ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1989

BETWEEN:

LIAT (1974) LIMITED - Appellant

and

LEEWARD ISLANDS AERONAUTICAL ENGINEERS ASSOCIATION - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: A. Jessamy and S. Browne for Appellant
J. Simon for Respondent

1989: June 8, 9.
27.11.89

JUDGMENT

BISHOP J.A.

On the 9th June 1989 this Court dismissed the appeal of LIAT (1974) Limited against the decision of the Industrial Court given on the 30th January 1989 in favour of Leeward Islands Aeronautical Engineers Association. It was indicated then that reasons for the dismissal would be reduced to writing and made available at the sitting of the Court of Appeal in November 1989.

LIAT (1974) Limited is a company incorporated under the laws of Antigua and Barbuda, and is concerned essentially with the carriage, by air, of passengers, freight and mail. Its shareholders comprise the Governments of Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago. The maintenance of the aircraft that are used is performed mainly at its engineering facilities at V.C. Bird International Airport in Antigua.

Leedward Islands Aeronautical Engineers Association is a trade union and the licensed bargaining unit representing the engineers employed by LIAT (1974) Limited.

From the time it was formed, the Company, as employer made agreements with the trade union governing the terms under which the engineers would be expected to work; and throughout the following years there were a number of such

/agreements....

agreements. Whenever an agreement became necessary, the previous expiring agreement was reviewed in order to determine whether any change by way of alteration or addition to its clauses ought to be made in the new and succeeding agreement.

The Agreement dated 10th July 1985 was due to expire in October 1989 and in the course of negotiating a new agreement, the parties reviewed the existing one. The negotiations did not achieve complete agreement and in June 1988 a trade dispute was referred to the Industrial Court by the employer, represented by its Industrial Relations Officer, Elmer James. Although the Reference contained some thirteen issues, only two formed the subject matter of this appeal.

The Employer set out its proposals in a Memorandum that read thus:

> "OVERTIME
>
> In the Aviation Industry it is essential that overtime be worked when necessary to permit the operation of any airline to continue and to allow the operator to maintain schedule integrity often due to circumstances beyond his control. On appointment to the position of Engineer, the Engineer is given a copy of his terms of reference which stipulates that a reasonable amount of overtime must be worked in order to maintain airline schedules. In addition, the policy of having to work overtime has been promulgated by the Company from time to time. Agreements between the Company and its other Bargaining Unit representatives make provision for overtime and the Antigua Workers' Union, which is the Bargaining representative for the mechanics, have such a provision in its contract. It would therefore result in a rather incongruous situation where a mechanic might be required to work overtime and the immediate Supervisor, the Engineer might be free to frustrate the operations of the Company by electing not to do so."

A supplemental Memorandum set out the proposed wording of the required clause on overtime, as follows:-

> "It is agreed that in the airline industry overtime is inevitable and is therefore a condition of employment. Whenever operational conditions and/or the nature of the work of the staff covered by this agreement so require, such staff may be called upon by the Departmental Head or his designated representative to work reasonable overtime or to work on public holidays and/or on their rostered days off."

/The other....

The other issue with which this appeal is concerned reads:-

> "NO STRIKE NO LOCKOUT
>
> Because of the key position employed by the engineers in the operations of the Company, the Engineers have resorted to disrupting the Company's operations at times when it can ill afford such disruptions. Though the Company is of the view that its present contract does provide a legal basis for taking action against such disruption it wishes to have a commitment spelt out in the Agreement and to that end include the normal provision of No Strike No Lockout clause as follows:
>
> Section XX-Article 6
>
> During the procedure outlined above there shall be no lockout by the Company and there shall be no interruption of work, work stoppage, strike, sit down, go slow or any other interference with the operations of the Company by an engineer or engineers during the term of this agreement."

The Employees' Memorandum, dated 28th October 1988, dealt with the two issues in the following paragraphs:-

> "4. The Union maintains that an employer cannot impose overtime on employees outside of the provisions of the law. The Union accepts that overtime is sometimes required, and are prepared to accept the following provision in relation thereto:
>
> Wherever operational conditions and/or the nature of the work of the employees covered by this agreement so require, such employees may be asked by the Department Head or his designated representative to work overtime or to work on public holidays and/or rostered days off a double time pay.
>
> 6. The Union denies that the employees have resorted to disrupting the employers operations. Whatever industrial action has been taken by the employees has been in total conformity with the law which provides that right save only when a dispute is pending before the Industrial Court. The Employer's proposal seeks to deny the employees their basic legal right and accordingly the proposed clause is rejected in its entirety."

On the issue of Overtime the Industrial Court heard evidence from the General Manager, Engineering of LIAT (1974) Limited, and a Grade A engineer employed by the Company for

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thirteen years. On the No Strike No Lock Out clause the Industrial Relations Officer of the Company gave evidence and produced documentary exhibits.

In its judgment the Industrial Court stated that not only had it weighed all the evidence carefully, but it had been guided also and particularly by section 9 of the Industrial Court (Amendment) Act 1985. I do not find it necessary to quote this section.

OVERTIME

The Industrial Court accepted the contention of the solicitor for the employees that it was the current agreement which governed. Further, the Court indicated that both the Terms of Reference and the Company's Policy Manual ought to be considered, rather than the latter only as was urged by the solicitor for the Association.

It was pointed out in the judgment that although the 3 Canadian cases cited were persuasive, it was to be noted nevertheless that the Court was not provided with the Ontario Labour Relations Act. The judgment continued:-

> "In any event this Court is not bound by precedent, and within the Antiguan context, we are firmly of opinion that it would not be in the best interest of good industrial relations to make overtime compulsory or obligatory. It is therefore the Order of this Court that overtime shall not be provided compulsorily. It is further ordered that compensation for having worked overtime shall remain as in the present agreement at page 10 Article 2....."

NO STRIKE NO LOCK OUT

The Industrial Court found that the following submissions of the solicitor for the employees, were, "by any analysis, sound and weighty"; (i) no evidence was led to substantiate the allegation made by the employers that the engineers have resorted to disrupting the Company's operations at times when it can ill afford such disruptions (ii) even if the Company's other bargain unit representatives have provided for such a clause that was no justification for including a similar clause in the new agreement being negotiated for the engineers (iii) sections XIX and XX of the current agreement are rather exhaustive in respect of the internal grievance procedure for

/employer....

employer and employee (iv) enshrined in section K 19 of the Antigua Labour Code is a provision that strikes and lock outs are legitimate aspects of free collective bargaining, and (v) limitations are specified in section K 20 of the Antigua Labour Code and are also provided for in section 21 of the Industrial Court Act 1976.

Then the judgment stated:-

> "We too are firm in our views that sufficient protection is afforded employers under the Antigua Labour Code and the Industrial Court Act 1976. In our judgment therefore there is no need for the inclusion of such clause as proposed by the Company. Accordingly we make no order for the inclusion of a No Strike No Lock Out clause."

GENERAL OBSERVATIONS

From a study of the submissions and arguments presented to us in this Court, and of the Record of proceedings in the Court below, it seemed rather clear that many of the submissions made and much of the argument used on each side, in the Industrial Court, were repeated before us; thereby bringing to mind the query whether the appellants were not seeking to elevate to the level of points of law, facts and views dealt with by the Industrial Court. The words of Everleigh L.J. in KEARNEY v. TRECKNER MARWIN LTD. v. VARNDELL (1983) 4 IRLR 335 CA, spring to mind:-

> "There is today too great a tendency to seize upon words in a judgment and use them as though they were laying down some new rule of law..... We must not strive to create a body of judge make law, supplementing the law as laid down in the Act..... The Act itself provides quite enough law in all conscience and it is no part of the judicial function to increase the potential area of appeal which is given .....and is only on a point of law, by increasing the numbers of points of law governing the determination of a case."

OVERTIME

Learned Counsel for the appellant referred to three former Working Agreements made between the Company and the Association, throughout the period 1974 to 1985. He pointed out the clause dealing with overtime that existed prior to and after the coming into being of LIAT 1974) Limited and corresponding clauses in subsequent agreements. He submitted that (a) it

/ought....

ought to be implied that overtime was a condition of employment and (b) the payment and acceptance of overtime by the employees was an admision that they would be obligated to work overtime.

Counsel also pointed out the existence of Terms of Reference, in particular, paragraph 8 of issue 3 revised 1st March 1971, paragraph 7 of issue 1 dated 30th March 1973, and paragraph 9 of issue 5 revised 27th February 1976, signed 9th November 1987. These paragraphs dealt with overtime, indicating in part that a reasonable amount of overtime beyond the stipulated 40 hours per week would or might be required for the maintenance of the aircraft in a serviceable condition.

In addition,Mr. Jessamy relied upon the provisions of sections C5, C6 and C7 of the Antigua Labour Code, urging in effect, the co-existence of statutory requirements and the Collective Agreement.

As I understood him, learned Counsel submitted that the Terms of Reference were part of the contract made by the parties and so it was interesting, to note that in answer to the learned President, Counsel said: "Overtime is already there in the Terms of Reference, we want it expressed in the Agreement".

The same Canadian cases cited below were relied upon in this Court, but I have not found it necessary to refer to any of them in dealing with the issues before us.

Learned Counsel for the appellant also advanced the contention that in the absence of an express term in the Agreement allowing the Company to schedule overtime, comparison of the several earlier agreements and terms of reference with those now in force, indicated that there was or should be a residual power in the Company to do so.

Counsel also asked this Court to find that upon a careful analysis of the evidence there was nothing revealed from which the Industrial Court could have stated what was good industrial relations practice. Indeed he submitted that the Industrial Court must have misdirected itself in law since no tribunal could have reached the decision reached by the Industrial Court, on the evidence before it. Counsel argued that in the absence of such testimony, the Industrial Court must have informed itself about what was good industrial relations practice; but

/it did...

it did not thereafter pursue the proper course, namely, give both parties the opportunity to adduce evidence on what was such practice regarding overtime. He pointed out that there was no address by either side on whether or not it was good industrial relations practice in Antigua, to make overtime obligatory.

Learned Counsel for the appellant dealt with the effect on the industry of an order that overtime should not be obligatory; and he submitted that if the Industrial Court had looked at the effect of such an order and at the evidence before it, it could not properly have concluded that it was in the interest of good industrial relations practice in Antigua, especially when it was borne in mind that Antigua was the biggest shareholder in LIAT (1974) Limited. Mr. Jessamy drew attention to the fact that under section 10(3)(a) of the Industrial Court Act 1976, the Industrial Court was expected to have regard to the interests of the persons immediately concerned and the community as a whole. He submitted that if overtime were not compulsory, there would be chaos and closure of the airline in the not too distant future.

I digress to make two observations on the last mentioned submission. Firstly, in the absence of compulsory overtime, to date, there has been nothing revealed approaching what I would call chaos or closure of the airline - one in which overtime provisions have existed since the company's inception in 1974. Secondly, I ask this question can it be truly said that there would be no chaos or any better guarantee of efficient maintenance of the aircraft in a serviceable condition if engineers were compelled to work overtime against their own judgment of the circumstances?

In dealing with the effect of not making overtime compulsory, among other things Mr. Jessamy drew attention to the fact that the Association had accepted that there were times (for example, during unscheduled delays) when overtime work was required; and he argued that difficulties would be created when an engineer - particularly one on the ramp who is paid Position Pay for his responsibility - could decide on his own that he was not working overtime. He also argued that there was little, if any justification, for distinguishing the agreement now under review from other agreements made with other bargaining units in the company; for example, that of the mechanics.

/Learned....

Learned counsel for the respondent argued that it was fallacious to regard earlier agreements made by the parties and therefrom imply an express term that overtime work was obligatory. He contended that each of the previous agreements had a stipulated life and after its expiration it had no real value. In his view - with which I agree - it was the existing agreement that was under review; and consequently that agreement was relevant to the negotiations and necessary interpretations. Mr. Simon then referred to the Agreement made for the period 1st December 1984 to 30th November 1986, and emphasised that there was no express clause requiring overtime from the engineers. Article 2 of section V dealt with the rate of pay for any overtime work done by Grade A and Grade B engineers and Article 1 of section VI set out the hours of work. Counsel submitted that in and by these articles the Agreement was merely conforming with the Antigua Labour Code (sections C26, C28 and C29) which laid down the maximum time for which an employer was entitled "to get work from his employee" (Counsel's words); and if the employee worked over and beyond that time, then the employee ought to receive premium pay (time and a half).

Counsel also referred to section C7 (iii) of the Code and submitted "that inasmuch as the Collective Agreement did not provide for obligatory overtime work by the employee, and in the light of the fact that the Code did not so provide, then to interpret the Terms of Reference so as to include such a provision, that provision would be in contravention of section C7 (iii), and would be null and void".

Mr. Simon urged upon us that having failed at the bargaining table, the employer was seeking to force an overtime clause upon the employee, throught the medium of the Industrial Court. However, in his view, the Collective Agreement, by Article 2 of section 1, stipulated unequivocally that "the Agreement shall apply to all engineers employed in that capacity by the Company and the provisions of the Agreement shall supercede any existing arrangements or agreements whether written, implied or in common practice between the Company and the Engineers employed by the Company"./Counsel contended further that the Collective Agreement in superceding existing or previous arrangements or agreements must "stand on its own and govern".

/Counsel....

Counsel for the respondent referred to the document headed "PERSONNEL ADMINISTRATION POLICY MANUAL OVERTIME". He pointed out that it was therein stated: "The practice of requiring employees to work overtime hours is undesirable except in cases of flight delays, emergency and excessive work load. It should be discouraged as it accentuates fatigue resulting in lowered employee efficiency and morals, increased error and inaccuracy in the work produced"; and he posed the question: "How come, in the light of such a policy, the Company requires compulsory overtime in the agreement"?

Mr. Simon emphasised that the employees have always co-operated in working overtime when required to do so; and that except for a single period there had been no real problem. That was when they stopped working overtime following a break down in negotiations; and when they were advised by the Labour Commissioner to do so, they returned to work as was usual. In support of this assertion Counsel cited the evidence of Derek Marcano, General Manager, Engineering, which read as follows:-

> "On or around 2nd February there was a breakdown in negotiations and a letter was received on 3rd February. Because of continuing negotiations at bargaining table the engineers should go back to work as normal and they complied with it. Apart from this there has been no other disruption by engineers. On the 25th March there was a disruption when they refused - entire night shift. Lasted for that shift. There was also another date when one gentleman told me he was not working overtime as a result of which I wrote the Association in June."

The evidence showed also that by the letter received on the 3rd February 1988, the then Chairman of the Association informed the General Manager, Engineering, that the members of the Association would not be doing overtime work with effect from 10th February 1988. There was a meeting with the Labour Commissioner around 11th February 1988, and following this, the engineers returned to normal conditions. At most, therefore, the engineers did not work overtime on 2 days.

Counsel submitted that it appeared that it was being urged on behalf of the employers that there was a reckless refusal to work overtime, on the part of the engineers; but

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there was no evidence whatever to support such a claim.

Mr. Simon differed from Mr. Jessamy on the proper course which ought to have been followed by the Industrial Court in deciding what was good industrial relations practice. He argued that it could not be successfully claimed that the Court should have realised that this aspect of the matter had not been canvassed by either solicitor and therefore should have called on them to deal with it. He saw it as a situation in which neither party was denied the opportunity to adduce evidence. Further, the Company had led evidence, electing not to call witnesses on this point. So it was erroneous to lay blame on the Court.

In considering the issue of overtime I regard it as vital to compare the clauses proposed. Except for minor word changes ("staff" to "employees", "called upon" to "ask", and the insertion of "reasonable" before "overtime") and the fact that only the memorandum of the Employers stated that it was agreed "that in the airline industry overtime is inevitable and is therefore a condition of employment", the clauses proposed are identical in substance. It is therefore not easy to appreciate why negotiations have been so protracted.

I am impressed and convinced by the submissions and contentions of Counsel for the respondent. I have already mentioned them and merely wish to add that I cannot find room in my interpretation of the law and its application to the pertinent facts to this issue, for holding that there is a residual power in LIAT (1974) Limited to schedule overtime.

On the finding of the Industrial Court that it would not be in the best interest of good industrial relations to make overtime compulsory - against which the appellant appealed - I must point out that the Industrial Court is given wide statutory powers by the Act creating it; and in the exercise of those powers, despite any rule of law to the contrary, the Court "shall act 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 in particular the Antigua Labour Code" (section 10(3)(b). In my view, the Industrial Court is not required to be provided with evidence on oath of those stated matters to which it must have regard. Section 9(1) of the Industrial Court Act 1976, on which learned Counsel for the appellant relied, makes it

/clear....

clear that the Court is not bound to follow the rules of evidence stipulated in the Ordinance. Again, the section deals with the facts and opinions from which the Court will reach its decision, and it confers powers wider than those given by the Evidence Ordinance, to gather such facts and opinions in the manner provided. Thereafter, if a party to the proceedings wishes to adduce evidence in connection with the facts and opinions so obtained, that party must be given the opportunity to do so. I do not interpret the section to mean that when the Industrial Court is acting under section 10(3)(b) and having regard to principles and practices of good industrial relations and in particular the Antigua Labour Code, a party must be afforded an opportunity to adduce evidence on such principles or practices; similarly with the requirement to act with equity and good conscience. The Industrial Court must be presumed to know the relevant principles and practices that the law demands it look at in the case before it. I do not agree with Counsel for the appellant that the Court has an onus to inform the parties of the principles or practices of good industrial relations on which it informed itself and then to allow either party to adduce evidence regarding that finding. In any event assuming, without admitting, that the Court had a duty to afford an opportunity, there was no evidence on record to show that this did not occur or that any opportunity sought was denied. The company called witnesses on other aspects of the facts material to the Court's decision on overtime. It must be presumed to know what the Court should have regard to and it elected not to call other evidence.

I have heard nothing advanced on behalf of the Company, in this appeal, for me to properly differ from the Industrial Court that in the context of the circumstances prevailing in Antigua, it would not be in the best interest of good industrial relations to make overtime obligatory; and I feel convinced that in so finding, the Industrial Court must have given due attention to the interests of the parties as well as of the community.

If it is correct to say that the employers accused the employees (engineers) of "resorting to disrupting operations because of their key positions in the operations" by refusing to work overtime at times when the Company could ill afford

/such....

such disruptions, then such evidence as was put before the Court did not establish this accusation. At its highest, the evidence pointed to only a two day period when there was such a refusal, and to another occasion when one shift - a night shift - refused to work. I would not say on that evidence that the engineers resorted to disrupting operations as alleged. I would regard the allegation as exaggerated and unproved.

NO STRIKE NO LOCK-OUT

Learned Counsel for the appellant contended that in the airline industry adequate protection under the law could only be given to the Company by including a No Strike No Lock-out clause, such as that proposed, in the Agreement. He submitted that as the position stood at present it would take a comparatively long time to obtain protection, because the protection only arose when the matter went before the Court. However, he argued, the Antigua Labour Code recognised that where you had a No Strike No Lock-out clause in the Agreement you had immediate remedy. He cited sections K 19 and K 20 (2)(f) of the Code.

Mr. Jessamy also drew attention to a number of examples of No Strike No Lock-out arrangements. Exhibits were on record showing relevant extracts from Collective Agreements made between Antigua Catering Services and the Antigua Workers Union, Benjies and the Antigua Workers Union, Eastern Airlines and The Antigua Workers Union, BWIA and the Antigua Workers' Union. A list of some 13 other parties who were alleged to have similar arrangements was also provided. Counsel urged that the clause was inserted in such collective agreements because its need was recognised...

Learned Counsel for the respondent referred to the Employer's Memorandum and submitted that (1) there was no evidence in support of the allegation; (2) there was nothing "normal" about a provision for No Strike No Lock-out (3) there are statutory provisions which allow for protection from strike action by employees (4) the extracts from other agreements made with two airlines and other businesses were irrelevant. There was no reason to force such a clause upon the engineers merely because other employees and employers had such an arrangement mutually; and (5) on the evidence and the existing law the finding of the Industrial

/Court.....

Court could not be said to be unjustified or without reason.

Mr. Simon also referred to the sections of the Code which were relied upon by Mr. Jessamy, pointing out that the strike and the lock out were legitimate aspects of the process of free collective bargaining, and that except in strict conformity with the provisions dealing with Industrial Action, no court shall have jurisdiction with respect to the granting of any restraining order or any injunction, temporary or permanent, in connection therewith. It was the contention of Counsel that the limitations present in the law (section K 20) gave adequate protection to the employer. Mr. Simon referred to Part III of the Industrial Court Act 1976 which deals with "Lock-outs and Strikes" and indicated that protection was also provided when the matter was pending before this Court (section 20 (1)); and when the national interest was threatened or affected, in the opinion of the Minister of Labour, he had power to seek an injunction restraining the parties from commencing or from continuing a strike or a lock-out (section 21 (15)). Then there was the further provision - in the Code - which empowered the Minister to designate the essential services in Antigua and Barbuda. The list of essential services could be amended, by the Minister, at any time, and a service whose interruption would be likely to jeopardise, among other things, the economy of the State could be added. There were 9 essential services listed under the law but airline services were not among them. Mr. Simon stressed that the Government of Antigua, a shareholder in LIAT (1974) Limited, had not seen fit to have the service declared or listed as essential; and so it could be readily and reasonably inferred that the economy of the State would not be jeopardised.

I have looked at the clause proposed by the employer and rejected in its entirety by the employees. I have analysed the evidence and considered the submissions and arguments of learned Counsel. Again I find those of Counsel for the respondent cogent and preferable. I am satisfied that they have effectively answered the points raised on behalf of the appellant. I share the views expressed in the judgment, especially that the statutory provisions pertinent to the issue provide adequate and sufficient protection to the Company; and I can find no reason for the inclusion of a No Strike No Lock Out clause in the new Agreement to be signed. Indeed it

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was, in my view, significant that the service provided by the Company, has not been given the level of importance by the major shareholder, that counsel would wish this Court to give it.

For all these reasons, I was convinced that the appeal ought to be dismissed.

Before leaving this matter I wish to observe that I anticipate that a degree of responsibility, at least as high as has already been demonstrated, will be exhibited by the parties. Counsel for the respondent while not giving an assurance, for the future, has emphasised that on the aspects under consideration the employees have always co-operated with their employer in order to ensure efficiency in maintenance of the aircraft; and I feel justified in assuming that their co-operation will continue, bearing in mind the significance of the role played by the Company. It would be folly for the engineers so to act that closure of the air-line resulted. Wisdom and good guidancae seemed to have been among the hallmarks of the previous relationship of the parties and I would anticipate that these qualities will continue to be demonstrated by both sides so as to bring credit to those directly involved, and to the commmunities served by an important regional airline.

E.H.A. BISHOP.
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal.