ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 2001

BETWEEN:

SUNDRY WORKERS OF THE ANTIGUA PORT AUTHORITY

Employees/Appellants

and

ANTIGUA PORT AUTHORITY

Employer/Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal

Appearances:

Mr. Sydney P. Christian, QC; Mr. Jason Martin with him for the Appellants
Mr. Dexter Wason for the Respondent

2002: May 29;
2003: January 28.

JUDGMENT

The Background

[1] **BYRON, C.J.**: The respondent is a statutory body created by the Port Authority Act 1973 and which falls under the purview of the Ministry of Finance. It is responsible for the cargo handling operations of the St. John's Port. The Appellants are the employees of the Respondent, who are presently represented by the Antigua's Workers Union.

[2] Since 1963, the Union has negotiated and entered into Collective Agreements on behalf of the longshoremen, tally clerks, forklift operators and others engaged in cargo handling operations. This appeal is the sequel to long and arduous negotiations between the Appellant and the Union over the terms and conditions of a new Collective Agreement to replace the agreement that had commenced in 1993 and expired since 19th July 1996.

[3] It was an important part of the background, to note that all parties agreed that the respondent had been losing money and was facing a financial crisis. The details of the dispute are clearly set out in the judgment of the Industrial Court and I do not think it necessary to detail them here.

[4] In brief, the proposals put forward by the Union included improvements in the terms and conditions of work resulting in further expenditure by the employers. The Port Authority on the other hand made proposals to increase efficiency of operations and to reduce the operating expenses in manners that were significantly less beneficial to the workers. These proposals included the virtual elimination of overtime work and a reduction of overtime rates where payable; a substantial reduction of earnings for the employees; the creation of a seven day week and the elimination of extra pay for work on weekends.

[5] The matter was eventually referred to the Labour Commissioner for conciliation but his recommendations of October 29th 1998 were not accepted. On 25th June 1999 the Union filed a Notification of a Trade Dispute on behalf of the Appellants, which commenced these proceedings.

[6] By the time the matter came on for hearing before the Industrial Court the disputes had been narrowed to the introduction of a new shift system, the definition of "call out" and amendments to a number of clauses in the pre-existing Agreement.

[7] It was apparent that the most significant issue was the introduction of the new shift system. The old system as I understand it was that from Monday to Friday there was one 7.00 a.m. to 4.00 p.m. shift with an hour lunch break. All work done after 4.00 p.m. is classified as overtime and is paid at time and a half for the first eight hours and thereafter at double time. Overtime starts at 4.00 pm regardless of what hour the men were called out or commenced actual work. Saturday work is paid for at time and a half for the first 8 hours and double time thereafter while Sunday work is paid at triple time. Under the new system there would be two shifts from 6.00 a.m. to 2.00 p.m. and from 2.00 p.m. to 10.00 p.m. Normal rates would be paid during those shifts. Overtime would only be paid when more than 8 hours work is performed or for work done between 10.00 p.m. and 6.00 a.m.

The Judgment of the Industrial Court

[8] The Industrial court decided in favour of the respondents and ordered the introduction of the new shift system. At paragraph [39] of the judgment, the court ruled:

> "…the time for change, indeed major changes, at the Port Authority has arrived and the foregoing amendments to the old Collective Agreement are made after full and careful consideration of the Industrial Court Act, Cap. 214, the Antigua and Barbuda Labour Code, Cap. 27, the evidence adduced and all other relevant matters, I believe the amendments to the old Collective Agreement will be in the best interest of the parties concerned and the community at large."

The Appeal

[9] Before I deal with the issues raised in the appeal, I think it imperative that I note that the position of the appellants in this case indicated that a non judicial forum for the resolution of this dispute would have been appropriate. This position is highlighted in the Appellant's skeleton arguments which states in paragraph 2:

> "The effect of this judgment is that the Court considered that the new shift system which the Port wants to introduce is acceptable and ought to be inserted in the new agreement with the necessary deletions and adjustments. The Antigua Workers Union argued strenuously against its introduction, but, bearing in mind the need to modernize the operations at

> the [Port], the Appellant now abandons its [objections] and arguments against introducing this new system..."

[10] In the same vein, the skeleton argument concluded as follows:

> "While the Appellant presses for severance pay in accordance with the last Union contract, it is mindful of the financial position of the Authority, and is prepared to agree to a reasonable phased pay out."

[11] At the request of counsel for both sides, the court had adjourned the hearing of the appeal on 11th day of February 2002, to allow the parties to continue talks towards settlement. The negotiations did not produce an agreed order.

[12] The issues that were raised in the written skeleton arguments were:

[i] Whether the introduction of the new shift system gives rise to a redundancy situation and an entitlement to severance pay?
[ii] Whether the annual bonus should be based on productivity or profitability?
[iii] Whether a transportation and shift allowance should be paid?
[iv] Whether the new agreement should be back dated to July 19th 1996 as proposed by counsel for Appellant, or to 19th March 2001 as ordered by the court below, or to some date in-between, to be determined by this court ?

[13] The appellant contended before the court of appeal that the introduction of the new shift system gave rise to a redundancy situation. Section C3 of the Labour Code as amended defines redundancy as a "situation in which by virtue of a 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". "Retrenchment" is also defined in the Code as " the cutting down or reduction of expenses, and/or the introduction of economies"

[14] This point had not been taken at the trial. Consequently no evidence had been adduced to demonstrate a factual basis for making such a finding at law. The important fact that needed to be proven was that there were tasks to perform

which no longer exist. The essence of redundancy therefore was not established. It was apparent that the anticipated outcome of the new system was increased efficiency and an increase of business.

[15] The appellant's contention before the court of appeal on the redundancy issue was clearly an afterthought aimed at a compensation package for the employees. The gravamen of the argument of the appellant was that the reality of the new shift system would inevitably result in the diminution of wages and a suitable compensation package was required.

[16] Counsel for the appellant argued that one way of arriving at such a package would be a declaration that the Appellants were constructively dismissed by the new contract and the financial package on termination should include severance payments. They would then become eligible for re-employment under the new Agreement. This point had not been taken at the trial and it does not seem to have featured in the negotiations. Consequently no evidence had been adduced to demonstrate a factual basis for making such a finding at law. The reality is that the evidence, which was adduced shows that there will be no cessation or substantial diminution of work to the employees. There is therefore no factual or legal basis on which such an order can be made. Despite the arduous negotiations, this really was a matter for that type of resolution. The facts of the case do not permit a judicial ruling that a redundancy situation exists.

[17] The second issue raised by the Appellant was whether the annual bonus should be based on productivity or profitability? At the trial court, there was a dispute as to whether the annual bonus should be calculated as a fixed percentage of annual earnings or should be based on productivity. The court resolved the dispute by considering that the policy of a bonus based on earnings could financially embarrass the respondent. The court then concluded at paragraph [30] that "the prime object of a bonus scheme is to act as an incentive and this continues even if it is based on productivity; consequently, a payment based on productivity does

not seem unreasonable and I would order that the new Agreement be amended accordingly." The appellants were unable to demonstrate that the court erred in law or committed any specific illegality in coming to the conclusion. The effect of the arguments presented by Counsel for the appellant was to persuade the substitution of our discretion. As will be shown, this is not part of the appellate function in matters on appeal from the Industrial Court.

[18] The appellant further raised the issue as to whether a transportation and shift allowance should be paid. At the end of the arguments before the Industrial Court, the appellant's representative proposed that in the event of the court ruling in favour of the new shift system, certain consequential changes should be made in favour of the employees. The court considered these proposals and rejected them firstly on the basis that they were unreasonable and secondly on the basis that as no arguments and evidence had been led on these issues the employers were not given an opportunity of rebuttal.

[19] On appeal, the appellants singled out the issue of transportation and urged that the agreement be amended to include a provision for transportation to and from work when scheduled in early morning or evening, or an allowance in lieu thereof. It was pointed out that evidence was adduced on this by Mr. Kiethlyn Smith, General Secretary of the Union, and there was no contention by the other side. However, it is not the function of the appeal court to substitute its own discretion for that of the trial court. Again the appellant was unable to establish any grounds for overturning the order of the court on that issue.

[20] I now move to whether the new agreement should be back-dated to July 1996, July 1999 as proposed by counsel for appellant or to March 2001 as ordered by the court. This proposition was not supported by any legal argument. Counsel for the appellant argued that even though it was accepted that the respondent was in poor shape financially, any additional income could be paid to the employees over

a period of time and that it was the position of the appellants that there should be a compromise on the starting date of the new agreement.

[21] Counsel suggested July 1999, which was somewhere between the date the appellants demanded at the negotiations of 1996 and March 2001, the date ordered by the court. This point was not presented in a manner, which provided adequate information. This ground too seemed to be aimed at inviting this court to substitute its own discretion for that of the Industrial Court.

[22] In response to arguments on the point, counsel for the Respondent referred to the provisions of section 10[3][a] of the Industrial Court Act, which set out the duty of the court as follows:

> "in the exercise of its powers the Court 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".

[23] This was the principle employed by the Industrial Court in deciding the most significant part of the judgment, to be found in paragraph 18:

> "No one finds it easy to lose that which he has, especially when it concerns finance and this is what the new shift system will cause to result. Under the new shift system Overtime will virtually become something of the past and no longer a major supplement to the Employees wages. While acknowledging the effect on what the new shift system will have on the earnings of the Employees this must be weighed against the benefit that will accrue, not only, to the Employers, but to the consumers and the country as a whole. The evidence is that the new system will lead to more ships calling at the Port, the mega ships with approximately 100 containers will be attracted to Antigua and the development of Antigua into a Transshipment Port".

Paragraph 39 of the court's judgment, which is recited at para. 8 of this judgment, further supports the application of the principle.

The Duties of the Court of Appeal

[24] The basis of the Court of Appeal's functions is set out in Section 17 of the Industrial Court Act, which prescribes the grounds of appeal on which it can adjudicate. These deal with the issues of jurisdiction, fraud, errors of law or other specific illegality in the course of proceedings. In section 17[3] the court is required to dismiss an appeal if it considers that no substantial miscarriage of justice has actually occurred, although it is of the opinion that any point raised in the appeal might have been decided in favour of the Appellant. The substitution of our discretion for that of the trial court is not part of our function.

Conclusion

[25] We must dismiss this appeal. I would only hope that the progressive attitude of the Appellants' Union will be mirrored by the Respondent and that future negotiations between the parties will provide results in which both sides could find equal comfort.

[26] There will be no order as to costs.

Sir Dennis Byron
Chief Justice

I concur

Satrohan Singh
Justice of Appeal

I concur

Albert Redhead
Justice of Appeal