

Original

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 1 OF 2006

BETWEEN:

JANNIS REYNOLDS-GREENE

Employee

and

THE BANK OF NOVA SCOTIA

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Samuel R. Aymer

Member

The Hon. M. Glendina McKay

Member

Appearances:

Sir. Richard L. Cheltenham, K.A., Q.C., PH.D. with

Shelly-Ann Seecharan - Attorneys-at-Law for the Employee

Mr. Roger Forde Q.C., with Raquel A. L. Walsh Silston of Simon

Rogers Murdoch - Attorneys-at-Law for the Employer

2008: November 24

2009: June 17, 18

2009: October 15

2010: July 01

JUDGMENT

PILGRIM, P:

INTRODUCTION:

- [1] The Employee Jannis Reynolds-Greene (hereinafter sometimes referred to as "*The Employee*") was born on February 23, 1957.

She resides at Hibiscus Lane, in the parish of St. John's in the island of Antigua & Barbuda. She is the mother of three children. Their ages are 30, 17 and 10 respectively.

- [2] (i) The Bank of Nova Scotia is one of many banks which carries on banking business in Antigua and Barbuda. It is a banking corporation duly incorporated under the laws of the Dominion of Canada. Its general office is situated at No. 44 King Street West, Toronto in the Province of Ontario in the Dominion of Canada.
- (ii) The Bank (sometimes referred to as "*the Employer*") carries on the business of banking in Antigua and Barbuda at two offices. They are located at High Street and Perry Bay in St. John's.

Employment profile

- [3] (i) In accordance with Exhibit "**JRG – 1**" entitled "*Employee Personnel Profile*" filed by the Employee, Mrs. Reynolds-Greene commenced working for the Bank as a Teller on August 18, 1975 at its High Street or Main Branch. This was categorised as a "**C 1**" position.
- (ii) The Employee rose from the rank of a "**C 1**" Teller to that of a Proof Teller "**C 2**" on December 01, 1976. On July 01, 1979 she was promoted to the position of Assistant Auditor. This position was categorised as a "**C 3**".

- (iii) On June 01, 1981 the Employee was again promoted to the position of Senior Deposit Accounts Clerk. This position was categorised as “C 5”. The Employee accepted a lateral transfer from the position of Senior Deposit Accounts Clerk to that of Accountant Trainee, a “C5” position on November 22, 1982. On March 01, 1984 she accepted a lateral transfer to that of Accounting Clerk. This too was a “C5” post.
- (iv) On November 01, 1988 the Employee was promoted from a “C5” position to that of Operations Officer. This was an “S1” position. On February 19, 1996 she was again promoted to a position entitled Senior Mortgage Officer. This was a “S4” position.

- [4] (a) The duties of the Senior Mortgage Officer were varied. They are particularised in two documents entitled (a) ***“Individual Duty Schedule Senior Mortgage Officer”*** and (b) ***“Position Description – Senior Mortgage Officer”***, Exhibit “JRG 2”.
- (b) In the document entitled ***“Position Description – Senior Mortgage Officer”*** under the heading entitled ***“General Accountability”*** it states as follows:

“The Senior Mortgage Officer is responsible for management of the mortgage portfolio to generate maximum business volumes and related revenues. To do so, the incumbent ensures sound lending practices, effective collection activities, development of marketing strategies and delivery of customer service consistent with the Scotia Service standards and Complaints

Resolution Standards and procedures as well as the effective management of assigned human, financial and other resources.”

- (c) In this position some of her specific duties included (i) ensuring staff are developed to conduct interviews conducive to recording customer information accurately and comprehensively; (ii) delegating, preparing and reviewing new loan applications, appraisals, credit investigations, correspondence and management information system reports; (iii) exercising sound credit judgement in the granting of loans within assigned limits effectively minimising branch losses; (iv) interacting with appraisers and Attorneys-at-Law as appropriate in the processing of mortgages including site visits to facilitate work in progress; (v) promoting the development and growth of profitable mortgage business in particular and other retail business in general by actively promoting and cross selling all retail banking services.

- [5] As the Senior Mortgage Officer, the Employee reported to the Retail Banking Manager. In the document entitled “***Position Description – Senior Mortgage Officer - JRG -2***”, whilst the Employee reported to the Retail Banking Manager, the document states as follows:

“Supervises: None”

- [6] According to Mrs. Reynolds-Greene, she was the head of the mortgage department. No one else performed that function.

She performed her duties from an office. It was located next to the Retail Banking Manager's Office.

[7] During the currency of her appointment as the Senior Mortgage Officer, the Employee also acted as the Consumer Credit Officer for ten (10) months from 1999 to 2000.

- [8] (a) As the Senior Mortgage Officer she achieved ***"two unbroken records."*** These are referred to at ***"JRG 4."*** The first award is entitled ***"Top Credit Sales Person Award."*** This was presented to her ***"in recognition of superior sales in the Caribbean region"*** on October 31, 1997. It was signed by Robert H. Pitfield, Senior Vice President, Caribbean and Central America, International Banking, Scotiabank.
- (b) The second award was presented to her on December 19, 1997. It was reported in the ***"International News Scotiabanker"*** of May/June 1998. It is entitled "Performance Recognized." The commentary in its entirety stated as follows:

"Performance recognised – Janice Reynolds-Knowles, Mortgage Officer at the St. Johns's, Antigua branch, was recognized for her outstanding performance during the "Borrow Your Way" loan campaign held throughout the Caribbean, Central America and Guyana last fall.

Presented with a plaque and a cash award by Len Wright, Manager, on December 19, she had the distinction of being named Top Seller of the Caribbean.

During the three month campaign, Reynolds-Knowles successfully increased the branch's mortgage portfolio by 36 per cent, contributing to Antigua surpassing its goal. Since Reynolds-Knowles took up her post as head of the mortgage department back in February 1996, the loan and mortgage portfolio has grown more than 130 per cent."

- [9] The Employee became a member of the Antigua Workers' Union in 1975 upon joining the Bank. According to Mrs. Reynolds-Greene she *"was an integral part of the interaction between the Employer and the Union having been a member of several union teams charged, at different times, with negotiating better salary and working conditions for the Bank's employees. In 1994 (she) was appointed shop steward for (her) union."*

- See Paragraph 6 of her Witness Statement

- [10] (a) In her capacity of Senior Mortgage Officer she earned a gross monthly salary of **\$8,566.66**. Mrs. Reynolds-Greene indicated that whilst employed with the Bank, she was self employed as a consequence of renting her property. She also sold properties for persons.
- (b) In addition to her monthly salary the Employee states that she enjoyed certain privileges which were (i) staff coverage under life and health insurance including dental and medical policies for her family and herself; (ii) a preferential staff deposit

account rate; (iii) a preferential staff mortgage rate and (iv) a preferential staff credit card rate; (v) and a passage grant.

11. (a) Mrs. Reynolds-Greene made an application to the Bank to obtain a loan of \$200,000.00 on November 05, 2001. This is referred to in **“JRG 27.”** The Employee stated that Mr. Fitzroy O’Neale the Retail Banking Manager carried out an investigation of her finances and in a Bank document dated March 14, 2001 verified that she earned a self-employed monthly income of \$19,951.00. This figure is reflected in **“JRG 3.”** She stated that this self -employed income was placed in the bank over a period of one year.
- (b) **“JRG 3”** is entitled ***“Budget Analysis for Self-Employed Applicants and other side income.”*** The regular employed income is stated as **\$8,567.00** presumably per month. The ***“Verifiable Self-Employed Income”*** is **\$19,951.00** presumably per month.
- (c) Mr. O’Neale wrote on **“JRG 3”** as follows:

“To qualify for the bank’s T.D.S.R., Mrs. Reynolds-Greene has requested that we extend the term on her 5% mortgage so that the recorded payments will place in line with T.D.S.R. However, due to additional income which is not reported on her staff loan application she feels that she can easily handle the higher mortgage payments and do not wish for the higher payments to change at this time.”

It was signed by him at the side marked *“Investigating officer signature.”*

- (d) The Bank through its Country Manager Mr. Brian Murdock in two letters dated December 21, 2001 **“BM-2”** and February 04, 2002 **“BM-3”** addressed to the Employee requested verification of her *“outside income”* in the form of *“Financial Statements prepared by an accountant or Tax Returns submitted to the Government.”* No such documents were provided by the Employee.
- (e) No evidence was produced by the Employee in the form of any bank statements or any other form so that the Court may be satisfied that any self-employed income was earned by the Applicant.

[12] In November 2002, the Bank embarked on a world-wide restructuring programme which included Antigua and Barbuda. It was entitled *“Seek, Discover, Prosper”* or **“SDP.”** Elements of this programme did not meet with the approval of the Employee. Mr. Murdock for the Bank wrote a letter to the Employee dated December 18, 2002. In that letter he warned the Employee that the Bank would have no further use of her services in the event that she failed to apply for any of the positions available. Alternatively, Mr. Murdock made reference to the Employee’s acceptance of a position under the new structure. Either way the Employee made no application to the bank or accepted any position under the new structure.

[13] By letter dated March 03, 2003 Mr. Brian Murdock the Bank's Country Manager wrote to the Employee. He informed her that *"the Bank has decided for practical reasons to terminate your employment on March 03, 2003."* A cheque for \$15,574.62 representing her salary for the period March 01 to April 30, 2003 was enclosed in the letter of termination. It is marked **"JRG 8."**

[14] The Employee states that she worked with the Bank until March 03, 2003. On this date Mrs. Reynolds-Greene states that the Retail Banking Manager came to her office at approximately 6.00 p.m. He asked her to accompany him to Mr. Murdock's office. Mr. Murdock gave her the letter of termination, along with the cheque for \$15,574.62. She was informed by Mr. Murdock to give her keys to the Retail Banking Manager and leave the premises immediately.

[15] Mrs. Reynolds-Greene returned to her office with the Retail Banking Manager. She took all of her personal belongings from the office in the Retail Banking Manager's presence. She was escorted off the premises at approximately 7.25 p.m. At this time according to the Employee there were still other members of staff present in the Bank. Her dismissal was widely known to them even before she had left the premises. Some staff members expressed shock and disbelief to her with regard to her *"abrupt termination."*

[16] (a) Mr. Murdock for the Employer indicated that the Employee was given her termination letter at the close of business on March 03, 2003 in the privacy of his office, behind closed doors

and when most of the staff members had already left the building for the evening. She was taken to her office by her Supervisor.

- (b) In answer to Sir Richard Cheltenham Q.C., Attorney-at-Law for the Employee, Mr. Murdock stated that it is not the Bank's normal practice to require a staff member's presence in the Bank on a weekend to effect a dismissal. According to Mr. Murdock, nothing was said by the Employer to any of its employees or to any member of the public to the effect that the Employee was dismissed for engaging in any act of impropriety.

Efforts at mitigation

- [17] The Employee produced 33 letters of application which she wrote to different entities in Antigua and Barbuda seeking employment. These included First Caribbean International Bank, Royal Bank of Canada, Pannell Kerr Forster, RBTT Bank Ltd, the Social Security Board, General Insurance Co. Ltd, Colonial Life Insurance Co. Ltd, British American Insurance Co. Ltd, State Insurance Corporation, PriceWaterhouse Coopers, Sun Printing & Publishing Ltd, Bank of Antigua Ltd, and other companies. They were written in June and July 2003. Responses dated between June and October 2003 from Antigua Commercial Bank and six other companies were produced by the Employee. All were marked "**JRG 26.**"
- [18] Between 2003 and 2005 the Employee wrote no other letters seeking employment. She indicated that she wrote letters to the Antigua and

Barbuda Government. This was an attempt to obtain employment which according to her would augment her self employment income. She also indicated that she obtained an auctioneer's license. She sought to advance her business as an innkeeper and realtor. She registered a company in June or July 2003.

- [19] The Employee in her Witness Statement of January 15, 2009 stated that between 2003 and December 2008 she earned **\$110,815.87** as income. There was no verification of this income nor was the source of it disclosed.

Legal proceedings

- [20] The Employee commenced proceedings in this Court in the form of filing a Reference dated **January 11, 2006**. In that Reference the Employee questioned whether her dismissal was unfair.
- [21] Legal Counsel for both parties met in Court on **November 24, 2008**. As a consequence of hearing Counsel, I made certain orders which granted liberty to both parties to amend and/or alter their Memoranda and Witness Statements. This Order was filed on **January 06, 2009**.
- [22] In compliance with the Order at **paragraph [20]** the Employee's Memorandum and Witness Statement were both dated and filed on **January 15, 2009**.
- [23] In accordance with the Order at **paragraph [20]** a Witness Statement of Mr. Brian Murdock and the Employer's Memorandum were both

dated and filed on **February 13, 2009**. A further Witness Statement of Mr. Brian Murdock was filed on **June 18, 2009**. An Exhibit in the former Witness Statement of Mr. Brian Murdock and his Witness Statement of June 18, 2009 formed a part of the Bank's evidence in this case.

[24] The following issues arise for a determination of this Court.

- (i) **Whether the reorganisation of the business which the Bank of Nova Scotia felt it had to undertake in Antigua and Barbuda and which commenced in November 2002 and continued in 2003, could be a substantial reason of a kind which would have entitled a reasonable employer to dismiss an employee holding the position which the Employee held in accordance with Section C58 (1) (e) of the Antigua and Barbuda Labour Code (afterwards referred to as "the Labour Code").**
- (ii) **In all the circumstances of this case did the Employer act reasonably or unreasonably in treating the reason in this particular case for the Employee's dismissal as a sufficient reason for dismissing the Employee?**
- (iii) **If the Employee was unfairly dismissed what awards are she entitled to?**
- (iv) (a) **Did the Employee misconduct herself by her insistence on continuing in her employment in a position which was identical with or similar to the functions which she discharged as Senior Mortgage**

Officer before the changes were introduced by the Bank?

- (b) Is the Employee entitled to a payment of pension from the Bank?**

The First Issue:

Whether the reorganisation of the business which the Bank of Nova Scotia felt it had to undertake in Antigua and Barbuda and which commenced in November 2002 and continued in 2003, could be a substantial reason of a kind which would have entitled a reasonable employer to dismiss an employee holding the position which the Employee held in accordance with Section C58 (1) (e) of the Antigua and Barbuda Labour Code (afterwards referred to as “the Labour Code”).

The Employee’s submissions through Sir Richard Cheltenham, Q.C.,

[25] Sir Richard Cheltenham Q.C., Counsel for the Employee submits that the Employer has not led any evidence as to why in its opinion the reorganisation became necessary.

[26] Learned counsel cited **Hollister v National Farmers Union [1979] I.C.R. 542** in support of this submission. He further submits that there is no evidence before the Court that the decision to restructure the Bank was a sound business decision based on reasonable information that was reasonably acquired. In support of this submission Sir Richard Cheltenham Q.C. cited **Orr v Vaughan**

[1981] I.R.L.R. 63 and the following passage which appears at page 63 of the headnote. It states as follows:

“What is to be done by way of a re-organisation of the business is largely for the employers to decide on the material which is available to them; and it is for the employers to decide whether the requirements of the business for employees to carry out particular work have ceased or diminished. If the employers act on reasonable information, reasonably acquired, that is the test and no more.”

[27] Learned Counsel for the Employee also submitted that the Court has been presented with no information as to the Bank’s financial standing, for example, profit and loss statements or the rationale for the decision to restructure. He questioned whether the Bank would be made more competitive in the marketplace, more attractive to potential and actual customers or whether it would be able to achieve economies of scale. In support of these submissions learned Counsel cited **Mark Azille v Courts (Antigua & Barbuda) Ltd. Ref. No. 27 of 2003**, a decision of this Court and **Banerjee v City and London East London Health Authority [1979] 1.R.L.R 147**.

The Employer’s submission

[28] Raquel A. L. Walsh-Silston of Simon Rogers Murdoch, Attorneys-at-Law for the Employer submitted that the reorganisation of the business which the Employer felt obliged to undertake was a substantial reason of a kind such as to justify the Employee’s

dismissal. Like Sir Richard Cheltenham Q.C. she cited **Hollister (op cit)**. Mrs. Walsh-Silston was of the view that there was a rational basis for the re-organisation of the Employer's business.

Mrs. Reynolds-Greene's submissions on September 30, 2009

- [29] (i) Mrs. Reynolds-Greene filed certain Written Submissions dated September 30, 2009 in the Court. They were entitled **"Addendum to Employee's Submissions."** These submissions were an addendum to Sir Richard Cheltenham Q.C.'s submissions which were filed on September 30, 2009. Some of these submissions were essentially a repetition of what appeared in Sir Richard Cheltenham Q.C.'s submissions.
- (ii) No submissions were made by the Employee with regard to the issue which I am required to determine.

The relevant law

- [30] **Section C.56** of the Labour Code states as follows:

"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer and no employer shall dismiss any such employee without just cause."

- [31] **Section C 58 (1) (e)** and the proviso to **C58 (1)** provides as follows:

"C 58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a).....;

(b).....;

(c).....;

(d).....; or

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

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

[32] A dismissal in the context of this case which raises an issue of whether or not the Bank had in law met the test of a proper reorganisation of its business as a reason for dismissal falls to be considered with regard to **Section 58 (1) (e) of the Labour Code**.

[33] The learned author of **Harvey on Industrial Relations and Employment Law, Butterworths 2008, in Chapter 13 of Volume 1** at **paragraph [1851]** state that the concept of some other substantial reason *“is not to be read ejusdem generis with the other reasons stipulated in S.98 (2)”* of the Employment Rights Act 1996. Section 98 (2) approximates to **C58 (1) (a) to (d) of the Labour Code**.

[34] The Parliament of Antigua and **Barbuda** may well have intended to set out in Section C58 (1) (a) to (d) of the **Labour Code** the common reasons for a dismissal, *“but can hardly have hoped to produce an exhaustive catalogue of all the circumstances in which an employer would be justified in terminating the services of an employee.”*
- See **R.S. Components Ltd v Irwin [1973] I.C.R. 535** per Sir John Brightman at page 540 Letter B.

[35] The categories of matters which Industrial Courts are requested to adjudicate upon is open-ended. However, many of the dismissals under this heading relate to the reorganisation of an employer's business.

[36] (a) It is not out of any disrespect to Sir Richard Cheltenham Q.C.'s submissions at **paragraphs [25] and [26]** of this judgment which were cogently and convincingly presented, but I do not agree with them. The reason is that they were based substantially upon the citation of cases namely *Mark Azille and Orr* which involve redundancy matters that bear no helpful relationship to a determination of the issue. I derive some assistance from a reading of the textbook entitled "*Labour Law*" authored by Simon Deakin and Gillian S. Morris, Fifth edition, Hart Publishing, Oregon, 2009 at page 472 paragraph [5. 181]. The authors state as follows:

"Both redundancy and some other substantial reason (SOSR) are potentially fair reasons for an economic dismissal. Whereas the statutory definition of a redundancy has been narrowly confined by case law, the residual SOSR category has been greatly expanded to cover most economic dismissals which do not fall into the category of redundancy. The effect is that an economic dismissal will not be unfair just because it cannot be classified as redundancy; it will most likely fall into the SOSR category and so be potentially fair. On the other hand, if a dismissal is categorised as

falling into the SOSR category, there is no automatic compensation for loss of employment as there is in case of redundancy.’

- (b) Learned Counsel for the Employee also submitted that the Employer was not justified either in carrying out its restructuring or in eliminating the Employee’s position. According to him, a repudiatory breach of contract was committed. In support of this submission he cited **Hilton v Shiner Ltd [2001] 1.R.L.R 727**. The cases of **Western Excavating (ECC) Ltd v Sharp [1978] 1. R.L.R 206**, and **Woods v WM Car Services Ltd [1981] 1.R.L.R 347** also appeared in his Bundle of Authorities. Happily I am not required to consider this submission or authorities with any degree of seriousness. In all of these cases the employees resigned from their places of employment. All of them claimed that they were constructively dismissed. This issue does not fall to be decided upon the facts of this case. There is no merit in learned Counsel’s submission.

[37] In **Ellis v Brighton Co-operative Society Ltd [1976] 1.R.L.R. 419** Mr. Justice Phillips at page 420 stated as follows:

“Where there has been a properly consulted – upon reorganisation which, if it is not done is going to bring the whole business to a standstill, a failure to go along with the new arrangements may well – it is not bound to, but it may well constitute “some other substantial reason.”

[38] The threshold of requiring that the whole business be brought to a standstill is not the test to determine whether the reorganisation of the business constitutes some other substantial reason. This is derived from a reading of **Hollister (op cit)**. In this case **Lord Denning MR** articulated a different test which the Employer would be required to satisfy. He stated at **page 551 Letter B** of the judgment as follows:

“But in the present case Arnold J. expanded it a little so as not to limit it to where it came absolutely to a standstill but to where there was some sound, good business reason for the reorganisation. I must say that I see no reason to differ from Arnold J’s view on that. It must depend on all the circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee’s contract unless he would agree to a new arrangement.”

[39] It is the responsibility of the Employer to demonstrate to the Court that it possessed a *“sound, good business reason”* for the reorganisation in this case. In this regard it must adduce evidence to show (i) the reasons for the reorganisation and (ii) the discernible advantages to the Bank of the reorganisation. If the Bank merely makes a statement to this effect, this is insufficient. This is the view of the **Employment Appeal Tribunal in the Banerjee case (op cit)**.

[40] **In Banerjee Mr. Justice Arnold stated at paragraph [19] page 149** as follows:

“If an employer comes along and says ‘We have evolved such and such a policy’ and either ‘we regard it as a matter of importance’ or ‘the advantages which are to be discerned

from this policy are so- and – so’, subject to there being any effective cross-examination, it seems to us that it must inevitably follow that that evaluation by the employer of the policy as a matter of importance, a matter in which substantial advantage is discerned, if it is properly the subject matter of another reason, can be seen to be the subject of a substantial other reason.”

- [41] Two other principles are derived from a reading of **Banerjee**. Firstly, **Mr. Justice Arnold** at **page 150** described the onus on the employer as *“not an onus which it is at all difficult to discharge, if the material upon which to discharge is available.”*

Secondly, where no minutes are available to show how the decision was made, *“When a question of unfair dismissal comes up, the officer of the employing company who has taken the decision to dismiss, or one of those who have been party to the decision to dismiss, comes along and says, ‘the reason we dismissed was’ this or that. ‘We have considered keeping him on. We considered the advantages of each course, and we decided’ so- and –so. We do not believe it is enough to say, ‘This is our policy, this is the recommendation which we received from a body appointed to advise us, and that is that.’*

- See page 150 of **Banerjee**, per **Mr. Justice Arnold**

- [42] (a) **Banerjee** was cited in **Kerry Foods Ltd v Lynch [2005] 1.R.L.R. 680**. In this case **Judge Peter Clarke** described the advantages to the employers of the proposed changes *“That*

was sufficient to pass the low hurdle of showing some other substantial reason for dismissal.”

- See page 682 paragraph [14] of the judgment

(b) Judge Peter Clarke in **Kerry Foods** (op cit) at page 682 paragraph [14] of the judgment opined as follows:

“It was not necessary as the employment tribunal accepted, to show the ‘quantum of improvement achieved;’ that was to put the onus on the employer too high.”

[43] The requirement that the employer should demonstrate that it had formulated a good business reason was applied in **Bowater Containers Ltd vs McCormack** [1980] 1.R.L.R. 50 and **Genower v Ealing Hammersmith and Hounslow Area Health Authority** [1980] 1. R.L.R. 297.

[44] In **Bowater** following **Hollister** the reorganisation was described by Mr. Justice Talbot at page 53 to be *“beneficial to the efficient running of the Company.”* In **Genower**, Mr. Justice Slynn at page 298 described the reorganisation or restructuring of a business as *“a sound good business reason.....even if the alternative of taking the course they propose is not that the business would come to a standstill but is merely that there would be some serious effect upon the business.”*

The legal principles

[45] The legal principles which are derived from the cases are as follows:

- (i) The Employer must demonstrate the reasons for the reorganisation.
- (ii) The Employer must state what benefits it would derive as a result of the restructuring.
- (iii) The reorganisation must be instituted for some “*sound business reason*”, or as “*a matter of importance*” or shows “*discernible advantages*” to the organisation or be “*beneficial to the efficient running of the company*”.
- (iv) The onus on the Employer is not at all difficult to discharge provided that the evidence is available.
- (v) There is a ‘**low hurdle**’ which the Employer must climb so as to demonstrate that the restructuring has been done.
- (vi) The officer who took the decision to dismiss can give such evidence to satisfy the requirements at **paragraph 45 (i–v)** above.

The state of the evidence

[46] Mr. Brian Murdock, the Bank’s Country Manager gave the evidence for the Bank. He stated that in November 2002 the Bank embarked on a world wide restructuring programme. It is known as “**Seek Discover Prosper**” (SDP). Particulars of this programme are

contained in an Employees Guide. It was produced by Mr. Murdock. It is marked "**BM-4**".

- [47] This document sought to examine a number of questions which employees of the Bank would be inclined to ask. Among these was question 7.

Question 7:

"Can part-time employees express interest in full-time SDP positions?"

ANSWER:

"The SDP initial conversion process is designed to maintain the complement size of the branch....In other words, the number of staff working in a branch and their individual work arrangements (i.e. number of work hours per week) will not change. Therefore, employees will be eligible to identify and express their interest in positions of the same employment status as their current position. This means that part-time employees can identify and express their interest in only part-time working hours and full time employees can enjoy and express their interest in only full time positions."

- [48] (a) Mr. Murdock stated that the SDP programme was designed to change the operation of the Bank to allow for an improved customer service. According to him the SDP *"was the Bank's vision for success, and was designed to give customers the advantage of a one stop shopping experience."*

-See paragraph [7] of Brian Murdock's Witness Statement

- (b) With the introduction of the SDP, the Employer's service which it provided to the public was changed from *"transactional banking"* to *"relationship banking."* *The Employer now focused on building relationships with its employees and its customers. To achieve this, the SDP was introduced to ensure that a customer could now have all his banking needs taken care of by one personal banking officer rather than go to several officers to have different transactions completed."*

-See paragraph [7] of Brian Murdock's Witness Statement

- (c) *"More specifically, the Employer embarked upon the SDP programme to ensure that its customers' needs were better met in the rapidly changing global business world and to ensure that the Employer remained viable and competitive. The Employer was forced to change the way it did business due to changing technologies, greater competition, increased customer demands, preferences and expectation, etc. Some very important changes which demanded that the Employer changed the way it did business was the non-stop introduction and acceptance of the new alternative delivery channels such as automated banking machines (ABMs) and telephone banking, the widespread use of technology such as internet and paperless banking."*

-See paragraph [8] of Brian Murdock's Witness Statement

[49] At **paragraph [11]** of Brian Murdock's Witness Statement he stated as follows:

“The reorganization meant that many of the operations of the retail branches, such as the Antigua branch to which the Employee was employed, underwent significant changes. As a result, the organisational structure of the Bank was revised to separate various aspects of the operations, namely, sales, service, transactions and administration, and consequently certain positions were eliminated to permit better staff allocation and deployment of the Bank’s human and other resources.”

[50] At **paragraph [9]** of his Witness Statement Mr. Murdock stated as follows:

“In order to compete in a rapidly changing business world the Employer changed the way it operated so as to be able to provide the customer with a more convenient, more efficient and more helpful service.”

[51] In answer to Sir Richard Cheltenham Q.C. Counsel for the Employee, Mr. Murdock stated as follows:

“I know how the Head Office in Canada determined the Antigua and Barbuda restructuring. It took new competitors, for example insurance companies coming into the market. The Bank of Nova Scotia , first tested this concept in Canada eight years prior to implementation. The findings were that Bank of Nova Scotia had 50% of its customers. The President of Bank of Nova Scotia made the decision. I had no say in the decision.”

[52] In further answer to the Employee's Counsel, Mr. Murdock stated as follows:

"We were reorganising to become more competitive."

[53] Mr. Murdock also stated that the restructuring took place in November 2002. When the Bank introduced the restructuring programme to the staff in November 2002, Mr. Murdock indicated that the first statement which came from his mouth was that all of the workers jobs were guaranteed. This was a complement neutral exercise not designed to eliminate jobs but to restructure the bank. The Bank's desire was not to reduce complement or expenses.

[54] Learned Counsel for the Employee made the following observation to Mr. Murdock:

"All of what is done now was always there. It is only a shift of degree."

Mr. Murdock replied as follows:

"No, because previously these people would spend over half their time checking people out for loans, verifying income, doing collection work on these customers. They spent their time doing these activities which the bank felt very, very strongly was holding us back from being successful. The shift was a huge degree from old to new."

[55] The Employee produced a document entitled ***"Measurements of Success Performance Appraisal Report"*** for the year 2002. It was signed by her and dated October 10, 2002. Mr. F. G. O'Neale, the Retail Banking Manager stated as follows:

“We are cognisant that the country’s economy remained in a sluggish state for the year under review which adversely affected growth in the SPL and Residential Mortgage categories in particular. However, Mrs. Reynolds-Greene was only able to achieve 7.78% of the goals set. We note that year to date the branch has generated \$28,518,000 in new sales of which Mrs. Greene has only contributed \$824,460. Given that Mrs. Greene’s portfolio is comprised mainly of mortgages where the average size is the largest, these results are unacceptable.....

Mrs. Greene needs to be more consistently diligent in identifying and successfully soliciting good business which the record shows, she has done previously.”

- This was admitted and marked **“JRG-18.”**

[56] The Employee did not agree with the Appraisal Report for 2002. In her letter dated November 20, 2002 addressed to Mr. Brian Murdock she outlined some of the difficulties faced by her which in her opinion should be taken into consideration by the Bank. Three challenges cited by her were as follows:

- (a) A lack of *“marketing material.”*
- (b) The absence of *“tools to assist (her) in the performance of her duties.”*
- (c) Her view that there was *“lost deposit business because we were not competitive.”*

- [57] The Employee in her own words wrote on November 20, 2002 that in her opinion the Bank was “*not competitive.*” This lack of competitiveness resulted in “*lost deposit business.*”
- [58] The Bank organised a meeting of staff members to discuss the SDP programme. It took place at Sandals Resort on or about **November 21, 2002.**
- [59] One day after the Employee wrote the Bank, she attended the staff meeting at Sandals on November 21, 2002. She would have been well aware that the Bank was required to institute certain measures to become “*competitive*” with other banks and related entities which provide similar mortgages and other retail products to potential customers.
- [60] The restructuring programme was designed by the Bank to become operational on May 01, 2003. Before it commenced the Bank provided all employees with reading material so as to assist them with the transition. The SDP Employee’s Guide “**BM 4**” was made available to each employee.
- [61] (a) In the reorganisation process Mr. Murdock testified that the Bank **would** eliminate administration duties from being performed by the sales officers. This action **would** allow the new Personal Banking Officers more time to engage in calling upon customers and preparation for interviews. They were **to be** given tools inclusive of new computer systems to build profiles of their customers. **These tools would** assist them to be successful **in their new engagements.**

- [62] The changes which were proposed by the Bank in its restructuring programme are outlined in “**BM 5** and “**BM 6**” respectively. “**BM 5**” is the existing Organisation Chart. It is dated February 1999. It shows that 61 persons **were** employed in the Bank. In the new proposed Organisation Chart dated May 06, 2003, 64 persons would become employed. In the Employee’s Organisation Chart dated August 01, 2001, 63 persons were employed by the Bank.
- [63] In the new reorganisation process Mr. Murdock indicated that several new positions were to be created and several former positions were to be eliminated. About 15 positions within the High Street Branch of the Bank were affected by the reorganisation.
- [64] The Bank was very concerned that as more financial companies entered into the market, then if it did not change the way how it did its business, it would loose market share to those new entrants.
- [65] The main purpose of a bank is to offer services to the public in order to make a profit. The persons who are responsible for interfacing with members of the public and other persons are the Bank’s staff.
- [66] (a) In the facts of this case, the Bank sought to perform its business in a different manner by (i) reorganising how its staff should perform its functions; (ii) proposing to (a) eliminate the administrative functions from its sales staff (b) increase the variety of services which its sales staff would sell and (c) provide the staff with the necessary tools for the performance of their new duties.

[67] Mr. Murdock indicated at **paragraph [10]** of his Witness Statement as follows:

“In order to remain competitive the Employer had to change the way its sales officers carried out their functions. The system was amended so that the sales officers spent less time on administration and more time on making appointments and meeting with the customers of the Employer. The focus of the Employer’s business was changed from selling a product to its customers (to) selling the service.”

[68] The Bank has also clearly shown that the reasons for the reorganisation was to create a fundamental change in how the work was to be performed by its employees. As a consequence, the Bank expected that the reorganisation would provide it with a competitive edge in a challenging financial environment which would produce successful results.

[69] As a consequence of the Bank’s reorganisation it was necessary for a number of staff members to obtain new positions of employment. The Employee was one of these staff members. It is my judgment that the Bank has demonstrated **sound business reasons** for its reorganisation which were matters of importance to it. This could be a substantial reason of a kind sufficient to entitle a reasonable employer to dismiss an employee holding the position which the Employee held in accordance with **Section C58 (1) (e)** of the **Labour Code**.

Whether or not the Bank’s decision to dismiss the Employee was fair or not having regard to whether or not it acted reasonably or unreasonably is a matter which I shall now address.

The second issue:

In all the circumstances of this case did the Employer act reasonably or unreasonably in treating the reason in this particular case for the Employee's dismissal as a sufficient reason for dismissing the Employee?

Sir Richard Cheltenham Q.C.'s Submissions

[70] (a) Learned Counsel submitted that consideration must be given to the question of whether it was necessary to insist upon changing the Employee's job. He further asserts that no evidence was led by the Employer that in making the decision to eliminate the Employee's position of Senior Mortgage Officer the Bank had regard to the Employee's seniority, job performance and attendance. He referred to a passage at **page 530 of Smith & Woods Employment Law Ninth edition**. The full relevant quote is as follows:

“Given the reorganisation plan, was it necessary to insist upon changing the employee's job in order to put that plan into effect? In many cases, the answer may simply be “Yes”, particularly where the employee is in a key position. It may be, however, that if only one or two employees are holding out and their concurrence is not absolutely vital, the employer may be expected to consider any minor alterations to his plan which might accommodate those employees without frustrating the reorganisation.”

(b) Learned Counsel cited **Martin v Automobile Proprietary Ltd [1979] 1.R.L.R 64** in support of his submission.

- (c) In **Martin's case (op cit)** the Employer consulted with the staff association. The three (3) employees had no faith in this association and terminated their membership of it. **Mr. Justice Kilner-Brown of the Employment Appeal Tribunal** at page 65 of the report stated as follows:

“The vital question is whether or not the employer had acted fairly and reasonably with reference to the individual, not whether or not they had consulted the staff association. This is only part of the story. Plainly, in some cases, the individual may, notwithstanding his personal attitude,..... have acted unreasonably and being unnecessarily obstinate. He may be caught by a collective agreement. In those circumstances, we can envisage the employer with comparative ease being able to satisfy the proposition that he had acted reasonably and to justify the reason for dismissal and then, ultimately, if there was an allegation of unfair dismissal, to say that in all the circumstances the dismissal was fair.”

- (d) One of the matters which **Mr. Justice Kilner-Brown** put forward was *“an obligation upon the employer to exercise the managerial judgment whether or not it may not be possible to make an exception in the case of the individual and not to force him into a collective arrangement.”*

[71] Learned Counsel for the Employee submitted further that the issue of consultation is an important factor to be taken into account when

examining the reasonableness of the Employer's conduct. He cited **Hollister (op cit) at page 551 paragraph [E], page 552 paragraph [F] and Ellis v Brighton Co-operative Society [1976] 1.R.L.R. 419.**

- [72] Learned Counsel for the Employee referred to Mr. Murdock's testimony that he invited the trade union to discuss the reorganisation with the Bank. According to Learned Counsel this Court has not been furnished with the precise details of these discussions or any evidence to satisfy the Court that there was any consultation within the true meaning of the expression.
- [73] Sir Richard Cheltenham Q.C., referred to the meeting between the Employee and Mr. Murdock which took place on December 17, 2002. Learned Counsel is of the view that the meeting was geared towards identifying positions which Mr. Murdock thought the Employee may be interested in applying for.
- [74] According to Sir Richard Cheltenham Q.C., the Employer's failure to consult with the Employee about the reorganisation and termination of her job is a major indication of the Bank's unreasonable conduct with respect to this entire matter.
- [75] Learned Counsel for the Employee also submitted that the Bank never considered deviating from the course set by its Head Office in Canada. In addition, the Employee's Counsel also submitted that

both positions made available to the Employee for her to apply for if she so chose were lower in status, rank, prestige and authority.

Sir Richard Cheltenham Q.C., cited **O'Grady v Insurance Corporation of British Columbia (1975) 63 D.L.R. (3d) 370.**

- [76] (a) **O'Grady (op cit), Johnston v Northwood Pulp Ltd (1968) 2 O.R. 521 and Hill v Gorman Ltd (1957) 9 D.L.R. (2d) 124,** are with respect, of no assistance to me to determine whether or not the Employer in this case acted reasonably or unreasonably.
- (b) **O'Grady's** case concerned an employee whose position was discontinued on inadequate notice. He sustained a substantial loss of prestige. The issue in this wrongful dismissal case was what was a period of reasonable notice which should have been given to the plaintiff. The Court held that a nine month period was reasonable.
- The plaintiff was compensated for nine months notice plus a sum of money certain for fringe benefits.
- (c) In Johnston's case the headnote states that **"An employee who is employed for an indefinite period and is discharged without fault on his part, or in the alternative, refuses to accept a unilateral change in the contractual terms of his employment on the part of his employer; is entitled to receive reasonable notice to terminate his contract of employment."**
- (d) **Hill's** case dealt with an employer's variation of an employee's contract. The Plaintiff's claim for a wrongful deduction of

some monies from his earned commissions was upheld by the Ontario Court of Appeal.

- (e) The Court in those cases was not asked to determine any issue of reasonableness of the dismissal. In addition damages in a wrongful dismissal case *“will be limited to a sum representing net salary for the notice contained in the contract..... These rules explain why, for most employees, the protection offered by the common law of dismissal is inadequate and why it was felt necessary for the legislature to intervene by introducing the principle of statutory unfair dismissal.”*

Labour Law, authored by S. Deakin and G. Morris (op cit) at page 360

- [77] (a) For the above reasons, Sir Richard Cheltenham Q.C., submitted that the Employer acted unreasonably in requiring the Employee to apply for a new position in the context of **Section 58 (2)** of the **Labour Code**.
- (b) Learned Counsel further submitted that the Employee is entitled to damages under certain headings in accordance with specific legal principles.

The Employee's submissions

- [78] The Employee stated the principle at **Section C58 (2)** of the **Labour Code**. Apart from this, no other submissions were made of any relevance under this heading.

Mrs. Raquel Walsh-Silston's submissions

- [79] Mrs. Raquel Walsh-Silston, Attorney-at-Law for the Employer submits that the Employee was given a deadline to inform the Bank of her choice of available positions under the new structure. The Bank extended the deadline to accommodate the Employee.
- [80] Learned Counsel also made reference to the reasons which the Employee articulated to the Bank and in Court with respect to why she refused to apply for any of the two positions. Taking into consideration the Employee's reasons, Mrs. Walsh-Silston submits that the reasons proffered by the Employee "***were unreasonable and not based on facts.***"
- [81] Learned Counsel for the Employer submitted that the new Personal Banking Officer and Senior Personal Banking Assistant positions were not clerical. Learned Counsel referred to Mr. Murdock's evidence to the effect that whilst the Senior Mortgage Officer concentrated essentially in selling mortgages, the new Personal Banking Officer's position dealt with a variety of retail credit products. Mrs. Walsh-Silston submitted that the Employee's request to be in charge of the mortgage programme under SDP was unreasonable.
- [82] Mrs. Walsh-Silston, Attorney-at-Law contends that the offer to change the Employee's terms and conditions of employment as a result of the reorganisation was reasonable. In support of this submission, learned Counsel stated that the original Senior Mortgage

Officer's position involved some related functions including cross selling. The new relevant positions also required her to sell mortgages.

[83] Mrs. Walsh-Silston also submitted that *“there was no obligation on the Employer in a reorganisation to offer employees positions which are identical and/or comparable in status in circumstances where the reorganisation eliminates existing positions and creates new positions, which in themselves may not be comparable in all respects.”*

[84] Learned Counsel for the Employer also submitted that where an employer reorganises his business and makes an offer to his employee of new terms and conditions, the nature of that offer and disadvantages to the employee are not the sole considerations in determining whether the employee acted reasonably and as such for determining whether there was some substantial reason for the dismissal. Mrs. Walsh-Silston, Attorney-at-Law cited **St. John of God Limited v Brooks [1992] ICR 715 and Chubb Fire Security Ltd v Harper [1983] 1.R.L.R 311**

[85] Mrs. Raquel Walsh-Silston further submitted that it does not follow that if it is reasonable for an employee to refuse to accept a new contract offered in the course of business reorganisation, then it is unreasonable for the employer to dismiss him when he does so. In support learned Counsel cited **Glasgow City Council v Deans,**

**Mulrine & McClenaghan [2006] UK Employment Appeal
Tribunal 0061/05/RN.**

- [86] With regard to compensation Mrs. Walsh-Silston, Attorney-at-Law outlined the principles which the Court takes into consideration to determine the nature of awards granted to employees under the established headings. Certain cases and an authority were cited in support of her submissions.

The relevant law

- [87] Section C58 (2) of the **Labour Code** states as follows:

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

- [88] (a) **Dillon L.J. in Gilham v Kent County Council (No. 2) [1985] I.C.R. 233 (CA) at page 243** stated as follows:

“In the present case, the key question which arises under Section 57 (3) of the Employment Protection Consolidation Act 1978 as amended.....is whether in all the circumstances the employers acted reasonably or unreasonably in treating their ground for dismissal as a

sufficient reason for dismissing these employees. Whether something is reasonable or unreasonable is a question of fact.

- (b) **Section 57(3)** of the Employment Protection (Consolidation) Act 1978, as amended by the Employment Act 1980 (UK) stated as follows:

“the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer; shall depend on whether in the circumstances.....the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.”

- (c) Section 57(3) approximates to Section 58(2) of the Labour Code.
- (d) At **page 244** of the report **Dillon L.J.** after stating that the reporting contains as it seems to him, a good deal of over sophistication as to the approach to be adopted by industrial tribunals to the question of reasonableness stated that it was sufficient for the tribunal to answer directly the simple question posed by Section 57 (3) of the then Employment Protection (Consolidation) Act 1978 as amended by the Employment Act 1980 (now Section 98 (4) of the UK Employment Rights Act 1996 which is as follows:

“In all the circumstances, did the employer act reasonably or unreasonably in treating the reason in the particular case as a sufficient reason for dismissing the employee?” That is a question of fact, and it is to be treated as a question of fact and not a sophistication of law. A tribunal may in a particular case react to the facts by saying “What the employer did is not what we ourselves would have done, but we cannot say it was unreasonable.” That again, however is an answer on the facts to a question of fact and not a guideline of law to be applied by all other tribunal in all other cases. Because the question is one of fact, and there are many different industrial tribunals, it is quite likely that different tribunals will reach different conclusions on the question of reasonableness on very similar facts. That is inherent in the system which Parliament has set up and is no indication that any tribunal has misdirected itself or erred in law.”

[89] The correct approach which this Court must adapt in a determination of whether the Bank acted reasonably or unreasonably to dismiss the Employee has been summarised by **Browne-Wilkinson J.** on behalf of the **Employment Appeal Tribunal in Iceland Frozen Foods Ltd v Jones [1983] I.C.R 17** at pages 24-25. **Browne Wilkinson J.** stated the test as follows:

“Since the present state of the law can only be found by going through a number of different authorities, it may be

convenient if we should seek to summarise the present law. We consider that the authorities establish in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57 (3) of the Act of 1978 is as follows: (1) the starting point should always be the words of section 57 (3) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band, it is unfair."

[90] With respect to the approach which this Court should adopt in deciding whether the Employer acted reasonably or unreasonably to dismiss the Employee, I make reference to three cases.

The first is **St. John of God Ltd v. Brooks (op cit)**. In this case the employers, a company which operated a hospital, carried out a reorganisation following substantial cuts from the National Health Service. The following are some relevant facts to consider.

- (i) They offered the staff new contracts of employment with less favourable terms including reduced pay and holiday entitlement.
- (ii) Certain employees refused to accept the new terms and were dismissed.
- (iii) The employees claimed that they were unfairly dismissed. An industrial tribunal found that the reorganisation was for some other substantial reason which justified dismissal. In addition, the tribunal was of the view that the crucial question was whether the terms offered were those which a reasonable employer would offer. It held that no reasonable employer should have expected the employees to accept the new contracts. The dismissals were held to be unfair.
- (iv) The employers appealed. **Knox J.** in writing the Court's decision stated at **page 721 paragraphs [E to F]** as follows:

“There is ...a danger in promoting the nature of the offer made by the employer of the new terms and conditions to the status of the sole or crucial test....because it involves or may involve a departure from the words of the statute which are “whether ...the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee”

where “it” is the reason shown by the employer for the dismissal.”

- (v) At page 722 paragraphs [F-G] of the report **Knox J.** stated as follows:

“The second reason why the majority of us consider that treating the nature of the offer of new terms and conditions as the crucial question is difficult to reconcile with the statutory provisions of Section 57 (3) of the Act of 1978 is that such an approach tends to lead to giving undue importance to the factor that the employee is acting reasonably in refusing the offer. The situation may very well be one in which the employer’s legitimate interests and the employee’s equally legitimate interests are irreconcilable. If there is a sound business reason for the particular reorganisation....the unreasonableness or reasonableness of the employer’s conduct has to be looked at in the context of that reorganisation. To look at the offer as the crucial question is apt to blur that aspect of the matter.”

- (vi) The Employment Appeal Tribunal upheld the employer’s appeal. The matter was remitted to the Industrial Tribunal to consider in light of the judgment.

- [91] (a) The second case is **Chubb Fire Security Ltd v Harper (op cit)**. Mr. Harper was employed as a sales representative. The company dismissed him when he refused to enter into a new

contract of employment. Consequent upon a re-organisation Mr. Harper contended that the offer would have resulted in a drop of his income. Attempts were made by the company to Mr. Harper to persuade him to change his mind. Those efforts failed. The Industrial Tribunal held that his dismissal was unfair. The company appealed.

- (b) **Mr. Justice Balcombe** in writing the Court's judgment stated at page 312 as follows:

"The Industrial Tribunal appear to have concentrated their approach on the reasonableness of Mr. Harper's belief that the new contract would be disadvantageous to him [T]hat was an incorrect approach."

- (c) After stating the Industrial Court's statement of a principle that if it was reasonable for Mr. Evans (in **Evans v Elemeta Holdings Ltd [1982] 1.R.L. R 143**) to decline the new terms of the contract then obviously it would have been unreasonable for the employer to dismiss him for such refusal, **Mr. Justice Balcombe** stated at page 313 as follows:

"We must respectfully disagree with that conclusion. It may be perfectly reasonable for an employee to decline to work extra overtime having regard to his family commitments. Yet from the employer's point of view, having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime."

"[I]t does not therefore follow that if it is reasonable for an employee to refuse to accept a new contract offered

in the course of a business re-organisation, then it is unreasonable for the employers to dismiss him when he does so.”

- See also **Glasgow City Council v Deans Mulrine & McLenaghan** (op cit) per Lady Smith at paragraph [15] page 10.

[92] The third case is **Catamaran Cruisers Ltd v Williams [1994] I.R.L.R. 386**. The employees in this case were dismissed when they refused new contracts which were offered to them as a part of a reorganisation by their employers. The new contracts were less favourable to the employees. The terms being offered were the result of negotiations with the recognised trade union. Most of the employees accepted the new contracts of employment.

[93] (a) When the matter reached the Industrial Tribunal it held for the employees upon the ground that the new contracts were less favourable to them than the old contracts. At **paragraph [8]** of the Tribunal’s judgment it stated as follows:

“We think that the summary which we have made in this paragraph represents the way in which a tribunal should look at the matter in that only one of the things which a tribunal must consider is a comparison of the new terms with the old. It must also consider why the employer is proposing the changes....”

(b) **Mr. Justice Tudor Evans** in the **Employment Appeal**

Tribunal Report (EAT) made reference to the Industrial Tribunal's statement of the law at **paragraph [8] of the Tribunal's judgment**. He stated at **paragraph [21]** of the **EAT Report** as follows:

“That is a clear statement of the principle of law to be applied....”

- [94] (a) At **paragraph [9]** of the Industrial Tribunal's judgment it found that the Employer's business did not experience any financial constraints which demanded immediate and drastic remedies that caused them to take the action which they did. It found that the primary purpose of the reorganisation was to make the business more efficient. It went on to make the following statement.

“The matter does not end there because the desire to make the respondents more efficient is, in our view a sound business reason for proposing changes provided that overall the new terms are no less favourable than the old.”

- (b) **Justice Tudor Evans at paragraph [21]** of the Employment Appeal Tribunal Report had this to say with respect to the Industrial Tribunal's analysis of the law stated at **paragraph [9]** of the Industrial Tribunal judgment.

“This is a plain misdirection of law which is repeated yet again in paragraph [11] of the decision”.

- (c) **Paragraph [11]** of the Industrial Tribunal's judgment stated as follows:

“The new contract, particularly bearing in mind our finding that financial constraints were not the reason for the imposition cannot in our view, be regarded as necessary for the proper re-organisation of the respondents.”

- [95] (a) Finally, the Industrial Tribunal with respect to the questions which arise within Section 57(3) of the Employment Protection (Consolidation) Act 1978 as amended stated as follows:

“We are therefore unanimously of the opinion that, having regard to the authorities and the principles we should apply,..... the new conditions,....were so unfavourable when compared with the conditions upon which the employees were working at the present time, that it cannot be said that the offer made by the respondents was one of new terms and conditions of employment that can be regarded as reasonable. Consequently, the applicants were wrongly dismissed.”

- (b) This statement is an error of law which grounded the successful appeal of the employers. The matter was remitted to the same Tribunal with specific guidelines to follow at **paragraph [28]** of the Employment Appeal Tribunal Report.

- [96] On remit to the Industrial Tribunal **Mr. Justice Tudor Evans** at

paragraph [28] of the Employment Appeal Tribunal Report stated certain guidelines which the Industrial Tribunal should consider.

They are as follows:

- “(i) *The Tribunal should consider the case without the restrictions which it applied, namely that unless the business reasons were so pressing that it is vital for the survival of the business that the terms be accepted, it is not unreasonable for an employee to refuse the terms.***
- (ii) *The tribunal should not limit their approach to the questions to be answered under Section 57(3) of the Act by looking at the matters solely from the point of view of the advantage or disadvantage of the new contract from the point of view of the employee. It is necessary to consider and take into account the benefit to the appellants in imposing the changes in the new contract.***
- (iii) *An express finding should be made as to whether the Tribunal accept the evidence of Mr. Vincent that the re-organisation was based, at any rate in part, on the question of safety and, if so, what effect it has on the questions arising under Section 57(3).***
- (iv) *An express finding should be made as to whether the dismissal was reasonable in the light of the fact that many of the employees accepted it...***
- (v) *Finally the Tribunal should consider whether the dismissal was reasonable in the light of any evidence that the trade union recommended the change.”***

[97] The learned authors of **Labour Law, Deakin & Morris (op cit)** at **page 253** stated with reference to the second part of the remit at **paragraph [28] in the Catamaran Cruisers case (op cit)** as follows:

“The tribunal had to consider the benefit or potential benefit to the employer in balancing the two interests and should also, in a case such as this, consider the relevance of the large majority of employees accepting the new terms.”

[98] **Lady Smith** in the **Glasgow City Council case (op cit)** in making reference to **Catamaran Cruisers (op cit)** stated at **paragraph [17]** of the judgment as follows:

“Any business re-organisation that satisfies the “some other substantial reason” test is bound to involve benefit to the employer. The message that emerges loud and clear from ...Catamaran Cruisers....is that that benefit ought not to be lost sight of when a tribunal is considering whether a dismissal on account of the re-organisation is fair or not. The fact of it is not spent just because it has been determined that the dismissal was for some other substantial reason. It needs to be recognised as being a potential counterweight to any disadvantage to the employee and the employer is entitled to have the balancing exercise carried out before any decision on fairness is reached.”

[99] One factor which the Court must take into account to determine if the Employer has acted reasonably or unreasonably is whether or not it engaged in consultation with the Employee.

-See **Hollister v National Farmers Union** (op cit).

The evidence

(a) The requirement to apply

[100] In answer to Sir Richard Cheltenham Q.C., the Employee stated as follows:

“In the Bank 32 positions in High Street were affected by the restructuring process. To my knowledge at Perry Bay in JRG-23, four (4) positions had to be applied for out of 12 available jobs. The other 8 were appointed without any applications required. To my knowledge 14 positions at the High Street Branch were applied for and there were 32 affected positions by the restructuring of all of the 14 positions which I state were applied for. There were more applicants than positions at the High Street Branch.”

[101] In further answer to Learned Counsel the Employee stated as follows:

“Various persons had to apply for positions.”

[102] In her answer to Mr. Roger Forde Q.C., Attorney-at-Law for the Employer, the Employee stated as follows:

“After the elimination of the Senior Mortgage Officer position, I was not asked by the Bank to match my skills to an available position. Mr. Murdock suggested to me that two positions would match my skills and experience. These were

Senior Personal Banking Assistant and the Personal Banking Officer. He invited me to apply for one of the positions.”

[103] Mrs. Reynolds-Greene was not the sole employee to whom the Bank made its offer in the way that it did. In these circumstances, I do not consider that it was unreasonable for the Bank to require the Employee to submit an application to obtain one of the positions which in the Bank’s estimation best matched her ***“skills and experience.”***

[104] It is the Bank’s evidence that had this Employee submitted an application to the Bank, she would have obtained either of the two positions referred to at paragraph [102] above.

[105] In her answer to her Attorney-at-Law the Employee also stated as follows:

“I was offered a position. I was invited to apply for a position. I was not offered a lateral transfer.”

[106] No evidence was led in this case by either party that the Bank offered a guarantee of employment to the 4 persons at the Perry Bay Branch of the Bank, nor any of the 14 persons at the High Street Branch that their applications would have been successful. In these circumstances, there was no requirement that this Employee was treated in any way different to those other employees.

(b) **The matter of consultation**

[107] In answer to her Counsel the Employee stated that she received a package as a result of attending a meeting on November 25, 2002. In her letter to Mr. Murdock dated December 19, 2002 “**JRG 7**” the Employee referred to a staff meeting with both Branches of the Bank. It took place at Sandals Resort on Thursday November 21, 2002. In her evidence the Employee stated that the Bank gave the Employees until November 28, 2002 to submit their applications to the Bank. In answer to Sir Richard Cheltenham Q.C., the Employee stated that her given deadline was December 31, 2002.

[108] On December 03, 2002 the Employee submitted a letter to Mr. Murdock. It was admitted as “**JRG-5**”. That letter read as follows:

“December 03, 2002

*Mr. Brian Murdock
Country Manager
Scotiabank
Antigua
Ref: SDP Package*

Dear Mr. Murdock,

This is to acknowledge receipt of your “SDP” package in reference to unilateral changes in my employment.

I have compared my present job title with the new options provided. I note, however, they are not in the least identical or compatible.

That being the case and in keeping with the provisions of the Antigua and Barbuda Labour Code, I think it is unfair to require me to accept any of the options offered.

Yours Truly,

Jannis Greene

Cc Jim White RBM”

[109] A meeting took place between Mr. Murdock and Mrs. Reynolds-Greene on December 17, 2002. His account of the meeting is to be found at **paragraph [16]** of his Witness Statement. It states as follows:

“In response to the Employee’s letter of 3rd December, 2002 the Employer on 17th December, 2002 held a meeting with the Employee and reviewed the entire restructuring program, including the Employee’s options to apply for a new position within the Employer’s new structure. The Employer also reassured the Employee that if she chose a position which was lower in remuneration than the position she then held, that the Employer would continue to pay her at the then current remuneration together with any increases and incentive pay to which she was entitled for the years 2003 and 2004. The Employer committed itself to ensuring that every effort was made during the 24 month period to place the Employee or any other employee similarly affected in a position at this higher level.”

[110] Mr. Murdock’s Witness Statement at **paragraph [17]** stated as follows:

“On the said 17th December, 2002 after the meeting, the Employee advised the Employer that having considered her options, she did not want to be considered for any of the new positions, again for reasons that they were not identical to nor compatible with her former position.”

[111] In accordance with the meeting between the Employee and Mr. Murdock on December 17, 2002, Mr. Murdock was of the opinion that the Employee “*did not want to be considered for any of the new positions.*” Mr. Murdock’s opinion was “**totally denied**” by the Employee. - See “**JRG 6 & 7**” respectively.

Mr. Murdock was faced at this stage with two options. Firstly, he may have considered that the matter was closed. Secondly, he could have pursued the matter further, if he so desired.

[112] One day later, Mr. Murdock wrote a letter to the Employee. This was admitted as “**JRG-6.**” In that letter Mr. Murdock referred to some matters. He indicated that the Senior Mortgage Officer’s position “*like many others is being eliminated to allow for a more effective allocation*” of the Bank’s branch staff. Mr. Murdock also stated as follows:

“As discussed previously, should you accept a position under the new structure which is lower in remuneration, you will continue to receive your current remuneration together with any increases negotiated through the collective bargaining process for 2003 and 2004. At that time, your

salary will be frozen until such time as you assume another position offering greater remuneration.”

Mr. Murdock requested the Employee’s final response on or before December 19, 2002.

[113] The Employee by a letter dated December 19, 2002 responded to Mr. Murdock’s letter. She stated that her ***“position remains the same as stated in the letter of 3rd December 2002 and which was restated at the meeting of 18th December, 2002.”*** She was later dismissed by the Bank’s letter dated March 03, 2003.

[114] I hold that the Bank engaged in direct consultations with the Employee. It made an offer of employment to the Employee. She refused the offer.

(c) The Employee’s views of her position /the offer

[115] The Employee was formerly employed by the Bank as its Senior Mortgage Officer. Some of her duties were previously referred to at **paragraph [4] of this judgment.**

[116] (a) Essentially, she was involved in the sale of the Bank’s mortgages. She informed the Court that she also dealt with Scotialines, credit cards, car and medical loans, and any retail products. In answer to Mr. Roger Forde Q.C., Counsel for the Employer, she stated that persons who desire to obtain credit cards would not normally apply to her. She was not in charge

of credit cards or the Bank's plan for motor cars. She was not responsible for the Bank's entire lending.

- (b) Her 1998 performance of which she gave evidence to this Court spoke of her ***"top credit sales person"*** award in the entire Caribbean. In October 1998 she ***"booked 55 loans totalling \$10,151,093.01."***

-See "JRG 28"

For the year 2002, ***"she was able to attain sales of only \$824,460 against a pro-rated target of \$10,600,000 a disappointing figure."***

-See "JRG-18"

- [117] According to Mrs. Reynolds-Greene, the mortgage portfolio carried ***"prestige"*** and it ***"was about the most important portfolio in the Bank."*** She also submitted that the mortgage business was the Bank's ***"largest and most prestigious portfolio."*** In the new SDP programme, she gave the following evidence.

"I expected it to continue that I would maintain my supervisory and management status. In the new SDP programme I expected to be in charge of the mortgage functions which I performed as the Senior Mortgage Officer and maintain my management and supervisory status. The Bank under the SDP still deals with mortgages. Under the SDP about eight persons deal with the mortgages."

- [118] In further answer to Mr. Roger Forde, Q.C. the Employee stated as follows:

“If the position of Senior Mortgage Officer was eliminated I expected to obtain a position which was identical and comparable to that of the Senior Mortgage Officer. I expected the salary and duties to be identical. The reason why I refused to accept the offer of the position of Senior Personal Banking Assistant or Personal Banking Officer were that they were not identical, comparable or guaranteed. These three elements are inseparable.”

[119] The Bank made an offer to the Employee to apply and/or to make a choice of one of two positions. Whilst her former duties dealt essentially with mortgages, the Senior Personal Banking Assistant and the Personal Banking Officer positions involved the sale of a variety of retail credit products. These included mortgages, credit cards, loans, personal lines of credit, consumer loans and term deposits. In either of these positions the Employee’s current monthly salary was guaranteed for a period of two years for the years 2003 to 2004.

[120] In answer to Sir Richard Cheltenham Q.C. Mr. Murdock stated as follows:

“As the Senior Mortgage Officer, this position was eliminated because the Bank as part of its restructuring was getting rid of the administrative duties that its sales officers had, which would then enable the new Personal Banking Officer to spend more time calling on customers, making appointments, having more time to prepare for the interview and we gave them tools to do it and actually going into the sales process better

prepared to identify customers' needs and our products to them as opposed to just selling a product. We also gave them a new computer system to build a profile on their customers to help them to be successful."

[121] In further answer to the Employee's Counsel, Mr. Murdock stated as follows:

"The services which Mrs. Reynolds-Greene performed mainly dealing with mortgages continues to be provided but how they are to be done has been changed. Resulting from the restructuring, her role would have diminished but she in turn would have been doing other duties. The role which she had before was dealing with mortgages would now be shared by six others."

[122] In the new SDP programme the position of Senior Mortgage Officer did not exist. The Employee expected that the Bank should provide her with a position which was *"identical, comparable or guaranteed."* According to the Employee, any new position which the Bank was mindful to offer her should have been characterised by prestige and status. The position should also have allowed her to engage in management and supervisory duties. She expected to be in charge of the mortgage portfolio.

[123] The Employee was therefore requesting the Bank to accord her some special status which in its opinion it frankly felt that she did not deserve. It no doubt would have considered her past experience, the

role which she discharged as the Senior Mortgage Officer and her ability and potential to be a part of the new reorganisation process. This potential may have included her own assessment of herself which she penned in a letter to Mr. Murdock dated January 16, 2003. It was submitted by her as “**JRG-21**”. Part of that letter read as follows:

“I have built this institution....”

- [124] (a) All of these Employee expectations were required to be met by the Bank in a reorganisation exercise. These expectations may have represented a herculean task for the Bank to achieve.
- (b) The offer made by the Employer to the Employee was one which the Bank viewed to be reasonable in the circumstances which confronted the Bank. If it posed any disadvantages to the Employee is one factor which I am required to consider at this stage of the process. In the circumstances of this case however, for the Bank to have made an exception for her to remain in the capacity and upon the terms as she specifically requested was not possible from the Bank’s assessment.

(d) **Acceptance by other employees**

[125] Mr. Murdock in his Witness Statement at **paragraph [15]** stated as follows:

“The Employee was the only employee among all the affected staff who chose not to accept any of the options offered by the Employer.”

[126] Mr. Roger Forde Q.C. asked the Employee whether she was aware of any staff member of the Bank except herself who was not re-engaged by the Bank under the SDP Programme. To this the Employee stated as follows:

“In the restructuring process I do not know of any other person who was not re-engaged by the Bank.”

[127] In his answer to Sir Richard Cheltenham Q.C., Counsel for the Employee, Mr. Murdock stated as follows:

“The bank wished to keep her but no jobs remained at the same level.”

[128] That no other person except the Employee who was not re-engaged by the Bank would clearly suggest that the eight (8) staff members at Perry Bay Branch and the fourteen (14) staff members at High Street were successful in their applications to the Bank.

(e) **The impact of trade union negotiations**

[129] It is apt to recall at this stage the Employee's evidence which she gave to this Court with respect to her trade union involvement. It is also replicated in her Witness Statement. In her sworn evidence in answer to Sir Richard Cheltenham Q.C. she stated as follows:

“Whilst I was employed by the Bank I joined the Antigua & Barbuda Workers Union in 1975. Management of the Bank was discriminatory and oppressive because I was involved in the Trade Union movement.”

[130] In her Witness Statement at **paragraph [6]** the Employee stated in part as follows:

“During my tenure at the Bank the Employer and I had strained relations due largely to the fact that I was heavily engaged in union activities. In 1994 I was appointed shop steward by my union...My union activities were wide – ranging and beneficial to the plight of the individual worker – all of which was looked on with disfavour by the Employer.”

[131] The Employee’s Witness Statement was filed on January 15, 2009. This is more than five years after her dismissal in 2003. It is more than six years since negotiations between the two parties commenced in November 2002. In 2009 the evidence is that the Employee was satisfied with her involvement with the Antigua and Barbuda Workers’ Union and its involvement with the Bank.

[132] In her answer to Mr. Roger Forde Q.C., the Employee stated as follows:

“I am not aware that the Union was informed of the Bank’s reorganisation. I am not aware that the Union was advised of the difference of opinion between myself and the Bank in connection with the offer which was made to me. I see “JRG – 6” which is the Bank’s letter to me dated December 18, 2002. I see it was copied to K. B. Smith of the Antigua and Barbuda Workers’ Union.”

[133] In further answer to Mr. Roger Forde, Q.C., the Employee stated as follows:

“The Employer acted in an oppressive and discriminatory manner against me because I was engaged in Trade Union activity. I joined the union in 1975. On December 1, 1976 I was promoted. I was also promoted in 1996.”

[134] In her letter dated December 19, 2002 to Mr. Murdock (“JRG-7”) the Employee stated as follows:

“I am not privy to discussions between the bank and the union at any meetings.”

[135] In Mr. Murdock’s Witness Statement he stated at **paragraph [5]** as follows:

“During her tenure at the Bank the Employee was a member of and participated in union activities. This at no time affected the manner in which the Employer dealt with the Employee or any of its employees. The Employer has at all times recognized and accepted the right of its employees including the Employee to be represented by their union. The result of this approach taken by the Employer is that it has maintained a good working and professional relationship with the union.”

[136] In answer to Sir Richard Cheltenham, Q.C., Mr. Murdock stated that the letter which he wrote to the Employee dated December 18, 2002 was copied to the trade union. He also indicated that the Trade Union

was aware of the reorganisation process. He verbally invited the trade union to participate in the restructuring process between the employees of the Bank and the Trade Union. The Trade Union became involved in the reorganisation process from November 2002 before the Bank introduced the proposals to the employees.

[137] The Employee led no evidence at all of any discriminatory behaviour by the Bank towards her. On the contrary, the Bank promoted the Employee on different occasions when it knew or ought to have been aware of her Trade Union activity.

[138] I do not believe the Employee's statement that she is *"not privy to discussions between the bank and the union at any such meetings."* In her Addendum to Employees's Submissions penned under her own hand, this Employee displayed an understanding of a number of important concepts of a specific document.

[139] At **page 12** of her Addendum the Employee submits as follows:

"In this case the Employee is covered by a collective agreement and worked with the Employer for a continuous term of 27 years 8 months and 12 days at a salary of \$8,908.33 per month paid fortnightly."

[140] At **paragraph [21 (a)] of her Addendum** under the heading of **'Retroactive Salary'** the Employee stated as follows:

"This claim is in consequence of salary increase under a collective agreement executed on August 07th, 2003 effective November 01st, 2002."

- [141] (a) At this stage of the Employee's Written Submissions all is well between herself and the Antigua Workers' Union. The Employee continued to pray in aid the existence of this Collective Agreement as she challenged the veracity of a statement made by Mr. Murdock in his Witness Statement at **paragraph [2]** thereof.
- (b) Mr. Murdock had stated that when the Employee was dismissed in March 2003 she was earning a monthly salary of \$8,566.66 and not \$8,908.33. According to him the monthly salary of \$8,908.33 became effective from August 2003.

[142] The Employee at **paragraph [19]** of her Written Submissions in response to Mr. Murdock's opinion at **paragraph [2]** of his Witness Statement that the Employee worked for "*a monthly salary of \$8,566.66 and not \$8,908.33 as indicated by the Employee*" stated as follows:

"It is contradicted by the very Country Head evidence at BM 12 which at page 30 article 26.01 confirms the effective date of the collective agreement to be November 01st, 2002 and at page 33 confirm the sign off date on the collective agreement to be the 07th day of August 2003; and at page 35 Appendix 11 confirmed the S4 salary as \$106,900.00 per annum, which calculates at \$8,908.33 per month."

[143] Norman Selwyn in the book entitled "**Selwyn's Law of Employment**" 15th edition 2008, Oxford University Press defines a collective agreement at **paragraph [3.52]** in the following manner:

“A collective agreement is an agreement made between an employers’ association, or a single employer; on the one hand and a trade union on the other, which as well as laying down the procedure which will govern the relationship between the signatories will also provide for the terms and conditions of employment of those covered by the agreement.”

[144] At paragraph [3.55] Mr. Selwyn states as follows:

“The authority of a trade union to enter into agreements which will be binding on its members vis-à-vis their employers stems either from express authority, implied authority or by virtue of the law of agency. Express authority will normally arise when a trade union (or an authorised official) is asked or is invited to negotiate on a specific issue which affects its members...”

[145] In this case it must be recalled that the Bank commenced discussions with the Antigua Workers’ Union on behalf of the Bank’s workers before the proposals were introduced to the workers themselves. It does appear from the evidence that Keithlyn B. Smith (now Sir Keithlyn Smith) the General Secretary of the Antigua Workers’ Union led the discussions on behalf of the Trade Union. Further evidence of this is contained in the Employee’s letter to Mr. Murdock dated December 19, 2002. In that letter the Employee wrote of a *“visit by Keithlyn Smith, who...came into my office unannounced and unexpected.”*

[146] There is a document entitled **“MEMORANDUM OF AGREEMENT BETWEEN THE BANK OF NOVA SCOTIA (THE BANK) AND THE ANTIGUA WORKERS’ UNION.”** It relates to the Bank of Nova Scotia employees and the Antigua Workers’ Union (the Trade Union). That document was attached to the former Witness Statement of Mr. Murdock which was filed on February 13, 2009. It is marked **“BM -12.”**

[147] This Memorandum of Agreement (MOA) is a critical document. It reveals a lot about what transpired between the Trade Union and the Bank during a relevant period of the history of the Bank’s business in Antigua and Barbuda for the purpose of this case.

Relevant details of the Memorandum of Agreement (MOA)

[148] I consider that the relevant details of the MOA are as follows:

- (i) Discussions took place between the Bank and the Trade Union between November 2002 and July 2003;
- (ii) The MOA was signed on August 07, 2003;
- (iii) The purpose of the Memorandum of Agreement was *“to record Agreement between the Bank and the Union on the regulation of salaries, hours of work, and general conditions of employment as contained in this Agreement applicable to the employees of the Bank covered by this Agreement in order to consolidate employee/employer relations, to secure a prompt and fair disposition of employee grievances, and to help achieve the highest level of performance consistent with safety and good health.”*

- See Clause 1.01

- (iv) *“The Bank recognises the Union as the sole collective bargaining agent with respect to all matters covered by this Agreement for all of its employees at its High Street and Perry Bay Branches in St. John’s Antigua save and except”* for certain employees who are not relevant for this judgment.

- See Clause 2.01

- (v) Secrecy, hours of work and overtime provisions are dealt with at **Clauses 6, 7, and 8** respectively. The Perry Bay Branch may open from Monday to Saturday and a different paragraph for hours of work is noted.
- (vi) Severance payment, union security/dues and representation are dealt with at **Clauses 12, 13 and 14** respectively.
- (vii) Grievance procedures, leave of absence and sick leave provisions are located at **Clauses 16 and 17** respectively.
- (viii) **“This Agreement shall be in effect from November 01, 2002 until October 31, 2005 and shall be continued from year to year thereafter unless either party gives to the other notice in writing...”**

- See Clause 26.01

- [149] (a) The classification of employees who benefit from the MOA is located in **Appendix 1** of the MOA. The full **Appendix 1** appears at **page 85** of this judgment.
- (b) It is to be observed that the annual salary which is payable to the holder of an S4 position is \$106,900.00 or a monthly salary of \$8,908.33 as correctly stated by the Employee.

[150] The class of workers which is represented by the Trade Union in the MOA includes **Senior Personal Banking Assistant, Accounting Officer, Personal Banking Officer, Personal Banking Assistant, Assistant Operations Officer (Tellers) and Operations Officer (Accounting).**

[151] Article 27 of the MOA states that “*Employees shall receive rates of basic pay in accordance with Appendices and II and III of this Agreement.*” **Appendix II** appears at **page 86** of this judgment.

[152] The MOA was signed by Keithlyn B. Smith (as he then was) General Secretary on behalf of the Trade Union and Brian Murdock, Country Manager on behalf of the Bank.

[153] The MOA between the Bank and the Union on behalf of the Bank’s employees was all embracing. It encompassed a significant number of areas of employment which included “*the regulation of salaries, hours of work and general conditions of employment.*”

- See Clause 1.01

[154] (a) The MOA also dealt with the elimination of certain positions. These included that of (a) Consumer Credit Officer; (b) Assistant Consumer Credit Officer; (c) Mortgage Interview Clerk; (d) Consumer Credit Interview Clerk; (f) Assistant Manager Consumer Credit; (g) Senior Mortgage Officer and (h) Retail Banking Manager.

- (b) An analysis of these positions in the Bank's former Organisation Chart which was entered by Mr. Murdock ("**BM5**" dated February 1999) or the Organisation Chart entered by the Employee ("**JRG-12**" dated August 01, 2001) reveals that at least 12 positions were eliminated.

[155] (a) The MOA also referred to the creation of certain new positions. These included (a) Personal Banking Manager; (b) Assistant Manager Sales Support; (c) Senior Personal Banking Assistant; (d) Personal Banking Assistant; (e) Retail Administrative Clerk; and (f) Personal Banking Officer

- (b) These new positions are specifically stated in the Bank's Organisation Chart. It is dated May 06, 2003 and entered as "**BM-6**" or "**JRG-13**".

[156] (a) In this case the Employee made specific reference to some of the old and new positions. Some of the former positions included (a) Consumer Credit Officer; (b) Assistant Consumer Credit Officer; (c) Mortgage Interview Clerk; (d) Consumer Credit Interview Clerk; (e) Senior Mortgage Officer. These positions appeared in the former Organisation Charts of the Employee and the Bank.

- (b) In the new Organisation Chart the Employee referred to the creation of the positions of (a) Senior Personal Banking Assistant and (b) Personal Banking Officer. These two positions were referred to in Appendix 1 of the MOA.

[157] In this case the evidence is that the Bank's restructuring of the manner it conducted its business from May 2003 was agreed upon by the Trade Union on behalf of the Bank's employees and the Bank during discussions between the two parties in the period sometime between November 2002 and July 2003.

[158] The impact of negotiations between the Bank and the Trade Union is a matter which I am required to consider in an assessment of the reasonableness or unreasonableness of the Employer's actions to determine whether the Bank's decision to dismiss the Employee was fair or unfair.

[159] In this regard the learning from **Harveys** (op cit) is useful to consider. At **Chapter 13, paragraph [1874] in Volume 1**, the learned author under the heading entitled "**The effect of union negotiations**" states as follows:

"An important factor which in practice is likely to affect the tribunal's assessment of whether a dismissal is fair, is whether a proposed re-organisation is agreed following negotiations with the union. This will in practice be powerful evidence that changes in terms and conditions are justified,....."

[160] In **Selwyn's Law of Employment** (op cit) the writer posits at **paragraph 17-148** that *"whether a trade union (has) recommended acceptance of the changes (is a) relevant (factor) to be taken into account."*

[161] It was proper for the Bank to engage in negotiations with the Trade Union which represented the interests of all of the employees of the Bank including Mrs. Reynolds-Greene. The Bank acted in a proper manner to negotiate and conclude discussions with the Trade Union with regard to its reorganisation exercise.

[162] The conclusion of the negotiations between the two parties meant that the Trade Union would have recommended to the employees that the new changes were fit and proper for them to continue in their employment with the Bank. In the words of Mr. Justice Kilner-Brown in the **Martin** case (**op cit**) at **page 65**, this Employee was “*caught by a collective agreement.*”

[163] At some undetermined time however the Employee’s views of the Trade Union changed. The Employee wrote a stinging rebuke of the Trade Union in her written Addendum to Employee’s Submissions. At page 24 of her submissions she wrote as follows:

“Although representation by the Union would have been more cost effective this was impossible for the Union changed horses midstream, played the indispensable role of traitor and played an active and unethical role in this matter.”

[164] I am required to take into account when considering whether the Bank acted reasonably or not that the terms of the MOA were freely negotiated between the Trade Union and the Bank. Mrs. Reynolds-Greene was one of these employees. All of the other employees accepted the recommendations of the Trade Union which culminated

accepted the recommendations of the Trade Union which culminated in the conclusion of the MOA. She did not wish to be a part of the MOA.

The balancing exercise

- [165] (a) Mrs. Raquel Walsh-Siltson, Attorney-at-Law's submission at **paragraph [85]** of this judgment has substantial merit. It is also referred to at **paragraph [27] of the Catamaran case (op cit)**. In summary, **Mr. Justice Tudor Evans** in **Catamaran** at **paragraph [27]** is of the view that it does not follow that if an employee reasonably refuses new terms of an offer then it was unreasonable for the employer to dismiss him for such refusal.
- (b) Applying this approach to the facts of this case, I hold that even if the Employee was considered to have acted reasonably in her refusal to accept the offer which was made to her by the Bank, it does not necessarily follow that the Bank acted unreasonably in its dismissal of the Employee when it did.

[166] I am very mindful that I must consider the reasonableness or unreasonableness of the Employer's conduct. In judging whether the Bank acted reasonably or unreasonably, I must not substitute my decision as to what was the correct course for the Bank to adopt.

[167] What the Bank did, may or may not have been what I would have done. What I would have done however is not the test. The test is whether the Bank's decision to dismiss fell within the band of reasonable responses which a reasonable employer might have

adopted, having regard to the circumstances which it was required to deal with at that time.

[168] I have taken into account the offer which the Bank made to the Employee. I have also taken into account the Employee's refusal of the Bank's offer. In addition, I have considered the benefits which the Bank expected to materialise as a consequence of the reorganisation exercise.

[169] I have also considered that the Bank engaged in negotiations with the Employee. The Bank extended the deadline in order to accommodate her. The Bank explained to the Employee the nature of the proposed changes which it planned to institute. Mr. Murdock outlined the terms of the new offer to the Employee. He listened to the views which the Employee expressed to him. The Employee's requests could not be accommodated by the Bank in the new structure.

[170] In the Employee's letter to the Bank dated December 19, 2002, it became quite clear that by the time the Bank decided to dismiss the Employee that she had indicated very clearly to the Bank that she was not prepared to accept its offer.

[171] I have also had regard to some other factors. These include the Employee's opinions of her role within the organisation, the acceptance of the new terms of employment by other employees, the impact of the negotiations between the Trade Union and the Bank, the MOA, and any perceived advantages or disadvantages to the

Employee. In taking these into account I must also have regard to the benefits of the reorganisation exercise which the Bank expected to realise.

Disposal

[172] Applying the principles which I have attempted to summarise at **paragraphs [165] to [171]** of this judgment and in all the circumstances of this case, I conclude that the Bank acted reasonably, and certainly that in treating the reason in this particular case for the Employee's dismissal was within the range of reasonable responses to be expected of an employer which was faced with this challenge. The Bank's dismissal of the Employee in this case was for some other substantial reason. The substantial reason was the proposed introduction of the Bank's reorganisation exercise. The Employee's dismissal in these circumstances was fair.

The Third Issue:

If the Employee was unfairly dismissed what awards are she entitled to?

[173] In light of the finding at **paragraph [172]** of this judgment, I do not consider that the Employee is entitled to any of the traditional awards.

The Fourth Issue:

- (a) **Did the Employee misconduct herself by her insistence on continuing in her employment in a position which was identical with or similar to the functions which she discharged as Senior Mortgage Officer prior to the changes which were introduced by the Bank?**
- (b) **Is the Employee entitled to a payment of pension from the Bank?**

The facts

[174] In her evidence the Employee stated that she became eligible for a pension at age 53, 60 or age 63. The Employee produced a document entitled **“Your 2001 Pension Statement.”** This was authored by the Bank. It was marked **“JRG-10”**. At March 01, 2010 she had attained 53 years of age. This statement outlined the Employee’s pension entitlement from the Bank as at October 31, 2001 as a member of the Scotiabank Pension Plan.

[175] The Employee in answer to Sir Richard Cheltenham, Q.C., referred to the inclusion of the concept **“just cause”** which appears according to her in the Memorandum of Agreement.

[176] Mr. Murdock in answer to Sir Richard Cheltenham, Q.C., Attorney-at-Law for the Employee reasoned that since the Employee was dismissed for her refusal to participate in the restructuring process then this **“was misconduct”**.

[177] (a) Mr. Murdock's evidence with regard to this issue is further contained at **paragraph [23]** of his Witness Statement. It read in part as follows:

“The Employee was a non-contributory member of the Employer’s pension scheme. However, the Employee was not paid a pension when she was terminated. At the time the Employee was terminated the Employer had in place a policy on pensions which was based on an agreement which was signed between the Antigua branch of the Employer and the Antigua Worker’s Union on behalf of the Employee. Pursuant to Memorandum of Agreement between the Antigua branch of the Employer and the Antigua Worker’s Union on behalf of the Employee, persons who are terminated for cause are not eligible to receive pension benefits. Attached is a copy of the said Memorandum of Agreement between the Antigua branch of the Employer and the Antigua Worker’s Union marked “BM11” for identification. Having been terminated for good cause, the Employee was therefore not eligible to be paid pension and was advised of this by letter to her Attorneys dated April 14, 2003.”

[178] I am unsure whether or not the words *“just cause”* or *“misconduct”* appear in the MOA. The MOA itself makes no reference to these concepts. They do appear in a document attached to the MOA. The MOA by itself makes no reference to this document. The document

is effective from January 01, 1998. I have entitled it as **“The pension plan document”** and **Appendix III**. It appears at **page 87** of this judgment.

[179] Sir Richard Cheltenham Q.C. Attorney-at-Law submits that the Employer’s position on the pension issue was wrong. Learned Counsel submits that the Employer’s refusal to award the Employee her pension due to misconduct which was akin to dishonesty was **“wrong-headed and perverse”**. No cases were cited in support of this submission.

[180] The Employee made some submissions with regard to her entitlement of a pension from the Bank. They may be summarised as follows:

- a) She accused the Employer of a **“conspiracy and deceit in withholding the Employee’s just entitlement to her pension.”**
- b) **“What is being witnessed is the strength and power of a global financial giant (a) situation that this Court in the jurisdiction of Antigua can legally address”.**
- c) **“The Employee is entitled to either a reduced monthly pension or a lump sum payment at her option on dismissal...”**

[181] Racquel A. Walsh-Silston, Attorney-at-Law for the Employer made the following submissions at **page 19** of her Written Submissions.

“Loss of Pension: It is submitted that the Union Agreement contemplates that an (employee) can be deprived of his pension if he is dismissed for cause and that the dismissal herein is akin to cause.

See Exhibit "BM 12." In the event that the Court does not construe the Union Agreement in this light, then it is submitted that the Employee is entitled to the pension as set out in the Employee's Scotiabank Pension Plan Statement of Benefits on Termination. In summary, as of the 30th day of April 2003 the Employee would receive a lump sum of CD\$128,500.90 (EC\$321,252.25) or a monthly payment of CD\$1,971.00. (EC \$ 4,927.50)."

No cases were cited in support of her submissions.

[182] No evidence was led by the Bank that the Employee was dismissed for misconduct. No allegations of misconduct were made by the Bank. Mr. Murdock in his evidence stated as follows:

"I wanted her to participate in the process."

"The Bank wished to keep her but no job remained at the same level for her."

[183] At **paragraph [28]** of Mr. Murdock's Witness Statement he stated as follows:

"The Employer contends that the Employee's actions were such that it proved to be a substantial reason of a kind which entitled the Employer and would have entitled any reasonable employer in the circumstances to dismiss her, holding the position which the Employee held. The Employer further contends it acted reasonable at all times."

[184] For the purpose solely of dealing with the matter of the Employee's pension entitlement, the Bank cites the "*just cause*" and "*misconduct*" provisions of the January 01, 1998 document (Appendix iii). With regard to the dismissal of the Employee however, the evidence put forward by the Bank related to the matter of *some other substantial reason*.

The law

[185] Neither Counsel cited any authorities. I am not however without guidance on the matter. Quite the reverse, for I have had the advantage of reading two authorities which deal with a determination of this issue.

[186] The first is **R. G. Knighton v Henry Rhodes Ltd** [1974] I.R.L.R. 71
The headnote reads as follows:

"In this case the applicant was a general maintenance fitter in the engineering section of the respondent company. The company decided as a matter of commercial policy to re-structure the maintenance department so as to ensure performance of maintenance duties at night. They created a pool of maintenance fitters and proposed to require them to undertake to do night shift working one week in six. The applicant objected to doing shift working....and having refused alternative employment as a charge-hand/fitter during the day, he was dismissed."

[187] The applicant commenced a claim for unfair dismissal. The Industrial Tribunal dismissed it. His appeal to the Employment Appeal Tribunal was dismissed.

[188] After stating that it was abundantly clear that as a result of the proposed reorganisation of the system affecting fitting at the respondent premises, there was to be no diminution in the requirements of the respondent for maintenance fitters and that it is also to be concluded that the applicant himself was at no material time affected by any redundancy situation, the **Employment Appeal Tribunal Report** at **page 72** stated as follows:

“It was argued before us that the reason for dismissal in this case should be held to have related to the conduct of the employee. We do not feel disposed or able to accept the validity of that argument. It cannot be complained, in our judgment; that Mr. Knighton misconducted himself simply by his insistence on continuing in his employment, if his employment were to continue, on the same conditions and terms as prevailed before the changes were introduced. We are, however, satisfied by the respondent that the reason for his dismissal was only because of the applicant’s refusal to accept a variation in his contract, so that it would provide for night shift working one week in six and we are satisfied that that was a substantial reason...of a kind such as to justify the dismissal of the applicant as a maintenance fitter.”

[189] The second case is **Robinson v Flitwick Frames Ltd [1975] I.R.L.R 261**. Mr. Robinson was dismissed from his job with the respective company for refusing to work overtime when requested by management to do so. At **page 262** of the **Industrial Tribunal Report** it states as follows:

“We first consider whether or not it can be considered as conduct.....therefore as he was working his contractual hours and was prepared to work them we do not think he was dismissed for conduct..We therefore find the employer has shown some other substantial reason.”

[190] From these two authorities, it is possible, I think, to extract the following principle and guidance. A dismissal for *“some other substantial reason”* in accordance with Section **58 (i) (e)** of the **Labour Code** cannot simultaneously be a dismissal for *“misconduct”* in keeping with **Section 58 (i) (a) of the Labour Code**.

[191] Mrs. Walsh-Silston’s submissions upon this ground are unmeritorious. I accept the submissions of Sir Richard Cheltenham Q.C. I also accept the Employee’s submissions at **paragraph [180] (c)** of this judgment.

Disposal

[192] The facts of this case do not disclose that the Employee misconducted herself by her insistence on continuing in her employment in a position which was identical with or similar to the functions which she discharged as Senior Mortgage Officer prior to the changes that

were introduced by the Bank. Her insistence in this regard was one of the factors which I took into consideration to decide that her dismissal was for some other substantial reason in accordance with **Section 58 (i) (e) of the Labour Code**.

[193] In the circumstances of this case the Employee is entitled to the value of all pension which she has accumulated with the Bank. On October 15, 2009 this Court ordered that the Bank should file forthwith a document which shows the Employee's entitlement to pension accumulated by her in accordance with the Scotiabank Pension Plan.

[194] (i) In compliance with the Court's Order of October 15, 2009 the Bank filed a document the same day. It dealt with the Employee's entitlement to an option of a monthly payment or a lump sum payment in accordance with the Scotiabank Pension Plan.

(ii) In accordance with the document at **paragraph [194] (i)** of this judgment the Employee's Commuted Value of her pension if it was transferred to her on August 31, 2009 was Cnd\$233,494.00 or EC\$583,735.00. The monthly sum was Cnd\$1,183.00 or EC\$2,957.50. These calculations were relevant to August 31, 2009.

(iii) An updated Scotiabank Pension Plan Estimate was received by the Court from the Bank on July 01, 2010. A copy was duly delivered to the Employee. The calculations were updated to June 30, 2010. The monthly pension payable to her in accordance with Option 1 is Cnd\$1,148.00 (EC\$2,870.00). If

Option 2 is exercised by the Employee the Commuted Value of her pension benefit in effect for June 30, 2010 is Cnd\$235,716.30 or EC\$589,290.75.

[195] At **paragraph [41]** of the Employer's Memorandum filed on February 13, 2009 the Employer states that *"the interest rates on the Employee's loans would have been converted from a staff rate of 5% per annum to one of 11% per annum. The Employer further states that the difference in the amount the Employee has had to pay on her loans as a customer is EC\$134,315.28."*

[196] In her evidence the Employee stated as follows:

"I have a mortgage from my employer at a preferential rate. This mortgage was obtained in 1985. When I obtained the mortgage I paid \$3,000.00 per month. After I was dismissed by the Bank the monthly payment remained the same."

[197] The Employee is entitled to exercise her option to receive from the Bank either (a) a lump sum payment of Cnd\$ 235,716.30 (EC\$589,290.75) or (b) a monthly pension of Cnd\$1,148.00 (EC\$2,870.00). Of course her liberty to exercise either option may be constrained by any sum of money which she may owe to the Bank.

[198] This Court expects that discussions between the two parties shall be speedily concluded and that they *"will provide results in which both sides could find equal comfort."*

-See Sundry Workers of the Antigua Port Authority vs Antigua Port

Counsels' submissions

[199] This Court is grateful for the wide-ranging and careful submissions put forward by both combinations of Attorneys-at-Law. They were lucid and helpful. These were done as a consequence of diligent legal research.

Final disposal

[200] Except for the findings of this Court at **paragraphs [192, 194 and 197]** of this judgment for the reasons that we have given, the Reference filed by the Employee on January 11, 2006 is dismissed. There shall be no Order as to costs.

APPENDIX 1

Classification of bargaining unit positions are listed below:

<u>Job Category</u>	<u>Position</u>
C2	Teller Bulk Teller Accounting Clerk – Data
C3	Accounting Clerk – Proof Retail Administration Clerk
C4	Accounting Clerk – Deposit Accounting Clerk Personal Banking Assistant
C5	Float Officer Senior Accounting Clerk Senior Bulk Teller
C7	Senior Personal Banking Assistant
S1	Accounting Officer Personal Banking Officer Senior Personal Banking Assistant Adjuster Float Officer
S2	Operations Officer – Tellers
S 4	Operations Officer – Accounting
Non-Clerical	Messenger

APPENDIX II
Salaries EC\$ - Nov/01/04

Job Category	Current Salary	Nov/01/02	Nov/01/03	Nov/01/04
C1	45700	47550	N/A	N/A
C2	56750	59000	61050	63200
C3	59650	62050	64200	66450
C4	62400	64900	67150	69500
C5	76750	79800	82600	85500
C7	88250	91800	95000	98350
S1	92500	96200	99550	103050
S2	100300	104300	107950	111750
S4	102800	106900	110650	114500
Messenger	39200	40750	42200	43700

APPENDIX III

The pension plan document

“Effective January 1, 1998:

- 1) Employees with two (2) years of service and who are eligible for and who are enrolled as members in the Bank of Nova Scotia Pension Plan (non-contributory) for two (2) years may, in accordance with the rules of the Pension Plan, elect in writing upon resignation, to collect their accrued Bank pre-paid pension benefit (i.e. the employees commuted value of their accrued benefit) rather than deferring their defined benefit until retirement.*
- 2) It is understood that employees dismissed for just cause are ineligible (e.g. theft, wilful damage, dishonesty, gross misconduct, or other similar situations)*
- 3) The parties further agree that all matters regarding these provisions and/or policies referred to are to be determined by the Bank, subject to the rules of the Pension Plan.*
- 4) The parties agree that the employee election in paragraph (1) shall not result in any double payment or pyramiding or results in more than one claim.”*

Postscript

[201] At **paragraph [20]** of the Employee's Witness Statement filed on January 15, 2009, she states in part as follows:

"I was invited to negotiate an ex-gratia payment with the Employer by letter dated 20th May, 2003, from the Employer's solicitors. I declined this offer, because I was confident of my entitlement to the pension which I had earned. I was satisfied, too, that I was not terminated for 'good cause' as alleged by the Employer."

[202] I have always encouraged both parties to a dispute to consider the possibility of speaking with each other. Such a session would at least determine (a) whether or not there does exist any matter which is worthy to discuss (b) is there any aspect of the dispute which may be the subject of further discussion, (c) are there any issues which may be settled, and (d) what matters if any, do the parties require the Court to resolve.

[203] It does appear that the parties to this dispute did not avail themselves of the possibility to at least enter into some discussions. This is regrettable.

Dated the 1st day of July, 2010



PHILIP A. PILGRIM

President

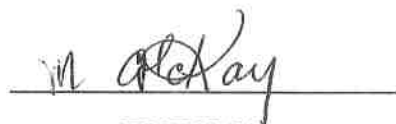
I have had the advantage in reading the judgment of the President. I agree with the reasons given by him for the conclusions which he has reached that subject to the findings at **paragraphs [192, 194 and 197]** of the judgment, in all other respects the Reference filed by the Employee is dismissed.



SAMUEL R. AYMER

Member

I too have had the advantage in reading the judgment of the President. I agree with the reasons given by him for the conclusions which he has reached that subject to the findings at **paragraphs [192, 194 and 197]** of the judgment, in all other respects the Reference filed by the Employee is dismissed.



M. GLENDINA MCKAY

Member

