

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. 2007/0175

BETWEEN:

DORNELLA SETH

CLAIMANT

AND

THE ATTORNEY GENERAL

DEFENDANT

Appearances:

Mr. Hugh C Marshall Jr. and Mrs. Charissa Roberts-Thomas for the : **Claimant.**

The Attorney General, Mr. Justin Simon Q.C. and with him

Ms. Alicia Aska, for the: **Defendant.**

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2009: January.
2010: January, 25.
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JUDGMENT

1. **Harris J:** The Claimant, Dornella Seth claims damages against the Defendant for breach of an employment agreement by which, at the material time, she was employed by the Government of Antigua and Barbuda as a Senior Counselor - a diplomat - and which she alleges resulted in her constructive dismissal. At the time of the alleged dismissal, the Claimant was employed at the Permanent Mission in New York where prior to her diplomatic posting she had been employed in various and subordinate posts since 1985. The Claimant alleges that by letter dated 1st July 2004 she was directed to immediately go on three (3) months leave from the 6th July 2004 and that upon the completion of her leave she would be transferred to the Head Office in Antigua and Barbuda. She alleged, that thereafter, despite repeated requests she was not provided with the particulars of her new position as Senior Foreign Service officer (including her duties and responsibilities thereto) at the

Antigua Head Office, neither was she given adequate notice of the transfer so as to enable her to put in place schooling arrangements for her son and other arrangements for herself. The claimant alleges further, that she was not provided the Airline tickets for herself and her dependant son or the monies for her shipment of her personal belongings to Antigua in sufficient time or at all, so as to allow her to report for Duty in Antigua on the dates requested. The claimant avers that since December 2004 she has been denied access to her previous station at the Mission in New York and remains without post and employment. The Claimant avers, that she is an active member of the Antigua Labour Party and that during the 2004 General Election, she returned to Antigua and actively campaigned for one, Mr. Elmore Charles, who ran for the said labour Party against the now deputy Prime Minister. Following the march 2004 General Election which the Labour Party lost, the claimant alleges that the Defendant took actions; *"calculated to be oppressive and arbitrary and motivated out of political spite and malice"*¹. This civil case arises out of those alleged actions.

2. The defendant admits that the Claimant was so employed, but denies constructive dismissal and counterclaims that the claimant breached the terms of her employment by up to now failing to report for duty in Antigua and Barbuda after she had been repeatedly directed to do so by the Permanent Secretary in the Ministry of Foreign Affairs (the "PS").
3. The defendant avers that the claimant was reluctant to take up her new position in Antigua notwithstanding that she was required under the terms of her employment to take up duties in other duty posts whensoever required. Further, consistent with the Ministry policy, adequate arrangements were put in place to facilitate the claimant's relocation to Antigua and these were communicated to her.² The Defendant avers that the Cabinet approved sum of US\$6000.00 for the shipment of her personal effects was deposited to the claimant's account and has to date not been recovered. Further, it is alleged that the cost of the two Airline tickets purchased and issued to her have been forfeited to the Airline due to the claimant's refusal to return certain documents to the Mission in a timely manner for forwarding to the Airline, as requested by the Airline and the said Mission.
4. The Claimant has claimed Special Damages of EC\$136,879.27 being the; *"loss of protection from unfair dismissal or Severance Pay in the sum of US\$35,980.68 or its Eastern Caribbean equivalent EC\$97,755.91 (being US\$157.61 x 228 months)"*³ **AND** *"Immediate loss of Income for three (3) months in the sum of US\$14,000.00 or its Eastern Caribbean equivalent US\$39,123.36."*

¹ See para. 12 of the Amended Statement of Claim.

² These arrangements included ; *"Baggage Allowance"*, *"Passage"* for her and her son, *"Resettlement Allowance"*.

³ See para. 11 of Amended Statement of Claim

5. *The Claimant alleged that she sustained injury as follows; "Headaches occasioned by stress", "Hyperglycaemia occasioned by stress". She claimed General Damages to be assessed; Exemplary Damages to be assessed; Interest and Costs.*
6. The Defendant denied the claim and counterclaimed inter alia for: General Damages for breach of employment contract; Special damages in the sum of US\$7,014.40 or equivalent \$EC19,057.42; Damages for Misrepresentation; Interest pursuant to the Eastern Caribbean Supreme Court Rules and Costs.

THE EVIDENCE – THE FACTS

Liability to transfer

7. Evidence was led by Dornella Seth for the Claimant. Evidence for the Defendant was led by Mr. Harold Lovell¹ (**the "Minister"**), Ms. Jackley Peters² and Mr. Collin Murdock³ (**the "PS"**).
8. At the onset let me say that I accept as a proved fact, that the terms of the claimant's employment permit her to be relocated to the head office in Antigua. I do not accept that she was employed under peculiar circumstances that allowed her to maintain her employment in the New York Permanent Mission indefinitely. There is simply no or insufficient evidence of this and it remains a mere assertion and not a proved fact. I make this finding fully cognizant of the fact she was first employed as far back as 1985 as a person already resident in the USA. This finding is also supported by the following evidence.
9. The Claimant's initial employment was as a receptionist and may well have carried with it the undertaking of the employer, that she would not be transferred out of the USA. However, subsequently, in 1993 she was appointed as a "*Second Secretary*" – a diplomatic posting – which has with it, terms and conditions including; "*liability to transfer between missions as well as to Headquarters of the Ministry of External*

¹ At the material time was the Minister of Foreign Affairs, Tourism, International Trade and Civil Aviation for Antigua and Barbuda.

² At the material time she was the Administrative/accounts attaché to the Permanent Mission in New York and was responsible for making the necessary arrangements in respect of the Claimant's re-location to the Headquarters in Antigua (see her witness statement and her testimony in court.)

³ The Permanent Secretary in the Ministry of Foreign Affairs Headquarters since 1995 (**the "PS"**).

Affairs.” The Claimant signed the letter of appointment as accepting the appointments and those additional terms and conditions thereto.¹

10. In the end, in cross examination, the claimant said; “*as a diplomat, I was subject to transfer to other Missions and to headquarters in Antigua*”. After establishing that she was initially employed at the mission as a receptionist, a follow up question was put to her and she said; “*I accept that things changed when I was made a diplomat.*”

Conduct of the parties – reasonableness?

11. There is no dispute that the claimant was sent on three (3) months leave from the 6th July 2004, at very short notice. This directive was contained in letter dated 1st July 2004 from the Permanent Secretary (**the “PS”**), Mr. Colin Murdock and further informed her that upon the expiration of the leave, she will be redeployed to the Ministry of Foreign Affairs Headquarters in Antigua and Barbuda where she will take up the position of Senior Foreign Service Officer.²
12. The claimant wrote several letters to the Permanent Secretary starting with that dated the 12th August 2004, of relevance to us requesting, firstly; that the terms of reference of the post of Senior Foreign Service Officer be communicated to her. Secondly, she raised the issue of the logistical arrangements for her transfer from New York to Antigua needing clarification³.
13. The PS Foreign Affairs wrote to the claimant by way of a MEMO, referring to his previous correspondence to her of the 1st July 2004, indicating that the Mission will be responsible for the costs and administrative arrangements associated with her reassignment. He there set out what he referred to as the ‘*basic terms and conditions which will govern the administrative arrangements of the reassignment...*’. These basic terms and conditions were limited to the ‘baggage allowance’, the payment of two air tickets and reference to a ‘*Resettlement*’ allowance.⁴ The other issues raised in her letter of 12th August do not appear to have been adequately addressed or addressed at all.

¹ See letter dated 30th Dec. 1993 from Min. of External Affairs at pp93 of the Trial Bundle (“**TB**”) vol. 2.

² See pp 95, Trial Bundle (“**TB**’) Vol. 2.

³ logistical arrangements; I understand to be largely the travel date, tickets and transport of personal effects.

⁴ No dollar value was placed on the resettlement allowance.

14. By letter dated Oct. 12th 2004 the claimant again wrote to the PS expressing the view that her employment with the Mission was one which allowed her to be permanently based in New York. She indicated to the PS that if she is to be transferred to Antigua it must be with her approval and on terms and conditions, including her emoluments, being no less than those she was currently entitled to. Mrs. Seth concluded that; *"Based on the foregoing I view my redeployment and the terms thereof (or lack of terms thereof) as a constructive dismissal of my employment. On that premise, I will accept Severance payment at one month's pay for each year of employment as full settlement of my employment equity with the Government of Antigua and Barbuda."*¹
15. On November 8th, the claimant wrote to the PS again, referring to her previous correspondence of October 12, indicating that she had not received a response to that letter. She indicated that in the absence of a response to the contrary to this present letter, she will report to duty at the Permanent Mission in New York on the 17th of November, immediately following the expiration of her vacation leave. She added that reporting to the New York Mission, was in keeping with the terms and conditions of her employment. The claimant at this time and by this letter appears to be still insisting that moving her to another geographical work post was not permissible under her subsisting contract of employment.
16. The PS replies to this last letter from the claimant, by his letter dated the 11th of November 2004. The claimant is still on vacation which will expire on the 16th of November 2004, some 5 days after the date of the letter from the PS. I think it fair to say that the letter dated 11th November, whether posted (or even couriered) from Antigua or from New York, would have reached her, at best, on the verge of the expiration of the vacation or more likely on or after the 16th of November 2004².
17. In this letter the PS dismisses the claimant's claim to having terms and conditions that preclude her from being transferred to another duty station. He refers to his communications to her of the 1st July and the 21st September 2004 correspondence that details the '*administrative arrangements*' for her relocation to the Head Office in Antigua. The PS pointed out to her that he had given her four (4) months notice of

¹ See pp 9 9, TB Vol.2

²A later attempt to post documents to the claimant failed to reach her. See below.

the transfer and sufficient notice of the "administrative arrangements" relating to the transfer. He then stipulates the date of the 22nd November 2004 (5 days after the expiration of her vacation leave), for her to report to work in Antigua, as he put it; "...to discuss the duties and the responsibilities associated with your position of Foreign Affairs Officer within the Ministry of Foreign Affairs". So at this time the claimant had not received a written description of her job and duties thereto. It appears also that the PS did not intend that she receive this written description until she reported for duty in Antigua. At this time she had also not received either the allowance for the transportation of her personal effects nor the tickets for travel both of which the PS had referred to in his 26th Sept. Memo to the claimant.

18. In cross examination, the PS, Mr. Murdock, made several telling concessions. In relation to the description of the claimant's new functions at Head Office he said; *"It is correct that her functions had not been communicated to Mrs. Seth in writing."* Further, he stated *"I accept that in changing the position of an employee, I am obliged to put in writing a description of their new position and their function"* The PS did not stop here but insisted that he *"expected her to report for duty in Antigua before she had received her job description."*¹

19. Needless to say, by the 22nd of November 2004 the claimant had not received either the tickets for travel, the monies for the shipment of her personal effects, her job description, nor answers to her other queries contained in her correspondence variously referred to above. In relation to this duty date, it is fair to say that the PS could not have reasonably expected the claimant to take up duty in Antigua². Indeed, in cross examination the PS conceded, and rightly so, that he; *"did not expect her to relocate before we met her travel or expenses of moving."* The evidence is that the claimant showed up for work at the New York Mission after her vacation where, by telephone, she was instructed by Mr. Murdock to go back home and wait for instructions from him for her to go to Antigua. Whatever was said by the claimant prior to returning to the Mission, of being constructively dismissed was clearly overtaken by the events on this day and suggested the employer-employee relationship still subsisted. The claimant submitted a sick leave certificate dated the

¹ See Rank Xerox Ltd v Churchill [1988] IRLR 280 for lawfulness of even an unreasonable mobility clause.

² See *Prestwick* case below.

- 22nd November 2004 indicating that she was incapacitated from the 18th Nov to the 24th November 2004. The submission of this certificate by the claimant is a conscious act of the employee and in my view is further evidence that she did not consider herself at this time to have been dismissed.
20. The claimant had by letter dated the 16th Nov. 2004 written to the PS a four (4) page letter setting out all her grievances including the shortness of the notice period. She indicated that the transfer being part of her duties, she could not have been expected to use her earned vacation leave to arrange these affairs. She raised the issue of not having the arrangements for moving fully clarified, that she has to make arrangement for her son to be enrolled in school and that this should have been done earlier so that he could have commenced school even before she had arrived in Antigua. The claimant averred in her statement of case that the PS was tardy in putting arrangements in place. The claimant alleged unfair treatment and repeated her earlier position that in the circumstances the directive for her relocation to Antigua and Barbuda is tantamount to her constructive dismissal. The PS responded by letter dated 25th November 2004.
21. The PS reiterated his position that; *"transfer and rotation is a normal part of diplomatic life and a fundamental component of the Foreign Service"*. He stated unequivocally that her *"attachment to the Antigua and Barbuda Permanent Mission to the UN has come to an end"* and that she should *"report for duty at the Ministry HQ on Monday 29th November 2004"*. The PS continued and informed the claimant that the Mission will meet the costs of up to US\$6000.00 for the shipment of her personal effects. This was the first time an actual dollar figure was communicated to the claimant. The PS indicate to the claimant that her assertion that her emoluments package she received in the USA should be transferred to her in Antigua was not going to happen and that such benefits on a transfer has never been applied to others in the diplomatic service.
22. Mr. Murdock, the PS, said further, that the period between the end of her paid vacation leave and her departure for Antigua was intended for her to *"make the necessary logistical preparations for your transfer and relocation to Antigua"*. This appears to be the PS response – and concession it would seem - to the claimant's assertion that she cannot be expected to use her vacation to do the business of her employment. He concluded by advising her that; *"failure to report for duty in*

Antigua as directed, without valid reasons will result in the determination that you have abandoned your employment, with all the attendant consequences.". Likewise, the defendant at this time did not consider that the claimant had abandoned her position or deemed herself constructively dismissed.

23. So the claimant has been given a second date for reporting for duty in Antigua, the 29th Nov. 2004. Again, the evidence in this case is that at that date neither the US\$6000.00 for transporting her personal effects, nor the tickets, were given to the claimant. In fact it does not appear from the evidence that up to the 29th Nov. 2004 the instructions had even been given to the administrative staff at the Mission to purchase the tickets or to transfer the funds to the claimant.¹ Neither it appears, was the claimant furnished with the description of her post or the functions of that post. She was given four (4) days from the date of this letter of the 25th to the date of departure. I cannot presume that the date of the letter is also the date of receipt of same. The evidence is that the final arrangements in fact commenced on the 5th of December 2004.

24. The claimant's evidence is that she spoke to Jackley Peters in New York on the 2nd December at which time she had not received the instructions to pay over any monies. She next spoke to Jackley Peters according to the claimant, on the 9th December 2009. By this time I accept the evidence that the US\$60000.00 had been transferred to the claimant's account and the electronic tickets had been purchased and available to the claimant. The evidence of the defendant is that the money was transferred on the 6th of December and the tickets were purchased on the 5th of December². The claimant said she became aware of the deposit on the 8th of December by way of notification by her bank. Mrs. Seth, in chief, testifies that in her conversation with Ms. Peters on the 9th of December, Ms Peters did not inform her that she, Ms. Peters, had already made any arrangements, had any airline tickets, had made the Reservations or had deposited any money to her account. She said

¹ See "Interoffice memo" from the Ambassador Arthur Ashe to Jackley Peters, of the 6th December 2004 at pp123 of TB Vol. 2, for the instructions to effect the travel and shipment financial arrangements; see also para. 16 of the witness statement of the claimant TB1 pp74.

² See invoice at pp 118 of TB 2.

that none of this was ever communicated to her.¹ Having regard to the irrefutable evidence that at the latest, as at the 9th December the said transactions had occurred, I find the claimant's evidence on this point incredulous and simply not believable. Firstly, I would imagine that the claimant herself would have raised the question about her travel arrangements. In any event, for what purpose would Jackley Peters have maintained a conversation with the claimant on the 9th December (or the 7th or 8th of Dec.), just a day(s) before the claimant was to travel, in the circumstances of the claimant's prior and persistent demands for clarity of the said arrangements, and then, not raise the fact that the arrangements had been made?

25. Jackley Peters evidence in chief however, is that contrary to that of the claimant, she spoke with the claimant on the 5th of December 2004, where, upon informing the claimant of the readiness of the cheque for the shipping of her personal effects and the purchase of the two e-tickets which were to be picked up at the airline counter at the time of departure, the claimant advised that the cheque be deposited to her account. This was done on the 6th. Ms. Peters said she immediately then posted to the claimant in New York as per the request of the claimant, documentary evidence of the transactions. Further, Mrs. Peters evidence in chief was that she again spoke with the claimant by phone around the 7th or 8th of December 2004 and the claimant told her that she had no intention of using the airline tickets because it was too late and she did not accept the travel arrangements to Head Quarters in Antigua. I accept Jackley Peters evidence as plausible, inherently consistent with the circumstances of this case and as true.

26. The Inter office memo from the Ambassador of the 6th December directs Jackley Peters to purchase a ticket for the claimant and her son to travel to Antigua on the 8th of December. The ticket stubs exhibited in the TB 2 pp 118 show a 10th December 2004 travel date on a one way ticket. The claimant said in chief, that after the 30th November the proposed dates of travel were uncertain. I agree. In fact, in the end it appeared that the claimant was informed of the travel date by the date of the ticket as conveyed to her by Jackley Peters and certainly on the 7th or 8th. by Mrs. Peters personally. There is no evidence from the Ambassador, the relevant Minister or the PS

¹ See para. 19 of the claimant's witness statement at pp75 of TB1

of they giving her the specific date for travel or for reporting for duty after the 29th November.

27. The claimant did not travel on the 10th of December 2004. The claimant has not reported for duty at the Head Office to date. By letter dated the 10th of January 2005, the claimant wrote to the PS referring to the several letters she had written to him chronicling her concerns with respect to the transfer and as yet unresolved issues arising thereto. She pointed out that the present state of affairs were untenable in which no employee could be expected to continue or remain and serve as employee. She reaffirmed her position that she had been constructively dismissed and called on the Government to settle her with Severance pay.

28. The claimant wrote to the Ambassador the following year, in April of 2005, concerning her Group Health Insurance plan termination since the 15th of December 2004 without her notice. The PS testified in chief, that he spoke with the Ambassador on this matter and that the claimant's group Insurance participation was limited to employees resident in New York and since the claimant had been transferred to Antigua from the 10th December, she would no longer qualify.¹ I note that at the 15th of December, the Ambassador would have known that the claimant had not travelled. However, the PS, if not the Ambassador, would have known at this time that the claimant considered herself as been constructively dismissed and therefore no longer in the employ of the Government.

29. I do not wish to tarry much longer with these facts. Suffice it to say, the treatment and expectations of the claimant by the defendant were initially unreasonable. The several dates set for her to report could not possibly be met due substantially to the failures of the Government. The initial expectation that she utilize her vacation time to make her arrangements to travel on official business was unreasonable and not lawful. Further, during that vacation time and thereafter the refusal to provide her with a description of her post and duties and other financial arrangements were contrary to law and in any event somewhat unreasonable. It is admitted by the Defendant that there was no articulated policy to govern transfer travel

¹ This evidence is contained in the witness statement of the PS. No objection (and notice thereof) was taken as to the potential heresy character of this evidence at the appropriate time, prior to trial.

arrangement situations such as this, so I am hard pressed to understand how the Government could have expected the claimant to have responded otherwise to their initial directives in the circumstances¹. Finally, however, when all was arranged for the claimant to travel on the 10th of December there was not in place thereafter, any specified time for the claimant to take up her duties - it was open. But, of importance, is that whatever version one accepts, whether it is that the claimant was informed on the 5th of December of the travel date on the 10th, or so informed on the 7th, 8th or 9th of December, it would be unreasonable and probably not possible for the claimant to have traveled on that date. I accept that the history of uncertainty and absence of advance shipping funds (not to mention her position that she had been dismissed) would not have allowed the claimant to have put herself in a state of readiness to have left the USA on the 10th November 2004. The PS in cross examination admitted, that; *"it is not reasonable for the claimant and her son to have organized herself to travel between the 6th of December and the 9th of December"*.²

30. What then is the effect of these circumstances? The claimant now has the money to pay for the shipment of her goods.³ She has access to the tickets. She has been informed in no uncertain terms that her assignment to the Permanent Mission is at an end.⁴ I am not satisfied that the 10th December travel date was an ultimatum. The duty date was left open. The claimant was free to set a travel itinerary and convey it to the PS. However, at this time she had already considered herself as constructively dismissed and would not have been open to arranging her affairs to travel on the 10th and/or travel and present herself in Antigua at a later date. Although she has not received her job description or the specified requested details of her emolument package,⁵ it was open to her as I said, to contact the Mission or the Ministry in Antigua to communicate her concerns and her estimated time for arriving at the

¹ The responses referred to, are her protestations and request for particulars of her post and transfer arrangements.

² Prestwick Circuits Ltd v McAndrew [1990] IRLR 191.

³ Although her earlier quotes for shipping her goods far exceeded the allowance, the claimant has not testified to the allowance being unreasonable; I reject her evidence that she was not informed as to what the US\$6000.00 was for. In any event, in cross exam she admitted that she connected the \$6000.00 deposit to the reference to the said sum in the earlier letter from the PS.

⁴ See letter of 25th November from the PS to the claimant referred to above.

⁵ She was made aware by the process of elimination that certain benefits attached to her posting at the Mission would not carry over to the posting at the Head Office.

head quarters. The claimant could, as at that time, either complete her arrangements for travel; resign her position; or, as in this case consider herself in the circumstances, as being constructively dismissed. If the claimant was to fall within the first option, then in my view, at most, one (1) more month from the 10th of December 2004 would be a reasonable time to complete her arrangements and present herself for duty at the Head Office. She would first advise the PS of the state of affairs and her estimated time of arrival and take it from there. Presumably this is what the Defendants are suggesting she should have done. That is, if she couldn't make the 10th December flight then she should have regrouped, *put her shoulder to the wheel* as it were, and traveled to Head Quarters at the earliest reasonable opportunity. But she did not, nor does it appear that she attempted to. The claimant remained in the USA, having considered herself as being constructively dismissed even prior to the travel date of 10th December 2004. The claimant does not make clear in her statement of case or her submissions before the Court exactly at what date she considered herself constructively dismissed. Notwithstanding her statements in her earlier letters to the effect that she had been constructively dismissed, she subsequently conducted herself as if still employed. However, by the combination of actions including the conversation with Jackley Peters on the 7th or 8th of December and her failure to fly on the 10th of December along with all the prior assertions that she was constructively dismissed, **I conclude that she, at the very latest, considered herself constructively dismissed by the 8th of December 2004.**¹ Now, on the facts of this case, were the circumstances facing the clamant such as to allow her to consider herself as being constructively dismissed?

THE LAW

31. The next order of business is to determine what law applies to the claimant and the circumstances of this case. Is this case governed by the common law breach of contract regime? Is it governed by the Antigua and Barbuda Labour Code?

The labour Code

¹ See para. 25 above for the relevant substance of the conversation.

32. The PS testified in re-examination, that the claimant was a non established Public officer.¹ The Pension (Non Established Government Employee) Act, Cap 310 of the Laws of Antigua and Barbuda defines this class of employee to mean; “a person employed by the Government on a week to week or month to month basis and whose wage or salary is paid from or out of a vote in the official Estimates of Antigua and Barbuda other than a personal emolument vote.” The Antigua Labour Code in its Interpretation section at section A5 provides that a “Non Established Employee” means; “a person who is employed by the Government whose wage or salary is paid from or out of funds other than personal emoluments including in the Official Estimates of Antigua and Barbuda” . The claimant did not refute her classification as a “Non Established Public Officer”. No evidence was led by either party to support any limb of the two definitions of the non-established Public Officer. On the balance, I hold that without evidence to the contrary, I accept the evidence of the PS that the claimant was a non established Public Officer. It is not surprising then, that she has not approached the question of a Pension, as a right. The evidence is that in 2005 the Cabinet was asked to consider the pension benefits of the claimant. This, as I have noted, appears to be a discretionary benefit under Cap 310².

33. The significance of this classification of the claimant, lies in the substance of section A6 (1), (2) of the Labour Code. Section A6 (1) provides that the Code applies to the Government as the employer of its non-established employees only. A6 (2) goes on to provide the exception to the non-established employees as; “... (d) Persons holding the status of Diplomatic Agents:...”(**emphasis mine**). If the Defendant/counterclaimant contends that the Labour Code does not apply to the facts of this case then, to establish that, they will need to bring the claimant under the exception in section A6 of the Code. They have not done so and it seems, did not intend to do so. It is said that the Vienna convention on Diplomatic Relations (April 18, 1961 23 U.S.T. 3227, 500 U.N.T.S.95) contains the most widely accepted description of the International law on Diplomacy. This convention divides the function of the diplomatic agents into six (6)categories, none of which are disclosed in this case. I am not able to classify the claimant as a Diplomatic agent (the ambassador appears to meet the criterion) and so hold that the Labour Code

¹ A peculiar and constitutionally questionable class of State employee that attracts a Pension only at the discretion of the Cabinet.

² In any event the claimant has not pleaded any demand or entitlement to a pension.

applies to this case. The claimant ought to have pursued and exhausted her rights under the Code first.

34. The labor Code at section C 2(1) provides as the national Policy; that “every workman should know what his Job consists of, what his working conditions shall be. ...”. Section C5 specifically provides for the employer providing the employee with a written description of their job, responsibilities and duties, among a comprehensive list of other particulars. It provides also for the provision of the employees pay and the method of computing same. Section C5 (4) provides that where the employer desires to change responsibilities and duties, he shall at or about the time he effects any such change¹, furnish the details to the employee. From the first date of duty on the 22nd day of November up to the 29th of November, no such statement had been provided. Extending the last date of duty to sometime after the 10th of December – no date of taking up duty after the 10th actually having been set and/or communicated to the claimant – then at least 18 days would have elapsed since the 22nd November. The section – C5 – cannot be construed as having contemplated this length of time for the employer to furnish the employee with the statement of the particulars. Failure to do so amounts to a breach of the code. The claimant contends in effect, that she requested such information (or in any event part of it) as the defendant is mandated to provide her and the defendant refused or otherwise failed to furnish her with, what I equate to the particulars set out in section C5 of the labour Code. If the claimant’s contention is true, then the defendant acted unlawfully with respect to a term of her contract of employment as implied by statute. There can be no doubt that the said statement and particulars were not provided the claimant as required by the code and as implied, by the contract of employment. Further, the claimant contends that the defendant has not, pursuant to the Labour Code or otherwise, at any time given the claimant written notice of the termination of her contract of employment. This is so.

¹ The section provides that for new employees or, for existing employees at the time of the commencement of the Act, that the job, duty and role description must be provided no later than 10 days thereafter. Arguably the different wording used in relation to the instant case ie. Changing responsibilities and duties; “...at or about...” may give the employer a few days at least, to provide the particulars.

35. If the Court were to find that the Defendant is liable, what heads of damage are applicable to this case? The defendant contends that the heads of damage claimed by the claimant are peculiar to the Industrial Court under the Industrial Court Legislation¹. The Defendant contends that if the Defendant were wrong (and it claims that it was not), the remedies available to the claimant lie in the combination of the common law and the Labour Code and not under the Industrial Court damages regime.

The common law – Breach of contract

36. The Defendant submits that the primary legal issues to be determined are whether the Claimant was constructively dismissed as alleged (that is, whether the defendant had repudiated the contract or was sufficiently in breach of it) or, alternatively, whether the claimant abandoned her post and thereby terminated her employment.²

37. The defendant submits as follows;³ it is settled law that a termination of the contract of employment by an employee will constitute a dismissal if she is so entitled to terminate because of the employer's conduct. The defendant submits that it is not enough for the employee to leave merely because the employer has acted unreasonably; the employers conduct must amount to a breach of the contract of employment. The defendant cites the case of Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713 (the "**Western Case**"), which indeed does support that proposition on the basis of the existing law in the UK. The defendant submits that in order for the claimant to establish her claim to constructive dismissal four conditions must be met; "**(a)** there must be a breach of Contract by the employer; this may be either an actual breach or an anticipatory breach; **(b)** that breach must be sufficiently important to justify the employee resigning; **(c)** the employee must leave in response to the breach, and not for some other unconnected reason; and **(d)** the employee

¹ The Industrial Court Act, Cap 214, Volume 5 of the Revised Laws of Antigua and Barbuda.

² See para. 3 of the 'Defendant's Closing Submissions'

³ Taken and substantially reproduced from the "Defendant's Closing Submissions".

*must not delay too long in terminating the contract in response to the employer's breach."*¹

38. Section C58 of the Labour Code sets out, the reasonableness of the employer's actions, as the test for deciding whether or not a dismissal was fair. However, I understand Lord Denning MR, in the **Western case** cited above, to be making the distinction that "reasonableness" being relevant to the determination of the fairness of the dismissal as opposed to the determination of the relevant question; that is, whether there had been a dismissal in the first place. I accept as a correct statement of the law in Antigua, that which is supported by the **Western case** and set out above.

FINDINGS

39. Applying the Law to the facts of this case; the defendant's failure to provide the claimant with the tickets for travel and the monies for the shipment of her personal effects to travel on the earlier dates does not amount to a breach of contract. The time for the claimant to take up duties in Antigua was pushed back repeatedly to allow for the issue of the monies and ticket. In effect the defendant never required her to travel without these arrangements in place. In any event, even if this was a breach of contract by the defendant, given the opportunities for taking up her duties after the 10th of December together with the apparent willingness of the employer to adjust the duty date, this breach would not have been sufficiently significant to justify the claimant either resigning and/or considering herself as being constructively dismissed.² There was no sufficient reason for the claimant to believe that unlike the previous dates, that she would not have been afforded the opportunity to take up her duties at a later date. In the end, she never did request this consideration and extension of time nor did she remain available to benefit from any extension of time before she deemed herself constructively dismissed. Her state of readiness to travel was peculiarly within her knowledge and it was incumbent on her to sufficiently inform her employers of her state of affairs. Her next communication with her

¹ See also para 16-19 of Brown v Merchant ferries Ltd. [1998] IRLR 682.

² The testimony of the PS was that;"my expectation was that if the claimant could not arrive on the 10th, she will arrive as soon after as she could."

employer was by letter dated the 10th January 2005 in which among other things she reiterated her position that she had been constructively dismissed. The claimant was still in New York. The defendant had however, required her to travel and take up duty without providing her with a written statement of her job description, duties and responsibilities, emoluments and method of calculating same and all the other particulars set out in section C5 of the Code. Despite the defendant's "desire" to change the claimant's responsibilities and duties since at least July 1st 2004 and, the claimant's several letters claiming her right to this information; and despite the several dates set for the claimant to take up her new post in Antigua, the defendant did not on or about the time it effected that change, furnish the said particulars and, from the 8th to the 10th of December had not in fact done so. The claimant has not claimed that she had no idea what the terms and conditions of her new post was, but rather, on the balance, the evidence suggests that she was unclear about certain particulars, more particularly those benefits/allowances which attended her posting at the New York Mission that would not be transferred with her to Head Quarters. Further, the fact that the claimant would query or stipulate that the allowances be transferred with her, reflects in my view, her intimate knowledge of the usual terms and conditions of her post in Antigua and Barbuda.

40. The contents of C5 are implied terms of an employment contract in Antigua and Barbuda. In assessing whether there has been a breach I have also looked at the impact of the defendant's conduct on the claimant rather than merely what the defendant intended by its actions. **Apart from being in breach of the Labour Code, the defendant was also in breach (both actual and anticipatory) of the contract of employment in this regard (see "a" above). This is the 1st condition to be met by the claimant in accordance with the formulation by Denning MR in the *Western Case* and she has met the condition.** The next question to be asked - (see "b" above) - was whether the breach was sufficiently important to justify the employee resigning or considering herself as being constructively dismissed. The test is an objective test. That is, to state the question another way; did the defendant's conduct so impact on the claimant, that viewed objectively, the claimant could properly conclude that the

defendant, her employer, was repudiating the contract¹? In my view not only could the claimant not properly make such a conclusion, but in fact, did not so conclude.

41. The transfer to Antigua was not a demotion or a disciplinary act. It undoubtedly had implications for the claimant personally (including the emoluments package, functions and duties of the post) and if the claimant had been found to have been constructively and unlawfully dismissed, the determination of the reasonableness of the "dismissal" would take these personal implications into account. However in the scheme of things, whether the breach is sufficiently important to justify her considering herself as being constructively dismissed, surely the claimant as a 19 yr veteran of the Foreign affairs department is taken to have substantially known what those functions and responsibilities of her new post were. She was, after all, to remain a diplomat. Part of the answer to her queries with regard to the transferability (and her allege entitlement) of the allowances, was provided her by the PS in the letter to her. Further, the PS had indicated to her in his later letter of the 11th November 2004, that she travel to Antigua as directed and thereupon he will discuss the *duties and responsibilities* associated with her position. This does not relieve the duty on the defendant to provide these particulars as provided in the Code, but the question is whether the absence of the written statement at that point in time, justifies the claimant's actions. Further, in determining the importance of these implied terms of the contract of employment, I note that unlike other sections of the Code, the Labour Code does not provide a sanction (either specifically or generally) for breach of section C5 . Further still, there is no evidence to suggest that the new position of the claimant – Senior Foreign Service Officer – was not an existing post with settled terms and conditions. I do not find that the provision (or failure to do so) of the written particulars of the job, duties and responsibilities in the circumstances of the claimant's employment history and tenure and in the circumstances of this case, to be sufficiently central a term of the contract of employment as to be considered as going to the root of the contract. **As tardy and inconsiderate as the defendant had been in dealing with the transfer, I cannot see this particular term and breach thereof as a being sufficiently egregious one, that justified the claimant considering herself**

¹ The considerations drawn from C56-C59 of the Labour Code and adapted, are relevant to this issue.

constructively dismissed.¹ I move now to another limb of the Denning formulation in the *Western Case*. The 3rd condition of the Lord Denning formulation that the claimant has to meet is; that the employee must leave the employment in response to the breach, and not for some other unconnected reason.

42. The defendant contends that the claimant did not want to leave the USA for personal reasons unconnected with the circumstances surrounding the transfer. It is not difficult to see why the claimant would not want to leave the country she had made her home for some 22yrs; 19yrs of which she worked with the defendant. Her evidence was in effect that she had secured as a condition of her initial employment as a receptionist, a contractual term that she would not be removed from the USA². In the instant case she initially alleged that that condition was still applicable to her present diplomatic position at the Permanent Mission 19 years later. She did instead focused on resisting the transfer on additional grounds. The claimant said that she was resident in the USA prior to getting the job with the defendant in 1986. She said that she was not brought to the USA by virtue of her employment with the Defendant. The defendant remains in the USA to date and is gainfully employed as a consultant in diplomatic affairs. I accept that the claimant was not enthusiastic about returning to Antigua, for reasons I believe would include; her long residence in the USA (and all that comes with that, including her sons schooling and connection to the USA) and the fact that a Government had come into power that opposed the one that she actively campaigned for. That is life. But, this does not mean necessarily that she refused to come to Antigua for those personal reasons. She may very well have been also concerned with the transfer arrangements. However, at no time from the October 2004 to date, has the claimant indicated a convenient date for her relocation. She resisted the transfer by identifying the shortcomings of the arrangements, her legal rights to remain in the U.S.A. and of course the fact that she was constructively dismissed. Whereas the claimant is entitled to do as she did without prejudice to her, the tone and text of the communication were not seeking to enhance the transfer process. The copying of the letters to various persons

¹ See also para 17-20 of the *Brown v Merchant Ferries* case for a discourse on the law of the conditions underlying a constructive dismissal by the Court of Appeal in Northern Island.

² If this had been a term of her contract of employment in 2004, it would amount to a central term, a breach by the employer of which would, if all other legal requirements being satisfied, entitle the claimant to consider herself as being constructively dismissed.

including her lawyer and the Union suggests a combative approach from the early stages of the process. Having regard to the documentary evidence – letters – and the testimony of the claimant, I am of the view that on a balance of probabilities the claimant did not want to take up her new assignment in Antigua and Barbuda and for personal (and perhaps perfectly understandable) reasons unrelated to the contract of employment preferred instead to remain in her adopted home in the USA. I am of the view that the claimant exercised poor judgment and exhibited a *thin skin* in considering herself as been constructively dismissed in the circumstances and at the premature time that she did.

43. The claimant alleges political motivation for the transfer and to that end gave some insufficient and not altogether convincing evidence to that effect and later cross examined the PS and the Minister to that end with limited effect. The purpose of this evidence, having regard to the way the claimant's case is framed, is not entirely clear at this time. It is not clearly articulated in the submissions of the claimant. No doubt there is conflict in the evidence between the Minister and the PS as to who gave the original directive to transfer the claimant. There is no conflict in who actually directed the claimant to transfer to the Head Quarters. The claimant contends, in effect, that members of the ruling party conspired to have her transferred because of her open involvement in the recent national election campaign. The claimant admitted to coming to Antigua prior to the elections and campaigning for a particular Labour Party candidate. In other words, her transfer was politically motivated because of her political election campaign involvement with the opposition political party. This allegation remains an allegation and after a trial, has not been elevated to proved fact.

44. The PS had pointed out to the claimant in the 3rd paragraph of his letter of the 25th November 2004, that *transfers* and *rotation* are a normal part of diplomatic life. He had indicated in the earlier letter of the 1st of July 2004 that the Ministry has reassessed the deployment of its staff overseas as part of its overall assessment of its human resources. Although the PS does not actually state it, presumably with the information obtained from the 'reassessment', it was determined that she be transferred to the head office. Counsel for the claimant suggested in cross examination that such a departmental reassessment needed to be of a formal

nature and asked if there was any documentary evidence of this. I disagree. In any event no documentary evidence of this was produced.

45. The Minister denied having the conversation with the claimant where it is alleged that he revealed; that for political reasons, persons within the now ruling party wanted to get her out of the department completely.

46. I find that this contention not proved. The Claimant was, as I have found, lawfully transferred and not for illegitimate reasons. The lawful reasons are in part identified in the said letter of the 25th of November.

47. The claimant in all her communications and her insistence that she was constructively dismissed, repeatedly claimed Severance pay for her constructive dismissal. The Labour Code provides for severance pay in a 'redundancy' situation. The Code's definition of a 'redundancy' does not include the circumstances of this case as alleged in the claimant's statement of case.

Counterclaim

48. The Defendant counterclaimed for the cost of the airline tickets and the monies deposited to the account of the claimant for her use in shipping her personal effects. The defendant claims that they were induced to purchase the tickets for the claimant and her son to travel, by the claimant's initial representations (Misrepresentation) that she was prepared to take up duty in Antigua. The defendant further claims that the failure of the claimant to both travel on the assigned date and to produce to the Mission "*copies of the necessary identification documents to enable the Defendant's to obtain a refund of monies paid for the airline tickets*"¹ has cost the defendant US\$7,014.40(EC\$19,057.42), being cost of the two airline tickets of US\$1,014.40 and the shipping cost of US\$6000.00.

¹ See para 9 of the Amended Defence and Counterclaim, pp30 of TB 1.

49. There is no dispute over the amount of the monies sent to the account of the claimant for the shipping – US\$6000.00. As to the airline ticket, I am unable to grasp the claimants fault in this loss. The failure of the claimant to submit the *necessary identification* documents that resulted in the loss is not clear. I am not entirely clear on what these documents are. I have not been satisfied that the claimant was obliged to produce these documents or that the production was necessary for the refund at all. The counterclaim for the loss of the ticket value is dismissed.

CONCLUSION

50. For the reasons provided above, the claimant has failed to prove that she was constructively dismissed as alleged. It is therefore not necessary for me to deal with the issues concerning the categories and quantum of damages in her favour. Further, the political motivation for the transfer was not proved. The allegations of “*oppressive and arbitrary actions*” are subsumed under and effectively dealt with in my determination of whether the ‘breach’ was sufficient to justify the claimant considering herself constructively dismissed.¹ Suffice it to say the claimant has failed to prove that any of the Defendant’s alleged actions set out in clause 12 of her amended statement of case as being ‘*motivated out of political spite and malice*’ or otherwise, existed and/or caused the unlawful transfer of the claimant to another duty post. The defendant has substantially proved its counterclaim²; that the claimant failed to report for duty in Antigua as alleged thereby unilaterally terminating her contract of employment. The loss to the defendant is for US\$6000.00, being the amount transferred by the defendant to the account of the claimant to cover her shipping expenses.

51. For the reasons provided above, IT IS HEREBY ORDERED as follows:

- i. That the claimant’s Claim is hereby dismissed;
- ii. That there be Judgment for the Defendant on the Claim and the Counterclaim;
- iii. That judgment on the counterclaim is for Special Damages only, in the sum of \$US6000.00;

¹ The 2nd limb of lord Denning’s formulation; see para. 37 above.

² Claimant has not however proved Misrepresentation (whether wholly Innocent, Negligent or Fraudulent) as a cause of action. Fraud was not pleaded or proved. In any event, if it had proved an Innocent Misrepresentation, it would only entitle the counterclaimant to a rescission of the contract induced by the misrepresentation. The contract of employment, the subject of this action, was not so induced nor is it so pleaded or otherwise alleged.

- iv. That there is awarded interest on the judgment sum pursuant to the Judgment Act only;
- v. That Costs is awarded the Defendant pursuant to the Prescribed Cost regime of the CPR 2000 at 60% of the said costs.¹

FURTHER AUTHORITIES CITED AND CONSIDERED: Bank of Antigua Ltd v Errol Williams Antigua and Barbuda Civil Appeal, 23 of 2001; McGregor on Damages, 15th edit. Pp23-27,254-260; O'Brien v Associated Fire Alarms Ltd [1969]1 ALL ER 93.

DAVID C HARRIS

HIGH COURT JUDGE

ANTIGUA and BARBUDA

¹ The counterclaim involved the same facts and for the most part, the law, as did the Claim. See also para.50 fn.2.