EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANULTAP2017/0001

BETWEEN:

HUMPHREY MICHAEL BLACKBURN

Appellant/Respondent

and

LIAT (1974) LTD.

Respondent/Counter Appellant

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Ruggles Ferguson with Mr. Septimus Rhudd and Mrs. Margaret Blackburn Steele for the Appellant/Respondent

Mr. Douglas Mendes, SC with Ms. Bellina Barrow for the Respondent/Counter Appellant

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2018: July 16;
September 20.

Labour Tribunal appeal – Employment – Unfair dismissal – Reasonableness of dismissal – Test for determining whether dismissal is unfair – Misconduct – Statements made publicly about employer – Antigua and Barbuda Labour Code – Whether court erred in finding that employee was unfairly dismissed – Compensation – Reduction of compensation – Court relying on transcripts and audio recordings which were not in evidence to reduce compensation – Whether court erred in so doing

Mr. Humphrey Michael Blackburn ("Mr. Blackburn" or "the Employee") was employed by LIAT (1974) Ltd ("LIAT" or "the Employer"), as a pilot for more than 33 years. He was at the relevant time the President of the Leeward Islands Airline Pilots Association ("LIALPA"), which was the sole bargaining agent for the pilots who were in the employ of LIAT. There were ongoing industrial disputes between LIAT and the pilots and their grievances appeared to have found themselves in the public domain. It appears that

during the ongoing disputes between LIAT and LIALPA public comments were made by either side. It is alleged that LIAT through its management caused certain assertions to be made against the pilots publicly and Mr. Blackburn is said to have made offending remarks about LIAT and its management during radio interviews.

LIAT was upset by Mr. Blackburn's comments and by letter dated 5th December 2011, referred to the statements that he had made, indicating that they amounted to misconduct as defined by the Antigua and Barbuda Labour Code and consequently terminated his employment.

On 18th June 2013, Mr. Blackburn filed a reference in the Industrial Court in which he challenged his dismissal on the basis that it was unfair, arbitrary and without due process. He also claimed that because of the unfair dismissal, he was entitled to be compensated. He said that the statements that he made were made in his capacity of Chairman of LIALPA and did not in any way detract or undermine his loyalty to LIAT. He denied that his utterances amounted to misconduct at all, and in any event, were spoken in his capacity as a union leader and did not warrant his dismissal. Importantly, he said that his termination was in breach of the Collective Agreement that LIAT had entered into with LIALPA.

After protracted proceedings in the Industrial Court, the court reserved its ruling. Nearly two years after the court, acting on its own volition decided to obtain and examine the recordings of Mr. Blackburn's statements to be guided by them in their deliberations. The court wrote to Mr. Blackburn and LIAT and indicated that it wished to have audio copies of the recordings of Mr. Blackburn's statements together with the copies of the transcripts. Mr. Blackburn indicated that he did not have copies of either and therefore did not provide any. LIAT however provided the Registrar of the Industrial Court with a copy of the transcript and the audio recordings. Mr. Blackburn eventually filed a notice of objection to the admission into evidence of copies of the transcripts.

The Industrial Court, in its judgment, concluded that Mr. Blackburn had been unfairly dismissed but reduced the level of compensation to which he was entitled, on the basis that he had significantly contributed to his unfair dismissal. In arriving at a reduction of 65% in compensation the court relied on the audio recordings and transcripts.

Mr. Blackburn only challenges the reduction of his compensation in this appeal. LIAT counter appeals challenging the court's decision that by reason of its unreasonable actions, Mr. Blackburn was unfairly dismissed. LIAT also challenges the court's determination that by reason of its unfair dismissal of Mr. Blackburn he is entitled to be compensated. The issues arising on the appeal and counter appeal are: 1. Whether the Industrial Court erred as a matter of law, by concluding that Mr. Blackburn was unfairly dismissed; and 2. Whether the Industrial Court erred, as a matter of law by relying on transcripts and audio recordings, which were not in evidence, as the basis to reduce the level of compensation by 65%.

Held: allowing the appeal; setting aside the order for compensation; directing that the Industrial Court conducts the assessment of compensation on an expedited basis utilising only the evidence that was adduced during the trial; dismissing the cross appeal and making no order as to costs, that:

1. It is common ground that the test that to be applied to determine whether a dismissal was unfair is that of reasonableness. In determining whether an employer acted reasonably, an industrial tribunal is not to substitute its own decision for that of the employer as to the right course to adopt, but instead was to determine whether the decision to dismiss fell within the band of responses which reasonable employers might have adopted.

   Polkey v AE Dayton Services Ltd [1988] ICR 142 applied; Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91 applied; Iceland Frozen Foods Ltd. v Jones [1983] ICR 17 applied.

2. In the present case, the Industrial Court applied the correct test of reasonableness and properly reached the conclusion to which it arrived. In so doing, the Industrial Court thoroughly reviewed the totality of circumstances and examined the important issue of whether the decision to dismiss Mr. Blackburn fell within the band of reasonable responses which a reasonable employer might have adopted and concluded that it did not. It was clearly open to the Industrial Court to so conclude. Therefore, there is no basis upon which to interfere with the Industrial Court's decision and it cannot be assailed.

   Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699 applied.

3. Natural justice or basic fairness required that the Industrial Court in its determination of the issues that were before it, act only on the evidence that was adduced. Procedural fairness required the Industrial Court to refrain from including evidence sought and obtained on its own volition after the close of the trial and more critically from relying on those audio recordings and transcripts to reduce the compensation to which Mr. Blackburn was entitled. It is even more egregious in circumstances where, as obtained in the case at bar, Mr. Blackburn had specially filed a notice of objection to the transcripts being admitted. Accordingly, in so far as the Industrial Court relied on the transcripts and audio recordings, it amounted to a miscarriage of justice and the Industrial Court's assessment of Mr. Blackburn's compensation can properly be impugned.

4. The statutory provisions of the Industrial Court Act confer exclusive jurisdiction in the Industrial Court to award compensation to persons who have been unfairly dismissed. Thus, the appellate court has no jurisdiction to exercise the discretion afresh to assess Mr. Blackburn's compensation and must remit the aspect of assessment of compensation to the Industrial Court.

Sections 10 and 17 of the Industrial Court Act applied; Caroni (1975) Limited v Association of Technical Administrative Supervisory Staff. (2002) 67 WIR 223 considered.

JUDGMENT

Introduction

[1] BLENMAN JA: This is an appeal by Mr. Humphrey Michael Blackburn ("Mr. Blackburn" or "the Employee") against the majority decision of the Industrial Court in which the court, having concluded that Mr. Blackburn had been unfairly dismissed by LIAT (1974) Ltd ("LIAT" or "the Employer"), reduced the level of compensation to which he was entitled, on the basis that he had significantly contributed to his unfair dismissal. Mr. Blackburn only challenges the reduction of his compensation in this appeal.

[2] There is also a counter notice of appeal by LIAT in which it challenges the majority decision of the Industrial Court, namely that by reason of its unreasonable actions, Mr. Blackburn was unfairly dismissed. LIAT also challenges the Industrial Court's determination that by reason of its unfair dismissal of Mr. Blackburn he is entitled to be compensated.

Factual Background

[3] LIAT is a limited liability company that provides the main means of air transportation in and between several Caribbean countries. Indeed, it provides critical air services to several countries and contributes greatly to the integration of our countries.

[4] Mr. Blackburn was employed by LIAT as a pilot for more than 33 years and attained the rank of captain. He was at the relevant time the President of the Leeward Islands Airline Pilots Association ("LIALPA"), which was the sole bargaining agent or trade union for the pilots who were in the employ of LIAT. There were ongoing industrial disputes between LIAT and the pilots and their

grievances appeared to have found themselves in the public domain. Prior to this, Mr. Blackburn had distinguished himself as an employee of LIAT and a few short years earlier, LIAT recognised him for excellent service. In fact, he is said to have had an unblemished record before the occurrence of the events that are the subject of this appeal.

[5] The employer – employee relationship between LIAT and the pilots, including Mr. Blackburn, was largely governed by the provisions of the Antigua and Barbuda Labour Code,[1] and a Collective Agreement between LIALPA and LIAT.[2]

[6] It appears that during the ongoing disputes between LIAT and LIALPA public comments were made by either side. It is alleged that LIAT through its management caused certain assertions to be made against the pilots publicly. Consequently, Mr. Blackburn was invited to appear on radio by the Observer Radio station ("Observer Radio") and certain questions were put to him by the moderator. Against that background, Mr. Blackburn is said to have made the offending remarks about LIAT and its management during the interviews.[3]

[7] LIAT was upset by Mr. Blackburn's comments and wrote him a letter dated 5th December 2011,[4] in which LIAT referred to the statements that he had made, indicating that they amounted to misconduct as defined by the Antigua and Barbuda Labour Code and terminated his employment.

[8] Consequently, on 18th June 2013, Mr. Blackburn filed a reference in the Industrial Court in which he challenged his dismissal on the basis that it was unfair, arbitrary and without due process. He also claimed that because of the unfair dismissal, he was entitled to be compensated. He said that the statements that he made were made in his capacity of Chairman of LIALPA and as a trade union leader and did not in any way detract or undermine his loyalty to LIAT. He denied that his

[1] Cap. 27, Revised Laws of Antigua and Barbuda 1992.
[2] The relevant provision of the Collective Agreement will be highlighted shortly.
[3] Details of the remarks will be provided shortly.
[4] Details of the letter can be found at paragraph 12.

utterances amounted to misconduct at all, and in any event, were spoken in his capacity as a union leader and did not warrant his dismissal. He therefore complained that LIAT's action in dismissing him breached the principles of good industrial relations practice to which it was obligated to have regard. Importantly, he said that his termination was in breach of the Collective Agreement that LIAT had entered into with LIALPA.

Mr. Blackburn's Statements

[9] I turn now to the statements that were allegedly made by Mr. Blackburn on 6th and 20th November 2011, respectively.

[10] The following are statements that were allegedly made by Mr. Blackburn on 6th November 2011:

> "There is a confrontational group within LIAT, an unqualified confrontational group, even within personnel, even within HR. I know there is a conflict because, Ms. Ramsay doesn't, I don't believe she's an educated person.
>
> There are management people in my department who have absolutely no qualifications in aviation. There is not one single person in my management that is qualified to make the decisions they are making.
>
> Management includes such posts as a Manager of Catering where LIAT has no catering."[5]

[11] On 20th November 2011, it is alleged that Mr. Blackburn made the following statements:

> "Let me put it to you now as a professional pilot…I am one of the most senior pilots...LIAT right now is not as safe as it was when we had two…and I am talking...I represent the training Captains...I am the sole spokesman of all the pilots...The standards of safety and operations that we have now are not better and if anything, are less than we had when Captain Murray and Captain Lake alone were running the flight operation department."

[5] Mr. Blackburn took issue with the accuracy of statement that he is alleged to have made about Mr. Ramsey, both in the Industrial Court and before this Court.

LIAT'S Response and Letter of Dismissal

[12] By letter dated 5th December 2011, LIAT wrote to Mr. Blackburn telling him that:

> "The Company's attention has been drawn to recent statements which you have made in the media.
>
> On 6th and 20th November...[y]ou were highly critical of the company's actions and policies. We are particularly concerned about your statements made about the quality of the airline's safety and members of senior management, some of which, we have been advised, may be defamatory…
>
> Your statements have crossed the line beyond what is permitted of a Union Leader and a Senior employee of LIAT…We have been advised the statements amount to misconduct as defined by the Labour Code of Antigua and Barbuda …
>
> Your employment is accordingly terminated, with immediate effect. The dismissal is on the grounds of misconduct which is so serious that LIAT cannot reasonably be expected to take any course other that termination. You have conducted yourself in such a manner as to clearly demonstrate that the current employment relationship cannot be expected to continue."

Procedural Matters in the Industrial Court

[13] It is important to set out the procedural history of the reference before the Industrial Court to give some context to the hearing before that court and to indicate the chronology of events that preceded the actual trial in the Industrial Court. [6]

Directions and Applications

[14] By requisition dated 25th June 2013, issued by the Registrar and addressed to the employer's Chief Executive Officer, LIAT was required to file its memorandum no later than 23rd July 2013.

[15] By an application filed on 27th August 2013, LIAT applied for an order staying the proceedings pending the discontinuance of High Court claim ANUHCV2012/0536 or alternatively, striking out this reference as an abuse of court process.

[6] This information is extracted from the Industrial Court's judgment.

[16] By requisition dated 12th February 2014 issued by the registrar and addressed to the legal practitioners for LIAT, LIAT was granted an unsolicited extension of time and was required to file its memorandum no later than 14th March 2014.

[17] By letter dated 27th March 2014, the Registrar issued a reminder to LIAT and noted that the Industrial Court had received no application for an extension of time. The Registrar warned LIAT that "unless the Court receives a written application for the further extension within seven (7) days of delivery of this letter to you, the Court will conclude that you have no defence to the Employee's case."

[18] By letter dated 27th March 2014, Mr. Blackburn opposed the grant of extensions of time and requested that judgment be entered for him.

[19] By an application filed on 13th May 2014, Mr. Blackburn applied for an order that judgment be entered in his favour. Grounds 3 to 5 of the application emphasised LIAT's failure to comply with the directions of the Court. Ground 9 stated as follows:

> "9. To date the Employer has not complied with the several directions of the Court. By its failure and/or refusal to comply, it is apparent that the Employer has no intention of defending the Employee's claim or otherwise complying with the Court's directions. The Employer has not given any indication of its intention to actively pursue this matter."

[20] By directions of 15th May 2014, LIAT was granted liberty to file and serve:

(a) an affidavit in opposition to the Employee's application, no later than 2nd June 2014; and

(b) skeleton submissions no later than 10th June 2014.

[21] Mr. Blackburn's skeleton submissions were filed on 10th June 2014 pursuant to the directions made on 15th May 2014. LIAT failed to comply with the Industrial Court's directions above.

[22] At the 'Call-Over' held on 30th July 2014, after consulting with each other, the legal

representatives for the parties agreed that the trial date be fixed at 24th November 2014.

[23] By a notice of trial date issued on 29th October 2014, the legal representatives for both parties were reminded and formally notified that the reference had been fixed for trial on 24th November 2014.

[24] By an application filed on 21st November 2014 and supported by an affidavit sworn by Juliette Dunnah, a clerk employed by a law firm of its legal representatives, LIAT applied for an order granting it an extension of time to file its memorandum of defence.

The Application to Stay or Strike Out

[25] LIAT's application for an order staying or striking out the reference was heard on 3rd October 2013 in the presence of Diane Shurland, LIAT's General Counsel and Director of its legal department. After considering the respective affidavit evidence together with the written and oral submissions of counsel the Industrial Court dismissed the application.

The Application for an Extension of Time

[26] At the commencement of trial on 24th November 2014, there were two applications pending before the Industrial Court. On the one hand, LIAT's application, filed belatedly on 21st November 2014, was for an order extending the time for filing its memorandum of defence. In her affidavit in support, Mrs. Dunnah asserted that LIAT had a bona fide defence to Mr. Blackburn's claim. The Industrial Court, upon considering the application together with the supporting affidavit, and upon hearing the oral submissions of counsel for LIAT and counsel for Mr. Blackburn, rejected LIAT's application for the following reasons:

(a) there was no evidence explaining the employer's failure to comply with the Court's earlier directions;

(b) there was no explanation for the inordinate delay in making the application;

(c) the employer did not demonstrate with any or any sufficient evidence that it had a good chance of success; and

(d) granting the application would result in a considerable degree of prejudice to the employee; Mr. Blackburn.

The Application for Default Judgment

[27] On the other hand, Mr. Blackburn's application, filed since 13th May 2014, was for an order that judgment be entered for him because of LIAT's failure to comply with the Industrial Court's several directions. In effect, it was an application for judgment in default of defence. The court declined to enter default judgment. In deciding to decline Mr. Blackburn's application and deciding that the trial should proceed ex parte on the issue of liability only, the Industrial Court stated that it paid special attention to the nature of his claim, the content of his witness statement and the provisions of section 10(3) of the Industrial Court Act[7] and Division C of the Antigua and Barbuda Labour Code.

[28] In ordering that the trial proceed ex parte, the Industrial Court said that it was especially mindful of its statutory obligations. With those in mind, it said that it decided that notwithstanding its denial of the application for an extension of time, counsel for LIAT should be permitted to cross examine Mr. Blackburn on his witness statement. The Industrial Court also said that the express objective of this concession was to test the veracity of the employee's evidence. It indicated that its concession was not intended to provide LIAT with an opportunity to present its case through the back door.

Evidence adduced by Mr. Blackburn

[29] The evidence that Mr. Blackburn provided in his witness statement was consistent

[7] Cap.214 Revised Laws of Antigua and Barbuda 1992.

with his memorandum. Importantly, Mr. Blackburn acknowledged that he had made statements about prevailing issues of "management and safety" with which he was quite familiar by virtue of his seniority. Instructively, he said that his comments were made as a union leader and an employee who was off duty. At paragraph 13 of his witness statement he stated that his statements were made in relation to:

1. (a) the employer's claim that it was necessary to have 6 Managers in its flight operations department.
   (b) the employer had referred to its safety concerns in its Safety Newsletter.
      (i) Crew and aircraft safety were ongoing matters of concern between the Employer and LIALPA.

2. His remarks about Ms. Ramsey, as transcribed by the employers did not reflect two pauses. As a result:
   (a) his remark was that Mrs. Ramsey is an educated person.
   (b) his comments about Ms. Ramsey were relative to the existence of a conflict.
   (c) the employer's representation of what he said about Ms. Ramsey is inaccurate and misleading.

[30] Captain Patterson Thompson, who was employed by LIAT, testified on behalf of Mr. Blackburn. In his witness statement, he stated that issues perceived by LIALPA to raise questions of safety were "being strongly contested" by LIALPA during his tenure as secretary of the Association and up to the date of Mr. Blackburn's dismissal.

[31] In the judgment, the majority of the Industrial Court stated at paragraph 70 as follows:

> "Captain Thompson's unchallenged evidence was very instructive in so far as it emphasized the Employer's intention as stated by representatives of Management on December 7, 2011. He reported that Management stated that they were not going to follow the Collective Agreement as it related to adverse reports, grievance procedures and discipline but that the

Employer would instead act under summary dismissal procedures as laid down in the Code."

Issues in the Industrial Court

[32] The issues before the Industrial Court are derived from what is stated in the judgment. At paragraph 67 of its judgment, the Industrial Court indicated that Mr. Blackburn's main contentions were that his dismissal:

(i) "was 'highhanded, unfair, arbitrary and contrary to law' and the manner thereof was 'baseless, harsh and oppressive].
(ii) deprived him of his entitlement to a fair procedure and the opportunity to be heard. In particular, the employer acted in breach of section XVI and XIII of the Collective Agreement.
(iii) was in direct contravention of the rules of natural justice.
(iv) was flagrantly in direct breach of the principles of good industrial relations practice.
(v) was influenced by malice."

[33] The court having heard the evidence and submissions, reserved its decision on 24th November 2014. At the end of the trial, the court granted leave to the parties to file closing submissions. Mr. Blackburn complied but LIAT did not comply with the court's directions. Instead, LIAT quite belatedly applied to the Industrial Court to reopen the reference.

LIAT's Application to Reopen the Reference

[34] On 1st December 2014, eight days after the Industrial Court had reserved its decision, LIAT, through its new Senior Counsel, applied for an order that the ex parte trial order be set aside and that LIAT be granted an extension of time to file its memorandum. Alternatively, LIAT sought an extension of time to file submissions on liability. Mr. Blackburn strenuously opposed the applications. The Industrial Court received both oral and written submissions from Mr. Blackburn and LIAT and ruled in its substantive judgment against both applications.[8]

[35] This brings us now to examine the Industrial Court's unilateral decision to hear the audio recordings and transcripts.

[8] There is no appeal or complaint against the ruling.

Transcript and Audio Recordings

[36] Nearly two years after the Industrial Court had reserved its ruling, the court, acting on its own volition decided to obtain and examine the recordings of Mr. Blackburn's statements to be guided by them in their deliberations.[9] The court wrote to Mr. Blackburn and LIAT and indicated that it wished to have audio copies of the recordings of Mr. Blackburn's statements together with the copies of the transcripts. There were several correspondence between counsel for Mr. Blackburn, counsel for LIAT and the Registrar of the Industrial Court in relation to the court's request of LIAT for transcripts and audio recordings. The correspondence continued over an extended period of time and there was no agreement. LIAT provided the Registrar of the Industrial Court with a copy of the transcript and eventually provided the audio recordings. However, Mr. Blackburn indicated that he did not have copies of either and therefore did not provide any.

[37] Mr. Blackburn eventually filed a notice of objection to the admission into evidence of copies of the transcripts. Mr. Blackburn indicated several grounds in support of his objection.

[38] It is important that we refer to the Collective Agreement which indicates some important aspects of the industrial practice that governed the relationship between LIAT and LIALPA.

The Collective Agreement

[39] Article 2 provides that:

> "The spirit and intention of this Agreement is to maintain a good relationship between the Company and the Association. It is in the mutual interest of the Company and the Association to provide for the operation of the services of the Company under methods which will further the safety of air transportation, the economy and efficiency of operations ...Therefore, it is recognised by this Agreement to be the duty of the Company and the Association to co-operate fully for the attainment of these purposes."

[9] See para.83 of the judgment of the Industrial Court.

[40] Article 10 stipulates that:

> "The Company and the Association shall not violate the provisions of this Agreement. In addition, where the agreement is not specific about any matters or where there exists a reasonable doubt as to the correct interpretation of any provision of this Agreement, the Company shall consult with the Association in an attempt to reach an agreement before implementation of any action. This does not prejudice the provisions set out in Section XIV."

Section XIII – Adverse Report/Disciplinary Action

[41] Article 1 provides that:

> "(a) Any adverse report on a Pilot shall be brought to the attention of the Pilot concerned and if such report is made in writing, the Pilot shall be invited to make his comments in writing ...
>
> (a) In the event that, as a result of an adverse report, the Company contemplates disciplinary action, then the Pilot concerned must be given an opportunity to exculpate himself in writing before Disciplinary Action is taken by the Company.

[42] Article 2 states that "In the event that the Company proceeds with Disciplinary Action, the Pilot reserves the right to take up the matter under the provision of section XIV."

[43] Article 3 states that "In cases of Discipline or Dismissal Section C-61 of the Antigua Labour Code shall apply."

Section XIV – Termination of Services

[44] Article 1 (a) states that "After confirmation of a Pilot's appointment to the permanent staff, the service can be terminated on either side by giving three (3) months' notice. Termination of service by the Company shall be on the decision of the Management body of the Company."

[45] Article 2 states that "A pilot may be dismissed or suspended by the Company for cause in accordance with the provisions of section XIII of this Agreement."

[46] We will now refer to the other important aspects of the judgment of the Industrial Court which was delivered on 13th June2017.

Judgment of the Industrial Court

[47] The majority of the court in a detailed judgment examined many important aspects of the reference. In relation to the test to be applied in the determination of whether the dismissal was unfair, at paragraph 127 of the judgment, the majority said as follows:

> "When we apply the test of reasonableness, having carefully taken into consideration all the other relevant statutory provisions, legal principles, contractual obligations, the Employee's evidence and the Employer's undischarged evidentiary burden, we are constrained to find that the Employee was unfairly dismissed."

[48] The Industrial Court having paid regard to the transcripts and audio recording said at paragraph 137 of the judgment:

> "…after careful consideration of the dismissal letter, the transcripts and the audio recordings of the Employee's statements, we found that the Employee was guilty of misconduct, which was a potentially good cause for dismissal. In particular, we are inclined to accept the Employer's view, as expressed in the dismissal letter that the Employee's statements did or were likely to do harm to the professional reputation of and public confidence in the Employer's senior management team and its business as a whole. Moreover, we find that the Employee's misconduct was more conspicuous and at least more potentially embarrassing and harmful by virtue of his emphasized position as Chairman of LIALPA."

[49] In paragraph 138 of the judgment the Industrial Court said:

> "Our said conclusion was obviously not based on the Employer's case which was non-existent in this Reference. However, having regard to our mandate under section 10(3) of the Act we felt compelled to fully inform ourselves of and be guided by the said best evidence of the Employee's statements, as we did."

[50] Further, at paragraph 139 of the judgment, the Industrial Court stated:

> "The facts of this case disclose that the Employee contributed significantly to his dismissal. In the exercise of our discretion and doing the best we can with the evidence before us, we assess his contribution at 65%. His compensation, to be assessed will be reduced accordingly.

[51] The Industrial Court highlighted the fact that it paid regard to the transcript and at paragraphs 101 and 102 of the judgment stated:

> "For the avoidance of doubt, we emphasize that the Court's interest in the transcript is well grounded on its view that the same is necessary for the full and proper discharge of its functions, especially as mandated by section 10(3) of the Act. Obviously, the actual recordings provide the best and most accurate evidence of all the statements made by the Employee."
>
> "102. It should be noted that the approach adopted by the Court was with the purpose of informing itself. We were careful not to consider the evidence which were obtained as being the Employer's evidence tendered at trial."

Grounds of appeal and counter-appeal

[52] Being aggrieved by the Industrial Court's decision both Mr. Blackburn and LIAT have filed several grounds in support of the appeal and counter appeal, respectively.

Issues on Appeal and Counter Appeal

[53] We have distilled the following two principal issues from the grounds of appeal and the counter appeal:

(a) Whether the Industrial Court erred as a matter of law, by concluding that Mr. Blackburn was unfairly dismissed;

(b) Whether the Industrial Court erred, as a matter of law by relying on transcripts and audio recordings, which were not in evidence, as the basis to reduce the level of compensation by 65%.

[54] We will now treat with the submissions of counsel on the above issues in turn.

Issue 1 – Whether the Industrial Court erred in concluding that Mr. Blackburn had been unfairly dismissed

[55] Learned Senior Counsel, Mr. Mendes, said that it is not in dispute that before LIAT took the decision to terminate Mr. Blackburn's services, it did not notify Mr. Blackburn of the charge it was considering, and it did not give him any opportunity

to say why he ought not to be dismissed. Neither is it disputed, as the Industrial Court found, that LIAT "spent the time between the misconduct and the dismissal to investigate the matter and/or obtain and analyse the audio recordings and/or transcribe the recordings and/or deliberate its opinions for disciplinary action against the employee." Mr. Mendes, SC posited that it was because of LIAT's failure to accord Mr. Blackburn a right to be heard, that the Industrial Court held that the dismissal was unfair. He therefore stated that the main question on cross-appeal is whether the court applied the correct test in coming to its conclusion.

[56] Mr. Mendes, SC stated that section C58 of the Antigua and Barbuda Labour Code mandates that in determining whether a dismissal is unfair, the test is "whether or not, under the circumstances, the employer acted unreasonably." He said that the question which the Industrial Court ought to have asked was whether, the employer acted unreasonably. He reminded this Court that prior to the decision of the House of Lords in Polkey v AE Dayton Services Ltd,[10] English Courts had adopted what had been referred to as the British Labour Pump principle, taken from a case of the same name, viz. British Labour Pump Co. Ltd. v Bryne,[11] which Browne-Wilkinson J summarised in Sillifant v Powell Duffryn Timber Ltd.[12] as follows:

> "even if, judged in the light of the circumstances known at the time of dismissal, the employer's decision was not reasonable because of some failure to follow a fair procedure yet the dismissal can be held fair if, on the facts proved before the Industrial Tribunal, the Industrial Tribunal comes to the conclusion that the employer could reasonably have decided to dismiss if he had followed a fair procedure."

[57] Mr. Mendes, SC said that it has been established that Polkey has rejected the British Labour Pump principle. He also reminded us that it has been long established that in determining whether an employer acted reasonably, an industrial tribunal was not to substitute its own decision for that of the employer as to the right course to adopt, but instead was to determine whether the decision to

[10] [1988] ICR 142.
[11] [1979] ICR 347.
[12] [1983] IRLR 91 at p. 92.

dismiss fell within the band of responses which reasonable employers might have adopted. This approach is usually attributed to Browne-Wilkinson J in Iceland Frozen Foods Ltd. v Jones.[13] Mr. Mendes, SC stated that the question which the court ought to have posed was whether having regard to its findings concerning Mr. Blackburn's conduct, and the investigation conducted by LIAT, LIAT acted reasonably in terminating Mr. Blackburn without giving him an opportunity to be heard. He said that, to paraphrase Browne-Wilkinson J in Sillifant, the question was whether LIAT was reasonable in taking the view that in light of the incontrovertible evidence of what Mr. Blackburn had said, as found by the court, it could properly take the view that no explanation or investigation could alter its decision to dismiss, and that its view fell within the band of reasonable responses which a reasonable employer might have adopted. In the circumstances, Mr. Mendes, SC said, having regard to the nature of Mr. Blackburn's offence, LIAT acted reasonably in thinking that no explanation or mitigation offered by him would alter its decision to dismiss. Mr. Mendes, SC said that LIAT's decision not to reach out to Mr. Blackburn for a response accordingly fell within the band of reasonable responses. Mr. Mendes, SC therefore submitted that the Industrial Court's decision, that Mr. Blackburn's dismissal was unfair, should be set aside, the cross appeal should be allowed, and the appeal dismissed.

[58] In forceful opposition, learned counsel Mr. Ruggles Ferguson stated that the Industrial Court properly examined the issue of reasonableness of the dismissal. Significantly, he said, that this was done in the section of the judgment which is captioned "Whether, in the circumstances, the Employer acted reasonably or unreasonably in dismissing the Employee." In the penultimate paragraph of that section, having examined the relevant matters, the President surmised that:

> "When we apply the test of reasonableness, having carefully taken into consideration all the other relevant statutory provisions, legal principles, contractual obligations, the Employee's evidence and the Employer's undischarged evidentiary burden, we are constrained to find that the Employee was unfairly dismissed. He was dismissed in blatant

[13] [1983] ICR 17.

contravention of the rules of natural justice and in breach of the principles of good industrial relations."[14]

[59] Learned counsel, Mr. Ferguson said that what the majority of the Industrial Court did was to correctly assess the issues of the reasonableness of the dismissal in the context of all the relevant circumstances and having due regard to, among other things, legal principles and contractual obligations. He was adamant that the Industrial Court applied the correct test, namely the test of reasonableness. Mr. Ferguson said that in applying that test, the Industrial Court quite correctly examined the relevant circumstances and did not base its decision on the breach of natural justice.

[60] Mr. Ferguson said that the test of reasonableness was examined in the Privy Council case of Sundry Workers v The Antigua Hotel and Tourist Association.[15] He said in that case, the workers had been dismissed for allegedly participating in an illegal strike. The Industrial Court held that they were unfairly dismissed. This decision was overturned on appeal by the Court of Appeal which held that the Industrial Court did not adequately address its mind to the matters which ought to have been considered in determining the issue. The Court of Appeal held that the absence from work was on account of conduct which amounted to a repudiation of the respective contracts and a breach of law. The Privy Council disagreed. It held that the Court of Appeal was not entitled to reverse the decision of the Industrial Court that the employee had been unfairly dismissed. In their Lordships' view, the Industrial Court was entitled to take into account, as was done, the penalties provided in the Collective Agreement for absence from work. The Privy Council noted that the Court of Appeal fell into error in holding that the absence from work "amounted to a repudiation of the respective contracts."[16] Mr. Ferguson emphasised that the contention that the president of the Industrial Court applied the wrong test is without merit.

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[14] At para. 127 of the judgment of the Industrial Court.
[15] (1993) 42 WIR 145.
[16] ibid at p. 155.

[61] Mr. Ferguson urged this Court to apply the approach that was adopted by the Privy Council in Sundry Workers to the case at bar, since he was adamant that the Industrial Court had applied the correct test and quite properly arrived at the correct conclusion that the dismissal was unfair. He reiterated that the cross-appeal and the issue of incorrect test lacks merit and should be dismissed.

Court's Discussion

[62] We will now refer to the statutory framework in order to provide some context to the appeal and counter-appeal.

[63] Section C56 of the Labour Code creates the right not to be unfairly dismissed. It provides that:

> "Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."

[64] Section C58(1) details the reasons for a dismissal which will immunise it from being unfair. "Provided…that there is a factual basis for the assigned reason", section C58(1) states that:

> " (1) A dismissal shall not be unfair if the reason assigned by the employer therefor –
>
> (a) relates to misconduct of the employee on the job, within the limitations of section C59(1) and (2);
>
> (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section C59 (3);
>
> (c) is that the employee was redundant;
>
> (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or
>
> (e) is some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held..."

[65] So far as is relevant, section C59 of the Labour Code provides as follows:

"(1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to, situations in which the employee has –

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue…"

"(2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of –

(a) repetition of the misconduct; or
(b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.

(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning."[17]

[66] Section C59 of the Labour Code finds its complement in section C9 which provides as follows:

"(1) An employer may, without advance notice, terminate the employment of any person who has engaged in misconduct related to his work within the limitations of section C59(1) or (2)."

[67] Finally, section C58(2) of the Labour Code sets out the test for determining whether a dismissal is unfair. It provides:

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

[17] See: The Antigua and Barbuda Labour Code (Amendment) Ac, 1998 Act No. 16 of 1998, Laws of Antigua and Barbuda.

[68] We turn now to the rival positions of LIAT and Mr. Blackburn on the question of the appropriate test to be applied.

The appropriate test to be applied

[69] It is common ground that the test that should be applied to determine whether Mr. Blackburn's dismissal was unfair is that of reasonableness. We have perused the majority judgment of the Industrial Court and have no doubt that the basis upon which it held that LIAT's dismissal of Mr. Blackburn unfair was on the application of the test of reasonableness. In our view, it is clear that the majority held that having reviewed the totality of circumstances, including the breach of natural justice, the industrial relations practice, Mr. Blackburn's statements and his service to LIAT, that LIAT's decision to dismiss him summarily was unreasonable. This the majority has stated quite categorically at paragraph 127 of the judgment and there is no basis for us to seek to impugn what is clearly stated. For emphasis we quote paragraph 127:

> "When we apply the test of reasonableness, having carefully taken into consideration all the other relevant statutory provisions, legal principles, contractual obligations, the Employee's evidence and the Employer's undischarged evidentiary burden, we are constrained to find that the Employee was unfairly dismissed."

[70] In our view, it is an unfair criticism to suggest that the majority of the Industrial Court applied the incorrect test. On that point we do not agree with LIAT's contention. To the contrary, we are of the settled opinion that the Industrial Court applied the correct test of reasonableness to the Employer's conduct in view of all of the circumstances, as the majority of the Industrial Court was alive to the fact that it was required to determine whether LIAT's action of dismissing Mr. Blackburn was reasonable or unreasonable. This is based on the jurisprudence that applies to issues of unfair dismissal. We note that the Industrial Court's judgment was thorough and examined a number of factors against which the employer's dismissal was tested for reasonableness.

[71] On the issue of the applicable test of reasonableness we are guided by the very

helpful pronouncements of House of Lords in Polkey which accepted the statement of Browne-Wilkinson J in Sillifant:[18]

> "The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An Industrial Tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the Industrial Tribunal in deciding whether or not the dismissal was reasonable within s.57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an Industrial Tribunal would be likely to hold that the lack of 'equity' inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it could make no difference: see the example referred to by Lawton LJ in Bailey v BP Oil (Kent Refinery) Ltd [1980] IRLR 287. Where, in the circumstances known at the time of dismissal, it was not reasonable for the employer to dismiss without giving an opportunity to explain but facts subsequently discovered or proved before the Industrial Tribunal show that the dismissal was in fact merited, compensation would be reduced to nil. Such an approach ensures that an employee who could have been fairly dismissed does not get compensation but would prevent the suggestion of 'double standards' inherent in the British Labour Pump [1979] IRLR 94 principle."

[72] We remind ourselves that it has been long established that in determining whether an employer acted reasonably, an industrial tribunal was not to substitute its own decision for that of the employer as to the right course to adopt, but instead was to determine whether the decision to dismiss fell within the band of responses which reasonable employers might have adopted. This approach is usually attributed to Browne-Wilkinson J in Iceland Frozen Foods where he said:

> "We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the Act of 1978 is as follows: (1) the starting point should always be the words of section 57(3) themselves; (2) in applying the

[18] Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91 at para. 31.

> section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which an employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstance of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair" (emphasis mine).[19]

[73] We can do no more than apply the very helpful principles that were enunciated above to the case at bar which serve to fortify our position already stated above.

[74] Buttressing our position is the fact that we are cognisant that the authorities establish that the band of reasonable responses test also applies to the reasonableness of the procedure adopted by the employer. In Whitbread plc (trading as Whitbread Medway Inns) v Hall,[20] Hale LJ said:

> "For my part, I find it impossible to read into these cases the proposition that the employer is free from any requirement to act in a reasonable fashion once the alleged misconduct is admitted. Section 98(4) of the 1996 Act requires the tribunal to determine whether the employer "acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and further to determine this in accordance with "equity and the substantial merits of the case". This suggests that there are both substantive and procedural elements to the decision to both **of which the "band of reasonable responses" test should be** applied." (Emphasis mine).

[75] We find the pronouncements of Lady Justice Hale, very informative and applicable to the case at bar and we can do no more than to apply them.

[76] We have carefully reviewed the judgment of the Industrial Court and have no

[19] [1983] ICR 17; p. 24.
[20] [2001] ICR 699, para 16.

doubt that the Industrial Court properly applied the objective standard in assessing the employer's decision. It is clear that the Industrial Court, in its determination of whether LIAT's dismissal of Mr. Blackburn was unfair, ascertained whether in all of the circumstances, LIAT's decision to dismiss Mr. Blackburn was reasonable. Reading the judgment as a whole, the Industrial Court also examined the important issue of whether the decision to dismiss Mr. Blackburn fell within the band of reasonable responses which a reasonable employer might have adopted and concluded that it did not.

[77] The Industrial Court quite properly referred to a number of relevant factual circumstances in its application of the correct test. They need no recitation. All these matters were in our view, highly relevant to the question whether in all of the circumstances, the events were of a kind which would entitle a reasonable employer to dismiss an employee in the position of Mr. Blackburn. These were pre-eminently questions of fact for the Industrial Court to determine and there was abundant evidence to justify their conclusion that the dismissal was unfair. Accordingly, we are of the view that the Industrial Court, having applied the correct test of reasonableness, properly reached the conclusion to which it arrived, namely that Mr. Blackburn's dismissal was unfair. We have no doubt that in the circumstances, it was clearly open to the Industrial Court to so conclude. We have no basis upon which to interfere with the decision and it cannot be assailed. Accordingly, LIAT's counter-notice of appeal on the issue of the application of the incorrect test fails.

[78] We now turn to consider the second issue.

Issue 2 – Whether the Court erred by relying on the transcript and audio recordings in exercising its discretion to reduce by 65% the compensation to which Mr. Blackburn is entitled

[79] Learned counsel Mr. Ferguson challenges the Industrial Court's 65% discount of Mr. Blackburn's compensation. He said that the Industrial Court's exercise of discretion was plainly wrong and fell outside the generous ambit of reasonable

disagreement. Mr. Ferguson said that the court did not give sufficient weight to relevant factors and considerations. He said that the Industrial Court placed excessive weight on certain factors that were clearly irrelevant to the issues that arose to be resolved.

[80] Critically, Mr. Ferguson complained that the Industrial Court erred as a matter of law, when in clear breach of the rules of natural justice, and on its own volition, it sought and obtained audio recordings and transcripts, and relied on them to reduce Mr. Blackburn's compensation. He reminded this Court that the appellate court would only reverse an exercise of discretion by a judge where it finds that the discretion was wrongly exercised.[21] Mr. Ferguson said that in relation to this aspect, Mr. Blackburn was denied natural justice. Mr. Ferguson reminded the Court that a discretion would be wrongly exercised where:

(a) despite that the judge commits no discernible error of legal principle, the appellate court is satisfied that the conclusion of the judge is plainly wrong as falling outside the generous ambit of reasonable disagreement;[22] or

(b) the judge takes into account irrelevant considerations and/or omits to consider a relevant consideration;[23] or

(c) the judge in arriving at his decision proceeded on the basis of an error of law.[24]

[81] Learned counsel Mr. Ferguson stated that in exercising its discretion under section 10(3) of the Industrial Court Act and deciding that Mr. Blackburn contributed 65% to his unfair dismissal on account of misconduct by him, the Industrial Court gave no, or no sufficient weight to factors favourable to Mr. Blackburn and attached excessive weight to factors unfavourable to him. Specifically, Mr. Ferguson

[21] Charles Osenton & Co. v Johnston [1941] 2 All ER 245.
[22] G v G [1985] 2 ALL ER 225.
[23] Blunt v Blunt [1943] 2 ALL ER 76.
[24] supra, n 21.

contends that the court gave no, or no sufficient weight to the following factors:

a) Mr. Blackburn had a record of over 33 years distinguished service with LIAT and occupied the responsible position of Captain.
b) Mr. Blackburn was Chairman of LIALPA, the trade union representing the LIAT Pilots, and in that capacity, he had a responsibility to speak on behalf of its members in circumstances where the interests of his members were or could be negatively affected;
c) The finding that Mr. Blackburn's dismissal by LIAT was 'in blatant contravention of rules of natural justice and in breach of good industrial relations and unfair.

[82] Mr. Ferguson opined that the Industrial Court placed excessive weight on the following factors:

a) "The responsibility of Mr. Blackburn to promote good industrial relations as leader of the trade union. The excessive weight given was in the context of the court making it clear that it made no finding as to the truthfulness of the allegations made by Mr. Blackburn.
b) The fact that there was no employer representative on the programme with Mr. Blackburn even though he had no control over this.
c) The manner of presentation by Mr. Blackburn, especially in the context of the finding on his personality."

[83] The major complaint against the Industrial Court's assessment of Mr. Blackburn's compensation is that it did so in breach of natural justice. Significantly, Mr. Ferguson, submitted that the Industrial Court erred in its reliance on the transcripts and audio recordings of the radio programmes which offended LIAT and led to its conclusion that Mr. Blackburn contributed to his unfair dismissal. He said that it is to be noted that the Industrial Court requested the transcripts and audio recordings nearly two years after the trial had been completed. Moreover, in response to several enquiries by counsel for Mr. Blackburn for the judgment of the court, the judgment had been promised on numerous occasions prior to the request by the Industrial Court for the transcripts. Mr. Ferguson said that from the very inception – being the December 2011 dismissal of Mr. Blackburn – LIAT had cited the statements made on Observer Radio as the basis of dismissal, yet LIAT produced

no transcripts for the November 2014 trial, despite having numerous opportunities to do so. Further, the Industrial Court itself, since the filing of the reference in June 2013, knew the basis of Mr. Blackburn's dismissal. Prior to the November 2014 trial, the Industrial Court "bent over" to secure a response to the reference by LIAT. He said that on four (4) occasions, LIAT blatantly ignored the Industrial Court, yet the Industrial Court "bent over" to accommodate LIAT.

[84] Learned counsel, Mr. Ferguson, pointed out that Mr. Blackburn was unaware that the Industrial Court had unilaterally admitted the transcripts and audio recordings into evidence. In fact, Mr. Blackburn only became aware when the judgment was delivered, that the Industrial Court had admitted the transcripts and audio recordings into evidence on its own volition and had used them as a basis to reduce his level of compensation.

[85] Learned counsel, Mr. Ferguson, said that moreover, after admitting the transcripts, the Industrial Court failed to allow Mr. Blackburn an opportunity to be cross-examined on its contents. He said that this failure assumes even greater significance in the context of the June 2016 notice of objection by Mr. Blackburn to the admission of the transcripts. He said that Mr. Blackburn had never before heard or seen the original audio or written submissions. Mr. Ferguson pointed out that the alleged transcripts were being produced some five (5) years after his dismissal. Moreover, the context in which the statements were made in his capacity as leader of the pilots' union would have been, or ought to have been, an important consideration for the Industrial Court and not just the statements themselves. The period was one of severe industrial conflict that: staff, including the pilots, had made complaints to the shareholders of managerial incompetency and lack of qualifications; the then CEO of LIAT had done an interview with Observer Radio in which he stated to the effect, the pilots were irresponsible and unprofessional and that six (6) management pilots flying the airline were necessary to comply with civil aviation regulations; the Observer Radio had invited Mr. Blackburn to respond to the statements of LIAT's CEO; and he had no control

over who Observer Radio invited on its programme. Further, Mr. Ferguson said that Mr. Blackburn's comments never stated or inferred unsafe operation, but rather related to relative standards. There was no proof of actual harm to LIAT arising from the purported statements of Mr. Blackburn. In fact, Mr. Ferguson said that it is widely believed that Mr. Blackburn's comments caused LIAT to 'pull up its socks' and improve operations in the interest of all stakeholders.

[86] Mr. Ferguson reiterated that the Industrial Court clearly relied heavily on the audio transcripts which were not properly before the court in arriving at its 65/35 allegation of damages, in the process, ignoring Mr. Blackburn's right to be heard and cross-examined on the issue it regarded as fundamental, long after the trial had taken place. Mr. Ferguson said that should this Court conclude that the Industrial Court improperly relied on the transcripts, so as to reduce the compensation to which Mr. Blackburn was entitled, it would mean that this Court should exclude the evidence in the transcript and the audio recordings. Mr. Blackburn would be entitled to be fully compensated.

[87] In strenuous opposition, learned Senior Counsel, Mr. Mendes, was adamant that the procedure adopted by the Industrial Court in unilaterally listening to the audio recordings and reading the transcripts after the close of the case, was not flawed even though he accepted that it was not perfect. He argued that there was no breach of natural justice by the Industrial Court, quite unilaterally, requesting the transcripts and audio recordings of Mr. Blackburn's statements and treating them as the "best of evidence" available to assist the court in its determination of the level of compensation.

[88] Learned Senior Counsel Mr. Mendes pointed out that save for the statements Mr. Blackburn is alleged to have made about Ms. Ramsey, he did not deny the correctness or truth of the other statements. He therefore said that even if the transcripts and the audio recordings were excluded the Industrial Court would still have arrived at the same conclusion based on the statements that Mr. Blackburn

made. Mr. Mendes, SC therefore urged this Court to dismiss Mr. Blackburn's appeal on the basis that there was no miscarriage of justice.

[89] Alternatively, Mr. Mendes, SC said that if we were to conclude that there was a breach of natural justice in view of section 10(6) of the Industrial Court Act we would have to remit the assessment of the compensation to the Industrial Court. Mr. Mendes, SC said the assessment of compensation is a jurisdiction that falls within the exclusive preserve of the Industrial Court. He said the appellate court does not have the jurisdiction to assess the level of compensation to which Mr. Blackburn was entitled. Mr. Mendes, SC maintained that should Mr. Blackburn succeed on his appeal, this Court should remit the case to the Industrial Court to determine the appropriate level of compensation to which Mr. Blackburn is entitled.

Discussion

[90] In our view, this is a very short point. Natural justice or basic fairness required that the Industrial Court in its determination of the issues that were before it, act only on the evidence that was adduced. While we are mindful of the fact that it was open to the Industrial Court to determine the procedure for the trial, we have no doubt that it could not seek to obtain evidence on its own volition after the close of the trial. Leaving aside any question of the admissibility of the audio recordings and transcripts, we have no doubt that procedural fairness required the Industrial Court to refrain from including evidence on its own volition (without any application being made) and more critically from relying on those audio recordings and transcripts to reduce the compensation to which Mr. Blackburn was entitled. In our view, it is trite that at the very least Mr. Blackburn ought to have been afforded the opportunity to be heard in relation to the transcripts and audio recordings and this is so whether or not he had admitted to having made the majority of statements. It is even more egregious in circumstances where, as obtained in the case at bar, he had specially filed a notice of objection to the transcripts being admitted into evidence. Despite how well intentioned the Industrial Court was in seeking to obtain "the best evidence possible", it acted in clear breach of natural justice.

[91] We accept learned counsel Mr. Ferguson's submission that the Industrial Court improperly included the transcripts and audio recordings after the close of the case and that this was fatal to its assessment of its compensation. Accordingly, in so far as the Industrial Court relied on the transcripts and audio recordings, it amounted to a miscarriage of justice. We accept that the Industrial Court's assessment of Mr. Blackburn's compensation can properly be impugned, since it was determined in breach of basic principles of fairness. We therefore find that the Industrial Court exercised its discretion improperly in its assessment of compensation and its decision can be assailed. Mr. Blackburn's appeal on this issue succeeds. We set aside the Industrial Court's order on the quantification of the compensation.

[92] This leaves us now to determine what is the correct course the Court should adopt on the matter of the compensation to which Mr. Blackburn is entitled. We find attractive and we are persuaded by the arguments advanced by learned Senior Counsel, Mr. Mendes, that due to the exclusive nature of the Industrial Court's jurisdiction in matters of compensation, the appellate court has no jurisdiction to exercise the discretion afresh. We are of the view based on the reading of the statutory provisions that they confer exclusive jurisdiction in the Industrial Court to award compensation to persons who have been unfairly dismissed. We are fortified in this view from a reading of section 10(4), (5) and (6) of the Industrial Court Act together with section 17(1)(d) and (e). Section 10(4), (5) and (6) provide as follows:

> "(4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of an employee , order the re-employment or re-instatement (in his former or a similar position) of any employee, order…subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such re-employment or re-instatement, or the payment of exemplary damages in lieu of such re-employment or re-instatement.
> (5)An order under subsection (4) may be made where, in the opinion of the Court, an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good

> industrial relations practice; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.
> (6)The opinion of the Court as to whether an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to sub-section (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever. (Emphasis mine)"

[93] Section 17(1)(d) and (e) of the Industrial Court Act provides for appeals to the Court of Appeal. Section 17(1)(d) states that an appeal shall be from any finding or decision of the court that is erroneous in point of law and 17(1)(e) references some other specific illegality not hereinbefore mentioned and substantially affecting the merits of the matter has been committed in the course of the proceedings.

[94] Persuasive authority for the above position is found in Caroni (1975) Limited v Association of Technical Administrative Supervisory Staff.[25] His Lordship, Chief Justice De La Bastide commented on section 10(a) of the Industrial Relations Act of Trinidad and Tobago which is similar to our section 10(6) of the Industrial Court Act:

> "The wording of s 10(6) is very explicit. However reluctant this court may be to accept that its jurisdiction has been ousted by an Act of Parliament and that it is thereby denied the opportunity of investigating an alleged injustice and correcting it, if found to exist, the intention of Parliament is too clear in this instance to be deflected by any presumption of law or canon of construction."[26]

[95] We are of the view that these comments are very helpful, and we adopt them. Accordingly, we accept the arguments of Mr. Mendes, SC that the appellate court has no jurisdiction to assess Mr. Blackburn's compensation. The jurisdiction to do so falls within the exclusive purview of the Industrial Court. Accordingly, we will

[25] (2002) 67 WIR 223.
[26] At p. 225.

allow Mr. Blackburn's appeal and set aside the award of compensation to him. We remit the aspect of assessment of compensation to the Industrial Court for that Court to do so based on the evidence that was adduced before it during the trial.

[96] It is noteworthy that the reference was filed in 2013. It is now 2018 and while we regret the fact that we have to remit Mr. Blackburn's assessment of compensation to the Industrial Court, we direct that the assessment be undertaken on an expedited basis.

Costs

[97] In accordance with section 10(2) of the Industrial Court Act, we make no order as to costs.

Conclusion

[98] For the reasons above, we make the following orders and directions:

(1) Mr. Blackburn's appeal against the award of compensation by the Industrial Court is allowed and the order for compensation is set aside.

(2) The Industrial Court is directed to conduct the assessment of compensation to which Mr. Blackburn is entitled, on an expedited basis, utilising only the evidence that was adduced during the trial.

(3) LIAT's cross appeal against the judgment of the Industrial Court is dismissed.

(4) In accordance with section 10(2) of the Industrial Court Act, we make no order as to costs.

[99] We gratefully acknowledge the assistance of all learned counsel.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar