

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

ANTIGUA AND BARBUDA

ANUHLTAP2023/0008

BETWEEN:

ANTIGUA WIRELESS VENTURES LTD. T/A DIGICEL

Appellant

and

KARL SKEPPLE

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Michael Koeiman and Ms. Jenell Gibson for the Appellant
Mr. Kendrickson Kentish for the Respondent

2025: February 28;
2026: May 19.

Civil appeal – Unfair dismissal claim – Trial proceeding in absence of the appellant - Right to appeal decisions of the Industrial Court – Section 17(1)(e) of the Industrial Court Act - Whether industrial court committed a specific illegality in the course of the proceedings – Whether the Industrial Court erred in exercising its discretion when it refused the appellant's counsel's request for an adjournment – Whether the Industrial Court failed to engage with and properly consider the reasons advanced for the request for an adjournment

This is an appeal against the decision of the Industrial Court to proceed with the trial of the respondent's claim of unfair dismissal in the absence of the appellant. On 20th October 2016, the respondent filed a reference of complaint in the Industrial Court alleging that he was unfairly dismissed by the appellant. The respondent's dismissal stemmed from allegations made by another employee of the appellant company that the respondent had made inappropriate sexual advances towards her. The disciplinary hearing was conducted on 31st

July 2015 and the respondent was subsequently dismissed by letter dated 6th August 2015 in which the appellant concluded that it believed the allegations made by the other employee.

After filing his complaint, the Industrial Court issued a notice dated 11th September 2023 and served via email on 13th September 2023 for the hearing of the trial on 20th September 2023, to counsel for the respondent and counsel in the court below for the appellant. The appellant's counsel thereafter wrote to the Industrial Court requesting an adjournment of the trial scheduled for 20th September 2023 on the basis that he was required to appear before both the Criminal and Civil Divisions of the High Court on the same date. The appellant's counsel also informed counsel for the respondent that because of the scheduling conflict he would be unable to attend trial on 20th September.

On the day of the trial, despite the previous correspondence to the court and communication with the respondent's attorney-at-law, the Industrial Court proceeded to hear the matter in the absence of the appellant. The Industrial Court had regard to "the absence of counsel for the Employer or anyone holding papers for him or any corporate representative or other official of the Employer; the chronology of proceedings to date with particular reference to the several adjournments; and the Employer's failure to comply with the Orders dated May 5th 2021, March 23rd 2023 and April 14th 2023 whereby it was repeatedly required to file its Witness Statements." The Industrial Court was also satisfied that the appellant was served with timely notice of the trial date and granted the respondent's *viva voce* application to proceed with the trial *ex parte*.

The Industrial Court found that the respondent was unfairly dismissed and was entitled to compensation in the sum of EC\$176,500.00 inclusive of costs against the appellant.

The appellant appealed the decision of the Industrial Court on the premise that the Industrial Court committed breaches of law and natural justice in exercising its discretion which amounted to a specific illegality committed in the course of the proceedings. In summary, the principal issue before the Court is whether in the exercise of its discretion, the Industrial Court ought to have granted an adjournment in the circumstances of this case.

Held: allowing the appeal and setting aside the order of the Industrial Court dated 20th September 2023; remitting the matter to the Industrial Court for rehearing before a differently constituted tribunal, and making no order as to costs, that:

1. A challenge, on appeal, to findings of fact made by the Industrial Court is precluded from being classed as a specific illegality under section 17(1)(e) of the **Industrial Court Act**. However where a finding of fact substantially affects the merits of the matter or where it is shown that the Industrial court erred in finding facts or drawing inferences which are not supported by the evidence, particularly where the facts so found substantially affect the merits of the matter or where the court did not consider the facts in light of applicable principles or statutory provision, then this would fall within the ambit of a specific illegality in section 17(1)(e).

Section 17(1)(e) of the **Industrial Court Act** applied; **Jewellers Warehouse v Cecil Norde** Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27th November

2006, unreported) considered; **Leonart Matthias v Antigua Commercial Bank** ANULTAP2017/0002 (delivered 28th May 2020, unreported) considered; **West Indies Oil Company Limited v Janis James et al** ANUHCVP2022/0014 (delivered 14th January 2025, unreported) considered.

2. The appeal at bar is not concerned with any finding of fact, nor is it concerned with the substantive issues of the case save for the challenge to the awards made for costs and exemplary damages. It is concerned with the exercise of the court's discretion to proceed with the trial in the absence of the appellant. The appellant's contention that the tribunal's decision adversely affected its fundamental right to a fair hearing enshrined in section 15(8) of the Constitution in that the Industrial Court in refusing to grant an adjournment failed to consider relevant factors; gave undue weight to expediency; and substantially affected the fairness and the outcome of the trial, finds merit and properly falls within section 17(1)(e) as constituting 'some other specific illegality' affecting the merits of the matter.
3. The decision to grant or refuse an adjournment is a discretionary power which the appellate court is slow to interfere with unless it can be said that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. A pertinent question and distinguishing factor in this appeal from the **Liat 1974 v Novella Shepherd** case, is whether the Industrial Court considered the representations made by the appellant's counsel in the letter sent to the court and considered the request for an adjournment. There is no indication on the record that the learned tribunal considered the reasons for the request, save for a passing reference to communication with the respondent's counsel. Neither the contents of the letter from the appellant's counsel explaining his scheduling conflicts, nor his email to the court were addressed. This is an important relevant consideration that was ignored or insufficiently weighed. Instead, the court appears to have placed undue weight on whether opposing counsel had received the correspondence and whether he agreed to or consented to the adjournment. Ultimately, the tribunal was required to consider the substance of the adjournment request and the overall interests of justice, which extend beyond the presence or absence of such concurrence by opposing counsel.

Dufour v Helenair Corporation Ltd (1996) 52 WIR 188 followed; **Multibank Fx International Corporation v Von Der Heydt Invest S.A** BVIHCP2022/0024 (delivered 29th April 2022, unreported) considered; **Ultramarine (Antigua) Limited v Peter Cochran** ANUHCVP2025/0005 (delivered 13th January 2026, unreported) considered; **Liat 1974 v Novella Sheppard** Antigua and Barbuda Civil Appeal No. 6 of 1991 (delivered 22nd November 1993, unreported) distinguished.

4. Furthermore, while it is accepted that a degree of discourtesy was shown by the appellant's counsel towards both the Industrial Court and the respondent in that the appellant failed to file any evidence before the Industrial Court, which in those circumstances would have precluded him from presenting evidence at trial, the learned tribunal was required to weigh the discourtesy of counsel and the appellant's failure to file evidence against the actual consequence to the appellant as a litigant,

namely the denial of an opportunity to cross-examine the respondent and to advance legal submissions. The right to legal representation and the right to be heard are fundamental entitlements that a court must consider even where the conduct of a party has been discourteous. The appellant's counsel faced a genuine scheduling conflict, communicated that conflict to both the court and opposing counsel in advance, and was in any event short-served with notice of the trial date. In those circumstances, the refusal to grant an adjournment deprived the appellant of a meaningful opportunity to participate in proceedings. Accordingly, the appeal is allowed.

JUDGMENT

- [1] **PRICE FINDLAY CJ:** This appeal concerns the decision of the Industrial Court to proceed with hearing and determining the respondent's claim of unfair dismissal in the absence of the appellant at the trial. The principal issue before this Court is whether, in the exercise of its discretion, the Industrial Court ought to have granted an adjournment in the circumstances of this case.

Background

- [2] On 20th October 2016, the respondent filed a reference of complaint in the Industrial Court alleging that he was unfairly dismissed by the appellant. The respondent's dismissal stemmed from allegations made by another employee of the appellant company that the respondent had made inappropriate sexual advances towards her. Upon further investigation, the appellant concluded that it was best to institute disciplinary proceedings against the respondent.
- [3] The disciplinary hearing was conducted on 31st July 2015 and the respondent was subsequently dismissed by letter dated 6th August 2015 in which the appellant concluded that it believed the allegations made by the other employee. In his complaint to the Industrial Court, the respondent averred that he was denied the 'full benefit and plenitude of natural justice' and took issue with the procedure adopted in the disciplinary process undertaken by the appellant which ultimately led the appellant to terminate him.

- [4] On 11th September 2023, the Industrial Court issued a notice of hearing for trial on 20th September 2023 to both counsel for the respondent, Mr. Kendrickson Kentish and counsel for the appellant below, Mr. Andrew O’Kola. The notice was served via email on 13th September 2023. Thereafter Mr. O’Kola wrote to the Industrial Court requesting an adjournment of the trial scheduled for 20th September 2023 on the basis that he was required to appear before both the Criminal and Civil Divisions of the High Court on the same date. The timing of this correspondence is disputed - the appellant contended that it was sent in advance of the scheduled trial, whereas the respondent suggested that the correspondence was sent to the Industrial Court on the morning of the trial. Additionally, on 18th September 2023, Mr. O’Kola informed counsel for the respondent that because of the scheduling conflict he would be unable to attend the trial on 20th September.
- [5] On the day of trial, despite having sent written correspondence to the Industrial Court and the respondent’s attorney-at-law and despite Mr. O’Kola’s verbal communication with the respondent’s attorney, the Industrial Court nonetheless proceeded to hear the matter in the absence of the appellant or its counsel. The Industrial Court had regard to “the absence of counsel for the Employer or anyone holding papers for him or any corporate representative or other official of the Employer; the chronology of proceedings to date with particular reference to the several adjournments; and the Employer’s failure to comply with the Orders dated May 5th 2021, March 23rd 2023 and April 14th 2023 whereby it was repeatedly required to file its Witness Statements.” The Industrial Court was also satisfied that the appellant was served with timely notice of the trial date and granted the respondent’s *viva voce* application to proceed with the trial *ex parte*.
- [6] The Industrial Court found that the respondent was unfairly dismissed and was entitled to compensation in the sum of EC\$176,500.00 inclusive of costs against the appellant.

The Appeal

- [7] The appellant filed its notice of appeal on 17th November 2023. The appellant sought an order from this Court that the order of the Industrial Court made on 20th September 2023 be set aside and the matter be remitted to the Industrial Court for re-hearing. The appellant's grounds of appeal as set out in its notice of appeal are as follows:

- "1. The learned President and Member erred in finding that the Employer was served with timely notice of the trial date. The Employer's attorney-at-law at the material time, Andrew O'Kola was served via email on 13th September 2023 with notice of the trial scheduled for 20th September 2023. The Industrial Court provided the Employer, through its attorney-at-law with less than seven clear days' notice of the trial date. The failure to provide the Employer with sufficient notice of the trial date amounts to a specific illegality committed in the course of the proceedings.
2. The Industrial Court failed to take into account email correspondence sent by the Employer's attorney-at-law to the Industrial Court, specifically to the Deputy Registrar (Ag.) of the Industrial Court, Diane Martin, and to the Registrar of the Industrial Court, Denniel Canoville, wherein the Employer's attorney-at-law informed the Industrial Court that he was unable to attend the trial due to the fact that he had one matter scheduled for hearing before the High Court (Civil Division) and multiple matters before the High Court (Criminal Division). This failure amounts to a specific illegality committed in the course of the proceedings.
3. The Industrial Court breached the Employer's right to be heard in the proceedings by failing, refusing or neglecting to adjourn the trial of this matter in light of correspondence from the Employer's attorney-at-law that he was unable to attend the trial in circumstances where the Employer's attorney-at-law provided reasonable and sufficient explanations for his inability to attend the trial. This breach amounts to a specific illegality committed in the course of the proceedings.
4. The Industrial Court breached the principles of natural justice and breached the Employer's right to procedural fairness in the conduct of the hearing by failing to grant an adjournment to permit the Employer an opportunity to cross-examine the Employee and/or the Employee's witnesses. This breach amounts to a specific illegality committed in the course of the proceedings.

5. The Industrial Court exceeded its jurisdiction in ordering exemplary damages against the Employer in the absence of evidence reasonably capable of supporting such an award.
6. The Industrial Court exceeded its jurisdiction in ordering costs where no exceptional circumstances existed to warrant an award of costs pursuant to section 10(2) of the Industrial Court Act, Cap. 214 of the Laws of Antigua and Barbuda.”

Appellant’s Submissions

[8] The appellant begins its submissions by correctly outlining the limited circumstances in which an appeal may lie to the Court of Appeal from the Industrial Court. The appellant cited section 17 of the **Industrial Court Act**¹ which states that:

“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;
- 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.”

[9] The appellant accepted that section 17(1) of the **Industrial Court Act** provides limited grounds of appeal, however the appellant submitted that its case falls squarely within section 17(1)(e) which permits appeals on the basis of some other specific illegality substantially affecting the merits of the matter. The appellant relied on the case of **Jewellers Warehouse v Cecil Norde**² to submit that this provision

¹ Cap. 214 of the Revised Laws of Antigua and Barbuda.

² Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27th November 2006, unreported).

includes findings of fact or inferences without evidential basis and failure to consider facts in light of applicable principles or statutory provisions.

- [10] The refusal to grant an adjournment, according to the appellant, constitutes a procedural illegality under section 17(1)(e) of the **Industrial Court Act** because the court's conclusion that the trial should proceed disregarded the appellant's documented efforts to notify the court and opposing counsel of the scheduling conflicts, relevant evidence which materially affected the fairness of the proceedings and that the procedural error directly impeded the appellant's ability to present its defence which amounted to a violation of natural justice principles.
- [11] Having addressed the Court's jurisdiction to hear the appeal, counsel for the appellant proceeded to expand upon the contention that his client had been denied the right to a fair hearing. He submitted that a litigant's right to a fair hearing is codified in section 15(8) of the **Antigua and Barbuda Constitution Order**.³ As a critical element of the right to a fair hearing, a litigant must be provided an opportunity to be heard and in certain circumstances an adjournment is necessary to enable a litigant to better prepare his case, counsel submitted.
- [12] The appellant acknowledged that an attorney-at-law is not entitled as of right to an adjournment. It is a discretionary power exercised by the court or a tribunal. In exercising its discretion, the court must examine all the circumstances of the case and ascertain whether the refusal of an adjournment would amount to a breach of the litigant's right to procedural fairness and, therefore, a breach of the litigant's right to a fair hearing and natural justice. The court is further entitled to consider the reasons presented for the adjournment and determine whether those reasons are sound enough to warrant the grant of an adjournment.

³ 1981 SI. No. 1106.

- [13] The appellant further relied on **The Attorney General of Saint Vincent and The Grenadines v Randolph Trueman Toussaint**⁴ as authority for the assertion that where the litigant's attorney acted reasonably and the need for an adjournment is prompted by circumstances beyond the litigant's control, it is a reasonable exercise of the court's discretion to grant an adjournment, similar to the circumstances in this appeal. In addition, the appellant contended that its right to a fair hearing was further infringed since it was not provided with adequate notice of the hearing date to permit it the opportunity to prepare its case.
- [14] The appellant emphasised that in the circumstances of this appeal, the appellant's attorney was given less than 7 clear days' notice of the trial date. His attorney's reason for his absence was the short notice he was given as well as his pre-existing obligations to the High Court. The appellant's argument is that the appropriate course of action that the Industrial Court ought to have taken should have been an adjournment of the trial paired with no order as to costs since the appellant was short served. The appellant further contended that authorities such as **Burgoine v Taylor**⁵ and **Justin Pemberton v Attorney General of the Commonwealth of Dominica et al**⁶ illustrate that the explanations advanced by counsel for the appellant's non-attendance were capable of justifying the setting aside of orders made in the absence of counsel and thus must warrant granting an adjournment.
- [15] In addition to being denied its right to be heard, the appellant contended that it was also denied its right to cross-examine the respondent to test the veracity and credibility of his evidence. This is especially crucial in light of the factual circumstances surrounding the respondent's dismissal. The appellant therefore averred that the Industrial Court ought to have granted an adjournment to permit the appellant an opportunity to cross-examine the respondent on his evidence before granting judgment in favour of the respondent.

⁴ Civil Appeal No.1 of 2004 (delivered 17th December 2004, unreported).

⁵ (1878) 9 Ch D 1.

⁶ DCAHCVAP2010/0016 (delivered 6th March 2012, unreported).

- [16] Counsel for the appellant maintained that the Industrial Court's failure to provide adequate notice of the trial date and its refusal to grant an adjournment in circumstances warranting same amounted to a breach of the appellant's right to procedural fairness and its right to a fair hearing of the complaint. Consequently, the appellant contended that the order of the Industrial Court made on 20th September 2023 ought to be set aside and the matter should be remitted to the Industrial Court for rehearing.
- [17] The appellant also complained of the order of the Industrial Court granting costs and exemplary damages to the respondent. Section 10(2) of the **Industrial Court Act** states that "the Court shall make no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise, and the Court of Appeal shall in disposing of any appeal brought to it from the Court make no order as to costs, unless for exceptional reasons the Court of Appeal considers it proper to order otherwise."
- [18] In this case, the appellant argued that the Industrial Court failed to identify any exceptional reasons warranting an award of costs. The appellant submitted that no such exceptional reasons existed and the Industrial Court exceeded its jurisdiction in making an order for costs. Similarly, the appellant argued that there was no evidential basis for the award of exemplary damages.

Respondent's Submissions

- [19] The respondent placed reliance on the reasoning of Byron JA in **Liat (1974) LTD v Novella Sheppard**⁷ to demonstrate that the Industrial Court was entitled to refuse to adjourn the trial and proceed in the absence of the appellant. Byron JA set down a number of factors that he considered in determining whether any injustice was done to the appellant by granting or refusing an adjournment. These included the

⁷ Antigua and Barbuda Civil Appeal No. 6 of 1991 (delivered 22nd November 1993, unreported).

conduct of the appellant and its counsel, the effect of further delay and the justice of the case.

[20] The respondent therefore invited the Court to consider that the appellant was in breach of the **Industrial Court (Procedure) Rules**⁸ in not filing any evidence, that the appellant itself did not attend the trial and that the appellant's counsel made no arrangements for other counsel to attend court and to move an application for an adjournment but simply assumed that by sending a letter (particularly without the concurrence of opposite counsel in seeking an adjournment) that the court should adjourn the matter.

[21] Counsel for the respondent further contended that the respondent is also entitled to a fair trial and that the Industrial Court was right to proceed to a trial. During oral submissions, counsel for the respondent placed great emphasis on the fact that counsel for the appellant in the court below would have been aware of the difficulty in the scheduling conflict but made no attempt to make a formal application, accompanied by affidavit evidence for an adjournment or an extension of time to file evidence. He argued that if a court is being moved to adjourn the proceedings, that court must be given sufficient material to assist in the determination of that application. In this appeal, the respondent argued that the Industrial Court was provided with no such information with which it could properly exercise its discretion. Finally, the respondent relied on the case of **Titus v Sandals (Antigua) Ltd**⁹ for the submission that the circumstances of the case warranted the award of costs and exemplary damages.

[22] For these reasons, counsel for the respondent submitted that the Industrial Court properly exercised its discretion to proceed with the trial and that the appeal should be dismissed with costs.

⁸ S.R.O 16/1980.

⁹ AG 2002 IC 1.

Discussion

Section 17(1) of the Industrial Court Act

- [23] At the outset, it is important to reiterate the limited circumstances in which an appeal may lie from the Industrial Court. I have already set out section 17(1) of the **Industrial Court Act** at paragraph 8 of this judgment. The specific section by which the appellant has grounded its appeal is section 17(1)(e) which states:

“Subject to this Act, any party to a matter before the Court shall be entitled as a right to appeal to the Court of Appeal on any of the following grounds but no others –

- (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.”

- [24] Section 17(1)(e) of the **Industrial Court Act** has been examined in **Jewellers Warehouse v Cecil Norde**. At paragraphs 14 and 15, Rawlins JA states:

“It would therefore 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 a 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 purposes of section 17(1)(e), since the proceedings would only be at an end after judgment is delivered and the Court is *functus*.

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. However, similarly to the common law principles, the jurisdiction to allow an appeal pursuant to section 17(1)(e) is exceptional and should only be exercised in those exceptional circumstances. 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. The burden is upon the appellant to satisfy this Court that it should exercise its exceptional jurisdiction to reverse the impugned decision.”

[25] The operation of section 17(1)(e) was also considered in **Leonart Matthias v Antigua Commercial Bank**.¹⁰ In that case Webster JA (Ag.) opined that illegality as set out in the **Industrial Court Act** may be established where it is shown that the Industrial Court erred in making or drawing 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 provisions, and that the error was committed during the course of the proceedings and substantially affected the merits of the matter.

[26] The principle that can be derived from the abovementioned cases is that this Court must be reluctant to entertain an appeal concerned with a challenge to a finding of fact in the Industrial Court. Indeed, in **West Indies Oil Company Limited v Janis James et al**,¹¹ on an examination of section 17 of the Industrial Court, it was held at paragraph [28] that:

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

[27] The appeal at bar however is not concerned with any finding of fact, nor is it concerned with the substantive issues of the case save for the challenge to the awards made for costs and exemplary damages. It is concerned with the exercise of discretion to proceed with the trial in the absence of the appellant. The appellant argued that the illegality affecting the merits in the Industrial Court is that the refusal to grant an adjournment deprived the appellant of the opportunity to file evidence, cross-examine witnesses, and present arguments which fundamentally undermined the fairness of the trial. Its contention is that the Industrial Court’s refusal to grant

¹⁰ ANULTAP2017/0002 (delivered 28th May 2020, unreported).

¹¹ ANUHCVP2022/0014 (delivered 14th January 2025, unreported).

an adjournment satisfies the criteria set out in **Jewellers Warehouse v Cecil Norde** since the decision to continue with the trial failed to give appropriate weight to the appellant's legitimate scheduling conflict, unjustly prioritised expediency over fairness and deprived the appellant of a meaningful opportunity to participate in the proceedings.

[28] The Industrial Court's refusal to grant an adjournment constitutes a discretionary error and a procedural illegality under section 17(1)(e) of the **Industrial Court Act**. The decision failed to consider relevant factors, gave undue weight to expediency and substantially affected the fairness and the outcome of the trial. According to the appellant, these exceptional circumstances warrant appellate intervention to correct the imbalance and restore the principles of natural justice. I find this argument persuasive.

[29] The fundamental right to a fair hearing is enshrined in the **Antigua and Barbuda Constitution Order** at section 15(8) which states:

“Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any persons before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

[30] The right to a fair hearing also exists as a core principle of natural justice and the rule of law. In **Ali v Attorney General of Trinidad and Tobago**¹² it was held that if the refusal of an adjournment effectively negated the right of a person to be heard, then that was one of the rare cases in which it was the duty of an appellate court to intervene. I am therefore of the view that the fundamental character of the right to be heard is such that a decision affecting a litigant's right to a fair hearing may properly be characterised as an illegality pursuant to section 17(1)(e) of the **Industrial Court Act**.

¹² TT 2002 CA 47.

[31] I am also satisfied that notwithstanding the failure of the appellant to file any evidence in the Industrial Court, it was nonetheless precluded from cross-examining witnesses and making submissions on the law. Had the respondent's evidence been properly tested by counsel below, the tribunal may have concluded differently than it had. While it is possible that the outcome would have remained unchanged, that very uncertainty indicates that the appellant's presence had the potential to influence the merits of the case. In my assessment, the appellant's grounds that the tribunal's decision adversely affected the fundamental right to a fair hearing enshrined in the Constitution properly falls within section 17(1)(e) as constituting 'some other specific illegality' affecting the merits of the matter.

The Adjournment

[32] Having established that the appeal is properly before this Court, the dispositive issue for determination is whether the learned tribunal erred in its exercise of discretion regarding the request for an adjournment.

[33] It is well established that an appellate court must be slow to interfere with a decision stemming from an exercise of a lower court's discretionary power. The principles governing such interference were enunciated by Sir Vincent Floissac CJ in **Dufour v Helenair Corporation Ltd**¹³ which states:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

¹³ (1996) 52 WIR 188.

[34] There is no doubt, nor any challenge that the power to adjourn is a discretionary power enjoyed by the courts. Section 8(1) of the **Industrial Court Act** states that:

“The Court, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, shall have all such powers, rights, and privileges as are vested in the High Court on the occasion of an action.”

[35] Rule 26.1 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** which deals with the court’s case management powers, provides at subrule 2 that:

“Except where these rules provide otherwise, the court may –

(a) adjourn or bring forward a hearing to a specific date.”

[36] The authority to grant an adjournment plainly falls within the remit of the High Court, and by extension, is a power that may be exercised by the Industrial Court. That discretionary power, however, must be applied in accordance with the court’s overriding duty to deal with cases justly as enunciated by Michel JA in **Multibank Fx International Corporation v Von Der Heydt Invest S.A.**¹⁴ He states at paragraph 30:

“Although not binding on this Court, I consider that the words of Coulson J in *Elliot Group Ltd et al v GECC UK* (formerly known as *GE Capital Corporation*) et al are useful. In that case, the learned judge was dealing with an application for an adjournment of the trial date and had this to say:

‘In essence, on an application of this sort, the court is faced with a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date (which promotes certainty) and avoiding any adjournment (which can only add to the costs of the proceedings) and, on the other, the risk of irredeemable prejudice to one party if the case goes ahead in circumstances where that party has not had proper or reasonable time to prepare its case’.”

¹⁴ BVIHCMAP2022/0024 (delivered 29th April 2022, unreported).

To my mind, the principle set out above is precisely the consideration a court exercising its discretion to grant or refuse an adjournment should be cognisant of.

- [37] This principle was endorsed by Cottle JA (Ag.) in **Ultramarine (Antigua) Limited v Peter Cochran**.¹⁵ The headnote reads:

“The test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether in the judgment of the appellate court, it was unfair. i.e. whether if the trial goes ahead, it will be fair in all the circumstances. If the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for. The assessment of what is fair is a fact-sensitive one and not one to be judged by the mechanistic application of any particular checklist. The facts of the present matter thus bear emphasis.”

- [38] Before turning to the facts of the present appeal, it is necessary to outline the principles established in the Antiguan and Barbudan decision of **Liat 1974 v Novella Sheppard**, upon which the respondent has placed considerable reliance, given the similarity of the facts to those in the present appeal. In that case the Industrial Court found that the respondent was unfairly dismissed. During the trial, when the respondent was to lead her case there was no appearance by the appellant or its counsel. The court proceeded. The matter was adjourned and came back on for hearing on 15th January 1990. Again, on that day, there was no appearance by the appellant or its counsel. Finally on 16th January 1990 the appellant appeared by its General Manager who applied for an adjournment on the basis that its counsel was wrongly notified that the hearing was scheduled for 17th, 18th and 19th January 1990.
- [39] The court did not accede to the application and proceeded with the hearing. The appellant who was present by its General Manager did not cross-examine the respondent or her witness but requested that they be recalled for cross-examination.

¹⁵ ANUHCVP2025/0005 (delivered 13th January 2026, unreported).

The court rejected the application and heard the final address of counsel for the respondent, then reserved judgment.

[40] On appeal Byron JA stated:

“The court did not purport to give written reasons for this decision and the only one to be gleaned from the record was a comment on the discourtesy of the appellant’s counsel. In considering, however, whether any prejudice was done to the appellant by this decision, it is necessary to consider the factual background just recounted. It raises issues of significance that either must have been or ought to have been considered by the court in refusing the judgment.

I have come to the conclusion that there was reason for the refusal of the adjournment. A comment on the discourtesy of the appellant’s counsel was the only reason for the refusal on the Record of Appeal, but I would list the factors which have impressed me.

1. The Conduct of the Appellant and its Counsel

It would not be usually the case that the discourtesy of counsel could have an effect on the justice between the parties. In this case, however, it went beyond that, because the discourtesy included the behaviour of the appellant itself. Moreover, the appellant’s reason for the adjournment was based on its allegation that the non-appearance on 15th January 1990, was due to its own default. In addition, the sequence of events raises the issue of deliberate absenteeism and contemptuous disregard for the court, either of which could have frustrated the completion of the trial within a reasonable time. The appellant’s plight was, therefore, brought on by its own misconduct.

2. The Effect of Further Delay

The court itself must have been embarrassed and the dispensation of justice adversely affected, by the great delay as over five years had already elapsed since the dismissal of the respondent, and the court was entitled to consider the expedition of the proceedings and the prejudice the respondent would suffer by further delay as important factors, which would weigh against the granting of the adjournment.

3. The Justice of the Case

The court had heard the appellant’s case in full and the respondent’s evidence, and was therefore well situated to determine the value of cross-

examination having regard to the nature and extent of controversy revealed by the evidence. In my view the refusal to adjourn did not have the effect of denying the appellant an opportunity of presenting its case because it had already done so nor was there any apparent prejudice to the justice of the case, by the failure to cross-examine as the testimony of the respondent and her witness did not raise matters of great factual controversy or matters which had not previously dealt with in the proceedings (written and oral).

In my view, any adjournment given in the circumstances of the case would have been unfair to the respondent and would have constituted an injustice to her. Therefore, it would seem to me that the interest of justice required a refusal of the application for the adjournment.”

[41] The reliance placed on this case by the respondent is understandable. In the present appeal, the appellant failed to file evidence despite repeated directions from the Industrial Court, leaving the court largely seized of the factual matrix, subject only to cross-examination and legal submissions. However, material differences exist also. For instance, I am unable to confidently characterise the appellant’s conduct as deliberate absenteeism or a contemptuous disregard for the court. It is therefore imperative at this juncture to consider the factual circumstances surrounding the adjournment.

[42] The order of the Industrial Court dated 20th September 2023, before contending with the substantive issues of the claim, reads as follows:

“HAVING REGARD to

- a. The absence of Counsel for the Employer or anyone holding papers for him; or any corporate representative or other official of the Employer;
- b. The chronology of proceedings to date with particular reference to the several adjournments;
- c. The Employer’s failure to comply with the Orders dated May 05, 2021, March 23, 2023, and April 14, 2023 whereby it was repeatedly required to file its Witness Statements.

THE COURT being satisfied that the Employer, as on previous occasions, was served with timely Notice of the Trial date.

UPON HEARING the vica voce [sic] application of Counsel on behalf of the Employee for an order that the trial proceeds ex parte;

AND THE COURT granting the application;”

- [43] From the order of the Industrial Court, it is difficult to determine whether the learned tribunal engaged with the request by counsel for the appellant in the court below at all. It is accepted that the letter sent to the Registrar and Deputy Registrar does not amount to a formal application as required by the **Industrial Court (Procedure) Rules**, however, the court is empowered to make an order for an adjournment in the absence of such. Indeed, adjournments are often granted following an oral application made by learned counsel on the date of hearing.
- [44] The question that must be asked is whether the Industrial Court considered the representations made in the letter sent to the court and considered the request for an adjournment. It is instructive to now turn to the Record of Appeal and the transcript of proceedings of 20th September 2023 to examine how the Industrial Court treated with the issue of whether the adjournment should be granted.
- [45] Firstly, the Record of Appeal at page 28 reveals that the notice of hearing of the trial date was issued on 11th September 2023 indicating that the reference had been fixed for trial on Wednesday, 20th September 2023. There was no evidence of service placed before this Court however it is noted that throughout the appellant’s notice of appeal and submissions, the date of service is indicated as 13th September 2023. The respondent has not challenged this assertion. While the transcript of trial proceedings depicts that the trial was held on 19th September 2023 at 5:25 p.m. to 7.11 p.m.,¹⁶ the Court is of the view that this was a typographical mistake. There is no indication from the record or from either counsel that the hearing date for the trial had been adjusted or that the trial did not take place as scheduled on 20th September 2023. Therefore, contrary to the suggestions of counsel for the

¹⁶ Page 33 of the Record of Appeal.

respondent, counsel for the appellant would have received only 5 clear days of service. The recital that the appellant was given timely notice would therefore be incorrect, a relevant factor for consideration by this Court.

[46] Nonetheless the following exchange took place between the President of the Industrial Court and Counsel for the respondent:¹⁷

“THE PRESIDENT: Mr. Kentish, have you seen the letter delivered to us this morning?

MR. KENTISH: No, sir.

.....
MR. KENTISH: Thank you. Well, Mr. President, I received a communication by phone from Mr. O’Kola on Monday [18th September 2023].

.....
MR. KENTISH: And I made it clear to him and gave him the history of the matter I will not be consenting to any adjournment. Whatever difficulty he had he needs to make arrangements.

.....
MR. KENTISH: Whatever difficulty he had I said to him he needs to make arrangements either in the High Court or here. Well, it’s not going to involve my consent.

...
THE PRESIDENT: Those are my words, not his. Not his. Those are my words. Yes. So you didn’t want to read the letter, counsel?

MR. KENTISH: If he didn’t send it, it is clear he was not writing for me to see. But the point I am making he represented to me that he would have a matter before one of the criminal judges.

MR. KENTISH: -- and I said to him well so do I.

...
MR. KENTISH: You understand? But I made appropriate arrangement so that I could be here to deal with that.

...
THE PRESIDENT: I understand the emotion. Okay. So this is the – actually he sent an informal communication by email the day before. Okay. So this is the part I was looking for. He says: *‘For transparency, I have also informed counsel of the other side – on the other side, Mr. Kenny Kentish, of my scheduling difficulties and have copied him on this correspondence.’*

...

¹⁷ Pages 37, 39, 40, 46, 47, and 48 of the Record of Appeal.

MR. KENTISH: So we would like to apply to proceed *ex parte*, sir, because they are failing to file their witness statements, they clearly do not intend to contest the matter. Because even if he came today, what was he going to say?

...

THE PRESIDENT: As I was saying to my brother before we came in, the important point this morning at the onset would be whether or not you had received correspondence and you had given him your word before as to –

...

THE PRESIDENT: I thought perhaps that there is a communication at a higher level beyond my level between senior counsel, but nevertheless; say no more on that. So you are applying for the matter to proceed *ex parte*.

MR. KENTISH: Yes, may it please the Court. I think there is sufficient material before the Court to - -

...

MR. KENTISH: -- show that even if he was here

...

MR. KENTISH: he would not have been in a position to present any evidence.

...

THE PRESIDENT: Yes. Application granted ...”

The Industrial Court then proceeded with dealing with the substantive issues in the reference.

[47] The portions of the transcript relevant to adjournment, or more precisely the application to proceed *ex parte*, disclose several matters. First, it is accepted that a degree of discourtesy was shown by Mr. O’Kola towards both the Industrial Court and Mr. Kentish. The appellant failed to file any evidence before the Industrial Court, and it is correct that in those circumstances he would have been unable to present evidence at trial. From the history of the matter and conduct of counsel, I am unsure that the appellant would obtain further time to file evidence, having been directed to do so on several occasions. Further, he neither appeared at the hearing nor made any formal application to adjourn.

[48] If the **Liat** decision is followed, this Court is entitled to look beyond the express reasoning and determine whether the discourtesy identified was the sole basis for the Industrial Court proceeding as it did. However, there are important distinctions

which must be taken into account. In particular, despite the appellant being short served, he made several attempts prior to the hearing to communicate his scheduling conflict to both the Industrial Court and counsel for the respondent (notwithstanding the absence of consent). In these circumstances, it cannot properly be said that the appellant's counsel was deliberately absent.

[49] A further distinction from the **Liat** decision is that the Industrial Court did not engage with the reasons advanced in the letter requesting the adjournment. There is no indication on the record that the learned tribunal considered the reasons for the request, save for a passing reference to communication with Mr. Kentish. Neither the contents of the letter, nor email were addressed as a basis for refusing the adjournment. In my view, the reasons for the request would have been an important relevant consideration in the Industrial Court's exercise of its discretion to grant or refuse the adjournment that was ignored or insufficiently weighed.

[50] In contrast, the Industrial Court appears to have placed undue weight on whether Mr. Kentish had received the correspondence and whether he agreed to or consented to the adjournment. The President stated that 'the important point this morning at the onset would be whether or not you had received correspondence and you had given him your word before...'. While the position of opposing counsel is a relevant factor, it is neither determinative nor binding on the court. The tribunal was required to consider the substance of the adjournment request and the overall interests of justice, which extend beyond the presence or absence of such concurrence.

[51] In my view, the learned tribunal was required to weigh the discourtesy of counsel and the appellant's failure to file evidence against the actual consequence to the appellant as a litigant, namely the denial of an opportunity to cross-examine the respondent and to advance legal submissions. The right to legal representation and the right to be heard are fundamental entitlements that a court must consider even where the conduct of a party has been discourteous.

- [52] The effect of proceeding in the appellant's absence in the circumstances of this case was to exclude the appellant entirely from the proceedings. This is distinguishable from **Liat** where the court already had the appellant's case in full. Here, the appellant had placed no evidence before the court, and although it is unlikely that it would have been permitted to do so, at the very least the appellant ought to have been afforded the opportunity to cross-examine.
- [53] Applying the principles in **Dufour v Helenair Corporation Ltd**, I am satisfied that the learned tribunal erred in principle in failing to engage with and weigh the reasons given by Mr. O'Kola as a relevant consideration in the exercise of its discretion and perhaps in giving undue weight to the position of respondent's counsel. As a consequence, the decision to proceed fell outside the generous ambit within which reasonable disagreement is possible and must be regarded as plainly wrong.
- [54] I am fortified in this conclusion by the test in **Ultramarine (Antigua) Limited v Peter Cochran**. The question is whether the refusal of an adjournment made the resulting trial unfair. In my view it did. Unlike the position in **Liat**, this is not a case of deliberate contemptuous action. The appellant's counsel faced a genuine scheduling conflict, communicated that conflict to both the court and opposing counsel in advance, and was in any event short-served with notice of the trial date. In those circumstances, the refusal to grant an adjournment deprived the appellant of a meaningful opportunity to participate in proceedings. I would therefore allow the appeal and remit the matter for re-hearing before the Industrial Court.
- [55] In light of that conclusion, it is unnecessary to make a final determination on the merits of the awards of costs and exemplary damages. I do observe that section 10(2) of the **Industrial Court Act** imposes a prohibition on costs awards save where exceptional reasons exist, and that any award of exemplary damages must be supported by a proper evidentiary basis. These are matters which the Industrial Court will be in a position to address afresh on the remitted hearing.

Disposition

[56] For the foregoing reasons, I would allow the appeal, set aside the order of the Industrial Court dated 20th September 2023 and remit the matter to the Industrial Court for rehearing before a differently constituted tribunal. There will be no order as to costs.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Eddy D. Ventose
Justice of Appeal

By The Court

Deputy Chief Registrar