

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE Nos.	20 of 2005 KEITH THOMPSON	Employees
	21 of 2005 STEPHEN ST. AGATHE	
	22 of 2005 CAESAR HAYNES	
	23 of 2005 RICARDO SEALY	
	24 of 2005 PATTERSON THOMPSON	
	07 of 2007 DYLAN BOXILL	

vs

Before:	CARIBBEAN STAR AIRLINES LIMITED	Employer
	The Hon. Philip A. Pilgrim	President
	The Hon. M. Althea Crick	Member
	The Hon. Samuel R. Aymer	Member

Appearances:

M. Gerald Watt, Q.C. in association with Dr. David Dorsett of Watt & Associates, Attorneys-at-Law for the Employees
Mr. Hugh C. Marshall in association with Mrs. Cherissa Robert-Thomas, of Marshall & Co., Attorneys-at-Law for the Employer

2007: July 04
2007: October 02, 03, 04
2007: November 08
2008: November 28

JUDGMENT

PILGRIM, P:

INTRODUCTION

- [1] On October 02, 2007 the above References were consolidated and ordered to be heard together. The relevant legal issues are identical. The reason given

for the dismissal of all the employees is also identical. There is therefore no actual difference in the reasoning of their dismissals which suggests a different application of the legal principles.

- [2] Caribbean Star Airlines Limited at all material times operated an airline called **Caribbean Star Airlines**. This shall afterwards sometimes be referred to as “**the airline**” or “**the Employer**”. The airline used to transport passengers and cargo to various countries in the Caribbean. Prior to 2007 it was based and had its headquarters in Antigua and Barbuda. It ceased its operations as an airline in or about the month of November 2007.
- [3] Prior to the commencement of the airline’s operations it recruited some pilots and airline workers. Some of those pilots include the ones who have commenced legal proceedings in this Court.

THE FACTS

(1) KEITH THOMPSON

- [4] Mr. Keith Thompson, (afterwards sometimes called “**Mr. Keith Thompson**” or “**the First Employee**”) resides at Cedar Grove in the parish of St. John’s in Antigua, and is a commercial airline pilot by profession. He was hired by the Employer as an airline pilot. This was pursuant to an agreement between himself and the Employer dated May 03, 2000. His contractual date of commencement of his duties was August 01, 2000. He actually started to work with the Employer on October 03, 2000. He worked as a Captain.

- [5] The First Employee along with the above Employees named in these References commenced efforts to and registered a trade union in or about October 2003. It was called Caribbean Star Airline Pilots Association. Its registration was renewed on November 11, 2004. (It shall be afterwards be called “**the Association**” or “**the Trade Union**”). In his opinion, the formation and registration of this trade union met with “*stout resistance and hostility from the Employer*”. (See his Witness Summary at paragraph 5.)
- [6] During his tenure with the Employer, he was complimented by letter dated May 12, 2004. That letter stated as follows:

“May 12, 2004

Dear Keith

TEAMWORK & RECOGNITION

*“There is no such thing as a self made man
You will reach your goals with the help of others”*

Team work 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 (Ms)
Director, Human Resources"*

- [7] The **First Employee** was offered the permanent appointment as Chief Pilot by the Employer in 2004. He worked in that position for four (4) months. He declined the Employer's offer. The airline wrote a Memorandum to the Flight Operations dated July 07, 2004. It stated as follows:

MEMORANDUM TO AIRCREW – ALL PILOTS

FROM: VICE PRESIDENT FLIGHT OPS & GROUND SERVICES

REF: Flight Operations Department Update

DATE: 7th July 2004

Further to my memo of Feb 9th 2004, Captain Keith Thompson has declined the permanent appointment to the position of Chief Pilot.

Captain Gerald Gill will now continue in this position.

The Company wishes to thank Capt. Thompson for his untiring efforts and energies expended during his short tenure in that office over the past 4 months and wishes him continued good cheer as he returns to full time line flying.

Yours truly,

*Captain Gerald Fredericks
V.P. Operations & Technical Services"*

- [8] Mr. Keith Thompson's employment with the Employer ceased on January 31, 2005. By letter of the same date the Employer wrote to the First Employee dismissing him from its employ. Save and except for the name and address of the **First Employee**, and the amount paid to him, the letter of dismissal to him is the identical letter which the Employer wrote to all of the employees in these References. I shall afterwards refer to it as "**the letter of dismissal**". The letter of dismissal reads as follows:

"31st January 2005

*Mr. Keith Thompson
c/o Caribbean Star Airlines Limited
Coolidge Industrial Park
St. George's
Antigua*

Dear Mr. Thompson:

Caribbean Star Airlines has a vision to become the best airline in the Caribbean and the world. Retention of the staff with the abilities and commitment to the airline and this vision is crucial to obtaining that goal. A cohesive team of management and staff working together with seamless cooperation and flawless execution is the only way that this objective shall be achieved.

Caribbean star Airlines Limited has had to make the hard decision as to which of our staff we consider shall enable us to achieve that vision. The Management of the Airlines has determined that we do not consider that you shall assist us to meet that goal.

We have therefore decided to terminate your employment with Caribbean Star Airlines with immediate effect. We appreciate your past efforts and are eager to assist you as much as possible. Accordingly we enclose a cheque in the amount of \$104408.00 to cover your Equity. 1 month's salary in lieu of Notice and 3 months additional pay. Any outstanding vacation or overtime entitlement will be forwarded in due course.

In the interim we ask that you immediately return all company property to your Manager. This is to include company identification, security passes, uniform, mobile phone, and laptop.

Please do not return to your office or the offices of Caribbean Star Airlines other than by prior arrangement to return company property. If you have to collect personal property from company premises then please notify your Manager so that this can be arranged.

We wish you well in your future endeavors.

Yours sincerely

*Jan Sirjusingh
Human Resources Director
Caribbean Star Airlines Limited"*

LEGAL PROCEEDINGS

- [9] The **First Employee** commenced legal proceedings by filing a Reference on September 23, 2005. In that Reference Watt & Associates, Attorneys-at-Law for Mr. Keith Thompson raised the existence of a trade dispute between the **First Employee** and the Employer.
- [10] (i) On October 25, 2005 an Employee's Memorandum was filed on Mr. Keith Thompson's behalf. The **First Employee** claims that his dismissal was unfair. It was done in a way which was contrary to good industrial relations practices. Mr. Keith Thompson avers in the Memorandum that whilst employed with the Employer the number of pilots hired by the Employer was sixty (60). According to him he was ranked number 8.
- (ii) The Employee's Memorandum also stated *inter alia* that by letter of May 18, 2005 his Attorneys-at-Law referred his dispute to the Labour Commissioner. He sought the Labour Commissioner's assistance to intervene with a view to arriving at a settlement of the dispute between the First Employee and the Employer. A conciliation meeting was

held. It was attended by the First Employee. The Employer was notified. It did not attend the meeting.

[11] The Employer's Memorandum was filed on March 21, 2006. The Employer in its Memorandum stated seven reasons why it dismissed Mr. Keith Thompson. They are as follows:

- (i) This Court has no jurisdiction to hear this matter having regard to Section 19 of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda;
- (ii) The formation of the Caribbean Star Airline Pilots Association;
- (iii) He protested simulator testing and verification of Pilots;
- (iv) A demonstration of a poor work attitude as a consequence of "***his membership and participation in the said Caribbean Star Airline Pilots Association***";
- (v) "***Disruptive conduct, public behaviour and statements made or caused to be made by and on behalf of the Employee.....on the Observer Radio on 14th December, 2004 and on dates thereafter***";
- (vi) The creation of "***low morale amongst employees on a whole***" and causing the Employer to be brought into "***public disrepute***";
- (vii) The actions at (ii) to (vi) above were not in keeping with the Employer's "***vision of (a) single investor who sought to provide high quality and reliable indigenous airline services to the people of the Caribbean region.***"

[12] The First Employee gave evidence. A Witness Summary was filed on his behalf on September 17, 2007. Attached to his Witness Summary is a quantification of his claim against the Employer in damages.

- [13] In answer to Mr. Marshall, Attorney-at-law for the Employer he stated *inter alia* that upon his termination by the Employer he was paid a cheque for \$104,408.00. He has kept that sum in its entirety. He worked at Caribbean Star Airlines Ltd. for \$12,400.00 monthly. This comprised a salary of \$7,400.00 and allowances of \$5,000.00.
- [14] He agreed with Mr. Marshall that the letter of dismissal relates to “***not having a vision***”. In January 2005 he would have earned \$12,400.00. There was no indication from his Employee’s Memorandum that he sought and refused employment between February 2005 and July 03, 2005. However, he gave evidence that he sought employment during the period from various airlines. (See paragraph [17] below)
- [15] He recalled the months immediately prior to his dismissal in January 2005. There was a public debate. It concerned the formation of a trade union. He recalled some press statements. He was of the view that it was “***a good public debate***”. Matters which concerned the Employer and the Employees were discussed in the public debate. He took no part in the public debate. The Association participated in the public debate.
- [16] As a council member the **First Employee** was in agreement with the public debate. As at January 31, 2005 there was a registered body which sought to have the airline recognize it as the sole bargaining agent. He was dismissed before the Association obtained recognition from the Employer as the Pilots’ Trade Union representative. The Trade Union process between the Employer and the Employees became contentious. It was in the public domain.

His Mitigating Efforts

- [17] Mr. Keith Thompson told the Court that he was hired by LIAT (1974) Ltd. in July 2005 as a First Officer. This is a junior position. He sought alternative employment. He was interviewed by the Director of Civil Aviation in Guyana. This took place in May 2005. A Flight Inspector's vacancy was available. He did not obtain this position. He also applied to St. Vincent Airways. No positions were available in February or March 2005. He also held discussions with Tobago Express in or about March 2005. These discussions bore no fruit due to work permit challenges.
- [18] He was currently employed with ANET, Osaka in Japan. ANET is a subsidiary of ANA All Nippon Airlines. He obtained this position from March 2007.

(2) MR. DYLAN BOXILL

- [19] Mr. Dylan Boxill is an airline pilot by profession. He is afterwards sometimes referred to as ("**Mr. Boxill**" or "**the Second Employee**"). He started to work for the Employer on June 18, 2001. This was pursuant to a contract of employment dated June 11, 2001. He worked as a Captain on the Employer's Dash 8 aircraft.
- [20] In similar fashion to Mr. Keith Thompson, Mr. Boxill participated in efforts to form a trade union. These efforts were successful. On October 31, 2003 the Association was formed. It became a trade union. It was met with hostility from the Employer.

- [21] The Second Employee was dismissed by the employer. The letter of dismissal is dated January 31, 2005. Save and except for (a) the amount paid to him and (b) his name and address, the letter of dismissal is identical to the one referred to at paragraph [8] hereof.
- [22] The dispute between the **Second Employee** and the Employer was referred to the Labour Commissioner by his Attorneys-at-Law by letter of May 18, 2005.

LEGAL PROCEEDINGS

- [23] A Reference on Mr. Boxill's behalf was filed on July 31, 2007. He claimed that he was unfairly dismissed. Some issues were raised in that Reference.
- [24] An Employee's Memorandum was filed on July 31, 2007. In summary the **Second Employee** claims that his dismissal was contrary to good industrial relations practices.
- [25] An Employer's Memorandum was filed on September 27, 2007. The Employer made mention of a dispute between the two parties. It was referred to the Labour Commissioner. The Employer's Memorandum of reasons for dismissal of Mr. Boxill is identical to those which are further particularized at paragraph [11] of this judgment.
- [26] Mr. Boxill gave evidence in support of his claim. He resides at Calgary, Alberta in Canada. He confirmed the contents of his Witness Summary filed on September 17, 2007.

- [27] In answer to Mr. Gerald Watt Q.C., Mr. Boxill stated that during his tenure with Caribbean Star Airlines he was never accused of any disruptive conduct. He was never written any letters from the Employer with regard to his connection with the Association. Particulars of his loss are attached to his Witness Summary.
- [28] When he was dismissed by the airline, he was a Captain who flew the Dash 8 aircraft. His seniority ranking was No. 31 in a field of 60 pilots. He stated that he received \$53,410.50 upon his dismissal from the airline. He occupied no position with the Association. Mr. Boxill avers that his monthly salary varies. This depends on the number of hours which he flies. His annual base salary is Canadian \$40,000.00.
- [29] He referred to the letter of dismissal. He agreed with Mr. Marshall that “*no paragraph states that I am incompetent.*” He states that he read paragraph (2) of the letter of dismissal. This deals with a vision which means the development of the Company moving forward. He was a member of the Association. He was not an executive member. He shared the aspirations of the association. In the months leading up to December 2004 he shared the activities of the Association.
- [30] He was aware of the role played by the Association in a public debate. He could not state why a matter between the Association and the Employer was discussed in the public domain. He signed a contract of employment which related to confidentiality. He heard comments on a radio station by members of the airline and the trade union. One of the trade union members who spoke

in a radio discussion was Captain Ricardo Sealy. It was during a call in programme.

- [31] In answer to Mr. Watt Q.C., Mr. Boxill stated that the Employer never explained to him what was the meaning of the “*vision of a single investor airline*”.

3. MR. CAESAR HAYNES

- [32] Mr. Caesar Haynes is an airline pilot by profession. He resides at Crosbies in the parish of St. Johns in Antigua. He was employed by the Employer as a Captain on its Dash 8 Aircraft. He commenced his employment from July 19, 2000. This was pursuant to a contract of employment between himself and the Employer dated April 15, 2000. He was employed as a Base and Instrument Rating Captain.
- [33] On October 31, 2003 Mr. Haynes together with the other Employees mentioned in these References formed the Association. He was elected as its Vice Chairman. It was disliked by the Employer.
- [34] By letter of January 31, 2005 the Employer dismissed Mr. Haynes. The letter of dismissal was in the same form and substance as the one which Messrs. Keith Thompson and Dylan Boxill received from the Employer, save and except for (a) the name and address of the Employee and (b) the sum paid to the Employee.

LEGAL PROCEEDINGS

- [35] Mr. Haynes commenced legal proceedings by filing a Reference. In that Reference certain issues were stated for the Court's determination.
- [36] An Employee's Memorandum was filed on October 25, 2005. In that document the Employee claims that he was unfairly dismissed. The reason for the dismissal was the identical one which the Employer rendered to Messrs. Keith Thompson and Dylan Boxill.
- [37] The Employer filed its Memorandum on March 31, 2006. The reasons outlined for dismissal in the Memorandum are outlined at paragraph [11] of this judgment.
- [38] Mr. Haynes gave evidence. A Witness Statement was filed on his behalf on September 17, 2007. The contents he stated are true and correct. The Employer in its Memorandum also averred that "*the Employee during the period May 4 to January 5 reported sick some 17 times.*" It was abandoned by Mr. Marshall Attorney-at-Law for the Employer. This is so because Mr. Allan Hart, Director of Flight Operations Officer of the airline in answer to Mr. Watt Q.C. in cross-examination stated *inter alia* as follows:
- "Caribbean Star is not pursuing the illness claim against Caesar Haynes."***
- [39] Mr. Haynes also denied the allegations referred to at paragraph [11]. No one from the Employer spoke to or with him about them. From September 2001 to August 2002 he held the position of Chief Pilot with the Employer. He resigned from this position. He was appointed Simulator Instructor from the

summer of 2003. At the date of his dismissal his gross monthly salary was \$12, 400.00. His seniority number was (5).

[40] Mr. Haynes referred the Court to a meeting which took place in the hangar at V.C. Bird International Airport. This was in July 2004. All of the pilots mentioned in these References attended. About 20 to 30 other pilots also attended. Mr. R. Allen Stanford the owner of Caribbean Star Airlines Limited also attended. He asked the pilots what was the matter. No one responded.

[41] Mr. Stanford made reference to the amount of money which he invested daily in the airline. He caused to be placed what he claimed was \$175, 000.00 in cash on a table. It was in front of him. Mr. Stanford referred to the Pilots Union. He walked directly to Captain Sealy. He asked Captain Sealy if a trade union was formed. Captain Sealy's response was as follows;

"We have an association."

Mr. Stanford asked the question of Captain Sealy again. Captain Sealy's response was:

"We have a union".

[42] According to Mr. Haynes, Mr. Stanford further stated his intention to "***shut the Company down and not lose one night's sleep.***" Most of the pilots on hearing this were "***rather quiet.***"

[43] In answer to Mr. Marshall, Mr. Haynes stated that he "***was never told by any member of Caribbean Star that (he) could not form an association.***" Mr. Haynes reiterated to Mr. Marshall, Mr. Stanford's wish that "***he had no***

intention of engaging with a bargaining unit and would shut the airline down”.

[44] In further answer to Mr. Marshall, Mr. Haynes stated that *“No one from Caribbean Star said to me that a trade union cannot be formed. Caribbean Star worked with the non-executive of the Pilots Association.”*

[45] According to Mr. Haynes *“the matters between the pilots and the Employer related to the employment relationship.”* They were confidential matters. The Association was active in placing the debate between the Employer and the Employee in the public domain. This debate concerned *“a B scale. This is a salary scale.”* This related to *“salary matters which were not addressed.”* *“No confidential information relating to Caribbean Star was taken into the public domain. In all of the places where he previously worked he did not hear of salary matters being discussed in the public domain.”*

[46] After being dismissed he was paid \$105,400.00 by the Employer. For the purpose of facilitating meetings with the airline, Mr. Haynes stated that he submitted the names of Captains Ricardo Sealy, Elliot Streete and himself to Captain Gill, Chief Pilot of the Employer. These were rejected by Captain Gill.

4. STEPHEN ST. AGATHE

[47] Mr. Stephen St. Agathe resides at Marble Hill in the parish of St. John’s in Antigua and Barbuda. He, like the other employees, is an airline pilot by profession.

- [48] He entered into a contract of employment with the Employer dated May 3, 2003. In accordance with that agreement he commenced employment with the Employer on August 1, 2000. He was employed as a Captain on the Employer's Dash 8 aircraft.
- [49] On October 31, 2003 he, along with the other pilots referred to in these References formed the Association. The Association was disliked by R. Allen Stanford. It essayed to obtain recognition from the Employer. The Employer refused to recognize it.
- [50] By a letter of dismissal dated January 31, 2005 the Employer dismissed Mr. Stephen St. Agathe. This letter of dismissal in substance and form is referred to at paragraph 8 of this judgment. Upon his dismissal he was paid \$97, 600.00 by the Employer.

LEGAL PROCEEDINGS

- [51] The Employee commenced legal proceedings by filing a Reference dated September 23, 2005. His Employee's Memorandum was filed on October 25, 2005. In that Memorandum he averred *inter alia* that at the date of dismissal as Captain, his seniority ranking was 30 from a field of 60 pilots.
- [52] The Employer's Memorandum was filed on March 21, 2006. The reasons outlined for the Employee's dismissal in the Memorandum are identical to those which are outlined at paragraph eleven [11] of this judgment.

[53] In addition to the reasons for the Employee's dismissal referred to at paragraph [11] the Employer also alleged that due to the Employee's days off from work due to illness during May 04, 2004 to January 2005, these acts caused a ***"disruption to the Employee's service to its customers and [in] some cases cancellation of a flight."***

[54] Mr. Allan Hart gave evidence for the Employer with respect to this matter. Since February 16, 2006 he was the Director of Flight Operations of the Airline. Prior to this date another employee made records in the log. A daily log is kept of all of the operations of the company with regard, *inter alia* to its pilots. The log includes a report when pilots are sick and or unable to work due to illness. He produced six logs which the Company kept. He also produced a summary of instances of illnesses of Mr. St. Agathe and another pilot. In answer to Mr. Watt Q.C. he stated *inter alia* as follows:

(i) ***"I have made a summary of 26 pilots. It is not a summary for 60 pilots. It is selective for 2 persons. It is not a fair comparison to use if it compares with sick days for other pilots. I see page 3. I see St. Agathe's name."***

(ii) ***I see August 14, 2002, September 9, 2002 and September 13, 2002. He was sick for 3 times in 2002. I see no sickness days for 2003."***

(iii) ***I see 4 times illness for 2004. I do not see a mention of illness of 17 times. It is actually 5 times. This is eight (8) times sick in three (3) years."***

(iv) ***Being sick for (8) eight times in three (3) years is not a bad attendance record for Mr. St. Agathe."***

- [55] Mr. Agathe gave evidence. No one employed by Caribbean Star has ever explained to him any details which deal with “*the airline’s vision.*”
- [56] During his period of employment he received no letters of warning from the Employer with regard to (a) any behaviour which resulted in a cancellation of a flight; or (b) any disruptive conduct. He made no personal statements as a member of the Association.
- [57] In answer to Mr. Marshall he averred that he is prevented from disclosing any employment related matters to the public. He heard of the word “**vision**”. He agreed with Mr. Marshall that he was dismissed due to the reason referred to at paragraph 2 of the letter of dismissal.

5. PATTERSON THOMPSON

- [58] Mr. Patterson Thompson resides at Pine Gardens in the parish of Saint Michael in Barbados. He is an airline pilot by profession. He entered into a contract of employment with the Employer. It is dated December 31, 2002. His effective date of employment was October 15, 2001. It was marked as “**PT-1**”. He was a First Officer of the Dash 8 aircraft.
- [59] On October 31, 2003 Mr. Thompson along with the other employees mentioned in this Reference formed the Association. He sought recognition from the Employer. According to him the Employer disliked trade unions.
- [60] He was complimented for the work which he performed for the airline during the 2004 Easter season. The Company’s reward to him was in the form of a

letter dated May 12, 2004. It is identical to that written to Captain Keith Thompson at paragraph [6] hereof.

- [61] The Employee caused a Witness Summary to be filed on September 17, 2007. At paragraph 4 of that document he made mention of a letter which was written to him by the Employer. It is dated December 21, 2004. It was not disavowed by the Employer. It read *inter alia* as follows:

“In appreciation of your contribution to the development of the company and in keeping with the Chairman’s mandate, this reward system was built based on a productivity scale.

As we continue to strive for excellence and unparalleled customer service, we have every confidence that you will unleash your potential which truly has no boundaries.

Together we will achieve our vision of “The World’s Best Airline.”

- [62] The Employer dismissed the Employee by letter dated January 31, 2005. It is identical to that which is further particularized at paragraph [8] hereof. The Employer gave him \$44, 163.25 upon his dismissal.

LEGAL PROCEEDINGS

- [63] Legal proceedings were commenced on behalf of the Employee by the filing of a Reference. It was dated September 30, 2005. He claims to be unfairly dismissed.

- [64] An Employee's Memorandum was filed on October 25, 2005. In that Memorandum the Employee avers *inter alia* that the Employer has evidenced no justifiable reason for his dismissal.
- [65] The Employer's Memorandum was filed on March 31, 2006. The reasons for the Employee's dismissal as contained in its Memorandum are identical to those referred to at paragraph (11) of this judgment.
- [66] In his evidence Mr. Thompson stated that the contents of his Witness Summary are correct. He was an Executive Member of the Association. The Executive of the Association decided to make certain statements in an Observer Radio discussion. These statements were in response to public utterances made by Dr. Austin Josiah.
- [67] The statements dealt with (a) the first officers' B" Scale salary, (b) Simulator training, (c) the general working conditions of the pilots employed by Caribbean Star. He did not hear any member of the Trade Union utter any statements which could be categorized as causing any disruptive conduct to occur to the airline. The statements were neither unacceptable.
- [68] Mr. Thompson further told the Court that he filed particulars of his loss sustained as a consequence of being dismissed by the Employer. He submits that those particulars are accurate.
- [69] In answer to Mr. Marshall he opined that a public discussion with respect to simulator training would not affect the airline financially. He referred to the meeting of July 2004. This is referred at paragraph [40]. He recalled Mr.

Stanford stating that if the pilots are part of any trade union then he would ***“lock down the airline within 24 hours and would not lose any sleep”*** as a consequence. At that meeting Mr. Thompson did not voice any opinions when asked to do so by Mr. Stanford. He was afraid.

(6) MR. RICARDO SEALY

[70] Mr. Ricardo Sealy (hereinafter referred to as “Mr. Sealy”) resides at Royals Thibou in Antigua. He is a commercial airline pilot by profession. He entered into an agreement with the airline. It is dated May 03, 2000. There is an Annex to the agreement. Both the agreement and its Annex were admitted into evidence and marked **“RS-1”**. Pursuant to the agreement and its annex Mr. Sealy was hired by the airline as a commercial airline pilot. He commenced work on August 1, 2000.

- [71] (i) During his tenure with the airline Mr. Sealy received certain commendations from it. The first is contained in a letter from the airline dated December 20, 2000. It was admitted as **“RS-2”**. In that letter the airline expressed it’s ***“most sincere gratitude for (his) performance over (the) last quarter . . . with regard to the airline’s overcoming many road blocks in order to get Caribbean Star Airlines to where it is today”***. The letter was written by Mr. G. Filiatreault for R. Allen Stanford, Chairman of the Board.
- (ii) The second commendation from the airline to Mr. Sealy was contained in a letter which it wrote to him dated November 22, 2001. Mr. Paul

Moreira the President and Chief Executive Officer of the airline wrote it. The writer thanked Mr. Sealy for his “*consistent hard work, dedication, and professionalism*” in his capacity as an airline pilot. According to Mr. Moreira, Mr. Sealy had “*demonstrated a willingness to take on each (challenge) without hesitation and played a key role in the success of our great Airline.*”

- (iii) By letter of October 24, 2002 Mr. Moreira on behalf of the airline adjusted Mr. Sealy’s salary to East Caribbean \$12,200.00 per month plus his “*applicable training allowance*”. This was admitted as “**RS-4**”.
- (iv) The airline also commended him in an undated letter **presumably** sometime in late 2002. I state “**presumably**” because the letter exhorted him to “*move forward with the same enthusiasm into 2003*”. The unnamed letter writer made a specific list of 17 achievements which Mr. Sealy and other employees had assisted the airline to achieve. For this achievement he was rewarded by the airline with E.C. \$500.00. The letter was admitted as “**RS-5**”.
- (v) By letter of December 22, 2003 written by Captain John C. Murray the then Chief Pilot of the airline; the company expressed its thanks to Mr. Sealy for his “*contribution and support during the past year.*” He received a bonus payment in recognition of his work. The letter was admitted as “**RS-7**”.

(vi) By letter of May 12, 2004 written by Mr. Moreira and Mrs. J. Sirjusingh, Director Human Resources the company commended Mr. Sealy for his “*invaluable contribution, (his) time, support and loyalties demonstrated*” during the Easter period. He was complimented “*for a job well done.*” He received a payment of E.C. \$500.00.

[72] On October 31, 2003 Mr. Sealy and the other airline pilots named in these References formed a Trade Union. It sought recognition from the Employer. This was refused. According to him the Employer disliked the formation of Trade Unions.

[73] Mr. Sealy was summarily dismissed by the Employer by letter dated January 31, 2005. Save and except for the name, address and a monetary figure the letter of dismissal is identical to one which is further particularized at paragraph [8] hereof. In that letter the Employer paid him the sum of \$104,408.00.

LEGAL PROCEEDINGS

[74] A Reference was filed on the Employee’s behalf on September 23, 2005. The Employee’s Memorandum was filed on October 25, 2005. The Employee avers that he was unfairly dismissed. He claims certain damages.

[75] The Employer’s Memorandum was filed on March 21, 2006. The reasons for Mr. Sealy’s dismissal as contained in the Memorandum are identical to the reasons particularized at paragraph [11] of this judgment. In addition to those

reasons the Employer submits that in November 2004 Mr. Sealy “*was not available for a change of duty when he was required to be. Additionally the Employee refused, neglected or otherwise failed to attend the Crew room after a flight as required to do*”.

See paragraph [9] of the Employer’s Memorandum.

- [76] The Employee gave evidence. He stated that the contents of his Witness Summary which was filed on September 17, 2007 are true. He refuted Dr. Austin Josiah’s allegation of his being “*repeatedly reported sick*”. He stated that the Crew room is an area which is provided for pilots to sit and relax. This takes place either prior to or after a flight has ended. According to him it was not correct to state that if a pilot did not visit the Crew room either before or after the end of a flight, that this was a breach of his duty to the airline.
- [77] Mr. Sealy also denied ever having made any public statements which brought the Company into disrepute. No conduct of a disruptive nature was ever committed by him during his period of employment with the airline. He had never disparaged the airline, its owner, Ms. Sirjusingh, or Dr. Josiah. He had never compromised the airline’s safety. He did not prevent the airline from discharging any of its responsibilities.
- [78] The Company never wrote to him on any occasion with regard to any of the allegations which are contained in Dr. Austin Josiah’s Witness Statement. This Witness Statement was filed on behalf of the Employer on September 28, 2007. No member of the airline’s management, the owner or anyone else on its behalf has ever questioned me with respect to any of the allegations which are contained in Dr. Josiah’s statement.

- [79] Mr. Sealy recalled making certain public statements on December 14, 2004. These were made in his capacity as Chairman of the Trade Union. They were aired on Observer Radio. Some members of the Executive Committee of the Trade Union appeared with him. The members were not named. He gave a reason for appearing as a guest on the Observer Radio programme. He stated that sometime prior to his appearance Dr. Josiah was a guest of the Radio Station. In this regard according to Mr. Sealy, Dr. Josiah stated that the Pilots' "B" Scale had been eliminated.
- [80] According to Mr. Sealy his appearance as a guest on the Observer Radio programme was to (a) refute Dr. Josiah's assertion; (b) discuss the pilots' simulator training programme. No other statements were made by him.
- [81] Mr. Sealy submitted that the Trade Union was a "*duly registered bargaining unit*" which represented "*at least 30% of the members*". The Company opposed the Trade Union as it "*was not representative of the majority of the employees in the Stanford Group*".
- [82] In his Witness Summary Mr. Sealy stated *inter alia* that "*30% of the Pilot Employees of Caribbean Star Airline..... have designated the Caribbean Star Airline Pilots Association to be their Bargaining Agent to represent them in Collective Agreement at the said establishment*". The entity referred to was the Employer. The Certificate of Registration of the Association dated November 11, 2004 and valid until November 10, 2005 was admitted as "**RS-22**".
- [83] Mr. Sealy was cross examined by Mr. Marshall, Counsel for the Employer. He informed the Court that he did not make a formal application to Tobago

Express. He was not refused a Work Permit in Trinidad & Tobago. He never applied for the position of First Officer with Liat. He did not apply for any positions during March or April 2005. He did not relax at home. During this period he performed trade union duties.

[84] When the Trade Union was formed a complement of about (50) pilots were employed by the airline. The Trade Union was formed to champion the interests of the pilots only.

[85] (i) He recalled the meeting of July 2004. It took place in the airline's hangar at V.C. Bird International Airport. R. Allen Stanford attended the meeting. Other pilots also participated in the meeting. Mr. Sealy spoke on behalf of the association. Mr. Stanford asked him what his problems were. He told Mr. Stanford the problems which he experienced. Mr. Sealy made his comments in the presence of other persons.

(ii) At the July 2004 meeting Mr. Sealy recalled Mr. Stanford's statement with respect to money that the airline lost daily. According to Mr. Sealy after Mr. Stanford caused to be placed \$175,000.00 in cash on a table Mr. Stanford stated *inter alia* as follows:

"This is what I am pissing off on you lot every day".

[86] According to Mr. Sealy, between July 2004 and December 2004 the Trade Union championed the causes of the pilots. For some time during this period the Trade Union was dormant. In or between November to December 2004 the Trade Union was reactivated. The Trade Union informed the Employer of

its being reactivated. The Trade Union requested to meet with the Employer. No meeting took place. Mr. Sealy was aware of a Committee which was established by R. Allen Stanford. The participants of this Committee were selected by the Chief Pilot. The pilots and all other departments were represented on this committee.

- [87] Mr. Sealy was aware of a newsletter which was produced by Caribbean Star. He was not aware whether or not the work of the Committee was reflected in the newsletter. He saw some of these newsletters previously. One was shown to him. He saw a mention of the Antigua Retirement Savings Plan. He did not agree that the Committee was responsible for this Savings Plan. Other achievements were put to Mr. Sealy as being the result of the Committee. Mr. Sealy did not agree with Mr. Marshall that the Committee should be credited with these achievements.
- [88] Mr. Sealy stated that he did not receive any permission from the Employer to discuss the matters of (a) the "B" scale issue and/or (b) flight simulator testing. Neither did he receive the Employer's consent to act as Chairman of the Trade Union.
- [89] Mr. Marshall referred Mr. Sealy to the letter of dismissal. Mr. Sealy stated that he previously saw a reference to the statement of Caribbean Star becoming the best airline in the world, in the company's newsletter. He previously saw a reference to the phrase "*seamless cooperation*". It was familiar to him.

- [90] He did not agree with Mr. Marshall that when he spoke on behalf of the Trade Union that his statements ran counter to the airline's management. He was not acting inconsistent with Caribbean Star in the achievement of its goals. In his opinion his contract of employment did not forbid him from making the statements which he made.
- [91] With respect to the Crew room Mr. Sealy stated that this facility was already in existence prior to the meeting of July 2004. He did not recall if he was called to the Crew room on November 18, 2004. Mr. Marshall's cross examination of Mr. Sealy ended at 1:20 p.m. on October 4, 2007. The Court drew Mr. Marshall's attention to the fact that as Mr. Sealy was the last pilot to give evidence no document was put to any of them with regard to any declaration of secrecy. Mr. Marshall then produced a document entitled "**Caribbean Star Association Ltd. Employment Agreement**". It is dated August 01, 2001. There is a section entitled "**Declaration of Secrecy**". It was signed on behalf of Caribbean Star Ltd. and also signed by Mr. Sealy. Mr. Watt, Q.C. objected to the production of this document upon the grounds that (a) it was never produced to him or Mr. Sealy and (b) he did not have the opportunity to prepare effectively or at all for the presentation of it. The Court allowed it to be produced. It was marked "**RS-30**".

THE EMPLOYER'S CASE

- [92] Two witnesses gave evidence on behalf of the employer. The first to give evidence was Mr. Allan Hart. Part of his evidence is recorded at paragraph [54] herein. He resides at St. Paul's in Antigua. In or about January 2006 he had reason to review the pilots' log. He made a summary of his findings.

This summary was produced and marked “**AH-1**”. The six logs referred to at paragraph [54] of this judgment were produced and marked “**AH-2-6**” respectively. The logs and the summary were for the period October 03, 2003 to December 31, 2004.

[93] In answer to Mr. Watt, Q.C. Mr. Hart stated that Captain Sealy did not fall ill in 2002. He was ill on three occasions in 2003. He reported sick for one day in 2004. In effect he was sick on four occasions over a three year period. In Mr. Hart’s opinion “*four days sick for three years is not a bad attendance record for Mr. Sealy*”.

[94] The second witness for the Employer was Dr. Austin Josiah. He resides in St. Philip in Antigua. He filed a Witness Statement on behalf of the Employer. It is dated September 27, 2007. It was filed on September 28, 2007. According to him the contents are true. His current position is that of Director of the Stanford Financial Group. He is the Director of Public Relations.

[95] In December 2004 he was the Director of Human Resources. He appeared as a guest on the Observer Radio. He responded to certain statements which were made by Mr. Sealy. They were broadcasted by Observer Radio.

[96] According to Dr. Josiah the pilots were not fired because of being involved in a Trade Union. In his opinion the reason why the employees were dismissed were as follows:

“They were not committed to the goals of the airline with respect to seamless co-operation and flawless execution.

The airline's arrangement would have determined at that time that the dismissed employees through its evaluation process would not have been considered productive employees towards achieving the best for Caribbean Star as an airline."

- [97] Dr. Josiah was cross examined by Mr. Watt, Q.C. He stated that prior to being employed with Caribbean Star he was the Labour Commissioner of Antigua & Barbuda for nine years and three months. During this period he gained much knowledge of labour relations. He has knowledge of the Antigua & Barbuda Labour Code. He applied this knowledge when he commenced employment with the Stanford Group.
- [98] He participated in the drafting of the letter of dismissal. He agreed with the principle that employees who do not function within their job description, who malign the company should not be employed by it. He did not however witness any of this behavior by any of the employees as outlined in the letter of dismissal.

THE ISSUES

- [99] The substantive issues are as follows:
- i) Whether or not the reasons for dismissal which are contained in the letters of dismissal of the Employees dated January 31, 2005 are in conformity with Section C 10 of the Antigua & Barbuda Labour Code?

- (ii) In the event that the letters of dismissal dated January 31, 2005 do collide with Section C 10 of the Antigua & Barbuda Labour Code do they render the employees' dismissal fair or unfair?
- (iii) Do the reasons which are contained in the Employer's Memorandum filed on March 21, 2006 amount to good cause for dismissal in accordance with Sections C 58 and C 59 of the Antigua & Barbuda Labour Code?
- (iv) In the event that the Court finds that the Employees or any of them were unfairly dismissed what is the measure of damages which should be paid to them?

THE EMPLOYER'S SUBMISSIONS

[100] Mr. Hugh Marshall Counsel for the Employer made the following submissions:

- (i) That the Employer's reasons for dismissing the Employees were factual;
- (ii) That subsequent to the date of dismissal on January 31, 2005 as no Employee requested from the Employer any particulars of the reasons for dismissal advanced in the letter of dismissal, the Employer was entitled to supplement the reasons given in the same letter of dismissal. He cited **Berridge and Ors v Benjies Business Centre [1997] 1 W. L.R. 53**
- (iii) That in accordance with paragraphs 8 and 9 of the Employer's Memorandum these constituted good grounds for dismissing the Employees;
- (iv) That the employees were fairly dismissed;

- (v) In the event that the Court holds that any or all of the Employees were unfairly dismissed, then they should be compensated pursuant to the four established headings. The sums which were already paid to them should be deducted from any awards which the Court makes. In addition no award should be made to the Employees for the loss of certain benefits. As well exemplary damages do not apply.

THE EMPLOYEES' SUBMISSIONS

[101] Mr. Gerald Watt, Q.C. Counsel for the Employees made the following submissions:

- (i) That **Berridge v Benjies Business Centre (op cit)** does not state the current law in Antigua & Barbuda with regard to Section C10 of the Antigua & Barbuda Labour Code;
- (ii) As a consequence of (i) above the Employer is bound by the reasons which it advances in the letter of dismissal dated January 31, 2005. The reasons contained in the Employer's Memoranda are inadmissible in evidence against the Employees.
- (iii) In any event, should the Court have regard to the additional reasons which are contained in the Employer's Memoranda, then these reasons are not supported by any evidence. In the alternative the evidence is not credible. He cited **Horace Helps v Antigua Sun Ltd. Reference No. 25 of 1999**, **Louis Daniel v Antigua Sun Ltd. Reference No. 26 of 1999** and **Faccenda Chicken Ltd. V Fowler [1986] 1 All E.R 617**.
- (iv) The real reason why the Employees were dismissed was their formation of a trade union which afterwards sought recognition by the Employer.

He drew the Court's attention to Section 13 (1) of the Antigua and Barbuda Constitution Order 1981 Cap. 23 and Section K 3 of the Antigua and Barbuda Labour Code.

- (v) The Court should have regard to Sections C 56, 58, and 59 in a determination of the issues.
- (vi) An award of exemplary damages is appropriate to be granted to the Employees.

DISCUSSION

[102] (i) Mr. Marshall in his Written Submissions stated *inter alia* that he proposed to identify and address “***only those matters relevant for a determination of the issues before this Court***”. No mention was made in these Written Submissions of whether or not the References were properly before this Court.

- (ii) However in all of the Employer's Memoranda filed herein Mr. Marshall did state, with some force, that the References were not properly before this Court. According to him, the matters were not heard by the Labour Commissioner's Office. This is a requirement to be satisfied before a matter is heard by the Industrial Court.
- (iii) The Court is very satisfied, however upon the evidence heard, that all of the References were heard by the Labour Commissioner's Office. As a result of no voluntary adjustment or settlement of the matters being reached by any of the parties, the Attorneys-at-Law for the Employees thereafter referred the matters to the Industrial Court ostensibly in accordance with Section 19 (2) of Cap 214. But no trade dispute existed between the parties. Section 7 (1) (c) of Cap. 214 is the

governing provision as opposed to Section (19) (2) of Cap. 214. For this reason, the References are properly before this Court. Accordingly there is no merit in the argument to the contrary.

THE FIRST AND SECOND ISSUES

[103] Section C10. (1), (2) and (3) of the Labour Code state as follows:

“(1) Upon termination by an employer of an employee’s employment subsequent to the expiration of the latter’s probation period, the employer shall, within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination.

(2) The employer shall, upon request of the terminated employee furnish a certificate specifying the dates of his engagement and termination and the type of work on which he was employed.

(3) An employer who furnishes a statement or certificate required by subsection (1) or (2) respectively, shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal as covered by Part 5 herein of his ability for severance pay covered by Part 4 herein.”

[104] In order to defend a claim that the Employees were rightfully dismissed the very first condition which the Employer is required to satisfy is that it must have a reason for dismissal of the Employees. The reason is the set of facts which are known to the Employer or may involve beliefs held by it which caused it to dismiss the Employees.

- [105] (i) Before this Court examines the efficacy of the reasons given for the dismissal of the Employees, it is necessary to examine Mr. Marshall's submission with regard to Section C10 of the Labour Code. At paragraph [100] (ii) of this judgment, Mr. Marshall, learned Counsel for the Employer, submits that since the Employees' dismissal, none of them "*requested from the employer any particulars for the reasons advanced*" for their dismissal. Consequently "*the Employer was entitled to and did supplement the reasons given*".
- (ii) In accordance with Mr. Marshall's submission, *a fortiori* if his argument is found to be unmeritorious, then the Employer was not entitled in law to supplement the reasons given in the letter of dismissal.
- (iii) No Attorney-at-Law who appears before the Industrial Court should attempt in any form or fashion to mislead this Court. Attorneys-at-Law are presumed to know the law. The predecessor to the present Section C 10 (1) of the Labour Code contained a provision which made it mandatory for an employer to render a written statement of the precise reason for the Employee's dismissal only in circumstances where it was "*upon a request being made by the employee within seven days of termination or notice thereof*".

- (iv) The judgment in **Berridge (op cit)** was delivered by Lord Hoffmann. The *ratio decidendi* was stated by him at paragraph [7] of the judgment. He stated that section C10 “*required a statement to be furnished upon request and made no exception for a case in which reasons had already been given.*”
- (v) But C10, as outlined in **Berridge (op cit)**, was specifically amended by the Antigua and Barbuda Labour Code (Amendment) Act, 1998 (**See Section 8 of No. 16 of 1998**). It was assented to by the then Governor General on November 09, 1998. It is referred to at paragraph [103]. The effect of the amendment is that there is no longer a requirement for an employer to await “*a request being made by the employee within seven days of termination*” for him to render reasons for dismissal irrespective of whether or not the Employee has requested the statement from the Employer. **Maundy P in Roger Richards v Dream Co. Ltd. Ref. No. 35 of 2000** held at paragraph 42 as follows:
“[42] *Under the Labour Code, as the Law was then, Section 10 apart, a dismissing employer was under a duty to inform the dismissed employee of the reasons for the dismissal and the general understanding is that at the very least some indication of the reasons had to be given at the time of the dismissal except when he was caught “red-handed” as previously stated - under the old Law the Employee could demand a written statement setting out the reasons and failure to do so would act as an estoppel to prevent the employer from leading evidence as to those reasons. However, by an*

amendment to Section C.10 (1) the statement must be furnished within seven days whether or not requested.”

The amended C10 made it compulsory for the Employer to “*furnish to such employee a written statement of the precise reason for the termination*”.

- (vi) If the Employer has rendered to the Employee a written statement of the reasons for dismissal then in accordance with Section C 10(3) of the Labour Code the Employer “*shall be conclusively bound by the contents therein in any proceedings testing the fairness of the dismissal*”. If authority is required for this finding then I derive comfort from a passage in the judgment of **Maundy P in Samuel Leonard, Dulcie Richards & Eion Laurie and Sandals (Antigua) Limited Reference Nos. 5, 6, and 7 of 1999**. At page 12 paragraph [42] Maundy P. stated *inter alia* as follows:

“As was said by Sir David Cairns in Monie v Coral Racing Ltd [1980] I.C.R. 109 at page 120 and paragraph E “the principal reason for dismissal is to be sought at the time of Mr. Batkin’s dismissal and not later,” and thus we will consider the reasons for the termination AS CONTAINED IN THE TERMINATION LETTERS” (the emphasis in capitals is this Court’s).

[106] During the course of the cross examination of Dr. Josiah, Mr. Watt, Q.C.

Counsel for the Employees, asked him *inter alia* what part did he play in the letter of dismissal. Mr. Marshall, Counsel for the Employer, objected to Mr. Watt’s question and stated *inter alia* as follows: *“If I may, the reason I object is that the law is very clear. THE EMPLOYER IS BOUND BY THE*

LETTER. . . .” (the emphasis in capitals and underline is the Court’s).

Section C 10 (1) of the Labour Code was amended since the ruling in **Berridge**. This Court finds that **Berridge** is no longer good authority to bind it with regard to an interpretation of Section C 10 (1). This Court therefore respectfully disagrees with Mr. Marshall that the Employer was entitled to supplement the reasons given in the letter of dismissal. This Court finds that the Employer was estopped from putting forward reasons for the Employees’ dismissal other than those which were stated in their letter of dismissal dated January 31, 2005.

[107] Section C 10 (1) of the Labour Code requires that the Employer shall furnish to such Employees a written statement of the **precise reason** for the termination. What does the word “**precise**” mean? **The Oxford Paperback Dictionary, Thesaurus and Wordpower Guide, Oxford University Press, London 2001, defines it in the following manner:**

“1 expressed very clearly and with great detail...2 careful about details and accuracy; 3 particular.”

Synonyms in place of accuracy include, clear-cut, correct, defined, distinct, exact, specific, unambiguous, among others.

In **Harvard Securities PLC v Younghusband [1990] I. R. L. R. 17 Mr. Justice Knox** delivered the judgment of the Employment Appeal Tribunal (U.K). At page 19 paragraph 20 he stated *inter alia* as follows:

“A reason has two elements: it has a factual basis of events that have occurred and which the employer considers to be the foundation for the dismissal and it has the consequences of those factual events which the

employer, rightly or wrongly, relies on to justify the dismissal”.

[108] The purpose for which Section 10 (1) is enacted is that it “*provides the machinery for ensuring that the employee does not start with the disadvantage of not knowing what it is that the employer relies on in dismissing him as the reason*”. - See **Mr. Justice Knox in Harvard Securities PLC** (op cit) at **page 19 paragraph 20**. In other words Section C 10(1) allows the employee to challenge the employer’s reasons for dismissing him in an unfair dismissal hearing.

[109] Section C 10 (1) does state that the reason for the dismissal must be precise. The letter of dismissal must contain particulars of the reasons why the employer dismissed the employees.

[110] Under Section 70 (1) (a) of the former Employment Protection Act 1975 (U.K.), an employee who had been unfairly dismissed was entitled to be provided by the employer “*with a written statement giving particulars of the reasons for his dismissal*.” The first case in which this section arose to be considered was **Horsely Smith & Sherry Ltd. v R.W. Dutton [1977] I.R.L.R. 172 (EAT)**. An employee could challenge the reasons given by the employer upon the ground that the reasons were “*inadequate*”. **Mr. Justice Phillips** delivered the Court’s judgment. He stated *inter alia* at **page 173 paragraph 9** as follows:

“The requirement in subsection (1) under which the employee is entitled to be provided by the employers with a written statement giving particulars of the reasons for

his dismissal is very simple”. It seems to us that the matter is essentially simple and puts no problems in the way of the employer. He must know why the employee has been dismissed. All that is required is that he should put into writing a statement which does disclose the reasons for dismissal. No particular technicalities are involved, and no particular form is required. It can be perfectly simple and straightforward. But the test which we think must be satisfied is this. The document must be of such a kind that the employee, or anyone to whom he may wish to show it, can know from reading the document itself why the employee has been dismissed.”

[111] Mr. Watt, Q.C., Counsel for the Employees in his written statement stated *inter alia* as follows:

“Reasons not furnished in the mandatory Section 10 letter cannot (be) advanced in the employer’s memoranda and are inadmissible in evidence”.

No cases were cited by Mr. Watt Q.C. in support of this submission.

[112] (i) I derive some assistance in a determination of the issues which are further particularized at paragraph 99 (i) and (ii) by an examination of two decisions of the Industrial Court of Trinidad & Tobago. The first case is **Banking, Insurance & General Workers Union and Hindu Credit Union Cooperative Society Ltd. Trade Dispute No. 2 of 2001**. In this

case the employer dismissed an employee of the Credit Union by a letter dated December 4, 1998. It stated as follows:

“December 4, 1998

Dear Ms. Naidoo,

Please be informed that the Board of Directors have decided that effective 7th December, 1998, your services will no longer be required because of loss of confidence..

Please be guided accordingly.”

- (ii) The relevant legislation in Trinidad and Tobago is the Industrial Relations Act Cap. 88:01. It does contain an analogous provision to that of Section C 10 of the Antigua and Barbuda Labour Code.
- (iii) Section 10(3) (a) and (b) of Cap. 88:01 states as follows:
“(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall -
 - (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;**
 - (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations”.**

Section 10(3) (a) and (b) of Cap. 88:01 are identical to Section 10(3) (a) and (b) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda. Sections 10 (4) (5) (6) and (7) of Cap 88:01 are also identical to Sections 4, 5, 6, and 7 of Cap. 214.

- (iv) His Honour Mr. Addison M. Khan the then President of the Industrial Court of Trinidad and Tobago rendered the Court's decision. In commenting upon the reason which was articulated for the dismissal of the employee being that of "**loss of confidence**" the learned President stated *inter alia* at page 59 of the judgment as follows:

"Before dismissing a worker from his employment; therefore; the employer should

(a) ;

(b) save in exceptional cases where it is not possible to do so, inform the worker of the specific reason or reasons for the proposal to dismiss him;

(c) "

- (v) At page 52 of the judgment Mr. Khan, President under the heading of Loss of Confidence stated *inter alia* as follows:

"The expression "loss of confidence" is not, by itself, a sufficient reason for a worker's dismissal. An employer may lose confidence in a worker for a variety of reasons. There may be a valid reason or reasons for losing confidence in a worker and valid reasons must be supported by credible evidence".

- (vi) Mr. Khan President in that case held that the evidence which was presented did not support the allegation of "**loss of confidence**". The term as used by the employer lacked specificity. It did not amount to "*a valid reason for terminating the worker's service*"

— See page 59 of the judgment.

- [113] (i) The second case is **Bank and General Workers Union and The Unit Trust Corporation of Trinidad and Tobago, Trade Dispute No. 370 of 1997**. In that case an employee was dismissed by the employer in a letter dated October 27, 1997. The letter of dismissal stated *inter alia* as follows:

“Dear Nr. Noel,

Further to our letter of October 13, 1997, I am directed to inform you that your services have been terminated with effect from October 27, 1997. We regret to inform you that the Corporation has lost all confidence in you . . .” (the emphasis is that of the Industrial Court of Trinidad and Tobago)

- (ii) **Mr. Khan President** in delivering the Court’s judgment especially with regard to the matter of “**loss of confidence**” stated at page 23 *inter alia* as follows:

“The expression “loss of confidence”

The expression “loss of confidence” used in the letter of dismissal is a most vague and uncertain concept. It refers to nothing in particular and is capable of embracing a variety of misconduct by workers. It is wholly inappropriate to use that expression in the context of modern good industrial relations practice. The principles of good industrial relations practice require an employer to inform a worker of the exact reason for taking disciplinary action against him before such

disciplinary action is taken. Save in the most exceptional circumstances, the principles of good industrial relations practice require an employer to:

- (i) inform a worker of the exact reason for a proposed termination;..*
- (ii)*
- (iii) “A worker is entitled to know the exact reason for any proposed disciplinary action to be taken against him. If he is not told the exact reason, he will be unable to make representations to this employer concerning the proposed action and this will be contrary to the principles of good industrial relations practice.....”*
- (iv) On the facts of this case, I find that the Corporation did not inform the worker of the exact reason for his dismissal and that its failure to do so was in violation of the principles of good industrial relations practice.”*

(The emphasis of the underlined words is that of the Industrial Court of Trinidad & Tobago)

[114] Did the airline’s letter inform the employees with such certainty, accuracy, specificity and clarity that they knew why they were dismissed? No particular form was required for this to be achieved. Did the employer in this

case believe that the reasons adumbrated in the letter of dismissal were “**the foundation for the dismissal**”? – See **Harvard Securities** (op cit) at page 19 paragraph 20.

[115] At paragraphs [94] to [98] of this judgment the Court made reference to Dr. Josiah’s evidence. It is appropriate to make further reference to his evidence. Dr. Josiah gave certain answers to Mr. Watt, Q.C. in cross examination. He stated *inter alia* as follows:

“The precise reason (for the employees dismissal) is that the employees could not catch the vision. . . . As it is what I had to do with this letter (of dismissal) is to see it and deciding that this did not reflect the facts for termination. As it is what I had to do to with this letter having seen it, that to state clearly to the company that this letter was the proper letter reflecting the facts as were told to me for termination. I disagreed that this letter here as it is reflects the facts and points that should be used for the dismissal of Ricardo Sealy and the other Caribbean Star pilots who were dismissed by that letter . . . I do not deny that I was part of the dismissal process.”

[116] In answer to Mr. Watt, Q.C. with regard to why Dr. Josiah allowed Ms. Sirjusingh to dismiss the employees for the reason stated in the letter of dismissal, he stated *inter alia* as follows:

“I did not say they are not the true reasons. I said it does not reflect the facts”.

[117] In further response to Mr. Watt, Q.C. Dr. Josiah stated *inter alia* as follows:

“I was aware of other facts which were not included in the form letter of dismissal In relation to the particular facts of which I am aware of before the Court, in these circumstances the Company should have written warning letters to these people Warning letters were written. They were written to some and were on the file for some. There is no place in my Witness Statement that I have alluded to the writing of warning letters to the Employees”.

[118] Dr. Josiah’s background in industrial relations is very impressive. He is no doubt aware of the Antigua and Barbuda Labour Code. He was accustomed to working in an industrial relations environment which required precision, attention to detail and accuracy. In his opinion, in answer to Mr. Marshall, the reasons why the Company dismissed the employees are outlined in paragraph [11].

[119] The reasons which Dr. Josiah gave to the Court at paragraph [96] for the Employees’ dismissal coupled with his opinion that they “***could not catch the vision***” are some of the most nebulous, vague, indefinable, ambiguous, imprecise, and unspecific reasons that I have ever read as reasons why an employer has dismissed an employee. I find as a fact that Dr. Josiah in his testimony at paragraph [115] had no justification whatsoever for believing that the Employer considered the reasons contained in the letter of dismissal as comprising any foundation for the dismissal of these Employees.

- [120] The expression “*loss of confidence*” is akin to those phrases which are contained in the letter of dismissal. They include “*this vision*”, “*A cohesive team of management and staff working together with seamless cooperation and flawless execution*”. This amorphous set of loose phrases strung together only was good enough to form sentences. But in reality they were absolutely meaningless.
- [121] Such reasoning lacks clarity and in the words of **Khan, President**, they refer “*to nothing in particular and is capable of embracing a variety of misconduct by workers*”. It is manifestly wrong to use such expressions as contained in the letter of dismissal in the context of modern good industrial relations practice. The reasons for dismissal denied each and all of the employees the opportunity to know exactly what areas of misconduct were being alleged. If they were particularized this would have been beneficial to both parties. The employees would have had the opportunity to challenge such allegations which should have been alleged by the employer if necessary. A better case would have been put forward by the Employer.
- [122] In all of the circumstances of this case I find that the letter of dismissal collides absolutely with and manifestly offends the provision of Section C 10 of the Antigua and Barbuda Labour Code.
- [123] The failure of the Employer to provide reasons consistent with the provision of Section C 10 is in violation of the principles of good industrial relations practice. Since the reasons do not contain any allegation of misconduct I hold that a failure to comply with the provisions of Section C 10 of the Antigua and Barbuda Labour Code rendered the employees dismissal not to

be in accordance with the principles of good industrial relations practice. Whether or not the Employees were unfairly dismissed is a matter I shall now address.

THE THIRD ISSUE

[124] Mr. Marshall, Counsel for the Employer, submitted in the alternative that the employees were dismissed for good cause. The reasons are outlined in the Employer's Memoranda. He submitted that these reasons fall under the heading of the employees inability to "*achieve that vision*" of being able to assist the employer to "*become the best airline in the Caribbean and the world*". Those reasons may be summarised as follows:

- (i) The making of certain statements by and on behalf of the employees. These statements were intended or likely to bring the Employer into public disrepute and cause the employer injury. These statements were published on the Observer Radio on December 14, 2004 and on dates thereafter;
- (ii) The breach of a confidential agreement;
- (iii) Discharging of their duties in a disloyal manner by protesting simulator testing and verification of pilots and the demonstration of a poor work attitude, the later emanating from their membership and participation in Caribbean Star Airline Pilots Association.
- (iv) The formation of Caribbean Star Airline Pilots Association during the period October 2004 through 2005 which said organization sought to and did make public statements intending to or likely to bring the Employer into public disrepute and thereby cause injury to the Employer.

[125] Section C 58 (1) (a) and (2) of the Antigua and Barbuda Labour Code states as follows:

“(1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) relates to misconduct of the employee on the job within the limitations of section C 59 (1) and (2);

(b).....;

(c);

(d);

(e);

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

(2) The test, generally, for deciding whether or not a dismissal was fair is whether or not, under the circumstances, the employer acted unreasonably or

(3) 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.”

[126] Section C 58 (1) (a) is to be read in conjunction with C 59 (1) and in particular C 59 (1) (a) which states as follows:

“C59. (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;”

[127] The burden and standard of proof which is required to be sustained in the case of a summary dismissal has been articulated in a number of cases. One of them is **Cable & Wireless (WI) Ltd. v Hill (1982) 30 W.I. R. 120**. In that case **Berridge J A** in delivering the judgment of the Court of Appeal agreed with what **Lord Maugham** stated in **Jupiter General Insurance Co. Ltd. v Shroff [1937] 3 All E.R. 67**, **PC Berridge JA** stated *inter alia* at page 129 as follows:

“[W]ithin the ambit of C58 of the Labour Code, the burden of proof was on the company to show just cause for dismissing the employees and that since summary dismissal constituted a ‘strong measure’ the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to

be correspondingly cogent and weighty in nature and content”.

The Observer Radio Recording

[128] The first ground for the Employees dismissal is based upon certain “*public statements intending to or likely to bring the Employer into public disrepute and thereby cause injury to the Employer.*” The said statements were published or caused to be published on the Observer Radio on December 14, 2004 and on dates thereafter.

- See any of the Employer’s Memorandum at paragraph [7]

[129] It is the responsibility of the Employer to place such evidence before the Court in order to justify the reasons for dismissal. Dr. Josiah’s Witness Statement on behalf of the Employer was filed on September 28, 2007. This is more than two years after the statements were purportedly made. Dr. Josiah at paragraph 23 of his Witness Statement stated unequivocally as follows:

“An audio recording of this statement will be made available to the Court a transcript of which is attached hereto labelled appendix A”.

[130] Dr. Josiah in his evidence to this Court gave a reason why the recording has “*gone walking*” as simple as that. When evidence was given in this Court on October 03, 2007 both parties’ Attorneys-at-Law engaged the Court in a conference in Chambers. Mr. Marshall, Attorney-at-Law for the Employer assured the Court that “*the Observer Radio tape recording shall be settled with Mr. Watt, Q.C.*”

[131] I find it very inexcusable that during the hearing of this matter no such recording was ever made available. It does not appear that any Observer tape recording was available to the Employer. If one was done, then it was incumbent upon Mr. Marshall to produce it for the Court's consideration. The non-production of this recording or a transcript thereof weakened the Employer's case. The Employer then attempted to prove that certain statements were made of a disruptive nature through the evidence of the Employees.

[132] The evidence is that one employee made statements which were broadcast in an Observer radio programme. His name is Mr. Ricardo Sealy. There is no evidence whatsoever that any of the other employees made any statements in the same broadcast. The allegation therefore that other employees made disparaging statements against the Employer has no substance whatsoever.

[133] Mr. Sealy gave evidence. He was cross examined by Mr. Marshall. The matters which he spoke of and which were published by the Observer Radio related to (a) the employees "B" scale, (b) the dismissal of certain pilots due to simulator failures. In answer to Mr. Marshall, Attorney-at-Law for the Employer, Mr. Sealy stated *inter alia* as follows:

"The statements I made on the radio related to matters that dealt with the employment relationship between the employer and its employees".

[134] No evidence was led by the Employer to show how in fact the matters referred to at paragraph [128] were ***"intending to or likely to bring the Employer into public disrepute and thereby cause injury to the Employer"***.

[135] Did the airline suffer a reduction in passengers who flew on it? Did the airline receive any letters or any other correspondence from anyone who stated that since the appearance of Mr. Sealy on the programme that those persons ceased to fly on the airline? Were any safety considerations raised by any member of the public or any staff member? The Employer presented absolutely no evidence whatsoever to justify the allegation raised at paragraph [128]. It was a bare allegation which was devoid of any substance when stripped down to its bare bones.

Breach of a Confidential Agreement

[136] The second ground related presumably to the breach of a confidential agreement by the Employees. The clause which Mr. Marshall cites that contains the confidential section read as follows:

“I will observe the strictest secrecy with regard to all the businesses and affairs of the Employer and of its customs, officers, employees and gents which shall be disclosed to me or which may come to my knowledge. I will not divulge any information concerning the same unless expressly authorized to do so by the Board of Directors either during or after termination of my employment with the company.”

[137] The probability of Caribbean Star having experienced a detrimental effect upon its business as a consequence of hearing Mr. Sealy’s statements was described by Mr. Marshall Attorney-at-Law for the Employer as being

“remote”. He described the occurrence at paragraphs [75 and 76] of his Written Submissions *inter alia* as follows:

“75. First, place yourself in the shoes of a member of the public hearing the public statements made by Ricardo Sealy, particularly in relation to the difficulties with the simulator testing. Wouldn’t you question the safety of Caribbean Star Airlines? Isn’t there then a possibility, even remote, that the statements could have resulted in a detrimental effect on the Employer’s business as a whole and the hundreds of other Employees?”

76. Secondly, place yourself in the shoes of the Employer, with the knowledge of this public debate which had the potential of affecting their business. What would you do? What would any reasonable employer do?”

[138] With respect, the Employer had a duty and responsibility to obtain such evidence from persons who heard the statements. I referred to this at paragraph [135].

[139] The evidence discloses that two Employment Agreements and an Annex to both of them were produced by Mr. Watt Q.C. Counsel on behalf of Mr. Patterson Thompson and Mr. Ricardo Sealy. Mr. Thompson’s Employment Agreement is dated December 31, 2002. Mr. Sealy’s Employment Agreement and its Annex were both dated May 3, 2000.

[140] There is no evidence that any Employment Agreements were produced to the Court on behalf of either Keith Thompson, Stephen St. Agathe, Ceasar Haynes or Dylan Boxhill. It is quite clear however that none of these employees made any statements whatsoever on the Observer Radio programme on December 14, 2004 and/or on any other subsequent dates. I therefore have to proceed without consideration of any such agreement. If any authority is required to justify the way I shall proceed, see the observations of **Maundy P, in Samuel Leonard, Dulcie Richards and Eion Laurie in Ref. Nos. 5, 6 and 7 of 1999 at paragraph [41]**. In that case Maundy P proceeded to analyse the evidence without regard to a Collective Agreement.

[141] Having regard to what is stated at paragraphs [138] and [139] I find that the reason stated at paragraph [136] for the dismissal of the Employees namely Keith Thompson, Patterson Thompson, Stephen St. Agathe, Caesar Haynes and Dylan Boxill is without any merit whatsoever.

[142] Mr. Marshall Attorney-at-Law for the Employer produced an Employment Agreement on behalf of Ricardo Sealy. It is dated August 01, 2000. It contained a provision at paragraph (2) which dealt with the need to observe the “**strictest secrecy**” in a manner which is further particularised at paragraph [136] of this judgment.

[143] At paragraph [136] I stated that a ground of dismissal was **presumably** the employees’ breach of a confidential agreement. I state “**presumably**” simply because of three factors. Firstly, apart from a statement of the term “**strictest secrecy**” at paragraph [136] and which appeared in the Employer’s

Memorandum with regard to Mr. Sealy there is no allegation in the same Employer's Memorandum that Mr. Sealy had infringed it. Secondly, a perusal of Dr. Josiah's Witness Statement with regard to Mr. Sealy at paragraphs 20 to 26 contains no reference whatsoever to (a) the existence of Mr. Sealy's contract; (b) a breach of that contract; and/or (c) the existence of the "**strictest secrecy**" provision. Thirdly, Mr. Marshall, the Employer's Attorney-at-Law, in his Written Submissions, makes no mention at all of Mr. Sealy's or any other of the Employees' breach of the "**strictest secrecy**" provision. Mr. Marshall merely submitted that "*the employees made public statements in contravention of the employment contract*" See paragraph [6] of Mr. Marshall's Witness Submissions.

[144] Mr. Marshall provided Mr. Sealy's contract after his cross examination of Mr. Sealy was completed. It contained the "**strictest secrecy**" provision. Mr. Watt, Q.C. objected to its introduction upon the grounds (a) that he had no knowledge of it and (b) it never formed a formal ground of dismissal. It was admitted and marked "**RS-30**". In his Written Submissions Mr. Marshall cited no authorities in support of his submission.

[145] Although the Industrial Court "*shall not be bound to follow the rules of evidence stipulated in the Evidence Act*" (See Section 9 (1) of Cap. 214 of the Laws of Antigua and Barbuda), there is still in existence the need to state quite clearly in the letter of dismissal and/or the Employer's Memorandum the precise grounds for dismissal. This allows the employee to properly prepare a rebuttal of the charge which is made against the employee or vice versa.

[146] Mr. Sealy's employment Agreement of August 01, 2000 was never put to Mr. Sealy in any manner so as to give Mr. Sealy the opportunity to show how any statements purportedly made by him on the Observer Radio programme compared with the secrecy provision.

[147] A matter of this nature arose to be considered in **Pamela Mayers v A.V. Management Ltd. t/a Antigua Village Reference No. 7 of 2003**. Maundy P at paragraph 2 of the judgment stated *inter alia* as follows:

“The allegation that the employee was being coerced into resignation was not pleaded in their Memorandum by the Employee and seems to be an after-thought; it was raised for the first time at the Hearing – the Employers were deprived of the opportunity to properly prepare a defence to this allegation”.

The Court did however consider the Employee's allegation and held that it was of no merit.

[148] **Ian Smith and Gareth Thomas, the authors of Smith & Wood Employment Law, 9th Edition, Oxford University Press, London 2008,** posit at page 169 *inter alia* as follows:

“During the course of his employment the employee is under an implied duty not to disclose confidential information belonging to his employer and this is a duty which may continue to operate after the termination of his employment”

[149] Mr. Watt, Q.C. referred me to the Court of Appeal decision in **Faccenda Chicken Ltd. v Fowler** [1986] 1 All E.R. 617; [1986] I.R.L.R. 69. It is the leading case which deals with this issue. The principles of law which are derived from that case are as follows:

- i. If a contract of employment exists between the employer and employee the obligations of the employee are to be determined by the contract between them.
- ii. In the absence of any express term the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.
- iii. While the employee remains in the employment of the employer the employee owes a duty of good faith or fidelity to the employer. This duty of good faith will vary according to the nature of the contract. The employee is under a duty not to disclose or profit from any confidential information acquired during the course of his employment.

[150] **Faccenda** was applied in **Jack Scott v Sunny Investment & Finance Co. Ltd. (Antigua) Ltd. Reference No. 42 of 1996**. Mr. Marshall appeared for the employers in this case. Prior to his dismissal, by letter written by Mr. Hugh C. Marshall, the employee was suspended for two weeks pending an investigation into whether the employee had committed any breaches of his fiduciary duties to the employers or terms of his employment contract. Subsequent to the suspension the employee was summoned to attend a meeting at Mr. Marshall's office to consider possible breaches of the fiduciary and other duties which he owed to the employers. He was

subsequently dismissed. Mr. Marshall submitted that the employees' dismissal was not unfair. He cited **Faccenda (op cit)**.

[151] It is the responsibility of the employer to put forward such evidence which justifies that this ground for dismissal is sound. In addition, the employer must state quite clearly what is the nature and extent of the confidential information which should not be divulged. Clause 2 of Mr. Sealy's employment agreement is so wide and all embracing. It can include such matters along a spectrum which are innocuous to extremely important. In this case no information was identified by the Employer that is confidential so as to compare it with what Mr. Sealy purportedly stated on the Observer Radio Programme.

[152] In **Jack Scott, (op cit) Maundy P** stated at page 11 inter alia as follows:

“A major weakness in the Employer's case is that no supporting evidence was adduced in substantiation of their allegations.....We are being asked to find that a dismissal was fair based on allegations which have not been supported by any independent or other testimony.”

[153] In the instant case I adopt the words of Maundy P at paragraph [152]. They are equally relevant to the facts of this case. I therefore find that this ground for the dismissal of the Employees was unmeritorious.

Disloyalty

[154] The third ground for the dismissal of the Employees related to the Employees discharge of their duties in a disloyal manner by protesting simulator testing

and verification of pilots. It is submitted that the Employees demonstrated a poor work attitude, the latter emanating from their membership and participation in the activities and business of the Association. The evidence disclosed that discussion took place between the Employer and the Employee which concerned the best way to utilise the simulator for training purposes.

[155] No employee from the airline testified with regard to (a) the manner in which the employees discharged their duties in a disloyal manner; (b) the way in which the Employer suffered; (c) the nature and extent of the simulator protest (d) what impact did this have on the airline; (e) what was the “*poor work attitude*” demonstrated by the employees; (f) how did this affect the company.

[156] I regard the ground as outlined at paragraph [154] as an amorphous list of statements which did not assist the Court to define the manner in which the employees behaved. I find that there is no substance or merit whatsoever in this ground of dismissal.

Public Statements/ Formation of the Association

[157] The fourth ground which was submitted by the Employer for dismissing the employees was their making of public statements intending to or likely to bring the Employer into public disrepute and thereby causing injury to the Employer. The statements were predicated upon the employees formation of the Association “*during the period October 2004 through January 2005*”.

– See paragraph 7 of the Employer’s Memorandum.

[158] Mr. Ricardo Sealy gave evidence. He was the most vocal with regard to the formation of the Association. He was the Chairman of the body. In cross examination by Mr. Marshall Counsel for the Employer he stated that he was aware of a committee formed by R. Allen Stanford, the owner of the airline. The participants of this committee were hand picked by the Chief Pilot. Every department of the airline was represented inclusive of pilots. Mr. Marshall referred Mr. Sealy to the committee's work and/or achievements. These included (a) the Antigua Retirement Savings Plan; (b) improved health Insurance; (c) a new incentive programme; (d) a salary review; (e) the pilots "B" scale matter. Mr. Sealy either disagreed with Mr. Marshall that such work and/or achievements were done by the committee or as it related to the health insurance matter, he was not aware if it was the committee's work.

[159] Mr. Sealy also stated that during his employment with the airline, in his capacity as the Chairman of the Association, he obtained "*a mixed response from Caribbean Star*". Sometimes the Committee responded to him well. On other occasions the Committee was "*indifferent*".

[160] Except for Mr. Boxill, all of the dismissed employees comprised the entire Executive Council members of the Association. The other pilots who formed no part of the Executive Council were retained in their positions by the Employer.

[161] In answer to Mr. Marshall, Mr. Sealy stated that between July 2004 and December 2004, the Association championed the cause of the pilots. For some period during these months the Association was dormant. During November to December 2004 it was re-activated.

[162] In his evidence for the Employer Dr. Austin Josiah stated that he joined the staff of Caribbean Star in September 2004 as the Director of Human Resources. His Witness Statement filed on September 28, 2007 contained no reference to the employees' involvement in the formation of the Association.

[163] In answer to Mr. Marshall he specifically stated *inter alia* as follows:

“The pilots were not fired because of being in a trade union”.

In answer to Mr. Watt, Q.C. Dr. Josiah stated that he knew that the employees were involved in a registered trade union from September 2004 when he went to work at Stanford.

[164] The meeting initiated by the airline's founder in July 2004 revealed what he thought of the pilots and the formation of a trade union. Mr. Sealy gave evidence of one of Mr. Stanford's statements at the meeting. He is reported to have said *inter alia* as follows:

“This is what I am pissing off on you lot every day”.

[165] This statement showed clear disrespect by Mr. Stanford for the pilots whom he employed.

[166] When the management committee which Mr. Stanford formed invited the Trade Union to nominate three representatives to sit on that body the names of Captains Sealy, Streete and Haynes were proposed by Ceasar Haynes to the Chief Pilot. Captain Gill was not called upon to give evidence in rebuttal.

[167] At that same meeting of pilots in July 2004 Captain Ceasar Haynes, Mr. Ricardo Sealy and Mr. Patterson Thompson recalled what Mr. Stanford stated. According to these three pilots Mr. Stanford stated that he had no intention of being dictated to by any bargaining agent. He would shut the company down and not lose one night's sleep. Most people at the meeting became quiet as a consequence of hearing these statements from Mr. Stanford. According to them Mr. Stanford stated that he would be establishing bi-monthly meetings during which he would act as the chairman. He would also invite three members of the pilot body to attend these meetings in an attempt to resolve any problems which the pilots were experiencing.

[168] In answer to Mr. Marshall, Mr. Haynes informed the Court that Caribbean Star worked with the non-executive members of the Pilots Association. This was after Captain Gill rejected the names of Captains Sealy, Streete and himself to serve in the meetings of the management committee. According to Mr. Haynes, Captain Gill informed him that he Captain Gill was not going to be responsible for the airline being shut down.

[169] The history of the struggles which were experienced by the Trade Union movement in Antigua and Barbuda to be formed and recognized has been written by many authors. One of them is Sir Novelle H. Richards, K.G.C.N. Prior to his death he wrote a book entitled: **"The Struggle and the Conquest"** in 1981. At pages 22 and 23 he wrote *inter alia* as follows:

"The job of organizing the trade union was not an easy one. Meetings had to be convened in the city of St. John's and in the villages to explain to the people the reasons for forming the new movement."

Despite these difficulties however, the drive for membership of the Trade Union continued and the ranks began to swell. Men from St. John's travelled far and wide throughout the Island – Sunday after Sunday – and weeknights, taking the message of Trade Unionism to the people. The backbone of resistance to the Trade Union Movement was broken, and many who were at first reluctant, offered their services as Section Officers. The stage was now set for action”.

[170] The protection of freedom of assembly and association is governed by Section 13 (1) of the **Antigua and Barbuda Constitution Order, 1981, Cap. 23 of the Laws of Antigua and Barbuda**. Section 13 (1) states as follows:

“13 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the promotion and protection of his interest.”

[171] The Antigua and Barbuda Labour Code provides some rights to employees who may wish *inter alia* to associate with themselves in the formation of trade unions. The relevant sections are A 3(a), (e), K3 and K4 (i) (a). They state as follows:

A3 “As further amplified in the various Divisions of this Code it is hereby declared that the following expressions of national policy underlie and shall be used in the interpretation of the various provisions of this Code”.

A3 (e) “workmen should be free to associate with one another or with a trade union to improve their lot, without interference, restraint, or coercion”.

K3. “Employees shall have the right to associate with each other with a trade union; to form, join, or assist trade unions to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for mutual aid or protection; and they shall also have the right to refrain from any and all such activities except as such right is limited by a union security arrangement as may be imposed by section J 13”.

K4. (1) “It shall be an infringement upon employees self-organizational rights for an employer

(a) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section K.3”.

[172] The Caribbean Star Airline Pilots Association was re-registered on November 11, 2004 by the Labour Commissioner. Attitudes in former years by employers towards the formation of trade unions were indeed hostile. Persons who attempted to do so faced tremendous challenges. Many battles have been fought and won by the trade union movement in Antigua and Barbuda. They have facilitated the formation of trade unions in this country.

- [173] The establishment of trade unions has been one of the major reasons why Antigua and Barbuda and the Caribbean have prospered and developed. Trade Unions have made a significant contribution towards the sociological, political and economic development not only of Antigua and Barbuda, but of the Caribbean and indeed for countries beyond our shores.
- [174] The tremendous gains which were achieved by the men and women in Antigua and Barbuda in favour of the right to establish trade unions must be respected by employers. Employees must be encouraged to associate with themselves in the quest to develop their interests with a view to becoming more productive workers.
- [175] The formation of working committees by employers with the assistance of the worker is also a laudable effort. However this must not be to the exclusion of the formation of trade unions.
- [176] In this case, what was the reason for the dismissal of these workers? If the reason is held to be misconduct, then the employer has satisfied the requirements of Section C 58 (1) (b). If on the other hand, there was some other reason the Employer would not have satisfied the Section. In this latter circumstance their dismissal would have been unfair.
- [177] Apart from Dr. Josiah, no other worker of the Employer gave evidence. Dr. Josiah's evidence was unhelpful to prove the Employer's case. I find that his evidence was very helpful to the employees. Firstly, Dr. Josiah was a former Labour Commissioner. He is aware of the provisions of Section C 10(1) of the Labour Code. He stated that in accordance with C 10(1) "*a dismissal*

letter must be clearly defined'. When asked by Mr. Watt, Q.C. what was the precise reason given by the Employer in the letter of dismissal he stated that *"they could not catch the vision"*. He saw no provision for a *"secrecy agreement"*, or a mention of *"disruptive behaviour"* or disrespectful public statements referred to in the letter of dismissal. As stated at paragraph [123] this reason did not conform with Section C 10 (1) of the Antigua and Barbuda Labour Code.

[178] Secondly, Dr. Josiah had no faith in the letter of dismissal to constitute the real reasons for dismissal. According to Dr. Josiah when he saw the letter of dismissal he stated *"clearly to the company that the letter of dismissal did not reflect the facts for termination"*. Further Dr. Josiah disagreed with the Employer that the letter of dismissal *"reflected the facts and points that should be used for the dismissal of Ricardo Sealy and the other Caribbean Star Pilots who were dismissed by that letter"*. He was aware of *"the true reasons"* or the other facts which were not included in the letter of dismissal.

[179] Thirdly, warning letters formed no part of the Employer's case. However Dr. Josiah informed the Court that letters of warning were written by the Company to the Employees. He could not show to the Court any reference to letters of warning in his Witness Statement. With regard to the issue of whether or not the Company should have issued letters of warning to the Employees Dr. Josiah's evidence was that in relation to the facts that are before the Court relative to the Employees' dismissal, in these circumstances the Company should have issued written letters of warning to the Employees.

- [180] The burden is upon the employer to satisfy the Court of the reason for dismissal. If the Employer produces some evidence to show the reason why it has dismissed the Employee, then the burden passes to the Employee to show that the Employer has dismissed the Employee for some other reason. The Employee has a higher evidential burden than the legal burden which is placed upon the Employer. It is not for the Employee to prove the reason for his dismissal. His responsibility is to advance some evidence that casts some doubt about the reason which has been put forward by the Employer for his dismissal.
- [181] The Court finds that the reasons adumbrated by the employer in the letter of dismissal were not the real reasons for their dismissal. The reasons as stated by the employer do not satisfy the provisions of C58 (1)(a) or (e) of the Antigua and Barbuda Labour Code.
- [182] The Court further holds and agrees with Dr. Josiah that the Employer had other reasons for summarily dismissing the employees. There is evidence that the Employer preferred the corporate style of management that favoured Committees of Management. When the Association suggested that three of its members should be represented thereon, they were categorically rejected by the employer.
- [183] The evidence also reveals that Mr. Stanford stated that he had no intention of being dictated to by any bargaining unit. He would shut down the company and would not lose any sleep.

[184] After the formation of the Association this development did not augur well with the Company. The Company tolerated its birth in the initial stages. After the Association started to demonstrate some strength it began to feel the wrath of the Employer. The Employer became highly annoyed with the employees subsequent to their formation of the Association. **Maundy P in Barrymore Joseph v Jolly Beach Resort Ltd. Reference No. 17 of 2002** after deciding that the case involved an instance of severance without notice said *inter alia* as follows:

“The action by the Employers occurred within a short time of the Employee having joined the Antigua Trades and Labour Union, which he has a right to do under the Labour Code and it thus begs the question whether this was what orchestrated “the move”.

[185] Options were available to the Employer beside summary dismissal. This Court has stated on numerous occasions that summary dismissal should be used as a last resort save and except in circumstances where it appears that the conduct of the Employee is deserving of such treatment. **Maundy P in Brenda Albert and Laurie Marsh v Woods Development Ltd. Reference No. 5 of 1998** stated the Court’s regard for summary dismissal at paragraph 34 as follows:

“Repeatedly this Court has stated that Summary Dismissal should be the ultimate punishment by an Employer and except for an extreme case should be applied only where all else has failed”.

[186] There was evidence in this case that the Employees performed their duties in an exemplary manner. Their commendations and/or monetary rewards which were given to them by the Employer have previously been referred to. Dr. Josiah's evidence with respect to the necessity of the Employer to give written warnings to the Employees before dismissal seriously undermined the Employer's case. No evidence was presented to the Court of any recording having been made by the Observer Radio Station.

[187] Mr. Addison Khan, President of the Industrial Court (Trinidad & Tobago) in the case of **National Union of Domestic Employees and Pit and Quarry Limited, Trade Dispute No. 47 of 1989** made the following statement at page 4 of the judgment:

“There is a tendency which we have noticed on the part of certain persons who appear in this Court to believe that they do not have to support their case by evidence. It is true that this Court is not bound by the rules of evidence stipulated in the Evidence Act but this does not mean that the Court can act without evidence. This Court, like any other court of justice, must determine the issue before it only on the evidence and not “by spinning a coin or consulting an astrologer”. We do not know how such a tendency developed, but we must say that if such an idea exists it is an erroneous and foolish one”.

[188] I adopt the words of **Khan P at paragraph [187]** as appropriate to the facts of this case. The Employer has not supported its case with any evidence of

such a nature, quality or kind to justify that these employees were fairly dismissed.

CONCLUSION

[189] I have taken into consideration all of the evidence adduced on behalf of both parties. I have observed the demeanours of all of the witnesses as they gave their evidence. The relevant sections of the Labour Code and the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda were also read and taken into consideration. In addition, the various submissions and legal authorities cited by both parties were carefully analysed.

[190] (i) I hold that the failure of the Employer to comply with the provisions of Section C10 of the Antigua and Barbuda Labour Code resulted in their being unfairly dismissed. Their dismissal was harsh and oppressive.

(ii) This Court finds that the reasons which were put forward by the Employer in the Employers' Memorandum, even though they were tendered for the purpose of satisfying Section C58 (1) (a) of the Labour Code, were merely used as a pretext for getting rid of the employees. No evidence was led by or on behalf of the Employer which substantiated the allegations made against the Employees. No witness was called to give evidence of these allegations in support of the Employer. Mr. Marshall, Attorney-at-Law for the Employer sought to prove these allegations by eliciting from the Employees the existence of the allegations. This strategy failed.

THE FOURTH ISSUE

The Award

[191] In all of the circumstances of this case the Employer acted unreasonably in dismissing the Employees. Their dismissals were harsh, crude, oppressive and not in accordance with good industrial relations practice. I find that their dismissals were made without any just cause. They were unfairly dismissed. As a consequence of these findings the Employees are entitled to compensation for being unfairly dismissed.

[192] Consequential upon a finding of unfair dismissal an employee is entitled to be compensated by the employer under certain established headings. I shall now address the entitlement of each employee under these headings.

(A) Basic Award for Loss of Protection

[193] (a) An award under this heading is arrived at in the same manner as the computation of severance payment. An employee is entitled to one month's pay for every year that he has worked at his last basic wage.

(i) Mr. Keith Thompson

Mr. Thompson's tenure of employment with the employer commenced on August 01, 2000. It was ended on January 31, 2005. He worked for four point five (4.5) years. His last monthly salary before dismissal was \$12,400.00. He is entitled to **\$55,800.00** under this heading.

(ii) Mr. Stephen St. Agathe

Mr. St. Agathe worked for the Employer from August 01, 2000 to January 31, 2005. He was employed for 4.5 years. His last monthly

salary before being dismissed was \$12,200.00. The sum which is due to him under this heading is **\$54,900.00**

(iii) **Mr. Ceasar Haynes**

Mr. Haynes' employment with Caribbean Star commenced on July 19, 2000 and ended on January 31, 2005. His last monthly salary which he received from Caribbean Star was \$12,400.00. He was employed for 4.5 years. The award due to him is **\$55,800.00**

(iv) **Mr. Ricardo Sealy**

Mr. Sealy was employed with the airline from August 01, 2000 to January 31, 2005. This represents a period of 4.5 years. He last earned \$12,400.00 per month from Caribbean Star. He is entitled to **\$55,800.00**

(v) **Mr. Patterson Thompson**

The airline employed Mr. Thompson from August 15, 2001 to January 31, 2005. This represents 3.5 years. His last monthly earnings prior to being dismissed was \$7,050.00. He is entitled to **\$24,675.00.**

(vi) **Mr. Dylan Boxill**

Mr. Boxill's employment with Caribbean Star began on June 18, 2001. It ended on January 31, 2005. He worked for 3.6 years. His last monthly salary before dismissal was \$12,200.00. He is entitled to **\$43,920.00** under this heading.

SUMMARY

- (b) The total sum which is due and payable by the Employer to the respective Employees under this heading is **\$290,895.00**. It is arrived at in accordance with the **First Schedule**.

(B) Immediate Loss

[194] All of the employees were summarily dismissed by letter dated January 31, 2005. They gave evidence with respect to the efforts which they made to obtain alternative employment. An employee is entitled to an award under this heading if there is evidence led of a nature, quality and kind that he has made all reasonable efforts to mitigate any loss, if any, which he has sustained consequential upon his dismissal. I shall now address the issue of whether or not any award is due to be paid to any employee under this heading.

(i) Mr. Keith Thompson

The efforts which Mr. Thompson made to mitigate his loss are set out at paragraphs [17] and [18]. In addition he stated that after being dismissed he remained unemployed for six months. He then obtained employment sometime in or about July 2005. His monthly salary was \$6,899.17. He subsequently obtained employment from Anet in Osaka, Japan in March 2007. This is a subsidiary of All Nippon Airlines. His Attorney-at-Law submits that he earns a monthly salary of \$7,028.33 from All Nippon Airlines. No evidence was submitted to this Court to prove such earnings.

[195] The main issue which is to be determined is what period (if any) should this Court compensate any of the employees who have suffered a loss under this heading? Mr. Marshall, Attorney-at-Law for the Employer submits that if any

of the employees has sustained a loss under this heading then such loss should be compensated by the payment of six months salary. Mr. Marshall cited *Claudette Higgins v Dr. Tele Akande Ref. No. 3 of 1993*, *Roxanne Warner-Payne v B.W.I.A. International Airways Ltd. Ref. No. 10 of 1998*, *Steadman Barzey v AGA Distributors Ltd. Ref. No. 16 of 1999*, *Leslie Emmanuel v Royal Bank of Canada Ref. No. 3 of 1994* and *Lawrence Defreitas v E. Alex Benjamin Ref. No. 3 of 1999* in support of his submission.

[196] Mr. Watt, Q.C. and Dr. David Dorsett, Attorneys-at-law for the Employees submitted a document entitled *Particulars of Loss Suffered by the Employee Pilots*. It contains the Immediate Loss which they say the pilots suffered. In that document and in their Written Submissions for the employees, not one single case was proffered in support of their submissions.

[197] The cases cited by Mr. Marshall are the identical ones which he cited in *Elliott Streete v Caribbean Star Airlines Ltd. Reference No. 19 of 2005*. In *Elliott Streete* I have sought to establish the legal principles which should be applied to an understanding of what an unfairly dismissed employee is entitled to under this heading.

[198] I shall not repeat in a verbatim manner what I stated in **Elliot Streete**. However a summary of the major principles of mitigation of damages is as follows:

- (i) If the Court holds that an employee was unfairly dismissed, then he is entitled to be compensated for immediate loss of earnings (i.e. loss of earnings between the date of dismissal and the date of the trial or judgment);

- (ii) An employee must take all reasonable steps to mitigate his loss sustained as a consequence of the employer's wrongful act;
- (iii) In taking such reasonable steps the employee must not remain idle at home. He must accept employment in keeping with his standing, experience and personal history. He should be afforded a reasonable period of time looking for other employment before accepting a lower paying job;
- (iv) Whether the dismissed employee has acted reasonably is a question of fact in the circumstances of each particular case;
- (v) The standard of reasonableness is not high since the defendant is the wrongdoer;
- (vi) When one party states that another party has failed to mitigate a loss, the burden of proof is upon the party making that allegation;
- (vii) If the trial takes place sometime subsequent to the dismissal and the employee continues to suffer loss, the Court may (a) apply an appropriate deduction if it is sure that the employee has failed to mitigate his loss or (b) allow the employee's claim if it is proved that he has acted reasonably to mitigate his loss.

The Mitigating Factors

[199] The employee's proof of actual loss is merely one of the several factors which this Court must take into consideration so as to determine the outcome of the issue at [194].

[200] The employee is a highly skilled airline pilot. He was formerly employed with Liat (1974) Ltd. He joined Caribbean Star as a Captain. On one

occasion he acted as the Chief Pilot in the Flight Operations Department. He subsequently declined an offer of permanent employment to this position.

- [201] (i) Subsequent to his dismissal Mr. Thompson informed the Court that he made an application to St. Vincent Airways. No positions were available in February or March 2005. He held discussions with Tobago Express in or about March and April 2005. These discussions were unsuccessful due to work permit challenges.
- (ii) He was interviewed by the Director of Civil Aviation in Guyana. This took place in May 2005. A Flight Inspector's vacancy became available in Guyana. He did not obtain this position.
- (iii) He gained employment with Liat in July 2005 as a First Officer. This is a junior position. His monthly earnings were \$6,899.17.
- (iv) Mr. Thompson left his position with Liat. He joined ANET in March 2007. This is a subsidiary of All Nippon Airlines.
- (vi) At the time of his dismissal the evidence was that three airlines in the Caribbean operated the Dash 8 aircraft. These were Caribbean Star, Liat and Tobago Express. In the circumstances of this case the efforts which Mr. Thompson made to obtain alternative employment after his dismissal were reasonable. I find that there was a direct relationship between his efforts to obtain alternative employment and the period of six months during which time his efforts were unsuccessful.

[202] Was it reasonable for Mr. Thompson to accept a lower paying job with Liat (1974) Ltd.? Should he have accepted employment with All Nippon Airlines in Osaka, Japan? For what period of time (if any) should he be compensated for any loss which he has sustained?

Application of the Legal Principles

[203] In *Streete* (op cit) I stated my reasons why the cases which were cited by Mr. Marshall at paragraph [195] hereof were irrelevant for a determination of the issue at paragraph [195] hereof. Briefly and without repeating myself, the reasons why I so opined were as follows:

- (i) The facts of those cases did not support a cap of such awards;
- (ii) Elsewhere in *Streete* I held that neither the Industrial Court in certain cases nor the Eastern Caribbean Court of Appeal in (a) **Liat (1974) Ltd. v Shepherd Civil Application No. 6 of 1991** and (b) **Antigua Village Condo Corporation v Jennifer Watt Civil Appeal No. 6 of 1992** had held that a cap existed for awards under this heading.

[204] Mr. Thompson was well known to Liat (1974) Ltd. He was afforded the first opportunity to use his professional skills in July 2005 subsequent to his dismissal. It paid him a lower salary than when he was employed with Caribbean Star. In all of the circumstances of this case, I find that it was reasonable for him to accept a position as First Officer with Liat (1974) Ltd.

[205] At Liat he was paid \$6,899.17. He remained at Liat until February 2007. No evidence was led of the circumstances why he ceased to work for Liat. Was he entitled to any salary increases over the period of his employment? This was an airline which was well known to him. It operated in a region which was very familiar to him. He lived in Antigua and Barbuda.

[206] No evidence was led in relation to his acceptance of employment from All Nippon Airlines in Osaka, Japan from March 2007. No details were presented of (a) the existence of a contract and/or (b) what are the contractual

terms? Shall he be able to obtain a promotion from his employer? Shall his salary be increased? What are his career options? Is he earning perquisites?

[207] What are the attractive features of his new contract which caused him to accept this offer? The Attorneys-at-Law for Mr. Thompson have submitted that the monthly salary which he earns from Nippon Airlines is EC\$7,028.33. No evidence was presented however to confirm this. This is merely EC\$129.16 more than what he earned at Liat (1974) Ltd. Why did he relinquish a job in a familiar environment to accept one in a far away place that pays him an infinitesimal amount higher than his previous job? No evidence was led of the status of the new position in which he works.

[208] No evidence was led to inform the Court of what Mr. Thompson expects to achieve from Nippon Airlines which is superior to his position with Liat. Having not been presented with any evidence which supports the decision which he has made I must respectfully hold that Mr. Thompson's acceptance of an offer from Nippon Airlines which pays him in essence almost the same salary as he previously earned from Liat, was not a reasonable step to find suitable alternative employment. He should not have accepted this offer from Nippon Airlines.

[209] In the circumstances of this case I find that Mr. Thompson's efforts to find alternative employment were reasonable from February 01, 2005 to February 2007. The sum which I award under this heading is **\$172,016.60**. It is shown in the **Second Schedule**.

(ii) **Mr. Stephen St. Agathe**

The Mitigating Factors

[210] Mr. St. Agathe worked for Liat as an airline pilot prior to working for Caribbean Star. He was employed by Caribbean Star on March 02, 2001 as a Chief Pilot in the Flight Operations Department. After being dismissed on January 31, 2005 he wasted no efforts to seek alternative employment. As a pilot in the employ of Caribbean Star he was ranked very highly. From a field of between (60) and (70) pilots he was ranked No. 5. Mr. St. Agathe made attempts to obtain employment after being dismissed. He sought alternative employment from Tobago Express within a week thereof. He also sought employment from Carib Aviation Ltd. This is located in Antigua and Barbuda. In addition, he applied to Liat to be employed as an airline pilot.

[211] He returned to work for Liat (1974) Ltd. on June 06, 2005. He is still employed with Liat as an airline pilot. There is testimony that Mr. St. Agathe would have been unable to be employed as a Captain. His position was that of a First Officer. This is a junior position. His initial monthly salary was \$6,899.17. His last monthly salary earned from Caribbean Star was \$12,200.00.

Application of the Legal Principles

[212] The efforts which Mr. St. Agathe made to obtain suitable alternative employment during the period January to June 2005 were reasonable having regard to the circumstances of this case.

[213] His monthly salary from Liat has risen from \$6,899.17 to \$7,028.33. His seniority has significantly fallen from being No. 5 from a field of about sixty (60) pilots to number (98) from a field of (100). This is understandable given the policy of Liat to initially employ pilots in junior positions as First Officers.

[214] The question which is to be determined is what is a reasonable period of time that this employee should be compensated for any loss suffered by him under this heading?

[215] In **Leslie Emmanuel and Royal Bank of Canada Reference No. 3 of 1994** Maundy P, stated *inter alia* as follows:

“But even when the employee took steps to mitigate his loss the Court will not necessarily award compensation for the period between the date of dismissal and the date of the trial or assessment, as is the prima facie rule, but for the time that, in its view, it would have taken a reasonable and prudent employee with due diligence and reasonable efforts to obtain similar or substantially similar employment”

The employee in that case was a teller who subsequently became an Operations Support Officer. A six month period was held to be reasonable.

[216] I am required to examine all of the facts of this case in order that I may determine the issue under this heading. Mr. St. Agathe is a commercial airline pilot. As at the date of the trial of this matter the evidence disclosed

that three airlines flew the Dash 8 aircraft. He obtained employment at one of these airlines which was Liat.

[217] An airline pilot is a highly skilled employee. No evidence was led by the Employer to show what other areas of employment may attract the employee's interest apart from flying aircraft. Of course it is also the responsibility of Mr. St. Agathe to explore all options in order to obtain suitable employment. Maundy, P in *Anthea Roberts v Cable and Wireless (WI) Ltd. Reference No. 29 of 1993* placed particular emphasis at page 16 of the judgment on the requirement for the employee to be ***"a professional person or someone who possesses a particular skill"*** to be granted a longer period of time to find suitable alternative employment over and above that of someone who is unskilled.

[218] In this case the Employer summarily dismissed the Employee. The Employer specifically pleaded in it's Employer's Memorandum at paragraph 9 as follows:

"In particular the Employee during the period May 04 to January 05 reported sick some 17 times. Usually such reports were made either during flight after completion of one leg. Few of the employee's illnesses were for periods beyond the two days that required a sick certificate. And in all cases the employee's sickness would by reason of the lateness of the report occasion disruption to the employee's service and [in] some cases cancellation of a flight".

[219] No warnings were issued to Mr. St. Agathe. He was accused of being disruptive. This allegation formed a plank in the Employer's armour of Memorandum reasons for dismissal.

[220] The employer was in possession of the data which was relevant to Mr. St. Agathe's days of illness. Mr. Allan Hart for the Employer gave evidence. He stated *inter alia* that Mr. St. Agathe was "***eight times sick in three years***". The years were 2002, 2003 and 2004. Mr. Hart also stated *inter alia* as follows: "***I do not see any seventeen times (Mr. St. Agathe) having reported ill during the years 2002 to 2004***".

[221] The allegation of Mr. St. Agathe's illness was completely untrue. All of the other allegations which flowed from his being sick on seventeen (17) occasions were also false.

[222] The Employer and Mr. Marshall, its Attorney-at-Law well knew or ought to have known that the contents of paragraph 9 of its Memorandum were without any merit whatsoever.

[223] I must have regard to the fact that the Employer is one of three airlines which operated the Dash 8 aircraft. The Employer should have been in a position to realise that this employee would in all probability face some challenges to find suitable alternative employment in his field.

[224] This Court has in **Danzlear Dublin v Royal Bank of Canada Reference No. 15 of 1983** made an award of immediate loss of earnings to an employee for the period he was out of work to the date of the decision.

[225] Taking into consideration all of the facts of this case, I find that the loss which Mr. St. Agathe has sustained since he was dismissed bears a relationship to his dismissal. His decision to remain employed by Liat was reasonable. The loss of earnings which he sustained from February 01, 2005 to the date of the trial of this action is reasonable having regard to all of the circumstances of this case. The sum which is to be paid to him is **\$208,454.88**. It is arrived at in accordance with The Second Schedule.

(iii) **Mr. Caesar Haynes**

The Mitigating Factors

[226] Mr. Haynes was employed by Liat before commencing employment with Caribbean Star. At Caribbean Star he held the position of Chief Pilot for the period September 2001 to August 2002. He resigned from this position. He was afterwards appointed to a position of Simulator Instructor from the summer of 2003 before he was dismissed on January 31, 2005. As at the date of his dismissal he was a Captain. His seniority was number 5 of approximately (60) pilots employed.

[227] Within a month of having his services terminated, Mr. Haynes applied for a position with Tobago Express. He held a discussion with the Vice President of Operations. Mr. Haynes is not a national of Trinidad and Tobago. He experienced work permit challenges. He made an application to Liat (1974) Ltd. He was interviewed by Liat in April 2005.

[228] There is an entity known as PARC Aviation. It is an internet organization. It provides opportunities for pilots who are seeking employment opportunities. Mr. Haynes submitted his name to this organization. He hoped

to find suitable employment by PARC Aviation. Alas, no opportunities were forthcoming from PARC.

[229] As a result of the interview with Liat Mr. Haynes obtained employment with Liat on June 15, 2005. Due to Liat's policy he obtained employment as a First Officer. This is a junior position. His seniority number is (97) from a field of about (110) pilots.

[230] Initially his monthly salary earned from Liat was \$6,899.17. As at September 7, 2007 this rose to \$7,028.33. He remains employed with Liat.

[231] The identical allegation of illness which was made against Mr. St. Agathe by the Employer, particulars of which are stated at paragraph [218], were also pleaded against Mr. Haynes. He denied them.

[232] When the allegation of illness was made by the Employer it ought to have been in possession of any documents to support its claim. At the trial Mr. Allan Hart for the Employer gave evidence. No evidence whatsoever was presented of Mr. Haynes having been ill on any occasion. Mr. Marshall Attorney-at-law for the employer did not pursue this head against Mr. Haynes. The allegations of illness were dropped. They were entirely unfounded, and ought not to have been pleaded.

Application of the Legal Principles

[233] Having taken into consideration all of the facts of this case I find that his decision to remain in the employ of Liat is reasonable. The loss which he has

suffered from February 01, 2005 to the date of trial is reasonable. The sum to which he is entitled is **\$213,069.38**. It is arrived at in accordance with **The Second Schedule**.

(iv) **Mr. Ricardo Sealy**

The Mitigating Factors

- [234] By letter dated February 17, 2005 Mr. Sealy applied to the Director General of Eastern Caribbean Civil Aviation Authority in St. John's, Antigua for a position of Flight Inspector. This letter was admitted as "**RS-12**". The Authority responded to him by letter of April 21, 2005. His application was "***being held for consideration***". This letter was admitted as "**RS-14**".
- [235] Mr. Sealy also applied to Liat (1974) Ltd. for the position as a Captain of its Dash 8 aircraft. He previously worked with Liat for twenty-one (21) years prior to his resignation to join Caribbean Star. This letter was admitted as "**RS-16**". By Liat's letter of August 11, 2005 it informed him *inter alia* that it was unable to offer him the position as Captain. This letter was admitted as "**RS-18**".
- [236] Mr. Sealy stated that he made further applications to obtain employment. No other applications were produced. Before obtaining employment he also spoke with an official of Tobago Express. Mr. Sealy said that "***there were Work Permit problems***".
- [237] Mr. Sealy subsequently obtained employment with Aero Contractors. This Company is located in Nigeria. In his Witness Summary he stated that he

commenced working in Nigeria from December 2006. He earns a monthly salary of \$13,400.00.

[238] Prior to being employed by Caribbean Star Mr. Sealy was employed by Liat ***“in the capacity as Captain on the Dash 8 aircraft for twenty-one (21) years”***. Due to Liat’s policy he could not rejoin Liat as a captain.

[239] In answer to Mr. Marshall Attorney-at-Law for Caribbean Star Mr. Sealy informed the Court that he had ***“never applied for a First Officer’s position at Liat”***. After being dismissed he obtained employment in Nigeria in December 2006.

Application of the Legal Principles

[240] The issue for determination is whether or not Mr. Sealy’s efforts or lack thereof to find suitable alternative employment between February 01, 2005 and November 2006 was fair and reasonable.

[241] Mr. Sealy gave evidence that he ***“did not apply for a job during February, March or April 2005”***. According to him during this period he was ***“performing tasks on the Association’s behalf and rendering services for the Association”***.

[242] Such efforts by Mr. Sealy are quite noble. The law is very clear however. A dismissed employee has a duty to find suitable alternative employment after dismissal.

[243] No evidence has been presented to this Court to show what Mr. Sealy did after May 23, 2005 to obtain any or any suitable alternative employment.

[244] Some of Mr. Sealy's own colleagues in this Reference were Captains with Liat before they resigned from the airline to join Caribbean Star. Whilst Mr. Sealy did nothing to obtain suitable alternative employment between May 23, 2005 and November 2006, Messrs. Patterson Thompson, Stephen St. Agathe, Caesar Haynes and Keith Thompson all rejoined Liat on June 06, 2005, June 15, 2005 and July 2005 respectively. It is clear that he wished a position of Captain to which he was formerly accustomed.

[245] I find that Mr. Sealy had a duty to request a First Officer's position from Liat. That he did not so apply is a significant factor which must be taken into consideration in a determination of the issue under this heading. It is highly probable that he would have obtained such a position with Liat between June 06 and 15, 2005. His monthly salary would most likely have been \$6,994.75.

[246] In the circumstances of this case I find that it was unreasonable for Mr. Sealy not to seek any alternative employment during the months of February to April 2005.

[247] In the circumstances of this case I find that Mr. Sealy is entitled to the sum of **\$172,769.38**. **The Second Schedule** shows how this figure has been arrived at.

(v) **Mr. Patterson Thompson**

The Mitigating Factors

[248] Mr. Thompson obtained employment on February 25, 2005. He worked with Trident Enterprises, Nairobi in Kenya until May 25, 2007. He flew a Dash 8 aircraft as a part of a United Nations sponsored programme. It was called “**Operation Lifetime Sudan**”. He joined LIAT (1974) Ltd. as a First Officer on June 06, 2007. He is still so employed.

[249] Before his dismissal Mr. Thompson’s last monthly salary was \$7,050.00. In his Particulars of Loss he submitted the different sums which he earned from Trident Enterprises and Liat.

Application of the Legal Principles

[250] Mr. Thompson grasped the first job opportunity which was presented to him. He wasted no time in his efforts to find alternative employment. I find that it was reasonable for him to accept the temporary position with the United Nations Humanitarian Programme. I also find that his decision to join Liat as a First Officer was reasonable having regard to all of the circumstances of this case.

His Mitigating Efforts

[251] The employee obtained employment on February 28, 2005. He worked with Trident Enterprises, Nairobi in Kenya until May 23, 2005. He flew a Dash 8 aircraft as a part of a United Nations sponsored programme.

[252] He joined LIAT (1974) Ltd. as a First Officer on June 06, 2005. He is still so employed. I find that the loss which he has sustained under this head is **\$17,476.50**. This sum is arrived at in accordance with **The Second Schedule**.

(vi) **Mr. Dylan Boxill**

The Mitigating Factors

[253] Before Mr. Boxill was dismissed his monthly salary was \$12,200.00. He gave evidence that he earns a monthly salary of \$10,000.00 from his position in Canada.

[254] Mr. Boxill wasted no time in an attempt to find suitable alternative employment from Tobago Express. Whilst employed by Caribbean Star he was a Captain who flew the Dash 8 aircraft. There is no evidence however that he made an application to Liat to obtain any alternative employment. It appears that Mr. Boxill wished to obtain employment which earned him a salary in close proximity to his salary which he earned at Caribbean Star. This is laudable.

[255] However, Mr. Boxill should have made an application to obtain employment from Liat. If he was not successful then I would have taken this event into consideration.

[256] In the circumstances of this case I find that in all probability Mr. Boxill would have obtained employment from Liat in or about the middle of June 2005. His monthly salary would most likely have been \$6,963.75. I also find that his other efforts to find alternative suitable employment were reasonable.

[257] I find that the loss which he suffered under this heading is **\$168,853.12**.
It is arrived at in accordance with The Second Schedule.

Summary

The total sum which is due and payable by the Employer to the Employees under this heading is **\$952,639.86**. It is arrived at in accordance with the calculations which are contained in **The Second Schedule**.

(C) Manner of Dismissal

The Law

[258] The following basic propositions of law can be derived from a reading of the authorities.

- i. If an award is to be granted under this heading the employee is required to prove that *“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. *“It is only if there is cogent evidence that the manner of the dismissal caused financial loss, as for example, by making it more difficult to find future employment; that the manner of the dismissal becomes relevant to the assessment of compensation”*.
- See Sir Hugh Griffiths in Vaughan v Weighpack Ltd. [1974] I.R.C. 261 at page 265, Letter G.

[259] These principles of law were applied in **Antigua Commercial Bank v Mary White Civil Appeal No. 1 of 1988**. In this case after stating the attempts which Ms. White made to secure employment in Antigua without any success, **Bishop, J.A.** in writing the decision of the Court stated *inter alia* at page 42 as follows:

“I am satisfied that, by her dismissal, Mary White was made less acceptable to potential employers. To borrow from the words of Sir John Griffiths in Vaughan v Weighpack Ltd(above) there was cogent evidence that the manner of dismissal made it more difficult for her to find future employment and, I add, especially at managerial level, in Antigua.”

[260] In addition, the Court is duty bound to apply the provisions of Section 10 (3) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda. That section provides as follows:

“(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the person immediately concerned and the community as a whole.

(b) act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of

good industrial relations and, in particular, the Antigua and Barbuda Labour Code”.

Application of the Law to the Facts

[261] In applying these provisions the Court “*must not confine itself to the evidence given 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 (op cit)**

[262] The manner or circumstances of the dismissal of the employees must take into consideration the letter of dismissal. At first blush, it would appear that by itself it did not in any way reflect adversely on the employees’ performance or on them personally.

[263] The letter of dismissal did not state explicitly any allegations of misconduct which were committed by any of the Employees. However, it was Mr. Marshall, Attorney-at-Law for the Employer who pleaded in the Employer’s Memorandum that (a) the employees began to discharge their duties in a disloyal manner; (b) they demonstrated a lack of commitment to their employer; and (c) they engaged in disruptive conduct. According to Mr. Marshall these allegations fully explained and truly reflected what the letter of dismissal meant. Mr. Marshall further submitted that the Employees’ termination was consistent with Section C59 of the Antigua and Barbuda Labour Code.

[264] The allegations of misconduct referred to at paragraph [263] were also contained in the Witness Statement of Dr. Austin Josiah on behalf of the

Employer. Dr. Josiah was unable to substantiate any of the allegations of misconduct referred to at paragraph [263].

[265] In **Norton Tool Co. Ltd v Tewson [1972] I.R.L.R. 86**, certain guidelines were laid down for Industrial Courts to follow and apply when assessing compensation. In **R W Tidman v Aveling Marshall Ltd [1977] I.R.L.R. 219** Mr. Justice Kilner Brown at page 219 stated *inter alia* as follows:

“We are of the opinion that in future cases it is the duty of an Industrial Tribunal to raise itself the five different categories of compensatory award.....It would be contrary to the spirit of the legislation if the Appeal Tribunal were to say that simply because a man himself did not put forward a particular ground that there he ought for ever to be struck out from raising it. More than that, we say as we have indicated, that it is the duty of an Industrial Tribunal itself to inquire into the possibility of various heads in this way. Once the categories have been investigated, it is, of course, for the aggrieved person to prove the loss and therefore it is essential that the difference between the inquiry into the categories and the proof of any loss under any one of those categories should always be borne in mind.”

[266] In this case all of the employees previously worked for Liat (1974) Limited. The evidence did not disclose the positions which all of them held with Liat prior to being employed with Caribbean Star.

- [267] It would be recalled that Mr. St. Agathe joined Caribbean Star as a Chief Pilot. His seniority ranking at Caribbean Star prior to being dismissed was No. 5 from a field of (60) to (70) pilots. As at the date of dismissal his monthly salary was \$12,200.00. When he rejoined Liat he commenced employment as a First Officer. He earns a salary of \$6,994.75. This is a junior position. His seniority ranking is No. 98 from a field of (100) pilots.
- [268] When Mr. Ceasar Haynes was dismissed he was a Captain. His seniority rank was No. 5 of approximately (60) pilots. When he rejoined Liat his ranking was (97) from a team of (110) pilots. His monthly salary moved from \$12,400.00 at Caribbean Star to \$6,963.75 at Liat.
- [269] Mr. Patterson Thompson joined Caribbean Star as a Captain. His monthly salary was \$7,050.00. His seniority ranking was (35) of about (60) pilots. When he rejoined Liat he earned a monthly salary of \$6,961.17. His ranking is now (99) of about (110) pilots.
- [270] Mr. Dylan Boxill was employed as a Captain with Caribbean Star prior to being dismissed. His seniority ranking was (31) from a field of about (60) pilots. His monthly salary was \$12,200.00. He joined Westjet Airlines as a First Officer. This is a junior position. His monthly salary is now \$10,000.00.
- [271] Mr. Keith Thompson was employed as a Captain with Caribbean Star prior to his dismissal. His ranking was (8) from a field of about (60) pilots. His monthly salary was \$12,400.00. After his dismissal he rejoined Liat in a junior capacity as First Officer earning a monthly salary of \$6,899.17. He

obtained other employment earning almost the same salary as he earned at Liat. A reasonable inference to be drawn from the salary which he currently earns is that he currently works in a junior position.

[272] Mr. Ricardo Sealy currently earns a higher salary than what he previously earned at Caribbean Star. No evidence was led with regard to the position in which he is currently employed.

[273] In **Antigua Commercial Bank v Mary White** (op cit) Ms. White obtained an award under this heading as a consequence of her inability to find secure employment in Antigua for about eighteen (18) months.

[274] It is true that Messrs St. Agathe, Haynes, Thompson, Boxill and Thompson all obtained relevant employment within a reasonable time after being dismissed.

[275] They all acted reasonably in obtaining employment with Liat. Liat's policy however is that it would not hire an officer as a Captain. That officer would be required to be hired as a First Officer. It was mandatory that the officer be trained in the operations of Liat. As he obtained further training and experience he or she would climb the professional ladder.

[276] With the exception of Mr. Patterson Thompson all of the other pilots (not including Mr. Sealy) were Captains. A captain is regarded in aviation circles as a senior officer. A First Officer is a junior officer who aspires to become a Captain in the future.

[277] (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.”

[278] 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.”

[279] Mr. Marshall Attorney-at-Law for the Employer made a submission to the Court that it should “*question the safety of Caribbean Star Airlines*” as a consequence of the Employees actions.

[280] An Attorney-at-law who makes a submission before the Court to explain the true reason for an Employer’s dismissal of Employees runs a substantial risk if that submission is proven to be unmeritorious and unfounded.

[281] The allegation at paragraph [279] was lacking in substance. It was submitted to cast bad aspersions upon the credibility of the Employees. This legal strategy is to be thoroughly condemned. It has no place whatsoever in a Civil Law practice. At paragraphs [181] and [190(ii)] I held that this and other allegations of misconduct were without any merit whatsoever.

[282] The allegations made on behalf of the Employer struck forcibly at the characters and reputations of the Employees to such an extent so as to cause

“the Employer to lose all trust and confidence” in the Employees’ reliability.
See the witness Statement of Dr. Austin Josiah at Paragraph [11]

[283] These unfounded allegations represent disgraceful stains upon the otherwise unblemished reputations of these Employees. It matters not whether they are contained in the letters of dismissal, the Employer’s Memoranda or disclosed in the evidence before this Court. Although the Employees obtained subsequent employment it is reasonable to conclude that a prospective Employer would be hesitant or unwilling to offer employment to these Employees who were accused of such awful actions.

[284] As a consequence of the allegations the Employees are made *“less acceptable to potential employers.”* – see **Sir John Donaldson in Norton Tool** (op cit) at **page 506 Letter E**. The sum which is due from the Employer to the Employees is **\$210,000.00**. The individual awards are further stated in **The Third Schedule**.

(D) Future Loss

Introduction

[285] The current legislation has not imposed any statutory limit on awards including an award for future loss.

- See **Dennis Byron JA in Antigua Village Condo Corporation and Jennifer Watt Civil Appeal No. 6 of 1992 at page 11**.

[286] The following principles of law emerge from a reading of the cases.

- i. *“[T]here must be some evidence of future loss and the scale of future loss to enable the industrial tribunal to make any award under this*

heading. The tribunal must have something to bite on, and if an applicant produced nothing for them to bite on, he will have only himself to thank if he gets no compensation for loss of future earnings.

- See *Adda International v Curcio* [1976] I.C.R. 406, per Bristow J. at page 412, Letter D.

- ii. *"Compensation for loss of future earnings should be predicated on the probability that the earnings from future employment or self-employment will be less than the earnings from the terminated employment. The loss is the difference between the two earnings and not the total amount of the prospective earnings from the terminated employment."*

- See *Antigua Village Condo Corporation and Jennifer Watt* (op cit) per Sir Vincent Floissac at page 9.

- iii. *"[T]he onus is on the unfairly dismissed employee to prove the probability of loss upon which an award of compensation is based and to prove the probable duration of that probability."*

- See *Antigua Village Condo Corporation and Jennifer Watt* (op cit) per Sir Vincent Floissac at page 9.

- iv. *"The head loss of future wages provides little difficulty when the employee has obtained other employment. There can be a determination of the difference between the current and the former remuneration. If the current remuneration is less than the former, it will form part of the loss, and then the length of time such a situation is likely or expected to last is estimated for the purpose of the calculation."*

- See **Antigua Commercial Bank v Mary White Civil Appeal No. 1 of 1988 per Bishop J.A. at paragraph 42.**

[287] The principles of law which are referred to at paragraph [286] involved cases in which the employees were unable to obtain employment at the date of trial. In this case the employees were able to obtain jobs. However their monthly earnings in all cases were reduced in varying amounts. In these circumstances it “*provides little difficulty (as they have) obtained other employment*”.

- See **Bishop J.A. at page 42.**

[288] The facts of this case are very unusual. It involved (a) a number of highly qualified professional specialists, (b) limited job market opportunities in Antigua and Barbuda and beyond for them to gain employment with similar terms and conditions of service as they previously enjoyed, and (c) most of the employees shall be required to spend in all likelihood a number of years before they are capable of earning monthly salaries which they earned prior to dismissal.

[289] Although there is not in existence a statutory limit which restricts any awards to which the employees may be entitled, this Court is required to take into consideration the principles which are enshrined in Section 10 (3) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda.

[290] No evidence was led on behalf of the employees to show what increases if any in monthly pay they would have earned from Caribbean Star. No increases in earnings which were put forward on their behalf have been taken

into account. Similarly there has been an insufficiency of evidence led to show what increases the employees would have been entitled to in their current employment.

[291] In **Leslie Emmanuel v Royal Bank of Canada Reference No. 3 of 1994**, the Court made an award of loss of future earnings to a non-professional employee for one year.

[292] I hold that the employees are entitled to awards for loss of earnings. They are outlined in The Fourth Schedule. In accordance with **Antigua Village Condo Corporation and Jennifer Watt (op cit)** the different discounts which are required to be subtracted from the awards are also found in the Fourth Schedule. The total sum awarded under this heading is **\$372,297.65**.

(E) Notice Pay

[293] The employees were summarily dismissed. As a consequence they are entitled to one month's payment. The total sum which shall be paid to them is **\$69,550.00**. The individual sums are set out in **The Fifth Schedule**.

(F) Vacation Pay

[294] The claims for the payment of outstanding vacation sums which were due to the Employees are contained in their Particulars of Loss. In each letter of dismissal the employer also stated *inter alia* that any "***outstanding vacation or overtime entitlement will be forwarded in due course***" to them.

[295] With the exception of Mr. Patterson Thompson who claims (19) days vacation pay, the other employees claim that when they were dismissed on January 31, 2005 they were owed (28) days vacation which presumably they did not obtain in 2005. Mr. Marshall, Attorney-at-Law for the Employer asserts *inter alia* that “***no vacation pay was due to any of the employees at the date of termination***”. Mr. Marshall however further submits that “***should the Court find in favour of the employees they would be entitled to their salary and allowances for any outstanding period which it is submitted would be limited to time accrued during their employment and not extend to what could have accrued beyond the date of termination***”.

[296] It would have been quite simple for Mr. Marshall to produce some record to show that the employees were in fact paid. I hold that they were not paid any vacation sums for the year 2005. I agree with Mr. Marshall that any sums due should be restricted to the year 2005. The sums due to be paid to the employees under this heading is **\$61,938.05**. The individual sums and their computation is set out in **The Sixth Schedule**.

(G) Fringe Benefits

[297] Only one employee claimed that he sustained real loss under this heading. Mr. Sealy's loss is contained at paragraph 10 of his Witness Summary. He submitted that he previously paid his mortgage at the Bank of Antigua. The concessionary interest rate was 7% per annum. He paid \$1,554.12 monthly. After dismissal the interest rate was increased to 9.5% per annum. The monthly payment increased to \$2,109.16.

[298] Mr. Watt, Q.C. submitted “*that the same principle guiding future loss is applicable to the loss suffered with respect to this fringe benefit*”. As usual with respect, no cases were cited for the Court’s guidance. I do not agree with this submission. The employee is not to be compensated for the monthly increase which he is required to pay to the Bank. A sum should be paid to him for the concession or benefit which he has lost.

[299] In **Danzlear Dublin v Royal Bank of Canada Reference No. 15 of 1983** the Court was required to consider the issue of what was an appropriate sum to award an employee who had sustained a loss of certain fringe benefits. These included a medical and dental care scheme, life insurance coverage, a pension plan, and one other loan which he was in default of making payments. The Court stated *inter alia* at page 17 as follows:

“He has been deprived of all these benefits and we have a duty to compensate him. We award him under this head \$50,000.00”.

[300] Mr. Sealy’s deprivation is much less than *Dublin’s*. In the circumstances of this case I award him **\$10,000.00** as outlined in **The Seventh Schedule**.

(H) Exemplary Damages

[301] At paragraph [191] I held *inter alia* that the dismissal of these employees was harsh, crude and without just cause. The employees were adversely affected. The total amount of compensation which is awarded to the employees is not sufficient to punish the Employer for dismissing them and in

the manner in which it dismissed them. They are entitled to an award of exemplary damages.

LEGAL SUBMISSIONS

- [302] Counsel for the employees submitted the classical case of **Cassell & Co. Ltd. v Broome [1972] 1 All E. R. 801 for my consideration.** No other cases were submitted for the Court's guidance. Mr. Watt, Q.C. submits that the Court should grant an award of \$150,000.00 in exemplary damages for each employee. Again no cases were cited in support of this submission.
- [303] Mr. Marshall, Attorney-at-Law for the employer submits that "***no such evidence has been (led)***" for an award to be granted under this heading. If the Court were mindful however to grant such an award he submitted that the Court should take into consideration certain cases. They are **Sundry Workers v Club Antigua Ref. No. 11 of 1997; Brenda Albert & Laurie Marsh v Woods Development Ltd. Ref. No. 5 of 1998; Leslie Hoffman v Stanford Financial Group Ltd. Ref. No. 4 of 1998 (now Stanford Financial Group Ltd and Leslie Hoffman Civil Appeal 2 of 2002); and Robert Hoffman v Stanford Financial Group Ltd. Ref. No. 10 of 1999.**
- [304] I have examined the cases referred to at paragraphs [302] and [303]. They do not however assist me to deal with the facts of this case which involve multiple employees.

The Law

[305] The statutory provision which governs the award of exemplary damages is Section 10 (4) and (5) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda. This Court is not bound to follow any common law rules. However an award of the Industrial Court must always take into consideration the principles which are outlined in Section 10 (4) and (5) of Cap. 214.

[306] To date I am not aware that the Industrial Court has been called upon to adjudicate upon a matter of this nature. What the Court is required to decide is what is a reasonable figure to award for exemplary damages against an employer in circumstances where multiple employees have been dismissed.

[307] The submission by Mr. Watt, Q.C., Attorney-at-Law for the employees that each employee be paid \$150,000.00 for exemplary damages which amounts to \$900,000.00 is without substance. This sum far exceeds any sum which has ever been previously awarded by this Court to an employee who was unfairly dismissed.

[308] The way in which exemplary damages should be approached in a case where there are several plaintiffs arose for consideration in **Riches v News Group Newspapers Ltd. (C.A.) [1986] 1 Q.B. 256**. The plaintiffs in this case who were then policemen brought an action in defamation. They claimed aggravated and exemplary damages against the News Group Newspaper Ltd. for publishing in its Sunday Newspaper an exclusive article which made serious allegations against them. The judge awarded each of them exemplary damages. The defendant appealed against the award of exemplary

damages. The appeal was allowed and a new trial was ordered for a determination of exemplary damages. The Court of Appeal established certain guidelines for the award of exemplary damages in which involves multiple plaintiffs.

Principles to be applied involving several Employees

[309] I adopt the guidelines which were applied in *Riches* as being very appropriate for a determination of the issue which I am required to decide. They may also be helpful to future Industrial Courts which may be asked to decide the same issue. They are as follows:

- (i) An employer in an unfair dismissal case may deserve to be punished more heavily for unfairly dismissing two or six employees than for unfairly dismissing one employee;
- (ii) The total amount which each employee receives as compensation for being unfairly dismissed must first be aggregated;
- (iii) The Court should consider whether the case is one in which exemplary damages can be awarded;
- (iv) If the case is one in which exemplary damages can be awarded, the Court should consider whether the aggregate of compensatory damages is enough to punish the employer;
- (v) If the compensatory element is insufficient, the Court should consider what total sum the employer ought to pay in order to do so;
- (vi) The total amount of any increase in damages for punishment must not be unreasonable or excessive for the purpose of expressing disapproval of the employer's conduct and deterring him from repeating it;

- (vii) Divide the difference between the total sum which the employer ought to pay and aggregate for compensatory damages by the number of employees and add the figure so arrived at to each of the compensatory sums;
- (viii) In cases where there is no difference between the employees each should be awarded the same sum.

Application of the principles to the facts

[310] The aggregate sum of compensation is insufficient to compensate the Employees. Having regard to all of the circumstances of this case, I award the Employees \$450,000.00 under this heading. This sum shall be divided in equal shares among all of the employees. The computation of these figures is set out in **The Eighth Schedule**.

Costs

[311] The Court does not normally award costs to either party. If costs are to be granted, the evidence must reveal that there are exceptional reasons for making such an award.

[312] Mr. Watt, Q.C. and Dr. Dorsett submits that “*this is an exceptional case and that costs should be awarded in the court’s discretion*”. No exceptions or other reasons were proffered. Mr. Marshall made no submissions under this heading.

[313] I find that the following are exceptional reasons which warrant that the employer should pay to the employees their costs.

- (i) The dismissals were en masse;

- (ii) The dismissals, in addition to being unfair, were harsh crude and without just cause;
- (iii) Some of the employees were required to travel from overseas countries and give their evidence.

[314] Taking into consideration the matters outlined at paragraphs [311] and [313].

I award the Employees costs in the sum of **\$20,000.00**.

[315] The Employer shall pay to the Employees the sum of \$2,417,320.40 less the sum of \$509,389.75 in addition to the sum of \$20,000.00 being their costs. The aggregate sum and the individual sums are set out in **The Ninth Schedule**. The net sum of **\$1,927,930.70** shall be paid by the Employer to the Employees on or before **December 31, 2008**.

THE FIRST SCHEDULE**Loss of Protection**

Name	Award
1. Mr. K. Thompson	\$55,800.00
2. Mr. S. St Agathe	\$54,900.00
3. Mr. C. Haynes	\$55,800.00
4. Mr. R. Sealy	\$55,800.00
5. Mr. P. Thompson	\$24,675.00
6. Mr. D. Boxill	\$43,920.00
Total Sum	\$290,895.00

THE SECOND SCHEDULE

Immediate Loss

Name	Computation	Sum Due
(1) K. Thompson	i. Salary from February 1, 2005 to June 30, 2005 - (\$12,400 x 5) ii. Loss for 20 months from July 2005 to February 2007 is (\$12,400 x 20) less (\$6,899.17 x 20)	\$62,000.00 <u>\$110,016.60</u> <u>\$172,016.60</u>
(2) S. St. Agathe	i. Salary from February 1, 2005 to June 15, 2005 (\$12,400 x 4.5) ii. Loss for 29 months from June 15, 2005 to October 31, 2007 is (\$12,200 x 29.5) less (\$6,994.75 x 29.5)	\$54,900.00 <u>\$153,554.88</u> <u>\$208,454.88</u>
(3) C. Haynes	i. Salary from February 1, 2005 to June 06, 2005 (\$12,400 x 4.25) ii. Loss for 29.5 months from June 07, 2005 to October 31 2007 is (\$12,400 x 29.5) less (\$6,963.75 x 29.5)	\$52,700.00 <u>160,369.38</u> <u>\$213,069.38</u>
(4) R. Sealy	i. Salary for May 2005 ii. Salary for 29.5 months from June 05 to October 30, 2007 is \$12,400 x 29.5) \$365,800.00 iii. Less Liat potential earnings for same period (\$6,963.75 x 29.5) <u>\$205,430.62</u>	\$12,400.00 <u>\$160,369.38</u> \$172,769.38
(5) P. Thompson	i. Salary for February 2005 ii. March 2005 (\$7,050 - \$4,050) iii. June 2005 (\$7,050 - \$2,646) - (\$6,899.17 x 6) iv. July – Dec 2005 (7,050 x 6) v. Salary for 2006 (\$7,050 x 12) – (\$6,899.17 x 6 + \$6,961.17 x 6) vi. Salary for Jan – Oct 30, 2007 (7,050 x 10) – (6,961.17 x 6 + \$7,028.33 x 4)	\$ 7,050.00 \$ 3,000.00 \$ 4,404.00 \$ 904.88 \$ 1,497.96 <u>\$ 619.66</u> <u>\$17,476.50</u>
(6) D. Boxill	Salary for Jan – June 2005 (\$12,200 x 5.5) Salary for June 15, 2005 to June 17, 2006 (\$12,200 - \$6,963.75) x 12 Salary for June 18, 2006 to Oct 31, 2007 \$12, 200 - \$10, 000.00) x 16.5	
TOTAL SUM		

THE THIRD SCHEDULE**Manner of Dismissal**

Name	Award
1. Mr. K. Thompson	\$35,000.00
2. Mr. S. St Agathe	\$35,000.00
3. Mr. C. Haynes	\$35,000.00
4. Mr. R. Sealy	\$35,000.00
5. Mr. P. Thompson	\$35,000.00
6. Mr. D. Boxill	\$35,000.00
Total Sum	\$210,000.00

THE FOURTH SCHEDULE**Loss of Future Earnings**

Name	Award	Less	Sum Due
1. K. Thompson	(\$12,400- \$6,899.17) x 24	10%	\$118,817.93
2. S. St. Agathe	(\$12,200 - \$6, 994.75) x 24	10%	\$112,433.34
3. C. Haynes	(\$12,400 -\$6,963.75) x 24	10%	\$116,753.40
4. P. Thompson	(\$7,050.00 - \$6,961.17 x 6)	-	\$532.98
5. D. Boxill	(\$12,200 - \$10,000) x 12	10%	\$23,760.00
Total Sum			\$372,297.65

THE FIFTH SCHEDULE**Notice Pay**

Name	Award
1. Mr. K. Thompson	\$12,400.00
2. Mr. S. St Agathe	\$12,400.00
3. Mr. C. Haynes	\$12,400.00
4. Mr. R. Sealy	\$13,100.00
5. Mr. P. Thompson	\$7,050.00
6. Mr. D. Boxill	\$12,200.00
Total	\$69,550.00

THE SIXTH SCHEDULE**Vacation Payment**

Name	Calculation	Days	Sum Due
1. K. Thompson	$\$12,400 \times 12 \div 365 = \$407.67 \times 28$	28	\$11,414.79
2. S. St. Agathe	$\$12,400 \times 12 \div 365 = \$407.67 \times 28$	28	\$11,414.79
3. C. Haynes	$\$12,400 \times 12 \div 365 = \$407.67 \times 28$	28	\$11,414.79
4. R. Sealy	$\$13,100 \times 12 \div 365 = \$430.68 \times 28$	28	\$12,059.17
5. P. Thompson	$\$7,050 \times 12 \div 365 = \$231.78 \times 19$	19	\$4,403.83
5. D. Boxill	$\$12,200 \times 12 \div 365 = \$401.09 \times 28$	28	\$11,230.68
Total Sum			\$61,938.05

THE SEVENTH SCHEDULE**Fringe Benefits**

Name	Award
1. Mr. K. Thompson	-
2. Mr. S. St Agathe	-
3. Mr. C. Haynes	-
4. Mr. R. Sealy	\$10,000.00
5. Mr. P. Thompson	-
6. Mr. D. Boxill	-
Total	\$10,000.00

THE EIGHTH SCHEDULE**Exemplary Damages**

Name	Award
1. Mr. K. Thompson	\$75,000.00
2. Mr. S. St Agathe	\$75,000.00
3. Mr. C. Haynes	\$75,000.00
4. Mr. R. Sealy	\$75,000.00
5. Mr. P. Thompson	\$75,000.00
6. Mr. D. Boxill	\$75,000.00
Total	\$450,000.00

THE NINTH SCHEDULE

Summary of Awards

Name	Loss of Protection \$	Immediate Loss \$	Manner of Dismissal \$	Future Loss \$	Notice \$	Vacation \$	Fringe Benefits \$	Exemplary Damages \$	Gross Award \$	Employer's Prior Payment \$	Costs \$	Net Award \$
K. Thompson	55,800.00	\$172,016.60	35,000.00	118,817.93	12,400.00	11,414.79	-	75,000.00	480,449.32	104,408.00	-	376,041.32
S. St. Agate	54,900.00	208,454.88	35,000.00	112,433.34	12,400.00	11,414.79	-	75,000.00	509,603.01	97,600.00	-	412,003.01
C. Haynes	55,800.00	213,069.38	35,000.00	116,753.40	12,400.00	11,414.79	-	75,000.00	519,437.57	105,400.00	-	414,037.57
R. Sealy	55,800.00	172,769.38	35,000.00	-	13,100.00	12,059.17	10,000.00	75,000.00	373,728.55	104,408.00	-	269,320.55
P. Thompson	24,675.00	17,476.50	35,000.00	532.98	7,050.00	4,403.83	-	75,000.00	164,138.31	44,163.25	-	119,975.06
D. Boxill	43,920.00	168,853.12	35,000.00	23,760.00	12,200.00	11,230.68	-	75,000.00	369,963.80	53,410.50	-	316,553.30
TOTAL SUM	290,895.00	952,639.86	210,000.00	372,297.65	69,550.00	61,938.05	10,000.00	450,000.00	2,417,320.40	509,389.75	20,000.00	1,927,930.70

Dated this 28th day of November 2008



PHILIP A. PILGRIM
President

I agree.



M. ALTHEA CRICK
Member

I also agree.



SAMUEL R. AYMER
Member

