

ANTIGUA AND BARBUDA**IN THE INDUSTRIAL COURT****REFERENCE NO: 15 OF 2011****BETWEEN:****GEOFFREY JOSEPH****Employee****and****CARIBBEAN UNION BANK LIMITED****Employer****Before:****The Hon. Philip A. Pilgrim****President****The Hon. Dr. Hayden Thomas****Member****The Hon. Jessie F. Kentish****Member****Appearances:****Ms. Marian Barbara Hesse-Attorney-at-Law for the Employee****Mr. Roger Forde Q.C; Ms. Kari-Anne Reynolds and****Ms. Eunica Anthony-Victor of Hill & Hill****Attorneys-at-Law for the Employer.**

2012: November 13**2013: May 02**

JUDGMENT**PILGRIM P.****INTRODUCTION**

- [1] Mr. Geoffrey Joseph, aged 38, resides at Paradise View, St. John's in Antigua. He is the holder of a Bachelor's and a Master's of Science Degree in Finance. In addition, he was awarded the designation of Chartered Financial Analyst in 2004.

- [2] The Employee commenced his employment with the Employer (**afterwards sometimes called “the Bank”**) with effect from November 15, 2007. This was in accordance with a written contract of employment between himself and the Employer (the said contract). It is dated October 12, 2007. (A copy of this contract was admitted into evidence as **“VH-8”**).
- [3] In accordance with the terms of the said contract, his basic monthly salary was EC\$9,500.00 paid in two instalments on the 15th and 28th day of each month. In addition, he received a monthly travel allowance of EC\$500.00. His net monthly salary inclusive of the travelling allowance was EC\$8,270.00.
- [4] The position in which the Employee was initially employed as stated in the said contract was that of **“Investment Officer/Commercial Credit Analyst”**. He reported to the Chief Financial Officer *“with a dotted line to the Credit Manager”*.
- see VH-8.
- [5] Mr. Joseph stated that as the Investment Officer he was responsible for Treasury Liquidity Management of the Bank. Treasury Liquidity Management meant that he was required to make sure that the Bank was in a liquid position at all times. He was also responsible for managing the investment portfolio. He also assisted the CEO **“on strategic matters”**.
- [6] Mr. Vere Hill is the Chief Executive Officer (CEO) of the Bank. A re-organisation of the Bank’s lending structure took place with effect from May

04, 2009. This was confirmed in an electronic mail dated April 30, 2009 from the CEO to some employees including the Employee.

[7] The first paragraph of the e-mail stated as follows:

“Effective May 04, 2009, the Bank will be implementing its strategic changes in the manner in which it handles its financial, investment and loan risk. Retail and Commercial Banking will be responsible for marketing the Bank’s Loan and Deposit services and have primary responsibility for Deposit and Loan Portfolio growth and Account Managers and Risk Management will have a primary responsibility to monitor, manage and control the financial, investment and loan risk of the Bank.” (This e-mail was admitted into evidence and marked “VH-6”).

[8] In addition to the electronic mail, the Bank wrote a letter (the said letter) to Mr. Joseph dated April 30, 2009. In accordance with the said letter, the Employee was appointed as Senior Credit/Risk Analyst-Risk Management Group. In the electronic mail to him his new appointment became effective from May 04, 2009. The opening sentence of the letter to him stated as follows:

“This letter will serve as your authority in your position as Senior Credit/Risk Analyst- Risk Management Group to recommend applications for loans on the following terms and conditions.”

(This letter was admitted into evidence and marked “GJ-2”).

[9] The Employee duly performed his duties as Senior Credit/Risk Analyst. His recommendations for certain loans were ***“to be submitted first to Mr. Hill***

for his approval and then to Mr. Williams for his concurrence PRIOR to submission to the Board of Directors for final authorization.”

- [10] Mr. Christopher Williams was the Bank’s Chief Financial Officer/Deputy CEO. In accordance with the terms of the said letter, the Bank’s CEO stated that the authority which was granted to Mr. Joseph *“expires on the one year anniversary of the date of this letter unless renewed by way of a new authority.”*
- [11] In a document from the Bank entitled **“Performance Evaluations for Management Staff”** dated December 04, 2009 the Employee’s overall evaluation was graded as *“Significantly exceeds expectations”*. (This document was admitted into evidence as **“GJ-3”**).
- [12] The Employee together with five (5) other senior employees of the Bank wrote a letter to the CEO dated December 11, 2009. In that letter the employees requested that a meeting be convened with the CEO on Wednesday December 16, 2009. The issues for discussion were stated in the said letter. (This letter was admitted into evidence as **“GJ-4”**).
- [13] The CEO by electronic mail dated December 15, 2009 to the six employees including Mr. Joseph, informed them that a response would be forthcoming from him to them *“in due course”*. The CEO responded to the employees in a letter to them dated December 22, 2009. (This e-mail and letter were admitted into evidence as **“GJ-5 and GJ-7”** respectively).

[14] The Employee and the other five (5) senior employees raised similar concerns with the Board of Directors of the Bank. This is contained in correspondence dated December 17, 2009 and March 05, 2010. (The relevant letters were admitted into evidence as **“GJ-6 and GJ-10”** respectively).

[15] The Employee along with the five other senior employees wrote to the Eastern Caribbean Central Bank by letter dated February 08, 2010. That letter highlighted the same issues which were stated in their correspondence to the CEO dated December 11, 2009. (That letter was admitted into evidence as **“GJ-8”**).

[16] By letter dated March 04, 2010 the Chairman of the Board of Directors of the Bank wrote a letter to Mr. Joseph. In that letter the Chairman informed Mr. Joseph ***“that the conduit between (himself) and the Board is the CEO”***. The letter also stated *inter alia* as follows:

“The Board was also of the view that your conduct may be detrimental to the Bank in that your letters which were copied to the Central Bank may bring undue scrutiny to the Bank by the said regulatory authority. The Board is not prepared to tolerate such irresponsible behaviour and hope that such will never be repeated. The Board has also instructed the CEO to respond to you and to deal with the matters in your said letter.”

(That letter was admitted as **“GJ-9”**).

[17] It is to be presumed that **“GJ-9”** was copied to the other five members of the Management Team. This appears so because by letter dated March 05, 2010,

the Employee and the five (5) other members of the Management Team replied to the Board of Directors' letter namely "GJ-9". (The letter of March 05, 2010 was admitted into evidence as "GJ-10").

- [18] The CEO by letter to Mr. Joseph dated March 05, 2010 terminated his *"employment effective immediately"*. The Employee was paid *"severance pay in the amount of \$22,166.67"*, *"one (1) day vacation pay in the amount of EC\$475.00 less statutory contributions"* and *"the sum of EC\$5,000.00 payment in lieu of notice less statutory contributions"* being a total of EC\$26,728.58. (This letter was admitted into evidence as "GJ-1").

Alternative employment

- [19] Mr. Joseph commenced the process of obtaining alternative employment after his dismissal. The first attempt which he made to obtain employment was on April 26, 2010. Other attempts were made in May, June, July and August 2010. Correspondence was also sent by him to different companies seeking employment.
- [20] Some organizations to which he sent his employment details included the National Bank of Dominica, Air Canada, First Caribbean International Bank, Bank of Antigua, Royal Bank of Canada, LIAT (1974) Ltd, the Financial Services Regulatory Commission, Mill Reef Club, and the Permanent Secretary, Ministry of Finance in Antigua and Barbuda.
- [21] He obtained employment with the office of The National Drug & Control Policy in Antigua from September 01, 2011 to May 09, 2012. He earned a net salary of EC\$6,190.00.

[22] On May 10, 2012 he obtained employment with the Antigua and Barbuda Social Security Board as the Deputy Director. He earns a net salary of EC\$6,371.00

Legal proceedings

[23] Mr. Joseph was not satisfied with his dismissal by the Bank. A Reference dated August 08, 2011 was filed on his behalf. In that Reference he stated that he was unfairly dismissed. His Witness Statement was filed on July 24, 2012.

[24] The Employer's Memorandum was filed on October 08, 2012. The Employer states that the Employee was dismissed for reasons of redundancy. A Witness Statement of Mr. Vere Hill, the CEO of the Bank was filed on October 08, 2012.

The issues

[25] The relevant issues are as follows:

- (i) **Whether in the circumstances of this case the work which Mr. Joseph was last employed to perform as at March 05, 2010 had ceased or substantially diminished, to result in a redundancy?**
- (ii) **Did the Employer act reasonably or unreasonably in its dismissal of the Employee?**
- (iii) **If the Employee was unfairly dismissed what is the measure of damages which is due to him?**

Some initial legal considerations

[26] Section C 56 of the Labour Code states as follows:

“C 56. 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”.

[27] Section C58 (1) of the Labour Code states as follows:

“C 58 (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.”

[28] Section C58 (2) of the Labour Code provides 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 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.”

[29] The term “**redundancy**” is defined at Section 3 as amended by the 1998 amendment to the Labour Code in the following manner:

“redundancy” means 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.”

[30] In Civil Appeal No. 28 of 2001 Sundry Workers and King’s Casino Limited, Byron C.J. (as he then was) stated as follows:

“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 the 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.....This brings me to point out, however, that the existence of a cause..... 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.....”

The First Issue

Whether in the circumstances of this case the work which Mr. Joseph was last employed to perform as at March 05, 2010 had ceased or substantially diminished, to result in a redundancy?

The Employee's evidence

- [31] As the Senior Credit/Risk Officer Analyst he stated that he was in charge of reviewing large loans as determined by the CEO. He was also responsible for putting together large loans which he recommended to the CEO for his action. In addition, Mr. Joseph stated that he was responsible for reviewing the loan portfolio if it needed to be strengthened or upgraded.
- [32] As the Senior Credit/Risk Analyst he worked in conjunction with the Chief Financial Officer/Deputy CEO in the Risk Management and Finance Department of the Bank. In summary, this Department consisted of two persons namely Mr. Christopher Williams and himself.
- [33] Mr. Joseph's duties as Senior Credit/Risk Analyst were outlined to him in the Bank's letter to him dated April 30, 2009 (**"GJ-2"**). The first duty which appeared in that letter was that he was tasked with the responsibility to recommend applications for personal loans of **"EC\$1,000,000.00 and above to a maximum CUB exposure of EC\$1,700,000"**. The recommendation was first to be submitted by him to the CEO and then to Mr. Williams prior to the Board's review.
- [34] Secondly, in his new position he could also recommend mortgage loans in excess of EC\$1,000,000.00 to a maximum of EC\$1,700,000.00 for strictly

residential purposes in the same manner as outlined in **paragraph [33]** above.

[35] Thirdly, Mr. Joseph could also recommend commercial loans from EC\$1,000,000.00 to a maximum exposure to the Bank of EC\$1,700,000.00 subject to those loans being fully secured with realizable collateral and repayable within a maximum of ten (10) years. This recommendation was also to be carried out in the same way as stated in **paragraph [33]** above.

[36] Fourthly, Mr. Joseph was authorized to approve an overdraft to an existing client of the Bank to a maximum of EC\$50,000.00 subject to complete details being recorded by the Bank.

[37] In answer to Mr. Roger Forde Q.C; Attorney-at-Law for the Bank, Mr. Joseph stated that he received a letter from the CEO of the Bank dated March 25, 2008. He further stated that he was aware that Caribbean Union Capital Markets Ltd an affiliate of the Bank was incorporated. (This letter was admitted as “VH-2”).

[38] In that letter the CEO stated *inter alia* as follows:

“As was discussed, you will be transitioned into our affiliate – Caribbean Union Capital Markets - upon establishment of this unit. Please note however, that all your terms and conditions of employment remain unchanged. Further, as agreed, we will transfer all benefits accrued during your tenure with the Bank over to Caribbean Union Capital Markets.”

- [39] Caribbean Union Capital Markets Limited (CUCM) was incorporated in Antigua and Barbuda on January 02, 2008, bearing Company No. C 3/08. (The Certificate of Incorporation was admitted as “VH-1”).
- [40] In answer to Mr. Forde Q.C; Mr. Joseph confirmed having a discussion with the Bank quite early in his employment, that (a) the Bank wished to establish another company to be called CUCM, and (b) when CUCM was formed this would result in the establishment of a capital bank.
- [41] Mr. Forde Q.C; referred Mr. Joseph to the Application Form for Broker Dealer Licence. At the back is Form 9. This is entitled “Notice of Change of Representative’s Employer.....” Mr. Joseph is listed by CUCM as the investment adviser. This Form which is part of the Application is dated April 18, 2008. (This Application is marked “VH-3”).
- [42] Mr. Joseph stated that to obtain a broker’s license the company would be required to appoint a representative. In addition, according to him, the company must be in a position to pay a certain amount of capital.
- [43] An electronic mail was produced on behalf of the Bank. It was created by Mr. Joseph from himself to two employees of the Bank. He represented himself as the Investment Officer of CUCM. It was dated April 06, 2009.
- [44] Mr. Forde Q.C; referred Mr. Joseph to a letter written by the Bank’s CEO to the Eastern Caribbean Regulatory Commission. It is dated April 23, 2009. In that letter the Bank’s CEO informed that body that *“the current global economic recession is now having a noticeable effect on the ECCU sub-*

region and specifically in Antigua & Barbuda. Consequently, the Board of CU Capital Markets Ltd. has decided to postpone its application for a Broker dealer licence until macroeconomic conditions have improved.”

(This letter was admitted as “VH-5”).

- [45] Mr. Joseph in further cross-examination stated that there were two (2) persons who were employed in his department. These were Mr. Christopher Williams and himself. According to him there was a diminution of loans in excess of EC\$1,000,000.00 prior to his dismissal on March 05, 2010. He did not accept however that his role as Senior Credit/Risk Analyst had diminished.
- [46] In further answer to Mr. Forde Q.C; Mr. Joseph stated that he is not in possession of any letter from the Bank which evidences his promotion. He stated that the position of Senior Credit/Risk Analyst meant that he was promoted as there was an expansion of duties to include that of Investment Analyst. He was now being made responsible for large loans in excess of EC\$1,000,000.00. According to him, the head of the Credit Department was not responsible for such a limit.
- [47] Mr. Forde Q.C; drew Mr. Joseph’s attention to the letter dated February 08, 2010 “**GJ-8**” - **see paragraph [15]** above. In answer to Mr. Forde Q.C; Mr. Joseph stated that the only person who signed the letter to the Eastern Caribbean Central Bank whose services were not terminated was himself.
- [48] In answer to Ms. Hesse, Attorney-at-Law for the Employee, Mr. Joseph stated that the Bank gave him the responsibility to prepare complex and

large loans in excess of EC\$1,000,000.00. Loans between EC\$250,000.00 and EC\$1,000,000.00 were required to be approved by his department.

- [49] In further answer to Ms. Hesse, Attorney-at-Law, Mr. Joseph stated that he was never employed by CUCM. With regard to “VH-4”, the e-mail which he wrote to two (2) employees of the Bank, Mr. Joseph stated that the Bank gave to Mr. Williams and himself a business card with each of their names being printed on those business cards.
- [50] Mr. Joseph also stated that four (4) persons including himself worked in the finance group. This was done to make the credit department stronger.
- [51] Mr. Joseph further gave evidence that in his role as Senior Credit/Risk Analyst he was still required to perform the role of Investment Officer. In this regard he was still required to review loans which were less than EC\$250,000.00 on a daily basis. The position of Investment Officer was not removed whilst he performed the role of Senior Credit/Risk Analyst. According to him his duties as Investment Officer still remained the same.
- [52] Mr. Joseph also stated that in his position as Senior Credit/Risk Analyst he was required to review applications for finance between EC\$250,000.00 and EC\$500,000.00.
- [53] According to him, the Bank did not present anything to him prior to his dismissal on March 05, 2010 that it was experiencing any financial difficulties.

The Employer's evidence

- [54] The evidence of the Bank was given by Mr. Vere Hill. He resides at Boons Point, Crosbies in Antigua and Barbuda. He signed a Witness Statement dated October 08, 2012. According to him the contents are true.
- [55] Mr. Hill stated that a bank is not licensed to trade in securities. A license would be required to execute broker dealer functions in accordance with the legislation. In or about 2007 the Bank decided to carry on the business as a broker dealer. In January 2008 CUCM was established as a subsidiary of the Bank.
- [56] According to Mr. Hill an application to obtain the broker dealer licence was postponed due to a lack of capital and the global economic recession.
- [57] Mr. Hill also stated that he had a discussion with Mr. Joseph and Mr. Joseph was advised that he would be transitioned into the CUCM if the licence was obtained. This discussion took place prior to the Bank's letter of March 25, 2008, to Mr. Joseph. I made reference to this at **paragraph [37]** above as **"VH-2"**.
- [58] According to Mr. Hill, prior to Mr. Joseph's employment as an Investment Analyst on October 12, 2007, this position did not exist. He was employed as an Investment Officer to contribute to the Bank until the licence was granted to operate as a broker at CUCM.
- [59] Mr. Hill stated Mr. Joseph's duties as Investment Officer included a review of the daily balances of the Bank's investment holdings which are the

Bank's Money Market accounts. He also assessed the Bank's holdings with the Eastern Caribbean Central Bank (ECCB) every Wednesday of the week, and conducted a review of the Bank's investment opportunities.

[60] Mr. Hill also stated that due to the economic downturn two matters arose. Firstly excess liquidity became less, and secondly creation of products on the Stock Exchange diminished.

[61] Mr. Hill also gave evidence that the Bank sought to obtain alternative employment for the Employee. A post of Senior Credit/Risk Analyst was created. According to him, the Employee would have been the sole investment officer in one department.

[62] Mr. Hill also stated that two persons worked in the Bank's Risk Department. They were Mr. Christopher Williams and Mr. Joseph. The later reported to Mr. Williams.

[63] According to Mr. Hill, the Risk Department was created in 2009 during the Employee's tenure of working with the Bank to improve the Credit Department. It was also established to manage the loan portfolio and to seize upon the Employee's skills.

[64] Mr. Hill also stated that the Risk Department was created as a separate department in order to review loans granted by the Bank. The concentration however was upon large loans in excess of EC\$250,000.00. He also stated that there was a significant diminution in demand from customers for large

loans in excess of EC\$250,000.00 between March 2009 and March 2010. In addition, loans in excess of EC\$1,000,000.00 became non-existent.

- [65] In answer to Ms. Hesse, Attorney-at-Law, Mr. Hill stated that as at October 12, 2007 Mr. Joseph was primarily hired by the Bank. In addition if there was work to be performed, Mr. Joseph would have been employed in the Credit Department. However, the complement of staff in that department which included two Chartered Accountants was sufficient to perform the duties of the credit department.
- [66] Mr. Hill stated that the Risk Department was “**dead**” when Mr. Joseph was terminated on March 05, 2010. As a consequence, the position of Chief Risk Officer no longer existed. Mr. Williams who held this post reverted to his substantive position of Chief Financial Officer. There was a diminution of work to be performed in the Bank’s investment portfolio and as a result Mr. Joseph could not have been offered any alternative employment.
- [67] Mr. Hill also stated that work still existed in the Retail and Commercial Banking department of the Bank. However, according to him, the work diminished. Mr. Hill made reference to a letter dated October 08, 2012 from the Bank to its Attorneys-at-Law. It purports to emanate from the Retail and Commercial Banking Department of the Bank and deals with loans during the period April 2008 to March 2010. (This was admitted as “**VH-7**”).
- [68] Mr. Hill further stated that when Mr. Joseph was dismissed by letter dated March 05, 2010 he was not in a position to state whether or not the Employee reviewed loan applications for less than EC\$250,000.00 on a

daily basis. According to him between April 2009 and March 2010 the Bank had requests for five (5) loans in excess of EC\$250,000.00. Mr. Joseph reviewed three (3) loans between April 2009 and March 2010 involving one hundred and twenty (120) loans which were approved.

[69] Mr. Hill stated that the duties of Investment Officer as it related to the Treasury functions remained as at March 05, 2010.

[70] The Retail and Commercial Department still handled the loans up to EC\$250,000.00. Very few requests for loans were received by the Bank. No one in the Retail and Commercial Department of the Bank was made redundant. The commercial part of Mr. Joseph's work had significantly diminished.

[71] According to Mr. Hill risks are now managed by different departments of the Bank. He states the position at **paragraph [13]** of his Witness Statement.

"I am aware that the Board subsequently reassessed the effectiveness of the Risk Department which was created in 2009 and determined that as a result of the small size of the bank and the expertise that already exists within the departments the responsibility for risk oversight could be redistributed among the staff in the credit department as it was done in the past. After careful analysis and consultations, management therefore decided and the Board of Directors concurred that the Risk Department should be closed."

The Employee's submissions

[72] Ms. Hesse's Written Submissions were dated and filed on December 19, 2012. Learned Counsel submits that the Employee was a permanent employee of the Bank. The Court should disregard the opinion of the Employer that it *"entered into a contract with the Employee to transfer him to "CUCM."*

[73] Ms. Hesse also submits that the information presented by the Bank which is contained in Exhibit **"VH-7"** dated October 08, 2012 is inaccurate and insufficient to suggest or imply that the work the Employee was last employed to carry out was substantially diminished.
-see paragraph [67] for an explanation of "VH-7".

[74] Ms. Hesse further submits that the period of ten (10) months and two (2) days between May 04, 2009 (the commencement of the Risk Management Department) and March 05, 2010 (the date of dismissal) does not constitute a time period sufficient to properly and accurately assess a trend, much less data to conclude that the said duty has been substantially diminished.

[75] Learned Counsel also submits that *"it is unreasonable and unrealistic for the Employer to have created a department to allocate a single duty to the Employee (i.e. reviewing loans in excess of EC\$ 1 million) without carrying out proper research to assess whether the Bank had sufficient work in the capacity to validate the creation of the new department. To consider the Employer's argument (of removing the Employee to work only on one task) it is submitted that it was unreasonable and unfair for the Employee to have been removed from his previous functioning role to*

an uncertain and destined to fail department, which the Employer would have realised had sufficient research been done”.

[76] Ms. Hesse also submits that *“the Employer should have provided sufficient data from previous years showing the influx of work (loans in excess of one million) to first illustrate the necessity to allocate the alleged primary responsibility of the Employee. Thus “VH-7” cannot be used or properly read to determine that the alleged primary duty of the Employee had substantially diminished”.*

[77] Learned Counsel for the Employee also submits that the Employer’s evidence contained at **paragraph [9]** of “VH-6” states that *“On a monthly basis, all applications approved within Retail and Commercial Banking under the \$250,000 unilateral limit MUST be reviewed by the Risk Management Group and any concerns addressed....”* According to Ms. Hesse this is evidence that the primary duty of the Employee (being one of two persons in the department) could not have been solely to assess loans in excess of EC\$1,000,000.00.

- see paragraph [26] of Counsel’s Written Submissions.

[78] Ms. Hesse cited **Williams & Others v Compair Maxam Ltd. [1982] ICR 156** and **Linda Richardson v Deep Water Development Co. Ltd. Ref. No. 7 of 1989**, (a decision from this Court) in support of a submission that the Employer failed to act reasonably before it terminated the Employee. As a result learned Counsel is of the opinion that the Employee was unfairly dismissed.

[79] The case of **Jennifer Watt v Antigua Village Condo Civil App. No. 6 of 1992** was submitted by Counsel for the Employee in support of certain awards under the following headings:

Immediate Loss	EC\$9,500.00 x 12.5 =	\$118,750.00
Loss of earnings	EC	\$ 49,687.20
Future loss of earnings	EC\$3,128.76 x 6 =	\$ 18,772.56
Loss of benefits	EC\$500 x 33.4 =	<u>\$ 16,700.00</u>
		<u>EC\$203,909.76</u>

The Employer's submissions

[80] The Employer's Written Submissions were dated and filed on December 07, 2012. They were signed by Mr. Radford Hill of Hill & Hill, Attorneys-at-Law for the Employer.

[81] Certain submissions on behalf of the Employer are clearly at variance with the evidence which was given by both parties in this Court. It is Mr. Radford Hill's submission that ***"The evidence of Mr. Vere Hill is that the duties of the Employer were minimal in that it was intended that he would have substantial duties once employed by CUCM."***

[82] I am of the view that Learned Counsel meant to submit as follows:

"The evidence of Mr. Hill is that the duties of the Employee were minimal...." and not the Employer.

[83] In any event however, Mr. Vere Hill gave no such evidence in Court. Moreover, Mr. Hill gave no evidence at all which related to the duties of the Employee ***"once employed by CUCM"***.

[84](a) Mr. Hill submits at **paragraph [6]** of his Witness Statement as follows:

“The Employee agreed that his transfer to CUCM was discussed and that he agreed to the transfer.”

(b) The evidence in this regard was referred to at **paragraphs [37], [40] and [49]** above respectively. There is no evidence whatsoever that an agreement took place between the Employee and the Bank for Mr. Joseph to be transferred to CUCM.

(c) In addition, most of the submissions at **paragraph [7]** of Mr. Hill’s Written Submissions are particularly troubling. They do not accord with the evidence which the Employee gave in this matter. Firstly, Mr. Hill submits that:

“The Employee admitted that upon the commencement of his employment he was not part of the finance department but he performed some duties which (were) previously done by members of that department”.

(d) I refer Learned Counsel, who was not in Court for any of the hearing of this matter to the Employee’s evidence at paragraphs [32] and [50] above. That submission by Counsel is at variance with the Employee’s evidence.

[85](a) Secondly, Mr. Hill submits as follows:

“The Employee also admitted that after his appointment as Senior Risk Manager in the Risk Department which was created in April 2009 his duties were prescribed by the said appointment”.

- (b) There is no evidence whatsoever in this matter that the Employee was appointed **“as Senior Risk Manager”**. The clear uncontroverted evidence is that in accordance with the Employer’s own documents, the Employee’s appointment was that of **“Senior Credit/Risk Analyst”**.
- (c) There is also no evidence given by the Employee that **“his duties were prescribed by the said appointment”**.

[86] In addition, no evidence was given by the Employee in the manner as stated by learned Counsel at **paragraph [7]** of his submissions as follows:

“The Employee also admitted that between 2009 and 2010 the number of loans which he approved decreased and that there was (a) diminution in his duties. The Employee however maintained that all of his work did not diminish.”

- (b) I refer Mr. Hill Attorney-at-Law for the Employer to **paragraph [45]** above for the Employee’s evidence in this regard.

[87] Mr. Hill Attorney-at-Law for the Employer submits that the Employer was unable to meet the capital requirements required by the legislation. In addition, the prevailing economic conditions did not favour the buying and selling of securities **for investors had no money**. Consequently by a letter dated April 23, 2009 the Employer (not the Employee as stated by Mr. Hill) wrote to the Commission postponing the Application for the Broker-Dealer licence.

-see paragraph 8 (g) of the Employer’s Written Submissions.

[88] Learned Counsel also submits at **paragraph [8] (h)** as follows:

“The re-organisation was aimed at improving efficiency in the area of Risk Management, but was also aimed at providing continued employment for the Employee whose services would not now be needed by CUCM”.

[89] With respect to the Employee’s duties as Senior Credit/Risk Analyst Mr. Radford Hill Attorney-at-Law states at **paragraph [8] (i)** of his Written Submissions *inter alia* as follows:

“In particular, he was required to assist the Credit Department in reviewing loans in excess of EC\$1.0 M and to make recommendation for approval of the said loans. The Employee was also required to assist in reviewing loans between 250,000.00 and 500,000.00. However, the Retail Group continued to have authority in respect of granting loans between 250,000.00 and 500,000.00 without the approval of the newly formed Risk Department...”

[90] According to Mr. Hill Attorney-at-Law the Risk Department was created in April 2009. It consisted of Mr. Williams and Mr. Joseph.

[91] Mr. Radford Hill Attorney-at-Law submits that the Employee was properly dismissed due to a redundancy situation. In support of this submission learned Counsel cites **Linda Richardson v Deep Bay Development Co. Ltd.** (*op cit*).

[92] It is Mr. Hill's submission that the Employee's dismissal fell within the provision of Section C58 (1) (c) of the Labour Code. The Employee therefore was not unfairly dismissed.

Discussion

(1) The Employee's status

[93] There is a need to examine the evidence to determine the Employee's status with the Employer. The Employer contends that Mr. Joseph's *"employment with the Defendant was therefore temporary and that it was intended that he would have been transferred to CUCM. The Employee agreed that his transfer to CUCM was discussed and that he agreed to the transfer."*

-see paragraph [6] of Mr. Hill's Written Submissions.

[94] Ms. Hesse Attorney-a-Law for the Employee submits at paragraph [14] of her written submissions that the Court should *"disregard this argument having assessed "VH-2" where the Employer offers permanent employment with the Bank to take immediate effect"*.

(a) The letter of October 12, 2007

[95] The evidence commences with the Employee's letter of appointment dated October 12, 2007. The full text of this document is contained in **Appendix 1** to this judgment.

[96] The Employee was first employed as **"Investment Officer/Commercial Credit Analyst"** with the Employer at the **"Management Support Level"**.

His working hours were *“from 7.45 am to 4.30 pm Monday to Thursday and 7.45 am to 5.00 pm on Friday.”*

[97] In addition to the Employee's hours of work the letter of appointment also stated as follows:

“Because of the nature of your job, however, it may be necessary that you work from time to time outside normal hours. If that becomes necessary and you are authorised by Management to work additional hours, you will be compensated accordingly.”

[98] The probationary period details state as follows:

“Upon your taking up the said offer of employment on the 15th November, 2007, you will be placed on probation for a period of three (3) months. At the conclusion of such a satisfactory three-month probationary period, your employment will be confirmed on a permanent basis.”

[99] The Employee's compensation was stated as follows:

“We agree to pay you a basic salary of EC\$9,500.00 per month, paid in 2 installments on 15th and 28th of each month in addition to EC\$500.00 travel allowance.”

[100] The letter in its conclusion stated as follows:

“We look forward to your joining the staff of Caribbean Union Bank, Ltd., and to our forging a mutually rewarding and long lasting relationship.”

[101] The Employee's employment with the Bank became effective from November 15, 2007. In the letter of employment which was signed by Mr. Vere Hill as the Bank's CEO on October 12, 2007, the Bank stated that a draft of the Employee's *"job description will be presented and finalized at the start of (his) employment"*. The Bank issued no job description to the Employee.

(b) The letter of March 25, 2008

[102] (a) Mr. Vere Hill wrote a letter to the Employee dated March 25, 2008. The full text of this letter is located at **"Appendix 2"** of this judgment.

(b) The **first paragraph** of the letter states as follows:

"Dear Mr. Joseph:

We write to advise that we have been satisfied with your performance in the position of Investment Officer throughout your probationary period, which concluded on 15th February, 2008, and hereby confirm your employment with the Bank on a permanent basis effective immediately."

(c) **Paragraph [2]** of the letter states as follows:

"As was discussed, you will be transitioned into our affiliate-Caribbean Union Capital Markets upon establishment of this unit. Please note however, that all your terms and conditions of employment remain unchanged. Further, as agreed, we will transfer all benefits accrued during your tenure with the Bank over to Caribbean Union Capital Markets".

[103] There are some features of the first and second letters which do provide some information as to the status of Mr. Joseph's appointment with the Bank.

[104] Firstly, the letters of October 12, 2007 and March 28, 2008 do not contain any reference whatsoever to the Bank's submission that Mr. Joseph's employment with the Bank was temporary. If the Bank so intended, it simply was required to state that the duration of Mr. Joseph's employment was for a finite period. After this period had elapsed as is the normal custom of such temporary appointments, the Employer would have simply informed the Employee that his employment had ceased.

[105] Secondly, Mr. Radford Hill submits that **"the duties of the (Employee) were minimal in that it was intended that he would have substantial duties once employed by CUCM"** Mr. Hill also submits that the Employee **"would have been transferred to CUCM."**

[106] The submission by Mr. Radford Hill that ***"the duties of the (Employee) were minimal"*** is at variance with the letter of appointment of October 12, 2007. In that letter Mr. Vere Hill after setting out Mr. Joseph's hours of work from Monday to Thursday to end at 4.30 pm stated quite clearly as follows:

"BECAUSE OF THE NATURE OF YOUR JOB, HOWEVER, IT MAY BE NECESSARY THAT YOU WORK FROM TIME TO TIME OUTSIDE NORMAL HOURS."

(The emphasis in capitals is mine)

[107] This requirement which envisioned the possibility that because of the nature of the Employee's job, he may be called upon to work beyond the normal eight (8) hours of work per day dismisses any notion that the Bank contemplated that Mr. Joseph's employment was temporary.

[108] Thirdly, there is a heading which is entitled "**Medical/Dental/Vision Care/ Life Insurance**" in the letter of October 12, 2007. Under that heading Mr. Vere Hill states as follows:

"Upon successful completion of your Probationary Period, the Bank will provide at no cost to you, medical, dental, and eye care insurance with a reputable insurer (currently Sagicor Life Inc.) for yourself, spouse and any dependent children. The Bank will also arrange life insurance, subject to acceptance of risk by our Insurers. Insurers may require a medical examination before approving coverage."

[109] The requirement for him to undergo a "*medical examination before approving coverage*" as early as October 12, 2007 was consistent at that stage with the understanding that at the conclusion of a satisfactory three month probationary period, Mr. Joseph would have become a permanent employee of the Bank. This is consistent with the finding in **Royal National Lifeboat Institution (RNLI) v Bushaway [2005] IRLR 675 (EAT)**. In that case a female employee Mrs. Bushaway was assigned to work from RNLI in a temporary capacity from October 21, 2002 as an administrative assistant. Her appointment became permanent on March 24, 2003. The employee terminated her employment with effect from February 27, 2004 and subsequently claimed unfair constructive dismissal. The RNLI

contested her claim on the grounds that she only became a permanent employee on March 24, 2003, and therefore she did not have sufficient service for making an unfair dismissal claim when she resigned less than a year later.

[110] The Employment Tribunal held that Mrs. Bushaway did have the necessary qualifying service to bring a claim of unfair dismissal. In summary, although there was a label of temporary employment she was found to have been a permanent employee. This finding was upheld by the **Employment Appeal Tribunal (EAT)**.

[111] At **page 679, paragraph [47]** of the EAT's judgment Judge J. R. Reid Q.C. stated *inter alia* as follows:

“Clearly there were significant differences in the mode of appointment: a short term temporary employee (particularly one with the applicant's employment history) would not be necessarily be required to provide references or to pass a medical.”

[112] There is no clear submission by Mr. Radford Hill Attorney-at-Law that the Employee's employment with the Bank would have ceased if the Bank did not obtain the establishment of CUCM. If this was a condition of his employment then it should have been clearly expressed in the letter of March 25, 2008 and agreed to by the Employee.

[113] Mr. Radford Hill's submissions with respect to the Employee's “**minimal**” duties with the Bank, his “**substantial duties once employed by CUCM**”, the “**temporary**” nature of his duties with the Bank, the Employee having

“agreed that his transfer to CUCM was discussed and that he agreed to the transfer”, were not substantiated by the evidence in this case.

(c)The period after March 25, 2008

[114] In accordance with the **Bushaway** case op cit *“a tribunal not only has to look at the written agreements which the parties concluded, but also at their conduct and how they operated the arrangement in practice. A label which the parties place on an arrangement is a helpful indication of the situation, but it is no more than that and the tribunal must look at the reality of the situation”*.

-See the headnote at page 674.

This reasoning was upheld by the EAT, by **Judge J.R. Reid Q.C;**

– see in particular paragraph [26].

[115] What was the reality of the situation between the Employee and the Bank? The Employee gave evidence with respect to the duties which he performed as Investment Officer/Commercial Credit Analyst. These are referred to at **paragraphs [5], [51], [59], and [69]** respectively of this judgment.

[116] Mr. Radford Hill in his submissions stated at **paragraph [4]** as follows:

“The evidence of Mr. Hill is that the duties of the (Employee) were minimal in that it was intended that he would have substantial duties once employed by CUCM”.

[117] The Employer’s evidenced an Application Form for Broker Dealer Licence on behalf of CUCM. It is dated April 18, 2008. It was forwarded to the Eastern Caribbean Securities Regulatory Commission (the Commission).

The names of the persons *“on the Application Form who would have been credited to CUMC were Christopher Williams as the “Principal” and Geoffrey Joseph as “Registered Representative”.*

[118] Mr. Vere Hill the CEO of the Bank gave evidence with respect to the duties which the Employee performed. He also gave his expectation of the role which Mr. Joseph would have performed with CUMC.

[119] He stated that prior to the commencement of Mr. Joseph’s employment with the Bank, the position of Investment Officer did not exist. According to Mr. Hill, Mr. Joseph was employed to make a contribution to the Bank until the license was granted to operate as a broker at CUCM.

[120] There was no evidence given by Mr. Vere Hill of the nature and extent of the duties which Mr. Joseph would have performed with this new entity. In addition, no evidence was led by Mr. Vere Hill that Mr. Joseph *“would have substantial duties once employed by CUCM”.*

- see paragraph [4] of the Employer’s Written Submissions

[121] In addition, I am not in a position to conclude from Mr. Vere Hill’s evidence that Mr. Joseph’s duties with CUCM would have been **“substantial”**.

[122] Mr. Roger Forde Q.C; drew Mr. Joseph’s attention to Exhibit **“VH-4”**.

The subject of the e-mail was **“Smith Barney March 2009 Statement”**. It was dated April 06, 2010. The e-mail stated as follows:

“Colleagues,

See attached

Regards,

Geoffrey Joseph, CFA Investment Officer CU Capital Markets Ltd.”

The website's address was caribbeanunionbank.com.

-see paragraph [49] above.

Mr. Joseph agreed with Mr. Forde Q.C; that he “*was writing as the Investment Officer-Capital Union Markets Limited*”. According to Mr. Joseph, this was a fair representation of the e-mail.

[123] In answer to Ms. Hesse Attorney-at-Law for the Employee with reference to the said e-mail, Mr. Joseph stated that Mr. Christopher Williams and himself were given credit cards by the Bank which had written on them his name, Investment Officer C U Capital Markets Ltd.

[124] The Employee's monthly salary as at April 06, 2009 which was paid by the Bank remained the same. The duties which he performed for the Bank were never changed. On April 06, 2009 CUCM did not come into existence. In addition, Mr. Joseph along with five (5) other employees of the Bank wrote a letter to Mr. Vere Hill, the CEO of the Bank. It is dated December 11, 2009. Mr. Joseph signed that letter as “**Senior Risk Analyst**”.

(d) The Employee's Evaluation- December 04, 2009

[125] Mr. Joseph's performance as an employee of the Bank was assessed by his immediate superior, Mr. Christopher Williams. Do recall that he was the Deputy Chief Executive Officer of the Bank. There is a document entitled “*Caribbean Union Bank, Performance Evaluations for Management*

Staff". It is dated December 04, 2009. It was produced as "**GJ-3**". The full text of this document is annexed to this judgment as "**Appendix 3**".

[126] Here is an Employee of the Bank who is continued to be paid his full monthly salary and his duties are said to be "**minimal**". If he does a "**minimal**" amount of work why is it necessary for his performance to be evaluated?

[127] What is the Employer's assessment of its own document "**GJ-3**"? This was Mr. Radford Hill's assessment which is contained at **paragraph [4]** of the Employer's Memorandum. The relevant comment is as follows:

"....the Employer admits that it evaluated the Employee on the 4th day of December, 2009 and stated, inter alia, that the Employee needed to show greater initiative and leadership."

[128] Was that comment a fair and balanced representation of the Bank's evaluation of Mr. Joseph? Whilst it is true that the evaluation of the Employee by Mr. Christopher Williams did state that "**Improvement is needed in the areas of creative problem solving and showing greater initiative and leadership**", I hold that Mr. Radford Hill's statement at **paragraph [4]** of the Employer's Memorandum (**paragraph [127]** above) was neither a fair nor balanced assessment of Mr. Joseph's work.

[129] In addition to Mr. Williams' comments at **paragraph [128]** above, he also stated *inter alia* as follows:

"i Planning: Has shown initiative with the development of the Risk Management Program.

Grade: 3.5

- ii **Organization of Work: Work is usually timely, some attention to format and layout is however required.**

Grade: 4

- iii **Compliance: Consistently adheres to the strict application of Bank policy.**

Grade: 5

- iv **Problem Solving and Decision Making: Excellent strategic insight, capable of synergizing all sides of an issue.**

Grade: 4

- v **Risk (Liability) Management (RM): Excellent re: liquidity, and credit risk. While other (RM) areas are under development.**

Grade: 5”

[130] The Employee was also graded in other areas of his work. These areas are further mentioned in “**Appendix 3**” of this judgment.

[131] The Ranking Form of the Performance Evaluation was as follows:

5- Outstanding

4-significantly exceeds expectations

3-fully capable

2-needs improvement

1-unsatisfactory

[132] The three (3) relevant Performance Definitions are as follows:

i. Outstanding

Performance at this level is clearly unique and far in excess of established expectations. The employee consistently exceeds expectations in the outcomes achieved in work quality, quantity and timeliness. The employee exhibits leadership among peers in all dimensions of the field of work performed.

ii. Significantly Exceeds Expectations

Performance at this level often exceeds established expectations and standards for work quality, quantity and timeliness. The employee exhibits mastery of most dimensions of the field of work performed.

iii. Fully Capable

Performance at this level is satisfactory on the established expectations and standards for work quality, quantity and timeliness. The employee competently achieves the requirements of the position.

[133] Some specific comments which were written by Mr. Williams are as follows:

“Has shown a desire for self-improvement by successfully completing the International Certificate in Banking Risk and Regulation, ICBRR.

Ably managed the Bank’s liquidity risk, and provided insightful credit analysis.

“Has also provided Executive Management with excellent strategic insight and advice when called upon.”

[134] (a) The last question in the Performance Evaluation document was as follows:

“What should be the manager/officer’s performance goals for the next year?”

(b) The answer by Mr. Williams was as follows:

“Completion of the Enterprise Wide Risk Management program”.

[135] Mr. Williams’ **“Overall Evaluation”** of the Employee was **“Significantly Exceeds expectations”**. His average grade was **4.3**.

[136] The Performance Evaluation report showed that Mr. Joseph exhibited a **“mastery of most dimensions of the field of work performed”**. These areas included:

(a) the risk management programme, (b) credit analysis, (c) liquidity risk, and (d) provision of excellent advice to Executive Management.

[137] There is no indication whatsoever in the Performance Evaluation Report that Mr. Joseph’s duties were **“minimal”** in nature for the period January 01, 2009 to December 04, 2009. I conclude from a reading of this report that Mr. Joseph continued to perform his regular duties with the Bank. His performance was assessed in the normal course of business. Mr. Williams certainly expected that Mr. Joseph would have continued to be employed by the Bank in the ensuing year, 2010.

[138] Antigua & Barbuda is a member of the organisation of Eastern Caribbean States. It is a small open economy. In this economy, for an employer to pay an employee in the private sector a gross monthly salary of EC\$10,000.00 is

fairly substantial. The Employee in this case was paid a monthly salary of EC\$10,000.00 from November 15, 2007, all through December 2007, for the entire years of 2008 and 2009 until his dismissal on March 05, 2010.

[139] In the circumstances of this case I have taken into account certain factors which include (a) the Employee's hours of work, (b) the probationary period and its completion, (c) the offer of medical, dental, eye care insurance and life insurance from as early as October 2007; (d) his monthly salary and (e) the Performance Evaluation Report of December 04, 2009, to find that Mr. Joseph was employed as a permanent employee of the Bank.

(ii) The events of January to February 2010

[140] Mr. Vere Hill sent a MEMO to Mr. Joseph dated February 17, 2010. It was admitted as part of a bundle entitled "GJ-11". This is annexed to this judgment. It is "Appendix 4".

[141] In this MEMO Mr. Hill makes reference to a "*specific assignment on January 7th 2010,*" which he sent to Mr. Joseph and to which he received no reply.

[142] Mr. Joseph in his capacity as Senior Credit/Risk Analyst, replied to Mr. Hill's MEMO. Mr. Joseph's reply is dated February 18, 2010. In that document Mr. Joseph stated inter alia that he "*was unaware of (Mr. Hill's) request*" as he was unable to locate Mr. Hill's specific e-mail to him. Mr. Joseph ended his response with these words:

"Let's continue to work together for the growth and sustainability of Caribbean Union Bank."

This Memo is annexed to this judgment. It is marked “**Appendix 5.**”

[143] Mr. Vere Hill replied to Mr. Joseph’s Memo by sending him a Memo also dated February 18, 2010. An excerpt of Mr. Hill’s Memo reads as follows:

“I have accepted your explanation. By way of this letter, this matter will be removed from your file”.

The deadline for completion of the assignment was varied to February 22, 2010. This Memo is annexed to this judgment. It is marked “**Appendix 6.**”

[144] There is therefore clear evidence, that as at February 18, 2010 there was in existence an effective Employee/Employer relationship between the two (2) parties in which the Employer through Mr. Vere Hill requested Mr. Joseph to execute a task which Mr. Hill described as “***necessary for effective operation of the bank***”. Having accepted Mr. Joseph’s explanation for his non-reply Mr. Hill stated that the matter would be removed from Mr. Joseph’s personnel file.

[145] Neither of the two Memos from Mr. Vere Hill to Mr. Joseph dated February 17 or February 18, 2010 gave any indication whatsoever to Mr. Joseph that at this stage the work which he was employed to perform had ceased or substantially diminished.

[146] On the contrary, the correspondence to Mr. Joseph evinces a fair conclusion that all was well between the two (2) parties. This is evidenced by Mr. Hill correctly requesting Mr. Joseph to perform his duty which Mr. Hill deemed as “***necessary for effective operation of the bank***”. This directive from Mr.

Vere Hill was in keeping with Mr. Joseph's evidence at **paragraph [5]** above and showed that he assisted the CEO "*on strategic matters*".

[147] In the circumstances of this case I hold that the working relationship between the two parties was not of a redundancy nature as at February 18, 2010. **Whether or not it existed fifteen (15) days later on March 05, 2010 is a matter which I shall now address.**

[148] There was a mention at **paragraph [4] (h)** of the Employer's Memorandum to the effect that the Employee refused to carry out an assignment "*in the latter part of 2009*". No evidence of this however, was led by the Employer in Court or in Mr. Vere Hill's Witness Statement. If the Employer meant the British American Company Limited circumstances ("**the BAICO matter**"), I made reference to this at **paragraphs [140] to [143]** above.

(iii) The events between February 19 , 2010 to March 05, 2010

[149] The Employer through Mr. Vere Hill wrote to the Commission by letter dated **April 23, 2009**. In that letter Mr. Hill stated that "*the current global economic recession is now having a noticeable effect on the ECCU sub-region and specifically in Antigua and Barbuda. Consequently, the Board of CU Capital Markets Ltd has decided to postpone its application for a broker dealer licence until macroeconomic conditions have improved*".

[150] Mr. Hill stated that a Risk Department was created as a separate department in order to review loans granted by the bank, but focusing on large loans looking at big loans over EC\$250,000.00.

[151] Mr. Hill also gave evidence that there was a significant downturn in demand from customers for large loans over EC\$250,000.00 between March 2009 and March 2010. In addition loans beyond EC\$1,000,000.00 became non-existent.

[152] There is a MEMO dated April 30, 2009. It was prepared by Mr. Vere Hill. It was entitled “**Re-organization of Lending Structure.**” It was forwarded to members of the Retail and Commercial Banking Department and Risk Management Group. One such employee was Mr. Joseph.

[153] A summary of this Re-organization is as follows:

- (i) Mr. Joseph would serve in the capacity of Senior Credit/ Risk Analyst.
- (ii) He was engaged to manage large corporate loans **in excess of EC\$1,000,000.00.**
- (iii) Credits up to EC\$250,000.00 will be handled initially entirely within the Retail and Commercial Banking Group and be subject only to review by a member of the Risk Management Group.
- (iv) Applications for credits between EC\$250,000.00 and EC\$500,000.00 to be prepared within the Retail and Commercial Banking Group and be subject only to review by a member of the Risk Management Group.
- (v) Applications between EC\$250,000.00 and EC\$500,000.00 will go to Mr. Joseph for concurrence.
- (vi) The full text of this document is annexed to this judgment. It is marked “**Appendix 7**”.

[154] Mr. Vere Hill wrote a letter to Mr. Joseph dated April 30, 2009. A summary of Mr. Joseph's duties was outlined as follows:

- (i) Personal loans of **EC\$1,000,000.00 and above** would be recommended by Mr. Joseph firstly to Mr. Hill for his approval.
- (ii) Personal Mortgage loans of **EC\$1,000,000.00 and above to a maximum of EC\$1,700,000.00** were to be recommended by Mr. Joseph to Mr. Hill.
- (iii) Commercial Loans of **EC\$1,000,000.00 and above to a maximum exposure of EC\$1,700,000.00** to be recommended by Mr. Joseph to Mr. Hill.
- (iv) An overdraft could be recommended by Mr. Joseph to Mr. Hill up to a maximum of EC\$50,000.00.

[155] The authorization for the performance of Mr. Joseph's new duties in **paragraph [154]** above was meant to expire on or about April 29, 2010. This letter dated April 30th, 2009 is annexed to this judgment. It is **"Appendix 8"**.

[156] Mr. Vere Hill in his Witness Statement at **paragraph [13]** stated *inter alia* that the Risk Department **"was created in 2009"**, Mr. Vere Hill did not state a specific date of the Risk Department's creation in his evidence. However, Mr. Radford Hill asserts in his submissions at **paragraph [12]** as follows:

"The evidence of Mr. Hill is that a Risk Department was created on the 30th of April 2009....."

[157] For the purposes of this judgment I hold that in accordance with Mr. Vere Hill's MEMO dated April 30, 2009 the Re-organization of the Bank's

lending Structure and the creation of the Risk Department according
Vere Hill became *“Effective (from) May 04, 2009.”*

(iv) **The concept of business re-organization**

[158] **Simon Deakin & Gillian S. Morris** in their book entitled **“Labour Law,”** Fifth edition, 2009, Hart Publishing, Oxford and Portland, Oregon, USA, at **paragraph [5.162]** state *inter alia* as follows:

“Economic dismissals- dismissals involving redundancy, reorganization and business transfers- form a distinct category within the law governing termination of employment. They touch on the key area of managerial prerogatives in the organisation of work and raise countervailing claims of job ownership by employees”.

[159] In the textbook entitled **“Smith & Woods Employment Law”** Ninth edition, authored by **Ian Smith & Gareth Thomas**, Oxford University Press, 2007, the learned authors at **page 527** under the heading **“Changing Business Needs and Reorganization”** state *inter alia* 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...”

-Lesney Productions & Co. Ltd. v Nolan [1977] ICR 235

[160] In the **Deakin & Morris** publication *op cit* the authors state at **paragraph [5.182]** *inter alia* as follows:

“There is a world of difference between saying that a dismissal is for a potentially fair reason, and concluding that the employer acted reasonably as treating that reason as sufficient in the particular

circumstances of the case. Thus even if the decision is motivated by economic considerations, the employer must still show that there were grounds upon which a reasonable employer could conclude that there was a need for changes leading to redundancy or reorganization. If the employer fails to offer any convincing evidence of business pressures leading to change, the tribunal may legitimately find the dismissal to have been unfair”.

-Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59

[161] In **Smith & Woods** op cit the authors at **page 529** put the position in the following manner:

“Was the reorganization necessary? Although it is not for the tribunal to decide how the employer ought to run his business and the employer’s genuine belief in the necessity for changes is likely to be paramount, a tribunal may expect the employer to lead evidence showing why he reached the particular decision in question.”

-Orr v Vaughan [1981] IRLR 63

[162] In **Ladbroke Courage** op cit Mr. Asten’s initial employment with the employer was as a seasonal bar manager. This was for the period March 13, to September 30, 1978. When the season had concluded he was kept on performing insurance work. He became a permanent employee. During the 1979 season he also worked as a bank manager and afterwards he continued to perform maintenance work. He was summarily dismissed without any warning.

[163] The employer stated that he was dismissed for redundancy because of a diminution of work when planning permission for further work was refused. The need to reduce the wages bill was also another consideration.

[164] The Industrial Tribunal held his dismissal to be unfair firstly because the company failed to produce any evidence that there was a real need to reduce the wages bill; and secondly because there was no consultation or discussion with Mr. Aster prior to the dismissal.

-see the headnote at page 60

[165] The Employment Appeal Tribunal upheld the Industrial Tribunal's finding. The headnote at **page 60** states as follows:

“The Industrial Tribunal had not erred in holding that the appellants had failed to establish that the respondent's dismissal because of the need to reduce the wages bill was reasonable in the circumstances. There was no error of law in the Industrial Tribunal's statement that if the employer seeks to rely on business reorganization or economic necessity as a reason for dismissal, he should produce some evidence to show that there was a reorganisation 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.”

[166] (a) In **Orr v Vaughan** (op cit) the appellant owned two (2) beauty salons. They were located in Cobham and Redhill respectively. Ms. Vaughan and two other employees were employed at the Redhill branch of the business. At the end of 1979 the owner's bookkeeper informed her that she was not

earning enough money to pay the bills and wages. The bookkeeper informed the owner that she was incurring a loss at the Redhill place of business. Ms. Vaughan was given notice of dismissal. The Industrial Tribunal held her dismissal to be unfair because the employer had failed to satisfy them as to the reason for it.

(b) On appeal by the employer to the EAT, the appeal was dismissed. The EAT held as follows:

“The Industrial Tribunal had not erred in holding that the dismissal of the respondent in order to cut staff costs in one of the appellant’s beauty salons was neither on grounds of redundancy nor for some other substantial reason and was therefore unfair”.

(c) Mr. Justice Slynn stated at **page 65** *inter alia* as follows:

“At the end of the day, it is largely for the employer to decide, on the material which is available to the employer; what is to be done by way of re-organization of the business; and it is for the employer to decide whether the requirements of the business for employees to carry out the particular work have ceased or diminished. If an employee acts on reasonable information reasonably acquired, then that is the test and no more.”

(v) **(a) The matter of the accumulated deficit**

[167] In his evidence Mr. Joseph stated that he was unaware that the company was facing financial difficulties. The Employer did not issue any letters to the employees with respect to any financial hardship which it experienced.

[168] Ms. Hesse referred Mr. Joseph to **page 22** of The Daily Observer Newspaper of Monday July 11, 2011. On that page the newspaper published the Consolidated Balance Sheet of the Bank for the years 2009 and 2010. (This document was admitted as **“GJ-12”**).

[169] In answer to Mr. Forde Q.C; Counsel for the Employer, Mr. Joseph stated that the company did not present anything to him to show that it was having financial difficulties before he was dismissed.

[170] In reply to Mr. Forde Q.C; Mr. Vere Hill made reference to **“GJ-12”**. This was the Bank’s Consolidated Balance Sheet. Mr. Hill stated that the document showed an Accumulated deficit of EC\$5.562 million over the years. According to Mr. Hill that the Bank made a profit of EC\$604,901.00 in 2010, still means that the company was in a deficit position.

[171] Mr. Radford Hill cites **Linda Richardson v Deep Bay Development Co. Ltd Ref. No. 7 of 1989**, a decision of this court. Learned Counsel states that the issue as to the profitability of the Employer is misconceived. The fact that a company is profitable does not mean that there cannot be a redundancy situation within certain departments of that company.

[172] Learned Counsel for the Employer also states that there is no evidence which suggests that the Employer was profitable. The Bank’s Financial Statements for the year 2010 discloses that the company sustained a loss of EC\$835,476.00 in 2009 and a profit in 2010. Accordingly, the 2010 profit does not negate the 2009 loss.

[173] Both Counsel cited **Linda Richardson v Deep Bay Development Co. Ltd.** op cit. In that case there was evidence that the employer had incurred losses which resulted in the hotel having to restructure the tour desk operation. At **page 9** of the judgment the then President stated inter alia as follows:

“We are satisfied that the Employer had produced the evidence to show that there was a need for reorganization and the Employer has also alluded to the losses of the Company and its dire financial straits.”

[174] There is no evidence in this case that Mr. Joseph was dismissed because the Bank was losing money. The letter of dismissal makes no reference to an occurrence of loss of any profits which caused the Bank to either restructure its operations or to dismiss the Employee.

[175] According to Mr. Vere Hill, the company’s solvency was challenged as at March 2010. The Bank continued to operate however for those years despite the accumulated deficit. It continued to function without reorganising itself in 2009. The Bank made a profit of EC \$604,901.00 in 2010.

[176] In the circumstances of this case I do not regard the Bank’s accumulated deficit as having any relevance to the reorganisation of May 04, 2009 or the Employee’s dismissal of March 05, 2010.

(b) The reorganisation

[177] Was this reorganization of the Bank necessary which became effective on May 04, 2009? What was the information which was available to the Employer prior to the reorganisation? Was that information reasonable to cause the Bank to institute the reorganisation?

[178] It is the Employer's evidence which is contained in its letter to the Commission dated April 23, 2009 that there was a *“current global economic recession” (which was) now having a noticeable effect on the ECCU sub-region and specifically in Antigua & Barbuda.*”

[179] This economic recession was the reason advanced by the Employer for a postponement of its application for a Broker dealer licence. In addition Mr. Vere Hill stated that the application was postponed due to a lack of capital. Mr. Radford Hill in his Written Submissions stated the reasons for the postponement at **page 4** as follows:

“By a letter dated 23rd day of April 2009, the Employer wrote to the Commission and advised that it was postponing its Application for the Broker Dealer licence.

The Employer was unable to meet the capital requirements required by the Act and the prevailing economic conditions did not favour the buying and selling of securities FOR INVESTORS HAD NO MONEY”.

(the emphasis in capitals is mine)

[180] No indication was given by the Bank as to what were the capital requirements which the Bank was required to satisfy. However, there is

evidence that as at April 23, 2009 prior to the reorganization, that the Bank was unable to meet those capital requirements.

[181] What was the nature of the reorganization? How did this impact upon the Employee's ability to execute his duties for the Bank?

[182] As at April 23, 2009 prior to the reorganization Mr. Radford Hill submits that **"INVESTORS HAD NO MONEY"** to invest in Antigua & Barbuda. The Bank was also aware on April 23, 2009 that **the global economic recession was then having a noticeable effect on Antigua & Barbuda.**

[183] What was the reasonable or any information which the Bank possessed of loans in excess of EC \$1,000,000.00 that were disbursed by it prior to its reorganization exercise that took effect on May 04, 2009?

[184] The Bank produced **"VH-7"** dated October 08, 2012. This contains no data of loans in excess of EC \$1,000,000.00 which the Bank disbursed to any customers immediately prior to May 04, 2009.

[185] The reorganization of the Bank's lending structure became effective on May 04, 2009. Elsewhere in this judgment at **paragraphs [153] and [154]** I have summarised the Employee's new targets which he was required to achieve.

[186] At **paragraph 4 (c)** of the Employer's Memorandum it states as follows:

"In the absence of a licence, the Employer gave the Employee employment as a Senior Credit/Risk Analyst and in his capacity his primary duty was to assess loans in excess of EC \$1,000,000.00."

[187] This Risk Department comprised two persons. They were Mr. Christopher Williams and Mr. Joseph. Mr. Williams was the Bank's Deputy Chief Executive Officer. The reorganization structure dictated that Mr. Joseph would recommend loans in excess of EC \$500,000.00 and EC \$1,000,000.00 to Mr. Williams. It does appear from this that it was primarily Mr. Joseph who was the person to effectively perform the duties in this Risk Management Department, as Mr. Williams was expected to execute his Deputy Chief Executive Officer's duties.

[188] Mr. Joseph's duties as the Senior Credit/Risk Analyst also involved recommending (a) Personal Mortgage loans in excess of EC \$1,000,000.00 to a maximum of EC \$1,700,000.00 and (b) Commercial loans in excess of the same EC \$1,000,000.00 to EC \$1,700,000.00.

[189] I do not have any knowledge of the state of loans over EC \$250,000.00 which the Bank disbursed in a calendar year prior to May 2009.

[190] The Table which is contained in "VH-7" dated October 2008, 2012 is of very little assistance to me to decide whether the evidence which the Employer acted upon to reorganize was factual and proper. For example between April 2009 to March 2010 the number of loans approved were 120. There were five (5) loans which were in excess of EC \$250,000.00.

[191] Firstly, no dollar value was given of the amount of the five (5) loans. Were they worth EC \$250,000.00 x 5 or EC \$500,000.00 x 5 or EC \$1,000,000.00 x 5 or of what combination?

[192] Secondly, the Employee gave evidence that in his capacity as Senior Credit/Risk Analyst he still was required to review loan applications less than EC \$250,000.00. In answer to Ms. Hesse, Mr. Vere Hill stated that when Mr. Joseph was dismissed by letter of March 05, 2010 he could not say that every day Mr. Joseph reviewed loans less than EC \$250,000.00.

[193] It is very possible therefore, that the one hundred and fifteen (115) loans each of which was valued less than EC \$250,000.00 could have cumulatively added up to a greater sum than the value of the five (5) sums each of which were in excess of EC \$250,000.00. The Employer would have had this information at its disposal but failed to produce it as evidence in this Court. In addition what was the value of the three (3) loans which the Bank stated that Mr. Joseph reviewed? No evidence was given of this figure.

[194] The Bank in its letter of dismissal dated March 05, 2010 stated at paragraphs [1] and [2] as follows:

“The global financial crisis coupled with the subsequent economic downturn in the Banking and Financial Industry in Antigua has led to a substantial decline in the number of loans being processed by the Bank, especially those in the quantum range for which you were engaged to process as Senior Credit/Risk Analyst.

As a result of the economic recession there is no longer a requirement for the Senior Credit/Risk Analyst in the Bank, as the work which you were last hired to perform has substantially diminished. Regrettably we are unable to offer you suitable alternative employment within the Bank at this time”.

This letter of dismissal dated March 5th, 2010 is annexed to this judgment. It is “**Appendix 9**”.

[195] The financial targets which the Bank established for the Employee to perform effective from May 04, 2010 must have been reasonable for Mr. Joseph to attain. The prevailing circumstances of the global economic downturn would be a factor which I am required to take into consideration to evaluate the setting of these financial targets contained in the Memo of April 30, 2009 and the letter of April 30, 2009.

[196] I derive some assistance to determine whether the Employer’s targets were reasonable in the circumstances from a reading of **Harvey on Industrial Relations and Employment Law, Butterworths, London, 2008, Volume 1**. At **paragraph [1551]** the learned authors state as follows:

“Where the employer offers further employment on different terms, then ...two separate issues have to be resolved. Was the employment suitable? Was the employee reasonable in refusing.”

[197] At **paragraph [1556]** of **Harvey’s** op cit the learned authors cited **Spencer & Griffin v Gloucestershire County Council [1985] IRLR 393 (CA)**. In that case, two school cleaners who had already suffered a reduction in their working hours, refused to accept a further reduction because **they were of the opinion that they could not perform their jobs satisfactorily within the time for them to do** so. The Industrial Tribunal held that they were correct to do so. They were reversed by the EAT.

[198](a) The Court of Appeal upheld the Industrial Tribunal's Judgment. The headnote reads *inter alia* as follows:

“The majority of the Industrial Tribunal were entitled to hold that the appellants had not acted unreasonably in refusing an offer of suitable alternative employment on the ground that they would not be able to do their work to a satisfactory standard on the new terms”.

(b) Lord Justice Neill stated at page 395, paragraph [14] *inter alia* as follows:

“In paragraph 11 the Industrial Tribunal set out the factors which they had in mind. It is clear from the way they expressed themselves in their reasons that they had a substantial amount of evidence from the applicants as to why they (the applicants) thought that the job could not be done satisfactorily in the way in which the employer suggested.”

(c) **Spencer & Griffin op cit** is not cited for the unreasonable issue matter, which does not apply in Mr. Joseph's case. It is cited as an illustration of the principle that **the work which the Employer sets for the Employee to perform must be capable of being performed to a satisfactory standard. Put another way, the Employee must be given a fair chance to perform the work which the Employer wishes him to perform.**

[199] The evidence is that on April 23, 2009 the Bank postponed its application to obtain a Broker Licence. This was due to a lack of capital by the Bank. The evidence also is that at April 23, 2009 the Bank acknowledged that the

current global economic recession was having a noticeable effect **“specifically in Antigua & Barbuda”**.

[200] Mr. Radford Hill Attorney-at-Law also submitted that as at April 23, 2009 **“INVESTORS HAD NO MONEY”** to invest in Antigua & Barbuda. According to Mr. Vere Hill there was a significant downturn in demand from customers for large loans over EC\$250,000 between March 2009 and March 2010.

[201] The Risk Department was established on April 30, 2009. It became effective on May 04, 2009. I have set out at **paragraphs [153] and [154]** above the new targets which the Bank required Mr. Joseph to achieve. In summary, Mr. Joseph was put in charge of recommending personal loans of EC\$1,000,000.00 and above. He was also to recommend personal mortgage loans of EC\$1,000,000.00 and above to a maximum of EC\$1,700,000.00. Applications between EC\$250,000.00 and EC\$500,000.00 required his concurrence.

[202] Given that the global economic recession was having a noticeable adverse effect on the Antigua & Barbuda economy and that **INVESTORS HAD NO MONEY** to invest in the country, both of these events occurring from as early as April 23, 2009 prior to the establishment of the Risk Department on May 04, 2009, it was expected that potential investors would be very wary of investing large sums of money in excess of EC\$250,000.00 and in particular involving even larger sums of EC\$1,000,000.00 for personal loans and up to EC\$1,700,000.00 for personal mortgage transactions.

[203] Given the prevailing economic environment which confronted Antigua & Barbuda in April 2009, and taking into consideration all of the facts of this case, I hold that the Employer knew or ought to have known that the work which it set out in the Memo and letter to the Employee both dated April 30, 2009 was highly improbable for the Employee to perform from the inception of the Bank's reorganisation until he was dismissed by letter on March 05, 2010.

[204] I agree with Ms. Hesse's submissions *"that the Employer should have provided sufficient data from previous years showing the influx of work (loans in excess of one million) to first illustrate the necessity to allocate the alleged primary responsibility of the Employee. Thus "VH-7" cannot be used or properly (be) read to determine that the alleged primary duty of the Employee had substantially diminished."*

-see paragraph [25] of Counsel's Written Submissions.

[205] Ms. Hesse's submission that the establishment of the Risk Department was **"destined to fail, which the Employer would have realised had sufficient research been done"** has considerable force and merit having regard to the evidence. I also agree entirely with this submission.

[206] **The establishment of this reorganisation exercise was based upon a well known poor financial environment which militated against its very conceptualization. It was a useless exercise of manpower and its very existence was stillborn.**

[207] **There is no evidence therefore that between February 19, 2010 to March 05, 2010 any work which Mr. Joseph was last employed to perform had either ceased or substantially diminished.**

[208] Mr. Joseph's dismissal was neither caused wholly or mainly to a cessation or diminution of work. His dismissal was caused simply because the Bank did not carefully analyse the state of its business. There was a reckless disregard by the Bank of the state of the economy which it knew or ought to have known as at March 2009 before carrying out what **Mr. Justice Slynn in Orr's** case (op cit) referred to at **paragraph [6]** of the judgment as a "**so-called reorganisation**" of its business. In the circumstances of this case the Bank commenced an unnecessary reorganisation which had the impact of causing Mr. Joseph's dismissal. In these circumstances when Mr. Joseph was dismissed on March 05, 2010, it was not due to redundancy.

The second issue

Did the Employer act reasonably or unreasonably in its dismissal of the Employee?

The evidence

[209] Mr. Joseph stated that he was terminated on March 05, 2010. On this day he went to work as usual. At the commencement of the luncheon interval the Human Resources Manager informed him that she wished to see him after the end of the lunch break. According to him upon his return to work he did see Ms. Denise Benjamin the Human Resources Officer.

[210] Ms. Benjamin gave Mr. Joseph his letter of dismissal dated March 05, 2010. No discussions took place between these two persons after he returned from the lunch break relative to his dismissal.

[211] At **paragraph [23]** of his Witness Statement Mr. Joseph stated that he was not consulted. The inference which I drew from this statement is that no consultation between the Employer and Mr. Joseph took place relative to his dismissal prior to or on March 05, 2010.

[212] Mr. Vere Hill in his evidence stated that he did not consult with the Employee as the Employee was employed in a sensitive position in management. If he was consulted, this could have caused a systemic risk to the Bank.

[213] (a) At **paragraph [17]** of his Witness Statement Mr. Vere Hill puts the matter in the following manner:

“The Employer considered whether to consult or warn the Employee of the possibility of redundancy. However, the Employer came to the conclusion that it was not in the best interests of the Employee and the Employer for such a consultation or warning to take place”.

(b) **Paragraph [7]** of the Employer’s Memorandum states as follows:

“...The Employer will contend that....the nature of the employment was such that consultation was not in the best interest of the Employer and Employee.”

[214] Mr. Joseph avers at **paragraph [23]** of his Witness Statement that he was not offered alternative employment within the Bank although he was responsible for most of the duties of the Chief Risk Officer. In his opinion the position of Chief Risk Officer could have been offered to him by the Employer.

[215] Mr. Vere Hill in answer to Mr. Forde Q.C; stated that the Bank sought to obtain alternative employment for Mr. Joseph. This was in the form of allowing him to work as the Senior Credit/ Risk Analyst. According to Mr. Hill the Risk Department was created during the Employee's tenure with the Bank in order that the Credit Department would be improved, to better manage the loan portfolio and to seize upon the opportunity to utilize the Employee's skills.

[216] According to Mr. Hill there was a diminution in the investment portfolio and work had diminished. As a result Mr. Joseph could not have been offered alternative employment.

[217] Mr. Vere Hill in his evidence stated that the Risk Department comprised two persons. These were Mr. Christopher Williams the Chief Financial Officer/Deputy Chief Executive Officer/Chief Risk Officer and Mr. Joseph. Mr. Williams was on secondment from his substantive post as Chief Financial Officer.

[218] Mr. Hill stated at **paragraph [14]** of his Witness Statement that in light of the decision to close the Risk Department, the Chief Risk Officer reverted to his substantive position as Chief Financial Officer.

[219] Mr. Hill stated at **paragraph [15]** of his Witness Statement as follows:

“Once the Chief Risk Officer re-assumed his substantive position as Chief Financial Officer, the Employee was the only person left in the now defunct risk department with no other substantive function and as such no selection criterion was applicable.”

The Employee’s submissions

[220] (a) Ms. Hesse Counsel for the Employee states that should the Court find that there was a redundancy, the Employer is required to (a) consult with the Employee and give him reasonable warning of an impending redundancy and (b) attempt where practicable to find suitable alternative employment with the Bank. In support of these submissions Ms. Hesse cited **Williams v Cowpair Maxam Ltd. op cit** and **Linda Richardson v Deep Bay Development Co. Ltd. op cit**.

(b) However, failure to act in accordance with one or more of the **guidelines in the Williams case** does not necessarily render a dismissal **“unfair”**.

-see the President’s words at paragraph [4] of Linda Richardson (op cit).

[221] Learned Counsel also submits that the Employer’s views that (a) no selection criteria was applicable, and (b) that it was not in the best interest of the Employee to be consulted or warned are clear indications of the Employer’s unreasonableness.

[222] Ms. Hesse submits further that the Bank could have opted to train the Employee to carry out work in a different department.

[223] According to Counsel, the Employer failed to act reasonably before it dismissed the Employee. In these circumstances he was unfairly dismissed.

The Employer's submissions

[224] (a) Mr. Radford Hill Counsel of Hill & Hill Attorneys-at-Law for the Employer submits **at paragraph [8] (p)** of his Written Submissions as follows:

“It was not practical to consult with the employee prior to dismissal because of the sensitive nature of the banking business and confidential information which the employee may possess.”

(b) At **paragraph [12]** of learned Counsel's Written Submissions Mr. Hill makes reference to *“the Employee as a senior person prior to dismissal”* which made it not practical for the Employer to consult him.

[225] (a) Mr. Radford Hill Attorney-at-Law also submitted that a failure to consult does not necessarily render the dismissal unfair. Each case must be judged on its own facts. Learned Counsel cited **Natasha Kirwan v Jumby Bay Ltd. Reference No. 4 of 2010**, a decision of this Court.

(b) I wrote that decision. On re-reading it, I see no mention that *“a failure to consult does not necessarily render the dismissal unfair”*. I think that what Counsel had in mind was what I wrote at **paragraph [55]** where I quoted Judge Peter Clarke in **Mugford v Midland Bank plc [1997] IRLR 208 at page 211**. In summary, after stating that no consultation would render the dismissal to be unfair except where consultation would have been

futile in the particular circumstances of the case I quoted **Judge Peter Clarke** at No. (3) where he stated as follows:

“(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.”

[226] Learned Counsel for the Employer also stated that if work in one department of the Bank had diminished and that department had consisted of four (4) persons, the Employer is not obliged to examine another department in order to determine whether or not it should displace certain other employees.

[227] Mr. Radford Hill Attorney-at-Law is of the view that the Risk Department where the Employee last worked was staffed by only two (2) individuals, one of whom was the Deputy CEO. This state of affairs made the issue of selection impractical.

[228] In light of the circumstances outlined at **paragraphs [227] to [229]** above learned Counsel submits that the Employer acted reasonably in dismissing the Employee.

The Law

[229] In **Langston v Cranfield University [1998] IRLR 172**, at paragraph [30] page 175, Judge Peter Clark stated *inter alia* as follows:

“Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the Employer.”

Discussion

[230] Has the Employer acted reasonably? Further the test is did the employer act reasonably?’ not ‘did the employment tribunal agree with what the employer did?’ (**Grundy Teddington) Ltd v Willis [1976] ICR 323**. An employment tribunal is not entitled to substitute its own views for those of the employer. (**Foley v Post Office) [2000] ICR 1283**. A decision on whether the employer acted reasonably is a question of fact for the employment tribunal to decide (**Iceland Frozen Foods Ltd. v Jones [1983] ICR 17...**

[231] To determine whether or not the employer has acted reasonably in dismissing the employee; the current test is *“What would a reasonable employer have done? There is a band of reasonableness within which one employer might decide to dismiss, whilst another might decide not to do so. If the circumstances of the case are such that a reasonable employer might dismiss, the dismissal will be fair even though not all the employers would take that view.* (**British Leyland (UK) Ltd. v Swift [1981] IRLR 91”**

-see the text Selwyn's Law of Employment, 17th edition authored by Astra Ermir, Oxford University Press UK, 2012 at paragraphs 17.75 and 17.77 at pages 460 and 461.

[232](a) The **Linda Richardson case** (op cit) was cited by both Attorneys- at-Law in this case. It involved a matter of reorganization of one department of a hotel in circumstances where the employer "*alluded to the losses of the Company and its dire financial straits*".
-see page 9 of the judgment.

(b) The learned President stated at **page 9** *inter alia* as follows:

"[T]here is still a further question to be determined: whether or not the redundancy dismissal meets the general test of fairness? What therefore has to be considered is not simply whether or not there was a genuine redundancy situation but also how the employer acted in the face of the redundancy in dismissing the employee. The employer must act fairly and reasonably."

(c) After making reference to the obligation of the employer to give to the employee "*reasonable warning of impending redundancy*" (also at page 9) the learned President stated at **pages 9 and 10** of the judgment *inter alia* as follows:

"With regard to consultation it is instructive to look at the case of Holden v Bradville Ltd. [1985] IRLR 483 where the E.A.T. in the course of its judgment stated the following: "No Court has ever gone so far as to hold that consultation is so essential that the absence of it will render any dismissal unfair automatically. Each

case has to be looked at upon its own particular merits and judged on its own special circumstances. Provided that Industrial Tribunals act upon the premise that consultation will normally be necessary if a redundancy selection is to be demonstrably fair, it is entirely a matter for the Industrial Tribunal members to decide whether in the particular circumstances presented to them, the redundancy selection was a fair one, and to make that decision whether or not there had been prior consultation.

Also noteworthy is what the E.A.T, had to say during the course of its judgment in Freud v Bentalls Ltd. [1982] IRLR 443. We quote: “We must emphasise that we are not saying that good industrial relations practice invariably requires such consultation. There may well be circumstances (for example a catastrophic cash flow problem making it essential to take immediate steps to reduce the wages bill) which render consultation impracticable. We are only saying that we would expect a reasonable employer, if he has not consulted the employee prior to dismissal for redundancy in any given case, to be able to show some special reason why he had not done so.”

(The underlined emphasis was that of the then President).

- (d) The quotation in **Holden’s case** is taken from **Mr. Justice Waite** at **paragraph [5] on page 484**. Mr. Justice Browne-Williamson delivered the judgment in the **Freud case**. The quotation in that case is to be found at **paragraph [15] on page 446**.

Discussion

[233] Mr. Vere Hill in answer to Roger Forde Q.C; made reference to the legal advice which was rendered to the Bank with respect to whether or not Mr. Joseph's position with it had become redundant. The Minutes of a Meeting of the Board of Directors of the Bank held on March 3, 2010 were produced by Mr. Vere Hill. (This document was marked "VH-9").

[234] A perusal of these Minutes under section 5 entitled "**Any Other Business**" reveals that a legal opinion was prepared by Hill and Hill Attorneys-at-Law "*on the question of redundancy in some areas of the Bank*". The opinion advised that in the circumstances presented in the instructions, a genuine redundancy existed so that the Bank could act accordingly. The Managing Director Mr. Vere Hill undertook to proceed with the matter in accordance with the legal opinion received.

[235] A careful perusal of the authorities do not support the Employer's opinion expressed at **paragraph [7]** of its Memorandum that consultation was not in the best interest of the Employee for whatever reason. It is good industrial relations practice that consultation by the employer with the employee before a redundancy situation is discussed will normally be necessary. In these circumstances I find no merit in the Employer's submission.

[236] Did the Employer in this case advance any special reason for its failure to consult with the Employee which rendered it unnecessary? Two reasons were put forward by the Employer.

nature of the banking business and confidential information which the Employee may possess.”

[238] No evidence was given by the Employer of any confidential information which the Employee possessed which rendered consultation before dismissal impractical. I am not aware of what the Employer refers to as “*the sensitive nature of the banking business*” which precluded consultation before dismissal.

[239] There was correspondence which was exchanged between Mr. Joseph and Mr. Vere Hill in January 2010. This exchange of letters did not reveal any behaviour by Mr. Joseph which merited a lack of discussion between himself and Mr. Vere Hill at a future date.

[240] (a) The matter of confidential information and how the Courts regard it in a redundancy situation was discussed in **Holden’s case** (op cit). This case is helpful to understand how a Court would regard the matter which I am required to resolve.

(b) In **Holden’s case** (op cit) the headnote at **page 483** states that Mrs. Holden was one of 33 employees out of the respondent’s workforce of 61 employees to be selected for redundancy. The decision to make these employees redundant was associated with negotiations for the sale of the company.

(c) The Industrial Tribunal held for the employer. Its reasoning was twofold. Firstly, there was the impracticality of individual consultation.

(c) The Industrial Tribunal held for the employer. Its reasoning was twofold. Firstly, there was the impracticality of individual consultation. Secondly, there was a need for secrecy prior to the takeover deal being concluded.

(d) The Employment Appeal Tribunal reversed the Industrial Tribunal. It held for Mrs. Holden. Mr Justice Waite delivered the E.A.T.'s decision. He stated at paragraph [35] on page 487 *inter alia* as follows:

“Finally, and independently of that ground, we think that the majority, in allowing themselves to be influenced by a presumed need for secrecy, went beyond the bounds of permissible speculation. They had no evidence before them that confidentiality precluded consultation. They should not in our view have allowed themselves to be swayed by what comes to no more than an uncertain guess”.

[241] Secondly, Mr. Vere Hill for the Employer stated that he did not consult with Mr. Joseph *“as he was in a sensitive position in management”*. Mr. Radford Hill Attorney-at-Law refers to him *“as a senior person prior to dismissal.”*

[242] It appears to me that the Bank took a position that as Mr. Joseph was employed *“in a sensitive position in management”*, this precluded consultation between himself and the Bank. No evidence was led by the Employer to show why it was that because Mr. Joseph was employed in a **“management”** position that this, along with any **“systematic risk”** disqualified him from enjoying the benefit of a basic elementary industrial

relations principle, namely to be consulted especially in a pending redundancy situation. Indeed no evidence was led by the Employer to show what is meant by the term systemic risk to the Bank.

[243](a) In the **Freud** case op cit, Mrs. Freud was employed by Bentalls Ltd. as its sole Press Officer. In July 1980, due to a fall-off in trade, a list of senior staff who might be considered for redundancy was drawn up. Mrs. Freud's name appeared on the list.

(b) On January 21, 1981 the board of directors of the employer decided that the Press Office would have to be closed and that Mrs. Freud would be made redundant. Five days after on January 26, 1981 the Personnel Director informed Mrs. Freud that she was to be made redundant. No prior warning of the redundancy was given. No consultation took place. **It was the company's policy not to warn senior staff of impending redundancy.** She claimed to be unfairly dismissed.

(c) The Industrial Tribunal held that there was no reason for finding that the dismissal was unfair by reason only that no earlier warning or consultation took place. The Employment Appeal Tribunal reversed the Tribunal's decision.

The need for consultation

(d) **Mr. Justice Waite** stated at **paragraph [14] page 446** *inter alia* as follows:

“Turning now to consideration of industrial relations practice, consultation (as opposed to unilateral action by the employer) is one

of the foundation stones of modern industrial relations practice..... In the particular sphere of redundancy, good industrial relations practice in the ordinary case requires consultation with the redundant employee so that the employer may find out whether the needs of the business can be met in some way other than by dismissal and, if not, what other steps the employer can take to ameliorate the blow to the employee. In some cases..... the employee may be able to suggest some re-organisation which will obviate the need for dismissal; in virtually all cases the employer if he consults will find out what steps he can take to find the employee alternative employment either within the company or outside it. For example, in present day conditions when so many people are unemployed many employees facing redundancy by reason of the disappearance of their existing job are prepared to take other jobs of lower status and commanding less pay. Only by consulting the employee can the employer discover whether such an option is open in any given case. Therefore good industrial relations practice requires that, unless there are special circumstances which render such consultation impossible or unnecessary, a fair employer will consult with the employee before dismissing him.”

(ii) The Employee's management status

(e) The matter of the company's 'policy' not to consult management employees who are threatened with redundancy was addressed by **Mr. Justice Browne Wilkinson** at **paragraph [21]** on **page 447** of the **Freud case**. He stated *inter alia* as follows:

“Mr. Day, for the company, pointed out that the ‘policy’ of the company not to consult employees threatened with redundancy was limited to employees ‘at this level’, i.e. employees at managerial level. We do not think this factor makes any difference. Although the nature of the consultation will obviously differ according to whether the employee is a shop floor worker and a member of a recognised union on the one hand or a member of management not represented by a union on the other, the desirability of consultation applies to employees of all kinds. Although there may be special cases in which the employer can show that fairness does not require consultation, in our view a general policy not to consult employees of whatever grade runs contrary to the most fundamental principles of good industrial relations.”

The Employee’s dismissal on March 05, 2010

[244] The Minutes of the Meeting of the Board of Directors of the Bank held on March 03, 2010 do reveal that the Board *“did not express any concerns”* with the legal opinion of Hill & Hill Attorneys-at-Law. The Managing Director of the Bank *“undertook to proceed with the matter in accordance with the legal opinion received.”*

[245] The Board of Directors of the Bank at the said Meeting at **paragraph [244]** above, decided at 3:30 pm on the said date to dismiss the Employee. Was the Bank facing an impending peril between Wednesday March 03, 2010 and Friday March 05, 2010 that rendered it as an urgent matter to dismiss the Employee **within two (2) days of the Board’s decision?**

[246] Was the financial state of the Bank for whatever reason after March 03, 2010 of such a nature which warranted Mr. Joseph's dismissal within two (2) days after the Board's decision?

[247] No evidence was presented by the Bank of any imminent matter which the Bank faced after March 03, 2010, that prevented the Bank from warning Mr. Joseph of imminent redundancy and discussing with him the possibility of alternative employment of whatever nature for whatever salary prior to his dismissal. I do not consider that the Bank's accumulated deficit in 2010, when it made a profit, was of such a serious nature that prevented the Bank from discussing with Mr. Joseph the Bank's plans for making his position and his alone, redundant.

[248](a) A matter of this nature which involved an employer's dismissal of an employee five days after the respondent's board of directors decided to make a senior staff member's position redundant arose for consideration in **Freud's** case op cit.

(b) **Mr. Justice Browne Wilkinson** stated *inter alia* at paragraph [17] page 446 follows:

"We can see nothing in the evidence which makes it exceptional beyond the fact that Mrs. Freud was the sole employee in the press office which was to be closed. That fact, by itself, does not obviate the need for consultation to consider helping Mrs. Freud with finding alternative employment especially as her evidence was that she was prepared to take employment of much lower status and at a lower rate of pay provided she could stay with the company."

- (c) At page 446 paragraph [19] Mr. Justice Browne Wilkinson also stated *inter alia* as follows:

“There was no evidence that the financial state of the company was such that Mrs. Freud had to be dismissed within five days after the board’s decision rather than the dismissal being postponed until after consultation had taken place in the ordinary way.”

[249] In the circumstances of this case the Employer presented no evidence of a financial or other nature of the Bank which rendered the Employee’s dismissal within two days of the Board of Directors’ decision.

[250] Consultation between the two parties after March 03, 2010 could not have been useless. The Employee may have been able to convince the Employer that its reconstruction exercise would have failed. He may have informed the Employer to allow him to revert to his prior position of Investment Officer.

[251] The Bank could have adopted an initiative to introduce a change in his contract of employment to allow him to initiate bringing business to the Bank in consideration of the payment of a commission plus some salary. Alternatively, other initiatives could have been discussed between the two parties. The Bank may have been in a position to discuss with him the possibility of finding suitable alternative employment elsewhere in another establishment.

[252] The Employee may have opted to work for a lower salary in a different position for a period of time or permanently upon mutually agreed terms. He may also have opted to seek alternative employment elsewhere.

[253] It is only as a result of consultation between the two parties that meaningful discussions may take place that could have been beneficial to the Employer and Employee.

[254] In the circumstances of this case taking into consideration the overall picture up to the date of Mr. Joseph's termination I hold that there were no special circumstances which rendered consultation impossible or futile, especially after March 03, 2010 and before Mr. Joseph was dismissed on March 05, 2010. I also hold that although Mr. Joseph may not have been unfairly selected, taking into consideration all of the facts of this case, I am unable to find that a warning and consultation by the Employer with the Employee would not have made any difference.

[255] In the circumstances of this case I hold that on March 05, 2010 the Bank's decision to dismiss the Employee for the reason stated in the letter of dismissal was outside the range of reasonable responses which a reasonable employer might have adopted. In this regard the Bank did not act reasonably in its dismissal of the Employee.

[256] The Employer's dismissal of the Employee for redundancy was unfair. The Employee is entitled to be compensated for being unfairly dismissed.

The third issue

If the Employee was unfairly dismissed what is the measure of damages which is due to him?

[257] An employee whom the Court regards as having been unfairly dismissed is entitled to certain awards under certain specific established headings. The awards are as follows:

(a) Basic award

This award is similar to severance pay. The Employee earned a basic salary of EC\$9,500.00 plus EC\$500.00 as a travel allowance payable in two instalments. He worked for the Employer from November 15, 2007 to March 05, 2010. This amounts to two (2) years and four (4) months. His entitlement is $(EC\$8,270.00 \times 2) + (EC\$8,270.00 \times 4/12)$. This amounts to EC\$19,296.66

(b) Immediate loss

The efforts made by the Employee to obtain alternative employment are commendable. A period of four (4) months is awarded under this heading. The sum is EC\$33,080.00

(c) Future loss

The sum which he currently earns is EC\$6,371.00. This amounts to EC\$1,899.00 less than in his former position with the Bank. I award him six (6) months loss of earnings less a ten per centum reduction. This amounts to EC\$10,254.60

(d) Notice pay

The sum awarded is one month's salary or EC\$8,270.00.

Conclusion

[258] The above sums amount to EC\$70,901.26 less EC\$26,728.58 previously paid to the Employee. The sum which is due to him is EC\$44,172.68. This sum shall be paid by the Employer to the Employee on or before June 30, 2013. There shall be no order as to costs.

Dated this the 2nd day of May, 2013

A handwritten signature in black ink, appearing to read "P. A. Pilgrim", written over a horizontal line.

PHILIP A. PILGRIM

President

I agree

A handwritten signature in blue ink, appearing to read "Dr. Hayden Thomas", written over a horizontal line.

DR. HAYDEN THOMAS

Member

I also agree

A handwritten signature in black ink, appearing to read "J. F. Kentish", written over a horizontal line.

JESSIE F. KENTISH

Member

List of Appendices

1. Appendix 1- Employee's letter of appointment dated October 12, 2007.
2. Appendix 2 - Letter from Employer to the Employee dated March 25, 2008.
3. Appendix 3 – CUB, Performance Evaluations for Management Staff dated December 04, 2009.
4. Appendix 4 – MEMO from Mr. Vere Hill to the Employee dated February 17, 2010.
5. Appendix 5 - MEMO from Mr. Geoffrey Joseph to Mr. Vere Hill dated February 18, 2010.
6. Appendix 6 – MEMO from Mr. Vere Hill to Mr. Geoffrey Joseph dated February 18, 2010.
7. Appendix 7 – MEMO from Mr. Vere Hill to Mr. Geoffrey Joseph et al dated April 30, 2009.
8. Appendix 8 – Letter from Mr. Vere Hill to Mr. Geoffrey Joseph dated April 30, 2009.
9. Appendix 9 – Letter of dismissal from the Employer to the Employee dated March 05, 2010.



October 12th, 2007

Mr. Geoffrey Joseph
Paradise View
P.O. Box W1527
St. John's
Antigua

Dear Mr. Joseph;

Further to our recent meeting, Caribbean Union Bank, Ltd. is pleased to offer you employment on the following terms and conditions:

Position Title

Investment Officer/Commercial Credit Analyst

Reporting To

Chief Financial Officer *with a dotted line to the Credit Manager*

Position Level

Management Support Level 4 (MS-4)

Job Description

A draft of your job description will be presented and finalized at the start of your employment.

Starting Date

The appointment is effective on November 15, 2007 and will commence with orientation.

Hours of Work

Regular working hours are from 7:45 a.m. to 4:30 p.m. Monday to Thursday and 7:45 a.m. to 5 p.m. on Friday, with one hour for lunch and a fifteen minute break in the mornings. Because of the nature of your job, however, it may be necessary that you work from time to time outside normal hours. If that becomes necessary and you are authorised by Management to work additional hours, you will be compensated accordingly.



Caribbean Union Bank

Probationary Period

Upon your taking up the said offer of employment on the 15th November, 2007, you will be placed on probation for a period of three (3) months. At the conclusion of such a satisfactory three-month probationary period, your employment will be confirmed on a permanent basis.

Compensation

We agree to pay you a basic salary of EC\$9,500.00 per month, paid in 2 installments on 15th and 28th of each month in addition to EC\$500.00 travel allowance.

Vacation

Your vacation period, according to our agreement, will be three weeks per year, the first of which is to be taken after the completion of your first year's employment.

Medical/Dental/Vision Care/Life Insurance

Upon successful completion of your Probationary Period, the Bank will provide at no cost to you, medical, dental, and eye care insurance with a reputable Insurer (*currently Sagacor Life Inc.*) for yourself, spouse and any dependent children. The Bank will also arrange life insurance, subject to acceptance of risk by our Insurers. Insurers may require a medical examination before approving coverage.

Performance Merit Award

The Management may, at their sole discretion, make a special financial award based on your personal performance assessment and the year-end results of the Bank. Where such results fall short of expectations, the Management of Caribbean Union Bank, Ltd. reserves the right not to declare an award. This award will be based on performance and hence not every member of staff may be eligible.

Confidentiality

You will be required to sign a formal Declaration of Secrecy, which we have enclosed. During your employment, you may not engage in activities or have personal interest which, in the opinion of the Management of Caribbean Union Bank, Ltd. impair, or appear to impair, independence of judgement or otherwise conflict with your responsibilities at Caribbean Union Bank, Ltd.



Caribbean Union Bank

Personnel Administration

The Bank will ensure that you receive a proper Orientation upon arrival and will provide you with all the necessary information and guidelines which will govern your employment.

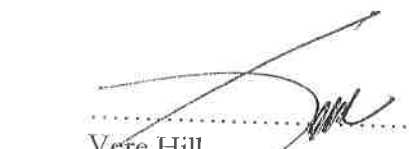
Governing Laws

This agreement shall be construed in accordance with and governed by the Laws of Antigua and Barbuda.

Should you require any further information regarding the foregoing, please do not hesitate to contact me. Kindly acknowledge your acceptance of this offer by signing, dating and returning the attached copy of this letter.

We look forward to your joining the staff of Caribbean Union Bank, Ltd. and to our forging a mutually rewarding and long lasting relationship.

Yours sincerely,


Vere Hill
Chief Executive Officer

Encl.

Accepted: 

Date: 12/10/07

Appendix 2



Caribbean Union Bank

March 25, 2008

Mr. Geoffrey Joseph
Paradise View
St. John's
Antigua

Dear Mr. Joseph;

We write to advise that we have been satisfied with your performance in the position of Investment Officer throughout your probationary period, which concluded on 15th February, 2008, and hereby confirm your employment with the Bank on a permanent basis effective immediately.

As was discussed, you will be transitioned into our affiliate - Caribbean Union Capital Markets - upon establishment of this unit. Please note however, that all your terms and conditions of employment remain unchanged. Further, as agreed, we will transfer all benefits accrued during your tenure with the Bank over to Caribbean Union Capital Markets.

In accordance with our policy as it relates to insurance coverage for permanent staff and as promised in your employment offer letter, the Bank will provide, at no cost to you, medical, dental, and eye care insurance with Sagacor Life Inc. We have attached a Sagacor Group Insurance Enrollment Form, which should be completed and returned to us at your earliest convenience.

We take this opportunity once again to welcome you to Caribbean Union Bank's team and look forward to forging a mutually beneficial and long lasting relationship.

Yours sincerely,


Vere Hill
Chief Executive Officer

VH/fc

Cc: Personnel File

Ms. Jeffrey Joseph
"GJ3"

Caribbean Union Bank

Performance Evaluations for Management Staff

Performance Definitions

Outstanding

Performance at this level is clearly unique and far in excess of established expectations. The employee consistently exceeds expectations in the outcomes achieved in work quality, quantity and timeliness. The employee exhibits leadership among peers in all dimensions of the field of work performed.

Significantly Exceeds Expectations

Performance at this level often exceeds established expectations and standards for work quality, quantity and timeliness. The employee exhibits mastery of most dimensions of the field of work performed.

Fully Capable

Performance at this level is satisfactory on the established expectations and standards for work quality, quantity and timeliness. The employee competently achieves the requirements of the position.

Needs Improvement

Performance at this level is minimally capable and below the level expected employee. Improvement is required in significant dimensions of the job in order to meet the expectations and standards for work quality, quantity and timeliness. The employee performing at this level may be denied merit increases until fully capable performance is demonstrated.

Unsatisfactory

Performance at this level is unacceptable. The employee often fails to achieve basic requirements of the position and has exhibited little or no improvement in job performance. The employee performing at this level should not be continued in this position; or where extenuating circumstances exist, should be retained only upon significant improvements within a fixed period of time to be defined by the Employer.

Ranking Form

Rank the manager on the performance factors using the performance definitions (5=outstanding, 4=significantly exceeds expectations, 3=fully capable, 2=needs improvement, 1=unsatisfactory)

1. Administration

Performance Factor	Performance (From 5 to 1)	Comments
Planning	<u>3.5</u>	Has shown initiative with the development of the Risk Management program.
Budgeting and Economic Management	<u>N/A</u>	Limited opportunities existed for review.
Organization of Work	<u>4</u>	Work is usually timely, some attention to format and layout is however required.
Business & Customer Development & Management	<u>N/A</u>	Limited opportunities existed for review.
Compliance	<u>5</u>	Consistently adheres to the strict application of Bank policy.
Problem Solving and Decision Making	<u>4</u>	Excellent strategic insight, capable of synergizing all sides of an issue.
Evaluation and Control	<u>N/A</u>	Limited opportunities existed for review.
Risk (Liability) Management (RM)	<u>5</u>	Excellent re liquidity, and credit risk. While other (RM) areas are under development.

2. Interpersonal

Performance Factor	Performance (From 5 to 1)	Comments
Oral Communication	<u>5</u>	Clear and insightful.
Written Communication	<u>4</u>	Very good writing skills, however points could be paid in a more succinct manner.
Coordination/Collaboration	<u>4</u>	Consummate team player.
Supervisory Control	<u>N/A</u>	Limited opportunities existed for review.
Leadership	<u>N/A</u>	Limited opportunities existed for review.
Staff Appraisal and Development	<u>N/A</u>	Limited opportunities existed for review.

- 2b. *Written Communication*: Prepares organized, clear, concise, accurate and informative letters, memos, reports and other documents which effectively fulfill content and timeliness requirements.
- 2c. *Coordination/Collaboration*: Works well with others at various levels; keeps information flowing to the appropriate parties vertically (down as well as up) and horizontally; facilitates communication and problems solving among parties when necessary.
- 2d. *Supervisory Control*: Effectively hires, assigns, directs, controls, evaluates performance, counsels and disciplines all other functions necessary or incidental to supervision; practices compliance with employment law guidelines and mandates.
- 2e. *Leadership*: Promotes cooperation and team work among employees; establishes high standards of conduct and job performance for subordinates; maintains open communication channels; delegates work; leads by example.
- 2f. *Staff Appraisal and Development*: Provides good record of subordinate performance; reviews appraisal information with subordinates; aides subordinates in improving performance on current job; helps subordinates in setting up and implementing development plans and objectives; cross-trains employees; encourages subordinates to participate in training.

3. Individual

- 3a. *Effort and Initiative*: Requires little work direction; exhibits persistence and initiative; puts forth a consistent, energetic effort; assumes full and complete responsibility for accomplishment of department functions.
- 3b. *Professional & Technical Competence*: Realistic knowledge and competence of the field and applies up-to-date technical/professional principles, practices, and standards appropriate to the functions of the department; acts as a resource person upon whom others can draw; professional demeanor maintained on a consistent basis.
- 3c. *Innovation*: Displays original and novel thought in creative efforts to improve on the status quo.
- 3d. *Objectivity*: Assesses issues, problems and decision situations based on the merits of the case presented; personal loyalties, biases, etc., does not influence department decisions; personnel decisions made on the basis of equal opportunity and objective job-related criteria.

Overall Evaluation (Please check one)

- ☐ Outstanding
☒ Significantly exceeds expectations
☐ Fully capable
☐ Needs improvement
☐ Unsatisfactory

What were the manager/officer's performance highlights in the past year?

Has shown a desire for self-improvement by successfully completing the International Certificate in Banking Risk and Regulation, ICBRR.

Able managed the Bank's liquidity risk, and provided insightful credit analysis.

Has also provided Executive Management with excellent strategic insight and advice when called upon.

What could have been most improved regarding the manager's/officer's performance in the past year?

Improvement is needed in the areas of creative problem-solving and showing greater initiative and leadership.

What should be the manager/officer's performance goals for the next year?

Completion of the Enterprise Wide Risk Management Program.

Evaluator's Signature

[Signature]

Date

December 4th, 2009

Manager/Officer's Signature

[Signature]

Date

4/12/09

Manager/Officer's signature indicates that the performance evaluation meeting took place and does not indicate agreement or disagreement with the ratings.



Caribbean Union Bank

MEMO

Date: February 17, 2010

To: Geoffrey Joseph, Senior Risk Officer

From: Vere Hill, Managing Director

RE: Unacceptable Behaviour

Employees of Caribbean Union Bank are expected to carry out orders from their superior officers. This is even more so in the case of upper-level officers and is necessary for effective operation of the bank.

I gave you a specific assignment on January 7th, 2010 to prepare a summary of a document necessary for the assessment of the risk exposure to CUB to the BAICO matter and to date, you have not sent me the completed work and neither have you communicated with me on the matter.

I require you to submit an explanation for this totally unacceptable behaviour no later than Friday 19th February, 2010.

cc: Personnel File

Memorandum

To: Vere Hill, Managing Director
CC: Christopher Williams, Chief Financial Officer
Denise Benjamin, Human Resource Officer
Personnel File
From: Geoffrey Joseph, Senior Risk Analyst
Date: 18 February 18, 2010
Re: Incomplete Task related to BAICO Judicial Report

I began employment with Caribbean Union Bank on 15 November 2007. Since my commencement date to present, I have executed every task that you have assigned to me as long as I was equipped with the tools and the knowledge to perform them. I have regularly performed tasks that were outside my job description without complaint even when faced with very ambitious timeframes. Therefore, the captioned task would have been executed consistent with my track record during my tenure at the Bank. If I were unable to complete the task I would have respectfully alerted you in advance of the deadline with an explanation.

I did not complete this BAICO Executive Summary task because I was unaware of your request. Notwithstanding your hard copy email, dated 7 January 2010, which suggests that your instructions were sent to me, I have searched my email Inbox, Deleted File folders, Spam folder, Archive folders, the Sent Items folders and my Bank assigned Blackberry phone and alas, that specific email cannot be found. (Please see attached copies of "Print screenshots" as evidence). I would never flatly refuse to execute tasks that are for the betterment of the Bank and its shareholders. It has been your practice when assigning tasks to me to carbon copy my immediate supervisor, Christopher Williams on these emails. I discussed the matter with him and he indicated that he had not seen the email.

However, given the importance of the assignment, I would be more than willing to work on it now. If you so desire, you can resend it to me along with the attached file. Lastly, Pete Richards of EC-Tech explained to me that there is IT equipment which Global Bank of Commerce has that allows for the review of all emails sent, delivered and read during a specific time period. CUB may wish to consider this for audit purposes going forward. Let's continue to work together for the growth and sustainability of Caribbean Union Bank.



Caribbean Union Bank

MEMO

Date: February 18, 2010
To: Geoffrey Joseph
From: Vere Hill
RE: BARCO Judicial Report

I have received today your response to my letter on the subject at caption.

I have accepted your explanation. By way of this letter, this matter will be removed from your file.

For clarity, you were the only person on duty in your department at the time the email was sent. Hence it was sent to you individually.

Further, I have attached herewith the original instruction but varied the deadline for the work to be completed by Monday February 22, 2010 no later than 8:00am.

Please confirm receipt of the hard copy of the document by signing the attached copy of the instructions.

Geoffrey Joseph

Date and time

Cc: Christopher Williams
Personnel File



Caribbean Union Bank

MEMO

Date: April 30, 2009.

To: Retail and Commercial Banking Department and Risk Management Group

Christopher Williams, Frank Allaway, Geoffrey Joseph, Gwendolyn Simon-Evanson, Josianne Hampson, Michelle Bailey Simmons, Oluichi Morton, Kayla Daley.

From: Mr. Vere Hill, Chief Executive Officer

Subject: Re-organization of Lending Structure

Effective May 04, 2009, the Bank will be implementing its strategic changes in the manner in which it handles its financial, investment and loan risk. Retail and Commercial Banking will be responsible for marketing the Bank's Loan and Deposit services and have primary responsibility for Deposit and Loan Portfolio growth and Account Managers and Risk Management will have a primary responsibility to monitor, manage and control the financial, investment and loan risk of the Bank.

- 1) Geoffrey Joseph will serve in the capacity of Senior Credit/Risk Analyst as this relates to preparing, documenting, submitting for approval and then managing large corporate applications in excess of EC\$1,000,000. He will not have a limit high enough for him to approve these but only to recommend for approval. Those applications will then be sent to Christopher Williams for concurrence before they are submitted to the Board of Directors for authorization.
- 2) Credits up to \$250,000 will be handled initially entirely within the Retail and Commercial Banking Group and be subject only to review by a member of the Risk Management Group. In other words those applications will be authorized within the unilateral limits of the lenders within that group.

- 3) Applications for credits between \$250,000 and \$500,000 will be prepared within the Retail and Commercial Banking Group and approved by Mr. Frank Allaway and then sent to the Risk Management Group for concurrence. These credits will require **BOTH** an approval and concurrence **BEFORE** they are considered authorized.
- 4) Applications between \$250,000 and \$500,000 will go to Mr. Joseph for concurrence. If he concurs, then the credit is considered authorized. If he does not concur, the approving officer and he will discuss the application and try to agree on whether this should be authorized or declined and on any changes to the application to achieve concurrence and hence authorization. If they cannot agree then the application will be elevated to me and Mr. Williams to resolve.
- 5) Applications in excess of \$500,000 whether initiated by the Retail and Commercial Banking Group or Mr. Joseph in his capacity as Senior Credit/Risk Analyst will be submitted to Mr. Williams for concurrence. If he concurs then the application will be considered authorized, if he cannot concur then he will discuss with the approving officer and try to find a meeting of the minds. If I or Mr. Williams cannot agree, the application will be submitted to the Loan Committee for adjudication, and a final decision will be made.
- 6) It is essential that we understand that Credit is NOT an exact science and hence approving and concurring officers have the right to an opinion. The whole idea is to provide a second opinion on an application and in so doing, hopefully pick up any weakness which had been missed by the originating officer. In cases where there is a disagreement the two parties should be able to discuss and negotiate a way to approve the application. On the rare occasion they simply cannot agree, the application is to be elevated to the next level in both groups. The Loan Committee will be the final adjudicator; though I expect very few if any applications getting to that Committee.
- 7) Both Groups should try to meet a time table for handling applications of 24 hours (maximum 48 hours) from the time the application is submitted.
- 8) No funds may be advanced to clients after the authorization of the applications until and unless the vouchers creating the advance are initialed by the Credit Control Officer. Any variance to this policy will require my approval and concurrence.
- 9) On a monthly basis, all applications approved within Retail and Commercial Banking under the \$250,000 unilateral limit MUST be reviewed by the Risk Management Group and any concerns addressed. The Report on these concerns is to be submitted to my office.

The new Job Titles in the Retail and Commercial Banking and Risk Management Group are:

Josianne Hampson: Account Officer - Retail and Commercial
Banking

Michelle Bailey-Simmons: Account Officer - Retail and Commercial
Banking

Kayla Daley-Gilkes: Credit Clerk

Christopher Williams: Deputy Chief Executive Officer and Chief
Financial Manager - Risk Management and
Finance Group

Geoffrey Joseph Senior Credit/Risk Analyst -- Risk Management
and Finance Group

Oluichi Morton Credit Control Officer

Please be guided accordingly.

Yours truly,

3/20/2020



Vere Hill
Chief Executive Officer

"GJ2"



Caribbean Union Bank

April 30, 2009

Mr. Geoffrey Joseph
Paradise View
St. John's
Antigua.

Re: Senior Credit/Risk Analyst - Risk Management Group

Dear Mr. Joseph,

This letter will serve as your authority in your position as Senior Credit/Risk Analyst - Risk Management Group to recommend applications for loans on the following terms and conditions.

1. Personal Loans – Revolving and Term

\$1,000,000 and above to a maximum CUB exposure of \$1,700,000. Following your recommendation, the application is to be submitted first to Mr. Hill for his approval and then to Mr. Williams for his concurrence **PRIOR** to submission to the Board of Directors for final authorization.

2. Personal Mortgage Loans

\$1,000,000 and above to a maximum of \$1,700,000 subject to loans being for strictly residential purposes, financing is no more than 80% of the appraised value or carries acceptable additional collateral or Mortgage Insurance, repayment is within 25 years and debt servicing is within normal debt servicing policy parameters. Following your recommendation, the loan must be submitted to Mr. Hill for his approval and then to Mr. Williams for his Concurrence prior to being sent to the Board of Directors for final authorization.

3. Commercial Loans- Operating/Revolving and Term

\$1,000,000 and above to a maximum exposure to CUB of \$1,700,000 subject to loans being fully secured with realizable collateral and repayable within a maximum 10 year term. Following your recommendation, the loan must be

submitted to Mr. Hill for his approval and then to Mr. Williams for his Concurrence prior to being sent to the Board of Directors for final authorization.

4. Overdrafts/Excesses

The Bank does not in normal course approve overdrafts. Where the client is an undoubted client you may recommend a temporary excess of up to 5% of the authorized limit (to a maximum of \$50,000) subject to complete details (reason, length of excess, specific source and date of repayment) being recorded in a file memorandum.

Excesses to existing clients must be repaid within 30 days and/or be the subject of a full credit application with detailed financial information before the expiration of the 30 days. This must be approved by Mr. Hill and concurred by Mr. Williams.

From time to time when an application under \$1,000,000 is received which is of high complexity and requires special assessment you may be requested to prepare and recommend that application.

In assessing credit applications it is expected that the Manager/Officer writing the application will independently confirm statements made by the client, specifically relative to income levels, cash flow, employment (and employment security) sources of repayment, and all and any other matters relative to the approval process. If the application is submitted to a higher authority, that authority will have the right to accept statements made in the application by the Account Manager/Officer as being correct.

In all instances, except for small temporary excesses of fewer than 30 days, applications MUST be by way of a full formal application and include detailed financial information, investigation and analysis to a level required for the complexity of the application. No application for permanent credit lines may be approved on the basis of a file Memorandum *and no funds may be advanced under any circumstances until the required collateral security is held. Only the CEO may waive that requirement and such approval must be done in writing.*

Where a Loan Manager/Officer is requested to write an application by another officer of the bank, he/she must perform an independent assessment of the application. If they cannot support the application, they MUST write the application as a decline with the relevant reasons for decline. When this application is submitted to a higher authority level, that level may over-rule the original decision. If that is the case they must outline the reasons and sign as authorizing the application.

This authority is provided to you personally while in your existing position and may not be delegated to any other officer of the bank.

"GJI"



Caribbean Union Bank

March 5, 2010

Mr. Geoffrey Joseph
Paradise View
St. John's
Antigua

Dear Mr. Joseph,

The global financial crisis coupled with the subsequent economic downturn in the Banking and Financial Industry in Antigua has led to a substantial decline in the number of loans being processed by the Bank, especially those in the quantum range for which you were engaged to process as Senior Credit/Risk Analyst.

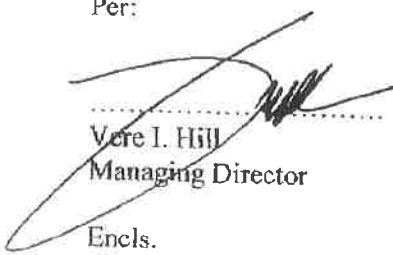
As a result of the economic recession there is no longer a requirement for a Senior Credit/Risk Analyst in the Bank, as the work which you were last hired to perform has substantially diminished. Regrettably we are unable to offer you suitable alternative employment within the Bank at this time.

In the circumstances therefore Caribbean Union Bank Limited hereby terminates your employment effective immediately. We will pay you the sum of EC\$5,000 payment in lieu of notice less statutory contributions. In accordance with section C40 of the Antigua and Barbuda Labour Code you are entitled to severance pay in the amount of \$22,166.67. You will also receive one (1) day vacation pay in the amount of EC\$475.00 less statutory contributions. Please find enclosed XCD Draft in the amount of \$26,728.58 and a Schedule with further details of your Severance Payout Computation.

Kindly immediately complete and return the attached form for all company property in your possession to Miss. Denise Benjamin – Human Resources Officer

Thank you for your invaluable contribution to the Bank during your employ at the Bank. The Management of Caribbean Union Bank Limited extends its best wishes for the future.

Yours Sincerely,
Caribbean Union Bank Limited
Per:

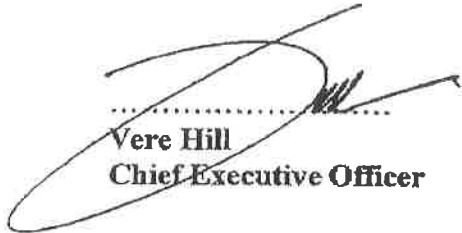

Vere I. Hill
Managing Director

Encls.

cc: Personnel File

This authority expires on the one year anniversary of the date of this letter unless renewed by way of a new authority. Limits may be decreased or increased based on both performance levels and the specific needs of the bank at any time.

Yours truly



Vere Hill
Chief Executive Officer

VH/db

Cc: Personnel File