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[2012] CCJ 3 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 3 of 2011
BZ Civil Appeal No 19 of 2009

BETWEEN

MAYAN KING LTD	**APPELLANT**

AND

JOSE L REYES	
OSCAR ORLANDO MARADIAGA	
JULIO CARCERES HERNANDEZ	
CORNELIO RUBIO GUITERREZ	
EMILINA BAUTISTA RIVERA	
RIGOBERTO MALDONADO	**RESPONDENTS**

Before The Honourables	**Mr Justice Nelson**
	Mr Justice Saunders
	Mme Justice Bernard
	Mr. Justice Wit
	Mr Justice Anderson

Appearances

Mr Eamon H Courtenay SC, Mrs Ashanti Arthurs Martin for the Appellant

Ms Antoinette Moore SC for the Respondents

JUDGMENT
of The Honourable Justices Saunders, Bernard, Wit and Anderson
Delivered by
The Honourable Mr Justice Saunders
on the 6th day of July 2012
and
JUDGMENT
of the Honourable Mr Justice Nelson

Introduction

[1] The six claimants were employed at Mayan King Limited ("Mayan"), a company that owns citrus and banana farms. The claimants filed this suit complaining that they had been unlawfully dismissed because of their pro-union activities. The Trade Unions and Employers Organisations (Registration, Recognition and Status) Act (which throughout this judgment we refer to as "the Act") specifically renders such a dismissal unlawful. The workers claimed redress under the Act. Their trial got underway on 4th October, 2004 and lasted until the 27th of that month. The trial judge delivered judgment on 10th July, 2009, almost five years later. The judge ruled in favour of the workers. He ordered Mayan to give to each employee one year's salary plus damages of $70,000 on the premise that constitutional rights had been violated. Mayan appealed. The Court of Appeal upheld the trial judge's findings but that court considered that the damages awarded were excessive. The Court of Appeal reduced the $70,000 per employee to $30,000 each and justified their reduced award on the basis of compensation for hurt feelings and injury to pride rather than the violation of constitutional rights. One of the workers, Mr Reyes, was awarded an extra $1,260 to recover rent allegedly paid by him to Mayan. The Court of Appeal ordered Mayan to pay 75% of the costs of the claimants. Mayan has appealed again, to this Court. Mayan considers that it should not have been held liable and that in any event, the damages awarded by the Court of Appeal are still excessive. The workers did not cross-appeal the Court of Appeal's reduction in the award of damages. For the reasons that follow, by a majority, this Court holds that the courts below were right to find Mayan liable but we have reduced the award to each worker to one month's wages plus the sum of $15,000.

The Act

[2] The Act was passed in the year 2000. If we are to accept what is stated in Hansard by the Minister of Labour, its passage was preceded by "extensive and fruitful" consultations with persons representing affected organizations. It was enacted in part to comply with two International Labour Organisation

Conventions, namely, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Belize has ratified both Conventions. The conventions are the foundation upon which trade union activity is premised. They cover the basic principles of trade union rights, assuring to workers such benefits as the right to organise and join independent trade unions of their choice and the right to engage in collective bargaining. In particular they guarantee to workers the right not to be discriminated against at work for trade union activities.

[3] The Conventions express concepts that are fully in line with the Belize Constitution. That Constitution guarantees to every person the right not to be hindered in the enjoyment of the freedom of assembly and association, that is to say, the right to assemble freely and associate with other persons. In particular, section 13 of the Constitution assures workers the right to form or belong to trade unions for the protection of their interests. The Act proceeds in the same vein. In at least five different areas[1] the Act refers to the Constitution and places the rights laid out under its provisions on par with the constitutional guarantee. In our view the Act fleshes out and provides meaningful content to section 13. The exercise of the rights captured by the Act has a major impact on work and living conditions, as well as on the development and progress of the economic and social system.[2] The Act therefore promotes better job security and a more stable industrial, social and economic environment.

[4] The Act created rights and obligations, albeit not specifically constitutionally enshrined, for employers, employees, trade unions and employers' organisations. These rights and obligations depart from existing common law and from traditional unfair dismissal statutes in at least three important respects. Firstly, in guaranteeing employees the right not to be discriminated against at work for trade union activities, the Act recognizes that a dismissed worker will usually face obstacles in being able positively to establish in a court of law that the dismissal

[1] s.4(1); s.4(2)(g); s.5(2)(b); s.5(2)(d) and s.5(2)(e)
[2] See the Report of the Director-General of the International Labour Conference, 97th Session 2008 accessed 4th May, 2012 at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_096122.pdf

was a deliberate act of discrimination. Section 11(1) prescribes that where a person considers that any right conferred upon him under the Act has been infringed, that person may apply to the court for redress. And significantly, where a complaint alleges that an employer has contravened the Act, the burden is on the employer to prove to the contrary. *See*: section 11(2).

[5] Secondly, the Act recognised that it would often be counter-productive for the new rights to be redressed in the same way in which damages for breach of contract are assessed at common law. Section 11(3) of the Act therefore states that in cases of breach, the court may make an order directing the reinstatement of the employee, unless reinstatement was not reasonably practicable. In addition to reinstatement the court "may further make such other orders as it may deem just and equitable, taking into account the circumstances of the case". Section 11(4) emphasises that the redress powers of the court are limited only by what the court deems "just and equitable" and that the scope of redress includes without limitation a) orders for reinstatement, b) the restoration of benefits and other advantages and c) the payment of compensation. Thirdly, the Act is not enforced by a specially established Industrial Court or Tribunal. Its provisions are enforced by no less a body than the Supreme Court. It is to a judge of the Supreme Court that complaint may be made.

The Grounds of Appeal

[6] Counsel for Mayan, Mr Eamon Courtenay QC, argued before this Court the same three points he had argued before the Court of Appeal. He submitted that the finding that the employees were dismissed for their union activities should be reversed especially as the trial judge (and the Court of Appeal as well) had accepted that Mayan was engaged in legitimate cost-cutting exercises during the relevant period. Secondly, as already noted, he contended that even the reduced damages awarded by the Court of Appeal were excessive. The trial judge had awarded $70,000 to each claimant on the premise that constitutional rights had been violated. The Court of Appeal rejected that reasoning and instead justified their reduced award on the basis of compensation for hurt feelings and injury to

pride. Mayan submitted to this Court that the Court of Appeal was wrong to award any compensatory damages whatsoever since, according to them, no injury had been pleaded or proved. Thirdly, Mayan submitted that they have been denied a fair hearing within a reasonable time because of the inordinate delay in the delivery of the trial judge's judgment. This circumstance, Mayan submitted, created a real likelihood that the judgment of the trial judge was flawed. It is convenient to deal separately with each of these three points. For ease of reference we can refer to them respectively as the evidentiary point, the quantum point and the fair trial point.

The Evidentiary Point

[7] To discuss this point it is first necessary to recap the evidence that was given. What follows is a brief summary.

Jose Luis Reyes

i) Mr Reyes was the first of the six claimants to testify. He had been employed by Mayan for eight years and eleven months before his dismissal in June 2001. He was involved in pruning activity on the banana farms. Throughout his employment with Mayan there had never been any problems with his work. His wages fluctuated. The evidence suggests that he earned, every 15 days, between $327 and $259, the latter being his last paycheck. In his work, he was supervised by a Captain. He lived rent free in workers' barracks on Mayan's compound but he testified that other workers who were married lived in their own houses. In May, 2001 he began promoting the idea of unionism among the other workers. He disseminated literature and spoke to his co-workers about "injustices that were happening at Mayan". His union work was not carried on during work hours. He and others organized a big public meeting for Sunday 27th May 2001. In promoting the meeting Mr Reyes urged his fellow employees not to be afraid "because an Act had been sign" and so "the State law would protect them". The meeting drew a crowd of about 150 persons. Mr Reyes spoke at the meeting. Many of those attending the meeting were Mayan workers who joined the union

during the course of or immediately after the meeting. On 7th June, 2001 Mr Reyes' Captain abruptly informed him that his services had been terminated. He was told to collect his wages the following day and to leave the compound by 5PM. He did not leave the compound. Apparently there was a dispute over the pay he had received but this issue was not pursued in his examination-in-chief. He removed himself from the compound several months later because, although there was a court order allowing him to remain there for the time being, he was afraid as the police were pressuring him. Also, he had received a letter from Mayan stating that if he did not move he would be charged $10.00 per day. No evidence was tendered as to whether this charge was ever levied on or paid by him.

Oscar Orlando Maradiaga

ii) Mr Maradiaga did not live in the barracks. He lived in his own house which he had been permitted to erect himself on nearby Mayan owned property. He resided there with his wife. His house was valued about $5,000. In 2001 he was employed as a watchman for Mayan's workshop and office. He had worked part time for Mayan between 1987 and 1997. From 1998 to the time of his dismissal in 2001 he worked full time from 6PM to 6AM, seven days a week. He received $20 for each day's work. He had never had any complaints about his work. He heard about the plans to form a union and he thought it a good idea. Mr Reyes encouraged him by providing him with literature. In time, he too began actively organizing to promote unionism at the workplace. He also spoke at the big meeting in May and he formally joined the union that day. His evidence too is that he implored his comrades "[N]ot to be afraid, because it was a law for the workers and that they should not be afraid". He was not afraid. On the 7th June, 2001, when he reported for work his Captain showed him a sheet of paper and told him that that night would be his last on the job. The sheet of paper stated that due to the end of the orange season Mayan would have to reduce the labour supply. The document contained a list of names. The persons on the list were mainly temporary citrus workers. Mr Maradiaga was, however, not working in the citrus field. His name and the names of all the other claimants save one (none

of whom was a citrus worker) were on the list. Mr Maradiaga was informed that he should collect his wages at 10AM the following day and leave his place of abode by 5PM. In essence, he and his wife were being summarily evicted. He managed to obtain a court order to stay the eviction for a month. He actually never did leave until September when he got a job in Placencia. Right after this he was deported to Honduras but he was able to make his way back to Belize. When he returned to Belize he discovered from his wife that his house on Mayan property had been demolished.

Julio Carceres Hernandez

(iii) Like many of the other claimants, Mr Hernandez worked in Mayan's banana fields. He had been employed with Mayan from 1983 to 1988 when he returned to Honduras for a year and a half. He resumed working with Mayan from 1990 until his dismissal on 7th June 2001. Throughout his employment with Mayan he never had any problems with his work performance. He joined the union on the Sunday of the big meeting in May. He was also active in encouraging his co-workers to join the union. On 7th June, 2001 his Captain approached him and showed him a document with a list of names of persons who were being dismissed for "low production". He noted that the document stated that because production was low "the company was forced to cut down". The document he saw was signed by Andy Sanchez. At the time of his dismissal Mr Hernandez was living with his wife and six children (who were all Belizean citizens) in a house on Mayan property. He was earning $245 per fortnight. He was apparently given five hours to leave the compound with his wife and six children. He had nowhere else to go. Due to the intervention of the union he was able to remain on the property until September, 2001. He left in that month because of pressure from the police. He was asked in court about the reason he was fired. He was clear in his mind that his dismissal was illegal "because it was after we have sign for the union".

Cornelio Rubio Guitterrez

(iv) By June 2001, Mr Guitterrez had been employed with Mayan for just over seven years. He worked only in the banana fields which guaranteed permanent employment. He also repaired bicycles. He lived with his wife (Emilina Bautista Rivera, another of the claimants) on the Mayan compound. They lived in a house with two others. He was also active in promoting the union and speaking to his co-workers about it. He encouraged his co-workers to join the union. He personally signed up "more or less 40 persons" as union members. He did his pro-union work openly, but after working hours. He felt reassured by the fact that "formation of the union had been signed by the State". On 7th June, 2001 his Captain showed him a document and told him that was to be his last day "since the company has decided to cut down on persons, because citrus season was over". The document had a list of names. The names on the list were all citrus workers and in addition the names of the claimants. After having been dismissed Mr Guitterrez continued to live on the compound until he was deported in September. He managed to return to Belize apparently because it was belatedly recognized that he had his residency.

Emilina Bautista Rivera

(v) Ms Rivera measured and packed bananas at Mayan. She had been employed with the company since May, 1995. She worked three, sometimes four days per week. Her last fortnightly pay check was $165. No complaints had ever been made about her work. She is the wife of Cornelio Rubio Guiterrez, the claimant whose evidence summary was just recapped. She too joined the union and went about encouraging others to do the same. She attended the big meeting in May. The totality of the evidence suggests that she was fired, not on the 7th June, 2001 with the other claimants, but some time about a week later. She was convinced that she was summarily terminated "[D]ue to the union". She was not given a letter or shown any document justifying or giving any reason for her dismissal. Her brother, who was her boss, simply told her that he was given instructions from a Mr Monroy to terminate her employment.

Rigoberto Maldonado Area

(vi) In May, 2001 Mr Area pruned bananas at Mayan. His last paycheck was $220 but that was not for the entire fortnight. He lived in the Mayan barracks. He had worked for Mayan for about ten years and then there was a break in his service. Immediately prior to May 2001 he had been working for three continuous years. He too joined the union and "invited" his co-workers to join. He did so fearlessly "because the union is legal". He attended the big meeting. On the 7th June his Captain showed him a document and asked him if he had joined the union. He responded in the affirmative. The Captain then told him that he did not have a job. He apparently remained on the compound for some time until Mr Zabaneh, the Managing Director, saw him and ordered him off. According to him, Mr Zabaneh told him that "he did not want to see me any longer on the farm or the field". Mr Zabaneh said this to him even as there existed a court order permitting him to remain on the property. In the end, despite the court order Mr Area decided to leave because he was scared.

[8] It is important to observe that the above evidence was un-contradicted. It was buttressed with the evidence of Gaspar Martinez, a Community Development Officer. In June, 2001 Mr Martinez was working for an organization called the Society for the Promotion of Education and Research ("SPEAR"). His organization lent support to the banana workers in the southern part of Belize in their effort to join the Christian Workers Union. In that capacity Mr Martinez got to know the claimants. Mr Martinez first met with Mr Reyes and gave the latter certain reading material in Spanish to take back to workers at Mayan. Mr Martinez also gave Mr Maradiaga additional reading matter for dissemination among the workers. He confirmed that Mr Reyes and Mr Maradiaga spoke at the big meeting in May. As Mr Guitterrez's house had electricity and so could charge the battery of a mobile telephone, SPEAR delivered a cellular telephone to Mr Guitterrez to facilitate communication between the workers and the union. Mr Martinez testified that on 4th June, 2001 he received a copy of a letter by fax sent from the Christian Workers Union to Mr Andy Sanchez. The letter informed Mr Sanchez that the union desired to meet with the Mayan management to discuss the

issue of unionization. Just three days later Mr Martinez learned that the claimants, members of the organizing group for the union, were among persons at Mayan who had been fired. As the workers were unhappy about their dismissal because they linked it to the union activity, Mr Martinez and SPEAR assisted them in various ways.

[9] That was the extent of the evidence for the claimants. In analysing that evidence a court would bear in mind that it is entirely inconceivable that a worker who brings proceedings under the Act would always have positive evidence that he was dismissed because of union activities. The Act recognizes this by providing, as it does in section 11, that the worker may lodge a complaint if he considers that any right conferred upon him under the Act has been infringed. Of course, such a complaint should not be entertained if it is frivolous or lacking in substance. But once the worker has shown that there is sufficient evidence to justify the making of a complaint under section 11 of the Act, the legal burden is on the employer to demonstrate that the dismissal did not amount to a contravention of the Act. Given the evidence led by the workers here, and in particular, the leading pro-union role of the dismissed workers, the proximity of the date of their dismissal to the date of the letter from the union to management, the evidence of management's hostility towards at least some of the workers, the abrupt nature of the dismissals, the unblemished working record of the workers, the trial judge would have been entitled and right to find, as he appears to have done, that there was at least a *prima facie* case that these dismissals were unlawful. That evidence having been adduced, Mayan was required to provide at the very least a cogent explanation that could dispel the inference drawn from that evidence. The Act imposed on Mayan the burden of proving that the workers were ***not*** dismissed on account of their union activity.

[10] Apparently, well before the trial, the workers produced further and better particulars of their claim which even further substantiated their allegations of unlawful conduct on the part of the company. That little or no evidence was adduced in court to support those particulars cuts both ways. The court could not

rely on any of the allegations contained in those particulars and so to that extent the case presented in court on behalf of the workers was not as strong as it might otherwise have been. On the other hand, even before the start of the case the company was favoured with detailed allegations which, if the allegations were false, enhanced its prospects of contradicting or even disproving the workers' complaint. As it turned out, not much of that detail was led in evidence nor did the company make any comment whatsoever on its absence. These "further and better" particulars were therefore of little or no assistance in deciding the case one way or another.

The Evidence of Mayan's Witnesses

[11] Mr Zabaneh, Mayan's Managing Director, took the witness stand. He testified that Mayan employs as many as 1200 workers over the entire year but recently, weather conditions had forced down production and prices had been depressed. In fact, the entire industry has been in crisis. Mr Zabaneh produced extensive records to support these statements. He stated that, as a means of responding to the situation, Mayan decided on a variety of cost-cutting measures including a reduction in the workforce. Although the Captains were responsible for the hiring of workers, management was responsible for reducing the numbers of workers. Short of outlining what the retrenchment policy was, Mr Zabaneh did not know what concrete steps were taken in relation to the laying off of workers and how the matter was handled. He could affirm, however, that management would ask the Captains to find "the least productive people to lay off". Mr Zabaneh was aware that generally, banana growers were anti-union but he claims that at a meeting convened by the Prime Minister to arrange a rapprochement between the union and the growers, he was the only grower or grower's representative, who supported the Christian Workers Union. This meeting with the Prime Minister took place after the dismissals. But even before then, Mr Zabaneh states, he was always in support of the union. As at the time he gave his evidence in 2004, Mr Zabaneh had no idea whether his workers had done anything with regard to unionizing but he tendered a report of July 2004 from the Christian Workers

Union that outlined that the union "had established a working relationship with several farms in the banana industries. The farms are: Farm 4 Limited; Mayan King Limited; Sagitun Farm; Farm 15; Farm 16; and Farm 21. We have managed to obtain 95% registration on Farm 16, about 45% on Farm 15 and about 35% on Farm 4. Management of Mayan King Limited is prepared to fully cooperate in unionizing all workers including citrus workers". Mr Zabaneh maintained that the last sentence was absolutely true.

[12] In cross-examination Mr Zabaneh elaborated on the Mayan management structure and its *modus operandi*. The workers were directly supervised by Captains. Each Captain had about 20-25 employees working under him. The captains reported to two managers, one for the citrus division and another for the banana division. The managers reported to Mr Sanchez and the latter reported to him. The banana division accounted for 75% of Mayan's income and so it was more likely for non-banana workers to assist in the banana fields than the reverse. Apart from Rigoberto Maldonado Area, Mr Zabaneh did not know the claimants. Although he had seen them around he didn't know their names. He did not know Mr Hernandez who had spent over 15 years with the company. Nor did he know Mr Maradiaga, the sole watchman for the office and garage. Mr Zabaneh conceded that the numbers of watchmen remained stable. In other words, a watchman was not the kind of worker who would ordinarily be retrenched. He stated that in 2001 the company was concerned about lowering costs. The company had not considered that increasing the workers' wages could actually have resulted in heightened productivity. Of the 24 persons dismissed on 7th June 2001 seventeen worked in the citrus fields. Only seven of those dismissed in June worked in the banana fields. Five of the six claimants were among these seven non-citrus workers. Mr Zabaneh was absolutely convinced that the claimants had been dismissed solely for legitimate cost-cutting reasons because they were the least productive *as determined by the Captains* (our emphasis). But Mr Zabaneh had to concede that on this point he didn't "have the facts". He was not even aware that Emilina Rivera had been dismissed. It was the Captains, he said, who on that issue had the facts and "[i]t was based on instructions from higher management

that they select their least productive". Mr Zabaneh was aware that on 4th June, 2001, just days before the claimants were dismissed, Mayan had received a letter from the union indicating that over 85% of the work force had applied for union membership and that the union was requesting a meeting with management to discuss the way forward.

[13] During cross-examination a document was put to Mr Zabaneh. It purported to be an unsigned Mayan management statement. It proclaimed, inter alia, that "currently the industry is fighting for its survival and dying slowly and unionization of the workers cannot save the industry it can only accelerate its demise". The same document spoke to the need for Mayan to engage in "lay-offs of non-productive workers and trouble makers" and that "support and innovations is not coming from unionizing the industry … that is why we at Mayan King outrightly reject unionization of our workforce…" The document was dated 11th September, 2001 and it was suggested to Mr Zabaneh that it was presented at a meeting with the Ministers responsible for Labour, and for Banana Production and other officials. Mr Zabaneh admitted that such a meeting was held and that he was present. He could not recall if the document was read at the meeting. He could not recall if it was distributed at the meeting. He could not recall if the document was published in the Stan Creek Star as was suggested by counsel cross-examining him. But when pressed he conceded "If it was, I will go along with that". He admitted that he recalled at some point reading the statement on behalf of Mayan but could not recall whether it was at the meeting with the Government Ministers. Pressed further he said he could not recall "reading it publicly am sure I did not and I don't recall even in its entirety reading the whole of this document…". In re-examination he denied that the views reflected in the purported statement represented the positions of the top management at Mayan.

[14] Mr Andres (also known as Andy) Sanchez also gave evidence for the company. In 2001 he was the Acting General Manager and financial Controller. He was responsible for the day to day financial administration of Mayan. In 2001 the company had a cash flow crunch and had to seek relief from its bankers. Mr

Sanchez produced financial records to support this fact. The company addressed the crisis by engaging in lay-offs. In February 2001 roughly 20 employees were let go. In March a further 10 employees were dismissed. In June, as we saw, 24 workers were dismissed and in August a further 24 were terminated. The Captains were instructed to assess who were the least productive workers as they *"were usually intimate with the whole workers and they would use criteria such as punctuality, dedication to work, priorities, poor performance"* (our emphasis). The banana Captains would meet together and come up with the recommendations for dismissal. Mr Sanchez was then shown a notice to the Captains with a list of the 24 employees (including all the claimants save Emilina Rivera) who were slated for dismissal on June 7th 2001. According to Mr Sanchez, Ms Rivera was not slated for dismissal.

[15] Mr Sanchez claimed that Mr Maradiaga, the watchman, had his name on the "least productive" list because he was inefficient. There were reports that he was doing day work at another establishment and during the last three years several items were missing from the garage area which was part of his area of watch. In the case of Mr Cornelio Rubio, it was reported that he was giving priority to his bicycle repair activity. As to the other claimants, Mr Sanchez stated that the reports were that "they were distracted from work". They were "involved with the movement in the banana industry and the whole attraction of unionism and … were more interested in promoting those ideas than attending to their assign task". According to him this "contributed to the slow-down in the amount of processing time to complete the export of bananas for that week". Mr Sanchez was asked about the process involved in selecting the names on the list apart from the watchman. He began his answer, "They were citrus workers and the citrus season –" but he was cut off by counsel, "No, no the process in the meeting, how did they arrive at those 19 names, was it a different process?" To which he responded, "No, same process". But significantly, Mr Sanchez failed to support his generalized and sweeping indictment on the work ethic of the majority of the claimants by pointing to a single instance that could indicate that the actual work performance of any of them was below par.

[16] Mr Sanchez said that he was ignorant of the fact that there were any union activities at Mayan before June 2001. He only became so aware on 4th June when the company received the letter from the union. It was he who had responded to the letter. And in his response he assured the union of Mayan's cooperation. His evidence was that in 2002 and 2004 Mayan had actually demonstrated such cooperation and indeed Mayan never had a policy "written or otherwise whereby the Captains are given instruction that they should discriminate in their selection of workers based on trade union affiliations".

[17] In cross-examination Mr Sanchez stated that the Captains had met in February, 2001 and March, 2001 before the persons for retrenchment in those months were selected. On neither occasion was there any discussion of problems with Mr Maradiaga's competence as a watchman. Mr Zabaneh, it would be recalled, had said that Mr Maradiaga had demonstrated his inefficiency as a watchman over the preceding three years. When challenged about this in cross-examination Mr Sanchez insisted that there were indeed incidents of items missing from the garage when Mr Maradiaga was the night watchman but he, Mr Sanchez, could not recall the exact date. Mr Sanchez claimed that in relation to the June meeting of Captains he was not present for the entire meeting and so he did "not really know what was said or told". If therefore something was said then in reference to the union Mr Sanchez would be none the wiser.

[18] The letter from the union to Mayan of 4th June 2001 must have been regarded by Mr Sanchez with some concern as he got on the telephone to inform Mr Zabaneh of its contents immediately upon receipt of it. Mr Zabaneh then gave him "some instructions". According to Mr Sanchez, and somewhat surprisingly, in 2001 the issue of unionization of Mayan and the fact that it might actually help the company was discussed by management "because a more contented work force would produce more". In 2004 when Mr Sanchez was giving his evidence the workers at Mayan were still not unionized.

[19] Mr Sanchez flat out denied that the company had placed in the Stann Creek Star the alleged Mayan Statement that had been put to Mr Zabaneh. He recalled

attending the September 2001 meeting with the Ministers of Government. He could not recall if any document was distributed at that meeting by the company. He recalled that at that meeting a statement was presented by the Managing Director but “it was impromptu statement and these [i.e. the words in the Stann Creek Star advertisement] were not his words”. He did concede however that the copy of the alleged Mayan Statement produced in court appeared to have been faxed from a company owned by Mr Zabaneh. And, as far as he was aware, no one from Mayan ever attempted to retract or to disassociate Mayan from the advertisement that was published in the Stann Creek Star. Similarly, although she was supposedly not earmarked for termination, no one from Mayan corrected Emilina Rivera’s situation and quashed her patently wrongful dismissal.

[20] That was the testimony given at the hearing. After listening to it, the trial judge accepted that Mayan had established that it had been making losses but he did not believe that the claimants were dismissed in a simple lay-off exercise. In his view the evidence to support their claim of having been victimized was “extensive” and the record of it “voluminous”. He found that they were all dismissed “because they assumed a leadership role in mobilizing fellow workers” to join the union.

Conclusions on the Evidentiary Point

[21] One would have expected that in light of the “extensive” and “voluminous” evidence supporting the claimants’ claim the judge would have marshaled at least some of that evidence in a coherent form in order to demonstrate how he arrived at his conclusion. Instead, the reasoning of the trial judge is extremely sparse and the criticism that it does not demonstrate a thorough analysis of the evidence is not without merit. It was severely attacked on this basis. Perhaps for this reason, the Court of Appeal in its judgment made a lengthy and rigorous analysis of the evidence and after having done so, that court also concluded that the claimants were indeed dismissed because of their union activities.

[22] Mr Courtenay laid much store on the fact that there was little or no direct evidence that the claimants were told that they were being dismissed for their

union activity. Only Emilina Rivera testified that she was dismissed for this reason. It seems to us, however, to be somewhat naïve to expect, as Ms Moore QC indicated, that in cases of this kind there will always be found a "smoking gun". These cases are, as we already indicated, more often than not established on the basis of reasonable inferences and here, there was ample scope for the trial judge to draw such inferences from the evidence that was led.

[23] The trial judge, for example, may have had concerns about the credibility of the defendant's witnesses in light of such matters as a) Mr Zabaneh's responses on the disclosure of the alleged Mayan statement at the September meeting with Government Ministers; b) the evidence given about the source of the fax machine from which that statement was sent; c) the absence of any repudiation of the statement by Mayan after it was published in the Stann Creek Star; and d) the curious circumstance that while both Mr Zabaneh and Mr Sanchez professed their partiality towards trade unions and the union claimed that it had the support of 85% of Mayan's workers in 2001, three years later Mayan's farms were still not unionized.

[24] These were all matters from which the trial judge may have drawn inferences adverse to Mayan's witnesses. We do not know whether he did. And out of an abundance of caution, having not seen and heard the witnesses, we are not prepared to draw any such inferences. But quite apart from inference, there are uncontested facts here that lend support to the claimants' case. These claimants were workers of long standing with Mayan. No complaints had ever been made about their job performance. They were the chief activists for the union at Mayan's farms. They were dismissed a few days after the company had received a letter indicating that 85% of the work force had joined the union. They were the only permanent workers laid off in June 2001 along with the seasonal citrus workers. It seems to us that these bare facts compounded rather than alleviated Mayan's duty to provide a cogent explanation for the dismissals of the six workers.

[25] For Mayan to discharge the onus cast upon it by the Act and for it to demonstrate that here there was nothing more than a genuine lay-off exercise, as Mayan claimed, the company needed to present evidence that could justify the dismissal of these particular claimants as part of normal retrenchment practice. It was not enough for the company to allege and prove that it needed to down-size its workforce or that it had good reason to lay off *some* workers. On 7th June, 2001 twenty-four workers were laid off but many more were kept on. The company was required to show that these particular claimants, who were not seasonal citrus workers, were not dismissed because of their union activity. Since, as Mayan's witnesses themselves alleged, normal retrenchment would involve dismissal of *"the least productive"* workers, it was incumbent upon Mayan to provide some evidence that indeed, as at June, 2001, these claimants were so characterized by the company. Mayan failed to do this. Based on the testimony led by Mayan, it was the Captains, and only the Captains, who could properly have given such evidence. For reasons best known to Mayan, however, no Captain was called to testify. Since neither Mr Zabaneh nor Mr Sanchez was actually in a position to assess or was involved in assessing who were the least productive workers, it was impossible for Mayan to rebut the *prima facie* case put up by the claimants. The aim of the legislation would be frustrated if it could be interpreted so as to suggest that the *prima facie* claim of a worker could be defeated by an employer merely suggesting, without providing evidence to substantiate, a reason for dismissal other than the one put forward by the worker.

[26] If indeed a smoking gun has to be found in this case then one can perhaps find it in the open admission by Management that at least some of the claimants were dismissed because they were "distracted" by their union activities. It seems to us that in light of the provisions of the Act, unless one can provide positive evidence that union activity is seriously interfering with a worker's job performance, it is a contravention of the Act merely to adduce as a legitimate reason for dismissing a worker the circumstance that the worker is "being distracted by union activity". The Act was passed precisely to allow workers to engage in union activity without fear of dismissal solely on account of being so "distracted".

[27] The printed evidence on its face, even without the benefit of seeing and hearing the witnesses, compels one to agree with the trial judge that there was cogent evidence against the company. The great pity is that the trial judge neglected appropriately to identify it and positively state it as the reasons for his judgment. But this deficiency in the judgment of the trial judge does not mean that an appellate court is barred from itself assessing the evidence to determine whether it supports the conclusion arrived at by the judge.

The Quantum Point

[28] The premise upon which the trial judge awarded the sum of $70,000 to each worker was that he/she had suffered the breach of a constitutional right. It is understandable why the judge may have taken that view. The Act does have a constitutional gloss about it. As previously indicated, the rights granted by it are specifically located in the guarantee provided by section 13 of the Constitution. It might be said that Parliament intended through the passage of the Act to give horizontal effect to the constitutionally enshrined right of freedom of association. As with the breach of that right, the forum Parliament stipulated for adjudicating complaints of a breach under the Act is the Supreme Court, not a subordinate tribunal. Moreover, as with the redress clause in the Constitution, section 11(3) and (4) of the Act gives the Supreme Court flexibility and breadth to determine appropriate remedies.

[29] As the Court of Appeal stressed, this was not, however, a case that was pleaded as a constitutional action and the defendant is not a state actor or a public body. We therefore agree with the Court of Appeal that the trial judge erred in treating the action as if it were one for constitutional redress. We also agree with the Court of Appeal that it would equally be wrong for a court to approach this case, and the remedies available to the workers, as if it were confined to common law paradigms relating to a claim for breach of an employment contract and related damages. Sosa JA, writing for the Court of Appeal, was right to note that the Act created "a new cause of action in Belize, [namely] dismissal in violation of a right specified in section 4(2) of the Act" and that the pursuit of this right "cannot, by

analogical reasoning, be affected by common law rules and authorities relating to any other form of dismissal known to the law in this jurisdiction…"

[30] Parliament having legislated this new right and afforded ample means for its enforcement, it is now the duty of the court to ensure that the right has content and meaning. To do less would impact negatively on the efficacy and standing of the justice system. As Lord Hope stated, "[t]he function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached". If a right can be infringed with impunity then the right is "a hollow one, stripped of all practical force and devoid of all content".[3]

[31] In terminating the workers in the way in which they did, Mayan acted in bad faith. Mayan was at all times fully aware that the manner of the dismissals necessarily entailed much more than ending an employment relationship. The dismissals were accompanied by the immediate expulsion of the claimants (and in some cases their families) from their homes. Whether under the old common law principles expounded in *Hadley v. Baxendale*[4] or under the "just and equitable" standard prescribed by the Act, these dismissals justify awards to the claimants for distress and inconvenience.

[32] To determine the actual amount that should be awarded under this new cause of action, cases of constitutional infringement do not provide the most reliable guide. The State has a supreme duty to conduct its relations with its citizens in an exemplary manner and has voluntarily committed itself, through the Constitution, not to breach fundamental rights. Moreover, while an additional criminal sanction may be visited on a private employer that is not the case in relation to the State. Damages against the State may therefore embody elements like deterrence that are more closely associated with punitive sanctions. For these reasons the amounts awarded in constitutional infringement cases would ordinarily be greater than those awarded in a case of this sort. Provided that these caveats are kept in mind, however, it is not altogether inappropriate to look at the constitutional cases

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[3] See Lord Hope in Chester v Afshar [2005] 1 AC 134 at [87]

[4] (1854), 9 Ex. 341, 156 E.R. 145

simply to get an idea of the range within which certain damages awards have been given. Like the trial judge and the Court of Appeal we opt not to consider individually and separately the circumstances of each of the claimants unless there is a significant basis on which a distinction can be made. In light of the paucity of the evidence presented it seems just and equitable to treat them in roughly the same fashion although the impact of Mayan's conduct would have been felt somewhat differently by each of the workers.

[33] The monetary award due to each of the workers may be divided into that aspect which represents quantifiable loss suffered and that aspect which is not so quantifiable. The judgments of the courts below appear to have reflected a similar approach with a sum being given that was referable to the workers' wages and a lump sum that was attributed to compensation. We agree with this approach. As to the former sum (i.e. that part that was ascribed to loss of earnings) both courts below ordered that each claimant should receive a year's salary. The basis upon which one year was selected as distinct from, say, two weeks or one month or six months, was not adequately explained by either court and we reject the notion of a conventional award in such cases. The Court of Appeal sought in part to justify this part of the award on the ground that dwindling fortunes in the banana industry at all material times may have affected the workers' chances of finding new employment but that does not explain why salary for one year as distinct from for any other period would be considered reasonable.

[34] The onus was on the claimants to give positive evidence in relation to the availability of or difficulty in securing alternative employment. As the Court of Appeal itself acknowledged, the evidence presented to assess the pecuniary loss suffered by the claimants was sparse and unsatisfactory. How old was each claimant? Were the claimants employed fortnightly, monthly? What was their contractual notice period? How much notice or wages in lieu of notice was received by those workers who were retrenched respectively in February and in March? At the date of the trial, some three years after the dismissals, all of the claimants were employed, save Mr Guttierrez who was then self-employed. How

long did it take each worker to gain fresh employment? How did the earnings from the new employment compare with those obtained from Mayan? This kind of evidence would have been helpful to the court in assessing this aspect of the award. Mr Maradiaga did testify that he obtained fresh employment in September, i.e. approximately three months after his dismissal. In his case therefore, we are prepared to adjust this part of his award to three months' wages. In the absence of concrete testimony in relation to the other claimants, this part of the latter's loss should not be open to the inferences made by the Court of Appeal. These losses should have been established by clear evidence. All that is revealed on the record is that these farm workers were paid bi-weekly and that their last bi-weekly wages ranged roughly from $165 to $280.

[35] In the circumstances, save in the case of Mr Maradiaga, to give to each of the other claimants a monetary sum under this head that is equivalent to one year's wages would secure to them an element of double-dipping since each of them is also to receive a lump sum. The rationale for so generous an award (that is not rooted in solid evidence) would overlap with the rationale for a compensatory lump sum. In the circumstances we would quash the award of one year's wages made to each worker. In the case of Mr Maradiaga, we would substitute the same with an award of three months' salary. Since the only evidence before us is that the claimants were paid fortnightly we feel obliged to treat their reasonable notice period as two weeks. But given the circumstance that dismissal would have entailed finding new housing arrangements we would increase this part of the award in respect of the other claimants to one month's wages. In light of the paucity of the evidence, we would also quash the award to Mr Reyes of $1,260 (supposedly representing rent at the rate of $10 per day) allegedly paid by him for accommodation during the period following his departure from the compound. We agree with Mr Courtenay that this $10 per day claim was neither pleaded nor satisfactorily proved.

[36] As to quantifying the amount of a compensatory lump sum, this is a much more difficult matter. All the circumstances surrounding the dismissals must be

considered so that ultimately compensation that is just and equitable can be given. Two of the workers gave no evidence on the point but for the others the length of time for which they had been employed with Mayan ranged from three years to fourteen years. The manner of their summary dismissal is apparent from the evidence summaries described at [7] to [20] above. These were permanent employees who all resided on Mayan's compound. They were, in the words of Sosa JA, "fired out of the blue and ordered to pack up and leave their places of abode by five the next day".

[37] The Court of Appeal considered that they should each be paid the sum of $30,000. Since there has been no cross-appeal against that award, the only question before us now is: Do we consider that amount to be reasonable or do we find it too high? Most of the Caribbean judgments in which an award of damages to a claimant was not tied to any real discernible loss are public law cases. In the Saint Lucia case of *Fraser v Judicial and Legal Services Commission and the Attorney-General*[5] the Privy Council upheld the trial judge's award of $10,000 for "distress and inconvenience" where the breach of a Magistrate's contract of employment was caused by an error by the Commission in failing to follow its own procedures. On the other hand, in *Inniss v Attorney General of Saint Christopher and Nevis*[6] the termination of employment was that of a Supreme Court Registrar. The summary nature of the latter's dismissal, for which no reason was given, the fact that there was a risk that the dismissal would have an adverse effect on the Appellant's future employment prospects and the need to deter the Executive from resorting to similar breaches in the future to further its own interests were all considered. In those circumstances the Privy Council upheld an award to Ms Inniss of $50,000.

[38] What of the cases from Belize? *Wade v Roches*[7] was a case brought against a Roman Catholic school by a teacher. The case was dealt with as a constitutional action given the close-knit connection in the realm of the provision of educational

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[5] [2008] UKPC 25
[6] [2008] UKPC 42
[7] Civil Appeal No. 5 of 2004

facilities between the Government and the school, a connection which included government funding. The claimant established that she was unlawfully dismissed only because she was pregnant and unmarried. The Court of Appeal reduced the Chief Justice's award of damages from $150,000 to $60,000.

[39] The claimant in *George Enrique Herbert v The Attorney General*[8] was a Belizean who was unlawfully taken up by the police and handed over to United States officials who placed him in a jet and took him to New York where he was detained at the time of the hearing of his matter in Belize. For the breach of his constitutional rights the Chief Justice awarded the claimant damages in the sum of $30,000.

[40] In *Brown v The Attorney General*[9] the claimant was awarded the sum of $20,000.00 for "emotional distress" which, according to Chief Justice Conteh, he "must have suffered as he watched haplessly as his property was being destroyed despite his pleas and entreaties with the police and in the full glare of rolling cameras of Television News Stations". These Belizean judgments are all cases of clear breaches of constitutional fundamental rights and so the amount of damages awarded must be regarded with the serious reserve which previously was mentioned at [30] above.

[41] Cases in the United Kingdom provide us with examples in private law of instances where courts have felt and acted on the need to award damages in the absence of proven loss. In *Ruxley Electronics and Construction Ltd v Forsyth*[10] a builder's breach of contract that did not occasion any consequential loss was redressed by an award of £2,500 for "loss of an amenity". In *Farley v. Skinner*[11] a trial judge's award of £10,000 for "distress and inconvenience" was upheld in circumstances where the claimant had occasioned no real loss. In *Rees v Darlington Memorial Hospital NHS Trust*[12] a health facility negligently performed a sterilization procedure on a visually impaired woman who did not

[8] Supreme Court Action No. 398 of 2003, judgment delivered 24 October 2003
[9] Supreme Court Action No. 202 of 2003, judgment delivered 25th July, 2003
[10] [1996] AC 344
[11] [2002] 2 A.C. 732
[12] [2004] 1 AC 309

wish to have children. After she gave birth to a healthy baby she sued for the cost of raising the child but was awarded a conventional sum of £15,000 to "afford some measure of recognition of the wrong done".[13]

[42] In our view the sum of $30,000 awarded by the Court of Appeal for each litigant is on the high side bearing in mind this is a case purely in the private sector domain. The aim of the award cannot be to enrich unjustly or arbitrarily a claimant with a bountiful windfall. Further, the degree of reprehensibility of the defendant's misconduct is to be considered more for its impact on the victim bearing in mind that the function of the civil law is ordinarily not to punish the defendant.

[43] On the other hand, these were permanent workers with unblemished records. They resided on Mayan's compound. Those with spouses were not discouraged from erecting their own houses on the compound. Two of the claimants lived on the compound with their spouses and families. Dismissing them and evicting them from their place of residence with barely 24 hours' notice must have occasioned significant mental distress. The only reason the claimants were able to mitigate this act of inhumanity is because they undertook the added stress of retaining lawyers and obtained from the court an injunction to forestall their immediate eviction. In spite of the injunction and during its pendency the workers stated that were afraid to be on the property as Mayan persisted in its efforts to get them off the compound. One of the workers, Mr Maldonado, testified, and again he was not contradicted, that someone from Mayan told him that he did not want to see him any longer in the field and actually "drove his car to mash" Maldonado.

[44] In fixing a figure to represent general damages a court must strive to avoid giving a sum that is simply too high or one that is just too low. There is no formula for reaching a precise figure between these extremes. One is guided by precedent and principle. Trial judges are in a better position than appellate judges but if the trial judge approaches the matter on a wrong principle the appellate court must either remit the matter or make the assessment itself. This case is too old to be remitted

[13] See [2004] 1 AC 309 per Lord Bingham at [8]

and in any event, the same judge would not now be in a position to hear it. Having considered that $30,000 is too high and bearing in mind the character of the employment, we think that, given the circumstances of this case, the sum of $15,000 is just and equitable for the wrong done to them. It is particularly significant that, as the evidence shows, the claimants were encouraged to embark on their union activities by their genuine belief that the very Act that was violated by the company would protect them. In all the circumstances we would therefore award to each claimant the sum of $15,000 in addition to the one month's wages, save of course that Mr Maradiaga would be entitled to three months' wages instead one month's.

The Fair Trial Point

[45] Mr Courtenay submits that the long delay in the handing down of the first instance judgment rendered the judgment unsafe and unfair to Mayan. In support of this point, counsel points to the weaknesses in the trial judge's judgment that have already been mentioned and to alleged factual errors in the judgment. Counsel also referred to section 6(7) of the Belize Constitution which guarantees a fair hearing within a reasonable time.

[46] The three alleged errors of the trial judge cited were that 1) the judge stated that the huts on Mayan's farms in which the claimants lived were quickly demolished after their dismissal; 2) the judge stated that the workers had testified that they did not wish reinstatement, and 3) the judge stated that after the dismissals there was no trade union activities on the farm. As to the first of the three, only Mr Maradiaga gave evidence of any such demolition and, as we saw, some of the workers lived not in huts but in barracks. As to the second, given that the trial was held more than three years following the dismissals, reinstatement was always a non-issue. As to the third, the fact of the matter is that as at the date of the trial, Mayan had not been unionized and the judge's statement looked at in this context was not inaccurate.

[47] In our view, there was no obvious link between these alleged errors and the main conclusion reached by the judge on Mayan's liability. Absent these alleged errors, there was still cogent evidence on which the trial judge could have (and must have) based his finding of liability on the part of Mayan. In light of that evidence and the burden the Act places on the employer to disprove the workers' complaint, it could not be said that the judgment contained errors that made it unsafe.[14] When an appellate court is being asked to reverse a judgment and order a retrial on account of the delay in the handing down of the judgment the appellate court does not simply look at the length of the delay. The appellant must be able to persuade the court that the delay necessarily contributed to clearly erroneous findings by the judge; that the natural advantage that the trial judge has of assessing the evidence has been so dissipated that the judgment is unreliable. In all the circumstances we would dismiss this ground of appeal.

Determination of the Appeal

[48] The Court therefore dismisses the appeal save that the amount of the award made to the claimants by the Court of Appeal is varied as indicated at [44]. The costs award made by the Court of Appeal is affirmed. Mayan will also pay to the claimants 50% of their costs of this appeal.

JUDGMENT OF THE HONOURABLE MR JUSTICE NELSON, JCCJ

[49] The Appellant, Mayan King Limited, is a banana grower in Belize. The Respondents (the Plaintiffs at first instance) were labourers employed in various positions with varying lengths of service on farms owned by the Appellant.

[50] On June 7, 2001 the Appellant terminated the employment of the five male Respondents. The female Respondent, Ms. Emilina Bautista Rivera, received her termination notice orally on June 13, 2001.

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[14] See for example Cobham v Frett [2001] 1 WLR 1775

[51] The Respondents sued the Appellant alleging that the company dismissed them "because of their union organizing activities and their close association with those organizing for the unionization of banana workers." In their claim, they prayed for "remedies under section 11 of the Trade Unions and Employers' Organization (Registration, Recognition and Status) Act 2000 ("the Act") namely reinstatement, if practicable, and compensation for the wrongful termination."

[52] The Appellant in its Defence stated that the terminations were part of their ongoing cost-cutting measures arising from financial losses suffered by the Company. The Company led evidence to show that it was union-friendly.

[53] The trial judge, Awich J. (as he then was) gave judgment for the Plaintiffs/Respondents on the ground that "a more probable conclusion was that the termination of the employment of the claimants was dismissal aimed at silencing trade union members and thwarting unionization of workers on the defendant's farm. It was undoubtedly union bashing, in my view." At paragraph [14] he states that "the six claimants were dismissed by the defendant because they joined a trade union and in particular, because they assumed leadership role in mobilizing fellow workers on the defendant's farms to join a trade union. That is a direct contravention of ss: 4(1) and 5(1) and (2)(b) and (c) of (the Act). Accordingly the claimants are entitled to the reliefs under s. 11 of the Act." Awich J. did not order reinstatement pursuant to section 11 of the Act, but instead ordered compensation of $420,000, $70,000 to each Respondent. His judgment came on July 7, 2009 some 4 years and 9 months after he reserved judgment on October 27, 2004.

[54] On appeal the Court of Appeal on October 21, 2010 upheld the judge's finding that the Respondents were dismissed in breach of the Act but allowed the appeal on the quantum of compensation by reducing it to $218,856 with interest at the rate of 6% from July 10, 2009. The court awarded each Respondent $30,000 for hurt pride and feelings and 12 months' salary and in the case of Reyes 8 months' rent ($1,260). The Appellant on March 15, 2011 obtained leave to appeal to the

Caribbean Court of Justice ("CCJ") and filed a Notice of Appeal on June 7, 2011, exactly 10 years after the dismissal.

The claim

[55] In their Statement of Claim the Respondents/Plaintiffs pleaded as follows:-

> *"6. All of the plaintiffs to a lesser or greater degree began to participate in union organizing efforts within the banana industry from the month of April 2001.*
> *7. The plaintiffs did not hide their union organizing efforts but neither did they flaunt these efforts. They discussed unionization and handed out membership application forms to co-workers during non working hours. Agents of the defendants were aware of these activities.*
> *8. Each of the plaintiffs signed a Christian Workers Union application for membership form, stating that they were applying for membership in the said union.*
> *9. On Sunday the 27th of May 2001, a public meeting to discuss the unionization of the banana workers at Mayan King was held at the village of Santa Cruz in the Stann Creek District in which 135 banana workers, three Christian Workers Union representatives and other persons were present.*
> *10. The first four named plaintiffs assisted in organizing the public meeting held off of the company compound.*
> *11. Each of the plaintiffs attended the public meeting on the 27th of May 2001."*

[56] The Respondents/Plaintiffs sought the following relief:

> *"1. Remedies under section 11 of the Trade Unions and Employers' Organization (Registration, Recognition and Status) Act, 2000, namely reinstatement, if practicable, and compensation for the wrongful termination*
>
> *2. Interest on an amount of damages at such rate and at such period as the Court may seem fit.*
>
> *3. Further or other relief.*
>
> *4. Costs."*

[57] The claim was thus brought under the Act and the remedies prayed for were reinstatement, if practicable, and compensation. No claim for common law damages for breach of contract was therefore articulated. Indeed, the claim pleaded was for unlawful dismissal under the Act, i.e. for compensation for a statutory wrong.

[58] The Respondents/Plaintiffs supplied further and better particulars of the Statement of Claim. These particulars describe retaliatory action by the company in response to alleged union activity:

> *"2. Raymundo Canales, a captain employed by the defendants, passed by the public union meeting on the 27th May 2001 on his bicycle and turned around and passed by the meeting a second time. He would have seen who was in attendance, who was speaking, and who was passing out literature at this meeting ...*
>
> *Henry Flowers, a packing shed captain, said to the first named defendant at the same meeting between farm captains and the first named defendant referred to by Hugo Hernandez, that "if you get the first, second and fourth named plaintiffs you will solve your problem."*
>
> *[Joel] would talk directly to the first named defendant [Zabaneh] when the first named defendant visited the compound supermarket and it is believed that this individual would have given information as to who was organizing the union activities to the first named defendant."*

[59] It is significant that Sosa JA said of the Further and Better Particulars at [2] of his judgment:

> *"... the respondents generously (if needlessly) shared with the appellant much of the evidence which, apparently, they proposed to adduce in support of their case (and much of which, assuming the record to be complete, was in the event never so adduced)."*

[60] Accordingly the Respondents adduced no evidence of any reaction of the company to the union activities of the Respondents, although the Further and Better Particulars suggested that the Respondents would lead such evidence.

[61] In its written submissions, the Appellant submitted that the evidence of the Respondents failed to meet the burden of proof. The Appellant also contended that the evidence before the trial judge was sufficient to discharge the evidentiary (sic) burden resting on the company.

[62] It is common ground between the parties that the Respondents were employees of the company and that they had participated in union activities prior to their dismissal on June 7 or June 13, 2001. The central issue in this case is whether

those union activities caused the dismissal. Section 11 of the Act forbids such dismissals and section 44 makes any contravention of the Act punishable on summary conviction with a fine not exceeding five thousand dollars or imprisonment for a period not exceeding five years.

[63] Section 11, so far as now material, provides:

> *"11(1) Any person who considers that any right conferred upon him under this Part has been infringed may apply to the Supreme Court for redress.*
>
> *(2) Where a complaint made under subsection (1) alleges that an employer or an employers organization, association or federation has contravened any of the provisions of subsection (2) of section 5, the employer, employers' organization, association or federation shall have the burden of proving that the act complained of does not amount to a contra-vention of any of the provisions of subsection (2) of section 5 which is the basis of the complaint."*

[64] In my judgment where statutes impose a burden of proof on an issue in the sense of a legal or persuasive burden, that allocation is not necessarily dispositive of the evidential burden in respect of that issue. Firstly, the claimant or plaintiff must allege and prove the facts on which it relies. Secondly, in a case such as this where the defendant is called upon to undertake the difficult task of proving a negative, fairness requires that the claimant/plaintiff bear the evidential burden of defining the case which the defendant must disprove or lose the case. In the instant case, that issue is whether or not the union activities caused the dismissal.

[65] Section 11(2) deals with the allocation of the burden of proof. An employee must allege in a complaint (presumably an action) that the employer has contravened section 5(2) of the Act i.e. taken prejudicial action against an employee by reason of participation in lawful trade union activities. In forensic terms the burden of adducing sufficient evidence to raise the issue that the employee was dismissed on account of union activities is placed upon the employee. This is an evidential burden. On the other hand, once the evidential burden has been satisfied by the employee, section 11(2) places a legal or persuasive burden on the employer to

prove that the dismissal was not because of, or caused by union activities. Therefore, it was critical in this case to appreciate as a matter of substantive law how the evidential risks were distributed between the parties.

[66] The trial judge had first to determine whether the Respondents had adduced sufficient evidence to show that their union activities caused the company to dismiss them. In the absence of sufficient evidence being adduced to raise the issue of causation, there was no choice to be made between rival explanations of the dismissals.

<u>The Respondents' evidence</u>

[67] There is no dispute between the parties that each of the Respondents was involved in union activity in May and June 2001 and that they were promoting membership of the Christian Workers' Union. A union rally had taken place at Santa Cruz Village on May 27, 2001 in which the Respondents took part. Many workers applied to join the Union as a result of that meeting.

[68] The evidence of Reyes suggests no reason for his termination. Maradiaga was given no reason for termination except that "due to the off-season of the orange" the company had to "cut down" workers. Carceres Hernandez was dismissed for "low production." Cornelio Rubio Gutierrez was informed that the reason for his dismissal was that the company was reducing its work force because the citrus season was over. Emilina Bautista Rivera was the wife of Gutierrez. Her brother told her she was fired about one week after June 7. At first she said she did not know why she was fired and then later that she was fired "due to the union." Maldonado was shown a page by his captain and asked if he had joined the union. He replied that he had and was told he "did not have a job."

[69] The decision to terminate the six Respondents was taken before June 7, 2001. The union activities of the Respondents took place in May and early June. The Respondents led no evidence of any reaction by the company to the union

activities of the workers that provide a causal connection between the union activities and the decision to dismiss the Respondents.

[70] The learned judge made no findings as to satisfaction of the evidential burden. He appeared to be impressed by the proximity in time of the major union activity, the meeting of May 27 to the dismissals. He treated all six claimants as having "a leadership role in the recruitment exercise." He also relied on the alleged non-existence of trade union activities on the farm after the dismissal. None of these findings relates to anything the company did in May or June 2001 in response to the mobilization of workers to join the union, which led to the dismissals on June 7, 2001. Indeed, none of the promised evidence in the Further and Better Particulars was placed before the trial judge in order to supply a sufficient causal link between the union activities and the dismissals, which would trigger the activation of the ultimate burden on the company to disprove that the dismissals were so linked or lose the case. The learned judge never considered whether the Respondents had adduced sufficient evidence to raise the issue of the causal link. However, the Court of Appeal did.

[71] Sosa J.A. (with whom Morrison and Carey JJA agreed) assessed the evidence of the Respondents summarized above in the following words:

> *"…that evidence … was essentially circumstantial in nature. Each and every respondent testified to having (a) been employed by the appellant (b) joined the union as far as he/she was concerned on 27 May 2001 (c) engaged in some form of union activity at sometime during the month/s of May and/or June 2001 and (d) been thereafter dismissed (in the latter month). It is apparent that none of these respondents, with the possible exception of Maldonado, came close to being told, in so many words, that he/she was being dismissed for having joined the union, and, to their credit, none of them sought to testify otherwise. Nor were any of these respondents, with the notable exception of Bautista, prepared to venture the conclusion, in testimony, that his/her dismissal was the result of his/her union activity."*

[72] Sosa JA treated the four events enumerated at [70] of his judgment as circumstantial evidence of a causal connection between the union activities and

the dismissals. Circumstantial evidence is evidence of relevant facts from which the existence or non-existence of a fact in issue may be inferred. Thus, if one sought to prove that union activities caused an employer to dismiss workers, facts must be proved other than membership of the union, union activities and the fact of employment, which are indicative of a state of mind, act, conduct or attitude of the company towards such union activities from which it can be inferred that the activities caused the dismissals. In the absence of any positive proved facts from which such inference about the employer can be made, the inference is unsubstantiated and is mere speculation or conjecture. In my respectful view, the Court of Appeal should have held that the Respondents had not satisfied the evidential burden assumed by them in the Statement of Claim to adduce sufficient evidence that the union activities of the Respondents caused the dismissal. The legal burden on the Appellant imposed by section 11(2) of the Act was therefore not activated.

[73] Counsel for the Appellant submitted that since once the learned trial judge and the Court of Appeal accepted that the company had suffered financial losses and was engaged since February 2001 in cost-cutting measures including retrenchment, the method of selection of workers for redundancy was irrelevant. On the other hand, counsel for the Respondents contended that the conclusion of Awich J. and the Court of Appeal that the dismissals were on account of union activities could not be challenged, and the Appellant failed to produce credible evidence that the Respondents were selected for dismissal owing to lack of performance and low productivity.

[74] Awich J. accepted the evidence that the company was in a retrenchment mode (paragraphs 12 and 13 of the judgment). Sosa J.A. considered that there was no reason to doubt the truthfulness of the evidence concerning the company's financial position. He continued thus:

> *"Nor is there any, I venture further to say, for doubting that a reduction of the appellant's work force by 24 was called for in the light of the*

> *appellant's financial difficulties. This may well have been a case of the de facto redundancy of 24 workers."*

[75] For the purpose of the case, there are two types of dismissal. First, there are dismissals in breach of section 5(2) of the Act, which is an unlawful dismissal. Secondly, there are dismissals by reason of redundancy, which are lawful dismissals. In the U.K., in the Industrial Relations Act 1971, from which the Act draws some inspiration, if the reason is redundancy a dismissal may still be considered discriminatory in that the worker was selected for dismissal because of the exercise of one or more of his or her trade union rights: section 24(5) and 26(2) of the U.K. Act. In Belize there is no such provision, and I agree with Mr. Courtenay S.C. that the method of selecting or the order of dismissals does not vitiate the dismissal. Therefore, once the courts below accepted the company was in a redundancy mode, they should have held that the dismissals of the Respondents were valid. Ordinarily a retrial of the case would have been ordered. The events at issue in this case took place nearly 11 years ago. Accordingly, I would dismiss the claim and allow the appeal on the evidence or liability point.

[76] Out of deference to the submissions of counsel, I would however, wish to make some observations on the compensation issue and the fair trial point on the assumption that I had held that a section 11 order should be made.

<u>The compensation issue</u>

[77] The Act provides in section 11 for a person who thinks that a right conferred under section 4 (basic rights of the employee) or section 5 (protection of employees from discrimination by employers) has been infringed to apply to the Supreme Court for redress. The material parts of section 11 are set out hereunder:

> *"(3) Where the Supreme Court finds that an employee was dismissed in contravention of subsection (2) of section 5, it may make an order directing the reinstatement of the employee, unless the reinstatement of the employee seems to that Court not to be reasonably practicable, and may further make such other orders as it may deem just and equitable, taking into account the circumstances of the case.*

(4) Without prejudice to the Court's powers under subsection (3), where the Supreme Court finds that a complaint made under subsection (1) has been proved to its satisfaction, it may make such orders in relation thereto as it may deem just and equitable, including without limitation orders for the reinstatement of the employee, the restoration of benefits and other advantages, and the payment of compensation."

[78] The Respondents relied on the endorsement by Sosa J.A. of their submission to the Court of Appeal that section 11 of the Act did not contain any principles or heads of compensation for the guidance of the Court. The Court of Appeal also accepted the submission that "the ability to claim compensation for breach of basic rights conferred by section 4 of the Act was a new right, [one] entirely different from any common law right to sue for breach of a contract of employment, or to make a claim under the Labour Act." It was therefore submitted that assessment of compensation under section 11 of the Act should not be constrained by the common law. The words "compensation" and "redress" included reparation for loss and injury of whatever kind. *Norton Tool Co. Ltd. v Tewson*[15] which held that "compensation" in a differently worded Industrial Relations Act 1971 (UK) did not in a dismissal case include compensation for injury to the employee's feelings and pride, was not applicable.

[79] The Respondents further contended that compensation which does not include reparation for all distress caused by "wrongful conduct in a real sense" would be inadequate. There was no provision excluding compensation for such distress. Although counsel conceded that compensation was not to be calculated on the basis of a breach of the fundamental right of freedom of association, it was submitted that in assessing compensation for distress the reduced sum of $30,000 based on $60,000 awarded in *Wade v Roaches*[16] (dismissal of a pregnant unmarried school teacher by the school board of a state-funded school) was a useful starting point.

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[15] [1973] 1 WLR 45
[16] (2005) Civ. App. No. 5 of 2004

[80] As regards direct financial loss, at the hearing counsel for the Respondents appeared to be no longer claiming lost accommodation on behalf of Jose Luis Reyes. It could not be correctly contended that an employee occupying premises by virtue of his employment had a right to occupy after termination of the employment: *Richardson v Koefod*[17] cited by the Appellant.

[81] On the assumption that the dismissal was in breach of section 11 of the Act, the company would have to pay compensation for loss of earnings which the Respondents would have earned during the period of notice plus any further loss of earnings subject to the Respondents' duty to mitigate their loss. There was no evidence of how long the Respondents were out of work. There is no written evidence of their earnings before dismissal. Counsel for the Respondents suggested that the claim need not be precisely or arithmetically proved since claims might be presented by claimants in person, as Sir John Donaldson MR observed in the *Norton Tool* case (supra). Whatever the merits of the argument, the claim in this case was presented by very able counsel. Further, no allowance is made in the Act for informality of claims, unlike the English statute in *Norton Tool*. Since the Respondents were paid fortnightly, in the absence of evidence to the contrary, the notice period must be taken as two weeks (instead of 12 months used by the Court of Appeal). Since no evidence was provided of any loss of earnings beyond the notice period compensation would be limited to a fortnight's wages at the base figure used by the Court of Appeal.

[82] Counsel for the Appellant accepted that the Act created a new right to claim compensation. However, the Act, unlike the Industrial Relations Act 1971 (UK), did not lay down any guidelines as to the measure of compensation. In such a situation, counsel maintained that regard should be had to the comparable common law measure of damages. In *Clerk and Lindsell on Torts* (20th edn.), the learned editors in dealing with breach of statutory duty at 9-43 state that: "The breach of the statute must result in personal injury, damage to property or

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[17] [1969] 3 All ER 1264 (CA)

recognized economic loss". Similarly, where constitutional redress is being granted, "the comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation: per Lord Nicholls in *Attorney General of Trinidad and Tobago v Ramanoop*[18].

[83] Since compensation for hurt pride and injury to feelings is not available at common law where an employee is wrongfully dismissed (see *Addis v Gramophone Company Limited* [1909] AC 488, by analogy such damages do not lie in the case of an employee dismissed in breach of an employment statute. In *Addis v Gramophone Company Limited* (supra) at p. 491 the Lord Chancellor said: "*I cannot agree that the manner of dismissal affects these damages.*" Sosa JA was prepared to infer injury to the Respondents' pride and feelings having regard to "the evidence of callous and inhuman dismissals …" However, not only would such damages not be available under the Act, but also none of the Respondents gave any evidence of wounded pride or hurt feelings as a result of the dismissals. As Elias J. said in *London Borough of Hackney v Miss KE Adams*[19], *"There will, however, have to be evidence of the nature of the discriminatory conduct."* Indeed Sosa JA apart from the inference above referred to found that none of the Respondents expressly complained in evidence of wounded pride or feelings. Accordingly, the award of $30,000 to each Respondent under this head cannot be sustained.

<u>The court's power to make just and equitable orders</u>

[84] The theme of section 11(3) and (4) is that the court will, as far as possible, reinstate the employee in his or her job and restore to him or her the benefits, advantages or compensatory sums denied him or her by the dismissal.

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[18] [2006] 1 AC 328 at [18]
[19] [2003] IRLR 402 at [11]

[85] However, there has been a suggestion that the phrase "just and equitable" was wide enough to enable an award of damages for breach of contract to be made, although no such claim was made and the action was in respect of a statutory wrong.

[86] Section 11 gives an employee the right to claim compensation whether or not he has received adequate notice, or any notice at all. Section 11 also enables an employee to claim reinstatement. The only question is whether the employee was unlawfully dismissed. If he or she was, the court has power to award the employee compensation for any loss proved, but the court is empowered to order only what it considers just and equitable. Any such order implies that both sides will be heard. For example, the employer may argue that the proven loss be not awarded because of the employee's conduct or performance record. In the instant case, there can be no question of a just and equitable order. There was no argument in any of the three courts on a just and equitable order in relation to general damages, and no submissions on what would be an appropriate award.

<u>The fair trial point</u>

[87] In view of the conclusion I have reached in favour of the Appellant that the Respondents had not discharged the evidential burden of establishing a causal link between the dismissal and the Respondents' union activities, it is not strictly necessary to deal with the fair trial point. Nonetheless, I wish to make a few observations on the point.

[88] Firstly, the delay of 4 years and 9 months between the hearing and the delivery of the reserved judgment is unacceptable. Secondly, such excessive delay would result in an order for retrial only if a party can demonstrate that the delay possibly or probably resulted in identifiable material errors in the judgment: see *Cobham v Frett*[20]. The real issue is as to the quality of the decision. I agree with counsel for the Respondents that two of the three alleged errors (lack of union activity on the

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[20] [2001] 1 WLR 1775 (P.C.)

farm and lack of interest in returning to the company farm) were not errors. The third error (that the Respondents' living accommodation was demolished) was not in the result material. Accordingly, the Appellant has not made out its case on the fair trial point.

Disposition

[89] I would hold that the Respondents failed to discharge the evidential burden of raising an issue that their dismissals were caused by their union activities. As a result, the obligation to dislodge the evidence on that issue prescribed by section 11(2) of the Act never shifted to the Appellant, who merely insisted that the company dismissed the Respondents as a cost-cutting measure. Even if the dismissals were in breach of section 11 of the Act, the Respondents have merely established a right to compensation for wages in lieu of a fortnight's notice. No further loss of earnings was pleaded or proved. Assuming a breach of statutory duty in relation to the dismissals by analogy with the common law compensation for injury to pride and hurt feelings (not pleaded or proved) was not payable. General damages for breach of contract (again not claimed or proved or argued) should not be awarded without the benefit of adversarial argument. The Appellant did not show that the inordinate delay in delivering the reserved judgment resulted in specific material errors. The appeal is therefore allowed except as to a fortnight's wages for each Respondent.