EMPLOYMENT RIGHTS TRIBUNAL

BARBADOS

DISSENTING DECISION

Beverley P Beckles

Case: ERT/2017/234

EDMUND BUSHELL **CLAIMANT**

V

BARBADOS LIGHT & POWER LIMITED (BL&P) **RESPONDENT**

DATES: 27 FEBRUARY 2020 13 AUGUST 2020

30 JULY 2020 10 SEPTEMBER 2020

01 APRIL 2021

BEFORE: EMERSON GRAHAM, Q.C. CHAIRMAN

MR EDWARD BUSHELL MEMBER

MRS BEVERLEY BECKLES MEMBER

APPEARANCES: MR JOHN COLLYMORE, ATTORNEY-AT-LAW- For the Claimant

MR MICHAEL KOEIMAN, ATTORNEY-AT-LAW- For the Respondent

1. INTRODUCTION:

The underlying facts and evidence in this case have been established and are not summarised separately in this dissenting opinion. Based on the evidence presented by the Claimant and the Respondent the outcome of Mr Bushell's claim of constructive unfair dismissal hinged on the determination of the following three (3) fundamental questions:

1.1. Was Mr Bushell Constructively Dismissed because of a serious or fundamental breach of his employment contract and was his position clearly indicated to his employer inter alia? OR

1.2. Did Mr Bushell resign from the BL&P to take up employment with another entity? OR

1.3. Did Mr Bushell abandon his job and was dismissed by the BL&P?

2. CONSTRUCTIVE UNFAIR DISMISSAL

An employee can claim constructive unfair dismissal by terminating his contract with or without notice because of the conduct of his employer in accordance with Section 26 (1) C of the Employment Rights Act, 2012-9 (ERA). But based on employment law precedent that employee has the major burden of proving that the employer's actions represented a serious or fundamental breach of his Contract of Employment – expressed or implied.

2.1. Mr Bushell's letter of November 14, 2014 **was not a letter claiming constructive unfair dismissal nor was it a letter of resignation**. In this letter, Mr Bushell simply asked the BL&P to add his name to the list of persons who did not wish to work under the new terms and conditions of service as a result of the introduction of flexible working hours, to be aware that he did not receive certain communications that would have allowed him to make an earlier decision, and to consider his request in time so that he could depart the company on severance by November 28, 2014. He further thanked the company for giving him the

opportunity to work over the last 15 years and wished the company success in the future.

2.2. In his evidence Mr Bushell stated that "I complained Mr Clarke (*sic)* who was in a supervisory position on Saturday (September) 6, 2014 for wetting me with a hose. I did not hear anything further until I was ready to proceed on vacation leave in November 2014. I was supposed to be issued with a warning letter. Mr. Jules did not serve me because he could not do so in the absence of a union delegate. I was taken aback by the development because I was the person who complained and up to this day I do not understand how I could be in the wrong for complaining. I do not know if anything was done to Mr. Clarke". The letter of November 18, 2014 put into evidence by BL&P, is the warning letter.

2.3. Mr Bushell proceeded on vacation leave from December 02, 2014 to December 22, 2014. This was a recommended and subsequently approved request.

2.4. On December 8, 2014 while the Claimant was on approved vacation leave, he wrote to the Human Resource Manager and stated that he was constructively dismissed effective November 29, 2014 and offered the following reasons for his position:

2.4.1. Mr Arthur Lewis, Generation Manager, informed him at a meeting on November 14, 2014 that the new 'flexible work arrangement" would be implemented with effect from January 01, 2015.

2.4.2. The new working hours would be disruptive to family life and he would have to weigh his options about continuing to work for the BL&P.

2.4.3. He did not receive the revised offer in April, 2014 because he was on sick leave due to a vehicular accident.

2.4.4. Mr Lewis told him that it was not too late for him to seek an accommodation of severance, but the request must be in writing. The request was made in writing on November 14, 2014 and he requested a

separation date of November 28 2014. The Human Resource Advisor was notified of the request. At December 08, 2014 he did not receive a response in writing.

2.4.5. He was placed in a difficult if not impossible situation to function on the job in safety and without fear of reprisal. The hierarchy was aware of a number of misunderstandings with a trainee supervisor. He was wet with a garden hose by this supervisor. He has had to exercise restraint in order to avoid physical confrontation.

2.4.6. He was transferred from Seawell to Spring Garden to facilitate separation between the trainee supervisor and himself and he understood that this same supervisor was being assigned to supervise him. He felt that this impending action was insensitive and uncaring particularly since the supervisor would be appraising his work performance.

2.4.7. The BL&P changed the Terms and Conditions of his employment to his detriment, was discourteous by not responding to his request to be severed and he was transferred into an environment which is stressful and hostile.

2.5. On December 29, 2014 the BL&P responded to Mr Bushell's letter of December 08,2014 making the under mentioned assertions:

2.5.1. The Claimant was on certified sick leave from April 11, 2014 until May 23, 2014, but the letter of March 04, 2014 outlining changes to his work arrangements and requested a response by March 17, 2014 indicating if he did not accept the new terms, was not responded to by the Claimant. Another letter was issued on April 16, 2014 to clarify certain issues, but the same offer remained and the letter of March 04, 2014 was not rescinded.

2.5.2. The Claimant was a Union Delegate when he returned to work on May 26, 2014 and attended meetings with the Barbados Workers Union (BWU) and BL&P. He was aware that five employees opted to leave the company but

the Claimant never indicated a desire to leave the company before the conclusion of the Collective Agreement on November 13, 2014.

2.5.3. The BL&P acknowledged the letter of November 14, 2014 from Mr Bushell and informed that the request for voluntary separation was subject to consideration and approval by the Board of Directors and the next scheduled meeting of the Board was set for March, 2015.

2.5.4. The Claimant was on vacation leave from December 02, 2014 to December 22, 2014 and the company expected him back on duty December 23, 2014. The Claimant was reminded that he did not submit supporting documentation in relation to his absence without leave

2.5.5. The company has a right to deploy staff as it sees fit and that the Claimant's transfer to the Generation Department was in no way precipitated by any incident.

2.5.6. The incidents the Claimant was involved in with the Trainee Supervisor were investigated and dealt with previously, but the latest incident would have been addressed on the Claimant's return to work on December 23, 2014.

2.5.7. The Claimant's continued absence from work without reasonable excuse will be considered as an abandonment of employment effective from December 30, 2014 and the company will proceed accordingly.

3. DISCUSSION OF UNFAIR DISMISSAL

3.1. **Prior admonishments or unfounded allegations of bad behaviour or any disciplinary proceedings that violated the principles of due process, fairness or item (d) of PART A of the FOURTH SCHEDULE of the ERA regarding the expunging of a written warning twelve months old or more from an employee's record, cannot be considered by the Tribunal as evidence against Mr Bushell.**

3.2. Mr Bushell's request of November 14, 2014 seeking approval for severance was not made within the various deadline dates set by the company. However, the contract negotiations were still ongoing after the deadline dates and as late as July 02, 2014 clarifications were still being done, but employees were unreasonably expected to make a decision by April 24, 2014 to opt to remain with or leave the company, without adequate knowledge of the full extent of their new Collective Agreement. In fact, the witness for the company conceded in her testimony that **negotiations were a "long way off from completion" and they continued well after the deadline date of April 24, 2014**.

3.3. The option was for an employee to state whether he/she agree or did not agree "with the changes to terms and conditions as outlined" in the letter of April 16, 2014. Page 3 paragraph 2 of that letter also stated "All of the changes noted above are subject to final agreement between the Company and the BWU and your agreement to these changes confirms your willingness to abide by this final agreement between the two parties". It further stated "your conditions of employment agreed between the BWU and the Company as amended will form part of your contract of employment" page 3 paragraph 3. It was unreasonable for the company to hold its employees to a deadline date before all material changes to the employment contract were fully negotiated and before the contract was agreed finally. Furthermore, none of the letters issued to the members of staff specifically stated that no late options would be entertained by the company. It was therefore not unreasonable for Mr Bushell to seek an accommodation after April 24, 2014 and expect a timely decision.

3.4. Mr Bushell made his request for separation on November 13, 2014 verbally to Mr Babooram, prior to the signing the Collective Agreement, and followed it up in writing on November 14, 2014, on the advice of a senior company employee (Mr Lewis), but Mr Bushell was later notified that the matter would be considered approximately four months later in March 2015 whilst the new terms and conditions of service would come into operation effective from January 01, 2015.

3.5. Mr Bushell had ample time to indicate whether he wanted to remain with the company or to apply for separation from the company and, at least by the time of receipt of letter dated July 02, 2014, was aware of the various deadline dates set. However, as a member who joined the Workers' Negotiation Team late May 2014, he was also uniquely aware that significant negotiations were in progress after April 24, 2014 that could have affected his final decision. Additionally, Mr Arthur Lewis, Generation Manager, believed that it was not too late for Mr Bushell to exercise his option for the severance arrangement. Mr Lewis even went as far as to recommend for approval Mr Bushell's application of November 14, 2014.

3.6. The testimony of the BL&P's representative that disbursements were only made in December was indicative that the company too was awaiting the conclusion and signing of the Collective Agreement on November 13, 2014 before implementing certain aspects of the terms and conditions of the Agreement.

3.7. Time was of the essence in this situation and a reasonable person would have expected the company to give an answer to Mr Bushell's request timeously. While there was no certainty of a positive outcome or otherwise to Mr Bushell's request, **it was incumbent on the company to avoid a delay in deciding the matter especially after insisting that the employees make a decision about their future status, with or without the company, whilst material changes were being negotiated. In addition, the company stated that "it has been agreed with the Union that it is not possible to have persons within the same unit operating under different terms and conditions"** (Letter dated March 04, 2014 page 2 paragraph 2). Paragraph 19 in the Court of Appeal of Barbados No 7, 2002 decision re Courts (Barbados) Limited v Inniss (Nov. 2005) proffered by the Respondent is therefore not applicable since Mr Bushell's contract would have changed.

3.8. If Mr Bushell had decided to continue working under the new agreement it might have been possible for the company to conclude that he waived his request to be considered for severance or that he affirmed the new contract.

3.9. Mr Bushell lamented that he was not being fairly treated. He expressed his concerns to management in a meeting of May 24, 2013. At this same meeting, both Messrs Anderson Henry and Geoffrey Richards attempted to point management in a direction where the issues raised by Mr Rommel Clarke and Mr Edmund Bushell could be settled.

3.9.1. Mr Henry indicated that he was aware of some of the issues between Mr Clarke and Mr Bushell. He opined that given the fact that Mr Clarke was now in a senior position, the fear of victimisation was a real possibility.

3.9.2. Mr Richards indicated that Mr Bushell's concern "should not go unnoticed or unresolved thoroughly". He guided management towards utilising available services that could help employees to be comfortable in the workplace. He also stated that Mr Bushell had a real concern and that it was management's responsibility to bring the employee back to his comfort zone. He suggested that another meeting should be held aimed at helping Mr Bushell back to a comfortable place.

3.9.3. The meeting of May 24, 2013 ended without a clear cut plan being considered to resolve the conflict between Mr Clarke and Mr Bushell. It is apparent to a reasonable person that the impotence of management in this matter resulted in the situation of September 06, 2014. The company's claim that the previous incidents were dealt with might be true but no evidence was presented to show that the complaints raised were settled to the satisfaction of the parties or that there was any follow-up on the recommendations coming out of the meeting of May 24, 2013.

3.9.4. In fact, Ms Grant in her evidence confirmed that the company had access to the services of a Psychologist but could not confirm that these resources were offered or made available to Mr Bushell. When asked about the atmosphere now Mr Bushell was no longer at BL&P, the Company's representative stated that it was more peaceful because "**No one was complaining for Supervisors and she can get the company's work done"**.

3.9.5. In its letter of December 29, 2014 to the Claimant, the company asserted its right to choose to deploy its workforce in the best way it sees fit. This inherent right is however, subject to some statutory provisions, e.g., health and labour laws, and particularly the ERA as well as generally accepted principles regarding the duty of care and the exercise of fairness and natural justice.

3.9.6. On September 06, 2014 Mr Bushell reported an incident that took place between himself and Mr Clarke, and the company without proper due process issued a warning letter dated November 18, 2014 intended for Mr Bushell, four days after he submitted his request not to continue with the company. The company probably inadvertently actually admitted in its letter of December 29, 2014, in response to Mr Bushell's letter of resignation dated December 08, 2014 that "The last incident referenced would have been addressed with you and your Union delegates as requested by you, on your return to work on the December 23, 2014". This breach of due process contravened the provisions of the ERA and fairness cannot be unilaterally remedied by the company. The disciplinary procedures used were unreasonable and unfair in arriving at its decision to warn Mr Bushell without due process. In fact, Mr Bushell complained about being wet with a hose by Mr Rommel Clarke but yet Mr Bushell was being warned about his purported use of "abusive and threatening language".

3.10. Just as the company's right to conduct it's affairs as it sees fit, Mr Bushell was in his right to expect timely and amicable solutions to his grievances and his request to vacate the company. In the case of W A Goold (Pearmak) Ltd v McConnell (1995) IRLR 516 it was held that there is an implied term in the contract that grievances should be dealt with in reasonable and prompt manner and a breach of such by an employer can lead to constructive dismissal. In fact Blackburn v Aldi Stores Ltd (2013) UKEAT/0185/12JOJ went further to suggest

that the company's failure also breaches the implied term of mutual trust and confidence.

3.11. Section 27 (1) of the ERA states that an employee has the right not to be unfairly dismissed by his employer. **This means that an employer must employ fairness and due process when making decisions about the employment status and contractual obligations to its employees.**

4. RESIGNATION TO TAKE UP A JOB WITH ANOTHER ENTITY

The company stated that Mr Bushell resigned to take up a new job with another entity and Mr Bushell did not deny that he was employed elsewhere, but this fact by itself was not enough to determine that he resigned his job with the BL&P irrespective of the events he encountered on the job and the actions of management. If it were proven that Mr Bushell commenced his employment prior to December 08, 2014 the date of his resignation, this fact among others might have been a fair argument and could probably have nullified Mr Bushell's claim of constructive unfair dismissal. However, the company failed to provide pervasive evidence to justify its position. For example, the company did not indicate when Mr Bushell took up the appointment, nor that he resigned because he got a new job and the actions or lack of action or decisions of the company had no significant impact, bearing, or influence on his decision to resign from the company.

5. ABANDONMENT OF JOB

5.1. In this regard, the Buckland principle is raised here re: Buckland v Bournemouth University Higher Education Corp. (2010) EWCA C iv 121. Once an employer had repudiated the employment contract it was not open to it to cure that repudiation. Furthermore, the company's action in its letter of December 29, 2014 cannot nullify Mr Bushell's right to claim constructive unfair dismissal. Mr Bushell's letter of December 08,2014 claimed constructive unfair dismissal because of the conduct of the BL&P and he was not required to give any notice

to the BL&P in accordance with Section 22 (2) (8) of the ERA notwithstanding the fact that he was still on vacation leave.

5.2. Mr Bushell cannot backdate his date of resignation to November 29, 2014. His resignation was effective from December 08, 2014. In this regard, the cases HEAVEN v WHITBREAD GROUP, plc (2010) UKEAT/0084/ 10 and FITZGERALD v UNIVERSITY OF KENT (2004) EWCA C iv 143 are relevant. The BL&P cannot ignore or unilaterally alter Mr Bushell's date of resignation.

5.3. Contemporary legal and human resource management experts and relevant literature and professional representations indicate that an employer has two options when an employee abandons his job or is a no-show no-call. The employer can affirm the contract or accept the repudiation of the contract. The BL&P argued that Mr Bushell abandoned his job and this was the reason for his dismissal. Therefore, the company cannot merely claim that Mr Bushell's actions represented an ordinary resignation and all the burden of proof is on him. In the case at hand, BL&P chose to accept the repudiation of the contract and therefore was obligated to apply procedural fairness which experts referenced above have represented as an onus on employers to make a genuine attempt to:

5.3.1. Contact the employee through appropriate means – phone, email, text, and letter etc. or as established in the contract of employment.

5.3.2. Understand the reason for the employee's absence and give the employee the benefit of the doubt.

5.3.3. Give the employee a sufficient or reasonable time to respond.

5.3.4. Consider the length of service of the employee (in this case 14+ years) and how frequently the employee has been ghosting or has been a no call, no-show.

5.3.5. Ensure that abandonment of job policies are consistently applied and

5.3.6. Ensure that the decisions taken are not harsh, rash, unjust or unreasonable in the circumstances.

5.4. In this regard, the case of Lazar v Ingham Enterprises PTY Ltd (2013) FWC 3447 is of relevance. In this case Ingham Enterprises exercised procedural fairness but the Court determined that the company's decision was harsh.

5.5. The fundamental principles are that the employer must act reasonably to satisfy itself that the employee had definitely abandoned the job, exercise procedural fairness in dismissing the employee and consider whether the dismissal may be interpreted or considered harsh, rash, unjust, or unreasonable in the existing circumstances.

5.6. The company failed to give the employee sufficient or reasonable time to respond to the letter of December 29, 2014 the time allowed being one day. The company wasted no time in terminating the services of Mr Bushell given that the **NIS TERMINATION OF SERVICES / LAY OFF CERTIFICATE was dated December 30, 2014 the same date on which Mr Bushell was expected to respond to the letter.** It was observed that in the year 2014, December 25 and 26 were public holidays, the 27 and 28 were Saturday and Sunday respectively and on Monday the 29 the letter was properly or legally issued.

5.7. Mr Bushell was employed by the company for over 14 years and no evidence was laid out by the company to show that Mr Bushell was habitually absent without leave or was guilty of ghosting.

5.8. Given Mr Bushell's length of service and his apparent good work performance, the action taken by the company was unjust and hasty especially since job abandonment does not necessarily mean immediate dismissal. **Also if it were possible that the company satisfied Section 29 (1) of the ERA the respondent still failed to apply procedural fairness as required by Section 29 (4) of the ERA.**

5.9. In all the circumstances therefore, Mr Bushell was unfairly or constructively dismissed on account of serious or fundamental breaches of his contract and the haste to dismiss him before the new contract terms were implemented. This was evident based on the timing of the letter of

December 29, 2014 but the BL&P did not make haste to get Mr Bushell's request for severance decided within a reasonable time.

6. CONCLUSION

6.1. The company cited the following three cases in support of its arguments. However, using the same cases I posit the below conclusions to debunk their position :

6.1.1. GENERAL MOTORS OF CANADA LTD v YOHANN JOHNSON

The facts in the above case pertained essentially to a poisoned work environment. Mr Bushell stated that he had concerns about certain unreasonable situations within the work environment and not being able to function on the job in safety and without fear of reprisal. His concerns were not imaginary given the failure of the company to follow up on recommendations made during the meeting of May 24, 2013, failure to deal with the complaint he made on September 06, 2014, the unfair disciplinary action taken against him on November18, 2014, failure to deal with his request to be considered for severance and the haste taken to dismiss him. However, notwithstanding these facts, the overriding issue in this case was not necessarily a poisoned work environment, but rather lack of due process or procedural fairness and lack of timely decision making by the BL&P.

6.1.2. WAITHE v CARIBBEAN CONFECTION CO. (1959) LTD

This case was decided in March, 2004 and paragraphs 13 and 14 were worthy of note. There were no statutory provisions in place in Barbados at that time and this fact was highlighted by the Court. The ERA is now in place and one cannot merely rely on this case in the current matter. The statutory provisions, for example, Sections 27 (1) and 29 of the ERA, must be followed. The BL&P did not follow the above statutory requirements.

6.1.3. COURTS (BARBADOS) LTD v INNISS

Paragraph 27 of the judgment is referenced here: "lack of expedition in reassuring the respondents concerns… These facts are beyond question and go to the heart of the issue of constructive dismissal." The essence or heart of Mr Bushell's case is procedural fairness and the lack of expedition by the respondent in handling matters that troubled the Claimant.

6.2. With regard to Mr Bushell's claim, he established a case and a basis for constructive unfair dismissal and put forward what he considered as his evidence to support his claim. The Respondent was therefore required to counter this claim by showing that its actions were not unfair and to demonstrate what the principal reason was, if more than one reason for the dismissal existed that satisfied the provisions of Section 29 of the ERA. In this regard, reference is made to the case of UPTON-HANSEN ARCHITECTS LTD v GYPTAKI UKEAT 0278/18/RN. In this respect, the Respondent did not meet the burden imposed by the law.

6.3. Based on the written and oral evidence presented in this case I have concluded that there were two serious and fundamental breaches of Mr Bushell's contract and that:

6.3.1. Mr Bushell was constructively dismissed.

- First, the BL&P disciplined him by giving him a warning letter dated November 18, 2014 after he made a complaint on September 06, 2014 against a fellow employee. He was not accorded due process and his complaint was not heard. The BL&P admitted in its letter of December 29, 2014 that it intended hearing Mr Bushell's complaint on December 23, 2014 on his resumption of duty after vacation. The company's action contravened Sections 27 and 29 of the ERA.

- Secondly, the company failed "the reasonable person test" by its failure to consider Mr Bushell's request to be severed in a timely manner, and

in fact decided not to hear his case for over four months. This time period was well over two months into the new contract terms and conditions of service and over six weeks prior to the commencement of the new contract on January 01, 2015. The company owed a duty to its employees to respond to their concerns in a fair and timely manner whether or not it agreed with the issues raised and irrespective of whether or not the Claimant knew about the proposed changes and deadlines imposed to opt to remain with or leave the company. The BL&P failed to adequately deal with the above representations by the Claimant or justify its actions.

6.3.2. No evidence was presented by the company nor obtained during the Hearing to demonstrate that Mr Bushell resigned from the BL&P specifically to take up employment with another entity irrespective of the actions or decisions of the company. In addition, the exact date Mr Bushell commenced employment was not evidenced by the facts in the case.

6.4. Mr Bushell did not abandon his job. He was constructively dismissed. However, if Mr Bushell had abandoned his job, the BL&P were obligated to apply procedural fairness in dealing with Mr Bushell's situation because the company opted to accept the employee's repudiation of the contract. In this circumstance, the company failed to follow fair procedures.

6.5. Compensation

In light of the above, Mr Bushell is therefore entitled to the following compensation in accordance with the ERA: -

1. **Notice Pay 22 (1) d- six weeks' pay i.e., $1,077.2 x 6 = $6,463.20**
2. **Fifth Schedule –**
   - **1 (a) Basic award as per para 2 (c) i.e., three weeks wages x fourteen years ($1,077.2 x 3 x 14 = $45,242.40)**
   - **1 (c) 52 weeks wages for the contravention of 30(1)C iv i.e., $1,077.2 x 52 = $56,014.40**

These equate to $107,720 prior to the inclusion of a sum to be calculated under 1(b) of the Fifth Schedule for pension and any other applicable benefits.

Beverley Beckles

Member

Dated this 13th date of July 2021