ANTIGUA and BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.28 OF 2001

BETWEEN:

SUNDRY WORKERS [VERONICA JOSEPH & OTHERS]
(represented by the Antigua Workers Union]

Appellants

and

KINGS CASINO LIMITED

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Justin Simon for the Appellants
Mr. John Fuller for the Respondent

2003: February 5;
April 3.

JUDGMENT

[1] BYRON, C.J.: On the 5th of September 2001, the Industrial Court dismissed the reference of the workers, in which they had applied for compensation for unfair dismissal. The court accepted, instead, that they had been made redundant, which was the reason assigned by the Casino.

The Factual Background

[2] The factual background is that the Kings Casino operated in St. John's, Antigua, where they employed approximately 200 persons. Employment was governed by a

collective agreement negotiated and signed by the Casino and the Antigua Workers Union.

[3] On September 4th and 5th in 1995 the island was struck by a vicious hurricane, hurricane Luis, and considerable damage was done to commercial areas, homes and other buildings in the country. In order to prevent looting, the army was called out to protect certain commercial areas that were badly hit. A curfew was imposed for a period of three weeks. The Casino remained closed during the curfew and it reopened within a day or two after it was lifted. There was evidence that damage to the Casino was extensive and the restoration costly. There was also evidence that business had fallen off drastically as a result of extensive damage to the hotel plant throughout the island resulting in a dramatic reduction in tourist arrivals. On the other hand there was evidence that the Casino reopened and was operational within a short time. The Industrial Court stated that it experienced difficulty in determining what to believe about the extent of the damage to the Casino and its business, but concluded that it was more likely that the damage was extensive, and the losses substantial. The Court concluded that there was a situation of redundancy.

The Appeal

[4] Counsel for the appellant contended that even if it was true that there was a redundancy situation that was not the reason why the workers were dismissed.

The Law

[5] The need for the establishment of the real cause of dismissal is spelt out in Antigua Labour Code in paragraph C60[1][c] which prescribes that a dismissal shall not be unfair if the reason assigned by the employer therefore is that the employee was redundant, provided, that there is a factual basis for the assigned reason. In my opinion this provision requires that the assigned reason be

supported by the facts, and that a factual link existed between the dismissal and the assigned reason.

[6] Redundancy is defined in Section C3 as amended by the 1998 Amendment Act to mean 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. We were referred to two cases where the provisions were discussed. Antigua Workers Union v Joseph Dew Civ. App. No.2 of 1992 at p.12 and US Naval Facility v Louis (1983) 31 WIR at p.191. I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be the cause and the effect. The effect being that the work has ceased or substantially diminished. In the Industrial Court reference No. 20 of 1988 Antigua Workers Union v Antigua Gases it was pointed out that the definition seems to contemplate the removal of superfluous workers. This could occur even where the tasks or work still exist but the employer requires fewer workers, or there is less work for existing workers. It is also clear that it could occur where a force majeure, such as a hurricane, causes a situation that substantially affects the workload and no workers or fewer workers are required. Although in this regard the Labour Code makes provision for temporary laying off in such circumstances where the diminution in work is not permanent. This brings me to point out, however, that the existence of a cause, such as the 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 Facts Found By The Court

[7] I think that it is only necessary to recite the crucial findings of fact made by the Industrial Court which I will set out in detail:

> "The casino remained closed during the curfew and it re-opened within a day or two after curfew was lifted, however it operated only at nights and only dealers and only senior staff members were re-hired.
>
> On October 12th, 1995, Elliot Wexelman, the Managing Director and Chief Executive Officer of the company called a general meeting and told the staff that the company was making a loss, that all wages would be freezed for 3 years and presented them with a new contract which he wanted them to sign; they were also guaranteed that the casino would be kept open for the next 3 years – See Exhibit CJ1 – Mr Wexelman gave the employees thirty (30) minutes to do so; he informed the meeting that if they agreed to the terms and conditions of the new contract he would re-engage the other employees within fourteen (14) days. The employees initially agreed to the proposals but then summoned their Union Representative, Keithlyn Smith and after discussions with him, they informed Mr. Wexelman that they could not sign the new contract. Mr. Wexelman then told the employees that he was giving them until the following day to arrive at a final decision and that if they did not, he will close the casino as he does not bluff and does not play poker. The senior staff continued to work that night and during the course of the night there was a strange incident – Management took all the chips off the table and closed the casino at about 12.00 midnight instead of between 2:00 am and 4:00 am, the usual time.
>
> On the following day the full body of workers returned to the casino at about 10:00 am and Mr. Smith and the Shop Stewards approached Mr. Wexelman. Mr. Wexelman started to point fingers at Mr. Smith and told him he was a traitor and he did not want him on his property. Mr. Wexelman informed the employees that the casino was closed that they could collect their cheques with their severance pay on the following day. The Labour Commissioner was then asked to intervene in the matter and had a series of meeting with both parties."

[8] After the dismissal, efforts to resolve the dispute continued. The opportunity to resolve the situation amicably was finally lost when the Casino again reopened in February 1996. It did not reemploy the existing staff and hired new staff. The Industrial Court found:

> "After closure of the casino on October 13th, 1995, and the deadlock in February 1996, the parties came to an agreement on condition that the rates

of payment would be reduced, in the case of the Senior dealers from $19.43 to $16.00 per hour. Mr. Wexelman had said that if this was done he would re-engage all the staff. It was agreed that all the workers were to report for work. On February 18, 1996, Emilio Fagaldi, the manager was standing at the door and told the employees he was not told to re-employ them and they were not to come onto the premises."

[9] In my view the conclusion that the Court reached did not follow logically from the findings of fact that it made. I found a case from the BVI Civil Appeal No.1 of 1971 Allan Callwood and Jonathan Harrigan v Adella Brewster, where Percy Lewis JA overturned a judgment of the High Court because the declaratory order made by the Judge was inconsistent with his findings and illogical. In this case the same principle should guide our decision. From the facts to which reference has been made it was clear that the only reason why the Casino dismissed the workers was that Mr. Wexelman did not get immediate acceptance of the terms as he had demanded. The fact that the Casino had decided to continue in operation if it could get an accommodation on the reduction of its employment expenditures is evidence that the work had not ceased nor substantially diminished. There were many alternatives, in addition to negotiations, that were open to the Casino to resolve the reduction of the wage bill. The real problem was that Mr. Wexelman did not intend to enter into any negotiations. He put forward a take it or leave it situation and was quite prepared to use the power of dismissal to compel the workers not only to accept his demand but to deny them the collective bargaining services of their union representative Mr. Keithlyn Smith.

[10] While it is true that the court found that there were financial difficulties caused to the business by the need for restoration and the dropping off of business after the hurricane, it was also clear from the facts found that the Casino was able to continue in business. There was therefore evidence that the work the employers had been employed to perform had not ceased or substantially diminished. In any event it was clear that was not the reason for the dismissal. In this case we were satisfied that the reason for dismissal was not redundancy. The dismissal was merely the angry response of Mr. Wexelman to the failure of the employees to agree to his demands within the time he had given them and their engagement of

their union representative Mr. Keithlyn Smith to represent them in the dispute. Thus there was no factual basis for the dismissal for the assigned reason. There was no linkage between the dismissal and any cessation or substantial diminishing of the work since it was caused by other factors.

Decision

[11] In the circumstances I think that the Industrial Court's decision did not follow from the facts they found and we would allow the appeal. The order of the Industrial Court is hereby set aside and an order is substituted that the dismissal was unfair. I would order that the matter be remitted to the Industrial Court for assessment of compensation.

Sir Dennis Byron
Chief Justice

I concur.

Ephraim Georges
Justice of Appeal [Ag.]

[Sgd]

I concur.

Brian Alleyne, SC
Justice of Appeal [Ag.]