EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNILTAP2013/0002

BETWEEN:

MONTSERRAT UTILITIES LIMITED

Appellant

and

MILDRED KIRWAN

Respondent

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Tyrone Chong, QC — Justice of Appeal [Ag.]
The Hon. Mr. John Carrington, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Kenneth Allen, QC, with him, Ms. Chivonne Gerald for the Appellant
Mr. Sylvester Carrott for the Respondent

2014: November 25;
2015: April 17.

Employment law- Appeal from Montserrat Labour Tribunal by way of Case stated- Unfair/unlawful dismissal – Employment Act Cap 15.03 – Labour Code 2012 – Interpretation Act – Whether Labour Tribunal erred in application of Labour Code instead of the Employment Act after Employment Act Repealed – Whether Interpretation Act requires that Labour Code should apply – Heads of damages for unfair/unlawful dismissal under Labour Code

On 30th November 2011, the respondent, Ms. Mildred Kirwan, was dismissed by her employer, the appellant, Montserrat Utilities Limited, on medical grounds after almost 32 ½ years of employment. On or about 6th November 2012, the respondent commenced proceedings before the Labour Tribunal ("the Tribunal") to challenge her dismissal on the grounds that her dismissal was unlawful.

The application was heard by the Tribunal between 29th April and 2nd May 2013, and on 5th December 2013, the tribunal delivered its decision. The Tribunal found that the appellant's dismissal of the respondent was unfair and unlawful and awarded the respondent compensation in the form of a lump sum pension and accrued interest, loss of earnings

from the date of dismissal to the date of determination of the dispute, injury to feelings, contributions to a pension fund and social security and holiday pay.

In reaching its decision, the Tribunal applied the provisions of the Labour Code 2012[1], and not the provisions of the Employment Act[2] which was in force at the time of the respondent's dismissal in November 2011 and the commencement of proceedings before the Tribunal in November 2012, but which had been repealed by the time the Tribunal had heard the matter in 2013.

The appellant challenged the Tribunal's decision and upon an application by the appellant, the Tribunal stated a case to the Court of Appeal asking the Court to determine whether it was wrong in law on three questions concerning the interpretation and application of the provisions of the Labour Code and Employment Act and any conflict or inconsistency arising between them, and a fourth question on whether the facts of the instant case were distinguishable from that of the decision in the English case Coulson v Felixstowe & Dock & Railway Company.[3] The appeal first came up for hearing before the Court in June 2014 and the Court, exercising its case management powers, directed that a fifth question be stated involving the matters of statutory interpretation and the appropriate heads of damages for unfair/unlawful dismissal under the Labour Code.

Held: agreeing with the conclusions reached by the Tribunal with respect to questions 1 to 4 of the case stated; with respect to question 5, varying the award of the Tribunal by disallowing the award of the pension and accrued interest and the award for injury to feelings and varying the award for loss of vacation pay; and ordering that the parties bear their own costs, that:

1. The provisions of the **Labour Code**, in respect of the unfair termination of employment and the seeking of remedies therefor, deals with matters that had previously been the subject of the **Employment Act**. The effect of the repeal of the **Employment Act** and its substitution with the **Labour Code** was, firstly, that the provisions of the **Employment Act** ceased to have effect save as provided by section 71 of the **Interpretation Act** or the **Labour Code** as the repealing Act. Secondly, on the facts of the instant case, the proceedings commenced by the respondent before the Labour Tribunal in November 2012 and any accrued right of the respondent or obligation of the appellant under the **Employment Act** continued to have effect notwithstanding its repeal. No question of the retrospective operation of the **Labour Code** therefore arises.

   Section 187(2) of the Labour Code applied; Sections 71 and 72 of the **Interpretation Act** applied;

[1] Act No. 20 of 2012.
[2] Cap 15.03, Revised Laws of Montserrat 2002
[3] [1974] IRLR 11.

2. It was consistent with the **Labour Code** that the proceedings initiated by the respondent under the **Employment Act** be continued under the **Labour Code** as both the **Employment Act** and the **Code** provided for the right of an employee not to be unfairly dismissed and for access to the Labour Tribunal for redress where there was an allegation of unfair dismissal and both provided for an obligation of an employer to pay compensation where they failed to discharge the onus to prove that the dismissal was in accordance with the legislative provisions. In addition, the procedure under the **Labour Code** could be adapted in relation to matters under the **Employment Act** and the enforcement of rights and obligations under the **Employment Act**. In the instant case it does not appear that significant procedural steps took place under the **Employment Act** between the commencement of proceedings in November 2012 and the repeal of the **Employment Act** in December 2012, therefore no concern about the adaptation of the procedure under the **Labour Code** arises.

   Section 23(3) of the **Labour Code** applied.

3. The Labour Code requires a Tribunal to determine the fairness of the dismissal of any employee by an employer. In this appeal there was no reason to interfere with the conclusion of the Labour Tribunal on the fairness of the respondent's dismissal as the Tribunal properly directed itself on the law by considering the reasonableness of the actions taken by the employer in the circumstances to both the employer and the employee in determining whether the dismissal was fair. The Tribunal applied the ratio of **J Coulson v Felixstowe Dock Railway Co** to the facts of the present case and were correct in distinguishing the decision reached in the **J Coulson** case on different facts.

   J Coulson v Felixstowe Dock Railway Co [1974] IRLR 11 applied.

4. Given the wide discretion vested in the Labour Tribunal under section 27 of the **Labour Code**, the consideration of gratuity and *ipso facto* a retirement benefit as part of the compensation due for unfair dismissal cannot be ruled out. However, the onus must be on the dismissed employee to prove the loss suffered as a result of the dismissal. If the employee can satisfy the Tribunal that as a result of the dismissal which has been determined unfair, that he/she lost a retirement benefit, it should be in the interests of the parties and the community as a whole to have the employee compensated for the loss of this benefit. In this appeal, the obligation to pay the respondent's retirement benefit was not the obligation of the appellant but that of a fund operated by a third party. It could not be fair and just to make the award against the appellant unless it could be established that by reason of the dismissal the appellant had caused any loss of such entitlement, or possibly, where fairness and the substantial merits of the matter demanded that the appellant should make such payment initially with provision to recoup such payment from the fund. In the circumstances, the respondent did not discharge the onus on her to prove that she lost the retirement benefit as a result of her dismissal.

Section 27 of the Labour Code applied; **Antigua Village Condo Corporation v Jennifer Watt** ANUHCVAP1992/0006 considered.

5. Section 68(2)(b) of the **Labour Code** permits a Labour Tribunal to take into account, inter alia, earnings lost by the employee on account of the dispute up to the date of determination of the issue by the Tribunal. However, this loss is recoverable subject to the employee's duty to mitigate such loss. Mitigation involves consideration of the steps taken to obtain alternative employment by the employee and, in principle, the length of time that the employee spends in bringing and prosecuting his or her claim. The onus of proof of failure to mitigate lies on a defendant and if a defendant intends to contend that a claimant has failed to act reasonably to mitigate his or her damage, notice of such contention should be pleaded or otherwise notice of the intention to take that point should clearly be given to the claimant in a timely manner before the hearing to enable the claimant to prepare to meet this issue.. In the present case, the appellant gave no notice to the respondent of its intention to take a point of mitigation and adduced no evidence to address the issue before the Tribunal. Accordingly, the appellant did not discharge the onus on it to prove that there had been unreasonable inaction on the part of the respondent in failing to commence the claim before the Labour Tribunal in November 2012, or that the respondent was responsible for the length of time the proceedings took. Consequently, there was no basis on which to interfere with the Tribunal's award for loss of income.

   Antigua Village Condo Corporation v Jennifer Watt ANUHCVAP1992/0006 applied; Section 68(2) of the **Labour Code** applied; **Geest plc v Lansiquot** [2002] 61 WIR 212 applied.

6. At common law, damages are not awarded for injury to feelings arising from wrongful dismissal. However, although injury to feeling is not a matter that the Tribunal is required to take into account under section 68 of the **Labour Code**, consideration under this head is not excluded by that section. To justify an award of damages for injury to feelings there should at the very least be a finding of an aggravating factor i.e. one which makes the dismissal so unfair in all the circumstances that a Tribunal acting in good conscience and applying the practices of good industrial relations is able to conclude that it is fair and just that compensation be awarded under this head or where there are financial consequences of the manner and circumstances of the dismissal. In the instant case, the Tribunal made no finding of aggravating factors in the dismissal of the appellant or that there were financial consequences of the injury to her feelings; accordingly, this award could not be upheld.

   Addis v Gramophone Co Ltd [1909] AC 488 applied; Section 68 of the **Labour Code** applied; **Antigua Village Condo Corporation v Jennifer Watt** ANUHCVAP1992/0006 applied; **Mayan King Ltd v Reyes and other** [2012] CCJ 3 (AJ) distinguished.

7. Section 68(2)(b) of the **Labour Code** mandates that a Tribunal should take into account wages and other remuneration lost by the employee on account of the dispute. Contributions to pension funds and social security form part of "other remuneration" under this section. Consequently, in this appeal, the respondent had a statutory right to the benefit of contributions to the pension fund and social security contributions as part of her compensation for unfair dismissal.

   Section 68(2)(b) of the **Labour Code** applied.

JUDGMENT

[1] **CARRINGTON JA [AG]**: On 30th November 2011, after the respondent had been employed with the appellant and its predecessor, Montserrat Electricity Services Limited (MONLEC), for approximately 32½ years, the appellant dismissed the respondent from its service on medical grounds. On 6th November 2012, the respondent commenced proceedings before the Labour Tribunal ("the Tribunal") challenging this dismissal on the grounds that it was unlawful.

[2] The application was heard by the Tribunal[4] between 29th April and 2nd May 2013 and the Tribunal delivered its ruling on 5th December 2013, finding that the respondent had been unlawfully and unfairly dismissed and awarding her compensation as follows: lump sum pension of $170,698.45 and accrued interest; loss of earning for the period of 2 years from the date of dismissal to that of the determination of the dispute by the Tribunal – $125,926.56; injury to feelings – $50,000; Monlec Contribution Fund – $8,814.72; Social Security Contributions – $4,800; Holiday pay – $2,098.80.[5]

[3] Appeals from the Labour Tribunal lie by case stated and upon the application of the appellant, the Tribunal stated a case to the Court of Appeal on 3rd January 2014 asking this Court:

> "to determine whether the Tribunal was wrong in law in determining that:

[4] The Tribunal was comprised of Ms. Veronica Dorsette-Hector, Chairman; and Mr. Julian Romeo and Mr. Winston Cabey, Members.
[5] Judgment of tribunal, record of appeal, p. 118.

1. The Employment Act Cap 15:03 falls within the category of any other enactment relative to Labour matters.

2. Further whether it had erred in determining that the sections to which it applied the Labour Code were in conflict with the Labour Code and therefore the Labour Code prevailed as provided for by section 186 of the said Code. This section was mandatory it having employed the words: "shall prevail".

3. The Montserrat Labour Code should apply despite the provisions of the Interpretation Act. The Tribunal accepted that this statute generally governs the interpretation of Legislation in relation to matters which are repealed or amended, but considered that given the mandatory nature of section 186 that the Code should prevail where there is a conflict or inconsistency between the Employment Act and it was therefore bound.

   The Tribunal accepted that the Employment Act applied as was permitted by the Interpretation Act, but not where there existed a conflict or inconsistency between the two statutes. It was of the view that the words "conflict" and inconsistency" should be given their ordinary meaning.

4. On the evidence, the case of **J Coulson v Felixstowe & Dock & Railway Company 1975 IRLR** was distinguished. The Tribunal was not satisfied on the evidence before it that the Appellants had shown that they had done sufficient to persuade the Tribunal to apply that decision in favour of the Appellants. It was clear from the facts that the Respondents in J Coulson had done all it could. The same could not be found of the Appellants."[6]

[4] After some initial procedural skirmishes between the parties had been resolved, the appeal first came up for hearing in June 2014 and this Court, in the exercise of its powers under Part 61 of the **Civil Procedure Rules 2000** ("CPR 2000") (as amended), directed that a further case be stated, namely:

5. Whether in the event that the Labour Tribunal was either (1) correct or (2) incorrect in its conclusion that the provisions of the **Labour Code 2012** ("the **Labour Code**"/"**the Code**")[7] apply to the determination of compensation for unfair

[6] Case stated, record of appeal, pp. 165 – 166.
[7] Act No. 20 of 2012.

dismissal in the circumstances of the instant case, the Tribunal had jurisdiction to order compensation under each of the heads of compensation, set out at the conclusion of the award, either individually or collectively.

[5] Questions 1 – 3 above appear to involve the interpretation of the provisions of the **Employment Act**[8] and the **Labour Code**. Question 4 appears to require a determination whether the facts in the instant case were distinguishable from that of the **J Coulson v Felixstowe Dock & Railway Co**[9] decision. This question was not argued by the appellant in its oral argument before us but was addressed in its written submissions and those of the respondent. Question 5 involves matters of statutory interpretation and the consideration of the appropriate heads for damages for unfair/unlawful dismissal under the **Labour Code**.

The Statutory Background

[6] Until the enactment of the **Labour Code**, the statutory regime in Montserrat for labour matters was the **Employment Act**. This latter **Employment Act** was in force at the time of the dismissal of the respondent in November 2011 and the commencement of the proceedings before the Tribunal on 6th November 2012 but had been repealed by the time the Tribunal had heard the dispute in 2013. The Tribunal held that the provisions of the **Labour Code** applied to the relief to be granted to the respondent. The appellant challenges this holding.

[7] The **Employment Act** Part III dealt with 'Notice and Dismissal'. Section 9(1)(e) provided that a person who has been employed for more than 15 years is entitled to a minimum of 8 weeks' notice of dismissal save where the employer was entitled to dismiss the employee summarily. Under section 11, an employee who has been employed for more than 13 weeks is entitled to compensation if dismissed for any

[8] Cap 15.03, Revised Laws of Montserrat 2002.
[9] [1974] IRLR 11.

reason other than those stated in section 11(2), which includes incapability to do the work he is employed to do due, inter alia, to health.[10]

[8] Where an employee applied to the Tribunal claiming compensation upon his/her dismissal, section 13 placed the burden of proof on the employer to show that the reason for dismissal was one of those allowed by section 11(2) and that it was reasonable in all the circumstances to dismiss the employee for that reason.

[9] Section 18(1) provided that an employee who was dismissed, other than for misconduct, after providing at least 20 years continuous service was entitled to a gratuity calculated at the rate of 2 weeks for every completed year of service and this gratuity was payable at the earlier of either 90 days of the termination of the employment or when the former employee reached pensionable age.[11] However, where the employee was entitled to a retirement benefit, he had to elect whether to accept this gratuity or the retirement benefit.[12]

[10] Under section 19, where the Tribunal was satisfied that an employee was not dismissed for a reason stated in section 11(2), the Tribunal was able to award compensation to the employee taking into account the financial loss suffered by the employee[13] and the circumstances of the dismissal,[14] provided that such compensation should not exceed 12 times the monthly wage of an employee who was paid on a monthly basis.

[11] The **Labour Code** Part 3 establishes the Labour Tribunal to which disputes may be referred by the Labour Commissioner under section 23. Section 27 provides that the Labour Tribunal may make such order or award in relation to disputes before it as it considers fair and just having regard to the interests of the parties and the community as a whole[15] and act in accordance with equity, good conscience and

[10] Section 11(2)(a).
[11] Section 18(7).
[12] Section 18(10).
[13] Section 19(2)(a).
[14] Section 19(2)(b).
[15] Section 27(1)(a).

the substantial merits of the case before it, with due regard to the principles and practices of good industrial relations.[16] There is no cap on the quantum of compensation awardable by the Tribunal as that which existed under the **Employment Act**.

[12] Section 59 provides that an employer shall not take disciplinary action (which by virtue of section 58 includes dismissal) against an employee without, inter alia, a valid and fair reason connected with the capacity and conduct of the employee.[17]

[13] Section 66 provides that where an employee claims to be unfairly dismissed and no settlement of the complaint is made in direct discussion with the employer, the allegation may be referred to the Labour Commissioner by either the employer or the employee or their representatives and failing settlement, to the Tribunal.

[14] Section 67(1) states that where an employee claims to have been unfairly dismissed, the employer has to prove that it was reasonable for him to dismiss the employee and that the procedures set out in the **Code** were duly observed.

[15] Under section 68, an employee who is dismissed in contravention of the **Code** is entitled, inter alia, to compensation as assessed by the Tribunal.[18] Section 68(2) mandates that the Tribunal, in awarding compensation, shall take into account various matters, including:

> "(a) any vacation pay earned, but not taken;
>
> (b) any wages and other remuneration lost by the employee on account of the dispute up to the date of determination of the issue by the Tribunal;
>
> (c) the termination notice to which the employee would have been entitled;

[16] Section 27(1)(b).
[17] Section 59(a).
[18] Section 68(1)(a).

(d) the employment category of the employee, his or her seniority and the ease or difficulty with which he or she can secure alternative employment; and

(e) the duty of the employee to mitigate his or her losses."

[16] Section 186 provides that to the extent that there may be conflict or inconsistency between the provisions of the **Code** or any other enactment relative to labour matters, the provisions of the **Code** shall prevail.

[17] Section 187(1) repeals, inter alia, the **Employment Act**. Section 187(2) is worth stating fully as its interpretation is in issue:

> "(2) Despite the repeal of the enactments mentioned in subsection (1), any requirement performed, table of fees, licenses or certificates issued, notice, decision, determination, direction or approval given, application or appointment made, or thing done, under any of the repealed enactments, shall, if in force on the date immediately prior to the coming into force of this Code, continue in force, or in the case of a license or certificate, continue in force until the date of expiry of such license or certificate as set out in such license or certificate, and shall, so far as it could have been made, issued, given or done under this Code have effect as if made, issued, given or done under the corresponding provisions of this Code."

Questions 1-3 Stated by the Tribunal

[18] The first three questions stated by the Tribunal can be conveniently dealt with together as they all involve consideration of the same question, namely, was the Tribunal correct to apply the provisions of the **Labour Code** rather than those of the **Employment Act** in determining the dispute, notwithstanding that the latter legislation was in force at the times of the dismissal on 30th November 2011 and the application to the Tribunal on 6th November 2012?

[19] Questions 1 and 2 indicate the view of the Tribunal that there was a conflict or inconsistency between the provisions of the **Employment Act** and the **Labour Code** with the result that pursuant to section 186 of the **Code**, the Tribunal had to apply the provisions of the Code.

[20] Section 186 contemplates inconsistency between provisions of the Labour Code and any other enactment relating to labour matters. The only other legislation that may have been relevant to the determination of the dispute before the Tribunal was the **Employment Act**, which had by then been repealed by section 187(1) of the **Labour Code**.

[21] The **Montserrat Interpretation Act**[19] is a general Act that applies, by virtue of section 3(1), to the interpretation of all enactments in the Territory. Part 12 of this Act deals with repeal and amendment of legislation. Section 71 provides that the repeal of an Act does not, inter alia:

> "(b) affect the previous operation of the enactment so repealed or anything duly done or suffered under it;
>
> (c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;
>
> (d) …
>
> (e) affect an investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c)…
>
> and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed."

[22] Section 72 states, inter alia:

> "Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefore-
>
> (a) …
>
> (b) ...
>
> (c) a proceeding taken under the former enactment is to be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

[19] Act No. 12 of 2011.

(d) the procedure established by the new enactment must be followed as far as it can be adapted—

(i) …
(ii) in the enforcement of rights, existing or accruing under the former enactment; and
(iii) in a proceeding in relation to matters that have happened before the repeal;"

[23] The material words of section 187(2) of the **Labour Code** appear to be as follows:

"(2) Despite the repeal of the enactments mentioned in subsection (1),any … application … under any of the repealed enactments, shall, if in force on the date immediately prior to the coming into force of this Code, continue in force … and shall, so far as it could have been made, issued, given or done under this Code have effect as if made, issued, given or done under the corresponding provisions of this Code."

[24] As illustrated above, the provisions of the **Labour Code** deal, in respect of the termination of employment unfairly and the machinery for seeking remedies therefor, with matters that had been previously the subject of the **Employment Act**. The **Labour Code** must therefore be treated as legislation that substituted for repealed legislation under section 72 of the **Interpretation Act**. This is borne out by the **Labour Code's** long title as "An Act to consolidate, amend and update labour legislation in Montserrat".

[25] The effect of the repeal of the **Employment Act** and its substitution with the **Labour Code** was that: (i) the provisions of the **Employment Act** ceased to have effect save as provided for by section 71 of the **Interpretation Act** or the **Labour Code** as the repealing Act and (ii) the proceeding commenced by the respondent before the Labour Tribunal in November 2012 and any accrued right of the respondent or obligation of the appellant under the **Employment Act** continued to have effect notwithstanding its repeal. No question of the retrospective operation of the **Labour Code** therefore arises.

[26] Because the **Labour Code** was substituted for the **Employment Act** with respect to disputes between employers and employees, the proceeding initiated by the respondent had to be taken up and continued under and in conformity with the **Labour Code** so far as this could be done consistently with the **Code** and the procedure under the **Code** had to be followed as far as it could be adapted in the enforcement of the rights existing under the **Employment Act** in proceedings in relation to matters that happened before the repeal of that Act. Provided the procedure could be continued under the **Code**, there could be no inconsistency as only the provisions of the **Code** could apply. An inconsistency or conflict could only arise if there were two or more possible courses which were either inconsistent or in conflict with one another.

[27] The first consideration is whether it was consistent with the **Code** that the proceedings initiated by the respondent under the **Employment Act** be continued under the **Code**. As can be seen from the summary of the relevant sections of the legislation above, both the **Employment Act** and the **Code** provided for the right of an employee not to be unfairly dismissed and for access to the Labour Tribunal for redress where there was an allegation of unfair dismissal. Both the **Employment Act** and the **Code** provide for the obligation of an employer to pay compensation where he failed to discharge the onus on him to prove that the dismissal was in accordance with the legislative provisions. It is therefore consistent with the **Code** for proceedings commenced under the **Employment Act** to be continued under the **Code**.

[28] The second consideration is whether the procedure under the **Code** could be adapted in relation to matters under the **Employment Act** and in the enforcement of rights and obligations under the **Employment Act**. Section 23(3) of the **Labour Code** provides that subject to the making of rules by the Governor for its procedure, the Tribunal is to regulate its own procedure. In the instant case, it does not appear that any significant procedural steps took place under the **Employment Act** between the date of commencement of the proceedings in

November 2012 and the date of repeal of that Act in December 2012, so there should be no concern about the adaption of the procedure under the **Code** to the complaint by the respondent and the enforcement of her rights under the **Employment Act**.

[29] Section 187(2) of the **Labour Code** merely confirms that if the application (to the Tribunal) could have been made under the **Code**, it continues as if it had been so made. I do not doubt that the application in issue could have been made to the Tribunal under the **Code** as it was made to enforce a right that existed both under the **Employment Act** and the **Labour Code**.

[30] Under the **Employment Act**, the respondent had the substantive right not to be dismissed unfairly and the corresponding obligation lay on the appellant, as her employer, not to dismiss her unfairly. A similar right exists under the **Labour Code**. Under each enactment, the Tribunal has the statutory jurisdiction to make an order for compensation in respect of this right.

[31] Mr. Allen, QC. for the appellant, argued that because the **Employment Act** provided for a cap on the amount of compensation that the Tribunal could award, the proceedings before the Tribunal could not have been continued consistently under the Labour Code. I do not agree. Mr. Carrott, for the respondent's, argument that the cap merely goes to the jurisdiction of the Tribunal rather than to any right of the employee, has compelling logic. As considerations of compensation relate to obligations of the employer, I find it difficult to analyse the cap in terms of a "right" of the employer.

[32] With respect to the third question posed by the Tribunal, the effect of the **Interpretation Act** is that the Tribunal was obliged to proceed, as it did, under the **Labour Code** and not the repealed **Employment Act** and as I have determined above, the issue of inconsistency between the repealed and current legislation does not arise.

[33] I therefore conclude on questions 1-3 posed by the Tribunal that the Tribunal was not wrong in law to apply the provisions of the **Labour Code** to the determination of the dispute between the parties but I come to this conclusion on different grounds from those of the Tribunal.

Question 4

[34] **J Coulson v Felixstowe Dock & Railway Co** is a decision of the Industrial Tribunal in England. Mr. Coulson, after prolonged absences over several years due to ill health, had been dismissed on the ground of incapability when, on being given a further opportunity to prove that he was able to carry out his duties as a working ship foreman, he had to take a further leave of absence that exceeded, at the time of his dismissal, 6 weeks. The question to be determined by the Industrial Tribunal was whether his dismissal was fair. The Industrial Tribunal found the dismissal to be fair in all the circumstances and indicated that in considering the fairness of the dismissal, they had to take into account the fairness of that course of action to both the employer and the employee.

[35] The Tribunal below distinguished the **J Coulson** decision on the ground that the respondent did not have a poor record of illness as had Mr. Coulson and there was no evidence that her sensitivity to cold had affected her capability on the job. The question posed by the Tribunal was in essence whether they were wrong in finding that the appellant had failed to discharge the burden of proof that it acted reasonably in dismissing the respondent.

[36] Mr. Allen, QC, submitted that the dismissal was fair in all the circumstances. He argued that what the respondent was asking for, effectively a special environment in which she could work, would 'put a strong financial demand on the Company' and if they could not meet her demand and she would not accept what Mr. Bramble, who had assisted the respondent at her meeting with the appellant's representatives, had negotiated for her, there was no alternative but to dismiss her.

[37] The Tribunal accepted that there was some confusion created by the respondent's doctor's reference to her working in an alternative environment but that this could have been, but was not, clarified by the appellant before dismissing the respondent. The Tribunal further considered that at the meeting between the appellant's representatives and the respondent and her representative, a suggestion was made by Mr. Bramble that the A/C unit, which had been accepted by all to be obsolete, cold and unable to be regulated, could be replaced by one which could be controlled and the respondent could wear a jacket. The respondent did not object to this suggestion. The appellant's response was that it was not practical to change the unit as it was functioning. Five days later, the A/C technician recommended a change of the unit and a new unit, capable of regulation, was installed shortly thereafter. The Tribunal concluded that the appellant made no effort to alleviate the situation so as to allow the respondent to return to work and did not act reasonably in dismissing the respondent.

[38] I see no reason to disagree with the conclusion reached by the Tribunal on the fairness of the dismissal. This is an issue that the **Labour Code** requires them to determine and they directed themselves properly on the law by considering the reasonableness of the actions taken by the employer in the circumstances to both the employer and the employee in determining whether the dismissal was fair. I find therefore that the Tribunal actually applied the ratio of **J Coulson v Felixstowe Dock & Railway Co** while distinguishing the facts of that case, which I agree were completely different from those in the instant case for the reasons given by the Tribunal. I therefore find that in relation to the fourth question, the Tribunal was correct to distinguish the decision in **J Coulson v Felixstowe Dock & Railway Co** on the evidence**.**

Question 5

[39] This was the additional question posed by the Court of Appeal concerning the heads of compensation awarded to the respondent.

[40] The Tribunal is to be guided by section 27(1) of the **Code** in making an award of compensation. The section states as follows:

> "(1) The Tribunal in the exercise of its powers shall—
>
> (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the parties and the community as a whole;
>
> (b) act in accordance with equity, good conscience and the substantial merits of the case before it, with due regard to the principles and practices of good industrial relations."

[41] The wording of this subsection is materially similar to that of section 10(3) of the **Antigua and Barbuda Labour Code**[20] which was considered by this Court in **Antigua Village Condo Corporation v Jennifer Watt**[21] where Floissac CJ held that:

> "The legislative intention clearly expressed in section 10(3) of the Act is that an award (including an award of compensation for unfair dismissal) should be fair and just and that the fairness and justice of the award should be determined by reference to the interests of the employer, the employee and the community as a whole … and the principles and practices of good industrial relations. Accordingly, an award of compensation for unfair dismissal should be held to be unfair and unjust if the award is a mere aggregation of the amounts of the losses suffered or likely to be suffered by the employee under various heads of loss and if the amounts of the heads of loss are calculated without due regard to the interest of the employer and the community as a whole and without making those reductions, deductions, discounts, allowances and mitigations which the principles of compensation in general and the principles and practices of good industrial relations in particular require to be made in protection of those interests and in behalf of the general fairness and justice of the award."

The Tribunal must also have regard to the matters set out in section 68(2) of the **Labour Code**. The award must therefore be examined in light of these principles.

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[20] Cap. 27, Revised Laws of Antigua and Barbuda 1992.
[21] ANUHCVAP1992/0006 (delivered 7th February 1994, unreported) at pp. 3 - 4.

[42] The first head of compensation awarded was for a lump sum pension which the Tribunal awarded on the basis that the respondent had indicated that if she had known that she would be dismissed on medical grounds, she would have resigned in order to receive her full benefit. Section 76 of the **Labour Code** provides that an employee is entitled to a gratuity upon retirement at the retirement age or resignation after 10 years' service and is entitled to the greater of any retirement benefit or the gratuity under that section.

[43] A gratuity and *ipso facto* a retirement benefit are therefore payments to be made upon the voluntary termination of employment by an employee who has met certain statutory criteria as to length of service and/or age. Can they also be part of compensation to be made for unfair dismissal by the employer? I believe that the wide discretion given to the Tribunal under section 27 of the **Code** does not rule out the consideration of such a benefit as part of the compensation due for unfair dismissal. However, the onus must be on the dismissed employee to prove the loss suffered as a result of the dismissal.[22] If the employee can therefore satisfy the Tribunal that as a result of the dismissal which has been determined to have been unfair, she has lost a retirement benefit, it should be in the interests of the parties and the community as a whole to have the employee compensated for the loss of this benefit.

[44] Did the respondent discharge that onus? The Tribunal, in its finding, records that the respondent explained that if she was told in advance that they were thinking of medical retirement, she would have resigned from the company in order to receive her full benefits, i.e. a lump sum pension of $170,698.45. Under cross examination, the respondent stated that she did not request information from CLICO 'which holds the fund and would write and explain what my benefits are'.[23] I find that if the Tribunal had properly considered this evidence, it would have had

[22] See Watt at p. 9 where Floissac CJ stated: "the onus is on the unfairly dismissed employee to prove the probability of loss upon which an award of compensation is based …".
[23] Notes of evidence, record of appeal, p. 25.

to conclude that the respondent's evidence, on which the Tribunal relied, was merely speculative and that there was no direct evidence that the dismissal caused her to lose any retirement benefit to which she would have been entitled if she had resigned as at the date of dismissal. The respondent's further evidence under cross examination that she would have been entitled to a lump sum of approximately $180,000 if she had resigned appears to have been equally speculative on her part and was correctly not considered by the Tribunal.

[45] A letter dated 22nd October 2012, labelled "MK 11",[24] was put into evidence at the hearing before the Tribunal. This was correspondence from the appellant to the respondent which stated in part:

> "1. Having received confirmation of the benefits due to you under the Montserrat Staff Pension Plan (MSPP) from CLICO, MUL is prepared to advance the payments to fulfil the obligations under the pension plan as outlined below, with the understanding that when the CLICO matter is resolved all sums paid to you would be recovered from the funds realized."

This correspondence contained a schedule stating that the figure of $170,698.45 was the amount available to the respondent under the Pension Plan[25]. This was the figure eventually used by the Tribunal in its award. The respondent refused this offer in her letter to the appellant of 3rd December 2012.[26]

[46] The letter of 22nd October 2012 suggests, and there is no evidence to the contrary, that the proper inference to be drawn is that the respondent did not actually lose a retirement benefit as a result of her dismissal. This must follow from the fact that the appellant was offering to pay the benefit but expected to recoup it from her at some point in the future. The loss to the respondent, if any, must have been limited to any future growth of the pension fund and the corresponding benefit that would be due to the respondent, from future contributions that both the employer and the employee could have been expected to make under the terms of both the

[24] Record of appeal, p. 140.
[25] Record of appeal, p. 153.
[26] Record of appeal, p. 142,

contract of employment and the rules of the fund. No evidence was lead of this and no corresponding attempt was made by the Tribunal to calculate such loss.

[47] The letter of 22nd October 2012 also suggests that the benefit arose under a fund administered by a third party, CLICO, to which both employer and employee had contributed. The obligation to pay the retirement benefit therefore was not an obligation of the employer but that of the fund. An award by which the employer was to pay the retirement benefit without giving any consideration to the terms of the pension fund, which were not in evidence, and specifically to any question of entitlement to a benefit that would arise from the fund, carries the risk the respondent may eventually get a double benefit if she is entitled to payment from the fund in the future and that there may be further litigation as to whether the employer should recoup such payment. In my mind, such an award could not be fair and just to both the employer and the employee.

[48] I am not satisfied therefore that the respondent discharged the onus on her to prove that she lost the retirement benefit as a result of her unfair dismissal. I am also of the view that it could not be reasonably considered to be in the interests of both the employer and employee that the appellant should be made to pay the retirement benefit in circumstances where there was no provision for reimbursement of such payment if any benefit were payable from the pension fund. As indicated above, neither the respondent nor the Tribunal appeared to have considered the correct basis on which loss of retirement benefits may have occurred in the instant case.

[49] Mr. Carrott for the respondent argued that in any event the respondent had an entitlement to the retirement benefit so that even if it were not strictly a matter of compensation for unfair dismissal, this part of the award should not be set aside. The difficulty with this argument is that it ignores the crucial consideration that this entitlement is as against the pension fund and not the employer. It therefore could not be fair and just to make the award against the employer unless it could be

established that the employer had caused any loss of such entitlement, or possibly, where fairness and the substantial merits of the matter demanded that the employer should make such payment initially with provision to recoup it from the fund. I would therefore set aside this head of the award.

[50] The second head of the award was payment for loss of earnings between the date of dismissal and date of the ruling of the Tribunal, which was approximately 2 years. In **Watt** at page 5, Floissac CJ had little difficulty with making an award under this head, stating:

> "An unfairly dismissed employee is obviously entitled to compensation for immediate loss of earnings (i.e. loss of earnings between the date of the dismissal and the date of the trial or judgment)."

His view was that this loss was recoverable subject to the employee's duty to mitigate. The Tribunal's finding was that the respondent did attempt to mitigate her loss by seeking alternative employment without success and that her age militated against her in this regard.

[51] During the course of his oral submissions, Mr. Carrott sought to make a concession that any damages under this head should only be calculated with reference to the date of the hearing rather that the date of the ruling of the Tribunal. I do not accept this concession in light of the wording of section 68(2)(b) of the **Labour Code** which permits the Tribunal to take into account, inter alia, earnings lost by the employee on account of the dispute up to the date of determination of the issue by the Tribunal.

[52] Mr Allen, QC, did not seek to challenge these findings but instead argued, admittedly for the first time before this Court, that there should be a deduction from the award because of (i) the length of time before the proceedings were commenced before the Tribunal; and (ii) the length of time that the Tribunal took to deliver its ruling. Mr Allen, QC, prayed in aid of his submission section 20 of the

Interpretation Act which requires a thing to be done with all convenient speed where no time is prescribed within which it is to be done.

[53] The dismissal letter was dated 24th November 2011.[27] In evidence before the Tribunal was a letter dated 19th December 2011 from the respondent, labelled "MK10A",[28] in which the respondent indicated that the 'so called "Medical Retirement' fiasco" was now in the hands of her attorneys. The next correspondence in chronological sequence before the Tribunal was that from the appellant dated 22nd October 2012 offering to advance the retirement benefit due under the pension plan. The respondent applied to the Tribunal by letter dated 6th November 2012 from the same attorney to whom she referred to in her letter of 19th December 2011. No evidence was led before the Tribunal of any reason why the application was not made for almost one year after the effective date of the dismissal and the appellant made no submission to the Tribunal on this issue for reasons given to this Court which, out of courtesy to Mr. Allen, QC, I would do no more than describe as completely unattractive.

[54] The first hearing before the Tribunal was on 27th February 2013 and this was adjourned to 24th April 2013 on the application of the respondent to accommodate her counsel. The hearing eventually started on 29th April 2013 and the evidence and submissions were completed by 2nd May 2013. The ruling was delivered 7 months later on 5th December 2013.

[55] I am prepared to distil from Mr Allen, QC's, argument what I understood to be its core proposition, namely, that if a claimant is entitled to damages for loss of earning up to date of judgment subject to his duty to mitigate such loss, then a court is entitled to consider whether the time spent in commencing and prosecuting the claim in reference to which damages for loss of earning is awarded should also be subject to the duty to mitigate.

[27] Record of appeal, p. 136.
[28] Record of appeal, p. 139.

[56] Mitigation is concerned with avoiding consequences of a wrong and the rule, as stated in **McGregor on Damages**,[29] is that a claimant must take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. In **Darbishire v Warran**[30] Pearson LJ put it this way:

> "it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "to minimise the damage". The [claimant] is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the claimant is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant."

The employee's 'duty to mitigate' is given a statutory basis in section 68(2)(e) of the **Labour Code**.

[57] If the rule is that a defendant should not be forced to compensate a claimant for loss that the claimant has failed to avoid through unreasonable action or inaction, then in principle I accept that the award of loss of earnings up to the date of judgment, which is undoubtedly subject to this rule with respect to steps taken to obtain alternative employment by the claimant, should be equally subject to this rule with respect to the length of time that the claimant spends in bringing and prosecuting his claim, as both impact on the quantum of compensation which a defendant may be obliged to pay.

[58] Nevertheless, I have come to the conclusion that the principle does not apply in the appellant's favour in the instant case for the following reasons. The principle of mitigation involves the consideration of the reasonableness of the conduct of the claimant. In **Sotiros Shipping Inc. and Another v Sameiet Solhot, The**

[29] (18th edn., 2009), at para. 7-004.
[30] [1963] 1 WLR 1067at p. 1075.

Solhot,[31] Donaldson MR stated: 'whether a loss is avoidable by reasonable action on the part of the claimant is a question of fact not law'. In **Geest plc v Lansiquot**,[32] Lord Bingham of Cornhill in delivering the reasons of the Privy Council stated:

> "It should, however, be clearly understood that if a defendant intends to contend that a [claimant] has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the [claimant] long enough before the hearing to enable the [claimant] to prepare to meet it. If there are no pleadings, notice should be given by letter."

Earlier in the decision, the Board held that the onus of proof of mitigation lies with the defendant.

[59] It was therefore for the appellant, as the defendant before the Tribunal, to give reasonable notice to the respondent of its intention to take the point of mitigation and it was further for the appellant to discharge the burden of proof that there was unreasonable inaction on the part of the respondent, i.e. she failed to act with all convenient speed in bringing or prosecuting her claim. Mr Allen, QC's, submission makes it clear that neither was done. The transcript of evidence does not show that any evidence was addressed to this issue. The appellant has not therefore discharged the onus on it to prove that there had been unreasonable inaction on the part of the respondent in commencing the claim in November 2012. Equally, the appellant has not demonstrated that the respondent was responsible for the length of time that the proceedings took before the Tribunal. There was one adjournment requested by the respondent in February 2013 due to the unavailability of her counsel. This was not unreasonable since the appellant was also represented by counsel and there does not appear from the record to have been any objection on the part of the appellant to the adjournment in any event. Any other delay in the proceedings appears to have been the responsibility of the Tribunal itself and the consequences of this cannot be visited upon the

[31] [1983] 1 Lloyd's Rep 605 at p. 608.
[32] (2002) 61 WIR 212 at p. 219.

respondent. I therefore refuse to interfere with the award by the Tribunal of 2 years' salary for loss of income.

[60] The respondent sought and was awarded damages for injury to her feelings arising from the dismissal in the sum of $50,000. It is well accepted that at common law damages are not awarded under this head for wrongful dismissal.[33]

[61] It seems that Mr. Carrott for the respondent accepted this reasoning applied equally to compensation for unfair dismissal under the **Labour Code** as he submitted that notwithstanding the label given by the Tribunal itself to this award and the fact that the respondent had sought an award for injury to feelings, the award of $50,000 should be regarded as being for future loss of earnings and for the circumstances of her dismissal including the fact that the appellant had provided the respondent with a mortgage and she was unable to pay the mortgage. I am satisfied, however, from my review of the record of the proceedings before the Tribunal that Mr. Carrott had submitted to the Tribunal that the respondent should be awarded $50,000 for injury to feelings and severe indignation suffered by the respondent and this was the basis on which the award was made.

[62] The question nevertheless arises whether compensation for injury to feelings is to be awarded under the provisions of the **Labour Code**. Although injury to feeling is not a matter that the Tribunal is required specifically to take into account under section 68, consideration under this head is not excluded by that section. In principle, every dismissal that is unfair is likely to cause an injury to the feelings of the employee who has been unfairly treated. The legislative scheme and scope of damages for unfair dismissal therefore must have taken into account the normal and natural effect on the employee of having been unfairly treated. However, to justify a specific award of damages for injury to feelings arising from the dismissal

[33] See Addis v Gramophone Co Ltd [1909] AC 488 at p. 491, where Lord Loreburn LC stated: "If there be a dismissal without notice the employer must pay an indemnity; but, that indemnity cannot include compensation either for the injured feelings of the servant …".

there should at the very least be a finding of an aggravating factor, i.e. one which makes the dismissal so unfair in all the circumstances that a Tribunal acting in good conscience and applying the practices of good industrial relations is able to conclude that it is fair and just that compensation be awarded on this head. With that said, it is more reasonable than not to conclude that in principle compensation may be awarded under this head under the **Labour Code**.

[63] In **Watt** at page 6, Floissac CJ set aside an award of compensation for the manner and circumstances of dismissal holding that:

> "The Industrial Court therefore wrongly awarded compensation for the manner and circumstances of the dismissal instead of rightly awarding compensation for the financial consequences (if any) of the manner and circumstances or for the financial loss (if any) likely to be incurred as a result of the manner and circumstances."

Thereby reinforcing that notwithstanding its social element, a contract of employment is still a contract and compensation for its breach by the employer is rooted in the pecuniary loss suffered by the employee arising from such breach that is not too remote. In **Watt**, the employee was dismissed on grounds of redundancy which the Tribunal found had not been made out by the employer. As a result the dismissal was unfair under the provisions of the Antiguan labour legislation. There was no finding of an aggravating factor in the dismissal.

[64] In the instant case, the Tribunal made no finding of aggravating factors in the dismissal or that there were financial consequences of the injury to feelings suffered by the respondent. With respect to Mr. Carrott's argument that the compensation should be regarded as being, inter alia, for the respondent's inability to pay her mortgage and future loss of earnings, these are both heads of damage that are quantifiable but the Tribunal made no effort to do so. The transcript of the hearing before the Tribunal reveals that Mr. Carrott had made submissions on the head of future loss of earning to the Tribunal which the Tribunal appears to have rejected. Although the Tribunal did state that it considered, inter alia, the respondent's inability to pay her mortgage, it did not find that there was a

pecuniary loss associated with such inability and in any event it is difficult to see how such loss could be related to the manner and circumstances of the dismissal rather than being an effect of the dismissal itself.

[65] Mr. Carrott in the alternative sought to justify the decision to award damages for injury to feeling based on the decision of the Caribbean Court of Justice in **Mayan King Ltd v Reyes and others**[34]. In **Mayan King**, the claimants were employed on farms in Belize on terms that included the permission for them to construct accommodation for them and their families on the employer's premises. They alleged that they were dismissed by their employer because of their participation in trade union activities.

[66] The Belize **Trade Unions and Employers' Organizations (Registration, Recognition and Status) Act**[35] section 11 provides that a person who considers that any right conferred on him under that Part of the Act has been infringed may apply to the Supreme Court for redress and where such a complaint is made alleging a contravention of the Act by the employer, the burden of proof that there has been no contravention of the Act lies on the employer. The court in determining the appropriate redress has the discretion to reinstate the employee or make such orders as it may deem just and equitable taking into account the circumstances of the case.

[67] The employer sought to justify the dismissal of the claimants on the basis of economic necessity and restructuring of their operations.

[68] The Belizean courts held that the employer had failed to discharge the onus of proof that the dismissals were not as a result of the employees' trade union activities and awarded compensation to the workers, inter alia, for injury to feelings and hurt to pride.

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[34] [2012] CCJ 3 (AJ).
[35] Cap 304, Revised Laws of Belize 2000.

[69] In the Caribbean Court of Justice, the majority held that the legislation created a new cause of action in Belize, namely dismissal in violation of the statutory right under section 4(2) of the Act, and found that "[t]hese rights and obligations depart from existing common law and from traditional unfair dismissal statues in at least three important respects".[36]

[70] That decision therefore concerned an award of damages for breach of a statutory right peculiar to Belize. While the majority of the Court upheld the award of Belizean courts for damages for distress and inconvenience, they reduced the amounts awarded under this head by 50% of the figure awarded by the Belize Court of Appeal which itself had reduced the figure awarded by the High Court. The award under this head flowed from the finding that there was an aggravating factor, namely that the dismissal of the workers led to their, and in some cases, their families', eviction from the compound of the employers where they lived on barely 24 hours' notice.

[71] The **Mayan King** decision is not therefore authority for a general principle that damages for injury to feelings are awardable for unfair dismissal. It does, however provide an illustration of the aggravating factors that a Tribunal may consider in determining whether in all the circumstances it is fair and just and in accordance with the principles and practices of good industrial relations to make such an award in a specific case. It is noteworthy that the awards under this head confirmed by the Caribbean Court of Justice in **Mayan King** were considerably less than the award of the Tribunal in the instant case and the reasoning adopted by that Court made it clear that awards in similar circumstances are unlikely to be substantial.

[72] Having regard to the foregoing, and in light of the fact that the Tribunal did not make any finding of an aggravating factor in the instant case, I would set aside the award of $50,000 for injury to feelings made by the Tribunal.

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[36] At para. 4.

[73] Section 51(6) of the **Labour Code** states that upon the termination of employment an employee is entitled to vacation pay for vacation earned but not taken and section 68(2)(a) specifies that this is one of the considerations for the Tribunal in making an award of damages for dismissal in breach of the **Labour Code**. Mr. Allen, QC, properly did not contest this head of the award. Mr. Carrott, at the end of his submissions to the Tribunal, corrected the figure claimed for the respondent's 8 days' outstanding vacation at the time of her dismissal to $1,836.45. It appears that the Tribunal mistakenly used his earlier figure in making the award. I would therefore vary the award of the Tribunal under this head by reducing it to $1,836.45.

[74] The final awards, contributions to the pension fund and social security contributions, can be conveniently dealt with together. These relate to the appellant's contributions to the pension plan and social security on behalf of the respondent and should have formed part of her wages which are defined in section 2 of the **Labour Code** as 'money or any other benefits … paid or contracted to be paid … as … remuneration for services rendered …'.

[75] Section 68(2)(b) of the **Labour Code** mandates that the Tribunal should take into account 'wages and other remuneration lost by the employee on account of the dispute up to the date of determination of the issue by the Tribunal'. I find therefore that the respondent has a statutory right to the benefit of these contributions as part of the "other remuneration" to which she was contractually entitled and which should have been paid to the respective funds by the appellant for the relevant period.

[76] I therefore do not agree with Mr. Allen, QC's, submission that the Tribunal had no jurisdiction to make such awards. Mr. Carrott in his submissions to the Tribunal gave the figures for the contributions to the pension fund and social security contributions which the Tribunal accepted. These figures were not contested by

the appellant before the Tribunal. I find therefore that there is no reason to interfere with either of these awards.

Conclusion

[77] I therefore agree with the conclusions reached by the Tribunal with respect to Questions 1 through 4 of the Case Stated. With respect to Question 5, I propose to vary the award of the Tribunal by disallowing the award of the pension and accrued interest and the award for injury to feelings and varying the award for loss of vacation pay to $1,836.45.

[78] As each party would have had some success on this appeal, I order that each party should bear his own costs of the appeal

John Carrington, QC
Justice of Appeal [Ag.]

I concur.

Mario Michel
Justice of Appeal

I concur.

Tyrone Chong, QC
Justice of Appeal [Ag.]