[2010] UKPC 25
Privy Council Appeal No 0013 of 2010

JUDGMENT

Cable & Wireless (West Indies) Limited *v* Conrad Tonge (deceased) et al, represented by The Antigua and Barbuda Workers' Union

From the Court of Appeal of Antigua and Barbuda

before

Lord Phillips
Lord Walker
Lady Hale
Lord Mance
Lord Collins

JUDGMENT DELIVERED BY
Lord Collins
on

28 September 2010

Heard on 12 July 2010

Appellant
E. Ann Henry
(Antigua Bar)

(Instructed by Blake Lapthorn)

Respondent
Charlesworth O.D. Brown
(Antigua Bar)

(Instructed by Charles Russell LLP)

LORD COLLINS:

1. This is an appeal from a decision of the Court of Appeal of the Eastern Caribbean Supreme Court sitting in Antigua and Barbuda. The Court of Appeal dismissed an appeal by the appellants, Cable & Wireless (WI) Ltd ("Cable & Wireless") from a decision of the Industrial Court of Antigua and Barbuda making an award of severance pay in favour of the respondents, a number of employees who had been made redundant ("the employees"). Not having called upon counsel for the employees, at the conclusion of the hearing the Board indicated that it would humbly advise Her Majesty that the appeal should be dismissed for reasons to be given later. These are the reasons.

2. Successive Collective Agreements covering specific periods have been in existence between Cable & Wireless and the Antigua and Barbuda Workers' Union ("the Union"), which has since 1982 been the designated "bargaining agent" to represent its employees in negotiations. At the material time, the Governing Collective Agreement was the 1994 Collective Agreement dated February 28, 1994. Since 1982 the Collective Agreement provided that severance pay terms would be the subject of negotiations between Cable & Wireless and the Union, but neither the Governing Collective Agreement nor any previous Agreements contained a provision prescribing the method of calculating severance pay for employees who became redundant.

3. Due to the re-organisation of Cable & Wireless, from about 1996 through to May 31, 2004, 47 employees in Cable & Wireless were declared redundant, including the respondent employees. The length of service of the employees with Cable & Wireless ranged from 5 to 40 years. Following the redundancies, there were negotiations between Cable & Wireless and the Union as contemplated by the Collective Agreement, but the negotiations did not result in settling the method for calculating the severance pay. The negotiations broke down in January 2001.

4. On making the employees redundant, Cable & Wireless unilaterally decided to make severance payments at the rate of 4 weeks pay for each year of service. In addition to the severance pay, the following were paid or provided: (1) a re-training grant was paid equivalent to 1.5 month's salary; (2) Cable & Wireless paid the redundant employees' medical insurance premium for 6 months after the date of the redundancy; (3) from 1990, Cable & Wireless had voluntarily made a monthly contribution to each employee's retirement at the rate of 7.5% of monthly salary, and 80% of this amount was paid to each redundant employee, and 20% was retained for the benefit of the redundant employee's estate; (4) those employees who remained in the Superannuation Fund (which was voluntarily contributed by Cable & Wireless

monthly at the rate of 14.5% of the employee's monthly salary) as at the date of their redundancy were paid an appropriate amount from the Fund.

5. The employees did not accept that the terms imposed by Cable & Wireless were fair and reasonable and the dispute was referred to the Industrial Court of Antigua and Barbuda ("the Industrial Court"), which is established under the Industrial Court Act, Cap. 214 of the 1992 Revised edition of the Laws of Antigua and Barbuda. By section 7 of the Industrial Court Act, the Industrial Court has jurisdiction to hear and determine trade disputes referred to it under the Act. By section 10(3) of the Industrial Court Act, the Industrial Court has this power:

> "Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court 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 persons immediately concerned and the community as a whole;
>
> (b) act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code".

6. The Antigua and Barbuda Labour Code, Cap. 27 of the 1992 Revised edition of the Laws of Antigua and Barbuda ("the Code"), codifies the employment law of Antigua and Barbuda. The Code establishes minimum standards to govern the relationship of employers and employees in Antigua and Barbuda. Section A8 of the Code (repeated in substantially the same language in Section C69) states:

> "Nothing herein shall be construed as prohibiting an employer, either unilaterally, by individual contract with an employee or with employees, or by a collective bargaining agreement with employee representatives, from establishing working conditions more advantageous to employees than those minimum standards which are set forth in this Code."

7. Sections C40 and C41 of the Code provide as follows:

> "C40. Every employee whose terms of employment with an employer ... has ... exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy.

> C41. Severance pay shall consist of at least one day's pay, at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer ..."

8. The Industrial Court decided on an approach different from the formula applied by Cable & Wireless. The Industrial Court ordered, and the Court of Appeal by a majority upheld its decision, that severance pay for the employees should be calculated according to a formula, namely: (1) employees with 30 years of service or more should be paid 5½ weeks pay for each year of service; (2) employees with 20 years of service but less than 30 should be paid five weeks pay for each year of service; (3) employees with 10 years or more of service but less than 20, should be paid 4½ weeks pay for each year of service; (4) employees with less than 10 years of service but more than 1 year should be paid four weeks pay for each year of service; (5) employees with 1 year of service should be paid 12 days severance.

9. The Industrial Court, in exercising its powers under section 10(3) of the Industrial Court Act, reasoned as follows: (a) under the Code the rate at which severance was to be paid was as set out in section C41 of the Code, namely at least 1 day's pay at the employee's basic wage for each month or major fraction thereof of his term of employment with his employer; (b) that was a minimum rate and the Code allowed affected parties to negotiate higher rates; (c) in the absence of an agreed rate, the Court would intervene where requested to do so; (d) the employees had cited a number of Collective Agreements with national and international companies in which the scale of severance payments was calculated by reference to the number of years service; (e) the result of those negotiations did not show that there was any established rule for payment of severance pay; (f) Cable & Wireless had not infringed the Code by granting severance at 4 weeks pay for each year of service, which was above the statutory minimum.

10. There was evidence that negotiated agreements with a number of companies had resulted in the scale of redundancy payments being calculated by reference to years of service: for example BWIA agreed 4½ weeks pay per year of service for 1-8 years, and 5 weeks pay per year for 9 years and over, and Barclays Bank Plc agreed 12 days' pay for 1 year's service, 3 weeks pay for each year for 2-5 years' service, 1 month's pay for each year for 5 to 15 years of service, and 1½ months pay per year for 15 years and over.

11. The majority judgment of the Court of Appeal was delivered by Hariprashad-Charles AJA (with whom George-Creque AJA concurred). The majority held that the Industrial Court had correctly directed itself: having referred to section 10(3), it was to be inferred that the Industrial Court had been guided by the principles of fairness and good conscience and considered the issue of appropriateness, reasonableness, fairness and adequacy in coming to its decision; the Industrial Court had sought to cure what it

perceived as an anomaly (that Cable & Wireless had had no regard to the length of service of the employees), and considered the wide discretionary power conferred upon it to resolve disputes in a manner which it considered just, fair and in accordance with equity and good conscience, and so properly and fairly weighed all the factors in arriving at its decision; the Industrial Court had taken into consideration the evidence, the submissions of counsel and the relevant law and rendered its decision using the wide discretion conferred upon it by the Act; it had also relied heavily on the prevailing practice of other similar companies within and outside Antigua and Barbuda within which the scale of severance pay had been calculated based on the number of years each employee had served. The decision of the Industrial Court to award a higher rate of severance pay to employees with more years of service and a lower rate of severance pay to those with shorter years of service was fair and not outside the general ambit of the discretion such as to warrant interference by the Court of Appeal.

12. Edwards AJA dissented on the ground that the employees had not produced evidence to justify a finding that the severance formula used by Cable & Wireless was unjust and unfair. In the absence of any finding that the severance pay calculations by Cable & Wireless were unfair, unreasonable, unjust, inappropriate or against the principles of good industrial practices, the Industrial Court was not entitled to make a ruling simply to resolve the deadlock. The burden was on the employees to establish that Cable & Wireless had acted unfairly and unjustly in the circumstances. The Industrial Court had wrongly been influenced by the Collective Agreements with other companies. Although they might be useful in providing an indication of the prevailing benchmark for severance pay, those were negotiated provisions and were of limited persuasive value in the present dispute. The Industrial Court had fallen into error by applying the practices established by those collective agreements simply to break the deadlock.

13. On the appeal to the Board, it was accepted by Ms E Ann Henry, counsel for Cable & Wireless, that the question for the Board, as it was for the Court of Appeal, was whether there was a basis, in accordance with familiar principles, for interfering with the exercise of discretion by the Industrial Court. She accepted also that the fact that Cable & Wireless had proposed more than the minimum severance pay required by the Code did not determine the matter, since section 10(3) of the Industrial Court Act required the Court to reach a determination which was fair to the parties concerned and to society as a whole and which determination would take into account the merits of the case before it having regard to the principles and practices of good industrial relations and the provisions of the Code.

14. The errors which Cable & Wireless says vitiate the exercise of discretion are these: (1) the Industrial Court failed to address the question whether, having regard to the law and the practice and principles of good industrial relations in Antigua and Barbuda, the formula applied by Cable & Wireless was reasonable; (2) the Industrial

Court acted in a manner inconsistent with the principles and practices of good industrial relations and the Code; (3) the burden was on the employees to establish that the severance formula used by Cable & Wireless was unjust and unfair, and little or no regard was had by the Industrial Court to the evidence led by the witnesses; (4) the comparative Collective Agreements produced by the employees did not show that there was any established rule for payment of severance pay; (5) there was no factual or legal basis on which the Industrial Court made or could have made its ruling; (6) the Industrial Court did not pay proper regard to the fact that Cable & Wireless' offer did not fall below the minimum requirements set out in the Code, that Cable & Wireless' formula had been accepted by both parties for several years prior to the redundancy, and that the Collective Agreements did not show that there was an established rule for payment of severance pay.

15. Although the reasoning of the Industrial Court for reaching its conclusion was somewhat sparse, none of the criticisms made of the judgment of the Industrial Court by Cable & Wireless goes anywhere near establishing that the Industrial Court applied any wrong principle, or took into account matters which it should not have taken into account (or failed to take into account matters which it should have taken into account), or was plainly wrong. The Industrial Court applied the right principles, namely those required by section 10(3) of the Industrial Court Act. The Court is to make an award which is fair and just, having regard to the interests of the employer, the employee and the community as a whole, in accordance with equity, good conscience and the substantial merits of the case, having regard to the principles and practices of good industrial relations, and, in particular, the Code. There is no rule that the Industrial Court has to uphold Cable & Wireless' decision to award the equivalent of 4 weeks' pay for each year of service unless the employees prove that it is unfair. The issue was not (as Cable & Wireless contended) whether Cable & Wireless' decision was so unreasonable and inadequate as to be wrongful and contrary to good industrial relation practice in Antigua. The Industrial Court has a wide discretion under section 10(3), and there are no grounds for holding that the Industrial Court failed in its responsibility.