JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 64 OF 2005

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE G. SMITH J.A. (Ag.)

BETWEEN:	COMPUTERS & CONTROLS (JAMAICA) LTD.	APPELLANT
AND	LEONARD SADDLER	RESPONDENT

Miss Jacqueline Cummings, instructed by Archer, Cummings & Co for the Appellant.

Mr. John Givans, instructed by Mrs. Chandra Soares for the Respondent.

February 4 and March 14, 2008

COOKE, J.A.

1. The appellant has usefully provided to the court a "chronology of events" which I now utilize.

> "1. March 1, 1988 — The Respondent was employed to Grace Unisys (Jamaica) Ltd.
>
> 2. May 21, 1997 — Grace-Unisys (Jamaica) Ltd changed its name to Infograce Ltd.
>
> 3. Jan 1, 2000 — The shares in Infograce Ltd were sold by Grace Kennedy Group Ltd to Computer & Controls (Trinidad) Ltd.
>
> 4. Jan 1, 2000 — Infograce Ltd changed its name to Computer & Controls (Jamaica) Ltd.

5. June 12, 2002 – Computer & Controls (Trinidad) Ltd sold its shares to Nicole Farmer, a former manager of Computer & Controls (Jamaica) Ltd

6. July 29, 2002 – Respondent was given a letter for an updated employment package with Computer & Controls (Jamaica) Ltd.

7. August 1, 2002 – Respondent refused the employment package and wrote to Computer & Controls (Trinidad) Ltd seeking redundancy.

8. August 2002 – The Appellant advised Computer & Controls (Trinidad) Ltd of the position taken by the Respondent.

9. August 2002 – The Respondent ceased working directly as an employee with Computer & Controls (Jamaica) Ltd but continued to work for the Appellant as an independent contractor/consultant being paid upon invoices he presented to the company for performing the same job functions as before.

10. October 31 2003 – The Respondent sued Computer & Controls (Jamaica) Ltd and Computer & Controls (Trinidad) Ltd for redundancy payments.

11. June 8, 2004 – Action against Computer & Controls (Trinidad) Ltd struck out by the Supreme Court.

12. February 28, 2005 – The Supreme Court orders that the Respondent is entitled to redundancy payments.

13. May 6, 2005 – Appellant appeals the decision of the Supreme Court"

2. Despite the changes in ownership, the business activity of the entity remained the same. When the respondent was first employed on March 1, 1988,

it was in the capacity of a zone manager. At the time of this dispute he was the Senior Customer Service Engineer. At all times the respondent retained all the benefits which had accrued to him by virtue of his employment such as those pertaining to his pension, his vacation leave and the like. Between March 1, 1988 and August 1, 2002 the respondent is to be regarded as being a permanent member of the staff. His employment was not circumscribed by any fixed period of duration. In what I shall regard as the foundation agreement in respect of his employment to the business entity the respondent agreed in accepting a position with Grace-Unisys (Jamaica) Ltd. to the following termination term.

> "TERMINATION: The arrangements as set out can be terminated by giving us (4) weeks notice in writing at the end of which time your employment with the company will cease. It will be our right to terminate the arrangements with immediate effect by paying you four (4) weeks salary."

It is my view that this termination clause remained operative during the entire period of the respondent's employment.

3. The respondent became dissatisfied when he received a letter dated July 29, 2002 which is now reproduced.

> "Dear Leonard,
>
> Please accept our apologies for the delay in advising you of your package for year 2002. The delay was due primarily to the uncertainty regarding the future of the company, which has now been established with the assumption of ownership of the company by the Management Team.

With the change in ownership has come a change in operations that is reflected in the adjustments to the individual packages. Outlined hereunder is your employment package effective 2002 August 01:

1 Position — Senior Customer Service Engineer — reporting directly to the Technical Services Manager.

2 Salary and Benefits:

a) Salary — you will be paid a basic salary $980,000.00 per annum. Payment to be made on or before the 28th of each month

b) Availability Allowance

Paid to Engineers and Sales Representatives for the use of their motor vehicles on the job. The amount, which is subject to change, is as stated in Clause 9.4 of the company's Policy and Procedures Manual

c) Mileage Allowance

Please refer to Clause 9.4 of the Policy & Procedures Manual.

d) Clothing

You will be eligible to receive clothing as stipulated in Clause 9.1 of the Policies & Procedures Manual.

e) Group Life Coverage

You will be covered at the rate of one times [sic] your basic annual salary.

f) Leave

i) Vacation Leave

You will be entitled to four weeks vacation leave per annum to be taken at a time that is agreed with your Manager.

ii) Sick Leave

Sick leave is earned at the rate of 10 days per annum after the first year of employment.

g) Pension Scheme

You will continue to be a member of the Computers & Controls Contributory Pension Scheme. Your compulsory contribution remains at 5% of your annual salary and you have the option to contribute an additional 5% per annum

h) Health Scheme

You will have the option to be covered under the Health Scheme (Individual/Family Plan) on satisfactory completion of your medical examination.

Our records indicate that your length of service with Computers & Controls (Jamaica) Limited is 14 years and 7 months. Your acceptance of this new letter of employment will result in the period of employment being counted and your years of service will be deemed not to have been broken by acceptance of a new letter of employment.

Please refer to the company's Policies & Procedures Manual regarding any areas of uncertainty with respect to the foregoing.

We look forward to a long and mutually beneficial relationship."

4. His rapid response to this communication was contained in a letter dated August 1, 2002, which is as follows:

> "The Chairman
> Computers and Controls Limited
> 80 – 82 Edward Street
> Port-of-Spain
> Trinidad, West Indies.
>
> ATTENTION: Mr. Peter Gillette
>
> SUBJECT: Change of Ownership and Management of Computers & Controls (Jamaica) Limited
>
> Dear Mr. Gillette,
>
> In a recent staff meeting held July 23, 2002, we were advised that the Company was about to change hands, as such, Computers and Controls would no longer have a vested interest in the new Company as of August 1, 2002.
>
> Considering my years of service and status with the Company, the new offer is not a reasonable offer within the terms of the Employment (Termination and Redundancy Payment) Act. [sic]
> *As a consequence, I would rather opt for Redundancy.*
> It is my understanding that under the above Act, the one-year period for payment explained for settling redundancy payment does not apply in this case.
>
> Recommendation
> Instead, I will be willing to meet with you or your representative, so that we can work out a reasonable payment plan.
>
> Should clarification be needed, please do not hesitate to contact me." [Emphasis mine]

5. Initially the respondent's claim for being entitled to redundancy payment was favourably entertained by the appellant but subsequently denied. The reason given by Nicole Farmer the Managing Director of Administration and Finance for the appellant company's initial stance is set out in paragraphs 8 – 10 of her affidavit dated 26th April 2004. Paragraph 8 speaks to her assertion that she was a Trinidadian national and that having fairly recently come to Jamaica she had little understanding of Jamaica employment laws. Paragraphs 9 and 10 of this affidavit are now set out.

> "9. That I was under the impression that every employee that is not employed by us upon purchasing the shares of the 2nd Defendant (Computers and Controls (Trinidad) Limited) would be entitled to redundancy without more.
>
> 10. That it was my mistaken understanding that if the Claimant rejected our offer of employment he was entitled to redundancy."

It is the refusal of the appellant company to make redundancy payment to the respondent which has occasioned this present litigation. Before addressing the issues pertinent to this case I should note that the respondent in August 2002 having ceased working as an employee with the appellant's company still performed the same job functions, but now as an independent contractor.

6. The Fixed Date Claim Form filed on behalf of the respondent sought:

> "An Order that the Defendants pay to the Claimant his Redundancy payment by virtue of section 5 of

Employment (Termination And Redundancy Payments) Act." (The Act)

The bases upon which the respondent relied in his claim for redundancy payment are to be found in two affidavits filed by him. In the first, filed on the 10th October 2003, the relevant paragraphs 11 – 15 are now set out.

"11. That pursuant to Agreement For Sale of Shares dated the 12th day of June 2002 between the First and Second Defendants Computer and Control (Jamaica) was sold to the Second Defendant.

12. That as a result of this change in ownership the Second Defendant offered me a new contract of employment on the 29th day of July 2002. That exhibited herewith is a copy of the contract offer marked "LS-3" for identification.

13. That after reviewing the new offer I was not satisfied with it and I indicated my dissatisfaction to the Second Defendant and instead opted for redundancy. That exhibited herewith is a copy of my letter opting for redundancy marked "LS-4" for identification.

14. That on the 30th day of July 2002 the Second Defendant accepted my rejection of the new offer of employment and confirmed arrangement for the payment of my redundancy entitlement. That exhibited herein and marked "LS-5" for identification is a copy of the said letter.

15. That I am advised and do believe that by virtue of my rejection of the said offer and in accordance with Section 5.1 of the abovementioned Agreement For Sale dated the 12th day of June 2002, I became entitled to Redundancy payment by the First Defendant and/or alternatively the Second Defendant. That exhibited herein and marked "LS-6" for

> identification is a copy of Section 5.1 of the said Agreement For Sale."

"LS-3" in the letter to the respondent dated July 29, 2002 which was reproduced in 2003 in paragraph 3 above. "LS-4" was his response which is the subject of paragraph 4 above. "Section 5.1" mentioned in paragraph 15 of the affidavit reads thus:

> "5.1 Prior to the expiration of sixty (60) days from the date of execution of this Agreement CCJ will implement a staff rationalization programme and if as a consequence of changes in the structure and staffing of CCJ the contract of employment of any employee of CCJ shall (within the aforesaid sixty (60) day period) be terminated by reason of redundancy as defined by the Employment (Termination and Redundancy Payments) Act, the full cost of redundancy entitlement actually paid to such employee shall be borne by CCT provided however that if any such person is, within a period of six months of being made redundant, re-employed by CCJ then the full amount of notice and redundancy payment made to such person shall be reimbursed to CCJ."

7. The relevant paragraphs 6-12 of the respondent's second affidavit dated 1st November 2004 are as follows:

> "6. That my position as Senior Customer Service Engineer would have remained the same under the new offer of employment.
>
> 7. That my gross annual salary of $973,070.00 would have increased slightly to $980,000.00. This was unsatisfactory as I was due an increase in salary for almost two years prior to the new offer. That based on almost 23 years of service to the company and its predecessors

I was entitled to a greater increase in my gross pay. That exhibited herewith and marked "L.S.-2" are copies of my pay slips.

8. That my motor vehicle re-imbursement was $356,630.00 for the year which is $29,719.16 per month. That the new offer greatly reduced this amount to $8,000.00 per month. That as a travelling officer this would have impacted greatly on my overall income and expenditure. That I am informed that subsequent to my departure from the Company this amount was increased to $15,000.00 which still represents an almost 50% reduction to the prior amount.

9. That I received $16.06 per mile traveled and was being offered $8.75 per km.

10. That the uniform allowance of $18,000.00 was withdrawn under the new offer and replaced with an option to receive a few pants and shirts.

11. That I received approximately 20 lunch tickets per month at a value of $80.00 per ticket, $19,200.00 per annum. This was withdrawn under the new offer.

12. That based on the above I calculated my take home pay before the new offer to be $120,000.00 per month and under the new offer to be $95,000.00 per month. That this was not a reasonable offer for someone with 23 years service to the Company and the continued hike in the cost of living."

8. The order sought by the respondent in the Fixed Claim Form was by virtue of Section 5 of the Employment (Termination And Redundancy Payments) Act. No particular subsection was targeted. I will now set out what I consider to be the possible pertinent sections.

"PART III. Redundancy payments

5.—(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed.

(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to —

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) 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; or

(c) ...

(3) ...

(4) ...

(5) For the purposes of this section an employee shall be taken to be dismissed by his employer—

(a) if the contract under which he is employed by the employer is terminated by the employer, either by notice or without notice; or

(b) if under that contract he is employed for a fixed term and that term expires without being renewed under the same contract; or

(c) if he is compelled, by reason of the employer's conduct, to terminate that contract without notice.

(6) An employee shall not be taken for the purposes of this section to be dismissed by his employer if his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment, and—

(a) in a case where the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he is employed, and as to the other terms and conditions of his employment, do not differ from the corresponding provisions of the previous contract, the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract; or

(b) in any other case, the renewal or re-engagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of that

> employment or after an interval of not more than two weeks thereafter."

9. On the 28th January, 2005, the court below declared that the respondent had been dismissed by reason of redundancy and was therefore entitled to redundancy payment. It is that declaration which the appellant now challenge on the appeal. The learned trial judge in her judgment had this to say:

> "However, the Claimant was a travelling officer. The Defendant continued to conduct its business by utilizing the services of the Claimant as a self-employed person. The fact that the defendant entered into independent contractual relations with him, they are deemed to have transformed him into a self-employed worker. It appears to me that the proposed engagement of the Claimant as a self employed person at a cost less than that which the defendant would have paid him under the original contract of employment, shows that there would be no longer a need for the Claimant to carry out his job as a full time employee.
>
> This leads me to conclude that they had reduced his motor car reimbursement and travelling allowances to one half of that which he had previously enjoyed as they are unable to meet his travelling expenses fully. *It follows therefore that there was a diminution of the requirements of the business for the claimant to carry out his work.* This circumstance creates a redundancy situation. It is obvious that he had been dismissed by reason of redundancy." [Emphasis mine]

10. The reasoning of the learned trial judge would seem to focus on section 5 (2) (b) of the Act (above). This sub-section is for ease of reference again set out:

> "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."

If an employee's dismissal is attributable wholly or partially to those stated circumstances such an employee "shall be taken to be dismissed by reason of redundancy". In this case it was never contended (nor could it be) that the kind of work which the respondent had to carry out had "ceased or diminished or are expected to cease or diminish". His position as the "senior customer service engineer" remained the same. The learned trial judge found as a fact that "there would have been no change in the duties he would have been required to perform". I am unclear as to the interpretation of the sentence in the judgment of the court below which reads. "It follows therefore ... to carry out his work." If its meaning is that the appellant could not or refused to satisfy the expectation of the respondent as to his travelling expenses, this is not a factor which is within the construction — or contemplation of 5 (2) (b) of the Act. I would hold that the court below misconstrued section 5 (2) (b) of the Act.

11. The respondent ceased to be an employee of the appellant as of the 1st August, 2002. This was entirely of his own choosing. He cannot be taken to have been dismissed within Section 5 of the Act above. His contract had not been terminated (section 5 (5) (a)); there was no contractual term which had expired; (section 5 (5) (b)). He has not said (nor could he say) that he was

compelled by reason of the employer's conduct to terminate "that contract without notice" (section 5 (5) (c)).

12. Section 6 (1) of the Act is explicit. It says:

> "6.— (1) An employee shall not be entitled to a redundancy payment—
>
> (a) if for any reason other than that specified in paragraph (c) of subsection (5) of section 5 he terminates the contract under which he is employed."

The respondent of his own volition, without the 4 weeks notice as stipulated in what I have characterized as the foundation agreement terminated his employment. He left the employment because he was dissatisfied with the employment package as set out to him in the letter of 29th July, 2002. The respondent's dissatisfaction is poignantly captured in paragraph 12 of his second affidavit which bears repetition.

> "That based on the above I calculated my take home pay before the new offer to be $120,000.00 per month and under the new offer to be $95,000.00 per month. That this was not a reasonable offer for someone with 23 years service to the Company and the continued hike in the cost of living."

So it was all about his remuneration package. If this respondent were to succeed it would mean that any employee who is disgruntled about his pay package could "opt for redundancy". This is a preposterous position and blatantly untenable. The circumstances in which redundancy arises are prescribed by the Act. The respondent's position does not fall into any of the

circumstances designated by the Act. In his first affidavit the respondent in paragraph 16 placed reliance on section 5.1 of the agreement for sale. This section has been reproduced earlier. A perusal of that section makes it clear that it does not assist the respondent. It may well be that the respondent made a grave miscalculation. He may well have had visions of receiving a worthwhile redundancy payment and continuing to earn by performing the same functions as before.

13. The court below was of the view that sections 6 (3) (a), 6 (4) and 6 (4) (a) of the Act applied in the favour of the respondent. These sections are as follows:

> "6 –(3) An employee shall not be entitled to a redundancy payment by reason of dismissal if before the relevant date the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that–
>
> (a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not differ from the corresponding provisions of the contract as in force immediately before his dismissal; and
>
> (b) the renewal or re-engagement would take effect *on or before the relevant date or* within two weeks after that date,
>
> and the employee has unreasonably refused that offer.

(4) An employee shall not be entitled to a redundancy payment by reason of dismissal if before *the relevant date the employer has made* to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed and as to the other terms and conditions of his employment, would differ (wholly or in part) from the corresponding provisions of the contract as in force immediately before his dismissal, but —

(a) the offer constitutes an offer of suitable employment in relation to the employee; and

(b) the place in which he would be employed would not be more than ten miles from the place at which he was employed under the contract as in force immediately before his dismissal; and

(c) the renewal or re-engagement would take effect on or before the relevant date or not later than two weeks after that date,

and the employee has unreasonably refused that offer." [Emphasis mine]

In the Preliminary section of the Act it is stated that "the relevant date" in relation to the dismissal of an employee means:

"(a) where his contract of employment is terminated by notice given by his employer, the date on which that notice expires;

(b) where his contract of employment is terminated without notice, whether by the employer or the employee, the date on which the termination takes effect;

> (c) where he is employed under a contract for a fixed term and that term expires, the date on which that term expires;
>
> (d) where he has been employed in seasonal employment and any of the events mentioned in paragraphs (b) and (c) of subsection (3) of section 5 occurs, the date on which the event occurs;"

14. The judgment of the court below in relation to this aspect expressed the following view.

> "Under the new offer of employment, the Claimant would have retained his position as a Senior Customer Engineer, he would have suffered no loss of status. The duties he was expected to perform would remain unchanged. His salary was marginally increased. However, the changes proposed in relation to his allowances, in particular, motor car reimbursement and his travelling allowances, are substantial variations of the old contract. He was a travelling officer, these allowances would rank as being important aspects of his condition of service. These have been significantly reduced. The loss of the allowances would cause a severe erosion of his income. This would, in my opinion, be sufficient to regard the offer unsuitable and his refusal to accept it reasonable."

15. It is to be observed that in his Fixed Date Claim Form the respondent invoked section 5 of the Act. There was no reference to section 6. Before the particular parts of section 6 of the Act which have been previously set out (para. 13 above) can become operative, there must be "the relevant date". I have previously set out the statutory meaning of "the relevant date" (para. 13 above). Section 6 of the Act is concerned with offers to the employee "before the

relevant date". In accordance with the statutory meaning of "the relevant date" this would include the date when the respondent's termination of his employment took effect. This was on the 1st August 2002. This termination was without notice. The appellant could hardly have anticipated the suddenness of the respondent's peremptory action. As such it would have been impossible for the appellant to have made "an offer before the relevant date". It would seem to me that the part of the statutory meaning of "the relevant date" which reads:

> "(b) where his contract of employment is terminated without notice, whether by the employer or the employee, the date on which the termination takes effect;"

does not fall within the purview of section 6 of the Act. Accordingly it would be the other aspects of the definition of "the relevant date" which would be germane i.e.

> "(a) where his contract of employment is terminated by notice given ... notice expires;
>
> (c) where he is employed under a contract ... that term expires."

These two aspects are preconditions for the operation of section 6 of the Act. In this case neither precondition obtains. The learned trial judge was therefore in error when in arriving at her decision she gave consideration to that section.

16. The court below ordered that the appellant pay to the respondent the sum of $10,500.00 for uniform allowance in respect of the period 1st January 2002 to

29th July 2002. There was to be interest of 12% per annum. There has been no appeal in respect of this order. It stands.

17. For the foregoing reasons, I would allow the appeal. The respondent was not entitled to redundancy payment. Since the issue of redundancy payment was the substantial subject of dispute in the litigation I would award 80% of the costs to the appellant both here and in the court below.

HARRISON, J.A:

1. I have read the draft judgment of my brother Cooke J.A, and am in agreement with his reasoning and conclusion as well as the proposed order. I wish however to make a few comments on section 5(2)(b) of the Employment (Termination and Redundancy Payments) Act ("the Act").

2. The learned trial judge in granting the declaration and order sought with respect to redundancy, found that the requirements for the Respondent to carry out work as a full time Senior Customer Engineer had diminished and that he was dismissed by reason of redundancy pursuant to section 5(2)(b) of the Act. The question to be determined now in this appeal, is whether she had correctly construed the section.

3. Section 5(2) contains three provisions in each of which a dismissed worker "shall be taken to be dismissed by reason of redundancy". The opening words of section 5(2) are:

> "5. (2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to -

Then follow three sets of circumstances:

> (*a*) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> (b) 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; ... (emphasis supplied)
>
> (c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment."

4. The words "ceased" and "diminished" referred to in section 5(2)(b) (supra) have been interpreted in section 2 of the Act to mean respectively, "cease or diminish either permanently or temporarily and from whatsoever cause".

5. The Act contains no definition of the words "dismissed" or "dismissal" but section 5(6) however, sets out the circumstances in which an employee shall not be taken to be dismissed by his employer. The section reads as follows:

> "5(6) - An employee shall not be taken for the purposes of this section to be dismissed by his employer if his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment, and
>
> (a) in a case where the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he is employed, and as to the other terms and conditions of his employment, do not differ from the corresponding provisions of the previous contract, the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract; or
>
> (b) in any other case, the renewal or re-engagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of that employment or after an interval of not more than two weeks thereafter."

6. Miss Cummings, for the Appellant, submitted in this court that there was no redundancy in the instant case for the following reasons:

1. There was no diminution in the work offered to the claimant.

2. He was still the senior systems engineer she said, so the work had not ceased or diminished.

3. Based on section 6(3) and (4) of the Act the letter of July 29, 2002 was not a letter of re-engagement but was simply a letter addressing salary and other benefits that were increased.

7. Mr. Givans for the Respondent submitted however, that the respondent was made redundant because the evidence below was such that the trial judge

could reasonably have inferred and had properly inferred a redundancy situation. He argued that the respondent under his contract as an independent contractor was working less hours and doing less work and that when one contrasts the emoluments enjoyed by the respondent as an employee with those proposed by the appellant in their letter of July 29, 2002, it was clear, that the appellant's need for the respondent had decreased.

8. Mr. Givans further submitted that since there was reduction in the emoluments offered, this was strong evidence that the appellant company was unable to afford to keep the respondent on staff and therefore the requirement for the respondent had diminished to use the language of section 5(2)(b).

9. Two fundamental issues arise for determination in the construction of section 5(2)(b). The first is whether the Respondent was dismissed by his employer. The authorities have made it abundantly clear that it is the employee who must prove that he is dismissed if that fact is not admitted. The second issue is whether the Respondent had been dismissed by the Appellant by reason of redundancy. Here it is for the employer to prove either that there was no redundancy situation or that the dismissal was neither wholly nor mainly attributable to that situation.

10. It is necessary to set out the provisions of section 5(2)(b) once more. The section reads as follows:

> "5(2) - For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to -
>
> .....
>
> (b) 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 ..."

11. Counsel on both sides were unable to find a local authority that could assist the court in the interpretation of section 5(2)(b). However, after carrying out some research of my own, I discovered that the case of ***Murray and another v Foyle Meats Ltd*** [1999] 3 All ER 769 decided by the House of Lords, offered some assistance. Their Lordships were faced with the task of interpreting the provisions of section 11(2)(b) of the Irish Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965.

12. Section 11(2)(a) and (b) of the Irish Act state as follows:

> "11(2) - 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 attributable wholly or mainly to -
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> (b) 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."

13. It is noticeable that our section 5(2) (a) and (b) is quite similar in wording to the Irish provision (supra). The difference lies in the use of the words "Part" and "partly" in the introductory portion of section 5(2). In construing section 11(2)(b), the House of Lords held that the question of whether an employee had been dismissed by reason of redundancy within the meaning of s 11(2)(b) of the 1965 Act, did not depend on the terms of his contract or the function which he had performed. Rather it was necessary to answer two questions of fact, namely (i) whether one or other of the various states of economic affairs in s 11(2)(b) existed, and (ii) whether the dismissal was attributable as a matter of causation, wholly or mainly, to that state of affairs. Lord Clyde had this to say at page 773:

> "But the only test for the application of a statutory provision, such as occurs in the present case, is whether or not on a proper construction of the statutory language the facts which have been established fall within the provision. I see no advantage in prescribing labels as a means of giving guidance to the method to be adopted in applying the provision. Once the statute has been properly construed its application does not depend upon any test but on the language used and the particular facts and circumstances of the case. On the other hand there is in my view a danger in prescribing and designating tests since they may encourage an approach not intended by the legislator."

and at page 774 he continues:

> "It is not to the actual contractual arrangements which the employees have made that the paragraph directs attention but to the requirements of the business. The requirements of

> the business may call for a particular number of employees and for employees of particular skills and abilities. But the contractual provisions which the employer may make with the employees are not necessarily a requirement of the business: they are rather a means whereby the requirements of the business in respect of the workforce may be met. That is not to say that the provisions of the contracts of employment are necessarily irrelevant; in some circumstances they may be useful, for example in throwing light on the kinds of work carried out or the place of employment. But the contractual terms are not determinative of the application of the subsection."

14. In my judgment, it is abundantly clear from the ratio in Murray's case that it is not the contractual arrangements which are relevant to determine whether there was a dismissal by reason of redundancy under 5(2)(b) but rather, whether the requirements of the employer's business for employees to carry out work of a particular kind had diminished.

15. The learned trial judge in the instant case, found that the Respondent was dismissed by reason of redundancy pursuant to the provisions of section 5(2)(b) and at page 7 of her judgment she said:

> "... So then, was there a cessation or diminution of the requirements in the defendant's business in relation to the Claimant's job as a Senior Customer Engineer? The position of Senior Customer Engineer, which the Claimant held, is still a part of the organizational structure of the defendant company. The Claimant presently works for the defendant as an independent contractor doing the very same type of work which he had done when he was in their employ. The defendant asserts that the post remained vacant, as they have been unable to find a suitable replacement. This I do not accept. In my view, the requirements for the Claimant to

> carry out work as a full time Senior Customer Engineer had diminished."

She further stated:

> "Under the new offer, the Claimant would have retained his position. There would have been no change in the duties he would have been required to perform. However, he continued to work for the defendant, but in the capacity of a self employed person earning approximately $56,000.00 monthly.
>
> There would have been a marginal increase of the Claimant's salary, certain allowances would have been reduced or withdrawn and certain benefits varied. Under the offer his gross annual salary of $973,070 would have been increased to $980,000.00. A monthly motor vehicle reimbursement allowance of $29,719.16 would be reduced to $15,000.00. His travelling allowance would be reduced from $16.06 per mile to $8.75 per kilometer. A lunch subsidy allowance of $19,200 annually and a monthly incentive allowance of $50,000.00 were withdrawn. An annual uniform allowance of $18,000.00 was withdrawn, but shirts and trousers were substituted."

She continued at page 8:

> "There were also changes with respect to vacation leave entitlement, Life Insurance and pension scheme contributions. In my opinion, the changes with respect to these three benefits and the uniform allowance was not so significant as to point to the creation of a redundancy situation.
>
> However, the Claimant was a travelling officer. The Defendant continued to conduct its business by utilizing the services of the Claimant as a self-employed person. The fact that the defendant entered into independent contractual relations with him, they are deemed to have transformed him into a self-employed worker. It appears to me that the proposed engagement of the Claimant as a self employed person at a cost less than that which the defendant would have paid him under the original

> contract of employment, shows that there would be no longer a need for the Claimant to carry out his job as a full time employee.
>
> This leads me to conclude that they had reduced his motor car reimbursement and travelling allowances to one half of that which he had previously enjoyed as they are unable to meet his travelling expenses fully. It follows therefore that there was a diminution of the requirements of the business for the claimant to carry out his work. This circumstance creates a redundancy situation. It is obvious that he had been dismissed by reason of redundancy."

16. In my judgment, the learned judge fell into error when she held that the Respondent was dismissed by reason of redundancy for the reasons outlined by her in her judgment (supra). On the basis of the authority of ***Murray*** (supra) it will be seen that it is not the actual contractual arrangement which the employee has made that section 5(2)(b) directs attention but to the requirement of the business. The "ceased and determined" referred to in the section must relate to the requirements of the business. It could never be said in the circumstances of this case that the work carried out by the Respondent had "ceased and determined". It is also my view, that the respondent had not been dismissed since he had voluntarily severed his relationship with the appellant company on July 30, 2002.

17. All that remains for me to say is that the appeal ought to succeed.

SMITH, J.A. (Ag.):

I have had the advantage of reading in draft, the judgments of Cooke, J.A. and Harrison, J.A. I am in agreement with their reasoning and conclusion.

COOKE, J.A.

ORDER:

The appeal is allowed in part. The appeal in respect of the issue of redundancy succeeds. The award for uniform allowance is affirmed. The appellant should have 80% of the costs both here and in the court below.