

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 26 OF 2010

BETWEEN

KENARD J. BYRON

Employee

and

BANK OF ANTIGUA LIMITED

First Defendant

EASTERN CARIBBEAN AMALGAMATED BANK

Second Defendant

Before:

The Hon. Philip A. Pilgrim

President

The Hon. M. Althea Crick

Member

The Hon. Samuel R. Aymer

Member

Appearances:

Sir Gerald A. Watt, KCN, Q.C. & Dr. David Dorsett
of Watt, Dorsett & Co. Attorneys-at-Law for the Employee
Stacy Richards-Anjo of Richards & Co.
Attorneys-at-Law for the Second Defendant

2011: November 07
December 14, 16
2012: March 30

JUDGMENT

PILGRIM, P

Background

Mr. Byron's working relationship with BOA

for the period October 01, 1992 to February 20, 2009

- [1] Bank of Antigua Limited (BOA or "*the Bank*") is a financial institution which is authorized to conduct banking business in accordance with the

provisions of the Banking Act Cap 40 of the Laws of Antigua and Barbuda. BOA's Head Office was previously located at 1000 Airport Boulevard, St. John's in Antigua and Barbuda. Its Branch Offices were located at High and Thames Streets, in St. John's and Nelson's Dockyard, English Harbour, both in Antigua and Barbuda. It is part of the Stanford Financial Group Limited. According to the evidence of Kenard Byron, the owner of Stanford Financial Group Limited is R. Allen Stanford.

- [2] Kenard Byron resides at Lower Fort Road in St. John's in Antigua and Barbuda. He commenced his employment with BOA on October 01, 1992 as its Branch Manager. He stated that he also served as a member of the Board of Directors of BOA. That appointment is described by him in paragraph 3 of his Witness Statement dated and filed in this Court on February 04, 2011 as follows:

"My employment with Bank of Antigua was negotiated with Mr. R. Allen Stanford the Chairman of the Board at the company's Group Office in Miami, and the terms of my employment are included in a letter of employment signed by the said Chairman and dated 28th August, 1992."

- [3] That letter was admitted into evidence as **"KB-1"**. In accordance with that letter of employment Mr. Byron's salary was EC\$200,400.00 per annum. It was paid at the rate of EC\$16,700.00 per month. Mr. Byron was also entitled to be paid certain perquisites and/or benefits. They include (a) provision of a new car, (b) a housing allowance, (c) a bonus and (d) standard medical, dental and life insurance.

[4] From the date of Mr. Byron's appointment as Bank Manager he reported to R. Allen Stanford and no one else.

– See paragraph [4] of his Witness Statement.

[5] Mr. Byron was promoted within BOA to the position of Managing Director/Chief Executive Officer with effect from July 01, 2001 to October 17, 2004. This appointment was made in accordance with a letter to him from BOA's Human Resources Manager of the same date. His annual salary was US\$105,000.00.

[6] With effect from October 18, 2004 Mr. Byron was appointed as Deputy Chairman of BOA. This appointment was made in accordance with a Secretary's Certificate of BOA. It was signed by Mr. Byron as Secretary of BOA. This certificate was admitted as "KB-2".

[7] As Deputy Chairman Mr. Byron was also charged with the responsibility of working as BOA's Relief Manager in the Relief Officer's Department. He also gave evidence that as Deputy Chairman if called upon to act as Chairman he would do so. However this opportunity never arose.

[8] Mr. Byron's promotion as Deputy Chairman of BOA did not involve him in any working relationship with any of BOA's employees. In his role as Deputy Chairman his responsibility involved that of (a) purchasing a new bank for BOA within a member state of the Organization of Eastern Caribbean States (O.E.C.S), (b) taking charge of Mr. Stanford's personal accounts, and (c) ensuring that some of BOA's customers were happy with

respect to the Bank's services to them. Mr. Stanford's accounts involved his credit cards, his personal chequing accounts and his wire transfers.

- [9] As Relief Manager Mr. Byron stated that no Relief Manager's Department existed. This position was created by R. Allen Stanford for Mr. Byron. He was the sole person who worked in this Department.
- [10] It is also his testimony that there was no occasion when the Chairman required him to perform any duties in BOA as its Relief Manager. On no occasion did he work to relieve any Manager of BOA.
- [11] As Deputy Chairman his functions also included his attendance at certain social functions. This was done in order that the BOA's image would be reflected at these functions.
- [12] Mr. Byron also stated that Mr. Stanford removed him as BOA's Managing Director. In his former position he was the *"overall practical boss of the bank"*. As Managing Director he had full responsibility for running the BOA's business. With his removal to that of Deputy Chairman/Relief Manager, apart from the functions listed at **paragraph [8]** above, his responsibility was to write a weekly report to Mr. Stanford. This report included matters of the country's government, politics and its laws. Matters of the Chairman's personal banking business were also featured in that report.
- [13] Mr. Byron described for the Court what a typical day at work was for him. He stated that he would receive telephone calls from potential customers

known to him. They would ask him what is the best deposit interest rate. If he knew the answer he would inform them. If he did not know the answer he would obtain that information and respond accordingly.

[14] In his capacity as Deputy Chairman/Relief Manager, his performance was assessed by the Chairman prior to 2008. According to Mr. Byron that appraisal by R. Allen Stanford did not require Mr. Stanford to write anything down and it did not warrant a discussion between the two of them relative to his performance in the discharge of his duties. He obtained yearly bonuses which were granted to him by Mr. Stanford.

[15] A document entitled “**Stanford PMP – Employee Standard Appraisal: Overview**” was presented by Mr. Byron. This document purports to be an appraisal of Mr. Byron by Mr. Juan Rodriquez for the period July 01, 2008 to December 31, 2008.

[16] Mr. Byron testified that he did not meet with Mr. Rodriquez at all. Mr. Byron merely obtained the appraisal form from his (Mr. Byron’s) own secretary. He submitted this form to Mr. Rodriquez.

[17] It was Mr. Byron’s testimony that Mr. Stanford gave him “*a chance to breathe up here in a nice comfortable quarters in his (Mr. Stanford’s) office*”. He continued to receive his salary for the period ending February 15, 2009.

[18] Mr. Byron in reply to Sir Gerald Watt KCN, Q.C. stated that when he commenced his employment as Deputy Chairman of BOA, Mr. Stanford did

not complain about his job performance. He was not given any option of being paid for his twelve (12) years of service. According to him Mr. Stanford offered *him “a particular position in his own bank, paying me with his own money”*.

- [19] Mr. Byron also stated that he never received a salary as a Director of BOA. He made reference to certain documents. They are (a) a Statement of Earnings for the period ending January 31, 2006, (b) an Earnings Statement for the period ending January 31, 2009 and (c) an Earnings Statement for the period ending February 15, 2009. These were admitted as “**KB-3, 3(a) and 3(b)**” respectively.

The events of February 2009

- [20] Certain events which occurred in Antigua and Barbuda in February 2009 with regard to BOA are referred to at **paragraphs [7] and [8]** of Mr. Byron’s Witness Statement. Such matters are referred to at **paragraphs [57] to [68]** of this judgment.
- [21] It is Mr. Byron’s testimony that on Friday, February 20, 2009 Mr. Henry Hazel an official of the Eastern Caribbean Central Bank (the Central Bank) *“who had been installed at Bank of Antigua, verbally and without prior notice informed me that my position with the bank had been made redundant and that I should vacate the premises immediately”*.
- See paragraph 9 of his Witness Statement

- [22] According to Mr. Byron, he left BOA within the hour after handing over his office keys to the Senior Vice President of BOA. He has been paid EC\$195,207.11 being his contribution to the Antigua Retirement Savings Plan.

The involvement of Eastern Caribbean Amalgamated Bank

- [23] The Eastern Caribbean Central Bank Act (Amendment of Schedule) Order, 1994 No. 35 grants to the Central Bank certain Emergency Powers which it may apply if certain circumstances arise in the banking industry of any of the member states of the O.E.C.S including Antigua and Barbuda. These Emergency Powers are defined in Part IIA of the said Amendment.
- [24] In February 2009 the Central Bank was of the opinion that customers' withdrawals of their funds from BOA warranted its intervention and control of BOA. Accordingly, the Central Bank by Notice of Intervention published in Volume XXIX of the Antigua and Barbuda Official Gazette of February 20, 2009, intervened in and assumed control of BOA on February 20, 2009 pursuant to the Emergency Powers which were granted to it in the said Amendment.
- [25] Upon the Central Bank's intervention, a new entity was created. It is called The Eastern Caribbean Amalgamated Financial Company Limited (ECAFC). This entity provided governance of BOA, supplanting its Board of Directors. It was formed within weeks of the said intervention.

- [26] The ECAFC, the forerunner of the Eastern Caribbean Amalgamated Bank (ECAB) is a grouping of certain banks which operate within the Eastern Caribbean Currency Union (ECCU) together with participation from the Government of Antigua and Barbuda. Its shareholders are the Antigua Commercial Bank Limited, the Eastern Caribbean Financial Holdings Company Limited, the National Commercial Bank (SVG) Limited, the National Bank of Dominica Limited, the St. Kitts Nevis Anguilla National Bank Limited and the Government of Antigua and Barbuda.
- [27] The ECAB was incorporated on July 16, 2009. It commenced banking business in Antigua and Barbuda on October 18, 2010, having purchased and assumed certain assets and liabilities of BOA.

The Purchase and Assumption Agreement between BOA and ECAB

- [28] There is a Purchase and Assumption Agreement (the Agreement) made between BOA and ECAB. It is dated October 12, 2010. It was produced pursuant to an Order of this Court dated November 07, 2011.
- [29] The Agreement is made between the Central Bank as Vendor of the One Part and ECAB (the Purchaser) of the Other Part. Attached to the Agreement is a Valuation of BOA as at March 31, 2010. This Valuation was commissioned by the Central Bank for prospective investors of ECAB in relation to their purchase of certain assets and liabilities of BOA.
- [30] In accordance with the Agreement, ECAB purchased certain assets from BOA inclusive of the properties referred to at Schedule 4 of the Agreement.

EACB did not purchase however BOA's properties identified in Schedule 5 of the Agreement.

- [31] According to Mr. Mc David ECAB's witness in this matter, certain physical assets are still owned by BOA. He identified one such property at High Street in St. John's in Antigua and Barbuda.
- [32] Pursuant to the Agreement, ECAB agreed to assume, pay, perform, and discharge certain debts and liabilities of BOA. They appear on the final balance sheet in the supporting books and documents of BOA subsisting at the Transfer Date, October 18, 2010 except the liabilities which are expressly excluded in sub-clause (2) of the Agreement.
- [33] The Valuation Report provides that the valuation of the equity in BOA was nil. There is a Net Deficit of \$2,147,000.00. The purchase price of BOA was \$1.00.
- [34] The ECAB was capitalized with an ordinary share capital of \$24,000,000.00 and 0.0 percent coupon rate non-callable non-cumulative preference shares of \$47,503,000.00
- [35] The Agreement was sanctioned by the Bank of Antigua Limited Banking Business Vesting Order made by the Minister of Finance of Antigua and Barbuda pursuant to Section 65 of the Banking Act, No. 14 of 2005. This Vesting Order is No. 19 of 2010.

[36] On November 10, 2011 the Central Bank relinquished control of BOA with effect from November 11, 2011.

Legal proceedings

[37] Mr. Byron commenced legal proceedings against BOA and ECAB by a Reference dated and filed on December 16, 2010. In that Reference some issues are raised. The Employee's Memorandum and Witness Statement were filed on February 04, 2011.

[38] The Memorandum of ECAB was filed on September 12, 2011. A Witness Statement of Mr. William Mc David for ECAB was filed on September 30, 2011.

The Issues

[39] They are three (3) issues to be determined. They are as follows:

- (i) **Did a redundancy situation exist on February 20, 2009 which caused the Employee's dismissal?**
- (ii) **Was the Employee's dismissal reasonable?**
- (iii) **If no redundancy existed on February 20, 2009 what is the measure of damages which is due to him? Which Defendant is responsible for the payment of damages to the Employee?**

Employee's legal submissions

[40] Learned Counsel for the Employee delivered their Written Submissions dated January 17, 2012 to the Court on January 18, 2012.

[41] Their submissions may be summarized as follows:

- (i) The Employee was terminated by reason of redundancy, and ought to have been paid his severance pay immediately upon dismissal.

– **See page 7 of the Submissions**

- (ii) The Directors and the General Manager of ECAF were well aware of the BOA's obligation to pay the Employee his legitimate severance pay as early as March 11, 2010. As of February 20, 2010, the Employee's severance was a liability which BOA was obligated to settle. This liability which remained unpaid by BOA should be paid by the ECAB.

– **See page 8 of the Submissions**

- (iii) This is a fit and proper case for this Court to exercise its equitable jurisdiction and apply equitable principles to arrive at a just result.

– **See page 9 of the Submissions**

Legal submissions on behalf of ECAB

[42] Learned Counsel for ECAB delivered her Written Submissions dated January 24, 2012 to this Court on January 25, 2012. They may be summarised as follows:

- (i) There was never an occasion that the Employee performed any duties at BOA that involved BOA. He discharged no responsibilities which related to the operations of BOA upon his dismissal. He reported to Mr. Stanford only. The Employee's assessments were conducted by Mr. Stanford only and not by the usual group assessor except for 2008.

– **See paragraph 6(b) of her Submissions**

- (ii) BOA and ECAB are separate legal entities. The action taken by the Central Bank in February 2009 preserved the interests of the depositors and creditors of BOA, the banking system in Antigua and Barbuda and the ECCU.

- **See paragraphs 9 and 10 of her Submissions**

- (iii) Certain assets and liabilities of BOA were transferred from BOA to ECAB as shown on the final balance sheet of BOA. This balance sheet did not reveal that there was any liability owed to the Employee.

- **See paragraph 12 of her Submissions**

- (iv) No principles of equity apply to the facts of this case. Counsel cited **Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] 2 All E.R. 961** and **Sempra Metals Ltd. v**

H M Commissioners of Inland Revenue [2007] 3 WLR 354 in support of her submissions.

- See paragraphs 21-25 of her Submissions.

- (v) The Employee has not approached this Court with clean hands. Counsel cites **J. Willis & Son v Willis & Another [1986] 1 EGLR 62** in support of her submission.

- See paragraphs 26 and 27 of her Submissions

The Law

[43] C56 of the Labour Code states as follows:

“C56. 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 employee without just cause.”

[44] C58 (i) (a) and (2) of the Labour Code reads as follows:

“C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a);

(b);

(c) is that the employee was made redundant;

(d);

(e);”

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

(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though the employer 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."

[45] The term "**redundancy**" is defined in Section C3 of the Antigua and Barbuda Labour Code as amended by Section 7 of the Antigua and Barbuda Labour Code (Amendment) Act, 1998. How the term 'redundancy' is defined and applied in practice was the subject of **Sundry Workers (Veronica Joseph and others) and Kings Casino Limited Civ. App. No. 28 of 2001**. Byron CJ (as he then was) stated at paragraph [6] of the judgment as follows:

"Redundancy is defined in Section C3 as amended by the 1998 Amendment Act to mean a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, an employer's going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished. We were referred to two cases where the provisions were discussed. Antigua Workers Union v Joseph Dew Civ. App No. 2 of 1992 at p. 12 and US Naval Facility v Louis (1983) 31 WIR at p. 191. I think that the main point of

relevance to this case is that it is pellucid that for a redundancy there must be the cause and effect. The effect being that the work has ceased or substantially diminished. In the Industrial Court reference No. 20 of 1988 Antigua workers Union v Antigua Gases it was pointed out that the definition seems to contemplate the removal of superfluous workers. This could occur even where the tasks or work still exist but the employer requires fewer workers, or there is less work for existing workers. It is also clear that it could occur where a force majeure, such as a hurricane, causes a situation that substantially affects the workload and no workers or fewer workers are required. Although in this regard the Labour Code makes provision for temporary laying off in such circumstances where the diminution in work is not permanent. This brings me to point out, however, that the existence of a cause, such as the hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably and the dismissal must be shown to have resulted from the cessation of work or the substantial diminishing of work as a result of the hurricane.”

- [46] In **Linda Richardson v Deep Bay Development Co. Ltd.** Ref. No. 7 of 1987 Mr. Justice H.S.R. Moe the then President of this Court interpreted the term ‘redundancy’ at pages 4 and 5 of the judgment in the following manner:

“In constructing a statutory provision the Court must give preference to a sensible rather than an absurd meaning; that is to say, if one interpretation brings about a startling and inequitable result then the Court must follow that other interpretation which

will do better justice. What Section C 3 of the Antigua Labour Code seems to contemplate therefore is that redundancy may occur as a result of retrenchment, which itself is ordinarily defined as removing that which is superfluous; or reducing the amount; or economising. Thus a re-organisation which results in a reduced workforce is a redundancy. Also redundancy may occur where there is a re-allocation of duties following a re-organization of the business and the employee is dismissed as a result of there being a diminution of work previously carried out by the employee; and it matters not, that there has been no overall reduction in the employer's business as was demonstrated in Cowen v Haden Ltd. [1983] I.C.R. 1.(C.A.) Another situation which may give rise to redundancy is where, because the work has been re-organized, fewer employees are required to do the same work, or it may be because of the introduction of labour-saving devices (or if you prefer, the installation of labour-saving machinery.)

[47] Ian Smith and Gareth Thomas the learned authors of 'Smith & Wood's Employment Law, Ninth Edition, Oxford University Press, London 2008' state *inter alia* at page 527 as follows:

"[The] employer must somehow be allowed to make changes necessary for the efficiency (and in an extreme case the survival) of the enterprise, but in ordinary law he must not make unilateral alterations to existing contracts of employment."

At page 529 the learned authors state *inter alia* as follows:

"The tribunal is therefore looking at the reasonableness of the employer's handling of the change, and in essence looking to see

whether the time had come when the employer had no further option but to dismiss the employee in order to put into effect the necessary changes.”

[48] In *Ladbroke Courage Holidays Ltd. V Asten* [1981] I.R.L.R 59 (E.A.T.) the Employment Appeal Tribunal made the following finding. It is recorded in the headnote at **page 50** of the report.

“There was no error of law in the Industrial Tribunal’s Statement that if an employer seeks to rely on business re-organization or economic necessity as a reason for dismissal, he should produce some evidence to show that there was a re-organization or that there was some need for economy and that it is material for the Tribunal to know whether the company was making profits or losses”.

[49] (i) What I am obliged to do in this case is to require *“that the assigned reason (for the employee’s dismissal) be supported by the facts, and that a factual link existed between the dismissal and the assigned reason”.*

- See Byron CJ (as he then was) in *Sundry Workers* (op cit) at paragraph [5] of the judgment.

(ii) The authorities to which reference was made from **paragraphs [46] to [49]** of this judgment appear in the judgment of **Mark Azille and Courts (Antigua and Barbuda) Ltd. Ref. No. 27 of 2003**. I wrote that decision.

(i) The first issue

Did a redundancy situation exist on February 20, 2009 which caused the Employee's dismissal?

The relationship between R. Allen Stanford and Kenard Byron

[50] In theory Mr. Byron remained an employee of BOA. In practice however he performed no real banking duties for BOA. He owed his professional existence, survival, perquisites, and monthly salary to R. Allen Stanford. He reported to R. Allen Stanford. It is therefore necessary in these circumstances to examine the relationship between Mr. Byron and Mr. Stanford. This relationship is commented upon elsewhere at **paragraphs [2] to [20], [86] to [87] and [90]** of this judgment.

[51] In Mr. Byron's reply to Sir. Gerald Watt, K.C.N, Q.C. he stated *inter alia* as follows:

"Mr. Stanford employed me in my first job with Bank of Antigua. I worked in this capacity until 2004 and I reported to the Board of Directors and R. Allen Stanford I was Stanford's man in the Bank. He put me in his office and he did not ignore me. We were in constant communication. He e-mailed or telephoned me sometimes three to four times per day, not every day but when he felt the need. Up to February 2009 Mr. Stanford never told me to follow instructions from the new Chief Executive Officer Harry Vanbergen".

[52] In a prior answer to Sir. Gerald Watt, KCN., Q.C. Mr. Byron stated *inter alia* as follows:

“The complete owner of Bank of Antigua was Stanford Bank Holdings and R. Allen Stanford. The owner of Stanford Bank Holdings is R. Allen Stanford.”

The clear inference which I draw from Mr. Byron’s reply to his Counsel is that R. Allen Stanford owned Bank of Antigua Ltd.

[53] Mr. Byron also testified that ***“The Chairman R. Allen Stanford did remove me from being the Managing Director of the Bank.”***

It was Mr. Stanford who appointed Mr. Harry Vanbergen as the new Managing Director of BOA in 2004.

The Employer’s duty of trust and confidence

[54] There is a duty which is imposed on an employer to maintain trust and confidence with the employee. This duty has been described as a ‘dynamic feature of modern employment law’.

- See **A Practical Approach to Employment law by John Bowers, Seventh Edition, Oxford University Press, New York, 2002 at page 41 Letter (k).**

[55] (i) One leading authority in favour of the existence of this duty is **Malik v Bank of Credit and Commerce International; SA (in compulsory liquidation) [1997] I.R.L.R. 462 (HL).**

- (ii) The facts of this case involved Mr. Malik and Mr. Mahmud. Mr. Malik had been employed by Bank of Credit and Commerce International (BCCI) for twelve years. His last position was that of head of deposit accounts and customer services at the Leadenhall branch. Mr. Mahmud worked for BCCI for sixteen years, most recently as manager of the Brompton Road branch. Both were dismissed on grounds of redundancy on October 03, 1991 by the provisional liquidators of BCCI. Neither was able to obtain employment in the financial services sector since their dismissal.
- (iii) Both Claimants submitted proofs of debt to the liquidators claiming “*stigma*” damages for pecuniary loss allegedly caused by the BCCI’s breach of an implied contractual obligation of mutual trust and confidence.
- (iv) They agreed that their association with BCCI at the moment of its liquidation and the alleged fraudulent practices which subsequently came to light put them at a disadvantage in the employment market, even though they were personally innocent of any wrongdoings. Their claims were rejected by the liquidators.
- (v) The matter eventually reached the House of Lords. This Court held in favour of the Claimants that there was a good cause of action to be tried.
- (vi) The implied term of mutual trust and confidence by the employer was defined by different members of the House of Lords in this case. Lord Steyn defined the term in this way at **page 468 paragraph [54]** of the judgment:
- “The employees’ primary case is based on a formulation of the implied term that has been applied at first instance and in the Court*

of Appeal. It imposes reciprocal duties on the employer and employee. Given that this case is concerned with alleged obligations of an employer I will concentrate on its effect on the position of the employees. For convenience I will set out the term again. It is expressed to impose an obligation that the employer shall not:

‘ without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’ ”.

- [56] (i) The findings of the House of Lords are encapsulated in the head note to the judgment. At **page 462** the head note reads as follows:

“Damages for loss of reputation caused by breach of contract may be awarded, provided that a relevant breach of contract can be established and the requirements of causation, remoteness and mitigation can be satisfied. If conduct by the employer in breach of the implied term of trust and confidence prejudicially affects an employee’s future prospects so as to give rise to continuing financial losses and it was reasonably foreseeable that such a loss was a serious possibility, in principle damages in respect of the loss should be recoverable”.

- (ii) The head note at **page 462** also states as follows:

“An employer which operates its business in a dishonest and corrupt manner is in breach of the implied contractual term of trust and confidence. In agreeing to work for the employer an employee,

whatever his status, cannot be taken to have agreed to work in furtherance of a dishonest business”.

- (iii) *“The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct objectively considered is likely to cause damage to the relationship between the employer and employee, a breach of the implied obligation may arise.”*
- (iv) **Pages 462 and 463 of the head note read as follows:**

“. the fact that the employee only learned of the employer’s conduct after the employment had ended cannot in principle be a bar to recovery . . . A breach occurs when the proscribed conduct takes place : here, operating a dishonest and corrupt business”
- (v) *In the present case, therefore, on the assumption that BCCI had operated its business in a corrupt and dishonest manner, it was in breach of the implied term of trust and confidence. Since it was arguable that the employees must be able to establish as a matter of fact that the corruption associated with the bank undermined their employment prospects causing them financial loss, there was a good cause for action and the appeal would be allowed.”*

Accusations against R. Allen Stanford

[57] R. Allen Stanford as the owner of Bank of Antigua, Stanford Bank Holdings or any other corporate entity owned by him, was required to conduct his business affairs in such a manner so as not to destroy or seriously damage the relationship of confidence and trust between himself, BOA and Mr. Byron.

[58] The events of February 2009 which I briefly referred to at **paragraph [20]** of this judgment are clearly set out at **paragraphs [7] and [8]** of Mr. Byron's Witness Statement. **Paragraph [7]** of his Witness Statement states:

"In or about the month of February, 2009, the Federal Authorities in the United States of America and particularly the (SECURITIES) AND EXCHANGE COMMISSION (SEC) commenced investigations into the vast corporate entities of R. ALLEN STANFORD accusing the Chairman of operating a "Ponzi Scheme". Shortly thereafter Mr. Stanford was arrested and has remained incarcerated in a (Houston) jail without bail, pending his trial in the year 2011. It has now been reported that a court has deemed him incompetent to stand trial and a new date for his trial is yet to be fixed".

[59] The Chairman, R. Allen Stanford, Mr. Byron's employer was accused in February 2009 by the SEC of operating a 'Ponzi Scheme'. In the financial environment such a practice involves the procurement of depositors' money through the sale of Certificates of Deposit or CD's. Depositors are usually informed that their investments are safely invested in stocks, bonds or other

securities. In the 'Ponzi Scheme' the SEC alleged that the depositors' monies were not so invested but were utilized or spent for the personal satisfaction of, as alleged by the SEC, R. Allen Stanford.

[60] The 'Ponzi Scheme' charge had a deleterious effect upon BOA in February 2009 immediately prior to Mr. Byron's dismissal from the Bank. Mr. Byron himself makes reference to it at paragraph 8 of his Witness Statement. He stated as follows:

"AS A RESULT OF THESE UNFORESEEN AND SHOCKING TURN OF EVENTS THERE WAS A RUN ON THE BANK OF ANTIGUA IN FEBRUARY, 2009 OF SUCH A MAGNITUDE THAT THE BOARD OF DIRECTORS WAS FORCED TO INVITE THE EASTERN CARIBBEAN CENTRAL BANK (ECCB) TO STEP IN AND TAKE OVER THE OPERATIONS OF THE BANK, AND TO DO WHAT WAS NECESSARY TO STEM THE OUTWARD FLOW OF DEPOSITS, AND TO SUPPORT THE OPERATIONS OF THE BANK."

(Substantial capitalization is mine)

[61] Mr. William McDavid gave evidence on behalf of ECAB. He commenced employment with BOA from 1988 to 1992. After this period he resumed employment with BOA from 1996 to June 2009. From July 2009 he assumed the position of Deputy General Manager of ECAB.

[62] When the crisis first commenced at BOA in February 2009 Mr. McDavid was employed as the Deputy Vice President of the Bank. It is his testimony

that the decision of the Central Bank **“to step in was taken by the Bank of Antigua’s Directors”**.

[63] It was Mr. McDavid who kept the Central Bank informed of the depositors’ continuous withdrawal of their monies from BOA. In the initial stages of these withdrawals ***“the Central Bank had to provide liquidation to BOA to satisfy the customers’ demands to obtain their funds from the bank”***. Subsequently this responsibility to provide funds to BOA was discharged by the Government of Antigua and Barbuda.

[64] In February 2009 prior to the dismissal of Mr. Byron, the accusation by the United States SEC against R. Allen Stanford that he operated a ‘Ponzi Scheme’ was public knowledge both in Antigua and Barbuda, the Caribbean and other parts of the world. It was also a matter of public knowledge that R. Allen Stanford as a part of his vast corporate empire operated a bank in Antigua and Barbuda which the SEC accused Mr. Stanford of managing and executing the administration of the Certificates of Deposit or CD’s that were issued by this bank to depositors in exchange for their monies. It was further alleged by the SEC that these monies were utilized in the execution of the ‘Ponzi Scheme’.

[65] Mr. Stanford’s incarceration in a Houston jail without bail awaiting trial in the United States of America significantly jeopardized the survival of BOA. In these circumstances this development caused and/or greatly contributed to BOA’s dire financial straits. It was unable to invest depositors’ monies elsewhere to make a profit. It faced imminent peril.

[66] In a Press Statement issued by the former Minister of Finance and the Economy shortly after the crisis in BOA was revealed, he stated *inter alia* as follows:

“This move by depositors caused significant liquidity problems for the Bank that, if not addressed immediately, could have resulted in serious consequences for the domestic banking sector and for the Eastern Caribbean financial system as a whole. This situation clearly demanded prompt and decisive action in order to reassure citizens and residents who were customers of the Bank of Antigua that their deposits and other financial interests in respect of the Bank remained secure”. (This Press Statement was admitted as Exhibit “KB-13”).

[67] There is therefore a very close link between the ‘Ponzi Scheme’ accusation against R. Allen Stanford, the behaviour of depositors who withdrew their money from BOA and the negative impact which these two circumstances had upon the survival of the Bank.

[68] In the circumstances of this case, without the intervention of the Central Bank and the advances of the Government of Antigua and Barbuda, BOA would have been unable to meet its liquidity demand. Insolvency of the Bank was imminent. The Bank would have been closed. The result of this would have been a loss of employment for all of its employees including Mr. Byron.

The initial decision

- [69] This Court is required to be satisfied that the assigned reason for dismissal by the Central Bank is supported by the facts and that a factual link existed between the dismissal and the assigned reason.
- [70] In this area of law the citation of cases is only helpful if they refer to general legal principles. This apart, each case is to be determined upon its own merits.
- [71] I have derived some assistance from a reading of two cases. The first is **Thompson v SCS Consulting Ltd [2001] I.R.L.R. 802 (E.A.T)**. In this case Mr. Thompson and twenty-four (24) other employees were dismissed by Receivers as a consequence of certain companies having experienced **‘serious financial difficulties’**.
- See paragraph 3 of the judgment
- [72] Mr. Thompson claimed before the Employment Tribunal that he had been unfairly dismissed. The Employment Tribunal found that Mr. Thompson’s dismissal was for an economic, technical or organisational reason and therefore the employee was not to be treated as automatically unfairly dismissed. Mr. Thompson appealed to the Employment Appeal Tribunal (EAT) against the dismissal of his claim before the Employment Tribunal.
- [73] The EAT dismissed the employee’s appeal. It held that it was open to the Employment Tribunal to conclude that the business was overstaffed, inefficient and insolvent, and that the only way in which it could be made

viable for the future and continued as a going concern was for the workforce to be reduced in size. The EAT further held that it was open to the Employment Tribunal to find that if the purchaser had not been on the scene, the receiver would have dismissed all the employees.

[74] The Tribunal also held that any liability to Mr. Thompson upon his claims was not transferred to Open Text UK (the transferee) but remained with the second respondent, his former employer. This finding was upheld by the E.A.T. The employee's appeal to the E.A.T. was dismissed.

[75] (a) The second case is **Warner v Adnet Ltd. [1998] I.R.L.R. 394 (CA)**.

A summary of the facts in this case is as follows:

“Microsystems was incorporated in 1982. It carried on business dealing in computer hardware, software and related services. At one time it employed up to thirty-three people. Mr. Warner was, from August 1986, employed as company accountant. The company fell on hard times. On 22 July, 1994, a Friday, Barclays Bank acting under a debenture granted by Microsystems on 24 December 1987, appointed two accountants, ... to be joint administrative receivers”.

- See paragraph 4 of the judgment

(b) On 11 July 1994 Mr. Warner informed the Managing Director *“that the company would shortly be unable to meet its debts as they fell due”.*

- See paragraph 5 of the judgment.

(c) The Receivers dismissed all of the staff on July 27, 1994 with immediate effect. Mr. Warner and a colleague left the premises, but the remaining staff were told at a meeting of the possibility of future employment if negotiations to salvage the loans were successful.

(d) On August 03, 1994 the business was sold to Adnet Ltd. All the former staff, with the exception of four employees including Mr. Warner, were re-engaged from August 04, 1994. The duties that Mr. Warner had previously performed were done within Adnet by an existing staff member over part of one day every week.

(e) Mr. Warner claimed to have been unfairly dismissed. The Tribunal held that he was dismissed for economic reasons.

[76] (a) The cases of *Thompson and Warner (op cit)* were decisions in which the Courts were required to have regard to the Transfer of Undertakings (Protection of Employment) Regulations 1981 (UK).

(b) **Paragraph 8 (1) and (2)** of the Regulations state as follows:

“(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated. . . . as unfairly dismissed if the transfer or a reason connected with it is the reason or principal reason for his dismissal.

(2) Where an economic, technical or organizational reason entailing changes in the workforce of either the transferor or the transferee

before or after a relevant transfer is the reason or principal reason for dismissal

(a) paragraph (1) above shall not apply to his dismissal

(b)”

[77] These Regulations are not part of the Industrial Court Act Cap. 214 or the Labour Code both of Antigua and Barbuda respectively. However I must have regard to **Section 10 (3) of Cap. 214**. It states as follows:

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

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

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

[78] I hold that the principles and practices of good industrial relations in Antigua and Barbuda in a discussion of this nature would quite naturally include (a) a contemplation of the removal of superfluous workers - see **paragraph [6] of Kings Casino Ltd. (op cit)** and **pages 4 and 5 of Linda Richardson (op cit)** and, (b) in an extreme case the survival of an enterprise – See **paragraph 23 of Mark Azille (op cit)**.

[79] Moreover, even prior to the passing of the Regulations referred to at **paragraph [76]** above, the English Courts have taken into consideration principles of *“business re-organization or economic necessity as a reason*

for a dismissal or that there was some economic need for economy” to decide whether an employee’s dismissal was correctly based on redundancy.

– See paragraph [14] of *Ladbroke* (op cit) at paragraph 14.

[80] Accordingly I am persuaded that when Mr. Henry Hazel on behalf of the Central Bank dismissed Mr. Byron for redundancy on February 20, 2009 this decision was well founded and was supported by the facts which caused the Employee’s dismissal.

(ii) The second issue

Was the Employee’s dismissal reasonable?

[81] When a Court has decided that the facts of a particular case do support a finding that an employee was dismissed due to redundancy, the Court has an obligation to further decide whether or not the employer followed certain good industrial relation practices so as to render the dismissal to be reasonable in accordance with Section C 58 (2) of the Labour Code.

[82] In a normal case the Court would be required to consider three general requirements which an employer who is about to make an employee redundant must examine. These are (a) unfair selection, (b) lack of consultation, and (c) failure to seek alternative employment.

– See *Langston v Cranfield University* [1998] I.R.L.R. 172 per Peter Clark J, at paragraph [30].

The decision

[83] (a) In the **Warner case** (op cit) Lord Justice Mummery took into consideration **(a) the dire financial straits in which the company found itself, (b) the urgent need to find a purchaser, (c) the fact that “Mr. Warner’s role was not an essential one”, (see paragraph [8] of the judgment), (d) “He was not replaced after the transfer as company accountant” (see paragraph [8] of the judgment) and (e) “Redundancies of non-essential staff would be required in any event”**

– See paragraph [8] of the judgment to hold at paragraph [36] as follows:

“My conclusion is that, in view of the facts found by the tribunal about the appointment of the receivers, the dire financial straits in which Microsystems found itself and the urgent need to find a purchaser for this undertaking as a going concern, the requirement of consultation normally applicable did not apply. The industrial tribunal were entitled to find that there was a fair dismissal, despite the absence of consultation. Consultation could not have made any difference to the decision to dismiss”.

(b) The Court found that the dismissal of Mr. Warner for redundancy was fair.

[84] Some of the debts and liabilities which are expressly excluded from the Agreement included those which relate to R. Allen Stanford or any company or entity of the Stanford Group of Companies, of any nature. This expressed exclusion naturally eliminated the requirement to employ any existing staff member to deal with such matters. As Mr. Byron formerly was put in

charge by Mr. Stanford to take charge of such matters, his presence in the new configuration was unnecessary.

[85] No evidence was presented that ECAB wished to purchase any new bank either in Antigua and Barbuda or in the ECCU. This also naturally eliminated him from performing this limited function in ECAB.

[86] Mr. Byron performed no core functions for BOA between October 18, 2004 and prior to his dismissal on February 20, 2009. The role which he performed for the Bank was non essential. His own words are as follows:

“AT MY AGE I ACCEPTED IT AND THE CHAIRMAN WAS AWARE AND HE GAVE ME A CHANCE TO BREATHE UP HERE IN A NICE COMFORTABLE QUARTERS IN HIS OFFICE”.

[87] In answer to Sir Gerald Watt, KCN, Q.C Mr. Byron states as follows:

“I WAS STANFORD’S MAN IN THE BANK”.

[88] Mr. Bryon was born on March 20, 1938. In 2009 he was one month shy of seventy-one (71) years of age. He had previously worked for Barclays Bank for 35.75 years from January 02, 1957 to September 30, 1992.

[89] R. Allen Stanford was imprisoned in a Houston jail in the United States of America in February 2009. There was therefore no need for Mr. Byron to be **“Stanford’s man in the Bank”** in 2009 when he was dismissed by the Central Bank for redundancy.

[90] From October 2004 to February 2009 Mr. Byron sat in *“nice comfortable quarters in Mr. Stanford’s office having been given a chance to breathe up (there)”* doing virtually nothing for Bank of Antigua, enjoying a salary notwithstanding. This is confirmed from Mr. Bryon’s own unabashed evidence that the position of Relief Manager was so created in order that the Chairman may require him to perform any other duties for BOA **“RATHER THAN BEING SENT HOME”** from being employed IN A DEPARTMENT WHICH NEVER EXISTED. In all of the circumstances of the case, I hold that Mr. Byron knew or ought to have known that the Central Bank would have dismissed him for redundancy as a non-essential staff member of BOA in February 2009.

[91] I therefore also hold that having regard to the facts of this case, Mr. Byron was properly selected to be dismissed for redundancy. There was no need to consult with him. It was not incumbent upon the Central Bank to find alternative employment for him.

[92] I hold further that in all the circumstances of this case the Central Bank acted reasonably to dismiss Mr. Byron despite the absence of consultation and a requirement to seek alternative employment. There was a fair selection of Mr. Byron for redundancy. Consultation would not have made any difference whatsoever to dismiss him. Mr. Byron’s dismissal for redundancy in these circumstances was fair.

The third issue

(iii) If no redundancy existed on February 20, 2009 what is the measure of damages which is due to him? Which Defendant is responsible for the payment of damages to the Employee?

[93] I agree with Counsel for the Employee that Mr. Byron was dismissed for redundancy. That apart, they have failed to examine in any material particular the nature of the redundancy in this case. I have not had the benefit of any cases cited by Counsel for the Employee to assist this Court to arrive at a determination of the issues to be tried. In the circumstances, of this case I am unpersuaded by their arguments that any judgment which is awarded for the Employee should be paid by ECAB.

Conclusion

[94] On December 14, 2011, I granted judgment in favour of Mr. Byron for \$449,812.50 against BOA as no Defence was filed on behalf of BOA. This sum is payable by BOA to Mr. Byron on or before April 30, 2012.

[95] The Reference is dismissed against ECAB. There shall be no order as to costs.

Dated the 30th day of March, 2012



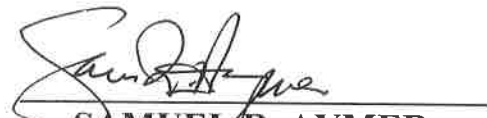
PHILIP A. PILGRIM
President

I agree



M. ALTHEA CRICK
Member

I also agree



SAMUEL R. AYMER
Member