EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANULTAP2016/003

BETWEEN:

CABLE AND WIRELESS (ANTIGUA AND BARBUDA) LIMITED

Appellant

and

ANTIGUA AND BARBUDA WORKERS' UNION

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Sydney Bennett, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Roger Forde, QC and Mrs. Ruth-Ann Richards-Simpson for the Appellant
Mr. Justin Simon, QC and Mr. Kwame Simon for the Respondent

2018: November 28;
2019: May 23.

Labour tribunal appeal – Dismissal by reason of redundancy – Unfair dismissal – Test for determining whether dismissal unfair – Reasonableness of dismissal – Whether it must be shown that employer acted reasonably in dismissing employee for redundancy – Whether Industrial Court erred in holding that employers acted unreasonably – Section C58 of the Antigua and Barbuda Labour Code Cap. 27, Revised Laws of Antigua and Barbuda 1992 – Whether sections C58(1) and (2) are to be read conjointly

The appellant, Cable and Wireless (Antigua and Barbuda) Limited ("Cable and Wireless") is a subsidiary of Cable and Wireless PLC UK Ltd ("Cable and Wireless UK"). The respondent, Antigua and Barbuda Workers' Union ("the Union") is the trade union representing the employees of Cable and Wireless.

In March 2015, by virtue of Cable and Wireless UK acquiring 100% of the shares in Columbus International Inc ("Columbus International"), it became the owner of Columbus International and Columbus International's subsidiary, Kelcom International (Antigua and Barbuda) Ltd ("Kelcom"). Kelcom provided communication services in Antigua and Barbuda under the trade name "FLOW".

Following the acquisition, Cable and Wireless UK reorganised its business in Antigua and Barbuda with the result that Cable and Wireless ceased its retail business. The retail business was thereafter carried on by Kelcom. By letter dated 23rd November 2015, Cable and Wireless notified all thirteen (13) employees in the retail department that they would be made redundant effective 30th November 2015 and sought to pay them severance pay.

On 27th November 2015, the Union sought and was granted an ex parte injunction restraining Cable and Wireless from dismissing the employees. This injunction was continued at the inter partes hearing on 15th December 2015 until further order.

The Union thereafter filed a memorandum in the Industrial Court seeking several reliefs including reinstatement or reemployment and alternatively, compensation for unfair dismissal. It stated that Cable and Wireless' letter of 23rd November 2015 constituted unfair dismissal of the employees, as Cable and Wireless' reorganisation of its business at the behest of Cable and Wireless UK did not constitute redundancy within the meaning of section C3 of the Antigua and Barbuda Labour Code ("the Labour Code"), nor does its action satisfy the statutory test of reasonableness outlined in section C58(2) of the Code.

The Industrial Court found that a redundancy situation existed as at 1st December 2015 and that where this is established, the court is further required by section C58(2) to consider whether dismissal by reason of redundancy was fair. It found that in the circumstances, Cable and Wireless failed to prove, on a balance of probabilities, that it acted reasonably. Accordingly, the employees were unfairly dismissed and entitled to compensation and costs.

Cable and Wireless, being dissatisfied with the Industrial Court's decision, appealed. The grounds of appeal raised two issues for determination: (i) whether an employer is required to prove that it acted reasonably within the meaning of section C58(2) of the Labour Code in dismissing an employee for redundancy; and (ii) if the employer was required to prove reasonableness, whether the Industrial Court erred in finding that the employer acted unreasonably in dismissing the employees.

Held: dismissing the appeal; ordering that the salaries paid to the employees from 1st December 2015 until 24th May 2016 be treated as part payment of the compensation awarded by the Industrial Court; and making no order as to costs, that:

1. It is a cardinal rule in interpreting statute that where the words are unambiguous, they must be given their ordinary and natural meaning unless to do so would lead to an absurd result. Sections C56 and C58 are unambiguous. Section C56 specifically prohibits an employee from being dismissed unfairly, while section C58 outlines reasons which make a dismissal fair where the employer acted reasonably in dismissing an employee for such reason. If the legislature was

desirous of making dismissal for redundancy or any of the other reasons listed in section C58(1) automatically fair, the legislature would have included redundancy or any of the other reasons in section C57 which makes provision for automatically fair dismissal. This difference in treatment by the Legislature clearly shows that subsections C58 (1) and (2) must be read conjunctively. Accordingly, the Industrial Court was correct in interpreting and applying sections C58(1) and (2) of the Labour Code in the same way the UK Employment Appeal Tribunal interpreted and applied section 57 of the UK Employment Act 1978 (now reproduced in section 98 of the Employment Rights Act 1996) in that they should be read conjointly.

Section 57 of the UK Employment Act 1978 (now reproduced in section 98 of the Employment Rights Act 1996) considered; Sections C58(1) and (2) of the Labour Code applied; Williams v Compare Maxim Ltd [1982] I.C.R. 156 applied; Paulette Matthew v Antigua and Barbuda Port Authority Board of Commissioners ANUHCV2005/0129 applied; Sundry Workers v Antigua Hotel and Tourist Association (1993) 42 WIR 145 applied.

2. The issue of whether Cable and Wireless acted reasonably is a question of fact. The circumstances in which a party may appeal a decision of the Industrial Court are very limited and are outlined in section 17 of the Industrial Court Act ("the Act"). An appeal against a finding of fact does not fall within the contemplation of this section. However, where the Industrial Court finds facts or draws inferences which are not supported by the evidence, particularly where the facts so found substantially affect the merits of the matter or where the court does not consider the facts in light of applicable principles or statutory provisions, then this would fall within the ambit of section 17(1)(e). The Industrial Court, having conducted a very detailed analysis of the evidence, was correct in concluding that Cable and Wireless acted unreasonably. The judgment of the Industrial Court shows that it took into account all of the relevant factors in determining whether Cable and Wireless acted reasonably in dismissing the employees. Accordingly, in the circumstances, it cannot be said that the court was plainly wrong.

   Section 17 of the Industrial Court Act Cap. 214, Revised Laws of Antigua and Barbuda 1992 applied; Jewellers Warehouse v Cecil Norde ANUHCVAP2004/0029 (delivered 27th November 2006, unreported) applied.

JUDGMENT

Introduction

[1] THOM JA: This is an appeal against the decision of the Industrial Court determining that the employees of the appellant, Cable and Wireless (Antigua and Barbuda) Limited ("Cable and Wireless"), who were dismissed on the ground of

redundancy, were unfairly dismissed and therefore were entitled to compensation for unfair dismissal

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Background

[2] The background to this appeal is that Cable and Wireless is a company which engaged in providing cable television, internet and telephone services in Antigua and Barbuda. It is a subsidiary of Cable and Wireless PLC. UK Ltd. The respondent, Antigua and Barbuda Workers' Union ("the Union"), is the trade union which represents the employees of Cable and Wireless.

[3] In March 2015, Cable and Wireless UK acquired 100% of the shares in Columbus International Inc. ("Columbus International"), a company which was also engaged in the communication business. Thereupon, Cable and Wireless became the owner of Kelcom International (Antigua and Barbuda) Ltd ("Kelcom"), a subsidiary of Columbus International, which provided communication services in Antigua and Barbuda under the name "FLOW". Following the acquisition of Columbus International and its subsidiary FLOW, Cable and Wireless UK sought to reorganise the operation of its subsidiaries in Antigua and Barbuda. As a consequence of this reorganisation, Cable and Wireless ceased its retail business. The retail business was thereafter carried on by the other subsidiary Kelcom. Cable and Wireless, having ceased its retail business, by letter dated 23rd November 2015, notified all thirteen (13) of its employees who were employed in the retail department that they would be made redundant with effect from 30th November 2015 and sought to pay them severance pay.

[4] On 27th November 2015, on the application of the Union, the Industrial Court granted an ex-parte injunction restraining Cable and Wireless from dismissing the employees. The injunction was continued at the inter partes hearing on 15th December 2015 until further order.

[5] On 19th January 2016, the Union, on behalf of the employees, filed a memorandum in the Industrial Court in which it contended that Cable and Wireless' reorganisation of its business at the behest of Cable and Wireless UK does not constitute redundancy within the meaning of section C3 of the Antigua and Barbuda Labour Code[1] ("the Labour Code"), nor does Cable and Wireless' action satisfy the statutory test of reasonableness outlined in section C58(2) of the Code. Rather, Cable and Wireless' letter of 23rd November 2015 constitutes unfair dismissal of the employees. They sought several reliefs including reinstatement or reemployment and alternatively, compensation for unfair dismissal.

[6] Cable and Wireless, in its memorandum of defence, contended that the matter fell within section C3 and alternatively that the employees were dismissed for some other substantial reason as contemplated by section C58(1)(e) being the reorganisation of its business.

Decision of the Industrial Court

[7] Having heard the evidence and submissions of counsel, the Industrial Court determined that the issues were: (1) Whether a redundancy effectively came into existence on 1st December 2015; and (2) Whether the employer acted reasonably or unreasonably under the circumstances when it took the decision that the affected employees had become redundant and should be dismissed.

[8] In relation to the first issue, the Industrial Court found that based on the evidence adduced by Cable and Wireless, a redundancy situation crystallised on 1st December 2015 since the work which the employees were employed to perform, being the retail business, had ceased.

[9] In relation to the second issue, the Industrial Court found that where redundancy is established, the court is also required by section C58(2) to consider whether the dismissal by reason of redundancy was fair. They based their decision on decided

[1] Cap. 27, Revised Laws of Antigua and Barbuda 1992.

cases of the Industrial Court dating back to the case of Antigua Workers Union v Antigua Gases[2] where Justice H.S.R. Moe having considered the meaning of redundancy stated:

> "Nonetheless the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that the dismissal was fair; for the determining factor is whether the employer acted reasonably in handling the situation. When, therefore, redundancies are being considered it might be regarded as good industrial relations practice to follow the guidelines laid down in Williams v Compare Maxim 1982 I.C.R. 156."

[10] The Industrial Court also relied on the following passage in the decision of this Court in Sundry Workers v Kings Casino Ltd[3] where Chief Justice Sir Dennis Byron stated:

> "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 had ceased or substantially diminished…This brings me to point out, however, that the existence of a cause, such as a hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably…"[4]

[11] They also referred to the following passage from Harvey on Industrial Relations and Employment Law[5] at paragraph 778:

> "But the justification for declaring redundancies may become indirectly relevant, if the true reason for a dismissal is put in issue. If the employer contends that the employee has been dismissed by reason of redundancy, the question may arise whether an apparent redundancy situation is a genuine redundancy situation or whether the employer is seeking to use the alleged redundancy situation as a pretext to cover its unfair tracts… and even if there is a genuine redundancy situation the law of unfair dismissal still asks the question whether the employer acted reasonably in treating redundancy as a sufficient reason for the dismissal in all the circumstances of the case."

[12] Having taken the above into consideration, the Industrial Court concluded that in view of the circumstances which existed, the action of Cable and Wireless was not

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[2] Industrial Court Reference No. 20 of 1988.
[3] ANUHCVAP2001/0028 (delivered 3rd April 2003, unreported).
[4] See para. 6.
[5] Vol. 1 Butterworths Issue 191, February 2008.

within the range of conduct which a reasonable employer should have adopted. Cable and Wireless had failed to discharge the burden of proving on a balance of probabilities that it acted reasonably under the circumstances. The Industrial Court therefore found the employees were unfairly dismissed and ordered Cable and Wireless to pay compensation and costs to the thirteen (13) employees to be assessed if not agreed.

[13] Cable and Wireless, being dissatisfied with the decision of the Court, appealed on several grounds.

The Appeal

[14] The issues which emerged from the grounds of appeal are:

(a) Whether an employer is required to prove that it acted reasonably within the meaning of section C58(2) of the Labour Code in dismissing an employee for redundancy?

(b) If the employer was required to prove reasonableness, did the Industrial Court err in finding that the employer acted unreasonably in dismissing the employees?

Issue 1 - Section C58 (2) of the Labour Code

[15] Mr. Forde, QC submitted that the Industrial Court erred in finding that where a genuine redundancy exists this does not per se lead to the conclusion that the dismissal was fair, but it must also be shown that the employer acted reasonably in dismissing the employee.

[16] Mr. Forde, QC contended that the wording of section C58 is very clear and unambiguous and should be given its natural and ordinary meaning which is that a dismissal is fair if the reason assigned by the employer is that the employee was made redundant and there is a factual basis for the reason. Thus, once the court finds that the dismissal was as a result of redundancy the dismissal cannot be

unfair. He submitted that the Industrial Court fell into error because it applied the reasoning of its earlier decisions in Antigua Gases and Linda Richardson v Deep Bay Development Co. Ltd,[6] the reasoning of which was based on the decision of the English Employment Appeal Tribunal in the case of Williams v Compair Maxim Ltd[7] in circumstances where the English Court was not interpreting legislation that was in pari materia with the provisions of section C58. He contended that the decision of Williams was based on the provisions of section 57 of the Employment Protection (Consolidation) Act 1978 (these provisions are now contained in section 98 of the Employment Rights Act 1996) which specifically provides that the fairness of a dismissal must be determined by the reasonableness of the employer. He submitted further that the English position is explained in the following passage of the text Unfair Dismissal: Law, Practice and Guidance:[8]

> "…when a potentially fair reason of dismissal has been shown by the Employer it is then for the Tribunal to consider whether the dismissal was fair by applying the test as set out in section 98 (4) of the Employment Right Act 1996… where the employer succeeds in establishing that the reason for dismissal is one that is automatically fair or the employees establishes as automatically unfair reason, the Tribunal will not go on to consider the question of reasonableness as it is an issue that simply does not arise."

[17] He argued that unlike the English statutory scheme, dismissal for redundancy pursuant to section 58(1)(c) is automatically fair and therefore the question of reasonableness did not arise. The application of section C58(2) resulted in negating the clear statutory provision of section C58(1) which deemed dismissal for redundancy to be fair. He submitted that the error by the Industrial Court of adopting the English statutory scheme has been repeated over the years.

[18] Mr. Simon, QC, in response, submitted that section C58(1) and (2) must be read conjointly. When read as a whole, section C58 makes it abundantly clear that the circumstances of an assigned and acceptable reason for a dismissal must be

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[6] Reference No. 7 of 1989.
[7] [1982] ICR 156.
[8] Michael Duggan, Unfair Dismissal: Law, Practice and Guidance (CLT Professional 1999) 74.

further examined to determine whether an employer acted reasonably in dismissing the affected employees. The section has been repeatedly interpreted in this manner by the courts at all levels. In support of this contention, learned Queen's Counsel referred to the cases of Linda Richardson;[9] Jennifer Watt v Antigua Village Condo Corporation;[10] Antigua Workers Union (On Behalf Of Laurel Humphreys) v Antigua Gases Ltd; Paulette Matthew v Antigua And Barbuda Port Authority Board Of Commissioners[11] and Sundry Workers.[12]

[19] Learned Queen's Counsel also relied on the following passage from the text Unfair Dismissal at page 236:

> "Reasonableness – Assuming that a redundancy situation has arisen, as set out in earlier chapters, it will be incumbent on the employer to carry out the redundancies in a manner which is fair. The requirements are twofold. He must show that the procedure was fair in terms of the pool of employees to whom the selection process was applied, the criteria that were used for selection, the application of that criteria and the consultative process that was followed before selections were made. Secondly if there is a possibility of alternative employment for the particular employee then that offer must be made. Failure to consider alternative employment may result in a dismissal, although for redundancy being unfair."

Discussion

[20] In determining this issue, the question is whether sections C58(1) and (2) are to be read conjointly.

Section C58 reads as follows:

> "(1) A dismissal shall not be unfair if the reason assigned by the employer therefor –
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> (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);

[9] Supra, note 5.
[10] Industrial Court Reference No. 19 of 1991.
[11] ANUHCV2005/0129 (delivered 4th September 2008, unreported).
[12] Supra, note 2.

(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 prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:[13]

Provided, however, that there is a factual basis for the assigned reason.

(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."

[21] I agree with Mr. Forde, QC that it is a cardinal rule in interpreting statute that where the words are unambiguous, they must be given their ordinary and natural meaning unless to do so would lead to an absurd result and that the section must be read in the context of the scheme of unfair dismissal outlined in Part 5 of the Labour Code.

[22] Parliament in section C56 unequivocally granted every employee who completed the probationary period the right not to be unfairly dismissed. The section reads:

> " C56. 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."

[23] This right is in keeping with the stated national employment policy outlined in section C2, subsection (6) which reads:

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

"C2. (6) As an individual works at a job he gradually earns an equity therein above and beyond his periodic wages, privileges and allowances, and the maintenance of this equity requires protection."

[24] I also agree with Mr. Forde, QC that the case of Williams on which the Industrial Court relied was decided on the United Kingdom legislation which was worded differently from the Labour Code. Williams was decided on the basis of section 57 of the UK Employment Protection (Consolidation) Act 1978 which reads as follows:

"57. (1) In determining for the purposes of this Part whether the dismissal of an employee was fair or unfair it shall be for the employer to show –

(a) what was the reason (or, if there was more than one, the principal reason) for the dismissal, and
(b) that it was a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(2) In subsection (1) (b) the reference to a reason falling within this subsection is a reference to a reason which:

(a) related to the capability or qualification of the employee for performing work of the kind which he was employed by the employer to do, or
(b) related to the conduct of the employee, or
(c) was that the employee was redundant, or
(d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) Where the employer has fulfilled the requirements of subsection (1), then subject to sections 58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

[25] In my view, the main difference between the UK provision and the Antiguan provision is that the UK legislation specifically states "Where the employer has fulfilled the requirements of subsection (1)…", the effect of which is that it expressly states that the employer must fulfill the provisions of subsections (1) and

(3), thus the subsections must be read conjunctively. There are no such words in the Antiguan legislation. The question is, does the lack of these words mean that section C58 (1) and (2) should be interpreted and applied disjunctively? This is an appropriate point to examine the approach of the courts in Antigua in the cases referred to by counsel on both sides.

[26] The authorities of Cable and Wireless v Hill[14], Antigua and Barbuda Workers Union v Joseph Drew[15] and Antigua Village Condo v Watt[16], in my view do not provide any assistance since section C58(2) was not discussed in these cases. Those cases were all determined on the basis that the employer could not satisfy the provisions of subsection (1).

[27] The Labour Code came into effect in 1976 and in my view the first definitive statement in relation to section C58 is to be found in the case of Antigua Gases which statement was reemphasised in Linda Richardson. There, the appellant along with several other workers were dismissed on the ground of redundancy. The Industrial Court was satisfied that based on the evidence adduced by the respondent, a redundancy situation existed. The Court then went on to state that:

> "…even where a genuine redundancy exist this does not per se lead to the conclusion that the dismissal was fair, for the determining factor is whether the employer acted reasonably in handling the situation. It might therefore be regarded as good industrial relations practice, when redundancies are being considered to follow the guidelines laid down in Williams v Compair Maxim Ltd. *[1982] I.C.R. 156*"

The Court was of the view that the UK and Antiguan legislation were not dissimilar in substance and intent.

[28] The Industrial Court in effect interpreted and applied section C58(1) and (2) in the same manner in which the UK Employment Appeal Tribunal interpreted and applied section 57 of the UK Employment Act 1978 in Williams, in that they

[14] (1982) 30 WIR 120.
[15] ANUHCVAP1992/0002.
[16] ANUHCVAP1992/0006.

interpreted it to read conjointly. The High Court in Paulette Matthew also adopted this approach. There, the court, having found that a redundancy situation did not exist nor was there a factual basis to support dismissal for some other substantial reason pursuant to subsection (1) (e), nonetheless stated at paragraph 20 that, '[w]hether or not a dismissal was unfair the Labour Code provides a general test in C58 (2). In applying this test, I find that the dismissal was unfair.'

[29] This Court in Sundry Workers adopted a similar approach. While section C58 (2) was not mentioned, this Court having found that the reason for dismissal was not redundancy, stated:

> "This brings me to point out however, that the existence of a cause, such as a 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…"[17]

[30] I find that the issue was settled by the Privy Council in Sundry Workers v Antigua Hotel and Tourist Association.[18] There the workers were dismissed for participating in a strike action that was deemed illegal by the High Court. Subsequent to the dismissal, the workers instituted proceedings for unfair dismissal. The Industrial Court found that they were unfairly dismissed. The Court of Appeal reversed the decision of the Industrial Court and found that the employees were fairly dismissed. On appeal to the Privy Council, the Privy Council stated that whether the dismissal was unfair was to be determined in accordance with section C58 and C60 (now C56 and C58). After outlining the provisions of the sections, the Board stated:

> "There has never been any suggestion that the dismissals could be justified under any paragraph of section C60(1) except paragraph (e). The reason assigned by the respondents for the dismissals was the participation by the appellants in an illegal strike between 23rd and 26th December 1983. The issues then were first whether this was a substantial reason of a kind which would entitle a reasonable employer to dismiss employees in the position of the appellants and Secondly whether

[17] See para. 6.
[18] (1993) 42 WIR 145.

> in the actual circumstances, as the Industrial Court found them to be, the respondents acted reasonably in doing so. The short judgment of the Industrial Court does not expressly refer to these statutory criteria but it is difficult to think that this specialist tribunal did not have them well in mind."[19]

[31] After referring to the evidence which was before the Industrial Court, the Board stated:

> "All these matters were in their Lordships' judgment highly relevant to the question whether in all the circumstances, the events occurring between 23rd and 26th December 1983 afforded a substantial reason of a kind which would entitle a reasonable employer to dismiss workers in the position of the present appellants and whether the respondents, having wrongly treated the appellants who sought to return to work on 25th or 26th December as having repudiated their contracts, acted reasonably in dismissing them on 31st January 1984 on the ground of their participation in an illegal strike."[20]

[32] This case clearly shows that section C58 must be read and applied conjunctively. In my view, the provisions of sections C56 and C58 are unambiguous. Section C56 specifically prohibits an employee from being dismissed unfairly, while section C58 outlines reasons which make a dismissal fair where the employer acted reasonably in dismissing an employer for such reason. When considering whether an employee has been unfairly dismissed, the Industrial Court is required to consider the following:

(i) the reason assigned by the employer for the dismissal;

(ii) whether the reason assigned by the employer falls within subsection (1) (a) – (e);

(iii) whether there is a factual basis to substantiate the reason for dismissal; and

(iv) whether the employer acted reasonably in dismissing the employee having regard to the actual circumstances.

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[19] See paras 152 J – 153 A.
[20] See para 154 A.

[33] It must be noted that the Legislature specifically made a distinction in the way the section is worded when the reason for dismissal would be automatically unfair such as section C57 which reads as follows:

> "For the purposes of this part, an employee will not be deemed to have been dismissed unfairly if his employment is terminated at the expiration of the term specified at the time of his hire."

[34] In my view, if the Legislature was desirous of making dismissal for redundancy or any of the other reasons listed in section C58(1) automatically fair, the legislature would have included redundancy or any of the other reasons in section C57. This difference in treatment by the Legislature clearly shows that subsections C58 (1) and (2) must be read conjunctively.

Issue 2 – Whether the employer acted reasonably

[35] In applying the test of fairness as outlined in section C58 (2), the Industrial Court found that Cable and Wireless acted unreasonably. Their action was not within the range of conduct which a reasonable employer should have adopted. The Industrial Court's reasons for so finding can be summarised as follows:

(i) Cable and Wireless UK usurped the role of Cable and Wireless which was not consistent with good industrial relations practices. This usurpation of role tainted the consultation process with the Union.

(ii) Applying the principles outlined by Glidewell LJ in R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others [21] that, "[f]air consultation means: (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; (d) conscientious consideration by an authority of the response to consultation", there was no fair consultation since the Union was not consulted at a sufficiently early stage; they were not given adequate information; they were not given adequate time to

[21] [1994] IRLR 72.

respond; and Cable and Wireless gave no or no sufficient consideration to the Union's response.

(iii) Cable and Wireless did not formulate and apply appropriate criteria for selecting those who were to be made redundant. Cable and Wireless did not consider selection from their overall pool of workers who performed similar duties, rather they simply dismissed all of those who worked in the retail business.

(iv) Having regard to the role of Kelcom in carrying on the retail business, which was previously carried on by Cable and Wireless, Cable and Wireless did not take steps to ensure the continued employment of the employees to fill the positions which became available at Kelcom but they simply told them to apply for vacant positions with Kelcom.

(v) The period of notice, being one week, was inadequate and contrary to good industrial relations principles and practices.

[36] Mr. Forde, QC contended that the court erred in concluding that the actions of the employer, taken as a whole, were not in the range of conduct which a reasonable employer could have adopted. There was no evidence which could support the finding that the conduct of the employer was unreasonable. He further submitted that the Industrial Court took into account irrelevant matters such as the capacity in which Mrs. Floro-Forde, the Chief Executive of Cable and Wireless UK, participated in the consultation with the Union. This, he submitted was not material since both the employer and the employee knew the parties. Further, this was not an issue raised by the employees. Their contention was that the redundancy was not necessary. Secondly, the provisions of section 10(3) do not serve as an aid to interpretation of provisions of the Labour Code where the provisions are clear and unambiguous.

[37] Mr. Simon, QC in response submitted that Cable and Wireless' conduct was unreasonable. He referred to article 2 of the Collective Agreement which provided:

> "(a) Whenever drastic effects of economic conditions and/or technological changes are considered by the company to warrant reduction in its normal labour force, every effort shall be made to ensure that the Union be called two (2) months in advance to discuss the matter jointly with the company before any decision is arrived at."

He contended that discussions were not held two months prior to the decision to make the employees redundant. The letter to the Union was dated 30th September 2015. The decision to close the retail business according to the evidence of Mr. Mathias was made on or about 10th September 2015. Secondly, the evidence reveals that no consideration was given to assessing the competence and/or suitability of the dismissed employees to fill the vacancies at Kelcom when it assumed the retail business that was carried on by Cable and Wireless, nor was consideration given to training the employees to fit roles in Cable and Wireless' business.

[38] Mr. Simon QC urged the Court to find that the Industrial Court did not err in finding that Cable and Wireless' conduct in dismissing the employees was unreasonable. He submitted that on an assessment of the evidence as a whole the employer's actions and rationale were properly found to be unreasonable in all the circumstances.

Discussion

[39] Section C58(2) outlines the test for determining whether a dismissal for a reason given in subsection (1) was unfair to be, whether having regard to the actual circumstances it was reasonable for the employer to dismiss the employee. The court is required to determine whether the dismissal was within the range of conduct which a reasonable employer could have adopted.

[40] The Industrial Court, in Antigua Gases and in Linda Richardson, opined that the principles of good industrial practices which a reasonable employer should adopt where a redundancy situation exists, should be those principles outlined in the guidelines laid down by the UK Employment Appeal Tribunal in Williams. The Court stated as follows:

> "It might therefore be regarded as good industrial practice when redundancies are being considered to follow the guidelines laid down in Williams v Compair Maxim Ltd [1982] I.C.R. 156; in particular the employer should seek to establish a selection criteria which can be objectively checked against, inter alia, such things as attendance records, job performance, length of service, needs of the business. But the E.A.T (Employment Appeal Tribunal) has also re-emphasised in Grundy (Teddington) Ltd. v Plummer & Salt (1983) IRLR 98 that failure to act in accordance with one or more of the guidelines in Compair Maxim does not necessarily render a dismissal unfair. The principles in Compair Maxim are not hard and fast rules to be applied in all cases; their application depends on what is desirable or practicable in a given situation. Perhaps the two main obligations resting upon an employer proposing to dismiss an employee for redundancy are to make reasonable efforts, where practicable, to find the employee suitable alternative employment in the business and to consult with him and give him reasonable warning of impending redundancy."

[41] In Williams, the Employment Appeal Tribunal outlined the following as the principles which a reasonable employer would seek to act in accordance with, where a redundancy situation exists and the employees are represented by an independent union recognized by the employer:

> "1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
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> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

> 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
>
> 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
>
> 5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."[22]

[42] The Employment Appeal Tribunal also opined that the principles should only be departed from where there is a good reason for doing so. Therefore, a lack of or adequate consultation would not automatically mean that a dismissal was unfair.

[43] I agree that the above principles are based on the UK code of practice made under the Employment Protection Act. However, section 10(3) of the Industrial Court Act[23] ("the Act") requires the Industrial Court to deal with matters 'in accordance with equity, good conscience and the substantial merits' whilst having regard to 'the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code'.

[44] Three decades have passed since the decision in the Antigua Gases case. Nothing was put before us to show that these are not the principles applied by employers in Antigua and Barbuda. Indeed, the gravamen of Mr. Forde's, QC argument is that there was no evidence to support the finding that Cable and Wireless acted unreasonably. While there is some merit in learned Queen's Counsel's argument, that the participation by representatives from Cable and Wireless UK could not taint the consultation process because there was no evidence which showed that there was any doubt as to who were the parties to the consultation and no objection was taken at any time to the representatives of the

[22] See para 162 C – 162 F.
[23] Cap. 214, Revised Laws of Antigua and Barbuda 1992.

Head Office participating in the consultation process, Cable and Wireless has two hurdles to cross. Firstly, the UK representative participation was not the only factor the Industrial Court took into account. As outlined earlier, there were several other factors. Secondly, and critically, the finding that Cable and Wireless did not act reasonably in the circumstances is a question of fact.

[45] The circumstances in which a party may appeal a decision of the Industrial Court are very limited as set out in section 17 of the Act. The section reads:

> "17. (1) Subject to this Act, any party to a matter before the Court shall be entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no others –
>
> (a) that the court had no jurisdiction in the matter, but so however, that it shall not be competent for the Court of Appeal to entertain such ground of appeal unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the matter before the making of the order or award;
>
> (b) that the Court has exceeded its jurisdiction in the matter;
>
> (c) that the order or award has been obtained by fraud;
>
> (d) that any finding or decision of the Court in any matter is erroneous in point of law; or
>
> (e) that some other specific illegality not hereinbefore mentioned and substantially affecting the merits of the matter has been committed in the course of the proceedings."

[46] An appeal against a finding of fact clearly does not fall within sub-paragraphs (a) – (e). The ambit of subparagraph (e) was examined by this Court in the case of Jewellers Warehouse v Cecil Norde.[24] In Jewellers Warehouse, the appellant appealed against the decision of the Industrial Court on the ground that the court had erred when it failed to find on the abundance of the evidence, that pursuant to section C58(1)(b) of the Labour Code, Jewellers was entitled to dismiss Mrs. Norde summarily for incapability of performing the work that she was employed to do. The respondent contended that there was no right of appeal from the finding

[24] ANUHCVAP2004/0029 (delivered 27th November 2006, unreported).

of facts by the Industrial Court. Rawlins JA after examining the provisions of section 17(1)(e) stated:

> "[14] It would therefore be a vitiating illegality under section 17(1)(e) of the Industrial Court Act where the Industrial Court, find facts or draw inferences for which there is no evidential basis, if the facts so found substantially affect the merits of the matter. It would also be a vitiating illegality where the Industrial Court does not consider the facts in the light of the applicable principles or statutory provisions. The illegality would be an error committed in the course of proceedings for the purposes of section 17(1)(e) since the proceedings would only be at an end after judgment is delivered and the court is *functus*.
>
> [15] …Even outside of section 17(1)(e) this Court could not permit a decision to stand, where for example, there is no evidence upon which a reasonable tribunal could have arrived at that decision or where the factual conclusions are clearly at variance with the evidence."

[47] While Cable and Wireless' appeal would fall within subparagraph (e), in my view the Industrial Court in paragraphs 52 – 98 of its judgment conducted a very detailed analysis of the evidence in relation to each of the factors. Based on the evidence that was before the Industrial Court, it was open to the court to make the findings which it did. In any event, it is settled law that an appellate court would be slow to interfere with the findings of fact of the lower court unless it is shown that it was plainly wrong. I can find no error in the reasoning of the Industrial Court other than the error alluded to in relation to the finding that the participation of Ms. Floro-Forde tainted the consultation process. As stated earlier, this was not fatal since the judgment of the Industrial Court shows that it took into account all of the relevant factors in determining whether Cable and Wireless acted reasonably in dismissing the employees. In the circumstances, it cannot be said that the court was plainly wrong.

[48] Mr. Forde, QC also raised the issue of the date of dismissal of the employees. He submitted that the Industrial Court, having found as a fact that a redundancy situation existed at 1st December 2015, erred in its final order when it stated that the employees were deemed dismissed with effect being 24th May 2016, the date of the decision of the Industrial Court. In response, Mr. Simon, QC did not dispute

the finding of the Industrial Court that a redundancy situation existed on 1st December 2015 when Cable and Wireless closed their retail store. Learned Queen's Counsel also accepted that the dismissal of the employees date back to 1st December 2015. However, Mr. Simon, QC submitted that in view of the injunction granted by the court which prevented Cable and Wireless from removing the employees from its payroll between 1st December 2015 and 24th May 2016 be taken into account on the assessment of compensation by crediting same as compensation paid in part. I agree that the Industrial Court erred in finding the date of dismissal was 24th May 2016 instead of 1st December 2015 and I also agree with the submissions of Mr. Simon, QC that the salaries paid be treated as part of the compensation for unfair dismissal.

[49] In relation to costs, section 10(2) of the Act, provides that the Industrial Court (and this Court) shall make no order as to costs unless for exceptional reasons. I will make no award as to costs since counsel for the respondent has not shown any exceptional circumstances within the meaning of section 10(2) to warrant such an order.

[50] For the reasons stated above, I would dismiss the appeal and order that the salaries paid to the employees from 1st December 2015 until 24th May 2016 should

be treated as part payment of the compensation awarded by the Industrial Court. There shall be no order as to costs.

I concur.
Mario Michel
Justice of Appeal

I concur.
Sydney Bennett
Justice of Appeal [Ag.]

By the Court

Chief Registrar