

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 17 of 2010

DALE ABRAHAM

Employee

and

HAWKSBILL HOTEL

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Dr. Hayden Thomas

Member

The Hon. Samuel R. Aymer

Member

Appearances:

Mr. Leon Symister, Attorney-at-law for the Employee

Ms. Fidela Corbin Lincoln of Simon Rogers Murdoch,

Attorneys-at-Law for the Employer

2012: September 06

November 14

2013: May 02

JUDGMENT

PILGRIM P.:

BACKGROUND:

- [1] Mr. Dale Abraham, the Employee herein, resides at Five Islands in St. John's in Antigua and Barbuda. Hawksbill Hotel now known as Hawksbill by Rex Resorts, the Employer herein, is one of several hotels which provide employment for many people in the country. Many tourists and visitors alike

enjoy its hospitality and accommodation. It is located at Five Islands in Antigua and Barbuda.

- [2] While the Employee stated in his Employee's Memorandum and Witness Statement that he commenced employment with the Employer in September 1981, both parties agreed by consent on September 06, 2012 that his employment began sometime on or about October 02, 1981.
- [3] Mr. Abraham worked as a Wine Steward. In this capacity he stated that two other persons were employed to work with him.
- [4] Mr. Abraham stated that his functions as wine steward were to make sure that the wine glasses were cleaned and placed on tables. On some occasions he cleaned the wine buckets. He took wine stocks. On some occasions he went to the bar and assisted in the sale of drinks.
- [5] According to the Employee, dinner at the hotel commenced about 7.30 pm. He took the wine list from the bar to the guests. He would ask the guests if they required to have some wine or other drinks from the bar.
- [6] Primarily as the wine steward he sold wines. He stated that some guests participated in the all inclusive package whilst others were not. On some occasions he sold wines to guests who were not on the all-inclusive plan.
- [7] In December 2003 Mr. Abraham was on vacation leave. While on vacation, he received a telephone call from someone at the Employer's place of business. He was required to meet with the Employer's manager. He

attended the meeting. He met with Mr. Richard Michelin. He was the General Manager of the hotel.

[8] Mr. Abraham stated that Mr. Michelin presented him with a cheque and a letter. He was told by Mr. Michelin that Hawksbill proposes to operate as an all-inclusive resort and from that day he had no job.

[9] The letter to which the Employee made reference is dated December 12, 2003. It was signed by Mr. Michelin and addressed to Mr. Abraham. It was admitted as “DA-1”. On September 06, 2012, both parties by consent agreed that the effective date of dismissal was December 12, 2003.

Alternative employment

[10] After being dismissed on December 12, 2003 Mr. Abraham sought to obtain alternative employment. He did not state when he commenced this process. It took him seven (7) months before he obtained employment after having been dismissed. This position lasted for four (4) months. What he did I do not know.

[11] He commenced painting in 2004. This lasted for six (6) months. After two (2) months he found alternative employment for one year. This position was not revealed by him. He is presently unemployed.

Legal proceedings

[12] A Reference dated September 28, 2010 was filed on his behalf on October 01, 2010. In that Reference he asserts that he was unfairly dismissed. His Employee's Memorandum and Witness Statement were both filed on January 12, 2011.

[13] The Employer's Memorandum was filed on March 08, 2011. A Witness Statement and a Supplementary Witness Statement for the Employer were filed on March 09, 2011 and November 13, 2012 respectively.

The issues

[14] **The issues are as follows:**

- (i) Does the Limitation Act No. 8 of 1997 and in particular Section 11 (1) of that Act contain a limitation period for the commencement of unfair dismissal matters in Antigua and Barbuda?**
- (ii) Whether in the circumstances of this case the work which Mr. Abraham was last employed to perform as at December 12, 2003 had ceased or substantially diminished to result in a redundancy?**
- (iii) Did the Employer act reasonably or unreasonably in its dismissal of the Employee?**
- (iv) If the Employee was unfairly dismissed what is the measure of damages which is due to him?**
- (v) Do any exceptional reasons exist in this case for an award of costs to be made?**

The first issue

Does the Limitation Act No. 8 of 1997 and in particular Section II (1) of that Act contain a limitation period for the commencement of unfair dismissal matters in Antigua and Barbuda?

The Limitation Act No. 8 of 1997

[15] Section II (1) of the Limitation Act No. 8 of 1997 states as follows:

“(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action occurred”.

[16] My exhaustive research does reveal that this is the very first occasion when this Court has been required to decide this issue. My searches have been verified by the Antigua and Barbuda Bar Association.

[17] Ms. Fidela Corbin Lincoln Attorney-at-law for the Employer filed initial Written Submissions on November 09, 2011. Mr. Leon Synister Attorney-at-law for the Employee filed his Written Submissions on December 14, 2011. When these Submissions were received by Counsel for the Employer learned Counsel filed another set of Written Submissions dated December 23, 2011.

Background

- [18] Mr. Symister in his Written Submissions stated that on or about January 25, 2004 Mr. Abraham through his Counsel contacted the hotel regarding his dismissal. Mr. Symister was informed by letter from the Employer dated February 04, 2 004 that the matter had been referred to the Employer's Counsel.
- [19] It is Mr. Symister's submission that some correspondence passed between both Counsel in 2006 which ended with a letter from the Employer's Counsel to him dated October 16, 2006. In that letter the Employer denied any obligation to the Employee.
- [20] Section C 60 (1) of the Labour Code states as follows:
- “Should any question arise as to whether an employee has been unfairly dismissed, the employee, or his registered agent, may seek a resolution of the question by filing a Complaint of Unfair Dismissal with the Labour Commissioner”.*
- [21] Section C 61 of the Labour Code outlines the preliminary action which the Labour Commissioner takes in accordance with Section B5 (2) of the Labour Code upon the filing of an employee's Complaint of unfair dismissal.
- [22] Mr. Symister states that a Complaint of unfair dismissal on behalf of the Employee was filed with the office of the Labour Commissioner on April 10, 2007. The Employer contends that it is unaware of the date when this Complaint was filed.

[23] Mr. Symister further states that some time in August 2008 both parties attended a hearing at the office of the Labour Commissioner relative to the Employee's Complaint. Ms. Fidela Corbin Lincoln for the Employer states that by notice dated September 15, 2008 the office of the Labour Commissioner informed the Employer ***"that discussions on this matter were scheduled for Thursday 23rd October 2008"***. Ms. Corbin Lincoln agrees with Mr. Symister that a Conciliation Hearing was held at the Labour Commissioner's office on August 02, 2008.

[24] Mr. Symister states that the Labour Commissioner made certain recommendations in March 2010. Learned Counsel for the Employer states that ***"an undated reconciliation report was issued around March 2010"***.

The Employer's submissions

[25] In her Written Submissions dated November 09, 2011 Ms. Corbin Lincoln Attorney-at-law for the Employer submits that ***"the Employee is barred from bringing this action and the Industrial Court has no jurisdiction to hear the action since the Employee commenced this action outside the six year period prescribed under Section 11 of the Limitation Act No, 8 of 1997"***.

(The emphasis is Counsel's.)

[26] Learned Counsel submits that an employee's right to bring a claim for unfair dismissal arises entirely from part 5, Section C56 of the Labour Code.

- [27] Ms. Corbin Lincoln further submits that Section 11 of the Limitation Act *is the relevant section for determining the limitation period in matters relevant to unfair dismissal*” in Antigua and Barbuda.
- [28] Learned Counsel for the Employer made reference to two dictionaries to explain the meaning of the word “*action*” in Section 2 of the Limitation Act.
- [29] According to Counsel for the Employer, “*the Employee’s referral of his claim to the Office of the Labour Commissioner or the conciliation hearing held by the said office cannot be considered an action*” under the Limitation Act since an ‘action’ for the purposes of determining whether a matter is statute barred refers to commencing proceedings in a *court of law*.
- [30] According to Ms. Corbin Lincoln no delays which took place at the Labour Department should be taken into consideration “*notwithstanding any hardship which may occur to the employee as a result of that process*”.

The Employee’s submissions

- [31] In his Written Submissions filed on December 14, 2011, Mr. Symister states that “*It is only after (the C60 and C61) procedure has been exhausted that an employee can invoke the jurisdiction of the Court*”. I disagree.
- [32] Mr. Symister made reference to “*the practice of this court (that) a matter cannot be filed in this Honourable Court until the matter has been heard at the Labour Commissioner’s Office*”. Learned Counsel urged this Court to take judicial notice of this practice.

- [33] According to Mr. Symister *“the legislature in its wisdom chose not to set a limitation on the period within which a reference has to be filed in the Court”*.
- [34] Learned Counsel for the Employee submits that Section 11(1) of the Limitation Act *“is limited to an action to recover a sum of money”*. Mr. Symister states that Section 11 (1) of the Act cannot be given such a broad interpretation to refer *“to the remedies set out in Section 10(4) of the Industrial Court Act”*.
- [35] Mr. Symister submits that *“section 11(1) of the Act is not applicable to an unfair dismissal matter because it is not an action for a sum of money”*. In the alternative Mr. Symister states that *“the court is urged to find that section 11(1) of the Limitation Act does not apply to unfair dismissal matters (provided that) a complaint is filed with the Labour Commissioner, within what would otherwise (have) been a limitation period.”*

The Employer’s further submissions

- [36] Learned Counsel for the Employer in her further Written Submissions filed on December 23, 2011 states that *“the employee has a right to bring a claim for unfair dismissal directly to the Industrial Court under the Industrial Court Act. The Court of Appeal in Universal Caribbean Establishment v James Harrison Suit No. 21 of 1993 held, inter alia, that an employee has a right to bring a claim for unfair dismissal before the Industrial Court and that the jurisdiction conferred by section 7(1)(c) empowers the court to hear any disputes concerning the dismissal of an employee”*.

[37] (a) Ms. Corbin Lincoln submits that an individual has a “*right of access to the courts*” in accordance with **Attorney General v Times Newspapers [1993] 3 ALL ER 54**, **Pyx Granite Co. Ltd. v Ministry of Housing [1959] 3ALL ER 1**, and **Kenneth Suratt v The Attorney General of Trinidad and Tobago [2008], 1 AC 655**.

(b) In accordance with this right of access learned Counsel submits that “the Employee has provided no legal authority for the assertion that an employee is barred from *commencing* his claim for unfair dismissal in the Industrial Court without going through the procedure set out in the Labour Code”.

[38] At **paragraphs [21] and [22]** of the Employer’s Written Submissions filed on November 09, 2011 learned Counsel states as follows:

“21. It is submitted that the Industrial Court is constrained by section 11 of the Limitation Act and any real or perceived hardship to the employee ought not to be resolved by this Court giving an enlarged interpretation to the clear and unambiguous words of the statute since to do so would be contrary to a (basic) tenet of statutory interpretation vis that words used in the statute are to be given their clear and unambiguous meaning.

22. It is further submitted that the provision of a remedy to the hardship resulting from the application of the clear and unambiguous meaning of the statute is the purview not of the court but of the Parliament”.

- [39] Ms. Corbin Lincoln submits that the Employee's Reference was filed some *ten* months after the expiration of the six year limitation period provided for in section 11 of the Limitation Act and it is therefore submitted that this matter is statute barred and ought not to be entertained by the Industrial Court.

Principles of interpretation

- [40] The first statement which Byron acting CJ (as he then was) made under the heading "**Principles of interpretation**" in the **Universal Caribbean case** (*op cit*) reported at (1992) 56 WIR 241, at 242 was as follows:
"Submissions were advanced on the principles of statutory interpretation".
- [41] Apart from the submission from Counsel for the Employer that the words of section 11(1) of the Act are "**clear and unambiguous**" no other principle of statutory interpretation was submitted by Ms. Fidela Corbin Lincoln. In this regard I do not derive any assistance from Counsel's submissions as to how section 11(1) should be interpreted.
- [42] In the **Universal Harrison** case the Court of Appeal was required to decide the applicability of section 7 (1) of the Industrial Court Act to the hearing of an unfair dismissal matter directly from an employee.
- [43] Byron CJ acting (as he then was) stated at **page 243** *inter alia* as follows:
"In this case, two conflicting contentions exist as to the policy which influenced the Act. The Industrial Court Act 1976 followed on and was linked to the 1975 Labour Code of Antigua and Barbuda; for example, see s 10(1)(3)(b) which requires the court to 'act in

accordance with equity, good conscience . . . and, in particular, the Antigua and Barbuda Labour Code'. The Labour Code was an innovative and important enactment, which made substantial changes to the industrial law of Antigua. It declared a national policy underlining the legislation and which included the proposition that, as an individual works, he gradually earns an equity in his job above and beyond his wages, an equity that requires protection. In particular, it created a new right not to be unfairly dismissed. This right had not been known to the common law. The Code created new and comprehensive machinery for dispute resolution. This involved a network including the Minister of Labour, the Labour Commissioner, decisional officers, an arbitration tribunal, a National Labour Board, hearing officers, the Board of review".

- [44] In *Universal Caribbean op cit* the court was not provided with any evidence *"as to whether the Labour Board became a functioning body under s B 19 and no findings of fact were made to the court below"*.
- see page 244 of the WIR.

- [45] At page 244 of the judgment **Byron CJ** acting (as he then was) also stated *inter alia* as follows:
"Yet the practice whereby the Industrial Court has been functioning instead of the dispute resolution procedures under the Code raises the question whether there was any alternative jurisdiction to that being exercised by the Industrial Court".

[46] Since the decision of the **Universal Harrison** case (*op cit*) in 1997 I do take quasi-judicial notice that a practice has developed by the vast majority of Attorneys-at-law and trade unionists in Antigua and Barbuda to make use of the machinery which is outlined in sections 60 and 61 of the Labour Code prior to the filing of a Reference in the Industrial Court. I reiterate however that this has become a custom and practice as opposed to a rule of law in light of the Universal Caribbean case.

[47] In addition, I also take quasi-judicial notice that there has been the establishment of the National Labour Board. It is alive. It recently made certain recommendations to the Minister of Labour.

[48] So, matters have changed significantly since the writing of the Universal Caribbean case. The Labour Code mechanism has been fairly effective to provide a *“quasi-judicial administrative dispute resolution system provided by the Code”*.

- (see Byron CJ (as he then was) at page 244 of the WIR judgment.)

[49] Two conflicting contentions do emerge from Counsel in this case for the Employer and Employee as to the meaning of section 11(1) of the Act. Firstly, Mr. Symister asserts that *“it cannot be said that section 11(1) of the Limitation Act applies to a cause of action for “re-employment” or “re-instatement” of the employee. However, it is undisputed that Mr. Abraham’s cause of action could result in his re-employment or re-instatement”*.

- [50] The submission by Mr. Symister at **paragraph [49]** above is part of a wider submission which in summary states that the remedies contained in section 10(4) of Cap. 214 are not within the compass of section 11(1) of the Limitation Act, 1997.
- [51] Section 10 (4) of Cap. 214 does provide *inter alia* for “***the re-employment or re-instatement (in his former or similar position) of any employee subject to such conditions as the Court thinks fit to impose***” and also subject to section 10 (5) of Cap. 214.
- [52] Ms. Fidela Corbin Lincoln Counsel for the Employer in reply to Mr. Symister states that the remedy of re-instatement or re-employment “***is rarely utilized by the Court***”. Learned Counsel further stated that “***even if section 11 of the Limitation Act does not apply to the remedies of re-instatement or re-employment, since compensation or damages clearly amount to a “sum recoverable” such an award would be barred by virtue of Section 11 of the Limitation Act***”.
- [53] Secondly, Counsel for the Employer clearly contends that Section 11 (1) of the Act relates to a limitation period of six years for the commencement of unfair dismissal cases in Antigua and Barbuda.
- see **paragraph [7]** of the Employer’s Memorandum
- [54] Conversely, Counsel for the Employee asserts that the “***proceedings in this matter commenced when the Employee filed the complaint of unfair dismissal with the Labour Commissioner well within (any) conceived limitation period***”.

[55] **Byron CJ** acting (as he then was) stated at **page 242** of the WIR *inter alia* as follows:

“The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. It is only where the words of the statute are not clear and unambiguous that it is necessary to enlist aids for interpretation”.

[56] At **page 244** of the judgment **Byron CJ** acting (as he then was) stated *inter alia* as follows:

“If the language of a statute is ambiguous so as to admit of two constructions, a court is also entitled to consider the consequences of the two alternative constructions, and to rule against adopting a construction which leads to manifest public mischief, or great inconvenience, or repugnance, inconsistency, unreasonableness or absurdity, or to great harshness or injustice”.

[57] The development of the Labour Code in Antigua and Barbuda was a major shift away from the common law. It provided an employee with a new statutory right not to be unfairly dismissed. It established statutory grounds of dismissal and provided a test for measuring whether or not those grounds existed.

[58] The Labour Code for the first time established minimum standards of working conditions for employees and brought together all legislation applicable to employment, employment standards and industrial relations in Antigua and Barbuda.

- [59] No limitation period exists either in the *Labour Code* or the *Industrial Court Act* Cap. 214 for the commencement of actions of unfair dismissal in Antigua and Barbuda.
- [60] In the **Universal Caribbean** case (op cit) Byron acting CJ (as he then was) described the Labour Code as “*an innovative and important enactment, which made substantial changes to the industrial law of Antigua*”.
- see page 243 of the WIR.
- [61] Byron CJ acting (as he then was) described the Industrial Court as adjudicating in the “*largest cluster of legal rights for which redress is most vigorously pursued before any court in Antigua and Barbuda*”.
- see page 243 of the WIR.
- [62] In the context of the major rights which these two (2) pieces of legislation conferred upon employees in Antigua and Barbuda without requiring them to commence their matters of unfair dismissal within a particular period of time, I hold that express language must be used by the legislature to restrict the employee’s right to commence such an action.
- [63] It is therefore not pellucid and unambiguous to me that section 11(1) of the Limitation Act at first blush contains clear words which imposes such a restriction.
- [64] (a) In the **Universal Caribbean** case **Byron CJ** acting (as he then was) stated *inter alia* at page 244:

“However, the relevant Hansard debates have not been available and it is not possible to ascertain the national policy which informed the Act by any external material. Thus, we are deprived of this aid to construction”.

(b) It appears to me that had the relevant *Hansard* debates been made available to the court in that case, they would have been clearly utilized.

The use of Hansard

[65] There is a legal textbook which is entitled “**Statutory Interpretation**”. The 4th edition, 2002 is authored by **Francis Bennion**. It is published by Butterworths, UK.

[66] At **page 545** Section 220 the author states *inter alia* as follows:

“(1) Except as provided in Code s 217, and subject to subsection (2) below, it is a rule of practice (the exclusionary rule) that recourse to reports of proceedings which took place in either House of Parliament during the passage of the Bill that on signification of royal assent became the Act of Parliament which falls to be construed is not permissible as an aid to its construction.

(2) Nevertheless the court, as master of its procedure retains a residuary right to allow recourse to such reports where, in rare cases, the need to carry out the legislator’s intention appears to the court so to require”.

[67] Section 217 of **Bennion** (*op cit*) states *inter alia* as follows:

“(1) In arriving at the legal meaning of an enactment to which this section applies, the court may have regard to any statement, as set out in the Official report of Debates (‘Hansard’) on the Bill for the Act, which satisfies the requirements of subsections (3) to (5) below, ... as is relevant for understanding that statement and its effect . .

(2)

(3) The statement must be made by or on behalf of the Minister or other person who is the promoter of the Bill.

(4) The statement must disclose the mischief aimed at by the defendant, or the legislative intention underlying its words.

(5) The statement must be clear”.

[68] In **Pepper v Hart** [1993] AC 593, [1993] 1 ALL E.R. 42 (HL) the House of Lords in deciding a matter which dealt with tax legislation, permitted the use of parliamentary material or *Hansard* as an aid to statutory interpretation to give effect to the true intention of the legislature. The leading speech was written by **Lord Browne-Wilkinson** at pages 53 to 74 of the **All England Report** (the Report).

[69] At page 69 of the Report in **Pepper v Hart**, Lord Browne-Wilkinson stated *inter alia* as follows:

“I therefore reach the conclusion, ...that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more

statements by a minister ; (c) the statements relied on are clear. Further than this, I would not at present go.”

[70] At **page 531** of **Bennion**, op cit the learned author stated *inter alia* as follows:

“The decision in Pepper v Hart relates only to a statement made by or on behalf of the promoter of the Bill. In the case of a government Bill this will be the minister in charge of the Bill”.

[71] At **page 49** of the **Report Lord Bridge** stated *inter alia* as follows:

“It should, in my opinion, only be in the rare cases, where the very issue of interpretation which the courts are called on to resolve has been addressed in parliamentary debate and where the promoter of the legislation has made a clear statement directed to that very issue that reference to Hansard should be permitted. Indeed, it is only in such cases that reference to Hansard is likely to be of any assistance”.

[72] **Lord Griffiths** in that case at **page 50** of the Report stated *inter alia* as follows:

“The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament”.

[73] **Lord Browne-Wilkinson** at **page 67** of the Report stated *inter alia* as follows:

“ parliamentary material should only be introduced in the limited cases I have mentioned and where such material contain a clear indication from the minister of the mischief aimed at, or the nature of the cure intended by the legislation”.

[74] Again at **page 68** of the Report, **Lord Browne-Wilkinson** stated *inter alia* as follows:

“The purpose of looking at Hansard will not be to construe the words used by the minister but to give effect to the words used so long as they are clear”.

[75] At **page 536 of Bennion** *op cit* the learned author articulated certain rules which *“can be extracted as to the professional duty of legal advisers and advocates as a consequence of the decision in Pepper v Hart”*. The relevant rules are as follows:

“(a) In every case involving the construction of an enactment, there must be a search in Hansard. This is because it is rarely if ever possible to be sure, without full knowledge of the background, that the Pepper v Hart conditions are not satisfied.

(b)

(c)

(d)

(e) Practitioners need to know how to find and search parliamentary materials competently.

(f) Practitioners need to understand parliamentary legislative procedure in order to evaluate the significance of passages found and present them to the court. If counsel do not carry out adequate research, the court may do it for them”

[76] At page 530 Bennion *op cit* states *inter alia* as follows:

“Judges have often allowed Hansard to be cited without any apparent attempt to check that the Pepper V Hart conditions are satisfied or even when it is clear they are not satisfied”.

[77] In support of the author’s view at paragraph [76] above he cited *Restwick v Crickmore* [1994] 2 ALL E.R. 112 (CA). At page 117 Stuart-Smith L J stated *inter alia* as follows:

“For my part I do not think that there is any ambiguity in the subsection. Accordingly, I do not think it is necessary to invoke the doctrine in Pepper (Inspector of Taxes) v Hart [1993] 1 ALL E.R. 42, [1993] AC 593, which entitles the court to look at the debate in Parliament during the passage of the Bill”

(a) Section 11(1) of the Limitation Act

[78] Both Counsel in this case fundamentally disagree as to its true meaning. Mr. Symister states that if any limitation period is relevant it should relate to a period during which the Employee’s claim for unfair dismissal should be filed before the Labour Commissioner’s office.

[79] Ms. Corbin Lincoln however states in summary that the office of the Labour Commissioner is irrelevant. According to her, a six year limitation period

“Madam Speaker, I move the second reading of a Bill shortly entitled the Limitation Act, 1997.

Madam Speaker, this is a very technical Bill. It sets out the limitation for actions founded on tort, on contract; and matters dealing with land, enforcement of judgements, accounts, trusts, property. It deals with the whole gamut of actions before the Court and limitation of those actions.

Now, Madam Speaker, a statute of limitation merely bars a plaintiff’s remedy, but does not bar his cause of action. So, it simply means that if one waits too long to bring a matter to the Court, there is a cut-off point where the Court will say I will not assist you in this matter; you cannot bring this matter to the courts.”

[83] At **page 197** of the *Hansard* Report the Minister continued to state as follows:

“In Antigua and Barbuda we have not had any statute that we could point to, as they have in England where there was the 1939 Statue of Limitation. And between 1939 and 1980, they have consolidated their legislation into something they now call the Limitation Act, 1980. Now, in England they have had several commissions meeting on this whole question of limitation and what it should be. Not only that, they have developed case law relating to their legislation.

We have in this statue, Madam Speaker, kept very closely to the United Kingdom’s Limitation Act, 1980; and the advantage of that is that we do not want to reinvent the wheel. They have had many studies on limitations of actions and we are taking advantage of their studies. Not only that, Madam Speaker, but we will be able to

take advantage of the case law relating to limitation of actions, because our statutes will be on all fours with the United Kingdom. As the law now stands, Madam Speaker, we have to use concepts of reception of law to find out what the law on limitation of action is, in Antigua.”

- [84] The Minister continued to speak on the motion at **page 198** of the *Hansard* Report. He stated *inter alia* as follows:

“It sets out in detail, the technical aspects of the Limitation of Action and I think this will be – well we have needed it for a long time and the law is, particularly in dealing with matters before the courts, will now have an easy reference and will have the English case law at their beck and call.

Madam Speaker, I commend this law to the House as a technical Bill which is in keeping with the Limitation of Action 1980 (UK) Legislation, and I ask them to consider it quickly”.

- [85] At **page 210** of the *Hansard* Report the Minister stated *inter alia* as follows:

“Hon. Minister of Justice and Legal Affairs:

“Madam Speaker, when I started off I said that this Bill was, as it were, lawyers’ law. It is based closely, almost word for word from the Limitation Act, 1980 of the United Kingdom. And I said, we are doing that for the purposes of getting the case law”.”

[86] At **page 219** of *Hansard* it states as follows:

“Hon Minister of Justice and Legal Affairs;

“Madam Speaker, I beg to move that the Bill shortly entitled Limitation of Actions Act, 1997 be read a third time and passed”.

The motion was seconded by the hon. Member for St. Phillip’s (North).

The question was put and the motion carried.

The Bill was read a third time by the Clerk and passed accordingly.”

[87] It appears to me that the words of the Minister were very clear. According to the Minister the legislation ***“deals with the whole gamut of actions before the court and limitation of those actions”.***

[88] The Minister further stated that the legislation has ***“kept very closely to the United Kingdom’s Limitation Act, 1980; . . . so as to be able to take advantage of the case law relating to limitation of actions, because our statutes will be on all fours with the United Kingdom’s statutes”.***

[89] If the Limitation Act, No. 8 of 1997 is **“on all fours with”** and **“is based very closely, almost word for word from the Limitation Act 1980 of the United Kingdom”** then I would not only hope to (a) find a similar provision in the UK Limitation Act, 1980, but (b) that section must be able to be interpreted in accordance with Counsel for the Employer’s submission.

The Limitation Act 1980 (UK)

[90] The Limitation Act, 1980 was passed in the United Kingdom on November 13, 1980. Section 9 (1) of that Act is identical with section 11 (1) of the Antigua and Barbuda 1997 Act. That section states as follows:

exists to a period during which the Employee must file his claim for unfair dismissal before the Industrial Court.

- [80] In any event however, is the Limitation Act relevant for a determination of whether any period of limitation in this case exists? Ms. Corbin Lincoln states that the Act is relevant. Mr. Symister states in substance that it does not apply. These arguments are evenly balanced.

(b) What does Hansard state? Are the words of the Minister clear?

- [81] I have been able to obtain a copy of the Antigua and Barbuda House of Representatives Minutes of The Meeting held on Tuesday 25th February 1997 commencing at 3.25 p.m. with Madam Speaker in the Chair (the *Hansard Report*).

- [82] Mr. C. Roberts (now Sir Clare Roberts Q.C.) was the then Minister of Justice and Legal Affairs and Attorney General. At **page 196** of the *Hansard Report* it stated as follows:

“THE LIMITATION ACT, 1997

(Madam Speaker recognized the Hon. Minister of Justice and Legal Affairs.)

Hon. Minister of Justice and Legal Affairs:

“Thank you, Madam Speaker.

Madam Speaker, I move the suspension of Standing Order 49(2) to enable the Bill shortly entitled, The Limitation Act, to be read a second and third times.”

The motion was seconded by the hon. Member for St. Philip’s (North).

The question was put and the motion carried.

Hon Minister of Justice and Legal Affairs:

“(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the commencement of six years from the date on which the cause of action occurred”.

[91] The Limitation Act, 1980 UK contains no provision whatsoever which deals with a limitation period for the commencement of unfair dismissal matters.

[92] The period of limitation for the commencement of unfair dismissal matters in the United Kingdom as at November 13, 1980 when the Limitation Act (UK) was passed was contained in the Employment (Consolidation) Act 1978 (UK). This was passed on July 31, 1978. Section 67(2) of that legislation mandated a three month limitation period with a discretion conferred upon the industrial tribunal to extend it “as the tribunal considers reasonable”.

[93] The Employment Rights Act 1996 (UK) substantially repealed the Employment Protection (Consolidation) Act *op cit*. It was passed as Chapter 18 on May 22, 1996. Section 67 (2) of the former Act was replaced with section 111(2) of the 1996 Act. In summary the three month limitation period has been retained with a similar discretion to extend.

[94] **Ruth Sullivan, Associate Professor of Law, University of Ottawa and the author of *Driedger on the Construction of Statutes*, third edition, Butterworths, Toronto, 1994 states at page 290 *inter alia* as follows under the heading entitled “Statutes of other Jurisdictions”.**

“General principle. In interpreting legislation the courts often find it helpful to look at the enactments of other jurisdictions. It is standard

practice to consult the legislation of other provinces when interpreting provincial legislation Reference is made to the legislation of other Commonwealth jurisdictions”

[95] The learned author also stated as follows at **page 290**:

“Obviously, the statutes of different jurisdictions cannot be regarded as constituting a single enactment. However, along with international law, the statutes of different jurisdictions form part of the legal context in which statutes are enacted and operate. As the world becomes smaller and more interdependent, the legislation of other jurisdictions becomes an increasingly relevant context in which to read domestic legislation”.

[96] At **page 291** of the same work Professor Sullivan states *inter alia* as follows:

“Cross-jurisdictional comparison. Where two statutes dealing with the same subject or enactment to achieve the same purpose use similar or identical words, the courts may readily conclude that the words have the same meaning and effect. Conversely, where statutes that otherwise are similar use different words or adopt a different approach, this suggests that a different meaning or purpose is intended. Although there is no presumption that a legislature is bound by the drafting conventions and patterns of expression found in the legislation of another jurisdiction, the cross-jurisdictional comparison can still be instructive”.

[97] The learned author then at **page 291** of the same work made reference to **Morguard Properties Ltd. v City of Winnipeg (1983), 3 D.L.R. (4th) 1**

(S.C.C.). In this case the Supreme Court of Canada was required to determine the effect of legislation in Manitoba which provided that in assessing taxes for the years 1981 and 1982 “**the assessor shall assess lands at the same level of values as were used in assessing lands for the year 1980**”. The issue was whether the effect of the legislation was to freeze the assessments or the property rankings on which assessments were based.

[98] The 1971 Ontario legislation and the 1974 British Columbia legislation had frozen the actual assessments. The Court held that the effect of the 1980 legislation was to freeze the property rankings on which the assessments were based as opposed to the actual assessments.

[99] In arriving at its decision **Estey J.** who delivered the Court’s decision stated *inter alia* at **page 10** as follows:

“It is not without significance that the Legislature and the Executive of the Province of Manitoba, in preparing and enacting the 1980 Act, had before them the legislation of the other two provinces”.

[100] **Estey J.** stated in my opinion with some force at **page 13** of the judgment *inter alia* as follows:

“In more modern terminology the courts require that, in order to adversely affect a citizen’s right whether as a taxpayer or otherwise, the Legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced. This principle of construction becomes

even more important and more generally operative in modern times because the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizens are involved. The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in our history of parliamentary rule”.

[101] The Minister in his speech as reported in *Hansard* at **page 197** stated *inter alia* as follows:

“Not only that, Madam Speaker, but we will be able to take advantage of the case law relating to limitation of actions, because our statutes will be on all fours with the United Kingdom’s statutes”.

[102] It is of some significance that in June 1997 Parliament in Antigua and Barbuda in preparing and enacting the Limitation Act 1997 had before it the 1978, 1980 and 1996 legalisation of the United Kingdom which I made reference to at **paragraphs [90] to [93]** above.

[103] In this regard the United Kingdom had passed other legislation which created a special limitation period for the commencement of unfair dismissal matters. This is to be found in its employment legislation.

If reference to Hansard is permissible what is the true construction?

[104] In my judgment, I am very clear that the parliamentary history in Antigua and Barbuda shows that the Limitation Act, 1997 was passed on the basis that (a) the Act was to be read in conformity with the Limitation Act 1980 (UK) and (b) **section 11(1) of the Act created no special limitation period for the commencement of unfair dismissal matters in Antigua and Barbuda.**

[105] The Antigua & Barbuda model of an Industrial Court is a creature of the English Employment Tribunal. This model involves the hearing of matters by members of the court who, like their English counterparts are generally lay members who are endowed with considerable qualifications, expertise and/or experience.

[106] Moreover, if Parliament in Antigua and Barbuda intended to abridge an employee's new substantial right not to be unfairly dismissed, a right not previously known to the common law as stated in **Moreguard** *op cit* at page 13, ***"the Legislature must do so expressly". The court "must look for express language in the statute before concluding that those rights have been reduced"***.

- see Estey J. in **Moreguard** *op cit* at page 13.

[107] (a) In **Chief Adjudication Officer v Foster** [1993] 1 ALL E.R. 705 (JL) Lord Bridge stated at page 717 *inter alia* as follows:

"Certainly in this case, if it had been possible to take account of the parliamentary material at the outset, it would have been clear that it refuted the appellant's contention and there would probably never

*have been any appeal to the Commissioner, let alone beyond him . . .
 . .But this encourages the hope that as time passes the effect of the
 new rule will be to prevent or to curtail much litigation relating to
 ambiguous statutory provisions which would otherwise be fought
 through the courts”.*

(b) I adopt **Lord Bridge’s** words as being appropriate to the facts of this case.

The second issue

Whether in the circumstances of this case the work which Mr. Abraham was last employed to perform as at December 12, 2003 had ceased or substantially diminished, to result in a redundancy?

[108] The Employee’s Witness Statement was admitted by Consent of both parties. It was marked “DA-2”.

The Employee’s evidence

[109] When the Employee was informed of his dismissal, the two other employees who worked with him were not terminated. These were Mr. David McCoy and Mr. William Duplesis. Mr. McCoy was the assistant wine steward. Mr. Duplesis was employed as the wine waiter. When the Employee was unable to perform his duties as wine steward for whatever reason, Mr. McCoy executed those duties.

[110] Mr. Abraham stated that Mr. McCoy became assistant wine steward after he Mr. Abraham became wine steward on January 09, 1987. Mr. Duplesis

commenced his employment with the hotel sometime after the Employee became employed from October 02, 1981.

[111] According to Mr. Abraham, Hawksbill's change to being an all inclusive hotel did not mean that the sale of wines to the guests by the hotel had ceased.

[112] Mr. Abraham stated that he was paid a weekly wage of about EC\$327.00 plus service charge. Between November and April in any year being the winter season, he stated that he was paid a net monthly salary of between EC\$4,000.00 to EC\$6,000.00. In the summer season according to him he received a net monthly salary of between EC\$2,000.00 and EC\$2,250.00. His letter of dismissal stated that the calculation of his severance payment was based upon a daily rate of EC\$65.50. No evidence was presented to substantiate the payment of the other claims for earnings.

[113] In answer to Ms. Fidela Corbin Lincoln Attorney-at-Law for the Employer, the Employee stated that **he was first employed as Head Bartender on October 02, 1981**. On January 09, 1987 he was promoted to the position of Wine Steward. When he became wine steward the work which he performed changed. His tasks as head bartender included being responsible for the bar stock, the workers' schedule, making sure that the workers performed their duties and to ensure that there was an adequate stock of glasses.

[114] As wine steward his salary remained the same. In this capacity he discharged the duties outlined at **paragraphs [4] to [6]** above. He was the sole wine steward.

[115] In further answer to counsel, Mr. Abraham stated that **Mr. McCoy and Mr. Duplesis were not bartenders**. He did not agree with learned Counsel that as the hotel was becoming all-inclusive that there would have been a need to sell less wines to the guests.

[116] In an all-inclusive package he could not state whether or not his salary or the sale of wines would have increased or decreased.

[117] In answer to the Court, the Employee stated that his hours of work were from 3.00 pm to 11.00 pm. He is now 57 years of age.

The Employer's evidence

[118] Hyacinth Charles resides at Bellevue Estate in Antigua and Barbuda. She is employed as the acting General Manager with the Employer. Her Witness Statement and Supplemental Witness Statement were admitted by consent of both parties. They were marked **"HC-1"** and **"HC-2"** respectively.

[119] Ms. Charles stated that she knew Mr. McCoy and Mr. Duplesis were both employed **as bar waiters with the Employer. Both of them assisted Mr. Abraham with the sale of wines. However, their substantive duties were bar waiters.**

[120] According to Ms. Charles, the custom was that at the end of each month when the wine sales were tallied by the accountant, the wine commission was remitted to Mr. Abraham. This sum was distributed to the other persons

who sold wines. These included Mr. McCoy, Mr. Duplesis and others who worked inside the bar.

[121] Prior to her appointment as the hotel's acting General Manager Ms. Charles was employed as the hotel's Accountant. In December 2003 she was so employed. Ms. Charles produced a document which was entitled "Wine Sales" for the period January 2003 to December 2009. Ms. Charles stated that it was obtained from the hotel's records. It was admitted as "**HC-3**".

[122] According to Ms. Charles, "**HC-3**" shows that prior to the hotel becoming all inclusive, the wine steward sold wines. In December 2003 the wine sales would have increased due to the New Year celebration activities. The hotel became all inclusive in December 2003.

[123] In answer to Mr. Leon Symister Attorney-at-Law for the Employee, Ms. Charles stated that the sale of wines do take place at the hotel but only on request.

[124] According to Ms. Charles the wine list is still available at the hotel from which the guests have a choice to purchase wines. This wine list is available at the bar. The preparation of a wine stock and the glasses are done by a member of the bar staff. The promotion of wine is not done.

[125] Mr. McCoy and Mr. Duplesis still sell wines. They receive commission from the sales of these wines. All of the bar waiters also sell wines if necessary. They also receive commission.

The Employee's submissions

[126] Mr. Symister's Written Submissions dated December 19, 2012 were filed one day later. Learned Counsel submits *inter alia* as follows:

"The central question for the Court to determine here is whether a redundancy situation exists.

There is no dispute that Hawksbill Hotel on December 20, 2003 went "all inclusive". Additionally, there is no question that as a result of going "all inclusive" that the sale of wines decreased.

The heart of the inquiry must focus on whether the functions performed by Mr. Abraham ceased to exist.

The Antigua and Barbuda Labour Code Cap 27 defines redundancy as:

"redundancy" means a situation in which, by virtue of a 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, tasks which a person was last employed to perform no longer exists,"

(The emphasis is Counsel's)

More than three decades ago in U.S. Naval Facility v Edison Lewis and Clive Ambrose (Industrial Court Appeal No. 2 of 1981) interpreting redundancy as provided in C3 Chief Justice Sir Neville Peterkin held "that a prerequisite to a redundancy situation is the non-existence of the tasks..."

[127] Learned Counsel also submitted that *“wine sales between 2004 and 2009 are irrelevant because (the Employee) was terminated in 2003”*.

[128] Mr. Symister further submits that *“all of the task(s) (which the Employee) performed are still existing today”*.

[129] As a consequence of the matters contained at **paragraphs [126] to [128]** above, Mr. Symister submits that no redundancy exists.

[130] I wrote a decision entitled **Natasha Kirwan and Jumby Bay Island Company Limited, Ref. No. 4 of 2010**. It was heard on April 11, 2011. I delivered it on June 11, 2011. I held for the Employer. In that case the identical definition of the term ‘redundancy’ with the same emphasis was made by another Counsel. In addition the same submission with respect to the cessation of the employee’s task was also made by another Attorney-at-Law in that case.

[131] At **paragraphs [35] and [39]** of that judgment I stated my reasons why Counsel’s definition of the term ‘redundancy’ was incorrect.

[132] The former definition of the term ‘redundancy’ located at Section C3 of the Labour Code was amended by Section 7 of No. 16 of 1998 to read as stated at **paragraph [139]** of this judgment.

The Employer's submissions

[133] Ms. Fidela CorbinLincoln Attorney-at-Law for the Employer submitted that the sale of wines which increased to \$12,306.58 in December 2003 from \$11,993.66 in November 2003 was due to the New Year celebration activities. According to Counsel, the real effect of the decision to become all inclusive in wine sales is reflected in the significant decline in wine sales from January 2004 onwards relative to the same periods in 2003 as shown on the wine sales summary.

[134] In the circumstances of this case Ms. Corbin Lincoln submits that *“based on the Employer’s decision to become all-inclusive to adapt to changing market trends, the work which the Employee was left employed to do, which.... was primarily to sell wines, substantially diminished”*. Accordingly, a redundancy situation existed.

[135] Learned Counsel for the Employer also submitted *“that the factual basis for the redundancy existed in that the ‘Cause’ was the change of the hotel’s operations to an all inclusive resort the ‘effect’ of which was that house wines were served, there was a reduced need to sell or promote the sale of wines to guests and consequently the work which the Employee was last employed to do substantially diminished.”*.

[136] According to Ms. Corbin Lincoln *“there is evidence to show that there was a factual basis upon which the Employer based its decision to terminate the Employee for redundancy”*. *Sundry Workers v Kings Casino Civil App. No. 28 of 2001* was cited by Counsel in support of her submission.

[137] Section 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 such employee without just cause”.

Section C58 (1) of the Labour Code states 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.”

[138] Section C58 (2) of the Labour Code provides as follows:

“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.”

[139] The term “**redundancy**” is defined at Section 3 as amended by the 1998 amendment to the Labour Code in the following manner:

“redundancy” means 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.”

[140] In **Civil Appeal No. 28 of 2001 Sundry Workers and King’s Casino Limited, Byron C.J.** (as he then was) stated as follows:

“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.....This brings me to point out, however, that the existence of a cause..... 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.....”

Discussion

[141] In *Natasha Kirwan op cit* I was required to decide whether certain matters which took place after the dismissal could be taken into account in favour of the employee. At **paragraphs [19] to [21]** I stated as follows:

“[19] The Court’s responsibility is to decide whether or not on March 01, 2009, a situation of redundancy existed at the Employer’s place of business. No circumstance which took place after the date of dismissal shall be taken into consideration by the Court.

[20] Two decisions are appropriate to illustrate these points made at 19 above. The first is **Portsea Island Mutual Co-Operative Society Limited v Rees [1980] I. C. R. (E.A.T) 261**. In that case **Brown J.** stated at **pages 262 and 263** *inter alia* as follows:

*“Now it has been long established, and one has only to turn to the two cases so often cited before us, **W. Davis and Sons Limited v Atkins [1976] I. C. R. 196**, and **Ferodo Limited v Barnes [1976] I. C. R. 439**, to see that what an industrial tribunal has to do is to look at the dismissing representative of the employers upon **the date of dismissal** and to have regard to his knowledge of his reasonable belief, or both, at **the time of the act** of dismissal.”*

[21] The second case is **Linda Richardson and Deep Bay Development Company Limited Ref. No. 7 of 1989**. In that case Mr. Justice H. S. R Moe at **page 5** of the Report citing a passage from **Polkey v A. E. Dayton Services Limited [1987] IRLR 503** stated *inter alia* as follows:

“..... the only test of fairness of a dismissal is the reasonableness of the employer’s decision to dismiss judged at the time when the dismissal takes effect”.

[142] On what basis for example can the Employer in this case take into consideration matters which took place between 2004 and 2009? This is a significant period subsequent to the Employee’s dismissal in December 2003.

[143] In the textbook entitled ‘**Selwyn’s Law of Employment 17th edition**’ authored by **Astra Ermir, Oxford University Press UK, 2012**, the learned author stated at paragraph 17.79 *inter alia* as follows:

“The point in time at which the reasonableness of the employer’s decision to dismiss is to be tested is when the employment comes to an end, not when the decision is taken, nor when the notice to terminate is given” (Stacey v Babcock Power Ltd. [1986] ICR 221 (EAT).

[144] In the **Stacey** case (*op cit*) **Waite J. at page 224** in delivering the judgment of the court after stating the question *“At what point of time does the fairness of the dismissal fall to be assessed”?* (See **page 224**) continued to make the following observations at **pages 225 and 226**:

“The principal debate in this appeal, however, has turned upon an even more fundamental issue than that. When exactly does the curtain.....come down? Does it drop at the moment when the employee receives his notice of dismissal, or, if the employment contract continues beyond that moment, at some later, and if so what,

point? In cases of dismissal without notice - or of dismissal with pay in lieu of notice – there is never any difficulty in fixing the time of the curtain’s fall. Everything is instantaneous, and the entire dismissal process is completed in one split second, with the employment contract coming to an end at the very moment when the relevant words of dismissal are communicated to the employee. Similarly, in cases where a short period of notice is given – a matter perhaps of only a few days or just one week – there is seldom any purpose in differentiating between the moment when the notice is given and when it expires, for the trajectory between the two events is so brief that it is natural, and in ordinary speech has become habitual, to talk interchangeably of the two events – notice and dismissal – as though they were one and the same thing.”

[145] In the circumstances of this case I am constrained to take into consideration the events which occurred at the hotel throughout the period of December 12, 2003 to December 19, 2003. I therefore agree with Mr. Symister’s submission that wine sales between 2004 and 2009 are irrelevant for the purpose of deciding the first issue.

[146] Ms. Charles did state in her evidence in chief that wine sales do increase a bit in December because of New Year celebrations.

[147] Ms. Charles in answer to Mr. Symister stated that she could not recall what was the occupancy level of the hotel in December 2003. In November 2003 there would have been a significant amount of wines which was sold by the hotel. The occupancy level for November is normally very good. It is a

period when hotel receives many guests who repeatedly return to the hotel. In the middle of December the occupancy level is normally reduced.

[148] The Employer's evidence as presented in HC-3 for the period January to December 2003 shows that there was a steady increase in wine sales in general terms from June 2003 to December 2003. No evidence was presented by the Employer for the period prior to the year 2003 for a proper comparison to have been made to determine whether there had been a substantial diminution in wine sales.

[149] In the circumstances of this case I find that there was not any reduction in the sales of wine for the month of December 2003. Accordingly, I hold that the work which Mr. Abraham was last employed to perform as at December 19, 2003 had neither ceased nor substantially diminished. No redundancy existed on December 19, 2003.

The third issue

Did the Employer act reasonably or unreasonably in its dismissal of the Employee?

The evidence

[150] The Employee stated that prior to his being away on holiday he was not informed that the hotel would become all inclusive. He obtained no warning from the hotel of its plan to make his position redundant. No one from the hotel discussed with him that he would no longer be employed before he was dismissed.

- [151] In the Employee's Witness Statement at **paragraph [7]** he stated that two employees who worked with him were junior to him. They *"were kept on to perform the identical duties that were carried on by (him). When (he) brought this to the attention of the Manager he told (him) that was the hotel's business"*.
- [152] According to the Employee at **paragraph [8]** of his Witness Statement *"There was no difference between the functions of the employees who replaced (him) and what (he) used to do."*
- [153] In answer to Mr. Symister, Ms. Charles stated that she was not aware that Mr. Abraham was offered alternative employment. According to her she *"was not the person who took the decision to make Mr. Abraham redundant"*.
- [154] Ms. Charles in further answer to Mr. Symister stated that because of the change to an all inclusive operation, less staff was required. According to her *"To employ Mr. Abraham, someone else would have had to be dismissed. Mr. McCoy was employed before Mr. Abraham. We would not have released Mr. Duplesis to keep on Mr. Abraham"*. The current head bartender performs the duties which were formerly done by the Wine Steward.
- [155] In answer to Counsel for the Employer Ms. Charles stated that she gave evidence as the Employer's representative. She was aware of the decision taken to dismiss the Employee and why the decision was taken. The decision was made to terminate Mr. Abraham and there was no need to re-

employ a wine steward under the all-inclusive arrangement. No discussion took place between her and Mr. Abraham about the redundancy. She did not know whether any discussion took place between anyone else at Hawksbill and Mr. Abraham about this redundancy.

[156] According to Ms. Charles, *“the Employer was unable to offer the Employee alternative employment due to its occupancy and staff levels at the time”* of dismissal.

- see paragraph [3] (g) of her Supplemental Witness Statement.

The Employee’s submissions

[157] Mr. Symister submits that Mr. Abraham was employed by the hotel for more than 22 years prior to his dismissal. He was never given any warning of his impending dismissal. In these circumstances the Employer did not act reasonably in its dismissal of the Employee. Counsel cited **British Leyland (UK) Ltd. v Swift** [1981] IRLR 91.

The Employer’s submissions

[158] Learned Counsel for the Employer made the following submissions:

- (i) The Employer considered the Employee for alternative employment but was unable to offer him any other employment.
- (ii) The Employer gave the Employee written notice of termination.
- (iii) The Employer paid the Employee EC\$26,953.25 upon termination.

[159] The Employer's Counsel cited **British Leyland (UK) Ltd. v Swift (op cit) and Iceland Frozen Foods v Jones [1982] IRLR 439** in support of her submissions at **paragraph [158]** above. According to Counsel for the Employer, the Employer acted reasonably in its dismissal of the Employer.

The principle of the reasonable employer

[160] Section 57 (3) of the former Employment (Protection) Consolidation Act, 1978 (UK) was replaced by Section 98 (4) of the Employment Rights Act, 1996 (UK). Section 57 (3) or Section 98 (4) is equivalent to Section C58 (2) of the Labour Code.

[161] I agree with Counsel for the Employer that the correct approach for a tribunal to adopt when considering the test of reasonableness of the Employer's conduct was articulated by **Mr. Justice Browne-Wilkinson in the Iceland Frozen Foods Ltd case. At page 442 of the report Mr. Justice Browne-Wilkinson** stated *inter alia* as follows:

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by s.57(3) of the 1978 Act is as follows:

(1) the starting point should always be the words of s.57(3) themselves;

(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they

(the member of the Industrial Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another.

(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

[162] In addition **Judge Peter Clark** stated *inter alia* in **Langston v Cranfield University** [1998] 1RLR 172 at paragraph [30] on page 175 as follows:

"Where an applicant complains of unfair dismissal by reason of redundancy we think it is implicit in that claim, absent 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".

[163] (i) For illustrative purposes only, the Natasha Kirwan case *op cit* involved matters of dismissal of an employee due to redundancy. The employer in that case was represented by Counsel for the Employer in this case. In that case clear documentary evidence was presented in the Witness Statement of

the Employer's Services Manager. That evidence included (a) a full list of a pool of all the relevant employees; (b) the commencement date of employment of each relevant employee; (c) the department and position held by each relevant employee; (d) a reference to the employment record and staff performance of each relevant employee; (e) how the selection process of the employee in that case was determined.

(ii) In addition, alternative working structures were implemented prior to dismissal. As well, the principle of "last in first out" was applied.

(iii) Of course I am not bound by the decision in that case. I am required to examine the facts of this case to determine whether or not the Employer acted reasonably or unreasonably in its dismissal of the Employee.

(a) The selection process

The law

[164] In **Capita Hartshead Ltd. v Byard [2012] ICR 1256 (EAT)** the Employment Appeal Tribunal reiterated that Section 98 (4) of the Employment Rights Act (section 85 (2) of the Labour Code) involves the principle of reasonableness which was put forward by **Mr. Justice Browne-Wilkinson** in the **Iceland Frozen Foods case** op cit.

-see paragraph [162] above.

[165] After outlining the principle of reasonableness **Silber J** who wrote the decision in the **Capita case** op cit stated inter alia at **paragraph [21]** on **page 1264** as follows:

“.....this principle applies to the approach to be adopted by an employment tribunal to the manner of the selection of a pool from which employees are to be considered for redundancy.”

[166] At **paragraph [31]** on **pages 1266 and 1267** of the **Capita case** op cit, after stating (a) the principle of the reasonable employer and (b) the reasonable response test is applicable to the pool at **paragraph [165] Silber J.** above continued to state as follows at (c) to (e):

*“(c) There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem: per **Mummery J in Taymech Ltd v Ryan 15 November 1994.**”*

*(d) The employment tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has **“genuinely applied”** his mind to the issue of who should be in the pool for consideration for redundancy.*

(e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.”

Discussion

[167] Ms. Charles in her evidence stated that she *“was not the person who took the decision to make Mr. Abraham redundant”*. However, in her reply to Counsel for the Employer she stated that she was *“aware of what the decision was and why the decision was made to terminate Mr. Abraham and there was no need to employ a wine steward under the all inclusive arrangement”*.

[168] Ms. Charles also stated that *“To employ Mr. Abraham someone else would have had to be dismissed. Mr. McCoy was employed before Mr. Abraham”*.

[169] The matter for me to decide is not whether there was a need to employ a wine steward under the all inclusive arrangement. I am required to consider whether the Employer **“genuinely applied”** its mind to the issue of who should be in the pool for consideration for redundancy.

[170] The Employer has not presented any evidence of the precise number of employees in this case who formed a pool of employees to show on what basis Mr. Abraham was chosen from that pool to be made redundant. This is a normal requirement in a matter of this nature.

[171] However there is an abundance of evidence in this case from which I do hold that a pool of employees did exist from which it was the Employer’s duty to show how the decision was made to choose Mr. Abraham for the purposes of redundancy.

[172] In summary, the evidence is that Mr. Abraham was first employed as head bartender on October 02, 1981. There was a close relationship between the bartenders and that of a wine steward. Ms. Charles stated that the current head bartender performs the duties of the wine steward which Mr. Abraham formerly performed. According to Ms. Charles, Mr. McCoy and Mr. Duplesis still sell wines. All of the other bar waiters also sell wines if necessary.

[173] No evidence was presented by the Employer to show that it **“genuinely applied”** itself to the establishment of a pool of employees which clearly existed for consideration for redundancy. This pool would have comprised Mr. Duplesis, Mr. McCoy and the other bartenders.

[174] It is not sufficient to state, as Ms. Charles testified, that **“To employ Mr. Abraham someone else would have had to be dismissed”**. This might be true. However the question to decide is whether taking into consideration the relevant facts, the Employer’s decision falls within the range of conduct which a reasonable employer could have adopted.

[175] Ms. Charles did state that Mr. McCoy was employed with the hotel before Mr. Abraham. The inference to be drawn from this evidence is that Mr. Duplesis may have commenced employment after Mr. Abraham. Mr. Abraham did state that Mr. Duplesis commenced his employment, with the hotel after him.

[176] In this case, I hold that the Employer failed to (a) select a correct pool of employees or any pool for consideration of redundancy and (b) properly select Mr. Abraham from that pool.

(b) The matter of consultation

[177] In **Mugford v Midland Bank plc** [1997] 1RLR 208, 211 Judge Peter **Clark** summarised the position with regard to consultation as follows:

“(1) Where no consultation about redundancy has taken place either with 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)

(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”.

[178] No evidence was presented by the Employer to show that it put forward any of the matters contained in the undated document entitled “**HC-3**” to the Employee before he was dismissed by letter dated December 12, 2003.

[179] It is good industrial relations practice for a reasonable employer to discuss and consult with an employee or his trade union representative the potential negative impact which a great operational change in the manner how its business is conducted, may have on his future employment.

[180] A reasonable employer may be able to clearly demonstrate to either party that the change in business operation is desirable in the best economic interest of the employer. This event may result in the need for the employer to make the employee's position properly redundant. In this circumstance the employee may be dismissed fairly on grounds of redundancy. However, the information must be presented by the employer to either party before a dismissal is fairly effected. This did not occur in this case.

[181] I accept Ms. Charles' evidence that she had no consultation with Mr. Abraham with regard to his imminent dismissal for redundancy. I also accept Mr. Abraham's evidence that the Employer did not engage with him prior to his being dismissed relative to his dismissal for redundancy.

[182] The evidence with regard to consultation is contained at **paragraphs [150] and [155]** of this judgment. Simply put the Employer presented no evidence that any discussion or consultation occurred between itself and the Employee.

(c) The matter of alternative employment

[183] The matter of alternative employment is addressed by Ms. Charles at **paragraph [3] (g)** of her Supplemental Witness Statement. It states as follows:

“(g) The Employer was unable to offer the Employee alternative employment due to its occupancy and staff levels at the time”.

[184] Neither the matter of the hotel's occupancy nor its staff levels were referred to in the letter of dismissal.

[185] The evidence of Ms. Charles was that the occupancy level for November is normally very good. In December the occupancy level “***normally drops in mid-December. It gets busy about 22 December***”. This is about the same time as the effective date of the Employee’s dismissal.

[186] In his evidence Mr. Abraham stated that he was not offered any position of alternative employment. According to him if the hotel had offered him “**another position**” he would have accepted it.

[187] In her evidence Ms. Charles stated that “***because of the change to all inclusive less staff is required***”.

[188] An offer of alternative employment in this case would have required the Employer to have his mind “**genuinely applied**” to a selection of a relevant pool of employees . This did not occur for the Employer to address this matter.

Conclusion

[189] In all of the circumstances of this case I hold that the decision to dismiss the Employee did not fall within the band of reasonable responses which a reasonable employer might have adopted. It was not therefore reasonable in this case for the Employer to dismiss the Employee. The Employee was unfairly dismissed.

The fourth issue

If the Employee was unfairly dismissed what is the measure of damages which is due to him?

[190] In the event that the Court holds that an employee has been unfairly dismissed, the employee is entitled to certain awards under specific established headings. The awards to which Mr. Abraham are entitled are as follows:

(a) Basic award

This award is similar to severance pay. The Employee was weekly paid. He earned EC\$65.50 per day plus a commission of EC\$164.56 per month or EC\$8.23 per day - see “HC-3”. This amounts to EC\$73.73 x 394 or EC\$29,049.62

(b) Immediate Loss

No clear evidence was stated by the Employee of the efforts which he made to obtain alternative employment. He did commence painting in 2004. Given his work as a wine steward I award three (3) months payment under this heading. This amounts to EC\$1,474.60 x 3 or EC\$4,423.80

(c) Manner of dismissal

No award is made under this heading.

(d) Future Loss

I make no award under this heading.

The fifth issue

Do any exceptional reasons exist in this case for an award of costs to be made?

[191] The limitation question to be decided in this case was of some significance. This is an exceptional reason which makes it proper to award costs to the Employee in accordance with Section 10 (2) of the Industrial Court Act.

[192] This matter however was about a small money award, having regard to the lack of evidence to prove the Employee's additional monthly earnings.

[193] In all of the circumstances of this case I award the Employee costs in the sum of EC\$5,000.00.

[194] The Employer shall pay to the Employee EC\$6,520.17 (EC\$29,049.62 – EC\$26,953.25 + EC\$4,423.80) and his costs of EC\$5,000.00 being a total of EC\$11,520.17 on or before June 30, 2013.

The need to amend

[195] In **British Building Appliances Ltd. v Dedman [1973] I.C.R. 82** the Court drew the attention (of those who are concerned with future amendment of the (then) Industrial Relations Act 1971 to the fact that the tribunal's powers to extend the time limit) for initiating proceedings in relation to an alleged unfair dismissal are extremely limited.

[196] (a) **Sir John Donaldson** in delivering the judgment of the Court continued at **page 85** to state *inter alia* as follows:

“It is not for us to amend Acts of Parliament or even to say that they should be amended. Our function is to draw the facts to the attention of those who are responsible for amendment, in order that they may form their own judgment as to whether some amendment is desirable.”.

(b) I fully agree with Sir John Donaldson’s words. They are appropriate to the facts of this case.

[197] I am deeply indebted to Messrs Thomas and Aymer for their considerable contribution to the final preparation of this judgment. As usual, they are a credit to this Court.

Dated the 2nd day of May 2013.


PHILIP A. PILGRIM
President

I agree


DR. HAYDEN THOMAS
Member

I also agree


SAMUEL R. AYMER
Member