(12)

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

INDUSTRIAL COURT APPEAL NO. 1 of 1981

CABLE & WIRELESS (WEST INDIES) LTD. - Employer/Appellant

and

DAIMA HILL
DONALD GARDNER
LIONEL GEORGE
ALSTON TURNER
HENZELLE RICHARDS
PATRICK LABADIE
BLASHFORD WILKINS
CALVIN EDWARDS
MOODY MASON
EDWARD DORAM
ROBIN ROMEO - Employees/Respondents

Before: The Hon. Sir Neville Peterkin, Chief Justice
The Honourable Mr. Justice Berridge
The Honourable Mr. Justice Robotham

Appearances: Henry Ford, Q.C., (B'dos.), Sir Fred Phillips & Steve Browne for the appellant.

Bernice Lake, Marcel Commodore & Gerald Watt for the respondents.

1982; July 5, 6, 7, 8, 9, 10, Nov. 15.

JUDGMENT

BERRIDGE, J.A.

This is an appeal by Cable & Wireless (W.I.) Ltd. (hereinafter sometimes referred to as the Company) from the decision of the Industrial Court (hereinafter sometimes referred to as the Court) dated the 5th October, 1981, in which it was ordered that each of the employees listed as respondents (other than Edward Doram and Robin Romeo)

(1) be re-instated without loss of pay benefits or privileges in the same (or a similar) position which he held with the Company on the date of his dismissal;

/(2) be awarded.....

(2) be awarded certain damages from which must be deducted the amounts paid by the Company to each employee on his dismissal in so far as it relates to ex-gratia pay in lieu of notice;

(3) be awarded costs in the sum of $3,000.00.

It was further ordered that the full pension rights and privileges of each of the said employees together with full benefits under the Staff Dependents Fund and the West Indies Medical Scheme be preserved and continued as if there has been no termination of employment.

From this order the Company has appealed from the whole decision save and except those portions dealing with the respondents Doram and Romeo and vacation leave on the following initial grounds -

"(1) The Honourable Court misdirected itself or erred in law in holding that the first nine Respondents were unfairly dismissed.

(2) The Honourable Court misdirected itself or erred in law in ordering that each of the Respondents other than Robin Romeo and Edward Doram be reinstated without loss of pay, benefits or privileges and in addition awarding them damages.

(3) The Honourable Court misdirected itself or erred in law in its construction of section 10(4) of The Industrial Court Act (No.4 of 1976).

(4) The Honourable Court was wrong in law in holding that the dismissals of the Appellants except Robin Romeo and Edward Doram had taken place in circumstances that were not in accordance with the principles of good industrial relations practice.

(5) The Honourable Court was wrong in making an order for re-instatement.

(6) The Honourable Court misdirected itself or erred in law as to the standard of proof necessary in cases of this nature.

(7) The decision cannot be supported by the evidence and ought to be set aside."

And on the following additional grounds -

"1. That the Honourable Court misdirected itself in construing the true meaning, purpose and intention of Parliament in regard to section 9(1) of the Industrial Court Act 1976.

/2. That the.....

2. That the Honourable Court misdirected itself and was wrong in law in excluding evidence which the Employer/Appellant considered vital to its case."

Respondents notices were filed by all the employees, the first-named nine craving a variation of amounts awarded by way of damages and costs as being inadequate while the notice in so far as it related to the last two respondents alleged -

(a) that the Court erred in finding that they were justifiably dismissed from their employment by the employer on the same and/or similar evidence rejected by the said Court in respect of the other respondents;

(b) that the Court erred in law in finding that they were deemed to have abandoned their claims against the employer because they failed to give evidence on their own behalf at the hearing of the reference.

A brief summary of the facts and circumstances leading up to suspension and ultimate dismissal of the eleven employees is necessary, indeed essential, in order to appreciate the atmosphere which prevailed among management and staff at the premises of the Company at Clare Hall on the 28th February, 1979.

It appears that following an award delivered by the Court on 9th February, 1979 which was not well received by the employees, the work output was markedly reduced to such an extent that it became necessary for the Manager of the Company to issue a letter dated 23rd February, 1979 to the staff but this did not bring about any improvement.

At what was described as a Management/Union/Shop Steward meeting held on the 23rd February, 1979 in the minutes under the heading "Return to normalcy by Staff" appears the following "Union feels that staff are working under severe pressure".

At about 1,20 p.m. on the 28th February, none of the eleven respondents was on duty for one reason or another. Hill alleged that he got permission to meet a Jaycees official due to arrive in the State.

/Labadie.....

Labadie alleged that he obtained permission to keep an appointment with his lawyer regarding a private matter. Wilkins alleged that he left the premises of his own volition for the Telephone Company on the business of the appellant Company. Richards was ill from the previous evening and the remaining respondents fell ill after the luncheon period on the 28th February.

At about 1.35 p.m. Wheeler returned to the Company's premises at Clare Hall and found a fault docket on his desk on which was written "1320. ATTN. A. WHEELER. M. Mason sick also C. Edwards ET R. ROMEO ET E. DORAM." Wheeler understood the note to mean that the persons named had gone off sick at 1320 hours or 1.20 p.m. and subsequently discovered that they were not in the Telephone Control Centre which was manned by them nor had they handed over to anyone.

At about 2 p.m., while at the Telephone Control Centre, Wheeler received telephone calls from St. Kitts and Montserrat in quick succession. As a result Wheeler proceeded to check the Reuter News Services from Barbados and found that it was out of operation. He was in the process of checking all this when Benjamin made a report to him as a result of which he discovered that a plug in the back of a Modem relating to Eastern Airlines Data System was partially out of its socket the effect of which was that the St. Lucia, Barbados, Port of Spain Data System was interrupted, that is to say that these places had lost the Data going south from Antigua thus rendering their part of the system inoperative. In addition this affected the Low Speed System to St. Kitts, Turks Island, Martinique and Guadeloupe. The system was returned to normal by re-inserting the loose plug.

Consequent upon Benjamin's report Wheeler made a further check and found that the British Airways Data System to the south of Antigua was not functioning and while trying to rectify the situation his attention was drawn by a consolidating technician to the back of the cabinet where

/he, Wheeler,.....

he, Wheeler, found 2 transmit wires carrying data south to St. Lucia and Barbados had been severed thereby interrupting the data south of Antigua.

It may be mentioned here that Keith Wood a technician recorded in Ex D H22 that Barbados had advised that the British Airways Data System had failed at 1.20 p.m.

Wheeler reported his findings to Eustace Phillips, Engineer Operations, who in turn, called the Branch Engineer and the Manager to the scene.

In addition, the evidence on record makes it abundantly clear that all concerned were working under severe strain in an atmosphere charged with bad relations based on ethnic factors where, on the one hand, management for the most part consisted of ex patriates, and on the other technicians were of local origin. Coupled with this there appears to have been the further element of professional jealousy.

By letter dated the 28th February, 1979, all the employees/respondents were suspended from duty by the Manager and on the 27th March, 1979, they were dismissed with effect from the 31st March, 1979, by a further letter from the Manager giving reasons for their dismissal. Some of the respondents were paid the equivalent of three months salary while others were paid the equivalent of four months salary and in the cases of all but the respondents George, Richards and Mason vacation leave pay was granted.

Except in the case of Henzelle Richards who did not report for duty on 28th February, 1979, and against whom there was no allegation of interference with the Company's equipment, the letters of termination of employment in each case alleged -

/(i) Neglect of.....

(i) Neglect of duty

(ii) Wanton interference with equipment of the Company within the area of responsibility discovered after leaving duties

(iii) Misconduct indicating that the employer/ employee relationship could not reasonably be expected to continue.

The material date in the allegations in (i) (ii) and (iii) above in each case was 28th February, 1979. The reasons, it is observed, though couched in similar terms, were not necessarily similar in content and in each case particulars under the various reasons were sought and obtained by Counsel for the employees.

It is convenient at this stage to set out in brief the findings of the Court in regard to the reasons stated for the dismissal of the respondents.

(i) In regard to the allegations of neglect of duty the Court accepted the explanations of the respondents and went so far as to say that in any case where the version of the respondents differed from that of Bolton, the Assistant Engineer (whose evidence was largely that of the Company) it was prepared to accept the version of the former and further that, in any event in some instances the Company should have applied the provisions of sec (61(2) of the Antigua Labour Code and issued a written warning that in the event of repetition disciplinary action would be taken.

(ii) In so far as the allegations of wanton interference with equipment of the Company was concerned the Court either accepted the denial of the respondents or found that there was no evidence or no sufficient evidence to implicate them. The Court also observed that it would be a rash assumption to make that damage was done by an employee or employees because it was found in his or their area of responsibility and that more cogent and specific evidence would be required before the Court

/could draw....

could draw the conclusion that it was invited to draw.

(iii) In so far as the allegation of misconduct affecting the employer/employee relationship was concerned, misconduct was invariably tied to neglect of duty and the Court found that the respondents had either been absent with the leave of a superior officer or that having left duty on account of illness they not only made a report to a senior officer but ensured that the equipment of the Company was secured before leaving the premises. In the case of the respondent Wilkins, who left for duty elsewhere, he left other technicians on duty. He did not return to the premises that day but there was nothing unreasonable about this as the job on which he was working was completed a mere ten minutes before he was due to go off duty that day.

Ground 7. Decision against the weight of Evidence.

Learned Counsel for the appellant contended that the Court misdirected itself in law and misapplied the facts in relation to the respondents: In doing so he cited a number of instances to which he submitted that the Court gave no or no adequate consideration in arriving at their decisions on the various reasons given for the dismissal of the respondents.

re HILL. Instances were cited where Hill's word was accepted against that of Bolton who stated that (i) he gave him no leave to be absent after lunch on February 28th (ii) he gave him certain programming work which he did not complete; and that of Jacobs who denied asking him to resume work on February 28th instead of 1st March.

re GARDNER. Reference was made to the fact that Bolton found it necessary to take Gardner to the Branch Engineer to complain about his consistently low output. Counsel also referred to the finding of the Court (at p.1186) that "there was no clear cut line of division in Mr. Bolton's evidence to say what part of his evidence related to Mr. Hill and what portion related

/to Mr. Gardner .....

to Mr. Gardner" and pointed out that the record indicates clearly (at p.509) that Counsel stated that he was about to examine Bolton in relation to the charges against Gardner and did in fact do do.

re GEORGE. Counsel submitted that the Court overlooked the significance of the fact that this respondent was not at work on 27th February, never reported on the 28th February until 9.20 a.m. (one hour and 20 minutes late) and gave no reason for his late arrival he himself stating that there was no duty on his part to report lateness to his superior officer. Further, that George alleged that he was given a job assignment on the 27th February but he was not at work on that day.

re TURNER. Reference was made to the finding of the Court that the failure of the Assistant Engineer, Benjamin, to record the time of the entry in the Wireless Log requiring Turner to check the circuits every 2 hours was vital to the complaint against Turner but Turner himself admitted having only once done the assessment in 5 hours. It was also contended that the 16 wires cut were in a spot within full view of the watch keeper and if Turner was at his desk he should have seen if some unauthorised person entered the area and enquired the reason therefor.

re RICHARDS. Instances were cited where Richards' denial that he phoned Wood at 4.53 p.m. on 28th February to report sick was accepted and again his denial that he told Wood that the technicians would be ill for 48 hours.

re LABADIE. While not disputing that this respondent had an appointment with his lawyer, Counsel observed that this was not brought to the attention of management and that even though, as Labadie admitted, he was not aware of his own suspension until mid-day of the 1st March, 1979 he took no steps to seek permission to be absent on the morning of the 1st March when the case in which he was involved was heard. Reference was also made to an insubordinate letter by Labadie to management explaining why he refused to carry out certain instructions issued to him.

/re WILKINS.....

re WILKINS. It was pointed out that the Company was not responsible for the maintenance of equipment at the Telephone Company and that no one asked Wilkins to go to the Telephone Company.

re EDWARDS. Reference was made to the omnibus notification to Wheeler by this respondent, Doram, Romeo and Mason that they were ill and to the statement to the Police to the effect that on the afternoon of February 28th at 1.20 p.m. he got fed up, reported sick and left the office, bearing in mind that Wood had recorded that he was advised by Barbados that British Airways Data System which is controlled by these 4 respondents had failed at 1.20 p.m. the same day.

re MASON. Counsel stated that all that was said about Edwards was equally applicable to Mason except that the latter adopted an attitude which was more reprehensible.

On the question of circumstantial evidence Counsel urged that it was strong and compelling particularly as it was established that unauthorised persons could not gain access to the damaged equipment without being seen by the staff. In addition he urged that undue importance was paid to the fact that the Police, though summoned to the premises, declined to institute criminal proceedings in regard to the damage to the equipment.

Apart from the instances which bear on insubordination and which should have attracted action under Sec. C61 of the Antigua Labour Code the findings of the Court are findings of fact.

Ord. 64 r.3 (i) R.S.C. 1970 provides that an appeal to the Court shall be by way of rehearing but this does not mean that an appelate court should lightly differ from the finding of a trial judge on a question of fact and it would be difficult to do so where the finding turned solely on the credibility of a witness.

The principles governing an appelate court when reviewing the findings of a judge sitting alone, without a jury, are well known but

/it may.....

it may be useful to set them out here quoting from the dictum of Lord Thankerton in Watt or Thomas v Thomas [1947] AC at p.487 also to be found in [1947] 1 All E.R. 582 -

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (2) The appellate court may take the view that, without having seen the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakenly so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

These principles are applicable mutatis mutandis to the instant case.

I have examined the judgment sufficiently minutely to come to the conolusion that there has been no misunderstanding or disregard or oversight of any material fact or wrong inferences drawn which would justify reversing the decision of the Court who heard this matter for the greater part of two years with intervening adjournments over which they had no control and I see no good reason to disturb the findings of the Court that the employees (other than Edward Doram and Robin Romeo) were unfairly dismissed. This aspect of the Company's appeal therefore fails.

Additional grounds 1 & 2 (1) Misconstruction of Sec. 9(1) of the Industrial Court Act 1976. (2) Wrongful Exclusion of evidence.

Counsel submitted that the Court erred in excluding from evidence a memorandum dated 19th February 1979 written by Bolton to his superior officer, the Branch Engineer, and sought to be put in evidence by the

/writer....

writer, regarding the work out put of the staff. Counsel, while conceding that the document offended against the hearsay rule relied on the provisions of S.9(1) of the Industrial Court Act under which section the Court is not bound to follow the strict rules of evidence.

The Court in ruling on the admissibility of the document found that a substantial part of it dealt with specific allegations which were really new in substance and in fact and which could not at that particular stage be commented on or explained by the employees who had already given their evidence. The Court accordingly ruled that the document was inadmissible in evidence on the ground that it would be prejudicial to the employees' case. With this ruling I am in agreement.

Ground 1. Misdirection in holding that first nine Respondents unfairly dismissed.

Counsel contended that the Court misunderstood the evidence, misapplied the facts, misconstrued and misapplied the law governing the respondents' dismissal resulting in their coming to a decision that was wrong.

Counsel in developing his argument observed that in a number of instances identical provisions of the U.K. Trade Unions Act 1974 were embodied in the Antigua Labour Code and cited, inter alia, the following cases:-

(i) Turner v Wadham Stringber Commercial [1974] IRLR 83.
(ii) Abernathy v Mott & ors. [1974] ICR 323 (C.A.).
(iii) Monie v Coral Racing Ltd. [1980] ICR 109 (C.A.).
(iv) Ferodo Ltd. v Barnes [1976] ICR 439.
(v) Carr v Alexander Russell Ltd. [1976] IRLR 220.

Turner's case (supra) is authority for saying that the Court in determining the reason for dismissal must examine all the circumstances rather than "the reason" which immediately precipitates the dismissal which may be triggered by a quite trivial matter.

/In Abernathy's.....

In Abernathy's case (supra) it was held that it mattered not that the employer gave the employee a wrong reason for his dismissal so long as there was a set of facts made known to the employee before or when he was given notice which the Tribunal could find was the principal reason for dismissal.

Monie's case (supra) decided that whether a dismissal based on mere suspicion of an employee's theft was fair depended on whether in all the circumstances of the case the employers had acted reasonably in treating their suspicion as a sufficient reason for dismissing the employee and that such reason was in the circumstances a "reason related to the conduct of the employee".

Ferodo's case (supra) is authority for saying that on a complaint of unfair dismissal the question for the industrial tribunal to consider was not whether they were satisfied that the offence had been committed but whether they were satisfied that at the time of the dismissal the employers had reasonable grounds for believing that the employee had committed the offence.

In the case of Carr v Alexander Russell Ltd. (supra) it was held that the test is whether the employers acted reasonably in the light of the circumstances known to them or which they ought reasonably to have known at the time the decision to dismiss is taken. It was up to the employers to make such inquiries as they properly could but it is not the function of the employer to adopt the role of a court of law and attempt to establish the innocence or guilt of the person concerned.

Sec. C 60(1)(e) of the Labour Code after setting out certain grounds for dismissal provides that a dismissal shall not be unfair if the reason assigned by the employer therefor 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 that there is a factual basis for the assigned reason.

/In the.....

In the case of each respondent the main reason assigned for dismissal is that on 28th February 1979 the respondent conducted himself on the Company's premises at Clare Hall in the course of his employment in such a manner as to clearly indicate that the employment relationship between the company and himself cannot reasonably be expected to continue. In short, the Company had lost confidence in the respondents as a result of their conduct on the job.

Counsel pin pointed certain portions in the evidence of Bolton, Wheeler, Jacobs, Phillip and Radwell among others (all of which was before the Court) as a factual basis for the reasons assigned for dismissal.

It was submitted by learned Counsel that the note left for Wheeler by Mason to the effect that he and 3 other employees were sick was indicative of the fact that they were acting in concert but although the allegations against the several employees are phrased in language almost identical there is nothing to suggest that they are alleged to have acted in concert.

Counsel observed that the tribunal in its judgment gave no consideration to various instances of insubordination on the part of the employees. He referred particularly to the incident involving Gardner who, having been reprimanded by Benjamin for unplugging relay sets, says he deliberately left them unplugged when going off duty at 1.20 p.m.

Counsel also referred to the conduct of Edwards who in his statement to the Police dated 8.3.79 said that he left work at about 13.20 hrs. (1.30 p.m. local time) "because of a confrontation which some of the workers including myself had with one Wheeler who is head of our section. We all got fed up of the scene where the whites want to tell we blacks what they wanted. As a result I reported sick and left the office". Counsel further referred to the conduct of Mason who stated that his illness was not his total problem when he signed out saying as he did

/"I was .....

"I was not in fact sick but I was not feeling well or fit enough mentally to continue my work".

Sec. 10(3)(a) of the Industrial Court Act provides that the Court in exercising its powers shall 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.

By no stretch of imagination however could the conduct of these three respondents in particular be regarded as exemplary and nothing could be more diametrically opposed to community interest than indiscipline particularly where the service concerned is an essential service.

Be that as it may, I am of the view as I have already stated that the finding of the Court that the employees (other than Doram and Romeo) were unfairly dismissed was a correct one.

Ground 6. Misdirection or error in law as to the standard of proof.

In Miller v Minister of Pensions [1947] 2 All E.R. 372 the widow of a former army officer who served in both world wars, having contracted a fatel illness while serving in the latter was entitled to a pension on account of the deceased's long service but she claimed the higher pension granted to widows of soldiers whose death was due to war service and in determining whether the tribunal in rejecting the claim erred in point of law in so doing, Denning J. (as he then was) had this to say at p.375 after referring to medical opinions by different specialists "The question is: What degree of doubt do those opinions impart? Do they give rise to a reasonable doubt or not?.....the weight to be attached to the various opinions and the assessment of the degree of probability were essentially matters for the tribunal. They came to the conclusion that the whole of the probabilities were that war service played no part. They recognised the existence of a possibility the other way but dismissed it as too remote.....".

/In the.....

In the Jupiter General Insurance Co. v Shroff [1937] 3 All E.R. 67 P.C. dismissal was regarded by Lord Maugham as a "strong measure" and while in the instant case it is true that the employees were initially suspended with effect from 28th February, 1979, until further notice pending investigation into the allegations leading to their suspension, the next link in the chain of events was the letter dated 27th March, 1979 terminating their employment with effect from 31st March, 1979.

The Court held the view that within the ambit of Sec. C58 of the Labour Code the burden of proof was on the Company to show "just cause" for dismissing the respondents and that since summary dismissal constitutes a "strong measure" the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a civil nature requiring a standard of proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, they would expect the evidence to be correspondingly cogent and weighty in nature and content.

Counsel expressed the opinion that strict proof and proof beyond a reasonable doubt are synonymous. I do not agree. I am of the view that the Court properly directed itself as to the standard of proof. This ground of appeal therefore also fails.

Ground 5 (embracing 2,3 & 4). Reinstatement

I now turn to the question of the order of the Industrial Court that the employees/respondents herein (other than Romeo and Doram) should be reinstated without loss of pay, benefits, or privileges in the same (or similar) positions held by each of them with the Company on the date of dismissal. This order formed a part of the Company's appeal, and is embodied in ground 2. At the hearing of the appeal, counsel for the employees intimated that the only employee who was still seeking to be reinstated was Donald Gardner, and that the others were no longer interested.

/It would...

> position held by the Company in the said field, i.e. Telecommunications. If an employee were to apply for another job in another branch of the Company he would have to disclose his previous experience and the fact that he has been dismissed from the Antigua branch of the Company will, of necessity come out and this will mean the end of any hope an applicant may have had of obtaining employment outside the Telecommunications field.
>
> Further, employment in the Telecommunications field is rare; in fact it is non-existent except where the Company is the employer and the dismissed employees will have to be re-trained if they are to find alternative employment outside the Telecommunications field."

Whilst it is perhaps fair to say that the Court was there propounding principles on which it was going to base its assessment of damages, one gets the distinct impression that it was there also looking at the question of reinstatement of the workers and seeing it from their standpoint only. Miss Lake in her submissions emphasised the fact that reinstatement was the first remedy mentioned in the section, and that if a worker is discharged he has to spend time building corresponding equity in his new job, whereas if he is reinstated, he is placed in the same position as if he had not been dismissed. Here again it is only the workers position which is being adverted to. It is as much a fallacy to say that on the question of reinstatement the interest of the worker only is to be considered, as it is to say in relation to criminal proceedings that the interest of justice means only the interest of the accused. Indeed the wish of the worker to be reinstated is one factor to be taken into consideration but there are at least two other main factors to be considered, and no one can be considered to the exclusion of the other.

These main factors are:

(1) The practicability of making the order and of compliance therewith by the employer;

(2) to what extent the conduct of the worker contributed to his dismissal.

/These are....

These are factors which fall to be considered in the United Kingdom when the appropriateness of the reinstatement is being considered and they are all embodied in the Employment Protection Act of 1978. Whilst neither the Antigua Labour Code (14/75) nor the Industrial Court Act (4/76) contain similar statutory provisions, section 10(3) of the Act gives the Court a wide horizon under which to exercise its powers. In so doing it shall make such an order or award in relation to a dispute as it considers fair and just having regard to the interest of the persons immediately concerned and the community as a whole, and shall also 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 Labour Code. These provisions I consider to be wide enough to leave ample room for a consideration of the factor of practicability of compliance with the order of reinstatement, and contributory fault on the part of the employee, even though they do not specifically form a part of the law of Antigua. In this respect therefore the United Kingdom and other authorities and such established works as Anderman on unfair dismissal (1978 edition) and Dix and Crump on contracts of employment can be of guidance to us in so far as they embrace facts and circumstances of a similar nature to those encountered in this case.

Although the remedy of unfair dismissal is relatively new and is now to a large extent codified, it does not relieve the tribunal of the responsibility of viewing objectively the feasibility of an order for reinstatement being complied with - Coleman v Magnet Joinery Ltd. [1973] IRIR 361.

In that case the Court had this to say:

> ".....when considering whether a recommendation (for reinstatement) is practicable, the tribunal ought to consider the consequences of re-engagement in the industrial relations scene in which it will take place. If it is obvious as in the present case that re-engagement would only promote further serious industrial strife, it will not be practicable to make the recommendation".

/The likelihood.....

The likelihood of friction between supervisors or other employees and a reinstated worker should also be taken into account even where there is no prospect of collective action. (See Anderman, page 206). In this case during the hearing of the appeal it was admitted on all sides that at the relevant time bad blood existed between the expatriate staff of the Company and certain employees, the least offender not being Gardner. As far as this Court is aware the Company still has expatriate workers in its employment, even if the complement has undergone a change. If this was not a sufficient reason for the tribunal to have held that it was not feasible for the order of reinstatement to be made, let us examine the conduct of Gardner over the unplugging of the HCW1 and HCW2 relay sets. It is true there was no charge made against him for leaving them unplugged. However, he was spoken to by John Bolton (an expatriate) and the engineer in charge of the section in which he worked on the morning of February 28, 1979, about leaving the relay sets unplugged, and on the floor. Bolton told him specifically that he should not have left them unplugged due to the adverse effect it would have on the telecommunications system, yet despite this, when he left the job after reporting sick at 1.20 p.m. on February 28 he in his own words "deliberately left them unplugged". This was in absolute defiance of the instructions given to him by Bolton only hours before, not to leave them unplugged. He also left them on the floor on this occasion.

Despite the fact that there has been a finding in his favour, there was evidence before the tribunal that he was involved in an incident with Allan Wheeler (another expatriate). This coupled with his wilful disregard of the instructions of Bolton not to leave the sets unplugged, does not portray Gardner in a favourable light, nor can it be said his conduct throughout was beyond reproach. Cable and Wireless (West Indies) Ltd. is an international company offering to the community at large an essential service under the laws of Antigua. It is a very

/sensitive.....

sensitive link between other islands in the Eastern Caribbean and the outside world. Its continued efficient operation is essential for the safe movement of major airlines such as Eastern, British Airways and B.W.I.A. within the region. Despite the finding in Gardner's favour that he was unfairly dismissed,he has been proven to be an indisciplined and insubordinate workman, but again no such charges were laid against him. Nevertheless, I am unable to say that it would be fair and just, and in accordance with equity, good conscience and the substantial merits of the case that this workman should be reinstated. I would therefore allow the appeal of the Company on the question of reinstatement of Donald Gardner. The other respondents not having pursued or being further interested in reinstatement the appeal of the Company in respect of each of them (with the exception of Romeo and Doram) must also be allowed.

The Company being successful in its appeal against the orders of reinstatement, it now brings this appeal into a different focus. Consideration of the respondents' notice seeking to have the damages and costs in each case increased,goes by the board. The question which falls immediately to be decided, is what order ought this Court to substitute for that of the tribunal which ordered reinstatement and damages in the case of each worker. Miss Lake submitted that the only appropriate order is one for the assessment of exemplary damages in lieu of reinstatement. The Industrial Court found that this was not a case in which exemplary damages ought to be awarded. I am entirely in agreement with this finding. The object of compensation is to place the worker as far as possible in so far as money goes in the same position as if he had not been dismissed. It is not intended to operate as a bonus to the worker, or to express disapproval of the Company's actions. The award of exemplary damages being sought by Miss Lake in lieu of compensation is only one of the alternative remedies offered by Section 10(4) of the Act. There is also the remedy of an award of compensation (not exemplary damages) in lieu of reinstatement and I would substitute this order in the case of each respondent (other than Romeo and Doram).

/Any other....

Any other order would not be fair and just as the word impeccable could not be used in describing the conduct and behaviour of any of the employees.

The next question which has to be decided is whether this Court should attempt to assess the compensation, or whether it should be sent back for the same panel of the Industrial Court to do so. Whichever course is adopted, consideration will have to be given as to whether the damages should be assessed as at the time of the conclusion of the hearing by the Industrial Court as suggested by Mr. Ford, or as at the time of the subsequent assessment as suggested by Miss Lake. All parties have asked that this Court should make the assessment rather than remit the matter. This request is made not because of any lack of confidence in the Industrial Court, but in the interest of there being a speedy conclusion to this long drawn out matter.

There are several basic heads under which compensation falls to be assessed and this Court would if it had to do so have to be guided by them. These are:

(1) the immediate loss of wages

(2) the manner of dismissal

(3) the future loss of earnings

(4) loss of protection in respect of unfair dismissal or dismissal by reason of redundancy

(5) loss of pension rights

(6) loss of fringe benefits (if any)

Norton Tool Co. Ltd. v Tewson [1973] 1 All E.R. 183

Tidman v Avelina Marshall Ltd. [1977] IER 506

This Court embraces the opportunity to enumerate these heads as both Mr. Ford and Miss Lake had urged us to consider under what heads it would be proper to award compensation. Mr. Ford relied on the Norton Tool Co. case and Miss Lake whilst not disagreeing with the heads of compensation propounded therein, suggested that to the six heads mentioned

/above....

above should be added the question of the availability of jobs in the restricted labour market of Antigua having regard to the particular skills of the employee. With due deference to Miss Lake I do not think this falls to be considered under a special head but rather would be a matter to be taken into account when considering the loss of future earnings.

The Norton Tool Co. case has been the focal point in cases involving the assessment of compensation in the United Kingdom from 1972. Ever since that date in nearly every case on compensation, which was cited before this Court, the principles laid down therein have been approved and followed. It is that case which held that the industrial tribunal had erred in law by not setting out their reasoning in sufficient detail to make entirely clear the principles on which it had acted in assessing the employees' compensation. It was conceded on all sides that failure to do this was an unfortunate lapse on the part of the Industrial Court when damages ranging from as low as $4,290.00 (four thousand two hundred and ninety dollars) in the case of Gardner to $18,600.00 (eighteen thousand six hundred dollars) in the case of Patrick Labadie were awarded. In the case of Tidman v Aveling Marshall Ltd. (supra) it was reiterated that it was the duty of the Industrial Court to itself raise the different heads of compensatory awards in so far as they are applicable and that the burden of proving the loss lies on the employees. This loss has not got to be proven with mathematical precision having regard to the fact that the Court is not bound by the strict rules of evidence. Whilst it would be desirable for this Court to assess the compensation so that there could be finality to these proceedings, I can see where we would be at a distinct disadvantage especially in calculating the financial loss to the employee. This of necessity must involve firstly an assessment of the actual loss sustained by the employee from the date of his dismissal up to the date of the hearing, and secondly an assessment of his future loss. Whilst calculating loss prior to the hearing might not be insurmountable, I can

/see where...

see where this Court would be at a distinct disadvantage in attempting to forecast future loss. This exercise involves such variables and probabilities as the duty of the employee to mitigate his loss, (and there is such a duty) and a prognostication of the time it would take the employee to find a similar, or a suitable alternative employment in what has been described as a limited job market in a small State. The Industrial Court itself found that the claims for compensation were couched in vague and loosely worded language, and the sums claimed were not precisely defined.

The Industrial Court is a special Court set up within the State to deal with Trade disputes and complaints brought or referred to it under the Act or the Code. They deal with such matters on a day to day basis and in so doing they are entitled to draw on their knowledge of local conditions, including their knowledge of the local employment situation when dealing with such matters as future loss of wages. They had the opportunity of seeing these employees when they gave evidence, and of observing their level of intelligence and general demeanour. Matters such as these are germane to a forecast of how long an employee is likely to be out of a job, and would prove to be speculative on our part.

In all the circumstances, I would allow the appeal of the Company on the question of reinstatement, dismiss the two respondent notices, and refer the matter back to the Industrial Court for them to assess what compensation should be paid to each employee (other than Romeo and Dorem) in lieu of reinstatement. This does not mean exemplary damages. Finally, since both parties sought relief in this Court, I think it only fair and just that the relevant date for the assessment of the compensation should be the date on which the matter was concluded before the Industrial Court. The Court may consider events occurring after the conclusion of the hearing if it can be shown that those events reflect the true position as at the date of the original decision. Qualcast (Wolverhampton) Ltd. v Ross [1979] ICR at 394).

/Whilst not.....

Whilst not wishing to fetter the discretion of the Industrial Court in any way it might find it useful and desirable when assessing the compensation to apply the principles laid down in the Norton Tool case, and those clearly enumerated in Chapter 16 of Anderman on unfair dismissal, photocopies of which were most kindly supplied to us by Counsel for the appellants. I am sure they would be willing to extend a similar courtesy to the Industrial Court on request.

Finally in so far as the respondents Remeo and Doram are concerned, they not having for whatever reason attended and given evidence before the Industrial Court in support of their claims, I can see no valid reason to disturb the finding of that Court in so far as they are concerned.

On the question of costs, having regard to all the circumstances of the case while not disturbing the award of costs in the Court below I would make no order as to costs on this appeal.

N.A. BERRIDGE,
Justice of Appeal

I agree.

L.L. ROBOTHAM
Justice of Appeal

I also agree

N.A. PETERKIN
Chief Justice.