BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 1 of 2014

BETWEEN

TRIMART INCORPORATED **APPELLANT**

-AND-

MICHELIN TYRON COX **RESPONDENT**

The Hon. Sir Marston Gibson, K.A., Chief Justice, The Hon. Justice Sherman Moore, CHB, The Hon. Justice Sandra P. Mason, Justices of Appeal.

2014: April 16;
June 25;
July 03;
2016: September 20

Ms. Hazelyn E. Devonish for the Appellant
Mr. Kendrid Sargeant for the Respondent

DECISION

GIBSON CJ:

[1] This is an appeal by the appellant, Trimart Incorporated ("Trimart") from a decision of the Severance Payments Tribunal which determined that the respondent, Michelin Cox ("Mr. Cox") had been continuously employed for the requisite 104 weeks under the ***Severance Payment Act, Cap 355A*** of the

Laws of Barbados and awarded him a severance payment in the amount of $19,169.00.

[2] By written contract of employment dated 30 May 2002, the respondent, Michelin Cox ("Mr. Cox" or "the respondent"), was employed as a warehouse manager with the appellant, Trimart Incorporated ("Trimart"). The employment commenced on the following day, 1 June 2002. The contract stated that "the nature and responsibilities of your job were discussed with you during our interview" and "[a] full job description [would] be given to you during your probationary period" which was to last for three months.

[3] The contract further provided, among other things, that "either party may terminate this contract by giving one month's notice in writing", or the payment by Trimart to Mr. Cox of one month's salary in lieu of notice. The stated grounds for termination were (i) proven misconduct by Mr. Cox, for example, theft, fraud, dishonesty or being guilty of any improper conduct in relation to the company's affairs or fellow employees; (ii) incompetence, negligence or carelessness in the performance of duties; (iii) prolonged illness or illness that frustrates the objective of his employment; (iv) persistent lateness or absenteeism after warnings; and (v) conviction of a serious criminal offence.

[4] By letter dated 28 February 2013 and delivered to Mr. Cox, Trimart terminated Mr. Cox's employment. The letter stated:

> Dear Mr. Cox:
>
> We wish to inform you that Trimart Incorporated has decided to exercise its rights as per the notice clause in your contract of employment. In this regard, the company will be terminating your services with effect from February 28th, 2013.
>
> The Termination benefits due to you are as follows:
>
> 1. One month's salary in lieu of notice totalling $3,396.46
>
> 2. Payment of accrued vacation leave totalling $1,420.66
>
> Enclosed is our cheque #14724 for $4,817.92 representing your total benefits, as well as your Termination of Services Certificate. You are asked to immediately return to the undersigned any Company property that you may have in your possession.
>
> We thank you for your contribution to the Company and wish you the best in your future endeavours.

The letter, which was signed by Mr. Geoffrey Evelyn, the Chief Executive Officer ("the CEO"), gave no ground for the termination.

[5] On 28 March 2013, Mr. Cox completed an application seeking severance payment under the ***Severance Payment Act, Cap 355A*** of the ***Laws of Barbados*** ("the Act"). He stated 'restructuring' as the reason for his application. On 13 September 2013, the Severance Payment Tribunal held the hearing. Mr. Cox testified that, at the meeting with the CEO at the time of his dismissal on 28 February 2013, he requested severance and was told that a severance payment would not be made. He stated that "the CEO said 'I

am sorry we have to terminate you because we are restructuring'". The CEO then gave Mr. Cox the termination letter. Mr. Cox also testified that the CEO told him that he (the CEO) had been advised "to give [him] the letter and don't pay [him] any severance." Mr. Cox testified that he had been replaced by another employee, a Mr. Brathwaite.

[6] Notably, Mr. Cox was the only witness called to testify. Before the Tribunal, counsel for Trimart contended that "there was no evidence that they restructured", at which point one of the Tribunal members, Mr. Beckles, stated that "[t]here were three people now they are two." Ms. Devonish for Trimart responded "[n]o, no, no. . .there's still three. Mr. Brathwaite was brought from another branch" to which the Chairman, Mr. Nelson, retorted that "the duties could have been distributed differently even if it were the same persons." However, notwithstanding the Chairman's invitation to Ms. Devonish "to counter and produce the evidence for us", and the presence at the hearing of Ms. Allison Payne, Trimart's Human Resources Manager, Ms. Devonish called no witness on behalf of Trimart.

The Tribunal's Decision

[7] At the conclusion of the hearing, the Chairman of the Tribunal stated:

> [W]e've come to the conclusion that Mr. Cox is entitled to the payment of severance. Mr. Cox said quite clearly that the C.E.O. told him that they were restructuring. He was cross-examined and he was not shaken by that and our task has been made easier by the fact that no one has come from

> Trimart to dispute or contradict that very telling bit of evidence so that notwithstanding the letter of termination, in which it is stated, that Trimart has exercised its right as per notice clause in their contract of employment. It is our opinion that that is merely a pretext and that he clearly stated that the C.E.O. said that they were restructuring.

[8] In its written reasons for decision dated 6 January 2014, the Tribunal "found as a fact that the termination of Mr. Cox's employment resulted from a restructuring of the operations of TRIMART as communicated to [Mr. Cox] by the C.E.O, Mr. Evelyn, and so the notice given, pursuant to the notice clause in the contract of employment, had been advanced, not as the real reason for the dismissal, but simply as the mechanism by which the termination had been effected."

[9] The Tribunal dealt with the issue regarding the new employee, Mr. Brathwaite. It stated that simply because Mr. Brathwaite may have been doing the same job as Mr. Cox did not mean that there had been no redundancy. The Tribunal also noted that it had not been provided with any evidence to show what pay Mr. Brathwaite was earning or even if he was doing the same work; what his job designation was; where in Trimart's structure he had been moved from; what had happened to his former job; or whether there had been no diminution or expectation of diminution in the business being carried on.

[10] The Tribunal concluded:

> The Tribunal found that the presumption of redundancy having arisen on the dismissal of [Mr. Cox] by [Trimart] under ***Section 38*** of ***the Severance Payments Act***, ***Cap 355A***, that there has been no evidence or sufficient evidence had not been adduced by [Trimart] to rebut the presumption of redundancy, particularly on the issue of restructuring or of the nature of the job being carried out by Mr. Brathwaite, and his pay, as compared to that of Mr. Cox., etc, so that on the basis of evidence adduced by [Mr. Cox] and believed by the Tribunal and so the Tribunal found in favour of [Mr. Cox].

The Appeal

[11] On 13 February 2014, Trimart appealed against the decision of the Tribunal on the following grounds:

> "(i) The Tribunal erred in law in holding that the applicant was employed by the Respondent for not less than 104 weeks and that in itself entitled him to receive severance payment;
>
> (ii) The Tribunal erred in law in holding that reorganization is the same thing as redundancy;
>
> (iii) The Tribunal erred in law and in fact in failing to pay any or sufficient attention to the letter of termination and the Termination of Services/Lay-off certificate from the applicant to the Respondent;
>
> (iv) The Tribunal erred in law in holding that an employer may not terminate the services of an employee who has been employed for 104 weeks or more by giving him notice in accordance with the terms of the contract made between the parties;
>
> (v) The decision is against the weight of the evidence."

The Submissions

[12] In support of these grounds, Trimart contended:

a) That the Tribunal failed to appreciate that the only ground on which it can make a decision is if a matter falls within ***section 3*** of the ***Severance Payment Act.***

b) That the Tribunal displayed such a lack of understanding of the provisions of the ***Severance Payment Act*** that it is unsafe to act on the decision;

c) That an employee is entitled to severance payment if he is employed for 104 weeks;

d) That reorganisation is [not] in itself a form or redundancy;

e) That a respondent must give evidence to confirm matters admitted by the respondent.

[13] In response, Mr. Sargeant, counsel for Mr. Cox, strongly supported the Tribunal's position that the presumption of redundancy had not been rebutted. He further contended that the evidence supported the Tribunal's conclusion that, since there had been a restructuring, there was therefore a redundancy.

The Issues

[14] We turn to examine what, in our view, are the two main issues, namely, (i) whether the presumption of redundancy has been rebutted; and (ii) whether a restructuring is tantamount to a redundancy.

The Law: The Presumption

[15] The long title of the ***Severance Payment Act*** states that it is an "[a]n Act to provide for the making by employers of severance payments to employees who cease to be employed in circumstances amounting to redundancy and for

related matters." ***Section 3(3)*** of ***the Act*** provides, so far as pertinent, as follows:

> (3) For the purposes of this Act, an employee who is dismissed shall be deemed
>
> (a) to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to
>
> (i) . . .
>
> (ii) the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish;
>
> (b) …

[16] ***Section 38(1)*** and ***(2)*** of ***the Act*** provide as follows:

> (1) Any question arising under this Act as to the right of an employee to a severance payment, or as to the amount of a severance payment, shall, in accordance with regulations made under this Part, be referred to and determined by a Tribunal appointed and constituted in accordance with the Sixth Schedule.
>
> (2) For the purposes of any such reference
>
> (a) a person's employment during any period shall, unless the contrary is proved, be presumed to have been continuous;
>
> (b) an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed because of redundancy or natural disaster.

[17] In ***Commonwealth Caribbean Employment and Labour Law*** (London and New York, Routledge, 2014), the authors, Nathalie Corthésy and Carla-Anne Harris-Roper note, at page 187, that "[***s]ection 38(2)*** of the Act creates a rebuttable presumption on the part of the employer that an employee is

dismissed by redundancy or act of God." In ***Employment Law*** (London, Sweet & Maxwell and Thompson Reuters, 2014), Professor Gwyneth Pitt observes, at p. 327, that "[o]nce it is established that an employee has been dismissed, ***ERA*** [the ***Employment Rights Act 1996***] ***s. 163(2)*** raises a presumption that the dismissal is by reason of redundancy, which means that the burden is on the employer to disprove it." ***Section 163(2)*** of the ***ERA***, and its predecessor, ***section 91(2)*** of the ***Employment Protection (Consolidation) Act, 1978***, ("***EPCA***") are *verbatim* with ***section 38(2) of Cap 355A***.

[18] The operation of the presumption, however, is pellucidly explained in ***The Law of Redundancy*** (3rd Edition 1988) by Professor Cyril Grunfeld, described as a "pioneering work" by ***Sir David Simmons CJ*** in ***June Clarke v American Life Insurance Co***, ***BB 2002 CA 21***. Discussing ***section 91(2)*** of the ***EPCA, 1978*** (formerly ***section 9(2)(b)*** of the UK ***Redundancy Payments Act 1965***) under the rubric "The Burden of Proof", Professor Grunfeld stated, at p. 112:

> The normal burden of proof is that, he must prove who alleges. However, while, as we saw in the previous chapter, it is the applicant for redundancy pay who must satisfy the industrial Tribunal that he had been 'dismissed,' the burden of proving that the dismissal was or was not attributable wholly or mainly to redundancy has been transferred by the Act from the applicant-employee to the respondent-employer. Section 91(2) states: 'an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.
>
> To avoid liability, the employer must satisfy the Tribunal, not beyond reasonable doubt, but on a balance of probabilities, that the dismissal was not due to redundancy, *i.e.* in practice, that it was in fact due (or substantially due) to a non-redundancy cause.

> The provision in section 91(2) is clear and mandatory. At its face value, section 91(2) means that, if there is no evidence in a case to indicate the reason for a dismissal, the case is governed by the statutory presumption and the applicant-employee wins; alternatively, if there is evidence which is evenly balanced, the statutory presumption will again be decisive in favour of the employee.

[19] It is clear, therefore, that the onus is on the employer against whom the claim is made for severance payment to prove that the employee has not been dismissed by reason of redundancy. And because ***section 38(2)*** presumes that every dismissal of an employee is by reason of redundancy, it follows that the employer must rebut that presumption as part of its burden of disproving redundancy in every case. As Lord Denning MR observed in ***Hindle v Percival Boats Ltd [1969] 1 All ER 836, 838*** ("***Hindle***"):

> That is a compelling presumption. The employer has to prove that the employee was not dismissed for redundancy. He has to prove a negative – always a difficult thing to do. . .The only way in which the employer can effectively discharge the burden of proof is by proving that the employee was dismissed for some other cause altogether.

[20] An interesting example of the application of the presumption was ***Willcox v Hastings [1987] IRLR 298*** ("***Willcox v Hastings***"). Mr. Willcox Sr. owned a business which had four employees, namely Mr. Willcox himself; his son ("Mr. Willcox, Jr") and Mr. Lane (who were the appellants); and a part-timer. Mr. Willcox Sr. subsequently sold the business to a married couple, Mr. and Mrs. Hastings, who both intended to work in the business full-time, along with their son who would also be a full-time employee. Since they had determined

that the business only required four employees as before, they only needed one additional employee, either Mr. Willcox Jr. or Mr. Lane. This meant that the other would be surplus; but the new owners had not determined which of the two it would be. Accordingly, they dismissed both Mr. Willcox Jr. and Mr. Lane both of whom applied to the Industrial Tribunal for redundancy payments.

[21] The Tribunal rejected their claims on the grounds that they had failed to fulfil the requirement in ***section 81(2)(b)*** of the ***EPCA*** of showing that their dismissals were wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished. The Tribunal found that the employers' requirement for employees had diminished to the extent of one employee whose work would in future be done by Mrs. Hastings as the joint proprietor but the decision to dismiss a second employee had nothing to do with the requirements of the business but rather the wish of the new proprietors to employ their son. Hence, neither Mr. Willcox Jr nor Mr. Lane had been dismissed wholly or mainly by reason of redundancy and so neither of them was entitled to redundancy pay.

[22] The Court of Appeal held, allowing the appeal, that both Mr. Willcox Jr and Mr. Lane were entitled to redundancy payments. It was the employers' burden

to prove that the dismissal of either Willcox or Lane was not as a result of redundancy and they had failed to discharge that burden. Sir John Donaldson MR noted, at para 9, that there was no trace whatsoever of the Tribunal having taken account of the presumption of redundancy upon dismissal of an employee contained in ***section 91(2)*** of the ***EPCA***. His Lordship continued, at paras 10 and 11:

> Two people had to be dismissed because there was a reduction in the requirements of the business to the extent of one employee, and another employee had to make way for the proprietor's son. That is uncontroverted. They then go on to say, 'There is no way in which we can decide which reason operated in respect of which employee. We are simply left with two employees leaving the service of the employer and two reasons, each of which could have been the cause of the departure of one such employee. In those circumstances, we just do not know. Maybe both operated on each. We just do not know'. Had they then added in the presumption, they must, as I think, have reached the conclusion that the employer had failed to rebut it. As is accepted by Mr. Marr-Johnson, appearing for the employers, each case has to be looked at individually. This is not a bulk application. Mr. Lane is entitled to say on the findings of the Industrial Tribunal, 'They do not know whether I was dismissed wholly or mainly on account of redundancy. Therefore I am entitled to rely on the presumption'. Mr. Willcox Junior is similarly able to say, 'They do not know. I can rely on the presumption'.
>
> It is an unsatisfactory feature of this particular case that the Solomonic answer is without doubt that there should be one redundancy payment to be divided between the two applicants. It is an injustice if neither applicant can claim a redundancy payment. It is an injustice to the employers if they have to pay two redundancy payments. But we have to administer the law as it is, and, in my judgment, if the presumption in s.91(2) is brought into account, as it does not appear to have been brought into account by the Industrial Tribunal, then these two applicants succeed.

[23] Applying the above learning to the facts of this case, we find compelling Mr. Sargeant’s contention, supporting the Tribunal’s conclusion, that the

evidence adduced was not sufficient to rebut the presumption contained in ***section 38(2)*** of ***the Act***. The only evidence on the record came from Mr. Cox himself who had testified to being told that his dismissal was due to a restructuring. There was no witness for, nor any countervailing evidence adduced by, Trimart. In ***Willcox v Hastings***, at least *some* evidence was adduced by the respondents, albeit insufficient to rebut the presumption. In response to Mr. Cox's testimony, however, Ms. Devonish for Trimart merely challenged a statement of one of the members of the Tribunal that there were three people doing the same job as Mr. Cox and that the number had been reduced to two.

[24] It is glaring that no one from Trimart's management was called to testify as to the true state of affairs regarding Mr. Cox's employment, even though the Tribunal's hearing transcript records that Trimart's Human Resources Manager, Ms. Allison Payne, was present at the hearing. This left an evidentiary vacuum as to what the requirements of Trimart were and whether they were diminished within the purview of ***section 3***.

[25] We conclude, therefore that the ***section 38(2)*** presumption that Mr. Cox's dismissal was the result of a redundancy has not been rebutted, and the employer, Trimart, has failed to discharge its burden of disproving redundancy. It follows that Trimart's appeal fails and must be dismissed.

[26] However, we wish to take the opportunity to examine Mr. Sargeant's contention and the Tribunal's conclusion, that, where there is a restructuring, there is without more a redundancy. We turn now to consider that contention.

Restructuring vs Redundancy

[27] Before us, Ms. Devonish contended that the Tribunal erred in law in holding that reorganisation is the same thing as redundancy. She submitted that an employer was entitled to reorganise his business on economic grounds and employees who were dismissed as a consequence were not necessarily dismissed on grounds of redundancy. Mr. Sargeant countered this argument by submitting that when a company reorganised or restructured its personnel or business, redundancy would automatically take place with the result that any employees terminated would be entitled to severance payment.

[28] The genesis of Mr. Cox's submission under this ground was, as noted above, the anaemic record before the Tribunal. There was evidence by Mr. Cox that he had been replaced by Mr. Brathwaite who was brought from another branch. Mr. Cox, however, could not verify what Mr. Brathwaite's role was, and no evidence was adduced showing that Mr. Brathwaite was working under the same terms and conditions as Mr. Cox or that he had the same job designation. As noted before, the Tribunal thus held that the termination of Mr. Cox's employment was as a result of Trimart restructuring its operations

which led to his redundancy. Can it be said that the Tribunal was correct in concluding that "reorganisation" was the same as redundancy?

[29] In ***Employment Law***, previously referred to above, Professor Gwyneth Pitt wrote at para 9-001:

> Businesses have to be flexible in order to survive and prosper. This means that they need to be free to reorganise, relocate, change methods of production or service delivery, move out of some products and services into different areas or even cease to carry out some kinds of business altogether. Obviously, such changes can have huge effects on workers' employment and the task of employment law must be to strike a balance between the needs of the business for flexibility and the needs of the workers for secure jobs and income. It is very common for business reorganisation and restructuring to give rise to job losses. . .

[30] After discussing in para 9-007 the "increasingly common" situation "where the amount of work remains the same, or may even have increased, but the employer decides that survival requires a cut in the salary bill – more must be done with less", Professor Pitt continued at para 9-008:

> A second area of difficulty related to this is where there is a reorganisation of tasks among employees with the result that someone's job disappears. In these circumstances, the employee may feel that he is not redundant but unfairly dismissed: his job is still there, but has been carved up among other people; there has been no diminution in the work. However, once more, it seems clear that if such reorganisation leads to management deciding that it needs fewer people, this is properly to be regarded as redundancy.

[31] In ***The Law of Redundancy***, from pp. 124-127, Professor Grunfeld considered what occurs as a result of reorganisation in situations involving new technology, absorption of work by fellow employees, a change of duties, and "bumping", that is, where an employee is transferred to another section of the

business, and there replaces a second employee who is "bumped" or dismissed as a result. What is clear is that there is no automatic answer. In some cases, the reorganisation results in redundancy; in other cases it does not. Indeed, at p. 135, under the rubric "Reorganisation in the Interests of Efficiency", he had this to say:

> The potential impact of redundancy legislation on managerial reorganisation of a business or other organisation, whether unilaterally or after consultation or negotiation with union officials, is a subject of particular importance.
>
> We have already considered cases in which reorganisation has resulted in redundancy. Is it, then, the special irony of redundancy law that, enacted to facilitate improvements in efficiency and productivity, its application has created a financial disincentive to enhance organisational performance? The Tribunals and courts have been in varying degrees aware of the need to strike a balance between individual protection and improved efficiency without allowing the former to stifle the latter.

[32] In our judgment, there is no talismanic effect in words such as "restructuring" or "reorganisation." Consistent with the opinion expressed by Professor Pitt, Trimart was entitled to reorganise, restructure, or change methods of production to make its business more economical. Hence the answer to the question whether redundancy follows from such a reorganisation or restructuring is to be located firmly within the language ***section 3(3)(a)(ii)*** of the statute. The authorities support this conclusion.

[33] The decision of the House of Lords in ***Murray and another v Foyle Meats Ltd [1999] 3 All ER 769*** is apposite. There, Foyle Meats Ltd ("Foyle") carried on the business of slaughterers and employed Mr. Murray and Mr. Doherty

who worked in the slaughter hall as "meat plant operatives." In 1995, there was a decline in business and on 27 March 1995, both Mr. Murray and Mr. Doherty were dismissed. The House of Lords held that the dismissal was for redundancy.

[34] Discussing ***section 11(2)(b)*** of the ***Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965*** (which is *verbatim* with ***section 3(3)(a)(ii)*** of Cap. 355A), Lord Irvine of Lairg LC stated at p.771:

> My Lords, the language of para (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the Tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the applicants being dismissed. That, in my opinion, is the end of the matter.

[35] In ***McCrea v Cullen & Davidson Ltd [1988] IRLR 30***, the facts of which were similar to the case at bar, the Court of Appeal held that the Tribunal had erred in considering whether the work of management had diminished as opposed to whether the requirement of the company for employees to carry out the work of management had diminished. The Court stated:

> The question therefore resolves itself into one of fact, namely, is the applicant's work and that work alone being done by someone else, in which case there is no redundancy but the replacement of one employee by another; or has another employee undertaken the work of the applicant additionally to his own, in which case there has been a reduction in the number of employees required to do the work and the applicant's dismissal is attributable to redundancy?

[36] In an illuminating passage, Gibson LJ stated:

> The most obvious situation for the application of the statutory provisions on redundancy is where the volume of work of a particular employee or in some department of the work of an employer has fallen off or been totally lost. In such a case some or all of the employees engaged in that work are surplus to the requirements of the business and so are redundant. A second class of case is where there has been no reduction in the volume of work of any particular kind but the requirement of the employer for as many persons to do the work has been reduced because of improved mechanisation, automation, or other technical advance. A further situation in which the requirement of a business for fewer employees to do a particular kind of work may arise, although there has been no reduction in the volume of work or production, is where there has been a reorganisation of the workforce or a reallocation of functions between them disclosing a position of overmanning.

[37] Trimart submitted to us the case of ***North Riding Garages Ltd v Butterwick [1967] 1 All ER 644.*** The respondent had been employed in a garage for 30 years and at the point of his dismissal was the workshop manager responsible for the repairs workshop. When the appellants took over the business they introduced new methods to which the respondent did not easily adapt. The appellants then dismissed the respondent who applied for a redundancy payment. Before the Industrial Tribunal, the appellants stated the reason for dismissal was because the respondent was incompetent and inefficient and not by reason of redundancy. The Tribunal ruled that the respondent was entitled to redundancy payment because, among other reasons, when the appellants reorganised their system of business as a whole the workshop manager of the old type, like the respondent, was no longer needed.

[38] The Queen's Bench Division reversed the Tribunal's decision, holding that the requirements of the business remained unchanged. Widgery J, as he then was, in discussing ***section 1 (2)(b)*** of the UK ***Redundancy Payments Act 1965,*** which is verbatim with ***section 3(3)(a)(ii)*** of ***Cap 355A***, at pp 647-648, stated:

> It is, we think, important to observe that a claim under s. 1 (2) (*b*) is conditional on a change in the requirements of the business. If the requirement of the business for employees to carry out work of a particular kind increases or remains constant, no redundancy payment can be claimed by an employee, in work of that kind, whose dismissal is attributable to personal deficiencies which prevent him from satisfying his employer. The very fact of dismissal shows that the employee's services are no longer required by his employer and that he may, in a popular sense, be redundant**.**
> . .
> . . .
>
> [T]he mere fact that a re-organisation has transferred this work to the respondent does not show that the requirement of the business for employees to do this, or any other, kind of work has diminished. The only possible relevance of this evidence would be to show that the volume of repair work had been run down to such an extent that the respondent could no longer occupy his whole time in it, but the Tribunal, on the totality of the evidence, does not seem to take that view.

[39] Commenting on the decision in ***North Riding Garages***, Professor Pitt opines at para 9-008 that "in effect, it was more a reallocation of tasks, which the court felt did not actually make it a different kind of work. If new methods alter the way work is done, rather than altering the nature of the work itself, the employee can be expected to adapt. . ."

[40] A similar conclusion was reached in the celebrated decision of ***Hindle***. Mr. Hindle was a highly skilled craftsman in woodworking who had been

employed for most of his life in boat-building. In the 1960s, fibreglass began to be used extensively as an alternative to wood in boat-building and repair. Mr. Hindle was dismissed and sought a redundancy payment. Before the Tribunal, Mr. Percival, one of the directors of the respondent company, explained that Mr. Hindle was an excellent craftsman, but he was very slow.

[41] The Court of Appeal, by majority, dismissed Mr. Hindle's appeal. Widgery LJ opined, at p. 847:

> All [the employer] must prove was that redundancy was *not* the main cause [of the dismissal] and he does this by proving that the requirements of the business for workers of the relevant kind had not diminished. It is not the policy of this Act to reward long service and good conduct, but only to compensate an employee who is dismissed for redundancy. . .Although the Tribunal accepted Mr. Percival as a truthful witness it very properly went on to consider whether the business had become overstaffed lest Mr. Percival had 'deceived' himself in ignoring this factor. Its conclusion on the evidence as a whole was that the effects of the re-organisation in 1965 had spent themselves and that at the date of the appellant's dismissal the business was not overstaffed. It accordingly held that his dismissal was not attributable to redundancy, and like the Divisional Court, I can see no error of law in this.

[42] What is therefore clear is that there is no short-hand or automatic answer to the question whether a redundancy has occurred upon the dismissal of an employee in the course of an alleged "reorganisation" or "restructuring." In every case, recourse must be had to the situations outlined in ***section 3(3)(a)(ii)*** of ***Cap 355A***, described by Lord Irvine LC as "simplicity itself." The question to be resolved, therefore, is always to what is the dismissal attributable, namely, whether the "dismissal is attributable to…the fact that

the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish." Nothing more, and nothing less, than that is required.

The Contract

[43] We mention one final point. During argument before us, Ms. Devonish contended that Mr. Cox was dismissed consistently with the terms of the contract between himself and Trimart. Her argument was that reference to the contract language alone was determinative of the question whether or not Mr. Cox's termination was for redundancy. In ***Murray v Foyle Meats***, Lord Irvine LC took the opportunity to debunk the "contract" reasoning in two cases, ***Nelson v BBC [1977] ICR 649*** and ***Nelson v BBC (No. 2) [1980] ICR 110***. His Lordship stated at p. 772:

> The judgments in the two ***Nelson*** cases have caused considerable difficulty for industrial Tribunals. They have been treated as authority for what has been called the 'contract test', which requires consideration of whether there was a diminution in the kind of work for which, according to the terms of his contract, the employee had been engaged. . .[B[oth the contract test and the function test miss the point. The key word in the statute is 'attributable' and there is no reason in law why the dismissal of an employee should not be attributable to a diminution in the employer's need for employees irrespective of the terms of his contract or the function which he performed. Of course, the dismissal of an employee who could perfectly well have been redeployed or who was doing work unaffected by the fall in demand may require some explanation to establish the necessary causal connection. But this is a question of fact, not law.

[44] We are in complete agreement with the statement by Lord Irvine LC.

DISPOSAL

[45] The appeal is dismissed and the decision of the Severance Payments Tribunal affirmed. The appellant shall pay to the respondent a severance payment of $19,169.00 plus interest at a rate of 6 % per annum from the date of filing until payment. The respondent shall have his costs to be assessed if not agreed.

Chief Justice

Justice of Appeal

Justice of Appeal