

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 66 OF 2015



BETWEEN:

ANTIGUA AND BARBUDA WORKERS' UNION

Employee

and

CABLE AND WIRELESS (ANTIGUA AND BARBUDA) LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel R. Aymer

Member

The Hon. Dr. Hayden Thomas

Member

The Hon. St. Lawrence de Freitas

Member

Appearances:

Mr. Justin Simon QC and Mr. Kwame Simon of Chancellor Chambers for the Employee

Mr. Roger Forde QC and Ms. Andrea Smithen of Hill & Hill for the Employer

2016: March 2, 3

May 24

JUDGMENT

Brown, P:

Background

1. The Employer was incorporated in Antigua and Barbuda as a wholly owned subsidiary of **Cable & Wireless Communication Plc (CWC)**. It provides Internet, mobile, and wireless communication services along with its retail business under the brand or trade names "*Cable & Wireless*" and "*Lime*"
2. **CWC** was incorporated in the United Kingdom as a full-service telecommunications company. It carries on business through subsidiary companies, including the Employer in the Caribbean and Latin America providing mobile, fixed, broadband and TV services.

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2. **CWC** was incorporated in the United Kingdom as a full-service telecommunications company. It carries on business through subsidiary companies, including the Employer in the Caribbean and Latin America providing mobile, fixed, broadband and TV services.

3. **Antigua & Barbuda Workers Union (the Union)** is the bargaining unit for both management and line staff of the Employer. It is recognized by the Employer as such under successive collective agreements.
4. **Columbus International Inc. (Columbus)**, is an international business corporation incorporated in Barbados and operates as a diversified communications company in 42 countries throughout the Caribbean and Latin America regions. Its core business is providing cable television services, digital video, high speed internet access, digital telephone and retail corporate data services.
5. **Kelcom International (Antigua and Barbuda) Ltd., (Kelcom)**, was incorporated in Antigua and Barbuda as a wholly-owned subsidiary of Columbus and operates under the “Flow” brand.
6. On March 31, 2015 **CWC** acquired the 100% shares in Columbus, and thereupon became the parent company of the Employer, Columbus and Kelcom with vested interests in their operations.
7. This Reference was filed by the Union on behalf of 13 employees employed by the Employer as “retail staff” to carry on its retail business.

Sequence of Events

8. By letter dated November 6, 2014 CWC informed the Union of its signing of an agreement to acquire Columbus with a view to significantly accelerating its growth strategy, provide the best services in the region, and strengthen its position against competitors. The full text of the letter reads as follows:

[CWC LETTERHEAD]

*“David Massiah
Antigua and Barbuda Workers’ Union*

...

06 November 2014

Dear David Massiah,

Proposed acquisition of Columbus Communications (“Columbus”) by Cable & Wireless Communications Plc (“CWC”)

Today, 6 November 2014, CWC announced that it has signed an agreement for the proposed acquisition of Columbus. The proposed merger will enable us to significantly accelerate our growth strategy,

help us to provide the best service in the region, and strengthen our position against our competitors.

The proposed deal will also accelerate our ambition to be #1 for Customer Service through a strengthened set of assets and capabilities. We plan to deliver enhanced benefits of a more comprehensive portfolio of product offerings across more geographies that will enable our customers to better grow their businesses.

The combined strengths of both companies will advance our leading quad play service, our delivery of a converged mobile, fixed line, and TV services that will give them greater value. Mobile users will experience improved network reliability and faster data speeds through our next generation fibre networks and superior TV content.

You may already know that Columbus is a privately held and diversified cable and telecom services company that operates in the Caribbean and Latin America. Through its "Flow" brand, Columbus offers digital cable television, high-speed broadband and digital telephony in nine countries in the region. It has a strong portfolio of offerings through its Columbus Business Solutions and Columbus Networks divisions, including connectivity, managed networking, IT solutions, cloud services and wholesale carrier services. I am confident that the combined business can become a world-class company in the region, and it will make us stronger, faster and smarter.

As we transition into our new company, we will be looking to forge a more strategic and flexible partnership with you, our Union Partners. We will need to create new business models and ways of working to remain competitive, serve our customers and create a new culture that will unlock the potential of our employees and make us one of the Great Places to Work. We will keep you updated as we progress through the regulatory approvals.

*Regards,
Jacqueline Floro Forde- Group HR Director"*

9. On March 31, 2015 CWC acquired all the shares of Columbus.
10. By a letter dated April 1, 2015 the Employer provided the Union with an update on the progress of the acquisition and the then proposed merger and integration of CWC and Columbus into a single hybrid business. The full text of that letter is as follows:

[EMPLOYER'S LETTERHEAD]

1st April 2015

*Mr. David Massiah
General Secretary
Antigua Workers' Union*

...

Dear Mr. Massiah,

***UPDATE: Acquisition/ Merger of Cable & Wireless Communications
and Columbus Communications***

Since the announcement on November 6th of our proposed merger, and our last formal correspondence, subsequent updates have been largely informal, however, as a valued partner, we would like to officially inform you of the progress around our merger activities and the plans we have for our combined business (NewCo).

Our need to comply with Government and regulatory policies did not place us in a position to share certain details prior to this correspondence. As such, we do hope you will appreciate the constraints placed upon us in our formal communications with you, until now.

Obtaining approval is the first step in this transformative process for CWC and Columbus and we are pleased to report that we have now met the applicable regulatory requirements in most markets where we operate and we continue to work with regulatory bodies in markets where we have yet to satisfy the applicable requirements.

The team is now focused on building and unveiling a hybrid business that combines the best of both CWC and Columbus, while delivering maximum value and service excellence to our customers, giving significant value to shareholders, and offering an array of exciting opportunities for employees.

Over the next couple of months it will be business as usual and we still have a long way to go before the transition is completely finalized. This will not be a quick or easy process.

The first phase will take us several months to launch as one business and then close to 18 months to fully integrate our two companies. The combined business will take a more proactive role in aiding national development on all levels and supporting the growth and

well-being of the communities it serves. Through our combined strengths we will accelerate delivery of technologically advanced products, which we are confident will contribute to economic growth, both nationally and regionally.

We remain excited about the future and we are firmly committed to delivering on our promises to our customers and employees. As our union partners, we ask for your continued patience and support as we work through the planning process.

We will provide you with monthly updates going forward and remain available to meet with you at mutually convenient time to discuss any questions or concerns from you and/or your members.

Yours sincerely,

.....
Davidson Charles
General Manager, Antigua

11. By letters dated August 19, 2015, written on the Employer's letterhead but signed by Joshua Stewart as Country Manager of CWC, CWC informed the Union of its preliminary identification of positions in the management and non-management sectors that would be made redundant, including 14 in the Employer's Retail Store Department. The Union was required to respond by August 21, 2015. The full text of that letter relating to the non-management sector is as follows:

[EMPLOYER'S LETTERHEAD]

"August 19, 2015

Antigua and Barbuda Workers Union (ABWU)

.....

Attention: Chester Hughes

Dear Mr. Hughes:

Re: Union Consultation- Cable & Wireless Communications
("CWC")

We write further to our meetings on June 3 and July 30, 2015. During our last meeting we scheduled a follow-up meeting for August 18, 2015, and although we had intended to provide you with an outline of the new corporate structure and likely redundancies impacting your

membership prior to our meeting, this information was not available sufficiently in advance to communicate it prior to our meeting.

We arrived for our meeting yesterday to share with you the new corporate structure and to identify the likely redundancies impacting your membership but were disappointed in your decision not to attend. However, in an effort to move the consultation process forward we are writing to outline the information which we had intended to share with you yesterday.

We have completed our review of the structure for the business, including a preliminary identification of redundant positions. As a result of this review we have identified the following likely redundancies which will be created as a result of the integration of CWC and Columbus Communications Inc. ("Columbus").

Please note that the Current State only includes individuals presently employed with CWC and represented by ABWU. Future State is the total number of future roles for both CWC and CII. Potential Impact identifies the total likely redundancies impacting both CWC and CII, while the Comment column outlines the reason for the change.

Non-Management

Function	Current State	Future State	Potential Impact	Comment
Retail Stores	14	14	8	Overlapping roles and reduction in roles
Marketing	1	1	1	Existing roles being declared redundant and replaced by new roles
B2B	8	6	2	Redundancy of existing roles

We are requesting that you review the identified redundancies and provide your questions, concerns and other feedback prior to close of business on August 21, 2015.

Although there will be redundancies created as a result of the integration of CWC and Columbus, we are seeking your input in order to minimize the adverse effects on impacted employees as much as possible. We note that redundancies were only identified when absolutely necessary. It is our intention to engage a rigorous, fair and transparent process for selecting and retaining the best people for the jobs as we shared with you during our meeting of July 30, 2015.

We are committed to moving forward with the integration of CWC and Columbus in an expeditious manner in order to reduce the level of anxiety that is often created by such mergers. As such, we remain committed to time meeting the frames previously communicated to you as follows:

- *Meet with employees to further discuss and explain the new organization structure, redundancies, selection process, rational and justification for change- the week of August 24*
- *Candidate selection process to begin no later than August 31*
- *Commence and complete the separation process of impacted employees between September 21-30*

As we communicated to you during our last meeting, although there will be redundancies created as a result of combining CWC and Columbus, we have pledged to create a significant number of new jobs across the region between now and 2019 by investing in jobs closer to our Caribbean customers and by growing our services and customer base.

We welcome your open, frank, comments and questions and we look forward to continuing an open and collaborative relationship with you.

We are focused on meeting the needs of our teams, creating a culture of excellence and accountability, and having the right people in the right positions and we believe that this can be achieved with your cooperation.

We look forward to our continued partnership and consultation throughout the integration process.

Yours sincerely,

.....

Joshua Stewart

Country Manager (Ag.)

CABLE & WIRELESS COMMUNICATIONS

12. By letter dated August 20, 2015 the Union responded to CWC as follows:

“20th August, 2015

Mr. Joshua Stewart
Country Manager

Cable & Wireless Communications

.....

Dear Mr. Stewart:

**Re: Antigua & Barbuda Workers' Union/ Cable & Wireless Merger
Consultation**

Thank you for your letter of 19th August, 2015.

We at the Antigua & Barbuda Workers' Union wish to state that we will not be dictated to by any employer. Your office was communicated to and was fully aware that we would not have shown up to the very meeting of 18th August, 2015 because the issue of the organizational structure was not communicated to us as promised and the outstanding issue as to the right to meet and to have former employees of Columbus Communications represented at the table was not settled on the part of the Company.

Your letter further failed to disclose the current number of employees at both establishments and the proposed new organizational structure/manning guide.

You requested a response to the very letter by 21st August but we are not in a position to respond to an issue which is so sensitive without necessary information. i.e. :

- I. The number of employees currently employed.*
- II. The proposed number of employees to be cut.*
- III. The new organizational structure/ chart including management.*
- IV. The proposed new job titles and functions.*
- V. The proposed new job titles and rate of pay within the Collective Bargaining Agreement.*
- VI. Proposed separation packages for affected employees, among other issues.*

We note the time line suggested to conclude this exercise, however, we must inform you that our General Secretary, Bro. David Massiah who handles the Management Bargaining Unit is off island and will return at the end of August.

Further, our Annual Delegates Conference commences on the 20th September, 2015 therefore, all efforts at this time are geared towards preparations for such Conference.

We note that you intend to hold discussions with employees to explain the organizational structure but you have refused to disclose the structure to the Bargaining Agent. We wish for you to place the discussion with employees on hold until both parties (Union/ Management) would have met to discuss same.

We are further requesting that all candidate selection processes be put on hold along with the issue of separation.

We wish to advise that if the company requires a smooth transition, it would adhere to the request of the Union.

This letter places you on notice of our intention to effect Industrial Action against you if you proceed to meet and discuss with employees without first dialoguing with the Antigua & Barbuda Workers' Union.

We trust that good sense will prevail on your part to avoid any further delay on this matter.

We have set aside the week of October 5th-9th, 2015 to commence talks and hopefully bring finality to this issue.

We hope that you see the wisdom in our request.

Yours truly
Antigua & Barbuda Workers' Union

.....
Chester N. Hughes (Dip I.R)

....
cc: *Hon. Steadroy Benjamin, Attorney General & Minister of Legal Affairs,*
....

13. By letter dated August 26, 2015, written on the Employer's letterhead, CWC provided additional information and stated that ***"....We are committed to moving forward with the integration of CWC and Columbus in an expeditious manner in order to reduce the level of anxiety that is often created by such mergers....."***
14. On September 10, 2015 the Labour Commissioner convened a meeting. He issued a Conciliation Report under the heading ***"Sundry Workers vs Cable & Wireless Communication Plc"***. The Representatives of the Employer were listed as follows
 - *Mr. Tommy Dinkins.....Snr. Vice President, Human Resources, Cable & Wireless Communications*
 - *Ms. Jacquelyn Floro-Forde.....Vice President, Human Resources, Cable & Wireless Communications*
 - *Mr. Joe Mathieson.....Country Manager, Cable & Wireless Antigua and Barbuda Ltd.*
 - *Mr. Joshua Stewart.....Acting Head of Retail and Customer Services*

15. By letter dated September 16, 2015, the Union acknowledged receipt of some documents and requested additional information. That letter reads:

"16 September 2015

*Mr. Joe Mathieson
General Manager
Cable & Wireless Communications / Columbus Communications '*

.....

Dear Mr. Mathieson:

We continue to act for and on behalf of the employees of Cable & Wireless Communications and Columbus Communications as their Bargaining Agent. We acknowledge receipt of the bundle of documents which included the job descriptions and the proposed new administrative structure at the Company.

We however request the following:

- *The current job categories and the job descriptions for same*
- *The proposed salary for the new positions and level within the Collective Agreement*
- *The proposed separation package for employees who are not successful during the process*
- *The number of employee currently employed at both Columbus Communications and Cable & Wireless*
- *The proposed number of employees to be cut*

We have set aside the 29th September, 2015 to commence talks on the issue at hand

We are further advising the Company not to proceed with any further interview with employees of both companies on this issue. As Bargaining Agent, the Antigua & Barbuda Labour Code empowers us to address with an employer all and any issues concerning employees whom we represent.

Failure to adhere to our request not to engage employees, we wish for you to take notice that we reserve our rights to seek legal redress and or take industrial action on this matter without further notice.

*Yours truly,
Antigua & Barbuda Workers' Union*

.....

Chester N. Hughes (Dip I.R)

cc: Mrs. Eltonia Anthony-Rojas, Labour Commissioner

16. By two letters dated September 30, 2015, written on CWC's letterhead, CWC advised the Union that the Employer and Columbus would no longer be integrated as a hybrid business but would remain separate and distinct legal entities. CWC also stated that the reorganization of the Employer would result in the elimination of certain positions and the addition of others. Save that they include tables for "management" and "non-management" employees, respectively, the contents of the letters are virtually identical. The full text of the letter referring to non-management employees is as follows:

[CWC LETTERHEAD]

"September 30, 2015

Antigua and Barbuda Workers Union

...

Attention: Chester Hughes

Dear Mr. Hughes:

Re: Union Consultation- Cable and Wireless Antigua and Barbuda Ltd.

We write further to our meetings on September 29, 2015 where we discussed the framework of the new corporate structure and how this will impact your membership.

As we have previously explained, although Columbus International Inc. ("Columbus") was purchased by Cable and Wireless Communications PLC ("CWC"), the existing corporate entities for both businesses in Antigua, Kelcom International (Antigua and Barbuda) Ltd. and Cable & Wireless Antigua and Barbuda Ltd. must continue to exist as separate legal entities due to certain bonding and other legal restrictions and therefore the companies cannot amalgamate and be treated as one company.

As a result, Kelcom International (Antigua and Barbuda) Ltd. and Cable & Wireless Antigua and Barbuda Ltd. will remain separate and distinct companies which will carry on separate and distinct, although complimentary, businesses.

Cable & Wireless Antigua and Barbuda Ltd. is entitled to reorganize their businesses for purposes which include efficiency, use of technology and increased profit. In an effort streamline their business, improve efficiency and client

services, and increase profit, Cable & Wireless Antigua and Barbuda Ltd. will reorganize its operations for purposes set out above, which will include the elimination of certain positions and the addition of other positions.

As promised during our meeting, we are providing an outline of the information we discussed with you yesterday. In that regard, please find enclosed herewith the following documents:

- The New organizational structure/chart, including management;
- The proposed new job titles and functions, which although previously provided, are enclosed for ease of reference; and

We have completed our review of the structure for the business, including a preliminary identification of redundant positions. As a result of this review we have identified the following likely redundancies which will be created as a result of the reorganization of Cable & Wireless Antigua and Barbuda Ltd.

Please note that the Current State only includes individuals presently employed with Cable & Wireless Antigua and Barbuda Ltd. and represented by ABWU. Future State is the total number of future roles in the reorganized business. Potential Impact identifies the total likely redundancies impacting Cable & Wireless Antigua and Barbuda Ltd.:

Non-Management

<i>Function</i>	<i>Current State</i>	<i>Future State</i>	<i>Potential Impact</i>
<i>Retail</i>	<i>14</i>	<i>0</i>	<i>14</i>
<i>Marketing</i>	<i>1</i>	<i>1</i>	<i>1</i>
<i>B2B</i>	<i>8</i>	<i>6</i>	<i>2</i>

Separation packages will be in accordance with existing terms and conditions of employment as outlined within the CLA and in compliance with the applicable legislation.

With respect to new job titles and rates of pay, individuals who are retained as part of the recruitment and selection process for the new organizational structure will, in the interim, continue to be employed by their legacy company on their existing terms and condition of employment. Once we have completed the process for selecting and retaining the best people for the jobs and completed the

separation process for those identified, we will be reviewing and assessing current compensation packages in consultation with the ABWU, as required, in order to ensure compensation is competitive and market driven across functions and consistent with the Company's financial targets.

We are requesting that you review the information and documentation provided, as well as the identified redundancies and provide your questions, concerns and other feedback prior to our meeting scheduled for October 6, 2015, so that we may be in a position to respond at that time.

We acknowledge the ABWU will need additional time to review the additional information provided and as such the previous date of September 30 to complete the separation process will be withdrawn to facilitate relevant communication with your members and consultation.

As we communicated to you in previous meetings, although there will be redundancies created as a result of the reorganization of the business, we have pledged to create a significant number of new jobs by growing our services and customer base.

We welcome your open, frank, comments and questions and we look forward to continuing an open and collaborative relationship with you.

We are focused on meeting the needs of our teams, creating a culture of excellence and accountability, and having the right people in the right positions and we believe that this can be achieved with your cooperation.

We look forward to our continued partnership and consultation throughout the integration process.

Yours sincerely,

Jacqueline Floro-Forde

Vice President of Human Resources for Special Projects"

17. By two letters dated November 23, 2015 the Employer informed the Union that 11 and 2 employees respectively would be made redundant as a result of the **"rationalization of the Company's resources"**. Both letters had identical opening paragraphs as follows:

"We write further to our letter of September 30th, 2015 in which we advised of the likely redundancies resulting from the integration of CWC and Columbus Communications Inc. We wish to inform you that as a result of the rationalization of the Company's resources, the following positions within Antigua Business Unit will be made redundant effective November 30th, 2015:"

The Injunction

18. By an ex parte Application filed on 27th November 2015, the Union applied for an injunction to restrain the Employer from dismissing 13 of its employees. The Application was supported by two affidavits sworn by Chester Hughes, the Union's Deputy General Secretary, and filed on 30th November 2015.
19. At the ex parte hearing of the Application on 30th November 2015 an injunction was granted restraining the Employer from dismissing the employees or removing them from its payroll. The inter parties hearing was fixed for 15 December 2015.
20. On 15th December 2015 the inter parties hearing was held and the Court's decision was reserved until 31st December 2015. It was ordered that the injunction continue pending further order.
21. On 31st December 2015, the parties reported on the progress of the then ongoing negotiations. It was agreed between the parties that the injunction would continue provided that the employees remain away from the Employer's premises. The matter was adjourned to 06th January 2016 for the Court's decision. The parties also agreed to pursue their negotiations towards an amicable resolution.
22. On 06th January 2016 the Court delivered its decision upholding the injunction and declining the Employer's application for its discharge. The Court also gave directions for the matter to proceed to trial on 02nd and 03rd March 2016.

The Employee's Case

23. By its Memorandum of claim filed on January 19, 2016, on behalf of 13 employees of the Employer, the Union highlighted the main points of the said sequence of events outlined above. In addition, at paragraphs 13 to 18 of its Memorandum the Union pleads as follows:

13. Redundancy Notification was dispatched to each of the thirteen affected employees by the Employer, with a breakdown of the separation package to be paid along with a Release for execution which indemnified C&W and the Employer and their "respective affiliates, subsidiaries, successors, assigns and predecessor companies" from a multitude of possible claims and actions in respect of or connected to their employment.

14. At no point has the Employer advised the Union or the affected employees that it will cease to carry on its Retail Business. In any event, the Union denies that there has been any cessation by the Employer of that part of the

business; and to the extent that the Employer says it has, the Union says that that is a sham.

15. By letter dated January 14, 2016 (nine days after the Injunction was continued by Order of the Court), C&W advised the Union that the position of Larissa Barnes, as Marketing assistant within the Business Unit of the Employer, will be made redundant effective January 22, 2016 for reasons of diminished responsibilities.

16. Further, the Union was advised by letter dated January 14, 2016 that there was a proposal that three more positions would be made redundant effective February 14, 2016: Senior Controller Credit & Collections; Senior Analyst Process & Reporting; and Credit & Collections support lead, with three new roles being created.....

17. The Union states that the Employer's actions in re-organizing its business at the behest of C&W (its parent company), does not constitute a "redundancy" as defined by section C3 of the Antigua and Barbuda A Labour Code, Cap. 27(as amended), nor does the Employer's actions satisfy the statutory test of reasonableness.

18. In the circumstances, the Union states that the employer's letters of November 23, 2015 constitute an attempt to unfairly dismiss the employees, and they seek relief pursuant to the powers of the court under section 10 of the Industrial Court Act, including:

- (1) Re-instatement, or re- employment,*
- (2) Compensation for Unfair Dismissal, in the alternative*
- (3)*

The Employer's Case

24. The Employer's case is set out in its Memorandum of Defence filed on January 22, 2016. For convenience, selected paragraphs or substantial parts thereof are reproduced as follows:

"4. The Employer also states that it does not have in house all the necessary skills in order to conduct all of its affairs as such it engages the services of experts and other skilled persons. In particular, the Employer engages C&W for expertise in the areas of Human Resource and Industrial Relation whenever servants or agents of Cable & Wireless negotiate or purport to negotiate on behalf of the Employer with the Antigua and Barbuda Workers' Union ("ABWU"), those servants or agents of C&W are authorized to do so and are acting as an agent of the Employer. Further, Mrs. Jacqueline Floro- Forde who negotiated with the

ABWU, as hereinafter mentioned, was authorized to do so by the Employer and did so as an agent of the Employer. Where the context so admits, all letters and communication signed by Mrs. Jacqueline Floro-Forde are letters written on behalf of the Employer. The Employer further states that the said Mrs. Jacqueline Floro-Forde has negotiated on behalf of the Employer with the ABWU for many years and at no time during any negotiations with the ABWU did the ABWU ever raise any concern as to the capacity in which the said Mrs. Floro-Forde acted.

5. The Employer further states that prior to the said acquisition of shares and in an effort to improve efficiency, reduce costs and maximize its profits, the Employer determined that it should examine several areas of its business in order to improve efficiency and maximize profits. The said examination revealed that there were certain inefficiencies in the business of the Employer and that there were certain areas in the business which were not profitable. The examination also revealed that certain technological changes could improve efficiency and profit, reduce expense, including labour, with savings to the Employer. In particular, the examination revealed that the retail area of the business was inefficient and costly and that savings could be made by cessation of business in this area. In addition, the Employer was aware that based upon customer service and focus group surveys which had been conducted, it was determined that the "Flow" brand utilized by Kelcom enjoyed a much more favorable brand recognition than the Employer's "Lime" brand. As a result of the said examination, the Employer determined that it should reorganize its business in order to be more efficient, reduce costs, maximize profits and make its business more marketable.

6....., the Employer states the contents of the letters represented its first thoughts on the proposed reorganization and that the ABWU rejected the said proposal of a hybrid business which contemplated a single management of the Employer and Kelcom.

7....., the Employer..... states that there was consultation with the ABWU prior to August 19, 2015. The Employer also states that it consulted with the ABWU on June 3, 2015 and July 20, 2015. The Employer further states that the said letter dated August 19, 2015 was a follow up to a meeting scheduled on August 18, 2015 which the ABWU failed to attend. The Employer further states that prior to August 19, 2015 it shared information with the ABWU on its proposed reorganization.

8.... the Employer states that it provided the said information. By letter dated August 26, 2015. Cable & Wireless Communication wrote to the ABWU in response to its letter dated August 20, 2015 and advised that it had provided certain information and that it was happy to provide any other information.

9. The Employer further states that the previous proposal for its reorganization as a hybrid business with the business of Kelcom as stated in paragraph 6 hereof, was rejected by the ABWU and as such it provided another proposal for reorganization and advised ABWU of that proposal prior to the letter dated September 30, 2015.

10....The Employer states that the said letter which was written by its parent company in order to keep the ABWU abreast of future developments and was not intended to affect the negotiations relative to the reorganization of the Employer for the proposed sale to Liberty Global had not been completed. The said letter was sent pursuant to the UK regulation which mandated that it be sent to the requisite parties.

11 The Employer states that as a result of its reorganization, the work for these Employees had ceased in that the Employer had ceased carrying on retail business.

12.... The Employer states that prior to giving the redundancy notices, it had advised the ABWU of its proposal for reorganization and provided relevant information including the possible redundancies and that it had received the comments of the ABWU on the said proposal and it had duly considered those comments. The Employer further states that it had advised the ABWU of its decision on the redundancies and that same would take effect from November 30, 2015 for the effective date for the reorganization of the Employer was December 1, 2015.

13... the Employer ...states that at a meeting held with the ABWU on September 29, 2015 and by letter dated September 30, 2015 it advised the ABWU of the likely redundancies. The Employer also states that by letter dated November 23, 2015 and at a meeting held on November 10, 2015 it advised that Employees will become redundant on November 30, 2015 and that the reorganization would be effective from December 1, 2015. The Employer further states that the Employees in the retail business failed to meet with it in order to receive details of the redundancy and the notices.

14. The Employer states that the injunction did not restrain it from dismissing Employees not mentioned in the Order for reasons of redundancy or otherwise. The Employer also states that the work of the Employees had ceased or diminished as a result of the reorganization.

15. ...The Employer further states that the said matters are irrelevant to the issue and that the redundancies fell within the purview of the definition of redundancy as contained in Section C.3 of the Labour Code.

16. ...The Employer contends that it is entitled to reorganize its business and that it made the decision to do so. The said decision was made by examining all relevant facts including the views of its parent company. The Employer also contends that the reasons for the reorganization are as set out in paragraph 5 hereof and in particular it was designed to improve efficiency, reduce labour costs and maximize profits and efficiency. The Employer states that with effect from December 1, 2015 it ceased to carry on the business of retail. The Employer is aware that with effect from December 1, 2015, Kelcom commenced a retail business using its trade name FLOW. The Employer is also aware that Kelcom is now the Lessee of the retail space which the Employer formerly occupied.

17. The Employer therefore denies that the Employees are entitled to the relief as stated in paragraph 18 of the Memorandum and would contend that the Reference should be dismissed. The Employer will further contend that the Employees were dismissed for some other substantial reason as contemplated by Section C.58 (1)(e) of the Labour Code, being reorganization of its business, or alternatively the dismissal was for reasons of redundancy. "

The Main Issues

25. The main issues arising for determination in its Reference are:

1. **Whether a redundancy effectively came into existence on December 1, 2015.**
2. **Whether the Employer acted reasonably or unreasonably under the circumstances when it took the decision that the affected employees had become redundant and should be dismissed.**

The Legal Parameters

26. Section C3 of the Antigua and Barbuda Labour Code (the Labour Code) provides a definition of redundancy as follows:

"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;"

27. An employee's statutory right not to be unfairly dismissed is established by Section C56 of the Labour Code:-

“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.”

28. As to what constitutes a just cause for dismissal, Section C58 (1) of the Labour Code provides:

C58 (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”

29. The determination as to what constitutes an unfair dismissal requires the application of the test of reasonableness as provided in Section C58(2) of the Labour Code as follows:

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

30. The Industrial Court, being a creature of statute, is clothed with specific statutory powers under the Industrial Court Act. Section 10(3) provides:

10 (3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

- a) Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;**
- b) Act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the**

principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.

Whether a Redundancy Situation came into existence

31. Having made the assertion and declared its right to dismiss the selected employees, the onus is on the Employer firstly to establish that a redundancy situation existed. In order to discharge this burden the Employer must prove the factual basis as required under the section C58 (1) of the Labour Code.
32. At paragraph 42 of her witness statement filed on behalf of the Employer, Jacqueline Floro-Forde, Vice President of Human Resources of CWC, stated that **“On November 30th 2015 the Employer ceased the business of retail and as such has no work for persons who had previously worked in the retail division of its business...”** That identical statement was repeated by Joe Mathieson, the Employer’s Country Manager at paragraph 20 of his witness statement filed on behalf of the Employer.
33. In Reference No. 20 of 1988, **Antigua Workers Union V. Antigua Gases Limited**, the Honourable Mr. Justice H.S.R. Moe, President (as he then was) considered the meaning of “Redundancy” (as then defined in the Labour Code). In construing the definition he stated:

“What this definition seems to contemplate therefore is that redundancy may occur as a result of retrenchment which itself is ordinarily defined as removing what is superfluous, or reducing the amount, or economizing. Redundancy may also arise because the work has been re-organized thus requiring fewer employees.... Thus a re-organization which results in a reduced workforce is a redundancy”
34. In the said Reference the President continued:

“Nonetheless the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that the dismissal was fair; for the determining factor is whether the employer acted reasonably in handling the situation. When, therefore, redundancies are being considered it might be regarded as good industrial relations practice to follow the guidelines laid down in Williams V Compair Maxim Ltd. 1982 1.C.R.156. In particular, the employer should seek to establish selection criteria which can be objectively checked against such things, inter alia, as attendance records, job performance, length of service, needs of the business. But the E.A.T. (Employment Appeal Tribunal) has also re-emphasized that failure to act in accordance with one or more of the guidelines ...does not necessarily render a dismissal unfair. The principles 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.”

35. In Civil Appeal No.28 of 2001 **Sundry Workers v. Kings Casino Limited**, Chief Justice (as he then was) Sir Dennis Byron stated:

“I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be cause and effect. The effect being that the work has ceased or substantially diminished....This brings me to point out, however, that the existence of a cause, such as a hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably ...”

36. Applying that dictum to the instant case, the cause and effect are obvious. The cause being the implementation of the Employer’s decision to cease its retail business. The effect being the cessation of work in that department.
37. Based on the foregoing uncontroverted evidence given on behalf of the Employer, we feel constrained to conclude that a redundancy situation crystalized on the 01st December 2015. That situation resulted from the closure of the Employer’s retail business.
38. Accordingly, we accept Mr. Hill’s submission on behalf of the Employer that, on the facts of this case, “the essential requirement of redundancy has been fulfilled.” The work which the employees were last employed to perform has ceased. In other words, a redundancy situation as defined in the Labour Code came into existence on 01st December, 2015.
39. Further on this issue, it would be remiss of us not to take judicial notice of the cessation of the Employer’s retail business. It is clear to us that the reality on the ground as communicated to and observed by the general public reflects the Employer’s evidence of cessation.
40. Having said that, we wholly reject Mr. Hill’s submission that **“Once the Employer established redundancy, then the Court has no jurisdiction to look beyond the issue of redundancy and consider fairness.”** In fact, by virtue of section C58(2) of the Labour Code we have the clear statutory obligation to look beyond the redundancy and consider the reasonableness of the Employer’s actions under the circumstances.
41. In their submissions on behalf of the Union, Messrs. Justin and Kwame Simon submitted that the situation created by the Employer does not constitute a genuine redundancy under the Labour Code. In our view, for the purposes of identifying whether a redundancy situation existed, it is immaterial that the state of affairs was “self-induced” by the Employer, having arisen from or being driven by a “business decision” of its parent company CWC.
42. In their submissions on behalf of the Union Messrs. Simon and Simon contended

that, based on the decision in Reference No. 16 of 1991 **Phillip Abbott v. LIAT (1974) Limited**, it was necessary for the Employer to prove the reorganization of its business. In our view, given the actual cessation of the retail business proof of the reorganization is not a necessary precondition or prerequisite for our finding that the redundancy situation existed.

43. In that regard, although we do not have identical corresponding provisions as in the United Kingdom, we adopt the assertion made by **Harvey on Industrial Relations and Employment Law**, Vol.1 Butterworths Issue 191, February 2008 at paragraph 777:

“The point cannot be made too strongly that the Act is not concerned to inquire what caused the redundancy situation. The question was what is the reason for the dismissal, not what is the reason for the redundancy”

44. In the circumstances, we do not think it is necessary to consider whether the reason tendered by the Employer constitutes “some other substantial reason” under section C58 (1) (e) of the Labour Code.
45. Accordingly, for the purposes of identifying the redundancy situation per se, we do not think it necessary to go behind the facts and investigate how the redundancy situation arose, whether it could have been avoided or whether there were any viable alternatives. It is enough to conclude that there was a demonstrated link between the reason assigned and the intended dismissals scheduled to take effect on December 1, 2015.
46. In the circumstances we declare that redundancy situation existed and move on to consider the second main issue, namely whether the Employer acted reasonably.

Whether the Employer Acted Reasonably

47. Since its establishment in 1976 this Court and the Court of Appeal have consistently applied the provisions of Section of C58 of the Labour Code. As early as 1988 in the **Antigua Gases case**, after discussing the meaning and existence of a redundancy situation, this Court (then differently constituted) asserted:
- “Nonetheless, the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that a dismissal was fair; for the determining factor is whether the employer acted reasonably in handling the situation.”**
48. Although we did not find it necessary to go behind the redundancy situation to determine the origin of its existence and consider the reasons for it, we think that the justification for the redundancies is still relevant in relation to the reasonableness of the Employer’s actions. According to **Harvey** at paragraph 778:

“But the justification for declaring redundancies may become indirectly relevant, if the true reason for a dismissal is put in issue. If the employer contends that the employee has been dismissed by reason of redundancy, the question may arise whether an apparent redundancy situation is a genuine redundancy situation, or whether the employer is seeking to use the alleged redundancy situation as a pretext to cover its unfair tracks.....And even if there is a genuine redundancy situation, the law of unfair dismissal still asks the question of whether the employer acted reasonably in treating redundancy as a sufficient reason for the dismissal in all the circumstances of the case”

49. The requirement for reasonableness under the laws of the United Kingdom is consistent with the provisions of section C58 (2) of the Labour Code in this jurisdiction. In other words, we must apply the statutory test of reasonableness.
50. The inherent and integral components of the test of reasonableness provided in Section C58 (2) of the Labour Code (see paragraph 28 above) are (a) the actual circumstances, taken as a whole, which existed and prevailed at the time, and, (b) the relevant actions of the Employer.
51. In order to apply the statutory test of reasonableness, based on our careful consideration of the stated factual background and the legal framework, we extracted salient aspects of the circumstances of and the Employer’s actions in dealing with the redundancy situation.

The Role of CWC

52. Firstly, we note the part played by Mrs. Floro-Forde in her stated capacity as agent for the Employer. She testified that as an employee of CWC she was negotiating with the Union as an agent for and on behalf of the Employer. Although her involvement with the Union started since November 2014, her role as agent was never formalized in writing or otherwise expressed to the Union until sometime in December 2015 after the commencement of these proceedings. In the context of this case, we find that omission to be noteworthy.
53. As we understand it, the nub of the Union’s case is that the redundancy alleged by the Employer was a self-induced state of affairs which resulted from the self-serving business decision of the Employer’s parent company, CWC. According to the Union, the closure of the Employer’s retail business was deliberately done to facilitate the conduct of that business by CWC’s other subsidiary, Kelcom under the “Flow” brand.
54. There is no doubt that, starting with its letter to the Union dated November 6, 2014, (see paragraph 8 above) the Employer’s parent company CWC played the leading and dominant role in the negotiation process with the Union and ultimately the

emergence of the redundancy situation. In that letter CWC informed the Union of proposed acquisition of Columbus. In the penultimate paragraph of her witness statement, Mrs. Floro-Forde, as CWC's Group HR Director, stated:

“As we transition into our new company, we will be looking to forge a more strategic and flexible partnership with you, our Union Partners.”

In our view, in the context of this Reference, there was no proper or legal partnership between CWC and the Union.

55. Moreover, in the last paragraph of that letter she referred to **“our customers”** and **“our employees.”** The effect of that letter was at least to effectively blur the lines of identity between the Employer and its parent CWC. At worst, the letter shows that CWC had presented itself as the Employer thereby giving the impression that it had usurped the role of the latter.
56. The blurring of the roles and/ or the usurpation of the Employer's functions seem to have continued throughout the ensuing negotiations with the Union. In the letter dated April 1, 2015 the Employer updated the Union about the **“Acquisition/ Merger of Cable and Wireless Communications and Columbus Communications”**. Writing on the Employer's letterhead as “General Manager, Antigua” Mr. Davidson Charles seemed to have switched places with Mrs. Floro-Forde and was then filling the role as agent for CWC. This conclusion is inevitable in light of his words conveying CWC's intention **“to launch as one business”** and **“to fully integrate our two Companies.”**
57. Further, like Mrs. Floro-Forde, Mr. Charles in his letter refers to **“our customers and employees”** and **“our union partners”**. To say the least, both letters contain loose representations of facts and legal relationships.
58. Further, in his letter dated August 19, 2015, (see paragraph 12 above) Joshua Stewart writing on the Employer's letterhead as Country Manager, Cable & Wireless Communications, reported that **“...we have identified the following likely redundancies which will be created as a result of the integration of CWC and Columbus...”**. In continuing Mr. Stewart referred to **“individuals employed with CWC and represented by ABWU”**.
59. Based on the foregoing observations, we conclude that the communication and negotiation processes was tainted by irregularities which appear to have continued at least up to the undisclosed date of the Employer's letter of authorization issued sometime in December 2015.
60. In any event, we conclude that the apparent usurpation of the Employer's role by CWC in the circumstances as disclosed in the correspondence, was unreasonable. The practice was not consistent with good industrial relations practices and procedures. In that regard, we have placed little weight on Mrs. Floro-Forde's

evidence that she had been negotiating on behalf of the Employer with the Union since 2009. Obviously, the state of affairs arising from CWC's acquisition of Columbus was unprecedented.

61. In the final analysis, on the face of the correspondence quoted above, there is doubt as to whether the negotiations were effectively conducted by CWC or the Employer. However, we do think that it is necessary to determine that point.
62. Suffice it to say: On the facts of this case generally and upon careful consideration of the letters by which the options were conveyed, we are of the firm view that the role of the parent company, CWC, was paramount. Having substituted itself as the Employer, considered the Employer's employees as its own and treating the Union as its partner, CWC wittingly or unwittingly caused the entire consultation process to be tainted.

The Consultation Process

63. In further application of the test of reasonableness under section C58 of the Labour Code, we are obliged to consider the actual consultation process. In doing so, we are mindful that a lack of any or any adequate consultation could potentially but not necessarily lead to a finding of unfair dismissal.
64. An important pillar of the Union's case, as we understand it, is the contention that the consultation was a sham designed to mask the real reason for the transfer of its retail business to its associate company Kelcom. In the Union's view, the real reason for the closure of the Employer's retail business- being a deliberate divestment in favour of Kelcom- could not properly ground a genuine redundancy.
65. For its part, the Employer points to the consultation with the Union and maintains that **"a lack of consultation will not be a bar to redundancy being a good reason for a dismissal"**
66. We respectfully disagree with the formulation of that submission by Counsel for the Employer. In our view, while a lack of consultation will not necessarily render a dismissal, based on redundancy, unfair, the lack of consultation or sufficient consultation in the instant case could be an indication of unreasonableness on the part of the Employer.
67. We accept Mr. Hill's Submissions that consultation does not give rise to an obligation to accept the advice of the person being consulted. However, we are concerned with **"fair consultation"**. In that regard, we adopt the statement of the meaning of fair consultation as adopted by Glidewell LJ in the United Kingdom case of **R v. British Coal Corporation** [1974] IRLR 72 as follows:

“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 consultor thereafter considering those views properly and genuinely”

68. It is common ground that the initial proposal advanced by the Employer involved the integration of its business with that of Kelcom as a single hybrid business with a single management structure. In that regard, we understand that that first proposal was conveyed by or on behalf of the Employer in the letter dated April 1, 2015. The decision to change course and maintain operations under two separate management structures, came six months later in September 2015 after the parties met at the Labour Department.
69. The further undisputed evidence as given by Mrs. Floro- Forde is that after the meeting on September 10, 2015 the Employer abandoned the initial proposal and replaced it with one which provided for the restructuring of the Employer and Kelcom as separate companies with separate employees. This significant change in approach was formally communicated to the Union by the letter dated September 30, 2015.
70. According to Mrs. Floro- Forde, the Employer **“is entitled to reorganize its business in order to maximize efficiency and profit and that in so doing, it is entitled to cease to carry on or to scale down any area of its operations”**. We accept that the Employer was so entitled to reorganize its business. However, we are of the view that the Employer well knew of that entitlement when it first proposed the hybrid option at the commencement of the consultation process.
71. Applying the principles highlighted and adopted by Glidewell LJ in the **British Coal Corporation** case, the following questions arise:
- (a) Was the Union consulted at a sufficiently early stage when the second option was being formulated or contemplated?
 - (b) Did the Employer provide the Union with adequate information regarding the second option on which to respond?
 - (c) Was the Union given adequate time to respond?

(d) Was there conscious consideration by the Employer of the Union's response to the introduction of the second option?

72. As to the timing of the consultation, after September 30, 2015 we are left to conclude that the Employer's consideration of the switch to the second option did not involve the Union at an early stage or at all. In that regard, we find that the Union had no or no sufficient time to understand, study and respond properly to the new proposal.
73. As to whether the Union was given adequate information on which to respond, we reach the same conclusion. There is no evidence that the Union was given any adequate information on which to respond. We accept the review of Ms. Floro-Forde's evidence done by Messrs. Simon and Simon that she offered no evidence about the reasons for the dismissals. Moreover, Ms. Floro-Forde was in no position at trial to assist the Court as to the bases and details of the reorganization of the Employer's business.
74. Moreover, in its Memorandum, the Employer merely stated that the retail area of its business was "**inefficient and costly**" and that savings could be made by the closure of the business in that area. There is no evidence that the Union was presented with even a modicum of information to ground that assertion. At the trial the Employer did not even attempt to remedy that omission.
75. Further, we note Mr. Mathieson's evidence is that the Employer conducted an analysis for the purposes of the restructuring exercise, as a result of which the decision was taken on or about September 10, 2016 to close its retail business. We are concerned about the timing of that analysis, the apparent lack of transparency, and the timing of the decision. In that regard, it is noteworthy that the decision to abandon the hybrid proposal was made after the meeting at the Labour Commissioner's office on September 10, 2015.
76. We have no evidence that the analysis, a summary or any part of it was delivered to the Union. It certainly, was not provided in the Employer's witness statements or presented as part of the oral testimony at the trial. Apart from its timing, the absence of disclosure of the results of the analysis is instructive. Based on the evidence, it appears to us that on or soon after September 10, 2015 the Employer had effectively abandoned its efforts to pursue genuine consultation with the Union.
77. In addition, we note that the evidence of Mr. Mathieson discloses that the closure of the Employer's retail business coincided with the commencement of the same retail business and the assumption of the relevant roles by Kelcom. This disclosure confirms the paramount role of CWC in directing or substantially influencing the operations of its subsidiaries, the Employer and Kelcom as it is entitled to do. Indeed, based on the evidence, it may reasonably be said that the decision to terminate the retail business in one subsidiary and simultaneously commence it in

the other was purely the decision of CWC. In any event, there is no resolution of the Employer or other formal document before us effecting or adopting the decision to close its retail business.

78. The evidence is that the decision that operations of the Employer and Kelcom should continue as separate companies was conveyed to the Union in or about the middle of September 2015. The redundancies were scheduled to take effect by November 30, 2015. Given the sequence of events and lack of timely information, we conclude the two month window for the Union's response and related consultation was inadequate. This view is reinforced when we take into account the Union's letter dated September 16, 2015 effectively suggesting that the Employer should not proceed with the redundancies at that scheduled time.
79. It appears that after the letter dated September 30, 2015 there was no further formal communication between the parties until the Employer's letters dated November 23, 2015, by which the 13 employees were identified as being redundant. Based on the evidence, we answer in the negative all four questions arising from the tests proposed by Hodgson J and adopted by Glidewell LJ in the **British Coal Corporation case**.
80. In other words, we find that the Union was not consulted at a sufficiently early stage; the Union did not receive adequate and timely information; the union was not given adequate time to respond; and the Employer gave no or no sufficient consideration to the Union's reaction to its new proposal and the abandonment of the hybrid option.

Selection of Employees for Redundancy

81. In giving effect to the anticipated redundancies, the question arises as to whether it was reasonable for the Employer to terminate the services of the 13 employees merely on the basis that they worked in the retail business department. We are mindful of the Employer's other businesses including its internet, mobile and wireless communication services. In any event, based on the evidence of the Employer, we can make the inference that the Employer's other businesses continued unabated despite the closure of the retail business.
82. In **Blackstone's Employment Law Practice**, 2014, Oxford University Press, the authors deal with the subject of redundancy in Chapter 25. The general principles in relation to an employer's approach are stated in paragraph 25:06 :

"The employer must choose its own selection criteria, which must be reasonable (Williams v Compair Maxam Ltd [1982] IRLR 83, EAT) and followed in a consistent and unbiased way (Dixon Stores Group v Sangster [2004] UKEAT 0205/04). Most fair criteria would include one or more of the

following factors: the type of skills and capabilities for which there is a continuing employment need, and the suitability of the individuals to perform tasks: competence, commitment and attitude, team-working ability, health, absences, and conduct.”

83. As paragraph 25:08 the authors assert that:

“In addition, the pool from which the employee is to be selected for redundancy needs to be ascertained. A wise employer will examine the extent to which other employees are performing similar roles to the role earmarked for redundancy, the extent to which other jobs are interchangeable and whether there are employees doing similar work at other locations”

The criteria to be applied in the selection of employees for redundancies were within the purview of the Employer. The criteria must be reasonable and applied carefully and consistently. On the evidence, we are not satisfied that the Employer formulated and applied appropriate criteria.

84. In **KGB Micros Ltd v Lewis** EAT 573/90 referred to a paragraph 25.07 of **Blackstone** it was held that salesmen were unfairly selected for redundancy by the employer’s comparison of their overheads with their revenue generation or net profit per salesman, rather than an assessment of the salesman skills.
85. We do not accept the sole criterion for selection should have been that the thirteen employees all worked in the retail department. Unfortunately, the evidence discloses no other criteria for selecting the thirteen employees.
86. There is no evidence that the Employer in the instant case applied its mind to particular selection criteria of the overall pool of their employees for the selection of redundancies. In that regard, the Employer could have considered “bumping” employees from other departments if they performed similar duties to those in the Retail Department. Potentially, this approach could have avoided the wholesale termination of all the affected employees in the retail department.

Alternative Employment

87. As to the possible offer of alternative employment, paragraph 25.24, **Blackstone** asserts:

“The employer also has a duty, if someone is provisionally selected for redundancy, to see whether there is any other role which might suit that particular employee, not only with the employer but also with any associated company of the employer. If this requirement is ignored, a dismissal is normally rendered unfair. If there are jobs, even if they are of lower status or carry lower wages than those which apply to the employee’s present job, the

prospect of moving to the alternative employment should nevertheless be raised. Where employees are potentially redundant but there are other vacant roles available, an employer should not invite applications for the vacant roles from the whole workforce before satisfying itself that the potentially redundant employees are not suitable to carry out the vacant role.”

88. In her comments on the “Further affidavit of Chester Hughes” Mrs Floro- Forde, at paragraph 43 of the Witness Statement, said “..... as a result of the reorganization of its business, the Employer no longer requires the services of the Employees who have been declared redundant as there is no work or job functions available for those persons within the Employer.”
89. Apart from our concerns regarding the application of proper criteria, we are not satisfied on the evidence that the Employer did a proper assessment on the basis of which it could have come to that conclusion that it had no choice but to terminate the services of the 13 employees. In any event, given the “overarching” role of CWC and the declared associated role of Kelcom/ Flow in carrying on the retail business immediately upon the cessation of that business by the Employer, we are confident that the Employer could have done more to at least attempt to ensure the continued employment of the affected Employees, if not by itself then by its associate company Kelcom.
90. Given the nature of the retail business as we understand it, we have no doubt as to the competence and suitability of the affected employees to fill the positions which became available at Kelcom consequent upon its assumption of the Employer’s retail business. In that regard, we note the relevant part of the evidence of Mr. Mathieson when he stated that the “Employer has a service arrangement with its associate company, Kelcom. Kelcom retails its own products as well as products formerly sold by the Employer.”
91. In relation to the Retail Business of Kelcom, we find the evidence of Gameel Dias which we wholly accept, to be very instructive. In his witness statement he said that:

“15. The software applications/Point of Sale system used in the retail Departments is called “Tally Soft POS” this system is used to transact payments for bills and products which is wholly owned and solely used by the Employer and runs on a server in Cable and Wireless Data Centre located in Jamaica.

16. The software application which is used for all customer information is the property of the Employer along with the Top Up portal, Phone Inventory and all other ancillary records, network, share folders and other non-proprietary software i.e Microsoft Office etc are also the

property of the Employer and are installed and supported by the IT Department.

17. As far as I am aware the computer desktops, printers, faxes, scanners and other equipment along with the network used in Retail Stores are the property of the Employer and as an employee of the Employer I still give Technical Support to the Retail Stores.

18. I am also aware that the Employer provides all the Retail Stores with its products to be sold to Customers.”

92. After Cross Examination, in answer to a question from the Court as to whether any consideration had been given by the Employer to provide training to allow the affected employees to fit into the new roles at Kelcom, Mr. Mathieson said that no serious consideration was given to the same because training would be too “onerous”. He did not provide any explanation.
93. In relation to the employees’ salaries, Mr. Mathieson said that their salaries were higher than those paid by Kelcom. This is consistent with the evidence of Mr. Dias. Mr. Mathieson said that all the new job descriptions, including the respective grades, were shared with the Union. Further, he said that the salaries were not declared to the employees but they would depend on the respective grades. The grades were advertised but not the salaries. The same were available from the Human Resource Department.
94. Based on Mr. Mathieson’s evidence alone we are left to conclude that the Employer should have provided more assistance generally and be more transparent in relation to the possibility of reemployment of the affected employees by Kelcom to avoid the wholesale termination of their services. A whole lot more should have been done towards the redeployment of the affected employees with Kelcom.
95. Mr. Mathieson’s evidence gives a clear hint that the Employer’s overriding concerns were about “net loss” and “net gain”, matters related to economics and efficiency. Mr. Mathieson also confirmed that the decision to use the brand name “**Flow**” for the Employer’s retail products was a decision of CWC.

Warning and Notice of Redundancy

96. We believe that paragraphs 38 to 42 of Mrs. Floro-Forde’s Witness Statement are particularly instructive in relation to the warning and notice of redundancy. Her evidence is as follows:

“38. On November 19, 2015 the Employer issued an invitation to its retail staff for a meeting to be held on November 23, 2015 to discuss the reorganization and its impact on the retail structure. Unfortunately, only 2 of 13 expected retail team members attending the meeting on November 23, 2015.

39. By correspondence dated November 23, 2015, the Employer advised the ABWU of the specific team members and positions that would be impacted by the redundancies.

40. The majority of retail staff of the Employer reported off work due to sickness on November 24 and 25, 2015 with the remainder of the Employer’s retail staff either on vacation or non-roster days, resulting in the closure of the Employer’s retail stores. The Employer’s retail stores remained closed until early on the afternoon of November 24, 2015 when the Employer was able to open one location with contractual seasonal staff.

41. I honestly believe that the failure of the Employer’s retail staff to attend the scheduled meeting on November 23, 2015 and the absence of the majority of staff on November 24 and 25, 2015 was an attempt to prevent the Employer from proceeding with implementation of its reorganization plan. In light of the absence of the Employer’s retail staff, the Employer attempted to personally deliver notification of redundancy to affected staff on November 24, 2015, however, staff refused to accept the notification or could not be located. In an effort to proceed with implementation of the organizational changes which had previously been communicated to the ABWU, the Employer provided a copy of the notification to affected staff electronically and the originals to the ABWU. These were returned to the Employer.

42. On November 30, 2015, the Employer ceased the business of retail and as such has no work for persons who had previously worked in the retail division of its business. I am aware that the retail business is now conducted by Kelcom under Kelcom’s “Flow” brand and that the said business is being conducted at space formerly occupied by the Employer. I am further aware that employees who were impacted by the cessation of the retail business of the Employer were invited to apply to Kelcom for employment but they have neglected or refused to do so”

97. On the evidence, we find it unacceptable that the employees were personally warned /notified of the individual redundancies no earlier than November 23, 2015. At paragraph 39 and 41 of his Witness Statement Mr. Mathieson corroborated Mrs. Floro- Forde’s evidence using identical terms to the effect that

the Union was notified of the individual redundancies on November 23, 2015 and attempted to serve the notices electronically.

98. The timing and the method of notification of the redundancies leave much to be desired. They are in our view, inconsistent with or contrary to good industrial relations principles and practices. We maintain this position regardless of the earlier general warning that might have been given to the Union. In our view, the employees personally received no or no adequate warning or notice of their termination due to redundancy.

The Proposed Release

99. The uncertainty regarding the role of CWC vis-à-vis the Employer starting with its letter to the Union in November 2014 (see paragraph 8) and subsequent letters proposing the hybrid and later switching to separate management after the 10th September, 2015 evolved into a full maze by the date of the proposed redundancy. The terms of the proposed Release presented or intended for presentation by the Employer to the employees include the undertaking on the part of the employees to:

“remise, release and forever discharge, Cable & Wireless Communications PLC, Cable & Wireless (Antigua) Ltd. (herein collectively referred to as the “Employer”) and its respective affiliates, subsidiaries, successors, assigns and predecessor companies: and their respective directors, officers, servants, agents and employees of and from all actions, causes of action, debts, suits, claims and demands of every nature or kind whatsoever arising out of or in any way related to or connected with, my employment with the Employer, or the termination thereof, including without limiting the generality of the foregoing all claims or demands....”

100. Those clauses of the release are consistent with the apparent joint course of conduct of CWC and the Employer throughout the negotiation process: Based on the correspondence, CWC and the Employer could be individually and/or collectively referred to as the Employer.
101. Based on the terms of the proposed Release it appears that the Employer and CWC considered themselves to be acting in concert for the purpose of the termination of the services of the Employees. In the context of the provisions of the Labour Code and good industrial relations principles, the Employer and the Union are mutually recognized negotiating partners. The apparent marriage between the Employer and CWC, for the purposes of the consultations culminating in the Release, could be considered to be bigamous.

Section 10(3) of the Industrial Court Act

102. This Court is clothed with the power to make such order or award as it considers **“fair and just”**. To that end, we must act in accordance with **“equity, good conscience and the substantial merits of the case”** before us. And we must have regard for the **“principles and practices of good industrial relations.”**
103. The Industrial Court Act does not provide a definition or explanation for what is “fair and just” and reasonable. Understandably, there are no general rules or objective tests which can be universally applied to determine what is fair, just and reasonable in every conceivable scenario. As to equity, according to R. E. Megarry in **Snell’s Principles of Equity** (23d ed.1947)., **“In its popular sense it [equity] is practically equivalent to natural justice...”** (See **Black’s Law Dictionary**, 10th Ed., 656)
104. There are known principles of natural justice which could be applied to determine what is fair and reasonable. The principles of natural justice should dictate that in any negotiation process the party being consulted must know clearly what is being proposed and then be given a fair opportunity of being heard.
105. Fortunately for tribunals and the Courts in the United Kingdom, the legislature has codified a whole range of provisions relating to good industrial relations practices and principles. We are not as fortunate. This Court must rely on its own knowledge of what constitutes good industrial relations practices and principles.
106. For the purposes of this judgment, I will adapt and adopt the following dictum of the Hon. Mr. Justice Browne-Wilkinson in **Williams and others v. Compair Maxam Ltd.** [1982] UK EAT 372./81.

“The Industrial Tribunal is an industrial jury which brings to its task a knowledge of industrial relations both from the view point of the employer and employee. Matters of good industrial relations practice are not proved before an industrial tribunal as they would be proved before an ordinary court: the lay members are taken to know them. The lay members of the Industrial Tribunal bring to their task their expertise in a field where conventions and practices are of great importance.”

107. In that case the Hon. Justice Browne-Wilkinson identified one of the two relevant principles of law as follows:

“The second point of law particularly relevant in the field of dismissal for redundancy, is that the tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted

reasonably in treating redundancy “as a sufficient reason for dismissing the employee,” i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal. In law therefore the question we have to decide is whether a reasonable tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted.”

108. For the avoidance of doubt, we make no pronouncements as to the corporate rights, privileges and powers of CWC to control, dictate to or influence the actions of the Employer.
109. Moreover, we are not suggesting that the actions of the Union during the consultation process were exemplary or flawless.
110. We emphasize that in the exercise of our statutory jurisdiction and powers we are obliged to place substantial weight on the actions and omissions of the Employer under the circumstances which actually existed at all material times. In that regard, the pertinent question is whether the Employer’s conduct falls within the range of conduct which a reasonable employer should have adopted.

Conclusion

111. For the foregoing reasons, we conclude that under the particular circumstances of this case, the actions of the Employer, taken as a whole, were not within the range of conduct which a reasonable employer should have adopted. In other words, we conclude that the Employer has failed to discharge its burden of proving on a balance of probabilities that it acted reasonably under the circumstances. Accordingly, we are constrained to determine this Reference in favour of the Union as the representative of the affected employees.

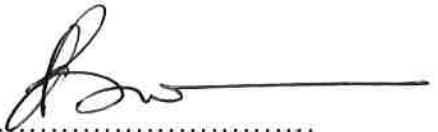
Declaration and Order

112. It is hereby declared and ordered as follows:

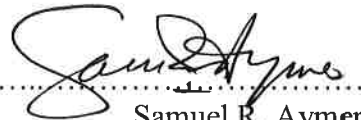
(1) The injunction granted on 27th November 2015, continued on 15 December 2015 and upheld on 06 January 2016, is hereby discharged.

- (2) The 13 affected employees – Leroy Allen, Usiega Benjamin, Danielle Charles, Joy De Castro, Nadia Farrell-O'Donoghue, Willhelmina Henry, Aisha Humphreys, Shari Davis, Torri Michael, Rochelle Perry-Christopher, Tanya Simon, Clint Matthew and Arlene Nelson – are deemed to have been dismissed with immediate effect by reason of redundancy.
- (3) The said employees were unfairly dismissed and are entitled to compensation to be assessed by this Court if not agreed.
- (4) Subject to agreement between the parties, the determination of the issue of costs is reserved.
- (5) If the quantum of compensation and costs, if any, are not agreed within a reasonable time then the parties are at liberty to file and serve additional witness statements and submissions no later than June 30, 2016.
- (6) If necessary, the assessment of compensation and the determination of the issue of costs will be held during the third quarter of 2016 on a date to be fixed by the Court Office.

Dated 24th May 2016



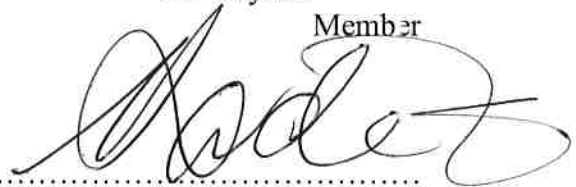
Charlesworth O. D. Brown
President.



Samuel R. Aymer
Member



Dr. Hayden Thomas
Member



St. Lawrence de Freitas
Member

