Hilary Term

[2020] UKPC 9

Privy Council Appeal No 0037 of 2019

JUDGMENT

Blackburn (Respondent) v LIAT (1974) Ltd (Appellant) (Antigua and Barbuda)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

before

Lord Kerr

Lord Wilson

Lady Black

Lady Arden

Sir Rupert Jackson

JUDGMENT GIVEN ON

16 March 2020

Heard on 18 February 2020

Appellant	Respondent
Douglas L Mendes SC	Ruggles Ferguson
Imran Ali	Septimus Rhudd
	Amy Bullock
(Instructed by Simons Muirhead & Burton LLP)	(Instructed by Blake Morgan LLP)

SIR RUPERT JACKSON:

1.
This opinion is in eight parts, namely:

Part 5. The Appeal to the Privy Council

Part 6. Can the Finding of Unfair Dismissal Stand?

Part 7. Should the Finding of 65% Contribution be Reinstated?

Part 8. Conclusion

Part 1: Introduction

2.
This is an appeal by the employer against a decision of the Eastern Caribbean Court of Appeal ("the Court of Appeal") in unfair dismissal proceedings. The principal issues concern (a) whether the Industrial Court of Antigua and Barbuda ("the Industrial Court") applied the correct legal test for unfair dismissal, (b) the consequences if it did not do so and (c) whether the Industrial Court erred in obtaining relevant evidence more than a year after the trial but before giving judgment.

3.
The employer is LIAT (I974) Ltd, an airline. The employee is Humphrey Michael Blackburn, an aircraft pilot. Both parties were appellants in the Court of Appeal. To avoid confusion, the Board will refer to them as "LIAT" and "Mr Blackburn".

4.
In this judgment the Board will use the following abbreviations:

"EPA" means Employment Protection (Consolidation) Act 1978.

"ERA" means Employment Rights Act 1996.

"ICA" means the Industrial Court Act of Antigua and Barbuda.

"Labour Code" means the Antigua and Barbuda Labour Code.

"LIALPA" means the Leeward Islands Airline Pilots Association

"TTIRA" means Trinidad and Tobago Industrial Relations Act.

5.
The Labour Code includes the following provisions:

"C9(1) An employer may, without advance notice, terminate the employment of any person who has engaged in misconduct related to his work within the limitations of section C59(1) or (2).

…

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

…

C58(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) …

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.

C59(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; …"

6.
The ICA includes the following provisions:

"9(1) 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 the 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, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto.

…

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

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

(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.

…

(6) The opinion of the court as to whether an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever.

…

17(1) Subject to this Act, any party to a matter before the Court shall be entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no others -

…

(d) that any finding or decision of the court in any matter is erroneous in point of law;

…

(3) The Court of Appeal may in any matter brought on appeal before it, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred although it is of the opinion that any point raised in the appeal might have been decided in favour of the appellant."

7.
Having set out the relevant statutory provisions, the Board must now turn to the facts.

Part 2: The Facts

8.
LIAT is an airline operating in the Caribbean region. Mr Blackburn was a senior pilot employed by LIAT for 33 years with an unblemished record until his dismissal on 5 December 2011. Mr Blackburn was also the chairman of LIALPA.

9.
There was a collective agreement between LIAT and LIALPA, which included the following provision at article 1 of section XIII:

"(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."

10.
On 6 and 20 November 2011 Mr Blackburn appeared on a local radio programme in which he made comments about LIAT's management and safety matters. LIAT took exception to those comments and decided to dismiss Mr Blackburn summarily.

11.
On 5 December 2011 LIAT summoned Mr Blackburn to a meeting and handed a letter to him which stated:

"On 6 and 20 November you were broadcast on Observer Radio's 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 6 November 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 the decisions they are making. Management includes such posts as a Manager of Catering where LIAT has no catering.

Further on 20 November 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 20 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."

12.
Mr Blackburn was aggrieved by his dismissal. After unsuccessful attempts to resolve the matter by mediation, he commenced the present proceedings.

Part 3: The Present Proceedings

13.
By a notice of reference filed in the Industrial Court on 18 June 2013, Mr Blackburn claimed against LIAT compensation and damages for unfair dismissal. In the accompanying employee's memorandum, Mr Blackburn contended that his remarks on the radio did not amount to misconduct. He further contended that the summary dismissal, without any prior warning, was a breach of good industrial relations practice and a breach of the collective agreement between LIAT and LIALPA. On 13 March 2014 Mr Blackburn filed witness statements made by himself and a fellow pilot, Mr Thompson, who was secretary of LIALPA.

14.
LIAT, despite repeated reminders from the court, failed to serve any memorandum setting out its defence or any witness statements. Mr Blackburn applied for summary judgment. The court directed LIAT to file its affidavit in opposition to that application and both parties to file their skeleton submissions. Mr Blackburn duly filed his skeleton submissions, but LIAT disregarded the court's directions. The court listed the case for trial on 24 November 2014.

15.
On 20 November 2014 LIAT applied for an extension of time to serve its memorandum, which it produced in draft. The court, unsurprisingly, refused that application.

16.
The trial proceeded on 24 November 2014 without any form of pleading or any evidence from LIAT. The dismissal letter dated 5 December 2011 was before the court, because that formed an exhibit to Mr Blackburn's witness statement. Mr Blackburn and Mr Thompson gave oral evidence. The court permitted Mr Kentish, LIAT's attorney, to cross-examine.

17.
Mr Blackburn referred to the statements attributed to him in the letter of dismissal. He said that he had heard a recording of the interview but did not have a copy of it (transcript p 77). Mr Blackburn admitted making some of the statements alleged. He contended that in the second sentence of the extract from the interview on 6 November 2011 quoted in the letter, where he was recorded as saying that "Ms Ramsey doesn't, I don't believe she's an educated person", there was a pause after the words "Ms Ramsey doesn't" and then again after the words "I don't believe"; what he was actually saying was that Ms Ramsey was an educated person. Mr Blackburn contended that he had made statements about prevailing issues of management and safety with which he was familiar by virtue of his seniority and that his comments were made as a union leader and an employee who was off duty. He stated that his comments that LIAT's present standards of safety and operations were less than when only two captains (Murray and Lake alone) were running the flight operations, were said in response to LIAT's CEO's claims on an earlier radio programme in the context of safety and crew that it was necessary to have six managers in its flight operations department. He also stated that LIAT had referred to safety concerns in its Safety Newsletter.

18.
The court invited the parties to lodge written submissions after the hearing, but only Mr Blackburn did so. There was then a delay of two-and-a-half years before the court gave judgment. During that period the court stated on occasions that its judgment would soon be ready, but those statements proved to be mistaken. Whilst the Board cannot commend such a leisurely approach to preparing judgments, nothing turns on the delay in this case. So, there is no need to go through the correspondence on that aspect.

19.
On 2 December 2014 LIAT applied for the order refusing permission to file an employer's memorandum out of time be set aside. The court heard this application on 14 January 2015. LIAT's first argument for re-opening the proceedings (transcript p 2) was that the court was hampered by not having the best evidence, because the transcripts of the two radio programmes had not been produced at the November hearing. The court reserved its decision.

20.

The court did not accede to LIAT's application (indeed the court eventually rejected it at paras 72-79 of the main judgment) but it did see force in LIAT's argument about the need to see transcripts of the two radio programmes. On 26 January 2016 the registrar of the Industrial Court wrote to Richards & Co, LIAT's attorneys, asking for the transcripts. Richards & Co duly sent the transcripts (which had been prepared by LIAT's communications manager) to the registrar by return of post.

21.
On 27 January 2016 Rhudd & Associates, Mr Blackburn's attorneys, wrote to the registrar asking for copies of the transcripts, so that Mr Blackburn could verify their authenticity. The registrar promptly sent copies to Rhudd & Associates. In her covering letter she wrote:

"The court has no reason to doubt the authenticity of the transcripts. However, your client is at liberty to compare them with the actual recording and let the court have his objections and comments, if any."

22.
In letters to Rhudd & Associates dated 28 January and 3 February 2016 and to Richards & Co dated 3 February 2016 the registrar requested copies of the full audio recordings, so that it could assess the authenticity and completeness of the transcripts. Richards & Co took their time. They provided the recordings to the court and to Rhudd & Associates in two instalments, namely on 20 June and 12 September 2016.

23.
Meanwhile, on 7 June 2016, Rhudd & Associates filed a Notice of Objection to Admission of Transcript. The notice argued that the court should decide the case on the basis of the evidence presented on 24 November 2014. Para 10 of the notice stated:

"As a matter of law, the Employee ought not to be obliged to produce, at this stage, any document upon which there is no opportunity to cross-examine or be cross-examined. In any event, the Employee was already cross-examined extensively by the Legal Representative of the Employer at the 24 November hearing. The said interviews, the transcript for which is now being introduced, had supposedly formed the basis of the Employer's decision to dismiss the Employee. Notwithstanding that, the Employer had failed to submit the transcript or any part of it at the hearing on 24 November."

24.
Richards & Co responded robustly on 5 July, pointing out that the court had power to request further evidence from litigants before coming to a decision. That was clearly a reference to ICA section 9(1), although Richards & Co did not specifically cite that well known provision.

25.
The court was unmoved by the Notice of Objection to Admission of Transcript. On 23 September 2016 the registrar, at the direction of the President, wrote to Rhudd & Associates as follows:

"You should recall that in an effort to fully inform itself of the pertinent matters, the Court requested copies of audio recordings of 6 November and 20 November 2011. In that regard, partial electronic disclosure was made by the Employer on 20 June 2016. Unfortunately, despite my repeated requests to both parties, the recordings for 20 November 2016 were not filed by the Employer until 12 September 2016.

You should appreciate that the precise utterances of the Employee and the context in which they are made are paramount for the just determination of the issues arising in the Reference. Now that we are in possession of both recordings the court will endeavor to advance the matter as some [sic] as practicable."

26.
By 23 September it was clear that the court would be paying close attention to the transcripts and the audio recordings. If Mr Blackburn had wished, he could (through his attorneys) have (a) sent in written comments on the transcripts and recordings, or (b) requested an oral hearing to deal with the new evidence, possibly including further oral evidence from himself. Under ICA section 9(1), the court would have been likely to accede to such an application. In the event, however, Mr Blackburn and his attorneys did not take that course. Instead they continued to press the court to expedite its judgment. That impatience is readily understandable.

27.
On 13 June 2017 the court handed down its written judgment. The court, by a majority of 3 to 1, held that the dismissal was unfair, but compensation should be reduced by 65% because of Mr Blackburn's contribution to his dismissal. One member dissented because in his view the dismissal was fair. References to 'the court' in the following paragraphs are to the majority of the court.

28.
At para 94, the court said this about Mr Blackburn's Notice of Objection to Admission of Transcript:

"We believe that the objection was misguided. The court's position in relation to the Employer's application to reopen which was heard on 14 January 2016, is set out at paras 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 27 January 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."

29.
Turning specifically to unfair dismissal, after considering the offending passages in the radio interviews in their full context, the court reasoned as follows:

"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 paras 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 para 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 paras 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 C58(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 his 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 5 December 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."

30.
Turning to the contribution issue, the court carefully evaluated Mr Blackburn's oral evidence as well as what he had said in the two radio programmes. The court concluded as follows:

"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."

31.
LIAT was aggrieved by the finding of unfair dismissal. Mr Blackburn was aggrieved by the finding that he had contributed to his own dismissal. Accordingly, both parties appealed to the Court of Appeal.

Part 4: The Appeal to the Court of Appeal

32.
By a notice of appeal filed on 20 July 2017, Mr Blackburn appealed against the finding that his compensation should be reduced by 65%. His two grounds of appeal were (i) that the Industrial Court had erred in finding that he had significantly contributed to his dismissal; (ii) that the Industrial Court had erred in relying upon the transcripts of the radio programmes, because (a) they were not properly before the court and (b) Mr Blackburn had not been given an opportunity to test their veracity or authenticity.

33.
By a counter-notice of appeal, filed on 9 August 2017, LIAT appealed against the finding of unfair dismissal. LIAT's grounds were (i) that the Industrial Court had applied the wrong test; (ii) that the Industrial Court had erred in concluding that breach of the procedure contained in the collective agreement was sufficient to render the dismissal unfair; and (iii) that the Industrial Court had erred in its finding that the dismissal was unreasonable, since such a finding was against the weight of the evidence.

34.
The Court of Appeal heard the appeal and the cross-appeal on 16 July 2018. The court handed down its reserved judgment on 20 September 2018. It allowed Mr Blackburn's appeal and dismissed LIAT's cross-appeal.

35.
Very sensibly, the Court of Appeal dealt with the cross-appeal first. It held that the Industrial Court had applied the correct test and considered all relevant factors. The Court of Appeal declined to interfere with the Industrial Court's assessment of the evidence. Indeed, it could not have done otherwise: see ICA section 10(6). Accordingly, the Court of Appeal upheld the finding of unfair dismissal.

36.
Turning to Mr Blackburn's appeal, the Court of Appeal held that the Industrial Court had erred in obtaining further evidence, namely the transcripts and audio recordings, after the trial had ended. At para 90 the court said:

“Natural justice or basic fairness required that the Industrial Court in its determination of the issues that were before it, act only on the evidence that was adduced. While we are mindful of the fact that it was open to the Industrial Court to determine the procedure for the trial, we have no doubt that it could not seek to obtain evidence on its own volition after the close of the trial. Leaving aside any question of the admissibility of the audio recordings and transcripts, we have no doubt that procedural fairness required the Industrial Court to refrain from including evidence on its own volition (without any application being made) and more critically from relying on those audio recordings and transcripts to reduce the compensation to which Mr Blackburn was entitled. In our view, it is trite that at the very least Mr Blackburn ought to have been afforded the opportunity to be heard in relation to the transcripts and audio recordings and this is so whether or not he had admitted to having made the majority of statements. It is even more egregious in circumstances where, as obtained in the case at bar, he had specially filed a notice of objection to the transcripts being admitted into evidence. Despite how well intentioned the Industrial Court was in seeking to obtain ‘the best evidence possible’, it acted in clear breach of natural justice.”

37.
The Court of Appeal quashed the 65% contribution finding and remitted the case to the Industrial Court, so that that court could conduct the assessment of contribution solely on the basis of the evidence adduced during the trial.

38.
LIAT was aggrieved by the Court of Appeal’s decision on both issues. Accordingly, it has appealed to the Privy Council.

Part 5: The Appeal to the Privy Council

39.
By a notice of appeal filed on 2 April 2019 LIAT appealed to the Judicial Committee of the Privy Council on two principal grounds, namely (i) the Industrial Court applied the wrong test and therefore the Court of Appeal had erred in upholding the finding of unfair dismissal; (ii) alternatively (if Mr Blackburn was unfairly dismissed), then the finding of 65% contribution should be reinstated; it was a proper exercise of the Industrial Court’s powers to obtain the transcripts and recordings after the trial, and the Court of Appeal erred in holding otherwise.

40.
The Board heard this appeal on 18 February 2020. Mr Douglas L Mendes SC appeared for the appellant, LIAT, leading Mr Imran Ali. Mr Ruggles Ferguson appeared for the respondent, Mr Blackburn, leading Mr Septimus Rhudd and Ms Amy Bullock. The Board is grateful to all counsel for their assistance.

Part 6: Can the Finding of Unfair Dismissal Stand?

41.
Mr Blackburn has succeeded on this issue, both at first instance and on appeal. LIAT contend that both courts below fell into error, because the Industrial Court applied the wrong test and the Court of Appeal approved that test.

42.
There are similarities between (a) the provisions of the Antigua and Barbuda legislation set out in Part 1 above and (b) legislation in Great Britain on unfair dismissal. The GB legislation was formerly

contained in EPA section 57 and is now contained in ERA section 98. Both the Labour Code and the GB legislation require consideration of the employer's reason for dismissing. They also require an assessment of whether the employer acted reasonably in dismissing the employee for that reason. Both the ICA and the GB legislation require the relevant tribunal to reach a decision in accordance with equity and the substantial merits of the case. In those circumstances, both parties have placed some reliance on the general principles emerging from UK authorities on unfair dismissal. The Board accepts that the general principles emerging from the UK authorities are relevant to the application of the Labour Code and the ICA.

43.
On the other hand, there are many differences in wording between the Antigua and Barbuda legislation and the GB legislation. There is much Caribbean authority on the specific provisions of the Caribbean legislation, to which the Board must have regard. As counsel have demonstrated, the legislation of Trinidad and Tobago in this field is closely aligned with that of Antigua and Barbuda. In particular, sections 10(6) and 18(2) of the Trinidad and Tobago Industrial Relations Act (TTIRA) are identical to ICA sections 10(6) and 17(1). Therefore, the Trinidad and Tobago authorities, as well as Antigua and Barbuda authorities, will require consideration in this appeal.

44.
One important feature of the Antigua and Barbuda legislation is that ICA section 10(6) accords special status to the decision of the Industrial Court. Accordingly, the Board held in Sundry Workers (represented by the Antigua Workers Union) v Antigua Hotel and Tourist Association [1993] 1 WLR 1250 that there could be no appeal against awards of compensation for dismissals that were "not in accordance with the principles of good industrial relations practice".

45.
The Trinidad and Tobago Court of Appeal explained the rationale of TTIRA section 10(6) and its interrelationship with section 18(2) of TTIRA in Flavourite Foods Ltd v Oilfield Workers' Trade Union (unreported) 26 January 1983. Sir Isaac Hyatali CJ, delivering the first judgment, said:

"It follows therefore that section 10(6) is to be read together with and given effect to as a proviso to section 18(2). In my opinion this conclusion is fortified by the fact that section 10(6) occupies a special place in the earlier part of the Act and to all appearances has been deliberately inserted there to put it beyond doubt that appeals will not be allowed against the court's opinion in what is manifestly a highly specialised area of industrial relations, namely, whether or not a worker has been dismissed in circumstances that offend against the principles of good industrial relations practice or are otherwise harsh and oppressive.

Consequently, if an appellant is unable to rely on any of the statutory grounds of appeal specified in section 18(2) then he is barred from appealing altogether since the Act prohibits him from relying on any other ground. If however he is able to rely on one or other of those statutory grounds he will nevertheless be barred from appealing if the only ground of appeal on which he relies involves a challenge against an opinion of the court given in pursuance of section 10(6).

This is an unusual provision by which to bind the Court of Appeal; but it is manifestly a sensible and logical one since members of the Industrial Court are normally selected for appointment thereto by reason of their specialised knowledge and experience in industrial relations and related matters. It is only right therefore that their opinion, duly formed on a question arising in such a specialised area of human relations should be final and not subject to review or recall by members of the Court of Appeal who would normally have no such knowledge or experience."

46.
The Trinidad and Tobago Court of Appeal developed this jurisprudence further in Caroni (1975) Ltd v Association of Technical, Administrative & Supervisory Staff (2002) 67 WIR 223. At p 226c-g de la Bastide CJ said:

“It does not matter whether the party challenging the decision of the Industrial Court on this issue claims, not merely that the decision was against the weight of the evidence, but goes further and claims that no reasonable judge properly directed could have come to the same conclusion, having regard to the evidence. In the latter case, the ground of appeal has graduated from a question of fact to a question of law; but it is nonetheless barred by the prohibition contained in section 10(6). This is not to say that a decision of the Industrial Court as to whether a dismissal is harsh and oppressive is so sacrosanct that it can never be challenged on any ground whatever. If, for instance, there has been some procedural irregularity which involves a breach of the rules of natural justice, then clearly an appeal would lie to the Court of Appeal, notwithstanding section 10(6). In such a case it would be the process by which the Industrial Court reached its opinion and not the opinion itself, that was challenged.

It is unnecessary and indeed dangerous to try to enumerate all the circumstances in which an appeal would lie to the Court of Appeal against the decision of the Industrial Court in a trade dispute over the dismissal of a worker. The answer in broad terms is whenever the appellant can rely on any of the grounds mentioned in section 18(2) without running foul of the prohibition contained in section 10(6). What this means in practice will have to be determined on a case-by-case basis.”

47.
LIAT does not challenge any of that jurisprudence. Indeed, LIAT relies upon it. LIAT contends that it can circumvent ICA section 10(6) by identifying an error of law which underlies the Industrial Court’s decision. In other words, LIAT is seeking to appeal pursuant to ICA section 17(1), “without running foul of the prohibition contained in section 10(6)” (the test formulated in Caroni).

48.
Mr Mendes relies upon the House of Lords’ decision in Polkey v A E Dayton Services Ltd [1988] AC 344 as establishing a general principle which is applicable in Antigua and Barbuda, as well as the UK. The employer in Polkey dismissed a van driver without any prior warning or consultation. That was a breach of the code of practice then in force under the EPA. The House of Lords held that such a procedural flaw would render a dismissal unfair, except in the rare case where a reasonable employer could properly take the view that whatever the employee might say would make no difference. Although we have heard no submissions on the point, it appears from the textbooks that the Polkey principle is still good law in the UK, subject to statutory exceptions introduced by the Employment Act 2002 and the Employment Act 2008. Be that as it may, both counsel have proceeded on the basis that the Polkey principle applies in Antigua and Barbuda. Both counsel place reliance on Whitbread plc v Hall [2001] ICR 699, which is to the same effect as Polkey. Mr Ferguson neatly summarised Whitbread in para 107 of his printed case: the ‘band of reasonable responses’ test applies to both the substantive and procedural elements of unfair dismissal.

49.
The real issue between the parties here is not as to what legal principle is applicable. It is whether the Industrial Court, and by extension the Court of Appeal, correctly applied the Polkey / Whitbread principle in the circumstances of the present case. Mr Mendes submits that they did not. Mr Ferguson submits that they did.

50.
The relevant section of the Industrial Court's judgment is set out in Part 3 above. In the Board's view, Mr Mendes is correct in his submission that the Industrial Court did not precisely adopt the test laid down in Polkey and Whitbread. Therefore, he submitted, the case should be remitted to the Industrial Court so that that court can re-assess the evidence, applying the correct legal test.

51.
Mr Ferguson submitted that it is clear how the Industrial Court would have applied the correct legal test. See paras 119 to 127 of that court's judgment. The court would surely have given the answer 'no', if it had asked itself the question: "is this one of those rare cases where a reasonable employer could properly take the view that whatever the employee might say would make no difference?" Mr Ferguson also relies upon ICA section 17(3), which enables the Court of Appeal (and by extension the Privy Council) to dismiss an appeal if it is satisfied that no substantial miscarriage of justice has actually occurred.

52.
In response to questions from members of the Board, Mr Mendes stood his ground on this point courteously, but firmly. It is not for this court, he submitted, to trespass into the exclusive domain of the Industrial Court. It is for the judges of that court alone, equipped with their superior knowledge of industrial relations, to provide the answer to the relevant legal question. In support of this submission Mr Mendes relied upon the Privy Council's decision in Sundry Workers and the Trinidad and Tobago Court of Appeal's decisions in Flavourite and Caroni. He submitted that ICA section 17(3) must be read together with section 10(6).

53.
The Board cannot accept Mr Mendes' argument for two reasons. First, ICA section 10(6) accords special status to matters which the Industrial Court has decided, not to matters which the Industrial Court has not decided. Secondly, whilst of course the Act must be read as a whole, ICA section 10(6) does not eviscerate section 17(3) to the extent suggested. In the present case the Board is satisfied that no substantial miscarriage of justice has occurred. It is obvious how the correct legal test would have been applied by the Industrial Court. The Industrial Court has already set out its thinking very clearly. No useful purpose would be served by the Industrial Court re-convening to hear this case in 2020, some nine years after the dismissal occurred.

54.
For these reasons, LIAT's appeal is dismissed. The finding of unfair dismissal stands.

Part 7: Should the Finding of 65% Contribution be Reinstated?

55.
The sole reason why the Court of Appeal quashed the assessment of 65% contribution was because the Industrial Court had impermissibly received and considered transcripts and audio recordings after the trial.

56.
Mr Mendes submits that the Industrial Court, in obtaining the transcripts and recordings post-trial, was properly exercising its powers under ICA section 9(1). Mr Ferguson, on the other hand, submits that the court had no power to receive the new material, since it had not acceded to LIAT's application to re-open the trial.

57.
The first question which arises, therefore, is whether the following phrase in section 9(1) is broad enough to include obtaining additional evidence after the end of a trial:

“the 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 …”

58.
The answer to this question can be derived from the last part of section 9(1). That requires the Industrial Court to give the parties the opportunity “of adducing evidence in regard thereto”. If the section is only talking about evidence obtained before or during the trial, such a provision would be pointless. Self-evidently the parties have an opportunity to adduce evidence in regard to such material. The final words of section 9(1) indicate that this is a broad provision. It empowers the court to obtain further material after the trial. For that reason, it adds a requirement that the court should give the parties “the opportunity, if they so desire, of adducing evidence in regard thereto”.

59.
Obviously, it is far better that all relevant evidence should be before the Industrial Court during the course of the trial. But, in an imperfect world, things sometimes go wrong. Section 9(1) is a safety valve. It enables the court, when justice so requires, to obtain additional evidence after the end of a hearing.

60.
The Industrial Court explained that it was relying upon its power “to obtain evidence at its own initiative”: see para 94 of the court’s judgment (set out in Part 3 above). This was clearly a reference to ICA section 9(1). The Court of Appeal, by contrast, made no reference to ICA section 9(1), even though that provision was cited in para 40 of counsel’s skeleton argument. Instead the Court of Appeal held: “we have no doubt that it [ie the Industrial Court] could not seek to obtain evidence on its own volition after the close of the trial”. That was a misstatement of the law.

61.
The transcripts and recordings were plainly important evidence. The Industrial Court needed that evidence in order fairly to consider Mr Blackburn’s case. The court needed to consider whether Mr Blackburn paused on the occasions which he identified. The court needed to consider whether Mr Blackburn’s evidence about Ms Ramsey was mis-transcribed, as he asserted. The court also needed the transcripts in order to assess Mr Blackburn’s contentions about the context in which the offending passages occurred. Although it is unfortunate that the trial proceeded in the absence of the transcripts and recordings, it cannot possibly be said that the Industrial Court erred in the exercise of its power under section 9(1) by calling for that material after the trial and before giving judgment.

62.
The next question which arises is whether the Industrial Court complied with the last limb of ICA section 9(1). Was Mr Blackburn given the opportunity, if he so desired, of adducing evidence in regard to the transcripts and audio recordings? Mr Mendes submits that Mr Blackburn was given such an opportunity. Mr Ferguson submits that Mr Blackburn was not given such an opportunity.

63.
The Board does not find this to be an easy question.

64.

As noted in Part 3 above, by letter dated 27 January 2016 the registrar invited Mr Blackburn to compare the transcripts with the audio recordings and to “let the Court have his objections and comments, if any”. It became possible for Mr Blackburn to do that exercise in September 2016, once his attorneys had received all the transcripts and recordings. On the other hand, once the court had received the transcripts and recordings and had identified these as important evidence (per the registrar’s letter dated 23 September 2016), the court never specifically notified Mr Blackburn and his attorneys that they had an entitlement under ICA section 9(1) “to adduce evidence in regard thereto”. Nor did the court inquire of the attorneys whether they and their client wished to exercise that right.

65.
As a matter of good practice, when the Industrial Court exercises its power under ICA section 9(1) to obtain additional evidence post-trial (hopefully a relatively rare event), the court should draw the attention of all parties to their rights under section 9(1) “to adduce evidence in regard thereto”.

66.
In the present case, however, the Board has come to the conclusion that the court did just enough to satisfy the statutory requirement. The registrar invited Mr Blackburn’s comments by her letters dated 27 January and 3 February 2016. The registrar wrote a number of letters to the attorneys on both sides about the additional evidence which the court required. The parties may not have been familiar with ICA section 9, but their attorneys would have been. Indeed, in their letter to the registrar (copied to Rhudd & Associates) dated 5 July 2016 Richards & Co specifically stated that the court was “empowered to request further evidence from litigants before coming to a decision”. That was a reference to ICA section 9. It must have been self-evident to Mr Blackburn’s attorneys that they were entitled to apply for an oral hearing at which they could make submissions and/or adduce evidence about the new material.

67.
In the event, Mr Blackburn, through his attorneys, never did request a further hearing at which he could give further evidence, or at which his advocate could make further submissions. Mr Ferguson has forcefully argued that the Notice of Objection to Admission of Transcript constituted such an application. Mr Ferguson relies in particular on para 10 of that notice (set out in Part 3 above). The Board cannot accept that submission. The whole of the notice is a robust and well-drafted argument, which was intended to deflect the court from persisting in its course of admitting further evidence. Neither para 10 nor any other part of the notice says “if, despite our arguments to the contrary, you decide to let this evidence in, then please hold a further oral hearing”.

68.
In the event, the Notice of Objection to Admission of Transcript did not achieve its objective. By 23 September 2016, at the latest, it was clear to all parties that the court had admitted the further evidence and was attaching considerable importance to it. There was a gap of some nine months between then and 13 June 2017, when the court delivered judgment. During that period Mr Blackburn and his attorneys could easily, if they wished, have sent in written comments upon the transcripts and audio recordings. They could easily, if they wished, have applied to the court for a further hearing at which to make submissions and / or to adduce oral evidence. They did not do so. Given the provisions of section 9(1), the court was unlikely to have refused such an application.

69.

Drawing the threads together, the Board concludes that the Industrial Court properly exercised its power under ICA section 9(1) to admit the transcripts and audio recordings. The Court of Appeal erred in holding otherwise. Since this was the only ground upon which the Court of Appeal quashed the Industrial Court's assessment of compensation, it follows that the Industrial Court's finding of 65% contribution must be reinstated.

Part 8: Conclusion

70.
For the reasons set out in Part 6 above, the Board will humbly advise Her Majesty that LIAT's appeal against the Court of Appeal's decision to uphold the finding of unfair dismissal should be dismissed. For the reasons set out in Part 7 above, the Board will humbly advise Her Majesty that LIAT's appeal against the Court of Appeal's decision to set aside the Industrial Court's assessment of contribution should be allowed.

71.
The Board will consider submissions on costs from both parties provided that these are made within 21 days.