

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 16 of 2014

BETWEEN:

MARY E. PROPHET

Employee

and

ANTIGUA COMMERCIAL BANK

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel R. Aymer

Member

The Hon. Megan Samuel-Fields

Member

Appearances:

Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation
for the Employee

Ms. Safiya Roberts and Ms. C. Kamilah Roberts of Roberts and Co. Attorneys-at-Law for
the Employer

2015: November 5

2015: November 23

2018: May 9

JUDGMENT

Brown, P:

Undisputed Facts

1. The Employer is a banking institution lawfully carrying on operations in Antigua and Barbuda with its principal place of business situate at the corner of Thames and St. Mary's Streets in the City of St. John's.
2. The Antigua and Barbuda Workers Union (the Union) is a leading trade union in Antigua & Barbuda. At all material times, it was the duly constituted



sole Bargaining Agent for the Bargaining Unit of employees employed by the Employer, of which the Employee was a member.

3. At all material times, there was in force a collective agreement between the Employer and the Union. In particular, there were Collective Agreements covering the periods 2002 – 2005 and 2005 – 2008, neither of which included a term as to the Employee's or Employer's "age of retirement".
4. The Employee was first employed by the Employer on a temporary basis as a Messenger/ Maid for 4 successive fixed-term contracts for periods as follows:
 - 2 months :- November 7, 2000 to December 29, 2000
 - 1 year :- January 15, 2001 to January 14, 2002
 - 1 year :- February 20, 2002 to February 19, 2003
 - 1 year :- February 20, 2003 to February 19, 2004Her main duties were running errands, cleaning, washing utensils and serving refreshments.
5. By letter dated February 5, 2004 the Employer notified the Employee that it would not renew her fourth contract of employment when it expired on February 19, 2004. The Union, being concerned about the Employer's intention and the Employee's temporary employment under the four successive contracts, made representations to the Employer in respect thereof.
6. The Employer capitulated to the Union's position and, by letter dated September 6, 2004, "offered" the Employee permanent employment "retroactive from November 7, 2000".
7. Between the date of expiration of the Employee's last temporary contract on February 19, 2004 and the Employee's acceptance of new formal offer of employment on September 10, 2004 the Employee continued to work uninterrupted while the Employer and the Union negotiated the terms of her employment. The negotiations did not include the question of the Employee's or the Employer's "age of retirement", "normal retirement age", pension or insurance coverage.
8. For present purposes, excerpts from the Employer's letter of offer of employment are reproduced below with sections underlined by us for emphasis:

"September 06, 2004

...

Dear Mrs Prophet:

Re: Letter of Offer for Position of Messenger/ Maid

This letter sets out the particulars of your employment with Antigua Commercial Bank retroactive from November 7th, 2000. These terms are in accordance with the minimum requirement of the Antigua & Barbuda Labour Code.

We advise that the following are Terms of Employment:

1. Position title

Your present position title will be Messenger/ Maid that is classified at the Non Clerical level.

2. Remuneration

Your current weekly wage of \$456.00 will remain unchanged.

...

6. Hours of Work

The bank normal hours of work are from 7:45am to 4: 30pm, Mondays to Wednesday's, 7:45am to 4:00pm on Thursday and 7: 45 am to 5:00 pm on Friday

7. Vacation

In addition to the normal public holidays, you are entitled to vacation as follows: 1st year of service 12 working days, 2 to 5 years of service 15 working days, 6-10 you will be entitled to 18 working days...

...

12. Contributory Pension Scheme

In accordance with the Trust Deed that governs the operation of the Staff Pension Scheme, your joining the Scheme is not automatic, because you were over the age of 50 years as at November 07, 2000. Consequently, you will need to make an application to the Board of Trustees requesting that they consider accepting you as a member.

If approved, you will be eligible to join the Scheme on its annual anniversary of October 01, 2004.

For staff who participates in the Pension Scheme, the Bank pays 5% and the Employee pays 5% of basic monthly earnings to this Scheme. The normal pension age is sixty (60) years.

13. Age of Retirement

The Bank's age of retirement is sixty (60) years.

14. Antigua Commercial Bank Group Life & Medical Scheme

The Bank's pays 50% and the Employee pays 50% of the insurance premium for the Scheme. The same ratio is applicable to dependents eligible under the Medical Scheme...

15. Collective Agreements

Your job classification is covered under the collective agreement between the Bank and the Antigua & Barbuda Workers Union.

16. Notice of Termination of employment

Termination of employment requires one (1) week's notice in writing from either party.

...

We welcome you to Antigua Commercial Bank as a permanent employee and look forward to a continued mutually beneficial working relationship.

Please acknowledge receipt of and concurrence with the terms of this agreement by signing and returning the duplicate of this letter to the undersigned by September 10, 2004.

Yours sincerely

...

Signed: Mary Ethlyn Prophet Dated: 10th September, 2004."

9. By letter dated February 4, 2008 the Employer referred to its "normal retirement age" and informed the Employee that since she would turn 60 on July 21, 2008, that would be her last day of work.
10. In or about June 2008, the Employer orally informed the Employee that when she attained age 60 her services would be terminated on the ground of retirement and that she would receive no benefits at that time. In that regard,

the Employee was required to go on vacation leave for the period June 27, 2008 to July 21, 2008.

11. The Employee proceeded on vacation until her last day of employment on July 21, 2008. She received no letter or statement of termination and no terminal benefits.
12. In response to the Employee's letter dated August 11, 2008 the Employer provided the Employee with a "Statement of Termination" and a "Certificate of Employment" pursuant to Section C10 of the Antigua and Barbuda Labour Code " (the Code) In those documents the Employer stated that" the date of termination was "July 21, 2008" and that the reason for termination was "Retirement".

The Memoranda

13. The foregoing facts were substantially stated in the Employee's Memorandum. In addition, the Employee contended that during her tenure she was deprived of certain benefits to which she was entitled under the Collective Agreement including Retroactive wages and membership in the Staff Pension Scheme
14. The Employee also pleaded that the Employer deprived her of the right to choose the date of her retirement and was not entitled to terminate her services on the ground of retirement.
15. Most significantly, the Employee pleaded that the purported termination of her employment on the ground of retirement was without notice, in violation of the collective agreement, contrary to good industrial relations practices and the laws of Antigua and Barbuda.
16. Moreover, the Employee maintained that the Employer treated her in an unfair and arbitrary manner for which she should be compensated.
17. For its part, the Employer pleaded that the details of the Employee's Memorandum in relation to the periods of temporary employment are irrelevant and that the terms and date of these employment were settled by the agreement dated September 6, 2004.
18. The nub of Employer's case as stated in the Employer's Memorandum is that the Employee was employed under a fixed-term contract commencing on November 7, 2000 and terminating on her 60th birthday. Accordingly, the Employer denies that the Employee's services were terminated without notice

in violation of the law, the Collective Agreement and good industrial relation practices.

19. More particularly the Employer pleaded that :

- The termination of the Employee's employment was not without notice since she accepted the terms of the offer of employment which clearly stipulated the Employer's retirement age to be 60 years. And the Employer wrote to the Employee by letter dated February 4, 2008 reminding her of the retirement age.
- Accordingly, the Employee's retirement at age 60 was not in the absence of mutual agreement and consensus as alleged by the Employee.
- The Employee did not have the sole right to choose the option of retirement as she alleged.

20. Needless to say, the Employer's case is diametrically opposed to that of the Employee to the effect that she was not unfairly dismissed and therefore not entitled to compensation.

The Issues

21. The main issue for determination is: Whether the Employee received any adequate, proper or reasonable notice of the Employer's retirement age policy requiring the compulsory termination of her employment when she attained the age of 60 years.

22. In addition, some overlapping secondary issues may be formulated as follows:

- (1) Whether an employment agreement for "permanent employment" is an agreement for employment of indefinite duration.
- (2) Whether the term in the employment agreement stipulating "the employer's age of retirement" constitutes a working condition "more advantageous" to an employee in permanent employment where no age of retirement is stipulated in statute or the governing collective agreement.
- (3) Whether the introduction of an employer's age of retirement for a member of a recognized bargaining unit without agreement or consultation with the bargaining agent is contrary to the principles and practices of good industrial relations.
- (4) Whether a term stipulating "the employer's age of retirement" in an individual employment agreement for permanent employment with a member of a recognized bargaining unit is valid and enforceable to compulsorily terminate an employee's employment.

(5) Whether an employer's termination of the employment of a permanent employee, who is a member of a recognized bargaining unit, without notice to the bargaining agent, on the ground of the employer's age of retirement is unfair.

23. Our consideration of the issues must be done in the context of the Collective Agreement and within the legal framework. We find the following Articles and statutory provisions most instructive.

The Collective Agreement

24. Article 1.01 of the 2007 Collective Agreement states its purpose as follows:

"1.01: The purpose of this Memorandum of Agreement is to record agreement between the Bank and the Union on the regulation of salaries, hours of work and general conditions of employment applicable to the employees of the Bank covered by this Agreement in order to consolidate employee/ employer relations ..."

25. In relation to management rights, Article 4.01 provides:

"4.01: The Union acknowledges and agrees that all the regular and customary functions, rights, powers and authority of Management are vested in the Bank subject to the provisions of this Agreement. Nevertheless, the Bank accepts that the Union has the right to approach Management to protect members of the Bargaining Unit against any form of arbitrary treatment or grievance..."

26. Under the heading General Principles, Article 4.02 refers to the spirit and intention of the Agreement as follows:

"4.02: It is the spirit and intention of this Agreement to further the best possible relations between the Bank and the Union. In accordance with this principle and the terms of this Agreement, the Union and the Bank agree to do everything in their power to promote good industrial relations."

- a) The Bank and the Union share a common aim in promoting and maintaining good staff relations in order to contribute to the efficiency and prosperity of the Bank and its staff.
- b) ...
- c) The Bank is committed to the continued development of positive policies to promote equal opportunity in employment.

27. In relation to Job Security, Article 10.01 of the Agreement provides:

"10.01: The bank shall continue to use its best efforts to ensure a maximum degree of job security for all of its employees consistent with its obligation to maintain efficient operations."

28. As to Conditions of Employment, Article 16.02 reads:

"16.02: In the event that any clause or clauses contained in the Contract of Employment conflict with the provisions of this Agreement, then the clause or clauses of this Agreement shall supersede".

29. Article 22.07 refers to Resignations/Retirements as follows:

"22.07: Resignations/Retirements Pro-Rated Leave- When a member of staff resigns or retires from the Bank's service he/she is entitled to pro-rated leave calculated for each completed month of service after the official basic leave ends. Resignation/retirement will take effect at the end of the leave. An employee who resigns/retires may opt for the equivalent monetary remuneration in lieu of any leave accumulated as above, if preferred."

30. Under the heading "Termination of Employment" Article 37.01 provides:

"37.01: If the Bank terminates the employment of any employee other than by summary dismissal in the event of either proven dishonesty or gross misconduct, the Bank will give the employee one month's notice or salary in lieu of notice".

31. Clearly, in so far as the Agreement provides for retirement it does so only in the context of the Employee's voluntary act of resignation or retirement and the related entitlement to leave prior to retirement. There is no provision for or reference to a "Retirement age policy" the "age of retirement" or "compulsory retirement", the termination of employment by the Employer on any of those grounds and the requirement for notice.

The Legal Framework

32. In respect of the termination of the employment of an employee, section C10 of the Code imposes a mandatory obligation and establishes an absolute bar as follows:

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

(2) ..

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

(4) An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate, in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable.

33. As to trade unions, the Code expressly recognizes their critical role in collective bargaining. In particular, Section A3 of the Code is comprised of expressions of the underlying national policy which must be used in the interpretation of several of its provisions. For present purposes, we note that the expressions of national policy to encourage the equality of bargaining power and the collective bargaining process between employees and their employer. Those expressions are stated in sections A(3) (f) and (h) as follows:

“(f) equality of bargaining power between employees and their employer is to be encouraged as a means of providing a channel of free communication, of equitably resolving problems related to working conditions, and of forestalling avoidable interruptions of production;

...

(h) collective bargaining, free of external interference, is to be encouraged; but where free collective bargaining fails, Government should provide machinery for the resolution of questions whose continued existence may harm the economy of Antigua and Barbuda;”

34. It is clear that, in so far as they advance the interest of workers by collective bargaining, trade unions play an important role in advancing the overall socio-economic development of Antigua and Barbuda. We are mindful that, in conjunction with employers, trade unions routinely contribute to the establishment of conditions of employment which are better than the minimum ones established under the Code. We accept this as the norm and note that, as part of their fundamental structure, collective agreements are

routinely consistent with the Code and the principles and practices of good industrial relations.

35. Section A8 of the Code explains the term "conditions of work" and define "collective agreement" as follows:

"collective agreement" means any contract between an employer or his bargaining agent and a group of employees or their bargaining agent, governing the work condition of such employees;

"conditions of work" or "conditions of employment" refers to the elements of hire and termination of employment; to the remuneration, hours, duties and the surrounding terms of employment; and to all other factors directly related to the employment arrangement;

36. Section A 8 of the Code provides for working conditions which are more advantageous than the minimum ones established in the Code as follows:

"A8. Nothing herein shall be construed as prohibiting an employer, either unilaterally, by individual contract with an employee or with employees, or by collective agreement with employee representatives, from establishing working conditions more advantageous to employees than those minimum standards which are set forth in this Code."

37. The Court's powers to determine disputes are derived from the Industrial Court Act (the Act), Section 10 (3) of which provides:

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

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

(b) Act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.

38. We emphasize the constraining components of our power including: (a) our order or award must be based on what we consider to be **"fair and just"**; (b) we must act in accordance with **"equity, good conscience and the substantial merits of the case"** before us and (c) we must have regard for (i) the **"principles and practices of good industrial relations and, in particular, (ii) the Antigua and Barbuda Labour Code."**

39. The Act does not provide a definition or explanation for what is “fair and just”. There are no general rules or objective tests which can be universally applied to determine what is fair and just in every conceivable scenario. Accordingly, what we deem to be fair and just in the instant case depends on the facts and the merits of the competing positions of the parties.
40. As to equity, as commonly understood, it is substantially equivalent to natural justice of which there are known principles which could be applied in particular circumstances. Among other things, those principles dictate that:
- (a) One party should not unilaterally depart from an agreed position arising from the collective bargaining process.
 - (b) There should be no discrimination against any member of the bargaining unit.
 - (c) Where one party is desirous of introducing a new condition of employment, it must clearly communicate its position to the other side and allow it a fair opportunity to negotiate a mutually acceptable position.
41. Since there are no direct express statutory provisions in the Code defining or explaining them, we have to rely on our own knowledge of what constitutes the principles and practices of good industrial relations in this jurisdiction.

The Evidence

42. The evidence on behalf of the Employee was given by Mr. Leonart Matthias, Shop Steward, of the Union and the Employee herself. Ms. L. Julie Purcell, Compensation Benefits and Industrial Relations Officer, testified on behalf of the Employer.
43. In addition to setting out the background facts the Employee testified that at the date of her dismissal she was being paid \$541.00 per week and was denied certain rights and privileges including annual increments; membership of Group Life Insurance Coverage; participation in the Pension Plan; progressive annual vacation; and overtime pay; annual bonuses; and clothing allowances.
44. Further, the Employee testified that she was denied the rightful privilege of joining the Employer’s Pension Scheme for which she was fully qualified for enrollment since November 1st 2001.
45. The Employee testified that she received no statement of termination within seven (7) days of her dismissal as required under the Code. Moreover, she stated that she received no “terminal benefits”.

46. The Employee contended that the termination of her services was unilateral, arbitrary, abusive, cruel, inhumane and a violation of her rights under the law and the Collective Agreement.
47. Under Cross-Examination, the Employee maintained that she was never paid her correct wages but eventually acknowledged receipt of the "back pay" to which she was entitled.
48. As to the Group Life Insurance policy and the pension plan, she admitted that although she made initial inquiries she did not follow up to ensure her participation.
49. In relation to the retirement age, when cross examined she admitted that the agreement stated that the age of retirement was stated to be sixty (60) years but that she did not expect that she would be required to stop working at that age. In that regard she named at least one person who worked past sixty (60) years.
50. Leonart Matthias testified that the Union and the Employer never agreed on or discussed the "retirement age" for bank's employees and that the issue was not addressed in the Collective Agreement. He named three (3) persons which continued to work past their 60th birthday. However, under cross-examination he admitted that he was not aware of the terms and conditions of their continued employment.
51. In addition, Mr. Matthias testified that in his opinion a conflict existed in relation to the "security of tenure" as provided by the Collective Agreement and the Employer's "retirement age". In his view, being required to retire at age sixty (60) is not job security.
52. On behalf of the Employer, Ms. Purcell testified that at the commencement of her employment the Employee agreed to the Employer's retirement age of 60 years and was notified of her retirement age on numerous occasions. In particular, she referred to the employment agreement signed in September 2004 and the Employer's letter issued in February 2008.
53. Ms. Purcell noted that the Collective Agreement does not address the retirement age of employees within the Bargaining Unit and did not give the Employee the sole right to choose the option of retirement.
54. The evidence of Ms. Purcell included her denials that the Employee was deprived of any rights and privileges as alleged. In particular, she denied that

the Employer failed to pay the Employee the negotiated salary increases, provide her with group life insurance coverage, membership in the Staff Pension Plan, outstanding vacation pay and overtime pay. She produced documentary evidence in support of her oral testimony.

55. Ultimately, Ms. Purcell denied that the termination of the services of the Employee was unilateral, arbitrary, abusive, cruel, inhumane and a violation of her rights under the law and the Collective Agreement.

Selected Submissions

56. On behalf of the Employee, Mr. Carty submitted that:

- (1) In light of the collective bargaining relationship, the first issue is whether Employer could enter into an individual employment arrangement with a mandatory retirement age of 60 years, contrary to the intent of the Collective Agreement.
- (2) By virtue of sections A3(e)-(h) and A5 of the Labour Code the "general working conditions" agreed in the Collective Agreement, from which a retirement age was omitted, are binding on the parties.
- (3) Given the Court's express obligation to fully take into account the provisions of the Code and good industrial relations practices; and in the absence of any provisions in the Code regarding retirement age, the matter of a "retirement age policy" must necessarily fall under the ambit of good industrial relations practices. There can be no valid retirement age policy unless it is agreed between the Union and the Employer.
- (4) Having regard for Section A8 of the Code, there can be no valid or binding term of employment in an individual contract of employment except such a term results in more advantageous working conditions than the minimum standards stipulated in the Code and/or the Collective Agreement. Employment for a "fixed term" to expire on her 60th birthday cannot be more advantageous than one for an "indefinite term". Consequently, the clause setting the retirement age at 60 years is unenforceable.

57. On behalf of the Employer, Miss Roberts submitted that:

- (1) The Employee agreed to retire at the age of 60 in accordance with the contract of employment, the Collective Agreements, the Labour Code

and good industrial relations practices. As a result of the agreement of a retirement age of 60 years, the contract became one for a fixed period expiring on the Employee's 60th birthday.

- (2) By virtue of section C57 of the Code the Employee cannot be deemed to have been dismissed unfairly since her employment was terminated at the expiration of the term specified at the time of hire.
- (3) Since the employment contract signed in September 2004 stipulated that the Bank's age of retirement is 60 years and further notice was given to her by letter in February 2008, the Employee had adequate notice of her retirement age.

Resolving the Secondary Issues

SECONDARY ISSUE 1: Whether an employment agreement for "permanent employment" is an agreement for employment of indefinite duration.

- 58. It is undisputed that the Employer converted the Employee's previous four individual terms of employment under four successive fixed-term contracts to a single continuous term of permanent employment commencing on November 7, 2000, the date of commencement of employment under the first contract.
- 59. It is also undisputed that upon the commencement of permanent employment the Employee became a member of the Bargaining Unit and that consequently the relevant terms of the Collective Agreement were applicable to her.
- 60. Further, it is undisputed that the Collective agreement contained no provision for a fixed term of employment or for compulsory retirement on any determinable date. To the contrary, under Article 10 of the Collective Agreement the Bank agreed to "ensure maximum job security" for its employees.
- 61. In our opinion, the concept of permanent employment does not encompass tenure limited to a fixed term demarcated at one end by the date of hire and on the other end by an employee's 60th birthday. In that regard, the Employer fully appreciated the distinction between the terms "temporary employment" and "fixed-term employment" on the one hand and "permanent position" or "permanent employment" on the other, as routinely used by it.

62. Moreover, we have noted that the Collective Agreement does not provide coverage for temporary or fixed-term employees. Obviously, such employees could not be assured the “maximum job security” under Article 10 of the Collective Agreement. In our opinion, the Employer was mindful of that and deliberately set about to convert the previous periods of fixed-term employment into one continuous period of permanent employment.
63. As we understand it, the term “permanent employee” as used by the Employer in the employment agreement, means an employee with a tenure of indefinite duration with no predetermined time limit, which would continue until such time in the future as the employer or/ and the employee, severally or jointly, no longer wished to continue the employment relationship.
64. On the facts of this case, the inclusion of item 13 of the terms of employment, stipulating the “Age of Retirement” did not render the employment contract to be one of a fixed term. To the contrary, the permanent employment of the Employee was employment of indefinite duration.

SECONDARY ISSUE 2: Whether the term in the employment agreement stipulating “the employer’s age of retirement” constitutes a working condition “more advantageous” to an employee in permanent employment where no age of retirement is stipulated in statute or the governing collective agreement.

65. The Employer’s letter dated August 25, 2004, whereby the Employee was fully acknowledged and embraced as an employee with permanent employment, marks a watershed. The permanency of her employment and her coverage under the Collective Agreement were confirmed by the Employer’s written Statement of Employment dated September 6, 2004. Thereafter, as a formally constituted member of the Bargaining Unit represented by the Union, the Employee was entitled to all negotiated and contingent rights, privileges and benefits.
66. Accordingly, any action by the Employer which constituted differential treatment meted out to the Employee, relative to other members of the Bargaining Unit without reasonable justification, amounted to discrimination against her. Reasonable justification can only be established by sufficiently cogent and convincing evidence. No such evidence was disclosed at the trial.
67. The Employer’s use of the term “permanent employee” is fundamentally inconsistent with the bare stipulation that its “age of retirement is 60 years”. The effect of the latter term was the Employer’s unilateral declaration to the Employee that it would limit the term of employment to the period from November 7, 2000 to July 21, 2008, the Employee’s sixtieth birthday. Clearly,

this was differential treatment meted out to the Employee without reasonable justification.

68. Under the circumstances, having particular regard to the involvement of the Union as Bargaining Agent for the Bargaining Unit of which the Employee was a member, (i) the employment contract contained no enforceable retirement date, (ii) there was no mutual consent to a termination date and (iii) there was no valid or reasonable notice that the Employer would terminate the agreement by implementing a mandatory retirement age.
69. As to the effect of employment of indefinite duration on the Employee, we will adopt the conclusion of, Rogers Murdoch, Chairman of this Court as she then was, in **Reference No. 3 of 1999, St. Lawrence De Freitas v E Alex Benjamin Limited** at page 19 of the judgment as follows:

“(1) The Employee’s contract was a contract of indefinite duration which entitled him to continue working either until he chose to cease voluntarily or by mutual agreement between himself and the Employer, or until he was no longer capable by reason of illness or otherwise of performing his duties”.

70. If there was no Collective Agreement, all other things being equal, then that unilateral declaration would serve as notice of the Employer’s intention to terminate her employment when the Employee attained the retirement age of 60 years. However, under the circumstances in this case, we deem the retirement age to be unenforceable. Moreover, we also find that any subsequent notification to the Employee of her impending retirement, in the absence of agreement or consultation with the Union, to be invalid.
71. In effect, neither at the commencement of her employment on November 7, 2000 as a permanent employee, nor at any subsequent date was there a predetermined date of termination of the Employee’s employment on July 21, 2008 or at all.
72. In the circumstances, as to the options open to the Employer, we will adapt and apply the additional concluding words of Chairman Rogers Murdoch in the **De Freitas Case** :

“The Employer was entitled to establish a retirement age policy, where the Employee’s contract contained no termination date, by either (i)

mutual consent or (ii) by giving the Employee reasonable notice that his employment would be terminated by the establishment of the policy”.

73. We adapt that conclusion to say: The Employer was entitled to establish a mandatory retirement age policy for members of the Bargaining Unit by either (i) mutual consent with the Union or (ii) by giving the Union and the Employee reasonable notice that the Employee’s employment would be terminated on a specified date by reason of the establishment of that policy.
74. As a result, the Employer’s termination of the Employee’s employment agreement on July 21, 2008 was not only without agreement but also without notice. In our opinion, neither the Employee’s individual employment agreement nor any notice oral or written, directed to her personally can be deemed to be adequate or sufficient notice since the same would fall outside the scope of the spirit and letter of the Code and the Collective Agreement.
75. In the final analysis, given the Employee’s permanent employment, we conclude that the stipulation of the Employer’s age of retirement in her employment contract did not introduce a condition of employment “more advantageous” to the Employee than those derived from the Collective Agreement and the Labour Code.

SECONDARY ISSUE 3: Whether the introduction of an employer’s age of retirement for a member of a recognized bargaining unit without agreement or consultation with the bargaining agent is contrary to the principles and practices of good industrial relations.

76. In our consideration of this issue, it is necessary to determine whether there was in existence an “age of retirement”. In that regard, we are mindful of the following:
- a) There is no provision in the Collective Agreement for a retirement age. In fact, the question of a retirement age was never agreed or discussed with the Union.
 - b) In previous contracts of employment where the employees held permanent positions, including those with Sharon Carlos, Nigel Benjamin and Sylvia Orr between 1994 and 1998, there was no clause specifying any age of retirement.
 - c) The four fixed-term contracts between the Employer and the Employee between 2000 and 2003 do not include any term specifying an age of retirement.
 - d) In its letter dated September 6, 2004, offering the Employee the position of Messenger/Maid it was stated that “the Bank’s age of retirement is sixty (60) years”.

- e) In its letter to the Employee dated February 2008, the Employer stated that: "As provided for in the Bank's policies the normal retirement date for an employee is the day of his/her 60th birthday".
- f) The Trust Deed, dated 13 October 1997, governing the Employer's Pension Scheme states that the Normal Pension Age for persons employed by the Employer before his 50th birthday, is 60 years. Thereafter, the Deed provides for the payment of pensions on "Normal Retirement", "Early Retirement" and "Late Retirement". In the latter case, it is acknowledged that employees may remain employed by the Employer up to age 70.
- g) The Statement of Termination reads: "Reason for termination: Retirement"

77. Taken as a whole, the evidence shows clearly the existence of "early", "normal" and "late" retirement. In our opinion, it is very instructive that no "mandatory" retirement age is stipulated anywhere in the documentary evidence.

78. It follows that, while there is no bar preventing the Employer from introducing a mandatory retirement age, it would be contrary to good industrial relations practices to have a provision to that effect unilaterally introduced into the 2004 employment agreement. In any event, a "normal" retirement age cannot be interpreted to mean a "mandatory" retirement age in the circumstances.

79. Further and notwithstanding that conclusion, the question arises as to whether the stipulation of the Employer's normal age of retirement and its effect of a mandatory retirement were not properly and fully brought home to the Employee. In our opinion, the Employer had a distinct obligation which it failed to discharge. Having regard to the evidence, we are inclined to conclude that, notwithstanding her signature at the foot of the letter, the Employee's "concurrence" with the full content of the offer of employment was never obtained.

SECONDARY ISSUE 4: Whether a term stipulating "the employer's age of retirement" in an individual employment agreement for permanent employment with a member of a recognized bargaining unit is valid and enforceable.

80. For the reasons stated above, and having particular regard to the spirit and letter of the provisions in the Code and the Collective Agreement regarding the collective bargaining process, it is our opinion that the term "the bank's age of retirement is 60 years" in the employment agreement is invalid and unenforceable.

SECONDARY ISSUE 5. Whether an employer's termination of the employment of an permanent employee, who is a member of a recognized bargaining unit, without notice to the bargaining agent, on the ground of the employer's age of retirement, is unfair.

81. As to the Employer's obligation under section C 10 (4) of the Code, we are mindful that at the commencement of the trial we entertained the Employee's application that the Employer be estopped from introducing evidence as to the precise reason for the termination of her employment. At that point, we formed an opinion based on the submissions of the parties and denied the application, thereby avoiding any semblance of a premature draconian outcome.
82. Having carefully considered the oral and documentary evidence, and having found that there was no fixed-term contract and that there was no timely statement of the precise reason for dismissal, we were inclined to approach the resolution of this issue in the conventional manner, consider the estoppel effect of Section C10(4), disregard the Employer's evidence, find that the Employee was unfairly dismissed and proceed to assess the compensation to which she is entitled.
83. However, we are constrained by the judgment of the Court of Appeal in **Civil Appeal No. 12 of 2002 E. Alex Benjamin Limited v. St. Lawrence De Freitas**. In that case, the Court of Appeal supplanted the conventional statutory approach with one focused on the reasonableness of the length of notice which employers are obliged to give when effecting compulsory retirement.
84. At paragraph 15 of the judgment of the Court of Appeal Saunders J.A (as he then was) stated:
[15]" The Court below, in my respectful opinion, adopted the wrong approach in holding that there was here an unfair dismissal on the basis that compulsory retirement is not specified as a "good cause" for dismissal pursuant to section C58 of the Labour Code. The Labour Code simply does not address the issue of retirement."
85. The effect of the Court of Appeal judgment, limited to that case, was to abandon the issue of the Employee's statutory right not to be unfairly dismissed. In its place, the real issue became one of reasonable notice. In the circumstances, save for purely academic purposes, it is no longer necessary to consider whether the dismissal was unfair in the statutory context.

THE MAIN ISSUE: Whether the Employee received any adequate, proper or reasonable notice of the Employer's retirement age policy requiring the compulsory termination of her employment when she attained the age of 60 years.

86. At paragraph 18 of the judgment the learned Justice of Appeal stated:
[18] **"In the circumstances, I would quash the decision of the Court below and substitute it with a finding that Mr. De Freitas had been retired but in circumstances where it was obligatory for his employers to have first given him reasonable notice. As regards the length of notice that should have been given, I would be guided by the Industrial Court's view that a period of at least 12 months should have been given. The period of 12 months is also in line with the judgment and approach of Singh, JA in Julie Saunders et al v St. Kitts Sugar and Manufacturing Corporation. In light of Mr. De Freitas' age and the fact that he had, in his words, "given in excess of some nine years loyal and efficient service to the company", I would agree that twelve months' notice would have been appropriate."**
87. In **Reference No. 5 of 2010 Theresa Gregory v. St. John's Cooperative Credit Union Limited** this Court, being mindful of the said Court of Appeal Judgment, the evidence and the submissions of Counsel limited itself to two issues only: (a) whether the employee had received reasonable notice and (b) if there was no reasonable notice, to what measure of damages was the employee entitled.
Having found that no reasonable notice was given, this Court followed the Court of Appeal and determined that the measure of damages was the equivalent of 12 months salary. Further the Court awarded costs in the sum of \$7,000.00.
88. Subsequently, in **Reference No. 32 of 2015: Irene Bowen v The Board of Trustees of Sunnyside Tutorial School**, this Court followed the Judgment of the Court of Appeal and awarded payment in lieu of reasonable notice equivalent to 12 months salary and costs of \$4,000.00.
89. It is noteworthy that the tenure of the employees in those cases were 9, 12 and 15 years respectively. In this case the Employee worked for approximately eight (8) years.
90. Based on our earlier findings, we conclude that the Employee received no proper, adequate or reasonable notice of the Employer's requirement for her compulsory retirement when she attained the age of sixty (60) years.

91. In the circumstances, we fix reasonable notice at twelve (12) months and find that the Employee is entitled compensation equivalent to twelve (12) months salary under that head.

The Awards

92. Having carefully considered the oral and documentary evidence, the Collective Agreements, the closing submissions of the Representatives and the relevant statutory provisions, we make the following awards:

(1) Basic Award in lieu of Notice of Compulsory Retirement:

The Employee is entitled to compensation by reason of the Employer's failure to give her reasonable notice of her compulsory retirement. In that regard, **we award the equivalent of 52 weeks wages in the sum of \$23,712.00**

(2) Accrued Benefits:

In addition, the Employee is also entitled to compensation for all accrued benefits of which she was deprived during her tenure as a member of the Bargaining Unit. We itemize her compensation in this category as follows:

(a) Retroactive wages:

During the course of trial the Employee conceded that she had been paid all retroactive wages to which she was entitled.

(b) Pay in lieu of vacation:

We accept the Employer's evidence as the number of vacation days taken with the result that the Employee was granted 6 days more than her entitlement. However, on the balance of probabilities, following the Employer's format of calculation, we find that the Employee was allowed no vacation for the periods:

1999 - 2000 (pro-rated November to December 2000): 2 days

2000 - 2001 12 days

In accordance with the Employer's statement of the Employee's "new salary" of \$456.00 per week by letter dated December 13, 2003, **we award the sum of \$729.60** representing 8 days $\{(12 + 2) - 6\}$ wages as payment in lieu of vacation.

(c) Overtime pay:

It is obvious that a dispute existed in respect of payments due to the Employee for work done during hours over and above those limited in the Collective Agreement. The Employee did not particularize her

claim. It is not in dispute that the Employer paid the Employee the sum of \$2,433.09 in two installments, the last of which was accepted by Dr. Dorsett, the Employee's Attorney-at-Law. In light of the Employer's letter dated September 3, 2007 to Mr. Mathias, the Shop Steward and Dr. Dorsett's letter dated July 3, 2008, we find no sufficient evidence to ground an award under this head.

(d)Uniform and shoe benefits;

Although the Employee initially claimed compensation in respect of "uniform and shoes", at the trial she pursued compensation for the shoes only. Given her limited evidence and that of Mr. Mathias, we find no basis for an award under this head.

(e)Group Life coverage:

The Employee's evidence in relation to her claim for compensation by virtue of her coverage under the Employer's group life policy is limited. However, we note that prior to being acknowledged as a permanent employee she was deprived of the coverage for over 3 years. She gave no evidence of illness or medical expenses during that period. In relation to her belated coverage, she admitted under cross examination that she benefitted from the policy when she was sick. However, she admitted that she did not follow up to ensure continuation of coverage beyond the termination of her employment. In the circumstances, there is not any sufficient evidence to ground an award under this head.

(3) Pension:

Under Articles 38 and 39 respectively of the 2006 and the 2009 Collective Agreements the Employer agreed to pay no less than 5% of the Employee's earnings into the Staff Pension Scheme. On the face of it, that obligation is not contingent upon the Employee's contribution of the same percentage. The Agreements are silent as to how membership is to be obtained. However, the employment agreement, being subordinate to the Collective Agreement, appears to superimpose a condition. It renders membership in the Scheme conditional upon the Employee's successful application to the Board of Trustees, a third party, for membership. In our opinion, such a state of affairs is untenable.

We note that upon her retroactive appointment as a permanent employee, the Employee should have been eligible for membership in the scheme with effect from October 1, 2002. It is noteworthy that the Employee testified that by letter dated September 14, 2004, she

submitted an application to join the Scheme but received no acknowledgement or other response from the Employer.

Under all the circumstances, we find that the Employer's actions or lack thereof within the whole spectrum of treatment meted out to the Employee, smacks of irresponsibility and indifference. In any event, the Employer's conduct in relation to the Employee's participation in the Pension Scheme, taken as a whole, is unreasonable.

We have carefully considered the pertinent submissions of Counsel for the Employer. While they are well structured and logically presented, they are fundamentally flawed for not fully taking into account the ascendancy of the Collective Agreement, the Employer's conduct and the role of the Union vis-a-vis that of the Employer in the collective bargaining / consultation process.

In the final analysis, we find that the Employer is wholly blameworthy and liable for the deprivation of the Employee's benefits under the Pension Scheme. Accordingly, **we award the Employee pension to be paid by the Employer at the rate equivalent to 50% of that set out in Part 4 of the Trust Deed establishing the Employer's Staff Pension Scheme.**

(4) Exemplary Damages:

As to exemplary damages, we are of the opinion that the treatment meted out to the Employee was harsh and oppressive. More specifically, the Employer's conduct was contrary to the spirit and letter of the Labour Code and the Collective Agreement. In particular, the Employee was subjected to discriminatory treatment. Moreover, the Employer's dealings with the Employee and the Union by extension showed a blatant disregard for the principles and practices of good industrial relations.

Having regard to section 10 of the Industrial Court Act, **we award exemplary damages in the sum of \$20,000.00.**

(5) Costs

Finally, based on the reasons stated above justifying the award of exemplary damages and having regard for the previous awards in similar cases, **we award costs in the sum of \$5,000.00.**

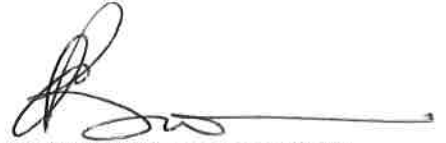
Order

93. We order that the Employer shall pay to the Employee the following amounts:

(1) Basic Award in lieu of Notice of Compulsory Retirement:	\$23,712.00
(2) Accrued Benefits: Payment in lieu of Vacation:	729.60
(3) Pension retroactive to July 21, 2008 at the Rate equivalent to 50% of the amount payable Under Part 4 of the Trust Deed establishing the Employer's Staff Pension Scheme.	
(4) Exemplary Damages	20,000.00
(5) Costs	<u>5,000.00</u>
Total	\$49,441.60

94. The Employer shall pay the total sum of \$49,441.60 and commence the payment of the pension on or before June 15, 2018.

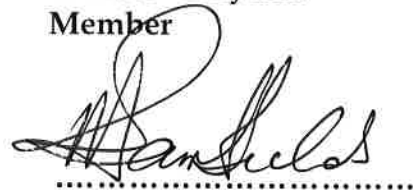
Dated the 09th day of May, 2018



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Charlesworth O.D. Brown
President



.....
Samuel R. Aymer
Member



.....
Megan Samuel-Fields
Member

