SUPPLEMENT TO

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OF THURSDAY 15th October, 2020

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INDUSTRIAL

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JUDGEMENTS

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SUPPLEMENTARY

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NOTICES

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 4 OF 2015

BETWEEN

ANDERSON CARTY

Employee

And

ANTIGUA AND BARBUDA TRANSPORT BOARD

Employer

REFERENCE NO. 8 OF 2015

BETWEEN

ANIQUE FRANCIS

Employee

And

ANTIGUA AND BARBUDA TRANSPORT BOARD

Employer

REFERENCE NO. 11 OF 2015

BETWEEN

JAMES SEBASTIAN

Employee

And

ANTIGUA AND BARBUDA TRANSPORT BOARD

Employer

Before:
The Hon. Charlesworth O.D. Brown — **President**
The Hon. Hayden Thomas — **Member**
The Hon. Megan Samuel-Fields — **Member**

Appearances:
Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employees
Mr. Hugh Marshall and Ms. Kema Benjamin of Marshall & Co., Attorneys-at-Law for the Employer

---

2018: April 20
2018: May 18
2020: August 28

JUDGMENT

Brown, P:

Introduction

1. In these References the Employees, claim that they were unfairly dismissed in in October and November 2015 on the purported ground of redundancy arising from retrenchment and reorganization processes carried out by the Employer. In their dismissal letters each of the Employees was informed that he /she had been "slated for retrenchment".

2. The trials in these three References were held together with the consent of the parties. The main issues are substantially identical to those in Reference No.17 of 2015**: Patricia Julian v. Antigua & Barbuda Transport Board** and Reference No. 33 of 2015: **Hudson Joseph v. Antigua & Barbuda Transport Board,** which were also heard together. Based on the background facts and the pleadings, we will adopt the same approach, use the same legal framework and apply the relevant principles as was done in this Court's recent judgment in latter two cases (the Julian case).

3. The two central issues are:

   (1) Whether a genuine redundancy situation existed at the material time?
   (2) Whether the Employer acted reasonably or unreasonably when it dismissed the Employees?

Background

4. The Employer, referred to in these References as Antigua & Barbuda Transport Board, was established as the "Transport Board" under the Transport Board Act, 1995. In accordance with that Act, its members are appointed by Cabinet from time to time. As a result of fresh appointments, the statutory body was reconstituted in July 2014 following national elections in the preceding month which resulted in a wholly new government.

5. Mr. Anderson Carty (Mr. Carty) commenced his employment on April 18, 2006. He first held the position of Human Resource and Training Officer. By letter dated September 8, 2009, he was re-appointed to the executive management team for a term of 3 years "with effect from May 1, 2009 for a period of three (3) years to expire on April 30, 2012". Upon his re-appointment, he was promoted to the position of Operations Manager with responsibility for four of the Employer's divisions, namely, the National School Bus System; the Government Motor Pool; Highway Patrol and Road Safety – Traffic Wardens; and the Public Service Demerit System. He was required to report directly to the General Manager.

6. At the date of his dismissal on October 15, 2014, Mr. Carty was still engaged as Operations Manager under an implied or inferred three-year contract for the period April 18, 2012 to April 17, 2015. He was earning a monthly salary of $7,300.00 and allowances totaling $2,250.00 per month, including a duty allowance of 1,500.00. He was also entitled to a gratuity, equivalent to 12.5 % of his aggregate salary for the contract period.

7. During his tenure, Mr. Carty contributed to a Thrift Fund, the operation of which by the Employer required it to deduct 2.5% of his salary and pay the same together with its contribution of a matching sum into a designated thrift fund account.

8. While Mr. Carty was on approved vacation leave for the period September 1 to October 14, 2014, the Employer issued a memorandum and a notice to its staff dated September 29 and October 3, 2014 respectively, informing them that:

   (a) As a result of its performance, which was 20% below expectation, there would be some restructuring of the organization to bring about a satisfactory level of efficiency.
   (b) As a result of the Employer's revenue being less than its employee cost, it was necessary to retrench staff to bring a balance to the situation.

9. Mr. Carty received neither the said memorandum nor the notice from the Employer and did not otherwise receive any official communication regarding their contents.

10. On October 3, 2014, while he was still on approved vacation, the Daily Observer newspaper published an article, entitled "Transport Board managers fired", informing the general public that the Employer had taken a decision to terminate the employment of several of its managers including Mr. Carty. He received no notice or any other communication from the Employer in respect of the termination of his employment.

11. On October 15, 2014 when Mr. Carty returned to work, he was invited to the office of the General Manager where the Acting General Manager delivered his letter of dismissal, bearing the same date, to him. Excerpts from that letter, which had immediate effect, are as follows:

> **"October 15, 2014**
> **…**
>
> **Dear Mr. Carty,**
>
> **During the past 8 years the Transport Board has been increasing its labour cost while its revenue has remained constant. Last year the general revenue of the Board was 38% less than the employee cost. At this time, including the Loan cost to the Board, which include Government loan placed on the Board to pay, along with the other myriads of Government expense placed on the Board, it has become crucial for its very survival and as part of its reorganization and restructuring.**
>
> **Regrettably, you are one of the managers slated for retrenchment effective October 15, 2014.**
>
> **While we are satisfied there was no written extension of your previous contract, we have in good faith accepted your latest employment with the Board to end October 15, 2014.**
>
> **…"**

12. Ms. Anique Francis (Ms. Francis) commenced her employment as Personal Assistant to the Operations Manager (Mr. Carty) on September 2, 2013. Apart from her salary of $2,850.00 she also received travel and telephone allowances totaling $400.00.

13. Ms. Francis' employment was subject to the Collective Bargaining Agreement then in force between the Employer and the Antigua & Barbuda Workers' Union.
14. Apart from the general information she gleaned from the Employer's memorandum and notice referred to in paragraph 8 above, Ms. Francis was not officially informed of the probability or likelihood of her dismissal.

15. On November 14, 2014 Ms. Francis was called to the Human Resources Department where her letter of dismissal, bearing that date, was delivered to her terminating her services with immediate effect. The first paragraph is identical to that in Mr. Carty's letter as stated above. The second and third paragraphs are as follows:

> **"November 14, 2014**
> **…**
>
> **Dear Ms. Francis,**
>
> **…**
>
> **Regrettably, you are one of the employees slated for retrenchment effective November 14, 2014.**
>
> **You commenced employment with the Board on September 2, 2013 and will end on November 14, 2014. Your weekly rate of pay was $660.00, resulting in a daily rate of $132.00.**
>
> **…"**

16. Mr. James Sebastian (Mr. Sebastian) commenced his employment as Manager, Motor Pool Division on September 2, 2004. During the term of his employment he also held the positions of Security Manager, Road Safety and Highway Patrol Manager and Property Maintenance Manager. In the last position, which he held at the date of his dismissal, he earned a monthly salary of $6,000.00 together with which he also received duty, telephone and gasoline allowances. In addition, one of the Employer's vehicles was assigned to him.

17. As a member of the management team, Mr. Sebastian was aware of the Employer's general concerns about its "efficiency level" and the existence of "overstaffing in certain areas". However, the Employer did not formally communicate to him that there was any probability or likelihood that his particular employment was or could be in jeopardy.

18. On October 2, 2014 Mr. Sebastian was invited to the office of the Acting General Manager where his letter of dismissal, bearing that date and having immediate effect, was delivered to him. In that letter, after the same opening paragraphs as those in the letters to Mr. Carty and Ms. Francis, the Employer stated:

> **"October 2, 2014**
> **…**
>
> **Dear Mr. Sebastian,**
> **…**
>
> **Regrettably, you are one of the managers slated for retrenchment effective immediately.**
>
> **…"**

The Opposing Cases

19. Although some of the facts on which the Employees rely in their Memoranda of Claim differ, their main assertions which ground their claim of unfair dismissal are strikingly similar, if not identical. They all contend that there was no redundancy situation; that their dismissals were politically motivated; that they received no notice of the termination of their employment; that the Employer failed or refused to consult with them regarding its retrenchment exercise; and that the Employer offered them no alternative employment. In pursuing their claims, the Employees emphasized and amplified those assertions in the context of the background facts outlined above.

20. Mr. Carty emphasized the timing and manner of his dismissal. He was virtually dismissed while he was on approved vacation leave and given his letter of dismissal on the very day he returned to work.

21. Further, in disputing the redundancy alleged by the Employer, Mr. Carty testified that after his dismissal, the Employer hired a new employee to fill the position of Commercial Manager to perform the duties he previously performed as Operations Manager. He also pointed out that on September 26, 2014 a new employee was hired to fill the position of Human Resources Manager and perform the duties previously discharged by him.

22. As to the political motivation for his dismissal, he noted that during parliamentary sessions, which were aired live on national radio and television, the Employer's Chairman, who had been newly elected as a Member of Parliament, berated and insulted him along with the Employer's entire management team.

23. For her part, Ms. Francis testified also highlighted the main grounds of her claim outlined at paragraph 19 above. She also emphasized the abrupt manner of her dismissal and pointed out that prior to her dismissal, the Employer did not implement any temporary austerity measures as it was required to do under the Collective Agreement between itself and the Antigua and Barbuda Workers' Union. Instead, the Employer hired several new employees including management and line staff.

24. Like Mr. Carty, Ms. Francis maintained that the termination of her employment was "politically motivated". She grounded that assertion largely on verbal exchanges she had with the Employer's Chairman, who was on the opposite side of the political divide, during the political campaign leading up to the elections. In particular, she testified that the Chairman threatened to dismiss her after the elections if his party was successful.

25. As to Mr. Sebastian, in addition to the main aspects of his pleadings outlined at paragraph 19 above, he noted that despite the Employer's financial position, of which he had basic knowledge, no alarm was raised at any of the management meetings which he attended.

26. Further, according to Mr. Sebastian, the basis for the Employer's political motivation to dismiss him was his role as a "major player" in the opposition political party prior to the national elections.

27. Mr. Sebastian also corroborated the evidence of both Mr. Carty and Ms. Francis to the effect that the Employer hired new managers and line staff after their dismissals. According to him, the new hires were needed to carry out duties which he previously performed in earlier positions and which he was still capable of performing.

28. The Employer disputed the three claims on the grounds stated in its Memoranda of Defence. In reliance on the evidence of its sole witness, the Employer contended that the Employees were dismissed as part of a retrenchment and restructuring exercise aimed at reducing employment costs in light of the dire state of its financial affairs. According to the Employer, the exercise was necessary because of inefficient management and overstaffing.

29. The Employer also contended that since the retrenchment process itself brought an end to the employment relationships, the Employees were not unfairly dismissed since the "Antigua and Barbuda Labour Code categorizes Retrenchment as a Redundancy and Section C58 states that a dismissal due to Redundancy cannot be unfair." Further, the Employer contended that it implemented its retrenchment and restructuring exercise "solely to reduce payroll cost" and get it out of its unsustainable financial position. Accordingly, the resulting "dismissal due to redundancy cannot be unfair under section C 58 of the Labour Code".

30. In disputing Ms. Francis' claim, the Employer contended that since it had retrenched Mr. Carty, who held the position of Operations Manager, it followed that her position as his Personal Assistant also became redundant.

31. Further, the Employer contended that both Ms. Francis and the Union, as her bargaining agent, were aware of the retrenchment process and had been given opportunities to make suggestions but failed to do so.

The Legal Framework

32. For present purposes, we think that it is appropriate to repeat and adopt this Court's statement of the Legal framework at paragraphs 13 to 23 of the judgment in the **Julian case** as follows:

> "13. We will determine the central issues within the legal framework established by (a) the Antigua and Barbuda Labour Code (the Labour Code); (b) judicial precedents; and (c) the Industrial Court Act (the Act).
>
> **The Labour Code: Redundancy and Unfair Dismissals**
>
> 14. Redundancy is defined in Section C 3 of the Labour Code as follows:
>
> > **"Redundancy" means a situation in which by virtue of lack of customers' orders, retrenchment, the installation of labour saving machinery, an employer's going out of business, *a force majeure,* or any other reason, work which a person was last employed to perform has ceased or substantially diminished;"**
>
> 15. An employee's statutory right not to be unfairly dismissed is established by Section C 56 in the following terms:
>
> > "**Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."**
>
> 16. As to what constitutes a just cause for dismissal, Section C 58 (1) provides:
>
> > **"A dismissal shall not be unfair if the reason assigned by the employer therefor**
> > **…**
> > ***(c)* is that the Employee was made redundant;**
> > **…**
> > ***(e)* is some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:**
> > **Provided, however, that there is a factual basis for the assigned reason"**
>
> 17. Notwithstanding the existence of good cause, the determination of what constitutes an unfair dismissal requires the application of the test of reasonableness as provided under Section C 58 (2) as follows:
>
> > **"The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defense, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."**

Judicial Precedents: Redundancy and Reasonableness

18. As to the burden of proof, at paragraph 31 of its Judgment in Reference No 66 of 2015 **Antigua and Barbuda Workers' Union v. Cable & Wireless (Antigua & Barbuda) Ltd.** (the Cable & Wireless case), this Court emphasized the burden on the Employer to prove the existence of a redundancy:

> **"Having made the assertion and declared its right to dismiss the selected employees, the onus is on the Employer firstly to establish that a redundancy situation existed. In order to discharge this burden, the Employer must prove the factual basis as required under Section C 58 (1) of the Labour Code."**

19. Regarding the definition of redundancy before it was amended in 1998, in Reference No 20 of 1988: **Antigua & Barbuda Workers' Union v. Antigua Gases**, (the Antigua Gases case), it was held:

> **"What this definition seems to contemplate therefore is that redundancy may occur as a result of retrenchment which itself is ordinarily defined as removing what is superfluous, or reducing the amount, or economizing. Thus the situation can arise where the task or work still exists but the employer requires fewer employees …Redundancies may also arise because the work has been re-organized thus requiring fewer employees to do the same work…Thus a re-organization which results in a reduced workforce is a redundancy.. "**

20. In Civil Appeal No. 28 of 2001: **Sundry Workers v. Kings Casino Limited,** (the Kings Casino case) Chief Justice (as he then was) Sir Dennis Byron emphasized the "cause" and "effect" components of a redundancy.

> **"I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be cause and effect. The effect being that the work has ceased or substantially diminished."**

21. In the **Antigua Gases case,** the requirement for reasonableness on the part of the Employer when handling a redundancy was underscored in the following terms:

> **"Nonetheless the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that the dismissal was fair: for the determining factor is whether the employer acted reasonably in handling the situation. When, therefore, redundancies are being considered it might be regarded as good industrial relations practice to follow the guidelines laid down in Williams v. Compair Maxam Ltd. 1982 I.C.R.156. In particular, the employer should seek to establish selection criteria which can be objectively checked …"**

22. In the **Kings Casino case**, after adopting the expressions regarding the definition of redundancy made in the **Antigua Gases case,** the Chief Justice also highlighted the requirement for reasonableness as follows:

> **"This brings me to point out, however, that the existence of a cause, such as a hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably and the dismissal must be shown to have resulted from the cessation of work or the substantial diminishing of work as a result of the hurricane."**

The Industrial Court Act: Statutory Powers

23. The powers of this Court derive from the Industrial Court Act. When exercising its powers, we are expressly required to have regard for the principles and practices of good industrial relations. Section 10(3) provides:

> **"Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-**
>
> ***(a)*** **Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;**
> ***(b)*** **Act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.**

The Evidence

33. In their Witness Statements, the Employees all confirmed the background facts and otherwise substantiated their claims. As to Mr. Carty, he testified passionately about the political motivation for his dismissal and contended that the Employer's own pattern of hiring new employees and their relative salaries demonstrated that there was neither a genuine redundancy nor any serious efforts to reduce costs. In that regard, under cross examination, he testified that by the date of trial the Employer had increased the number of its Managers from 7 to 9, of which 5 or 6 were new hires and 4 were hired within a year after his dismissal.

34. Ms. Francis testified that in her former position of Personal Assistant, her duties were generally clerical and administrative nature, not dissimilar to other clerical and administrative positions within the Employer's organization. According to her, since her dismissal, the Employer hired several new staff to do work which she was capable of performing. In emphasizing her contention of political motivation, Ms. Francis cited open exchanges between herself and the Employer's Chairman during his campaign leading up to the national elections in June 2014.

35. In turn, Mr. Sebastian testified regarding his several managerial positions during the 10 years of his employment. He stated that there was no indication that labour costs and financial considerations were major factors informing the Employer's decision to dismiss him. He maintained that his dismissal was also politically motivated and that there was no redundancy situation In particular, he emphasized that several managers were hired after his dismissal at least one of which was carrying out some of the identical functions which he previously performed.

36. As in the **Julian case,** the Employer's only witness was its Financial Controller, Mr. Carlton Brodie. His witness statement in each of the three References are substantially the same as the ones given in the Julian case. He testified as to the state of the Employer's financial affairs which caused it to be "struggling financially". In particular, he referred to the Employer's Revenue and Expenditure Statements for the years 2011, 2012 and 2013 and testified that the Employer was "grossly overstaffed". Further, he testified about the high "employee cost" relative to the Employer's other expenditures which rendered its financial position "unsustainable". According to him, the Employer's "dire financial state" justified its retrenchment and reorganization processes.

Resolving the issues

Issue 1: Whether a genuine redundancy situation existed at the material time.

37. As defined, a redundancy must necessarily have both a cause and an effect component. The potential causes named in the definition include "retrenchment". As to the required effect, in order to properly ground a genuine redundancy the Employer must prove that there existed (a) a cessation, or (b) a substantial diminution of the work which the Employee was last employed to perform, or (c) a genuine requirement for fewer workers in the organization to perform the required work.

38. We are satisfied that Mr. Brodie's evidence fully discharged the evidentiary burden establishing the dire financial state of the Employer as the cause for the retrenchment and reorganization. However, The Employer's exclusive reliance on his testimony has left much of the Employees' evidence largely unchallenged. As a result, the Employer has failed to prove the required effect in any of the three forms identified at paragraph 37 above. Thus, in the words of Byron, CJ in the Civil Appeal No 8 of 2001: **Sundry Workers v. Antigua Port Authority**: "The essence of redundancy therefore was not established".

39. Accordingly, we reject the submissions of Learned Counsel, Mr. Marshall, to the effect that there was "Redundancy by Retrenchment". Moreover, we consider the Employer's contention in its Memorandum that a "dismissal due to redundancy cannot be unfair" to be wholly misguided. That position totally disregards the Employer's obligation to prove the required factual bases as well as the reasonableness of its actions and omissions.

40. As he did in the **Julian case**, Mr. Marshall also submitted that, in the alternative, the retrenchment/ restructuring could amount to "some other substantial reason" under section C 58 (1) (e) of the Labour Code. If he is right and /or if we are wrong in our finding that there was no genuine redundancy situation, we are obliged to apply the test of reasonableness under Section C 58 (2) of the Labour Code which brings us to the second main issue.

Issue 2: Whether the Employer acted Reasonably or Unreasonably

41. Reasonableness is grounded on principles of natural justice. It is an inherent component of the principles and practices of good industrial relations. Accordingly, we considered whether the Employer acted reasonably or unreasonably in dismissing the Employees having regard for their respective tenure, position and rank. Given the limited evidence adduced on behalf of the Employer, it will suffice to summarize our findings in respect of reasonableness as follows.

Fair Selection Process

42. Given its compliment of approximately 238 staff members, the Employer did not establish any or any fair selection process during the retrenchment / reorganization process. In particular, it adduced no evidence to prove that it engaged in a fair selection process in relation to the Employees or any of them. Mr. Brodie testified that the Employer took the decision to terminate the services of 5 of its 7 managers but was in no position to give an explanation as to why Mr. Carty and Mr. Sebastian were included in that group. Similarly, he could not provide any evidence in relation to the selection of Ms. Francis. In fact, he testified that he did not know what process of selection was used by the Employer. As a result, we find that no fair selection process was followed. The Employer's failure in that regard is an important element of unreasonableness.

Fair Consultation

43. The Employer adduced no evidence to establish that it consulted adequately or at all with the Employees or any of them. In relation to the Efficiency Study Report commissioned by the Employer in August 2014, the clearest express indication of the Employer's failure to consult with the Employees came from Mr. Sebastian. His testimony, which we accept, is that although he knew it was being carried out, he was never approached to give any suggestions or otherwise make an input. His testimony is echoed by both Mr. Carty and Ms. Francis. In the circumstances, we find that the Employer failed or refused to give the Employees any reasonable opportunity to engage in meaningful consultation regarding the contemplated retrenchment / restructuring exercise. This is also an important element of unreasonableness.

Adequate Warning and Notice of Redundancy

44. None of the Employees received proper or adequate warning or notice of the termination of their services on the ground of redundancy. In fact, we find that the dismissals were all effected in an abrupt and discourteous manner. Mr. Sebastian and Ms. Francis testified that they were at work on October 2 and November 14, 2014, respectively, when they were both dismissed with immediate effect. The timing and manner of Employer's actions in dismissing Mr. Carty, taken largely while he was on approved vacation leave, are most egregious. Essentially, the Employer effectively communicated his dismissal to the general public via the print and electronic media during his absence before informing him of its decision to do so. Taken as a whole, the Employer's failure to warn the Employees and give them notice of their impending dismissals is an additional significant instance of unreasonableness.

Manner of Termination of Employment

45. We have noted above our conclusion that each of the dismissals was effected in an abrupt and discourteous manner. This is especially noteworthy in relation to Mr. Carty and Mr. Sebastian in light of their relatively long tenure, positions, seniority and ranks. In the case of Mr. Carty, his dismissal involved a flagrant breach of the fixed term employment agreement, which had been agreed to expire approximately 6 months later on April 18, 2015. Clearly, apart from being very unreasonable, the Employer's action in dismissing Mr. Carty, and allowing the same to come to the attention of the general public, while he was on approved vacation constitute aggravating circumstances

Alternative Employment

46. The Employer failed to prove that it seriously considered alternative employment for the Employees or any of them. The evidence as a whole discloses that they were all at least potentially suitable for alternative employment within the Employer's organization. It is noteworthy that Mr. Brodie himself testified that at the date of trial, almost four years after the declared redundancies, the Employer's staff compliment had been reduced by only 18, from 238 to 220. Moreover, Mr. Brodie also testified that the reorganization resulted in the hiring of several new workers to "replace" some of those, including the Employees, who were displaced. In relation to Mr. Carty and Mr. Sebastian in particular, he admitted that their duties were being performed by newly hired employees. In our view, in light of the several management positions previously held by Mr. Sebastian and Mr. Carty and the clerical

and administrative duties which Ms. Francis had been required to perform, the Employer's failure to seriously consider them for alternative employment was also very unreasonable.

Conclusion as to Liability

47. In the final analysis, within the legal framework stated at paragraph 27 above, we find that the Employer failed the test of reasonableness by acting unreasonably when it dismissed the Employees. Accordingly, based on the absence of a genuine redundancy situation and the lack of reasonableness, we are constrained to declare that the Employees were unfairly dismissed and are entitled to compensation as awarded below.

48. In making our assessment of the compensation, we are obliged to discharge our statutory mandate in accordance with the provisions of section 10 (3) of the Industrial Court Act. We are of the opinion that the following awards are fair and just.

Mr. Carty

(a) Pay in Lieu of Notice:
We note that he was paid the equivalent of one month's salary under this head. In our estimation, as a senior member of management on a fixed term contract, he should have received no less than the equivalent of 2 months' salary. Accordingly, **we award the additional sum of $7,300.00**

(b) Loss of Earnings:
The General measure of compensation payable to Mr. Carty for loss of earnings is the quantum of the emoluments he would have earned if he had worked for the unexpired portion of his fixed term contract, subject to the discharge of his duty to mitigate. At the date of his dismissal the unexpired portion of the fixed term contract was 6 months. However, he was paid the equivalent of his emoluments up to the end of October 2014. We are satisfied that he made reasonable efforts to mitigate his loss during the 5 and a half months immediately after his dismissal.

In the circumstances, **we award the sum of $52,525.00** ($9,550 x 5.5), being the equivalent of his total emoluments for the unexpired and unpaid portion of his fixed term contract. Since Mr. Carty had no guaranteed employment beyond the fixed term, we made no further award in respect of loss of earnings.

(c) Gratuity:
Although he claimed gratuity payment for the period October 15, 2014 to April 17, 2014 in the sum of $5,018.75, the documentary evidence shows that he was credited with that sum when he received his final net payment on or about October 30, 2014. Moreover, under cross examination he admitted that he had received his gratuity payment. In the circumstances, we make no award under this head.

(d) The Thrift Fund:
Based on the evidence before us, we accept that Mr. Carty is entitled to 100% of his Thrift Fund entitlement. Since he was paid the sum of $7,111.18 representing 75%, **we award the sum of $2,370.39** being the 25% portion that was withheld.

(e) Retroactive and Other Payments
We note Mr. Carty's claim for 4 items of retroactive and "promissory" payments. However, having regard to the Employer's statement of Mr. Carty's emoluments by letter dated August 8, 2014 the evidence does not justify any awards under this head.

(f) Exemplary Damages
There are several grounds for an award of exemplary damages to Mr. Carty, these include the following:

i. He was virtually dismissed while he was on approved vacation leave.

ii. Notice of his imminent dismissal was repeatedly published in the media before he received any notice of the same.

iii. Generally, there was a blatant disregard for the principles and practices of good industrial relations.

iv. Mr. Carty was prevented from collecting his personal items from the Employer's premises and had to resort to making a complaint to the Police Commissioner.

v. Although he had a contractual arrangement to repay the government advance (loan) by monthly installments of $343.33 per month, the Employer unreasonably deducted the full outstanding balance of $16,823.37 from his final payment without consulting with him.

vi. Overall, we are of the opinion that the treatment meted out to Mr. Carty was harsh and oppressive.

For the foregoing reasons **we award exemplary damages in the sum of $25,000.00** to Mr. Carty.

Ms. Francis

(a) Pay in lieu of Notice:
Ms. Francis testified that after her dismissal she received payment for "severance, outstanding vacation and notice pay". She did not disclose the amount paid or make a claim for any further sum under this head.

(b) Loss of Protection
Under this head, Ms. Francis is entitled to compensation at the rate of one month's salary for each year of work. Although she did not disclose the amount she received as severance pay, based on her daily rate of $132.00 as stated in her dismissal letter, we conclude that she was paid the sum $1,914.00 ($132 x 14.5). Since she worked for 14.5 months, **we award the sum of $1,534.50** ($2,850 x 1.21) less ($132 x 14.5).

(c) Immediate Loss
In our opinion, Ms. Francis made reasonable efforts to mitigate her loss. Since she was not successful in doing so until approximately four months after her dismissal, **we award the sum of $13,000.00 ($3,250 x 4),** being the equivalent of four months' emoluments. In addition, **we award the sum of $2,250.00, being the shortfall** in her earnings during her temporary employment for the ensuing three (3) months making a total award of $15,250.00 under this head.

(d) Exemplary Damages
Based on her evidence, we conclude that Ms. Francis' dismissal was harsh and oppressive without regard for the principles and practices of good industrial relations. In the circumstances, **we award the sum of $2,500.00 as exemplary damages.**

Mr. Sebastian

(a) Pay in Lieu of Notice:
Since Mr. Sebastian was paid the equivalent of one month's salary, we make no further award under this head.

(b) Loss of protection
Mr. Sebastian was employed for a period of 10 years and 1 month. At the rate of one month's pay per year of service, his entitlement under this head is $60,500.00. Since he was paid the sum of $41,445.99 as his severance pay**, we award the additional sum of $19,054.01 under this head.**

(c) Immediate Loss of Earnings:
Mr. Sebastian made reasonable efforts to find alternative employment but was not successful. For present purposes, doing the best we can with the available evidence, we would fix the value of his allowances at the same level as that of Mr. Carty in the sum of $2,250.00 bringing his total monthly emoluments to $8,250.00. Having regard for his age**, we award the sum of $49,500.00, being the equivalent of 6 months' emoluments** under this head**.**

(d) The Thrift Fund:
Since he was paid the sum of $5,978.29 representing 75% of the Employer's contribution, **we award the sum of $1,992.76,** being the 25% portion that was withheld.

(e) Exemplary Damages
Like those of the other two Employees the dismissal of Mr. Sebastian was harsh and oppressive. He was dismissed without regard for the principles and practices of good industrial relations. In the circumstances, **we award exemplary damages in the sum of $10,000.00.**

Costs

49. In our opinion, the exceptional reasons disclosed above will justify an award of costs in the sum of $2,500.00 to each of the three Employees.

Order

50. We order that:

(1) The Employer shall pay compensation and costs to Mr. Carty as follows:

(a) Additional pay in lieu of notice	$7,300.00
(b) Loss of Earnings	52,525.00
(c) Thrift Fund entitlement	2,370.39
(d) Exemplary damages	25,000.00
(e) Costs	2,500.00
Total	**$ 89,695.39**

(2) The Employer shall pay compensation* and costs to Ms. Francis, less amounts previously paid to her as severance pay, as follows:

(a) Loss of Protection (balance due)	$1,534.50
(b) Immediate Loss	15,250.00
(c) Exemplary damages	2,500.00
(d) Costs	2,500.00
Total	**$ 21,784.50**

(3) The Employer shall pay compensation and costs to Mr. Sebastian as follows:

(a) Loss of Protection (balance due)	$19,054.00
(b) Immediate Loss	49,500.00
(c) Thrift Fund Entitlement	1,992.76
(d) Exemplary damages	10,000.00
(e) Costs	2,500.00
Total	**$ 83,046.77**

(4) The Employer shall pay compensation and costs in the aggregate sums of **$89,695.39, $21,784.50 and $83,046.76,** respectively, to the Employees no later than October 31, 2020.

Dated this 28th day of August 2020

Charlesworth O.D. Brown,
President

Dr. Hayden Thomas,
Member

Megan Samuel-Fields,
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 26 of 2017

BETWEEN:

NSAKA SESEKEKIU

Employee

And

THE FINANCIAL SERVICES REGULATORY COMMISSION

And

ANTIGUA TRADES AND LABOUR UNION

Employer(s)

Before:
The Hon. Charlesworth O.D. Brown **President**

Appearances:
Mr. Nsaka Sesekekiu, the Employee in person
Mr. Ralph Potter of Antigua Trades & Labour Union for the First Employer
Ms. Jasmine Wade of the Financial Services Regulatory Commission for the Second Employer

2017: September 17
2020: September 20

DECISION

Brown, P;

Background

1. These proceedings were commenced by a Reference of Complaint filed on March 27, 2017 by the Honorable Minister of Labour. The Main issue in dispute was described as a "Complaint of Infringement". In his Memorandum filed on May 3, 2017 the Employee (Mr. Sesekekiu) , deliberately omitted the name of the second Employer from the heading of his pleading and invoked his right of disassociation guaranteed under chapter 9 of the Constitution of Antigua and Barbuda as reflected in sections A5, C 30, J4 and K3 of the Antigua and Barbuda Labour Code (the Labour Code).

2. On the basis of his right of disassociation, the Employee objected to the payment of certain fees by way of deduction from his salary under the Labour Code on the grounds that:

   (1) The Labour Code does not provide for a mandatory deduction from his salary.

   (2) Any deduction from his salary must be specifically authorized by him.

   (3) The payment of a negotiation fee under the Labour Code can only arise under a contractual arrangement between himself and the Union, in the absence of which the Union is prohibited from claiming the payment of a debt owed by him.

   (4) The Labour Code does not provide for the compulsory payment by him to the Union.

   (5) He has an unqualified right of disassociation from Membership in the Collective Bargaining Unit.

The Opposing Cases

3. Since the filing of the complaint the Employee has repeatedly sought to proceed against the Union only. In fact, in each subsequent filing he wholly omitted the Commission from its heading. Further, by letter dated May 3, 2017 Mr. Sesepkekiu wrote to the Registrar requesting that the Commission be removed as a party. That letter was followed by one from the Commission enquiring as to whether it had been removed.

4. By letter dated August 3, 2017 Mr. Sesekekiu noted that three months had passed since the Union had been served with the documents he filed and sought an order estopping the Commission from paying any part of his salary to the Union without his consent.

5. At the Case Management Conference held on October 4, 2017, the parties were directed to file submissions in respect of the future conduct of the proceedings. A week later Mr. Sesekekiu filed a Notice of Discontinuance purporting to discontinuance proceedings against the Commission. Moreover, In his submissions, after setting out of the grounds for his application he maintains that he has no grievance or dispute with the Commission. As a result, there exists no dispute as between an employee and an employer.

6. In his Submission under the heading "The Constitution and the Labour Code", Mr. Sesekukiu correctly identifies the connection between the constitution and several sections of the Labour Code. Further, he notes in the ordinary course of things matters of the protection of an individual's fundamental rights are properly left to the jurisdiction of the High Court. Thus, the claim in this Reference, which requires the determination of whether there has been an infringement of these fundamental rights outside an employment relationship, should be accordingly left to the High Court.

7. It is noteworthy that Mr. Sesekekiu acknowledges this Court's limited statutory jurisdiction which has been acknowledged as a machinery wholly supplanting the network set up by the Labour Code to deal with trade and other employment disputes.

8. The main intent underlying the enactment of the Labour Code as expressed in Division A thereof is to bring together, insofar as is practicable, all legislation applicable to employment, employment standards, and industrial relations in Antigua and Barbud. Moreover, the nine expressions of "national policy" stated in Section A3 of the Labour Code all make it pellucid the relationship between employees and employers is the lodestar of all its provisions including those founded on Constructional rights.

9. It is very instructive to note that none of the remedies claimed by Mr. Sesekukiu touch or concern the employment relationship between himself and the Commission. He prays for: an injunction against the Union prohibiting it from claiming monies deducted from his salary; an order requiring the Union to repay monies collected as negotiation fee; a declaration that the Union infringed its statutory rights; a declaration that his membership in a bargaining unit is not mandatory.

10. In my opinion, any departure from stated parliamentary intent and the national policy as urged by Mr. Sesekekiu would be unsafe and tenuous at best. Accordingly, for the reasons stated above, I am inclined to conclude that this Court should dismiss this Reference for want of jurisdiction. However, before stating my final conclusion, I feel obliged to consider the closing submissions of the Union and the Commission:

11. The Union's Submissions which were filed on October 17, 2017 are simple and logically sound to the effect that since there is no employment relationship between Mr. Sesepkekui and the Union there is no dispute between them which falls within the statutory scope of hearing delimited by section 16 of the Industrial Court Act.

12. I am inclined to accept the Union's position and make the desired declarations with the inevitable result that there would remain no proper party to respond to Mr. Sesekekiu's claim.

13. The Commission's submissions were filed on October 18, 2020 with its application for an order removing it as a party to these proceedings on the grounds that the dispute is one between Mr. Sesekekiu and the Union and that the Commission has no case to answer. In the Affidavit in Support of its application, sworn by Ms. Brenda Sheppard, the Commission underscored the fact that by his witness statement, Mr. Sesekekiu made "inflammatory statements" and unreasonably embroiled the Commission into the heart of the matter.

14. Upon careful consideration of the Commission's application, I would make the order removing the Commission as party in these proceedings. Accordingly, as persuaded by Mr. Sesekekiu himself, the Union and the Commission, there would remain no proper party to respond to claim made in this Reference. This means that the entire claim would collapse and fall away.

Conclusion

15. For the reasons stated above, and having particular regard for the respective submissions of the parties, I have come to the following conclusions:

(1) The Union is not the employer of the Employee and is improperly named in this Reference.
(2) On the applications of both Mr. Sesekekiu and the Commission itself, the Commission is removed as a party in this Reference.
(3) There being no parties remaining as employer or respondent, this Reference is unsustainable.
(4) The issue raised in the Reference relate to a constitutional right of which Mr. Sesekekiu has allegedly being deprived. As such, the "Complaint of Infringement" raised in this Reference are beyond the jurisdiction of this Court and should properly be determined by the High Court.

16. For the foregoing reasons, the Reference is hereby dismissed with no order as to costs.

Dated this 7th day of September 2020

Charlesworth O.D. Brown,
President

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE No. 48 of 2015

BETWEEN:

ALEX MARCUS

Employee

And

BAZIL UZOMA T/A WATCHES-R-US INC

Employer

Before:
The Hon. Samuel Aymer **Chairman**
The Hon. Dr. Hayden Thomas **Member**
The Hon. St. Lawrence de Freitas **Member**

Appearances:
Mr. Samuel A. James, President of the Antigua and Barbuda Free Trade Union, Representative for the Employee
Ms. Mary B.E. White, Attorney-At-Law, for the Employer

2017: May 31
2019: September 13

JUDGMENT

Aymer, C;

Background

1. Sometime in or about 2003, the Employer commenced a small business, selling and repairing watches from a removable kiosk on the sidewalk of Market Street – a main thoroughfare - in the City of St. Johns, the Capital of Antigua.

2. Adjacent to the Employer's spot on the sidewalk, the Employee plied his trade as a newspaper vendor and supplied the Employer with newspapers.

3. Arising out of this physical proximity, a cordial, friendly and informal relationship **evolved** between the Employer and the Employee; to the extent that when the Employer had to leave his kiosk to run short errands during the day, including picking up his children from school, he would ask the Employee to keep an eye on his stock during his absences – such periods said to be no longer than 45 minutes at any given time. And for these "favours", the Employer would give the Employee "something" at the weekend "according to the time expended during the week".

4. This interaction evolved further, and in a continued informal way over time, into a full time work relationship between the Employer and the Employee some time during 2004.

5. From 2004 to 2009, as the Employer's business grew he rented a small spot within the front of the building (and next to his original pitch) and engaged the Employee, while training him in the watch repair business in 2004, at a weekly wage of $375.00. Later as his business picked up, the Employer started paying the Employee $500.00 per week from 2012.

6. The relationship, though informal, was uneventful prior to late 2014. Before that year, all was well so the Employee had no complaints.

7. The principal issue of contention between the Employee and the Employer arose in 2014 when the Employee took two weeks vacation on or about August 25, 2014 and was due to return on September 8, 2014. However, he returned one week earlier, on September 1, 2014 and a number of issues then ensued which led, ultimately, to the fractured employment situation. We will return to this later.

LEGAL PROCEEDINGS

The Employee's Case

8. A Reference was filed on behalf of the Employee on September 8, 2015.The Employee's Memorandum of claim was that he was *unfairly/wrongfully dismissed*. The Employee's Witness Statement and Memorandum were filed on September 8, 2015. In the Memorandum the Employee claimed, *inter alia*, that:

    a. He was employed by the Employer in January 2002 as a Sales/Watch Repair Technician on a six-day work week earning a wage of $500.00
    b. Over the period of his employment he was only paid for 12 days vacation.
    c. On or about August 25, 2014, he took 6 days vacation for which he did not receive payment and that when he returned to work on or about September 1, 2014, the Employer did not pay him for his vacation.
    d. On or about September 8, 2014, the Employee reported for duty late and the Employer became angry and sent him home.
    e. He prayed the Court to declare the termination unfair and unlawful and to award compensation in the sum of $53,833.02.

The Employer's Case

9. The Employer's Memorandum of Defence and Witness Statement were filed on October 16, 2015 and November 9, 2015 respectively in which the Employer claims that:

    a. The Employer did not commence his business in the year 2002, having been employed as a truck driver and general handyman by Bargain Centre Hardware Store prior to commencing his business on the sidewalk some time in 2003. This was confirmed by letter from the Deputy Managing Director of The Bargain Centre.

    b. In 2003 the Employee commenced his business on the side walk on Market Street before taking out his business licence.

    c. He was located in front of a building. At the end of the day he would bundle his goods and store them at home overnight, repeating the same business routine the next day.

    d. Sometime in 2003, the Employee was in the course of selling newspapers at the same location when he first came into contact with the Employer who became a customer.

    e. The Employee and the Employer befriended each other over time, to the extent that the Employer entrusted the Employee with the task of watching and keeping an eye on the stock on the side walk when the Employer had to be briefly absent on occasions (e.g. when picking up his children from school). The Employee was paid "something" at weekend, at the Employer's discretion, according to the time expended during the week.

    f. In the year 2004, the Employer took out a Business Licence in the name of Bazil Uzoma t/a Watches-R-Us Inc.

g. As business picked up between 2004 and 2009, the Employer paid the Employee $375 per week bearing in mind that the Employee "had absolutely no knowledge of, or skills pertaining to, the repairing of watches at the initial encounter of both of them on the side walk, and it was agreed by both Employer and Employee that training for proficiency in watch repairs could take up to one year.

h. Up to August 2014 the Employee had received all holiday pay due to him then.

i. On September 1, 2014, when the Employee approached the Employer for his wages and holiday pay, as he had returned from his holiday one week early, the Employer asked him to give him some time to make the payment as the Employer had just returned to Antigua from the USA with a sick wife who had been diagnosed with terminal cancer and funds were low.

j. The Employee demanded his salary for August/September and holiday pay, which amounted to $1500.00. The Employer did not pay him anything then, as he was in financial straits. The Employee did not remain on the job and returned about 2.00pm later that day. The Employer paid him $500.00 which he took and left.

k. The Employer did not see the Employee until 9 days later when he came back demanding the balance of his wages and holiday pay.

l. A week later the Employee brought a Union Officer to the Business.

m. The next time the Employer saw the Employee was at the funeral of the Employer's wife on 14th November 2014, at which time he asked the Employer to accept his sympathies and said nothing more to him.

n. The Employer next saw the Employee at the Conciliation Hearing on April 1, 2015.

o. By this time the Employee was fully employed with Sanitex and Sandals.

p. The Employer never dismissed the Employee and the Employee was paid in full, all outstanding amounts due for public holidays.

q. The Employer contends that the Employee abandoned his job, wherefore the Employer did not effect an unfair and unlawful dismissal of the Employee.

r. The Employer therefore refutes any liability howsoever /whatsoever to pay compensation or at all to the Employee.

THE ISSUES

10. Based on the opposing positions of the parties as set out in their Memoranda of Claim and Defence respectively, the main issues to be determined are:

    a. Did the Employee abandon his job?
    b. Was the Employee dismissed?
    c. If the dismissal was unfair, what compensation is the Employee entitled to?

Finding of facts

11. We emphasize that the following findings of facts are provided after careful consideration of the evidence provided to the Court by the Employee and the Employer at the hearing and in their supporting documents. To this end a number of statements are examined.

12. **The date of the employment of the Employee**. The Employee's Memorandum of Claim is that he was employed in January 2002 as a Sales/ Watch Repair Technician on a six-day work week, earning a wage of $500 per week. The evidence strongly points to the inaccuracy of this statement as follows:

    a. The Employee, during his examination-in-chief, when asked to put a date to his full-time commencement of employment with the Employer answered; *"From 2004 to be exact".*

b. Mr. Elias Mansoor is the owner of the property in front of which the Employer initially operated from the sidewalk and was a witness for the Employer. During his examination-in-chief he said: "***I know Basil and Alex (the Employer and Employee). I have seen them in the open space outside of my store on the side walk. Basil repaired watches and Alex sold newspapers".*** He explained to the Court that he did extensive renovations to his building in 2002 and produced invoices and receipts of building materials in support of his statement. In his written statement he stated that in 2003, when the renovations were complete the Employer asked him to rent him a small area in the building; which he did. He further stated that he thought the Employer started to work full time with the Employer "sometime in the year 2003". However under cross examination his evidence was: ***"I don't know when Alex started working with Mr. Uzoma".***

c. In the Employee's Memorandum of claim, he stated that he worked a six day week earning a wage of $500.00 per week. However, the Employer gave evidence, uncontroverted, that in 2004, he began to train the Employee as he was untrained in the skill of watch repairing which, according to the Employer, would take about one year to become proficient, and consequently began to pay the Employee a wage of $375.00 per week. And in 2012 he started paying him $500.00 per week.

13. **Vacation and vacation pay**. Further, in his Memorandum of Claim, the Employee stated that over the period of his employment he was only paid 12 days vacation. As stated in paragraph 3 above, the relationship between the Employer and the Employee was one that had **evolved**, given the nature of its genesis. Accordingly, there were none of the structural norms such as, for example, a contract (written or unwritten), which laid out job description, quantum and frequency of vacation with clear understandings of the parameters that governed those relationships. Consequently, the Court does not have a template against which to make some clear determinations. The question of vacation is a case in point.

14. The Employee has stated that he was only paid 12 days vacation over the period of his employment. During the hearing, however, in replying to questions under cross examination by Learned Counsel, Attorney Ms Mary White, these were the responses given by the Employee. Attorney: *"**Did you travel on several occasions to Guyana between 2003 and 2004?" Employee answer: "Yes".*** Attorney: ***"Did you get rebated tickets?" No answer***. Employee continued: "***I did travel and it was vacation".*** (Reference to rebated tickets alluded to evidence given that the Employee's wife was an airline employee and had access to such facility). During his examination-in-Chief, the Employee was asked: "***Did you receive payment of any kind for public holidays?*** Answer: "***Yes, I have the cheques – about 2013 - started receiving payments about 2013".*** Further questioning during examination- in-chief: Question: ***"When you started working with the Employer at first were you receiving vacation and vacation pay?"*** Answer: ***"Monies received".***

15. **Did the Employee Abandon His Job?** The outcome of exchanges on September 1, 2014 and beyond gave rise to the Employer's Defence of Job Abandonment**.**
It is the Employee's case that "on or about August 25, 2014 he **"took** 6 days vacation but my Employer did not pay me my vacation pay for the 6 days". The Employee returned to work on September 1, and asked for his wages and holiday pay. The Employee's return to work coincided with the return of the Employer's wife to Antigua from the USA, having been diagnosed with terminal cancer.

16. This unfortunate familial episode gave rise to a number of challenges, including financial ones, for the Employer who had to travel to the USA to accompany his sick wife back to Antigua. The Employee knew of this domestic development. In addition the business had to be closed at intervals as the Employee's vacation overlapped with these events and there was no one to manage the business with both Employee and Employer being away at the same time.

17. Notwithstanding the requirement of Part 2 C18(3) of the Antigua and Barbuda Labour Code which states that ***"the dates of the taking of earned vacation leave shall be fixed by agreement between employer and employee",*** this situation points to the informal and unstructured relationship that existed between the Employer and Employee in that the taking of vacation was seemingly a unilateral decision by the Employee who, as he put it, **"took"** 6 days vacation at a time when the taking of such vacation clearly impacted the running of the business.

18. The uncontroverted evidence is that in response to the Employee's request for payment, the Employer pointed out his financial difficulty and asked the Employee to give him time to pay having regard to his domestic circumstances.

19. It is the Employee's evidence under cross examination by Learned Counsel that before the September 1, 2014 exchanges, all was well with the employment relationship. In the Employee's own words: ***"I did not complain – there was basically no problem".***

20. Arising out of the September 1, exchanges are two different related responses. On the one hand, the Employee, in his Memorandum of claim stated that on or about September 8, 2014, he reported for duty late and the Employer became very angry and sent him back home.

21. The Employer, on the other hand, stated that the Employee demanded his holiday pay and salary which amounted to $1500.00. ***"I did not pay him anything when he showed up. He did not remain on the job and returned about 2.00 pm later that day. I paid him $500 which he took and left. I did not see the Employee until 9 days later when he came back demanding the balance of his wages and holiday pay. I begged the Employee to be reasonable stating that I had no money since I had to close the business more often than it was opened".***

22. It is the further evidence of the Employer that he next saw the Employee **one week later** with a Union Officer, and yet later on November 14, at the funeral of the Employer's wife at which the Employee offered condolences and said nothing more. His last encounter with the Employee was at a Conciliation hearing on April 1, 2015, **some seven (7) months after the initial exchanges** on September 1, 2014.

23. **Other Concurrent Employment:** In addition to the above exchanges, another issue of fact that might have impacted the behavior of the parties in this matter and on which the claim of job abandonment could conceivably have been grounded, was the matter of concurrent employment, which we now address.

24. Tendered and unchallenged in evidence were documents which provided credible government records indicating that during the currency of the employment with the Employer, including period of claimed *unfair dismissal*, the Employee held full-time employment concurrently with a number of other employers.

25. From November 2013 up to and including August 2015, the Employee was fully employed by Philip's Carpeting and Cleaning with total earnings amounting to $45,449.25. From September 2015 to October 2015, the Employee further obtained employment with 3-D Engineering and earned some $982.50. The Employee was also employed with Sanitex.

26. These engagements were largely "graveyard" assignments involving all night and early morning working and led to a request from the Employee to the Employer for a change of starting hours to a later daily starting time on the job. Evidence was given by the Employer that the Employee was often found sound asleep during the course of his day job with the Employer. Indeed this was also confirmed in oral evidence given by Mr. Elias Mansoor when he stated in giving evidence that: ***"I see Alex sleeping and Basil saw him as well".*** This was confirmed in his written evidence where he stated: ***"I can see the operation. It is just a screen between the watch business and mine…….I have seen the Employee sleeping on the job. He sometimes put his head on my cash register".***

27. Given the chronology of the dates of absences of the Employee from his job with the Employer, as outlined in paragraphs 21 and 22 above, and his periods of other full time engagements concurrent with the period for which he is claiming unfair dismissal by the Employer, we are of the view that the employee showed very little interest in, and noticeable indifference, to continued employment with the Employer after the exchanges of September 1, save and except to mount a claim for unfair dismissal.

28. It is instructive that the Employee gave evidence that the Employer did not know of his concurrent employment with other agencies even as he was claiming unfair dismissal.

29. Mr. James for the Employee, made much of some procedural principles that, in his submission, the Employer ought to have followed and particularly as regards communication between the Employer and the Employee on the road to establishing Job Abandonment, and the Court is grateful to him for the research he put into these submissions. In one such submission quoted from HR Knowledge (The HR Blog) on the issue of Job Abandonment he quoted the following:

> *'As an employer it is **usually a good practice, although not legally required**, to reach out to contact the employee who fails to show for work…..If the employee doesn't contact the company within a certain number of days with a reasonable explanation, the employer can then terminate the employee for job abandonment".(Emphasis is the Court's).*

30. In the field of industrial relations we cannot overlook the importance of the peculiar prevailing circumstances and facts of each case. In the instant case, it has been stated *supra* that the relationship between the Employer and the Employee evolved into a close informal one where, initially, the Employer was accommodating and compassionate not only to the Employee but also to his family. The relationship evolved and the normal arrangements that would govern employer/employee interaction at the workplace were more implied than expressed.

31. Uncontroverted evidence was given that the bonding was so strong in the instant case, that at times the Employer advanced payments of significant amounts to the Employee to pay for the Employee's rent and for school fees for his children. Whether these were gifts or loans remained questionable, but the Employee did not deny that these payments were indeed made by the Employer on his behalf. Further, the Employer was invited to, and attended the wedding of the Employee. This close relationship was further underpinned by the Employer initiating a dialogue with the Employee with a view to encouraging the Employee to set up a self-employed business of his own – a matter that did not materialize as this was overtaken by the events of September 1, 2014.

32. In brief, a body of trust had developed between the Employee and the Employer and upon reviewing the evidence, we conclude that the Employee conducted himself in a manner calculated to destroy the relationship and confidence between the Employer and himself and evinced an undeniable intention not to cooperate with, nor come to the aid of, the Employer in his time of dire need.

33. Given all of these circumstances and the lack of interest and indifference shown by the Employee, we find that it was reasonable for the Employer to conclude that the Employee had abandoned his job – a conclusion with which we agree.

Was the Employee dismissed?

34. From the evidence, it was clear that the Employer did not dismiss the Employee. In fact in answer to a question put to him by Counsel: **"Was the Employee terminated?"** The Employer replied: **"I would not terminate him. He was my only assistance".** Moreover, the Employer emphatically denied sending the Employee home to await recall.

35. Having regard to the foregoing and to the demeanour of the litigants during the trial we are of the view that the Employer did not dismiss the Employee. Consequently there is no need to discuss the provisions of C10 of the Labour Code.

36. We are mindful though, of Clause 10 (3) of the Industrial Court Act [CAP.214] which states that this Court in the exercise of its powers shall-

    a) *"make such order or award in relation to a dispute before it as it considers, fair and just, having regard to the interests of the persons immediately concerned as a whole;*
    b) *act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code……"*

The Decision

37. Consequently, the Reference is hereby dismissed and there is no order as to costs.

Dated this day of September 2019

Samuel R. Aymer,
Chairman

Dr. Hayden Thomas,
Member

St. Lawrence DeFreitas,
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 21 of 2011

BETWEEN:

ANDRE THOMAS

Employee

Band

MILL REEF CLUB

Employer

Before:
The Hon. Charlesworth O.D. Brown **President**
The Hon. Megan Samuel-Fields **Member**
The Hon. John Benjamin **Member**

Appearances:
Ms. Samantha May of May Knight Law, Attorneys-at-Law for the Employee
Ms. Fiona Murphy of Simon Rogers Murdoch, Attorneys- at -Law for the Employer

2016: October 11
2020: July 24

JUDGMENT

Brown, P;

Introduction

1. These proceedings were commenced by the filing of the Reference on April 29 2011, approximately 13 years after the dismissal of the Employee. The issues in dispute between the parties were identified by him as "unfair dismissal and adequate compensation".

2. In answer to the claim, the Employer relies on the equitable doctrine of laches to the effect that the Employee should be precluded from obtaining any relief because of his long delay in commencing and pursuing his claim.

The Opposing Cases

3. The Employee's case, as set out in his Memorandum of Claim and supported by his witness statement, is grounded on the manner of his dismissal by the Employer's Club Manager on or about November 16, 1998. Some salient points of the Employee's case are as follows:

(1) He commenced his employment on December 18, 1981 as a "Permanent Seasonal Worker" in the position of Porter in the Food Preparation Department. In January 1995, based on his good performance, he was promoted and transferred to the Front Desk Department in the position of Assistant Receptionist and Porter.

(2) During the course of his employment up to the date of his dismissal, he always wore an Afro hairstyle and braided his hair on numerous occasions. He was always properly groomed. Since it was not offensive to anyone, he received no complaints about his hairstyle.

(3) On June 12, 1998, the Employer by letter bearing that date under the hand of Collie D. Gardner, Club Manager, confirmed his employment and stated that "he participates in the direct guest contact involved in the routine departure, arrival and inquiry functions of the Clubhouse"

(4) At the beginning of the 1998 / 1999 annual tourist season the Employee was asked to change his hairstyle and not to report for work with his hair braided.

(5) On November 13, 1998 the Employee reported for duty with his hair braided as usual. By an unsigned letter bearing that date issued by Greg M. Poirier, Club Manager, he was formally suspended on two grounds. Although unsigned, the letter was admitted into evidence. It reads as follows:

> "Dear Mr. Thomas,
>
> I am officially notifying you that you are on full suspension from employment at Mill Reef Club. This suspension started with the day you were sent home for your unwillingness to conform to the grooming standards of the Club. You were also suspended for your disruptive behaviour in the Front Office meeting on our opening day."
>
> If you are intending to return to work you must meet the following conditions. First you must agree to return to work in full compliance with the grooming standards of the Mill Reef Club. Second, you must agree to conduct yourself in a proper mode of conduct with regards to your cooperation and supportive spirit that the job requires both with the members and fellow employees, including management. Until such an agreement is made, you will be kept on full suspension and face possible termination of employment. We will expect to meet with you or hear from you regarding these conditions by November 18, 1998.
>
> **Greg M. Poirier,**
> *Club Manager* "

(6) On November 16, 1998 the Employee was summoned to a meeting at which the Mr. Poirier as Club Manager told him that if he did not cease braiding his hair, his employment would be terminated. Being aware of his constitutional rights, the Employee expressed the view that once his hairstyle was not offensive, he should be allowed to wear his hair as he saw fit.

(7) As a result of the Employee's insistence on asserting his rights, his services were terminated by letter dated November 16, 1998 signed by Mr. Poirier in his capacity as Club Manager. In part, that letter reads:

> "Dear Andre,
>
> Thank you for coming to see me today. I regret that you have made a decision to leave the Mill Reef Club as you have chosen not to conform to the hair grooming standards of the Club. As I stated in a previous letter, the choice was yours to make.
>
> In response to that decision of yours, to not make the necessary changes in your hair grooming, this is official notice of our termination of your employment effective immediately.
>
> ….
> **Greg M. Poirier,**
> *Club Manager*

4. The Employee contends that his dismissal was unfair for the following reasons:

a) He did not choose to leave his job.
b) His hairstyle was never offensive or proved to be a discomfort to either his coworkers or the Employer's clientele.
c) His dismissal was unfair, harsh and in breach of the Constitution and the Labour Code.
d) The Employer created a situation which resulted in his constructive dismissal.

5. As stated in its Memorandum of Defence, the Employer relies on the equitable doctrine of laches. In essence, the Employer contends that the Employee unnecessarily delayed the pursuit of his claim and thereby caused significant prejudice to the Employer which left it in no position to defend the claim on its merits. The Employer urges the Court to apply the doctrine and deny any relief which it could otherwise grant to the Employee because it would be unfair and unjust to do so in the circumstances.

6. The factual bases of the Employer's defence are as follows:

a) The Employee's services were "terminated in or around 1998".

b) Mr. Poirier, the Club Manager who dealt with the matter "ceased working" with the Employer in or around 2002."
c) The Reference was filed on August 29, 2011, approximately 13 years after the dismissal.
d) The records regarding the Employee's employment were discarded in keeping with the Employer's policy of discarding records of ex-employees at the expiration of 10 years from the date their employment contract ended.

Equitable Principles

7. In the exercise of its statutory powers this Court is expressly required to have regard for equity. Section 10(3) of the Industrial Court Act, by which this Court was established, provides as follows:

> "Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-
>
> *a)* Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interest of the persons immediately concerned and the community as a whole.
>
> *b)* Act in accordance with equity, good conscience and substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.

Clearly, the equitable doctrine of laches falls squarely under the umbrella of those statutory provisions.

8. Both Counsel cited the 1874 judgment of the Judicial Committee of the Privy Council in **Lindsay Petroleum Company V Prosper Anthony Hurd and others** (1874) LR. 5. P.C 221. For convenience, we reproduce the excerpt from that case as quoted by Learned Counsel, Ms. May, on behalf of the Employee, as follows:

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In either of these cases, lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

9. Further, the following excerpt from I. C. F Spry, Equitable Remedies - as quoted by Thomas J. A. at paragraph 40 of his Judgment in Civil Appeal

HCUAP 2006/020A - is instructive.

> "The defence of laches arises if two conditions are satisfied: first, there must be unreasonable delay on the part of the plaintiff in the commencement or prosecution of proceedings, and secondly, in view of the nature and consequences of that delay it must be unjust in all the circumstances to grant the specific relief that is in question whether absolutely or on appropriate terms or conditions.
> In the first place, it must hence be shown the plaintiff has been guilty of unreasonable delay. Prima facie, the time from which the length of delay is judged is the time at which the plaintiff became aware of the existence of the fact that gave rise to a right to equitable relief in question."

10. In order to properly consider whether the defence of laches is available to the Employer, we must consider all the evidence given at the trial and resolve the issues as formulated by Learned Counsel, Ms. Murphy, on behalf of the Employer, as follows:

a) "Is the Employee's delay in bringing his claim unreasonable?
b) Has the Employee's delay resulted in substantial prejudice to the Employer?
c) Is a fair trial of the claim possible in the circumstances"?

The resolution of these issues in favour of the Employer will supersede any consideration of the issues of "unfair dismissal and adequate compensation" and render them redundant.

Was the Delay unreasonable?

11. In his witness statement, the Employee referred to the meeting to which he was summoned on November 16, 1998. He testified that he was aware of his fundamental rights and freedoms guaranteed under the Constitution and that he was also aware of the provision in the Labour Code protecting him from discrimination. Moreover, at the meeting he stated his view that once his braided hairstyle was not offensive and since none of his co-workers or the Employer's guests complained, he should be allowed to wear his hair as he desired.

12. Given his knowledge of the facts and the rights which he knew and asserted, there is no doubt that the Employee knew of his entitlement to the relief which he eventually claimed 13 years later in this Reference.

13. At first blush, it appears that there was inordinate delay in the commencement of these proceedings. Moreover, the court records suggest that the Employee was guilty of further delay by not diligently prosecuting his claim with the obvious result that the trial did not materialize earlier. In particular, the court file shows that almost a whole year passed before compliance with the Registrar's request for the Employee's Memorandum of Claim. Further, the suggestion emerged from his evidence that there was a long gap of approximately 2 years in his communication with his Solicitors immediately before the trial.

14. In the circumstances, we will consider whether the Employee provided any reasonable explanation or excuse for the obvious delay. His witness statement is silent on the reason for the delay. However, his oral testimony is very instructive in that regard.

15. Regarding his circumstances immediately after his dismissal, the Employee testified that after working for over 8 years he received only $500.00 from the Employer as his share of the "Thrift Fund". He also stated that at that time he "just had a child". Perhaps most instructively, the Employee also testified that after paying to pursue his claim at the Labour Commissioner's office, he "had nothing left". Further, he stated that as a result of his "financial problems" he "went to England to make a little money".

16. He testified that he travelled to England in 2010 and remained there until 2012. He explained that his trip to and sojourn in England were wholly funded by a lady named Samantha Brown. He acknowledged that he spent 12 years in this jurisdiction before his claim was filed. His explanation for the delay was because he had "financial problems" and "did not have money to pay his Solicitors.

17. Further, the Employee emphatically denied that he was "lackadaisical". He testified that upon returning to Antigua in 2012 he left his telephone contact numbers at the Chambers of his solicitors and thereafter did casual work, like cutting grass and trimming hedges to make ends meet.

18. Although the Employee's evidence regarding his financial problems is sketchy, based on our assessment of his oral evidence and his general demeanor, we are not inclined to agree with Ms. Murphy's submission that the delay was due to him being "lackadaisical and indolent". At the end of the day, although we would have preferred it to be more fulsome, we find that his explanation is plausible.

Did the Delay Result in Prejudice to the Employer?

19. The Employer's evidence, as given by Ms. Ephraim, Human Resource Manager, is to the effect that:

(a) She commenced her employment in May 2007 and has no knowledge of material information surrounding the dismissal.

(b) Mr. Poirier, The Employer's Club Manager who issued the suspension and dismissal letters, ended his tenure in or about 2002. As at the date of trial there were no employees who had knowledge of the circumstances surrounding the termination of the Employee's employment.

(c) As a matter of policy, the Employer had discarded the relevant records upon the expiration of 10 years after the termination of the Employee's services.

(d) As a result, the Employer had no information on the basis of which it could substantially respond to the Employee's claim.

20. As to the availability of witnesses to testify on behalf of the Employer, Counsel for the Employer questioned Ms. Ephraim about the Employer's attempts to contact Mr. Poirier. She did not have any documentary evidence of such attempts but stated that the Club used Mr. Poirier's "contact information" but was unable to reach him.

21. On behalf of the Employee, based on his earlier testimony, Learned Counsel suggested to Ms. Ephraim that Mr. Gardner, who held the position of Club Manager in June 1998 and was still employed as a Manager, should have been required to give a witness statement and testify at the trial. In response, Ms. Ephraim testified that "attempts were made to get Mr. Gardner to be a witness in this matter. He did not provide a witness statement regarding the specifics".

22. We believe that it will be useful to remind ourselves of the gist of the Employee's evidence regarding Mr. Gardner. In response to questions put to him by the Court, the Employee asserted that of the 8 years he worked for the Employer, 4 of them from 1994 to 1998 were spent working directly with Mr. Gardner immediately before his dismissal. He continued to explain that Mr. Gardner knew the duties he had to perform and knew the relevant rules governing the performance of those duties. More specifically, the Employee testified that: "I did not work with Mr. Poirier the year that I was terminated. Mr. Gardner would know more about me than Mr. Poirier".

23. As to the Employer's policy of discarding employees' records on the expiration of 10 years after the termination of their employment, Ms. Ephraim's testimony would have been more convincing if she had produced supporting documentary evidence and/ or provided a rationale for the same and/ or given details of its implementation.

24. In the final analysis, it is our opinion that, although the Employer might have suffered some degree of inconvenience as a result of the delay, the extent of the prejudice, if any, which it suffered was largely self-inflicted. At the very least, the Employer should have been mindful that the Employee had pursued his claim of unfair dismissal at the Labour Department and that the dispute remained unresolved.

25. Further, we reject the Employer's contention that at the date of trial there were no employees with knowledge of the circumstances surrounding the Employee's dismissal. On the evidence, we find that Mr. Gardner, who held the position of Club Manager at least up to June 12, 1998, would have been at least a useful witness, if not a crucial one, for the Employer.

26. In the circumstances, we do not agree with Ms. Murphy's submission that the inordinate delay on the part of the Employee in commencing and prosecuting his claim was so prejudicial that it left the Employer in no position to properly respond to it. On the facts, determined largely from the Employee's uncontroverted evidence, it is clear that the delay was not as severely prejudicial as the Employer would have us believe.

27. In conclusion, we would resolve the issues identified at paragraph 10 above in favour of the Employee on the following grounds:

a) Although the commencement and prosecution of the Employee's claim was unusually protracted, on the facts of this case, the delay was not beyond the limits of acceptability such as to render it unreasonable.
b) The prejudice, if any, suffered by the Employer because of the Employee's delay was largely self-inflicted. In any event, we find that any resulting prejudice was not so substantial as to prevent the Employer from disputing the Employee's claim on its merits.
c) In our opinion, notwithstanding the protestations of the Employer, a fair trial of the Employee's claim was still possible in the circumstances.

28. For the reasons stated above, the Employer cannot avail itself of the doctrine of laches to preclude the Employee from obtaining the relief to which he is entitled on the particular facts of this case. For the avoidance of doubt, we hasten to add that our approach and conclusion are not of general application. Each case turns on its own facts.

<u>The Alternative Defence</u>

29. We now turn to the Employer's alternative defence, as stated in its Memorandum, that the Employee's claim was statute barred under the Limitation Act No 8 of 1997. In dealing with that contention, it is sufficient to note that by the date of trial the Court of Appeal, in dismissing Civil Appeal **ANUHCVAP 2013/0014, Hawksbill Hotel V Dale Abraham,** held that that Act created no limitation period for the commencement of unfair dismissal claims.

Reasons for and Circumstances of the Dismissal

30. We accept the Employee's evidence that throughout the course of his employment he always had an Afro hairstyle and often braided his hair. It appears that his hair became an issue after Mr. Gardner was replaced by Mr. Poirier as Club Manager sometime after June 12, 1998. Neither the suspension nor the dismissal letter mentions any change in policy regarding grooming standards. Further, neither letter explains why the Employee's Afro or braided hair were no longer acceptable. Moreover, there is no indication of the nature of the "disruptive behaviour".

31. In any event, the Employee was suspended on an undisclosed date prior to November 13, 1998 not only because of his failure to conform to the undisclosed "grooming standards" but also because of his undisclosed "disruptive behaviour". The suspension was for an indefinite period until (a) he met the grooming standards and (b) he agreed to conduct himself in a "proper mode". November 18, 1998 was stated as the date by which the Employer expected to hear from the Eemployee or have a follow-up meeting with him.

32. The letter of dismissal was issued on November 16, 1998 after the Employee went to see Mr. Poirier. It does not address the issue of the Employee's conduct but focuses entirely on his failure to conform to the grooming standards. In the letter, the Employer took the position that the Employee made a choice not to conform to the required standards and thereby had decided to quit his job. As a result, the Employer purported to merely respond to the Employee' s decision by giving him "official notice of the termination of (his) employment".

33. In our estimation, the Employer had no good basis for its conclusion that the Employee had decided to leave his employment. More importantly, we accept the Employee's evidence that he "never decided or chose" to do so.

Concluding Declarations and Directions

34. Having regard to the written, documentary and oral evidence before us, as well as the Employer's failure to challenge the claim on its merits, we are of the opinion that the justice of this case demands that we declare that the Employee was unfairly dismissed and is entitled to compensation.

35. Unfortunately, the evidence discloses no or no sufficient bases on which we could reasonably determine the quantum of compensation. As a result, the justice of this case further demands that we also make the exceptional further declaration that these proceedings be reopened for the limited purpose of taking evidence and hearing submissions in respect of the quantum of compensation payable to the employee.

36. For the reasons stated above, we declare, order and direct as follows:

(1) The Employee was unfairly dismissed and is entitled to compensation.

(2) The proceedings herein are hereby reopened for the limited purpose of determining the quantum of compensation.

(3) For the said limited purpose, the parties are at liberty to file additional witness statements and submissions no later than August 15, 2020. Any such witness statements and submissions must be promptly served on the other party.

(4) The assessment of compensation will be held during the second half of August 2020 on a date to be fixed by the Court Office.

Dated this day of July 2020

Charlesworth O. D. Brown
President

Megan Samuel-Fields
Member

John Benjamin
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 66 of 2016

BETWEEN:

BEVERLY WILLIS

Employee

And

ST. HELENA CLUB INC.
t/a
THE INN AT ENGLISH HARBOUR

Employer

Before:
The Hon. Charlesworth O.D. Brown **President**
The Hon. St. Lawrence de Freitas **Member**
The Hon. Samuel Aymer **Member**

Appearances:
Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation for the Employee
Mrs. Sharon Cort-Thibou of Cort & Cort, Attorneys-at-Law for the Employer

2020: August 12
2020: August 21

JUDGMENT

Brown, P;

Background

1. The main issue in dispute in this Reference is whether the Employee, a former Cook Helper at the Employer's hotel, was unfairly dismissed in relation to two rolls of bathroom tissue, two bottles of wine and a plastic bag containing basmati rice found in her possession on the Employer's premises on June 17, 2016.

2. It is not in dispute that the Employee had the items in her possession. She maintained that they all belonged to her as she purchased the bathroom tissue from a village shop and that the wine and rice were given to her by a relative, Jason, in whose vehicle she was a passenger on her way to work earlier that day. She also maintained that she omitted to declare the items upon her arrival or at any time during her shift because she was late for work and the day was busy.

3. The Employer contended that the items were of the same type and brand as the ones kept on stock in its storeroom for use in the normal course of its business; that contrary to established rules, the Employee failed to declare that the items were in her possession on the Employer's property; that the Employee attempted to conceal the items at the checkpoint when leaving the premises at the end of her shift; that the Employer became suspicious as the Employee was not able to give a satisfactory explanation regarding her possession of the items; that upon its investigation, the Employer confirmed that the items were "identical" to those kept in its storeroom; and that although she was given a further opportunity, the Employee could not provide a reasonable explanation for her possession of the items and/ or provide proof of ownership of the same.

4. Apart from the evidence in her Witness Statement, the Employee testified on her own behalf. Mr. Fabio Giorgi, the Employer's General Manager, testified on its behalf. Factually, it is common ground that the Employee had the items in her possession. Accordingly, the dispute to be resolved by this Court turns largely on the pertinent conduct of the parties at all material times.

The Burden of the Employer

5. Given the statutory origin of the Employee's right not to be unfairly dismissed, a finding of unfair dismissal will be made unless the Employer can establish that it had a good cause for the dismissal and that it acted reasonably in dismissing the Employee under Section C58 of the Antigua & Barbuda Labour Code (the Labour Code).

6. It is well settled that, as stated by this Court in its Judgment in **Ref. No. 22 of 1990: Hubert James v. St. James's Club**, there is no burden on the Employer to prove that the Employee is guilty of a criminal offence provided that it formed a genuine and reasonable belief to that effect. In other words, the Employer must discharge the burden of proving that it entertained a reasonable suspicion amounting to a belief that the Employee was guilty of the alleged misconduct.

7. As in all civil matters. he standard of proof in this matter is on the balance of probabilities. Accordingly, in so far as the evidence of the two witnesses differ, we may accept one version over the other. We may be persuaded or convinced one way or the next after careful consideration of the evidence as a whole, taking into account our careful observation of the demeanor of each witness.

8. In relation to the Employee's evidence, we are not convinced by her account of how she came into possession of the items; the reasons for her failure to declare them upon arrival or at any time during her shift; her interaction with Mr. Giorgi at the checkpoint; and her failure to provide a reasonable explanation or provide adequate proof at or before the meeting on Monday June 20, 2016.

9. In our estimation, it was reasonable for the Employer to conclude that her possession of the items was not a mere coincidence. Further, in our view, it was natural for the Employer to form a reasonable suspicion that the Employee was guilty of "Stealing Hotel Property" expressed as part of item No.27 of the Disciplinary Code in Appendix 1 to the governing Collective Agreement.

10. In our opinion, the evidence of Mr. Giorgi is more plausible than that of the Employee. In the circumstances, we find as follows:

    a) Based on an incident which occurred about one month before her dismissal, the Employee was aware that the Employer was concerned about the unauthorized removal of its property from its premises.

    b) The Employee failed to prove that she purchased the bathroom tissue at a village shop as she claimed.

    c) The Employee failed to prove that the two bottles of wine and the basmati rice were gifts she received from her relative, "Jason".

    d) In breach of the rules, the Employee failed to declare the items either upon her arrival at work, during her lunch break or at any other time during her shift.

    e) At the exit checkpoint, the Employee was reluctant to remove the items from her bag. Eventually, she did so at Mr. Giorgi's request.

    f) Based on the identity of the items she removed from her bag at the checkpoint, her failure to declare the items upon entering the premises and her unsatisfactory explanation, the Employer formed a reasonable suspicion about the Employee's possession of items and her related conduct.

    g) The Employer carried out a reasonable investigation and determined that the items found in the Employee's possession were in fact "identical" to or of the same kind as those in stock in the Employer's storeroom or otherwise on its premises.

    h) The Employee had access to the stocks of identical items kept in storage or otherwise by the Employer on its premises.

    i) As a result of its investigation, the Employer confirmed its reasonable suspicion that the Employee was guilty of gross misconduct.

    j) On Monday, June 20, 2016, at a meeting convened by the Employer, the Employee was given a further opportunity to provide proof of her ownership of the items and/ or a reasonable explanation as to how they came into her possession.

    k) At the said meeting the Employee failed to provide the required proof and /or provide a reasonable explanation.

l) Based on its prior reasonable suspicion, the Employer formed a reasonable belief that the Employee had misappropriated the Employer's property for her own use.

m) The dismissal of the Employee was properly grounded on the Employer's reasonable belief that she was guilty of gross misconduct.

Concluding Declaration and Order

11. In the circumstances, we find that the Employer had a good cause for the dismissal and that it acted reasonably in dismissing the Employee. For those reasons we declare that the Employee was not unfairly dismissed and order that her claim be and is hereby dismissed.

Dated this day of August 2020

Charlesworth O.D. Brown,
President

St. Lawrence de Freitas,
Member

Samuel Aymer,
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 26 OF 2013
BETWEEN

ICILMA FRANCIS-PIGOTT

Employee

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown	President
The Hon. Dr Hayden Thomas	Member
The Hon. Judith Dublin	Member

Appearances:
Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation for the Employee
Mr. Justin L. Simon QC, with him, Ms. Fiona Murphy of Simon Rogers Murdoch,
Attorneys- at -Law for the Employer

2015: November 3
2019: May 24

DECISION ON APPLICATION TO STRIKE OUT REFERENCE

Brown, P;

Introduction

1. The Employer's application to strike out this Reference was filed on 27th October, 2015 and heard at the commencement of proceedings on 03rd November, 2015, the date fixed for trial. The application was supported by an affidavit sworn by Ms. Vanereen McKenzie, a Court Clerk in the Chambers of Counsel, which raised issues of law based on the information and advice of her principals.

2. Towards the end of his Submissions learned Queen's Counsel, Mr. Simon, referred to other jurisdictions in which the term "Unfair Labour Practices" is used in statute and undertook to provide the Court with copies of the relevant

sections. Having heard the submissions of Counsel for the Employer and the Employee's Representative, the Court reserved its decision.

The Application

3. By its application the Employer applied for an order (a) striking out the Reference; and (b) declining jurisdiction to hear this Reference. The application listed 7 grounds which essentially assert that the Employee's Claim of "Unfair Labour Practice" is not sustainable because the laws of Antigua & Barbuda do not include any right of action for such a complaint. As a result, being a creature of statute, this Court has no jurisdiction to hear and determine the Employee's claim. Accordingly, this Court should decline to exercise its jurisdiction and strike out the Reference.

4. In her Affidavit in Support, Ms McKenzie relies largely on the information and advice received from her principals. She deposed that:

"

(1) The main contention of the Employee, as disclosed in her Memorandum of Claim and Witness Statement, is that the Employer is guilty of an Unfair Labour Practice for not promoting the Employee to a position in which she acted in excess of 6 months.

(2) Although the Antigua & Barbuda Labour Code establishes the statutory right not to be unfairly dismissed which carries with it the right of action for unfair dismissal, there is no corresponding or similar right not to be subjected to Unfair Labour Practices. Thus, according to Ms. McKenzie, while this Court is given specific jurisdiction to make orders and awards in relation to complaints of unfair dismissal, it has no jurisdiction to make any award or order in respect of Unfair Labour Practices.

(3) ***In the circumstances, "the Employee's Reference to the Industrial Court in this matter is erroneous in law since it is based on a right or cause of action which is unknown to the local law." As a result, "the Industrial Court has no jurisdiction to hear the matter raised---and the Court should --- decline to exercise jurisdiction and should strike out the Employee's Reference in its entirety"***

The Dispute

5. In its Reference filed on 18th March, 2013 the Employee identified the issue in dispute between the parties to be: "Unfair Labour Practice". In her Memorandum of Claim, she states:

> ***"37. We therefore avert (sic) that the employer acted deliberately prejudicial, bias and unfair, in that they denied the employee, who was eminently qualified and had successfully acted for more than ten (10) months, a fair opportunity to fill the vacant post of Head of Corporate Banking, as advertised on April 4th 2007"***
>
> ***"38. Therefore, in keeping with the law and acceptable industrial relations practice within the State, we contend that the employer is guilty of engaging in an "Unfair Labour Practice."***

6. On the other hand, by its Memorandum of Defence filed on 19th January, 2015 the Employer set out its version of the factual background and averred that:

> ***"41. Paragraph 37 of the Employee's memorandum is denied in its entirety. The Employer reiterates the matters averred in paragraphs 38 to 40 above and states that since it was under no legal equitable or other duty to confirm the Employee in the position in which she had acted merely by virtue of the fact that she had acted in the position for a period of excess of 6 months, the failure to so confirm her was neither prejudicial, deliberately prejudicial, biased or unfair."***
>
> ***"42. The Employer denies the contention in paragraph 38 that its failure to confirm the Employee in the substantive position of Head of Corporate Banking in which she had acted for period in excess of six months in circumstances where it had no legal equitable or other duty or obligation so to do means that it is guilty of engaging in an unfair labour practice."***

7. The Employer's application to strike out the Employee's claim is clearly and specifically foreshadowed by paragraph 43 of its Memorandum:

"43. In addition the Employer states that the complaint of unfair labour practice against the Employer is not a complaint that can be made by the Employee in the circumstances since such a claim by an employee is unknown to local law as not being provided for by either the Labour Code or the Industrial Court Act. The Employer further contends that if it is guilty of engaging in an unfair labour practice (which is categorically denied), the Industrial Court has no jurisdiction to hear the complaint since the claim is unknown to the local law and no remedies are provided either in the Labour Code or in the Industrial Court Act for such a complaint."

The Employer's Submissions

8. Learned Counsel for the Employer highlighted subsection 7 (1) of the Industrial Court Act, Cap. 214 (the Act) which establishes the jurisdiction of the Court. He noted that there was no mention of the term "unfair labour practice".

9. Further, Counsel referred to and relied on subsections 10 (1), 10 (4) and 10 (5) of the Act which deals with powers of the Court. He submitted that, as expressed in those subsections, the Court's jurisdiction is limited to matters which deal with trade disputes, trade unions and complaints brought in accordance with the Act, and other matters referred to it under the Act.

10. In addition, learned Counsel also submitted that "unfair labour practices" are neither expressly nor impliedly addressed in the Act.

11. In support of his submissions, Mr. Simon cited the landmark judgment of the Court of Appeal in Suit No. 21 of 1993 **Universal Caribbean Establishment v. James Harrison (the Harrison case)** in which the appellant challenged the jurisdiction of the Court to hear matters not involving trade disputes. He noted that the Court of Appeal held that matters of unfair dismissals were included in the terms "any matter" or "other matters" and as such were within the purview of the jurisdiction of this Court.

12. As to the Antigua and Barbuda Labour Code (the Labour Code), Mr. Simon also noted that unlike those establishing a right not to be unfairly dismissed, there are no provisions bestowing on an employee the right not to be subjected to unfair labour practices.

13. Learned Counsel also submitted that, like an employee's complaint of a denial of natural justice, his complaint of unfair labour practices, in the absence of any express statutory provisions, must be pinned to a substantive claim like unfair dismissal and cannot be pursued on its own.

14. In his submissions, Counsel also attacked the formulation of the Employee's claim. He noted that there is nothing in the law giving an employee the right to a particular position. Based on its own observation and assessment, an employer has the absolute discretion as to which employee should be promoted to fill a particular position.

15. Finally, Counsel submitted that unlike in Antigua and Barbuda, statute in some other jurisdictions such as the South Africa, Canada and the United States of America, expressly define or explain the term "unfair labour practices". In those jurisdictions an employee has the statutory right not to be subjected to unfair labour practices.

16. In the premises, the Employer contended that the Employee's complaint of "unfair labour practices" is unknown to the Labour Code and the Industrial Court Act, as a result of which, her Memorandum of Claim should be struck out.

The Employee's Submissions

17. In his response to the Employer's submissions, Mr. Carty relied on the **Harrison case** in opposing the application to strike out. His main submissions were grounded on his view that the question of this Court's jurisdiction was settled by that judgment which confirmed that its jurisdiction went beyond that of unfair dismissal.

18. In more general terms, Mr. Carty submitted that the Employee has certain rights which are enshrined in legislation. In addition, he stated that there are settled customs and practices within the industry which protect those rights, some of which are expressed and others are implied.

19. Further, Mr. Carty passionately submitted that this Court was created to protect the rights of both parties to the employment relationship. According to him, it is undeniable that this Court should hear all complaints connected with

that relationship because under Sec 7 (1) (c) of the Act it has the jurisdiction to hear and determine "any complaints". In that regard, he also submitted that this Court must rely on its own judgment, to which end it should consider "common law practices" and industrial relations.

20. In addition, Mr. Carty also submitted that the Employer's "recruitment policy" and the "acting policy" form part of the contract of employment. And that the proper execution of those policies should not result in unfair treatment to any employee.

21. According to Mr. Carty, Section 10 (3) (b) of the Act is critical in so far as it mandates the Court to have regard for equity and good conscience and the substantial merits of this particular case.

Statutory Jurisdiction: The Harrison Case

22. It cannot be disputed that, being a creature of the Industrial Court Act, this Court's jurisdiction is limited by the provisions of that Act.

23. As submitted by Counsel, in the **Harrison Case** the Court of Appeal dealt with the issue as to whether this Court has jurisdiction to hear and determine matters not involving trade disputes. In approaching the resolution of that issue, Chief Justice Byron, as he then was, adopted Counsel's description of the Industrial Court Act as *"amorphous piece of legislation, poorly drafted, creating jurisdiction not in a precise methodological and linear fashion, but obliquely and by disorganized composition".*

24. On that premise, the Court of Appeal considered Section 7 of the Act, with express provisions regarding its jurisdiction; applied the relevant principles of interpretation; considered other particular provisions of the Act and construed it as a whole. At the end of the day, the Court of Appeal determined that this Court has jurisdiction to hear and determine individual complaints of unfair dismissal.

25. For present purposes, it will suffice to quote the following excerpts from pages 10/11, 12 and 13 of the Court of Appeal judgment: At pages 10 and 11 under the heading "Individual access to the Industrial Court" the Chief Justice stated:

> ***"In dealing with the specific question raised, that is, whether the court has jurisdiction to hear an individual employee claim for unfair dismissal where it is not part of a trade dispute, it may be useful to consider firstly, whether an individual employee can bring an unfair dismissal claim under any circumstances."***

26. In conclusion on that issue, the learned Chief Justice held:

> ***"In my view, the legislation clearly envisages that an individual employee can be party to a trade dispute or any other matters."***

27. Further, at page 13 under the heading "Jurisdiction for unfair dismissal" the learned Chief Justice concluded that:

> ***"The necessary result of that view is the jurisdiction conferred by section 7 (1) (c) empowers the Court to hear any disputes concerning the dismissal of an employee… I would therefore conclude Section 7 (1) (c) gives jurisdiction to hear cases for unfair dismissal in cases other than trade dispute matters."***

28. It is clear that the judgment of the Court of Appeal, when read in its proper context, supports the Submissions of Learned Counsel and not those of Mr. Carty. In that regard, it cannot be over-emphasized that the Court of Appeal Judgment was premised on the existence of an employee's right not to be unfairly dismissed, as provided in Section C 56 of the Labour Code.

29. Thus, the nub of Mr. Simon's submissions is that, in the absence of such a right in respect of labour practices, the employee has no good basis for his claim. Counsel emphasized that in Antigua & Barbuda employees have no distinct statutory right to fair labour practices. Stated differently, in Antigua & Barbuda employees have no express statutory right not to be subjected to unfair labour practices.

30. As submitted by Counsel, the sections of the statutes furnished by him show that the position is different in South Africa, Canada and the United States of America. In the case of South Africa, under Section 23, of Chapter 2 of the South Africa Bill of Rights, under the heading "Labour Relations", it is provided that:

"23 (1) Everyone has the right to fair labour practices."

31. Further, Chapter VIII of the South African Labour Relations Act, 1995, is entitled "Unfair Dismissal and *Unfair Labour Practice*." Subsection (2) of Section 186 provides:

> ***"Unfair Labour practice" means any unfair act or omission that arises between an employer and an employee involving-***
>
> ***Unfair conduct by the employer relating to the promotion, demotion, probation… or training of an employee or relating to the provision of benefits to an employee…"***

It is also noteworthy that Section 193 stipulates the remedies available where the employer is guilty of unfair labour practices.

32. Further, the Labour Relations Act of South Africa also provides that:

> "***Unfair Labour Practice" means any failure to act or unfair act of an employer towards a worker concerning:***
>
> - ***Promotion, demotion, trial periods, training or benefits***
> - ***…"***

33. Similarly, under the Canada Labour Code (R.S.C 1985) and the Federal Service Labour Management Relations Statute 5 USC in the United States of America, there are definitions and/or explanations of "Unfair Labour Practice" and related stipulations as to an employee's rights in respect thereof.

34. We accept as a matter of fact that the term "Unfair Labour Practices" is not defined or explained in either the Industrial Court Act or the Labour Code. Moreover, as submitted by Counsel, unlike the jurisdictions mentioned above, there is no statutory right not to be subjected to "unfair labour practices". And even if such a right could be implied at common law, there exists no remedy under the Act for its breach.

35. It is also noteworthy that learned Queen's Counsel asserted the notion of natural justice at common law is an important component in the consideration of an unfair dismissal. However, the statutory provisions do not include a right to natural justice so that a complaint of the denial of natural justice without more cannot stand on its own and is not sustainable by itself in this Court of limited statutory jurisdiction. The same logic applies to the complaint of Unfair Labour Practice. Both a complaint of denial of natural justice and one of unfair labour practice involve substantially procedural issues. They can be the genesis or the foundation of support or be part of a claim of unfair dismissal or unfair suspension but cannot stand on their own.

36. In passing, it may be useful to note that this Court does not have the "wide and all- encompassing" jurisdiction which the High Court has. It cannot be over- emphasized that the jurisdiction of this Court is limited by the Act. We hasten to add that the issue of "unfair labour practice" would have been a nice one for consideration, if and only if, the situation had somehow morphed into a complaint of constructive unfair dismissal grounded on an allegation of breach of the fundamental implied term of "reasonableness" and or that of "trust and confidence."

Conclusion

37. For the reasons stated above, we are of the opinion that we have no jurisdiction to hear and determine the complaint of "Unfair Labour Practice" per se. In the circumstances, we will grant the application and strike out the Employee's claim.

Dated the day of May, 2019

Hon. Charlesworth O.D. Brown,
President

Hon. Dr. Hayden Thomas,
Member

Hon. Judith Dublin,
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD/39 OF 2016
BETWEEN:

DENZELL OTTO

Employee

and

ANTIGUA PUBLIC UTILITIES AUTHORITY

Employer

Before:
The Hon. Charlesworth O.D. Brown — President
The Hon. Hayden Thomas — Member
The Hon. Judith Dublin — Member

Appearances:
Mr. Ralph Potter of the Antigua Trades & Labour Union, Representative for the Employee
Mr. Kelvin John, Mr. Loy Weste & Ms. Lisa John Weste of Thomas John & Co., Attorneys- at -Law for the Employer

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2017: November 20
2019: May 24

JUDGMENT

BROWN, P:

Background

1. By his Reference in these proceedings the Employee identified the main issue in the dispute to be the "non-payment for work done on meal breaks". By his Memorandum of Claim filed on 22nd March, 2017 he acknowledged that he was a member of the bargaining unit represented by the Antigua & Barbuda Workers' Union and as such was subject not only to the provisions of the Antigua & Barbuda Labour Code (the Labour Code), but also to the terms of the Collective Agreement subsisting from time to time between that union and the Employer (the Collective Agreement). In these proceedings both parties relied on the Agreement executed on November 30, 1997.

2. The Employee was employed as a Water Treatment Plant Operator. During his tenure as such, he worked as a "shift worker" and was always deployed at one of the Employer's Water Treatment Plants. He worked for thirty-three and one third years between 1975 and 2008 and rose to the rank of Foreman.

3. Unlike other employees of the Employer, the Employee and other shift workers at the Water Treatment Plants were not allowed to take scheduled meal breaks. According to the Employee, the Employer's policy and the terms of the employment arrangement which allowed for that differential treatment was discriminatory and unfair.

4. Paragraph 6 of the Employee's Memorandum of Claim reads:

> ***"The Employee and the Antigua Trades & Labour Union contend that the provisions of the Collective Agreement which allows for meal breaks to be given to all employees except shift workers', solely on the basis that they work on a shift system, is a violation of good industrial relations practices and the purposes of the Antigua & Barbuda Labour Code."***

   That pleading is particularly interesting because the Antigua & Barbuda Trades & Labour Union is not a party to these proceedings.

5. By its Memorandum of Defence filed on 19th May, 2017 the Employer denied that it acted in violation of good industrial relations practices and the purposes of the Labour Code. More particularly, the Employer denies that the Employee was denied meal breaks. In accordance with the governing Collective Agreement, they were not allowed to have "scheduled" breaks. In that regard, the Employer also pointed out and emphasized that Clause 7.3 (b) of the

Collective Agreement provides: "no regular meals period are scheduled on shifts, and meals must be eaten on the job, with no relief from responsibility…"

6. At paragraph 5 of its Memorandum the Employer asserted that:

> ***"The Employee was a shift worker and worked on the plant on a shift basis of eight consecutive hours in a work day. The Employee, along with all weekly paid employees, was governed by the terms in the Collective Agreement between Antigua Public Utilities Authority and Antigua Workers' Union. Clause 7 of the Collective Agreement is applicable to all shift workers and states that no regular meal breaks are scheduled."***

7. Further, the Employer maintained that the Employee was always treated fairly and prayed that his claim be dismissed.

The Evidence

8. For present purposes it is sufficient to adopt the Employee's summary of the relevant evidence set out in his Closing Arguments as submitted by Mr. Ralph Potter of the Antigua Trades & Labour Union on his behalf. Parts of that summary are as follows:

> "***<u>No Meal Breaks</u>***
> ***(1) …***
> ***….***
> ***(4) The employee was at all times during his employment part of a unionized Bargaining Unit represented by the Antigua Workers Union (Antigua and Barbuda Workers' Union).***
> ***(5) As a shift employee, the employee was not allowed to take meal breaks. All meals had to be eaten on the job with no relief from responsibility. This is stated in Clause 7 of the Collective Bargaining Agreement between the Antigua Public Utilities Authority and the Antigua Workers Union (Antigua and Barbuda Workers' Union).***
> ***Clause 7.3 (a)***
> ***Shift workers regular work day is a shift of eight (8) consecutive hours in a work day. The hours of work will be in accordance with separately issued shift schedules.***
> ***No regular meals period are scheduled on these shifts and meals must be eaten on the job with no relief from responsibility. Employees on shift must remain on their job until properly relieved.***
> ***(6) All employees in the Bargaining Unit who are not shift workers are entitled to an interval of one hour lunch during each work day according to the evidence of Mr. Rodney Simon, Human Resource Manager of the Antigua Public Utilities Authority. This is also supported by Clause 7.2 of the Collective Agreement.***
> ***Clause 7.2***
> ***The regular work day for workers except clerical workers shall consist of eight (8) hours in any workday normally commencing at 7:00 am and continuing until 4:00 pm Monday to Friday with an interval of one hour for lunch."***

9. For its part, the Employer emphasized the oral testimony of its Human Resources Director, Mr. Rodney Simon and the documentary evidence of the relevant parts of the Collective Agreement. The Employer also highlighted clause 7.3 (b) as quoted by Mr. Potter. Further, the Employer relied on the uncontroverted evidence of Mr. Simon to the effect that "there has never been any issue raised by the relevant collective bargaining Trade Union on behalf of the Employee with the Employer in relation to meal breaks and clause 7 of the Collective Agreement."

The Employee's Closing Arguments

10. In his submissions, Mr. Potter acknowledged that the question may arise as to whether (a) the issue is one of the interpretation of the Collective Agreement under Section 15 (2) of the Industrial Court Act (the Act) and (b) whether his Union can be a party having an interest in the matter under that subsection.

11. As to those possibilities, Mr. Potter also submitted that this case is not one of the interpretation of any provision of the Collective Agreement. According to him, this Reference is concerned with the "provision of the agreement which is unfair, discriminatory, is in violation of employment principles established by the Antigua & Barbuda Labour Code and also not in keeping with the long established historical practice of allowing meal breaks for all employees."

The Employer's Legal Submissions

12. Contrary to the position taken by Mr. Potter in his submissions, Counsel for the Employer, Mr. Loy Weste puts Section 15 (2) of the Act up front and center in these proceedings. He noted that the proceedings were "commenced by the Employee in his own name and was not referred to the Court by the Employer, or by any trade Union having an interest in the matter."

13. Accordingly, Mr. Weste submitted that "the Employee has no *locus standi* to refer this matter to the Industrial Court for the interpretation of any provision of the Collective Agreement herein. "Further he submitted that, as a creature of statute, this Court is constrained to dismiss the Employee's Claim since it is not properly before the Court…"

14. In addition, Counsel also submitted that the Employee is in breach of the Collective Agreement by not following the agreed procedure set out under Clause 14 (2) (c) which reads:

"14. (2) Any employee or group of employees who have a grievance or complaint may, within 10 working days after the occurrence of the specific matter giving rise to the complaint , seek redress in the following manner:
a…
b…
c. If the grievance is not disposed of at the second stage then an officer of the Union shall present the case to the General Manager…"

15. Clearly, Mr. Weste places much emphasis on the requirement for the involvement of the Antigua and Barbuda Workers' Union as the bargaining agent which negotiated the Collective Agreement. Logically, Mr. Weste further submitted that this Court should refer the matter back to the Antigua & Barbuda Workers' Union so that it may present the grievance to the Employer's General Manager.

16. Significantly, in his legal submissions, Counsel maintained that the Employee "breached the law by commencing this action without *locus standi* to do so… and has breached the Collective Agreement by refusing to submit to the grievance procedure stated therein."

17. Ultimately, the Employer relied on Section 15 of the Industrial Court Act, Cap 214, and prayed that the Employees Claim be dismissed.

Section 15 (2) of the Act: The Interpretation and Application of relevant provisions of the Collective Agreement

18. Having read the Memoranda of the parties, considered the evidence and the submissions, we have determined that the nub of the Employee's claim requires us to have regard for Section 15 (2) of the Act and consider the "interpretation and application" of several clauses in the Collective Agreement including Clauses 7.2, 7.3 (b), 10.1 and 14 (c). We have also identified the paramount and overriding issue to be: Whether the Employee has *locus standi* to refer this matter to the Court?

19. Section 15 (2) of the Act provides:

> ***"15. (1) …***
> ***(2) Where there is any question or difference as to the interpretation or application of the provisions of a collective agreement any employer or trade union having an interest in the matter or the Minister may make application to the Court for the determination of such question or difference."***

20. As to the applicability of Section 15 (2) of the Act, we are obliged to refer to the Labour Code. In that regard, we refer to and follow the dicta of Byron C J, as he then was, at paragraph 3 of Judgment of the Court of Appeal in Suit No. 21 of 1993 **Universal Caribbean Establishment v James Harrison**:

> **"*The Labour Code was an innovative and important enactment, which made substantial changes in the industrial law of Antigua … The code created new and comprehensive machinery for dispute resolution. This involved a network including the Minister of Labour, the Labour Commissioner, decisional officers, an Arbitration tribunal, the National Labour Board, Hearing Officers, the Board of Review."***

The learned Chief Justice then noted the establishment of the Industrial Court in 1976 under the Industrial Court Act and asserted that:

"Since its establishment, …the Industrial Court has been exercising jurisdiction in labour and employment disputes… This procedure completely supplanted the network set up by the Labour Code."

21. We have no doubt that when Parliament passed the Industrial Court Act establishing the Court and providing for the "interpretation and application" of Collective Agreements under section 15 (2), it was mindful of the provisions of Division G of the Labour Code dealing with Trade Unions, and particularly Part 4 of Division K dealing with Collective Agreements.

22. In approaching the construction of any statutory provision there exists the presumption that parliament "has been specially precise and careful in its choice of language." So that one of the cardinal rules to be applied in the construction of statutory provisions is that "words are to be interpreted according to their ordinary and natural meaning."

23. Thus, in the absence of any inconsistency or ambiguity, we are constrained to give the words of subsection 2 of section 15 of the Act their natural and ordinary meaning. To the extent that there may be any semblance of doubt as to the construction of that subsection, we considered the Act as a whole. In that regard, as this Court did when construing the definition of the term "suspension" in its recent judgment in Reference No. 56 of 2016, **Otis Teague v Antigua Public Utilities Authorit**y, we rely on the **4th Edition Halsbury Laws of England Volume 44 paragraph 872** where the learned authors assert that:

"872 Statute to be construed as a whole, … for the purposes of construction, the context of the words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute.
Thus a statute should be construed as a whole so as, so far as possible to avoid any inconsistency or repugnancy either within the section to be construed or as between that section and other parts of the statute."

24. As with all References before us, we are keenly aware of section 10 (3) of the Act which requires us, in the exercise of our powers, to have particular regard to the Labour Code. That section reads:

(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall –
(a)…
(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code."

25. In the circumstances, in addition to considering other sections of the Act, in particular section 10 (3), we have allowed ourselves the liberty of considering the significant provisions of Division G and Part 4 of Division K of the Labour Code.

26. At the end of the day, it is our opinion that we have no choice but to constrain ourselves to construe section 15 (2) of the Act strictly in accordance with its express terms. Where there is a difference in the interpretation or application of the provisions of a collective agreement, as in this Reference, the application to the Court must be made by (a) the employer, (b) the union having an interest, or (c) the Minister. That section leaves no room for an application by an individual employee.

27. In the premises, we reject Mr. Potter's submission that this matter is **not** one of the interpellation of any provision of the Collective Agreement. In our opinion, this Reference falls squarely under Section 15 (2) of the Act. It deals with the interpretation and application of Clauses 7.2, 7.3 (a), 10. 1, 14 (c) and other relevant clauses of the Collective Agreement.

28. Needless to say, once the matter is properly before it, after its interpretation of named clauses, this Court could very well conclude that some or all of them are unfair, discriminatory, in violation of the relevant provisions of the Labour Code or contrary to long established historical practices as contended by the Employee.

29. The rejection of Mr. Potter's submission brings us to consideration of the primary issue stated above: Does the Employee have the necessary *locus standi* to commence and prosecute his claim in this Reference? In that regard, we have noted the Employee's averment, at paragraph 6 his Memorandum, as though the Antigua and Barbuda Trades and Labour Union is a party in these proceedings. In fact, the Reference was prosecuted, as it was commenced, by the Employee as an individual employee.

30. For the reasons stated above, we resolve the primary issue in favour of the Employer. The Employee does not have the requisite locus standi. The Reference should have been commenced and prosecuted by a "trade union having an interest in the matter".

31. Obviously, this is not a determination of the merits of the substantial points of claim in relation to the effect of the relevant clauses of the Collective Agreement vis-à-vis the provisions of the Labour Code and good industrial relations practices.

Conclusion

32. In the premises, it is ordered that the Reference herein be and is hereby dismissed with no order as to costs.

Dated the day of May, 2019

Hon. Charlesworth O.D. Brown,
President

Hon. Dr. Hayden Thomas,
Member

Hon. Judith Dublin,
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 28 OF 2014
BETWEEN

HAROLD SAMUEL

Employee

and

AMERICAN UNIVERSITY OF ANTIGUA INC

Employer

Before:
The Hon. Charlesworth O.D. Brown — President
The Hon. Megan Samuel-Fields — Member
The Hon. Samuel Aymer — Member

Appearances:
Ms. Cicely Charles of Antigua Hotel Management Association, Representative for the Employee
Mrs. Andrea Roberts-Nicholas of Roberts & Co., Attorney-at-Law for the Employer

2016: November 9
2019: May 31

JUDGMENT

Brown, P;

Background

1. By his Reference commencing these proceedings, the Employee identified "unfair dismissal" the main issue between the parties. By his Memorandum of Claim filed on 30th July, 2014 he averred that the termination of his employment was "unfair and cruel."

2. The Employee commenced his employment as a Plumber/Carpenter in the Employer's Maintenance Department situate at Jabberwock Road, Antigua on 01st July, 2009. His last salary was $3,786.00 per month. In accordance with the terms of his letter of employment, he was required to report to Mr. Basil Stuart, the Employer's Director of Administrative Services and Mr. Liston Murraine, the Facilities Supervisor. Three years later, by letter dated 12th October, 2012 the Employer confirmed the Employee's "usual duties in plumbing and carpentry, and any other related duties which may be assigned by Management."

3. On 09th July, 2013, Mr. Stuart instructed the Employee to carry out some remedial plumbing works on the Employer's premises. The Employee failed to comply as instructed. When Mr. Stuart questioned the Employee about the matter, differences arose between them.

4. On 10th July, 2013 a meeting was convened by the Employer to enquire into the unresolved differences. Those in attendance included the Union's Shop Steward, Lisa Yearwood, Martin LaBarrie and Mr. Paul Thomas who were then the Employer's Director of Administrative Services and Facilities Supervisor respectively. During the meeting an altercation developed between the Employee and Mr. Stuart.

5. By letter dated July 10, 2013 the employee was suspended for 3 work days on the grounds of (a) his failure to carry out the specific instructions of Mr. Stuart (who was then the Employer's Vice-President of Administrative Services) and (b) insulting Mr. Stuart and displaying threatening behavior towards him. By that letter the Employee was required to report to the office of the Human Resources Manager on July 15, 2013

6. On July 15, 2013 the Employer delivered a letter to the Employee summarily dismissing him for "gross misconduct" in the course of his employment. By that letter, the Employee was also informed that a report had been made to the police concerning his threats to Mr. Stuart.

The Legal Framework

7. It is clear that in accordance with section C 58 (1) of the Antigua and Barbuda Labour Code, the Employer relies on misconduct as good cause for the Employee's dismissal. The proviso in that section is that there must be a factual basis for that assigned reason. Section C 58 (1) provides:

> ***"C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor***
>
> ***(a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);***
> ***(b) relates to the capability or qualifications of the employee t perform work of the kind he was employed to do, within the limitations of section C59 (2);***
> ***(c) is that the employee was made redundant;***
> ***(d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or***
> ***(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:***
>
> ***Provided, however, that there is a factual basis for the assigned reason."***

8. Section C59 (1) allows for the summary dismissal of an employee who is guilty of serious misconduct such that the employer could not reasonably be expected to continue the employment relationship. Section C 59 (1) provides:

> ***" C59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has***
> ***(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;***
> ***(b) committed a criminal offence in the course of employment, without the consent, express or implied, of the employer; or***
> ***(c) behaved immorally in the course of his duties."***

9. An employer's action in dismissing an employee is subject always to the test of reasonableness under section C 58 (2) of the Labour Code. The question is whether the employer acted reasonably or unreasonably in dismissing the

employee for the assigned reason under the circumstances which prevailed at the material time. Section C 58 (2) reads:

> ***"C 58 (2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."***

10. Summary dismissal is a strong measure requiring strict, persuasive and convincing evidence which must be cogent and weighty in nature and content. Where an employer has dismissed an employee, the burden is on the employer to prove on a balance of probabilities, that the dismissal was not unfair.

11. In instances where a dismissal is held to be unfair by reason of the employer's failure to follow the correct procedure, the Court will consider to what extent, if any, the Employee contributed to his dismissal. In such situations a compensatory award to the employee may be reduced to take into account his contributory fault.

Findings of Fact

12. We have carefully noted and considered the personal testimonies of the Employee and the Employer's 2 witnesses, Mr. LaBarrie and Mr. Thomas. It is noteworthy that although they were listed as witnesses, Mr. Stuart and Ms. Yearwood were not called to testify. In our estimation, Mr. Stuart would have been a crucial witness.

13. On a balance of probabilities, taking all the oral and documentary evidence as well as the closing submissions of Counsel and the Union Representative into account, our findings of fact include the following:

    At the meeting on July 10, 2013 the Employee-

    (a) insulted Mr. Stuart by calling him a "jackass" in the presence of other members of the management team and the Shop Steward.
    (b) used threatening language to Mr. Stuart and displayed aggressive physical behavior towards him.

14. In addition, we also find that:

    (c) It was not uncommon for the Employee to receive conflicting instructions from members of management
    (d) Prior to receiving instructions from Mr. Stuart on July 9, 2013, the Employee had received conflicting instructions from Mr. Thomas.
    (e) In relation to the instructions given by Mr. Stuart, the Employee explained to Mr. Thomas the difficulties he was having regarding the availability of some power tools.
    (f) The Employee was a competent worker to whom Mr. Thomas extended a certain amount of trust.
    (g) Prior to calling him a "jackass", Mr. Stuart had insulted the Employee by referring to him as "an idiot" during the said meeting.
    (h) The Employee deliberately refused to answer the question put to him by Mr. Stuart.
    (i) Both the Employee and Mr. Stuart became angry towards each other during the meeting. They raised their voices and became agitated during the exchanges between them.

15. It is noteworthy that the reasons assigned by the Employer for the dismissal, being largely related to items (g), (h) and (i) of paragraph 14 above, were limited to the events at the meeting on July 10, 2013. The dismissal letter did not accuse the Employee of insubordination or any other form of misconduct prior to the meeting.

Resolving the Main Issue

16. The main issue as to whether the Employee was unfairly dismissed must be resolved in accordance with the provisions of the Labour Code and the evidence before us. To that end, the first question to be answered is whether there was a good factual basis for the Employer's conclusion that he was guilty of misconduct. Secondly, we have to consider whether the Employer presented sufficient evidence with the requisite cogency and weight. Thirdly we also have to consider whether the Employer acted reasonably in dismissing the Employee for the assigned reason of misconduct in the circumstances.

17. Having regard to our findings of fact above, we are of the view that the situation was far more complex than suggested by the Employer. There existed fundamental issues regarding the chain of command moving upwards from the Employee. For example, was it reasonable for Mr. Stuart to countermand the earlier instructions given to the Employee by Mr. Thomas?

18. In that regard, we recall the requirement in the Employee's contract that he report to both Mr. Basil Stuart, who was then the Employer's Director of Administrative Services and Mr. Liston Murraine, who was then the Facilities Supervisor. The evidence discloses that by May 9, 2010, due to an apparent reorganization or restructuring, the Employee was required to report to Mr Martin LaBarrie who had taken over Mr Stuart's earlier position of Director of Administrative Services as well as Mr. Stuart, who then held position of Vice President of Administration and Mr Paul Thomas, the Maintenance Manager. It is not clear whether the Employee was still required to report to the Facilities Supervisor, the position previously held by Mr. Murraine. It is also interesting to note that by the letter dated October 12, 2012 the Employee was required to perform duties assigned to him by "Management". To say the least, it appears to us that at the material time, the chain of command was blurred if not confusing.

19. Further, the question arose as to whether the necessary tools were available to the Employee to facilitate the work which Mr. Stuart required him to perform. The evidence discloses that there were issues as to the whereabouts of particular tools from time to time.

20. It appears that these important questions and others, which we need not dwell on for present purposes, were glossed over by the Employer which appeared to place all its focus solely on what happened at the meeting on July 10, 2013.

21. In the circumstances, the consideration of the factual basis for the assigned reason and the application of the test of reasonableness under section C58 (2) of the Labour Code must be administered in the context of the overall situation, including what happened before as well as during the meeting.

22. The dismissal came after the suspension which itself was based on two grounds: the failure to comply with the instructions, on the one hand and what transpired at the meeting, on the other. It is clear that, from the Employer's perspective, the first ground was abandoned or spent with the suspension, so that the basis for the dismissal was exclusively the second ground.

23. In light of our findings of fact at paragraphs 13 and 14 above, the application of the test of reasonableness under subsection 2 of section C 58 becomes paramount. Did the Employer act reasonably or unreasonably in the circumstances?

24. In our opinion, there were lingering issues to be addressed which required a thorough fact-finding investigation as to what happened before the suspension. How did it really come about that Mr. Stuart's instructions were not carried out? Was there a wilful act of insubordination on the part of the Employee? Were there mitigating or militating circumstances? A proper investigation would have informed and influenced the meeting and its outcome.

25. In any event, in the face of the Employer's conclusion about the Employee's conduct at the meeting, it would have been reasonable to communicate to the Employee in writing about what was alleged against him arising from the meeting. Thereafter, a disciplinary hearing should have been convened which would allow the Employee ample opportunity to defend himself with the assistance, if necessary, of a representative of his choice. The decision, if any, to dismiss the Employee should have been communicated only after that investigative process and the disciplinary hearing were completed.

26. In the circumstances, the question of natural justice emerges and becomes a critical factor in determining whether the Employee was unfairly dismissed. In our opinion, in the absence of a proper fact-finding investigation of the matters arising before and during the meeting, the Employer's action in dismissing the Employee was at least suspect and susceptible to challenge.

27. Further, there is a lingering question as to how adequately the matter was handled by the Human Resources Manager. In that regard, we note that the letter of suspension merely required the Employee to report to the office of the Human Resources Manager for a final decision. On that date, it would have been reasonable for the Employer to apprise the Employee of what was alleged against him, as stated in the dismissal letter, and give him the opportunity to speak on his own behalf and perhaps exculpate himself.

28. As to the requirement for a fair hearing, we remind ourselves of the significance of the same when applying the test of reasonableness. The existence of a potentially good cause for dismissal does not necessarily preclude a finding of unfair dismissal. The judgments of this Court in Reference No. 54 of 2013 **Humphrey Michael Blackburn v LIAT**

(1974) LTD. (the Blackburn case**)** and Reference No. 66 of 2015 **Antigua and Barbuda Workers' Union v Cable and Wireless (Antigua and Barbuda) Limited** (the Cable and Wireless case) will suffice to illustrate this point.

29. In the **Blackburn case**, this Court determined that the Employee was guilty of misconduct which was serious enough to potentially justify his dismissal. However, the Court went on to consider the summary nature of the dismissal, which was effected 2 weeks after the alleged misconduct. The crucial question then was, as it is now, whether the employer acted reasonably or unreasonably in the circumstances. Paragraph 126 of that judgment is pertinent in this Reference. It reads:

> ***" 126. At the end of the day, we find that, in the circumstances, following a fair procedure generally and providing the employee with the opportunity to be heard in particular, could have made a difference in the Employer's deliberations before the dismissal."***

30. Further, at paragraph 127 of the judgment, the Court concluded that the employee "was dismissed in blatant contravention of the rules of natural justice and in breach of the principles of good industrial relations." In the final analysis, it became clear that notwithstanding, the existence of a potentially good cause for dismissal, upon the application of the test of reasonableness, it was held that the Employee was unfairly dismissed.

31. In the **Cable & Wireless case**, it was held that there was a redundancy situation which constituted a potentially good cause for dismissal under section C 58 (1) of the Labour Code. However, upon application of the test of reasonableness it was held that the employees were unfairly dismissed. The determining factor was whether the employer acted reasonably in handling the redundancy situation.

32. In its conclusion in that judgment this Court held:

> ***"111. For the foregoing reasons, we conclude that under the particular circumstances of this case, the actions of the Employer, taken as a whole, were not within the range of conduct which a reasonable employer should have adopted. In other words, we conclude that the Employer has failed to discharge its burden of proving on a balance of probabilities that it acted reasonably under the circumstances. Accordingly, we are constrained to determine this Reference in favor of the Union as the representative of the affected employees."***

33. The foregoing approach and final determination of the matter by this Court were approved by the Court of Appeal in its recent judgment in Civil appeal ANUL TAP 2016/ 003: **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers' Union**.

34. We adopt the settled approach used in both the **Blackburn** and the **Cable & Wireless** cases. And we have arrived at substantially the same result. At the end of the day, the Employer has not presented the required cogent and weighty evidence to justify the summary dismissal of the Employee. In other words, we conclude that the Employer has failed to prove that it acted reasonably in dismissing the Employee in the manner it which it did in the then prevailing circumstances.

35. We now turn our attention to the Employee's contribution to his dismissal. On the preponderance of the evidence, it is clear that he was guilty of misconduct which could have justified his dismissal but for the Employer's failure of the test of reasonableness.

36. Notwithstanding our finding that he was unfairly dismissed, we are of the opinion that the Employee contributed significantly to his dismissal. We assess his contribution to be 50% and will reduce his compensatory award below by that percentage.

37. In arriving at our conclusion, we were obliged to have regard to section 10 (3) of the Industrial Court Act which requires us to determine matters "… in accordance with equity, good conscience and the substantial merits of the case...having regard to the principles and practices of good industrial relations and the Antigua and Barbuda Labour Code"

<u>The Award</u>

38. We award compensation as follows:

(a) Notice Pay

The Employee was earning $3,786.00 per month at the date of his dismissal. Since he received no notice, he is entitled to pay in lieu thereof. Accordingly, **we award the sum of $3,786.00** under this head.

(b) Loss of Protection

The period of employment was 4 years from July 1, 2009 to July 15, 2013. His compensation under this head is the equivalent of severance pay in a redundancy situation. Accordingly, **we award the sum of $15,144.00** under this head.

(c) Immediate Loss

The evidence discloses that after his dismissal the Employee earned approximately $1,500.00 per week, which is more than the amount earned while working for the Employer. As a result, we make no award under this or any other head.

39. In the premises, the total sum due to the Employee is $9,465.00, being 50% of the total award.

Order

40. It is ordered that:

(1) The Employer shall pay to the Employee the total sum of $9,465.00 as compensation for his unfair dismissal.

(2) Payment of the said sum must be made on or before 30th day of June 2019.

Dated this day of May, 2019

Hon. Charlesworth O.D. Brown,
President

Hon. Megan Samuel-Fields,
Member

Hon. Samuel Aymer,
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 20 OF 2016

BETWEEN

HAYNES JOSEPH

Employee

And

ATTORNEY GENERAL
THE SUPERINTENDENT HER MAJESTY'S PRISON

Employers

Before:
The Hon. Charlesworth O.D. Brown — President
The Hon. John Benjamin — Member
Appearances:

Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee
Mrs. Carla Brooks-Harris, Ms. Alicia Aska and Ms. Rose-Anne Kim of the Attorney General's Chambers, Attorney-at-Law for the Employers

2017: July 05
2019: August 26

JUDGMENT

Brown, P;

Background

1. The operation, maintenance and administration of Her Majesty's Prison are largely governed by the provisions of the Prison Act, Cap 341 of Laws of Antigua & Barbuda. That Act provides from the establishment of a Visiting Committee and the appointment of Prison Officers. The power to make rules for the regulation and management of prisons, the conduct and discipline of Prison Officers is vested in the Cabinet pursuant to section 26 of the Act.

2. Prison Rules 97, 98 and 117 provide as follows:

> **97.** USING OR BRINGING IN PROHIBITED ARTICLES. No subordinate officer shall introduce into, keep or use in the prison tobacco or liquor of any kind or any newspaper, book or other publication, except under such restrictions as may from time to time be laid down by the Superintendent. Officers in charge of gangs employed outside the prison walls shall on no account use tobacco or spirituous liquors whilst in charge of such gangs.
>
> **98.** PUNISHMENT FOR DEALINGS WITH PROHIBITED ARTICLES. Every subordinate officer or servant of the establishment who shall (except for lawful purposes and with the authority of the Superintendent) bring in or carry out, or endeavour to bring in or carry out, or knowingly allow to be brought in or carried out of the prison, or convey or attempt to convey, or knowingly allow to be conveyed to or for any prisoner within or without the prison walls, any money, clothing, provisions, tobacco, letters, papers, other articles whatsoever not allowed by the Rules of the prison, shall be suspended from his duties and placed under arrest by the Superintendent who shall forthwith report the offence to the Governor-General. Such conduct shall be liable to be punished under the provisions of the law relating to prisons.
>
> **114.** OFFENCES BY SUBORDINATE OFFICERS. (1) if a subordinate officer is guilty of any of the following offences, namely-
>
> (i) …
> …
> (xx) Drunkenness, disobedience of, or negligence in carrying out, the Prison Rules, or any orders or directions given by any proper authority;
>
> the Superintendent may, unless he considers the offence to be of a serious nature, impose a fine not exceeding five dollars for each offence. If the Superintendent considers the offence to be of a serious nature he shall report the matter to the Chairman of the Visiting Committee, who may summon a meeting of the Visiting Committee and cause an inquiry upon oath to be made before him and if after such inquiry the Visiting Committee are satisfied that the offence with which the officer has been charged be proved to their satisfaction, they may award any of the following punishments-
>
> (i) …
> ….
> (viii) Recommendation for dismissal"

3. The Employee commenced his employment on 24th March, 2000 as a Non- Established employee of the Government of Antigua and Barbuda holding the position of Junior Prison Officer with effect from 24th March, 2000. As such he was subject to the Prison Rules.

4. On or about the 21st January, 2012 the Acting Superintendent, Mr Percy Adams discovered the following items in the locker assigned to the Employee:

Two (2) plastic bottles containing alcohol
Three (3) packs bamboo wrappers
Nine (9) large packs of cigarettes
Four (4) small packs of cigarettes
Two (2) bottles of pepper sauce
Four (4) lighters

5. As a result, the Employee was summoned to a meeting with the Superintendent and 5 other senior officers, where he was confronted with allegations that he was in breach of the Rules. In response, the Employee admitted that the items belonged to him and that he was in breach of the rules by taking the prohibited items into the prison but contended that this was due to inadvertence on his part.

6. Upon hearing the Employee's explanation Mr. Adams came to the conclusion that the Employee disobeyed and violated the relevant Prison Rules by bringing prohibited articles into the Prison and attempting to convey them to a prisoner. As a result by letter dated 26th January, 2012 the Employee was suspended with half pay and charged with three (3) offences.

7. The three offences with which the Employee was charged are:

"

(1) Mr. Haynes Joseph, a Junior Prison Officer at Her Majesty's Prison on/or about the 23rd January, 2012 you disobeyed and violated the prison rules by bringing prohibited articles into the compound of the Prison, contrary to Section 97 of the Prison Rules, Cap. 341, Volume 13 of the 1992 revised Laws of Antigua and Barbuda.

(2) Mr. Haynes Joseph, a Junior Prison Officer at Her Majesty's Prison on/or about the 23rd January, 2012 you disobeyed and violated the rules of the Prison by attempting to convey to a prisoner prohibited articles, contrary to section 98 of the Prison Rules, Cap. 341.

(3) Mr. Haynes Joseph, a Junior Prison Officer at Her Majesty's Prison on/or about 23rd January 2012 you disobeyed and violated the rules of the Prison contrary to section 114 (XXV) of the Prison Rules, Cap. 341."

8. After several hearings before it, the Prison Visiting Committee by letter dated 17th January 2013 found the Employee guilty of the offences and recommended that he be dismissed from his employment.

"January 17th, 2013

Mrs. Sharon Peters,
Permanent Secretary
Ministry of National Security & Labour
…

Dear Mrs. Peters,

Re: Jr. Officer Haynes Joseph

After several hearings in the case involving the above named Officer and statements received from various witnesses, it is the conclusion of the Prison Visiting Committee Members that Mr. Haynes Joseph, is guilty of the charges brought against him, regardless of the fact that he pleaded not guilty.

Further, it is the Committee's opinion that Mr. Bowen (Mr. Joseph's Attorney) failed to prove his client's innocence in the cross-examination of witnesses who were called to testify during the hearing.

In light of the above submission, the Committee hereby recommends the dismissal of Mr. Haynes Joseph from the service of Her Majesty's Prison.
Respectfully,

Pastor James Warner,
Chairman, Prison Visiting Committee
cc: …"

9. By its decision made on Wednesday 30th January 2013, Cabinet agreed with the recommendation of the Visiting Committee and directed the Permanent Secretary to implement it. That decision was communicated as follows:

> ***" IN THE CABINET OF ANTIGUA AND BARBUDA***
>
> ***Wednesday 30 January 2013***
>
> ***Request for the Termination of the Appointment of Junior Prison Officer – Mr. Hayden Joseph – Her Majesty's Prison***
>
> ***63. Cabinet agreed to the recommendation of the Prison Visiting Committee to terminate the appointment of Mr. Haynes Joseph, Junior Prison Officer, Her Majesty's Prison effective 17th January, 2013 and consequently directed by the Honourable Minister of National Security and Labour to cause the Permanent Secretary to implement the said recommendation. "***

10. Ultimately, the Employee was dismissed by letter dated 19th February 2013 to him from the Permanent Secretary, Ministry of National Security and Labour.

Court Proceedings

11. The Employee commenced these proceedings by Reference filed on 07th July 2016 by which he identified the issues in dispute to be unfair dismissal and unlawful suspension.

12. In his Memorandum of Claim the Employee set out his version of the events, denied the allegations against him and contended that his suspension and dismissal were unlawful.

13. By its Memorandum of Defence, the Employer joined issue with the Employee's claim, asserted that his dismissal was not unlawful and maintained that he contributed to or caused his own dismissal.

14. At the commencement of the trial the Employee's representative Mr. Carty made a preliminary submission on his behalf contending that the Employer failed to state the precise reason for the dismissal pursuant to Section C10 of the Labour Code. He submitted that as a result of that failure, the Employer was estopped from introducing evidence at the trial that could otherwise be used to justify the dismissal.

15. Upon hearing the submissions and having regard to the express inclination of the Court, Ms. Kim, on behalf of the Employer, conceded that the Employee was unfairly dismissed by reason of the Employer's failure to furnish him with a statement of the precise reason for his dismissal pursuant to the Labour Code.

The Issue of Compensation

16. Having conceded that the dismissal was unfair, Counsel did not call Mr. Albert Wade, Superintendent of Prison, to testify on behalf of the Employer, although his witness statement with supporting documents attached was before us. The Employee was called to testify on his own behalf after which both Representatives made closing oral submissions.

17. In our estimation, the approach of both Representatives to the assessment process is flawed. On the one hand, Counsel's election not to call Mr. Wade was misguided. Notwithstanding the prior determination of liability, the Employer's evidence would have been critical for the purposes of the assessment of compensation. Accordingly, on the other hand, Mr. Carty's submission that in carrying out its assessment, this Court should wholly disregard all the Employer's evidence is also misguided. Each case turns on its own facts. In the instant case, the abundance of documentary evidence, although initially directed at the issue of liability, was also most instructive for the purposes of the assessment.

18. In the ordinary course of things, when determining the quantum of compensation payable to an employee who has been unfairly dismissed, we invariably carry out our assessment subject always to our consideration of the employee's contribution, if any, to his dismissal. In that regard, Ms. Kim relied on Reference No. 13 of 2013**: Tanika Martin v Board of Education** and Reference No. 79 of 2000 **Judith Bramble v St. Nicholas Primary School**. In those cases, this Court, as differently constituted, found that the employees were blameworthy and fixed their contributions to their dismissals at 50% and 60% respectively. In the more recent case of **Damien Lynch v Kenny Gardner:** Reference No. 7 of 2015, this Court took into account the employee's contribution to his dismissal discounted his compensation by 75%.

19. In the instant case, we have taken into consideration, (a) the nature and purpose of the institution where the Employee's services were deployed, (b) the nature and purpose of the duties which he performed, and (c) the egregious nature and execution of offences committed by the Employee. In fact, we agree with Ms. Kim's submission that the Employee's conduct "is a flagrant and blatant violation of his duty to maintain the safety and security of visitors, fellow officers and inmates of the prison". Counsel also expressed the view, with which we agree, that the Employee's conduct had serious implications for national security.

20. Based on the Employee's own testimony, during which we carefully observed his demeanor, and the relevant documentary evidence, we make the following findings of fact:

    (1) The Employee is not a credible witness. For that reason, we reject his version of the events leading up to his dismissal. In any event, he admitted that he knowingly breached the Prison Rules as he well knew that he was not permitted to take the prohibited items into the prison. Moreover, by his manuscript letter to the Permanent Secretary dated 23rd January 2013 he admitted his guilt and requested her leniency.

    (2) The Employee failed to take any or any sufficient steps to mitigate his loss after his dismissal. He presented no documentary evidence of his applications for employment and testified that he found no employment until 8 months after his dismissal. We conclude that during that period he continued to operate his own and/or his family's retail shop and did not diligently attempt to find fresh employment.

21. As to the Employee's claim for a pension, we are mindful of section 4 of the Pension (Government Non- Established) Act Cap 310 which provides that no employee shall have the absolute right to a pension or gratuity payment. Further section 4 (2) provides that where Cabinet is satisfied that an employee "has been guilty of negligence, irregularity or misconduct", his pension may be withheld. In the circumstances, suffice it to say, the matter of the award of a pension to the Employee is entirely with Cabinet's purview.

22. In the final analysis, there can be no doubt that as a matter of record, the Employee betrayed the trust and confidence reposed in him by the relevant authorities. We are mindful of the purpose of the institution of the Prison, the inherent nature of his duties as a Prison Officer, and the inclinations and the presumed propensities of some of the prisoners under his charge from time to time. Taken in context, we are inclined to agree with Ms. Kim that the Employee's conduct was "perverse".

23. Having regard to all the circumstances, we are acutely aware of our mandate under Section 10 (3) of the Industrial Court Act. At the end of the day, in making our order, we must make an award according to what is "fair and just, having regard to the interests of the persons immediately concerned and the community as a whole". We must at always "act in accordance with equity, good conscience and the substantial merits of the case" before us.

Conclusion

24. We find that, by reason of his misconduct, the Employee is blameworthy for the state of affairs culminating in his dismissal. In the words of Ms. Kim: "the culpability of the employee being clearly established …he is totally to blame for his dismissal, it is just and reasonable to reduce any compensation awarded (to include the employee's gratuity and pension) by one hundred (100%) percent." We are so persuaded by those submissions that we will refrain from treating this matter as an ordinary assessment.

25. In the premises, we are of the firm opinion that the Employee's claim for compensation has no merit. Consequently, it is fair and just that we make no award of compensation in this case.

Dated this day of August 2019

Charlesworth O.D. Brown,
President

John Benjamin,
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 20 OF 2016

BETWEEN

HAYNES JOSEPH

Employee

And

ATTORNEY GENERAL
THE SUPERINTENDENT HER MAJESTY'S PRISON

Employers

Before:
The Hon. Charlesworth O.D. Brown — President
The Hon. John Benjamin — Member

Appearances:
Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee
Mrs. Carla Brooks-Harris, Ms. Alicia Aska and Ms. Rose-Anne Kim of the Attorney General's Chambers, Attorney-at-Law for the Employers

2017: July 05
2019: August 26

JUDGMENT

Brown, P;

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> (ii) ……

(xxi) Drunkenness, disobedience of, or negligence in carrying out, the Prison Rules, or any orders or directions given by any proper authority;

…

the Superintendent may, unless he considers the offence to be of a serious nature, impose a fine not exceeding five dollars for each offence. If the Superintendent considers the offence to be of a serious nature he shall report the matter to the Chairman of the Visiting Committee, who may summon a meeting of the Visiting Committee and cause an inquiry upon oath to be made before him and if after such inquiry the Visiting Committee are satisfied that the offence with which the officer has been charged be proved to their satisfaction, they may award any of the following punishments-

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….
(viii) Recommendation for dismissal"

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Further, it is the Committee's opinion that Mr. Bowen (Mr. Joseph's Attorney) failed to prove his client's innocence in the cross-examination of witnesses who were called to testify during the hearing.

In light of the above submission, the Committee hereby recommends the dismissal of Mr. Haynes Joseph from the service of Her Majesty's Prison.

Respectfully,
……..
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The Issue of Compensation

41. Having conceded that the dismissal was unfair, Counsel did not call Mr. Albert Wade, Superintendent of Prison, to testify on behalf of the Employer, although his witness statement with supporting documents attached was before us. The Employee was called to testify on his own behalf after which both Representatives made closing oral submissions.

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45. Based on the Employee's own testimony, during which we carefully observed his demeanor, and the relevant documentary evidence, we make the following findings of fact:

    (3) The Employee is not a credible witness. For that reason, we reject his version of the events leading up to his dismissal. In any event, he admitted that he knowingly breached the Prison Rules as he well knew that he was not permitted to take the prohibited items into the prison. Moreover, by his manuscript letter to the Permanent Secretary dated 23rd January 2013 he admitted his guilt and requested her leniency.

    (4) The Employee failed to take any or any sufficient steps to mitigate his loss after his dismissal. He presented no documentary evidence of his applications for employment and testified that he found no employment until 8 months after his dismissal. We conclude that during that period he continued to operate his own and/or his family's retail shop and did not diligently attempt to find fresh employment.

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having regard to the interests of the persons immediately concerned and the community as a whole". We must at always "act in accordance with equity, good conscience and the substantial merits of the case" before us.

Conclusion

49. We find that, by reason of his misconduct, the Employee is blameworthy for the state of affairs culminating in his dismissal. In the words of Ms. Kim: "the culpability of the employee being clearly established …he is totally to blame for his dismissal, it is just and reasonable to reduce any compensation awarded (to include the employee's gratuity and pension) by one hundred (100%) percent." We are so persuaded by those submissions that we will refrain from treating this matter as an ordinary assessment.

50. In the premises, we are of the firm opinion that the Employee's claim for compensation has no merit. Consequently, it is fair and just that we make no award of compensation in this case.

Dated this day of August 2019

Charlesworth O.D. Brown,
President

John Benjamin,
Member