

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 19 of 2005

BETWEEN:

ELLIOT ARNIM STREETE

Employee

and

CARIBBEAN STAR AIRLINES LTD

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Edward T. Henry

Member

The Hon. Samuel R. Aymer

Member

Appearances:

**Mr. Gerard A. Watt Q.C in association with Dr. David Dorsett,
Attorneys-at-Law for the Employee**

**Mr. Hugh C. Marshall in association with Mrs. Cherissa Roberts-
Thomas, Attorneys-at-Law for the Employer**

2008: January 08

2008: November 27

JUDGMENT

PILGRIM, P:

Background

- [1] The essential facts are as follows: Elliot Arnim Streete, the Employee herein was trained to be an airline pilot. He is a commercial airline pilot by profession. He previously worked as a Captain with LIAT (1974) Ltd (hereinafter called “**Liat**”) and flew Dash 8 aircraft.

- [2] Sometime in or about the year 2000 the owner of Caribbean Star Airlines Limited (hereinafter sometimes called **“Caribbean Star”** or **“the Employer”**) was desirous of establishing an airline. The airline commenced its operations in or about the year 2000. It transported passengers and their cargo throughout Caribbean countries. In order that this goal could be accomplished, it hired various personnel including pilots.
- [3] Several pilots who previously were employed by Liat were offered and accepted employment with Caribbean Star. Mr. Streete was one of those employees.
- [4] Mr. Streete commenced his employment as a First Officer with Caribbean Star in or about July 2000. He started command training on November 11, 2000. He successfully completed this training on November 24, 2000. He also successfully completed his three month probationary period with Caribbean Star on October 18, 2000.
- [5] Mr. Streete’s employment with Caribbean Star was confirmed by the Employer in a letter which it wrote to him dated January 16, 2001. His effective commencement date of employment was stated to be ***“effective 19th October 2000”***.
- See Exhibit “EAS - 1”
- [6] From the outset of Mr. Streete’s employment with the company, he was commended by it. Mr. G. L Gill, the Chief Pilot of Caribbean Star (hereinafter sometimes referred to as **“the Chief Pilot”**) in a letter to then First Officer Streete dated September 5, 2000 wrote *inter alia* and thanked

Mr. Streete for his “**assistance over the past few months**”. This included a regard by the company for Mr. Streete’s use of his “**own time**” and “**in some instances (his own) resources.**”

[7] Mr. Streete was again complimented by the airline in a letter dated December 20, 2000 which it wrote to him. He was promoted from the position of First Officer to the rank of Captain with effect from December 24, 2000. At all material times he flew the Dash 8 aircraft.

[8] The Chief Pilot again complimented Captain Streete by a letter dated December 16, 2002. In that letter he stated *inter alia* as follows:

“Dear Captain Streete,

It is always a pleasure to receive a response from you concerning any topic I may write you on.

Your answers are always clear, concise and to the point....A simple telephone call to you explaining my predicament would have, I am sure, solved the issue.....

I do sincerely thank you for your help Eliot and in the future will try to use my old tried and true method of dealing with matters.

“Communication”.

Sincerely

Captain G. L. Gill”

- (This was admitted and marked as “**EAS-18**”)

- [9] The Company again wrote to Captain Streete by a letter to him dated May 12, 2004. That letter states as follows:

“Caribbean Star Airlines

May 12, 2004

Dear Eliot

TEAM WORK & RECOGNITION

“There is no such thing as a self made man.

You will reach your goals with the help of others”

Teamwork is the essence of corporate success. Live demonstration of true CSA team spirit took place over the recent Easter period with our busy flight schedules. We safely transported several passengers across the region and it was only possible, with the minimum of disruptions, through your efforts and cooperation.

Your invaluable contribution, your time, support and loyalties demonstrated over this period did not go unrecognized. We thank you for a job well done and encourage you to continue to strengthen the ties of friendship and work to our mutual benefit. In one way or another we all contributed to the huge operating success for the Easter, Cricket and Sailing Week activities.

In recognition, we are pleased to award you a token of our appreciation for your contribution of EC \$500.00. This will be reflected in your account on May 15, 2004.

We look forward to your continued support in the development of our business.

Sincerely

.....

Paul J. Moreira

President & COO

.....

J. Sirjusingh

Director, Human Resources

[10] Captain Streete continued to perform his duties as a pilot for Caribbean Star. No adverse reports were ever presented by the employer either with respect to his conduct or his capability to fly the aircraft.

[11] (i) The Organisation of Eastern Caribbean States Directorate of Civil Aviation of which Antigua & Barbuda is a member (hereinafter called “**the Authority**”) mandates that all pilots of aircraft do subject themselves for periodic medical evaluations. This is to ensure that such pilots are fit to fly such aircraft. This requirement assures passenger safety. If the pilot passes the medical examination, he is certified as being fit to fly.

(ii) On Sept 21, 2004 Mr. Streete was medically examined by Dr. Nicholas Fuller. He is an Authorised Medical Examiner for the Authority. Mr. Streete was certified by Dr. Fuller as being “**fit to fly**”. Accordingly, the Authority issued to Captain Streete a renewal of his license from October 1,

2004 to March 31, 2005. This Certificate of Validation was admitted into evidence and marked “**EAS-5**”.

- [12] Captain Streete in his Witness Summary filed on January 7, 2008 states *inter alia* at paragraph 4 as follows:

“My employer had received a Sick Leave Certificate with respect to my illness. The said Sick Leave Certificate covered the period 29th September 2004 to 1st January 2005”

- See Exhibit EAS-3

- [13] It is very regrettable that “**EAS-3**” refers not to a Sick Leave Certificate or any similar certificate for verification that such leave was in fact granted. **Exhibit “EAS-3”** refers to a letter written by the Chief Pilot to Captain Streete dated October 15, 2004.

- [14] The actual certificate or certificates of absences due to illness were never led in evidence either by the Employee or the Employer. However, both parties have submitted that Captain Streete had obtained a leave of absence or leave of absences from work due to illness for the period September 29, 2004 to January 01, 2005.

- [15] This medical certificate of leave was presented to Caribbean Star. Upon receipt of the medical certificate the Chief Pilot wrote to Captain Streete by letter of October 15, 2004. The letter states as follows:

*“October 15, 2004
Captain E. Streete
Caribbean Star Airlines*

*St. John's
Antigua*

Dear Captain Streete,

We have received your Sick Leave Certificates covering the period from the 29th of September to 01st of January 2005. While we do not know the nature of your illness, we are concerned that you did not seek medical care from our company doctor, Rodney Williams.

We are further concerned that your incapacitation extends for such a long period, and believe that we may opt to assist you under Section C 16 (2) of the Antigua and Barbuda labour Code: "in the event that, in the opinion of his employer the extent of such leave (Sick Leave) taken renders the employed unfit to continue in his employment, and the employer terminates the employment [therefor] the employee shall receive compensation calculated in the manner specified under Par 4...(12 days pay for each year worked).

Before taking this action we seek your cooperation in visiting our company doctor to ascertain your position on or before Wednesday, 20th October. Failure of which we shall effect the above in order to recruit a pilot of your status to continue the company's business.

Regards

Captain G. L. Gill
Chief Pilot

- [16] The Chief Pilot in his letter to Captain Streete requested him to be medically examined by Dr. Rodney Williams on or before Wednesday, October 20, 2004. Dr. Williams is the Employer's medical doctor. He is the holder of an M.B, B.S. C.A.M. His letterhead reads "***Family, Sports and Aviation Medicine***". No evidence was led as to the date on which Captain Streete received the Chief Pilot's letter of October 15, 2004.
- [17] In accordance with Caribbean Star's request, Captain Streete was seen by Dr. Williams on November 4, 2004. Dr. Williams issued a medical report dated December 17, 2004. (It was admitted into evidence and marked "LC-4".) The letter reads as follows:

"17 December 2004

Caribbean Star Airline Management
Airport Main Road
Coolidge

To Whom It May Concern

This is to certify that Eliot Streete was first seen by me
on 7th September 2004 after he was referred by
Caribbean Star Airlines Management.

At that time he complained of headaches. On
questioning he gave a history of occasional headaches
for which he would take treatment. Once the treatment

was taken, the headache would go. Clinical examination was unremarkable.

He was asked to see me in November 04 again by Caribbean Star Airlines, since he was put off work for three (3) months by Dr. Fuller.

On questioning, he had lost some 10 lbs at his last physical exam and was not sleeping well.

Dr. Fuller then referred him to a Dr. King who I am made to understand felt that he was suffering from stress. Dr. King felt that he should be given medication and put off work. I have been trying for days to speak with Dr. King without success.

Sincerely

Dr. Rodney Williams MD., M.B.B.S.

- [18] (i) In answer to Mr. Hugh Marshall, Counsel for Caribbean Star, Captain Streete stated *inter alia* as follows:

“I was suffering from headaches and was not sleeping well prior to going on sick leave. I was referred to Dr. King by Dr. Fuller. Dr. King is a psychologist. I did not have any discussions with Dr. Williams about being referred to Dr. King. I was treated by Dr. King sometime in October 2004 and ended at the end of October 2004. During the period of sick leave from Dr. King, I was given medication.”

(ii) Captain Streete also gave the following evidence in answer to Mr. Hugh Marshall in cross examination. He stated *inter alia* as follows:

“Between the 21st day of September and the 29th day of September 2004, I did not get involved in an accident. Captain Gill’s letter of October 15, 2004 was delivered to my home. Dr. Williams is a Doctor of good repute.”

[19] Dr. Williams by letter of November 30, 2004 addressed to Dr. Fuller requested that Dr. Fuller should forward to him certain information with respect to Captain Streete’s medical condition. (The letter was admitted as Exhibit “LC-2”.) It reads as follows:

“30th November, 2004

***Dr. Nicholas Fuller
Long Street
St. John’s***

Dear Dr. Fuller

Caribbean Star Airlines has asked me to investigate the medical condition of Captain Elliot Streete, who was given a three months sick leave certificate from you not so long ago.

I am therefore seeking from you a complete report of his medical condition, inclusive of his P.M.H., present diagnoses and treatment.

Grateful for your assistance in this regard.

Sincerely

*Dr. Rodney Williams M.D.
C.C. Gerry Gill, Ag. Chief Pilot
J. Sirjusingh Human Resource Manager”*

[20] Dr. Fuller by letter of December 01, 2004 responded to Dr. Williams’ letter. He advised Dr. Williams that Mr. Streete’s consent should first be obtained for him **“to release his records to”** Dr. Williams.

[21] By letter of December 28, 2004, Dr. Fuller wrote a letter which states in its entirety as follows:

“28th.12.04

Re: Eliot Streete

To whom it may concern;

*This gentleman is now fit to resume work as of the 02.
Jan. 05.*

With pleasant regards

*DR. N. L. FULLER
P.O Box 1249
St. John’s
Antigua, WI”*

[22] In his evidence Captain Streete indicated that no request has ever been made of him by Dr. Williams, so that his consent may be obtained for a release of his medical records to Dr. Williams.

[23] Captain Streete further stated that he visited Dr. Williams. Dr. Williams informed him that he Dr. Williams consulted with Dr. Fuller since he was

placed on certified sick leave by Dr. Fuller. In his witness statement, Captain Streete at paragraph 9 thereof stated *inter alia* as follows:

“On 21st December 2004 a medical practitioner from whom I was receiving treatment informed Dr. Williams that I was fit to resume work on 2nd January 2005. Dr. Williams did not request that I visit him before returning to work.”

- [24] In his Witness Statement, Captain Streete at paragraph 10 thereof states *inter alia* as follows:

“On 28th December 2004 the letter from Dr. Fuller as required in the Directorate of Civil Aviation regulations was delivered to the Directorate of Civil Aviation.”

- [25] By letter of December 29, 2004 Captain Streete's employment with Caribbean Star was terminated with effect from January 2, 2004. As at the date of his dismissal, his net monthly earnings was \$11,591.54. The letter of dismissal states as follows:

“December 29, 2004

***Mr. Elliot Street
14 Flamboyant Avenue
Paradise View
St. John's
Antigua***

Dear Captain Streete:

Reference ours to you of October 15, 2004.

Having examined all the circumstances of your extended sick leave, we have concluded that the extent

of such leave taken renders you unfit to continue in your employment as a pilot with Caribbean Star Airlines.

As a result your services with Caribbean Star Airlines is terminated effective January 2, [2005] in line with Section 16 (ii) of the Antigua and Barbuda Labour Code.

A further communication will follow on your entitlement under the law, and any other requirement on your part to the company.

Best wishes.

*J. Sirjusingh
Human Resource Director
CC Captain G. Fredericks
Captain G. Gill
E. Gilkes
A. Josiah*

EMPLOYEE'S MITIGATION EFFORTS

- [26] Subsequent to Captain Streete's dismissal he gave evidence that he was unemployed for three (3) months. In mid –February 2005 he applied to LIAT (1974) Ltd (**afterwards called “LIAT” or “Liat”**). Soon thereafter he was interviewed at that company for the position as a pilot. He was informed by Liat that he would be considered to be hired in July or August 2005.

- [27] He was also interviewed for a position as pilot by Trinidad and Tobago Express. This took place in or between March and April 2005. He was offered a position. He stated that the salary was inadequate to support himself and his family. He would have been required to live in Trinidad and Tobago. His family consists of his wife, his mother and his seven (7) year old daughter. They reside in Antigua. He informed the Court that the gross monthly salary was \$6,000.00. This was subject to statutory deductions. He refused this offer of employment. It was insufficient to support two households in Trinidad and Antigua.
- [28] Captain Streete obtained work with Haddeed Motors for one month from May 6 to June 20, 2005. He rejoined LIAT on July 04, 2005 as a First Officer. He was granted a leave of absence for three years from Liat. He currently works as an airline pilot in Japan. This employment commenced from on or about July 5, 2007. In answer to Mr. Marshall he stated that he decided to obtain employment in Japan *“due to financial matters”*.

LEGAL PROCEEDINGS

- [29] By a **Reference** filed on September 23, 2005 the Employee's Attorneys-at-Law notified the Court of the existence of a trade dispute between the two parties. No trade dispute however existed between the two parties.
- [30] The Employee through his Attorneys-at-Law caused to be filed his **Employee's Memorandum**. In effect, the Employee contends that his dismissal is unfair. The Court should grant him certain awards.

- [31] The Employee's Memorandum also states that by letter of May 18, 2005, the Employee's Attorneys-at-Law did refer the matter of his dismissal to the Labour Commissioner in accordance with section 19 of the Industrial Court Act Cap. 214 of the Laws of Antigua & Barbuda (hereinafter sometimes referred to as "**Cap 214**"). In addition, according to the Memorandum, the Employer was informed by the Labour Commissioner that conciliation discussions shall be held on a particular date. On that date the Employee attended the meeting. The Employer failed to attend. A report was thereafter delivered by the Labour Commissioner.
- [32] The **Employer's Memorandum** was filed on March 21, 2006. At paragraph 2 thereof, it averred that the Employee had not complied with Section 19 of Act 214. Neither Counsel for the Employer nor the Employee made any submissions with respect to this matter. The Court is satisfied in the circumstances that both parties were informed by the Labour Commissioner of the need for conciliation discussions to take place on a particular date at the office of the Labour Commissioner. In the circumstances, the Court is satisfied that the relevant provision is Section 7 (i) (c) of Cap. 214. For the avoidance of doubt and to give some guidance to all future References, save and except for trade disputes, "*the individual access to the Court is not limited to matters of the determination of trade disputes under Section 7 (i) (a) [S]ection 7 (i) (c) gives jurisdiction to hear cases for unfair dismissal in cases other than trade dispute matters.*" – see the observations of Byron, C J. (ag) (as he then was) in **Universal Caribbean Establishment and James Harrison Civil Appeal No. 21 of 1993** at page 18.

[33] Notwithstanding the objection of the Employer which is stated at paragraph [32] hereof, the Employer averred at clause 4 of its Memorandum that *“the Employee’s termination was in accordance with the letter of termination dated the 29th of December 2004 and in accordance with the Antigua & Barbuda Labour Code.”*

[34] At clause 9 of the Employer’s Memorandum it states as follows:

“9. That having regard to a Medical Report of Dr. Rodney Williams dated 17th December, 2004 which suggested that the Employee was not fit for work and the Employer after due consideration terminated the Employee in accordance with Section C 16 (ii) of the Labour Code.”

(Emphasis of the words underlined is that of the Employer’s Attorney-at-Law).

[35] In the circumstances of the Employee’s termination the Employer submits that the termination of the Employee was fair and lawful. It was in keeping with proper labour practices.

[36] The Employee’s Attorneys-at-Law caused to be filed on January 7, 2008 a **Witness Summary** on behalf of the Employee. He also gave evidence to support his case that he was unfairly dismissed.

[37] In the Employee’s Witness Summary he states at paragraphs [12] to [19] that he was an executive member of Caribbean Star Airline Pilots Association. It is afterwards referred to as **“the Association”**. His membership thereof and

the work which he did on behalf of the Association collided with his employer's dislike of trade unions. As a consequence thereof, the Employee asserts that his dismissal was not due to matters of illness. He was dismissed because of his trade union activities.

[38] Ms. Laura Cotton gave evidence on behalf of the Employer. She stated *inter alia* that she was the person who was responsible for all activities which related to the closure of **Caribbean Star**.

- **Exhibits LC 1 and LC 4 were introduced into evidence by her.**

ISSUES FOR TRIAL

[39] Having regard to the evidence of the Employer and the Employee the Court is asked to determine the following issues:

- (i). **Was the Employee's contract of employment lawfully terminated by the Employer's letter of December 29, 2004 in accordance with C 16 (ii) of the Labour Code?**
- (ii). **Was the Employee fairly dismissed in accordance with C 58 (i) (e) of the Labour Code?**
- (iii). **If the Employee was unfairly dismissed, what compensation is he entitled to?**

THE EMPLOYER'S SUBMISSIONS

[40] Mr. Marshall for the Employer submits that having received the Employee's Certificates of leave due to illness then it was reasonable for the Employer to have regard to the Employee's ability to discharge his employment functions

in a safe and effective manner. The Employer wrote to the Employee and requested him to be evaluated by Dr. Rodney Williams.

[41] The Employee was evaluated by Dr. Williams and he issued a medical report dated December 17, 2004. According to Mr. Marshall it was this medical report which was the foundation for the Employer's dismissal of the Employee.

[42] Mr. Marshall asserts at Head 4 of his Written Submissions *inter alia* as follows:

“At no time does the Employer have any reason to question the sincerity or accuracy of the report of Dr. Williams.

Notwithstanding that the Doctor has indicated that he has been unable to confirm the position of the Employee with Dr. King, it is submitted that the Report contains enough information for the Employer to reasonably suspect that the Employee is suffering from some form of mental illness.

The Employee himself confirms that in his cross examination when he states that Dr. King to his knowledge is and was a psychologist, and that Dr. King placed him on medication.”

[43] Counsel for the Employer is of the view that *“the facts as in the Employer's possession suggested a strong possibility that the Employee was suffering from some form of mental illness”*.

- See Head 5 of his Written Submissions.

- [44] Such “*mental illness*” Mr. Marshall asserts would have invoked “*claims of negligence on the part of management of the Employer should a mishap occur to a flight under the Employee’s command given that the Employee’s business vests [it] with an obligation of public safety.*”
 – see Mr. Marshall’s Written Submission under Head 5.

- [45] Mr. Marshall submits that the Court should apply the test adumbrated in *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] I.C.R. 303. He is of the view that given the Employer’s knowledge of the circumstances it was reasonable to dismiss the Employee in accordance with C16 (ii) of the Labour Code.
- [46] In the alternative however that the Court should find in favour of the Employee, Mr. Marshall submits that the Employee should be compensated in the sum of \$27,800.00 under the heading of Immediate Loss.

THE EMPLOYEE’S SUBMISSIONS

- [47] Mr. Gerald Watt Q.C., Attorney-at-Law for the Employee submits that during his employment with Caribbean Star, Mr. Streete discharged his duties in an exemplary manner. He displayed a high level of skill in operating the company’s aircraft. He was a dedicated employee with an exemplary record of attendance.
- [48] Counsel further submits that C 16 (ii) of the Labour Code is inapplicable for a determination of the issues. It contemplates a situation where an employee is permanently unable to perform his duties under his contract of

employment. In this regard, Counsel submits that upon the recognition of this event, then C 16 (ii) becomes applicable.

[49] Mr. Watt Q.C. is of the view that the relevant section of the Labour Code which this Court should take into consideration so as to determine the fairness of the Employee's dismissal is Section C 58. He submits that Counsel for the Employer is estopped from relying upon this section having regard to the letter of dismissal dated December 29, 2004.

[50] In the event however, that this Court is so minded to have regard to the provisions of Section C 58, then Mr. Watt Q.C submits that the Court should take into consideration "*the learning on the question of termination for reasons of ill health as contained in "Modern Employment Law" 8th edition by Michael Whincup paragraph 9. 13-14 (pages 158-163).*"

[51] Having regard to all of the circumstances of this case, Mr. Watt Q.C is of the view that the Employee was unfairly dismissed. He submits that the real reason for the Employee's dismissal is his Trade Union activity. Dr. David Dorsett, also Counsel for the Employee submitted that the Employee is entitled to awards under certain headings.

Issue No. (I)

Was the Employee's contract of employment lawfully terminated by the Employer's letter of December 29, 2004 in accordance with Section C 16 (ii) of the Labour Code?

[52] For the purposes of an understanding of C 16 (ii) it is best to examine C 16 in its entirety. It states as follows:

“C 16. Each Employee is entitled to leave on workdays, or parts thereof, during which he is ill or otherwise physically incapacitated for work: Provided, however that

- (i) said leave shall be taken only in connection with actual illness or other physical incapacitation for work, evidence of which in the form of a doctor’s certificate or other satisfactory means, must be furnished by the involved employee to his employer on the third (3) consecutive day of any such leave; and*
- (ii) in the event that, in the opinion of his employer the extent of such leave taken renders the employee unfit to continue in his employment and the employer terminates the employment therefor, the employee shall receive compensation calculated in the manner specified under part 4 or a collective agreement in force relating to compensation for severance pay.*
- (iii) in the event that the illness of an employee or his incapacity is such that he is unable to continue to exercise his duties under his contract of employment, then he may apply to be examined by a medical board appointed in accordance with regulations made under this Act, and where the*

Board decides that he is unable to continue to exercise his duties under this contract then he shall receive compensation calculated in the manner specified under Part 4 or a collective agreement in force relating to compensation for severance pay.”

- [53] C 16 (ii) must be read in conjunction with C 16 (i). C 16 (i) deals with a situation where an employee obtains a leave of absence due to **‘illness or other physical incapacitation for work’** evidence of which is in the form of a doctor’s certificate or other satisfactory means.
- [54] That C 16 (i) ends with the word **‘and’** is extremely vital to an understanding of what follows in C 16 (ii). What the word **“and”** clearly contemplates is that if the **“illness or other physical incapacitation from work, evidence of which in the form of a doctor’s certificate or other satisfactory means”** continues in such a manner that **“in the opinion of his employer the extent of such leave taken renders the employee unfit to continue in his employment”**, then the employer has a good reason to **“terminate the employment therefor”**. The provisions of C 16 do not afford the employer the opportunity to terminate the contract of employment other than for the specific reason stated therein.
- [55] C 16 does afford to an employer a reason to **“terminate”** the contract if and only if the Sick Leave Certificate or some other satisfactory evidence states categorically that the Employee’s leave continues, which renders him to be **“unfit to continue in his employment.”**

[56] Furthermore if an employee is incapacitated in accordance with C 16 (i) and (ii) then he may apply to be examined by a medical board in accordance with C 16 (iii).

[57] If authority is required for the finding that C 16 (i) should be examined in order to understand the meaning of C 16 (ii), I make reference to “**Craies on Legislation , London, Thompson Sweet & Maxwell 2004 edited by Daniel Greenberg**”. The learned author states at paragraph 20.1.20 as follows:

“Use of context

An obvious but important rule for approaching the construction of a piece of legislation is to look at the provision concerned in the context of the legislation as a whole. This is a rule of ancient origin, and one which owes its authority to common sense.

As Coke said –

“The office of a good expositor of an Act of Parliament is to make construction on all parts together, and not of one part only by itself – *nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit*”.

“It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the

meaning of the makers....and this exposition is *ex visceribus actus*.”

As in the case of all these rules, however, the use of context is designed only for the elucidation of what the legislature has said where there is any doubt about its meaning. It is not a method of changing or undermining the clear meaning of words used.

The rule advocating the use of context for the elucidation of meaning is sometimes referred to as the rule of exposition *ex visceribus actus*, construction within the four corners of the Act.

The rule has been cited and acted upon in a large number of cases, ancient and modern.”

- [58] What is the evidence which the employer had available to it on December 29, 2004 which justified it to terminate the Employee’s contract of employment? Counsel for the Employer averred at Clause 9 of its Memorandum that it was the Medical Report of Dr. Rodney Williams dated December 17, 2004 which suggested that the Employee was not fit for work as the reason for the Employee’s termination. An examination of the Medical Report of Dr. Rodney Williams is of some relevance so as to determine if the Employer’s act to terminate was sound. (**The emphasis is that of Counsel**).

- [59] (i) In Dr. Williams' medical report he states that he first saw Mr. Streete on September 7, 2004. The employee complained of headaches for which once he took medication, this remedied those headaches. He further opined as follows:

“Clinical examination was unremarkable”

- (ii) In the words of Counsel for the Employer:

“There was not forthcoming any apparent diagnosis from which the Employer could evaluate the position of the Employee”.

- See Mr. Marshall's Written Submissions under Head 4.

- [60] In the Employee's Witness Summary he stated at paragraph 7 as follows:

“By letter dated 15th October 2004, Caribbean Star [requested] that I visit Dr. Rodney Williams by 20th October [2004]. I did visit Dr. Williams on 18th October 2004. During this visit Dr. Williams did an examination of me. However, Dr. Williams advised that I consult with Dr. Fuller on the matter of my sick leave.”

- [61] Dr. Williams in his Medical Report of December 17, 2004 stated *inter alia* that on questioning the employee ***“he had lost some 10 lbs at his last physical examination and was not sleeping well.”***

- [62] In Dr. Williams' opinion he was ***“made to understand” that Dr. King was of the view that Mr. Streete was “suffering from stress”. In Dr. Williams' opinion, Dr. King felt that he should be given medication and put off***

work.” He, Dr. Williams was “trying for days to speak with Dr. King without success.”

- [63] Counsel for the Employer submits that based upon the Medical Report of Dr. Williams, this Court should conclude as follows:

“that the Report contains enough information for the Employer to reasonably suspect that the Employee is suffering from some form of MENTAL ILLNESS”

- See Mr. Marshall’s Written Submissions under Head 4
(the emphasis in Capitals is the Court’s)

- [64] (i) A finding by a medical practitioner that an employee and especially an airline pilot is suffering from *“some form of mental illness”* must be unmistakable, clear and unambiguous. It must as well be in the form of an opinion which grants to the employee a certified leave of absence due to such mental illness or it ought to be clearly written in the form of a medical report. Some proper foundation for such a conclusion to be made must be laid.

- (ii) The issue of the right of an airline to request one of its pilots to submit himself to a psychiatric evaluation fell to be determined in **LIAT (1974) Limited v Roger Greenidge Civil Appeal No. 13 of 1989**. In that case the respondent pilot refused to undergo a psychiatric examination which LIAT had arranged. LIAT stopped him from flying any of its aircraft. It ceased to pay his salary until *“a satisfactory report had been received from either the company Psychiatrist (Dr. Mahy) or alternatively, a Psychiatrist recommended by the Director of Civil Aviation.”*

– See page 5 of the judgment.

(iii) The Industrial Court held in his favour. It found that the Employer did not have the right to insist that the pilot respondent be examined by a psychiatrist. LIAT appealed the decision.

(iv) **Moe, J.A** in writing the decision of the Court of Appeal stated *inter alia* at page 9 of the judgment as follows:

“It seems to me a matter of good sense that an employer should be able to ensure than an employee is mentally fit to perform the duties required to be performed where such fitness is relevant to the particular duties to be carried out. The relevancy would of course depend on the particular contract of employment. But it is not only good sense, it is a matter of law.”

(v) At page 9 of the same judgment **Moe, J.A.:** stated *inter alia* as follows:

“It seems to me therefore that if there is reasonable grounds for believing that an employee is no longer competent (physically or mentally fit) the employer should surely have a right to have a medical opinion on the matter.”

(vi) Moe, J.A. further stated *inter alia* at page 10 of the judgment as follows:

“There is evidence that mental fitness is a relevant consideration to this employment under review. The respondent was psychiatrically examined for the purpose of obtaining the contract. The right to have an

employee examined does not exist only at the time of appointment.”

(vii) The Court was required to consider in the *Greenidge case* whether there were reasonable grounds for requesting that the pilot submit himself to a psychiatric examination. In the circumstances of that case the Court held that there were certain factors which “*provided sufficient basis for the appellant to feel that more probably than not something was wrong and that there should be a check whether it was so or not.*”

- See Moe, J.A. at page 11

(viii) Counsel for the Respondent pilot in the *Greenidge case* submitted that after the pilot had supplied a medical certificate that there was no justification for insisting thereafter that the respondent undergo a psychiatric

examination. To this submission, Moe, J.A. held at page 11 *inter alia* as follows:

“I do not understand that examination by a physician satisfies the requirement of an examination by a psychiatrist.”

(ix) Moe J.A at page 11 of the judgment in the *Greenidge case* in commenting upon the efforts made by LIAT to ensure that the pilot was treated fairly so as to determine his mental competence to fly concluded *inter alia* as follows:

“It seems to me that the appellant bent over somewhat to give the respondent an opportunity to have an examination the result of which would have let both the

appellant and respondent know whether they could discharge their respective obligations to the flying public. The respondent did not get the examination which was reasonable for the appellant to have requested and insisted upon.”

- (x) In a consideration of all of the circumstances of the *Greenidge case* the Court of Appeal held that LIAT did not act unreasonably when it repudiated its contract with the respondent.

[65] This Court disagrees with Mr. Marshall that this Employee was suffering from “*mental illness*” or “*some form of mental illness*”. There is not a scintilla of evidence in the report of Dr. Williams that Mr. Streete was suffering from some form of mental illness or any other illness which would have caused the Employer to terminate the employee’s contract of employment. No evidence has been led in this Court that Dr. Williams is qualified and/or experienced in the field of psychiatry. Furthermore, Dr. Williams’ letter of December 17, 2004, contains no evidence whatsoever that Mr. Streete was ill or to any extent that should have caused the Employer to terminate the Employee’s contract of employment.

[66] Was there any other satisfactory means of evidence which the employer had in its possession so as to “*render the employee unfit to continue in his employment?*” On the contrary, the employer had in its possession (a) “*the Sick Leave Certificates concerning the period from the 29th of September to 1st of January 2005*” - see Captain Gill’s letter of October 15, 2004; (b) the Certificate of Validity issued by the Authority and (c) the Medical Report of Dr. Fuller dated December 28, 2004. Furthermore, according to

the Employee, his evidence is that on December 17, 2004 he spoke with Ms. Jan Sirjusingh, Human Resource Director for the Employer. In that conversation, he informed her that he ***“would be fit to resume work on 2nd January 2005 and that a letter would be sent to the Directorate of Civil Aviation confirming the same.”***

- See his Witness Summary at paragraph 6.

[67] Upon all of the evidence which was given by the Employer and the Employee no ***“doctor’s certificate or other satisfactory means”*** of proof was presented which revealed any ***“actual illness or other physical incapacitation for work”*** by the Employee. The employee was fit to resume his duties as an airline pilot with Caribbean Star on January 2, 2005.

[68] In consequence of the finding at paragraphs [65 to 67] hereof this Court concludes that in accordance with the substantial merits of this case and having regard to the principles and practices of good industrial relations, the Employee’s contract of employment was not lawfully terminated by the Employee’s letter of termination dated December 29, 2004 in accordance with C 16 (ii) of the Labour Code. This Court holds that the Employee was in fact dismissed by the Employer.

Issue No. II

Was the Employee fairly dismissed in accordance with C 58 (i) (e) of the Labour Code?

[69] C 58 (1) (e) states as follows:

***“A dismissal shall not be unfair if the reason assigned
by the employer therefor:***

(a)

.....;

(b)

(c).....;

(d).....;

(e) *is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:*

Provided, however, that there is a factual basis for the assigned reason.”

C 58 (2) states as follows:

“(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal.”

[70] Counsel for the Employer submits that the test to be used is whether the decision to terminate was reasonable given the Employer’s knowledge of the circumstances at that time. He cites *British Home Stores Ltd v Burchell* (op cit).

[71] This Court finds that the test for which ***British Home Stores Ltd*** stands as an authority is irrelevant for an analysis of incapacity due to ill-health cases of which Mr. Streete's circumstances clearly typifies. That case deals with misconduct matters. This is not a case of misconduct.

[72] In the ***British Home Stores Ltd*** case **Arnold J** at page 304 of the report stated *inter alia* as follows:

“The case is one of an increasingly familiar sort in this tribunal, in which there has been a suspicion or belief of the employee’s misconduct entertained by the employers; it is on that ground that dismissal has taken place.... What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question.....entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.”

[73] In the circumstances, this Court is disinclined to adopt the **Burchell** test as it would place a burden upon the employer which would be wholly inappropriate, manifestly burdensome and plainly wrong.

[74] The test to be applied in a general way to decide whether or not a dismissal was unfair in the circumstances of this case is clearly set out at C 58 (2) of the Labour Code.

- See paragraph [69] hereof.

- [75] The specific test to be applied in an analysis of whether or not the Employer acted reasonably in circumstances where it has dismissed an Employee for reasons of incapacity due to ill health has been established in *Spencer v Paragon Wallpapers Ltd* [1977] I.C.R. 301. At page 307 Phillips J stated *inter alia* as follows:

“Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances.”

- [76] At pages 305 & 306 of *Spencer*, Phillips J. emphasises the need for communication between the employer and the employee before the employee is dismissed. Phillips J. states as follows:

“During the course of the argument it was accepted for the employers that this stated the position too strongly. Obviously, the case of misconduct and the case of ill-health raise different considerations, but we are clearly of the view that an employee ought not to be dismissed on the ground of absence due to ill-health without some communication being established between the employer and the employee before he is dismissed. The word “warning” perhaps is not appropriate, for by its association with cases of misconduct it carries with it suggestion that the employee is being required to change or improve his conduct. That is not the case where the absence is due to ill-health, and it is possible

to imagine cases of ill health where some damage could be done by a written warning..... What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously, what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health."

[77] *Phillips J, in East Lindsey Council v Daubney [1977] ICR 566 at pages 571 & 572 stated inter alia as follows:*

"Unless there are wholly exceptional circumstances before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.....Only one thing is certain, and that is that if an employee is not consulted, and given an opportunity to state his case, an injustice may be done."

[78] It has also been true that *"in the normal case, a measure of consultation is expected of an employer before he decides to dismiss an employee for ill health."* - See Lord McDonald in *Taylorpan Catering (Scotland) Ltd v McInally [1980] I.R.L.R. 53 at page 55.*

[79] *“Therefore, in deciding whether an employer acted fairly or unfairly in dismissing an employee on grounds of ill health, an Industrial Tribunal must determine as a matter of fact and judgment what consultation, if any, was necessary or desirable in the known circumstances of the particular case; what consultation, if any, in fact took place; and whether or not that consultation process was adequate in all the circumstances. If it was not adequate, the dismissal will be unfair.”*

- See the headnote in *A Links & Co. Ltd v. Rose* [1991] IRLR 353

[80] What material findings of fact in all the circumstances of this case did the Employer have in its possession before it took the decision to dismiss the Employee? What was the adequacy of the consultative process?

[81] The material findings of fact with respect to the Employee’s illness are all outlined at paragraphs [64 to 68] above. In essence, the Employee had in its possession the Certificates of Leave of Absences of Dr. Fuller prior to October 15, 2004. The Employer as at October 15, 2004 was aware of the fact that the Employee was due to return to work on January 2, 2005.

[82] The Employer made provision for the Employee to be seen by Dr. Williams on or before October 20, 2004. The Employee duly presented himself to be medically examined by Dr. Williams on October 18, 2004.

[83] No evidence has been presented by the Employer with respect to the Employee’s absence from work due to illness prior to September 29, 2004. As well, this Court has not been presented with any evidence by the Employer that the Employee’s services were very much in demand, that the airline’s business was disrupted and in the circumstances if he was unable to

execute his duties then the company would be faced with no other alternative but to dismiss him. He was not given an opportunity by the Employer to make up his mind having been given an ultimatum, either to return to work prior to January 2, 2005 or face the prospect of being dismissed. Indeed I am reminded of the Chief Pilot's letter to Captain Streete dated December 16, 2002. In that letter the Chief Pilot stated *inter alia* as follows:

“A simple telephone call to you (Captain Streete) explaining my predicament would have, I am sure, solved the issue....”

- See paragraph 8 of this judgment

[84] Indeed the process of the Employer's medical adviser Dr. Williams to ascertain the Employee's true medical position was truly inconclusive. Dr. Williams himself made no diagnosis that Mr. Streete was suffering from stress. How he was able to obtain that information is not apparent from his medical report.

[85] But there was consultation between the Employee and Ms. Sirjusingh, the Human Resources Director of Caribbean Star on December 17, 2004. In that conversation he told her that he ***“would be fit to resume work on 2nd January 2005”***.

- see his Witness Summary at paragraph 8 thereof

[86] In addition the Employee's Certificate of Validity of a License for Pilots of Aeroplanes was still valid for the period October 1, 2004 to March 31, 2005.

- [87] In the evidence as presented by the Employee, the Employer was clearly made aware by the Employee that he was fit to resume duties on January 2, 2005. This has not been challenged by the Employer.
- [88] Dr. Rodney Williams' Medical Report of December 17, 2004 which formed the basis for the Employer to dismiss the Employee was inconclusive in its findings of the Employee's state of health. In addition the Medical Report failed to express any opinion of (a) the Employee's fitness to resume work and or (b) the date when the Employee was fit to resume work.
- [89] Having regard to all of the facts of this case, it is fair and reasonable to find that the consultative process between the Employer and the Employee was wholly inadequate. In any event however, the process of communication between the two parties clearly reveal that (a) the Employer was aware of the Employee's date of resumption of duty and (b) there is absolutely no evidence to suggest that the Employee was incapable of performing his duties due to ill health.
- [90] This Court therefore finds that the Employer acted unreasonably when it repudiated its contract with the Employee and as a consequence thereof the dismissal of the Employee was manifestly unfair.
- [91] The facts of this case did not justify a finding of termination of the Employee's contract in accordance with C 16 (ii) of the Labour Code. In accordance with Section 10 (5) of Cap. 214 I hold that his dismissal was harsh, crude and oppressive. It was unfair. It was not in accordance with the principles of good industrial relations practice.

Issue No. III

If the Employee was unfairly dismissed, what compensation is he entitled to?

[92] Compensation which is to be paid to an employee who has been unfairly dismissed may vary according to the four established heads and/or other entitlements.

(a) Basic Award for Loss of Protection

[93] Under this heading an employee's entitlement is one month's pay for every year that the employee has worked or a substantial part thereof at his last basic wage. The Employee worked for the Employer for 4.5 years. His last net monthly salary was **\$11,591.54**. His entitlement under this heading is **\$52,161.93**.

(b) Immediate Loss

[94] After his dismissal in December 2004 which was effective January 2, 2005, the Employee gave evidence of the efforts which he made to mitigate his loss as an airline pilot. They are further particularised at paragraphs [26-28]. In essence the Employee made certain attempts to obtain further employment. He was unable to obtain any other job which paid him a salary in comparison to the one which he earned with Caribbean Star, save and except as an airline pilot in Japan for three years under a three year contract. He took up this position on July 05, 2007 on secondment from LIAT. The contract may be terminated by notice from either side.

[95] The ultimate issue for determination under this heading is what period (if any) would the Employee be compensated? Counsel for the Employee submits that he should be compensated for the period ***“from his dismissal with Caribbean Star to his employment in Japan.”*** This is a period of 30

months from January 2005 to June 30, 2007. For the employer, Counsel submits that *“should this Court find in favour of the Employee, compensation should be limited to\$20,400.00 plus \$7,400.00 in lieu of Notice.”*

THE LAW – MITIGATION OF DAMAGES

[96] (i) What are the legal principles to be applied to an understanding of what an unfairly dismissed employee is entitled to under this heading? The starting point is the Court of Appeal’s decision in *Antigua Village Condo Corporation v Jennifer Watt Civil Appeal No. 6 of 1992* (hereinafter called the “Jennifer Watt case”).

(ii) The legal principles which are to be applied in an analysis of an unfair dismissed employee’s entitlement without an alternative offer of employment by his former employer having been made to him are as follows:

- (a) *“An unfairly dismissed employee is obviously entitled to compensation for immediate loss of earnings (i.e. loss of earnings between the date of the dismissal and the date of the trial or judgment). That head of compensation includes the amount to which the employee is entitled by way of salary or wages in lieu of notice.”*
 - See Sir Vincent Floissac in the Jennifer Watt case at page 5.
- (b) *“The Plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant’s wrong and if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.”*

- see **Halsbury's Laws of England (Reissue) Vol. 12 (1) paragraph 1041**

(c) It is the duty and responsibility of the dismissed employee *"to take proper and reasonable steps to obtain other suitable employment and thereby to mitigate the loss of earnings during that period."*

- See Sir Vincent Floissac in the Jennifer Watt case at page 5.

(d) This duty of the employee is clearly expressed in **paragraph 1043 of Halsbury's Laws of England, Fourth Edition (Reissue) Vol. 12 (i)** as follows:

"In actions for breach of a contract of employment a plaintiff who has been wrongfully dismissed must take reasonable steps to obtain other suitable employment. He is not entitled to remain idle at the defendant's expense simply because no precisely similar employment can be found, but must accept employment which, having regard to his standing, experience and personal history he can reasonably be expected to accept. He must be prepared if necessary to lower his sights and accept employment at a lower remuneration."

(e) The acceptance of employment at a lower remuneration is also subject to the principle that the dismissed employee may reasonably spend time looking for other employment at a comparable level to that of his previous salary before being prepared to take employment at a lower level with less pay.

- *See Yetton V Eastwoods Froy, Ltd [1996] 3 ALL E.R 353 and A. G. Bracey v Iles [1973] I.R.L.R. 210.*

In **A. G. Bracey v Iles**, Sir John Donaldson in delivering the judgment of the Court stated *inter alia* at page 211 as follows:

“But we think that he overstates the case in submitting that it is the duty of a dismissed employee to take the first job that comes along, irrespective of what remuneration is available in that job and of what are the job prospects. This is not the law. The law is that it is the duty of a dismissed employee to act reasonably in order to mitigate his loss. It may not be reasonable to take the first job that comes along. It may be much more reasonable, in the interest of the employee and of the employer who has to pay compensation, that he should wait a little time. He must, of course, use the time well and seek a better paid job which will reduce his overall loss and the amount of compensation which the previous employer ultimately has to pay.”

- See **Hardy v Polk (Leeds) Ltd [2005] I.C. R 557** per **Burton J (President)** at page 562 paragraph (c)
 - See **Yetton v Eastwoods Froy Ltd (op cit)** and **A.G.Bracey v Iles (op cit)**
- (f) What is the standard of conduct or reasonableness which is to be expected of an unfairly dismissed employee? The standard has been clearly expressed at **paragraph 1042 of Halsbury’s Laws of England Fourth Edition (Reissue) Volume 12 (1)** as follows:
- “The plaintiff is required only to act reasonably, and whether he has done so is a question of fact in the*

circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interest of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. One test of reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default. In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighted in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty.”

(iii) **The Employment Appeal Tribunal in *Fyfe v Scientific Furnishings Ltd* [1989] I.C.R. 648** gives an indication of how high is the standard of conduct or reasonableness which the employee must discharge. At page 650 **Wood J** stated *inter alia* as follows:

*“It is important to emphasise that the duty is only to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is a wrongdoer. This was put clearly by Lord MacMillan in *Banco de Portugal v Waterlow and Sons Ltd.* [1932] A.C. 452, 506, where he said:*

“Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment

the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.”

- (iv) (a) *“Where a defendant alleges that the Plaintiff has failed to take all reasonable steps to mitigate his loss the burden of proof is upon the defendant.”*

- see Halsbury’s Laws of England, Fourth Edition (Reissue) Vol. 12 (1) at paragraph 1041. See as well *Bessenden Properties Ltd v Corness* [1977] I.C.R. 821 per Roskil L.J. at page 823 where he stated *inter alia* as follows:

- (b) *“Questions of mitigation are questions of fact. When one party seeks to allege that another party has failed to mitigate a loss, the burden of proof is upon the party making that allegation”.*

- (v) (a) This Court being an Industrial Court must be provided with evidence in order that it may be able to decide whether or not the

employee has acted reasonably in the mitigation of his loss. The law is clearly expressed in **Ministry of Defence v Hunt [1996] I.C.R. 554 at page 562 Letter G by Maurice Kay J.** He stated *inter alia* as follows:

“If a tribunal is to be invited to consider whether or not there has been a failure to mitigate or, if there has been such a failure, the quantification of any reduction in the value of the claim, it must be provided with the evidence with which to perform its task, either arising from cross-examination or from evidence called by the [employer]. A vague submission of failure to mitigate unsupported by any evidence is unlikely to succeed.”

(b) **Maurice Kay J. in Ministry of Defence v Hunt (op cit) at pages 562 to 563** articulated what an Industrial Court should have regard to if a reduction in compensation as a consequence of an employee’s failure to mitigate is to be upheld. He stated *inter alia* at Letters H and A as follows:

“Industrial tribunals will have in mind the words of Browne Wilkinson J in Gardiner-Hill v Rowland Berger Technic Ltd [1982] I.R.L.R. 498, 500:

“In order to show a failure to mitigate, it has to be shown that if a particular step has been taken, Mr. Gardiner-Hill would after a particular time, on balance of probabilities have gained employment; from then onwards the loss flowing from the unfair dismissal would have been extinguished or reduced by his income from that other source. In fixing the amount to be deducted for failing to mitigate, it is necessary for the tribunal to identify what

steps should have been taken; the date on which that step would have produced an alternative income and, thereafter, to reduce the amount of compensation by the amount of the alternative income which would have been earned. Since that is the principle of mitigation, a reduction of a percentage of the total sum representing compensation for the whole period is inappropriate.”

- (c) Moreover at **page 500 of Gardiner-Hill, Browne-Wilkinson J** stated *inter alia* as follows:

“Moreover, although it is not necessary for us to go into it in great detail, it is well-established that it is inappropriate in dealing with failing to mitigate damages to reduce the amount of compensation by a percentage.”

- (vi) *“If in taking steps to mitigate his loss, the Plaintiff incurs expenses or further loss, he may recover such expenses and further loss from the defendant, even if the resulting damage is greater than it would have been had the mitigating steps not been taken.”*

- see Halsbury’s Laws of England Fourth Edition (reissue) Vol. 12 (i) at paragraph 1041.

- (vii) The test of unreasonableness is an objective one which is based on the totality of the evidence according to the circumstances of each case. A reference to objectivity does no more than to emphasise that the duty is to act reasonably. The objective approach was referred to by Byron J. A. who delivered the judgment of the Court of Appeal in **LIAT v Sheppard** (Civil Appeal No. 06 of

1999) (hereinafter called “the Sheppard case”). He stated *inter alia* at page 8 as follows:

“The court cannot be debarred from exercising an objective approach merely by proof of actual loss because its duty must include considering the issue of mitigation as well.”

- (viii) The issue of mitigation may be raised by the employee, the employer or it may be raised by the Court itself as the procedures before the Court are flexible. It is appropriate however in a matter like this to adopt the words of Wood J. in *Fyfe v Scientific Furnishings Ltd* (op cit) at page 652 where he stated *inter alia* as follows:

“where competent representatives are involved, one would hope that the matter would be put clearly, so that the applicant was not taken by surprise.”

- (ix) The Court is therefore mandated at the trial of the employee’s action in circumstances where his dismissal has taken place several months before the trial to act in one of the following ways.

(a) To apply *“an appropriate deduction from the compensation for that loss” if it is proven on a balance of probabilities that the employee has failed to mitigate his loss;*

- See the Jennifer Watt case per Sir Vincent Floissac C. J. at page 5.

or;

(b) *a fortiori* if it is proved as aforesaid that the employee has acted reasonably in all the circumstances to mitigate his loss then his claim would be allowed.

(c) **Wood J. in Fyfe v Scientific Furnishings Ltd.** (op cit) articulated the position of the employee who has acted reasonably in the following manner. At page 650 he stated *inter alia* as follows:

“Whether the applicant has acted reasonably is in every case a question of fact, provided there is evidence which, in law, is capable of substantiating the decision.

It has been settled that under the common law rules the onus is upon the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps then the normal measure of damages will apply.”

The Mitigating Factors

[97] The Employee’s proof of actual loss in this case is but one factor to take into consideration in a determination of his immediate loss. But what is of greater importance is that the Court has a duty to clearly examine “*the issue of mitigation as well*”.

- **See Byron J.A at page 8 of the Sheppard case** (op cit).

[98] In an examination of the issue of mitigation, the Court must have regard to a number of factors. In this case, the Employee was dismissed by letter of December 29, 2004. He was unemployed for a period of four (4) months from January to April 2005. During this period in February 2005, he applied to LIAT and was informed that the company would employ him in July or August 2005.

[99] Before he obtained employment with LIAT, the Employee preferred not to stay at home and do nothing. The evidence is that in March or April 2005, he was interviewed in Trinidad & Tobago for a pilot's position with Tobago Express. He was offered a gross salary of \$6,000.00 from which unnamed statutory deductions would have been made. In this position, he would have been required to reside in Trinidad & Tobago. He stated that he could not simultaneously support himself in Trinidad & Tobago and his family in Antigua. For these reasons, he declined the offer.

[100] Was his refusal of this offer reasonable? The applicant is a highly skilled professional who was qualified to work as an airline pilot. He may be required to accept a lower paying job, but one which ought not to have placed him under greater financial embarrassment.

[101] Had he taken the position with Tobago Express he may have been required to borrow sums of money to support both households. Although these expenses may have been legitimately claimed by him, he would have exposed himself to some criticism. No evidence was led or adduced by Counsel for the Employer to show what efforts this Employee ought to have taken to mitigate his loss.

[102] At the time of his dismissal from Caribbean Star his evidence is that his *"seniority was 11 of approximately 60 pilots."* His evidence is that he *"was close to the top of the pack in terms of seniority. Seniority for a pilot determines his promotion prospects, it determines in what country he will reside and what work roster and vacation he will receive."*

[103] Whilst the Employee gave no evidence as to where the position with Tobago Express had placed him in terms of a position and seniority with the company, that he was offered a gross monthly sum of \$6,000.00 which was just over half of his previous salary earned with Caribbean Star, would clearly suggest that this position would have reduced his status, prestige, salary, allowances and/or such similar benefits which he had earned in his prior position with the Employer.

[104] In all of the circumstances of this case, I find that it was extremely reasonable for this Employee to have refused the offer of employment from Tobago Express.

[105] The Employee obtained a position with Hadeed Motors from May 16 to June 15, 2005 in Antigua at a monthly salary of \$2,640.00. This salary was substantially less than what he obtained in his former position with Caribbean Star. He accepted this offer. It allowed him to live and reside in Antigua.

[106] In August 2005, he rejoined LIAT in Antigua. He commenced earning a gross monthly salary of \$6,899.17. In his evidence he stated *inter alia* that “**when he rejoined LIAT, he lost all of his seniority.**” The applicant testified that he started at No. 100 out of 104. In June 2007 he was earning a gross monthly salary of \$6,961.17 with LIAT. Whilst at LIAT, his seniority was 104 of approximately 110 pilots. He further testified that he “**left LIAT because the salary at the time could not take care of [his] personal needs.**”

[107] Mr. Streete now resides in Japan. On July 5, 2007 he obtained employment with All Nippon Airways. He is a Captain. He commands the Q. 400 series.

Dash 8 aircraft. His monthly salary is U.S. \$5,000.00. This amounts to \$13,500.00.

[108] In further evidence the Employee testified that he “*would wish to work in the Caribbean because (he has) no friends (in Japan) and (he likes) the lifestyle in the Caribbean.*” In answer to Mr. Marshall he informed the Court that he accepted the position in Japan “*due to financial matters*”.

[109] The applicant’s period of unemployment after his dismissal was for 4.5 months from January 2 to May 15, 2005. During that period he made attempts to obtain alternative employment. I must have regard to his skill, standing, experience and personal history. The period of being unemployed was very low. He was placed in a position of some embarrassment to find alternative suitable employment. His inability to find suitable and alternative employment for 4.5 months bears a direct relationship to the efforts which he made to secure such employment.

[110] No evidence was led by either side with respect to any efforts which could have been made by this employee to obtain employment during the period of August 2005 when he rejoined LIAT at a lower salary than what he worked for at Caribbean Star and on July 4, 2007 when he obtained a leave of absence for three years from LIAT. Was it reasonable for him to continue to work as a pilot for LIAT? Were any other alternative jobs available to him? If yes, did the Employee explore any of these alternative employment prospects?

[111] This Employee was under a duty to seek alternative employment. Firstly, in the circumstances of this case, his efforts in accepting employment with Haddeed Motors and thereafter with LIAT were reasonable. Secondly, having regard to all of the circumstances of this case, inclusive of (a) his professional skill as a pilot, (b) the fact that this Employee would have preferred to work in the Caribbean, and (c) that he has no choice but to work in Japan because as a consequence of making further employment applications it is there that he obtained a pilot's position which pays him a higher salary than his previous job with Caribbean Star; this Employee acted reasonably to mitigate his loss.

[112] Should this employee be compensated for the period beyond the date when he found employment under this heading of immediate loss? Was his loss a continuing one until he obtained employment in Japan on July 5, 2007 at a comparable salary as his employment with Caribbean Star? Was a period of 30 months a reasonable time for him to receive compensation under this heading?

Application of the Legal Principles

[113] According to Mr. Marshall if the Court was mindful to award the employee a sum under this heading then ***“the Court should, having regard to precedents limiting awards due to the delayed nature of the legal process in the past, (and) restrict any award to this employee under this head to July 2005 being six (6) months”***. In support of this submission he cited certain cases. They are **Higgins v Akande (Ref. No. 3 of 1998)** and

Warner Payne v B.W.I.A International Airways Ltd. (Ref. No. 10 of 1998), Barzey v A.G.A. Distribution Ltd (Ref. No. 16 of 1999), Emmanuel v RBC (Ref No. 3 of 1994) and Defreitas v Benjamin (Ref. No. 3 of 1999).

[114] This Court is of the view that Attorneys-at-Law who cite cases in this Court or any other Court should have regard to certain basic principles. The first principle is that the authorities which are cited by Counsel should be relevant in support of the submissions which are made. The second principle is that where a decision of the Industrial Court has been appealed to the Court of Appeal, should there be a decision of the Court of Appeal, then that decision should be made available to the Industrial Court. This Court holds that the cases cited by Mr. Marshall are not authorities for the submission that this Court has limited awards under this heading for six (6) months. No cases were cited by Mr. Watt Q.C. or Dr. Dorsette in support of their submissions under this heading.

[115] In **Claudette Higgins v Dr. Akande Ref. No 3 of 1998**, the employee in that case was a **domestic worker**. Similarly the employee in **Steadman Barzey Ref. No. 16 of 1999** was employed as a gardener/handyman. In **Leslie Emmanuel**, the employee performed different duties *“the purpose of which was to provide the Manager, Operations and Customer service with support in the routine operations of all departments of the branch”*.

- See page 4 of the judgment.

In **Roxanne Warner Payne’s matter** she worked with B.W.I.A International Airlines as a **Customer Service Representative**. In this case there was an appeal by BWIA to the Court of Appeal. The Court of Appeal

in **Civil Appeal No. 11 of 2001** held that *“in the circumstances the Employers acted unreasonable and that the dismissal was unfair”*.

In **St. Lawrence Defreitas’ case** the Industrial Court awarded the employee *“compensation for immediate loss for a period of 9 months in the sum of \$72,495.00.”* The employer being dissatisfied with the Industrial Court’s judgment took the matter to the Court of Appeal. **Saunders JA** in delivering the judgment of the Court stated *inter alia* at **page 5** as follows:

“It seems to me..... [that] the Industrial Court treated the case as an ordinary case of unfair dismissal. I think this was unfortunate.”

The Court of Appeal quashed the Industrial Court’s decision and substituted it *“with a finding that Mr. Defreitas had been retired but in circumstances where it was obligatory for his employers to have first given him reasonable notice.”*

see **page 7 of the judgment**

[116] What an employee may be entitled to under the heading of immediate loss must of necessity take into consideration the general principles of law which properly govern the duty of the employee to mitigate his loss, the precedents of this Court, the decisions of the Court of Appeal and any other relevant decisions.

[117] The general principles of law which this Court must have regard to, have been set out at **paragraph [96]**. Very briefly without a repetition of those principles, the Court must take into consideration (a) the standing, experience

and personal history of the employee, (b) evidence of the job market and (c) what the employee has done or failed to do to obtain alternative employment.

[118] An analysis of the cases which have been decided by this Court and the Court of Appeal in order to ascertain whether or not a precedent has been set to limit awards for immediate loss to six (6) months shall now be examined. In addition, what this Court shall also examine is what is the proper approach of the Court to the issue of what is the period (if any) during which an employee who is unfairly dismissed is able to claim under the heading of immediate loss.

[119] The case law commences with that of **LIAT (1974) Ltd v Sheppard Civil Appeal No. 6 of 1991**. The Respondent in this case was employed by LIAT for about seven years as an accounts clerk. She was dismissed with effect from August 14, 1984. The Respondent obtained employment 51 months after her dismissal and the Industrial Court awarded her a sum equivalent to her earnings for that period. The question arose as to what was a reasonable period during which she should have found alternative employment. **Byron JA** in delivering the judgment of the Court stated *inter alia* at page 8 as follows:

“The period of 51 months is so long that it raises by itself the issue of mitigation, and it was the duty of the court to determine whether in the context of the relevant circumstances the respondent’s inability to find employment was related to the quality of her efforts in that regard.”

At pages 8 and 9 Byron JA also stated *inter alia* as follows:

“The evidence was that she was not a specially skilled employee. Her job was as an accounts clerk and her salary indicated that she held a junior grade. Neither party adduced evidence on the job market and there was no evidence before the court other than the unsuccessful attempts made by the respondent in her search for employment. I have been unable to accept that evidence of 6 of 7 unsuccessful attempts to obtain employment over 51 months could constitute reasonably diligent attempts to find employment at the level of non-specialised work as an accounts clerk. The court cannot be debarred from exercising an objective approach merely by proof of actual loss because its duty must include considering the issue of mitigation as well. In my view the extent of the failure to mitigate is sufficiently substantial to warrant at least halving the award under this head.”

[120] Byron JA in his judgment was very clear that the Industrial Court should have regard to certain matters under this heading. They are as follows:

- (a) the duty of the employee to *“make reasonably diligent efforts to find employment;”* (See page 8)
- (b) the standard of alternative employment should be *“comparable”* to his previous employment; (See page 8)
- (c) The nature of employment previously held by the employee. In this regard whether the worker was *“a specially skilled employee”* is of some relevance; (See page 8)

- (d) “*Evidence of the local job market*”; (See page 8)
- (e) The duty of the court is to determine “*whether in the context of the relevant circumstances the respondent’s inability to find employment [is] related to the quality of (the employee’s) efforts in that regard*”; (See page 8)
- (f) The Court exercises “*an objective approach*” to the matters at (a) to (e) above. (See page 8)

[121] The Court of Appeal in **the Sheppard case** did not establish any particular time period during which an employee should mitigate his loss. It is to be noted that in accordance with the facts of this case the Court of Appeal opined that the **unskilled employee ought to have mitigated her loss within 25.5 months.**

[122] (a) The matter of an employee’s duty to mitigate also arose to be considered in the Industrial Court in the case of **Jennifer Watt v Antigua Village Condo Corporation Ref No. 19 of 1991**. A perusal of the Industrial Court report reveals that the Court did not analyse the issue of mitigation. The Court stated *inter alia* at page 16:

“(b) **Immediate loss of earnings: Subsequent to the dismissal, the Employee was out of work from November 01, 1990 until December 28, 1991; she took reasonable steps to find employment and made application to Sandals, St. James Club and Tour Operators and for this we would award U.S. \$1,800.00 x 13.5 months = U.S. \$24,200.00 @ \$2.70 = E.C \$65,610.00.**”

- (b) The award to the employee in this case was considered by the Court of Appeal. **Sir Vincent Floissac C.J** made reference to the “*objective*

approach” referred to by **Byron J.A. in Liat v Sheppard** (op cit). **Floissac CJ in Antigua Village Condo Corporation v Jennifer Watt at page 5** of the judgment articulated the Court’s clear duty in circumstances where the employee has failed to mitigate his loss. In those circumstances, *“the Court should make an appropriate deduction from the compensation for that loss.”*

- (c) The Court of Appeal in Jennifer Watt again did not establish any period during which an employee should mitigate his loss. In that case it upheld the award granted to the employee for 13.5 months during which time the Industrial Court held that *“she took reasonable steps to find employment”*.

- [123] (a) In **Anthea Roberts v Cable & Wireless (WI) Ltd. Ref No. 29 of 1993** this Court considered the issue of the employee’s immediate loss in the context of what was a reasonable period during which the employee should have mitigated her loss. The then President stated *inter alia* the Court’s ruling at page 16 in the following manner:
“The Employee is not a professional person or someone who possesses a particular skill, and thus we find it difficult to accept that with reasonably diligent efforts she could not have found employment at a comparable standard – for practical purposes her position could be described as a clerical officer.
No evidence has been adduced as to the job market in Antigua at the time and we believe that in all the circumstances the Employee should have been able to

obtain if not similar certainly alternate employment within a period six (6) months....”

- (b) The Court in *Anthea Roberts* took into consideration the following matters in arriving at its decision that a period of six (6) months was reasonable for the employee to find alternative employment.
 - (a) the fact that the employee was “*not a professional person or someone who possesses a particular skill;*” and
 - (b) “*all the circumstances*” of that particular case.

This judgment was finally heard in April 1998.

[124] Mr. Marshall Counsel for the Employer in his submissions under this heading at paragraph [113] of this judgment probably had in mind the Industrial Court case of **Juliet Harley v Blue Waters Beach Hotel Ref. No. 17 of 1995**. In this case “*The Employee commenced working with the Employers as a house maid responsible for cleaning rooms and making the beds (turn down beds).....*”

– See page 2 of the judgment.

She was subsequently offered a position in the gardening department “*as a weed-picker*” - (see page 2 of the judgment) and thereafter as a laundry maid. She always worked however as a “*house maid*”. She was dismissed in January 1993 and found employment in January 1995. The issue before the Court was what was the period during which she should have found alternative employment. The Court made two decisions under this heading. Firstly, it held that the employee should have found alternative or self-employment well within two years. Secondly, the Court limited the period

during which an award would be granted to an employee under this heading. The President stated the matter thus at **page 15** of the judgment.

“We believe that there should be a cut-off point and this we would fix at 24 weeks bearing in mind that the dismissal took place at the height of the tourist season.”

This decision was also heard in April 1998.

[125] Despite two decisions of the Court of Appeal in the *Sheppard case* (op cit) and the *Jennifer Watt case* (op cit) in which neither case has established that there should be a period of time during which all employees should mitigate their losses, the Industrial Court has ruled upon a specific period of time during which most employees should find alternative employment or be self employed. I refer to the cases of **Juliet Harley and Anthea Roberts** (op cit). This is particularly so regardless of the nature of the employment which the employee previously held. In effect, whether the employee is a “*house maid*” (see *Juliet Harley*) a professional, a highly skilled employee; or any other employee, all employees according to **Juliet Harley, Anthea Roberts** and subsequent cases must be regarded in the same manner.

[126] Whilst the Court of Appeal especially in **Liat v Sheppard** (op cit) and **Antigua Village Condo Corporation** (op cit) have established some guidelines which the Industrial Court should utilise in circumstances where there has been a failure to mitigate pre-trial loss of earnings so as to “*make an appropriate deduction from the compensation for that loss*” (see **Floissac CJ at page 5 of the Jennifer Watt case**) these guidelines have not been followed in the **Juliet Harley case** (op cit) nor in the cases which have been subsequently decided.

- [127] Furthermore, no guidelines have been articulated in the cases of **Juliet Harley and/or the Anthea Roberts** cases nor in the subsequent decisions for an understanding of how the Court has arrived at fixing “*a cut-off point at 24 weeks*” (see page 15 of the **Juliet Harley judgment**). Clear guidelines must be established in order that some consistency may be established in the granting of awards under this heading.
- [128] Must all employees in various spheres of management, television producers, highly skilled personnel, airline pilots, and others similar employees, mitigate their losses within 6 months in the same manner as the house maid, garbage collector, weed picker, handyman, security guard, or other such similar employees? These are merely but a few of the examples of workers who perform certain services. This list is however not exhaustive. Is this Court bound to follow the decisions of the previous Industrial Court in this regard?
- [129] **In Ministry of Defence v Hunt** (op cit), one Employment Appeal Tribunal of England was required to consider certain guidelines which were laid down by another Employment Appeal Tribunal to encourage consistency in certain awards for loss of earnings which were fluctuating. **Maurice Kay J in delivering the judgment of the Court stated *inter alia* at pages 567 and 568 as follows:**
- “Ministry of Defence v Cannock [1994] I.C.R. 918 was decided at a time when there was widespread concern about publicity given to widely fluctuating awards. Its purpose was to lay down guidelines in order to encourage consistency. It is a case of enormous importance and we pay our tribute to what was by any*

standards a judicial 'tour de force'. However, guidelines are simply that. They do not become self-executing and they do not relieve industrial tribunals to produce substantially similar awards in substantially similar cases. It seems to us, however, that the sheer number and variety of pending cases is still bound to produce a fairly wide range of awards. One only has to look at the evidence in the cases before us to appreciate this. The cases of Mrs. Hunt and Mrs. Anderson, for example, are substantially dissimilar and it should surprise no one that they attract dissimilar awards. In an area in which there is no statutory cap on awards, it would be surprising if highly dissimilar cases were all to be encompassed within a narrow band of quantum."

[130] In relation to awards under this heading some awards may be lower or higher than others for varying reasons. Some general observations are relevant to be mentioned. Firstly, the nature of an employee's employment may not involve a particular skill and in such circumstances having regard to all of the facts of the case the employee may be fortunate to find alternative employment within a shorter period of time. In these circumstances the consequences to this employee will be less significant than for a skilled employee.

[131] Secondly, should the employee's former position have entailed a degree of professionalism and /or skill, then having regard to the employee's standing, experience and personal history, and other circumstances, it may very well

be that he may only be able to obtain suitable alternative employment at a later stage than an unskilled employee.

[132] Thirdly, in circumstances where some employees have not achieved a satisfactory degree of education, where different employees have obtained varying experiences and personal history, all employees should not be all expected to mitigate their loss by finding alternative employment within a certain period of time.

[133] Fourthly, what particular period during which time an employee should find alternative comparable employment is a matter that I am not prepared to state. In this regard I prefer to be guided by certain guidelines laid down in **Liat v Sheppard** (op cit), **Antigua Village Condo Corporation** (op cit) and other general principles of mitigation outlined at paragraph [96] of this judgment.

[134] Fifthly the “*objective approach*” as stated by **Byron J A in Liat v Sheppard** (op cit) at page 8 is that the employee should act reasonably. Whether or not he has done so is a question of fact to be decided in the circumstances of each particularly case, and not a question of law.

[135] In **Ministry of Defence v Hunt** (op cit) this Employment Appeal Tribunal preferred not to follow certain “*guidelines in order to encourage consistency*” which were laid down by another Employment Appeal Tribunal in **Ministry of Defence v Cannock** (op cit). **Ministry of Defence v Cannock** was described as “*a case of enormous importance and a judicial tour de force.*” – per **Maurice Kay J.** at page 567 in **Ministry of Defence v Hunt** (op cit).

[136] No such guidelines for the establishment of a judicial cap in an area where there is no statutory cap have been articulated by this Court for awards to be limited to “*a cut-off point.....at 24 weeks.*” Since no guidelines have ever been established it stands to reason *a fortiori* that this Court is not bound by any prior decisions of this Court which seek to establish such a “*cut-off point*” during which time all or any employees irrespective of their standing, skill, training, professionalism and or experience and personal history are all expected to obtain suitable alternative employment within a period of 24 weeks.

[137] The efforts which this employee made to mitigate his loss are outlined at paragraphs [26] to [28] hereof. The conclusions which I have arrived at are that this employee acted reasonably in all of the circumstances of this case to obtain suitable alternative employment and that he has mitigated his loss are referred to at paragraphs [99], [100], and [111] hereof.

[138] In light of the conclusions which are arrived at in paragraphs [136] and [137] hereof, this Court holds that the period between January 1, 2005 to July 04, 2007 was reasonable for this employee to have found alternative comparable employment having regard to all of the facts of this case. It represents a period of 30 months which is fair and reasonable. The sums earned during this period must be deducted from the award.

[139] (a) The sum which is due to the Employee under this heading is \$192,684.12. It is shown in the schedule at paragraph [139] (b).

Schedule

(b) **Immediate Loss**

Years with Employer	Gross Sum Expected	Amount worked for	Deductions	Net Loss
2005	\$147,600.00	\$44,041.02	\$4,618.32	\$98,940.66
2006	\$150,000.00	\$83,162.04	\$4,618.32	\$62,219.64
2007	\$75,600.00	\$41,767.02	\$2,309.16	\$31,523.82
Total	\$373,200	\$168,970.08	\$11,545.80	\$192,684.12

(c) **Manner of Dismissal**

[140] (i) An employee is entitled to an award under this heading only if *“the manner and circumstances of his dismissal could give rise to any risk of financial loss at a later stage by for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal.”*

- See Sir John Donaldson in Norton Tool Co. Ltd. v Newson [1972] I.C.R. 501 page 506 Letter E.

(ii) Each case has to be determined upon its own merits.

[141] The Court *“must not confine itself to the evidence on oath. It must take cognisance of, among other things – principles and practices of good industrial relations....”*

See Bishop J.A. In Antigua Commercial Bank v Mary White Civil Appeal No. 1 of 1988

Application of the Law to the Facts

[142] The letter of dismissal dated December 29, 2004 made reference to the Employee's "*extended sick leave*" which rendered him "*unfit to continue in (his employment) as a pilot with Caribbean Star Airlines.*" As a consequence of this finding by the Employer it dismissed the Employee. Nowhere in the letter of dismissal was there a mention of the Employee's inability to perform his duties due to any mental incapacity.

[143] (i) A Medical Report authored by Dr. Rodney Williams on behalf of the Employer and dated December 17, 2004 was admitted into evidence as "LC-4". That Medical Report contains no reference to the Employee's inability to perform his duties. In fact he stated *inter alia* as follows:

"Clinical examination was unremarkable."

(ii) There was no evidence whatsoever that Dr. Williams was trained in psychiatry. He expressed no psychiatric opinion.

(iii) The Employer was well within its right to have the Employee examined by a psychiatrist. This examination would have tested his mental and or psychiatric competence to perform his duties as an airline pilot. If any authority is required for this proposition of law, it is **LIAT [1974] Ltd. United v Roger Greenidge Civil Appeal No. 13 of 1989.**

[144] Mr. Marshall submits *inter alia* at **paragraph [42]** that Dr. Williams' medical report contains enough information for the Employer to reasonably suspect that the Employee is suffering from some form of mental illness. According to Mr. Marshall "*The employee himself confirms that in his*

cross examination when he states that Dr. King to his knowledge is and was a psychologist, and that Dr. King placed him on medication.”

[145] At paragraph [44] Mr. Marshall asserts *inter alia* that Mr. Streete’s “**mental illness**” would have invoked “**claims of negligence on the part of management of the Employer should a mishap occur to a flight under the Employer’s command given that the Employee’s business vests [it] with an obligation of public safety.**”

[146] There was no evidence in this case that the Employee was suffering from any form of mental illness. The Employer never availed itself of its legal right to have the Employee’s mental competence examined by a psychiatrist.

[147] Was it a good industrial relations practice for Mr. Marshall to seek to introduce and or to seek to colour the evidence in such form or fashion to state that Mr. Streete was “**suffering from some form of mental illness**”?

[148] I hold that it was wrong and unfair for Mr. Marshall to submit that the Medical Report of Dr. Williams which formed the basis of the Employee’s dismissal gave the Employer the authority to state that the Employee was a mad person. This was an unwarranted and vicious comment upon the character and reputation of the Employee. It is not a good industrial relations practice for an Employer to dismiss an employee in accordance with this form of letter of dismissal and in the same manner subsequently to state in Court that he was “**suffering from some form of mental illness**”.

[149] i) This Court was required to examine the issue of an employee’s manner of dismissal in **Madeline Taylor v The Epicurean Ltd. Ref. No.**

56 of 1996. In that case the employee was charged by the police with theft of money. She was acquitted. She was subsequently dismissed for the same offence of theft. Maundy P. held that her dismissal was unfair. In the Court's judgment Maundy P. stated *inter alia* at page 14 paragraph [39] as follows:

“Even though subsequent to the dismissal the Employee did obtain employment where she was again concerned with monies, I believe that it is correct to say that as a general rule an employer is usually reluctant to employ such a person to deal with his monies. And even if the allegation is found to be false or unsubstantiated, it nevertheless will leave an indelible mark on the individual's character and she will have fingers pointed at her perhaps for the balance of her life, especially in a small community like ours.”

(ii) Maundy P. stated further reasons for the award at paragraph [50] (c) as follows:

“I am of the view that the dismissal of an Accounts Supervisor who deals with money and indeed, large sums of money, struck directly at her reputation and character and would make her more liable for dismissal and less liable to find employment. To my mind this is a fit and proper instance for an award under this head and would award the sum of \$5,000.00.”

[150] The Employer appealed the judgment of the Industrial Court. In **The Epicurean Ltd and Madeline Taylor Civil Appeal No. 4 of 2003**,

Rawlins, J.A (Ag) (as he then was) in delivering the judgment of the Court of Appeal stated inter alia at page 11 paragraph [39] as follows:

“For the reasons that the Industrial Court gave we agree with the sums of \$22,500.00 that it awarded for Immediate Loss. We also agree with the sum of \$5,000.00 that it awarded under the heading of Manner of Dismissal.”

[151] The Employee in this case obtained subsequent employment as an airline pilot. It is however reasonable to hold that if an Employer is aware of the allegations of mental illness which were made by the Employer against the Employee in this Court then it would be hesitant or unwilling to offer him employment as an airline pilot.

[152] I hold that this is a proper case for an award to be made under this heading. The sum of \$35,000.00 is fair to award him.

(d) **Future Loss**

In the Employee's evidence he stated that he was paid US \$5,000.00 per month. A conversion of this sum is E.C \$13,500.00 per month. No award shall be made under this head.

(e) **Fringe Benefits**

(a) **Pension Loss**

(i) The Employee in his evidence as contained in his Witness Statement gave evidence that he suffered loss as a consequence of a contribution which he made to a pension fund. He stated that he was contributing

\$648.00 per month to this pension programme. The Employer also contributed one half of this amount or the sum of \$324.00 each month.

- (ii) No computation was presented by either Counsel for the Employee of what the Employee requests. No cases were cited in support of the submission of an award under this heading. Counsel for the Employer was equally unhelpful simply stating that “*no evidence has been tendered in support of such*” a claim under this heading.
- (iii) I derive some assistance however in how this matter shall be dealt with by reference to the Court of Appeal judgment in **Liat (1974) Ltd. v Sheppard** (op cit). **Byron J.** in delivering the Court’s judgment stated *inter alia* at paragraph 9 as follows:
- “The existence of a pension fund into which contributions were paid requires an award under this head.....”*

Byron J. at page 9 of the judgment also articulated an approach which the Court may utilise in arriving at the determination of an award under this heading. He stated *inter alia* as follows:

“Fringe Benefits

(a) pension rights

It has been accepted that one method of assessing loss under this head is to calculate it in terms of the loss of money already contributed to a pension scheme the employee being entitled to the value of the employer’s contributions as well as his own up to the date of the

dismissal increased by compound interest from the date of payment.

Copson V Eversure Accessories Ltd (1974) I.C.R. 636.”

- (iv) In **Liat v Sheppard** although there was insufficient evidence under this heading “*the Court arrived at a gross estimate*” which was upheld by the Court of Appeal. More evidence was presented in this case for this Court to arrive at a determination of the issue than in **Liat v Sheppard**.
- (v) In addition I have been assisted by a decision of this Court in **Dublin v Royal Bank of Canada Ref. No. 15 of 1983**. In that case, the Court awarded the employee \$50,000.00 for the loss of a number of fringe benefits which included (a) loss of contributions to the pension fund, (b) loans at concessionary rates of interest, (c) life insurance coverage (d) other benefits. Upon the facts of this case the Employee was entitled to; (a) contributions to the pension fund; (b) loans at preferential rates (see Exhibit EAS 15-1); (c) group life insurance coverage.

The employee has been deprived of these benefits and is entitled to be compensated under this heading. Taking into consideration the facts of this case I award him the sum of \$75,000.00 under this heading.

(b) Holiday Pay

In the Employee’s Witness Statement at EAS 16-2, he stated that he was due his holiday of 42 days for the year 2004. This is valued at \$16,005.85. No evidence was led by Counsel for the Employer to refute the Employee’s

claim under this heading. In the circumstances, I award the Employee \$16,005.85 under this heading.

(c) Notice Pay

The Employee was dismissed without any notice. In accordance with C 9 (3) and (4) of the Labour Code, he is entitled to one month's pay in lieu of notice. The sum to be paid to him is \$11,591.54.

Exemplary Damages

- [153] This Employee had previously received no warnings for misconduct and/or any other type of misbehaviour from the Employer. On the contrary he received four (4) letters of commendation. No evidence was led by the Employer that he was placed upon any other certified leave of absences due to illness apart from that which was referred to in the Employer's letter to the Employee dated October 15, 2004.
- [154] The first response to the Employee's certified leave of absence due to illness is contained in Captain Gill's letter to the Employee dated October 15, 2004. This letter while acknowledging that the Employer was not aware of "*the nature of (the employee's) illness*," advised him to be examined by Dr. Rodney Williams, the medical officer on behalf of the Employer.
- [155] He was at all material times due to return to work on January 2, 2005. His Certificate and Validity of a Licence for Pilots of Aeroplanes issued by the OECS Directorate of Civil Aviation was valid from October 1, 2004 to March 31, 2005. In addition, the Employee spoke with Ms. Jan Sirjusinga, Human Resource Director of the employer on December 17, 2004. In that

conversation, he informed her that he *“would be fit to resume work on 2nd January 2005 and that a letter would be sent to the Directorate of Civil Aviation confirming the same”*.

- See his Witness Summary at paragraph 8

[156] No medical evidence was produced by Dr. Williams or any other medical practitioner to the Employer which evinced the Employee’s unfitness to work on January 2, 2005. On the contrary, the medical report of Dr. N. Fuller dated December 28, 2004 stated *inter alia* that the Employee was *“now fit to resume work as of the 22 January 2005.”*

[157] The Employee gave evidence that he was an executive member of the Association. He performed the duties of a Council Member. He informed the Court of a letter dated December 16, 2004 which the Association sent to the Labour Commissioner. It was forwarded to Ms. Jan Sirjusingh, Director of Human Resources of Caribbean Star.

- See Exhibit “EAS-8”

[158] He further gave evidence that as the establishment of the Association gained some currency and was known by the Employer to have been formed, *“meetings between the executive of the Union and official of the Employer ceased. The management of the Employer ceased to hold meetings with us, as was the case and customary in times past.”*

- See his Witness Summary at paragraph 17

[159] He further gave evidence at paragraph 19 of this Witness Summary as follows:

“(19) The billionaire owner of Caribbean Star, Robert Allen Stanford, had made it known in no uncertain terms that he would not tolerate the presence of a union in any of his companies and if he got wind of the fact that Caribbean Star had been unionised he would close down the airline in a heartbeat. In a meeting in July 2004, when Mr. Stanford summoned the pilots to a meeting at the airline’s hanger and slapped \$175,000.00 on the table. [H]e made known his position. Mr. Stanford was not into unions and he was not going to allow unions to [set] up shop in his airline.”

[160] Counsel for the Employer in his submissions to this Court stated inter alia as follows: *“Clearly the facts as in the Employers possession suggested a strong possibility that the Employee was suffering from some sort of mental illness.”*

[161] An assertion by Mr. Marshall, Counsel for the Employer that there was a *“strong possibility”* that this Employee *“was suffering from some sort of mental illness”* was absolutely unsupported by the evidence. In the circumstances it was wholly inappropriate, improper and absolutely wrong for Mr. Marshall to make such a submission which had no basis in fact whatsoever.

[162] The evidence did not support a finding that this Employer was fired due to any illness which he previously exhibited. When the letter of dismissal was written on December 29, 2004, the Employer was fully aware that his return to work was extremely imminent.

[163] The Employer was also cognisant of this Employee's participation and involvement in the Association which the Employer expressed its objections thereto. The Employer may not be criticised for its objection to the establishment of the Association. However, if it takes any action against an Employee simply because that Employee participates in the Association, especially in circumstances where the Employer dismisses the Employee, then its actions may be visited by an award of exemplary damages being made against it.

[164] The Employee in this case gave evidence that the employer "*intended to inflict maximum embarrassment to [him] and once and for all bring to an end any efforts by employees to unionise within any Company that was part of the Stanford Financial Group.*"

- See his Witness Statement at paragraph 30

Mr. Streete was not cross examined with regard to this statement. The Employer's witness Ms. Laura Cotton was not requested to comment upon it.

THE DECISION

[165] The dismissal referred to at paragraph [91] had a deleterious effect upon this Employee. The Employer needs to be punished for the behaviour which it exhibited. The awards previously outlined above are inadequate for the purpose of punishing and deterring the Employer. In light of this finding, this Employee is entitled to an award of **exemplary damages**.

THE LAW

[166] Section 10 (4) and (5) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda make provision for an award of exemplary damages to be made to an employee where he has been dismissed in circumstances that are harsh and oppressive or not in accordance with good industrial relation practices. The principles which guide the Court in the making of such an award are set out in **Halsbury's Law of England Fourth Edition (Reissue) Vol. 12 (1) at paragraphs [1115 to 1119]**. They may be summarized as follows:

- (i) Exemplary damages are to be awarded only if the compensatory award is inadequate;
- (ii) For an award the employee must have suffered some punishable behaviour;
- (iii) The standard of proof is civil;
- (iv) The power to award exemplary damages should be used with restraint;
- (v) The parties' means are relevant;
- (vi) Awards should be moderate.

[167] Counsel for the Employee submits *"that a substantial sum ought to be awarded in the instant case for exemplary damages"*. Apart from the cases of **Cassell & Company Ltd v Broome [1972] 1 All E.R. 801** and **Rookes v Bernard [1964] 1 All E.R. 367** no cases of the Industrial Court or the Court of Appeal were cited for this Court's consideration.

[168] Counsel for the Employer is not of the view that an award should be made under this heading. However, he submitted as follows:

"Notwithstanding the Employer's position on such an award, an examination of the case law in which such awards were made (include) the following."

He cited **Sundry Workers v Club Antigua Ref. No. 11 of 1997, Brenda Albert et al v Woods Development Ltd. Ref. No. 5 of 1998, Leslie Hoffman v Stanford Financial Group Ltd Ref. No. 4 of 1999, and Robert Hoffman v Stanford Financial Group Ltd Ref. No.10 of 1999.**

- **See Head 6 of Mr. Marshall's Written Submissions.**

[169] The question is, whether the sum which the Court has awarded the employee for compensatory damages is adequate. In my judgment it is not. I am not of the opinion that this sum is an adequate reflection of the gravity of the Employer's conduct, or that it would deter it from such conduct in the future. In these circumstances an award of exemplary damages is therefore in my judgment, necessary to meet these two requirements.

[170] I have found **Stanford Financial Group Ltd v Leslie Hoffman Civil Appeal No. 2 of 2002** to be helpful. In that case the Court of Appeal upheld the Industrial Court's award of US \$30,000.00 made in favour of the respondent. **Redhead J.A** in delivering the Court's judgment stated *inter alia* at page 5 as follows:

"It cannot be said in my judgment, that this award was out of all proportion and unjustifiable so as to cause this Court to interfere with the discretion of the Industrial Court when it awarded US \$30,000.00 as exemplary damages."

[171] Taking into consideration all of the facts of this case inclusive of the right to an employee not be fired at the will of the employer without just cause, I award the Employee \$75,000.00.

COSTS

[172] In accordance with Section (10) 2 of the Industrial Court Act, costs are only awarded if the circumstances of the case reveal that there are exceptional reasons for so doing. Major issues upon which considerable attention was placed dealt with;

- (a) circumstances under which a termination of an employee's employment may properly take place under C 16 (2) of the Labour Code;
- (b) the principles to be examined under the heading of dismissal due to illness under C58 (i) (e) of the Labour Code;
- (c) principles of mitigation of loss;

[173] I find that the matters stated at paragraph [172] are exceptional reasons which make it fit and proper to order costs to the employee in accordance with Section 10 (2) of the Industrial Court Act. As far back as 1983 in **Danzlear Dublin v Royal Bank of Canada Ref No. 15 of 1983**, this Court made an award of costs to an Employee in the sum of \$10,000.00. However I hold that Counsel for the Employee ought to have been more productive with respect to their submissions. In all of the circumstances therefore, I award the Employee \$20,000.00 under this heading.

[174] **SUMMARY OF AWARDS**

(a) Loss of Protection	\$	52,161.93
(b) Immediate Loss	\$	192,684.12
(c) Manner of Dismissal	\$	35,000.00
(d) Future Loss	\$	NIL
(e) Fringe Benefits		
(i) Pension Loss	\$	75,000.00
(ii) Holiday Pay	\$	16,005.85
(iii) Notice Pay	\$	11,591.54
(f) Exemplary Damages	\$	75,000.00
(g) Costs	\$	<u>20,000.00</u>
	\$	<u>477,443.44</u>

[175] In arriving at a decision with regard to this Reference, this Court has examined all the evidence adduced, observed the witnesses' demeanours and the submissions made on behalf of both parties. This Court has also taken into consideration the relevant provisions of the Antigua & Barbuda Labour Code and the Industrial Court Act Cap. 214 of the Laws of Antigua & Barbuda.

[176] **CONCLUSION**

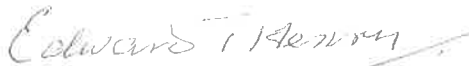
The above sum of \$477,443.44 less any sum which was paid by the Employer to the Employee upon his dismissal shall be paid by the Employer to the Employee on or before the 31st day of December 2008.

Dated the 27th day of November 2008



PHILIP A. PILGRIM
President

I agree.



EDWARD T. HENRY
Member

I also agree.



SAMUEL R. AYMER
Member

