

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

ANTIGUA AND BARBUDA

ANUHLTAP2020/0008

BETWEEN:

FINANCIAL SERVICES REGULATORY COMMISSION

Appellant

and

SUNDRY WORKERS

Respondent

Before:

The Hon. Mr. Mario Michel

Chief Justice [Ag.]

The Hon. Mde. Margaret Price Findlay

Justice of Appeal

The Hon. Mr. Trevor M. Ward

Justice of Appeal

Appearances:

Mr. Hugh Marshall for the Appellant

Mr. Cosbert Cumberbatch for the Respondent

2024: December 10;

2025: December 12.

Civil appeal – Unfair dismissal – Dismissal by redundancy – Section C58 Antigua and Barbuda Labour Code – Reasonableness of termination – Whether the appellant acted unfairly and unreasonably in dismissing the employees – Principles of good industrial practices adopted in redundancy situations – Guidelines in Williams v Compair Maxam Ltd. [1982] I.C.R. – Section A5 Antigua and Barbuda Labour Code – Whether the Tribunal erred by finding that the dismissal of the employees was tantamount to a lockout

In 2013 the Financial Services Regulatory Amendment Act (“the FSRC Act”) was passed. The FSRC Act mandated the Financial Services Regulatory Commission (“the appellant/”the Employer”) to carry out a restructuring of its workforce, and that the termination of employees pursuant to the said restructuring is to be considered a redundancy for the purposes of the Antigua and Barbuda Labour Code.

The appellant embarked upon a restructuring exercise in 2014 by having a series of communications with the respondent’s collective bargaining agent. In March 2015, as part of the restructuring process they advertised new employment positions, and in May 2015, the appellant carried out several terminations including Ms. Nicole Buntin, Ms. Jeanette Thomas and Ms. Candida Etinoff (“the Employees/”the respondent”).

The Employees, via their collective bargaining agent, the Antigua Trades and Labour Union (“the Union”), wrote to the Labour Commissioner seeking her intervention. On the day of the meeting, the appellant was unable to attend, and the meeting proceeded without them. After hearing from the Union, the Labour Commissioner’s Office proceeded to issue a conciliation report on 7th May 2015. Nonetheless, the appellant proceeded to terminate the Employees and subsequently the respondent filed a claim for unfair dismissal in the Industrial Court.

In the Industrial Court, the respondent contended that during discussions between the Employees, the Employer and the Union in the period 2013 and early 2015 it was agreed among them that the process would not result in the termination of the employment of any of the Employees. The appellant contended that as early as 4th June and 26th November 2014, The Employees and the Union was informed that ‘the placement of all other staff within the new organization chart would follow the completion of the recruitment and hiring process in Phase 1, and Phase 2 would involve the review of the organizational structure for all other positions’. The appellant also contended that three organizational charts were shared with the Union as part of its conciliatory efforts, additionally they issued regulatory updates to the Employees on the restructuring process and accommodated the Union’s input in reassignments. The appellant indicated that the matters related to the Employees were prior to the filing of the reference in the Industrial Court and, as a result, there was no unfair dismissal.

The Industrial Court identified two main issues: (1) Whether a genuine redundancy situation existed at the material time; and (2) whether the Employer acted reasonably or unreasonably in dismissing the Employees. The learned tribunal found that a genuine redundancy situation existed within the Gaming Department, a finding which remains unchallenged. However, the tribunal determined that while awaiting the Labour Commissioner’s conciliation report in May 2015, the Employer proceeded with restructuring and terminated the Employees, demonstrating unreasonable conduct and disregard for the Commissioner’s office. The tribunal also held that this amounted to a lockout in breach of Article 44 of the collective agreement, and that continuing the restructuring after being served with the reference was also unreasonable. The tribunal concluded that the Employer failed the test of reasonableness under section C58(2) of the Labour Code, and the Employees were unfairly dismissed and entitled to compensation.

Being dissatisfied with the order of the Industrial Court, the appellant appealed. The appellant advanced five grounds of appeal. The main issue stemming from those grounds can be summarized as whether the appellant acted unfairly and unreasonably in dismissing the Employees.

Held: allowing the appeal, setting aside the order of the Industrial Court and making no order as to costs that:

1. The jurisdiction conferred upon this Court by section 17 of the Industrial Court Act is to be exercised only in exceptional circumstances. The burden rests on the appellant to demonstrate that the Court should invoke this exceptional jurisdiction and overturn the decision of the Industrial Court.

Section 17 of the **Industrial Court Act** Cap. 214 of the Revised Laws of Antigua and Barbuda applied; **Jewellers Warehouse v Cecil Norde** Civil Appeal No. 29 of 2004 (delivered 27th November 2006, unreported) followed; **West Indies Oil Company Limited v Janis James et al** ANUHCVP2022/0014 (delivered 14th January 2025, unreported) followed; **Leonart Matthias v Antigua Commercial Bank** ANULTAP2017/0002 (delivered 28th May 2020, unreported) followed.

2. The Industrial Court concluded that there existed a genuine redundancy situation within the Employer's Gaming Department. It then went on to find that the Employer acted unreasonably and stated the reasons for same. However, it should have first considered the appropriate conduct for an employer in a redundancy situation. The principles of good industrial practices which a reasonable employer should adopt where a redundancy situation exists, should be those outlined in the guidelines laid down by the United Kingdom Employment Appeal Tribunal in **Williams v Compair Maxam Ltd.** The Industrial Court makes mention of this case yet opted not to consider the principles therein. Instead, the tribunal was of the view that it was not necessary to apply those principles to the facts of the case since the Employer continued with the restructuring process, essentially giving effect to the dismissals of the Employees after being served with the reference. Therefore, the learned tribunal erred on this point.

Williams v Compair Maxam Ltd. [1982] I.C.R 156 applied; **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers' Union** ANULTAP2016/0003 (delivered 23rd May 2019, unreported) applied; **Antigua Workers' Union v Antigua Gases Ltd.** Industrial Court Reference No. 20 of 1988 (delivered 8th July 1987, unreported) applied.

3. While the considerations outlined in **Williams v Compair** do not amount to legal principles strictly speaking, they serve as important guidelines to assist an industrial tribunal in assessing whether an employer acted reasonably. By disregarding these guidelines, the Industrial Court failed to take into account factors that could have supported a finding that the Employer's behaviour was not unreasonable. In this case, the conduct of the Employer was in line with the **Williams** guidelines. The Employer informed the Employees of their redundancy prior to the proceedings in the Industrial Court, they were in communication with the Union and implemented suggestions made by the Union and they afforded the Employees the opportunity to apply for other positions in the appellant Commission.

Williams v Compair Maxam Ltd. [1982] I.C.R 156 applied.

4. While it is regrettable that the Employer proceeded to terminate the Employees prior to considering the conciliation report, the redundancy was well in effect by that time. Although the effective date of redundancy was stated to be 8th May 2015, Ms. Buntin was given written notice of the termination of her employment by letter dated 30th April 2015, prior to the involvement of the Labour Commission., Ms.

Etinoff's letter of dismissal was also dated 8th May 2015 but she was aware of the redundancy as early as 26th November 2014. In the case of Ms. Thomas, her letter of termination was dated 15th May 2015, after the conciliation report was received by the Employer. It is therefore difficult to determine how the Employer acted unreasonably since the termination of Ms. Thomas took place after the conciliation report was presumably considered. Effecting termination prior to receiving the conciliation report does not amount to unreasonableness in the face of the principles set down in **Williams**.

Williams v Compair Maxam Ltd. [1982] I.C.R 156 applied; **West Indies Oil Company Limited v Janis James et al** ANUHCVP2022/0014 (delivered 14th January 2025, unreported) followed.

5. The circumstances described under the definition of 'lockout' under the Labour Code do not apply in the present case. The present case concerned the termination of employment due to a statutorily required redundancy. There was no scope for bargaining nor inducement as contemplated by the Labour Code. Even where the 'inducement aspect' of the definition of lockout is ignored, the circumstances of this case disclose a dismissal rather than a lock out. The Employer was acting within the authority conferred by statute in exercising its power to dismiss the Employees owing to redundancy. The Industrial Court therefore erred in characterising the Employer's conduct as tantamount to a lockout and by extension, unreasonable.

Section A5 of the **Antigua and Barbuda Labour Code** Cap. 27 of the Revised Laws of Antigua and Barbuda applied.

JUDGMENT

- [1] **PRICE FINDLAY JA:** This appeal has its origin in a decision of the Industrial Court of Antigua and Barbuda where the learned tribunal determined that the respondent employees were unfairly dismissed by the appellant.

Brief Facts

- [2] In 2013 the **Financial Services Regulatory Amendment Act**¹ ("the FSRC Act") was passed. The FSRC Act mandated the appellant (or the "Employer") to carry out a restructuring of its workforce, and that the termination of employees pursuant to

¹ No. 5 of 2013 of the Revised Laws of Antigua and Barbuda.

the said restructuring is to be considered a redundancy for the purposes of the **Antigua and Barbuda Labour Code (the “Labour Code”)**.²

- [3] The appellant then embarked upon a restructuring exercise in 2014 by having a series of communications with the respondent’s collective bargaining agent. In March 2015, as part of the restructuring process the appellant advertised new employment positions, and in May 2015 the appellant carried out several terminations including Ms. Nicole Buntin, Ms. Jeanette Thomas, and Ms. Candida Etinoff (“the Employees” or “the respondent”). The appellant contended that it gave the Employees notice of their individual terminations as early as March 2015.
- [4] The Employees, via their collective bargaining agent, wrote to the Labour Commissioner seeking her intervention. On the day of the meeting the appellant was unable to attend, and the meeting proceeded without them. After hearing from the Antigua Trades and Labour Union (“the Union”), the Labour Commissioner’s Office proceeded to issue a conciliation report on 7th May 2015. Nonetheless, the appellant proceeded to terminate the Employees and subsequently the respondent filed a claim for unfair dismissal in the Industrial Court.

Decision in the Industrial Court

- [5] In the Industrial Court the respondent contended that during discussions between the Employees, the Employer and the Union in the period between 2013 and early 2015 it was agreed among them that the process would not result in the termination of employment of any of the Employees.
- [6] The Employer contended that as early as 4th June and 26th November 2014 it was communicated to the Employees and the Union that ‘the placement of all other staff within the new organization chart would follow the completion of the recruitment and

² Cap 27 of the Revised Laws of Antigua and Barbuda.

hiring process in Phase 1 and that Phase 2 would involve the review of the organizational structure for all other positions'.³

- [7] The Employer contended that it made available to the Union as part of its conciliatory efforts 3 organizational charts. The Employer also issued memoranda to all its employees updating them about the restructuring process and the revisions of the organizational chart. It therefore denied that it 'largely ignored' the suggestions of the Union but in fact accommodated the Union in the reassignments.
- [8] Finally, the Employer indicated that the matters related to the Employees were prior to the filing of the reference in the Industrial Court and as a result there was no unfair dismissal.
- [9] The learned tribunal identified 2 main issues emerging from the pleadings: (1) Whether a genuine redundancy situation existed at the material time and (2) whether the Employer acted reasonably or unreasonably in dismissing the Employees.
- [10] In relation to the first, the learned tribunal concluded that there existed a genuine redundancy situation within the Employer's Gaming Department. This finding is not contested by the parties.
- [11] On the second issue, the learned tribunal found that the Labour Commissioner's conciliation report was generated on 7th May 2015 and reached the Commission on 11th May 2015. It was also found that the Employees were effectively terminated in May 2015; Ms. Buntin was terminated on 8th May 2015, Ms. Etinoff on 8th May 2015 and Ms. Thomas on 15th May 2015. Therefore, while the Employer awaited receipt of the Labour Commissioner's conciliation report, it proceeded with the restructuring process and terminated the employment of the Employees. The learned tribunal

³ Paragraph 10 of the judgment in the court below.

found those actions of the Employer to be unreasonable and demonstrated scant regard for and towards the office of the Labour Commissioner.

[12] Additionally, the learned tribunal found that the conduct of the Employer was tantamount to a lockout while the matter remained pending before the Labour Commissioner in contravention to Article 44 of the collective agreement between the Union and the Employer.

[13] The continuation of the restructuring process after being served with the reference may also be considered similar to a lockout, amounting to further unreasonable conduct. The learned tribunal therefore found that the Employer had failed the test of reasonableness under section C58 (2) of the Labour Code and determined that the Employees were unfairly dismissed and were entitled to compensation.

The Appeal

[14] The appellant set out 5 grounds of appeal for the Court's determination:

- (i) The learned tribunal erred in law by finding that the dismissals were unfair having regard to the facts that the Employees had submitted the decision to dismiss to the Labour Commissioner for voluntary resolution and subsequently to the Industrial Court for judicial determination, in particular as the decision to dismiss had already been taken and could not be rendered fair or unfair by subsequent events of the making of that decision.
- (ii) The learned tribunal erred in law by finding that the dismissals of the Employees were similar to or tantamount to a lockout contrary to s20 of the Antigua and Barbuda Labour Code.
- (iii) The learned tribunal erred in law by finding that the Employer acted unreasonably in terminating the Employees after the commencement of the proceedings before the Labour Commissioner and in the Industrial Court. In particular as the proceedings before the Labour Commissioner

are voluntary and the parties are not bound by the recommendations arising there from. Additionally, a Reference in the Industrial Court does not operate as an automatic stay on the Employer and though the Employees were entitled to apply for an injunction restraining the Employer from putting into effect the already decided terminations, they did not.

- (iv) The learned tribunal erred in law by finding that the Employer acted unreasonably in terminating the Employees having regard to its express statutory powers contained in s39 of the Financial Services Regulatory Commission Act 2013 permitting it to restructure its organisational structure.
- (v) The tribunal erred in law in awarding immediate loss to the Employees when the evidence before the court did not support such an award. In particular, as the employees were under an obligation to mitigate their losses and provided no evidence of mitigation.

The main issue stemming from these grounds of appeal can be summarized as whether the appellant acted unfairly and unreasonably in dismissing the respondents.

Appellant's submissions

- [15] The appellant's submissions largely focus on when the Employees were actually terminated. This would be determinative of whether the Employees were terminated prior to the conciliatory efforts and therefore could be seen as reasonable or whether the Employees were terminated during the conciliatory efforts and therefore be seen as unreasonable and unfair as found by the learned tribunal.
- [16] The appellant submitted that the learned tribunal erred in law by finding that the dismissals were unfair having regard to the facts that the Employees had submitted the decision to dismiss to the Labour Commissioner for voluntary resolution and

subsequently to the Industrial Court for judicial determination, particularly as the decision to dismiss had already been taken and could not be rendered fair or unfair by subsequent events of the making of that decision.

- [17] The appellant averred that the material time for examining the conduct of an employer under C58(2) of the Labour Code is prior to and at the time of the dismissal. It cannot include the conduct of the employer after the decision to terminate has been made and acted upon. They contended that the learned tribunal erred in law when it considered the failure of the appellant to await the conciliation report of the Labour Commissioner. In any event, the appellant suggested that the Labour Commissioner's recommendation in its conciliation report is not binding on the parties to conciliation.
- [18] The appellant suggested that the law requiring the restructuring of the appellant came into being in August 2013. As early as April 2014, the respondent's Union and the appellant were in discussions about restructuring. By letter dated 26th November 2014 the appellant wrote to the respondent and all other employees advising of its intention to commence a restructuring exercise. By the letter of 2nd December 2014, the Union on behalf of the respondent and other employees acknowledged that the appellant was beginning the restructuring process. The appellant then implemented as Phase 1 of the process by way of voluntary severance. The Employees each acknowledged as early as 25th February 2015 of the voluntary severance scheme.
- [19] The appellant further posited that several organizational charts had been developed and discussed with the Union which resulted in the final organizational chart and salary scale being sent out in March 2015. Each employee was afforded the opportunity to view the organizational chart to see if their current position was being phased out and what other positions were being made available within the organization.

- [20] The appellant therefore cited **Williams and Others v Compair Maxam Ltd**⁴ as well as C58(2) of the Labour Code to submit that the Employer acted reasonably by adopting a process that allowed for the Employees to have sufficient notice to be able to obtain employment elsewhere.
- [21] Another point of possible unfairness and unreasonableness identified by the learned tribunal was that the collective bargaining agreement contained a grievance procedure to be invoked and that the dismissal of the Employees was contrary to said procedure. The appellant suggested that this was an error for several reasons. Firstly, the collective bargaining agreement cannot apply to dismissed employees in relation to conduct occurring after the determination of the employment relationship. At the time of filing the reference to the Industrial Court, the Employees were no longer employees of the appellant. Furthermore, the Employees were not locked out but instead dismissed, and article 44 of the collective bargaining agreement made no prohibition against dismissals.
- [22] The appellant contended that the learned tribunal erred considering evidence pertaining to the appellant's conduct during voluntary reconciliation proceedings before a Hearing Officer. Although B10 of the Labour Code generally advocates for the reception of all relevant evidence, it specifically precludes the admissibility of statements or acts performed in connection with attempts to settle the issues by informal agreement.
- [23] Finally, the appellant averred that the learned tribunal erred in awarding immediate loss to the Employees when the evidence before the court did not support such an award since the Employees failed to mitigate their losses.

Respondent's submissions

- [24] In response, the respondent placed emphasis of the abovementioned findings of the learned tribunal in the Industrial Court. They stated that the appellant showed

⁴ [1982] ICR 156.

complete and total disregard for the process of negotiations and not only declined to attend a meeting set to resolve the issue but took the opportunity to dismiss the workers while discussions were still pending.

[25] The respondent suggested that the appellant's actions were in clear violation of section 20(1) of the **Antigua and Barbuda Industrial Court Act (the "Industrial Court Act")**⁵ which prohibits strikes by the employee and lockouts by the employer while proceedings in relation to a trade dispute is pending before the Court or Court of Appeal, as well as in violation of the collective bargaining agreement which essentially prohibits the same.

[26] In response to the appellant's contention for immediate loss, the respondent argued that the Employees' evidence was heard and accepted in the court below that they had in fact made efforts to secure further employment and mitigate their loss. The respondent submitted that it was open to the court to make such a finding and to make the award it did.

Discussion and Conclusion

[27] Before addressing the substantive issues of this case, it is necessary to establish the circumstances in which a party may appeal a decision of the Industrial Court to the Court of Appeal. Section 17 of the Industrial Court Act states:

"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 has 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 findings or decision of the Court in any matter is erroneous in point of law; or

⁵ Cap. 214 of the Revised Laws of Antigua and Barbuda.

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

[28] The question of whether the Employer acted reasonably in the circumstances is a question of fact and it is clear that such an issue does not fall within the abovementioned sub-paragraphs. Section 17(1)(e) of the Industrial Court Act was examined in **Jewellers Warehouse v Cecil Norde**.⁶ Here Rawlins JA determined that:

“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 purpose of section 17(1)(e) since the proceedings would only be at an end after judgment is delivered and the court is *functus*.”

[29] In **West Indies Oil Company Limited v Janis James et al**⁷ this Court examined *inter alia* Section 17 of the Industrial Court Act. At paragraph 28 it was determined 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 provision, then this would fall within the ambit of section 17(1)(e).”

[30] The Court cited Webster JA in **Leonart Matthias v Antigua Commercial Bank**⁸ where he opined that illegality under section 17(1)(e) may be established where it is shown that the Industrial Court erred by making or drawing inferences for which

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

⁷ ANUHCVP2022/0014 (delivered 14th January 2025, unreported).

⁸ ANULTAP2017/0002 (delivered 28th May 2020, unreported).

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.

[31] In considering the jurisdiction conferred upon this Court by section 17, I remain mindful that such jurisdiction is to be exercised only in exceptional circumstances. The burden rests upon the appellant to demonstrate that the Court should invoke this exceptional jurisdiction and overturn the decision of the Industrial Court. I will now examine the substantive issue of the case, after setting out the relevant legislation: whether the appellant acted unreasonably in dismissing the respondent, and whether such dismissal was unfair.

[32] The law pertaining to this appeal is as follows:

Section 39 of The Financial Services Regulatory Commission Act

“(5) Without limitation of the powers of the Commission as an employer, the Commission may, as a result of the adoption of the revised organization structure:

- a) Prepare new or revised posts and job descriptions;
- b) Reassign tasks among employees; and
- c) Terminate upon at least 60 days’ notice the employment of any member who:
 - i. Holds a post for which there is no equivalent in the new organizational structure; or
 - ii. Perform tasks which have been reassigned to other employees.

(6) In the event that an employee’s employment is terminated pursuant to subsection (5)(c) such employee shall be deemed redundant for the purposes of the Antigua and Barbuda Labour Code Cap. 27.”

Labour Code

“C56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss such employee without just cause.

C58. (1) A dismissal shall not be unfair if the reason assigned by the employer therefor;

...
(c) is that the employee was redundant

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

(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

[33] Firstly, a construction of the FSRC Act reveals that a termination of an employee in an effort to comply with the FSRC Act at large, specifically s39(1), is to be considered a redundancy under the Labour Code. In other words, the reason given for the termination under section 39 of the FSRC Act is that the employee was made redundant under the Labour Code.

[34] With that in mind, I turn to C58 of the Labour Code which demonstrates that a dismissal shall not be unfair if the reason assigned by the employer is that the employee was redundant as long as there is a factual basis assigned for the reason. This is however not the end under C58. According to Thom JA in **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers' Union**⁹, C58 simply outlines reasons which make a dismissal fair where the employer acted reasonably in dismissing an employee for such reason. She continues:

"If the legislature was desirous of making dismissal for redundancy automatically fair, the legislature would have included redundancy or any of the other reasons listed in section C57 which makes provision for automatically fair dismissal. The difference in treatment by the Legislature clearly shows that subsections C58(1) and (2) must be read conjunctively."

⁹ ANULTAP2016/0003 (delivered 23rd May 2019, unreported).

[35] It is therefore not sufficient for the appellant to simply state that the provisions of the legislation were followed and so the Employer cannot be deemed to have acted unreasonably as it was 'simply following the FSRC Act'. In **Antigua Workers' Union v Antigua Gases Ltd**¹⁰ it was held that:

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

[36] The learned tribunal made the determination that a redundancy situation existed and correctly identified the factual basis that underpinned the redundancy. At paragraph 16 the learned tribunal found:

- (a) "The restructuring of the Employer pursuant to Section 39 of the Financial Services Regulatory Commission Act was a continuation of the process which started prior to 2013.
- (b) The express policy underlying the restructuring process was to make the Employer more efficient and cost effective.
- (c) The restructuring exercised was carried out in two phases, the first of which involved the reorganization of the management staff which was completed by the end of December 2014. That was followed by the second phase which involved the restructuring of the various departments of the Employer's operations.
- (d) By the end of Phase 1 in December 2014, the Union and the Employees were all adequately informed of the Employer's approach to the restructuring exercise.
- (e) The Employer's Gaming Department was staffed by employees transferred from Interactive Gaming and Wagering Division of the Antigua and Barbuda Free Trade Zone in 2001. At that time, 93 Gaming License were regulated by the Employer. That number was reduced significantly to 30 by 2007 and further reduced to 13 in 2014. The reduced number of licenses inevitably resulted in a significant reduction in the Employer's revenue. The reduced number of licenses also resulted in a substantial diminution in the number of tasks and overall volume of work which was required to be done within the Gaming Department.

¹⁰ Industrial Court Reference No. 20 of 1988 (delivered 8th July 1987, unreported).

- (f) After its careful analysis of the staff requirements of the Gaming Department, the Employer made certain remedial policy decisions in an effort to streamline its staff towards greater efficiency.
- (g) Taking into consideration, the details of the staffing requirements as determined by the respective heads of departments, including the Director of Gaming, the Employer decided as a matter of policy that the positions held by Ms. Buntin, Ms. Thomas and Ms. Etinoff would be made redundant.
- (h) Although they were entitled to do so, the Employees did not individually avail themselves of the agreed Grievance Procedure set out in Article 44 of the Collective Agreement”

This was uncontested by the parties.

[37] Having made those factual findings, the learned tribunal concluded that there existed a genuine redundancy situation within the Employer’s Gaming Department. It then went on to find that the Employer acted unreasonably for the reasons stated at paragraphs 13-15 of this judgment. Prior to this however, the learned tribunal should have considered what conduct an employer should adopt where a redundancy situation exists.

[38] The Court in both **Cable and Wireless** and **Antigua Gases** considered that the principles of good industrial practices which a reasonable employer should adopt where a redundancy situation exists should be those outlined in the guidelines laid down by the UK Employment Appeal Tribunal in **Williams v Compair Maxam Ltd**¹¹.

[39] In **Williams v Compair Maxam Ltd**, the United Kingdom Employment Appeal Tribunal outlined the following as the principles which a reasonable employer would seek to act in accordance with:

1. “The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts,

¹¹ [1982] I.C.R. 156.

consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
3. Whether or not an agreement as the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.”

[40] I must note here that the United Kingdom Employment Appeal Tribunal in that case was careful to point out that these are not immutable principles which will stay unaltered for ever. Practices and attitudes in industry change with time and new norms of acceptable industrial relation behaviour will emerge and while the factors exemplified standards of behaviour, they were not principles of law. These principles have been adopted and applied by the Industrial Court in Antigua and Barbuda however and there is nothing before the Court to demonstrate that these are not the principles to be applied by employers.

[41] Indeed, the Industrial Court makes mention of the **Williams** case yet opted not to consider the principles therein. Instead, the learned tribunal was of the view that it was not necessary to apply those principles to the facts of the case since the Employer continued with the restructuring process, essentially giving effect to the dismissals of the Employees after being served with the reference. In my view the learned tribunal erred on this point.

- [42] Had the tribunal undertaken the usual exercise of considering what regularly amounts to reasonable conduct of the Employer, it would have noted that the Employees were given warning as early as 26th November 2014¹². Further, several organizational charts had been developed with the cooperation of the Union, the last of which was sent out in March 2015¹³. In my view this communication suggests that the Employees should have been aware that their respective positions were at risk of retrenchment. In fact, employees in such a circumstance were invited as of 25th February 2015¹⁴ to apply for voluntary severance, a directive that was originally suggested by the Union by letter dated 16th December 2013¹⁵.
- [43] After reviewing the correspondence between the Employer and Employees, I am of the view that the Employees should have been aware of their redundancies prior to the filing of the reference. The appellant fully adhered to the first guidelines in the **Williams** case i.e. the Employer gave as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
- [44] Similarly, the other principles demonstrating reasonable and fair conduct could be seen with correspondence between the Union and the Employer as it concerns consulting the Union and considering any representations made by it.¹⁶ The Employees were also given an opportunity to apply for new positions by the very process of the restructuring. Indeed, the employee Ms. Thomas applied for the position of Administrative Officer.

¹² Page 37 of the Supplemental Record of Appeal.

¹³ Page 17 of the Supplemental Record of Appeal.

¹⁴ Page 16 of the Supplemental Record of Appeal.

¹⁵ Page 34 of the Supplemental Record of Appeal.

¹⁶ See Page 33 of the Supplemental Record of Appeal.

- [45] Therefore, the learned tribunal fell into error by failing to consider the usual principles when determining what constitutes reasonable conduct in circumstances where redundancy is the apparent reason for termination. While the considerations outlined in **Williams** do not amount to legal principles strictly speaking, they serve as important guidelines to assist an industrial tribunal in assessing whether an employer acted reasonably. By disregarding these guidelines, the Industrial Court failed to take into account factors that could have supported a finding that the Employer's behaviour was reasonable.
- [46] In my view, the conduct of the Employer was in line with the **Williams** guidelines; i.e., the Employer informed the Employees of their redundancy prior to the proceedings in the Industrial Court; they were in communication with the Union and implemented suggestions made by the Union and they afforded the employees the opportunity to apply for other positions in the appellant. If **Williams** is to be followed, the Employer's conduct could be seen as reasonable and therefore the decision of the Industrial Court should be set aside on the basis that court did not consider the facts in light of the applicable principles and that such error substantially affected the merits of the matter.
- [47] Still, I must consider the behaviour of the Employer that the Industrial Court found to be unreasonable.
- [48] The Industrial Court considered whether the Employer's failure or refusal to attend the hearing before the Labour Commissioner on 5th May 2015 was unreasonable but determined that the Employer's failure to attend was due to communication and logistical challenges. Further, an unsuccessful attempt was made to reschedule the hearing for later the same day. The result of that meeting was the preparation of the Labour Commissioner's conciliation report. Prior to obtaining said report, the Employees were terminated. The Industrial Court found such conduct to be 'most unreasonable' and condemned the Employer for demonstrating scant regard towards the office of the Labour Commissioner.

[49] While it is regrettable that the Employer proceeded to terminate the Employees prior to considering the conciliation report, the redundancy was well in effect by the time. Although the effective date of redundancy was stated to be 8th May 2015, Ms. Buntin was given written notice of the termination of her employment by letter dated 30th April 2015, prior to the involvement of the Labour Commissioner. Ms. Etinoff's letter of dismissal was also dated 8th May 2015 but she was aware of the redundancy as early as 26th November 2014 as discussed above. In the case of Ms. Thomas, her letter of termination was dated 15th May 2015, after the conciliation report was received by the Employer. It is therefore difficult to determine how the Employer acted unreasonably since the termination of Ms. Thomas took place after the conciliation report was presumably considered (particularly since the recommendation by the Labour Commissioner is not binding on the parties).

[50] When I consider the general behaviour of the Employer, effecting termination prior to receiving the conciliation report does not amount to unreasonableness in the face of the principles set down in **Williams** and applied by this Court in **West Indies Oil**. This is particularly so since the Employees already had knowledge of their respective redundancies from the year before.

[51] The second point under which the learned tribunal found the conduct of the Employer to be unreasonable is that the conduct described (namely to give effect to the dismissals of the Employees after being served with the Reference) was tantamount to a lockout prohibited under section 20 of the Industrial Court Act and contrary to the voluntary agreement between the parties. Section 20 (1) of the Industrial Court Act states:

“No employee may go on strike or take part in a strike, and no employer may declare a lockout or take part in a lockout while proceedings in relation to a trade dispute between such employee and such employer are pending before the Court”

[52] A lockout is defined in the Labour Code at section A5 as follows:

“Lockout means an employer's closing of an enterprise or business place, his suspension of work, or his refusal to continue to employ any number of his employees, **with a view toward inducing or compelling employees directly, indirectly, or through their bargaining agent, to accept**

conditions of employment which he has offered, which offer has been rejected; and the term includes an action designed to induce or compel the acceptance by the employees, or their bargaining agent, of another employer of conditions of employment which he has offered but which have been rejected.” (emphasis mine)

[53] In my view, the circumstances described under the definition of ‘lockout’ are not the ones surrounding the present case. The present case concerned a termination of employment due to a statutorily required redundancy. There was no scope for bargaining nor inducement as contemplated by the Labour Code. Even where the ‘inducement aspect’ of the definition of lockout is ignored, the circumstances of this case disclose a dismissal rather than a lock out. In my view, the Employer was acting within the authority conferred by statute in exercising its power to dismiss the Employees owing to redundancy. The tribunal therefore erred in characterising the Employer’s conduct as tantamount to a lockout and by extension, unreasonable. On the evidence before this Court, no such finding could properly have been made.

[54] Having considered all the circumstances of this case and the relevant principles to be applied, I am satisfied that the Employer acted reasonably in dismissing the Employees. The conduct of the Employer reflects the principles set out in **Williams v Compair Maxam**; the Employees were consulted, objective and fair criteria were applied, and alternatives were considered and suggested. I am not persuaded that the conduct which the Industrial Court characterised as unreasonable was, in fact, unreasonable. In my view the Employer’s actions were largely keeping with good industrial practice.

[55] Consequent to my abovementioned findings, the issue of determining whether the Employees adequately mitigated their loss is no longer of the moment.

Disposition

[56] Having regard to the conclusions reached above, I would allow the appeal and set aside the order of the Industrial Court.

[57] There will be no order as to costs.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Trevor M. Ward
Justice of Appeal

By the Court

Chief Registrar