

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 1989

BETWEEN:

THE ANTIGUA HOTELS & TOURIST
ASSOCIATION

= Appellants

and

SUNDRY WORKERS

- Respondents

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Miss Justice Joseph (Acting)

Appearances: T. Kendall, Q.C. and A. Henry for the Appellants
J. Simon for the Respondents

1990: Feb. 26, 27,
June 11.

JUDGMENT

MOE, J.A.

This is an appeal by the Antigua Hotels and Tourist Association from a decision of the Industrial Court given on the 18th May, 1989 that the respondents were unfairly dismissed by their employers, all hotels and members of the Appellant Association.

BACKGROUND:

At the material time the respondents were employees of various hotels represented by the appellants at negotiations with the Antigua Workers Union representing the respondents with respect to a Collective Agreement between the respective hotels and the employees. The negotiations broke down and the dispute was referred to the Minister of Labour for further conciliation. At a meeting the Minister put forward certain compromise proposals on outstanding issues for consideration by both parties who were to inform the Minister at a meeting convened for the 23rd December 1983 of their respective positions on his compromise proposals. At the meeting, the

/Antigua Workers.....

Antigua Workers Union accepted the proposals. The appellants did not. The Minister announced a deadlock. Before he left the meeting, the General Secretary of the Antigua Workers Union handed to a representative of the appellants a letter already prepared and signed which stated in effect that unless the dispute was resolved, strike action will be taken.

At 11.45 a.m. on the 23rd December, 1983 the matter was referred to the Industrial Court. The Antigua Workers Union was notified in writing that the dispute was so referred. This was before mid-day. The employees went on strike as threatened as from mid-day on 23rd December 1983.

On the said 23rd December 1983 the appellants issued a press release in which they indicated the reference to the Industrial Court, the illegality of the strike and the right to summarily dismiss employees who continued to participate in the illegal strike. On December 24th 1983 the appellants issued a second press release advising that effective 7.00 a.m. on 25th December, the employers would take appropriate action against employees who continued participation in the strike. On the same day the appellants posted on their various bulletin boards notices that the employers would continue employment of employees who returned to work by 8.00 a.m. on 25th December, whereas those who continued strike action thereafter would be considered as having abandoned their employment.

On the said 24th December the Minister of Labour announced on radio that the strike was illegal and advised the respondents to go back to work. A similar announcement was made by the Attorney General on the same day.

On the 25th December a barrister-at-law on radio gave the opinion that the strike was illegal and urged the respondents to go back to work. The Antigua Workers Union met with the respondents on the afternoon of the 25th December and advised them to go back to work as from the 26th.

When the employees turned up for work on the 26th December, their employers refused to take them back and gave as the reason that they had abandoned their jobs. The employers took the position that they would take back those employees only if they signed rehiring forms.

/The respondents.....

The respondents filed Suit No. 109 of 1983 in the High Court which found that the employees had not abandoned their jobs and held that the employers could not treat the employment as terminated for that reason. It also found that the matter had been referred to the Industrial Court, that there had been notice of the reference and that the strike was illegal. Immediately after that judgment, on the 31st January 1984 the employers dismissed the employees for taking part in an illegal strike. The judgment of the High Court was upheld by the Court of Appeal.

The Industrial Court in its written decision referred to the judgment of the High Court in Suit No. 109 of 1983 in which it was ruled that the respondents had taken part in an illegal strike but had not abandoned their employment. The tribunal reasoned that the respondents having not abandoned their employment both the respondents and their employers were still bound by the Collective Agreement existing between them. It took the view that the employers had the right to impose any of the penalties under the Collective Agreement. It referred to the Appendix to the Collective Agreement where it was provided that "if any worker committed the offence of 'Failure to report for work for a complete day without reasonable explanation' on the first occasion he or she would be liable to receive a reprimand, on the second occasion, he or she would receive a warning, on the third occasion he or she would receive a suspension and on the fourth occasion, a dismissal". The tribunal found the respondents were absent for one day from their employment and this was the first occasion of absence without reasonable explanation by the respondents. The tribunal did not find that the respondents were on strike for a period which would warrant dismissal under the Collective Agreement. In the circumstances they declared that the dismissal of the employees was unfair and awarded them compensation as follows:-

- "(a) Those employees who worked less than nine (9) years shall be paid five (5) weeks' pay for each year of service.
- (b) Those employees who worked for nine (9) years and over shall be paid six (6) weeks' pay for each year of service.
- (c) Amounts paid for compensation shall be calculated on the last basic wage received.

/(d) This....

- (d) This compensation must be paid to the employees not later than the 27th day of July, 1989."

THE APPEAL:

The grounds of the appeal are:

- (1) The Industrial Court erred in law in that they failed to appreciate or to address their minds properly or at all to the legal effect of an illegal strike on a contract of employment.
- (2) The Industrial Court erred in law in that they failed to appreciate or to address their minds properly or at all to the legal remedy available to an employer at law in the event of an illegal strike and that such remedy was in no way affected by the Antigua Labour Code, 1975 or by the Collective Agreement.
- (3) The Industrial Court erred in law in that they failed to appreciate the Criminal sanctions provided for by the Antigua Labour Code, 1975 did not displace the legal remedy available to an employer in the event of a strike in pursuance of a dispute which had been referred to the Industrial Court.
- (4) The Industrial Court erred in law in that the award of compensation was arbitrary and ignored evidence before the Court of the varying circumstances of the employees immediately after being dismissed. The award of damages is excessive in the extreme and cannot be supported by reference to the evidence before the Court and to any precedent.

Grounds 1,2 and 3 of the appeal were argued together. Counsel for the appellant originally sought to show that the provisions of the Antigua Labour Code have no relevance to the instant case. It was submitted that the Law relating to unfair dismissal as set out in the Antigua Labour Code is founded on the premiss that there was a subsisting contract of employment at the time of dismissal and that the employer had committed a breach of that contract by unfairly dismissing the employee. That in this case the relevant contracts had terminated before the dismissals on 31st January 1984. This seemed to be a peculiar stance to adopt. Before the Industrial Court the

/appellants.....

appellants admitted that the respondents were dismissed on the 31st January 1984 for participating in an illegal strike. If the contracts of employment had terminated before the 31st January 1984 what employment was there dismissal from on that date? Clearly the respondents would have to have been dismissed as from the 31st January 1984 from employment subsisting up to that date. On this Court adverting to the admission of dismissal on the 31st January 1984 and of the reason for the said dismissal, the appellants' Counsel cited *Simmons v. Hoover Ltd.* (1977) 1 All E.R. 775 with particular reference to a passage in the judgment of Phillips J. at page 785 in support of his contention that the dismissals are justifiable. He also submitted that the authorities show that the employers were entitled to dismiss summarily. He contended that on the facts the dismissal had to be fair.

The submissions of Counsel for the respondents were that every employee has a right not to be unfairly dismissed. That once dismissal is established an onus is placed on the employer to show that the dismissal was not unfair. That section C 60 of the Antigua Labour Code places limitations on the reasons which an employer may advance in order to show that the dismissal is not unfair; that the reason adduced must conform with the provisions of section 60(i)(a) to (e) of the Antigua Labour Code. Therefore the employers were obliged to establish that the dismissals fell within one of the sub-paragraphs of section 60(1).

Section 60(1) of the Labour Code provides as follows:

- "(1) A dismissal shall not be unfair if the reason assigned by the employer therefor -
- (a) relates to misconduct of the employee on the job, within the limitations of section C 61(1) and (2);
 - (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section C 61(3);
 - (c) is that the employee was redundant;
 - (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of Law; or
 - (e) is some other substantial reason of a kind which would enable a reasonable employer to dismiss an employee holding the position which the employee held.

provided,

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

Counsel for the respondents advanced the view that the only possible paragraph applicable to the case would be paragraph (e) but he contended that participation in an illegal strike is not per se a substantial reason, for in looking at the circumstances in which a dismissal took place it may be found that the reason was not a substantial reason. He recognized that section 20(1) and (7) of the Industrial Court Act, 1976 provides sanctions for participating in an illegal strike, but he referred to section K 19 of the Antigua Labour Code which declares the strike a legitimate aspect of the process of the collective bargaining. He submitted that the Antigua Labour Code does not make any provision in respect of strike action taken not in conformity with that Code and contended that by section A 10, of the Antigua Labour Code, that Code is supreme.

Section 20(1) and (7) of the Industrial Court Act, No. 4 of 1976 provides as follows:-

"(1) No employee may go on strike or take part in a strike and no employer may declare a lockout or take part in a lockout while proceedings in relation to a trade dispute between such employee and such employer are pending before the Court or Court of Appeal.

① ② ③ ④ ⑤ ⑥ ⑦ ⑧ ⑨ ⑩ ⑪ ⑫ ⑬ ⑭ ⑮ ⑯ ⑰ ⑱ ⑲ ⑳ ㉑ ㉒ ㉓ ㉔ ㉕ ㉖ ㉗ ㉘ ㉙ ㉚ ㉛ ㉜ ㉝ ㉞ ㉟ ㊱ ㊲ ㊳ ㊴ ㊵ ㊶ ㊷ ㊸ ㊹ ㊺ ㊻ ㊼ ㊽ ㊾ ㊿

(7) Any employee who takes part in a strike called in contravention of subsection (1) is guilty of an offence and shall be liable on summary conviction to a fine of two hundred and fifty dollars or three months imprisonment."

Section A 10 of the Antigua Labour Code states:-

"A 10. To the extent that there may be conflict between any provision of this Code and any provision of existing Law not specially repealed in one or another of the provisions herein, the applicable provision of this Code, as of its effective date, shall prevail over said provision of existing Law."

Counsel finally submitted that taking into consideration all the circumstances the dismissals of the respondents were unreasonable. In a reply Counsel for the appellants referred to section 10(3)(a) and (b) of the Industrial Court Act - subsection K 20(1) of the Labour Code and submitted that the dismissals clearly fell under section C 60(1)(e) of the Labour Code.

Section 10(3)(a) and (b) of the Industrial Court Act provides as follows:-

15510 *Asplenium adnigrum* (L.) Oakes

"(3) Notwithstanding anything in this Act or in any other rule of Law to the contrary, the Court in the exercise of its powers shall -

- (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests in the persons immediately concerned and to the community as a whole;
- (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua Labour Code."

Section K 20(1) of the Labour Code States:-

"(1) Nothing in section K 19 herein shall affect the Law relating to riot, unlawful assembly, breach of peace, sedition, or any offence against the State."

APPLICABILITY OF THE CODE*

In this case there was the fact of dismissal and a stated reason for the dismissal. On hearing the complaint relating to the dismissal the Industrial Court as enjoined by section 10(3)(b) of the Industrial Court Act had to apply the provisions of the Antigua Labour Code. By virtue of the provisions of section C 60 of the Code the tribunal had to decide whether the appellants had established that the dismissals were not unfair. An issue for determination was whether the dismissal fell within the provisions of section C 60(1) of the Code. As it has ***-turned out the issue left is whether paragraph (e) of section 60(!) has been satisfied.

I am in agreement with what the President of the Industrial Court in *Novelle Martin v Bryson & Co. Ltd.* Ref. No. 7 of 1978 had to say on section C 60(1)(e) of the Code. He said at page 8 "Since the company is relying on paragraph (e) of section C 60(1) of the Code to support its contention that the employee's dismissal was not unfair, it will first have to adduce "some substantial reason" for the dismissal and then establish to the satisfaction of the Court that that reason entitled it to dismiss the employee". He earlier said at page 6, "The requirement of this section that the reason for dismissal should be of a substantial nature gives adequate warning to an employer that a reason which is either of a fanciful or far-fetched character will be unacceptable to a tribunal charged with the responsibility

/of deciding.....

of deciding whether the dismissal of an employee in the circumstances of any case is fair or unfair..... The section contemplates "a reasonable employer" and so prescribes that an objective test is to be applied in deciding whether or not the particular employer whose conduct is being considered falls within the ambit of the words mentioned in the section". He went on to say at page 7, ".....A Court's duty when considering an employee's allegation that his dismissal was unfair is to examine the whole of the evidence before it; to assume that the employer is a reasonable employer who has viewed the facts on which he acted in a fair and reasonable manner; and having done so, to say whether the employer's decision was a reasonable one in the circumstances.....in considering whether the employer acted reasonably or unreasonably the tribunal should adopt a broad approach of common sense and common fairness, eschewing all legal or other technicalities. In other words they should constitute themselves an industrial special jury".

SUBSTANTIAL REASON OR NOT:

The conduct of the respondents stated as the reason for their dismissal was conduct which constituted a breach of their contracts of employment and it was open to their employers to accept the breach as a repudiation of their contracts or to ignore the breach. The conduct was such as also entitled the employers to dismiss the respondents summarily. Relevant authorities were reviewed in *Simmons v. Hoover Ltd.* (1977) 1 All E.R. 775 in which it was held that where there was a strike, whether preceded by a proper strike notice or not, the participation by an employee in the strike would, in normal circumstances, constitute a repudiation of his contract of employment which, in law, entitled his employer to dismiss him without notice. This case has been followed in *Hadow v. I.L.E.A.* (1979) I.C.R. 202. The reason for the dismissals in the instant case can in no wise be regarded as fanciful or far-fetched. In addition the conduct of the employees offended section 20 of the Industrial Court Act.

I find no conflict between the provisions of section 20 of the Industrial Court Act and any provision of the Antigua Labour Code. The sections of the Code referred to by Counsel for the respondents recognize a strike as legitimate industrial action and the Code sets out how employees may proceed to effect such action. There is no provision in the Code which recognizes or approves of strike action when the relevant trade dispute has been referred to the Industrial Court. To the contrary section 20

/of the Code.....

of the Code places limitations on the right to strike and it may be observed that in 1975 when the Code was enacted, i.e., before the enactment of the Industrial Court in 1976, by virtue of section K 20(2)(c) there was already the concept of prohibition of strike action in pursuance of a matter referred for formal handling, and section K 22 provided penalties and sanctions for violations of the prohibitions.

The employers had established a substantial reason for the dismissals in this case.

REASONABLENESS OF DISMISSAL:

The question now is would the reason entitle a reasonable employer to dismiss the employees holding positions which the respondents held. What had to be determined therefore is whether on 31st January 1984 the appellants acted reasonably in treating participation in an illegal strike as a sufficient reason for dismissing the employees. The Industrial Court considered the matter from the point of view of absence from work and appears to have considered that the employers' rights were only as provided for in the Collective Agreement between the parties. Whether an employer did not follow a procedure agreed upon in a Collective Agreement is only one factor to be taken into account in deciding whether in the circumstances of a particular case an employer acted reasonably in dismissing an employee; that is if the particular provision is at all relevant. In this case the absence from work was on account of conduct which amounted to a repudiation of the respective contracts and a breach of the Law in the circumstances outlined above. It has to be borne in mind also that the consideration is not what some other employers might have done but whether it was reasonable for the employers to have acted as the employers did in the circumstances. In considering the circumstances it is the employers' conduct being judged and therefore what they knew or ought to have known at the time of the dismissal may be taken into account. The consequences of the dismissal are not relevant considerations.

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

/should.....

should be remitted to the Industrial Court or whether this Court ought to act in accordance with its powers under section 17(2) of the Industrial Court Act (supra). I think the latter to be the better alternative in the circumstances.

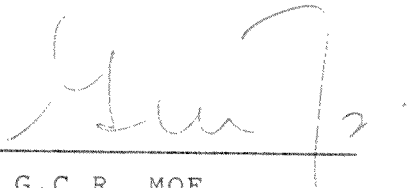
The conduct of the respondents, various factors and circumstances have been set out. It is evident from the Press Release and Notice issued by the employers on the 24th December 1983 that as from 7.00 a.m., 25th December 1983 they had decided to accept as repudiation of the respective contract a continuation by any respondent in the illegal strike. It is clear that as from that date the employers intended to terminate the contract of employment of the relevant employees. The intention to take the action was declared after the employers own indication to the respondents that they were in the wrong and offered to continue employment of those employees who returned to work by a certain time; this was also after the Minister of Labour and the Attorney-General had announced that the respondents were breaking the Law and should return to work. The employees continued participation in the strike beyond the deadline and when they next turned up for work, the employers did not take them on; the employers had accepted the respondents' repudiation of their contracts. The employers laid down terms for re-engagement of the respondents.

The respondents were paid up to 31st January 1984. The evidence is not direct as to why the appellants having accepted the respondents breach, as of the 25th December 1983, paid them up to 31st January 1984. But it is a reasonable inference that while the legal position between the parties was as earlier stated the matter being before the High Court the employers awaited the Court's decision. The evidence is that for that waiting period while the employees did no work, they were paid i.e., up to 31st January 1984. Consequently I take the view that the employers on 31st January 1984 took action which it all along intended to take and was entitled to take, i.e., terminated the contracts summarily.

Having considered all the circumstances I cannot say that a reasonable employer would not have acted as the appellants did. I find that the reason for dismissal fell within section C 60(1)(e) of Antigua Labour Code and accordingly I hold that the dismissals were not unfair. The question of compensation does not arise.

I would allow the appeal, set aside the decision of the Industrial court and dismiss the respondents' claim.

/G.C.R.....



G.C.R. MOE,
Justice of Appeal



E.H.A. BISHOP,
Chief Justice (Acting)



MONICA JOSEPH,
Justice of Appeal (Acting)