

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 27 of 2003

BETWEEN:

MARK AZILLE

Employee

and

COURTS (ANTIGUA & BARBUDA) LTD

Employer

Before:

The Hon. Philip A. Pilgrim

The Hon. Norris O. Scholar

The Hon. Dr. Hayden Thomas

President
Member
Member

Appearances:

Simon Rogers Murdoch - Attorneys-at-Law for the Employee
Marshall & Company - Attorneys-at-Law for the Employer

2008: October 07
2009: March 26

JUDGMENT

PILGRIM, P:

THE RELEVANT FACTS

[1] Courts (Antigua & Barbuda) Ltd. is a commercial entity which is engaged in

the sale of several products for use in many households. This

merchandise includes electronic and furnishing items. They are purchased by members of the general public in exchange for cash. A hire purchase mechanism is also attractive to several persons who may not have available cash or prefer to purchase their items in this manner. It is a popular store in Antigua & Barbuda.

[2] Mr. Mark Azille the Employee herein commenced working for Courts on February 18, 1986 as the Assistant Warehouse Manager. In September 1986 he obtained a promotion as Store Manager. He subsequently was promoted to the position of Branch Manager. In this position he assumed responsibility for the store and the warehouse.

[3] It is Mr. Azille's view that the management of Courts was confined to Antigua & Barbuda. It maintained a Head Office in the United Kingdom. It was Mr. Azille's understanding that in 1986 Courts did not establish an entity in St Kitts & Nevis.

[4] According to Mr. Azille, Courts in St Kitts & Nevis was established sometime in the 1990's. It was not a separate entity to the Courts in Antigua & Barbuda. It was Mr. Azille's impression that Courts in St Kitts & Nevis was managed by personnel in Courts in Antigua & Barbuda. During his

tenure at Courts (Antigua & Barbuda) Ltd. Mr Azille stated that Courts in St Kitts & Nevis developed its own management with some strings attached to Courts in Antigua & Barbuda.

[5]

The Employee achieved a further promotion to that of Operations Executive. His monthly salary was \$7,500.00. In this position Mr. Azille asserts that he was granted (a) concessions upon the purchase of all Courts products, (b) a company car, (c) pension and health insurance for his family and (d) a commission of one fifth of one percentum of all deliveries over \$11,500,000 from 1992 to 1998.

[6]

A full list of his duties as Operations Executive is included in Courts Antigua & Barbuda Ltd's *Job specification and Description* and is marked **MA-1**. Those duties included (a) setting monthly sales targets, (b) monitoring of sales staff in their compliance, (c) ensuring customer service satisfaction, (d) health and safety issues, (e) recommendation of the promotion, transfer and termination of employees as necessary, and (f) other duties.

[7]

By a letter of March 12, 2002 from the Employer the Employee's employment was terminated. The letter admitted as MA-2 states as follows:

"12 March 2002

**Mr. Mark Azille
Clark Hill
St John's
Antigua**

Dear Mr. Azille,

Due to recent turn of events within the economy, it has become necessary for management to seek out ways of enhancing the companies overall performance and efficiency. It was to this regard that a merger between our Antigua and St Kitts operations was undertaken. It was found necessary, therein, to eliminate and/or realign certain aspects of the business.

Therefore, it is to my greatest regret to inform you that it has been deemed necessary to eliminate your position, in effect terminating your employment, effective immediately. All monies owed will be paid out as is legally required. Monies owed is limited to the following:

16 years* months Basic wage \$7500 = \$120,000

2 Days = \$692.30

1 month in lieu of notice = \$7500

Vacation/Holiday pay = \$15,000

Grand total = \$143,192.30

You are kindly asked to refer to Mr. Hugh Marshall, the company's solicitor, for the collection of these monies.

Please bear in mind that this is strictly a result of our current economic situation and is not based on your performance.

If you have any questions or comments, please feel free to contact me.

Warmest regards

Vernon Solomon Jr.

Human Resource Manager

Cc: Eddie Sarno – MD

Claude Anthony – FD

Antigua Workers Union

Employers Federation”

MITIGATION EFFORTS

[8] Following his termination Mr. Azille stated that he submitted approximately

fifty (50) applications to different companies in search of employment. In

April 2002 he made applications to Khoully Furniture Factory Ltd and

Carlisle Bay Club. In July 2002 he applied to State Insurance Corporation

and Caribbean Airport Services Ltd. In January 2003 he made an

application to Henderson's Ltd. He achieved no success as a result of

submitting these applications.

[9] On August 07, 2002 he obtained employment at Sunsail Club Colonna. He is employed as the Store Supervisor. He earns a gross monthly salary of \$1,760.00.

LEGAL PROCEEDINGS

[10] Mr. Azille was not pleased that he was terminated by Courts. He commenced proceedings by filing a Reference dated July 09, 2003.

[11] On July 30, 2003 he filed his Employee's Memorandum. In that document he claims (a) compensation for unfair dismissal, (b) future loss, (c) loss of fringe benefits, (d) pension loss, (e) 3 month's vacation pay; and (f) compensation of one-fifth of one percentum of a profit sharing agreement between the Employer and himself from 1992 to 1998.

[12] The Employer filed its Employer's Memorandum on August 26, 2003. In

that document the Employer states *inter alia* that "due to restructuring the employee together with other management employees had been terminated in what was the second of three sets of terminations." In these circumstances the Employer further states *inter alia* that "the

termination of the Employee was fair and in keeping with good labour practices."

- [13] The Employee filed his Witness Statement on October 02, 2008. In addition to a claim for Manner of Dismissal Mr. Azille states that he is entitled to those awards referred to at paragraph 11.
- [14] The Witness Statement of Mr. Claude Anthony on behalf of the Employer was filed on October 02, 2008.

ISSUES FOR TRIAL

- [15] The following issues fall to be determined by this Honourable Court:
- (i) Whether or not in March 2002 a merger of Courts (Antigua & Barbuda) Ltd and Courts (St Kitts & Nevis) Ltd took place which resulted in a re-organisation of the workforce of Courts (Antigua & Barbuda) Ltd, is supported by the facts, and that a factual link existed between the dismissal and the assigned reason.
- (ii) If a redundancy did or did not exist did the Employer act reasonably at the time when the Employee was dismissed?
- (iii) In the event that no redundancy existed on March 12, 2002 and the Employer did not act reasonably what is the measure of damages to which he is entitled?

EMPLOYEE'S LEGAL SUBMISSIONS

[16] Mrs. Racquel A. Walsh Silston of Simon Rogers Murdoch made several submissions. They are summarized as follows:

- (i) That Mr. Azille was given no prior warning of his impending dismissal and no discussions took place between the two parties relative to his imminent dismissal.
- (ii) The tasks which Mr. Azille was employed to perform did not cease or diminish. A redundancy situation did not exist when Mr. Azille's employment was terminated.
- (iii) The Employer did not place before this Court such evidence of a financial nature which substantiated the requirement to amalgamate certain positions in the two entities.
- (iv) The Employer failed to act reasonably in dismissing the Employee.
- (v) The Employee's dismissal was unfair having regard to all of the circumstances of this case.
- (vi) The Employee is entitled to awards for (a) immediate loss of earnings, (b) future loss of earnings, (c) accrued vacation up to 1997 equivalent to 3 months, and (d) certain other awards.

EMPLOYER'S LEGAL SUBMISSIONS

[17] Mr. Hugh Marshall of Marshall & Company Attorneys-at-Law for

the Employer made certain submissions. They may be stated succinctly as

follows:

(i) At the time of the termination of Mr. Azille's employment the

management functions performed by him at Courts (Antigua &

Bardua) Ltd were merged with Courts (St Kitts & Nevis) Ltd.

(ii) By virtue of Section C 10 of the Labour Code the Employer is

bound by the reasons stated in the letter of termination dated

March 12, 2002. According to him the reason assigned by the

Employer for dismissing the Employee is a valid reason for

termination. An Employer who re-organises his business in such

a manner that the work which an Employee used to perform is no

longer being performed by him or is greatly diminished is a

substantial reason for termination. He cites *Murphy v Epsom*

College [1985] 1 C R 80.

(iii) Consultation with an Employee or his trade union representative

prior to termination by the Employer is desirable. However

failure to consult prior to termination does not of itself render a

decision unfair.

(iv) In the circumstances of this case Mr. Marshall submits that the Employee's termination was valid due to redundancy.

Mr. Marshall also submits that there was "some other substantial reason" to dismiss the employee in accordance with Section C 58 (1) (e) of the Antigua & Barbuda Labour Code.

THE LAW

[18] C 56 of the Labour Code states as follows:

"C 56. 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 any employee without just cause."

C 58 (i) (a) and (2) of the Labour Code reads as follows:

"C 58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

- (a)
- (b)
- (c) *is that the employee was made redundant;*
- (d)
- (e)

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

the employer 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."

[19] Section C 3 of the Labour Code was amended by Section 7 of the Antigua &

Barbuda Labour Code (Amendment) Act, 1998. The manner in which this

section is to be applied in practice has been commented upon by different

judges in some cases. I prefer the language of Byron C. J.: (as he then

was) in *Sundry Workers [Veronica Joseph & Others] and Kings Casino*

Ltd Civil Appeal No. 28 of 2001. In that case the former Chief Justice

stated *inter alia* at paragraph 6 as follows:

"Redundancy is defined in Section C3 as amended by the 1998

Amendment Act to mean a situation in which by virtue of lack of

customers orders, retrenchment, the installation of labour saving

machinery, an employer's going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished. We were referred to two cases where the provisions were discussed. *Antigua Workers Union v Joseph Dew Civ. App. No.2 of 1992 at p.12 and US Naval Facility V Louis (1983) 31 WIR at p.191*. I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be the cause and the effect. The effect being that the work has ceased or substantially diminished. In the Industrial Court reference No. 20 of 1988 *Antigua Workers Union v Antigua Gases* it was pointed out that the definition seems to contemplate the removal of superfluous workers. This could occur even where the tasks or work still exist but the employer requires fewer workers, or there is less work for existing workers. It is also clear that it could occur where a force majeure, such as a hurricane, causes a situation that substantially affects the workload and no workers or fewer workers are required. Although in this regard the Labour Code makes provision for temporary laying off in such circumstances where the diminution in work is not permanent. This brings me to point out, however, that the existence of a cause, such as the hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably and the dismissal

must be shown to have resulted from the cessation of work or the substantial diminishing of work as a result of the hurricane.”

[20] In the earlier decision of this Industrial Court in *Linda Richardson and*

Deep Bay Development Co. Ltd. Ref No. 7 of 1989 Mr. Justice H.S.R

Moe, the then President of the Court after setting out the then statutory

provision of the Labour Code which defined “redundancy” rendered his

interpretation of the statutory provision at *pages 4 and 5 inter alia* as

follows:

“In construing a statutory provision the Court must give

preference to a sensible rather than an absurd meaning;

that is to say, if one interpretation brings about a

startling and inequitable result then the Court must

follow that other interpretation which will do better

justice. What Section C 3 of the Antigua Labour Code

seems to contemplate therefore is that redundancy may

occur as a result of retrenchment, which itself is

ordinarily defined as removing that which is superfluous;

or reducing the amount; or economising. Thus a re-

organization which results in a reduced workforce is a

redundancy. Also redundancy may occur where there is

a re-allocation of duties following a re-organization of the business and the employee is dismissed as a result of there being a diminution of work previously carried out by the employee; and it matters not, that there has been no overall reduction in the employer's business as was demonstrated in *Cowen v. Haden Ltd.* [1983] I.C.R. I.C.A. Another situation which may give rise to redundancy is where, because the work has been re-organized, fewer employees are required to do the same work, or it may be because of the introduction of labour-saving devices (or if you prefer, the installation of labour-saving machinery.

[21] In a modern commercial environment an employer is entitled to re-organize its business in such a manner which requires a lesser number of workers if there are sufficient circumstances which justify the re-organization. Lord Denning M.R. in *Johnson v Notts Police* [1974] I.C.R 170 (CA), at pages 176 Letters (F) and (H) and 177 Letter A state the principle in the following manner:

"It is settled that an employer is entitled to reorganize his business so as to improve its efficiency and, in so doing, to propose to his staff a change in the terms and conditions of their employment:

and to dispense with their services if they do not agree. Such a change does not automatically give the staff a right to redundancy payments. It only does so if the change in terms and conditions is due to a redundancy situation. The question in every case is: was the change due to a redundancy situation, or not?

[22] In *Lesney Products & Co. Ltd v Nolan* (C.A) [1977] I.C.R.235, Lord

Denning M.R stated *inter alia* at page 238 as follows:

“[I]t is important that nothing should be done to impair the ability of employers to re-organize their work force and their terms and conditions of work so as to improve efficiency.”

[23] Ian Smith and Gareth Thomas the learned authors of “Smith & Wood’s Employment Law”, Ninth Edition, Oxford University Press, London

2008 state *inter alia* at page 527 as follows:

“[The] employer must somehow be allowed to make changes

necessary for the efficiency (and in an extreme case the survival) of the enterprise, but in ordinary contract law he may not make unilateral alterations to existing contracts of employment.”

At page 529 the learned authors state *inter alia* as follows:

“The tribunal is therefore looking at the reasonableness of the

employer's handling of the change, and in essence looking to see whether the time had come when the employer had no further option but to dismiss the employee in order to put into effect the necessary changes."

[24] In the book entitled "A Practical Approach To Employment Law"

authored by John Bowers, Seventh Edition, Oxford University Press, 2005, the writer states *inter alia* as follows at paragraph 13.218:

"Tribunals should scrutinize the basis on which the employer acts to dismiss."

[25] Ian Smith and Gareth Thomas in Smith & Wood's Employment Law (op cit) at page 529 state *inter alia* as follows:

"Was the re-organization necessary? Although it is not for the tribunal to decide how the employer ought to run his business and the employer's genuine belief in the necessity for changes is likely to be paramount, a tribunal may expect the employer to lead evidence showing why he thought change necessary and how he reached the particular decisions in question."

[26] In *Ladbroke Courage Holidays Ltd v Asten* [1981] I.R.L.R. 59 (E.A.T)

the Employment Appeal Tribunal held as follows. The head note reads

inter alia at page 60:

“There was no error of law in the Industrial Tribunal’s Statement

that if an employer seeks to rely on business re-organization or

economic necessity as a reason for dismissal, he should produce

some evidence to show that there was a re-organization or that

there was some need for economy and that it is material for the

Tribunal to know whether the company was making profits or

losses.”

[27] In *Orr v Vaughan* [1981] I.R.L.R. 63 (E.A.T) the Industrial Tribunal

concluded that the employer did not conduct a thorough financial inquiry

although certain books were produced. Mr. Justice Slynn stated what the

employer’s responsibilities should be in a re-organization exercise. At page

65 he stated *inter alia* as follows:

“At the end of the day, it is largely for the employer to decide on

the material which is available to the employee; what is to be done

by way of re-organization of the business; and it is for the

employer to decide whether the requirements of the business for

employees to carry out the particular work have ceased or

diminished. If an employer acts on reasonable information reasonably acquired, then that is the test and no more.”

[28] In *Robinson v British Island Airways Ltd* [1978] I.C.R. 304 (E.A.T)

Phillips J. in delivering the judgment of the Court at page 308 stated *inter alia* as follows:

“Cases concerning redundancy arising out of re-organization always cause difficulties.”

[29] Mrs. Walsh Silston Attorney-at-Law for the Employee cited *Williams and others v Compare Maxim Ltd.* [1982] I.C.R. 156; *Ladbroke Courage Holdings Ltd. v Asten* [1977] I.R.L.R. 477, *Linda Richardson v Deep Bay Development Co. Ltd.* (op cit); *Jennifer Watt v Antigua Village Condo Ref. No.19 of 1991*; *Corbette Smith et al and Caribbean Hotel Management Services Ltd. t/a Club Antigua Ref. No.45 of 1996*; *Andrew Biggart v University of Ulster The Industrial Tribunals, Case Ref. No: 00778/05 (UK); and U.S. Naval Facility v Lewis et al* (1983) 31 W.I.R 191. in support of her submissions.

[30] Whilst the citation of cases in the Industrial Court is always to be

encouraged, in a case of this nature, if such cases do not refer to general

principles of law, each case is to be determined upon its own merits. This was made very clear by the English Court of Appeal in **Murphy v Epsom College** (op cit). **Sir Denys Buckley** in that case stated the principle in the following manner at **page 93**. He stated *inter alia* as follows:

“Every case of re-organization must, I think, depend ultimately on its particular facts. In each case it must be for the industrial tribunal to decide whether the re-organization and re-allocation of functions within the staff is such as to change the particular kind of work which a particular employee, or successive employees, is or are required to carry out, and whether such change has had any, and if so what, effect on the employer’s requirement for employees to carry out a particular kind of work.”

[31]

What is required to be done in every case of this nature is to analyse the

facts and to match this analysis against the words of **Section C 58 (1) (c)** and the definition of **redundancy** contained in **Section C 3** of the Labour Code. In other words, **Section C58 (1) (c)** of the Labour Code:

“requires that the assigned reason be supported by the facts, and that a factual link existed between the dismissal and the assigned reason.”

– See *Byron, C.J.: in Sundry Workers ... and Kings Casino Ltd.*

(op cit) at paragraph 5 of the judgment.

[32] If the Employer puts forward evidence of a nature, quality and kind that the Employee was fairly dismissed due to redundancy, the Industrial Court is still required to consider whether or not the employer followed certain good industrial relations practices so as to render the dismissal to be reasonable in accordance with Section C 58 (2) of the Labour Code. Mr. Justice H.S.R. Moe in *Linda Richardson v Deep Bay Development Co. Ltd.* (op cit) stated the law at pages 4 and 5 of the judgment. He stated *inter alia* as follows:

“[W]e must nevertheless point out that even where a genuine redundancy does exist this 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. It might therefore be regarded as good industrial relations practice, when redundancies are being considered to follow the guidelines laid down in *Williams v Compair Maxim Ltd.* [1982] I.C.R. 156; in particular, the employer should seek to establish selection criteria which can be objectively checked against, *inter alia*, such things as attendance records, job performance, length of service, needs

of the business. But the E.A.T. (Employment Appeal Tribunal)

has also re-emphasized in *Grundy (Teddington) Ltd. v Plummer & Salt (1983) I.R.L.R. 98* that failure to act in accordance with one or more of the guidelines in Compare Maxin does not necessarily

render a dismissal unfair. The principles in Compare Maxin are not hard and fast rules to be applied in all cases; their application depends on what is desirable or practicable in a given situation. Perhaps the two main obligations resting upon an employer

proposing to dismiss an employee for redundancy are to make reasonable efforts, where practicable, to find the employee suitable alternative employment in the business and to consult with him and give him reasonable warning of impending redundancy.”

[33] Whether an Employer has acted reasonably “is always a pure question of fact, so long as the tribunal deciding the issue correctly directs itself on the matters which should and should not be taken into account.”

– per Donaldson L.J. in *Union of Construction, Allied Trades and Technicians v Brain* [1981] I.C.R. 542 (CA) at page 550 Letter B.

The Employee's Termination

22

[34] At paragraph 10 of the Employer's Memorandum, filed on

August 22, 2003 Mr. Hugh Marshall Attorney-at-Law for the Employer

stated as follows:

"By letter of 15th April 2002 the Employer refuted the allegations that the Employee had been terminated on grounds of redundancy and reassured that due to restructuring the employee together with other management employees had been terminated in what was the second of three sets of terminations."

[35] The letter of dismissal dated March 12, 2002 states quite clearly the specific reason why the Employee was dismissed. It begins as follows:

"Due to a recent turn of events within the economy, it has become necessary for management to seek out ways of enhancing the companies overall performance and efficiency." (The emphasis in the highlighted words is the Court's.)

The penultimate sentence of the letter of dismissal states as follows:

"Please bear in mind that this is strictly a result of our current economic situation and is not based on your performance."

(The emphasis in the highlighted words is the Court's.)

[36] In *Dupert Phillip Natalie Stevenson & Sandie Phillip v Courts (Antigua & Barbuda) Ltd* Ref No. 18 of 2003, which included a similar principle of restructuring of Courts between 2000 and 2002, Maundy P: at paragraph 7 of the judgment examined the facts in accordance with **Section C 58 (1) (c)** and (e), **Section C 58 (2)** and the legal provision of **redundancy** as defined in **Section C 3** of the Labour Code.

[37] Concepts such as “recent turn of events within the economy”, “our current economic situation” referred to in the letter of dismissal, coupled with the “restructuring of management” and the Employer’s invitation to the Employee “to forward alternative suggestions other than the termination for consideration by the Company” referred to in the Employer’s Memorandum, all clearly point to the fact that the reason attributed for the Employee’s dismissal was in accordance with **Section 58 (1) (c)** and the definition of **redundancy** in **Section 3** of the Labour Code.

[38] The case of *Murphy v Epsom College* (op cit) cited by Mr. Marshall Attorney-at-Law for the Employer included the issue of whether or not the evidence of a re-organization was sufficient to satisfy a redundancy.

Whether or not in March 2002 a merger of Courts (Antigua & Barbuda) Ltd and Courts (St Kitts & Nevis) Ltd took place which resulted in a re-organization of the work force of Courts (Antigua & Barbuda) Ltd, is supported by the facts and that a factual link existed between the Employee's dismissal and the assigned reason.

[39] (a) The Court must make a decision whether or not a redundancy

situation existed which caused the Employer to dismiss the Employee. When a company seeks to re-organize itself in any way whatsoever,

inclusive of a merger between itself and another company or entity for economic or financial reasons and this exercise is the reason for the

Employee's dismissal, "it is material for the Tribunal to know

whether the company was making profits or losses".

-see *Ladbroke Courage Holidays Ltd v Asten* (op cit) at page 60.

(b) In addition, it is the Employer's responsibility to place before the Court such material which was available to it and which formed the

basis for it to merge with Courts (St Kitts & Nevis) Ltd. It is not

sufficient for the Employer to state that a merger or re-organization of the two entities took place without placing before the Court the

evidence in support of this decision. On the other hand, if the

information before the Court supports the merger, then the Court is

bound to accept such evidence and proceed to an analysis under

Section C 58 (2) of the Labour Code. What is the state of the

evidence?

[40]

The Witness Statement of Mr. Claude Anthony in support of the Employer

was filed on October 02, 2008. At paragraph 3 Mr. Anthony stated *inter alia*

as follows:

“3. In a series of meetings with the Employer prior to his

termination discussions were held with a view to considering

suitable alternative positions for the Employee. A position was

offered by the Employer in the Sales Department but the

Employee declined the position and opted to be paid off”.

[41]

This witness also gave evidence. In his evidence he stated *inter alia* that the

contents of his Witness Statement “are true”. In his evidence in chief

however in response to Mr. Marshall, Attorney-at-Law for the Employer,

Mr. Anthony stated *inter alia* as follows:

“I swore to a Witness Statement on October 01, 2008. Its contents

are true. I was not intimately involved in Mr. Azille’s termination.

A lot of information in my Witness Statement was told to me by

Mr. Eddie Sarno. Mr. Eddie Sarno died in August 2006. Mr.

Eddie Sarno and Mr. Vernon Solomon were part of Mr. Azille’s

termination.... At March 2002 I was the Financial Controller and Mr. Eddie Sarno was the General Manager and Managing Director.”

[42] Mr. Anthony's recollection of the nature of these meetings was challenged by Mrs. Walsh Silston, Attorney-at-Law for the Employee. In response to her, he stated *inter alia* as follows:

“I knew that meetings were held between Mr. Azille and Mr. Sarno but I do not know the contents of those meetings. I do not know what position was offered to Mr. Azille. I am not able to tell the Court who attended the meetings. I am not able to say if the offer to the Employee in the Sales Department was reduced in writing.”

[43] Mr. Anthony was therefore not in a position to assist this Court with respect to (a) the nature of and content of the meetings held between Mr. Azille and Mr. Sarno and (b) whether any offer of alternative employment was put forward by the Employer to the Employee.

[44] Not a scintilla of evidence was presented by the Employer to show whether the Employer was making profits or losses. No financial statement of the

Employer was produced. No evidence was adduced for or on behalf of the Employer of “events within the economy” or the Employer’s “current economic situation” as was made reference to in the Employer’s letter of dismissal dated March 12, 2002.

[45] Surely Mr. Anthony who in March 2002 was the company’s Financial

Controller ought to have been in a position to give the Court some evidence with regard to the company’s financial circumstances. Who is better than

him to tell the Court of the economic situation within Antigua & Barbuda or St Kitts & Nevis at the relevant time? If this evidence was proffered by Mr. Anthony or any other witness on behalf of the company, the Court may have become convinced of what the Employer meant by the “events within the economy” and the Employer’s “current economic situation”.

[46] At the end of the day whilst business re-organizations and mergers are

decisions for employers to decide, this Court must be satisfied that, at least, the Employer arrived at the decision to merge with Courts (St Kitts & Nevis) Ltd based “on reasonable information reasonably acquired.”

- see Orr v Vaughan (op cit) per Mr. Justice Slyn at page 65 paragraph

[47] The proper approach which the Employer ought to have followed in a case of this nature where it states that meetings were held between the Employer and the Employee was outlined by Mr. Justice Arnold in *Banerjee v City and East London Area Health Authority* [1979] I.R.L.R 147. At page 150 paragraph 27 he stated *inter alia* as follows:

“There is no reason why, in this case, an account should not have been given, either by the production of the relevant minutes (if there be minutes) of how the decision was made, of the

consideration which was given to the matter, of the pros and cons which were considered, of the importance which was attached to the different features which went into the decision as ingredients. No attempt was made to bring forward any material of that sort. If there were no written minute, then it could easily have been

done by word of mouth, by calling one witness who was a party to the decision. And, in ordinary industrial cases this is the course which employers invariably take. When a question of unfair

dismissal comes up, the officer of the employing company who has taken the decision to dismiss, or one of those who have been party to the decision to dismiss, comes along and says, ‘The reason we

dismissed was’ this or that. ‘We have considered keeping him on. We considered the advantages of each course, and we decided’

so-and-so. It may very well be that if that course had been taken by the Employer the onus would have been discharged.”

[48] The Witness Statement of the Employee was filed on October 02, 2008. In that Witness Statement the Employee stated *inter alia* at **paragraph 3** as follows:

“3. As the Operations Executive I had responsibility for the overall management of the branch. I was responsible for the day to day operational issues involved in the running of the branch.”

[49] The Employer issued to the Employee a comprehensive document which is entitled “Courts (Antigua) Ltd Job Specification and Description

Position: Operations Executive Reports To: Operations Director” What follows the title are (a) the purpose of the position, (b) required education, (c) required skills/experience, and (d) required personal characteristics. On the other page is a detailed list of duties which the Operations Executive is required to perform. They number 23. At the bottom of the page the

Employer stated as follows:

“This represents a broad outline of duties and responsibilities and does not include other tasks that the jobholder will be expected to

undertake.”

[50] In his evidence in answer to Mr. Marshall, Mr. Anthony stated *inter alia* as follows:

“The Employer in Antigua & Barbuda was merging with Courts in St Kitts & Nevis. Because of the merger certain functions were duplicated. One example of this was the Operations Department of the Company. The Operations Department from St Kitts became the Operations Department in Antigua. Vernon Solomon from the Human Resources Department in St Kitts came over to Antigua. Tyrone Prophet was the Operations & Buying Director and he came across from St Kitts to Antigua to perform the heading of the Operations Department of both companies as the Operations and Buying Director.”

[51] No job description of Mr. Prophet was produced so as to compare the specific duties which he was expected to perform with those which Mr. Azille performed.

[52] In Mr. Azille's evidence to this Court in answer to Mr. Marshall, Attorney-at-Law for the Employer he stated *inter alia* as follows:

“The buyer in St Kitts was Mr. Tyrone Prophet. He was in the Store about a week before my termination. I don't know if Mr.

Solomon was performing Ms Matthew's duties. Mr. Prophet's office was upstairs and mine was downstairs. Mr. Prophet was not performing some of my duties. I have no reason to doubt the letter of March 12, 2002."

[53] In answer to Mrs. Walsh Silston, Mr. Azille stated *inter alia* as follows:

"I was an Operations Executive and not Manager up to the time of dismissal. I saw Mr. Tyrone Prophet from St Kitts in the Store. This is not an unusual practice. I would not ordinarily make a conclusion as a result of seeing someone from the St Kitts office in the Antigua office."

[54] The Operations Department of Courts in Antigua & Barbuda prior to Mr. Azille's termination comprised 19 workers. Two workers in this department were terminated due to the Employer's actions. One of them was Mr. Azille.

[55] The work of the Operations Department continued to function after Mr. Azille's termination. There is therefore evidence that the work which

Mr. Azille had been last employed to perform had not ceased or substantially diminished.

[56] The Employer has not placed before this Court any qualitative evidence which it took into consideration to arrive at its decision to merge or re-organize itself with Courts (St Kitts & Nevis) Ltd.

[57] In the Written Submissions of Mr. Marshall, Attorney-at-Law for the Employer he states at **paragraph 6** as follows:

“6. By virtue of Section C 58 (1) (e) of the Antigua & Barbuda Labour Code a substantial reason of a kind which would entitle a reasonable employer to dismiss an employee would deem a dismissal fair. However, there must be a factual basis for the termination.”

[58] At **paragraph 10** of the Employer’s Memorandum it refers to a letter of 18th April 2002 in which **“the Employer refuted the allegations that the Employee had been terminated on grounds of redundancy.”** In that same letter which was marked **“CA-3”** it stated however that Mr. Azille **“was offered a package of redundancy, which he unequivocally accepted in a series of meetings.”**

[59] There was no evidence which was presented to the Court by or on behalf of the Employer that Mr. Azille was dismissed for **“some other substantial**

"reason" in accordance with Section 58 (1) (e) of the Labour Code. This issue arose to be decided in *Murphy v Epsom College* at the F. A. T. level reported at [1983] I. R. L. R 395. In that case Mr. Justice Browne-Wilkinson stated *inter alia* at page 399 Numbers 19 and 20 as follows:
 "In *Gorman v London Computer Training Centre Ltd* [1978] I.R.L.R 22, this Appeal Tribunal held that it was not necessary to 'plead' some other substantial reason in the full technical sense of the word. However, in our judgment in the light of the Nelson case it is probably necessary that the matter should be expressly ventilated in the Industrial Tribunal before it reaches a decision on the matter so that the parties can have a full and proper opportunity to deploy their case on the matter. Natural justice requires that the party should not have a case decided against him on a ground on which he has not had an opportunity to be heard. It is therefore not safe for us to approach this case on the basis that the reason for dismissal was either redundancy or some other substantial reason. It is accordingly necessary for us to consider whether, on the facts of this case, Mr. Murphy could properly be held to be redundant."

reason of redundancy we think it is implicit in that claim, absent

“30. (4) Where an applicant complains of unfair dismissal by

follows:

University [1998] I.R.L.R 172 (E.A.T) at page 175 stated inter alia as
founded in the case law. Mr. Justice Peter Clark in *Langston v Cranfield*

Industrial Court to consider these three (3) matters. This principle is well

whether they are pleaded or not by either party. It is the duty of the

redundancy situation such a claim involves three (3) inherent matters

[61] In a claim for unfair dismissal which is based upon the existence of a

If a redundancy did or did not exist did the Employer act reasonably at the
time when the Employee was dismissed?

Issue No: 2

[60] In all of the circumstances of this case this Court is not persuaded that
Mr. Azille's dismissal due to **redundancy** has been satisfied.

-See O'Connor L.J's judgment at pages 95 & 96, Paragraph (H)

Appeal's judgment reported at [1985] I. C. R. 80.

Wilkinson's statement of the law was upheld by the Court of

Nelson v BBC [1977] I.R.L.R 148. Mr. Justice Browne

In that case Mr. Justice Browne-Wilkinson was making reference to

agreement to the contrary between the parties, that the

unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer.

31. (5) Because there is now no onus on either party to establish the reasonableness or unreasonableness of the dismissal...it is for the Industrial Tribunal to determine the question 'neutrally'.

32. (6) In these circumstances we think it is incumbent on the Industrial Tribunal to consider each of the three questions mentioned in (4) above, in the same way that an industrial tribunal will consider the threefold Burchell test in an appropriate conduct case.

33. (7) Normally, an employer can be expected to lead some evidence as to the steps which he took to select the employee for redundancy, to consult him/or his trade union and to seek alternative employment for him.

34. (8) We would normally expect the Industrial Tribunal to refer to these three issues on the facts of the particular case in

explaining its reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy.”

[62] The three (3) main matters which this Court is required to examine so as to determine whether or not the Employer acted reasonably in dismissing the Employee may be succinctly stated as follows:

(1) The Employer must select the Employee fairly who it desires to make redundant.

In *British Aerospace plc v Green et al* [1995] 1 R.L.R. 433 (CA) the headnote reads *inter alia* as follows:

“In general, an employer who sets up a system of selection which can reasonably be described as fair and applies it without any covert sign of conduct which mars its fairness, will have done all that the law requires of him.

...[I]t is sufficient to show that he set up a good system of selection and that it was fairly administered and that ordinarily there is no need for the employer to justify all the assessments upon which the selection for redundancy was based, would be endorsed.”

(2) (i) As a general rule, the employer should consult with an employee and give him reasonable warning of impending redundancy.

-see the observation of Mr. Justice H.S.R Moe in Linda Richardson and Deep Bay Development Co. Ltd. (op cit) at page 9.

(ii) Fair consultation has been described by Glidewell LJ in *R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and other* [1994] 1 R.L.R 72 (High Court) at page 75 Nos. 24 and 25 *inter alia* as follows:

“24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v Gwent County Council ex parte Bryant* reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:

‘Fair consultation means:

- (a) consultation when the proposals are still at a formative stage;
- (b) adequate information on which to respond;
- (c) adequate time in which to respond;
- (d) conscientious consideration by an authority of the response to

consultation.’

Another way of putting the point more shortly is that fair

consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is

being consulted, and to express its views on those subjects, with the consultant thereafter considering those views properly and genuinely?

(iii) This passage should be of some assistance to employers when they are required to consult with employees in circumstances of dismissal for redundancy or in other dismissal circumstances.

Each case is to be decided upon its own peculiar facts.

(iv) Mr. Justice Peter Clarke having reviewed the authorities with respect to consultation has summarized the position in *Mugford v Midland Bank Plc*

[1997] I.C.R. 399 (E.A.T) at page 406 Letters G and H and page 407 Letter A as follows:

“(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria

does not of itself release the employer from considering with

the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial

tribunal to consider whether consultation with the individual

and/or his union was so inadequate as to render the dismissal

unfair. A lack of consultation in any particular respect will not

automatically lead to that result. The overall picture must be

viewed by the tribunal up to the date of termination to

ascertain whether the employer has or has not acted

reasonably in dismissing the employee on the grounds of

redundancy.”

(3) The employer should make reasonable efforts “where practicable

to find suitable alternative employment for the employee within

the business.”

-per Mr. Justice H.S.R Moe in Linda Richardson and Deep Bay

Development Co. Ltd. (op cit) at page 9.

[63] In *Linda Richardson and Deep Bay Development Co. Ltd.* (op cit) Mr

Justice H.S.R Moe stated at page 10 *inter alia* as follows:

“In circumstances like redundancy a good employer would give as

much warning as possible to the employee so that the employee

may be aware that the axe is about to fall long before it actually

does fall. This also gives the employee an opportunity to seek

THE INSTANT CASE

THE SELECTION PROCESS

[64] The evidence led on behalf of the Employer is that Mr. Azille's duties were assumed by Mr. Prophet in the new position of Operations and Buying Director.

[65] No evidence was presented to this Court by the Employer of the specific or any other functions of the position of Operations Director which Mr. Prophet was expected to perform so that the Court would have been in a position to compare those duties with the functions which Mr. Azille performed.

[66] No evidence was given of Mr. Prophet's qualifications and experience. This Court is therefore uncertain whether or not Mr Azille's functions as Operations Executive were properly subsumed in Mr. Prophet's new position as Operations Director.

[67] In these circumstances the Employer has not adduced such evidence before this Court that the selection process for choosing which employees were to be made redundant was transparent and fair.

CONSULTATION AND WARNING

[68] Mr. Anthony was the sole witness called on behalf of the Employer. He was unable to tell the Court of the contents of meetings held between Mr. Azille and Mr. Sarno of Courts. Mr. Eddie Sarno became deceased in 2006. Mr. Azille in his Witness Statement filed on October 02, 2008 at paragraph 8

states that prior to being terminated, he was given no warning of imminent termination. This Court holds that no meetings took place between the Employee and the Employer with regard to the Employee's termination. There was no warning given to him by the Employer prior to the letter of dismissal dated March 12, 2003.

[69] The Employee had rendered 16 years of service to the Employer. Some attempt ought to have been made by the Employer to reach out to the Employee with a view to holding some discussions with him. These talks should have included the Employer's intention, and the Employer should have obtained the Employee's response in an attempt to be fair and reasonable to the Employee.

[70] He should have been given some opportunity to find alternative employment before he was dismissed as there appeared not to be any circumstance or

peril which prevented the Employer from so doing.

SUITABLE ALTERNATIVE EMPLOYMENT

[71] No attempt was made by the Employer to find any suitable alternative

employment for the Employee before he was dismissed by letter of March 12, 2002. It has long been settled law that such attempts should be made

before the Employer dismisses the Employee.

In *Vokes v Bean* [1974] 1 C.R. 1 (N.I.R.C) the employee was dismissed by

the employer. The Employer made no offer of alternative employment to the employee before dismissal. Sir Hugh Griffiths in delivering the Court's

judgment stated at page 4 Letter E *inter alia* as follows:

“These employers made no offer of help to the employee before

they dismissed him, nor did they allow time off to seek work. As

the employee reasonably complained: “It’s more difficult to find

employment if you have been summarily dismissed than if you are

seeking a new job while still in employment.”

At page 5 Letter E Sir Hugh Griffiths stated *inter alia* as follows:

“If the employers had made all reasonable attempts to place the

employee in the group and had failed, then the time might have

come when it would be reasonable for them to regard the

redundancy as a sufficient reason for the dismissal, but until that

moment had come the Tribunal were entitled to take the view that it was not reasonable to dismiss for redundancy and accordingly that it was unfair.”

[72] The matter is stated in the following way by Lord McDonald in Barratt

Construction Ltd v Dalrymple [1984] I.R.L.R. 385 (E.A.T) at page 386: “In the present case the Tribunal appears to have gone further.

They say it is the duty of an employer before dismissing an

employee for redundancy to see whether alternative employment

can be found for him. As a general proposition this is correct. In

the present case the evidence before the Tribunal was that the

appellant’s regional director had looked around within his own

company but no other employment was available.”

FINDINGS

[73] In all of the circumstances of this case the Employer in the Court’s judgment acted unreasonably toward the Employee. It failed to satisfy the general test of fairness. In these circumstances this act to dismiss the Employee for reasons of redundancy was unfair. The Employee is entitled to be

compensated for unfair dismissal.

In the event that no redundancy existed and the Employer did not act reasonably, what is the measure of damages to which he is entitled?

[74] An employee who is held to be unfairly dismissed is entitled to certain

awards under established headings.

(a) Basic Award For Loss of Protection

The Employee was compensated by the Employer in the sum of \$120,692.30 for his 16 years of service to the Employer.

(b) Immediate Loss

After the Employee was terminated by letter of March 12, 2002

he did not obtain alternative employment until August 07, 2002.

The efforts which he made to obtain suitable employment are

outlined at paragraph [8] of this judgment. They are reasonable

attempts to mitigate his loss. The sum which is due to him

under this heading is $(\$7,500 \times 4) + (\$7,500 - \$1,760)$ or

\$35,740.00.

(c) Manner Of Dismissal

No award is made under this heading.

(d) Future Loss

The Employee's present monthly income is \$1,760.00. This

represents a monthly loss of \$5,740.00. A period of six months

loss of earnings would suffice to be awarded under this

heading. If a 10 percentum reduction is applied the sum is

\$30,996.00.

(f) Fringe Benefits

In the position of Operations Executive the fringe benefits to

which he was entitled are set out at paragraph [5] of this

judgment. No evidence was led with respect to the commission

payment which would satisfy this Court of the seriousness of

this claim. On the other hand except for any loss of pension for

which he was previously compensated the other perquisites

appear reasonable to be quantified.

In Baptiste v Bank of Nova Scotia Ref No. 25 of 2005 the

Employee was awarded \$10,000.00 under this heading. Mr.

Azille's loss appears to be of a higher nature. I award him

\$15,000.00.

CONCLUSION

[75] The Employer shall pay to the Employee **\$81,736.00** on or before

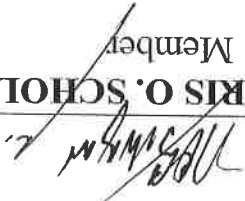
April 30 2009. There shall be no order as to costs.

Dated the 26th day of March 2009



PHILIP A. PILGRIM
President

I agree.



NORRIS O. SCHOLAR
Member

I also agree.



DR. HAYDEN THOMAS
Member