

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

ANTIGUA AND BARBUDA

ANUHCVP2022/0009
Formerly [ANUHLTAP2019/0007]

BETWEEN:

KIER CONSTRUCTION LIMITED

Appellant

and

[1] SUNDRY WORKERS
[2] GEORGE DEXTER TAVERNIER (Trading as
Tavernier Construction)

Respondents

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mde. Margaret Price-Findlay	Justice of Appeal

Appearances:

Ms. Safiya Roberts for the Appellant
Mr. Cosbert Cumberbatch for the First Respondent
Mr. Kendrickson Kentish for the Second Respondent

2023: November 21;
2024: March 13.

Civil appeal – Appeal from decision of Industrial Court – Section 17(1) of the Industrial Court Act – Whether the Court of Appeal has jurisdiction to review findings of fact by the Industrial Court – Contractual Interpretation - Whether the Industrial Court erred in its interpretation of Article 8.1 and other express terms within the agreements executed between Kier and Tavernier, which lead to the decision that there was an employee-employer relationship between Kier and the workers - Whether the Industrial Court erred in failing to take into consideration the evidence before it concerning the course of conduct of Kier and Tavernier and Tavernier’s actions towards the workers – Whether the Industrial Court misapplied the relevant legal principles and tests in determining whether an employee-employer relationship existed between Kier and the workers

The appellant, Kier Construction Limited ("Kier"), was engaged to work on the expansion of the Sandals Resort Hotel in Antigua ("the Sandals Expansion Project"). By agreements dated 31st August 2005 ("the August Agreement") and 20th December 2005 ("the December Agreement"), Kier subcontracted the second respondent, George Dexter Tavernier T/A Tavernier Construction ("Tavernier") for the construction of a superstructure at the Sandals Expansion Project, as well as to supply skilled tradesmen for the construction of the superstructure. These skilled tradesmen are represented by the first respondent, Sundry Workers. Kier and Tavernier also entered into a Subcontractor Agreement dated 13th September 2006 for Tavernier to install the structure for a restaurant, dive pool, dive shop facility, outside class, pool equipment room and stormwater holding tank. The Subcontractor Agreement also required that Tavernier submit to Kier the names and addresses of all 'operatives he chose to employ on the work'.

By letter dated 6th July 2007, Kier wrote to Tavernier confirming that as 'employer' of the labour resources, Tavernier was responsible for all severance, notice and holiday payments due to employees under the Laws of Antigua and Barbuda. Kier acknowledged that it had paid Tavernier 'gross wages due to labour resources calculated to agreed rates' and that it was understood between both parties that sufficient monies had been paid to Tavernier by Kier to meet Tavernier's contractual and statutory obligations. Kier referenced discussions between both parties in which Tavernier revealed its inability to meet its financial commitments to the employees. To prevent disruption to the Sandals Expansion Project, Kier on a without prejudice basis, agreed to assist Tavernier in meeting its contractual and statutory obligations by making payment in the sum of EC\$242,964.33.

On or around August 2007, the scope of the works defined under the Subcontractor Agreement was said to have been completed and, as a result, the contractual relationship between Kier and Tavernier came to its natural conclusion. However, Sundry Workers on 4th November 2008, filed a reference against Tavernier alleging that it had effected a series of layoffs of employees between October 2006 and July 2007, which resulted in those employees being unfairly dismissed. In May 2015, the court granted the Sundry Workers leave to add Kier as a defendant employer and the Sundry Workers claimed that Kier, as principal contractor, was jointly liable with Tavernier to meet all payments to which the employees became entitled.

On 30th September 2016, the Industrial Court ordered that a preliminary hearing be held to determine the issue of liability of Kier and Tavernier in respect of the Sundry Workers' claim for unfair dismissal. At the hearing, Kier argued that Tavernier was solely responsible for hiring its workforce, paying wages, terminating or ending work contracts, and had the responsibility for managing and supervising its workers and that the August Agreement, December Agreement, Subcontractor Agreement and the letter dated 6th July 2007, *inter alia*, sufficiently exhibited that there was no employer-employee relationship between it and the Sundry Workers. On the other hand, Tavernier submitted that its only obligation was to merely supply labour and deliver workers to the job site and that it was not responsible for the supervision of the workers. The Industrial Court, in a judgment delivered on 13th September 2019 held that the Sundry Workers were in fact employees of Kier and that it was liable to meet all payments to which the employees became entitled.

Being dissatisfied with the decision of the Industrial Court, Kier filed a Notice of Appeal on 4th October 2019 listing 10 grounds of appeal, each relying on findings of fact, however 3 main issues fell to be determined by this Court: (i) whether the Industrial Court erred in its interpretation of the effect of Article 8.1 and other express terms within the agreements executed between Kier and Tavernier, which lead to the decision that there was an employee-employer relationship between Kier and the workers; (ii) whether the Industrial Court erred in failing to take into consideration the evidence before it concerning the course of conduct of Kier and Tavernier and Tavernier's actions towards the workers; and (iii) whether the Industrial Court misapplied the relevant legal principles and tests in determining whether an employee-employer relationship existed between Kier and the workers. This Court was also called upon to determine whether it had the requisite jurisdiction to determine an appeal against findings of fact emanating from the Industrial Court.

Held: Allowing the appeal and quashing the order of the Industrial Court, that:

1. In the usual course, the Court of Appeal can treat with appeals against findings of fact in accordance with its established body of case law. However, as it relates to matters emanating out of the Industrial Court, the jurisdiction to review findings of fact is governed by legislation, specifically section 17(1) of the Industrial Court Act. If the findings of fact relied upon by the Industrial Court are found to be based on no evidence or if the Industrial Court fails to construe the evidence in accordance with the correct legal principles, it would amount to an illegality that would substantially affect the merits of the case, such that the Court of Appeal would be furnished with the requisite jurisdiction under the legislation to interfere.

Section 17(1) of the **Industrial Court Act** Cap 2.14 of the Laws of Antigua and Barbuda applied; **Leonart Matthias v Antigua Commercial Bank** ANULTPAP2017/0002 (delivered 28th May 2020, unreported) followed; **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers' Union** ANULTAP2016/003 (delivered 23rd May 2019, unreported) considered.

2. The President of the Industrial Court found that Article 8.1 of the August Agreement and December Agreement when read, clearly supported Tavernier's assertions that he was engaged for the limited purpose of supplying Kier with tradesmen and that he was at no time considered the employer of the Sundry Workers. However, the Court must ascertain the objective meaning of the language which the parties have chosen to express the agreements. To do so, the Court must not solely focus on the wording of Article 8.1 of the August and December Agreements but must consider all the agreements as a whole. Upon reading the August and December Agreements in full, it is apparent that there are several articles which articulate clearly that it was agreed that Tavernier, as subcontractor, was expected to perform tasks beyond simply transporting the employees to the job site.

Rainy Sky SA and Others v Kookmin Bank [2011] UKSC 50 applied; **Wood v Capital Insurance Services Limited** [2017] UKSC 24 applied.

3. Article 1.1 of the August and December Agreements contemplates later modifications and supplemental documents and as such, the provisions of the Subcontractor Agreement should have also been taken into consideration in the President's analysis of the facts. It is apparent and reasonable to conclude that the August, December and Subcontractor Agreements all contemplated that Tavernier would have at his disposal employees to complete the work subcontracted for and that such employees would not be the employees of Kier.
4. In addition to the August, December, and Subcontractor Agreements, the letter dated 6th July 2007 acknowledges that without prejudice to Kier, Tavernier as 'employer' of the labour resources, was responsible for all severance, notice and holiday payments due to employees under the Laws of Antigua and Barbuda. The President in arriving at the conclusion that neither of those agreements governed the contractual relationship between the parties due to their conduct, was plainly wrong. The President appears to have cherry-picked which provisions in the Agreements were enforceable and which were not, without undertaking the appropriate thorough analysis of the various agreements.
5. Further, his basis for finding that the August and December Agreements did not govern the parties was because there were amendments or modifications to the Agreements by the parties. However, this was not only an error in fact but also an error in law as it is trite that agreements can be mutually varied orally, in writing or by conduct. In any event, the August and December Agreements specifically provided that modifications to the agreements after the date of execution were permissible. It is clear throughout their interactions up until the Sundry Workers' filing of a claim before the Industrial Court, there was *consensus ad idem* between Kier and Tavernier on how the Agreements should be executed.

Globe Motors v RW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396 (20 April 2016) applied.

6. Finally, in a commercial context, it is quite difficult and tenuous to contemplate a reality where a subcontractor would be paid such a lucrative subcontract sum for works limited to the transport of labour and that there would be no direction, or supervision of the subcontracted works by the subcontractor if those subcontracted works were performed by the employees. Contract interpretation necessitates that good commercial sense should prevail, and in accepting the evidence of Tavernier that he had solely been contracted to transport the tradesmen, the Industrial Court came to a conclusion which was not borne out in the agreements, nor did that conclusion make sound commercial sense. From all accounts, Kier is a well-established construction company in Antigua and Barbuda. If it so wished, it could have contracted these tradesmen directly without going through the extensive task of executing 3 agreements which emphasised that it was not liable for hiring, supervising or paying these tradesmen. When considering the scope of the work required it would be quite difficult to contemplate Kier's agreement to subcontract work to a contractor who had no employees or who was not prepared to hire employees to complete the subcontracted tasks. Accordingly, the findings of fact relied upon by the Industrial Court cannot be supported by the evidence nor was the evidence

construed in accordance with the correct legal principles. Therefore it is overwhelmingly clear that the findings amounted to an illegality that would substantially affect the merits of the case, such that this Court can review them in accordance with section 17(1)(e) of the Industrial Court Act.

JUDGMENT

Background

- [1] **PRICE-FINDLAY JA:** June 2005, the appellant, Kier Construction Limited ("Kier"), was engaged to work on the expansion of the Sandals Resort Hotel in Antigua ("the Sandals Expansion Project"). By agreements dated 31st August 2005 ("August Agreement") and 20th December 2005 ("December Agreement"), Kier subcontracted the second respondent, George Dexter Tavernier T/A Tavernier Construction ("Tavernier") for the construction of a superstructure to the main room block and central facilities at the Sandals Expansion Project, as well as to supply skilled tradesmen for the construction of the superstructure.¹
- [2] The skilled tradesmen 'supplied' for this project are represented by the first respondent, Sundry Workers. Kier and Tavernier also entered into a Subcontractor Agreement dated 13th September 2006 for Tavernier to install the structure for a restaurant, dive pool, dive shop facility, outside class, pool equipment room and stormwater holding tank. The Subcontractor Agreement also required that Tavernier submit to Kier the names and addresses of all 'operatives he chose to employ on the work'.²
- [3] By letter dated 6th July 2007, Kier wrote to Tavernier confirming that as 'employer' of the labour resources, Tavernier was responsible for all severance, notice and holiday payments due to employees under the Laws of Antigua and Barbuda. Kier acknowledged that it had paid Tavernier 'gross wages due to labour resources calculated to agreed rates' and that it was understood between both parties that sufficient monies had been paid to Tavernier by Kier to meet Tavernier's contractual and statutory obligations. Kier referenced discussions

¹ See Article 8 of the August and December Agreements.

² See Condition 9 of the Subcontractor Agreement dated 13th September 2006.

between both parties in which Tavernier revealed its inability to meet its financial commitments to the employees. To prevent disruption to the Sandals Expansion Project, Kier on a without prejudice basis, agreed to assist Tavernier in meeting its contractual and statutory obligations by making payment in the sum of EC\$242,964.33.

- [4] On or around August 2007, the scope of the works defined under the Subcontractor Agreement was said to have been completed and, as a result, the contractual relationship between Kier and Tavernier came to its natural conclusion. However, Sundry Workers on 4th November 2008, filed a reference against Tavernier alleging that it had effected a series of layoffs of employees between October 2006 and July 2007, which resulted in those employees being unfairly dismissed. In May 2015, the court granted the Sundry workers leave to add Kier as a defendant employer and the Sundry Workers claimed that Kier, as principal contractor, was jointly liable with Tavernier to meet all payments to which the employees became entitled.
- [5] On 30th September 2016, the Industrial Court ordered that a preliminary hearing be held to determine the issue of liability of Kier and Tavernier in respect of the Sundry Workers' claim for unfair dismissal. The preliminary hearing commenced and before the Industrial Court Kier argued that Tavernier was solely responsible for hiring its workforce, paying wages, terminating or ending work contracts, and had the responsibility for managing and supervising its workers and that the August Agreement, December Agreement, Subcontractor Agreement and the letter dated 6th July 2007, *inter alia*, sufficiently exhibited that there was no employer-employee relationship between it and the Sundry Workers. Tavernier in its submissions argued that its only obligation under the agreements with Kier was to merely supply labour and to deliver workers to the job site and that it was not responsible for the supervision of the workers.
- [6] The Industrial Court, having heard evidence and legal submissions from the parties during the preliminary hearing, delivered its judgment on 13th September 2019 and held that the Sundry Workers were in fact employees of Kier and that it was liable to meet all payments to which the employees became entitled.

- [7] Dissatisfied with the decision of the Industrial Court, Kier filed a Notice of Appeal on 4th October 2019 appealing the judgment of the Industrial Court. Kier in its notice of appeal filed 10 grounds of appeal, each relying on findings of fact.

Issue(s) on appeal

- [8] While Kier has mounted an appeal supported by 10 grounds of appeal, each ground is undergirded by a finding of fact. These grounds when read produce some repetition and can in my view be succinctly captured in 3 grounds of appeal, namely:

- (i) whether the Industrial Court erred in its interpretation of the effect of Article 8.1 and other express terms within the agreements executed between Kier and Tavernier, which lead to the erroneous decision that there was an employee-employer relationship between Kier and the workers;
- (ii) whether the Industrial Court erred in failing to take into consideration the evidence before it concerning the course of conduct of Kier and Tavernier and Tavernier's actions towards the workers; and
- (iii) whether the Industrial Court misapplied the relevant legal principles and tests in determining whether an employee-employer relationship existed between Kier and the workers.

- [9] In the usual course, this Court can treat with appeals against findings of fact in accordance with **Ming Siu Hung and Others v JF Ming Inc and another**³ and other authorities of this Court. However, as it relates to matters emanating out of the Industrial Court, an appellate court's jurisdiction to review findings of fact is not governed by case law. It is instead governed by legislation, specifically, section 17(1) of the **Industrial Court Act**.⁴

³ [2021] UKPC 1.

⁴ Cap. 214 of the Laws of Antigua and Barbuda.

- [10] As such the Court must first determine whether by virtue of section 17(1) of the **Industrial Court Act** it has the jurisdiction to determine this appeal against findings of fact. If the Court is found to lack jurisdiction, then this is dispositive of the appeal and the appeal should be dismissed. However, if the Court is found to be possessed of jurisdiction under section 17(1) of the **Industrial Court Act**, then the Court can review the findings of fact on appeal and determine whether an employee-employer relationship existed between Kier and the Sundry Workers.

Submissions

Appellant's Submissions

- [11] Counsel for the appellant, Ms. Roberts, submitted principally that the written agreements between Kier and Tavernier were essential to the Industrial Court's determination of the preliminary issue before it. She submitted that the Industrial Court in its judgment failed to properly consider these agreements and misapplied the legal principles concerning an employee-employer relationship, which ultimately led to the court's erroneous decision that Kier was the employer of the Sundry Workers.
- [12] Having made this decision, she argued that the Industrial Court went further to disregard all other written contractual obligations in the August and December Agreements and the Subcontractor Agreement which required Tavernier *inter alia* to 'supervise and direct' [his work] and pay workmen's compensation, as being contrary to or inconsistent with Article 8.1 of the August and December Agreements. She further argued that the Industrial Court's reasoning for placing such paramountcy on Article 8.1 is without any legal basis and that the Court seemingly emphasised the fact that the terms of Article 8.1 were capitalised and had the use of a parallel line. She submitted that these factors speak to merely the form of the printed words and does not provide a basis for holding that the other terms of the August and December 2005 Agreements and the entire Subcontractor Agreement were null if it was contrary to or inconsistent with Article 8.1.

- [13] Ms. Roberts also submitted that the Industrial Court erred in making other findings of fact that were not supported by the evidence, such as finding that Kier deployed, directed, and supervised the Sundry Workers and was solely responsible under the agreement between the parties for hiring the workforce. Ms. Roberts submitted that there was no evidential basis for these findings and that there was evidence available to the Industrial Court that contradicted this.

Respondents' submissions

- [14] Both counsel for the respondents, Mr. Cumberbatch and Mr. Kentish, argued that the Industrial Court was comprehensive in its identification and application of the relevant legal principles and tests to be applied in determining whether an employer-employee relationship exists between parties, namely, the control, integration, economic and multifactor tests. They argued that the Industrial Court was seized of and took into account a multiplicity of relevant facts which when taken together and applied to the legal principles/tests identified, produced an outcome that was correct in fact and law and that could not be impeached.
- [15] Counsel for the second respondent further added that this Court is precluded from hearing an appeal on findings of fact from an Industrial Court judgment unless these findings resulted in an illegality in the sense contemplated under section 17(1)(e) of the **Industrial Court Act**. As no such illegality existed, he argued that no appeal from this judgment could be sustained.

Discussion

- [16] Section 17(1) of the **Industrial Court Act** states the following:
- “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.”

[17] In **Leonart Matthias v Antigua Commercial Bank**,⁵ this Court in a judgment authored by Webster JA [Ag.] set out the approach to be taken in determining whether the appellate court could review findings of fact. This approach involved interpreting the plain words of section 17(1) of the **Industrial Court Act**. Webster JA [Ag.] stated as follows:

“[13] ...

Having listed the grounds on which a decision of the Industrial Court can be challenged on appeal, it follows that the right to appeal only lies in the limited circumstances listed in the section. This interpretation follows from a plain reading of the words in the section including the fact that the list of appealable matters is preceded by the words ‘and no others’. It follows that the non-inclusion of a right to appeal against findings of fact by the Industrial Court means there is no right of appeal on that ground. The section is a classic illustration of the Latin maxim often used in the interpretation of statutory provisions, ‘expressio unius est exclusio alterius’; that is to say, when one or more things of a class are expressly mentioned, others of the same class are excluded.

...

[14] Learned counsel for the Bank, Mrs. Andrea Roberts-Nicholas, responded by relying on the case of *Jewellers Warehouse v Cecile Norde*, a decision of the Court of Appeal sitting in this jurisdiction, that considered the meaning of section 17 of the Act. The judgment of the Court of Appeal was delivered by Rawlins JA. The judgment is instructive on how the Court of Appeal should approach challenges to findings of fact by the Industrial Court. The learned judge highlighted the five instances in section 17 by which a party may appeal as of right against a decision of the Industrial Court, then focused on ground (e), and stated:

“[14] It would be a vitiating illegality under section 17(1)(e) of the Industrial Court Act, where the Industrial Court finds facts or draws inferences for which there is no evidential basis, if the facts so found substantially affect the merits of the matter. It would also be vitiating illegality where the Industrial Court does not consider the facts in the light of the applicable principles or statutory provision. The illegality would be an error committed in the course of the proceedings for the purpose of section 17(1)(e), since the proceedings would only be at an end after judgment is delivered and the Court is functus.

⁵ ANULTPAP2017/0002 (delivered 28th May 2020, unreported).

[15] The requirement in section 17(1)(e) that the vitiating illegality must be one ‘substantially affecting the merits of the matter’ means that the illegality must have adversely affected the central issue or issues around which the appeal revolves.”

The examples given by His Lordship in paragraph 14 are not exhaustive of the matters that can constitute vitiating illegalities within the meaning of section 17(1)(e), but they provide good guidance in this case. Following the learned judge’s guidance, Mr. Matthias has to satisfy this Court that the Industrial Court made findings of fact or drew inferences for which 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.”

the Industrial Court had the advantage of observing the witnesses while they were giving their evidence and this Court would be slow to interfere with the findings of fact unless it can be shown that such findings were not open to the Industrial Court on the evidence or were blatantly wrong. I am satisfied that the findings were open to the Industrial Court and were not blatantly wrong. There is no basis for this Court to interfere with the findings.”

[18] In coming to his conclusion, Webster JA [Ag.] relied on the earlier decision of this Court in **Jewellers Warehouse v Cecil Norde**⁶ authored by Rawlins JA, where he, in examining section 17(1)(e) of the **Industrial Court Act**, held that findings of fact could be reviewed by this Court if said findings were based on no evidence or a finding that does not construe the evidence in accordance with the correct legal principles and as such it would amount to an illegality that would substantially affect the merits of the case. Rawlins JA confirmed that in such a case, this Court could not allow that illegality to stand.⁷

[19] In **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers’ Union**,⁸ Thom JA in examining section 17(1)(e) also relied on **Jewellers Warehouse v Cecil Norde**, affirmed the case and accepted that Cable & Wireless’s appeal fell into subparagraph (e) as an appeal against

⁶ Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27th November 2006, unreported).

⁷ Ibid paragraph 12.

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

findings of fact. However, it was her view in that case that the Industrial Court conducted a very detailed analysis of the evidence, and it was open to the judge to make the findings that he did. Thom JA stated that:

“The ambit of subparagraph (e) was examined by this Court in the case of *Jewellers Warehouse v Cecil Norde*.²⁴ In *Jewellers Warehouse*, the appellant appealed against the decision of the Industrial Court on the ground that the court had erred when it failed to find on the abundance of the evidence, that pursuant to section C58(1)(b) of the Labour Code, Jewellers was entitled to dismiss Mrs. Norde summarily for incapability of performing the work that she was employed to do. The respondent contended that there was no right of appeal from the finding of facts by the Industrial Court. Rawlins JA after examining the provisions of section 17(1)(e) stated:

“[14] It would therefore be a vitiating illegality under section 17(1)(e) of the Industrial Court Act where the Industrial Court, find facts or draw inferences for which there is no evidential basis, if the facts so found substantially affect the merits of the matter. It would also be a vitiating illegality where the Industrial Court does not consider the facts in the light of the applicable principles or statutory provisions. The illegality would be an error committed in the course of proceedings for the purposes of section 17(1)(e) since the proceedings would only be at an end after judgment is delivered and the court is functus.

[15] ...Even outside of section 17(1)(e) this Court could not permit a decision to stand, where for example, there is no evidence upon which a reasonable tribunal could have arrived at that decision or where the factual conclusions are clearly at variance with the evidence.”

47 While Cable and Wireless' appeal would fall within subparagraph (e), in my view the Industrial Court in paragraphs 52 - 98 of its judgment conducted a very detailed analysis of the evidence in relation to each of the factors. Based on the evidence that was before the Industrial Court, it was open to the court to make the findings which it did. In any event, it is settled law that an appellate court would be slow to interfere with the findings of fact of the lower court unless it is shown that it was plainly wrong. I can find no error in the reasoning of the Industrial Court other than the error alluded to in relation to the finding that the participation of Ms. Floro-Forde tainted the consultation process. As stated earlier, this was not fatal since the judgment of the Industrial Court shows that it took into account all of the relevant factors in determining whether Cable and Wireless acted reasonably in dismissing the employees. In the circumstances, it cannot be said that the court was plainly wrong.”

[20] In addition to the authorities emanating from the Eastern Caribbean, the Privy Council has confirmed in **Blackburn v LIAT (1974) Ltd**⁹ that the industrial court legislation in Trinidad and Tobago 'is closely aligned with that of Antigua and Barbuda'. Sections 10(6) and 18(2) of Trinidad and Tobago's Industrial Relations Act are identical to sections 10(6) and 17(1) of the **Industrial Court Act** of Antigua and Barbuda. As such, Trinidad and Tobago authorities can be considered in an appeal concerning section 17(1) of the **Industrial Court Act**.

[21] In **Caroni (1975) Ltd v Association of Technical, Administrative & Supervisory Staff**,¹⁰ de la Bastide CJ in his judgment, discussed the restrictions section 10(6) placed on section 18(2) of the Industrial Relations Act of Trinidad and Tobago. He stated:

" I have read in draft the judgment of Jones and Warner JJA and I agree with it. I wish merely to add a few words of my own on the restriction imposed by s 10(6) of the Industrial Relations Act on the right of appeal granted by s 18(2) of the same Act.

The wording of s 10(6) is very explicit. However reluctant this court may be to accept that its jurisdiction has been ousted by an Act of Parliament and that it is thereby denied the opportunity of investigating an alleged injustice and correcting it, if found to exist, the intention of Parliament is too clear in this instance to be deflected by any presumption of law or canon of construction. It is clearly the duty of this court to give effect to it. We must not be tempted to do otherwise by pictures painted of the gross injustices which may be perpetrated if we recognise and accept the restriction which Parliament has imposed on our right to interfere. In any case, s 10(6) does not oust any pre-existing jurisdiction of the Court of Appeal. The Industrial Court is a comparatively recent creation of statute, and so is the right given to appeal from it to the Court of Appeal. The intention of Parliament, clearly expressed in s 10(6), is that the question whether the dismissal of a worker is in any case harsh and oppressive and contrary to the principles of good industrial relations practice, should be reserved to the Industrial Court. What distinguishes a dismissal that is harsh and oppressive from one that is not, is a matter which the Act clearly regards as grounded not in law, but in industrial relations practice. The practice, which is not codified in our jurisdiction, is to be determined and applied to the facts of each case by the Industrial Court. The policy of the statute is obviously to entrust that function only to judges of the Industrial Court who come equipped with experience of, and familiarity with, industrial relations practice. This is a qualification which judges of the Supreme Court do not necessarily or even ordinarily have. It is considerations like these which presumably

⁹ [2020] UKPC 9.

¹⁰ (2002) 67 WIR 223.

underlie the prohibition in s 10(6) against the Court of Appeal reviewing the decision of the Industrial Court that the dismissal of a particular worker does, or does not, have the quality which triggers the grant of the remedies of compensation and reinstatement.

A harsh and oppressive dismissal is something which, according to the Act, may be identified only by the Industrial Court.

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 s 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 s 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 s 18(2) without running foul of the prohibition contained in s 10(6). What this means in practice will have to be determined on a case-by-case basis.”¹¹

[22] This case was considered in **Blackburn**. In **Blackburn**, the Industrial Court in its written judgment held that Mr. Blackburn, a senior pilot employed by LIAT (1974) Ltd. was unfairly dismissed, but reduced his compensation because of his contribution to his dismissal. This Court allowed Mr. Blackburn’s appeal and dismissed LIAT (1974) Ltd.’s cross-appeal that the Industrial Court had applied the wrong test, such that the appellate court had erred in upholding the finding of unfair dismissal.

[23] Before the Privy Council, LIAT (1974) Ltd. argued that it is not for the Board to trespass into the exclusive domain of the Industrial Court. It is for the judges of

¹¹ Ibid at 226.

the Industrial Court alone, equipped with their superior knowledge of industrial relations, to provide the answer to the relevant legal question. Section 17(3) of the **Industrial Court Act** must be read together with section 10(6). The Board dismissing the appeal stated the following:

“53. The Board cannot accept Mr Mendes’ argument for two reasons. First, ICA section 10(6) accords special status to matters which the Industrial Court has decided, not to matters which the Industrial Court has not decided. Secondly, whilst of course the Act must be read as a whole, ICA section 10(6) does not eviscerate section 17(3) to the extent suggested. In the present case the Board is satisfied that no substantial miscarriage of justice has occurred. It is obvious how the correct legal test would have been applied by the Industrial Court. The Industrial Court has already set out its thinking very clearly. No useful purpose would be served by the Industrial Court re-convening to hear this case in 2020, some nine years after the dismissal occurred.”

54. For these reasons, LIAT’s appeal is dismissed. The finding of unfair dismissal stands.”

[24] Although in that case the Board dealt with section 17(3) and not 17(1) of the **Industrial Court Act**, **Blackburn** may be instructive on how the Court should treat with section 10(6). Whilst the Industrial Court Act must be read as a whole, section 10(6) did not eviscerate section 17(3) to the extent suggested by LIAT (1974) Ltd. While the Board did not detail the extent or further its pronouncement in any way, it can be a good indication that section 10(6) should be treated similarly in its interaction with section 17(1)(e).

[25] It is clear from the above authorities that there is an established and well-developed jurisprudence within the Eastern Caribbean on this issue. Therefore, if the findings of fact relied upon by the Industrial Court are found to be based on no evidence or if it fails to construe the evidence in accordance with the correct legal principles, it would amount to an illegality that would substantially affect the merits of the case. It will not be allowed to stand.

[26] The appellant has submitted that the findings of fact made by the Industrial Court were not supported by any evidence. I will now review.

[27] The President of the Industrial Court begins his analysis by stating the following:

"46. Article 8.1 of both the **August 2005 Agreement** and **December 2005 Agreement** in the Standard Form required the party completing the form to: *"Insert a precise description of the work of this subcontract..."* The clauses inserted in that Article in both Agreements are all in capitals and further highlighted with the said parallel line. Those clauses in the **August and December 2005 Agreements**, respectively, are as follows:

"SUPPLY OF SKILLED AND UNSKILLED TRADESMEN FOR THE CONSTRUCTION OF THE SUBSTRUCTURE TO THE MAIN ROOM BLOCK AND CENTRAL FACILITIES"

"SUPPLY OF SKILLED TRADESMEN FOR THE CONSTRUCTION OF THE SUPERSTRUCTURE TO THE CENTRAL FACILITIES AT THE SANDALS ANTIGUA EXPANSION PROJECT."

47. The express requirement for the insertion of a "precise description", the use of capital letters, and the use of the parallel line leave no doubt in my mind that Employer deliberately and carefully chose its words in describing "the work" to be carried out under those two subcontracts. In my view, it is instructive that, save for the names of the parties on the cover pages, no other Article of the August and December 2005 Agreements contain insertions made in capital letters.

...

49. As a result, all other written contractual obligations in the **August and December 2005 Agreements** and the **September 2006 Agreement** which required the First Employer to "supervise and direct" his work, purchase workmen's compensation and so on are contrary to or inconsistent with Article 8.1. In any event, there is no evidence before me that those obligations were willingly discharged by the First Employer or were enforced by the Second Employer.

50. It is also noteworthy that the **"Implementation Letter"** dated August 8, 2005, referred to at paragraph 7 above, which modified at least the August 2005 Agreement, was not produced by the Second Employer. As a result, without the benefit of the written modifications to the August 2005 Agreement, I am left to do the best I can with the available evidence.

51. Based on my assessment of the written and oral evidence of the witnesses and my observations of their demeanours, I find that the First Employer is a more believable witness than Mr. O'Neill. To the extent that their testimonies conflict, I prefer the written and oral evidence of the First Employer. As to Mr. Nathan, although his evidence was partly contradictory and partly supportive of each of the two Employers, I find him to be an honest witness." ¹²

¹² See Record of Appeal pages 309-310.

[28] In his final analysis on the balance of probabilities, the President of the Industrial Court concludes that the course of conduct of the parties established the following facts:

“(1) In accordance with Article 8.1 of the August 2005 Agreement and the December 2005 Agreement, the First Employer was engaged for the limited purpose of supplying the Employees as tradesmen to the Second Employer for the execution of the construction works by the Second Employer.

(2) The First Employer discharged his obligation by transporting the Employees from time to time to the job site whereupon they were deployed, directed and supervised by the Second Employer.

(3) Apart from recruiting them and paying their wages, the First Employer had no control over the Employees in the daily performance of their work.

(4) The sums paid by Second Employer to the First Employer under the August and the December 2005 Agreements exceeded the "Contract Sum" respectively stipulated under Article 10 of those Agreements.

(5) The First Employer provided the Employees with no tools, materials or equipment for the performance of their work on the job site.

(6) The First Employer's actions in paying their wages and meeting the Employees' share of the compulsory statutory payments did not relieve the Second Employer of its statutory obligations.

(7) The services of the Employees were terminated exclusively by the Second Employer.

(8) The Second Employer's payment of the sum of \$242,964.33 under the July 2007 Agreement was tantamount to a partial discharge of its statutory obligations arising upon the termination of the services of the Employees by reason of redundancy.

(9) As a result of their conduct at all material times, save for the "precise description" of the work as stipulated in Article 8. 1 of the 2005 Agreements, neither those agreements nor the 2006 Agreement governed the contractual relationship between the First and Second Employers.”¹³

[29] I will now consider each fact established by President Charles to determine whether it would amount to an illegality that would substantially affect the merits of the case.

¹³ See Record of Appeal pages 310-311.

“The First Employer was engaged for the limited purpose of supplying the Employees as tradesmen”

[30] President Charles in his judgment pronounced that Article 8.1 of the August Agreement and December Agreement when read, clearly supported Tavernier’s assertions that in addition to the subcontracted works to be performed, he was solely engaged for the limited purpose of supplying Kier with tradesmen and that he was at no time considered the employer of the Sundry Workers.

[31] Both Article 8.1 of the August Agreement and the December Agreement are identical in their terms and state as follows:

“ARTICLE & THE WORK OF THIS SUBCONTRACT

§8.1 The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.

(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda. Modifications and accepted Alternates.)

SUPPLY OF SKILLED AND UNSKILLED TRADESMEN FOR THE CONSTRUCTION OF THE SUBSTRUCTURE TO THE MAIN ROOM BLOCK AND CENTRAL FACILITIES AT THE SANDALS ANTIGUA EXPANSION PROJECT.”

[32] In **Rainy Sky SA and Others v Kookmin Bank**,¹⁴ the UK Supreme Court stated that where the parties have used unambiguous language, the Court must apply it.¹⁵ In **Rainy Sky SA** the UK Supreme Court also stated:

“14....the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

¹⁴ [2011] UKSC 50.

¹⁵ Ibid para 12.

15. The issue between the parties in this appeal is **the role to be played by considerations of business common sense in determining what the parties meant.**" (Emphasis added)

[33] In **Wood v Capital Insurance Services Limited**¹⁶ the UK Supreme Court further clarified the position on contract interpretation stating that:

"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning..."

[34] This Court, in taking guidance from **Wood v Capital Insurance Services Limited**, must ascertain the objective meaning of the language which the parties have chosen to express the agreements. To do so, this Court must not solely focus on the wording of Article 8.1 of the August and December Agreements but must consider all the agreements as a whole.

[35] Upon reading the August and December Agreements in full, it is apparent that there are several articles which articulate clearly that it was agreed that Tavernier, as subcontractor, was expected to perform tasks beyond simply transporting the employees to the job site.

[36] Article 4.1.6 of the August and December Agreements state:

"§ 4.1.6 The Subcontractor shall pay for all materials, equipment and **labor** used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements." (Emphasis added)

[37] Article 4.3.4 of the August and December Agreements state:

"§ 4.3.4 **To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees** of any of them from and against claims, damages, losses and

¹⁶ [2017] UKSC 24.

expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.” (emphasis added)

[38] Article 10.1, of the August and December Agreements state:

“§10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of Seven Hundred Sixty-two Thousand Six Hundred Fifty-six Eastern Caribbean Dollars and Fifty-four Cents (ECS762,656.54), subject to additions and deductions as provided in the Subcontract Documents.”

In addition to the listed subcontracted sum, Article 10.3 takes into consideration unit prices of different tiers of labourers anticipated to be employed by Tavernier.

[39] Additionally, we must also take into consideration the Subcontractor Agreement. Article 1.1 of the August and December Agreements list the documents which should form part of the “Subcontract Documents”. It states that:

“§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.”

[40] It is clear that this contemplates later modifications and supplemental documents and as such, the provisions of the Subcontractor Agreement should have also been taken into consideration in the President’s analysis of the facts.

Clause 9 of the Subcontractor Agreement proves particularly relevant as it states:

“9. LABOUR. The sub-contractor is required to submit the names, addresses of all operatives he proposes to employ on the work, to the Contractor's office prior to their commencing work on site.”

[41] Whether applied literally or contextually, it is apparent and reasonable to arrive at the conclusion that the August Agreement, December Agreement, and the Subcontractor Agreement all contemplated that Tavernier would have at his disposal employees to complete the work subcontracted for and that such employees would not be the employees of Kier. Further, commercially, it is quite difficult and tenuous to contemplate a reality where a subcontractor would be paid such a lucrative subcontract sum for works limited to the transport of labour and that there would be no direction, or supervision of the subcontracted works by the subcontractor if those subcontracted works were performed by the employees. Contract interpretation necessitates that good commercial sense should prevail, and in accepting the evidence of Tavernier that he had solely been contracted to transport the tradesmen, the Industrial Court came to a conclusion which was not borne out in the agreements, nor did that conclusion make sound commercial sense.

[42] From all accounts, Kier is a well-established construction company in Antigua and Barbuda. If it so wished, it could have contracted these tradesmen directly without going through the extensive task of executing 3 agreements which emphasised that it was not liable for hiring, supervising or paying these tradesmen. Further, Tavernier's evidence contradicts the idea of commercial sense. Under cross-examination, Tavernier states the following:

“Between 2005-2007 other than Kier Workers I had no employees”¹⁷

[43] When considering the scope of the work required it would be quite difficult to contemplate Kier's agreement to subcontract work to a contractor who had no employees or who was not prepared to hire employees to complete the subcontracted tasks.

¹⁷ See page 282 of the Record of Appeal.

“The appellant directed and supervised the employees”

[44] Control of the employees or more particularly, the entity to which control, direction and supervision could be attributed to in relation to the employees have dominated these proceedings, with the President in his judgment, correctly highlighting several tests, being the Control, Organization and Mutuality of Obligation tests. In each of these tests, to varying degrees, the person or entity responsible for the direction, supervision, payment of salaries and social security, and provision of tools could, depending on the totality of the circumstances, be considered an employer.

[45] In addition to the August, December, and Subcontractor Agreements, the letter dated 6th July 2007 acknowledges that without prejudice to Kier, Tavernier as ‘employer’ of the labour resources, was responsible for all severance, notice and holiday payments due to employees under the Laws of Antigua and Barbuda. However, the President held that these agreements were not legally binding and should not be considered in determining who in fact owed obligations that of an employer to the employees (this will be discussed later). The President having rejected the effect of these contracts on the parties’ relationship, relied on several witnesses, including the evidence of Glenmore Nathan, the sole witness for the Sundry Workers. However, what is peculiar about this evidence is that it almost totally confirms that an employee-employer relationship existed between Tavernier and the employees, in accordance with the authorities cited by the President. At paragraph 278-280 of the Record of Appeal, the Examination in Chief and Cross-Examination of Glenmore Nathan reads:

“Glenmore Nathan...Employee witness

Examination in Chief by Cumberbatch

...
I went to Tavernier for a job.. he employed me same day as a carpenter
I worked there for 1 year and 6 months

...
As soon as I turn into work...A white man came and said
All Tavernier men to get off the job site”

Cross Examination by Roberts

We went to Mr. Tavernier and I was employed by Mr. Tavernier.
He didn’t have to ask anyone.

When Mr. Tavernier hired me, I was employed as a Carpenter.

I worked only at Sandals.

He agreed to pay me \$800.00 per week.

There was no written document.

He said he would pay Social Security and so on.

I was supervised by "Blinds" who worked for Dexter Tavernier"

[46] Although the President expressed in his judgment that he found Mr. Nathan to be a credible witness, he gave no reason as to why he rejected this portion of his evidence in favour of accepting that Kier supervised, directed and was responsible for the payment of the employees. It seems contradictory to accept this witness as a witness of truth but make a finding contrary to the very evidence which the Court found to be credible.

[47] The evidence of Tavernier exercising the duties of an employer in an employee-employer relationship is not only evident in the mutually executed agreements, but also by Tavernier's own admission that he hired 'Blinds' to supervise the workers¹⁸ and that he paid their social security albeit claiming he did so out of a desire to placate them and not out of obligation.¹⁹ Whatever the motivation offered by Tavernier it is clear that there was an employee-employer relationship that existed between himself and the employees.

[48] I further find that the letter dated 6th July 2007 is also key to clarifying which entity was responsible for paying the employees. The letter states that Tavernier and Kier understood that sufficient monies had been paid to Tavernier by Kier to meet Tavernier's contractual and statutory obligations and that to prevent disruption to the Sandals Expansion Project, Kier on a without prejudice basis, agreed to assist Tavernier in meeting his contractual and statutory obligations by making payment in the sum of EC \$242, 964.33. While Tavernier has proffered an argument that this letter was signed under duress,²⁰ save for his viva voce evidence, he has not tendered before the court any evidence, such as a letter in response to the letter, that he disagreed with the letter and that he

¹⁸ See page 281 of the Record of Appeal.

¹⁹ See page 282 of the Record of Appeal.

²⁰ Pages 281-282 of the Record of Appeal.

felt undue pressure to sign it. In fact, there is nothing in the record to indicate that Tavernier was under duress or that he was forced to sign the agreement.

“Save for the ‘precise description’ of the work as stipulated in Article 8. 1 of the 2005 Agreements, neither those agreements nor the 2006 Agreement governed the contractual relationship between Kier Construction Limited and Tavernier”

[49] Article 1.1 of the August and December Agreements as referenced above states that the subcontract documents consist of ‘Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement’ and ‘Modifications to this Subcontract issued after execution of this Agreement.’

[50] The President in arriving at the conclusion that neither of those agreements governed the contractual relationship between the parties due to their conduct, was plainly wrong. The President appears to cherry-pick which provisions in the Agreements were enforceable and which were not, without undertaking the appropriate thorough analysis of the various agreements. Further, his basis for finding that the August and December Agreements did not govern the parties was because there were amendments or modifications to the Agreements by the parties. However, this was not only an error in fact but also an error in law as it is trite that agreements can be mutually varied orally or in writing. In **Globe Motors v RW Lucas Varity Electric Steering Ltd**²¹ the UK Court of Appeal held that a contract can be varied by an oral agreement or by its parties’ conduct, even where the contract itself contains a ‘no oral variation’ clause.

[51] In this case a ‘no oral variation clause’ is not in issue but it is clear that the parties could by virtue of their conduct vary the Agreements. In any event, the August and December Agreements by virtue of Article 1.1 specifically provided that modifications to the agreements after the date of execution were permissible. It is clear throughout their interactions up until the Sundry Workers’

²¹ [2016] EWCA Civ 396 (20 April 2016).

filing of this claim before the Industrial Court, there was *consensus ad idem* between Kier and Tavernier on how the Agreements should be executed. This is particularly evident as there is no record of the execution of the Agreements becoming litigious or being challenged.

- [52] When one considers that the findings of fact relied upon by the Industrial Court cannot be supported by the evidence or do not construe the evidence in accordance with the correct legal principles, it is overwhelmingly clear that it amounts to an illegality that would substantially affect the merits of the case, and allows this Court to review the findings of the Industrial Court in accordance with section 17(1)(e) of the **Industrial Court Act**.

Conclusion and disposition

- [53] I find that Tavernier is in fact and law the employer of the employees and that Tavernier is liable to meet all payments to which the employees became entitled upon termination of their services.
- [54] I would therefore allow the appeal and quash the order of the Industrial Court.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar