

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2022/0014

BETWEEN:

WEST INDIES OIL COMPANY LIMITED

Appellant

and

[1] JANIS JAMES

[2] BERNADINE HENRY HUGHES

Respondents

Before:

The Hon. Mde. Margaret Price Findlay

Justice of Appeal

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Justin L. Simon KC for the Appellant

Ms. E. Ann Henry KC for the Respondents

2024: October 4;

2025: January 14.

Civil Appeal – Employment Law - Redundancy – Unfair dismissal – Sections C58(1) and (2) of the Antigua and Barbuda Labour Code – Reasonableness of dismissal – Whether Industrial Court erred in finding that despite there being a genuine redundancy situation the respondents’ dismissal was so unreasonable in the circumstances to be unfair - Whether the Industrial Court took into account irrelevant matters in considering whether the appellant’s actions in dismissing the respondents were reasonable or not – Whether the Industrial Court misconstrued pertinent facts – Whether there had been adequate warning and notice of redundancy – Timing and adequacy of consultation process – Selection of the respondents for redundancy – Whether appellant sufficiently considered alternative employment for the respondents prior to dismissal – Awards of compensation – Whether the Industrial Court erred in its assessment of the compensation awarded to the respondents - Notice pay – Immediate loss - Future loss of earnings – Fringe benefits

The appellant, West Indies Oil Company Limited, is a company incorporated under the laws of Antigua and Barbuda. The respondents were employees of the appellant. The first respondent, Janis James, commenced her employment with the appellant on 10th June 1991. She held the position of Accounts Clerk. The second respondent, Bernadine Henry-Hughes, commenced her employment with the appellant on 11th August 1977. She held the position of Accounts Foreman. The employment relationship was governed by a Collective Bargaining Agreement entered into between the appellant and the Antigua Trades & Labour Union ("the Union") and covered the period 8th July 2015 to 31st December 2018.

In 2015, after the Government of Antigua and Barbuda became the appellant's major shareholder, it was given a new mandate to carry out departmental restructuring with a view to achieving greater efficiency. In 2017, the appellant's Chief Financial Officer carried out the review and made recommendations for the restructuring of the Accounts and Finance Department, which the appellant's Board accepted. One of those recommendations was that the respondents' positions be made redundant.

In early 2018 there were meetings and correspondence passing between the appellant, the respondents and their Union. By letter dated 30th April 2018, the appellant advised the respondents that with effect from 1st June 2018, their positions would become redundant, and, as a result, their employment with the appellant would be terminated by reason of redundancy. The respondents commenced proceedings in the Industrial Court claiming that they were unfairly dismissed and thereby entitled to compensation. By judgment dated 10th June 2022, the Industrial Court concluded that a genuine situation of redundancy existed, but the appellant had nonetheless acted unreasonably in dismissing the respondents. The Industrial Court made awards in favour of the respondents under the heads of: (a) Notice pay; (b) Immediate loss; (c) Future loss; and (d) Fringe benefits. In total, Ms. James was awarded \$585,102.78; while Mrs. Henry-Hughes was awarded the sum of \$454,686.02.

Being aggrieved, the appellant filed a Notice of Appeal on 25th July 2022. The three grounds of appeal set out in the notice of appeal give rise to the following issues for this Court's determination: (a) whether the Industrial Court erred in law in finding that despite the proved factual basis for the redundancies, the terminations were so unreasonable in the circumstances as to be unfair; (b) whether the Industrial Court erred in law in its award of pay in lieu of notice and fringe benefits as itemized; (c) whether the Industrial Court erred in law in its assessment of immediate loss and future loss.

Held: allowing the appeal against the compensation awards in part; varying the awards made at sub-paragraphs 60C (iv), (v), (vi), (vii) and (viii) of the Industrial Court's judgment and making the orders at paragraphs 161 and 162 of this judgment, that:

1. Even where a genuine redundancy situation exists, the employer must still satisfy the test of reasonableness in terminating the employee; in other words, the subsequent dismissal must be fair. This is the conjunctive effect of sections C58(1) and (2) of the Antigua and Barbuda Labour Code (the "Code"). They impose an obligation on the court to consider the reasons assigned for the dismissal of the employee, to determine whether there is a factual basis for it, and to assess whether the employer acted reasonably or unreasonably in dismissing the employee for the assigned reason. Furthermore, section 10(3) of the Industrial Court Act ("ICA") enjoins the Industrial Court to act fairly and justly and with regard to the interests of the parties immediately concerned and the community as a whole when making orders or awards. It must also do so 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.

Section C58(1) and (2) of the **Antigua and Barbuda Labour Code** Cap 27 of the Laws of Antigua and Barbuda applied; Sec 10(3) of the **Industrial Court Act** Cap 214 of the Laws of Antigua and Barbuda applied; **Antigua Workers' Union v Antigua Gases** Industrial Court Reference No. 20 of 1988 applied; **Sundry Workers [Veronica Joseph & Others] v Kings Casino Ltd** ANUHCVP2001/0028 (delivered 3rd April 2003, unreported) followed.

2. Section 17 of the ICA restricts appeals from decisions of the Industrial Court to those disputing points of law. This provision would seem to preclude the appellate court from entertaining an appeal where what is being challenged are findings of fact made by the Industrial Court. Whether or not an employer has acted reasonably in terminating an employee is a question of fact. However, where the Industrial Court finds facts or draws inferences which are not supported by the evidence, particularly where the facts so found substantially affect the merits of the matter, or where the court does not consider the facts in light of applicable principles or statutory provisions, then this would fall within the ambit of an 'illegality' described in section 17(1)(e) of the ICA, and therefore subject to appeal.

Sections 10(6) and 17 of the **Industrial Court Act** Cap 214 of the Laws of Antigua and Barbuda applied; **Leonart Matthias v Antigua Commercial Bank** ANULTAP2017/0002 (delivered 28th May 2020, unreported) followed; **Blackburn v LIAT (1974) Ltd** [2020] UKPC 9 followed; **Williams and Others v Compair Maxam Ltd** [1982] ICR 156 applied.

3. As it relates to the adequacy of the warning or notice of redundancy given to the respondents, the opinion of the Industrial Court that the notice provided to the respondents of their impending redundancy was inadequate is immunised from appeal by virtue of section 10(6) of the ICA. The Industrial Court's opinion on the inadequacy of the notice of redundancy given to the respondents and the late stage at which the appellant engaged the respondents' Union representative must be accorded due deference by this Court, given the specialised knowledge and expertise of the Industrial Court in relation to such matters, therefore it is not open to this Court to substitute its view as to what would have constituted reasonable notice to the respondents.

Sections 10(6) and 17 of the **Industrial Court Act** Cap 214 of the Laws of Antigua and Barbuda applied; **Blackburn v LIAT (1974) Ltd** [2020] UKPC 9 followed; **Williams and Others v Compair Maxam Ltd** [1982] ICR 156 applied.

4. However, to the extent that the decision of the court is being challenged on the basis that the factual basis upon which the Industrial Court concluded that the respondents received no clear and unequivocal warning or notice of the redundancies from the appellant until 30th April 2018, was incorrect, the Court agrees that the Industrial Court committed a partial error. Contrary to what the Industrial Court stated, the email of 9th February 2018 clearly communicated to the respondents' Union representative that their positions were to be made redundant. However, the Industrial Court's conclusion was not entirely incorrect because the email gave no date when these redundancies would be effective.

The date of the redundancy is of critical importance if the respondents were to have sufficient time to put their house in order to face the uncertain future. Nevertheless, the Industrial Court's partial error does not vitiate the core reason why the court concluded that the appellant had acted unreasonably in relation to the provision of notice, which was that the appellant should have given notice of the possibility of redundancy as early as 2015 or, at the latest, the beginning of January 2018 when, as they found, the appellant was in a clear position to issue unequivocal notices to the respondents of the date or approximate date when their positions would become redundant.

5. In relation to the adequacy of the consultation process, there is no rule of law that lack of proper consultation necessarily renders the dismissal unfair. However, fair consultation is an important consideration in determining whether an employee has acted reasonably when dismissing an employee. Fair consultation means: (a) consultation when the proposals are at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; (d) conscientious consideration by an authority of the response to consultation. In so far as the appellant submitted that there was no obligation to consult with the respondents or their Union at the formative stage, as the Industrial Court has held, that submission is contradicted by the case law. The appellant's submissions merely invite this Court to come to a different view as to the adequacy of the consultation process between the appellant and the Union to that taken by the Industrial Court. The Industrial Court assessed the evidence before it and determined that as a matter of good industrial relations practices, the period of consultation and the content of the discussions that occurred between 19th January and 18th April 2018 did not comport with its notion of good industrial relations practices and was inadequate. This opinion was one properly open to the Industrial Court to make on the evidence and is therefore not amenable to appeal.

Hollister v National Farmers' Union [1979] ICR 542 applied; **R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others** [1994] IRLR 72 applied.

6. In relation to the selection of the respondents for termination, a very relevant consideration, even in a genuine situation of redundancy, is the means whereby the employee is selected to be dismissed and the reasonableness of the steps taken by the employer to choose that employee, rather than some other employee, for dismissal. Timely and meaningful consultation is also important in this regard as it affords an opportunity for discussion between the employer and the union aimed at achieving an outcome that is fair and with as little hardship to the employees as possible. Attempting to secure agreement on the criteria to be applied in selecting the employees to be made redundant is an important facet of the consultation process. In this case, the Industrial Court, in their assessment, found that the reasons advanced by the appellant for selecting these employees were unsatisfactory. Admittedly, the Industrial Court may have strayed beyond its proper remit in venturing to suggest what the appellant should have done in going about the restructuring of its business. The proper role of the court is to assess whether the actions taken by the employer were reasonable; it is not to proffer its views on what should have been done. Nonetheless, on the evidence, there is no basis for impugning the Industrial Court's conclusions on this aspect. The Industrial Court did not misunderstand

or misdirect itself on the evidence. Furthermore, there was no evidence that the appellant had consulted the Union or invited them to make representations in relation to the selection of the respondents for redundancy. In the circumstances, there is no basis to interfere with the Industrial Court's conclusion on this issue

Williams and Others v Compair Maxam Ltd. [1982] ICR 156 applied.

7. In so far as there is a duty on an employer to consider the question of alternative employment, the guidelines which have been consistently applied and followed in Antigua and Barbuda mandate an employer to consider the question of alternative employment. When a claim for unfair dismissal comes before the Industrial Court the court is obliged to consider whether the employer did so. If there is no evidence that the employer did so, the burden being on them, then that is a matter the Industrial Court is entitled to take into account. Indeed, the Industrial Court would have fallen into error had it failed to address its mind to this question. With this in mind, this Court finds that the Industrial Court made no error in law in considering the issue of alternative employment. The appellant's argument that the issue of alternative employment did not arise at trial so that there was no evidence on which the court could conclude that the appellant made no, or no sufficient attempts, to secure alternative employment is contradicted by the evidence. The issue of alternative employment did arise during the examination-in-chief of the appellant's Chief Financial Officer and its Human Resources Manager. This demonstrates that the issue of alternative employment was canvassed and was in issue. Furthermore, the Industrial Court found that on the evidence, the respondents had exposure across various departments over their respective 27 and 41 years' employment with the appellant. The Industrial Court was entitled to conclude that on the sparse evidence before it, the appellant had not done enough to find alternative employment for the respondents and did not sufficiently explore whether there were any other suitable roles in other departments which the respondents might fill. That was a question of fact for their assessment.

Bugden v Royal Mail Group Ltd [2024] ICR D39 applied.

8. In coming to its conclusion that the actions of the appellant were unreasonable, the Industrial Court considered an ex gratia payment which was made to Ms. James as part of her payment package but made not to Mrs. Henry-Hughes; the release agreement which was amended to remove the word 'final'; and anniversary magazine issued by the appellant which described the respondents as 'retired' as further matters which in its view evinced unreasonable conduct on the part of the appellant. These three matters do not appear to have the same nexus with the decision to dismiss as the standard factors identified in the authorities. In the Court's view, the Industrial Court erred by taking these irrelevant matters into consideration when assessing whether the appellant acted reasonably in dismissing the respondents. Firstly, an ex gratia payment is discretionary. Whether an ex gratia payment should be made to the respondents was entirely within the discretion of the employer and thus, cannot be seen to be unreasonable simply on the basis that it chose to make payment to one but not the other respondent. Secondly, in relation to the release, it is hard to appreciate why the amendment which was made at the request of the Union should be seen as indicative of equivocal and unreasonable conduct on the part

of the appellant; especially where the amendment was more favourable to the respondents in safeguarding their options to pursue their claim in the Industrial Court. Thirdly, nothing turns on the respondents being described as 'retired' in the appellant's anniversary magazine or that this is reflective of equivocal conduct of the appellant. Notwithstanding the foregoing finding that the Industrial Court erred in considering the ex gratia payment, the release and the anniversary magazine as factors in concluding that the appellant acted unreasonably in dismissing the respondents, having considered matters in the round, the Court is of the view that the Industrial Court's conclusions on the core factors identified in the guideline cases are unimpeachable and there is no basis to set aside its conclusion that the appellant acted unreasonably.

9. As to the award of compensation made by the Industrial Court for payment in lieu of notice, section C9(3)(c) of the Code prescribes only the period of notice required to be given by an employer of its intention to terminate an employee's employment. It does not preclude an employer from giving a longer period of notice and does not say that in the exercise of its discretion the Industrial Court may not award compensation in lieu of notice for any period beyond the 30-day notice period prescribed. It can properly be read as setting a minimum standard for the notice period and not a ceiling. Therefore, the Industrial Court's decision to award compensation based on notice periods of 5 and 6 months on the particular facts and circumstances of this case cannot be impugned on the basis that it applied any wrong principle or took into account matters which it should not have taken into account or failed to take account of matters which it should have or was plainly wrong.

Cable & Wireless (West Indies) Limited v Conrad Tonge (deceased) and others [2010] UKPC 25 followed.

10. An employee is entitled to immediate loss of earnings or benefits from the date of dismissal to the date of assessment, subject to the employee's duty to mitigate. This award is usually made to compensate an employee for financial loss for the period between their dismissal and the date of judgment. This entitlement accrues whether or not a claim is made in the Memorandum submitted in the Industrial Court. However the employee has a duty to mitigate which entails making reasonably diligent efforts to find employment at a comparable standard to reduce or extinguish the loss suffered from the employer's wrongful act through the income earned from the new job. Undoubtedly, the failure of an employee to mitigate is a highly relevant factor when considering whether to make an award under the head of immediate loss. However, the authorities do not go as far as saying that the failure to mitigate will ineluctably lead to no award being made.

LIAT (1974) Ltd v Novella Sheppard Antigua Civil Appeal No. 6 of 1991 (delivered 22nd November 1993, unreported) followed; **Antigua and Barbuda Transport Board v Anderson Carty** ANUHLTAP2020/0005 (delivered 27th July 2023, unreported) followed; **Jennifer Simpson-Edwards v Digicel Antigua Limited et al** Industrial Court Reference C/98 of 2017 considered; **Antigua Village Condo Corporation v Jennifer Watt** Antigua Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported) followed; **Tidman v Aveling Marshall Ltd** [1977] ICR 506 considered; **Gardiner-Hill v Roland Beiger Technics Ltd** [1982] IRLR 498 considered; **LIAT (1974) Ltd v Novella Sheppard** Antigua Civil

Appeal No. 6 of 1991 (delivered 22nd November 1993, unreported) applied; **Norton Tool Co. Ltd v Tewson** [1973] 1 All ER183 considered.

11. In the case at hand, the respondents gave no evidence of efforts to mitigate their loss. The Industrial Court nonetheless awarded them the equivalent of their full monthly salaries for the first year after their dismissal. The court also awarded the respondents further sums equivalent to the difference between the respondents' actual salary and prospective earnings based on its assessment of the respondents' prospective earnings in the 2nd, 3rd and 4th years after their dismissal. Again, no deduction was made on account of the absence of evidence in mitigation. Such an approach is not aligned with the traditional jurisprudence of the Industrial Court which treats the failure to mitigate as a factor that diminishes the award made under this head. The approach taken by the Industrial Court here has the effect of rewarding or conferring a bonus and windfall upon an employee who has absolutely failed to mitigate, instead of penalising their failure. This undermines the important policy reasons underlying the emphasis consistently placed by the Industrial Court on the employee's duty to mitigate. Furthermore, no reasons were advanced nor basis stated for determining what sums the respondents were likely to earn in their 2nd, 3rd and 4th year after dismissal. Accordingly, the Court finds that the Industrial Court erred in law such that the award made under the head of immediate loss should be varied.
12. In relation to an award for loss of future earnings, Sir Vincent Floissac CJ identified four basic rules that must govern such an award: (i) future loss of earnings should be predicated on the probability that the earnings from future employment or self-employment will be less than what was earned prior to termination and that the loss is the difference between the two earnings; (ii) there is a limit to be placed on the number of years over which such loss is calculated and on the amount of future loss recoverable; (iii) there must be a significant discount for the fact that the award is an accelerated lump sum payment in realisation of a mere expectation and; (iv) the onus is on the employee to prove the probability of loss upon which an award of compensation is made and to prove the probable duration of that probability. This last requirement is of critical importance as failure by an employee to discharge this burden can result in no award being made under this head.

Antigua Village Condo Corporation v Jennifer Watt Antigua Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported) followed; **Adda International Ltd. v Curcio** [1976] 3 All ER 620 considered.

13. The Industrial Court granted an award for future loss of earnings to Mrs. Henry-Hughes when there was simply no evidence from her to prove any of the matters required to secure an award under this head. Having already made awards to her for immediate loss for 4 years after her dismissal, the Industrial Court made an award for the remaining 9 months until she reached her retirement age of 65. While on its own an award of the equivalent of 9 months earnings for future loss might not be objectionable, on the facts of this case, the approach taken by the Industrial Court violates and circumvents the requirement to limit the duration and quantity of compensation for loss of future earnings as the awards made for immediate loss were calculated using the same formula employed to calculate future loss. The substantive effect of the combined awards for immediate loss

and future loss using the same formula is that Mrs. Henry- Hughes was effectively given awards for a period of 4 years and 9 months, in circumstances where she provided no evidence of loss. The award for loss of future earnings is therefore set aside.

14. In assessing the appropriate award for the loss of fringe benefits as a head of loss, the court looks to the employment contract or the Collective Bargaining Agreement to ascertain what fringe benefits the employee would have enjoyed had his or her employment not been terminated. The fringe benefits for which the Industrial Court made awards, which were challenged, were Cooking Gas Concession; Thrift Fund; and Health Insurance Coverage. Having considered the Collective Bargaining Agreement and having regard to the finding that the appellant acted unreasonably in terminating the respondents' employment, and that the sums awarded under these heads were consistent with the respondents' entitlements under the Collective Bargaining Agreement, this Court finds no basis to interfere with these awards.

Cable & Wireless (West Indies) Ltd v Hill (1982) 30 WIR 120 followed.

JUDGMENT

- [1] **WARD JA:** West Indies Oil Company Limited ("the appellant") is a company incorporated under the laws of Antigua and Barbuda. It provides oil storage facilities and petroleum products to the Antigua and Barbuda market and other countries in the Eastern Caribbean. The first respondent, Janis James, commenced her employment with the appellant on 10th June 1991. She held the position of Accounts Clerk. The second respondent, Bernadine Henry-Hughes, commenced her employment with the appellant on 11th August 1977. She held the position of Accounts Foreman. When necessary, I will refer to Ms. James and Mrs. Henry-Hughes collectively as the respondents. The employment relationship was governed by a Collective Bargaining Agreement (the "Agreement") entered into between the appellant and the Antigua Trades & Labour Union ("the Union") and covered the period 8th July 2015 to 31st December 2018. Article 28(3)(a) of the Agreement stipulated that the retirement age of employees was 65 but an employee could apply for early retirement pursuant to Article 28(3)(b), (c) and (d).

- [2] In 2015, after the Government of Antigua and Barbuda became the appellant's major shareholder, it was given a new mandate to carry out departmental restructuring with a view to achieving greater efficiency. In 2017, the appellant's Chief Financial Officer, Mr. Carlton Bramble, carried out the review and made recommendations for the

restructuring of the Accounts and Finance Department, which the appellant's Board accepted. One of those recommendations was that the respondents' positions be made redundant.

- [3] In early 2018 there were meetings and correspondence passing between the appellant, the respondents and their Union. By letter dated 30th April 2018, the appellant advised the respondents that with effect from 1st June 2018, their positions would become redundant, and, as a result, their employment with the appellant would be terminated by reason of redundancy.
- [4] The respondents commenced proceedings in the Industrial Court claiming that they were unfairly dismissed and thereby entitled to compensation. By judgment dated 10th June 2022, the Industrial Court concluded that a genuine situation of redundancy existed, but – for reasons I will discuss later in this judgment - the appellant had nonetheless acted unreasonably in dismissing the respondents.
- [5] The Industrial Court made awards in favour of the respondents under the heads of: (a) Notice pay; (b) Immediate loss; (c) Future loss; and (d) Fringe benefits. In total, Ms. James was awarded \$585,102.78; while Mrs. Henry-Hughes was awarded the sum of \$454,686.02.
- [6] Being aggrieved, the appellant filed a Notice of Appeal on 25th July 2022 challenging:
 - (a) the decision of the Industrial Court that although a genuine redundancy existed, the termination of the respondents was unreasonable, and thus unfair; and (b) the legal basis on which the Industrial Court awarded compensation for unfair dismissal to the respondents. The notice of appeal sets out the following three grounds of appeal:
 - “(a) that the Industrial Court erred in law in finding that despite the proved factual basis for the redundancies, the terminations were so unreasonable in the circumstances to be unfair;
 - (b) that the Industrial Court erred in law in its award of pay in lieu of notice and fringe benefits as itemized;
 - (c) that the Industrial Court erred

(d) in law in its assessment of immediate loss and future loss given the reasonable standards established by the Court of Appeal in that regard and consistently followed by the said Court.”

- [7] The appellant’s notice of appeal sought orders that: (a) the termination of the respondents on the grounds of redundancy was both justifiable and reasonable; or (b) alternatively, if the termination is found to be justifiable but unreasonable in all the circumstances, that the awards for pay in lieu of notice, immediate loss and future loss be substituted for (sic) a lower amount; and that there be no award for fringe benefits.
- [8] At the hearing of the appeal, counsel for the appellant, Mr. Justin Simon KC, made it clear that the appellant was not challenging the finding that a genuine redundancy situation existed. Its contention is that in coming to a finding that the appellant acted unreasonably in dismissing the respondents, the Industrial Court took into account irrelevant matters and/or misapprehended the facts.

The legal framework

- [9] Section C56 of the **Antigua and Barbuda Labour Code**¹ (the “**Code**”) secures for an employee who has completed probation a right not to be unfairly dismissed.
- [10] Whether or not a dismissal is unfair is governed by section C58 of the **Code**. Section C58(1) provides:
- “(1) A dismissal shall not be unfair if the reason assigned by the employer therefor –
- (a) relates to misconduct of the employee on the job, within the limitations of section C59 (1) and (2);
 - (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section C59(3);
 - (c) is that the employee was redundant;
 - (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer’s part) of a requirement of law; or
 - (e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

¹ Cap 27 of the Laws of Antigua and Barbuda.

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."

[11] Section 58(1) prescribes that a dismissal will not be unfair if the reason assigned for dismissal is one of the matters listed at subsection (1) (a) – (e). Redundancy is one such reason and means essentially that the work performed by the employee has ceased or substantially diminished.² Section 58(2) sets out the test for determining whether a dismissal for one of the assigned reasons in section 58(1) is unfair.

[12] In this regard, another important concession made by Mr. Simon KC was that subsections C58 (1) and (2) of the **Code** must be read conjunctively, so that even where a genuine redundancy situation exists, the employer must still satisfy the test of reasonableness in terminating the employee. This principle has been established by jurisprudence of long-standing emanating from the Industrial Court and this Court. This may be illustrated by reference to two cases. In **Antigua Workers' Union v Antigua Gases Ltd**,³ Justice H.S.R. Moe, having considered the meaning of redundancy stated:

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

[13] In coming to its decision, the Industrial Court relied on dicta of Byron CJ in the decision of this Court in **Sundry Workers [Veronica Joseph & Others] v Kings**

² By section C3 of the Code, "redundancy" means a situation in which, by virtue of a lack of customers orders, retrenchment, the installation of labour-saving machinery, an employer's going out of business, a force majeure, or any other reason, tasks which a person was last employed to perform no longer exist.

³ Industrial Court Reference No. 20 of 1988.

Casino Ltd.⁴ In considering the definition of redundancy, and in making the point that although a situation of redundancy may exist, the subsequent dismissal must be fair, Byron CJ gave the example of a redundancy caused by a hurricane and stated:

“This brings me to point out, however, that the existence of a cause, such as the hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably...”⁵

[14] Since the point is not in issue on this appeal, it suffices for present purposes to merely cite several authorities which support the proposition. In this regard, see **Paulette Matthew v Antigua and Barbuda Port Authority Board of Commissioners**;⁶ **Sundry Workers v Antigua Hotel and Tourist Association**;⁷ **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers’ Union**;⁸ **Blackburn v LIAT (1974) Ltd.**⁹

[15] In summary, the effect of section C58(1) and (2) of the **Code** is to impose an obligation on the court to consider the reasons assigned for the dismissal of the employee, to determine whether there is a factual basis for it, and to assess whether the employer acted reasonably or unreasonably in dismissing the employee for the assigned reason.

[16] In assessing whether an employer has acted reasonably or unreasonably in dismissing the employee, the Industrial Court’s jurisprudence has been developed over the years by reference to the guidelines laid down by the United Kingdom’s Employment Appeals Tribunal (“EAT”) in **Williams and Others v Compair Maxam Ltd.**¹⁰ In that case, towards the last quarter of 1980, the company found itself experiencing significant financial losses. In December 1980, a new manager was hired and given the mandate to put the company’s finances in order. After considering its options, he eventually opted for a complete reorganisation of the company’s business. As a first step, he reduced

⁴ ANUHCVP2001/0028 (delivered 3rd April 2003, unreported).

⁵ ANUHCVP2001/0028 (delivered 3rd April 2003, unreported), paragraph 6.

⁶ ANUHCVP2005/0129 (delivered 4th September 2008, unreported).

⁷ (1993) 42 WIR 145.

⁸ ANULTAP2016/003 (delivered 23rd May 2019, unreported).

⁹ [2020] UKPC 9.

¹⁰ [1982] ICR 156.

the number of managers to three. Secondly, each of the managers was required to 'pick a team' for his department so that staff were retained to keep the company viable.

[17] On 16th January 1981 there was a meeting with the Union involved (APEX). The Union were told that there had to be 21 redundancies and that the first step was to ask for volunteers. The Union agreed to this course. However, the Union was not informed of how the remaining names for redundancy were to be selected. Only seven employees volunteered. The departmental managers subsequently drew up lists of those to be retained and those to be made redundant. The process employed to draw up those lists was that each manager picked the employees he thought would make his department viable.

[18] The Union was only told on 28th January 1980 that there had been insufficient volunteers and that the others who were to be made redundant would be told that same afternoon. The Union's request for a list of the names of those to be made redundant was refused but management did agree to postpone the dismissals until the following morning. Those selected for redundancy were dismissed on the morning of 29th January and given their statutory notice, four weeks salary and redundancy payments considerably in excess of their statutory entitlement.

[19] Several of the employees challenged their dismissal as unfair. The majority of the industrial tribunal, though critical of the lack of consultation by the company with the Union, nevertheless held the dismissals to be fair. They took the view that the company was in a 'survival situation' and had to do something drastic. They held that it was reasonable to make the selection for redundancy by selecting those employees whom the managers regarded as being those who would keep the company viable in the long run. As to the lack of warning, they took the view that as the employees had known for some time that there were to be redundancies, in the circumstances, no further warning was possible but, in any event, the extra four weeks salary gave the employees that amount of time to look for alternative employment.

[20] On appeal, the EAT gave guidance on what it described as ‘the principles which, in current industrial practice, a reasonable employer would be expected to adopt’ in the following terms:

“1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.”¹¹

[21] The EAT was careful to point out, however, that “these are not immutable principles which will stay unaltered for ever. Practices and attitudes in industry change with time and new norms of acceptable industrial relation behaviour will emerge. Secondly, the factors we have stated are not principles of law, but standards of behaviour.”¹²

[22] The foregoing principles have been so treated, adopted and applied by the Industrial Court in Antigua and Barbuda in cases such as **Antigua Gases; Antigua and Barbuda Workers’ Union v Cable & Wireless (Antigua and**

¹¹ [1982] ICR 156 at 162.

¹² Ibid at 167.

Barbuda Limited);¹³ and **Jennifer Simpson-Edwards v Digicel Antigua Limited et al.**¹⁴ This Court at paragraphs 40 and 44 of **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers' Union**¹⁵ recognised that that jurisprudence had long been adopted by the Industrial Court. Thom JA remarked:

“Three decades have passed since the decision in the **Antigua Gases** case. Nothing was put before us to show that those are not the principles applied by employers in Antigua and Barbuda.”

[23] Indeed, in some Commonwealth Caribbean countries they have been codified in statute. For an example of this see section 145 (1) of Saint Lucia’s **Labour Act**.¹⁶

[24] Another very important provision of the **Industrial Court Act**¹⁷ (the “ICA”), which is relevant on this appeal, is section 10(3), which enjoins the Industrial Court to act fairly and justly and with regard to the interests of the parties immediately concerned and the community as a whole when making orders or awards. It must also do so 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**.

[25] This provision must be read with section 10(6) of the **ICA** which provides:

“(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.”

[26] Later in this judgment, I will discuss the interplay between this section and section 17 of the **ICA**, which I next discuss.

¹³ Industrial Court Reference No. 66 of 2015.

¹⁴ Industrial Court Reference C/98 of 2017.

¹⁵ ANULTAP2016/0003 (delivered 23rd May 2019, unreported).

¹⁶ Cap 16:04 of the Revised Laws of Saint Lucia.

¹⁷ Cap 214 of the Laws of Antigua and Barbuda.

Appeals

[27] Appeals from decisions of the Industrial Court are limited to points of law. This limitation is imposed by section 17 of the **ICA**, which provides:

“17. (1) Subject to this Act, any party to a matter before the Court shall be entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no others-

(a) that the Court had no jurisdiction in the matter, but so however, that it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the matter before the making of the order or award;

(b) that the Court has exceeded its jurisdiction in the matter;

(c) that the order or award has been obtained by fraud;

(d) that any finding or decision of the Court in any matter is erroneous in point of law; or

(e) that some other specific illegality, not hereinbefore mentioned, and substantially affecting the merits of the matter, has been committed in the course of the proceedings.”

[28] This provision would seem to preclude this Court entertaining an appeal where, on proper analysis, what is being challenged are findings of fact made by the Industrial Court. It is settled that whether or not an employer has acted reasonably in terminating an employee is a question of fact. However, this Court has held that where the Industrial Court finds facts or draws inferences which are not supported by the evidence, particularly where the facts so found substantially affect the merits of the matter or where the court does not consider the facts in light of applicable principles or statutory provisions, then this would fall within the ambit of section 17(1)(e).¹⁸

[29] Similarly, in **Leonart Matthias v Antigua Commercial Bank**¹⁹ Webster JA [Ag.] opined that in order to establish that a finding of fact is susceptible to appeal, the person challenging the finding must show that it was illegal within the meaning of section 17(1)(e), and illustrated how this may be achieved:

“Such an illegality may be established, for example, where it is shown that the Industrial Court erred by making or drawing inferences for which

¹⁸ See *Cable and Wireless (Antigua and Barbuda Limited) v Antigua and Barbuda Workers' Union*, supra. n 15.

¹⁹ ANULTAP2017/0002 (delivered 28th May 2020, unreported) at para. 1 of the headnote.

there is no evidentiary basis, or that the court did not consider the facts in light of the applicable principles or statutory provision, and that the error was committed during the course of the proceedings and substantially affected the merits of the matter.”

- [30] In exercising the jurisdiction vested in it by virtue of section 17(1)(e), however, this Court must be mindful that it should only be exercised in exceptional circumstances; the burden being on the appellant to satisfy this Court that it should exercise its exceptional jurisdiction and reverse the Industrial Court’s decision.²⁰

The relationship between sections 10(6) and 17 of the ICA

- [31] I promised earlier to discuss the relationship between this section and section 10(6) of the ICA. I do so now. In **Blackburn v LIAT (1974) Ltd**, the Privy Council explained the relationship between section 10(6) and section 17 of the ICA. The Board observed:

“44. One important feature of the Antigua and Barbuda legislation is that ICA section 10(6) accords special status to the decision of the Industrial Court. Accordingly, the Board held in *Sundry Workers (represented by the Antigua Workers Union) v Antigua Hotel and Tourist Association* [1993] 1 WLR 1250 that there could be no appeal against awards of compensation for dismissals that were “not in accordance with the principles of good industrial relations practice”.

45. The Trinidad and Tobago Court of Appeal explained the rationale of TTIRA section 10(6) and its interrelationship with section 18(2) of TTIRA in *Flavourite Foods Ltd v Oilfield Workers’ Trade Union* (unreported) 26 January 1983. Sir Isaac Hyatali CJ, delivering the first judgment, said:

“It follows therefore that section 10(6) is to be read together with and given effect to as a proviso to section 18(2). In my opinion this conclusion is fortified by the fact that section 10(6) occupies a special place in the earlier part of the Act and to all appearances has been deliberately inserted there to put it beyond doubt that appeals will not be allowed against the court’s opinion in what is manifestly a highly specialised area of industrial relations, namely, whether or not a worker has been dismissed in circumstances that offend against the principles of good industrial relations practice or are otherwise harsh and oppressive.

²⁰ *Jewellers Warehouse v Cecile Norde* ANUHCVP2004/0029 (delivered 27th November 2006, unreported).

Consequently, if an appellant is unable to rely on any of the statutory grounds of appeal specified in section 18(2) then he is barred from appealing altogether since the Act prohibits him from relying on any other ground. If however he is able to rely on one or other of those statutory grounds he will nevertheless be barred from appealing if the only ground of appeal on which he relies involves a challenge against an opinion of the court given in pursuance of section 10(6).

This is an unusual provision by which to bind the Court of Appeal; but it is manifestly a sensible and logical one since members of the Industrial Court are normally selected for appointment thereto by reason of their specialised knowledge and experience in industrial relations and related matters. It is only right therefore that their opinion, duly formed on a question arising in such a specialised area of human relations should be final and not subject to review or recall by members of the Court of Appeal who would normally have no such knowledge or experience.”

46. The Trinidad and Tobago Court of Appeal developed this jurisprudence further in *Caroni (1975) Ltd v Association of Technical, Administrative & Supervisory Staff* (2002) 67 WIR 223. At p 226c-g de la Bastide CJ said:

“It does not matter whether the party challenging the decision of the Industrial Court on this issue claims, not merely that the decision was against the weight of the evidence, but goes further and claims that no reasonable judge properly directed could have come to the same conclusion, having regard to the evidence. In the latter case, the ground of appeal has graduated from a question of fact to a question of law; but it is nonetheless barred by the prohibition contained in section 10(6). This is not to say that a decision of the Industrial Court as to whether a dismissal is harsh and oppressive is so sacrosanct that it can never be challenged on any ground whatever. If, for instance, there has been some procedural irregularity which involves a breach of the rules of natural justice, then clearly an appeal would lie to the Court of Appeal, notwithstanding section 10(6). In such a case it would be the process by which the Industrial Court reached its opinion and not the opinion itself, that was challenged.

It is unnecessary and indeed dangerous to try to enumerate all the circumstances in which an appeal would lie to the Court of Appeal against the decision of the Industrial Court in a trade dispute over the dismissal of a worker. The answer in broad terms is whenever the appellant can rely on any of the grounds mentioned in section 18(2) without running foul of the

prohibition contained in section 10(6). What this means in practice will have to be determined on a case-by-case basis.”

[32] In **Compair Maxam Ltd** the EAT put the matter in these terms:

“The industrial tribunal is an industrial jury which brings to its task a knowledge of industrial relations both from the view point of the employer and the employee. Matters of good industrial relations practice are not proved before an industrial tribunal as they would be proved before an ordinary court: the lay members are taken to know them. The lay members of the industrial tribunal bring to their task their expertise in a field where conventions and practices are of the greatest importance. Therefore in considering whether the decision of an industrial tribunal is perverse, it is not safe to rely solely on the common sense and knowledge of those who have no experience in the field of industrial relations. A course of conduct which to those who have no practical experience with industrial relations might appear unfair or unreasonable, to those with specialist knowledge and experience might appear both fair and reasonable: and vice versa.”²¹

[33] Section 18(2) of the Trinidad and Tobago Industrial Relations Act referred to in the cases cited above, and as recognised by the Board, is in similar terms as section 17 of the **Code**. The above dicta therefore apply in the Antigua and Barbuda context with equal force. In summary, an appellant can rely on any of the grounds of appeal in section 17 of the **ICA**, provided that the ground relied on does not involve a challenge to an opinion of the Industrial Court given pursuant to section 10(6).

The appeal

[34] Section 17(1)(e) of the **ICA** is the limb to which the appellant clutches in its bid to set aside the Industrial Court’s finding of unreasonableness. This brings me to a discussion of each of the appellant’s grounds of appeal, which I will examine *seriatim*.

[35] The specific illegalities committed by the Industrial Court as developed by the appellant in oral submissions were: (i) that the Industrial Court took account of certain matters that were irrelevant to the question of whether the appellant’s

²¹ [1982] ICR 156 at 160 - 161.

actions were reasonable or not; and (ii) misconstrued some of the pertinent facts.

[36] At paragraph 23 of its judgment, the Industrial Court listed 9 matters to which the employer should have had regard:

- (a) The relevant provisions of the Labour Code.
- (b) The sacred role of trade unions generally and its engagement with the Antigua Trades and Labour Union in particular.
- (c) All relevant provisions of the Collective Agreement then in force.
- (d) Basic principles and practices of good industrial relations.
- (e) The established retirement age of 65 years.
- (f) The employees' ages of 61 and 60 years.
- (g) The employees' long tenures of 27 and 41 years.
- (h) The timing of the decision to review the Department, the actual review, and the implementation of the ensuing recommendations; and
- (i) The likely impact of the implementation of the recommendations on the employees.

[37] Mr. Simon KC submitted that only (a), (c), (d) and (i) were relevant considerations. He advanced no reasons why the other factors were irrelevant. More particularly though, the appellant took issue with seven factors that the Industrial Court considered in coming to its conclusion that the appellant acted unreasonably when it terminated the respondents' employment. These complaints are addressed below.

Warning and notice of redundancy

[38] The appellant takes issue with the Industrial Court's conclusions on the adequacy of what it called the 'warning and notice of redundancy' given by the appellant to the respondents as set out at paragraphs 25 to 32 of its judgment. Employing a colourful analogy with the staged warnings given on the imminent approach of a hurricane,

the Industrial Court concluded that the appellant failed or refused to give the respondents any or any adequate warning or notice of their redundancies. Such discussions as had occurred between the parties came far too late and did not suffice to give the respondents and/or their Union the required clear and unequivocal warning and notice of the impending redundancies which ultimately resulted in the termination of their employment. This was unreasonable.

[39] These conclusions were based on a mixture of the following facts which the Industrial Court found proved and certain opinions it formed:

- (j) The mandate to restructure the appellant's Finance and Accounts Department was given in 2015.
- (ii) It would have been appropriate for the appellant to give the respondents and their Union early indication of the possibility of redundancies in the department pending the review and restructuring processes.
- (iii) The review process was completed in or around November/December 2017 and the recommendations for the redundancy were accepted then. The appellant therefore had a further and better opportunity to give the respondents early notice or warning of possible redundancies and this would have made partial amends for its failure to do so in 2015;
- (iv) By the start of January 2018, the appellant was in a clear position to issue unequivocal notices to the employees of the date or approximate date when their positions would become redundant; (emphasis added)
- (v) A meeting was held on 19th January 2018 with the respondents' Union but although there was some discussion between the appellant and the respondents' Union, that date was too late and, in any event, those discussions were largely concerned with the appellant's attempts to convince the respondents to opt for early retirement, although they had not applied for same.

- (vi) The respondents received no clear and unequivocal warning or notice of the redundancies from the appellant until 30th April 2018 via a letter from the appellant's Chief Executive Officer, which informed the respondents that their positions would become redundant with effect from 1st June 2018.

[40] Mr. Simon KC submitted that the Industrial Court erred in law in faulting the appellant for not giving notice to the respondents in 2015 because the appellant had no legal obligation to notify the respondents that it was contemplating restructuring the Finance and Accounts Department; that was a matter for the appellant's Board. It was only after recommendations were made, and the appellant's Board accepted the recommendations to restructure that an obligation would have devolved upon the appellant to notify the respondents that their positions were to be made redundant. The decision to make the respondents' positions redundant was taken in December 2017.

[41] Mr. Simon KC agreed with the Industrial Court's opinion expressed at paragraph 28 of its judgment that "certainly, by the start of January 2018, the Employer was in a clear position to issue unequivocal notices to the Employees of the approximate date when their positions would become redundant". However, Mr. Simon KC submitted that the evidence showed that the appellant did meet with the respondents on 4th and 15th January 2018 to inform them of the decision to make their positions redundant and invited them to apply for early retirement as an alternative option to redundancy. The supporting evidence for this assertion was said to be the evidence of Mr. Carlton Bramble, the appellant's Chief Financial Officer, and two letters sent to the respondents. The first was dated 8th January 2018 addressed to Mrs. Henry-Hughes. The second is a letter to Ms. James dated 30th April 2018. Both letters make reference to meetings with the respondents on 4th January and, in the case of Ms. James, the letter to her makes reference to a further meeting with her on 15th January, and with her and her Union representative on 1st March 2018. Mr. Simon KC also relied on emails dated 29th January and 9th February, which he submitted made it clear that the respondents' positions were being made redundant.

- [42] Mr. Simon KC submitted that based on this evidence, the Industrial Court's conclusion that the respondents received no clear and unequivocal warning or notice of the redundancies from the appellant until 30th April 2018 was plainly factually wrong.
- [43] It was submitted that the Industrial Court's reliance on an erroneous view of the facts constitutes an error of law or 'other illegality' within the meaning of section 17(e) of the **ICA** and should lead to the finding of unreasonableness being set aside.
- [44] On behalf of the respondents, Ms. E. Ann Henry KC in response to this point, submitted that upon a proper reading of the January letters, the issue of redundancy was never raised with the respondents, contrary to the evidence of Mr. Bramble. What was discussed then was early retirement. These letters, she submitted, supported the testimony of the respondents under cross-examination that redundancy did not form part of these early discussions. Additionally, Ms. Henry KC drew the Court's attention to a letter from the appellant's CEO dated 19th January 2018 addressed to both respondents which she submitted makes clear that the discussions between the parties on 4th and 15th January 2018 related to early retirement only.
- [45] Ms. Henry KC's point was that this evidence provided the evidential basis on which the Industrial Court properly concluded that the appellant only raised the issue of redundancy unequivocally on 30th April 2018.

Discussion and conclusions on adequacy of notice and warning

- [46] In my view, while Mr. Simon KC argued that the appellant did not have any legal obligation to notify the respondents about the possibility of redundancy before a decision in that regard was actually taken, I do not read the Industrial Court's judgment as suggesting that there was any such legal obligation. As I read it, the Industrial Court viewed the matter from the perspective of the dictates of the principles and practices of good industrial relations, pursuant to its mandate under section 10(3) of the **ICA** to act fairly and justly and with regard to the interests of the parties immediately concerned. Further, it is apparent that the Industrial Court's position on this matter was informed by the guidelines in the **Compair Maxam Ltd**

case, which mandates the employer to “seek to give as much warning as possible of impending redundancies so as to enable the Union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.”

- [47] The opinion of the Industrial Court that the notice provided to the respondents of their impending redundancy was inadequate is immunised from appeal by virtue of section 10(6) of the **ICA**. As was stressed in **Blackburn v LIAT** citing approvingly Sir Isaac Hyatali CJ in **Flavourite Foods Ltd v Oilfield Workers’ Trade Union**:²²

“This is an unusual provision by which to bind the Court of Appeal; but it is manifestly a sensible and logical one since members of the Industrial Court are normally selected for appointment thereto by reason of their specialised knowledge and experience in industrial relations and related matters. It is only right therefore that their opinion, duly formed on a question arising in such a specialised area of human relations should be final and not subject to review or recall by members of the Court of Appeal who would normally have no such knowledge or experience.”

- [48] It is therefore not open to this Court to substitute its view as to what would have constituted reasonable notice to the respondents.

- [49] As it relates to Mr. Simon KC’s efforts to impugn the Industrial Court’s decision on the adequacy of notice by arguing that the factual basis on which the Industrial Court concluded the respondents received no clear and unequivocal warning or notice of the redundancies from the appellant until 30th April 2018 was incorrect, these assertions require closer scrutiny.

- [50] Mr. Bramble’s evidence in relation to the January meetings with the respondents²³ was that he and the Human Resources Manager, Ms. Marlene Bailey, met with the respondents separately and informed them that they had done a review of the organisation and as a result of that review their positions had become redundant. However, because of their contribution to the company over their quite considerable years of employment, he took the initiative to represent to the HR

²² TT 1983 CA 3 (26th January 1983, unreported).

²³ Record of Appeal Vol IV, pg. 41.

Manager and also to the CEO that it would not be appropriate to give these employees letters stating that their positions were being made redundant. He testified that out of respect for them he suggested that the company explain to them that their positions 'have been made redundant' and offer them early retirement but obviously their settlement packages would be at the higher rate which would be the severance rate. That was the discussion had with both employees separately on 4th January 2018. He added:

"We explain (sic) why we propose -- the reason why we propose (sic) the option of early retirement was out of a respect -- out of respect for their long contribution to the company and the relationship between them, and myself, and the company. And I stated -- I recall stating to them that I did not want to give them a letter stating that they have been made redundant."²⁴

- [51] Ms. Henry KC, however, called this Court's attention to the evidence of Ms. Bailey, which she submitted contradicts Mr. Bramble's evidence. It is convenient to set it out here. Ms. Bailey testified that she and Mr. Bramble met with the respondents individually on 4th January. They told them that the department was going to be undergoing a restructuring and had identified inefficiencies and process improvements. They met with the respondents again on 9th January and discussed with them the area where process inefficiencies existed and advised them that unfortunately their positions would have been affected in the 'restructure'. They also told them that the appellant was offering an option of early retirement, but it would be paid as severance benefits 'so it would not disenfranchise them'. This was done 'out of respect for their years of service to the company'. She later reiterated:

"We told them where inefficiencies existed. We told them the positions that would be affected in the redundancy and we advise them that these two positions were in fact being made redundant however because of the years of service by the employees we gave them an option of early retirement. But yet again it would be paid at severance which according to the CBA offered a higher value of separation."

- [52] In relation to the meeting with the respondents and their Union on 19th January, Ms. Bailey testified:

"We -- we advised Mr. Potter exactly what we advised the employees in our two previous meetings. We went through the restructuring with him. We

²⁴ Record of Appeal Vol IV, pg. 44.

identified where the inefficiencies existed. And we also told Mr. Potter that we were proposing an offer -we offered the employees an option of early retirement, however, it would be paid at the rate of severance so that the employees were not disadvantaged.”²⁵

- [53] Turning now to the letters sent by the appellant to the respondents in January, the letter to Mrs. Henry-Hughes dated 8th January reads in material parts:

“Following our meeting of January 4, 2018, and subsequent to your agreement, the Company has opted to offer you an early retirement with the benefit of payment calculated on par to severance benefits for your months of service to the West Indies Oil Company Limited. Your early retirement will take effect April 6, 2018. However, you will proceed on vacation leave from January 29, 2018 (48 days inclusive). You will be remunerated for the remaining thirty-three (33) days at the end of the notice period.”²⁶

- [54] The rest of the letter deals with the method of computation of severance pay pursuant to the Collective Bargaining Agreement between the appellant and the respondents’ Union. I pause here to note that on the face of it this letter makes no specific reference to redundancy discussions.

- [55] As it relates to the letter to Ms. James dated 30th April 2018, the material parts read as follows:

“We refer to meetings held with you on January 4th and 15th, 2018 and a subsequent meeting of March 1st, 2018 with your representative of the Antigua Trades & Labour Union (AT&LU), in which it was explained by Management that your current position with the company as Accounts Clerk was being made redundant. In light of this, we provided you with the option, at your sole discretion, to proceed on early retirement with a separation package to be paid at severance rate in keeping with the Collective Bargaining Agreement (CBA) between West Indies Oil Company Limited and the Antigua Trades & Labour Union (AT&LU), ...

This offer was not accepted by you and, despite repeated attempts to have further dialogue with your representative of the AT&LU on the said matter, the latter failed to attend the scheduled meeting and failed to reschedule another meeting.

We therefore formally notify you that with effect from 1st June 2018, your position with the company as Accounts Clerk shall become redundant and, as a result, your employment with the company shall be terminated by reason of redundancy.

²⁵ Ibid, pg.297.

²⁶ Record of Appeal Vol II, pg. 14.

Please be advised that your final entitlements, including outstanding vacation days will be paid by cheque at the end of your tenure. A summary of your entitlements is herein included.”²⁷

[56] Undoubtedly, this letter unequivocally stated that Ms. James’ position was being made redundant with effect from 1st June 2018. But was it the first such unequivocal communication to either respondent of the date or approximate date of the imminent redundancy as found by the Industrial Court?

[57] To answer this question, there are a couple pieces of contemporaneous correspondence which I consider relevant to an understanding of what discussions ensued between the appellant and the respondents and/or their union between January 2018 and 30th April 2018. First, there is a letter from the Chief Financial Officer to Ms. James dated 19th January 2018. It states so far as material:

“Following our discussions on January 4, 2018 and January 15, 2018 in which we discussed the proposed terms of your early retirement from the West Indies Oil Company Ltd, please see attached the agreed payout calculations for your review.

If the payment amount is acceptable to you, we will proceed to finalize the date and terms of your early retirement. We should point out however, that this amount was determined after several meetings with you and adjusted to meet specific requests you made during our discussions.”²⁸

[58] On the face of this letter, the meetings of 4th and 15th January between the appellant and Ms. James discussed early retirement. Read with the subsequent letter to Ms. James dated 30th April 2018, that letter must be interpreted as saying that the issue of redundancy was discussed with her at the 1st March meeting. This is consistent with the letter dated 8th January to Mrs. Henry-Hughes, which speaks only of discussions in relation to early retirement on 4th January 2018. I view these letters as more consistent with the respondents’ testimony at the trial that only early retirement was discussed in early January 2018, or, at least, were primarily concerned with early retirement.

²⁷ Ibid, pg. 18.

²⁸ Record of Appeal Vol II, pg. 20.

[59] There is also a letter dated 29th January 2018, sent by the respondents' union representative, Mr. Potter. So far as material it states:

"As promised in our recent conversation on matters pertaining to both Mrs. Janis James and Mrs. Bernadine please be advised of the following:

There is a need for clarity in the proposed position of the company. In both verbal and written communication concepts of severance and also retirement have been advanced by the WIOC. We must appreciate that they are not the same.

The employees have both consulted the Antigua Trades and Labour Union for advice and representation in this matter. We are prepared to provide the best advice towards resolution in the matter, but believe it is important that there is clarity with respect to the company's position."²⁹

[60] Contrary to the submissions of Mr. Simon KC, I do not find this letter confirmatory of the fact that in previous discussions between the parties in January, the respondents were told unequivocally that their positions were being made redundant as at any particular date. The letter sought clarification of the letters sent by the appellant's CFO which referenced an early retirement package but at the same time made mention that the separation package would be paid at severance rates. If anything, the letter supports the impression held by the Industrial Court that the appellant's position up to that point was equivocal.

[61] Indeed, that letter seems to have prompted a response from the appellant's Human Resources Manager, who by email dated 9th February 2018 stated:

"Thank you for meeting with myself and Mr. Carlton Bramble our Chief Financial Officer on Friday 19th January. We are heartened by your proposal to provide advice towards resolution in the matter of separation of Ms. James and Mrs. Hughes from the company.

Ms. James and Mrs. Henry's positions are being made redundant as their duties have been considerably diminished with automation of our procedures and changes to the business over the years which have resulted in redundancy of tasks they performed.

²⁹ Record of Appeal Vol II, pg. 126.

The company is therefore offering a separation package to Ms. James and Mrs. Hughes, on terms which are fair and acceptable and consistent with the provisions of the collective bargaining agreement.”³⁰

[62] It strikes me that this is the first correspondence that contains an express statement that the respondents’ positions were being made redundant. Notably, unlike those that preceded it, there is no reference to early retirement. Notably also, it still does not indicate the date from which the respondents would be made redundant.

[63] The Industrial Court was not unmindful of all of the letters previously discussed. They summarised each of them at paragraph 21 of the judgment.

[64] My assessment of the evidence as gleaned from the series of correspondence discussed above is that during the month of January 2018, the appellant engaged in discussions with the respondents largely about early retirement. The employees seemed uninterested. In light of Mr. Bramble’s and Ms. Bailey’s evidence on the reason why early retirement was raised with the respondents, there was an evidential basis for the Industrial Court’s finding that the discussions in January related largely to early retirement, even if some mention was made of redundancy. This seems to be the reason why the Industrial Court viewed the appellant’s position up to this point as equivocal.

[65] The Union was engaged on or about 19th January, and by email sought clarification from the appellant on what its position was in relation to the respondents. Accordingly, on or about 9th February 2018, the appellant, in response to that communication from the respondents’ Union representative, decided to communicate clearly its intention to make their positions redundant. In my view, this letter clearly and unequivocally communicated to the respondents through their authorised Union representative that their positions were to be made redundant. Therefore, to the extent that the Industrial Court concluded that the respondents received no clear and unequivocal warning or

³⁰ Ibid, pg.128.

notice of the redundancies from the appellant until 30th April 2018 that was partially factually incorrect.

[66] I say so because, contrary to what the Industrial Court stated, the email of 9th February clearly communicated to the respondents' Union representative that their positions were to be made redundant. However, the Industrial Court's conclusion was not entirely incorrect because the email gave no date when these redundancies would be effective. In that sense, the email of 9th February did not constitute full notice of the redundancy. The date of the redundancy is of critical importance if the respondents were to have sufficient time to put their house in order to face the uncertain future. Mere mention of redundancy at some unspecified time in the future does not suffice to enable the Union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere as contemplated by the guidelines in **Compair Maxam Ltd.**

[67] In my view, the Industrial Court's partial error does not vitiate the core reason why the Industrial Court concluded that the appellant had acted unreasonably in relation to the provision of notice, which was that the appellant should have given notice of the possibility of redundancy as early as 2015 or, at the latest, the beginning of January 2018 when, as they found, the appellant was in a clear position to issue unequivocal notices to the respondents of the date or approximate date when their positions would become redundant. It must be accepted that neither in the evidence of Mr. Bramble or Ms. Bailey nor in the letters issued by the appellant in January and February was there any indication that the respondents were told in clear terms, or at all, that they were to be made redundant as at a specified date.

[68] The Industrial Court's ultimate opinion remains unaffected by its partial error because the evidence establishes that the letter of 30th April, is the first occasion on which the fact of redundancy and the effective date of redundancy were communicated to the respondents, and in the opinion of the Industrial Court, neither the 9th February nor 30th April date provided adequate notice. Indeed,

the Industrial Court further found as a fact that the appellant only engaged with the respondents' Union representative on 19th January 2018 and opined that that engagement too was far too late in the circumstances.

[69] On the evidence, and in circumstances where the respondents both had 4 and 5 years to go before retirement, it was entirely open to the Industrial Court to conclude, as it did, that "our unavoidable conclusion is that the discussions between the parties did not suffice to give the Employees and/or their Union the required clear and unequivocal warning and notice of the impending redundancies. In our opinion the Employees received no or no adequate warning or notice of the redundancies which ultimately resulted in the termination of their employment."³¹

[70] Consistent with the principles in **Blackburn v LIAT**, the Industrial Court's opinion on the inadequacy of the notice of redundancy given to the respondents and the late stage at which the appellant engaged the respondents' Union representative must be accorded due deference by this Court, given the specialised knowledge and expertise of the Industrial Court in relation to such matters. It is not within the purview of this Court to substitute its view on what constitutes reasonable notice of redundancy for that of the Industrial Court.

The consultation process

[71] There is no rule of law that a lack of proper consultation necessarily renders the dismissal unfair.³² However, fair consultation is an important consideration in determining whether an employee has acted reasonably when dismissing an employee. It has been held that fair consultation means:(a) consultation when the proposals are at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.³³

³¹ Paragraph 32 of the Industrial Court's judgment.

³² See *Hollister v National Farmers' Union* [1979] ICR 542.

³³ See *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others* [1994] IRLR 72.

[72] The consultation process to which the Industrial Court addressed its attention was specifically as between the appellant and the respondents' Union. The timing of the process and the adequacy of the information provided to the Union were the subject of scrutiny. In relation to the timing of the consultation process, the Industrial Court's finding was that:

"34. The evidence reveals that the Union was not engaged to discuss the unfolding situation until January 19, 2018, by which time the Employer had apparently reached a firm decision to terminate the employment of the Employees, subject only to its efforts to convince them to opt for early retirement.

35. Needless to say, the preferable approach should have been to engage the Union in fair consultation starting in 2015 when the decision was taken to review the Department. In any event, the acknowledged involvement with the Union clearly did not commence at the first stage when the Employer contemplated the restructuring. Moreover, the evidence reveals that the Employer provided no or no adequate information regarding the rearrangement of functions and duties and the redeployment of some employees in the Department.

36. In particular, there is no evidence that the Employer shared information of the "roles assignment" within the Department prior to the implementation of the restructuring exercise vis-à-vis and [sic] its proposals for the new role assignments which would result from the restructuring. In our estimation all the relevant information were [sic] available in the tables prepared by Mr. Bramble and should have been shared with the Union preferably during their draft stage or, in any event, upon their completion by the end of December 2017.

37. As events transpired, during the first quarter of 2018, the Union was not given adequate details of the restructuring and no sufficient opportunity to respond to the Employer's proposals within a reasonable time or at all. Ultimately, it appears that the Employer did not open its mind to any possible alternatives or further review based on what might have been proposed or counter proposed by the Union."³⁴

[73] The Industrial Court concluded that the consultations between the employer and the Union were largely confined to a period of approximately two months ending on 18th April 2018. They held:

"In so far as consultation is a key component of good industrial relations practices, we find that there was inadequate consultation, for which we hold the Employer wholly blameworthy."³⁵

³⁴ Paragraphs 34-37 of the Industrial Court's judgment.

³⁵ Ibid at paragraph 40.

[74] The appellant does not complain about the findings of fact set out at paragraphs 34 to 37 of the judgment. The criticisms levied by Mr. Simon KC in relation to the findings and opinion of the Industrial Court was that the Industrial Court erred in finding that the appellant should have consulted with the Union when recommendations for restructuring were at a formative stage. Mr. Simon KC argued that there was no basis in the Collective Bargaining Agreement for consultation to take place until a determination had been made by the Board.

[75] Further, in its written submissions, the appellant contended that:

“The business of the Appellant is not being undertaken as a joint enterprise with its employees, and it was sufficient that upon its acceptance in December, 2017 of the recommendation of its Chief Financial Officer, discussions were held with the Respondents along with the Union in January, February, and March, 2018 advising them of the impending redundancies and giving the Respondents an option to apply for early retirement.

The Appellant submits that there was a sufficient consultation period, at which all relevant information was given including the reason for selecting the Respondents.”³⁶

[76] Two things may be said in answer to these criticisms. First, in so far as Mr. Simon KC submitted that there was no obligation to consult with the respondents or their Union at the formative stage, as the Industrial Court had held, that submission is contradicted by the **British Coal Corporation**³⁷ case, to which the Industrial Court made express reference, and to which I have previously referred above.

[77] Secondly, the appellant’s submissions merely invite this Court to come to a different view as to the adequacy of the consultation process between the appellant and the Union to that taken by the Industrial Court. The Industrial Court assessed the evidence before it and determined that as a matter of good industrial relations practices, the period of consultation and the content of the discussions that occurred between 19th January and 18th April 2018 did not

³⁶ Hearing Bundle, pg 8 at paragraphs 18 and 19 of the Appellant’s Submissions.

³⁷ [1994] IRLR 72.

comport with its notion of good industrial relations practices and was inadequate. That evidence is as previously rehearsed in this judgment.

- [78] In my view, for the reasons previously discussed, the Industrial Court's opinion that consultation was a key component of good industrial relations practices, and its evidence and experience based conclusion that the consultation process was inadequate and did not accord with good industrial practices was one properly open to it on the evidence and is therefore not amenable to appeal.

Selection of the respondents for redundancy

- [79] As we have seen, even where a genuine redundancy situation exists, a very relevant consideration is the means whereby the employee was selected to be dismissed and the reasonableness of the steps taken by the employer to choose that employee, rather than some other employee, for dismissal.³⁸

- [80] The Industrial Court was cynical about the reasons advanced by the appellant through Ms. Bailey and Mr. Bramble for the selection of the respondents for redundancy. Ms. Bailey proffered the following explanation:

“Q. And are you able to comment on how Ms. Janis James and Mrs. Bernadette Henry-Hughes would have been selected for possible redundancy?

A. Well let me just say, we first looked at the positions, and like I said earlier, you look at the roles and responsibilities and not necessarily the employee who is doing them. And so you look at the roles, you look at where there are deficiencies and inefficiencies in the department. You try to rectify those inefficiencies matched with the function and unfortunately those functions that were going to be made redundant those functions that we were putting in process improvements were held by Mrs. Henry-Hughes and Ms. James unfortunately.”³⁹

- [81] Mr. Bramble's reasons are recorded in the judgment as a 'lack of comfort' with the new technology; and that they lacked 'that type of qualifications' and 'could not perform with the same competence' as younger employees who held associate

³⁸ *Compair Maxam Ltd*, supra n. 10.

³⁹ *Record of Appeal Vol IV*, pg. 289.

degrees and had been hired in 2016. The Industrial Court dismissed these reasons stating:

“42. ... In our opinion, Mr. Bramble’s comments are far too general and vague to convince us that the Employer applied any objective criteria in selecting the Employees for dismissal. The Employer provided no evidence that it earnestly attempted to avoid the dismissal of the Employees and was left with no choice but to select them for dismissal. Moreover, there is no evidence that the Employer explored other options, such as training the Employees to equip them to function efficiently within the restructured and automated Department.

43. ...At the end of the day, based on Mr. Bramble’s subjective assessment, the Employer appeared to have formed the view that the Employees were not trainable. In the absence of any objective criteria, we consider the selection of the Employees for redundancy to be unsafe and unreasonable.

44. Further, from the wider perspective, we have no evidence in respect of any restructuring of any of the Employer’s other departments. In our opinion the Employer should have explored the possibility of dealing with the redundancy situation in such a manner as to avoid the dismissals of the Employees, even if that meant “bumping” other employees in other department [sic]. From the available evidence, we do not know if any consideration was given to the possibility of redeploying the Employees, perhaps after adequate training and reorientation, if necessary, to function in other departments. In that regard, there is no evidence that the Employer considered the well-known principle of “last in, first out” in relation to its entire staff complement.”⁴⁰

[82] By way of criticism of these conclusions, Mr. Simon KC focused on the view expressed at paragraph 44 of the judgment and submitted that it was solely within the prerogative of the appellant to decide which department should be the subject of restructuring. The court should not be suggesting what should have been done unless the suggested courses were options available to the employer.

[83] I am satisfied that the Industrial Court may have strayed beyond its proper remit in venturing to suggest what the appellant should have done in going about the restructuring of its business, including ‘bumping’ other employees in accordance with the last in first out principle or restructuring some other department. The proper role of the court is to assess whether the actions taken by the employer were reasonable; it is not to proffer its views on what should have been done. As was said

⁴⁰ Paragraphs 42- 44 of the Industrial Court’s judgment.

in **Compair Maxam Ltd** “it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.” That is the extent of its remit.

[84] Nonetheless, this seems to be the only objectionable aspect of the Industrial Court’s overall conclusions and opinions on the question of whether the appellant justified the selection of these two respondents for redundancy.

[85] Timely and meaningful consultation serves the purpose of affording an opportunity for discussion between the employer and the union aimed at achieving an outcome that is fair and with as little hardship to the employees as possible. Attempting to secure agreement on the criteria to be applied in selecting the employees to be made redundant is an important facet of the consultation process.

[86] On the evidence, I can see no basis for impugning the Industrial Court’s conclusions that the selection of the respondents for redundancy was made on the subjective assessment of Mr. Bramble; did not apply objective standards on the adequacy of the consultation process; provided no evidence that it earnestly attempted to avoid the dismissal of the respondents and was left with no choice but to select them for dismissal; provided no evidence that the appellant explored other options, such as training the employees to equip them to function efficiently within the restructured and automated Department.

[87] This is not a case where the Industrial Court has misunderstood or misdirected itself on the evidence. It is a case where, in their assessment, the reasons advanced by the appellant for selecting these employees were unsatisfactory. Furthermore, there was no evidence that the appellant had consulted the Union or invited them to make representations in relation to the selection of the respondents for redundancy. I conclude that there is no basis to interfere with the Industrial Court’s conclusion on this issue.

Alternative employment

- [88] The evidence was that the mandate to review the appellant's business with a view to restructuring was given in 2015. The Finance and Accounts Department comprising of 9 employees was selected for review. Between 2015 when the mandate was given and 2017 when the recommendations to restructure were tendered and accepted by the appellant's Board, two persons were hired to join the Finance and Accounts Department. The appellant's total staff complement at the time numbered approximately 100 employees. The Industrial Court also relied on evidence adduced at the trial that during the course of their employment the respondents had 'exposure and interaction' with several other departments, including Purchasing and Stores, Maintenance, Computer, Personnel and Human Resources Departments. It was of the view that Mr. Bramble's testimony offered the bare assertion that 'no alternative employment was available'. The Industrial Court concluded that the appellant's evidence did not persuade them that it had done enough to find alternative employment for the respondents and did not sufficiently explore whether there were any other suitable roles in other departments which the respondents might fill.
- [89] Mr. Simon KC submitted that this was an error of law on the part of the Industrial Court since the issue of alternative employment did not arise at trial so there was no evidence on which it could be concluded that the appellant made no, or no sufficient attempts, to secure alternative employment.
- [90] I am not persuaded by this argument. The guidelines which have been consistently applied and followed in Antigua and Barbuda mandate an employer to consider the question of alternative employment. When a claim for unfair dismissal comes before the Industrial Court, it is obliged to consider whether the employer did so. If there is no evidence that the employer did so, the burden being on them, then that is a matter the Industrial Court is entitled to take into account. Indeed, the Industrial Court would have fallen into error had it failed to address its mind to this question. This position is supported by the decision of the United Kingdom's EAT in **Bugden v Royal Mail Group Ltd**,⁴¹ in which it was held:

⁴¹ [2024] ICR D39.

“In a case such as the claimant’s, the question of whether the employer had considered redeployment as an alternative to dismissal, and the impact of that on the reasonableness of the decision to dismiss, was one that an employment tribunal could be expected to consider as a matter of course when addressing the statutory question of whether the employer’s decision to dismiss was reasonable in the circumstances. In omitting to consider that question, even though the parties had not specifically raised it, the employment tribunal had erred in law.”

[91] In any event, and contrary to Mr. Simon KC’s submissions, I find that the issue of alternative employment did arise in this case. During Mr. Bramble’s examination-in-chief the following exchange is recorded:

“...And are you able to say, Mr. Bramble, whether the company would have considered any alternative employment for either Ms. Janis James or Ms. Bernadine Hughes?

A. Yeah. We considered that. Bearing in mind that both employees would have spent all of their years within the company in the finance department, and the finance department is being restructured. The -- the nature of the company, the company is primarily the -how to put it? It’s an operations company, right, and their service over the years would primarily be clerical service so alternative employment in other areas of the company would really not -- was not available.

Q. But you did consider it.

A. We did.”⁴²

[92] Furthermore, the issue arose again when Ms. Bailey was being examined:

“Q. And just a few more elucidations, Ms. Bailey. Are you able to say whether the employer considered suitable alternative employment for these employees prior to them being terminated?

A. Yes sir. We did. We looked at all possible areas of how we could utilize them but unfortunately at the time ...however, at the time there was nothing suitable for them.”⁴³

[93] These exchanges demonstrate that the issue of alternative employment was canvassed and was in issue. On this sparse evidence, and considering the Industrial Court’s finding on the evidence that the respondents had exposure across various departments over their 27 and 41 years’ employment with the appellant, the Industrial Court was entitled to conclude that the appellant had not done enough to find alternative employment for the respondents and did not sufficiently explore whether there were any other suitable roles in other

⁴² Record of Appeal Vol IV, pgs. 47- 48.

⁴³ Record of Appeal Vol IV, pgs. 320 -321.

departments which the respondents might fill. That was a question of fact for their assessment. I find no merit in this complaint.

The ex-gratia payment/releases/anniversary magazine

[94] The Industrial Court considered three further matters which in its view evinced unreasonable conduct on the part of the appellant. I can deal with these together and fairly briefly.

[95] The appellant made an ex-gratia payment of \$56,808.00 to Ms. James as part of her payment package but made no such payment to Mrs. Henry-Hughes. The Industrial Court concluded that in the absence of an explanation for the differential treatment it was unreasonable for the appellant to make that payment to one employee but not to the other.

[96] Secondly, the appellant had presented a form of release agreement to each respondent for their signatures. By way of illustration, the release agreement in respect of Ms. James read:

"Final Payment and Individual Statement

"I, JANIS JAMES hereby accept the sum of EC \$195,914.67 from the WEST INDIES OIL COMPANY LIMITED as full and final settlement of any and all outstanding claims from West Indies Oil Company Limited for my services as an employee during the period June 10, 1991 to May 31, 2018.

This release is final, enforceable and supersedes all correspondences and agreements between the West Indies Oil Company Ltd and JANIS JAMES on this matter".

[97] Following objection by, and at the request of, the Union the document was amended by the deletion of the word 'Final' in the heading and the release agreement amended to read:

"I JANIS JAMES hereby accept the sum of EC \$200,000 from the WEST INDIES OIL COMPANY LIMITED for my services as an employee during the period June 10, 1991 to May 31, 2018."

[98] The Industrial Court held that "the actions of the Employer in acceding to the request of the Employees and agreeing the new terms of [the] Statement and Release, vis-à-vis the original version, constitutes an element of unreasonableness. In effect, the Employer was maintaining an equivocal position. As we understand the Employer's

actions at this stage, it continued to equivocate as it had been doing since January 4, 2018 when it sought to convince the Employees to opt for early retirement.”⁴⁴

[99] In relation to the appellant’s anniversary magazine, this was published in late 2018 at a time when the respondents had already been made redundant. The magazine carried photos of the respondents and described them as ‘retired’. The Industrial Court regarded this as “consistent with the Employer’s stance from the onset. It is indicative of the Employer’s preferred position that the Employees be considered as retirees.”⁴⁵

[100] In my view, while the factors to which the Industrial Court should have regard when assessing whether an employer acted reasonably in accordance with the guidance in **Compair Maxam Ltd** are non-exhaustive, I note that these three matters are not included in that list and do not appear to have the same nexus with the decision to dismiss as the standard factors identified in the authorities. An ex-gratia payment is discretionary. The Industrial Court was well aware of this as it stated so later at paragraph 59 of its judgment when considering compensation for unfair dismissal. Therefore, whether an ex-gratia payment should be made to the respondents was entirely within the discretion of the employer and thus, cannot be seen to be unreasonable simply on the basis that it chose to make payment to one but not the other respondent.

[101] In relation to the release, it is hard to appreciate why the amendment which was made at the request of the Union should be seen as indicative of equivocal and unreasonable conduct on the part of the appellant; especially where the amendment was more favourable to the respondents in safeguarding their options to pursue their claim in the Industrial Court.

[102] Similarly, in light of the evidence of Ms. Bailey that the respondents were described in the magazine as ‘retired’ because the appellant did not see it appropriate to refer to them in a commemorative magazine as having been made redundant, I can’t see that anything turns on this or that it is reflective of equivocal conduct of the appellant,

⁴⁴ Paragraph 52 of the Industrial Court’s judgment.

⁴⁵ Ibid, paragraph 54.

when any such equivocation was clearly put to bed by at least 9th February and certainly by 30th April when, as the Industrial Court found, the respondents were given clear and unequivocal notice that their positions were to be made redundant effective 1st June 2018. The publication of the magazine comes too late in the day to be used as a factor indicating that the appellant acted unreasonably in dismissing the respondents.

[103] I am therefore satisfied that the Industrial Court erred by taking these irrelevant matters into consideration when assessing whether the appellant acted reasonably in dismissing the respondents.

[104] I do not, however, agree that this means that its ultimate conclusion that the appellant acted unreasonably in dismissing the respondents should be set aside on account of this. Matters have to be looked at in the round. Since I have concluded that the Industrial Court's conclusions on the core factors identified in the guideline cases are unimpeachable, there is no basis to set it aside.

The compensation awards

[105] Having concluded that the respondents had been unfairly dismissed, the Industrial Court made awards in favour of the respondents under the heads of: (a) Notice Pay; (b) Loss of Protection; (c) Immediate Loss; (d) Future Loss; and (e) Fringe benefits.

Notice pay

[106] Under this head the Industrial Court awarded Ms. James the sum of \$23,670.00 and Mrs. Henry-Hughes the sum of \$49,260.00. After deductions on account of payments previously made to them for payment in lieu of notice for 4 days, net awards were made in the sums of \$22, 796.04 and \$47, 744.12 respectively. The Court rationalised these awards in the following way:

“The Labour Code provides that unless the employment contract calls for a longer period, advance notice of termination by the employer need not exceed 30 days. Under Articles 28 of the Collective Agreement, “An employee wishing to retire shall give a minimum of three months’ notice in writing”. Given the circumstances in this case, we are of the opinion that 5 and 6 months’ notice, respectively, of the impending redundancies would have been reasonable.”

[107] The appellant submitted that upon receipt of their letter dated 30th April 2018 which notified them that the effective date of termination was 1st June 2018, the respondents received the required minimum one month's notice pursuant to section C 9(3)(b) of the **Code**, and further, section C 9(3)(c) provides that in no case need the period of said advance notice exceed 30 days unless an employment contract calls for a longer notice period. It was submitted that an award based on 5 and 6 months' pay in lieu, on the basis that Article 28 of the Collective Bargaining Agreement provides for an employee who applies for early retirement to give a minimum of three months' advance notice in writing, is patently wrong, unjustifiable, and legally indefensible as early retirement was an option solely for employees reaching the age of 60 years.

[108] For the respondents, Ms. Henry KC submitted that section C 9(3)(c) of the **Code** prescribes a minimum and not a maximum award for notice pay. Reliance is placed on the case of **Cable & Wireless (West Indies) Limited v Conrad Tonge (deceased) and others**.⁴⁶

Analysis and conclusion - Notice pay

[109] The starting point of this analysis is section C 9(3)(c) of the **Code**, which provides:

"C9 (1) An employer may, without advance notice, terminate the employment of any person who has engaged in misconduct related to his work within the limitations of section C59 (1) or (2).

(2) With respect to a person who has been engaged for a specified term of employment of less than one week's duration, the employer need give no further notice of his intention to terminate said employment at the end of the specified term, unless the terms of his employment specify otherwise.

(3) In all other cases, the employer must give advance notice to the affected employee of an intention to terminate that person's employment, as follows-

(a) with respect to an employee within his probation period, an employer must give at least 24 hours advance notice of his intention to terminate said employee's employment.

(b) with respect to all other employees, the period of said advance notice shall be at least equivalent to the interval of time between the affected employee's paydays;

⁴⁶ [2010] UKPC 25.

(c) in no case need the period of said advance notice exceed 30 days unless an employment contract calls for a longer notice period.so far as relevant.”

- [110] On a proper reading of the section, it prescribes only the period of notice required to be given by an employer of its intention to terminate an employee’s employment. It does not preclude an employer from giving a longer period of notice and does not say that in the exercise of its discretion the Industrial Court may not award compensation in lieu of notice for any period beyond the 30-day notice period prescribed. The case of **Cable & Wireless (West Indies) Limited v Conrad Tonge (deceased) and others** provides a good example of the plenitude of the discretion conferred upon the Industrial Court in such matters.
- [111] In that case, the Industrial Court made an award of severance pay in favour of a number of employees who had been made redundant. Cable & Wireless had unilaterally decided to make severance payments at the rate of 4 weeks’ pay for each year of service. This was more generous than the rate at which severance should be paid pursuant section C41 of the **Code**, which provided a severance rate of at least 1 day’s pay at the employee’s basic wage for each month or major fraction thereof of his term of employment. The Industrial Court employed a different formula than the one used by Cable & Wireless whereby it awarded 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. In so doing, the Industrial Court considered that: the rate provided at section C41 was a minimum rate and the **Code** allowed for affected parties to negotiate higher rates; in the absence of an agreed rate the Court would intervene where requested; in a number of Collective Agreements with national and international companies the rate of severance pay was calculated by reference to the number of years of service of the employee; there was no established rule for severance pay; and that Cable and Wireless had not infringed the **Code** by granting severance at a rate above the statutory minimum.
- [112] The Court of Appeal held that the Industrial Court had correctly directed itself in accordance with section 10(3) of the **ICA** and its decision was fair and not outside the general ambit of the Industrial Court’s discretion such as to warrant interference

by the Court of Appeal. On further appeal to the Privy Council, the Board held at paragraph 15:

“Although the reasoning of the Industrial Court for reaching its conclusions is 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 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...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.”

- [113] In similar vein, I consider that the language of section C9(3)(c) does not translate into a proposition that in the exercise of its discretion the Industrial Court may not award compensation in lieu of notice for any period beyond the 30-day notice period prescribed, bearing in mind section C69 of the **Code** which provides:

“Nothing herein shall be construed as prohibiting an employer, whether unilaterally, by individual contract with an employer 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.”

- [114] This provision tends to confirm that section C9(3)(c) can properly be read as setting a minimum standard for notice period and not a ceiling.

- [115] It is apparent that before embarking on the assessment of compensation, the Industrial Court articulated its primary objective as being to compensate the respondents for the financial loss they suffered as a consequence of their unfair dismissals. It reminded itself that in the exercise of its discretionary powers it was obliged to make fair and just awards, taking into account the interests of the parties as well as the national community as a whole, and its duty to act in accordance with equity and to have regard to the principles and practices of good industrial relations, and the provisions of the **Code** in particular. While not mentioned expressly, it is evident that in so directing itself, the Industrial Court clearly had in mind the provisions of section 10(3) of the **ICA**, the provisions of which have been previously set out in this judgment.

[116] While it is true that the Industrial Court did consider the provisions of Article 28 of the CBA in relation to the 3 months' period of notice required to be given by an employee seeking early retirement, that was not the sole basis on which they determined the level of compensation for the respondents. That factor was considered together with all of the circumstances of the case. These circumstances included the fact that this was a situation of redundancy. Given the Industrial Court's conclusions on the inadequacy of the period of notice given by the appellant of the impending redundancies, which they held should have occurred at the latest in early January 2018, its decision to use a period of 5 and 6 months instead of the 30 days prescribed at section C 9(3)(c) of the **Code** seems reasonable in the circumstances.

[117] In my view, the Industrial Court's decision to award compensation based on notice periods of 5 and 6 months on the particular facts and circumstances of this case cannot be impugned on the basis that it applied any wrong principle or took into account matters which it should not have taken into account or failed to take account of matters which it should have or was plainly wrong.

Immediate loss

[118] In calculating the award under this head, the Industrial Court explained that subject to an employee's duty to mitigate, such an award is usually made to compensate an employee for financial loss for the period between their dismissal and the date of judgement. Notably, the Industrial Court remarked that neither the Union representative nor counsel for the appellant (not Mr. Simon KC) addressed them on this point. Thus, it felt it was left to 'do the best we can, based on the available evidence and our knowledge of the job market'. The matters/evidence which the Industrial Court considered were: (a) there was no evidence of the respondents' efforts to mitigate but this was not surprising given the circumstances under which they were dismissed; (b) that at the date of dismissal Ms. James was 3 years and 8 months away from retirement while Mrs. Henry-Hughes was 4 years and 9 months away from retirement; (c) given their ages, a typical employer in the ordinary course of things would most likely be skeptical about hiring the respondents.

- [119] For those reasons, the Industrial Court awarded both respondents the equivalent of their full monthly salaries for a period of one year up to 31st May 2019. This translated to an award to Ms. James in the sum of \$56,808.00 (\$4,734x12); for Mrs. Henry-Hughes \$98,520.00 (\$8,210x12). Additionally, on the basis that with diligent efforts to find alternative employment or engage in start-ups of their own, the respondents should have been able to earn at least a fraction of what they earned previously, estimated at a net monthly earning of \$1,500.00, the Court awarded the equivalent of their previous salary less \$1,500.00 for the 12 months ending 20th May 2020 (the 2nd year after their dismissal). This resulted in an award to Ms. James of \$38,808.00 (\$4,734 - \$1,500) x 12, and \$80,520.00 to Mrs. Henry-Hughes (\$8,210 - \$1,500) x 12.
- [120] A further sum was awarded on the basis that assuming a reasonable amount of diligence, the respondents should have been in a position to increase their average monthly net earnings to \$2,000.00 during the third and fourth years after their dismissals commencing June 2020. In the case of Ms. James, she was awarded an additional amount for the period up to her 65th birthday, and in the case of Mrs. Henry-Hughes up to the date of judgment. Thus, Ms. James was awarded \$54,680.00 (\$4,734 - \$2,000) x 20. Ms. Henry-Hughes was awarded \$149,040.00 (\$8,210 - \$2,000.00) x 24. The total award payable to Ms. James was reduced by \$56,808.00 on account of the ex-gratia payment she had received. In total, under the head of immediate loss, Ms. James was awarded \$93,488.00, while Mrs. Henry-Hughes received \$328,080.00.
- [121] Mr. Simon KC takes issue with this award on the basis that an award for immediate loss is normally calculated for the period between the date of dismissal and the date of trial or judgment, and subject to the employee's duty to mitigate by taking proper and reasonable steps to obtain suitable employment. Mr. Simon KC's submission goes further. He submitted that in the absence of evidence by the respondents that they took proper and reasonable steps to obtain suitable employment, the Industrial Court erred in principle in making an award under the head of immediate loss. The cases of **Antigua and Barbuda Transport Board v Anderson Carty**⁴⁷ and

⁴⁷ ANUHLTAP2020/0005 (delivered 27th July 2023, unreported).

Antigua Village Condo Corporation v Jennifer Watt⁴⁸ are prayed in aid of this submission.

[122] Mr. Simon KC further submitted that the normal award has been 6 months' pay, except where there are unusual circumstances, which are not present in this case. Further, these awards were made in circumstances where the respondents had made no claim for immediate loss. It was further submitted that there is no legal precedent for such an award, nor has the Industrial Court explained the basis for making an award of these amounts. Ms. James was 61 years old on her termination with four more years before retirement, while Mrs. Henry-Hughes was 60 years old with five more years before retirement. The Industrial Court's decision was handed down on 10th June 2022, 4 years after their dismissals in respect of which they received full payment for severance and other owed legal entitlements.

[123] Ms. Henry KC countered that in the exercise of its discretion the matters considered by the Industrial Court were based on the evidence before the Court. In reaching a determination as to quantum, it properly took into account the respective ages of the respondents and the proximity of their dismissal to their expected dates of retirement and their respective challenges in being able to earn a living in the period post termination.

Analysis and conclusions - Immediate loss

[124] The jurisprudence of the Industrial Court and this Court in relation to awards for immediate loss is quite settled. An employee is entitled to loss of earnings or benefits from the date of dismissal to the date of assessment, subject to the employee's duty to mitigate.⁴⁹ Immediate loss is thus awarded in respect of an ascertainable and finite period, and the sum payable is usually the net salary that the employee would have earned during this defined period, subject to the employee's duty to mitigate.

[125] The duty to mitigate placed on an employee entails making reasonably diligent efforts to find employment at a comparable standard to reduce or extinguish the loss

⁴⁸ Antigua Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported).

⁴⁹ LIAT (1974) Ltd v Novella Sheppard Antigua and Barbuda Civil Appeal No. 6 of 1991 (delivered 22nd November 1993, unreported).

suffered from the employer's wrongful act through the income earned from the new job. The absence of mitigation militates against an award under the head of immediate loss.⁵⁰ The question whether there has been a failure to mitigate is one of fact to be determined by the tribunal.

- [126] The issue raised on this appeal is whether the absence of evidence of mitigation by the employee means that the Industrial Court may not make any award for immediate loss. The appellant relies on **Anderson Carty**, where this Court held:

“An unfairly dismissed employee may be entitled to his immediate loss of wages. This head of compensation represents the loss of wages or pay between the date of the employee's dismissal and the date of trial or judgment. However, this award's availability to the employee is contingent upon the employee's mitigation of loss during that period.”⁵¹

- [127] Similarly, reliance is placed on the following passage in **Antigua Village Condo Corporation v Jennifer Watt**:

“An unfairly dismissed employee is obviously entitled to compensation for immediate loss of earnings (i.e. between the date of the dismissal and the date of the trial or judgment). That head of compensation includes the amount to which the employee is entitled by way salary or wages in lieu of notice. But during the pre-trial period, the employee is under a duty to take proper and reasonable steps to obtain other suitable employment and thereby to mitigate the loss of earnings during that period.”

- [128] Undoubtedly, the failure of an employee to mitigate is a highly relevant factor when considering whether to make an award under the head of immediate loss. However, the authorities do not go as far as saying that the failure to mitigate will ineluctably lead to no award being made. Two cases suffice to illustrate that this proposition is too broadly stated.

- [129] In the **Jennifer Simpson-Edwards** case the Industrial Court expressly acknowledged that the entitlement of an unfairly dismissed employee to an award under the head of immediate loss is subject always to her duty to mitigate her loss, and remarked further that ‘the absence of mitigation militates against a reward under this heading’. Notwithstanding these statements, and despite an express admission by the employee during her testimony that she made no effort to find alternative

⁵⁰ Jennifer Simpson-Edwards v Digicel Antigua Limited supra n. 14.

⁵¹ Anderson Carty, supra n. 47 at paragraph 22.

employment, the Industrial Court made an award for immediate loss limited to the equivalent of 2 months' salary of \$11,916.66. In **Antigua Village Condo Corporation v Jennifer Watt**, Sir Vincent Floissac CJ stated further:

“Where therefore the trial commences several months after the dismissal and the employee has failed to mitigate the pre-trial loss of earnings the court should make an appropriate deduction from the compensation for that loss.” (emphasis added)

[130] As I read these cases, an employee is obviously entitled to an award under the head of immediate loss. Given what it seeks to compensate, it seems to me that this entitlement accrues whether or not a claim is made in the Memorandum submitted in the Industrial Court. I find support for this conclusion in the case of **Tidman v Aveling Marshall Ltd**,⁵² cited approvingly in **Antigua Commercial Bank v Mary White**,⁵³ where Kilner-Brown J is quoted as saying:

“We are of the opinion that in future cases it is the duty of an industrial tribunal to raise itself the five different categories of compensatory award.” (emphasis added)

[131] However, the employee has a duty to mitigate their loss and the extent to which an employee mitigated or failed to mitigate his or her loss is a significant factor that will impact the quantum to be awarded under this head.

[132] In going about the task of determining the quantum to be deducted, **Gardiner-Hill v Roland Beiger Technics Ltd**⁵⁴ advocates the following approach:

“In fixing the amount to be deducted for failure to mitigate, it is necessary for the Tribunal to identify what steps should have been taken; the date on which that step would have produced an alternative income and, thereafter, to reduce the amount of compensation by the amount of the alternative income which would have been earned.” (emphasis added)

[133] It follows that I do not agree that the Industrial Court erred in principle in making an award under this head in the absence of evidence of mitigation. Whether they erred in principle in assessing the quantum of compensation payable under this head will be examined presently.

⁵² [1977] ICR 506.

⁵³ Antigua and Barbuda Civil Appeal No. 1 of 1988 (unreported).

⁵⁴ [1982] IRLR 498 at 500.

[134] Mr. Simon KC next submitted that the Industrial Court erred in making this award for a period of one year since the Industrial Court's norm has been 6 months' pay, except where there are unusual circumstances. This assertion is inconsistent with the dicta in all of the above cited authorities in relation to the period for which compensation is payable and is too broadly stated. Indeed, in **Jennifer Watt**, the Court of Appeal affirmed the Industrial Court's award for immediate loss for a period of 13.5 months acknowledging that she had been out of work for approximately 2 months but had taken reasonable steps to find alternative employment.

The award

[135] Although the Industrial Court acknowledged that the respondents gave no evidence of efforts to mitigate their loss, it nonetheless awarded the respondents the equivalent of their full monthly salaries for the first year after their dismissal. Such an approach is not aligned with the traditional jurisprudence of the Industrial Court which treats the failure to mitigate as a factor that diminishes the award made under this head.

[136] As it relates to the further sums which the Industrial Court awarded to the respondents for immediate loss, the Industrial Court engaged in an exercise whereby they awarded sums equivalent to the difference between the respondents' actual salary and prospective earnings based on its assessment of the respondents' prospective earnings in the 2nd, 3rd and 4th years after their dismissal. Again, no deduction was made on account of the absence of evidence of mitigation.

[137] The Industrial Court was under a duty to take account of the respondents' failure to mitigate and deduct an appropriate sum from the compensation it might otherwise be minded to award. This duty was underscored by Byron JA in **LIAT (1974) Ltd v Sheppard**.

[138] In that case, the appellant obtained employment 51 months after her dismissal. The Industrial Court awarded her a sum equivalent to her previous earnings for that period totalling \$66,508.00. In reducing that sum by half, Byron JA explained:

"The well settled law is that in order for an employee who has been unfairly dismissed to discharge the duty to mitigate his loss, he must make reasonably diligent efforts to find employment at a comparable standard.

The period of 51 months is so long that it raises by itself the issue of mitigation, and it was the duty of the court to determine whether in the context of the relevant circumstances the respondent's inability to find employment was related to the quality of her efforts in that regard. The court did not specifically discuss or rule on the issue of mitigation although there was an inferential ruling in its finding that the appellant had been "unable to find employment" for the 51 month period.

....

Neither party adduced evidence on the job market and there was no evidence before the court other than the unsuccessful attempts made by the respondent in her search for employment. I have been unable to accept that evidence of 6 or 7 unsuccessful attempts to obtain employment over 51 months could constitute reasonably diligent attempts to find employment at the level of non-specialised work as an accounts clerk.

The court cannot be debarred from exercising an objective approach merely by proof of actual loss because its duty must include considering the issue of mitigation as well.

In my view the extent of the failure to mitigate is sufficiently substantial to warrant at least halving the award under this head. In the circumstances, I would halve the award under this head to account for the respondent's failure to mitigate and vary the award from \$66,508.00 to \$33,254.00."

- [139] While the Industrial Court appears to have taken the approach suggested in **Gardiner-Hill**, there is a difficulty with applying this approach to the assessment of immediate loss while ignoring the fact that there has been absolutely no evidence of mitigation. Just as in the case of **LIAT (1974) Ltd v Sheppard**, there was no evidence before the Industrial Court of the state of the job market but unlike that case there was no evidence of any attempts by the respondents, unsuccessful or otherwise, to secure alternative employment. The closest the Industrial Court comes to furnishing a reason for not making a deduction for failure to mitigate is the statement at paragraph 60C (ii) that "given the circumstances under which they were dismissed, and the claims made on their behalf, it is not surprising that no evidence was advanced about mitigation". It is not apparent to me why the fact that the respondents were unfairly dismissed (the circumstances of their dismissal) would justify a failure to adduce evidence of mitigation.

- [140] Even with evidence of 6 or 7 attempts to obtain alternative employment, the Court of Appeal in **LIAT (1974) Ltd v Sheppard** considered those attempts at mitigation a substantial failing warranting a reduction in the award by half; a fortiori where, as here, there has been no evidence of any attempt at all.
- [141] The approach taken by the Industrial Court in the present case has the effect of rewarding or conferring a bonus and windfall upon an employee who has absolutely failed to mitigate, instead of penalising their failure. It cannot be right in principle that having failed completely to adduce any evidence of mitigation during the 4 years pre-trial that they should be awarded such huge sums? Failure to consider the lack of mitigation and make the appropriate deduction for that failing tends to undermine the important policy reasons underlying the emphasis consistently placed by the Industrial Court on the employee's duty to mitigate. The incantation of the duty to mitigate would ring hollow if, despite clear evidence of the failure to do so, an employee could be rewarded with such princely sums. This must be wrong in principle.
- [142] For these reasons, I conclude that each sum awarded under the head of immediate loss at sub-paragraph 60C (iv) (v), (vi), (vii) and (viii) of the judgment should be varied. Making due allowance for their ages and the challenges which this might reasonably present in securing alternative employment, I would limit recovery for immediate loss to 6 months each.
- [143] Furthermore, it seems to me that Mr. Simon KC's submission that these sums were arrived at on a speculative basis without evidential basis is well made. While the Industrial Court properly took account of the respective ages of the respondents and the proximity of their dismissal to their expected dates of retirement and the likely challenges they might have encountered in earning a living in the period post termination, it concluded that with reasonable diligence they would have secured employment in the second year onwards.
- [144] However, no reasons were advanced nor basis stated for determining what sums the respondents were likely to earn in the 2nd year, nor the basis for determining that in the 3rd and 4th years they 'should have been in a position to increase their average

monthly net earnings to \$2,000.00'. For example, were they based on the current minimum wage? Even an indication to that effect would have provided some insight as to how these figures were arrived at.

- [145] It is one thing to afford deference to the Industrial Court in the exercise of its discretion because of its considerable experience in the field, but such discretion has to be exercised judicially and must be rooted in some evidence, otherwise, it would be arbitrary and unreasonable. The point is made trenchantly by Sir John Donaldson in **Norton Tool Co. Ltd v Tewson**.⁵⁵

“But we do not consider that Parliament intended the court or tribunal to dispense compensation arbitrarily. On the other hand, the amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle.

The court or tribunal is enjoined to assess compensation in an amount which is just and equitable in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle.”

- [146] This provides an additional reason for interference with the Industrial Court's awards under this head.

Award for future loss

- [147] In **Jennifer Watt**, Sir Vincent Floissac CJ identified four basic rules that must govern an award for loss of future earnings. First, future loss of earnings should be predicated on the probability that the earnings from future employment or self-employment will be less than what was earned prior to termination and that the loss is the difference between the two earnings. I should add, however, that where, as here, the employee has not obtained alternative employment, the task is a bit more challenging. A number of factors must be weighed which have been aptly described as imponderables because of the hypothetical and speculative nature of the assessment which defies precise calculation. These include, the length of time the employee would have remained employed; whether his earnings would have increased or decreased, and, if so, to what extent; how long might it take for the employee to secure comparable alternative employment.

⁵⁵ [1973] 1 All ER183 at 186.

[148] Secondly, there is a limit to be placed on the number of years over which such loss is calculated and on the amount of future loss recoverable. Such limitations serve the interests of fairness and justice. The Chief Justice explained this rule by reference to the position at common law in Antigua and Barbuda, whereby employees who were wrongfully dismissed were limited in general damages to the net remuneration which they would have earned during the unexpired period of the contract of employment or during the period of reasonable notice, as the case may be. It was further explained that:

“The result was that in the vast majority of cases of wrongful dismissal in Antigua and Barbuda, damages were never measured in terms of years but were measured only in terms of weeks or months of salary or wages. The object of the importation of the concept of an employee's statutory right not to be unfairly dismissed was to enhance the remedies of an employee who was wrongfully or unfairly dismissed, but not to do so limitlessly beyond anything contemplated by the source of the importation⁵⁶ or beyond the bounds of the fairness and justice upon which the Code is based.”

[149] Third, there must be a significant discount for the fact that the award is an accelerated lump sum payment in realisation of a mere expectation.

[150] Fourth, the onus is on the employee to ‘prove the probability of loss upon which an award of compensation is made and to prove the probable duration of that probability’. In other words, the dismissed employee must prove that it is probable he would have suffered loss and the probable duration of that loss.

[151] This last requirement is of critical importance as failure by an employee to discharge this burden can result in no award being made under this head. The point is bluntly made in a judgment of the UK Employment Appeal Tribunal in **Adda International Ltd. v Curcio**,⁵⁷ cited approvingly by this Court in **Anderson Carty**, where Bristow J in delivering the judgment of stated at page 624:

“This appeal has underlined for us two things of general importance. The first is that there must be some evidence of future loss and the scale of

⁵⁶ According to the judgment, section 20(1)(b) of Schedule 1 of the Trade Union and Labour Relations Act limited compensation to the equivalent of 104 weeks' pay or £5,200.00 whichever is less. The Employment Protection (Consolidation) Act 1978 limited compensation for unfair dismissal to £7,500.00 but conferred power on the Secretary of State to increase this sum with Parliament's approval.

⁵⁷ [1976] 3 All ER 620 at 624.

future loss to enable the tribunal to make any award under that head. The tribunal must have something to bite on, and if an applicant produces nothing for it to bite on he will have only himself to thank if he gets no compensation for the loss of future earnings.”

[152] Curiously, the Industrial Court granted an award for future loss of earnings to Mrs. Henry-Hughes only. In this case, there was simply no evidence from her to prove any of the matters required to secure an award under this head. The Industrial Court recognised this yet decided, in their words ‘do the best we can’. Having already made awards to her for immediate loss for 4 years after her dismissal, the Industrial Court estimated that for the remaining 9 months until she reached her retirement age of 65 she would have increased her earnings to \$2,500.00. It multiplied the difference between this and her earnings prior to dismissal by 9 and awarded the sum of \$51,390.00, which was then discounted by 20% on account of the fact that it was an advance payment and “the relative value of money over time. This yielded the sum of \$41,112.00.

[153] While on its own an award of the equivalent of 9 months earnings for future loss might not be objectionable, it is my view that on the facts of this case, the approach taken by the Industrial Court violates and circumvents the requirement to limit the duration and quantity of compensation for loss of future earnings as the awards made for immediate loss were calculated using the same formula employed to calculate future loss. The substantive effect of the combined awards for immediate loss and future loss using the same formula is that Mrs. Henry-Hughes was effectively given awards for a period of 4 years and 9 months, in circumstances where she provided no evidence of loss. I would therefore set aside the award for loss of future earnings.

Fringe Benefits

[154] In **Cable & Wireless (West Indies) Ltd v Hill**⁵⁸ the Court of Appeal recognised the loss of fringe benefits as a head of loss. In assessing the appropriate award, the court looks to the employment contract or the Collective Agreement to ascertain what fringe benefits the employee would have enjoyed had his or her employment

⁵⁸ (1982) 30 WIR 120.

not been terminated. The fringe benefits for which the Industrial Court made awards were Cooking Gas Concession; Long Service Award; Thrift Fund; and Health Insurance Coverage.

- [155] The appellant's written submissions articulated no specific reasons for challenging these awards. However, at the oral hearing Mr. Simon KC indicated that the appellant does not take issue with the award for long service. Mr Simon KC, however, criticised the awards made for Cooking Gas Concession, Thrift Fund and Health Insurance Coverage. I will examine the challenged awards next.

Cooking Gas Concession

- [156] In oral submissions Mr. Simon KC criticised this award on the ground that it extended beyond the retirement age of the respondents because the Industrial Court multiplied the cost of a cylinder (\$175.00) by 8 years and 10 years respectively. On closer analysis it would be seen that despite appearances at first blush, this is not so. In this case the Industrial Court had regard to the Collective Bargaining Agreement under which Article 12.9 entitled the respondents to 2 free 100lb cylinders of cooking gas per year. Thus, based on an age of retirement of 65 years per the Collective Bargaining Agreement, Ms. James would have enjoyed this entitlement for a further 4 years; while Mrs. Henry-Hughes' entitlement would have run for 5 years. At a current value of \$175.00 per cylinder their entitlement is the equivalent of \$350.00 per year. Ms. James' award would be the equivalent of \$350.00 x 4 or \$1, 400; while Mrs. Henry-Hughes' would be \$350.00 X 5 or \$1,750.00. These are the precise sums the Industrial Court awarded. There is no basis for interference by this Court.

Thrift Fund

- [157] The Industrial Court awarded Ms. James \$14,580.72 and Mrs. Henry-Hughes \$32,757.90 for this fringe benefit. It did so on the basis that under the Collective Bargaining Agreement the employer was obliged to contribute 7% of the respondents' wages to the thrift fund. At that rate of contribution up to the age of the respondents' retirement, the value would have been the amount awarded. In oral submissions, Mr. Simon KC criticised the thrift fund award as erroneous and invited

this Court to strike them out. I find no fault with the Court's approach, which is a rational way to approach the assessment of compensation for this benefit.

Health Insurance Coverage

[158] The Industrial Court awarded the respondents continued health insurance coverage up to their 68th birthday and purported to base this on Article 28(4) (erroneously stated in the judgment to be 68(4)) of the Collective Bargaining Agreement. Mr. Simon KC criticised the Health Insurance Coverage award on the basis that the Industrial Court extended coverage beyond the respondents' retirement age of 65 stipulated in the Collective Bargaining Agreement without any rationale for so doing. He also drew attention to the letters of dismissal to the respondents in which the appellant indicated that notwithstanding that their termination was due to redundancy the appellant would make a special exception to allow them the benefit of health insurance coverage for a period of 3 years following their termination.

[159] The short answer to these submissions is that the Industrial Court correctly interpreted Article 28(4) of the Collective Bargaining Agreement, which provides:

“(4) Health Coverage after Retirement: Health Coverage will continue three (3) years after the retirement providing that the employee has been in the employ of the company for not less than fifteen (15) years.”

[160] By this provision, contrary to the submissions of Mr. Simon KC, health insurance coverage would not have ended at retirement age of 65 but would have continued for three years beyond that to age 68. Furthermore, in light of the Industrial Court's finding that the appellant acted unreasonably in terminating the respondents' employment, the Industrial Court did not err in awarding coverage to age 68. There is no merit to this complaint, and I would allow this award to stand.

Disposition

[161] For the reasons given in this judgment, I would allow the appeal against the compensation awards in part and vary the awards made at sub-paragraphs 60C (iv), (v) (vi), (vii), and (viii) of the judgment by substituting an award for immediate loss equivalent to 6 months wages as follows: Janis James (\$4,734 x 6) = \$28,404.00; Bernadine Henry-Hughes (\$8,210 x 6) = \$49, 260.00. The award of future loss in

the sum of \$41,112.00 to Mrs. Henry-Hughes is set aside. All other awards made by the Industrial Court are affirmed.

[162] No order as to costs.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar