1989 August 10

(A. LOIZOU, P., DEMETRIADES, PIKIS, JJ.)

ELBEE CO. LTD.,

Appellants-Respondents,

v.

SOZOS EFSTATHIOU,

Respondent-Applicant.

(Case Stated No. 249).

Wrong dismissal — Variation of contract of employment by employers — Implied acceptance of variation (which was a temporary duration and involved only an insignificant change in salary) by accepting payment of emoluments for the next two months — Treating variation as constructive dismissal — In the circumstances, the employee had no such right.

The applicant-respondent was being employed by the appellants as salesman. The terms of the employment were embodied in a Collective Agreement. In October 1984 the appellants informed the respondent that during the winter period he would be employed as replacement salesman. The Collective Agreement did not provide for such a right, but in a note to the table of basic salaries, to which there is an express reference in the Collective Agreement, the case of conversion from salesman to replacement salesman is mentioned. In any event, the change involved an isignificant amount, as far as the salary is concerned. The respondent accepted payment of salary without protest for October and November, but when he was offered his 13th salary, he protested and treated the change as a constructive dismissal.

He left his work and applied for damages to the Industrial Disputes Court. The latter gave judgment for the applicant. Hence this appeal by way of case stated.

Held, *allowing the appeal, Pikis, J. dissenting:* (1) On the facts of this case and in particular in the light of the aforesaid note, the respondents have not committed a breach of the contract of employment.

(2) In any event, since the respondent had accepted the variation of the contract, he was not entitled to treat the conduct of his employers as amounting to constructive dismissal.

Appeal allowed. No order as to costs.

Cases referred to:

Western Excavating (E.C.C.) Ltd. v. Sharp [1978] Q.B. 761;

Millbrook Furnishing Industries Ltd. v. McIntoch and Others (1981) 1 RCR 309;

W. E. Cox Toner (International) Ltd. v. Crook (1981) I.C.R. 823;

In Re HjiCostas (1984) 1 C.L.R. 513;

Stylianides v. Paschalides (1984) 1 C.L.R. 49;

Bracegirdle v. Oxley [1947] 1 K.B. 349;

Bashir v. Brillo Manufacturing Co. (1980) 1 R.L.R. 284;

Stokes v. Hamstead Wine Co. Ltd. (1979) 1 R.L.R. 297.

Case stated.

Case stated by the Chairman of the Industrial Disputes Court relative to his decision of the 29th November, 1986 in proceedings under the Termination of Employment Law, 1967 (Law No. 24/67) instituted by Sozos Efstathiou against Eteria Elbee Ltd. whereby the respondent was ordered to pay damages and wages in lieu of notice.

K. Michaelides, for the appellants.

A. Scordis, for the respondents.

Cur. adv. vult.

A. LOIZOU P.: This is an appeal by way of case stated by the Industrial Disputes Court in Case No. 6/85, in which judgment was delivered on the 29th November 1986. This is the majority judgment (A. Loizou P. and Demetriades J.). H.H. Pikis will deliver his dissenting judgment.

The facts of the case as found by the Court are as follows:

The appellant Company, hereinafter to be referred to as the Company, is a company of limited liability and is an agent and distributor of soft drinks in Limassol and the Limassol district.

The applicant (respondent in the appeal) hereinafter to be referred to as the employee was employed by the Company on the 8th October 1979, originally as a replacement salesman for the sale and distribution of soft drinks and in particular of Coca-Cola drinks, and as from May 1980 as a salesman, with such remuneration as was provided for in the Collective Agreement of the Soft Drinks Industry which by virtue of article 23 thereof also extends to sales depots. There were no individual contracts of employment between the Company and its employees.

The Company occasionally, during the winter months, when its business was low, would modify or decrease the itineraries in accordance with its requirements and would also change the duties of a number of salesmen into those of replacement salesmen in order that according to its allegation, it would not be obliged to dismiss any personnel due to the fall of any seasonal demand.

In or about October 1984, the employee was informed that during the winter period which, depending on the weather conditions, would last until the 1st of March, or the latest until the 1st of April, he would be performing the duties of a replacement salesman. The employee worked as a replacement salesman during November 1984 at the end of which he was paid the basic salary of a replacement salesman plus cost of living allowance and other benefits. He did complain about this to his Trade Union, but continued to work as such also during the month of December. On the 21st of December as his 13th salary was calculated on the basic salary of a replacement salesman plus cost of living allowance, he refused to collect it as he did not wish to work as such and demanded, if he was to continue to work as a replacement salesman to be paid the salary of a salesman, otherwise to be reinstated to the post of salesman. He considered as the Company did not comply with this that this amounted to constructive dismissal and on the 2nd January 1985 he did not turn up for work but telephoned the Company and informed them that he would file a Court action against them, and thereafter he refused to return to work.

The Company wrote to him on the 3rd of January to the effect that since his refusal to work had been considered as a resignation, it was accepted as from the 2nd January 1985. He replied on the 5th January 1985 that he considered the attitude of the Company as amounting to constructive dismissal and filed as a result an

application to the Industrial Disputes Court which was accepted for the reason that it was considered that the unilateral alteration of the basic terms of the Collective Agreement by the Company - which would have continued for about six months - constituted a breach of an essential term amounting thus to constructive dismissal and furthermore that he rightly terminated his employment with the Company as he was not bound by its previous conduct vis-a-vis other employees.

By the above case stated the following questions of law were formulated by the Judge of the said Court:

1. Whether the Court on the evidence before it wrongly accepted that the change of duties of the applicant from a salesman to a replacement salesman constituted conduct amounting to constructive dismissal.

2. Whether the amounts of remuneration adjudicated by the Court to the applicant were wrongly assessed.

3. Whether the Court wrongly decided that the applicant was entitled to payment of wages in lieu of notice since though the respondent had notified the applicant of the change of duties in October 1984, he left their employment in January 1985.

Counsel for the Company, submitted that there had been no breach by the Company regarding the contract of employment of this particular employee as it is incorporated in the Collective Agreement, but that he had left voluntarily, and that even if there had been a breach such had to be of a fundamental kind in order to entitle him to terminate his employment. It was argued that in the first place, though not expressly provided for in the Collective Agreement there was a practice which was followed for a great number of years and which had been accepted by the Trade Union.

Secondly, as regards this particular employee, he had worked for practically two months under the «varied» contract and in view of the fact that the variation was temporary, that is of four or maximum five months, in view of the material advantages which this person obtained and the insignificant overall loss, it was submitted that he must be taken to have elected to affirm the varied contract.

Counsel for the appellant Company relied for support on the case of *Western Excavating (E.C.C.) Ltd., v. Sharp* [1978] Q.B. 761, where it was said at p. 769 by Lord Denning M.R. as follows:

> «If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract».

Similarly in the case of *Millbrook Furnishing Industries Ltd., v. McIntosh and Others* (1981) IRLR 309, at p. 311 it was stated as follows:

> «We can accept that if an employer, under the stresses of the requirements of his business, directs an employee to transfer to other suitable work on a purely temporary basis and at no diminution in wages, that may, in the ordinary case, not constitute a breach of contract. But in saying that, we think it must be clear that the word 'temporary' means a period which is either defined as being a short fixed period, or which, as in the *Aveling Barford* case, is in its nature one of limited duration».

If the intention of the employer is to preserve the jobs of his employees the breach may not be of the type which entitles his employees to treat the contract at an end. Whether or not it is a repudiatory breach depends on its nature and the circumstances of the case. Relevant is what was said in the *Millbrook* case (supra) at p. 312:

> «This requires one to look at the intentions of the party in breach of the contract. In the context of cases where two

parties are in open disagreement as to the proper construction of a contract, it has been held that the mere insistence by one party on his construction of the contract, albeit at the end of the day found to be mistaken, does not constitute a repudiatory breach: see *Woodar Investment Development Ltd., v. Wimpey Construction U.K. Ltd.* (1980) 1 WKR 277 applied in an employment context in *Frank Wright & Co., (Holdings) Ltd. v. Punch* (1980) IRLR 217».

Also in the case of *W. E. Cox Toner (International) Ltd., v. Crook* (1981) I.C.R. 823, it is stated at p. 831:

«To stay at work for a period of one month to 'look around' starting from the initial breach of contract might well not have been fatal: but to work for a further month, six months already having elapsed, seems to us inconsistent with saying that he had not affirmed the contract».

In the present case we consider that on the facts as stated by the trial Court wrongly accepted that the conduct of the Company amounted to breach. Though, as stated above, it was not expressly provided for in the terms of the Collective Agreement, in the tables of basic salaries and commissions paid, attached thereto and to which express reference is made in Article 3 thereof, it is stated in the form of a note that salesmen and/or drivers who will be converted into replacement salesmen, who were in the employment of the Company on the 31st December 1968 will receive the basic salary increased by two pounds.

Since the Collective Agreement containing this provision was signed as a whole by the Trade Unions, this provision is thus deemed to be incorporated therein and has become part and parcel of the Agreement.

Consequently, we do not consider that the Company was in breach of any of the terms of the Collective Agreement by temporarily changing the duties of this employee, as it did, but that it had acted within the framework of the agreement.

But even if such conduct by the Company were to be considered as being a variation of the terms of the Collective Agreement nonetheless it was for a temporary and practically definite duration - that is until the 1st March or the latest the 1st April - and the overall monetary loss, if any, was insignificant. Furthermore the employee continued to work for almost two

months before deciding to treat his contract of employment as having been repudiated and this only after his demands which were made for the first time at the end of December, beginning of January, were not met by his employers.

On the authorities cited above, we consider that in any case he was not entitled to treat the conduct of his employers as amounting to constructive dismissal, since for all intents and purposes he even accepted the offending variation of the contract.

In view of the above conclusion there is no need for us to examine questions 2 and 3.

In the result and for the reasons stated above the appeal succeeds.

In the circumstances, however, there will be no order as to costs.

PIKIS J.: From 1.1.89 all my judgments were delivered in Greek. The decision in this case is the only exception. My brethren have delivered the majority judgment in English. As I differ, I shall give a separate judgment. In the interest of uniformity of language I, too, shall deliver my judgment in English.

The power of the Supreme Court to review by way of appeal cases stated by the Arbitration Tribunal, is confined to pure questions of law. What amounts to a question of law as distinct from a question of fact or a mixed question of law and fact, was debated in a number of decisions of this Court, including *In Re HjiCostas** and *Stylianides v. Paschalides.*** Also the subject is illuminated by numerous English decisions.*** The application of the law to a given set of facts can be properly classified as a question of law. A clear perspective must be kept of the line dividing questions of law and questions of fact. Our reviewing powers are confined to the former.

The appellants are distributors of soft drinks, namely Coca-Cola. They employed the respondent as a salesman. In October, 1984, after four years service in that capacity, the respondent was relegated for a foreseeable period of five - six months to an assistant salesman; a demotion that entailed change of duties, diminution of status, as well as a small loss of income amounting

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* *(1984) 1 C.L.R. 513.*

** *(1985) 1 C.L.R. 49.*

*** *(See, inter alia, BRACEGIRDLE v. OXLEY [1947] 1 K.B. 349).*

between four and five pounds a month. The employers changed the terms of his employment unilaterally, without reference to or prior consultation with the respondent. There was no warrant for the change in the contract of employment, founded, as it was, on the terms of a collective agreement negotiated between employers and the union representing employees in the trade. The respondent objected to the change of the terms of his employment. The objection was raised through his union, the established channel for the ventilation of complaints of workers against management. He did not resign immediately; he awaited the outcome of his protestations. Thus he served in November, 1984, the month immediately following the communication of the change, as assistant salesman and drew the emoluments paid to that category of personnel. Nevertheless, he persisted in his protestations and left the employment of the appellants as soon as he was informed that his objections were dismissed. The appellants made their position known towards the end of December, whereupon the respondent refused to accept the salary of assistant salesman and submitted his resignation as early as possible thereafter, on 2.1.85.

The respondent had recourse to the Arbitration Tribunal that vindicated his claim for constructive dismissal. The Court found that the employers had changed the terms of employment unilaterally, contrary to and in breach of the terms of the contract of employment. At the request of the appellants the Court stated a case for the decision of the Supreme Court revolving on the implications of the primary findings of the Court.

Among the questions we are asked to resolve, is the question whether the practice followed in the trade of distribution of soft drinks to downgrade occasionally salesmen to assistant salesmen during the winter months when business was at its lowest, should be deemed to be incorporated and form part of the contract of employment, and whether the acceptance by the respondent in the month following the variation of the terms of the employment of the emoluments that were payable to assistant salesman, constituted acquiescence on his part to the changes made by his employers. The appellants argued that seasonal variations in the duties of the personnel of distributors of soft drinks should be considered to be part of the contract of employment. Also they submitted that the conduct of the respondent following the changes, signified acquiescence on his part to the decision of the

employers, dissuading him from protesting thereafter. The change in the duties of the respondent, on the other hand, was so slight and insignificant - the employers argued - as to leave no noticeable effects on the contract of employment.

Before answering the questions raised, I must emphasize that there is no finding that the practice in the trade, the uniformity and effect of which were not identified, was made part of the contract of employment. On the contrary, the only pertinent finding is that the terms of employment of the respondent were solely governed by the contract of employment.

The motives of the employers, in effecting the variation in the terms of the contract of employment of personnel, are not in themselves relevant (*Millbrook Furnishing Industries Ltd. v. McIntosh and Others* (1981) R.L.R. 309). Nonetheless, we may note in passing that the relegation of the respondent to assistant salesman was not wholly unconnected with the disapproval of the employers of the level of efficiency of the respondent and certain traits in the discharge of his duties.

The caselaw establishes that unilateral changes in the terms of the employment introduced at the instance of the employer, entitle the employee to treat the contract as broken and seek damages for dismissal; provided that the variation is not insignificant or such as it could be deemed to be part of the custom in the trade. Whenever the variation strikes at the root of the contract or entails a breach of a material term of it, it entitles the employee to treat the contract as at an end and seek damages for constructive dismissal.

Another test that has been propounded is to cast an objective glance on the contractual situation and treat the contract as broken by the employer whenever the changes are such as to reasonably entitled the employee to treat the contract as at an end (the subject is discussed and relevant caselaw reviewed, in *Labour Law Cases and Materials* by Elias, Nappier and Wellington).

One's employment is the principal avenue for the expression of his creativity; whereas his status and duties at work are directly associated with his self-esteem and scope for creative work. The duties of an assistant salesman, within the context of the employment of the respondent, were different from those of a

salesman; particularly in terms of responsibility and initiative. The tasks of an assistant salesman were wholly subordinate to those of a salesman and superior personnel. Responsibility for the promotion of the sales of soft drinks rested primarily with salesmen. The changes affecting the terms and conditions of the employment of the respondent were contractually and objectively material. In effect, he was required to carry out duties other than the ones he stipulated for. In the case of *Bashir v. Brillo Manufacturing Co.** it was held that the downgrading or lowering of the status of an employee in breach of the terms of his employment, amounted to a breach of a material term of the agreement, entitling the employee to treat the conduct of the employer as an act of dismissal. The case of *Millbrook*, supra, serves to illustrate the importance of the terms of the contract of employment and the weight that the worker may legitimately attach to them as defining the context of his employment.

The loss of income, limited though it was, augmented the breach. The findings of the Arbitration Tribunal disclose a material breach of the contract of employment on the part of the employers. In those circumstances the employee could justifiably treat the contract he originally entered into as at an end.

The next question we must answer is whether the respondent had acquiesced to the changes by accepting to serve as assistant salesman. The case of *Stokes v. Hamstead Wine Co. Ltd.*** suggests that an employee who is wronged in the context under consideration, need not lay down his tools, so to say, and walk away the moment that the wrong occurs. He may protest and may stay on course in anticipation of the outcome of his protestations. This is a reasonable approach; in fact, a desirable one given the present-day realities of industrial relations. It is not unreasonable for a worker to await for a reasonable time the response of his employers to his objections. In this case the respondent left his employment soon after his objections were dismissed. The time that elapsed until the views of the employers to his objections were made known, was not unreasonably long. These findings made, in my view, inevitable the conclusion of the Arbitration Tribunal that the respondent was constructively dismissed.

Consequently, I would, for my part, dismiss the appeal.

Appeal allowed by majority without costs.

* *(1980) 1 R.L.R. 284.*
** *(1979) I.R.L.R. 297.*