation. A judge should therefore not decide a case on a point which has not been raised in argument without first giving notice to the parties and allowing them an opportunity to make submissions.”

[69] In any event, counsel also submitted, the Tribunal misunderstood and misapplied the principle of acquiescence. Acquiescence, according to him, is an equitable defence to a claimant enforcing his strict legal rights. He maintained that, as the principle functions, the defence of acquiescence could have been raised by Sagicor, as the defendant, to the claim for a severance payment as a defence where it could have contended that Mr. Hill, having worked since the administrative amalgamation on 1 September 2003, demonstrated by his conduct that he had acquiesced in the new arrangement whereby allegedly (but not admitted) he got reduced earnings. Counsel doubted whether acquiescence could then be a defence to that defence. This therefore meant, argued counsel, that the Tribunal applied acquiescence as a defence to a defence of acquiescence, something not seen in any decided case.

[70] Mr. Lashley QC submitted as important the fact that the case was heard before the High Court by **Sir David Simmons, CJ**, who gave his judgment on 12

October 2007. Thereafter, counsel noted, there was a continuation of the representatives' application for severance payment. Hence the letter dated 25 October 2007 was written renewing Mr. Hill's, and the other representatives', claim for severance. Counsel continued that it was Sagicor who had brought the action for certain declarations and it was agreed between the parties that the status of the representatives would be decided.

[71] Counsel agreed that the Tribunal described the conduct by Sagicor as acquiescence. He argued, however, that that expression was used to highlight the fact that there was an issue which Sagicor in agreement with Mr. Hill and his colleagues had to determine. Counsel submitted that that is what the Tribunal meant by acquiescence. The Tribunal was using the strict meaning of the word in the context of what transpired in the instant case, that is: "consent which is expressed or implied from conduct".

[72] In our judgment, it is well-settled law that acquiescence is an equitable defence – a shield not a sword. In this instant case Mr. Hill would be using it as a sword. We do not think it can be so used or relied upon by a plaintiff/respondent.

[73] Acquiescence is a form of equitable estoppel. It arises where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived or abandoned his rights.

[74] In the instant case it was Mr. Hill who alleged that he was constructively dismissed by Sagicor. It was, therefore, his right to leave Sagicor's employ. He failed to do so – remaining with Sagicor for several years after he claimed to have been constructively dismissed. In our view the Tribunal erred when it found that Sagicor was a party to Mr. Hill's acquiescence.

Is Mr. Hill Disentitled to Severance Payment

Whether the Tribunal erred in not making specific findings in respect of the Alleged termination?

[75] As we have already noted, by the operation of **sections 4 (3), 4 (4), 9 (2) and 16 (2)**, an employee is disentitled to severance because of dismissal if “before the relevant date” the employer has offered to renew his contract or to re-engage him under a new contract and the offer does not differ from the corresponding provisions as the contract in force before the dismissal or the offer constitutes an offer of suitable employment in relation to the employee. It is clear from phrase “before the relevant date” in these subsections that a finding of the moment of termination of employment by dismissal is of crucial importance in determining whether Mr. Hill is disentitled to severance pursuant to this subsection.

[76] In this case, the Tribunal was specifically asked by Sagicor to make findings of fact with respect to identifying the moment of termination and the terminating event. The reason for this request, according to counsel for

Sagicor, was because on the facts of this case there were two possible forms of dismissal, constructive dismissal or dismissal by change of employer. The latter would have occurred on 1 September 2003, which was the date Sagicor's suite of products was to take effect pursuant to the appellant's letter of 31 July 2003. It was on that date that the appellant took over responsibility for LOBRA. However, counsel submitted, when, if at all, the appellant repudiated the contract giving rise to a constructive dismissal, is a more difficult and elusive issue on the facts.

[77] Counsel contended that the burden was on the respondent to prove the date of the dismissal, and he did not. Counsel argued that, under cross-examination, the respondent maintained that the date of his termination was 1 September 2003. That date was the target date for legal amalgamation of LOB and Sagicor, but that target date was not achieved. The reliance on 31 December 2003 as the date of termination, essentially rules out a dismissal by amalgamation on 1 September 2003 or change of employer or owner on that date. If the date of termination was 31 December 2003, and not 1 September 2003, when the administrative amalgamation of the two companies took effect, and a consequent change of employer, the Tribunal could not properly have relied on the provisions relating to a change of owner to grant a severance payment to the respondent, as it did. It could only have relied on constructive dismissal.

- [78] Put differently, argued counsel, were it held that the dismissal occurred on 1 September 2003 by reason of the amalgamation and consequent change of employer, then **sections 4 (3), 4 (4), 9 (2) and 16 (2)**, all dealing with change of owner would come into play. However, they cannot be relevant where the alleged dismissal occurred on 31 December 2003, some four months after the change of the employer, and the allegation is one of constructive dismissal.
- [79] For the foregoing reasons, counsel maintained that the Tribunal was wrong to apply **section 4 (4)** when the alleged dismissal was on 31 December 2003, four months after the administrative amalgamation, and Mr. Hill's contract was already taken over by Sagicor. There was no specific event or act which occurred on 31 December 2003, which would have amounted to a dismissal or change of employer. As Mr. Hill's case was based on the choice of 31 December 2003 as the termination date, that date had to be explained and justified, as a foundational issue.
- [80] Counsel argued further that the Tribunal was also bound to make a finding of fact as to the terminating event, whether it was the administrative amalgamation or constructive dismissal by way of the alleged major changes to the contract of employment. Such a finding was required to identify the relevant provisions of the Act to be applied – those relating to change of owner or those relating to constructive dismissal.

[81] Counsel pointed out that Sagicor's case was that the administrative amalgamation, as at 1 September 2003, amounted to a dismissal at common law and under the Act. However, since Sagicor offered to renew Mr. Hill's contract on the same terms and conditions as the old, by virtue of the provisions of the Act set out above, counsel argued, Mr. Hill must be deemed not to have been dismissed for the purpose of severance, and his service must be treated as unbroken.

[82] In response, Mr. Lashley QC explained that the termination date was not clearly stated because from July 2003 until the decision of **Sir David Simmons, CJ** on 12 October 2007, the status of the representatives, including Mr. Hill, was in doubt having been challenged by Sagicor. However, counsel argued that, though the Tribunal did not state specifically that termination was at the end of December 2003, it so implied by stating at paragraph 3 of its findings that:

“Having continued to work for Sagicor since the beginning of 2004, the applicant must be deemed to have been engaged under new conditions of service under protest subject to the payment of severance for the period of employment prior to 2003.”

[83] There is clearly some doubt as to the termination date alleged by Mr. Hill. However Mr. Lashley QC seemed to have accepted that date as 31 December 2003 when the companies were amalgamated. However, we find no evidence to support Mr. Lashley QC's argument that upon the

amalgamation of the companies, an employee is dismissed by the company which “was taken over” and enters into a new contract with the company which “took over” that company. In applying basic company law principles enshrined in **section 206** of the **Companies Act, Cap 308**, we do not consider that there was a cessation of employment by Mr. Hill upon the amalgamation of LOB and Sagicor. Rather, the obligations of LOB became the obligations of Sagicor upon their amalgamation, and the contracts of employment entered into by LOB became the contracts of employment binding on Sagicor.

[84] The argument that Mr. Hill was dismissed from his employment with Sagicor is the substructure on which he claims severance. Therefore, if this foundation is defective, then any claim on this structure must also be defective.

[85] Mr. Hill would have to prove that, subsequent to the amalgamation of the companies, there was a dismissal under **section 16 (1) (c)** of **Cap. 355A**, whereby he terminated his contract of employment without notice in circumstances such that he was entitled to terminate the contract by reason of Sagicor’s conduct. Under **section 16 (4) (b)** the dismissal must have a relevant date which is the date on which the termination takes effect.

Whether the Sagicor Offer was different from the LOBRA or was unsuitable

[86] On the question of whether the Sagicor Offer was different from the LOBRA, thus amounting to a constructive dismissal, we agree with counsel for Sagicor that the Sagicor Offer consisted of substantially the same terms and conditions

as were contained in the LOBRA. In our view, the only change made in the Sagicor Offer was the rationalisation of the respective rate books of LOB and Sagicor. The foundation of the LOBRA was that Mr. Hill solicit applications for life assurance and annuities offered by his employer; not to sell specific products. No change was made to that foundational contractual understanding.

[87] Similarly, as was earlier stated herein, it is our judgment that there was no change to the other terms and conditions on which Mr. Hill was previously employed by LOB. The contract offered by Sagicor was the LOBRA under which Mr. Hill and the other representatives had previously been employed by LOB. The terms of that contract remained the same. The two rate books were rationalised, some products being removed and new ones introduced and some commissions substantially reduced. The business of selling insurance policies and annuities remained the same. The income of the representatives still depended on their own industry and effort. Therefore Mr. Hill's contention in respect of a variation to his contract with LOB ought to have failed before the Tribunal.

[88] We also accept counsel for Sagicor's submission that, even if the Sagicor Offer was not on the same terms and conditions as the LOBRA, the conduct of Mr. Hill showed that he accepted the Sagicor Offer, whatever were its terms. The legal consequence of this was that, even if the Sagicor Offer was

different in part from the LOBRA, and Mr. Hill were in consequence deemed dismissed under **section 16 (1) (c)** or otherwise, by continuing to work after such dismissal, Mr. Hill must be taken to have accepted Sagicor's Offer or to have elected to treat the contract as continuing notwithstanding the deemed dismissal by operation of **section 16 (1) (c)**.

[89] On the further question as to whether the Sagicor Offer was unsuitable, the Tribunal found that the Sagicor Offer did not satisfy the requirements of **section 4 (4)** and was therefore unsuitable. In our view, on the plain language of **section 4 (4)**, that subsection is only applicable where there is an offer of new or renewed employment following a dismissal. As previously stated, there was no dismissal by LOB, nor a new contract entered into with Sagicor, which would render the Sagicor Offer unsuitable. We therefore are of the view that the Tribunal wrongly applied **section 4 (4)** to this case.

Disposal

[90] For all of the foregoing reasons, the appeal is allowed and the order of the Tribunal is set aside. We make no order as to costs.

Justice of Appeal

Justice of Appeal

Justice of Appeal