

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 54 OF 2013

BETWEEN:

HUMPHREY MICHAEL BLACKBURN

Employee

And

LIAT (1974) LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Samuel Aymer

Member

The Hon. Dr. Hayden Thomas

Member

November 24th, 2014 –

Mr. Gregory Delzin, Mr. Septimus A. Rhudd, Mrs. Michelle Emmanuel-Steele and Mr. Jermaine Rhudd of Rhudd & Associates for the Employee.

Mr. Kendrickson K. Kentish of Lake & Kentish for the Employer

January 14th, 2015 –

Mr. Ruggles Ferguson, Mr. Septimus A. Rhudd and Mrs. Margaret Blackburn-Steele of Rhudd & Associates for the Employee

Mr. Douglas Mendes SC, Mrs. Stacy Richards-Roach and Ms. Bellina Barrow of Richards & Company for the Employer

2014: November 24

2015: January 14

2017: June 13

JUDGMENT

Brown, P

Background

1. The Employer is a limited liability company incorporated in Antigua and Barbuda trading as LIAT and carrying on commercial airline operations mainly in the



Leeward and Windward Islands. By providing the main means of air transportation. Its services are widely considered to be vital for intraregional commercial and leisure activities.

2. The Employee commenced his employment with the Employer in 1978 as an Airline Pilot. By December 5, 2011, after 33.5 years of service and having attained the rank of Captain in or about 1990, he was earning a monthly income of \$23, 503.72.
3. At all material times the Employee held the position of Chairman of the Leeward Islands Airline Pilots Association (LIALPA), the exclusive bargaining agent for all pilots employed by the Employer.
4. The employment relationship between the Employee and the Employer was largely governed by the provisions of the Antigua and Barbuda Labour Code, Cap 27 and a Collective Agreement between the Employer and LIALPA dated August 23, 1996.
5. The Observer Radio disseminates information throughout Antigua and Barbuda, regionally and internationally via conventional radio broadcasts and otherwise by electronic means.
6. On November 6, 2011 and November 20, 2011 the Employee was interviewed live on Observer Radio during its "Big Issues" programmes.
7. By letter dated December 5, 2011 the Employee's employment was terminated on the ground of misconduct in respect of his statements made during his interviews on the said programmes.

The Employee's Case

8. The Employee commenced these proceedings by Reference filed on June 18, 2013. The issues in dispute were stated to be Unfair Dismissal and the Employee's entitlement to compensation and damages therefor.
9. In his Memorandum of Claim (Employee's Memorandum) filed on June 18, 2013 the Employee contended that:
 - (1) The termination of his employment 'with immediate effect' was arbitrary and without any process whatsoever, summary or otherwise, contrary to Section XIV Article 1 of the Collective Agreement.
 - (2) Prior to his dismissal the Employee had an unblemished record. In 2008 he received a Certificate of Appreciation from the Employer for his 30 years of distinguished service.

10. At paragraphs 11, 12, 13-16 and 18-21 of his Memorandum, the Employee pleaded:

“11. On 6th and 20th November, 2011 the Employee, while speaking on radio during the ‘Big Issues Programme’, a talk show run by Observer Radio Antigua & Barbuda, made Statements about aspects of the Employer’s operations. This he did in his capacity as Chairman of the said LIALPA; and as such as Trade Union Leader. Those comments had nothing to do with the Employee’s loyalty to the Employer as a senior employee of the Employer. Indeed, when the Employee made the Statements he was not on duty, he was off duty.

12. The Employer by letter of 5th December 2011 to the Employee, told the Employee that with reference to the statements referred to in paragraph 11 above, the statements amounted to misconduct as defined by the Labour Code of Antigua and Barbuda. The letter added that:

Your employment is accordingly terminated, with immediate effect. The dismissal is on the grounds of misconduct which is so serious that LIAT cannot reasonably be expected to take any course other than termination. You have conducted yourself in such a manner as to clearly demonstrate that the current employment relationship cannot be expected to continue.

13. The Employee contends that the statements referred to in paragraph 11 do not, and cannot, in law constitute misconduct warranting dismissal, and in any event, the principles of good industrial relations practice require an employer to inform a worker of the exact reason for taking disciplinary action against him before such disciplinary action is taken.

14. The Employee contends that the termination of his employment by the Employer is unfair, and in breach of the Collective Agreement.

15. ...

16. The Employee’s dismissal was in contravention of **Section XVI Article 2** of the **Collective Agreement** between LIAT and the Union, which provides that the provisions set out in **Section XIII** must be followed by the Employer when a pilot is being dismissed for cause.

17. ...

18. The Employee was dismissed without the engagement of the disciplinary procedure laid down under the Collective Agreement, without being given an opportunity to be heard in the matter of the allegation, and in breach of the principles of good industrial relations practice.

19. The Employee's dismissal was, in any event, for reasons that are baseless and was harsh, oppressive and unfair.

20....

21. The Employer, by dismissing the Employee in an arbitrary manner and in the circumstances without any process whatsoever, summary or otherwise, acted unreasonably and oppressively."

11. The Employer filed no Memorandum of Defence (Employer's Memorandum) and witness statements. Accordingly, for reasons which will emerge below, we ruled that the trial should proceed ex parte.

The Main Issues

12. The main issues arising in this Reference are:

- (1) Whether the Employee was guilty of misconduct.
- (2) If the Employee was guilty of misconduct, whether it was sufficiently serious to justify summary dismissal.
- (3) Whether or not, under the circumstances, the Employer acted unreasonably or reasonably in dismissing the Employee.
- (4) If the Employer acted unreasonably, whether the Employee contributed to his dismissal.

Directions and Applications

13. By Requisition dated June 25, 2013, issued by the Registrar and addressed to the Employer's Chief Executive Officer, the Employer was required to file its Memorandum no later than July 23, 2013.

14. By an application filed on August 27, 2013, the Employer applied for an order staying the proceedings pending the discontinuance of High Court Claim ANUHCv 2012/0536 or, alternatively, striking out this Reference as an abuse of the Court process.

15. By Requisition dated February 12, 2014, issued by the Registrar and addressed to Lake & Kentish, Legal Practitioners for the Employer, the Employer was granted an unsolicited extension of time and required to file its Memorandum no later than March 14, 2014.
16. By letter dated March 27, 2014, the Registrar issued a Reminder to the Employer and noted that the Court had received no application for an extension of time. The Registrar warned the Employer that "unless the Court receives a written application for a further extension within seven (7) days of delivery of this letter to you, the Court will conclude that you have no defence to the Employee's case".
17. By letter dated March 27, 2014, the Employee opposed the grants of extensions of time and requested that judgment be entered for the Employee.
18. By an Application filed on May 13, 2014, and supported by his Affidavit of even date, the Employee applied for an Order that judgment be entered in his favour. Grounds 3 to 5 of the Application emphasized the Employer's failure to comply with the directions of the Court. Ground 9 is as follows:

"9. To date the Employer has not complied with the several directions of the Court. By its failure and /or refusal to comply, it is apparent that the Employer has no intention of defending the Employee's claim or otherwise complying with the Court's directions. The Employer has not given any indication of its intention to actively pursue this matter."
19. By Directions given on May 15, 2014, the Employer was granted liberty to file and serve:
 - (a) an affidavit in opposition to the Employee's application, no later than June 2, 2014; and
 - (b) skeleton submissions no later than June 10, 2014.
20. The Employee's Skeleton Submissions were filed on June 10, 2014 pursuant to the Directions Order made on May 15, 2014. The Employer failed to comply.
21. At the 'Call-Over' held on July 30, 2014, after consulting with each other, the Legal Representatives for the parties agreed that the trial date be fixed at November 24, 2014.
22. By a Notice of Trial Date issued on October 29, 2014, the Legal Representatives for the parties were reminded and formally notified that the Reference had been fixed for trial on November 24, 2014.

23. By an Application filed on November 21, 2014 and supported by an affidavit sworn by Juliette Dunnah, a Clerk employed by the law firm of its Legal Representatives, the Employer applied for an order granting it an extension of time to file its Memorandum of Defence.

The Application to Stay or to Strike Out

24. The Employer's Application for an order staying or striking out was heard on October 3, 2013 in the presence of Diane Shurland, the Employer's General Counsel and Director of its Legal department. After considering the respective affidavit evidence together with the written and oral submissions of Counsel, this Court, as then constituted, dismissed the Application

The Application for an Extension of Time

25. At the commencement of trial on November 24, 2014, there were two applications pending before the Court. On the one hand, the Employer's application, filed belatedly on November 21, 2014 was for an order extending the time for filing the Employer's Memorandum. In her affidavit in support, Mrs. Dunnah asserted that the Employer had a *bona fide* defence to the Employee's claim.
26. In Civil Appeal No. 19 of 2003, **John Cecil Rose v. Anne Marie Uralis Rose**, Sir Dennis Byron, Chief Justice, as he then was, stated that the grant of an extension of time is a discretionary power of the Court to be exercised for "good and substantial reasons". He listed the four categories of matters that the Court considered as follows: (1) the length of the delay; (2) the reasons for the delay; (3) the chance of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the Respondent if the application is granted.
27. Upon considering the Application generally, reading the grounds thereof and the supporting affidavit, in particular, and upon hearing the oral submissions of Counsel for the Employer and the Employee, we applied the dicta of Sir Dennis Byron and rejected the Employer's application for the following reasons:
- (a) there was no evidence explaining the Employer's failure to comply with the Court's earlier directions;
 - (b) there was no explanation for the inordinate delay in making the application;
 - (c) the Employer did not demonstrate with any or any sufficient evidence that it had a good chance of success; and

- (d) granting the application would result in a considerable degree of prejudice to the Employee which would likely outweigh any prejudice to the Employer if the application was denied.

The Application for Default Judgment

28. On the other hand, the Employee's Application, filed since May 13, 2014, was for an order that judgment be entered for him as a consequence of the Employer's failure to comply with the Court's several directions. In effect, it was an application for judgment in default of defence.
29. The Employee's affidavit in support set out the chronology starting with the filing of the Reference on June 18, 2013 and culminating with the filing of its Application.
30. Despite the forceful submissions of Mr. Delzin, we declined to enter default judgment. In deciding to decline the Employee's Application and deciding that the trial should proceed ex parte on the issue of liability only, the Court paid special attention to the nature of his claim, the content of his witness statement and the provisions of Section 10 (3) the Industrial Court Act (the Act) and Division C of the Antigua and Barbuda Labour Code (the Code).
31. In ordering that the trial proceed ex parte, we were especially mindful of our statutory obligations. With those in mind, we decided that, notwithstanding the denial of its application for an extension of time, Counsel for the Employer should be permitted to cross examine the Employee on his Witness Statement. The express objective of this concession was to test the veracity of the Employee's evidence. Our concession was not intended to provide the Employer with an opportunity to present its case through the back door.

Key Parameters

32. It is convenient at this stage to set out the statutory provisions, legal principles and other key parameters which we will apply towards the resolution of the main issues identified above. To the desired end, we will focus on the following:
- a) The statutory powers of the Court;
 - b) The principles and practices of good industrial relations;
 - c) The constitution of Unfair dismissal;
 - d) Implied terms of an employment contract;
 - e) The rules of natural justice;
 - f) The role of trade unions;
 - g) Express contractual obligations;
 - h) The burden of proof on the Employer;

- i) Justifying summary dismissal;
- j) The effect of contributory fault.

Powers of the Court

33. Ultimately, this Court must exercise its statutory powers in accordance with the provisions of Section 10 (3) of the Industrial Court Act, which are:

“(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its power 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”.

Good Industrial Relations

34. In this case, the “principles and practices of good industrial relations”, referred to in the aforesaid section of the Act, are extremely important. In order to emphasize this point, we rely on the definitions in **Black’s Law Dictionary**, 10th Edition, 2014.

Principles are the basic law, doctrines or rules which are fundamental to the proper and efficient functioning of any system. Practices are the settled and widely accepted procedural methods which govern the way things are done in a particular situation. Industrial relations are the dealings and relationships between an employer and its employees. It includes matters of and arising from collective bargaining with a recognized trade union.

35. Unlike those in the United Kingdom, legislation in our jurisdiction does not systematically set out the principles and practices of good industrial relations. In that regard, we are mindful of the provisions of the Industrial Relations Act 1971 and the Industrial Relations Code of Practice 1972 in the United Kingdom. However, by virtue of its composition, this Court is deemed to know those principles generally and the particular ones to apply in any given situation. The latter position was reflected in the context of industrial tribunals by the Honorable 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."

Unfair Dismissal

36. Section C56 of the Code establishes an employee's right not to be unfairly dismissed. It constituted a new right previously unknown at common law.

37. Naturally, the right not to be unfairly dismissed does not preclude dismissals which are not unfair. Section C58(1) sets out some good causes for dismissal, including misconduct on the part of an employee. That section provides:

- "(1) A dismissal shall not be unfair if the reason assigned by the employer therefor**
- (a) relates to misconduct of the employee on the job, within the limitations of section C59 (1) and (2);**
 - (b).....**
 - (c)**
 - (d)**
 - (e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:**
- Provided, however, that there is a factual basis for the assigned reason.**

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

38. The Code recognizes that there are types of misconduct which are so serious that they would justify summary dismissal. In that regard, section C59(1) provides:

- (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has
- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;
 - (b)
 - (c)

39. In our view, the scope of that subsection of the Code is wide enough to encompass situations other than misconduct “on the job” under Section C 58(1) (a). We are of the opinion that offences comprising some other “substantial reason” falling under the wider umbrella of Section C58 (1) (e) may justify a dismissal under Section C 59(1).

Implied Terms of Employment Contract

40. From time to time this Court has applied pertinent common law principles to supplement statutory provisions. In that regard, it is well settled that there is implied in every contract of employment an implied term of mutual trust and confidence. It imposes a reciprocal duty on both employer and employee not to engage in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. Each must conduct itself with reasonable skill and care to avoid harming the other. Historically, this implied term has been more commonly formulated to impose the obligation on the employer. See **Woods v. WM Car Services (Peterborough) Ltd.** [1981] IRLR 347 and **Malik v. BCCI SA (In liq)** [1997] IRLR 462.
41. Separate and apart from the implied term for mutual trust and confidence, perhaps more fundamentally, there is also an implied term imposing on each employee an obligation to serve his employer loyally and not to act contrary to the employer’s interests. This obligation is sometimes referred to as a duty to maintain fidelity and includes a duty not to impede the employer’s business. See **Secretary of State for Employment v Associated Society of Railway Engineers & Firemen (No. 2)** [1972] 2 QB 455.

Natural Justice

42. At common law, the principles of natural justice dictate that an employee has a right to know any and all adverse allegations against him. An employee against whom an adverse allegation is made must be given an opportunity to exculpate himself and otherwise be heard in his own defence. The principles of natural justice underpin much of Division C of the Code generally, and Sections C58 and C59, in particular, which deal with unfair dismissals.
43. Thus, save for exceptional situations which may warrant summary dismissals under section C59 (1) of the Code, an employee must be given a written warning setting out the alleged misconduct and stating the action the employer intends to take in the event of a repetition of the same or similar misconduct within the ensuing six months. In other words, as a general rule, an employer has an obligation to notify the employee of the precise allegations against him, give him the opportunity to answer them, avoid repetition of the same and to improve, if necessary.
44. In Civil Appeal No. 4 of 2003: **The Epicurean Limited v. Madeline Taylor**, while reviewing a judgment of this Court, the Court of Appeal reminded itself of the significance of natural justice. At paragraph 33 of the judgment Rawlins J. A., as he then was, stated:

"The principles of natural justice are well known, trite and ancient. It is said that rules that required a fair hearing before impartial adjudicators can be traced back to ancient times, were known in medieval precedents and reached a 'high watermark' in their development in Dr. Bonham's case (1610) 8 Co. Rep. 113b. Indeed, we were reminded that, although their disobedience was obvious, even Adam and Eve were given the opportunity to speak in their defence before they were cast out from the Garden of Eden."

45. As to the significance of the opportunity to answer allegations and to improve, at page 89 of his book, **The Law of Unfair Dismissal**, Butterworths 1978, Steven D. Anderman asserts:

"With the exception of gross misconduct or other circumstances entitling an employer to dismiss without notice, an employer is normally expected to give a final formal warning before dismissing an employee. Although the omission of a warning will not as a matter of law make a dismissal unfair, where a warning if duly given is likely to influence the result, or if there is a real possibility that it might influence the result, its omission may well make a dismissal unfair."

The Role of Trade Unions

46. The Code expressly recognizes the critical role of trade unions in several of its sections. In particular, Section A 3 of the Code comprises expressions of the underlying national policy which must be used in the interpretation of its several provisions. Ultimately, in so far as they advance the interests of workers by collective bargaining, trade unions play an important role in advancing the overall socio-economic development of Antigua and Barbuda.
47. In conjunction with particular employers, trade unions routinely contribute to the establishment of standards higher than the minimum ones established under the Code. We accept this as the norm and note that, as part of their fundamental structure, collective agreements routinely include the application of the principles of natural justice.
48. Accordingly, it is not surprising that after recognizing LIALPA as the sole agent for negotiating agreements with the Employer in relation to its Pilots in Article 1 of Section 1, the spirit and intention of the Collective Agreement is stated in its Article 2 of the same section as follows:

"ARTICLE 2

The spirit and intention of this agreement is to maintain a good relationship between the Company and the Association. It is in the mutual interest of the Company and the Association to provide for the operation of the services of the Company under methods which will further the safety of air transportation, the economy and efficiency of operations and the continuation of employment under reasonable hours of work, compensation and generally to improve the working conditions within the Pilot body. Therefore, it is recognized by this agreement to be the duty of the Company and the Association to cooperate fully for the attainment of these purposes."

49. Further, in dealing with its recognition and scope, Article 10 of Section 1 of the Collective Agreement provides:

"ARTICLE 10

The Company and the Association shall not violate the provisions of this Agreement. In addition, where the agreement is not specific about any matters, or where there exists a reasonable doubt as to the correct

interpretation of any provision of this Agreement, the Company shall consult with the Association in an attempt to reach an agreement before implementation of any action. This does not prejudice the provisions set out in Section XIV."

Express Contractual Obligations

50. The same principles of natural justice underpin Sections XIII, XIV and XVI of the **Collective Agreement** between the Employer and the Pilots which it employs. Section XIII outlines the disciplinary procedure in cases where an adverse report is made against a Pilot. Section XIII reads:

"SECTION XIII – ADVERSE REPORT / DISCIPLINARY ACTION

ARTICLE 1

- (a) Any adverse report on a Pilot shall be brought to the attention of the Pilot concerned and if such report is made in writing, the Pilot shall be invited to make his comments in writing...
- (b) In the event that, as a result of an adverse report, the Company contemplates disciplinary action, then the Pilot concerned must be given an opportunity to exculpate himself in writing before Disciplinary Action is taken by the Company...

ARTICLE 2

In the event that the Company proceeds with Disciplinary Action, the Pilot reserves the right to take up the matter under the provisions of Section XIV.

ARTICLE 3

...

In cases of Discipline or Dismissal Section C-61 of the Antigua Labour Code shall apply."

51. Section XVI of the Collective agreement provides for the termination of the services of a Pilot as follows:

"SECTION XVI – TERMINATION OF SERVICES

ARTICLE 1

- (a) After confirmation of a Pilot's appointment to the permanent staff, the service can be terminated on either side by giving three (3) months' notice. Termination of service by the Company shall be on the decision of the Management body of the Company.
- (b) The provisions of sub-paragraph (a) of this Article shall not apply to dismissal under the provisions of Article 2 of this Section.

ARTICLE 2

A Pilot may be dismissed or suspended by the Company for cause in accordance with the provisions of Section XIII of this Agreement.

ARTICLE 3

....

ARTICLE 4

Nothing in this Section shall be interpreted to preclude the right to appeal in terms of Section XIV of this Agreement."

The Burden on the Employer

- 52. Given the aforesaid provisions of the Code, the principles of natural justice, and the contractual obligations, and having particular regard for the content of the dismissal letter dated December 5, 2011, the onus is on the Employer to satisfy the Court by positive evidence that it acted reasonably.
- 53. For present purposes, we will be mindful of the dicta of President Moe, as he then was, from page 3 of his judgment in Ref. No. 9 of 1988: **Wesley Wade v St. James Club Ltd.**:

"Since the Employer has admitted dismissing the Employee on these grounds they will have to justify this action and accordingly the burden of proving that the Employee was fairly dismissed rests with the Employer. This is the central issue in this case. If the Employer fails to establish it to the satisfaction of the Court, then it follows that the Employee must inevitably be deemed to be unfairly dismissed as he claims to be and is entitled to the relief sought. The Court is therefore charged with the responsibility of determining whether that dismissal

was fair or unfair in accordance with Section C60 (2) of the Antigua Labour Code...”

Summary Dismissal

54. In Industrial Court Appeal No. 1 of 1981, **Cable & Wireless (West Indies) Ltd v Dalma Hill et al**, the Court of Appeal reviewed the judgment of this Court in relation to the summary dismissal of the respondents. At page 15 of the judgment, Berridge J.A., as he then was, approving the approach of this Court, stated:

“The Court held the view that within the ambit of Section C58 of the Labour Code the burden of proof was on the Company to show “just cause” for dismissing the Respondents and that since summary dismissal constitutes a “strong measure” the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a Civil nature requiring a standard of proof on a balance of probabilities, since the matters to be proved were of a grave and weighty nature, they would expect the evidence to be correspondingly cogent and weighty in nature and content.”

Contributory Fault

55. In cases where an employee is found to have been unfairly dismissed, this Court is obliged to consider if and to what extent he contributed to his dismissal. When a dismissal is found to be unfair by reason of an employer’s failure to follow a statutory or contractual procedure, the customary award of compensation may be reduced on account of the employee’s contributory fault. In such cases, the extent of the reduction, if any, would turn on the likelihood that the dismissal would have taken place even if the proper procedure had been followed. If the employer proves that the dismissal would have taken place in any event, no reduction would be made.

The Employee’s Evidence

56. At trial the Employee testified on his own behalf. His witness statement filed on March 14, 2014, with the attached documents, was consistent with his Memorandum. In particular, we had regard for the following salient points of evidence.

57. It is noteworthy that the Employee worked as a Pilot of the Employer for thirty three and a half years, having commenced his employment in 1978. We hasten to add that,

given the Employer's formal recognition of his distinguished service, that fact may operate as a two edged sword in the particular situation in which the Employee found himself at the date of his dismissal. In our deliberations, we considered its potentially exacerbating or mitigating effect.

58. Moreover, we note that the Employee had served as Chairman of LIALPA on 'many different occasions' and was holding that position for 'quite some time' before his dismissal. In that regard, he is deemed to have been fully familiar with the acceptable standards of conduct of Pilots generally and the Chairman, in particular, vis-à-vis the Employer. Ultimately, we have to determine whether he was unfairly dismissed. And if he was, to what extent, if any, he was nevertheless blameworthy.
59. At paragraph 9 of his witness statement, the Employee stated that his appearance on the radio talk show was 'by virtue of an invitation'. We assume that the invitation came from the producers of the programme. There is no evidence that the Employer received a similar invitation. In any event, there was no one on the programmes speaking for or on behalf of the Employer. That fact is also of importance to us.
60. At paragraph 10 of his witness statement, the Employee acknowledged making statements about the Employer's operations related to 'prevailing issues of management and safety' with which he was 'quite familiar' by virtue of his seniority and experience. Instructively, the employee stated that his comments were made as 'a Union Leader and an employee who was off duty'. Those words represent an acknowledgement that his statements were 'in relation to his employment'.
61. At paragraph 11 of his witness statement, the Employee referred to the dismissal letter and the particular allegation contained therein that his statements amounted to misconduct for which he was being dismissed with immediate effect because the Employer could not be expected to take any other course.
62. We reproduce the full text of the dismissal letter, which was attached to his witness statement, as follows:

"December 5th, 2011

Captain H. Michael Blackburn

...

Dear Sir,

Re: Termination of Employment

The Company's attention has been drawn to recent statements which you have made in the media.

On 6th and 20th November you were broadcast on Observer Radio Big Issues Programme. You were highly critical of the company's actions and policies. We are particularly concerned about your statements made about the quality of the airline's safety and members of senior management, some of which, we have been advised, may be defamatory.

Some of the inappropriate statements made by you during these broadcasts are reproduced below and the company reserves the right to rely on and produce the entire broadcasts in any subsequent legal proceedings.

On November 6th on the said radio programme you stated, inter alia:

There is a confrontational group within LIAT, an unqualified confrontational group, even within Personnel, even within HR. I know there is conflict because, Ms. Ramsey doesn't, I don't believe she's an educated person.

There are management people in my department who have absolutely no qualifications in aviation. There is not one single person in my management that is qualified to make decisions they are making.

Management includes such posts as a Manager of Catering where LIAT has no catering.

Further on November 20th on the said radio programme you stated, inter alia:

Let me put it to you now as a professional pilot... I am one of the most senior pilots... LIAT right now is not as safe as it was when we had two... and I am talking... I represent the training Captains ... I am the sole spokesman of all the pilots... The standards of safety and operations that we have now are not better and if anything, are less than we had when Captain Murray and Captain Lake alone were running the flight operations department.

Your statements have crossed the line beyond what is permitted of a union leader and a senior employee of LIAT. We have been advised the

statements amount to misconduct as defined by the Labour Code of Antigua and Barbuda. In that regard:

The statements made about Miss Ramsey were very derogatory and would tend to undermine corporate and public confidence in her competence to manage the Human Resources Department of LIAT and would tend to subject her and in particular her professional reputation to opprobrium and disrepute;

The statements made about "management" would tend to undermine corporate and public confidence in the competence of the flight operations department;

The statement concerning catering is wholly untrue. The Manager of In-flight services and catering has direct responsibility for all Cabin crews. Further, you are aware that the company offers refreshments to passengers on early morning and late night flights, and to pilots throughout their flight rotation;

The statements about the airline's safety made on 20th November would tend to undermine public confidence in the safety of LIAT.

Your employment is accordingly terminated, with immediate effect. The dismissal is on the grounds of misconduct which is so serious that LIAT cannot reasonably be expected to take any course other than termination. You have conducted yourself in such a manner as to clearly demonstrate that the current employment relationship cannot be expected to continue."

63. Paragraph 13 of the Employee's witness statement is particularly interesting. In it, he outlined the following 'facts' regarding his statements.

- (i) His statements about safety standards were made in relation to:
 - a. the Employer's claim that it was necessary to have 6 managers in its Flight Operations Department.
 - b. The Employer had referred to its safety concerns in its Safety Newsletter issue of December 2011.
 - c. Crew and aircraft safety were ongoing matters of concern between the Employer and LIALPA.
- (ii) His remarks about Mrs. Ramsey, as transcribed by the Employer, did not reflect two pauses. As a result:
 - a. His remark was that Mrs. Ramsey is an educated person.

- b. His comments about Ms. Ramsey were relative to the existence of a conflict.
- c. The Employer's representation of what he said about Ms. Ramsey is inaccurate and misleading.

64. As to the procedure which the Employer adopted for his actual dismissal, the Employee testified that on the day of his dismissal he was on 'reserve' when he was called out to duty to operate a flight out of Trinidad and Tobago. After checking in at airport in Barbados he was requested to report to the office of Capt. McFarlene where he met four of the Employer's executives, including Mrs. Ramsey, the Director of Human Resources, who informed him that his services were being terminated with immediate effect.
65. Perhaps most instructively, the Employee testified that prior to his dismissal he was given no opportunity to be heard, was not informed of any pending investigation against him or allowed any representation by his union. Further, he stated that at no time was he questioned about the performance of his duties. Moreover, he said that no allegation was made against him that he had breached his contract of employment.
66. It is noteworthy that the Employee testified that during a teleconference after his dismissal, involving his Union, the Employer, Senator Chester Humphrey of Grenada, with the Minister of Labour of Antigua and Barbuda serving as Mediator, he offered to clarify his comments, and withdraw and/ or apologize for making them, but the Employer rejected his offer.
67. At the end of the day, the main contentions of the Employee were that his dismissal:
- i. was 'highhanded, unfair and arbitrary and contrary to law'.
 - and the manner thereof was 'baseless, harsh and oppressive'.
 - ii. deprived him of his entitlement to a fair procedure and the opportunity to be heard. In particular, the Employer acted in breach of Section XVI and XIII of the Collective Agreement.
 - iii. was in direct contravention of the rules of natural justice
 - iv. was flagrantly in direct breach of the principles of good industrial relations practice
 - v. was influenced by malice.
68. Under cross-examination, the Employee asserted that he was being truthful and stood by the contents of his witness statement. He asserted that parts of his statements were taken out of context. He also denied that making that statement meant that he was being disloyal. He said that his statements were based on his

concern about the provision of the best working conditions for members of his Union and the safety of crew and passengers. Moreover, the Employee denied that when making the statements he was talking out of turn.

69. Captain Patterson Thompson, one of the Employer's pilots testified on behalf of the Employee. At paragraph 7 of his witness statement, he stated that 'issues perceived by LIALPA to raise questions of safety' were 'being strongly contested by the Association' during his tenure as Secretary up to the date of dismissal of the Employee.
70. Captain Thompson's unchallenged evidence was very instructive in so far as it emphasized the Employer's intention as stated by representatives of Management on December 7, 2011. He reported that Management stated that they were not going to follow the Collective Agreement as it related to adverse reports, grievance procedures and discipline but that the Employer would instead act under summary dismissal procedures as laid down in the Code.
71. At the end of the trial the parties were invited to file closing submissions on or before December 1, 2014. Submissions were filed on behalf of the Employee on the said date but none were received from the Employer.

The Employer's Application to Reopen the Reference

72. As a matter of convenience and for completeness we now deal with the Employer's application to reopen the proceedings although it was filed after the completion of the ex parte trial.
73. By the application filed on December 2, 2014 the Employer applied for an order that the order that the trial proceed ex parte on liability be set aside and that the Employer be granted an extension of time to file its Memorandum. Alternatively, the Employer sought an extension of time to file submissions on liability.
74. The Employer's application was filed with a supporting affidavit as sworn by Ms. Diane Shurland, the Employer's General Counsel and Director of its Legal Department. The Employee filed an affidavit in opposition on December 31, 2014.
75. In his written submissions filed on January 5, 2015, Counsel for the Employer conceded that our decisions, in proceeding with the matter as we did with the information before us, were correct. It was emphasized that as a result of the shortcomings of the Employer's predecessor Counsel, the Employer had been deprived of the opportunity to fully defend the Reference.

76. In his submissions, Counsel also highlighted this Court's "ample powers", grounded on sections 9 and 10 of the Industrial Court Act, to reopen the proceedings to allow the Employer to present its defence. In that regard, we have noted the Employer's concern that there is 'the possibility that the Employee will have received an award on the basis of incomplete evidence of what he actually said, when the evidence is readily available'.
77. The application to reopen the proceedings was heard on January 14, 2015. Lead Counsel for the Employer, Douglas Mendes SC, outlined the background facts arising from the ex parte trial on November 24, 2014 and submitted that the Court could be hampered by not having the best evidence of the statements made by the Employee. Accordingly, he maintained that, given the powers of Court under the Act, the Court should exercise its discretion in favour of the Employer by reopening the case with a collateral award of costs as a remedy for any resulting prejudice suffered by the Employee.
78. In response to the Employer's submissions, Mr. Ruggles Ferguson, Lead Counsel for Employee vigorously resisted the Employer's submissions. He also highlighted the Court's discretionary power to reopen the proceedings and contended that this is not a suitable case for reopening. He made the following submissions in sequence:
- i) Notwithstanding the Court's labelling of the trial as ex parte, it was in fact inter parties since the Employer's Counsel was allowed to extensively cross examine the Employee.
 - ii) The Court had a duty to ensure that the parties were on equal footings. The Employee had no means to match the Employer's institutional support with a Legal Department and access to a team of lawyers.
 - iii) In the interest of fairness and justice, the Court had previously ruled against the Employer's application for an extension of time to file its Memorandum and moved the Reference forward to trial. There was no application for permission to file witness statements, in the absence of which, extending the time to file the memorandum would take the case no further.
 - iv) In the balancing exercise, it is clear that the Employee would suffer the greater prejudice if a decision is made by the Court to reopen the proceedings. The Employee's evidence has already been given and tested at the trial. Therefore, it would be unfair to allow the Employer at that late stage to fashion its evidence on that of the Employee which is already fully before the Court.

- v) The Employer's application to strike out the Reference had already been dismissed in the presence of its General Counsel since October 3, 2013. The Employer itself is at fault, not only the Employer's predecessor Counsel.
- vi) In the circumstances, allowing the Employer's application to succeed would create a dangerous precedent.

79. Having carefully considered the supporting and opposing affidavits as well as the submissions and the supporting authorities kindly provided by Counsel, we have determined that we should not exercise our discretion to reopen the proceedings. Moreover, we agreed with the Employee's submission that, on the facts of this case, granting any of the remedies sought on the application would set a 'dangerous precedent'.

The Recordings and Transcripts

80. Having decided not to reopen the proceedings, we became increasingly mindful of our obligations under section 10 (3) of the Act to have regard for the interests of the parties as well as our community as a whole when making a decision that is fair and just.
81. The groundings of the Employee's case include his contentions that (a) some of his statements were taken out of context, and (b) the Employer did not take into account two pauses in his speech at particular points while making the statements.
82. As we considered the particular background facts, the evidence, the submissions of Counsel and the authorities, it became increasingly clear to us that, in assessing the fairness of the dismissal, our full knowledge of the statements made by the Employee was paramount. We took the position that the required 'best evidence' was 'readily available' from the parties without 'reopening' the proceedings.
83. Given the Court's powers under the Act, we decided to better inform ourselves of the statements made by the Employee during the radio programmes on the 06th and 20th November 2011. Accordingly, we decided to obtain and examine the recordings of the Employee's statements and be guided by them in our deliberations.
84. To the desired end and based on the assertions of the Employer in the dismissal letter, upon the directions of the President, the Registrar by letter dated January 26, 2016 wrote to the Attorneys-at-Law for the Employer requesting a copy of the transcripts of the interviews. The letter was copied to the Attorneys-at-Law for the Employee.

85. Under cover of their letter dated January 26, 2016 Richards & Company promptly provided the Court with the required transcripts.
86. By letter dated January 27, 2016, Rhudd & Associates expressed the Employee's desire to have sight of the transcripts so that 'their authenticity and contents can be verified'. In particular, the Employee expressed his 'wish to be allowed to examine (the transcripts) and to compare them with the actual recordings'.
87. Upon receipt of the Employee's letter and upon the directions of the President, the Registrar under cover of a letter of even date promptly furnished Rhudd & Associates with a copy of the transcripts. In the said letter the Registrar stated that the Court had no reason to doubt the authenticity of the transcripts and requested that the Employee provide it with a copy of the "actual recordings"
88. In the circumstances, the Court deferred its delivery of its judgment pending the receipt of a copy of the full audio recording from the Employee in respect of which, by letter dated January 28, 2016 copied to Richards & Company, it requested the urgent attention of Rhudd & Associates.
89. In response, by letter dated February 1, 2016, Rhudd & Associates informed the Registrar that the Employee was in no position to comply because he never had or had access to the recordings. In that letter the Employee requested that the Employer provide him with a copy of the recordings so that he could compare the same with the transcripts.
90. By letter dated February 3, 2016, copied to Richards & Company, upon the directions of the President, the Registrar set out the selected chronology, expressed her concern and informed Rhudd & Associates that the Court would accede to its request by requesting the recordings from the Employer.
91. By letter dated February 23, 2016 the Registrar, acting on the directions of the President, wrote to Richards & Company requesting that the Employer provide it with the required copy of the audio recordings.
92. By letter dated February 9, 2016, copied to Rhudd & Associates, Richards & Company advised the Registrar that they were in a position to produce the recordings for the November 6 programme and sought an extension of time to produce the recordings for November 20, 2015.
93. By Notice of Objection filed on June 7, 2016, the Employee objected to the admission into evidence of copies of the transcript on the ground that they 'bear no relevance

to the decision to be delivered by the Court as to whether to grant the Employer's application for an extension of time'.

94. We believe that the objection was misguided. The Court's position in relation to the Employer's application to reopen which was heard on January 14, 2016, is set out at paragraphs 72 to 79 above. In light of our said determination of that application and having regard for the Court's power to obtain evidence at its own initiative, as we had done, and having particular regard for the opportunity extended by the Court to the Employee by letter dated January 27, 2016, to be at liberty to compare the transcripts with the actual recordings and submit its objections and comments, we find no merit in the Employee's objection to the admission of the transcripts.
95. By letter dated June 15, 2016, as directed by the President, the Registrar wrote to Rhudd & Associates enquiring as to how soon the Court should expect to receive "the part or parts of the audio recordings" in the Employee's possession. That letter was copied to Richards & Company.
96. Similarly, by letter dated June 15, 2016, and as directed by the President, the Registrar wrote to Richards & Company referring to their letter dated February 9, 2016, and enquiring as to how soon the Court should expect to receive the recordings for November 20, 2016. That letter was also copied to Rhudd & Associates.
97. By letter dated June 16, 2016 Rhudd & Associates wrote to the Registrar stating that the Employee never had or been in possession of any part of or the entire recordings.
98. The audio recording of the statements made by the Employee on November 20, 2015 were filed by the Employer on September 12, 2016.
99. By letter dated September 20, 2016, Rhudd & Associates renewed their enquiry as to when the Court's decisions would be delivered.
100. In response to the said letter from Rhudd & Associates, the Registrar, as directed by the President, reminded Rhudd & Associates that the required audio recordings were not filed until September 2016. In the said letter, the Registrar reminded the Employee's representative that "the precise utterances of the Employee and the context in which they were made are paramount for the just determination of the issues arising in the Reference."
101. For the avoidance of doubt, we emphasize that the Court's interest in the transcript is well grounded on its view that the same is necessary for the full and proper discharge of its functions, especially as mandated by section 10 (3) of the Act.

Obviously, the actual recordings provide the best and most accurate evidence of all the statements made by the Employee.

102. It should be noted that the approach adopted by the Court was with the purpose of informing itself. We were careful not to consider the evidence which we obtained as being the Employer's evidence tendered at the trial.

The Statements of the Employee as shown in the transcript

103. The statements which offended the Employer and which it relied on as good cause for the dismissal are set out in the letter of dismissal which is reproduced at paragraph 62 above.
104. The first statement complained of appears at page 10 of the transcript of the recording for the first programme on November 6, 2011. We now reproduce the full page of the transcript, including the preceding question or comment of the host, Shelton Daniel, and his other guest Lawrence Poyette. The offending statement is underlined by us for emphasis as follows:

"LAWRENCE POYETTE: But you see the issue here is more the approach, the manner in which they want to approach discussions with the union. They are not treating unions as equals they are not showing that level of mutual respect that is required to develop the trust which we need in this current situation to see how best we could deal with the situation. What you have is a type of arrogance, you are an inferior partner in the relationship and we would treat you as such. All we are saying is that look, the time for that time of behaviour is over. We are living in a more matured industrial relations environment and we expect persons in authority to behave responsibly. If they don't want to behave responsibly and their situation is to provoke a conflict, then one must ask the question whether there are persons within the LIAT management who are prepared to sabotage LIAT internally by provoking conflict with the employee representatives.

SHELTON DANIEL: Captain Blackburn what do you think of that?

MICHAEL BLACKBURN: My comrade has made a very valid point. Let me say this, I have been on record, in writing. I have written to Dr. Gonsalves who represents the shareholders. I have gone on record as saying that I have complete confidence in the integrity and goodwill of Mr. Challenger. I like him. He is a man of impeccable integrity, he means well. But he is surrounded by people who will not provide accurate

information and who are not cooperating with him. There are people who are undermining Mr. Challenger behind his back and I have told him so several times but he doesn't want to take any action. There is a confrontational group, even within Personnel, even within HR. I know there is conflict because, Ms. Ramsey doesn't, I don't believe she's an educated person. This management needs to be totally revamped. We need to sit down as human beings as worker and employer and come to an understanding and the shareholders have got to facilitate that or lock down the airline. I am not going to stand by and have my pilots who I represent lose their jobs while fellas living high on the hog.

SHELTON DANIEL: Well is so interesting that you've said that because one of the e-mails that I received from two people at LIAT, kind of mid-level people where they said that Mr. Challenger, exactly what you said, is a very well intentioned person but there are two people within the senior management of LIAT who seem to be hijacking any process at reconciliation or resolution of problems and even when decisions are taken to settle issues and so on, these two people seem to wield so much influence within the high management echelons of LIAT that sometimes they succeed in getting the management to reverse positions that it has taken. In fact two names keep coming up which I won't mention. There are two names of two big people."

105. The second and third offending statements are contained at pages 2 and 3 of the transcript for the November 6 programme as underlined in the following excerpt:

"SHELTON DANIEL: Antigua headquartered regional airline LIAT continues to be in the news for reasons that we are all sure it would prefer not to be. Last week the unions representing LIAT's workers in the territories where the airline operates boycotted a meeting with management saying, through Senator David Massiah who heads the Caribbean Congress of Labour and is also General Secretary of the Antigua and Barbuda Workers Union, that they would not attend a meeting where the Company would simply be spelling out to them its plans for making major job cuts, reducing staff as part of its cost cutting measures. There is also allegations that while the management of LIAT is axing the jobs of workers at the lower levels as part of its cost cutting, that the pool of management continues to expand and that it is growing all the time, becoming more top heavy. There are also allegations from several quarters which seem to be supported by documentation, of what many claim to be abuses by the Company's management in terms of how they utilize LIAT's resources while asking workers to cut costs. I have with me today the Chairman of the Leeward Islands Airline Pilots Association.

Captain Michael Blackburn is on the line with us. Good Afternoon Captain Blackburn. And on the line from St. Lucia is an official of one of the unions representing LIAT workers in St. Lucia, the National Workers Union, in the person of Mr. Lawrence Poyette. Let's begin with you Captain Blackburn, last week on one of Observer's programmes, you did point out that for all the cost cutting measures that LIAT says it is trying to implement that the management side seems to be exploding.

MICHAEL BLACKBURN: Yes I did, yes. I can go back to the incubus, the starting point in that there was a meeting held in Barbados attended by Comrade Baldwin Spencer; Comrade Ralph Gonsalves, my friend; and Owen Arthur, Prime Minister Owen Arthur at the Hilton including executives from the Caribbean Development Bank and prominent trade unionist Sir Leroy Trotman, I sat next to him. And we looked at the restructuring of LIAT and the CDB came forward and was willing to give us a loan, guaranteed by the governments. And the governments were going to put up money, to refinance the airline and restructure it. And Prime Minister Owen Arthur called me aside in the presence of Dr. Gonsalves and Mr. Darby and said that LIAT and the unions, including the pilots, (and we were decisive), must get together and must streamline the airline. When you're talking about streamlining trade unionists tend to be very skeptical, you know, that is talking job cuts. It sounded like look, if it has to go to survive and to benefit the Caribbean, we have to do it and we were all willing to look at the whole situation in totality. When that was done, December of 2006, I have a list of the managers there on print, there were 33 to 34 managers. LIAT is now telling me that they have increased the amount of staff under Mr. Challenger to the extent that the managers now total over 65. And they include such posts as a Manager of Catering where LIAT has no catering. There has been industrial conflict with my association because LIAT won't even serve water on flights and you have a manager, a fat cat, collecting all the monies. There are areas where managers their offices with luxury. They rented a place for 23 thousand US a month plus, -whatever it is- when they could have been free in other offices and those premises have to be vacated because of health issues. We are looking at, if you ask the workers to come, to sacrifice like I have done as a pilot. I have residence in Canada. I could have stayed in Canada. I sacrificed because I wanted to stay in the Caribbean. And my association has integral and intrinsic to our ethic is a contract with the Caribbean people. We are willing to make sacrifices. But you are squandering money. Money is being spent like there is no value. We just hired 10 pilots, trained them in ground school, send them to simulator, hundreds of thousands of dollars and I'm being told now we

are looking to lay them off. Nobody is gonna answer for that. There is no planning Are we working by the moon or obeah. So there seems, and then management getting some perks there, a mean I have heard, I have seen some salaries, they have been going off the clock. Management in LIAT making more money than prime ministers you know, I'm not joking. I have seen it. So when we get a list of the job cuts and there appear to be no management going home, just ground staff, people who. You have to look at the global economy, you have to look at the Caribbean Diaspora. Job losses now in the Caribbean are significant and serious matters. It has regional impact, it has national impact. So you need to look, the closure of the City/town Offices, are unjustified in my opinion and unreasonable in the scenario. I, we came to an agreement in Antigua last time and that agreement laid down in principle, in principle, in the event that it was necessary to lay off staff, this is the procedure which would be followed. In addition, I have, the pilots have their own contract and so on. But I recall very, very clearly, Senator Massiah, he'll be here, and comrade Crump expressing serious reservation about the agreement. I had to go outside and speak to Senator Massiah and brother Crump to get them to sort of a let's look at this thing here, you know, let's go along with it. But they expressed serious reservations which is on the record because of the management's track record. The Barbados authorities Workers Union expressed clear and unambiguous provisions that they are not supporting it and they would continue to negotiate. It therefore appears to my mind that that got through to LIAT. So now we're faced with another meeting now to sort of justify what they are doing. And I don't think that this is justifiable. I think we need to look at a comprehensive picture. We need to look at the broad picture. We need to sit down as unions representing the workers and in the interest of Caribbean people to look at where we can effectively make cuts, where we can effectively reorganize the airline.

There are management people in my department who have absolutely no qualifications in aviation let me make my position clear. The LIAT Pilots Association has numerous qualified degree holders in aviation. The management of my department has none. **There is not one single person in my management that is qualified to make the decisions they are making.** So we need to take comprehensive, we need to go to the shareholders and say enough is enough, enough is enough. Either lock down the airline and bring in REDjet or let's reorganize. I think that is where the situation has reached at this time, total frustration and double standards, double standards, very serious.

SHELTON DANIEL: Okay, let's bring in Lawrence Poyette of the National Workers Union. Mr. Poyette, we've been hearing a lot of things

and I mean you always hear those things they are not very confirm but a recurring complaint seems to be, not just of a top heavy management but of a management that is utilizing the resources of LIAT where many workers and union representatives seem to believe that this is where the cost cutting needs to take place.”

106. The fourth statement which the Employer found offensive as stated in the dismissal letter was made on November 20, 2011 and shown in the transcript as follows:

“**SHELTON DANIEL:** I was about to ask Captain Blackburn, given LIAT’s impressive, near almost impeccable safety record, is that not part of the reason why they have had that success, that they have basically pulled out all the stops, left no stone unturned.

MICHAEL BLACKBURN: Let me put it to you as a professional pilot. I am one of the most senior pilots. LIAT right now is not as safe as when we had two (managers). And I am talking I represent the training captains. I am the sole spokesman of all the pilots. The standards of safety and operations that we have now are not better, and if anything, are less than we had when Captain Murray and Captain Lake alone were running the Flight Operations Department, and with four different airplanes. And Captain DeGannes and Captain King were respectively General Manager of Operations and Chief Pilot, and I am saying to you on behalf of the pilots, including the training establishment that set up our standards, and our safety in particular we were better than they were now. So, and I am spokesman for the pilots, nobody else can make that statement except me on behalf the pilots and I am going on record as saying that. So the safety record has nothing to do with what or the professional or the operational standards because it is not better than it used to be. It is worse and I have documented that to the Labour Commissioner including issues of safety.

The Audio Recordings

107. Having listened to the audio recordings, suffice it to say as follows:

- (a) the transcript of the recordings for November 6, 2011 fails to disclose two pauses in respect of the comments about Ms. Ramsey. However, in our view, those pauses did not affect the essence of the message conveyed by the Employee.
- (b) The sequence of the offending statements quoted in the dismissal letter is not accurate. The correct sequence is shown in the underlined sentences above.

- (c) The offending statements quoted in the dismissal letter represent excerpts only. The preceding and subsequent statements, as shown in the transcripts, are reproduced above.

108. Based on the evidence, including the audio recordings, we will resolve the issues within the framework of the parameters listed in paragraph 32 and outlined sequentially in paragraphs 33 to 55 above.

Whether the Employee was guilty of misconduct

109. As stated at paragraph 37 above, Section C58 (1) of the Code identifies misconduct 'on the job' as one of the main statutory categories of cause for dismissal. It is clear from the evidence that the Employee was not on the job at the material time. Naturally, this rules out the application of sub-section C58 (1) (a).
110. We note that although sub-sections C 59 (1) and (2) establish limitations within which the Employer must deal with misconduct 'on the job', they are not limited in application to that occurrence only. Those subsections expressly widen the net to include misconduct 'in or in relation to his employment'. In other words, the Employee's misconduct in relation to his employment, wherever it occurs, may justify his dismissal under Section C59 (1) (a) of the Code.
111. At the end of the day, we find that on the evidence disclosed in the transcripts and audio recordings, subject to the proper administration of the established fair procedure, the Employee was guilty of misconduct which was serious enough to potentially justify his dismissal.
112. Having regard to the Employer's burden (see paragraphs 52 and 53 above) in these proceedings to prove that the dismissal was not unfair on a balance of probabilities, it is doubtful that the potential good cause could crystalize into an actual good cause in the absence of any evidence from the Employer.
113. On the facts of this case, we do not consider it necessary to finally determine this issue in isolation. In considering the potentially good cause in the absence of any evidence from the Employer, we are of the opinion that we must also consider the summary nature of the dismissal.

Whether the misconduct was serious enough to justify summary dismissal

114. Given the principles of natural justice, the question arises as to whether the Employee was entitled to an opportunity to be heard in his own defence before being dismissed. Automatically, his long tenure and position as Chairman of his union would have to be taken into consideration. It would be open to the

Employer to contend that it was not necessary to give him such an opportunity because it would have made no difference to the final outcome.

115. Even in the absence of the pertinent provisions of the Collective Agreement, the burden would be on the Employer to prove that summary dismissal was warranted in the circumstances. To that end, as outlined at paragraph 54 above, it would have to present 'cogent and weighty' evidence to convince this Court, on a balance of probabilities, that the misconduct was sufficiently serious or gross to justify summary dismissal.
116. In this case, the terms of the Collective Agreement, reproduced at paragraphs 48 to 51 above, operate to significantly increase the evidentiary burden on the Employer. There is no doubt that Article 1 of Section XIII gives the Employee the right to be told of any adverse report against him and to be provided with a copy of the same if it is in writing. Further, where the Employer contemplated disciplinary action, as it did in this case, the Employee had the right to an opportunity to exculpate himself before disciplinary action is taken.
117. Clearly, the Employer's general evidentiary burden to prove that a dismissal was not unfair is substantially heavier because the Employee was summarily dismissed. In our view, that substantially heavier than normal burden thrust on the Employer is made even heavier by virtue of the peculiar facts and circumstances of this case. In the circumstances, the Employer's failure to advance 'cogent and weighty' evidence or any evidence at all in these proceedings may be fatal.
118. Notwithstanding our inclination towards the resolution of this issue and the preceding one in favour of the Employee, we will refrain from doing so at this stage. Instead, we will move on to consider the third issue regarding the reasonableness or unreasonableness of the dismissal. In our view, the result of the test of reasonableness, as required under section C 58(2) of the Code, will be the ultimate determining factor.

Whether, in the circumstances, the Employer acted reasonably or unreasonably in dismissing the Employee

119. In some cases, the absence of a fair procedure may not, by itself, render a dismissal unfair. In other words, the adoption of a fair procedure would nevertheless lead to a dismissal which is not unfair. In other cases, a fair procedure could make a significant difference in the outcome. The question at this point is: In which of the two categories does the Employer's actions fall?
120. Apart from its failure to discharge its evidentiary burden, we are of the opinion that, in any event, the breach of the Employer's clear contractual obligation to

follow the agreed procedure, reinforcing its commitment to abide by the principles of natural justice, was sufficient by itself to render the dismissal unfair in the circumstances.

121. In relation to the Employer's clear breach of its specific contractual obligation to give the Employee the opportunity to exculpate himself, we are mindful of the Employee's testimony that (a) there were factual bases for his statements (b) the Employer failed to take two pauses into consideration in relation to his comment about Ms. Ramsey (c) the representation of some of his comments in the dismissal letter were taken out of context and / or inaccurate and /or misleading.
122. Further, we also note the Employee's testimony that the overall objective of his statements was to advance better working conditions for members of his union. In our view, such an explanation, if made earnestly, together with other possible mitigating factors, could possibly have tempered the severity of the Employer's reaction.
123. It is also noteworthy that, although it came a few days after his dismissal, the Employee had offered to clarify his comments, withdraw them and / or apologize for the same. In the circumstances, we will never know whether the Employee would have demonstrated a genuinely contrite, remorseful and apologetic attitude if given the opportunity and whether the same would have made a difference in the final outcome.
124. We have also considered the actual process and timing of the dismissal. In that regard, the evidence is that the Employee was dismissed on December 5, 2011 in Barbados, two weeks after the second broadcast of his offending statements and one month after the first. In order to be in a position to deliver the letter, the Employee was called out to work while he was on 'reserve duty' and summoned to the office of the Employer's Station Manager where the dismissal letter was delivered to him by the Employer's Director of Human Resources who, in the presence of three other senior executives, told him that he was being dismissed with immediate effect.
125. On the facts, we believe that it is fair to surmise that the Employer spent the time between the misconduct and the dismissal to investigate the matter and /or obtain and analyze the audio recordings and /or transcribe the recordings and/ or deliberate its options for disciplinary action against the Employee. Whatever its reasons for the delay, we find it unreasonable to effect the dismissal in the manner and at the time when it did.
126. At the end of the day, we find that, in the circumstances, following a fair procedure generally and providing the Employee with the opportunity to be heard in

particular could have made a difference in the Employer's deliberations before the dismissal.

127. When we apply the test of reasonableness, having carefully taken into consideration all the other relevant statutory provisions, legal principles, contractual obligations, the Employee's evidence and the Employer's undischarged evidentiary burden, we are constrained to find that the Employee was unfairly dismissed. He was dismissed in blatant contravention of the rules of natural justice and in breach of the principles of good industrial relations. The Employer acted unreasonably in the circumstances when it dismissed the Employee.

128. In the premises, the Employee was unfairly dismissed and is entitled to compensation to be assessed.

Whether the Employee contributed to his dismissal

129. Quite apart from the application of the said provisions of the Code, we also took into consideration the Employee's positions as a senior pilot, with over 33 years' experience, and Chairman of LIALPA. Our conclusion as to the existence of a potentially good cause for dismissal, as stated at paragraph 108 above, was also influenced by other considerations including the following.

130. We paid particular attention to the demeanor of the Employee while he was giving testimony. We found him to be overly and unnecessarily combative and belligerent. We formed the opinion that he is a proud and assertive person with a tendency to be arrogant. That tendency was obvious during the two broadcast interviews. His tone and manner of speech influenced our assessment of his statements and his testimony.

131. Our analysis of the statement, inclusive of the two pauses, leave no doubt in our minds that a reasonable listener would have come to the conclusion that the Employer's representation of what the Employee said was reasonable. Despite the two pauses identified in the audio recording, we find the Employee's statement about Ms. Ramsey, one of the Employer's senior managers, to be particularly vulgar and offensive.

132. In terms of industrial relations, we note the Employee's repeated assertions during the radio programmes, on his Memorandum and his Witness Statement that, as Chairman of LIALPA, he spoke on behalf of all the member pilots of his Association. He had a duty to be guided by the principles and practices of good industrial relations. His statements which offended the Employer were contrary to the principles and practices of good industrial relations, as we know them and as are referred to at paragraphs 34 and 35 above.

133. As to his employment contract, the offending statements were in breach of the implied term of mutual trust and confidence between himself and the Employer (see paragraphs 40 and 41 above). The Employee's statements smacked of disloyalty and were clearly contrary to the Employer's best interests. Moreover, we are of the view that the implied term of mutual trust and confidence also extended to the contractual relationship between LIALPA and the Employer. By speaking as the Chairman and sole spokesman of his Union, the breach of the implied term was more blatant and damaging. We believe that the Employee was competent to express himself on the several matters without being as offensive as alleged by the Employer or at all.
134. As to the principles of natural justice outlined briefly at paragraphs 42 to 45 above, they are to be applied reciprocally. In our opinion, it was contrary to natural justice that the Employee made use of the radio programmes to make those pronouncements to the general public in the absence of any representative of the Employer. Obviously, the Employer was in no position to respond in real time to the serious allegations made by the Employee. The evidence discloses no effort to provide the Employer with the opportunity to participate in the programme or to inform it of the Employee's participation.
135. Further, as to the role of Trade Unions, outlined at paragraphs 46 to 49 above, we have no doubt that the Employee's statements did nothing towards the establishment, maintenance or enhancement of a good relationship between the Union and the Employer. For the avoidance of doubt, we emphasize that we make no pronouncements about the management personnel or conduct of the Employer as alleged by the Employee. Whatever grounds or motivation he might have had for making the offending statements, the Employee clearly did nothing to advance a harmonious or symbiotic relationship between his Union and the Employer.
136. Based on our knowledge of the then prevailing and continuing general use and abuse of the electronic media to 'talk as you like' and thereby disseminate general information and specific thoughts and ideas, we find that it was wholly inappropriate for the Employee to use the particular forum in the manner he did. If the Employee wished, which he apparently did, to advance his personal or his union's agenda, he should have found alternative ways to do so at properly convened consultation or negotiation sessions.
137. As stated above, after careful consideration of the dismissal letter, the transcripts and the audio recordings of the Employee's statements, we found that the Employee was guilty of misconduct, which was a potentially good cause for dismissal. In particular, we are inclined to accept the Employer's view, as expressed in the dismissal letter that the Employee's statements did or were likely to do harm

to the professional reputation of and public confidence in the Employer's senior management team and its business as a whole. Moreover, we find that the Employee's misconduct was more conspicuous and at least more potentially embarrassing and harmful by virtue of his emphasized position as Chairman of LIALPA.

138. Our said conclusion was obviously not based on the Employer's case which was non-existent in this Reference. However, having regard to our mandate under section 10 (3) of the Act we felt compelled to fully inform ourselves of and be guided by the said best evidence of the Employee's statements, as we did.

139. The facts of this case disclose that the Employee contributed significantly to his dismissal. In the exercise of our discretion and doing the best we can with the evidence before us, we assess his contribution at 65%. His compensation, to be assessed, will be reduced accordingly.

Conclusion

140. In conclusion, we declare that:

(1) by reason of the Employer's unreasonable actions and omissions in the circumstances, the Employee was unfairly dismissed and is entitled to compensation.

(2) the Employee significantly contributed to his dismissal, by reason of which his compensation, to be assessed, will be reduced by 65%.

(3) subject to further directions, the assessment of compensation due to the Employee will take place on a date to be fixed by the Court.

Dated *13th* June 2016




.....
Charlesworth O. D. Brown
President


.....
Samuel R. Aymer
Member


.....
Dr. Hayden Thomas
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 54 OF 2013

BETWEEN:

HUMPHREY MICHAEL BLACKBURN

Employee

And

LIAT (1974) LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Samuel Aymer

Member

The Hon. Dr. Hayden Thomas

Member

November 24th, 2014 –

Mr. Gregory Delzin, Mr. Septimus A. Rhudd, Mrs. Michelle Emmanuel-Steele and Mr. Jermaine Rhudd of Rhudd & Associates for the Employee.

Mr. Kendrickson K. Kentish of Lake & Kentish for the Employer

January 14th, 2015 –

Mr. Ruggles Ferguson, Mr. Septimus A. Rhudd and Mrs. Margaret Blackburn-Steele of Rhudd & Associates for the Employee

Mr. Douglas Mendes SC, Mrs. Stacy Richards-Roach and Ms. Bellina Barrow of Richards & Company for the Employer

2014: November 24

2015: January 14

2017: June 13

JUDGMENT



1. I have had the benefit of reading the judgement herein of the learned President and the esteemed fellow Members of this Court (which I will refer to as the "Majority Judgment"). The Majority Judgment sets out the facts of this case in detail and provides a meticulous analysis of the relevant law, which I wish in large part to now adopt. To avoid repetition, I therefore hereby adopt paragraphs 1-55, 56-71, 72-79, 130 and 136-138 of that judgment.
2. However, after due consideration I cannot arrive at the same conclusion as did the learned President and Members in the Majority Judgment. I will therefore now address those matters on which I respectfully disagree with the findings therein.

The Evidence:

3. The Employee was not only employed by LIAT but was also Chairman of the Leeward Island Airline Pilots Association (LIALPA) the bargaining agent for all pilots. LIAT and its pilots union have a unique relationship, in that the pilot's Union is also made up of LIAT Employees. At the time of his termination Mr. Blackburn had been employed with LIAT for some 33.5 years, and was a Captain with the Airline with a salary of \$23,503.72 per month.
4. The Employer failed to comply with several of the Courts orders to file required documents on time. The Employee made application for the Court to give judgment in default of defence. The Court declined to give judgment in default and ruled that the trial should proceed on the issue of liability but that the Employer would not be permitted to file an Employee Memorandum or to lead any evidence since it had failed to comply with several earlier deadlines.
5. The Employee's case was subsequently presented to the Court, and the Employee was cross examined.
6. In his Memorandum the Employee stated *inter alia* that the subject of the dispute is the termination of the employment of the Employee by the Employer "**with immediate effect and on the grounds of misconduct which is so serious that LIAT cannot reasonably be expected to take any course other than termination, -----**". (The emphasis is the Employees).

7. The Employee's Witness Statement together with exhibits presented by him were admitted into evidence.
8. By his witness statement the Employee admitted that on the 6th And 20th of November, 2011 he spoke on the radio in his capacity as head of LIALPA, by virtue of an invitation to participate in a radio talk show/programme called "BIG ISSUES", which is a programme run on air by Observer Radio in Antigua. He also said in respect of those radio appearances: *"I am aware that I made statements about aspects of the Employer's operations"*.
9. Mr. Blackburn, by his witness statement introduced in evidence the "Termination of Employment" letter addressed and delivered to him by his Employer. It is important to note that this letter was admitted in evidence by the Employee himself. So even though the Employer did not lead any evidence, the dismissal letter is evidence which the Court may consider and decide what, if any, weight it should carry. That full text of that letter is reproduced in the Majority Judgment.
10. Also, the Court considered it important to rely upon section 9 of the Industrial Court Act. Clothed in the powers of that section the Court decided to obtain the best evidence readily available by requiring the parties to produce the recordings of the radio programme on which Mr. Blackburn spoke. This was done to better enable the Court to inform itself in assessing the fairness or otherwise of dismissal.
The full transcripts of those recordings and the details of how they were obtained by the Court are set out in the Majority Judgment.
11. The Court, having informed itself from the actual recordings and the transcripts, was now obliged to be guided during its deliberations by all the evidence before it, including the said recordings and transcripts.
12. It is important to note that when the Court reviewed those recordings it became clear that the language complained of by the Employer in the Termination Letter was in fact used by the Employee in the radio broadcasts. This is borne out by the transcripts and recordings even

though the Employee in his evidence sometimes could not recall whether he had said some of those things and, in some cases even denied that certain things had been said by him.

The Law:

13. Several sections of the **Industrial Court Act (Cap 214)** are relevant.

(i) **Section 10 (3) (a) & (b)** states that

“Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its power shall ---

a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interest of the persons immediately concerned and the community as a whole;

b) act in accordance with equity, good conscience and the substantial merit 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.”

(ii) **Section 9(1)** reads in part:

“In the hearing and determination of any matter before it, the Court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but he Court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material,-----“.

(iii) **Section 16** places an obligation on the Court that it shall

“hear, enquire into and investigate every dispute and all matters affecting the merits of such dispute before it -----.”

14. The **Antigua and Barbuda Labour Code (Cap 27), Section C9 (1)** reads:

“An employer may, without advanced notice, terminate the employment of any person who has engaged in misconduct relative to his work within the limitation of Section C59 (1) or (2).”

15. Additionally, **Sections C58(2) and C59 (1) of the Code** state that:

(i) **Section C58(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.”

(ii) **Section C59(1):**

“An employer may terminate the employment of an employee where the employee has been guilty of misconduct in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.

(b) _____

(c) _____ ”

16. **In Cable & Wireless (WI) Ltd v Hill and Others (1982) 30 W.I.R., Berridge JA** in delivering the Judgment of the Court of Appeal stated *inter alia* -- as follows:

*“[T]he burden of proof was on the company to show ‘just cause’ for dismissing the employees and that since summary dismissal constituted a “strong measure” the standard of proof should be **strict, persuasive and convincing**. Further, understanding the fact that this is a matter of civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be corresponding cogent and weighty in nature and content.” (Emphasis added)*

17. **In Jupiter General Insurance Co. Ltd. V Schroff [1937] 3 All E.R. 67** the Court made two observations which are to be borne in mind. The first is that summary dismissal is a strong measure which may be justified only in exceptional circumstances. The second observation is particularly important, namely that the test to be applied in determining

whether a summary dismissal is justified would vary depending upon the circumstances of each case. Such circumstances would include the nature of the business and the position held by the employee. – See **I.T Smith and J.C. Wood's Industrial Law (Second Edition) pg. 174**

Analysis:

18. It is well established that an employee owes a contractual duty of loyalty, good faith, trust and confidence to his employer.
19. The Employee asserted and maintained that at the time of the radio broadcasts that led to his dismissal he was the Chairman of LIALPA, the pilots union, and therefore the representative of the pilots at LIAT and that his interview on radio was in his capacity as Chairman of the union.
20. It is accepted that as a union representative, he would have certain relationships and privileges when dealing with the management of LIAT outside of his relationship as an employee and therefore would in certain circumstances be permitted to express himself, his thoughts and ideas in a manner that might otherwise not be tolerated under the usual employee/employer relationship. One would however expect that such circumstances would normally arise within the environment of union/management negotiations and other union/ management deliberations, --- certainly not on public radio where he would run the risk of bringing the Employer's business into disrepute.
21. Mr. Blackburn chose to be interviewed on a public radio station that is heard in Antigua and around the Caribbean in particular, the very Island States that LIAT serves.
22. Mr. Blackburn was careful during the broadcast to establish his qualification as "*a Professional Pilot*" and one of the most "*senior pilots*" and then he went on to tell the Antiguan, and indeed the Caribbean public that "*LIAT right now is **not as safe** as when we had two [managers]*". Mr. Blackburn went on to state that the standard of **safety** and operation that we have now are "*not better and if anything, **are less than** we had when Captain Murray and Captain Lake alone were running the flight operations _____*".

23. Having regard to the Court's powers and obligations under section 10(3) (b) of the Industrial Court Act, especially the obligation to act in accordance with equity, good conscience and the substantial merits of the case, I am satisfied that any reasonable person hearing the words used by Mr. Blackburn on the radio addressing the safety of the airline and disparaging its management would very likely question the safety and reputation of LIAT.
24. I am therefore satisfied on the evidence that the Employee knew or he ought to have known that suggesting to the flying public, or in any way insinuating that the Airline he flies for, as a senior professional pilot, was less safe, or not as safe as some previous times, would be reasonably expected to cause distrust and fear among his Employers passengers and could bring disrepute to and lack of confidence in LIAT.
25. I am satisfied that Mr. Blackburn knew or he ought to have known that the various adverse comments he made on public radio concerning the management of LIAT in general and Ms. Ramsey in particular would be reasonably expected to undermine public confidence in the Company. He knew or should have known that the comments made in the same forum concerning the manager of in-flight service could further cast doubt on and cause lack of confidence in the company.
26. Such action is a serious breach of the employer-employee relationship and the employee's duties of loyalty, good faith and trust. Even if, as Mr. Blackburn testified, there were factual reasons in some cases for some of his statements, that cannot justify him going on public radio with such comments. He also gave evidence that he had offered to publicly withdraw, clarify or apologize for his statements. However I am not satisfied that such action by him after the fact could adequately repair the damage to the employer-employee relationship.
27. However it is important to note that the Employer was barred from giving evidence due to their own failure to comply with orders of this Court. . In such circumstances it is not for the Court to speculate as to whether or not the Employer could have led evidence to show "just cause" for summary dismissal if it had filed

an Employer's Memorandum in a timely manner. The fact is that no such evidence was led by the Employer.

28. However, I am satisfied that the Court, in determining whether or not there was "just cause" must take into consideration all the evidence before it, including not only the evidence of the Employee in his witness statement but also his evidence on cross examination and the evidence contained in the transcripts and recordings. This is consistent with the Court's powers and obligations pursuant to sections 9(1) and 16 of the Industrial Court Act.

I am also mindful of the fact that the Industrial Court is a unique creature of statute constituted with wide powers to do justice between the parties without regard to technicalities, legal form or rules of evidence (Section 9 Industrial Court Act)

29. I concur with the learned President and fellow Members of this Court when they state in the Majority Judgement that the demeanour of the Employee under cross examination was overly contentious, belligerent and arrogant. I am also of the view that he appeared to be evasive in answering questions and that his demeanour as a whole raised serious questions as to his credibility as a witness. He frequently claimed that he could not recall much of the language complained of by his Employer, but the transcripts and recordings make it clear what was said by him and the tone and manner in which it was said.
30. In all the circumstances of this case, the Court is, in my view, entitled to rely upon the evidence of the recordings to assess the matter of "just cause", even in the absence of any evidence led by the Employer.
31. I therefore turn now to consider whether the materials found on the recordings and complained of by the Employer in the "Termination letter", when coupled with the Employee's evidence on cross examination and the Court's concerns as to the credibility of the Employee, are sufficient to establish "just cause" for the summary dismissal of Mr. Blackburn. To be sufficient such evidence must be "*cogent and weighty in nature and content*", and must satisfy the court to a

“strict, persuasive and convincing” standard of proof that the Employee “has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination”. Such misconduct may include a situation where the Employee has “conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.

32. The nature of the Employer’s business is that of an airline that flies passengers from one destination to another. It would necessarily depend upon its safety record and its good standing with the flying public for its success. The position held by the Employee was that of a professional pilot and a senior pilot with the company for some 33 years.
33. I respectfully disagree with findings of the learned President and fellow Members of the Court that the failure of the Employer to permit the Employee an opportunity to be heard prior to any decision regarding dismissal should be fatal to a finding of “just cause” for the dismissal.
.....
34. Certainly it is good industrial relations practice for an employer to give an employee an opportunity to be heard before taking disciplinary action of any kind. However the test is whether the Employer acted reasonably in the actual circumstances of the case (see Section C58 (2) of the Antigua and Barbuda Labour Code). There are cases where an employee acts so egregiously that there is nothing the employee could say or do which could change or mitigate the facts on which such summary dismissal would be based. In such a case it may be reasonable for an employer to dismiss an employee summarily and without the preliminaries of a ‘hearing’.
35. Of course, if it turns out that an employer is mistaken as to the factual basis for the dismissal then a finding of unfair dismissal would be appropriate (s. C58(2)).

An employer takes that risk in dismissing without first giving an employee an opportunity to explain alleged misconduct. However, if an employer is correct as to the factual basis and moves straight to dismissal, the fact that he did not follow specific procedures, does not in my view automatically mean that he acted unreasonably, especially where the employee's misconduct is very serious. The prevailing statutory test is whether the employer acted reasonably.

36. Circumstances of gross misconduct are in my view a clear exception to the need for notice and may also preclude the need for discussion with the employee in some cases (see *The Law of Unfair Dismissal*, Butterworths 1978, by Steven Anderman at page 89).
37. I have also read the provisions of the Collective Bargaining Agreement between the Employer and its pilots. Certainly the Employer's failure to invite the Employee to explain himself before taking disciplinary action may be in contravention of that Agreement (especially Article I). However a collective bargaining agreement is a contractual agreement and cannot supercede the Employer's statutory right to summarily dismiss in circumstances permitted by the Antigua and Barbuda Labour Code.

Decision:

38. On a careful and in-depth examination of all the evidence, I find
 - (i) that the evidence is persuasive and convincing and sufficiently cogent and weighty in nature and content, to justify summary dismissal in accordance with the statutory requirements of the Antigua and Barbuda Labour Code; and
 - (ii) that the Employee's misconduct, (bearing in mind the nature of Employers business and the position held by the Employee), clearly demonstrated that the employment relationship could not reasonably be expected to continue; and
 - (iii) that the Employee's misconduct was so serious that the Employer could not reasonably be expected to take any course other than termination.

39. I am therefore satisfied that the evidence justifies the Employee's dismissal without advanced notice and that the Employer acted reasonably.
40. I therefore respectfully disagree with the findings of the learned President and fellow Members of the Court that the Employee was unfairly dismissed and find that the Employer was justified in its decision to dismiss pursuant to Sections C58(2) and C59(1) of the Antigua and Barbuda Labour Code. Accordingly, I would dismiss the Employee's claim and make no order as to costs. However, I acknowledge that in this decision I am in the minority among the esteemed Members of this Court and that the findings of the majority of the Court will prevail in this matter.



St. Lawrence de Freitas -- Member

13 June 2017



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 54 OF 2013

BETWEEN:

HUMPHREY MICHAEL BLACKBURN

Employee

And

LIAT (1974) LTD

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JUDGMENT

Hon. Charlesworth O.D. Brown, President
Hon. St. Lawrence de Freitas, Member
Hon. Samuel Aymer, Member
Hon. Dr. Hayden Thomas, Member