Privy Council Appeal No. 51 of 1995

(1) Margaret Berridge and

(2) Dave Edwards *Appellants*

v.

Benjies Business Centre *Respondent*

FROM

THE COURT OF APPEAL OF THE EASTERN CARIBBEAN (ANTIGUA AND BARBUDA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 7th November 1996

Present at the hearing:-

Lord Mustill

Lord Nicholls of Birkenhead

Lord Hoffmann

·*[Delivered by **Lord Hoffmann**]*

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1. This appeal concerns the effect of section C10 of the **Antigua and Barbuda** Labour Code upon proceedings before the Industrial Court for unfair dismissal. The relevant parts of the section read as follows:-

"(1)Upon the termination by an employer of any person's employment subsequent to the expiration of the latter's probation period, the employer shall, upon a request being made by the employee within seven days of termination or notice thereof furnish forthwith to said employee a written statement of the precise reason for the action.

(3)An employer who furnishes a statement...required by subsection (1) ..., shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal ...

(4)An employer who fails to furnish ... the statement ... shall be estopped from introducing testimony as to facts which might have been recited in said statement ..., in any proceedings testing the fairness of the dismissal ..."

2. The appellants, a man and a woman, were senior employees of the respondent company. On 16th January 1991 the respondent's managing director sent them each written notice of summary dismissal. The letters assigned the following reason: "misconduct on the job in that you were seen committing an indecent act on your employer's premises during working hours". The appellants went to a solicitor and on the same day he wrote to the respondent asking under section C10 for a statement of the precise reason for the termination of their employment. There was no reply.

3. Section 19 of the Industrial Court Act 1976 gives the Minister of Labour power to refer to the Industrial Court (established under that Act) any trade dispute which has come to his attention. On 12th December 1991 he referred the dispute between the appellants and the respondent over whether the former had been unfairly dismissed to the Court. The 1976 Act defines a "trade dispute" (by reference to the definition in the Labour Code) as, among other things,

"any disagreement between employer and workers ... over ... the ... termination ... of employment of one or more workers ... which disagreement has led, or may lead, to an interruption of employment by lockout or by strike."

4. In the course of his argument for the respondent, Dr. Ramsahoye Q.C. questioned whether this dispute could have qualified for reference to the Industrial Court under section 19. There was, he said, no evidence that when the reference was made, nearly a year later, there had been any strike or lockout or that any was threatened. He also said that power to make a reference was impliedly excluded by the existence of an alternative statutory procedure for dealing with complaints of unfair dismissal in sections C62 to C69 of the Code. But Dr. Ramsahoye fairly acknowledged that a challenge to the jurisdiction of the Industrial Court was not open to him. Section 17(1) of the 1976 Act gives a right of appeal from the Industrial Court to the Court of Appeal on various grounds, including lack of jurisdiction (paragraph (a)) but provides that:-

"it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the matter before the making of the order or award."

5. No such objection was taken before the Industrial Court and its jurisdiction is therefore not open to challenge on appeal.

In accordance with the rules of the Industrial Court, the appellants filed a Memorandum of Claim. This recited the reason assigned by the respondent for the dismissal, claimed that it had been "refuted" and alleged that the dismissal was unfair. The Employer's Memorandum filed by the respondent on 9th March 1992 gave some more details of the alleged indecent act and claimed that the dismissal had been fair. Issue therefore appeared to be joined on what the appellants had been doing on the occasion in question. A year later, on 8th March 1993, the case came on for hearing. Dr. Ramsahoye Q.C. represented the respondent and was ready to call witnesses. But Miss Kentish, who appeared for the appellants, raised a preliminary point. She said that by virtue of section C10(4) of the Code, the respondent was not entitled to call any evidence. The facts which they sought to prove "might have been recited" in the statement which they had been obliged to furnish under section C10(1). Accordingly they were estopped from introducing testimony to prove them. It followed that the claim for unfair dismissal could not be resisted and must succeed. The Court accepted her submission, found that the applicants were unfairly dismissed and stayed the assessment of compensation pending an appeal.

6. There was no challenge to the basic facts upon which Miss Kentish made her submission, namely that there had been a request for a written statement of the reasons for dismissal and

that none had been furnished. But Dr. Ramsahoye plainly felt that he had been ambushed. Nothing had been said about section C10 during the two years in which the proceedings had been on foot. It seems to their Lordships, however, that if the point was a good one, the Industrial Court had no option but to give effect to the provisions of the Code. In the absence of "exceptional reasons" the Court has no jurisdiction to make an order for costs: see section 10(2) of the 1976 Act. No application was made for an order on the grounds that costs had been thrown away by the C10 point being taken late. So there, in their Lordships' opinion, the ambush point must rest.

7. The Court of Appeal, by a majority, allowed the respondent's appeal. Sir Vincent Floissac C.J. gave the leading judgment. He said that section C10 must be given a purposive construction. The mischief which the section was intended to remedy was that, before the introduction of the Code, employees who had been summarily dismissed were often not given any reasons until litigation had been commenced. In a case in which the employee had already been given the reason, a right to a further written statement was unnecessary. He concluded that:- "...a former employee is not entitled to demand a written statement of the precise reason for his dismissal if the employer has already furnished him with that written statement."

Satrohan Singh J.A. agreed with the Chief Justice. Byron J.A. dissented, holding that the language of the section was unambiguous. It required a statement to be furnished upon request and made no exception for a case in which reasons had already been given.

8. Their Lordships think that Byron J.A. was right. The purpose of section C10 is not merely to ensure that the employee is given reasons for the termination of his employment. It requires those reasons to be given in a form which can be readily identified for the purposes of any subsequent proceedings "testing the fairness of the dismissal". The reason why they need to be capable of identification as formal statutory reasons is that in such proceedings, the employer is "conclusively bound" by the statutory reasons (subsection (3)) but not by any other reasons which he may have given. Likewise, he is estopped by subsection (4) from introducing testimony of facts which could have been included in the statutory reasons. On the other hand, if there has been no request for statutory reasons within 7 days of the notice of dismissal, the employer is not estopped from supplementing or even contradicting any non-statutory reasons which he may have given. The statutory reasons are therefore akin to an unamendable pleading which the employer may be required to serve.

9. This pleading function of the statutory reasons makes it impossible for earlier informal reasons to take their place. For example, it is not unknown for an employer who has good grounds for dismissal to try to soften the blow by giving some other reason which he thinks

less hurtful to the employee. If there is no request for statutory reasons under section C10 and the employer is afterwards sued for unfair dismissal, he may or may not have evidentiary problems in persuading the court to accept that his real reasons were different, but he should not be barred from trying to establish them. On the other hand, if the employee makes a statutory request, the employer will know that the time for prevarication is past. He must state his true reasons and be bound by them.

10. Their Lordships think that this construction of section C10 gives it a reasonable effect. On the other hand, the reasoning of the majority in the Court of Appeal leads to the conclusion that either the employer is conclusively bound by his first informal reasons, which seems to their Lordships unfair to the employer, or that he is neither bound by his first reasons nor liable to furnish statutory reasons which would be binding upon him afterwards, which seems unfair to the employee.

11. Byron J.A. drew attention to the differences between the language (and purpose) of the **Antigua and Barbuda** Labour Code and the equivalent legislation in the United Kingdom, namely section 53 of the Employment Protection (Consolidation) Act 1978. In England the written statement is admissible evidence but does not bind the employer or create any estoppel. The employee's remedy is to make a complaint to an industrial tribunal which can award him a sum equal to two weeks' pay if it finds that the employer "unreasonably" refused to provide a written statement of reasons for dismissal. On these provisions, it is not surprising that in *Marchant v. Earley Town Council* [1979] I.C.R. 891, 895-6, Slynn J. held that an employer who had already provided written reasons did not "unreasonably" refuse a request to give them again. The position would in their Lordships' view have been very different if the duty to give reasons was, as in **Antigua and Barbuda**, unqualified, and if reasons given in response to a request and only such reasons were conclusively binding upon the employer.

12. On the footing that he was wrong on the construction of section C10, Dr. Ramsahoye Q.C. made a number of alternative submissions based on provisions in the 1976 Act, which he said overrode or gave the Industial Court power to mitigate the rigour of section C10(4) in an appropriate case. The majority of the Court of Appeal did not find it necessary to deal with these submissions, but Byron J.A. considered and rejected them. Again, their Lordships think that Byron J.A. was right and do not find it necessary to burden this judgment with a repetition of the reasons convincingly stated in his judgment. The section upon which the respondent principally relies is section 9(1) of the 1976 Act, which says that the Industrial 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 ..."

13. This section deals with matters of evidence and procedure. It is true that estoppel is sometimes called a rule of evidence, but this is not the case. It is a rule of substantive law, by which the facts which a party is estopped from proving, which would otherwise be material to the issue of liability, are assumed to be otherwise. Evidence to the contrary is inadmissible not on account of some technical exclusionary rule like hearsay, but because the substantive law makes it irrelevant. The effect of section C10 is that if no statutory statement is furnished, the grounds which it could have contained are irrelevant to the question of whether the employee was wrongfully dismissed. Section 9(1) has no application to such a rule. The same is true of section 10(3), which says:-

"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."

14. It seems to their Lordships that the binding effect of a statutory statement of reasons for dismissal is an integral part of the principles and practices of the **Antigua and Barbuda** Labour Code and that the Industrial Court could not have been intended to be able to jettison section C10 simply on the grounds that a less draconian rule would be fairer. This was a matter for the legislature in enacting the Code.

15. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the order of the Industrial Court restored. The respondent must pay the appellants' costs before their Lordships' Board and in the Court of Appeal.

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