IN THE COURT OF APPEAL OF BELIZE AD 2009

CIVIL APPEAL NO 19 OF 2009

MAYAN KING LIMITED Appellant

v

(1) JOSE LUIS REYES

(2) OSCAR ORLANDO MARADIAGA

(3) JULIO CARCERES HERNANDEZ

(4) CORNELIO RUBIO GUTIERREZ

(5) EMELINA BAUTISTA RIVERA

(6) RIGOBERTO MALDONADO Respondents

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BEFORE

The Hon Mr Justice Manuel Sosa Justice of Appeal
The Hon Mr Justice Boyd Carey Justice of Appeal
The Hon Mr Justice Dennis Morrison Justice of Appeal

A Arthurs Martin for the appellant.
A Moore for the respondents.

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2010: 12 March and 21October

SOSA JA

I – *Introduction*

1. The proceedings in the court below were commenced by the respondents in June 2001 with the issue of a writ of summons bearing an indorsement which read:

'(a) The plaintiffs's (*sic*) claim of discriminatory and illegal dismissal on the 7th and 13th of June 2001 from their employment at Mayan King, Ltd. against the defendants is pursuant to sections 4(1), 5(1), 5(2)(a), (b), and (c) of the Trade Unions and Employers' Organization (Registration, Recognition and Status) Act, 2000 and the plaintiffs seek remedies for the defendants (*sic*) contravention of those provisions of the said act pursuant to section 11(1) *et seq* of the said act.

(b) The plaintiffs seek an order from the court prohibiting the defendants from evicting or removing the plaintiffs from their respective homes situate on the defendant's property in the Stann Creek District of Belize since their eviction or removal would arise directly from the aforementioned discriminatory and illegal dismissals.

(c) Costs.'

The writ was issued against both John Zabaneh and the appellant but, having regard to the fact that the trial judge ruled at the close of the case for the respondents that there was no case for Mr Zabaneh to answer, I do not propose to deal in this judgment with anything contained in the pleadings or evidence insofar as it related to his alleged liability.

II - *The pleadings*

2. It was averred by the respondents in their statement of claim that they were labourers whom the appellant, a 'banana producer' in the Stann Creek District, had employed as follows:

i) José Luis Reyes (continuously since 1992),

ii) Oscar Orlando Maradiaga (continuously since 1997),

iii) Julio Carceres Hernández (since 1990, but not continuously),

iv) Cornelio Rubio Gutiérrez (continuously since 1990),

v) Emelina Bautista Rivera (continuously since 1995) and

vi) Rigoberto Maldonado (since 1998, but not continuously)

and, further, that all of them had (in ways that were specified) participated in union-organising efforts during a period beginning in April 2001. It was pleaded, in particular, that Mr Reyes, Mr Maradiaga, Mr Carceres, and Mr Rubio had all helped to organise, and (in common with the other two respondents) had attended, a 'public union meeting' held in the village of Santa Cruz on Sunday 27 May 2001 to discuss unionisation of the banana workers at Mayan King. The respondents further pleaded that, on 7 June 2001, the appellant informed all respondents, except the respondent Ms Bautista, that their services were no longer required, Ms Bautista, the common law wife of the respondent Mr Rubio, not being notified of her own dismissal until 13 June 2001. Concluding their allegations, the respondents averred, first, that none of them had ever received a warning to the effect that his/her work was in any way unsatisfactory or been

informed that he/she was being inefficient in the performance of his/her job and, secondly, that he/she had been dismissed for his/her close association with others organising for the unionisation of banana workers. In a five-page document entitled 'Further and Better Particulars of Statement of Claim' and dated 11 April 2002, 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).

3. In its defence, the appellant denied that the respondent Bautista was ever its permanent worker and that she was orally dismissed as alleged. It averred, moreover, that it was not aware which of its workers had applied for union membership, which had attended meetings, which were involved in the promotion of meetings or in the subscription of membership and which, if any, had spoken at meetings of prospective members. The appellant further pleaded that, after its suffering of considerable loss in 2000 (the intention must have been to refer to 2001), its Board had instituted in February of that year certain measures to reduce expenses and improve production. In March 2001, the pleading continued, the Board further decided to reduce its work force, which decision led to termination of the services of 30 workers. Then, on 7 June 2001, according to the averment, 24 workers were given notice of intention to terminate their services (an allegation to be highlighted below, at para 86), followed on 18 June 2001 by lawful termination notices including instructions to collect all their

entitlements at the appellant's office. All of the respondents except the respondent Bautista were amongst those so terminated on 18 June. The defence further alleged that dismissal of the 24 workers was dictated by economic necessity and was in no way related to trade union activity or membership and that selection of the 24 workers was not based upon misconduct but upon their relative efficiency and competence in the performance of their duties.

III - *Orders made before trial*

4. Two orders were made by Awich J in these proceedings before the matter was set down for trial. The first was an order granting an interlocutory injunction in favour of the respondents on 31 July 2001. There appears to be no copy of the order on the record but the relevant notice of motion discloses that the application was intended primarily to be for 'an order that [the appellant and John Zabaneh] whether by themselves or agents or servants or any of them or otherwise howsoever be restrained by injunction until judgment in this action or further order from removing or evicting [the respondents] from their respective places of residence or interfering in way with [the respondents'] continued residence in their respective homes'. The second was an order dismissing an application made by the appellant and John Zabaneh for what Awich J referred to in his relevant ruling of 14 June 2004 as 'an order to the effect that [the respondents] did not meet "preconditions" for membership in a trade union and therefore could "not qualify to enjoy and be entitled to rights, benefits and

advantages conferred by the Trade Unions and Employers' Organization (Registration, Recognition and Status) Act Cap 304, Laws of Belize'. It is only to the first order that further allusion will be appropriate later in this judgment.

IV - *The evidence for the respondents*

5. For the sake only of convenience and with no intention to be disrespectful, I shall refer to the respondents individually (and to all other witnesses) by their respective surnames, paternal only, in the remainder of this judgment.

(a) Reyes'

6. Reyes, like the other respondents, testified in Spanish and was assisted, as were, indeed, all other participants in the trial in the court below, by an interpreter. His evidence was that he worked for the appellant on its banana farm for a total of eight years and eleven months. According to the record (p 37), he described part of his work as 'frowning', but it seems clear enough from the context that the interpreter's word would have been 'pruning'. He did not, during that time, ever have any problem 'at [his] job'. His fortnightly wages varied, depending, *inter alia*, on the amount and nature of his work. He had earned as much as $327.00 per fortnight. But there were fortnights for which he would be paid less, say two hundred seventy-odd dollars; and his last pay (not necessarily for a full fortnight) was $259.00. Sometime prior to 27 May 2001 he attended workers' meetings at a farm known as Farm 16 and at a place called Cowpen and made contact with one Gaspar Martínez ('Martínez') who, as it turns out, was

then employed by the Society for the Promotion of Education and Research ('SPEAR'). From Martínez he obtained copies of a booklet entitled 'The Fruit of Your Works', which he proceeded to distribute, outside of working hours, among his co-workers at Mayan King. In addition, he was part of a group of six workers who would meet to 'talk in relation to the union' at the house of Maradiaga (located, as Maradiaga was later to testify, off the Mayan King compound ('the compound') but on Mayan King land all the same). But he was also active on the compound itself, where he would visit co-workers in the camps where they lived and talk, it is to be inferred, about unionisation.

7. Reyes gave evidence of a meeting held on 27 May 2001, a Sunday as already noted above, at certain school premises in the centre of the village of Santa Cruz. The 'building' was an incomplete structure having columns but no walls. Reyes was among those who addressed the gathering of some 150 persons (mostly workers, it is to be inferred) on that occasion. His message to them was that they ought fearlessly to exercise their legal right to join the Christian Workers Union ('the union'), representatives of which were in attendance. (Ironically, Reyes disclosed in his evidence that, out of fear, he generally conducted his own pro-union activities in secret.) Furthermore, as far as he was concerned, he, the other respondents and many others present at the meeting (in all some 110 workers), all joined the union, then and there, by signing the necessary papers.

8. In the days following 27 May, Reyes continued to be active as a unionist, outside working hours, on the compound, encouraging other workers to join the union.

9. Reyes further testified of events which took place on the compound on 7 June 2001, which would have been a Thursday. He was approached by his captain with a notice which he was allowed to read but which was not left with him. As he understood the notice, he was not only being dismissed but also being required to collect his pay on the next morning and thereafter leave the compound by five o'clock. He presented himself for his pay (and was, presumably paid) but did not leave the compound as required by the notice for the reason that, in his words, 'all of us were members of the union'. With the help of the union, he and others who were dismissed on 7 June obtained legal representation. Subsequently, however, following receipt of a notice signed by John Zabaneh ('Zabaneh') and the intervention of the police, Reyes, overcome by fear, finally vacated his place of abode in the compound. He was aware at all relevant times that there was in force an order of the Supreme Court allowing him to remain on the compound. At the time of trial, he had been living, for the previous year and a half or so, in rented accommodation for which the monthly rent was $70.00.

10. In his cross-examination of Reyes on behalf of the appellant, experienced Senior Counsel covered four main areas, viz (a) the status of Reyes as a union

member, (b) the question of the appellant's knowledge of Reyes' pro-union activities, (c) the suggested absence of opposition on the part of the appellant to such activities and (d) the vacating, by Reyes, of the compound. Reyes' evidence that he had had no problems on the job at any time was not disputed.

(b) Maradiaga's

11. Maradiaga gave evidence similar to that of Reyes. He, however, had worked for the appellant since 1987. Initially, he had sprayed orange trees, but from 1998 to 2001 he was a watchman, with responsibility for watching the workshop and the office at the compound seven nights per week in return for wages at the rate of $12.00 per night. Like Reyes, he had never had a problem with the appellant concerning his work performance.

12. In May 2001, he heard something about a union and broached the subject with Reyes, who handed him a book, after the reading of which he (Maradiaga) began to 'meet' and 'organise' with others. This group invited many workers at Mayan King to attend a meeting to be held in the nearby village of Santa Cruz. The meeting was duly held; and he was one of the persons who addressed the workers in attendance, urging them to be fearless, presumably about joining the union. He was satisfied in his own mind that, by signing the appropriate form, he had joined the union on that day.

13. During off duty hours in the days following 27 May, Maradiaga kept up (a) his efforts to persuade others, off duty themselves, to join the union and (b) his work of providing to workers forms of application for union membership.

14. Maradiaga further gave evidence that he was on duty on 7 June 2001 when his captain went up to him, showed him a sheet of paper and told him that that would be his last night on the job. He understood the paper to be saying that workers were being 'cut down' as the citrus harvest had ended; and he saw his name on the paper. He was, the paper further stated, to collect his pay at the office at ten in the morning and vacate his place of abode on the compound by five o'clock. The union was then advised of the dismissal of him and others and, in due course, union representatives visited them.

15. Maradiaga referred in his testimony to the obtaining of an order of the Supreme Court allowing him and the other respondents to remain in their respective places of abode. He said, however, that he was unable to remain there as a result of having been arrested by the police in September 2001 and placed with three other respondents, against their will, on a boat which proceeded to take them to Puerto Cortez, Honduras. With the help of an order made by the government, he was subsequently brought back to Belize but, unsurprisingly in the circumstances, did not seek to resume occupation of his former place of abode, which he had built and which was valued at about

$5,000.00. Sometime later, on passing by the compound, he discovered that his house was no longer there.

16. The cross-examination that next followed concentrated on the number of workers referred to in the paper said by Maradiaga to have been shown to him on 7 June . Senior Counsel did not dispute Maradiaga'a claim that he had never had a problem with the appellant as regards his performance on the job.

(c) Carceres'

17. Carceres (the correct surname may well be Cáceres: see pp 226 and 227, record) said in evidence that he was a banana worker of the appellant from 1983 to 1988 and, again, from 1990 to 7 June 2001. He had had no problem concerning his work performance from 1990 to 2001.

18. As far as he was concerned, he had joined the union on 27 May 2001. Having done so, he returned to the camp and invited co-workers there to go to Santa Cruz and sign forms of application for membership. On subsequent days, he continued to assist the cause of unionisation by seeking out co-workers and filling-out forms.

19. Carceres further testified as to his dismissal on 7 June 2001. He said that his captain, on that day, showed him a piece of paper on which his name was listed and which he understood to be saying that he was being dismissed 'due to

low production'. He sought to clarify this reply by saying that he understood that '[d]ue to low production [the appellant] was force to cut down'. Having received his last 'paycheck' in the sum of $245.00, for a fortnight's work, he did not leave his place of abode at once; but he eventually left, in September 2001, owing to 'pressure from the police'.

20. Unlike Reyes, but like Maradiaga, Carceres said that his pro-union activities were not carried out clandestinely.

21. Carceres was not cross-examined by Senior Counsel for the appellant. His assertion that he had had no previous problem concerning his work performance thus stood unchallenged.

(d) Rubio's

22. Rubio testified that on 7 June 2001 he had been working on the appellant's banana farms for seven years and a month, during which period he had had no complaints about his work, performed four days a week . His last fortnightly 'paycheck' was for $261.00.

23. It was the further testimony of Rubio that, from April to June 2001, he was 'promoting the union movement along with the other co-workers'. Expanding on this, he said that he would speak to his banana farm co-workers in order to get them to join the union.

24. On 27 May, according to Rubio's evidence, he attended the meeting of workers and 'members of the union' and signed up to join the union. Thereafter he would secretly speak about the union to others on the compound.

25. Regarding the happenings of 7 June 2001, Rubio stated that at 4 pm his captain showed him a paper and told him that that day was his last on the job since the appellant had decided to, as he put it, 'cut down on person, because citrus season was over'.

26. He gave further evidence that he eventually left his place of abode on the compound on 7 September 2001 as a result of being deported. Since he was in fact a resident of Belize, he was able to return to Belize but, owing to fear, he did not go back to the house in which he had formerly lived with Bautista as man and wife.

27. The cross-examination of Rubio was focused principally on the truthfulness of his claim that his pro-union work had been done secretly. As in the cases of the previous witnesses, counsel did not dispute the claim made in examination-in-chief that the appellant had at no time during Rubio's seven-plus years of service complained to him about his work.

(e) Bautista's

28. For her part, Bautista, the common law spouse, as adumbrated above, of Rubio, said in evidence-in chief that on 7 June 2001 she was working on one of the appellant's banana farms as a packer, having first been employed in May 1995. During the intervening years the appellant had never complained to her about her work, for the last fortnight of which she had been paid $165.00.

29. She gave further testimony that she had done pro-union work in the sense of encouraging other workers to join the union, taking the opportunity to do so while collecting her pay and while washing clothes in the river. On 27 May 2001 she attended the meeting held in Santa Cruz and, as far as she was concerned, joined the union. Thereafter she continued talking to co-workers about the union.

30. Her husband was, sometime after the day of the meeting, dismissed by the appellant and she herself was dismissed a week later, on a Wednesday, no reason for dismissal having been given to her, but her own view being that she was dismissed 'due to the union'. Upon being informed as to her dismissal, no paper had been shown to her. She had continued living in the camp on the compound until the deportation of her husband on 7 September 2001.

31. In the brief cross-examination that followed, counsel restricted his questions to the nature of Bautista's work, seeking to (a) show that it had been no more than casual, (b) reinforce her evidence that she had not (unlike the other

respondents) been shown any paper containing a list of names and (c) otherwise demonstrate, through admissions by Bautista, that she had not, either while working for the appellant or upon her alleged dismissal, been treated as an employee. Counsel refrained from challenging the claim of the witness that, in all the years she had worked for the appellant, the latter had not once complained to her about her work.

(f) Maldonado's

32. Maldonado's evidence was that, on 7 June 2001, having been employed for the past three years and two months, he was a pruner on the appellant's banana farms and had received no complaint about his work at any time during that period. He had, in addition, been previously employed by the appellant for a period of some ten years.

33. In May 2001 he had not only attended the union meeting held in Santa Cruz (on the last Sunday of the month) but also, as far as he was concerned, joined the union. Besides, during a period which he left unspecified but which clearly extended beyond the last Sunday in May 2001, he would busy himself outside working hours, inviting co-workers also to join the union.

34. On 7 June 2001, however, a captain came up to him, showed him a 'page' and asked whether he had joined the union. Counsel for the appellant raised no objection to the admission of the asking of this question by the captain, properly

in my view, and the judge, again properly in my opinion, admitted it in evidence without comment. (I say this fully mindful of the approaches taken in both substantive judgments, of Rowe P and myself, in an entirely distinguishable situation in *José Chan v Carabeef Ranch Ltd*, Civil Appeal No 15 of 2000, judgments delivered on 8 March 2001.) Maldonado replied to the captain that he had joined the union, whereupon the captain informed him that he no longer had a job and that he should go to the office and collect his cheque.

35. Maldonado continued living in his room at the compound, knowing that he was entitled to do so under an order of the Supreme Court, but he eventually left, out of fear, after an incident in which he was told by Zabaneh that he did not want to see him again, either on the farm or on the field.

36. Maldonado was cross-examined as to (a) the incident just alluded to, (b) the identity of his captain and the nature and content of the paper showed by the latter to him and (c) whether anyone had tried to stop him from inviting workers to join the union or from attending the Santa Cruz meeting. However, as in the case of every other respondent, there was no disputing of the witness's claim that no one had ever complained to him about his work during the previous three years and two months.

(g) Martínez'

37. The only other witness for the respondents was Martínez, to whom I have referred at para 6 above and who, as already noted, was an employee of SPEAR in May 2001. He was in fact the coordinator of SPEAR's Community Empowerment Programme and, as such, a member of a task force known as The Banana Task Force which, having as it main objective the lending of support to banana farm workers in the south in their efforts to unionise, became involved sometime shortly after March 2001 in the mobilisation of workers with a view to their registration as members of the union. It suffices, for present purposes, to say that he testified to the establishment and development in May 2001 of a working relationship between him, as a member of The Banana Task Force, and, initially, Reyes, Maradiaga and Rubio, as workers on the appellant's banana farms who were desirous of achieving unionisation on those farms. In so doing, he gave testimony, sometimes circumstantial, of the pro-union activities of Reyes (not the least of these activities being organisation of, and participation in, the meeting of Sunday 27 May 2001, whose main purpose was to demonstrate worker interest in joining the union) as well as of Maradiaga, Rubio and Maldonado.

38. Consistently with the general tenor of his cross-examination of all the respondents, counsel did not seek in his cross-examination of Martínez, to challenge his evidence of the participation of the named respondents in question in pro-union activities in the days leading up to 7 June 2001.

39. Strangely, no official of the union was called as a witness for the respondents.

V - *The evidence for the appellant*

(a) *Zabaneh's*

40. Zabaneh, one of two witnesses called for the appellant in the court below, gave testimony that he was Managing Director of the appellant at all material times as well as at the time of trial. The appellant was involved in farming and cultivated, among other crops, bananas, which it selected, packed and exported for itself. It was his evidence that bananas produced in Belize had lost much of the market protection they had once enjoyed and that, as demand and prices fell, banana growers in Belize in general, rather than the appellant alone, had been facing a crisis since 2001. In support of this claim, Zabaneh produced a table comparing the appellant's income during the first five months of 2000 and 2001 which table purported to show, *inter alia*, that whereas, in 2000, approximate income for the relevant period had been US$2,754,502.00, it had, in 2001, only been US$1,476,052.00. The difference of US$1,278,450.00 was, according to Zabaneh, explained, in large part, by a drop in the price of a box of bananas from US$10.40 to US$7.90. Zabaneh further testified that, in this situation, the appellant decided at Board level to adopt cost-cutting measures designed to improve productivity and efficiency. Zabaneh then produced a list of these measures as made known to management, with instructions for implementation,

in February 2001. (The list's stated date of 19 February 2000 is quite obviously erroneous in part, as the witness Andrés Sánchez Jr was later to point out: see p 227, record.)

41. It is apparent that Zabaneh testified with gusto, in examination-in-chief, on the subject of the existing good relations between the appellant and the union. But, alas, he could not but admit that such relations had only been established sometime after June 2001; and whilst he claimed to have been the only banana grower's representative prepared to lend the union support at a particular meeting, he could not recall the date of that meeting.

42. At the same time, as to the question whether workers of the appellant had 'done anything with regard to unionising', Zabaneh claimed to have 'no idea' at all, while admitting that he had heard of a meeting they had held on or near to the compound.

43. On the policy of the appellant regarding layoffs, Zabaneh said that management's practice was to ask captains to 'naturally look for the least productive people to lay off'. Captains would be told how many workers needed to be laid off and they, would then go off and decide, among themselves, which workers would make up the required number.

44. Zabaneh, in the course of a very lengthy cross-examination, said that, while he had no direct contact with any of the respondents, he did know Maldonado and did have contact with some other banana farm workers since, to use his words, 'There would be a few people that are more friendly.' Moreover, the number of his weekly visits to the compound varied but was probably more than one; and he certainly considered himself to be in touch with the affairs of the appellant in 2001.

45. Regarding the union, Zabaneh said he was in support of it even before 2001. But, when required to elaborate on this, he could only refer to support voiced at meetings of the Banana Growers Association, which, as he had admitted in evidence-in-chief, did not go as far back as June 2001.

46. As far as he was concerned, the firing of 24 persons, including the six respondents, on one and the same day was purely and simply a cost-cutting measure. The sole criterion employed in dismissing workers was to dismiss the least productive; and it was the captains who had to decide who were the least productive workers and should therefore be dismissed. He disagreed with counsel's suggestion that the respondents were not among the least productive workers of the appellant but admitted, at the same time, that he, unlike the captains, did not have the necessary facts. He further disagreed with the suggestion that the respondents were fired because of their union activities on the appellant's farm. While he agreed that the instructions of the captains had

come from 'higher management', he insisted that it was the captains who had selected their 'least productive' for dismissal.

47. The cross-examination of Zabaneh ended with this telling exchange:

> 'Q. Now its three years and three months, since the plaintiffs were dismissed from Mayan King, and there's still no union at the Mayan King banana farm is that correct?
>
> A. Am not certain about that I don't know, I would not be surprise, if there was I don't know.'

(b) Sánchez

48. The only other witness called by the appellant was Sánchez (known not only by his name, given at para 40 above, but also as Andy Sánchez), who testified in examination-in-chief that he was the former Acting General Manager and Financial Controller of the appellant, which was, in his words, 'in a very tight cash flow crunch' in the first five months of 2001. He produced a document dated 21 June 2001 which purported to be a Cash Flow Summary in respect of the appellant for the period 5 January 2001 to 1 June 2001, inclusive, showing what he called a cumulative cash flow deficit of $840,882.00 at the end of that period. Sánchez referred also to a report prepared by him which showed that out-turn for (as I infer) the same period in 2001 was about 20-25 per centum less than that for the corresponding period in 2000. As a result of the unfavourable

situation, he was informed of the need to adopt several cost-cutting measures as set out in the list earlier produced in evidence through Zabaneh. Sánchez' clarification that the list erroneously gave the date for implementation of these measures as 19 February 2000, when the year should have been 2001, has been mentioned at para 40 above. The majority of these measures, including dismissals, were implemented that same month. As regards reduction of the work force specifically, Sánchez said that, at the end of February 2001, the number of employees was reduced by about 20 and that there was, in March 2001, a further reduction by 10 (cf the averment in the defence that 30 workers were terminated in March). Then came the even further reduction by 24 in June 2001 and another, by 24, in August 2001. Some of the reduction was, however, the result of attrition (workers leaving on their own), a factor which accounted for a reduction by about 28 during the months of June and August of 2001.

49. Sánchez further said in evidence-in-chief that it was the responsibility of captains to assess 'their workers' and recommend for dismissal those who were 'least productive'. Captains were 'intimate' with workers and would assess on the basis of punctuality, dedication to work, priorities and general performance. He and the rest of management would be told by how much the work force needed to be reduced and they would provide the figure to the captains. The 'banana captains' would then meet and agree on the names to be submitted.

50. It was the further evidence-in-chief of Sánchez that, whereas the names of Reyes, Maradiaga, Carceres, Rubio and Maldonado were included in a list of 24 workers to be dismissed (a list admitted in evidence), the name of Bautista, a casual worker, was not and she, unlike the other respondents, was never given notice of termination. It was a brother of hers, who happened to be a captain, who, without the authority of the appellant, told her that she was being terminated. His (Sánchez') own thinking had been that, as Rubio and Bautista were cohabiting, the dismissal of Rubio would have resulted in the relocation of both.

51. Sánchez gave further evidence that he attended the meeting of captains but did not remain throughout in the particular office that served as its venue.

52. The examination-in-chief of Sánchez included questions on the reasons for dismissal of the different relevant respondents. He said that Maradiaga's name was included in the list because of reports that he, a night watchman, was 'doing day work at another establishment' and also because, over a period of three years, items had gone missing from a garage area which he was responsible for watching and it was therefore determined that he was not 'the most efficient watchman'. Rubio, for his part, was included because of a report that he was giving 'more priority' (the words of Sánchez) to a bicycle repair business that he carried on than to his work for the appellant, which was essentially 'contract work' rather than work for a set number of hours per day. As

regards Reyes, Carceres and Maldonado, the evidence-in chief of Sánchez was that 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 (*sic*) task'. The other 19 workers dismissed on 7 June 2001 were all citrus farm workers.

53. According to the further evidence-in-chief of Sánchez, he did not know of the union activity at Mayan King until 4 June 2001, when the appellant received a letter from the union ('the letter') expressing an interest in negotiating with it (the appellant). The appellant's reply to the letter, admitted in evidence, was in the form of a faxed message in which the letter is said actually to have been received on 5 June 2001. The reply advised the union to address future correspondence to the Banana Growers Association ('BGA') but closed with an assurance of the cooperation of the appellant, in collaboration with the BGA.

54. At the end of his evidence-in-chief, Sánchez said, in reply to counsel, that he was no longer an official of the appellant and, in reply to the judge, that he was then working for someone else.

55. Cross-examined, Sánchez testified that he still considered himself loyal to the appellant.

56. As regards the date of the meeting of captains at which the June dismissals were discussed, he stated that that would have been in early June or late May 2001. There had also been meetings preceding the February and March dismissals; but at neither of them had there been discussion of any difficulty or problem with Maradiaga. What is more, Sánchez was not able to recall at what point/s of time any or all of the incidents involving loss of items in the garage area had occurred. With regard to Rubio, his undue attention to his bicycle repair business had not been raised at either the February meeting or the March one. Sánchez, seeking to move out of the corner of the ring, so to speak, said that Rubio's name had, however, come up 'in a subsequent event that happened on the farm'; but that point was hardly self-explanatory given that it was the appellant's case that the difficulty with Rubio was that he was giving to his own business, presumably carried on off the farm, preference over the work to be done for the appellant.

57. It was frankly acknowledged by Sánchez that, at the stage of the meeting where distraction from work through union activity was being discussed, he was himself distracted by having to make an appearance at another meeting taking place upstairs. He could not, therefore, say whether Rubio's name had come up during that discussion. It is to be inferred from this that his earlier testimony (see para 52) as to the reason for Rubio's inclusion in his captain's list had been based on second-hand knowledge.

58. The following exchange which took place later in the cross-examination is of particular interest in view of what, from all indications, was Sánchez' unquestioning (if interrupted) presence at the captains' meeting:

> 'Q. And was it your view … that unionizing at Mayan King would harm … the financial condition of [the appellant]?
>
> A. No, that is not my personal view.'

Also of special interest, though not for the same reason, is the exchange below, which followed after that just quoted:

> 'Q. You said that no one mention (*sic*) the view to you that the unionizing would further harm the financial condition of [the appellant]. So let me ask you, in these discussions did you discuss the fact that unionizing might help the financial condition of [the appellant]?
>
> A. Yes.'

59. After having said in evidence-in-chief that he was still keeping in touch with the management of the appellant at the time of the trial, Sánchez said in cross-examination that, as far as he knew, the workers at Mayan King were still not unionised at such time. (The full significance of this reply was to be revealed

in re-examination, at which stage Sánchez disclosed that he was, at the time of trial, doing consulting work for the appellant.)

60. The suggestion was made to Sánchez, but rejected by him, that he was gravely mistaken about the position of the appellant's management with regard to unionisation.

61. Concerning the nature of the work done by all the respondents save for Bautista and Maradiaga, Sánchez agreed that it may have been pruning, which was an essential part of banana production, and one for the performance of which much training had to be provided.

62. In his re-examination, Sánchez indicated that Bautista left the compound because Rubio (with whom, as already noted, she was cohabiting) was leaving and for no other reason.

VI - *The judgment of the court below*

63. At the conclusion of the trial on 27 October 2004, Awich J reserved his judgment until 30 November. In the event, such judgment was not delivered until 10 July 2009, a matter to which I shall have to return in due course.

64. In his judgment, the judge found that the appellant's farming operations had been sustaining losses but said that he did not believe that the six

respondents were dismissed 'simply in a lay-off exercise'. He reached the conclusion that the respondents were dismissed for the purpose of 'silencing trade union members and thwarting unionisation of workers' on the appellant's farm. That was, in his opinion, a 'direct contravention of ss: 4(1) and 5(1) and (2)(b) and (c) of the Trade Unions and Employers' Organisations (Registration, Recognition and Status) Act , 2000'. But he further held that the dismissals were in breach of section 13 of the Belize Constitution ('the Constitution') which guarantees freedom of assembly and association, in general, and the right to belong to, among other associations, trade unions, in particular. He then proceeded to award compensation in the amount of $70,000.00 to each of the respondents, with interest at 6 per centum per annum from the date of judgment until payment, as well as with costs.

VII - *The grounds of appeal*

65. The appellant now appeals against the whole of the relevant order dated 16 September 2009, seeking that it be set aside.

66. Although effectively advancing five grounds of appeal, counsel, in the notice of appeal, set them out in the form of a single five-fold ground in the terms following:

> 'The trial judge erred in law and/or misdirected himself by:

1. finding that the termination of the Respondents contravened sections 4(1), 5(1), 5(2)(b) and 5(2)(c) of the Trade Unions and Employers (*sic*) Organisations (Registration, Recognition and Status) Act ('the Act');
2. failing to consider and conclude that the termination of the Respondents was as a direct result of lay-off exercises necessitated by the proven losses and financial difficulties of the farming operation and thereby covered by section 5(4) of the Act;
3. applying the case of Clement Wade v Maria Roches Civil Appeal No 5 of 2004 when assessing the quantum of compensation payable to the respondents, and thereby awarding $70,000 to each respondent; and
4. finding that in all the circumstances it was just and convenient to grant the relief by an award of damages in the absence of proof of loss by the Respondents.
5. That the passage of 7 (*sic*) years and 9 months between the end of the hearing and the delivery of the Judgement (*sic*) by the trial Judge was a breach of the Appellant's right to a fair hearing within a reasonable period of time, and the judgment is unsafe.'

VIII - *Discussion*

67. I accept appellant's counsel's entirely voluntary written formulation of the issues in the appeal, which, when formally altered by the insertion of numbers, is as follows:

> 'i) Was the judge's determination that the respondents were terminated in violation of the Act supported by the evidence?
>
> ii) Was the basis and quantum of the award of compensation legally sound?
>
> iii) In light of the 7 (*sic*) years and 9 months between the completion of the hearing and the delivery of the judgment, was there a fair trial?'

(This formulation was expressly confirmed by counsel in oral argument.)

68. For the sake of convenience, I reproduce below some presently relevant provisions of the Trade Unions and Employers' Organisations (Registration, Recognition and Status) Act, 2000 ('the Act'). Section 4 provides:

> '4. (1) Subject to section 13 of the Belize Constitution, every employee shall have and be entitled to enjoy the basic rights specified in subsection (2) below.
>
> (2) The basic rights referred to in subsection (1) above are:-
>
> (a) …
>
> (b) freely deciding whether to be a member of a trade union …;

(c) taking part in any lawful trade union activities …'

Subsections (1) and (2) of section 5 state:

'5. (1) It shall be unlawful for an employer … to engage in the activities specified in subsection (2) below in respect of any employee or person seeking employment.'

(2) The activities referred to in subsection (1) above are:-

(a) …

(b) discriminating or engaging in any prejudicial action, including ... dismissal … because of the employee's exercise or anticipated exercise, of any rights conferred or recognized by this Act or any Regulations made hereunder, the Belize Constitution, any other law governing labour and employment relations, or under any collective bargaining agreement.

(c) discriminating or engaging in any prejudicial conduct, including … dismissal … by reason of trade union membership … or participation or anticipated participation in lawful trade union activities.'

69. The issues shall now be dealt with in numerical order, save to the extent that, for ease of exposition, it will be indicated at once that, for reasons to be given below, the third is, in my view, to be resolved in favour of the respondents. I would also, as a prelude to consideration of issue i), make passing mention of the fact that, whereas in the court below it was contended for the appellant that Bautista was not an employee and had hence never been sought to be dismissed, no such contention was advanced before this Court. No more need be said about this contention than that it was, in my opinion, a hopeless one which was properly rejected.

Issue i)

70. I have reached the conclusion that the judge's determination that the dismissal of the respondents was in violation of the Act was supported by the evidence. Insofar as it was given by the respondents themselves, that evidence, as has been seen, 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. After reading the record with the utmost care, one is unable to form the impression that the respondents are a set of out of control vengeful employees out to get even with their former employer at whatever cost. Moreover, this was, without a doubt, in my judgment, a group of witnesses whose evidence, if uncontradicted, was quite capable of sustaining an inference to the effect that the dismissals complained of were carried out in direct response to their union activities.

71. But that evidence was, up to a point at least, contradicted. Both Zabaneh and Sánchez testified of the financial woes of the appellant in the first half of 2001. That was testimony which the judge had no apparent difficulty in accepting. It was also testimony supported by contemporaneous documents with which the judge cannot have had any difficulty either. There is, in my view, no reason for doubting the truthfulness of that evidence, *viva voce* as well as documentary. 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.

72. That said, however, as Sir John Donaldson MR remarked in *Carrington v Therm-A-Stor Ltd* [1983] 1 WLR 138, 141, letters G-H, a case of alleged unfair dismissal:

> 'Where redundancy is the reason for the dismissal, the dismissal is not necessarily unfair. However, the method of selection for dismissal can make the dismissal unfair.'

In my view, it was the method of selection for dismissal that made the dismissals in the instant case unlawful, ie in violation of the rights of the respondents under section 4(1) and (2) of the Act. The evidence as to the method of selection was given, not by the captains who, it was indicated, were the persons most engaged in the selection process, but by Sánchez and, in less detail, Zabaneh. The claim of both of these witnesses was that the directive given by upper management, under orders from the Board, to the captains was to select the 'least productive' for dismissal. The captains, in their search for the 'least productive', took into account, it was said, punctuality, dedication to work, priorities and general performance. The five respondents whose dismissal (unlike Bautista's) Sánchez accepted, were, he said, all dismissed as having been among the least productive. To my mind, the judge was right to find that the reason for the dismissals was that which was to be inferred from the circumstantial evidence of the respondents and to reject by clear implication, at the very least, the appellant's claim that the reason had to do with the relative productivity or otherwise of the five respondents concerned. As was noted in the review of the evidence appearing above, none of these respondents' evidence to the effect that no one ever complained to them about their performance on the job was even slightly challenged in the cross-examination of them. And neither of the two

witnesses called by the appellant contradicted, or even sought to contradict, that evidence when they testified. It is certainly improbable, as I see it, that five long-serving workers of whose work performance there had never been a complaint would be among the 24 least productive in a work force as large as that on the appellants farms was made out by Zabaneh to be (as many as 1,200 workers in a year). I cannot, in all conscience, say the same of the theory that, in the circumstances described by the six respondents, their particular selection for dismissal was a direct reaction to their participation in union activities. I fear that there is nothing improbable, in the light of the circumstantial evidence, about that theory. The position is well put by the learned editors of Phipson on Evidence, 17th ed, 2010, page 152, para 6-07:

> 'Elimination of an improbable theory may of course lead to the acceptance of a competing theory that is not improbable where the available evidence supports this.'

73. I have, to be sure, not disregarded the contention of counsel for the appellant that the evidence indicated that, far from being anti-union, the appellant was singularly pro-union. Counsel pointed in this regard to the assurance of cooperation extended by the appellant to the union in the faxed message of 6 June 2001, the very eve of the firings. But to what extent, if at all, is that setting down of words on a piece of paper reflected in the actual contemporaneous conduct of the appellant? The evidence of Sánchez is clear in showing that the

captains knew for a fact at the stage of the game when they drew up their lists that Reyes (for whose stated predilection for secrecy, see para 7 above), Carceres and Maldonado, at least, were all involved in union activity. It is difficult to believe, in the face of that admission, that they did not also know, by then, of the involvement of the others (especially Maradiaga who, in contrast to Reyes, said that he did not operate under a cloak of secrecy) in such activity. The manner in which these six respondents were shortly thereafter dismissed was, to be appropriately blunt, callous. And it was not only five men who were being put on the street by the accompanying evictions but also wives and children. Carceres, to take but one example, had a wife and half a dozen children. In my view, it is improbable that a genuinely pro-union employer, whom one would expect to be sympathetic to union activity, would dismiss with such a show of inhumanity, workers whose misfortune (one cannot say 'only sin') had been to be deemed to be among the least productive as a direct result of 'distraction' with, of all things, union activity. There was no evidence at all (and it was therefore simply not open to the judge to find) that other workers were dismissed in the same harsh manner. In fact all the other 19 workers dismissed on 7 June having been citrus farm workers and the citrus harvest being known to end at a particular time each year, it is unlikely in the extreme that any of them did not know all along exactly what, to put it colloquially, was coming for them.

74. It is as well summarily to dispose at this point of counsel's related argument that absence of allegations of the use of union-busting tactics prior to 7 June

2001 furnished powerful support for the appellant's claim to having been union-friendly from the outset. By the showing of its own top executive, Sánchez, it was only on 5 June (the date provided in his faxed reply to the union) that the appellant found out about union activity on the compound. On that basis, the only time available to the appellant for reprisals was 5-7 June.

75. Evidence of what may have characterized the relationship between the appellant and the union after 7 June 2001 is not, in my opinion, of any real relevance in this case. This is particularly so as regards the supposed quality of that relationship after the commencement of the action in the court below in June 2001 and the granting of the interlocutory injunction against the appellant in July 2001, when the full impact of what it was up against must have been strongly felt.

76. Quite apart from the weakness already referred to of the evidence adduced by the appellant to support its claim that the five respondents in question were dismissed simply because they were among the 24 least productive of its workers as at 7 June 2001, the evidence of Zabaneh and Sánchez was generally not apt to impress a reasonably alert and reflective judicial mind. In the case, for example, of Zabaneh, whose evidence may not have been as crucial as that of Sanchez, but was by no means without importance, his attitude to the court and counsel, if the record be accurate, was hardly winning. The exchange between him and counsel for the respondents which was reproduced at para 47 above was there described as 'telling' for the

obvious reason that it showed, in its bold evasiveness, a serious lack of respect, not only for counsel but also for the judge and the entire judicial process. After all, it is nothing short of incredible that the witness would not have known that, at the time of trial, the appellant's farm remained as non-unionised as it had ever been. A reasonably alert and reflective judicial mind would be expected to entertain a healthy doubt as to the willingness of this witness to bring out the truth where the same was not in his and, hence, the appellant's, favour.

77. Another instance of weakness, this time in the form of unreliability, has been adverted to at para 45 above, where it is demonstrated that Zabaneh was unable to ground his claim that his professed support for the union went even farther back than 2001.

78. Sánchez was weak as a witness but in his own way. His admitted abiding loyalty to the appellant was all-too-quick to come to the fore in the course of his testimony. He was prepared to testify that no one in the appellant's upper management had expressed the view to him that unionism would further harm the appellant's financial condition, but he replied in the affirmative when asked if the appellant's upper management had considered whether unionisation might assist its financial condition. But was the court to believe that a company conducting farming operations on the large scale described by Zabaneh would, in its debate at upper management level of the question of unionisation, consider and examine the pros but give no thought to the cons?

79. Again, as has been seen, Sánchez advanced in cross-examination the personal view that unionisation of the appellant's farms would not further harm its financial condition; yet, as has previously been hinted, there is no indication that, despite having been the Acting General Manager and Financial Controller of the appellant at the time, he sought to air this view on learning of the captains' conviction that three of the respondents (among them Rubio, whose unchallenged evidence that he was latterly working only four days a week for the appellant supports the inference that he had his fair share of off duty hours to use as he pleased) were being distracted in some unspecified way from their work by union activity and should therefore be placed on the list of employees doomed to dismissal.

80. There was also some reason for thinking that Sánchez could have better prepared himself to testify in this case and thus maximised his credibility. Given his position that he, and hence the appellant, only learned of the union activity at Mayan King on receipt of the union's letter dated 4 June 2001, it could not have escaped his attention that the exact date of that letter's receipt was important in the light of the admitted date of dismissals of the male respondents and the undeniable close proximity of such dismissals to the date of such receipt. Yet, as pointed out earlier, his testimony to the effect that he first learned of the union activity on 4 June was in conflict with that which was stated as the date of receipt in his faxed reply to the union, viz 5 June, thereby raising a little higher, as it were, the question of his credibility. Sánchez' evidence that even seasonal citrus

farm workers sent home on 7 June were selected by application of the criteria supposedly applied in the case of the respondents seems to be another instance of insufficient pre-trial thought. Why would any criteria at all have to be applied to a seasonal worker who, by definition, would be jobless come the end of the season? Was this a *fidus Achates* going, if not that full extra mile, then at least a quarter of one?

81. Counsel for the appellant placed emphasis on the fact that some of the respondents testified that they were not told they were being dismissed for union activity and/or that they were told that the reason for termination was low production. In my view, however, the only obvious importance of such evidence in this case is that it suggests an unpolluted belief on the part of the witnesses concerned in the old and, alas, increasingly unpopular maxim that honesty is the best policy. These witnesses may well have struck the judge as being just simple folk faithfully repeating, out of a sense of duty, that which was said to them by their respective captains. It was, after all, in large part, their blind faith in the protection of the law that had landed them in their present troubles. Their testimony does not, however, prove the truth of the reasons proffered to them by their captains. Rather, it is in the assessment of all relevant evidence, including that relating to the appellant's professed attitude to unionisation, that an experienced judge would have been able to find the truth or falsity of the proffered reasons for dismissal. For reasons already given above, I am not prepared to accept the submission of counsel for the appellant that there was

significant evidence of a pro-union policy in the appellant's corporate offices at any material time. Nor do I see, in the light of all of the foregoing, any firm foundation for counsel's reliance on the appellant's categorical denials that the terminations were a reaction to union activity on the part of the respondents.

82. Before parting with this issue, I would, first, point out that in dealing with it I have taken due note, following confirmation by diligent perusal of the transcript, of the fact that, throughout the hearing before this Court, appellant's counsel treated the matter as one of six dismissals, without in any wise differentiating between the case of Bautista and the cases of the male respondents. I regard this treatment as deliberate and entirely consistent with the feature of the appellant's case already noted at para 69 above.

83. Secondly, I would, with due acknowledgment to the editors of Phipson, *ibid*, footnote 19, reproduce the following passage from the judgment of Lord Brandon in *Rhisa Shipping Co v Edmunds (The Popi M)* [1985] 1 WLR 148 HL:

> 'No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.'

To my mind, there is no need to take such a course in the present case. However, it may be helpful to advance, for future reference, the view that the 'burden' placed by section 11(1) on the employer is that which Phipson refers to as the 'persuasive burden': *op cit*, p 149, para 6-02. (Morrison JA expressed a similar view in *Belize Telemedia Limited v Perriott*, Civil Appeal No 33 of 2007 (judgment delivered 20 June 2008)). Were it necessary, therefore, to decide this case on the burden of proof, the guiding principle would, as I opine, be that set out by Phipson, *ibid*, as follows: 'A party who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on the issue in question.' Application of that principle could hardly assist the appellant in the instant case.

Issue ii)

84. I have concluded that the basis and quantum of the award of compensation in this case was, from a legal standpoint, not entirely sound. As was stated above, the trial judge formed the opinion that the dismissals of the respondents were violations not only of their rights under sections 4(1), 5(1), 5(2)(b) and 5(2)(c) of the Act but also of their rights under section 13(1) of the Belize Constitution. Although he regarded the respondents as entitled to relief under section 11 of the Act, he held that that section, together with sections 4 and 5 of the Act, is 'an effective way of implementing the provisions of s: 13 of the Constitution'. Citing the fact that the respondents did not wish to be reinstated in the employ of the appellant, he proceeded to award them

compensation, in the amount already stated above, and treated as his guide the award of this Court in *Wade v Roches*, Civil Appeal No 5 of 2004, in which judgment was delivered on 9 March 2005, that is to say, after the conclusion of the hearing before him.

85. Section 11 of the Act, insofar as relevant to the topics of redress and relief, provides as follows:

> '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.
>
> …
>
> (3) Where the Supreme Court finds that an employee was dismissed in contravention of subsection (2) of section 5 above, 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 reasonable, taking into account the circumstances of the case.
>
> (4) Without prejudice to the Court's powers under subsection (3) above, where the Supreme Court finds that a complaint made under subsection (1) above 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.'

86. In my view, counsel for the appellant advisedly shied away from an outright submission that the judge was wrong in his decision not to order the reinstatement of any of the respondents. Even the shadow of a suggestion of discontent in this regard, which at times seemed about to show itself, would, in my opinion, be unwarranted in the circumstances (which, lest it be forgotten, included termination without notice, though notice was pleaded; an order for the immediate vacating of places of abode; interlocutory injunctions to prevent forcible eviction from such places; deportatation of some respondents; and even the mysterious disappearance of one respondent's humble place of abode – which William Pitt the elder, in his eloquence, may have chosen to call his 'ruined tenement').

87. It is also, as I see it, right that there is no serious dispute as to the propriety of an order for compensation in the circumstances of this case. A nominal award would have been wholly inappropriate in the circumstances, for reasons which shall appear as I proceed.

88. The dispute quite correctly has at its centre the quantum of the compensation awarded. As it was put (acceptably to the respondents' counsel) in the skeleton argument of the appellant: 'Section 11 of the Act does not contain

any principles or heads of compensation for the guidance of the Court.' Counsel for the appellant further submitted, uncontroversially in my opinion, that '[t]he 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.'

89. Counsel's respective suggested approaches to the assessment of compensation for the violation of the relevant rights were sharply divergent. It was the contention of counsel for the respondents that the judge below was right to adopt as his guide in assessing compensation in this case the award which, in *Roches*, was substituted by this Court for that of the court below. But the present case involved no application for constitutional redress under section 20(1) of the Belize Constitution. None of the respondents alleged the contravention (actual or prospective), in relation to himself/herself, of any of the relevant provisions of the Constitution. Supreme Court Action No 309 of 2001, when commenced on 18 June 2001 and ever after, was utterly devoid of a public law element. It sought purely private law remedies against an entirely private entity and a private individual. There was, therefore, absolutely no basis for a finding that the provisions of section 13(1) had been contravened by the dismissals of the respondents. In those circumstances, I respectfully consider that the judge was in error in finding violations of their constitutional rights and awarding them compensation on the basis of guiding principles to be found in the judgment in

Roches and on the assumption that the amount there awarded was a good starting point in the determination of the appropriate quantum in the instant case.

90. Counsel for the appellant, on the other hand, commended to the Court the principles set out by the National Industrial Relations Court in England in *Norton Tool Company Limited v Tewson* [1973] 1 WLR 120 and adopted by the Court of Appeal of Eastern Caribbean States (Civil Division) in *Cable & Wireless (West Indies) Limited v Hill et al* (1982) 30 WIR 120.

91. Respondents' counsel, for her part, submitted that both *Norton Tool* and *Cable & Wireless* were unhelpful in the instant case for the reason that neither concerned union activity or discrimination. I am mindful of the fact that in *Norton Tool* the English court was dealing with an appeal involving an award of compensation for unfair dismissal made by an industrial tribunal pursuant to the Industrial Relations Act 1971 (UK). I also keep in mind that in *Cable & Wireless* what the Eastern Caribbean court had before it was a case of unfair dismissal involving compensation in lieu of reinstatement under section 10(4) of the Industrial Court Act in force in Antigua in 1979. Furthermore, not only is it is true, as respondents' counsel pointed out, that neither case involved union activity or discrimination but also that, as appellant's counsel frankly acknowledged, '… the legislation in the United Kingdom and in the Caribbean governing labour relations is fundamentally different than the Belize law as appears in the Act …' (p 20, skeleton argument).

92. Having considered the judgment of the court in *Norton Tool*, I conclude that it is in fact quite helpful but not in the way suggested by appellant's counsel. The passage from which I derive compelling (if only broad) guidance is the following, at p 48:

> 'In our judgment the common law rules and authorities on wrongful dismissal are irrelevant. That cause of action is quite unaffected by the Industrial Relations Act 1971 which has created an entirely new cause of action, namely, "the unfair industrial practice" of unfair dismissal. The measure of compensation for that statutory wrong is itself the creature of statute and is to be found in the Act of 1971 and nowhere else.'

Recognising, as I do, the propriety of the distinction drawn in *Norton Tool* between unfair dismissal, the 'unfair industrial practice' which became by virtue of statute a new cause of action in England, and wrongful dismissal, I consider that it is, *a fortiori*, proper to distinguish between unfair dismissal in England and unlawful dismissal under the Act in Belize, the latter being not an 'unfair industrial practice' but wrongful conduct in a real sense and, hence, logically comparable to wrongful dismissal rather than to unfair dismissal. It follows that I do not accept appellant's counsel's submission that wrongful termination is akin to unfair dismissal. As a new cause of action in Belize, dismissal in violation of a right specified in section 4(2) of the Act, 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, let alone in a foreign jurisdiction not having a statute containing similar provisions. Being in agreement with counsel on both sides that the Act contains no principles or heads of compensation for the guidance of the court, I must, adopting the pertinent conclusion of the court in *Norton Tool*, state the resultant position in Belize thus: the precise measure of compensation for the statutory wrong (which the violation of a statutory right must be) of unlawful dismissal under the Act is not to be found in the Act and cannot properly be sought anywhere else. In that recognition, the search can only be for something less than the precise measure of compensation; and, in my view, it must be for fundamental building blocks, as it were, in the form of first principles. I set out on that quest, accepting fully the submission of counsel for the appellant that section 11 is there to ensure the grant of relief that is 'just and equitable' and gives rise, in legal theory, to the widest possible power to grant relief (p 20, skeleton argument). But, as counsel goes on to caution, such power must, in practice, be judicially exercised and is thus by no means unfettered. While, for the reasons given, I do not consider that this Court is free in this case to adopt the principles applied in *Norton Tool*, which, in the language of the National Industrial Relations Court, 'emerge from section 11 of the Act of 1971' (p 48), there is no denying the force and relevance of two first principles recognised by that court, viz that a legislature cannot be taken to intend that a court will dispense compensation arbitrarily (by, eg, awarding a bonus) and that , in dealing with a discretionary element in a relevant statutory provision, it must be

remembered that every discretion must be 'exercised judicially and upon the basis of principle'.

93. The important consequence of all this is that, in my view, this Court cannot say, with the court in *Norton Tool*, that what is just and equitable must be related to 'the loss sustained by the complainant'. No such restriction is to be found in the Act. In *Norton Tool*, this consideration led the court to hold:

> '"Loss" in the context of section 116 does not include injury to pride or feelings. In its natural meaning the word is not to be so construed, and that this meaning is intended seems to us to be clear from the elaboration contained in section 116(2). The discretionary element is introduced by the words "having regard to the loss".

Bearing in mind the absence of similar restrictive language in the Act, I fail to see why compensation for injury to pride or feelings should not be available to a claimant pursuing this 'entirely new cause of action'. And while it may be true that none of the respondents expressly complained in evidence of wounded pride or feelings, the evidence of callous and inhuman dismissals (long-serving employees, whose job performance had never given rise to complaint, being fired out of the blue and ordered to pack up and leave their places of abode by five the next day) gives rise to the clearest of inferences of such injury. (For another

instance of judicial deductive reasoning of this sort see the leading judgment of Mottley P in *Roches*, at para 52.)

94. What, then, ought the quantum of the award properly to have been? Unquestionably, the respondents were entitled to be compensated for proved loss of earnings. Did they prove any? In my opinion they each did, although their evidence in this regard was not as full as it might have been. Each and very one of them omitted to provide the court below with an estimate of the period during which he/she was out of work. There was, however, evidence of dwindling fortunes in the banana industry at all material times. And the manner and circumstances of the terminations would have affected the respondents' chances of finding new employment in a shrinking job market. I do not, in these circumstances, consider it unreasonable to award to each respondent the amount of his/her average fortnightly pay during the last twelve months of his/her employment for a period of twelve months. I take the case of Reyes, although it is not as straightforward as the others, as an example. His unchallenged evidence was that, while his last 'paycheck' was in the sum of $259.00 only, his wages had varied, having gone as high as $327.00 at one time but later gone down to $270.00-plus. These figures, like those for the other respondents, do not give me all the assistance I would like to have. Nevertheless, doing the best I can, I consider that he should receive $275.00 X 26, ie $7,150.00 for loss of earnings. This figure should be increased to $8,410.00 by the addition of the sum of $1,260.00 representing rent paid by him for accommodation during a

period of some 18 months following his departure from the compound, a matter on which he testified, unlike the other respondents, and was unchallenged. To this increased amount is to be added, in my view, a sum in respect of injury to the particular worker's pride or feelings. In all the circumstances, the sum of $30,000.00 per worker seems to me to be adequate for this purpose, which (again as a matter of first principles) can have nothing to do with punishment. To go back to the case of Reyes, that would increase his compensatory award to $38,410.00, which, in my view, should be its total amount.

95. It follows from the immediately foregoing, that the awards of this Court to the respective remaining respondents should, in my opinion, be as follows:

Maradiaga	$37,280.00
Carceres	$36,370.00
Rubio	$36,786.00
Bautista	$34,290.00
Maldonado	$35,720.00.

In the case of Maradiaga, the award does not purport to cover the loss of his house since there is no evidence to show to what extent, if any, that would have been caused by his dismissal. It is not known, for example, whether this was a house which he could have moved to another location had he wished to do so.

Issue iii)

96. As earlier adumbrated, the trial was, in my opinion, a fair one notwithstanding the passage of some four years and nine months between the end of the hearing and the delivery of judgment.

97. That said, however, it is necessary at once to add that a delay of this length is very much to be regretted and causes deep concern whatever the circumstances leading up to it. While the judge did record at para 2 of his judgment that the file had been lost and found, he did not give any indication of the approximate length of time during which it was missing.

98. The submissions of counsel for both sides in this appeal were, as regards this issue, appropriately concise. On behalf of the appellant, the chief written submissions were to the effect that the delay 'eroded the trial Judge's ability to render a fair and just decision' and had resulted in an 'unsafe and unfair' judgment. Counsel cited in support of these submissions the cases of *Goose v Wilson Sanford & Co* [1998] EWCA Civ 245, *Cobham v Frett* [2001] 1 WLR 1775 and *Marin v Betson*, Civil Appeal No 26 of 2007, a decision of this Court delivered on 20 June 2008. Counsel's further written submission was that the delay also resulted in a judgment lacking in judicial reasoning and assessment of the evidence. In oral argument, counsel contended that the decision was unfair by reason of having been rendered so long after the end of the hearing, at a point when the judge 'may not have recalled all the evidence'. Counsel suggested that difficulty in recollecting the evidence may have resulted in the judge not attaching

sufficient weight to the evidence adduced by the appellant as to the reasons for the dismissals.

99. Respondents' counsel submitted that the delay had not resulted in an unfair or unjust decision. All three cases cited by the appellant, submitted counsel, were authority for the proposition that delay will be a good ground only where there has been judicial error which is attributable to it. The appellants, she contended, had not shown how the delay had resulted in an unfair or unjust decision.

100. In rejecting the submissions of counsel for the appellant, I would draw attention to *Cobham*, an appeal from the Court of Appeal of the British Virgin Islands to the Privy Council in a case involving a delay of 12 months in the delivery of judgment. Lord Scott of Foscote, delivering the advice of the Board said, at what appears (since I could be mistakenly treating a single paragraph as three) to be the 30th paragraph (unnumbered):

> 'In their Lordships opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.'

101. I would emphasise the difference between the position as stated by the Board and as somewhat erroneously understood by counsel for the respondents. Such error as is made in a judgment under appeal need not in fact be attributable to the delay. It suffices that it is 'probably or even possibly' so attributable. Lord Scott, having cited the decision of the Court of Appeal of England and Wales, Civil Division, in *Goose*, a case in which it was held that Harman J committed errors of the kind in question, went on to conclude that, in the case before the Board, Georges J had not similarly erred.

102. In the instant case, as I have already concluded above, there is ample support in the evidence for the judge's determination that the dismissal of the respondents was a violation of the Act. In reaching that determination, the judge necessarily rejected the evidence adduced by the appellant to show that the terminations of the respondents were in fact necessitated by the proven financial losses and difficulties of the appellant's farming operations and thus covered by section 5(4) of the Act. The existence of ample support in the evidence for the relevant determination of the judge adequately demonstrates, to my mind, the absence of any material error by him that could be said to be possibly attributable to his admittedly inordinate and excessive delay in delivering judgment.

IX – *Disposition*

103. In my opinion, the appeal must be dismissed to the extent that it challenges the entry of judgment, with costs, for the respondents but allowed to

the extent that it challenges the amount of the compensation awarded. Accordingly, I would, in respect of the order made below, affirm it so far as the entry of judgment, with costs, against the appellant is concerned but set it aside so far as the award of compensation is concerned, substituting for that award one in the total amount of $218,856.00, payable as follows:

Reyes	$38,410.00
Maradiaga	$37,280.00
Carceres	$36,370.00
Rubio	$36,786.00
Bautista	$34,290.00
Maldonado	$35,720.00.

Interest should be paid at 6 per centum per annum from 10 July 2009 until payment. The appellant is to pay to each respondent ⅔ of his/her costs of the appeal, to be taxed if not agreed.

104. I am authorised to say that my brother Carey JA concurs in the reasons for, and orders proposed in, this judgment.

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SOSA JA

MORRISON JA

105. I have had the advantage of reading, in draft, the judgment prepared by Sosa JA. I agree with it and I have nothing to add.

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MORRISON JA