IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: G 64 of 2020

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 79 (1) OF THE LABOUR LAW (2011 REVISION)

AND IN THE MATTER OF GCR ORDER 55

BETWEEN

MARSH MANAGEMENT SERVICES (CAYMAN) LTD

APPELLANT

AND

NATHANIEL CLAYTON PRICE

RESPONDENT

IN OPEN COURT

Appearances:	**Mr. Hector Robinson QC and Ms. Angelique McLoughlin of Mourant for the Appellant**
	Mr. Mark Goodman and Ms Natasha Partos of Campbells for the Respondent
Before:	**The Hon. Justice Robin McMillan**
Heard:	**8 June 2020**
Draft Judgment Circulated:	**30 June 2020**
Judgment Delivered:	**8 July 2020**

HEADNOTE

The definition of "redundancy" under Section 2 of the Labour Law (2011 Revision) – The relevance of restructuring and/or reorganization – The character of the legislation and the ordinary and natural meaning of the words used.

JUDGMENT

Introduction

1. This matter arises from a Notice of Originating Motion dated 31 March 2020.

2. The Appellant is Marsh Management Services (Cayman) Ltd ("Marsh Cayman") and the Respondent is Nathaniel Clayton Price ("Mr. Price").

3. It is an appeal against the decision of the Labour Appeals Tribunal ("LAT"), dated 9 March 2020 ("the LAT Decision"), whereby it was determined that:-

   (a) The Labour Tribunal, in its decision dated 2 April 2019 ("the Labour Tribunal Decision"), failed correctly to apply the statutory definition of *'redundancy'* under the Labour Law (2011 Revision) ("the Labour Law") when the Labour Tribunal determined that the Respondent was not unfairly dismissed by the Appellant;

   (b) The Respondent was unfairly dismissed by the Appellant; and

   (c) The Respondent is entitled to an award of US $149,423.02 against the Appellant for unfair dismissal (the "Award").

4. Marsh Cayman has sought the following orders and determinations: -

   (1) an order that the LAT Decision be set aside;

(2) a determination that Marsh Cayman's termination of the Respondent's employment was not unfair within the meaning of Part VII of the Labour Law;

(3) an order that the Award be set aside;

(4) in the alternative to paragraph (3) above, should contrary to Marsh Cayman's primary case, the Court determine that the Respondent was unfairly dismissed, a determination by this Court of the appropriate amount, less than the Award, to which the Respondent is entitled, or alternatively, an order remitting the matter to the Labour Tribunal for the determination of the appropriate award; and

(5) an order that the costs of the appeal be paid by the Respondent to be taxed if not agreed.

5. The grounds on which this appeal is brought are set out in the Notice of Originating Motion. The Court has been informed by oral submissions however that Marsh Cayman will not pursue Ground 3 and that Ground 4 will only arise for consideration in due course if the Court is against Marsh Cayman on Grounds 1 and 2.

6. In formal terms the Grounds of Appeal are as follows:-

"1. The LAT erred in law by failing properly to construe and to apply the meaning of the term 'redundancy', as defined at Part I, section 2 of the Labour Law, when it determined that the Respondent was not dismissed by reason of redundancy.

2. *The LAT erred in law by failing to consider the question whether, if the Respondent's dismissal was not by reason of redundancy, then, as determined by the Labour Tribunal, the Respondent's dismissal was for 'some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held within the meaning of section 51(1) (f) of the Labour Law.*

3. *In determining whether the Respondent's dismissal was unfair, this Court should disregard the statements made by the LAT at paragraphs 27 to 30 of the LAT Decision regarding the applicability to the Cayman Islands of the guidance enunciated by the UK'S Employment Appeals Tribunal (EAT) in Williams v Compare Moxam Ltd [1982] ICR 156, since:-*

    (a) *In any event, the LAT's statements form no part of its reasons for decision; and*

    (b) *The LAT, in making the statements, ignored, or misunderstood the legal and factual context within which the guidance given in Williams v Compare Moxam Ltd was enunciated, and misdirected itself in its determination that the guidance given by the EAT, derived from a specified legislative and factual context, can be transplanted to the Cayman Islands without regard to the different legislative and factual context in the Cayman Islands, and the facts and circumstances of the specified case.*

4. *The LAT in making the Award failed to have regard to, or to give any sufficient weight to any of the factors set out in section 55(2) of the Labour Law which a Labour Tribunal shall have regard to in making an award of compensation for unfair dismissal, or to the facts of the case as determined by the Labour Tribunal."*

7. The appeal is brought upon section 79 of the Labour Law which states:

"(1) An appeal may be made to the Grand Court from a decision of the Appeals Tribunal upon a point of law only.

(2) Subject to subsection (1), no decision of a Labour Tribunal or the Appeals Tribunal shall be open to challenge or review in any Court of Law upon any grounds whatsoever.

(3) An appeal pursuant to subsection (1) shall not operate as a stay of any award, order or decision of a Labour Tribunal or the Appeals Tribunal, or of the effect of any notice, unless the Grand Court so orders.

(4) An application for a stay shall be made by ex parte application."

8. In addition, GCR Order 55 deals with appeals to the Grand Court from *inter alia* a Tribunal and GCR 55 r. 1(1)(3) provides that the following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or by or under any enactment.

9. GCR Order 55 r. 2 states that except where it is otherwise provided by these Rules or by any enactment an appeal to which this Order applies shall be heard and determined by a single Judge.

10. Finally, GCR 55 r. 3(1) states that an appeal to which this Order applies shall be by way of rehearing and must be brought by Originating Motion.

11. In summary, the scope of a rehearing is subject to the provisions of the Labour Law and in particular to determination by this Court on a point of law only. This issue is of significance in that the Respondent raises a preliminary issue as to whether this appeal is founded on an issue of fact as distinct from an issue of law, a matter to which this Court will return in due course.

The Background

12. Marsh Cayman is a Cayman Islands company operating in the Cayman Islands. Its main business is the provision of management services to captive insurance businesses. Other services include: brokerage services, compliance and the maintenance of books and records.

13. Marsh Cayman is an indirect subsidiary of Marsh & McLennan Companies, Inc. ("Marsh & McLennan"), headquartered in New York City. Marsh & McLennan is a global professional services firm with businesses in insurance brokerage, risk management, reinsurance services, talent management, investment advisory and consulting.

14. Marsh Cayman falls within Marsh Captive Solutions, a division of Marsh LLC, a direct subsidiary of Marsh & McLennan. Marsh Captive Solutions is the division of Marsh LLC which provides management services for captive insurance businesses. For descriptive purposes, the term *'Marsh'* will be used interchangeably to mean Marsh Cayman, the Marsh Captive Solutions divisions and March & McLennan Companies, Inc.

15. The Respondent's employment with the Marsh & McLennan Group, through a series of predecessor-employers, commenced in October 1981. His employment with Marsh Cayman commenced on 1 June 2008. Immediately prior to that, the Respondent was Director of Client Services with Marsh Management Services (Bermuda) Ltd, the Bermuda affiliate within Marsh Captive Solutions. Upon his transfer to Marsh Cayman, the Respondent was appointed to the role of Office Head.

16. As Office Head of Marsh Cayman, the Respondent's responsibilities included strategic management and direction of Marsh Cayman; financial management, client development, including new business growth, staff management and information management. He had responsibility for supervising all the employees of Marsh Cayman within the Cayman Islands and reported to the Regional Leader for the USA, Canada, the Cayman Islands and Barbados.

17. The Respondent continued in the role of Office Head of Marsh Cayman until the termination of his employment on 26 February 2018. For the purposes of continuous employment, he was treated as having 37 years of service. His base salary at the time of his termination was US $210,000 per annum.

18. Although Marsh Cayman is a separate legal entity, it operates as part of the integrated international business structure of Marsh Captive Solutions.

19. In October 2017, Mrs. Ellen Charnley ("Mrs. Charnley") was appointed as Managing Director and President of Marsh Captive Solutions. As President of Marsh Captive Solutions, Mrs. Charnley was based in Las Vegas, Nevada, USA, and was at all material times, the global leader of the Marsh captive insurance business with responsibility for the business and staffing strategy, personnel and operations of the global business of the insurance management group covering 26 countries, territories and regions across Europe, Asia, Australia, North America, the continental USA, Bermuda and the Caribbean.

20. Immediately following her appointment, Mrs. Charnley undertook a strategic assessment of the captive global insurance business following which she proposed a new reorganised structure. The new proposed structure reorganised the insurance management businesses such that they were divided into three geographic regions:

(a) International – covering the entities in Europe and Asia;

(b) The Islands – covering entities in Bermuda, the Cayman Islands and Barbados; and

(c) US Continental – covering entities in continental United States.

21. Under the new structure each geographic region would be headed be a Regional Leader. Each Regional Leader would have responsibility for the strategic leadership and growth of the business within their respective geographic region. The new structure was approved by Marsh.

22. Under the new structure, Ms. Julie Boucher was appointed as Regional Leader for the Islands Region, comprising offices in Bermuda, the Cayman Islands and Barbados. Prior to the restructure, Ms. Boucher was the Regional Leader for the entire Americas, covering entities in Canada, Hawaii, six States within the Continental USA, the Cayman Islands and Barbados.

23. Under the new structure, Ms. Boucher would undertake all the strategic responsibilities previously carried out by each of the Office Heads in the three offices within the Islands Region. With the assignment of the Office Heads' strategic responsibilities to the Regional Leader, each of the Office Heads it is claimed would have no responsibilities beyond their client services responsibilities which it is said could easily be performed by other employees within each office. As such, as part of the new reorganised structure, Mrs. Charnley proposed that the role of Office Head be eliminated, initially in the Cayman Islands and Bermuda. Similar steps were undertaken in other regions.

24. It is contended by the Appellant that in line with the reorganising plan, which was approved by Marsh, the decision was taken to terminate the Respondent's employment by reason of the role of Office Head of Marsh Cayman having become redundant under the new structure. Whether this was a lawful redundancy will be a central issue of this appeal.

25. The Respondent's employment was in any event terminated on 26 February 2018 by reason of purported redundancy. His former responsibilities for strategic leadership and direction were assumed by Ms. Boucher. The Respondent's client services roles were assigned to other members of the Cayman Team.

26. Other changes made in the structure of the Cayman office included: the appointment of Mr. Kieran Mehigan, previously SVP and Team Leader, to a newly created role of Client Services Leader within Marsh Cayman, with functions materially different from those previously performed by the Office Head, Ms. Kerri Rasuilis, formerly SVP Finance/Operations Manager, was appointed SVP financial Controller and Mr. John Ramsey retained his position as SVP Risk and Advisory Insurance Manager. All of Mr. Mehigan, Ms. Rasuilis and Mr. Ramsey now reported directly to Ms. Boucher, whereas previously they reported to the Respondent as Office Head.

27. Marsh contends that it considered whether there were alternative position to which the Respondent could have been assigned but determined that there was none. This is factually disputed by the Respondent.

28. Upon his termination Marsh offered the Respondent a separation package as follows:

(a) his usual salary and benefits to the termination date;

(b) three months' salary in lieu of notice in the amount of US $54,300;

(c) severance pay in the amount of US $149,423.10;

(d) paid vacation entitlement of US $7,269.23;

(e) continuation of his health insurance coverage for three months; and

(f) an *ex gratia* payment of US $64,616.38 in return for signing a Separation Agreement.

29. The Respondent refused to sign the Separation Agreement and Marsh paid the Respondent all the amount offered in the separation package except the *ex gratia* payment.

The Statutory Framework

30. In the opinion of this Court, the purpose of the Labour Law was to establish a code governing terms of and conditions of employment and to create a procedure for dealing with unfair dismissals. As a statute of widespread social significance and application, it was important and remains important that the language as used would be readily comprehensible and free of doubt and ambiguity wherever that is possible.

31. In section 2 of the Labour Law *"redundancy"* reads as follows:

> *'"redundancy" means a situation in which, by virtue of a lack of customers or of orders, retrenchment, the installation of labour-saving machinery, an employer's going out of business, force majeure or any other reason, tasks which a person was last employed to perform no longer exist.'*

32. Section 40 of the Labour Law creates a right to severance pay which becomes payable by the employer to the employee upon termination of the employment *'for any reason other than a dismissal which is within paragraphs (a) (b) and (c) of section 51(1).'*

33. Section 51 sets out the circumstances in which a dismissal *'shall not be fair'* for the purposes of entitlement to compensation for unfair dismissal. Paragraphs (a) (b) and (c) of s. 51(1) refer to dismissal for cause –i.e., misconduct or unsatisfactory performance. The remaining paragraphs of s.51(1) set out the other grounds on which dismissal *'shall not be unfair'*, being-

(d) that the employee was redundant;

(e) that the employee could not continue to work in the position without being in contravention of a legal requirement; and

(f) some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position.

35. It thus becomes apparent that the term *"redundancy"* should be construed within the context of the Labour Law as a whole and in relation to the principles of unfair dismissal which have previously been identified in broad terms. When a dismissal has been determined to be unfair a separate payment to the person dismissed of a sum of money by way of compensation may be ordered (Section 55(1)).

36. Accordingly the Court considers that where a situation of redundancy arises in relation to an employee the employee is then redundant and not otherwise. At the centre of this case there is the question of whether redundancy has arisen in law. A further question of less immediate concern that can arise is as to whether if redundancy has properly arisen under the circumstances the employer acted reasonably and a dismissal for redundancy was not itself unfair.

37. For completeness the Court also notes that section 51(2) and section 51(3) state-

"(2) Where the reason for the dismissal of an employee was that he was redundant but it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking, who were employed to perform work of the kind he was employed to do and who have not been dismissed by the employer, and-

(a) that those other employees do not hold the same status as the redundant employee for the purposes of Parts III to V of the Immigration Law (2011 Revision) (Caymanian Status, permanent residence and work permits); and

(b) that the redundant employee was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case,

then, for the purposes of this Part, the dismissal shall be regarded as unfair.

(3) The question whether an employer has acted reasonably for the purposes of this Part shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances."

38. Clearly redundancy can be not merely the ground for dismissal but also the ascribed *"reason"* for dismissal.

The Decision of the Labour Tribunal

39. The Respondent filed a complaint with the Department of Labour & Pensions seeking compensation for unfair dismissal. The subsequent decision of the Labour Tribunal was date 29 March 2019.

40. The Labour Tribunal concluded that Marsh dismissed the Respondent's complaint for reason of redundancy and/or reorganisation and the Tribunal found that the decision to dismiss for that reason or reasons fell within the band of reasonable responses in the particular circumstances and so was fair.

41. At paragraphs 20-22 the Tribunal records the following:

"20. Before the Complainant's Complaint was filed, the attorneys acting for Marsh had provided a 'Statement of Reasons for Termination of Employment' dated 9th April 2018 indicating that the Complainant had been made redundant. The Statement of Reasons said that Marsh had made a business decision to restructure management of the Cayman Islands operations of the group. As a consequence of this restructuring process, strategic responsibilities for the Marsh Cayman operations were to be transferred to Marsh's regional management, located in the USA.

21. The Statement of Reasons continued

"Arising from this restructuring process, the duties and responsibilities formerly carried out by the Employee as Office Head within the Cayman Islands Office ether no longer exist or have been transferred to other personnel and as a consequence the Employee's position as Office Head was eliminated".

22. The Separation Agreement mentioned in the Complainant's Complaint was in the form of a letter from Marsh to the Complainant. It did not give a reason or reasons for the dismissal, although it did provide the Complainant with 14 days to consider it before deciding whether or not to sign it."

42. The Labour Tribunal makes reference to the witness statement of Ms. Ellen Charnley at paragraphs 49-53:

> *"49. The fact that the Separation Agreement did not mention redundancy, or re-organisation, meant that, as with the employee in Vokes, it was perhaps understandable that there was doubt in the Complainant's mind as to the reason for the dismissal. The Complainant's Complaint stated, "Mr. Price is 59 years old and the alleged poor performance has arisen in circumstances where he believes he was terminated in order to hire another employee" so the Complainant had misgivings about the real reason behind the dismissal and for matter which the Tribunal will come on to, on their face the Complainant's misgivings do not appear unreasonable.*
>
> *50. However, in her witness statement Ms. Charnley said*
>
> *"I was appointed as President of Marsh Captive Solutions in October 2017. Following my appointment, I carried out a strategic assessment of the structure of the business as it existed at the time. Based on my assessment I concluded that certain changes to the structure of the business were necessary. At the time, for example, Julie Boucher was Regional Leader for the entire Americas region covering all the entities in Canada, Hawaii, six states within the Continental USA, the Cayman Islands and Barbados. Her responsibilities were much greater than those of the other Regional Leaders at the time.*

I decided to reorganise the business by creating a structure which was more balanced and had greater synergy. I concluded that there was a need for greater consolidation of the strategic direction of the business and in which the leadership and management responsibilities were more evenly distributed among the Regional Leaders.

I therefore proposed a new structure in which the businesses are divided into three geographic regions: International - covering the entities in Europe and Asia; the Islands - covering entities in Bermuda, the Cayman Islands and Barbados; and US Continental - covering entities in continental United States of America. Under my new proposed structure, each geographic region would have a separate Regional Leader. In addition, certain functions are now reported to me directly such as the sales and consulting divisions.

Under the proposed reorganised structure, each Regional Leader would have responsibility for the strategic leadership and growth of the regional business, such responsibilities to include making decisions aimed at creating greater synergies among the entities within the region and greater consolidation of the strategic direction.

Julie Boucher (Julie), who was then the Regional Leader of the entire Americas region would be appointed as the Regional Leader for the Islands, comprising the offices in Bermuda, the Cayman Islands and Barbados. She would eventually be based in Bermuda. In her new role she would be undertaking all the strategic responsibilities previously carried out by the Office Heads in each of the individual offices within the region. Without the strategic responsibilities previously undertaken by the Office Head, the person occupying that role would have no further functions beyond any client service functions they undertook. Those client services functions can easily be undertaken by other colleagues within each office, As such, I proposed that the role of Office Head would be eliminated initially in the Cayman Islands and Bermuda where the existing Office Heads undertook the strategic management and direction functions for those offices"

51. *In her testimony Ms. Charnley also confirmed the discussions she said she had with senior personnel at Marsh about the restructuring, same being a John Drizik and a Mike Poulos ("Mr. Poulos") and she took the Tribunal to an email she had sent to Mr. Poulos on 21st November 2017 and which is timed at 5:22pm ("the 21st November 2017 email") which referred to "less need for an Office Head position in Cayman".*

52. *The 21st November 2017 email did refer to "another example of our need for more competent leadership in Cayman" but Ms. Charnley confirmed that performance*

related issues were not part of her decision-making process concerning re-organisation.

53. Ms. Charnley also took the Tribunal through the 'Marsh Group Solutions' revised organisational structure (at page 4 of the exhibit to her statement) and she gave more detail concerning other aspects of her reorganisation plans for Marsh, for example, by combining the "Office Head" roles for the Luxemburg and Switzerland offices."

43. The Labour Tribunal notes at paragraph 61 that Ms. Charnley's evidence was that the role of *'Office Head"* was becoming obsolete throughout the Islands region, with *'Office Head'* being phased out in Bermuda and Barbados as well as in Cayman.

44. The Labour Tribunal then turns to the specific matter of redundancy at paragraphs 77-79:

"*<u>Redundancy/ Re-Organisation</u>*

77. In the 'Statement of Reasons' submitted on behalf of Marsh it was said that the Complainant was terminated "by reason of redundancy" and the Labour Law defines redundancy as

> *"a situation in which, by virtue of a lack of customers or of orders, retrenchment, the installation of labour-saving machinery, an employer's going out of business, force majeure or any other reason, tasks which a person was last employed to perform no longer exist."*

78. *In written submissions made on behalf of Marsh, mention is made of restructuring, but it appears that the restructuring did not mean that the tasks the Complainant performed no longer existed. They continued to exist but were to be performed by Ms. Boucher or Ms. Charnley.*

79. *The distinction, if there is any in this case, between "redundancy" and "restructuring" was not raised during these proceedings but if it had been argued that any distinction could or should change the findings of the Tribunal, the point would be made that even if a business reorganisation did not involve a redundancy, a dismissal pursuant to a reorganisation may still be fair, as being for "some other substantial reason" (see Hollister supra) and the fact that at some time or other Marsh may have applied the wrong label to the dismissal, this would not be fatal. In Abernethy v Mott, Hay and Anderson (CA) 1974 ICR 323 Denning MR said*

> *"The employer has under the Industrial Relations Act 1971 to "show" the reasons for the dismissal. That is clear from section 24(6). It must be a reason in existence at the time when he is given notice. It must be the principle reason which operated on the employer's mind... But I do not think that the reason has got to be correctly labelled at the time of dismissal. It may be that the employer is wrong in law as labelling it as*

dismissal for redundancy. In that case the wrong label can be set aside. (at D-E page329)."

45. In practical terms the Labour Tribunal interrelated the concepts of redundancy and reorganisation and at paragraph 83 it concludes its analysis in this way:

"83. Marsh dismissed the Complainant for reasons of redundancy and/or reorganisation and the Tribunal finds that the decision to dismiss for that reason, or reasons, falls within the band of reasonable responses in the particular circumstances and so was fair. And whilst Marsh did not warn the Complainant of the impending dismissal, or consult with him in connection with it, or in connection with his finding alternative employment in the organisation, it did try to soften the blow by offering the Complainant an additional 4 months wages and in the Tribunal's view this means that the dismissal was both substantively and procedurally within a reasonable range and so again was fair."

The Decision of the Labour Appeals Tribunal

46. The Respondent appealed from the decision of the Labour Tribunal and the decision of the Labour Appeals Tribunal ("LAT") is dated 9 March 2020.

47. The Grounds of Appeal are set out as follows at paragraph 11:

"11. It is the Appellant's case that the Labour Tribunal erred in the following ways:

i. The Labour Tribunal failed to correctly apply the statutory definition of redundancy pursuant to Part 1, Section 2 Labour Law (2011 Revision).

ii. *The Labour Tribunal failed to give sufficient weight to and/or failed to apply the principles of* ***Williams and Others v. Compare Maxam Ltd. [1982] (EAT) 156 ("Williams")*** *and / or* ***Voke Ltd. V. Bear (NIRC) [1974]("Voke").***

iii. *The Labour Tribunal erred in Law and / or fact and / or its decision was perverse in finding that the Appellant was dismissed because of a redundancy and /or that the decision to dismiss the Appellant was procedurally fair and / or fell within a reasonable band of responses in accordance with all of the circumstances of the case.*

iv. *The tribunal erred as a matter of fact and law by substituting its own grounds for the Appellant's dismissal for that of the Respondent and determining that the Appellant was dismissed for "some other substantial reason" and that his dismissal was fair pursuant to s.51(1)(f) of the Law.*

v. *The Tribunal erred as a matter of fact and law and its decision was perverse / wrong and /or unreasonable in that it determining that the Respondent had "tried to soften the blow by offering the Complainant as additional 4 months of wages and in the Tribunal's view this means the dismissal was substantively and procedurally within a reasonable range and so again was fair."*

vi. *The Tribunal failed to give sufficient weight to the Appellant's evidence."*

48. The LAT states at paragraphs 16-18:

"16. Upon consideration of Part 1(2) of the Labor Law, a redundancy arises, when "tasks which a person was last employed to perform no longer exist." The LAT finds that the definition of "redundancy" is clear. The question arises therefore, as to whether this definition was applied, and if so, was it applied correctly?

17. At paragraph 78 of the Judgment of the Labour Tribunal, reference is made to the written submissions made on behalf of the Respondent employer, particularly, "mention is made of restructuring, but it appears that the restructuring did not mean that the tasks the Complainant performed no longer existed. They continued to exist but were to be performed by Ms. Boucher or Ms. Charnley." The LAT finds that in this application and finding, that the ***Labour Tribunal found as a matter of fact, that that the tasks the Complainant performed continued to be performed by Ms. Boucher and Ms. Charnley.***

18. At paragraph 79, the Labour Tribunal considers the distinction between redundancy and restructuring. The Tribunal refers to the matter of Abernathy v. Mott, Hay & Anderson (CA) 1974 ICR 323. The LAT does not find this case of assistance. The question arising in this present matter, flowing from the statutory definition of "redundancy" pursuant to Part 1(2) of the Labor Law (2017 revision) is whether the tasks performed by the employee still exist? In the

opinion of the LAT, if they do not still exist then the redundancy must be fair. If they do still exist, then the redundancy must be unfair."

38. The relevant findings of the LAT are set out at paragraphs 20-24:

"20. The Labour Tribunal, at para 56 of the Decision found as a fact that the Appellant's dismissal was as a result of a reorganisation:

56. Ms. Boucher said she did mention performance issues but she said that in connection with the Complainant's enquiry concerning an annual bonus and Ms. Charnley, who was in the room with the Complainant and Ms. Boucher at the material time, also confirmed Ms. Boucher's evidence in regard to the meeting and the Tribunal is satisfied that given Ms. Charnley's testimony, only a small part of which has been referred to in this Decision, the reason for the Complainant's dismissal was not because of any alleged poor performance. The real reason was because of a reorganisation.

21. The LAT finds that for a redundancy to be fair, pursuant to section 51(d) of the Labor Law (2017 revision), the tasks last performed by the dismissed person must no longer exist. In making a specific finding "that the restructuring did not mean that the tasks the Complaint performed no longer existed. They continued to exist but were to be performed by Ms.. Boucher or Ms.. Charnley" the Labour Tribunal incorrectly applied the definition of redundancy pursuant to Part 1(2) of the Labour Law (2017 revision). Further in so doing so, the Labour Tribunal

incorrectly applied the statutory definition of redundancy pursuant to section 51(d) of the Labor Law (2017 revision).

22. *Further, the Labour Tribunal made a finding that the "real reason was because of reorganisation." (para 56). Pursuant to section 51 (1) (d) of the Labor Law (2017 revision) the LAT finds that this does not amount to the statutory definition of redundancy.*

23. *The LAT accordingly finds that in the absence of the reason of redundancy pursuant to the statutory definition, the dismissal of the Applicant does not fall under section 51 (1) (d) of the Labor Law (2017 revision).*

24. *Accordingly, the LAT allows Ground 1 of the Appeal."*

39. The Decision of the LAT states at paragraphs 31 – 33:

"Decision of the LAT

31. *The LAT has considered the submissions and has reviewed and considered the documents and pleading filed in this matter by both parties.*

32. *The LAT finds that the Labour Tribunals failed to correctly apply the statutory definition of redundancy pursuant to Part 1(2) Labour Law (2017 Revision) and in doing so erred in law. In the circumstances, the LAT finds that Mr.. Price was unfairly dismissed.*

Award

33. The LAT awards the Appellant one (1) weeks' pay at final rate of pay of US$4,038.56) for each of the 37 completed year of employment, being a sum of US$149,423.02."

The Preliminary Argument of the Respondent

51. The Respondent contends that the Appellant does not have standing to bring an appeal on what the Respondent contends is a point of fact or a mixed question of fact and law. In the Respondent's Written Submissions dated 13 May 2020, paragraph 5.2 states:

"5.2 First, it is not accepted that the Respondent's role of Office Head of Marsh Cayman was redundant under the new structure at the Appellant. This was the central issue of dispute before the LT and LAT and the Appellant does not have standing to bring an appeal on a point of fact. The Respondent invites the Court to have regard to the following:

(a) the LAT found as a matter of fact, and LAT adopted its finding, that the Respondent's tasks that he was employed to perform "continued to exist but were to be performed by Ms. Boucher or Ms. Charnley. This is a finding of fact, which is not capable of being appealed in the Grand Court;

(b) the LAT found, accepted as a matter of fact, that the

Respondent's role had not been eliminated, in that it continued to be performed by Ms. Boucher and Ms. Charnley. This is a finding of fact, which is not capable of being appealed in the Grand Court;

(c) the LAT found that the Respondent had not been dismissed by way of a redundancy and therefore did not fall within 51(1)(d) of the Labour Law (2011 Revision);

(d) Mr. Kieran Mehigan, who was instructed to carry out the Respondent's tasks after his dismissal, now has the title of "Director, Client Services & Senior Vice President" which was the Respondent's title when he was appointed as the Appellant's Cayman Office Head in 2008."

52. Then at paragraphs 6.1 and 6.2 the Respondent submits:

"6.1 The Grand Court's jurisdiction to hear an appeal from the LAT is limited to considering questions on a point of law (s.79 (1) of the Law).

6.2 In Final Touch Limited v Labour Appeals Tribunal and Wilkins [2009 CILR N8] Henderson J confirmed that the jurisdiction of the Grand Court, when hearing an appeal from the LAT, did not extend to mixed questions of fact and law and that Grounds of Appeal with a mixed question of law and fact would be excluded from the consideration and jurisdiction of the Grand Court. Henderson J confirmed that in circumstances where the LAT had considered its obligations under s.51(3) of the Labour Law the Grand Court did not have the power to substitute its own view

on the reasonableness of the employer's actions because that would be a mixed question of fact and law."

53. The Court fully agrees that the determination of all questions of fact are confined to the respective administrative tribunals themselves. However, in the *Final Touch* case in this regards the appeal was dismissed on the basis that the reasonableness of the employer's actions in the circumstances was preeminently a question of fact and at most raised a question of mixed law and fact.

54. With respect to the Respondent's assertion, the role of the Court in relation to the instant appeal is entirely different from that in the *Final Touch* case. The Court is here required to consider whether under the Labour Law the statutory definition of *"redundancy"* is a broad or a narrow one and whether or not it may properly encompass restructuring or reorganisation in appropriate circumstances as those circumstances are themselves factually identified at tribunal level.

55. Once the scope of the term *"redundancy"* itself has been identified, the further question that arises as to whether the LAT correctly or incorrectly applied the definition as thus explained by this Court.

56. In other words, it is not the facts which are under appellate scrutiny but rather the nature and scope of the statutory definition which is suitably and properly applied to those facts.

57. In addition, were that not the position, it is difficult to conceive of any circumstances in which a redundancy decision could be examined by this Court in order for this Court to determine if the decision was in conformity with the Labour Law at all.

58. For these reasons, this Court rules that the Appellant has standing to bring this appeal on the points of law raised in the Grounds of Appeal.

59. Finally, it is worthy of note that the concepts of conformity with the Labour Law and contravention of the Labour Law are expressly recognised in section 5 of the Law itself. It is for this Court to determine both conformity and contravention in the event of error in law.

The Legal Arguments of the Appellant

60. The Appellant states at paragraph 29 of the Appellant's Written Submissions dated 29 April 2020 that the Labour Tribunal's Decision accepts as a matter of fact that the reason for dismissal was *"redundancy/reorganisation".*

61. The Appellant amplifies this observation by stating at paragraph 30 that the Labour Tribunal's Decision, at paragraphs 78 and 79, raised a potential dichotomy between *'redundancy'* and *'restructuring'* but, ultimately, did not treat any distinction between the two concepts as affecting the outcome. At paragraph 31, the Appellant states that after considering the grounds of unfairness alleged on behalf of Mr. Price, the Labour Tribunal found that the Respondent's dismissal was not unfair and dismissed the Complaint.

62. The Appellant then characterises the Decision of the LAT in this way at paragraph 32:

> *"32. The LAT determined the appeal on the short point as to the proper construction and application of the statutory definition of 'redundancy'. The LAT determined, in effect, that because the functions previously performed by the Respondent continued to be performed by others, the case did not come within the meaning of the definition of 'redundancy' under the Labour Law."*

63. The Appellant proceeds to argue that the LAT's approach to redundancy fails to interpret the words used in the statutory definition in their full and proper context.

64. In particular, the Appellant relies at paragraph 36 on certain statements from Halsbury's Laws of England:

> *"36. This contextual approach to statutory interpretation is required by what is defined at 5 Halsbury's Vol 96, para 731 as 'the informed interpretation rule' as follows:*
>
> *'The informed interpretation rule is a rule under common law that the Court must infer that the legislator when settling the wording of the enactment, intended it to be given the fully informed, rather than a purely literal, interpretation. Accordingly, the Court does not decide whether or not there is any real doubt as to the meaning of the enactment, and if so in what way to resolve it, until it has first discerned and considered, in the light of the facts to which the enactment is applied, the context of that enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual context of the instant case.'*

...

Additionally, the informed interpretation rule requires that, when construing an enactment as it applies to the facts of the instant case, attention should be paid to the relevant aspects of: (1) the state of the law before the Act containing the enactment was passed; (2) the history of the enacting of that Act; and (3) the events which occurred in relation to the Act subsequent to its passing. These may be described as the legislative history of the enactment, and individually as the pre-enacting, enacting and post-enacting history."

66. Although this principle is an important and instructive one in the opinion of the Court it is essential to consider the nature of the legislation to which it may be applied. For example, in the case of legislation governing employment relations in the Cayman Islands, it is also important that an employee can readily understand his or her rights and obligations in a comprehensible and straightforward manner. In that regard, it is entirely appropriate for this Court to ask itself what is the ordinary and natural meaning of the words actually used.

67. The Appellant proceeds with a review of overseas legislation in this area and a useful summary of the Appellant's position is found at paragraphs 42 – 43:

> *"42. In this regard, a significant body of common law jurisprudence has developed in Australia, for example, as to the circumstances in which an employee is deemed to be dismissed by reason of redundancy. According to this jurisprudence, an employee who is dismissed as a result of the requirements for his job functions having been eliminated or reduced, is deemed to be dismissed by reason of redundancy. This may arise from a very wide set of circumstances including some of those enumerated in the definition in the Cayman statute, but also where his job functions have been redistributed to other employees as a result of a restructuring or reorganisation of the employer's business.*
>
> *43. In Zafirou v Saint Gobain Administration Pty Ltd (2013) BC20131121216 (Supreme Court of Victoria), Emerton J did a comprehensive review of the relevant Australian authorities. Beginning at para. 48 of the judgment he said:*
>
> > *'The concept of redundancy does not have a fixed meaning. However in Fosters Group v Wing [2005] VSCA 322-148 IR 22417, the Court of Appeal held that a clear guide to the meaning of redundancy was to be found in the judgment of the Full Court of the Supreme Court of South Australia in R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative [(1977) 16 SASR 6]18 in which Bray CJ said:*

[T]he concept of redundancy in the context we are discussing seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or on any consideration peculiar to him but because the employer no longer wishes the job the employee has been doing to be done by anyone.

To similar effect, Bright J opined that the question of the redundancy of an employee was linked to the continued utility of the job he is performing and does not relate to the personal competence of the employee in that job.

In Wing, the Court of Appeal was concerned with a re-allocation of duties following a restructure. The Court referred with approval to the judgment of Spender, Dowsett and Allsop JJ in Dibb v CMr. of Taxation BC [2004] FCAFC 12619, in which their Honours considered the "employer's prerogative" to rearrange the organisational structure by breaking up the functions, duties and responsibilities attached to a single position and to distribute them among the holders of other positions. Their Honours referred in turn to the analysis of Ryan J in Jones v Department of Energy and Minerals [1995] IRCA 292 (16 June 1995)20, in which Ryan J

identified the critical feature in such a circumstance to be "whether the holder of the former position has, after the reorganisation, any duties to discharge."

In Hodgson v Amcor; Amcor v Barnes (2011) 32 VR 495; [2011] VSC 63; BC 20110093021, Vickery J reviewed the authorities on what constituted a redundancy, including those referred to above, to derive the following general propositions:

(a) A job becomes redundant when the job of the employee ceases to exist because the employer, for whatever reason, whether by way of reorganisation, mechanisation, change in demand or other reason, no longer desires it to be performed by anyone;

(b) This can occur either when the role no longer exists or the duties have so changed that for all practical purposes the original role no longer exists;

(c) However, redundancy is not limited to the circumstances where the employer no longer desires to have the work previously performed by the terminated employee done by anyone;

(d) A redundancy may also arise upon the redistribution of job functions, where the duties performed by an employee are redistributed among other employees. In this case the employer

still requires the duties to be performed, but the reorganisation may give rise to a redundancy. In this event, although the duties remain to be performed, "for all practical purposes the original role no longer exists" because the duties are divided and assigned amongst others. In such a case the question whether any function or duty remains to be performed by the employee. A redundancy will occur if, after the reorganisation, the employee in question is left with no duties to discharge;

(e) Redundancy will not arise where the termination of employment is carried out solely because of any personal act or default of the employee terminated or for any consideration peculiar to the employee."

68. In fairness to the Appellant's argument, the Court has set out these passages at some considerable length. However, the Court also reminds itself that this appeal concerns the construction of domestic legislation only, and in important material respects that domestic legislation may well diverge from that applicable in other countries.

69. At paragraph 45 the Appellant states that the Labour Law was first enacted in 1987 and that the definition of *"redundancy"* has remained unamended since the Law was first enacted. The scheme of the Law was broadly based on the Antigua Labour Code, 1975, which was itself broadly based on the Industrial Relations Act, 1971 (UK). Among the concepts introduced were unfair dismissal and redundancy, which the Court has earlier set out and described.

70. The Appellant further states at paragraph 49:

> *"49. Similar to the position in the other jurisdictions referred to above, the principal aim of the Labour Law with respect to an employee dismissed by reason of redundancy is to create an entitlement to a payment, referred to as severance pay, which however, is also payable in other circumstances where an employee is terminated due to no fault of his own."*

71. This leads the Appellant to the central propositions of its argument at paragraphs 50:

> *"56. The term 'redundancy' must therefore be construed within the context of the legislative framework of the Labour Law and the purpose it was clearly intended to achieve. Within the context of the meaning the term had acquired at common law and in the statutes from which the Labour Law adopted the concept, it would require very clear unambiguous language for a Court to conclude that the framers of the Cayman Islands Legislation intended to give the term a meaning which was narrower than the meaning it had acquired at common law and in those statutes.*

That meaning, in effect, is that an employee is deemed to be dismissed by reason of redundancy if, for a wide range of reasons affecting the business, the employee has become surplus to the requirements of the business."

72. In essence, the Appellant advocates a broad, purposive and commercial construction. The concern of the Court is that the term *"redundancy"* as enacted in the Cayman Islands may be intended to be narrow and particular rather than broad and general, and that this is how it should ordinarily and naturally be read and understood.

73. The Appellant reiterates its position at paragraph 56:

"56. There is nothing in the context of the framework of the statute which should result in the meaning of the words 'tasks which a person was last employed to perform no longer exist' being restricted to circumstances where all the functions of the former role have been completely eliminated. To interpret the words as also applying to circumstances where the tasks have been re-assigned or redistributed, whether arising from a restructuring or some other reason, would result in a construction which would be logical, practical and consistent with common sense, especially within the context of the framework of the statute and its legislative history."

74. Some general indirect support for this approach is found in *Paulette Matthew v. Antigua and Barbuda Port Authority Board of Commissions* ANUHCV 2005/0129, a decision of the High Court of Justice of Antigua and Barbuda. Paulette Matthew was a Security Guard employed by the Defendant in its Security Division.

75. By letters dated 1st July and 2nd July 2004 all (80) security personnel hired by the Port Authority were terminated forthwith including personnel on vacation leave, maternity leave and sick leave and they were all subsequently paid terminal benefits in accordance with the Antigua and Barbuda Labour Code provisions in relation to severance in a redundancy situation. The letter of termination referred to the employee being *'severed'* which although alludes to a redundancy situation, did not contain an express reason for the termination. The terminated security guards did not request a reason in writing for their termination, pursuant to the Antigua and Barbuda Labour Code. The reason ultimately assigned for the termination by the employer/ Port Authority, is pleaded in the Port Authority Defence as *'restructuring'* and *'reorganisation for cost-effectiveness'*. This assigned reason was broadly consistent with the content of the prior discussion with the union as evidenced by the documentary and oral evidence in this matter. The Claimants were aggrieved, alleged wrongful dismissal, and brought an action to recover their loss.

76. Harris J states at paragraph [4]:

> *"[4] The issues raised here are (i) Did a redundancy situation exist on the 1st July 2004 and 2nd July 2004 (ii) Were the contract(s) of the Claimants terminated for a substantial reason of a kind which would entitle a reasonable employer to dismiss an employee in the position of the Claimant (iii) Were the contracts of the Claimants and each of them terminated with just cause – factual basis (iv) In awarding damages to the Claimants can the High Court exercise powers conferred on the Industrial Court in relation to breaches under the Antigua and Barbuda Labour Code."*

77. The learned judge continues at paragraphs [6] – [9]:

> ***"Did a redundancy situation exist at the Port?***
>
> *[6] This question arises as it turns out, because of the use of the word, "sever" in the letters of termination. 'Sever' and 'severance' is a term of art. It is used in the Labour Code in specific reference to a redundancy. Redundancy is defined in the Act as "a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, an employer's going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished".*
>
> *[7] Counsel for the Defendant submits that a reorganizing and restructuring of an organization such as with the Port Authority, can also result in a redundancy.*

In support of this submission the Defendant cites the authorities, Bowers and Simon in Labour Law pp 177- 183 and summarizes the learned authors review of case from the United Kingdom dealing with "substantial reason" (see A.L.C. C.56 (1)(e) for Antigua and Barbuda 'equivalent' provisions).

[8] In summary, contends the Defendant, where there are economic, technical or organizational reasons entailing a change in the work force such as the Port Authorities need to conform with the requirement of the ISPS Code by 1st July, 2004, the employer may rely on such reasons to justify dismissal. Contrary to the submission of counsel for the Defendant at para. 6(b) of its written submissions, the Port Authority having advanced reorganisation and restructuring as a reason for the termination under a redundancy or any other basis, has failed to show the existence of a policy other than merely stating that it exists and more importantly, failed to show the advantages to be derived from the implementation of the policy and the necessity to terminate the claimants thereto. Further, the flaw in this argument, is that it fails to take into consideration the Antigua and Barbuda Labour Code definition of a Redundancy. In that definition the ground relied on for dismissal can only fall under "... or any other reason...". I accept that it can be considered under that heading. However, it still remains that it has to be shown that as a result of 'any other reason', the work which the security guards were last employed to

perform had not ceased or substantially diminished as required by the Labour Code. I accept that if it is shown that the 'work now required to be done required expertise that the claimants did not possess' that that may satisfy the definition of 'redundancy' under the Act.

[9] The evidence is pellucid. The work which the security guards were last employed to perform still substantially exists. Indeed in this case, based on the evidence the work and the character of the work has not diminished at all and for the most part required the same expertise that existed in the claimants. Notwithstanding the Defendant witnesses description of the expected effect of the implementation of the ISPS Code, I have no evidence before me that the 'work' since the termination requires a greater level of expertise, training or personal capacity in the personnel and/or very importantly that the replacement guards in fact reflect this elevated qualification. I know of no category of employee from the highest employee in our global civilization to its lowest that could not do with some improvement in their performance. The Defendant needs to go further than this. Suffice it to say, a redundancy situation did not exist at the time of the termination of the Claimants.

78. Several features of this authority are immediately apparent.

79. First, the relevant statutory provision defining redundancy while not identical to that in the Labour Law is in material respects fairly similar but also somewhat broader.

80. Secondly, in the course of paragraph [6] Harris J accepts that the Antigua and Bermuda definition of redundancy can extend to circumstances of reorganisation or restructuring as constituting *"any other reason"* for redundancy under the relevant Labour Code provision.

81. Thirdly, this state of affairs can arise when it can be shown that on the evidence the work in which the employees were last employed to perform had not ceased or substantially diminished, but it is shown the work now required to be done requires expertise that the Claimant, in that case, did not possess.

82. Fourthly, and notwithstanding this expression of collective legal principle, the Court went on to conclude in paragraph [9] that the requisite circumstances requiring a greater level of expertise, training or personal capacity so as to satisfy redundancy on the basis of a genuine restructuring had not been evidentially made out by the Defendant Port Authority.

83. In conclusion this Judgment even though not entirely applicable to the facts of the instant appeal does provide some level of support for the stance which the Appellant has presented. At the same time and for immediately understandable reasons Harris J did not fully develop or explain his remarks in relation to the generic relationship identified between redundancy in general and restructuring in particular as a

presumed aspect of redundancy. Consequently the assistance which this authority can provide to the Court is necessarily of limited significance.

84. At paragraph 59 of the Appellant's Written Submissions, the Appellant accordingly makes the argument that the LAT having adopted a construction which led to its determination that the Respondent was not dismissed by reason of redundancy, it should have considered whether the Labour Tribunal was correct in finding that a reorganisation would constitute *'some other substantial reason of a kind which would entitle an employer to dismiss an employee holding the position that the employee held'* within the meaning of section 51(1) (f) of the Labour Law.

85. The Appellant emphasizes that the inclusion of *"any other reason"* in the redundancy definition, without limitations, is an indication of an intention to widen the range of factors which may cause the elimination or redistribution of job functions. Therefore, to the extent that restructuring or reorganization are not encompassed by retrenchment, for example, they could still come within *"any other reason"* in section 2 or *"some other substantial reason"* in section 51(1) (f).

86. It is obvious to the Court that this conceptual approach goes far beyond what might be described as a simple and elementary reading of the words used.

The Legal Arguments of the Respondent

87. The Court has already satisfied itself that it has jurisdiction to hear the Appellant's Grounds of Appeal, and therefore the Court will concern itself at this juncture with setting out the balance of the Respondent's legal argument.

88. In relation to Ground 1 and the legal meaning of the term redundancy, the Respondent submits at paragraphs 7.1 – 7.3 as follows:

> *"7.1. The LAT correctly identified that the statutory definition of redundancy is clear and went on to correctly apply the meaning of redundancy to the facts of this case. Respectfully, this Court does not have the power to: (i) ignore the express wording of s.1 (2) of the Law; or (ii) extend or amend the Law as proposed by the Appellant.*
>
> *7.2. As set out above the statutory definition of redundancy is not in dispute, it reads:*
>
> > *"redundancy" means a situation in which, by virtue of a lack of customers or of orders, retrenchment, the installation of labour saving machinery, an employer's going out of business, force majeure or any other reason,* ***tasks which a person was last employed to perform no longer exist****" (emphasis added)*
>
> *7.3. The question flowing from the statutory definition is whether, due to a reduction in required labour, the tasks performed by the employee no longer*

exist. Therefore it is the tasks performed, not the title, which must cease to exist for there to be a true redundancy situation pursuant to the Law."

89. At paragraph 7.4 the Respondent alleges that the Appellant is inviting the Court to introduce a new concept of *"redundancy"* which includes a situation where an employee's tasks continue to exist but are undertaken by other employees.

90. The Court observes at this point that there is nothing in principle wrong with such a wider definition of redundancy, and indeed there may be good commercial justification for it, but the critical question is whether the statutory definition allows for it.

91. The Respondent then sets out his broad proposition at paragraph 7.5:

"7.5. This would introduce a concept of redundancy which conflicts with the express wording of s.1 (2) of the Law and therefore is not capable of being "interpreted" into the Law. Respectfully, the Court does not have the power to introduce new law or re-draft and/or extend the statutory definition of redundancy. Parliament is the only body with the power to change, amend or enact new Laws.

Parliament has not amended the definition of redundancy, in the manner advocated by the Appellant, and the statutory definition of redundancy has remained good law since 2011 (and in substance since The Employment Bill 2003). The Court will also have regard to the fact that the LAT, an experienced

Appellant panel, had no difficulty in confirming that s.1 (2) of the Law and the definition of redundancy was and is clear."

92. At paragraph 7.6 the Respondent submits that the Appellant's reliance on common law principles to extend the express definition of *"redundancy"* as defined in the Labour Law is of minimal assistance to the Court. Emphasis is placed on the precise definition of redundancy at section 139 of the Employment Rights Act 1996. Emphasis is also placed on the apparent situation in Australian law under which unlike in the Cayman Islands the concept of redundancy does not have a fixed meaning.

93. In principle the Court accepts and agrees with the Respondent's cautionary approach to statutory interpretation set out in paragraph 7.6, and the Court will return to this theme when it reaches its formal Findings.

94. Significantly and importantly the Respondent describes the protection of employee rights at paragraph 7.7:

"7.7. What the employer cannot do is to arbitrarily decide that a particular employee should be made redundant in the absence of any evidence of a reduction in the work required and where, in fact, the tasks that they performed are still required by the business and those tasks have just been transferred to another employee. It is that approach which would produce an absurd result, in that it would allow an unreasonable employer to avoid the

protections conferred by Part VII of the Law by simply reallocating the role to another employee. It cannot have been the intention of the Legislature to enact Legislation which affords no real protection to employees. It is entirely consistent with the public policy which underpins Part VII of the Law that employers must behave reasonably and only dismiss employees on grounds of redundancy where they have a proper justification based on external factors affecting their business."

95. Reliance is placed on the Labour Tribunal's findings of fact at paragraphs 7.11 – 7.12:

"7.11. After hearing evidence and receiving written and oral submissions the LT found as a matter of fact that the Respondent's role had not been eliminated but that the tasks he had been employed to perform continued to be performed by Ms. Boucher or Ms. Charnley.

7.12 The LAT thereafter found, as a matter of fact, that because the Respondent's tasks continued to be performed by his colleagues he had not been made redundant in accordance with the Law and that the LT had therefore misapplied the Law when it found the Respondent's dismissal was capable of being fair by way of redundancy (s.51(d) of the Law)).

7.13. If the Appellant had wished to challenge the LT's finding of fact that the Respondent's tasks had not been eliminated, it could have appealed the LT's decision. It did not do so and in fact has reaffirmed that the Respondent's responsibilities were assumed by

(i) Ms. Boucher and (ii) assigned to other members of the Cayman team in its written submissions to this Court."

96. In relation to the second Ground of Appeal, the Respondent states at paragraph 8.1:

> *"8.1. The Appellants second ground of appeal is misconceived. The LAT did not have the jurisdiction to substitute the Appellant's reasons for the Respondent's dismissal for that of its own and, respectfully, neither does this Court."*

97. As the Court will conclude at a later point, the reason of restructuring given by the employer for dismissal is essentially a matter which this Appellate Court is unable to go behind, nor should it go behind it.

98. The Respondent, in the opinion of the Court, helpfully sets out the history of this aspect as paragraph 8.3:

> *(a) Throughout the history of this case the Appellant has relied on redundancy as the reason for the Respondent's dismissal. This is evidenced by the following statements made by the Appellant:*
>
> *(a) in the Appellant's Statement of Reasons it confirmed that the Respondent was dismissed by reason of redundancy;*
>
> *(b) in the Appellant's Written Response it stated that the reason for the Appellant's dismissal was redundancy;*
>
> *(c) in the Appellant's opening remarks to the LT it said that there were two questions for the Tribunal:*

(d) *whether the employee was redundant within the meaning of the statute, and the statue defines what constitutes redundancy; and*

(e) *whether the employee acted reasonably under the circumstances;*

(f) *in the Appellant's written submissions to the LAT dated 25 November 2019 it stated that "the Labour Tribunal was entitled on the evidence to conclude that the only reason for the termination was redundancy...";*

(g) *in paragraph 21 of the Appellant's skeleton argument before this Court it has alleged that "The Respondent's employment was accordingly terminated on 26 February 2018 by reason of redundancy"; and*

(h) *in paragraph 27 of the Appellant's skeleton argument before this Court it has alleged that "the Respondent was dismissed by reason of redundancy arising from the restructuring of the Marsh Captive Solutions business"."*

99. As we have seen, the Respondent relies on the express wording of section 2 of the Labour Law, asserting that the task performed by the employee must no longer exist. The Respondent rejects reliance on common law principles, or indeed on statutory analogies from other jurisdictions.

100. The Respondent relies on the protective nature of the legislation and refutes the contention that the employer can arbitrarily decide that a particular employee should be made redundant where in fact the tasks that the employee performed are still required by that business and those tasks have simply been transferred to another employee. After considering this matter carefully, this Court considers this last submission especially cogent.

The Findings of the Court

101. Four aspects of this matter immediately become apparent.

102. First, this is a question of some legal uncertainty. The contrasting decisions of the Labour Tribunal and the LAT indicate that conscientious and competent administrative bodies can nonetheless come to widely different conclusions on the same subject.

103. Secondly, the definition of *"redundancy"* does not explicably exclude the possibility that a ground for redundancy as described in the language *"for any other reason"* than those specified could include restructuring or reorganisation.

104. Thirdly, the Court may properly take into account the social character of the relevant legislation and may allude to the respective rights and obligations of employers and employees. Putting the matter another way, is the predominant purpose of redundancy as reflected in the natural and ordinary manner of the words used in the legislation intended to protect employers or employees or possibly to protect both?

105. Fourthly, although there is some controversy over the circumstances of Mr. Price's termination of employment, nonetheless it is essentially an undisputed fact that the Appellant specifically relies upon redundancy by way of a restructuring and reorganisation at Marsh as the basis for Mr Price's termination and dismissal. Once again, the Court reminds itself that it is not concerned to settle and resolve any matters of fact but instead to decide relevant points of law only.

106. There are two Grounds of Appeal in relation to the issue of redundancy and restructuring. The first ground is that the LAT erred in law by failing to properly construe and to apply the meaning of the term *"redundancy"* as defined in the Labour Law. The second ground is that the LAT erred in law by failing to consider whether the Respondent was dismissed for *"some other substantial reason"* within meaning of section 51(1) (f) of the Labour Law.

107. The way in which the grounds have been argued and the role of any restructuring or reorganisation within the scheme of the Labour Law make it conceptually difficult to differentiate the grounds themselves, particularly in light of the fact that the Appellant has already chosen to state that a restructuring or a reorganisation is itself the basis for redundancy in this case. As the Court sees it, some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held presupposes a reason of some kind other than the single expressed reason already provided by the employer for the purported *"redundancy"* itself.

108. Had the Appellant not chosen to attach a particular label to the reason for termination the position might be different, but on this occasion with great respect it did attach a particular label, being it seems the only label available to the Appellant.

109. In other words, because of what has happened the Court considers that the weight of the argument should be primarily considered in relation to Ground 1 rather than distinctively in relation to both Ground 1 and Ground 2.

110. At the centre of the Appellant's case is the proposition that a redundancy may arise upon the redistribution of job functions where the duties performed by an employee were redistributed among other employees.

111. The argument appears at paragraph 44 of the Appellant's written submissions as follows:

> *"44. Similarly, in the UK, applying s.139 of the ERA, an employee who is dismissed as a result of the redistribution of his former job functions to others is deemed to be dismissed by reason of redundancy. That was the result in Lambe v 186 K Ltd [2005] ICR 30722 where the employee was one of three corporate finance managers whose roles were assigned to a single senior corporate finance manager, with the result that the employee was dismissed by reason of redundancy. The employee's contention that it was not a genuine case of redundancy was rejected by the employment tribunal. That part of the decision was upheld by the Court of Appeal."*

112. The relevant statutory provision appears in the *Lambe* case at page 313 paragraph 23:

"23 As to redundancy, the relevant section is section 139 of the 1996 Act.

As applicable to the facts of this case, it reads:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to . . . (b) the fact that the requirements of that business-(i) for employees to carry out work of a particular kind . . . have ceased or diminished or are expected to cease or diminish."

113. Then at page 316 paragraph 33, the English Court of Appeal continues:

"33 In relation to business disposals, the employment tribunal's finding was that there was a present diminution in the need for corporate finance managers, and that at the relevant time there was a need for staff to deal with the anticipated" future activity of the business. These were legitimate considerations both for the employer and the employment tribunal. The phrase dedicated corporate finance manager" used by the tribunal in para 3 of its reasons, set out at para 25 above, seems to us an apt description of how the applicant saw himself, particularly in the light of his refusal of employment in a different department. It is true that events moved swiftly. On the applicant's case as set out in para 12 of this judgment it was effectively two weeks from ultimatum to dismissal. However, in our judgment, the employment tribunal was entitled to find that these matters went to the fairness of the process, not to the question of whether the reason for the applicant's dismissal was redundancy.

34 Finally, it seems to us that Glidewell LJ's judgment in Ex p Price's case [1994] IRLR 72, the relevant extract from which we set out at para 40 below, goes to the process of selection for redundancy rather than to redundancy itself.

35 In summary, therefore, we take the view that the employment tribunal was fully entitled to reject the first limb of the applicant's case on the facts. The tribunal heard a great deal of evidence, and although Mr. Green submitted that the tribunal's finding about the nature of the applicant's employment was perverse, we do not agree for the reasons we have given. The first limb of the appeal accordingly fails."

114. It is clear from these passages that the English Court of Appeal was concerned with a statutory diminution of business needs whereas in the case of the Labour Law itself *"redundancy"* is more narrowly and exclusively defined than that. Diminution *per se* has no relevance here.

115. This observation does not in itself dispose of the arguable merit of the Appellant's more general point as to restructuring, but it does provide a timely reminder that this Court should act with great circumspection when considering the guidance of authorities from other jurisdictions.

116. More broadly, the Appellant argues that in terms of commercial prudence and indeed common sense the Court should have due respect to an *"employer's prerogative"* and to the employer's practical needs from time to time to arrange for the redistribution of job functions among other employees. In summary, the argument goes that the employer can still require the duties themselves to be performed but the reorganisation may nonetheless give rise to a redundancy.

117. The Appellant comments on the overriding logic of this position at paragraph 55.

> *"55. It would be a bizarre and absurd result if the meaning of redundancy would have different results if, for example, in two identical businesses having the same service lines, decide to reduce costs by terminating staff - one does it by completely eliminating a service, and the other by maintaining all its service lines, reducing the number of employees and distributing the functions of the terminated employees among the others. Adopting the construction applied by the LAT, the employees of the first business would be terminated by reason of redundancy but the employees of the second business would not be."*

118. At the outset of these Findings the Court identified a number of general considerations which provide a broad framework as to how it should approach the principal point in issue.

119. Perhaps the most important of these are that the Court may properly take into account the character of the relevant legislation and that the Court does not have jurisdiction to settle and resolve matters of fact.

120. The Appellant has entirely understandably placed its emphasis on what it would consider to be good commercial sense and the need to interpret the Labour Law provisions in a way that conforms with the realities and contingencies of business in the context of an ongoing international enterprise. These arguments are of course highly pertinent and in no way remiss and Mr. Robinson has presented them in a skillful and measured manner.

121. The difficulty which the Court perceives is that the Labour Law was not enacted as it originally was in 1987 with these factors either explicitly or implicitly in mind.

122. In principle, the Court finds that under the statutory definition a restructuring or a reorganisation could supply another reason for redundancy in addition to those enumerated in section 2, but only where that restructuring or reorganisation causes tasks which a person was last employed to perform no longer to exist.

123. The Court prefers and accepts the construction of the Respondent not only because it is the literal meaning but also because it is the simple meaning. This meaning moreover accords with the ordinary and natural language used in section 2 of the Labour Law.

124. Here we have a code of law and practice designed and intended to protect employees against the consequences of an unfair dismissal. Such persons should be able to read about and to understand their rights and obligations without recourse to arcane and seemingly impenetrable legal complexity. Equally the Labour Law does not contemplate situations where as exigencies arise the employees' rights somehow come to diminish while at the same time the rights of their employers somehow come to increase.

Conclusion

125. It is the considered conclusion of the Court that the Decision of the LAT dated 9 March 2020 was correct in law and that the dismissal of the Respondent did not properly or lawfully fall within section 51(1) (d) of the Labour Law (2011 Revision). The dismissal correspondingly did not fall within section 51(1) (f). Accordingly the decision of the LAT is upheld.

126. Therefore for the reasons which have been set out in this Judgment, Grounds 1 and 2 of the Notice of Originating Motion are dismissed.

127. Ground 3 as the Court understands it is not pursued and so falls away.

128. In relation to Ground 4, and in light of the Findings of the Court, further assistance will be needed from counsel as to how or if at all this Court ought to proceed in all the circumstances having regard to an award of compensation for unfair dismissal.

Robin McMillan

THE HON. JUSTICE ROBIN MCMILLAN

JUDGE OF THE GRAND COURT

GRAND COURT CIV-03 CAYMAN ISLANDS