

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

ANTIGUA AND BARBUDA

ANUHLTAP2019/0002

BETWEEN:

LESTER JONAS

Appellant

and

JUMBY BAY ISLAND COMPANY

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Trevor M. Ward

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Kendrickson Kentish for the Appellant
Ms. Nelleen Rogers Murdoch for the Respondent

2023: November 20;
2024: April 17.

Civil Appeal – Appeal against decision of Antigua and Barbuda Industrial Court – Employment Law – Dismissal by reason of redundancy – Challenge to compensatory award – Whether the Industrial Court erred in declining to award compensation for manner of dismissal, future loss of earnings, overtime/premium pay and public holiday pay – C6, C7, C14, C15, C26, C27 of the Antigua and Barbuda Labour Code Cap. 27 – Whether the Industrial Court erred in failing to award the appellant compensation for unpaid allowances on account of the restructuring of his salary

The appellant, Mr. Lester Jonas, was a Security Manager at the respondent company, commencing employment on 3rd May 2010. In April of 2012, the respondent company restructured the remuneration package of its managers in accordance with the Government's revision of its schedule of non-taxable allowances. The effect of this restructuring was an increase in the appellant's net income as statutory deductions only applied to his base pay. On 8th January 2013, the appellant formally signed the contract of employment.

By letter dated 18th February 2015, the respondent terminated the appellant's employment on the ground of redundancy. The appellant received one month's pay in lieu of notice with severance accrued at one month for each year worked; accrued vacation up to and including February 2015; and his pro-rated salary up to and including 19th February 2015. The appellant also received an ex-gratia payment equivalent to 3 months' salary. The total amount paid to the appellant was the sum of \$97,307.41, all payments being subject to the deduction of the applicable taxes.

The appellant filed a reference with the Industrial Court claiming unfair dismissal and that he was entitled to compensation under several other heads of loss, namely future loss of earnings, loss for manner of dismissal, overtime/premium pay, holiday pay and unpaid allowances. The Industrial Court, however, granted an award to the appellant under the sole head of immediate loss of earnings and refused compensation under the other heads referred to.

Being dissatisfied with the decision of the Industrial Court, the appellant appealed to this Court and the issues which fell for determination were: (i) whether the Industrial Court erred in declining to award compensation for the manner of dismissal, future loss of earnings, overtime/premium pay, and public holiday pay and (ii) whether the Industrial Court erred in failing to award the appellant compensation in relation to unpaid allowances due to him from the respondent on account of the restructuring of his salary with effect from 1st April 2012.

Held: allowing the appeal in relation to the claims for overtime/premium and holiday pay, dismissing the appeal in relation to the claims for manner of dismissal, loss of future earnings and unpaid allowances and making no order as to costs, that:

1. The appellant, being an employee within the meaning of the Antigua and Barbuda Labour Code, was entitled to premium pay at the prescribed statutory rate for hours worked in excess of the 40-hour work week. There was no evidence before the Industrial Court that the appellant was remunerated at a higher salary level to compensate for him having to work overtime and on holidays. In addition, the Industrial Court's conclusion that 'if payment for overtime and off days was intended for the employees and other managers this benefit would have been negotiated and included in the contract or memorandum of agreement' fails completely to address the provisions of the Labour Code prescribing mandatory minimum standards in relation to premium pay for employees. The effect of these provisions is that where the contract of employment expressly derogates from these minimum standards or is silent in relation to premium pay, those terms are null and void to that extent and the provisions of the Labour Code apply. However, in the absence of some evidential basis that provides at least some rough estimate of the number of overtime hours worked by the appellant, only a nominal sum should be awarded under this head, set at \$5000.00.

Sections C6, C7, C26 and C27 of the **Antigua and Barbuda Labour Code** Cap. 27 of the Laws of Antigua and Barbuda applied.

2. The Industrial Court was wrong not to have considered the provisions of Division C of the Labour Code in relation to holiday pay as (1) the statement in the respondent's policy document contradicts the respondent's contention that the

respondent had a policy of not paying holiday pay to managers and (2) there is no evidence of any negotiated alternative means of compensation for the appellant in relation to holiday pay, which does not run afoul of the minimum statutory standards. Division C15 of the Labour Code therefore applied, and the appellant is entitled to compensation for holiday pay. The appellant having not furnished any evidence to establish the number of holidays on which he worked, an award under this head can only be for a nominal sum, set at \$5000.00.

Sections C6, C7, C26 and C27 of the **Antigua and Barbuda Labour Code** Cap. 27 of the Laws of Antigua and Barbuda applied.

3. To succeed on a claim for loss by reason of manner of dismissal there is an evidential burden on the employee to adduce evidence of the likelihood or risk of financial loss to the employee as a result of the manner or circumstances of their dismissal, or that the manner or circumstances of the dismissal made the employee less acceptable to potential employers or exceptionally liable to selection for dismissal. The evidence before the Industrial Court falls well short of establishing a causal link between the manner or circumstances of the appellant's dismissal and his failure to secure employment. There was no evidence before the Industrial Court that any of the employers to whom he reached out were even made aware of the circumstances of his dismissal, which would provide some basis for drawing an inference that that was the reason for them not engaging him. Resultantly, the appellant has failed to discharge this evidential burden and the Industrial Court did not err in refusing to make an award under this head.

Antigua Village Condo Corporation v Jennifer Watt Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported) followed; **Antigua and Barbuda Transport Board v Anderson Carty** ANUHLTAP2020/0005 (delivered 27th July 2023, unreported) followed; **Norton Tool Co. v Tewson** [1973] 1 All ER 183 applied; **Lewis v Courts (Antigua and Barbuda) Ltd.** Reference No. 13 of 1997 applied.

4. An appellate court should accord weight to the findings of facts made by the Industrial Court mindful of the advantage they enjoyed over the appellate court, having seen and heard the witnesses. The Industrial Court having accepted (1) the evidence of the respondent's witnesses relating to the circumstance surrounding the re-structuring of the appellant's salary, (2) that the appellant did not sign the formal contract containing these terms under duress and (3) that the restructuring did not operate to the appellant's disadvantage as his net take-home pay was higher since his statutory deductions were only applied to his base pay, there is no basis for disturbing any of the findings of fact made by the Court. The decision of the Industrial Court not to make an award for unpaid allowances is therefore upheld.

JUDGMENT

[1] **WARD JA:** This is an appeal by Lester Jonas (“the appellant”) against a decision of the Industrial Court of Antigua and Barbuda (“the Industrial Court”) in relation to the award of compensation for the appellant’s unfair dismissal from his position as Security Manager at Jumby Bay Island Company (“the respondent”). The Industrial Court made an award in favour of the appellant under the head of immediate loss of earnings, in a sum equivalent to six months full salary, with a further three months at 50% of his salary, less an ex-gratia payment previously made by the respondent. The Industrial Court, however, refused to make any award under the heads of future loss of earnings, manner of dismissal, unpaid allowances, overtime work and public holiday pay. Being aggrieved, the appellant filed a Notice of Appeal on 3rd May 2019 challenging the decision of the Industrial Court. The notice of appeal sets out several grounds of appeal, but at the hearing the appellant’s counsel indicated that he would no longer be pursuing that ground of appeal which sought the award of exemplary damages. The remaining grounds give rise to the following issues on this appeal:

- (1) Whether the Industrial Court erred in declining to award compensation for (a) the manner of dismissal, (b) future loss of earnings, (c) overtime/premium pay and (d) public holiday pay;
- (2) Whether the Industrial Court erred in failing to award the appellant compensation in relation to unpaid allowances due to him from the respondent on account of the re-structuring of his salary in with effect from 1st April 2012.

Background

[2] The appellant was employed by the respondent as Security Manager from 3rd May 2010 to 19th February 2015. His initial terms and conditions of employment were communicated to him via an email from the respondent’s CEO dated 27th April 2010 with a promise to subsequently incorporate these terms into a ‘standard management letter of employment’ following a review by the respondent of its human resources programs. On commencement, the appellant was earning a gross monthly salary of \$9,000.00, and, after the relevant

statutory deductions were made, a net monthly salary of \$7, 638.54. On account of increments paid to him, his gross monthly salary subsequently increased to \$10, 502 .00 and a net salary of \$8,862.67 after statutory deductions.

[3] In April 2012, the Government reviewed its schedule of non-taxable allowances, providing a specified threshold for such allowances. With a view to allowing its managers to benefit from the government's reviewed schedule, the respondent, on advice from its accounting partner, re-structured the remuneration package of its managers. The formula employed was to adjust the gross salary of each manager to reflect a lower taxable gross pay and to reflect the excess on the existing gross salary as non-taxable allowances comprising travelling, housing and utilities. The benefit derived was that the appellant's net take-home pay was higher because the statutory deductions were only applied to his base or basic pay. The appellant initially expressed some concern about the effect of this re-structuring on his pension benefits but was assured that those benefits would not be affected, and that any future computation would be based on his gross salary. The appellant signed the formal contract of employment on 8th January 2013.

[4] By letter dated 18th February 2015, the respondent informed the appellant that his employment with the company would be terminated with effect from 19th February 2015. The reason given for the termination was that his position as Security Manager had become redundant. (I will return to this letter in greater detail when examining the appellant's claim for an award for manner of dismissal). The letter also indicated that the appellant would be paid one month's pay in lieu of notice; severance accrued at one month for each year worked; accrued vacation up to and including February 2015; and his pro-rated salary up to and including 19th February 2015. In addition, the appellant received an ex-gratia payment equivalent to 3 months' salary. All payments were subject to the deduction of the applicable taxes. A cheque for the sum of \$97,307.41 was paid to the appellant by the respondent for the monies due to him.

- [5] On 14th September 2015, the appellant filed a Reference with the Industrial Court in Antigua and Barbuda claiming that he was unfairly dismissed and that he was entitled to compensation under several heads of damages including immediate loss of earnings, future loss of earnings, manner of dismissal, loss of protection, unpaid allowances, and compensation for work done on public holidays and overtime work done on his scheduled off days.

Judgment in the Industrial Court

- [6] Before the Industrial Court, the respondent conceded that the appellant's dismissal was unfair and that he was entitled to compensation in respect thereof. In its judgment dated 25th March 2019, the Industrial Court made an award in favour of the appellant under the head of immediate loss of earnings but refused to order compensation under the heads of future loss of earnings, loss for manner of dismissal, overtime/premium pay, holiday pay and unpaid allowances.
- [7] In relation to future loss of earnings, the Industrial Court declined to make such an award 'having regard to our award under Immediate Loss'. Seemingly, the Industrial Court was of the view that having made an award for immediate loss of earnings it should not or could not make an award for future loss of earnings. Its stated reason for not making an award for manner of dismissal was that 'the statements in the letter of dismissal could not have had such a negative effect on the Employee's re-employment'. The appellant's claims for awards of overtime/premium pay was refused on the basis that 'it is often the practice for managers to be remunerated at a high enough salary level to take care of, among other things, overtime work and days off....if payment for overtime and off days was intended for the employees and other managers this benefit would have been negotiated and included in the contract or memorandum of agreement'. The latter reference is to a Memorandum of Agreement between the respondent and the Antigua and Barbuda Workers' Union (on behalf of the security employees). The Industrial Court also premised its decision under this head on its finding that the appellant had not produced any records to support his assertion that he had worked 900 hours overtime and 100 days off. The Industrial Court characterized these numbers as 'guesstimates'. In relation to the

appellant's claim for public holiday pay, the Industrial Court held that 'while line staff is eligible for this benefit in accordance with the Labour Code and Memorandum of Agreement generally, in the case of managerial staff this would normally need to be negotiated by contract. The Employee's contract did not address this issue and therefore there is no authority to make this request enforceable'.

- [8] As it relates to the appellant's claim for unpaid travelling, housing and utilities allowances, which he argued should have been paid separately and in addition to his salary, the Industrial Court dismissed this contention on the basis that there was nothing 'out of order' with the new salary arrangements introduced by the respondent in April 2012.

**Issue 1 – (a) Manner of dismissal
Appellant's submissions**

- [9] The appellant claims that he is entitled to an award under the head of loss for manner of dismissal and that the Industrial Court erred in the exercise of its discretion by failing to make an award in that respect. On behalf of the appellant, learned counsel, Mr. Kendrickson Kentish, submitted that such an award is made in instances where the manner of the dismissal had the effect of reducing the employee's potential for re-employment. He contended that the dismissal letter issued to the appellant had such an effect on his future job prospects. This is so argued Mr. Kentish, because although the respondent had cited redundancy as the reason for the appellant's termination, the dismissal letter highlighted concerns relating to inadequate island surveillance, numerous thefts of both large and small assets, issues of road safety and potential exposure of the respondent to severe reputational risks. Mr. Kentish submitted that all of these issues related directly to the appellant's job as Security Manager. The language employed in the dismissal letter was prejudicial to the appellant as a security professional since the concerns raised implied poor performance of the security department of which the appellant was the manager. Consequently, this made him less attractive to other employers in the security field.

[10] In answer to a suggestion that the appellant adduced no evidence that there was any likelihood or risk of financial loss being suffered by him on account of the manner of his dismissal, Mr. Kentish referred the Court to the case of **Antigua Village Condo Corporation v Watt**¹ which he sought to distinguish from the circumstances in the present case. In the **Watt** case, this Court refused to make an award under the head of loss by reason of manner of dismissal on the ground that there was no evidence of the likelihood or risk of financial loss to Ms. Watt by manner of her dismissal. However, Mr. Kentish contended that in the **Watt** case, the finding by the Court that the language of the dismissal letter was benevolent is a distinguishing feature from the facts of this case, where prejudicial statements and language were used by the respondent in the dismissal letter to the appellant. Mr. Kentish submitted that the Industrial Court failed to take this distinguishing factor into account and thereby wrongfully exercised its discretion.

[11] Mr. Kentish also referred the Court to the case of **Dublin v RBC**,² a case where the court awarded \$10,000.00 for loss by reason of manner of dismissal. Mr. Kentish submitted that similar to **Dublin** where the reason of 'misconduct' was used as 'a sham' to dismiss the employee, in this case, the termination due to redundancy was also a sham and the real reason was the purported poor performance of the appellant. Mr. Kentish further relied on the case of **Lewis v Courts (Antigua and Barbuda)**³ where the employee was summarily dismissed for misappropriating 30 cents in stamps and the court accepted that the employee was perceived in the public as a thief. The court made an award of \$8,000.00 for manner of dismissal. Therefore, the appellant invites this Court to make an award of \$15,000.00 under this head.

Respondent's submissions

[12] For the respondent, Ms. Nelleen Rogers Murdoch, submitted that on a proper construction of the dismissal letter, it was not prejudicial to the appellant as it did not impugn his performance as security manager and did not contain prejudicial

¹ Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported).

² Reference No. 15 of 1983.

³ Reference No. 13 of 1997.

language which would have made the appellant less attractive to employers in the future. Ms. Murdoch invited the Court to view the letter as doing no more than identifying certain structural, administrative and operational issues that had created problems, which the respondent was taking steps to remedy. When looked at in this way, Ms. Murdoch submitted, it cannot be reasonably said that the letter impugned the appellant's performance, character or ability or the performance of the department he managed, so that he would be less likely to be hired in the future or singled out for dismissal. To support this assertion Ms. Murdoch referred the Court to the evidence of the appellant in relation to his attempts to secure alternative employment with a prospective employer, Mr. Purcell. It is pointed out that while Mr. Purcell told the appellant he would not hire him, he did promise to engage him in the future to conduct training sessions with his staff.

- [13] It was further submitted that the appellant has conflated the respondent's concession that the dismissal was unfair, with an entitlement to compensation for loss for manner of dismissal. For these reasons, the respondent submitted that the Industrial Court did not err in refusing to order compensation for loss.

Discussion

- [14] Loss by reason of manner of dismissal is one of the recognized heads of loss for which compensation may be awarded to an employee who has been unfairly dismissed.⁴ Such an award seeks to compensate an employee whose future employment prospect may be impaired by virtue of the manner and circumstances under which their dismissal occurred. For example, a dismissal which is harsh and oppressive or executed in a public way or communicated to others can have a deleterious effect upon an employee's reputation and prospects of future employment, thereby occasioning loss to the employee. In an age where employment may generally be more difficult to come by, it is important that an employee be compensated in some way for an unfair dismissal that produces such consequences.

⁴ See *Antigua Village Condo Corporation v Jennifer Watt* Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported).

[15] It has been held that in making an award under the head of manner of dismissal, the court considers whether the manner and circumstances of the employee's dismissal could give rise to any risk of financial loss at a later stage by, for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal: **Norton Tool Co v Tewson**.⁵ In this case Sir John Donaldson P stated the proposition thus:

“As the employee secured employment within four weeks of his dismissal and we have taken full account of his loss during this period, we need only consider whether the manner and circumstances of his dismissal could give rise to any risk of financial loss at a later stage by, for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal. There is no evidence of any such disability and accordingly our assessment of the compensation takes no account of the manner of his dismissal. This took place during a heated exchange of words between him and one of the directors.”

[16] This approach has been followed by this Court as recently as the decision in **Antigua and Barbuda Transport Board v Anderson Carty**.⁶ The real question, however, is what evidence the employee is required to adduce in support of a claim for loss for manner of dismissal. It seems to me that at least two things must be established. First, there must be evidence of the loss. Secondly, it must be shown that that loss is attributable to the manner of dismissal. All the authorities to which we have been referred, starting with **Norton Tool Co**, show the courts engaged in scrutinizing the evidence on which the claim for loss is founded, and I propose to do the same.

[17] In this case, the appellant relies on the contents of the dismissal letter, which are said to have had the effect of reducing the appellant's potential for re-employment because they reflect negatively on his performance as Security Manager. It is necessary to set out the material parts of that letter, which followed a review of the Security Department undertaken by the respondent.

“Dear Mr. Jonas,

⁵ [1973] 1 All ER 183.

⁶ ANUHLTAP2020/0005 (delivered 27th July 2023, unreported).

Management has undertaken a review of the operation of the security department over the past 12 months in view of the concerns that have arisen over the period regarding among others (a) inadequate island surveillance; (b) numerous thefts of both large and small assets (c) issues of road safety. These matters pose significant risks to both external and internal guests and potentially expose the company to severe reputational risk.

As a result of the review management has concluded that there exists in the security department as structured certain inadequacies which management had concluded needs to be addressed to facilitate a change and reduce the significant risk to which the company has been exposed.

In order to achieve this objective, management has determined on a re-organization and restructuring of the security department which we believe will not only enable management to save significant costs but will enable the company to better ensure the safety and security of all guests and employees. A new structure of the department will therefore be put into place within the next month.

This structure involves the streamlining of functions and deploying staff in a manner that increases supervisory manpower and streamlines the accountability of the supervisors to one entity.

To this end the decision has been taken to eliminate the position of manager of security, and to appoint four supervisors who will report directly to the director of security. Management believes that the increase in supervisory personnel would permit specific tasks to be assigned based on specific areas of specialization thus streamlining the department's functions. The effect will also be to ensure that there is enhanced record keeping and statistics, and enhanced reporting..."

- [18] The evidence before the Industrial Court was that following his dismissal the appellant testified that he had sent out numerous applications to hotels, security companies and also sought employment within the government sector, to which he received no response. He also explored the option of providing training to companies. To this end he submitted proposals to a company called ECAB which responded. He met with them, and they indicated that they would move forward with the project, but matters had not progressed further as at the date of the trial. In another case, he sought employment with a Security Company but was informed by one Mr. Purcell, that he would not hire him, but promised to engage the appellant in the future to conduct training sessions with his staff should the need arise.

- [19] In his written submissions, the appellant invites this Court to view these two encounters as ‘instances in which it may reasonably be inferred that due to the manner of dismissal, the potential employers refrained from hiring him’.
- [20] To my mind this evidence falls well short of establishing a causal link between the manner or circumstances of the appellant’s dismissal and his failure to secure employment. There was no evidence before the Industrial Court that any of the employers to whom he reached out were even made aware of the circumstances of his dismissal, which would provide some basis for drawing an inference that that was the reason for them not engaging him.
- [21] Indeed, the appellant himself posited several reasons before the Industrial Court as to why the prospect of securing employment at his level in the security field would prove challenging. According to his evidence:
- “...The establishments that are out there, they have their own security personnel and they don’t require at this time any security manager or either supervisor. And the other companies in terms of security companies that are there are running individually and are not really – the only that – I actually spoke with Mr. Purcell to try and get a job with him and he said ‘Jonas I am not going to employ you. If I have something for you to do and I need your services, I will call you to do some training form me, but I am not going to employ you, I can’t employ you.’”
- [22] None of these reasons explaining why the appellant was unable to secure employment bears any nexus with the manner or circumstances of his dismissal.
- [23] Mr. Kentish argued further that even in the absence of evidence that the prospective employer was aware of the manner or circumstances of the appellant’s dismissal, the mere contents of the letter itself suffices to warrant an award for manner of dismissal. He submitted that while the letter cites redundancy as the reason for dismissal, the letter also cited the performance of the security department. Thus, the appellant when seeking alternative employment would not be able to say that he was terminated for redundancy.

[24] Mr. Kentish relies on the following passage in the **Watt** case, in which the Court of Appeal explains its reversal of the Industrial Court's award for manner of dismissal. After referring to the statement of Sir John Donaldson P in the **Norton Tool Co Ltd v Tewson** quoted above, Sir Vincent Floissac stated:

“In the present case, there was no evidence of the likelihood or risk of financial loss to the respondent as a result of the manner or circumstances of her dismissal. There was no evidence that the manner or circumstances of the dismissal made the respondent less acceptable to potential employers or exceptionally liable to selection for dismissal. On the contrary, the letter of dismissal was civil and benevolent. It purported to have been based on redundancy which did not in any way reflect adversely on the respondent's performance as an employee or on the respondent personally.”

[25] Mr. Kentish seizes on the last two sentences to ground a distinction with the instant case based on the tone of the dismissal letter, seemingly drawing an inference that had the tone of the dismissal letter in **Watt** been other than civil and benevolent, the award for manner of dismissal would have stood. I do not agree. I do not read the above passage as basing the decision to reverse the award for manner of dismissal on the fact that the letter of dismissal was civil and benevolent. The real reason, as clearly stated, was the absence of evidence of the likelihood or risk of financial loss to the employee as a result of the manner or circumstances of her dismissal, or evidence that the manner or circumstances of the dismissal made the employee less acceptable to potential employers or exceptionally liable to selection for dismissal. It was the absence of such evidence that led the Court of Appeal to reverse the Industrial Court's Award.

[26] Mr. Kentish also relies on **Dublin v RBC**. In that case an employee of the Royal Bank of Canada received a letter of dismissal which ascribed the reason for dismissal as follows:

“Dear Mr Dublin,
As a result of your wilful disobedience clearly demonstrated by your conduct towards customers of the bank and your availing yourself of unauthorized leave your employment with the bank has been terminated for just cause with effect from July 25th 1983.”

[27] The Industrial Court's assessment and findings in relation to the evidence bearing on the question of an award for manner of dismissal was as follows:

“...following his dismissal the employee began efforts to find alternative employment. Each time the response was the same; the employer would await the outcome of the dispute with the Royal Bank of Canada. As he was unsuccessful in these attempts, he decided to become self-employed fixing sewing machines. In the evenings he assisted his mother-in-law in the cleaning services she provided to business places in St. John’s including the Royal Bank of Canada. The remuneration he received from these two endeavours was negligible and his household depended to a large extent on his wife’s salary. He has not yet found comparable alternative employment. We are satisfied that by his dismissal, the employee was made less acceptable to potential employers and under this head we award him 10,000.00.”

[28] It is clear that in **Dublin** there was evidence before the Industrial Court that prospective employers’ reluctance to engage with the employee was a direct result of the circumstances of his dismissal from the bank, of which they were obviously aware since they clearly stated that they would await the outcome of that dispute. In these circumstances, there was evidence to establish a causal link between the manner or circumstances of the employee’s dismissal and his inability to secure comparable alternative employment. That is not the case here.

[29] The appellant also seeks to rely on **Lewis v Courts (Antigua and Barbuda) Ltd**⁷ where the Court awarded \$8,000.00 for manner of dismissal. Here the employee was employed with Courts (Antigua and Barbuda) Ltd. as a cashier until her dismissal. On the morning of her dismissal the employee had a letter she wished to post but on account of working late she was unable to get to the post office to purchase a stamp. The letter of dismissal alleged that she had used the company’s franking machine to print 30 cents on a personal letter, thereby misusing the company’s property without permission. In making an award for manner of dismissal, the Industrial Court articulated its reasons for so doing in the following terms:

“The employee was a cashier and although there was no direct allegation of larceny she was alleged to have acted dishonestly and was alleged to have been guilty of the unauthorized misappropriation of Company property. Further, she testified that many persons thought she had been dismissed for stealing. I believe the dismissal made the employee less acceptable to

⁷ See note 3.

potential employers and more likely for dismissal and award the sum of \$8,000.00 under this head.” (Emphasis added)

[30] Here again, there was some evidence of how others perceived the employee in light of her dismissal, thus creating some link between the employee’s dismissal and her impaired employment prospects.

[31] Finally, in the recent case of **Antigua and Barbuda Transport Board v Anderson Carty**⁸ the employee was employed with the Transport Board as Operations Manager. During his tenure with the company, he held several positions including Human Resources and Training Officer. In October 2014, a newspaper article was published in Antigua and Barbuda informing the general public that the Transport Board had taken the decision to dismiss several of its managers including one Mr. Carty. There was no evidence before the Industrial Court that the publication was at the behest of the Transport Board. At the time of the newspaper article’s publishing, Mr. Carty had been on approved vacation leave. Upon resuming work, Mr. Carty received a letter dismissing him with immediate effect on account of redundancy.

[32] The employee claimed that his dismissal was politically motivated and asserted that no genuine redundancy situation existed at the material time and questioned whether the Transport Board acted reasonably in terms of its selection process, consultation, notice, and manner of termination. In relation to his claim for compensation for manner of dismissal, the employee adduced evidence that his dismissal was highly publicised and that despite submitting about 10 applications to prospective employers subsequent to his dismissal, he had failed to secure a single interview despite his excellent qualifications and experience.

[33] In upholding the Industrial Court’s award under the head of loss for manner of dismissal, Thom JA held:

“...I do agree that it is surprising that a professional with Mr. Carty’s expertise could not obtain an interview from the 10 applications that he

⁸ See note 7.

submitted to various companies. Mr. Carty is therefore awarded \$2500.00 under this head.”

- [34] It is easy to rationalise why an award was made in that case, given the wide publicity that followed the employee’s dismissal and his failure to secure even one interview despite his impressive credentials.
- [35] To summarise, therefore, what the above authorities illustrate and underscore is that there is an important evidential burden on the employee who seeks an award for loss by reason of manner of dismissal to adduce evidence of the likelihood or risk of financial loss to the employee as a result of the manner or circumstances of their dismissal, or that the manner or circumstances of the dismissal made the employee less acceptable to potential employers or exceptionally liable to selection for dismissal.
- [36] In my view, the dismissal letter on its face does not have the effect suggested by Mr. Kentish. While the letter did identify several problems afflicting security operations, it is clear that on a fair reading of it, the letter attributes these to structural and manpower deficiencies. These are matters for which the respondent had responsibility; not the appellant, and the letter does not purport to suggest otherwise.
- [37] In my view, the appellant has failed to discharge this evidential burden and the Industrial Court did not err in refusing to make an award under this head on the basis that there was no evidence that the statements in the letter of dismissal had the effect of preventing the appellant from obtaining a job in the security field.

(b) Premium pay
Appellant’s submissions

- [38] In relation to this head of loss, Mr. Kendrick’s contention is that by virtue of section C27 of the **Antigua and Barbuda Labour Code**,⁹ (“the **Labour Code**”) an employee is entitled to premium pay for the hours worked in excess of his or

⁹ Cap. 27 of the Laws of Antigua and Barbuda.

her normal contracted hours. The right to premium pay is a statutory right which parties cannot contract out of, although they were free to negotiate terms more favourable than the statutory minimum standards. Mr. Kentish drew attention to the appellant's contract of employment which stipulated that he would be required to work a minimum of 40 hours per week but provided that due to the nature of the position and responsibilities held by the appellant, he may be required to work outside the contracted working hours. Notwithstanding this, there was no cash compensation or other mechanism for compensating the appellant for the hours worked in excess of his prescribed 40 hours per week.

[39] Mr. Kentish submitted that the Industrial Court committed a fundamental error when they failed to advert to the provisions of the **Labour Code** at C6 and C7 which led to their conclusion that managers in the tourism sector are not entitled to premium pay.

[40] The appellant contended that he was deprived of the opportunity to earn premium pay by virtue of the practice adopted by the respondent whereby employees holding a managerial position are not entitled to premium pay and invites this Court to award compensation to the appellant. Recognizing that the appellant has not furnished any records of the number of overtime hours worked, Mr. Kentish invites this Court to award what he describes as a 'nominal' sum of \$15,000.00 as compensation. The case of **The Proprietors, Condominium Plan 2/1989 v Trinity Investment Company Limited**¹⁰ was cited in support of this approach.

(c) Holiday pay

[41] With specific reference to holiday pay, Mr. Kentish relied largely on the submissions deployed in relation to premium pay, save that the relevant provisions of the **Labour Code** engaged here are C14 and C15. Section C15(2) of the **Labour Code** provides for an employee who works on a public holiday to be paid, in addition to any wage he would have received, an hourly rate of not

¹⁰ ANUHCVP2008/0009 (delivered 19th September 2016, unreported).

less than 150 per centum of this basic rate per hour worked. Given these provisions, it was submitted that the right to holiday pay does not derive from the contract of employment but is a statutory right enacted for the benefit of the employee, and there is no scope for industry practice overriding the clear statutory provisions. Likewise, submitted Mr. Kentish, an employee cannot acquiesce in the breach of these statutory provisions.

[42] The appellant therefore seeks an award of \$10,000.00 on this basis.

The respondent's submissions – Premium and holiday pay

[43] Ms. Rogers accepted graciously that the arguments advanced by Mr. Kentish under these heads were 'able' and conceded that the **Labour Code** gives employees the right to premium pay and public holiday pay.

[44] Nonetheless, Ms. Rogers contended that industry norms are a relevant consideration, and, on that basis, submitted that the Industrial Court's finding that managers, including the appellant, were not entitled to premium or holiday pay in accordance with the **Labour Code** (in the absence of negotiated terms in the contract of employment) was not unreasonable and/or against the weight of the evidence. Ms. Rogers directed the Court's attention to the evidence that established two industry norms as it relates to premium and holiday pay. First, Ms. Gyger testified that as an employee at management level with the respondent she was not aware that the respondent had been paying managers for overtime and had been told from the commencement of her employment that managers do not get overtime pay. Secondly, Ms. Marcia Brown Kelly testified that during his tenure with the respondent, the appellant never raised the issue of premium or holiday pay.

[45] Ms. Rogers submitted that the non-payment of managers for overtime and holiday work is a well-established and recognised industry standard in Antigua and Barbuda and that it is the industry norm that managers are not paid overtime or holiday pay but are paid substantially higher salaries than what line staff are paid to account for the times when they may have to work on these occasions.

This is evidenced by the collective agreements which were before the Industrial Court which specifically addressed the issue of holiday or overtime/premium pay for line staff but also specifically stated that it did not apply to managers.

[46] Similarly, unlike the line staff who had to clock in for overtime so that a record was kept, there was no system in place for managers to record overtime or holiday work. The respondent therefore submitted that it was well within the purview of the Industrial Court to determine that the appellant was not entitled to be paid for his claim in this regard.

[47] Further, the respondent submitted that when the appellant entered into his employment, he was aware of these standards, which he accepted, and acted in the responsibilities of his position for several years and made no claim in respect of same. It was only after he was terminated that he sought to raise the issue.

[48] Alternatively, Ms. Rogers Murdoch submitted that even if this Court is minded to make an award for overtime/premium pay, the sum of \$15,000.00 claimed by the appellant cannot be regarded as nominal. The respondent also reminded the Court that the sum of \$10,000.00 sought by the appellant as holiday pay was only raised for the first time at the hearing.

Discussion – Overtime/premium and holiday pay

[49] The starting point in relation to the issues relating to both premium and holiday pay is the **Labour Code**. In relation to premium pay, the **Labour Code** provides so far as relevant at Division C:

“C6. An employer shall not provide employment, and an employee may not accept employment, under terms and conditions which do not conform to the provisions of this Code.

C7. It shall be lawful for an employer and employee to enter into an individual contract of employment, covering terms of employment, but-

(i)any provision thereof which establishes conditions which fall below the minimum employment standards established by this Code shall be null and void;...

C26. Premium pay shall consist of at least one-and-one half times an employee's basic wage per hour.

C27. For any hour of work in excess of eight in any twenty-four hour period or in excess of forty-eight in any one hundred and sixty-eight hour period, an employer shall give premium pay to the involved employee:

Provided that the Minister may revise these standards for any given industry or enterprise by the issuance of an Order to that effect.”

[50] These provisions establish that premium pay is payable to an employee using a prescribed statutory formula. An employee is defined as ‘any person who enters into or works under or stands ready to enter into or work under, a contract with an employer, personally to perform any services or labour, whether the contract be oral or written, expressed or implied; and the term includes a person whose services or labour have been interrupted by a suspension of work during a period of leave, temporary layoff, strike, or lockout, as well as an apprentice whose services or labour may be designed primarily to train such apprentice; but the term does not include established employees of the Government’.¹¹ While parties are free to enter into a contract of employment, any term in that contract which derogates from the minimum statutory standards is deemed to be null and void. It is open to the Minister by Order to revise these standards in relation to any given industry or enterprise.

[51] There can be no doubt that the appellant is an employee within the meaning of the **Labour Code** and that the above provisions governed him and his employer. Secondly, it is not in dispute that the appellant’s formal contract did not address the issue of premium or holiday pay, nor did it expressly provide for compensation or other mechanism for compensating the appellant for the hours worked in excess of his prescribed 40 hours per week.

[52] An industry norm which provides for compensation, by whatever mechanism, for overtime hours worked by managers and which does not fall below the

¹¹ See Section A5 of the Labour Code.

minimum standards set by the **Labour Code** may arguably not be in breach of Division C7 of the **Labour Code**.

- [53] It is therefore necessary to examine the evidence that was before the Industrial Court in relation to this industry norm.
- [54] Ms. Gyger testified that when she commenced her employment with the respondent, she was told that managers are not paid overtime, although she admitted that she had not seen a written policy to that effect. Mrs. Brown-Kelly testified that she was aware that managers within the hospitality industry 'are compensated at a level that exempt (sic) them from overtime'.
- [55] Such evidence as there was in this case of industry norm was sparse. Be that as it may, there was no evidence that the level of the appellant's remuneration or compensation package was fixed to compensate him for overtime hours worked, and which would not fall below the minimum statutory standards for payment of overtime.
- [56] The parties also agree that the Minister has not issued any order revising the minimum standards prescribed by the **Labour Code**.
- [57] It would seem to me, therefore, that the appellant was entitled to premium pay at the prescribed statutory rate for hours worked in excess of the 40-hour work week. The Industrial Court's reliance on 'the practice for managers to be remunerated at a high enough salary level to take care of, among other things, overtime work and days off' does not pay sufficient regard to the actual evidence before them. There was no evidence before them that the appellant was remunerated at a higher salary level to compensate for him having to work overtime and on holidays.
- [58] There was, however, evidence before the Industrial Court that the respondent's 'Employees Handbook' which was provided to the appellant, provided for the payment of overtime and premium pay to all employees in keeping with the Jumby Bay calendar, and contained no exemption in relation to managers. This

document, which was last revised in 2011, contains the following self-description:

“The Jumby Bay Island Company Limited (JBIC) employee handbook summarises the policies and procedures in effect at Jumby Bay.”

- [59] The handbook, which is the official statement of the respondent's policies, contains, inter alia, 'a summary of the overtime rate of pay for JBIC jobs, which conforms to the Antigua and Barbuda Labour Code'. While it does contain a statement that 'all overtime must be authorized in advance by your manager', I do not accept the argument of counsel for the respondent that this means managers are not entitled to overtime pay. There can be no doubt on the evidence that although the appellant was a manager, he reported to the CEO and so, he was also caught by the obligation.
- [60] This document does not support the respondent's contention that the respondent had a policy of not paying overtime/premium pay to managers.
- [61] The Industrial Court further concluded that 'if payment for overtime and off days was intended for the employees and other managers this benefit would have been negotiated and included in the contract or memorandum of agreement'. This conclusion fails completely to address the provisions of the **Labour Code** prescribing mandatory minimum standards in relation to premium pay for employees. The effect of these provisions is that where the contract of employment expressly derogates from these minimum standards or is silent in relation to premium pay, those terms are null and void to that extent and the provisions of the **Labour Code** apply.
- [62] It would be all too easy a device for defeating the clear terms and objective of the **Labour Code** for a contract of employment to simply say nothing about premium pay, thus allowing the employer to say that the employee is not entitled to it because the contract does not provide for it. It is inconceivable that the Legislature intended such a consequence. Indeed, if it was intended to exempt managers from these provisions the legislature could have easily so provided, as has been done in other Commonwealth Caribbean countries such as Anguilla

and the Commonwealth of the Bahamas whose equivalent legislation contains a provision exempting certain categories of persons, including persons above first line supervisory positions, from the statutory provisions in relation to overtime pay.

- [63] The Industrial Court also premised its decision to deny premium pay to the appellant on its finding that the appellant had not produced any records to support his assertion that he had worked 900 hours overtime and 100 days off. The Court characterized these numbers as 'guesstimates'. This finding is unassailable. The appellant conceded during oral submissions that he has furnished no records to substantiate his claim to 900 hours of overtime hours and that the suggested 'nominal' sum of \$15,000.00 is not based on any 'amalgamation of any particular items'. Furthermore, it cannot be ignored that the appellant never made a claim for premium pay during his employment; he only did so upon his dismissal. In the absence of some evidential basis that provides at least some rough estimate of the number of overtime hours worked by the appellant, I consider that only a nominal sum should be awarded under this head, which I would set at \$5000.00.

Holiday pay

- [64] In relation to holiday pay, the relevant provisions of the Labour Code provide as follows:

"C14. (1) Subject to subsection (2) no employee shall be obliged to work on a public holiday except in emergency situations.

(2) The Minister may, by Order published in the Gazette, exempt certain industries and enterprises, or certain parts thereof, from the requirements of subsection (1) on such terms and conditions as he may think fit.

C15. (1) If an employee does not work on a public holiday he shall suffer no loss of pay, that is, he shall be paid the basic wage he would have received for work performed on that day had it not been a public holiday, provided he has worked his scheduled work day immediately before and his scheduled work day immediately after the said public holiday.

(3) If an employee does work on a public holiday he shall be paid, in addition to any wage which he would have received in respect of the

public holiday, an hourly rate of not less than 150 per centum of this basic rate per hour worked.”

- [65] This provision, like those in relation to premium pay, provides a statutory formula for the calculation of holiday pay. It is meant to apply to all employees. When the appellant was first engaged his terms and conditions were documented in an email sent to him on 27th April 2010 by the then CEO, Mr. Michel Ducamp. It clearly stipulated that he would be entitled to “all paid holidays as per the JBIC Calendar. This was not reflected in the revised contract, which is silent on the issue. However, the employee handbook, to which I referred above clearly provided at paragraph 1.9:

“Holiday Pay

Employees who are required to work on Public Holidays will be paid in accordance with the laws of the Antigua and Barbuda Labor (sic) Code.”

- [66] This statement in the respondent’s policy document tends to contradict the respondent’s contention that the respondent had a policy of not paying holiday pay to managers. Further, there is no evidence of any negotiated alternative means of compensation for the appellant in relation to holiday pay, which does not run afoul of the minimum statutory standards. In these circumstances Division C15 of the **Labour Code** applies. I would therefore hold that the Industrial Court was wrong not to have considered the provisions of Division C in relation to holiday pay and that the appellant is entitled to compensation for holiday pay.

- [67] The question is how is that figure to be calculated? The appellant has not furnished any evidence to establish the number of holidays on which he worked, and if so, the number of hours worked on each holiday but nonetheless seeks an award of \$10,000.00. As the Court of Appeal for Antigua and Barbuda, the Court can take judicial notice that Antigua and Barbuda has on average 11 public holidays annually. It seems to me that at best, any award under this head can only be for a nominal sum, which I would assess at \$5000.00.

(d) Loss of future earnings

- [68] Although the Notice of Appeal states at paragraph 1.2 that it challenges the finding of law that the employee was not entitled to an award for future loss having regard solely to the award given for immediate loss, and ground 6 of the Notice of Appeal asserts that the court erred in law and failed to consider that immediate loss and future loss are mutually exclusive awards, the appellant advanced no arguments in relation to this issue either in his written or oral submissions. Similarly, no submissions were advanced by the respondent in its written or oral submissions in relation to this ground. It is therefore not addressed in this judgment.

Issue 2 -The claim for unpaid allowances

- [69] The appellant submitted that when in April 2012, the Government of Antigua and Barbuda revised the schedule of non-taxable allowances and provided a specific threshold for these allowances, the respondent's decision to restructure the appellant's salary by reducing his base pay and reflecting the difference as housing, utilities and travelling allowances instead of adding these allowances to the appellant's existing salary, this was done unilaterally and in circumstances where the appellant signed the new agreement reflecting these terms under some duress as he was fearful of losing his job if he did not sign. The appellant therefore seeks compensation representing the allowances he claims to have been entitled to from April 2012 to February 2015.
- [70] For the respondent, Ms. Rogers submitted that although the restructuring of the managers' salaries, including the appellant's salary, was a unilateral decision taken by the respondent, it caused no prejudice to the appellant. The appellant suffered no loss in salary and in fact benefitted from the restructuring due to a decrease in the amount of taxes that he was liable to pay on his earnings. The appellant's net pay increased by about \$150.00. The respondent also cited the appellant's evidence in cross examination that an increase in salary would be solely dependent upon an employer and that he could not demand from an employer to be paid allowances.

[71] Additionally, Ms. Rogers referred the Court to the unchallenged evidence of its witness that the Inland Revenue Department had conducted an extensive audit after the restructuring had been done and had found nothing wrong with the breakdown of the allowances and base pay and that the arrangement continued even up to the time of trial.

[72] Finally, Ms. Rogers refuted the appellant's claim to have signed the contract under duress by referring the Court to the evidence of Ms. Gyger who testified that while the appellant had expressed concerns about the effect the restructured salary would have on his pension, she had allayed these concerns by assuring him that there would be no loss to him as a result. He signed the formal contract of employment embodying these terms on 8th January 2013.

Discussion

[73] The Industrial Court accepted the evidence of the respondent's witnesses relating to the circumstances surrounding the re-structuring of the appellant's salary and accepted that he did not sign the formal contract containing these terms under duress. It also accepted that the restructuring did not operate to the appellant's disadvantage as his net take-home pay was higher since his statutory deductions were only applied to his base pay. An appellate court should accord weight to the findings of facts made by the Industrial Court mindful of the advantage they enjoyed over the appellate court, having seen and heard the witnesses. This Court may only disturb these findings if it is satisfied that such an advantage enjoyed by the court below could not be sufficient to justify the conclusions reached because the reasons given are not satisfactory having regard to the evidence.

[74] I see no basis for disturbing any of the findings of fact made by the Industrial Court and would uphold the decision of the Industrial Court on this issue.

Disposition

- [75] For all the foregoing reasons I would allow the appeal in relation to the claims for overtime/premium and holiday pay and would award the appellant the sum of \$5,000.00 in relation to each head. I would dismiss the claims for loss by reason of manner of dismissal, loss of future earnings and unpaid allowances.
- [76] There will be no order as to costs.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar