Privy Council Appeal No. 35 of 1991

Sundry Workers (represented by The Antigua Workers Union) *Appellants*

v.

The Antigua Hotel and Tourist Association *Respondents*

FROM

THE COURT OF APPEAL OF ANTIGUA AND BARBUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST FEBRUARY 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD WOOLF

*[Delivered by **Lord Bridge of Harwich**]*

This appeal arises out of a dispute between workers (the appellants before the Board) and employers (the respondents before the Board) in four hotels in Antigua. In 1983 the workers, through their trade union, and the employers, through their association, were in negotiation over the terms of a proposed new collective agreement. When no agreement was reached the issue was referred under a statutory conciliation procedure to the Minister of Labour who in due course proposed a compromise of the dispute which the workers were prepared to accept but the employers rejected. This produced an impasse. On 23rd December 1983 two events occurred simultaneously: the union called the workers out on strike; and the Minister of Labour referred the dispute between the parties to the Industrial Court. On 25th December the union called off the strike and all the workers sought to return to work on either 25th or 26th December, but the employers treated them as having repudiated their contracts of service and were only willing to re-engage them under new contracts. The workers promptly instituted proceedings in the High Court and on 30th January 1984 Byron J. declared that the

[1] strike action taken by the workers did not amount to an

abandonment of their employment and he enjoined the employers from treating the workers' contracts of service as having been terminated thereby. But he further declared that by reason of the proceedings pending before the Industrial Court pursuant to the reference made by the Minister of Labour the strike was illegal as contravening section 20 of the Industrial Court Act 1976. The employers thereupon gave notice dismissing the workers as from 31st January 1984 on the ground of their participation in an illegal strike.

The workers in due course instituted proceedings in the Industrial Court claiming that their dismissal on 31st January 1984 had been unfair and claiming compensation. The hearing of these proceedings was spread over 26 sitting days between 30th June 1987 and 9th November 1988. On 18th May 1989 the court delivered a short, unanimous judgment holding the dismissals to have been unfair and awarding compensation. The employers appealed to the Court of Appeal who, in a judgment delivered on 11th June 1990, reversed the Industrial Court, holding that the dismissals had not been unfair. The workers applied to the Court of Appeal for leave to appeal to Her Majesty in Council, but on 25th February 1991 a differently constituted Court of Appeal held that no appeal lay to Her Majesty in Council from a decision by the Court of Appeal determining an appeal from a judgment of the Industrial Court. On 24th July 1991 special leave to appeal against both judgments of the Court of Appeal was granted by Her Majesty in Council.

The jurisdiction issue.

The first question falling to be determined is whether any appeal lies to Her Majesty in Council from a decision of the Court of Appeal of Antigua and Barbuda determining an appeal from a judgment of the Industrial Court, and, if so, whether, in the circumstances of this case, the appeal lies as of right or only pursuant to the grant of special leave, a distinction which, it is said, may affect the manner in which the appeal is to be decided.

The Industrial Court was established by the Industrial Court Act 1976. Section 17 of the Act has the side note "Appeal on point of law" and provides, so far as material:-

> "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, ...
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> (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.

...

(4) Subject to subsection (1), the hearing and determination of any proceedings before the Court, and an order or award or any finding or decision of the Court in any matter (including an order or award) -

(a) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever; and

(b) shall not be subject to prohibition, *mandamus* or injunction in any court on any account whatever."

Section 122 of the Constitution of Antigua and Barbuda, set out as Schedule 1 to the Antigua and Barbuda Constitution Order 1981 (S.I. 1981 No. 1106), provides:-

"122.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -

(a) final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the prescribed value or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and

(d) such other cases as may be prescribed by Parliament.

(2) Subject to the provision of section 44(8) of this Constitution, an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -

(a) decisions in any civil proceedings where in the opinion of the Court of Appeal the

question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and

(b) such other cases as may be prescribed by Parliament.

(3) An appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court of Appeal in any civil or criminal matter.

(4) Reference in this section to decisions of the Court of Appeal shall be construed as references to decisions of the Court of Appeal in exercise of the jurisdiction conferred upon that court by this Constitution or any other law for the time being in force.

(5) In this section the prescribed value means the value of fifteen hundred dollars or such other value as may be prescribed by Parliament."

The Court of Appeal held, first, that section 17(4)(a) of the Act of 1976:-

"... effectively rules out any further appeal to Her Majesty from a decision of the Court of Appeal on whom the jurisdiction to hear appeals from the Industrial Court is expressly conferred under section 17(1) of the Act."

Their Lordships cannot agree. Section 17(4) confines an appeal from the Industrial Court to the Court of Appeal to the grounds set out in subsection (1) and precludes any collateral challenge to a decision of the Industrial Court by judicial review or otherwise. But once the Court of Appeal has entertained an appeal from the Industrial Court and given its decision thereupon, section 17(4) ceases to be of any relevance. The question whether an appeal lies from the decision of the Court of Appeal to Her Majesty in Council then falls to be determined in accordance with section 122 of the Constitution and their Lordships can see no arguable ground for excluding such a decision from the ambit of the phrase "any decision of the Court of Appeal in any civil or criminal matter" in section 122(4) from which an appeal lies with the special leave of Her Majesty.

The appellants, however, contend that no special leave was required and that they are entitled to appeal as of right pursuant to section 122(1)(a). It is common ground that the amount of the compensation awarded by the Industrial Court exceeds "the prescribed value" under that provision. The Court of Appeal rejected this contention on the ground that disputes before the Industrial Court under the Act of 1976, decisions of that court and appeals therefrom are not "civil proceedings" within the meaning of that phrase in section 122. They referred to certain provisions of the

Rules of the Supreme Court 1970 and contrasted the procedures before the Industrial Court. They appeared to take the view that the phrase "civil proceedings" in section 122 of the Constitution applied only to proceedings originating in the High Court.

Mr. Guthrie, for the respondents, submitted that this was the correct construction of section 122 and their Lordships have had the advantage of his careful argument which, very properly, examined the antecedent history of legislative provisions governing appeals to Her Majesty in Council from Antigua. Before Antigua and Barbuda obtained full independence under the 1981 Constitution, Antigua was one of the West Indies Associated States established under the West Indies Act 1967. The Supreme Court for the Associated States was established by the West Indies Associated States Supreme Court Order 1967 (S.I. 1967 No. 223) and appeals to Her Majesty in Council from the Court of Appeal, which formed part of the Supreme Court, were governed by the West Indies Associated States (Appeals to Privy Council) Order 1967 (S.I. 1967 No. 224) which provided by section 3:-

> "An appeal shall lie to Her Majesty in Council from decisions of the Court given in any proceeding originating in a State in such cases as may be prescribed by or in pursuance of the Constitution of that State."

The Constitution of Antigua established by the Antigua Constitution Order 1967 (S.I. 1967 No. 225) provided by sections 104 and 105 as follows:-

> "104. An appeal shall lie to the Court of Appeal in the following cases -
>
> (a) as of right from decisions of the High Court given in exercise of the jurisdiction conferred on that court by section 15 or section 51 of this Constitution (which relate respectively to the enforcement of the fundamental rights and freedoms provisions and the determination of questions relating to membership of Parliament);
>
> (b) as of right from final decisions of the High Court in any civil or criminal proceedings on questions as to the interpretation of this Constitution;
>
> (c) from decisions of the High Court or any other court or tribunal established for Antigua in such cases as may be prescribed by Parliament.
>
> 105.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -

(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of fifteen hundred dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of fifteen hundred dollars or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution;

(d) final decisions determining any such question as is referred to in section 51(1) of this Constitution; and

(e) such other cases as may be prescribed by Parliament.

(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament.

(3) Nothing in this section shall affect the right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter.

(4) References in this section to decisions of the Court of Appeal shall be construed as references to decisions of the Court of Appeal in exercise of the jurisdiction conferred by this Constitution or any other law for the time being in force in Antigua."

These were the relevant provisions in force at the time when the Industrial Court Act 1976 was enacted and, as has already been seen, that Act provided by section 17 for a limited right of appeal to the Court of Appeal, which accordingly fell within section 104(c) of the Constitution. It is unnecessary to examine in detail the nature of the jurisdiction and procedure of the Industrial Court, but it is clear that "proceedings" is a perfectly apt word to describe disputes which the Industrial Court determines and indeed is the word used in section 17 and elsewhere in the Act

itself, in particular in the phrase "the parties to the proceedings" which is used in section 9. Under the 1967 Constitution it appears to their Lordships that in both sections 104(b) and 105(c) the phrase "any civil or criminal proceedings" and in section 105(3) the phrase "any civil or criminal matter" are used in a comprehensive sense to embrace proceedings or matters of every kind which are assumed to fall into the one category or the other. It is true, of course, that "proceedings" in section 104(b) are expressly confined to those originating in the High Court, as are those referred to in section 105(1)(c) by necessary implication, since the High Court alone has jurisdiction to determine questions as to the interpretation of the Constitution. But there does not appear to their Lordships to be anything in this context to justify the exclusion from the ambit of the phrase "civil proceedings" in sections 105(1)(a) or (2)(a) of proceedings which are civil not criminal in character but which come to the Court of Appeal from some court or tribunal inferior to the High Court. It is surely apparent that in any modern jurisdiction in the common law world, where so many issues fall to be determined by specialist tribunals, decisions on appeal from those tribunals may turn upon questions of "great general or public importance" and it would be an odd result if the true construction of section 105 of the 1967 Constitution led to the conclusion that the Court of Appeal had no power to give leave to appeal in such cases under subsection (2)(a) on the ground that they were not "civil proceedings", although leave could be obtained from Her Majesty in Council under subsection (2) on the ground that they were "civil matters". Their Lordships conclude that when the Industrial Court was established final decisions given by the Court of Appeal on appeals brought under section 17 of the Act of 1976 fell within section 105(1)(a) of the 1967 Constitution so that, if the amount in issue satisfied the criterion of value under that subsection, either party could appeal as of right to Her Majesty in Council.

Is the position any different under the Constitution of 1981? The provisions of section 122 have already been set out and a comparison of that section with section 105 of the 1967 Constitution reveals some minor differences of language but no difference of substance which is of any materiality to the question in issue. There is, however, one striking difference between section 104 of the 1967 Constitution in the corresponding section 121 of the 1981 Constitution. The latter provides:-

> "121. Subject to the provisions of section 44 of this Constitution, an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases -
>
> (a) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;

(b) final decisions given in exercise of the jurisdiction conferred on the High Court by section 18 of this Constitution (which relates to the enforcement of the fundamental rights and freedom); and

(c) such other cases as may be prescribed by Parliament."

Thus, it will be seen that the new Constitution entrenches only the right of appeal from the High Court to the Court of Appeal in the cases mentioned and omits the reference, which was included in the previous Constitution, to appeals from "any other court or tribunal established in Antigua in such cases as may be prescribed by Parliament". It is not for their Lordships to speculate as to the policy consideration which may have prompted this omission. But it is to be noted that section 104 of the 1967 Constitution was drafted to embrace the whole field of the Court of Appeal's jurisdiction, whereas 121 of the 1981 Constitution embraces only those appeals which are to lie as of right. It has not been, and indeed could not be, suggested that the omission of any express reference in the Constitution to appeals from courts or tribunals other than the High Court was intended to curtail the jurisdiction of the Court of Appeal to entertain such appeals under statutes such as the Industrial Court Act 1976, which continued in force. On the contrary, it is clear from section 122(4) that decisions of the Court of Appeal to which section 122 is to apply are to include decisions in the exercise of the jurisdiction conferred not only under the Constitution but also under any other law for the time being in force. Whatever other significance the difference in drafting between the old section 104 and the new section 121 may have had, their Lordships are satisfied that it cannot have been intended to effect a difference in the rights of appeal to Her Majesty in Council conferred by the new section 122 as compared with the old section 105.

Accordingly the appellants are entitled to appeal as of right.

The issue of unfair dismissal.

The question whether the dismissal of the appellants on 31st January 1984 was unfair fell to be determined in accordance with sections C 58 and C 60 of the Antigua Labour Code 1975, which provide as follows:-

"C 58. 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.

...

C 60.(1) A dismissal shall not be unfair if the reason assigned by the employer therefor -

(a) relates to misconduct of the employee on the job, within the limitations of section C 61(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 C 61(3);

(c) is that the employee was redundant;

(d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or

(e) is some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

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."

There has never been any suggestion that the dismissals could be justified under any paragraph of section C 60(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 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. They had heard evidence for 23 days including on the one hand the evidence of many of the dismissed workers describing the circumstances in which they had participated in the strike and on the other hand a number of witnesses on the management side of the hotels. They had had the advantage of three days of argument from the same learned counsel who subsequently presented the case to the Court of Appeal. Not surprisingly the short judgment of the Industrial

Court does not review all the evidence in detail, but gives a general account of the circumstances in which the strike began and ended and it is particularly directed to aspects of the matter reflecting on the degree of blameworthiness attaching to the conduct of the strikers on the one hand and the reasonableness of the employers' reaction to it on the other. The illegality of the strike arose under section 20 of the Industrial Court Act 1976 which makes it an offence for an employee to take part in a strike when proceedings are pending before the Industrial Court. The Court found that the union had given notice to the employers of the intention to call the strike at a time before there had been any reference made to the Industrial Court by the Minister of Labour. They held that the union "on learning of the illegality of the strike made every effort to contact the employees who responded to its directions to return to work". They pointed out that after the strike there had been no criminal proceedings instituted against either the union or any individual under section 20 of the Act of 1976. The employers, as the court found, had issued an ultimatum by posting notices requiring the workers to return to work by 7.00 a.m. on 25th December, indicating that, if they did not do so, they would be treated as having abandoned their employment but, as Byron J. had held, there had been no abandonment, so that in this respect the employers were acting under a misapprehension. The Court found that some of the workers had sought to return to work during the day on 25th December and the majority on the following day when the employers refused to permit them to return unless they abandoned their rights under their existing contracts of service and entered into new contracts. They pointed out that under the terms of their existing contracts of service which again, as Byron J. had found, continued in force, a disciplinary code provided that the penalty for a failure to report for work for a complete day without reasonable explanation was on the first occasion a reprimand, on the second occasion a warning, on the third occasion a suspension, and on the fourth occasion dismissal.

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. These were pre-eminently questions of fact for the Industrial Court to determine and there was abundant evidence to justify their conclusion that the dismissals were unfair.

Presumably the Court of Appeal, in reversing the decision of the Industrial Court, intended to do so under section 17(1)(d) of the Act of 1976 on the ground that the decision was erroneous in point of law. Their Lordships

have found some difficulty in following the reasoning in the single judgment, delivered by Moe J.A., with which the other members of the Court agreed and, in particular, in ascertaining what was the error of law on the part of the Industrial Court on which the Court of Appeal relied as the ground for allowing the appeal. The judgment sets out the grounds of appeal relied on by the employers in the following terms:-

> "(1) The Industrial Court erred in law in that they failed to appreciate or to address their minds properly or at all to the legal effect of an illegal strike on a contract of employment.
>
> (2) The Industrial Court erred in law in that they failed to appreciate or to address their minds properly or at all to the legal remedy available to an employer at law in the event of an illegal strike and that such remedy was in no way affected by the Antigua Labour Code, 1975 or by the Collective Agreement.
>
> (3) The Industrial Court erred in law in that they failed to appreciate the Criminal sanctions provided for by the Antigua Labour Code, 1975 did not displace the legal remedy available to an employer in the event of a strike in pursuance of a dispute which had been referred to the Industrial Court."

The judgment, as their Lordships think rightly, rejects the contention, which appears to be at the heart of these grounds of appeal, that the matter was not governed by the Antigua Labour Code. It identified the issues as those arising under section C 60(1)(e) and (2) of the Code. But the judgment then proceeds immediately to set out the Court of Appeal's own findings on these issues in two substantial passages headed respectively "Substantial reasons or not" and "Reasonableness of dismissal". It is only in the course of the latter passage that criticism is directed at the decision of the Industrial Court in the following terms:-

> "The Industrial Court considered the matter from the point of view of absence from work and appears to have considered that the employers' rights were only as provided for in the Collective Agreement between the parties. Whether an employer did not follow a procedure agreed upon in a Collective Agreement is only one factor to be taken into account in deciding whether in the circumstances of a particular case an employer acted reasonably in dismissing an employee; that is if the particular provision is at all relevant. In this case the absence from work was on account of conduct which amounted to a repudiation of the respective contracts and a breach of the law in the circumstances outlined above. ...

> It does not appear to me that the Industrial Court adequately directed its mind to the matters which ought to have been considered in determining the issue. Further it does not seem to me that despite the misdirection the tribunal's conclusion is unquestionably right."

In their Lordships' judgment the reference in the judgment of the Industrial Court to the penalties for absence from work provided in the collective agreement, which continued in force after the strike, does not indicate any more than that this was one of the relevant matters which the court, as it was entitled to do, took into account in arriving at its conclusion. Moreover, the Court of Appeal itself fell into error in holding that the absence from work "amounted to a repudiation of the respective contracts". This ignored the declaration made by Byron J. on 30th January 1984 which had never been challenged by the employers and was *res judicata*. Their Lordships accordingly conclude that the Court of Appeal was not entitled to reverse the decision of the Industrial Court that the appellants had been unfairly dismissed.

The issue of quantum.

The Court of Appeal, having found in the respondents' favour on the main issue, did not go on to consider the further ground of appeal by which the respondents sought to challenge the Industrial Court's awards of compensation as excessive and their Lordships have been invited to address that issue. The powers of the Industrial Court conferred by section 10 of the Act of 1976 include the following:-

> "(4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of an employee, order ... the payment of compensation or damages ...
>
> (5) An order under subsection (4) may be made where, in the opinion of the Court, an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice: and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.
>
> (6) The opinion of the Court as to whether an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to sub-section (5) shall not be

> challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever."

It appears to their Lordships that when the Industrial Court has found that employees have been unfairly dismissed the necessary implication of such a finding is that the dismissals were in circumstances that were "not in accordance with the principles of good industrial relations practice". From this it must follow that no appeal lies against the awards of compensation made by the Industrial Court in this case.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside and the order of the Industrial Court restored. The respondents must pay the appellants' costs before the Board.