

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2021/0026

BETWEEN:

ANTIGUA COMMERCIAL BANK

Appellant

and

MARY E. PROPHET

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Safiya Roberts for the Appellant
Mr. Justin L. Simon KC for the Respondent

2024: September 30;
2025: October 30.

Civil Appeal – Employment Law – Retirement – Interpretation of employment contract and Collective Bargaining Agreement – Whether the Industrial Court erred in law in holding that the contractual term stipulating the retirement age was null, void and unenforceable as being contrary to the Collective Bargaining Agreement – Whether the Industrial Court erred in law in holding that there was no retirement age policy in the absence of a negotiated position with the Union – Construction of the term ‘permanent employee’ – Whether the Industrial Court erred in determining that the term connoted employment of indefinite duration – Whether the Industrial Court erred in finding that the respondent was not given proper, adequate or reasonable notice of retirement – Industrial relations practice – Exemplary Damages – Whether the Industrial Court erred in finding that the Bank’s conduct was harsh, oppressive and contrary to good industrial relations principles so as to warrant an award of exemplary damages – Pension entitlement – Whether the Industrial Court erred in finding that payment under the Staff Pension Scheme was not contingent upon the respondent’s contribution and that participation in the Scheme was automatic – Whether the Industrial

Court erred in holding that the Bank was liable to pay 50 per cent of the respondent's pension – Costs – Whether the Industrial Court erred in awarding costs to the respondent.

The respondent, Ms. Mary Prophet was employed by the appellant, the Antigua Commercial Bank from 7th November 2000, initially on successive fixed-term contracts as a messenger/maid. By letter dated 4th February 2004, the appellant was informed that her contract would not be renewed when it expired. The respondent thereafter contacted the Antigua and Barbuda Workers Union ("the Union") who was the sole bargaining agent for the bargaining unit of employees of the bank and who had concluded Collective Agreements with the bank for the periods 2002-2005 and 2005-2008 which established general terms and conditions of employment for its members who were employees of the bank. Following representations to the bank by the Union on her behalf, the bank by letter to Ms. Prophet dated 6th September 2004, offered her permanent employment retroactive to her start date. Clause 13 of the offer letter stated that 'the Bank's age of retirement is sixty (60) years'. The letter also indicated that as the respondent was over fifty at the time, her entry into the contributory pension scheme was not automatic and required an application to the scheme's Board of Trustees. Ms. Prophet submitted an application to the Board of Trustees but received no response. The offer letter was signed by Ms. Prophet on 10th September 2004. By letter dated 4th February 2008, the appellant was then notified by the respondent that she would be retired on her 60th birthday, on 21st July 2008. The respondent subsequently brought a claim in the Industrial Court, challenging the termination by asserting that her termination was made in violation of the collective agreement, without notice and contrary to good industrial relation practices and the laws of Antigua and Barbuda. The Industrial Court held that the term 'permanent employee' meant employment of indefinite duration with no pre-determined time limit; that the contractual retirement age was null, void and unenforceable; that no adequate notice of termination was given; and that the respondent was accordingly entitled to twelve month's wages in the sum of \$23,712.00 in lieu of notice, fourteen days' pay in lieu of vacation amounting to \$729.60, exemplary damages of \$20,000.00 for harsh and oppressive treatment, and a pension to be paid by the appellant at 50% of the rate in the Trust Deed.

The appellant, being dissatisfied with the decision of the Industrial Court, filed its appeal in which they set out twenty-six grounds. In summary, the bank contended that the Industrial Court erred in law and fact by misinterpreting the nature of 'permanent employment', wrongly invalidating the agreed retirement age clause, finding that no adequate notice was given, and making unjustified awards for exemplary damages, pension and costs.

The issues for determination on appeal can be conveniently condensed as follows: (1) in relation to its findings as to the retirement age, whether the Industrial Court erred in holding that: a) the term of the employment contract stipulating the retirement age was null, void and unenforceable as being in contravention of the Collective Bargaining Agreement; and b) there was no retirement age policy in the absence of a negotiated position with the Union with respect to such a policy; (2) whether the Industrial Court erred in determining that the term 'permanent employee' had the effect of employment of indefinite duration; (3) whether the Industrial Court erred in finding that no proper, adequate or reasonable notice was given of the respondent's retirement; (4) whether the Industrial Court erred in finding that the bank's conduct was harsh, oppressive and contrary to good industrial relations so as to

attract exemplary damages; (5) whether the Industrial Court erred in finding that the bank's payment under the Staff Pension Scheme was not contingent on the respondent's contribution to the Scheme and that the respondent's participation in the Scheme was automatic; and erred in holding that the bank is responsible for paying 50% of Ms. Prophet's pension; and (6) whether the Industrial Court erred in awarding costs to Ms. Prophet.

Held: allowing the appeal in part; making the orders at paragraph 107 of this judgment, and ordering no costs on the appeal, that:

1. A retirement policy as contemplated and described by this Court in **E. Alex Benjamin Limited v St. Lawrence DeFreitas** is not limited to the establishment and institution of a compulsory retirement age for a single employee. As clearly articulated by the Court, the policy must be applicable to all employees. It may be captured in each employment contract or it can be set out in a policy document that is readily available and communicated to the affected employees. The policy need not establish a compulsory retirement age (although it might) but must set out the main features of the company's position on retirement of employees generally. The fact that such a policy is implemented is not intrinsically unreasonable or unfair. However, the employer must ensure that its application is reasonable and fair so that adequate notice of retirement is given to an affected employee. There is no dispute that in the absence of a policy, a company is entitled to agree with individual employees the terms and conditions of their retirement in an employment contract limited to that discrete relationship. Additionally, since the **Labour Code** is silent about whether retirement affords a basis for dismissal, it is clear that the circumstances in this case do not give rise to a claim by Ms. Prophet for unfair dismissal, by virtue of the bank's unilateral imposition of a retirement policy.
2. The Trust Deed and the Explanatory Booklet to the Staff Pension Scheme which came into force in 1991 by the bank's unilateral initiative, comprehensively capture the bank's retirement age policy. The policy in practical terms translates to a mandatory retirement age of 60 years subject to the exceptions that the employee is either unable to continue working to age 60 years due to incapacity to fulfil his or her duties by reason of illness or injury; or there is an agreed deferral of retirement for a period up to but not extending beyond his or her 70th birthday. It does not translate to indefinite employment. Moreover, the Trust Deed, having been instituted by the bank satisfies the requirements of a retirement age policy that was imposed unilaterally by the bank, and it was not necessary for those terms as to retirement to be negotiated with the Union and incorporated as part of the Collective Agreements. It sufficed that the retirement age policy was outlined in the Trust Deed in 1991 and was open to membership by all employees. The Industrial Court therefore erred in determining that the term 'permanent employee' had the effect of employment of indefinite duration and in holding that there was no retirement age policy in the absence of a negotiated position with the Union with respect to such a policy.
3. The evidence is that the Union and Ms. Prophet were aware of the terms of the Trust Deed at all material times. It was unnecessary for those terms as to retirement to

be negotiated with the Union and incorporated as part of the Collective Agreement, they already having been settled years before the Collective Agreements were executed and well before the negotiation and execution of the employment contract with Ms. Prophet. It follows that on the facts of this case the Industrial Court erred in law by holding that there was no retirement age policy in the absence of a negotiated position with the Union with respect to such a policy. Applying the learning from **E. Alex Benjamin**, in the circumstances, Ms. Prophet was properly and lawfully retired in accordance with the bank's retirement age policy.

E. Alex Benjamin Limited v St. Lawrence DeFreitas Antigua and Barbuda Civil Appeal No. 12 of 2002 (delivered 16th September 2003, unreported) followed.

4. In deciding whether the notice of retirement is reasonable, the court should consider the relevant circumstances of the case such as the employee's qualifications, the stature in the position held, period of employment, the post held, the duties performed, the employee's age, expertise, skill, training and the reasonable length of time it would take him to obtain alternative employment. The Industrial Court did not advert to any of those factors in settling on a period of twelve months as reasonable notice and thereby erred. The court also erred in failing to discount that period by the five months between February and July 2008 during which time Ms. Prophet remained in the bank's employ. Having reviewed the circumstances of the case, eight months would have afforded the respondent a reasonable period of notice. Having received five months' notice by letter dated 4th February 2008, the respondent would be entitled to receive three additional months' pay in lieu of notice. Accordingly, the Industrial Court's award of twelve months' pay in lieu of notice is substituted with three months' (twelve weeks) pay in lieu of notice which amounts to \$5,472.00.

E. Alex Benjamin Limited v St. Lawrence DeFreitas Antigua and Barbuda Civil Appeal No. 12 of 2002 (delivered 16th September 2003, unreported) followed; **Julie Sanders et al v St. Kitts Sugar and Manufacturing Corporation** Saint Kitts and Nevis Civil Appeal No. 1 of 1993 (delivered 6th April 1995, unreported) followed.

5. Properly construed, sections 10(4) and (5) of the **Industrial Court Act** confers on the court a discretion to award exemplary damages to an employee whom the court determined was dismissed from his employment, but only where the court first finds that the circumstances of the dismissal were harsh and oppressive or not in accordance with the principles of good industrial relations practice. A finding of dismissal is a condition precedent to awarding exemplary damages. The Industrial Court did not find that the respondent was dismissed from her employment and therefore erred in awarding exemplary damages to the employee in contravention of the clear and unambiguous language of the statute. The award of exemplary damages is therefore quashed.

Section 10(4) and (5) of the **Industrial Court Act** Cap. 214 of the Laws of Antigua and Barbuda applied.

6. The Industrial Court erred in law by not attributing sufficient weight to the evidence that the pension scheme is run by a board of trustees which is separate from the bank. The court overlooked the fact that the employee did not address her application for admission into the Pension Scheme to the bank. Consequently, the foundation on which the court arrived at its conclusion regarding pension liability is evidentially and legally flawed. Its determination regarding payment of pension is thereby fatally undermined and cannot stand. The court therefore erred in finding that Ms. Prophet's participation in the Scheme was automatic and that the bank's payment under the Staff Pension Scheme was not contingent on such participation and her contribution to the Scheme and in holding that the bank is responsible for paying 50% of Ms. Prophet's pension.

Montserrat Utilities Limited v Mildred Kirwan Territory of Montserrat Labour Tribunal MNILTAP2013/0002 (delivered 17th April 2015, unreported) considered.

7. The court's power to award costs is to be exercised in exceptional cases as provided in section 10(2) of the **Industrial Court Act**. The Industrial Court justified its costs order by virtue of its reasons for awarding exemplary damages. In view of the conclusion that the exemplary damages award was made in error, the court's basis for the costs award falls away.

Section 10(2) of the **Industrial Court Act** Cap. 214 of the Laws of Antigua and Barbuda applied; **Kenard Byron v Eastern Caribbean Amalgamated Bank** ANUHCVP2010/0010 (31st May 2017, unreported) considered.

JUDGMENT

Introduction

- [1] **HENRY JA:** This is an appeal by Antigua Commercial Bank ("the bank") from the judgment of the Industrial Court dated 9th May 2018, in which it held that the bank failed to give adequate notice of termination of Mary Prophet's ("the employee") employment on the ground of retirement. The Industrial Court awarded the employee a basic award in lieu of notice of compulsory retirement and exemplary damages for harsh and oppressive treatment. The bank contends that the Industrial Court erred in finding that the termination was effected without adequate notice and without the employee's concurrence with a normal retirement age of 60 years.

Factual Matrix

- [2] There is common ground between the parties as to the circumstances surrounding the employee's employment with the bank. Ms. Prophet was initially employed with

the bank on 7th November 2000, on a temporary basis as a messenger/maid. Her primary duties were cleaning, washing dishes, serving refreshments and running errands. Her first contract spanned a period of 2 months from 7th November to 29th December 2000. This was followed by three successive one-year fixed-term contracts respectively, from 15th January 2001 to 14th January 2002, 20th February 2002 to 19th February 2003, and 20th February 2003 to 19th February 2004.

- [3] Towards the end of her contract in 2004, the bank informed the employee by letter dated 5th February 2004, that her contract would not be renewed when it expired. Being concerned, the employee contacted the Antigua and Barbuda Workers Union ("the Union") of which she was a member. The Union was the sole bargaining agent for the bargaining unit of employees of the bank. It had concluded Collective Agreements with the bank for the periods 2002-2005 and 2005-2008 which established general terms and conditions of employment for its members who were employees of the bank.
- [4] The Union made representations to the bank on Ms. Prophet's behalf, regarding the bank's expressed intention not to renew her contract of employment. As a result of those representations the bank reversed course and by letter to Ms. Prophet dated 6th September 2004, offered her permanent employment retroactive from 7th November 2000. The effect of this arrangement was to convert the four fixed-term contracts to a continuous term of permanent employment commencing November 2000.
- [5] In the meantime, Ms. Prophet continued in the bank's employment from 20th February 2004 without interruption up to the date of the letter, while the negotiations ensued between the bank and the Union. She signed the offer letter on 10th September 2004 signifying acceptance of the terms set out in it and that she remained in the bank's employ. The topics of retirement age and eligibility for pension were not the subject of negotiations between the Union and the bank prior to finalization of the contract of employment.

- [6] Notably, one of the terms set out in the offer letter was that the normal age of retirement at the bank is sixty years. It did not, however, specify that Ms. Prophet's retirement age was sixty years. The letter indicated that because Ms. Prophet was already above the age of fifty, her membership in the pension scheme was not automatic and she would therefore need to apply to become a member of the scheme. It was pointed out in the letter that the scheme was administered by a board of trustees, and any such application must be sent to the board.
- [7] By letter dated 14th September 2004, Ms. Prophet dispatched an application to the board of trustees seeking admission to the pension scheme. She received no response to the application. Accordingly, Ms. Prophet did not become a member of the pension scheme and neither the bank nor Ms. Prophet contributed to the scheme.
- [8] As she approached her sixtieth birthday in 2008, the bank sent Ms. Prophet a letter dated 4th February 2008, notifying her that as she would attain the age of sixty years on 21st July 2008, that would be her final day of work at the bank since she would have reached the normal retirement age. In June, the bank's agent informed Ms. Prophet orally that her services would be terminated on the ground of retirement on her sixtieth birthday and she would receive no benefits. She was invited to proceed on vacation from 27th June to 21st July 2008, which she did. She received no statement of termination at that time or any benefits.
- [9] By letter dated 11th August 2008, Ms. Prophet requested particulars of her termination. In response, the bank gave her a Statement of Termination and Certificate of Employment pursuant to section C10 of the **Antigua and Barbuda Labour Code** ("the **Labour Code**").¹ In it, the reason given for termination of her employment was retirement effective 21st July 2008.

¹ Cap. 27 of the Laws of Antigua and Barbuda.

- [10] Ms. Prophet was displeased with the termination. Consequently, she made a claim in the Industrial Court in which she asserted that her termination was made in violation of the Collective Agreement, without notice and contrary to good industrial relation practices and the laws of Antigua and Barbuda. She contended that the bank was not entitled to terminate her services on retirement grounds and had unlawfully deprived her of the right to choose her retirement date. She asserted that she should be compensated by reason of the unilateral, abusive, cruel, inhumane, unfair and arbitrary manner in which the bank had treated her. She claimed retroactive wages, terminal benefits and pension.
- [11] The bank resisted the claim and refuted Ms. Prophet's assertions that she was unfairly dismissed and entitled to compensation. It denied that her termination was effected unlawfully without notice or in contravention of the Collective Agreement or good industrial relation practices. The bank relied on the terms of employment outlined in the offer letter signed by Ms. Prophet and the 4th February 2008 letter to her reminding her of the retirement age. It maintained that the offer letter demonstrates that there was mutual agreement and consensus as to the retirement age and contended that Ms. Prophet did not have the sole right to choose the option of retirement.
- [12] The Industrial Court held among other things, that the term 'permanent employee' used in the employment agreement means an employee with a tenure of indefinite duration with no pre-determined time limit, that would continue until such time in the future as the employer and/or employee, severally or jointly, no longer wished to continue the employment relationship.² The court ruled further that the term of the agreement stipulating 'Age of Retirement' did not render the employment contract to be a fixed-term agreement.
- [13] The court ruled that the notification to Ms. Prophet of impending retirement was invalid having been effected without notice and in the absence of agreement. The

² Para. 63 of the Industrial Court's judgment.

retirement age stipulated in the agreement was held to be unenforceable. It concluded that in the circumstances twelve months' notice would have been reasonable.

- [14] The Industrial Court awarded Ms. Prophet twelve months' wages in the sum of \$23,712.00, as compensation in lieu of notice; fourteen days' pay in lieu of vacation amounting to \$729.60 and pension retroactive to 21st July 2008, at the rate of the amount to which she would have been entitled had she contributed to the pension scheme in the usual manner. She was also awarded exemplary damages of \$20,000.00 for what was described by the court as harsh, oppressive and discriminatory treatment by the bank and its 'blatant disregard for the principles and practices of good industrial relations' and costs of \$5,000.00.
- [15] Being dissatisfied with the Industrial Court's decision, the bank appealed. It contended among other things that the Industrial Court erred by holding that 'permanent' employment meant employment for an 'indefinite' duration, which could not allow for a retirement age to be mutually agreed by the parties or imposed by an employer; and by ruling that an employee of a permanent nature could not have her employment ended by the imposition of a retirement age or by voluntary resignation or retirement. It was submitted that the Industrial Court erred further by holding that the employment contract contained no enforceable retirement date.
- [16] Ms. Prophet argued that the appeal is without merit and should be dismissed. She contended that on the evidence, the Industrial Court properly ruled that she was dismissed without notice and it therefore did not err in awarding her compensation and other benefits.
- [17] For the reasons outlined in this judgment, the appeal is allowed in part. The orders of the Industrial Court are affirmed, save and except that the award of exemplary damages is quashed and the compensation in lieu of notice is reduced.

Issues

[18] The bank raised twenty-six grounds of appeal. The issues emerging from those grounds of appeal may conveniently be condensed into six. They are:

- (1) In relation to its findings as to the retirement age, whether the Industrial Court erred in holding that: a) the term of the employment contract stipulating the retirement age was null, void and unenforceable as being in contravention of the Collective Bargaining Agreement; and b) there was no retirement age policy in the absence of a negotiated position with the Union with respect to such a policy.
- (2) Whether the Industrial Court erred in determining that the term 'permanent employee' had the effect of employment of indefinite duration.
- (3) Whether the Industrial Court erred in finding that no proper, adequate or reasonable notice was given of the respondent's retirement.
- (4) Whether the Industrial Court erred in finding that the bank's conduct was harsh, oppressive and contrary to good industrial relations so as to attract exemplary damages.
- (5) Whether the Industrial Court erred in finding that the bank's payment under the Staff Pension Scheme was not contingent on the respondent's contribution in the Scheme and that the respondent's participation in the Scheme was automatic; and erred in holding that the bank is responsible for paying 50% of Ms. Prophet's pension.
- (6) Whether the Industrial Court erred in awarding costs to Ms. Prophet.

Pertinent documents

[19] Several documents are central to understanding the respective contentions of the parties as well as the Industrial Court's evaluation and determination of the dispute. These include the text of the 6th September 2004 and the 4th February 2008 letter from the bank to Ms. Prophet; the material parts of the employment contract; the

Trust Deed;³ the Explanatory Booklet to the Staff Pension Scheme (“Explanatory Booklet”)⁴ and the Collective Agreements. It is instructive to set out the critical parts of those records to frame the context within which the arguments are advanced. I now do so.

[20] In its 6th September 2004 offer letter authored by G. S. Joseph of General Manager, the bank wrote in part:

“... 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 as the Non Clerical level. ...

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. ...

16. Notice of termination of employment

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

17. ...

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.”⁵ (Underlining supplied)

³ Record of Appeal, pgs. 146 to 151.

⁴ Effective from 1st October 1991. Record of Appeal pgs. 35 – 45.

⁵ Record of Appeal, pgs. 114 -117.

Ms. Prophet signed the last page of the duplicate letter and entered the date 'September 10, 2004' as instructed, before returning it to the bank.

[21] Clauses 5 and 6 of the Explanatory Booklet are self-explanatory. They state:

"5. *Your normal pension age*

Your normal pension age shall be 60, provided you are under 50 when you join the Scheme. Please refer to the Secretary for special terms and conditions if you are aged over 50 at date of joining.

6. *Benefits payable on retirement at normal pension age*

Your pension shall be a percentage of your average salary (excluding special payments such as bonus, commission or payment for overtime) over the last three years immediately prior to your actual retirement." (Underlining supplied)

[22] Importantly, clause 7 allows for pension benefits to be payable on late retirement over the age of 60 years up to 70 years of age. It notes that arrangement must be made with the bank for retirement beyond the age of 60 years. In a similar manner, provision is made in clause 8 for early retirement between age 50 and 60 years by reason of incapability arising from injury or ill health, in which case a reduced pension is payable.

[23] The relevant parts of the 4th February 2008 letter state:

"... We make reference to your employment with the Antigua Commercial Bank as Messenger/Janitor from November 7, 2000. We note your birth date of July 21, 1948.

As provided for in the Bank's Policies the normal retirement date for an employee is the day of his/her 60th birthday. Having regard to your birth date of July 21, 1948, you will turn 60 on Monday July 21, 2008 which would be your last day of work with the Antigua Commercial Bank. ..."⁶ (Emphasis supplied)

[24] Ms. Prophet's tenure with the bank was governed by two collective agreements, each of which related to different successive time periods.⁷ The Collective Agreements were executed between the bank and the Union on 19th December

⁶ Record of Appeal, pg. 98.

⁷ The first remained in effect from 1st October 2002 to 30th September 2005. The second was operative from 1st October 2005 to 30th September 2008. [Clauses 39.01 and 40.01 respectively].

2006 and 19th November 2009 respectively.⁸ Clauses 1.01, 3.01, 16.02, 22.07, provide respectively:

“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, to secure a prompt and fair disposition of employee grievances, and to help achieve the highest level of performance consistent with safety and good health.

3.01 The Union is recognized as the sole bargaining agent for the employees of the Bank with the exception of: ...
for the purpose of collective bargaining in respect of salaries, hours of work and conditions of employment as contained in this agreement.

The Bank shall provide each employee covered by this Agreement with a copy of the Agreement and shall provide the Union with a reasonable number of copies.

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.

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 months of service after the official basic leave ends.
Resignation/retirement will take effect at the end of the leave. ...”⁹

Retirement Age, Permanent Employee and Notice The bank’s submissions

[25] The issues numbered one through three touch and concern the overarching contention about retirement and share overlapping factual bases. They are

⁸ Record of Appeal, pgs. 48 -60.

⁹ Clauses 39.01 and 40.01 appear respectively in the first and second Collective Agreements.

therefore dealt with together. The bank took several points on the issue of the retirement age. Firstly, it argued that it is settled in law that an employer may agree a mandatory retirement age directly with an employee (even where a collective agreement exists) or introduce and impose a compulsory retirement age provided it gives the employee adequate notice. The bank contended further that there was adequate evidence to support a finding that it had instituted a retirement age policy; had imposed a mandatory retirement age of sixty years and had provided Ms. Prophet with sufficient notice of the same, or had agreed a retirement age with her, she having consented to it. Therefore, she was not entitled to payment of twelve months' wages in lieu of notice.

- [26] Secondly, the bank submitted that the Industrial Court erred in finding that by the imposition of a mandatory retirement age in Ms. Prophet's case, this amounted to treatment being accorded to her of a differential and discriminatory nature from that of other employees who were also members of the bargaining unit.
- [27] A third contention was that the Industrial Court failed to determine whether there was a conflict between the employment agreement and the **Labour Code** or between the employment agreement and the Collective Agreement. It was argued that the court erred by holding that the retirement age clause in the contract contravened section C7 (i) and (iii) of the **Labour Code** and was therefore void and unenforceable.
- [28] On the question of the validity of the retirement age clause in the agreement, the bank submitted that the case of **E. Alex Benjamin Limited v St. Lawrence DeFreitas**¹⁰ makes it clear that a mandatory retirement age may be incorporated into an employment contract by mutual agreement between the employer and employee and that it is reasonable for an employer to institute a retirement age policy. Alternatively, an employer can, by giving adequate notice as to the retirement age, impose a retirement age policy. It was submitted that the Industrial Court failed

¹⁰ Antigua and Barbuda Civil Appeal No. 12 of 2002 (delivered 16th September 2003, unreported).

to apply the principles emanating from the **E. Alex Benjamin Limited** case when it reasoned that the term 'permanent employee' in the employment agreement, means an employee with a tenure of indefinite duration with no pre-determined time limit, that would continue until such future time 'as the employer or/and the employee, severally or jointly, no longer wished to continue the employment relationship'.

[29] The bank submitted that by applying such reasoning the Industrial Court fell into error by holding that despite the parties agreeing to a retirement age or the employer imposing a retirement age policy, the permanent employment was employment of indefinite duration. The bank reasoned that in so holding, the court failed to have regard to the evidence that Ms. Prophet was aware of and agreed that her employment would end at the age of 60 years, at which time she would retire. It was submitted that the Industrial Court failed to place the requisite weight on the contractual term by which Ms. Prophet agreed to the retirement age of 60 years.

[30] In relation to the court's finding of differential discriminatory treatment to Ms. Prophet it was argued that the court failed to consider the evidence that under the Collective Agreement there was no retirement age policy and therefore the retirement age clause in the agreement with Ms. Prophet could not be regarded as differential treatment from that of other members of the bargaining unit. Further, the court did not consider properly or attach sufficient weight to the evidence that other members of the bargaining unit were subjected to a retirement age policy of 60 years which applied to all staff and formed part of the term of employment. The bank reasoned that accordingly, the evidence did not support the court's conclusion of differential treatment being applied to Ms. Prophet.

[31] It was submitted further that in interpreting sections A8 and C7(i) of the **Labour Code**, the court seemed only to consider whether the term in the employment contract stipulating 'the employer's age of retirement' constituted a working condition 'more advantageous' and stopped short by not really determining whether

there was a conflict between the employment agreement and the **Labour Code** and/or the employment agreement and the Collective Agreement.

[32] The bank's position is that neither section A8 nor C7(i) of the **Labour Code** applies to the facts of the instant case because the **Code** does not provide for a retirement age or prohibits an employer from instituting a retirement age. Rather, the effect of sections A8 and C7 of the **Code** is to prohibit an employer from offering to an employee or establishing terms and conditions of employment that are less disadvantageous than the minimum standards set out in the **Code**. The bank argued that the Industrial Court seemed to come to the conclusion that the term of the retirement age was void but did not state how it fell below the minimum employment standards, particularly in light of the decision in **E. Alex Benjamin Limited v St. Lawrence DeFreitas**.

[33] The bank submitted that in deciding whether the retirement age clause in the contract was disadvantageous to the employee, the court was required to first consider whether it conflicted with the provisions of the agreement and this was not done. In addition, not only is there no clause in the contract that conflicts with the Collective Agreement, but also, the court did not identify any such conflicting provision. Therefore, it cannot be said that the offer of a retirement age policy is less disadvantageous than the terms of the **Code** or fall below the minimum employment standards set out in the **Code**. Accordingly, this ruling by the Industrial Court ought to be overturned as being flawed and instead a finding should be made that the imposition of a retirement age policy as a term in an employment contract is not in contravention of sections A8 and C7(i) of the **Labour Code**.

[34] As to whether the retirement age clause was null and void and unenforceable, it was submitted that the Industrial Court erred by so holding in reliance on sections C7(i) and (iii) of the **Labour Code**. The bank contended that in arriving at that determination the court had to find that the clause must: i) have been to the employee's disadvantage; and ii) conflict with the terms of a collective bargaining agreement. It argued that neither of those requirements was satisfied. It was

submitted that the retirement age clause in the contract was not a condition which fell below the minimum employment standards mentioned in C7(i) of the **Code** nor was it a provision which operated to the employee's disadvantage or under C7(iii) of the **Code** conflicted with the terms of either Collective Agreement.

[35] The bank submitted that the Collective Agreement referenced 'resignation/retirement' at article 22.07 which was erroneously construed by the court within the context of 'an employee's voluntary act of resignation or retirement'. It was submitted that article 22.07 does not use those express words and the surrounding language do not allow for such an interpretation or for such a term to be implied. It was argued that article 22.07 simply provides for the entitlement to leave on retirement, and the provision leaves it open as to whether the retirement arises by voluntary retirement, the imposition of a mandatory retirement age policy or by mutual agreement as to the age of retirement. Accordingly, properly interpreted it does not provide a term stipulating a specific retirement age or restricting the employer from imposing a retirement age policy. Therefore, the imposition of the retirement age cannot, in the absence of any reference to it in the Agreement, be held to be in conflict with its terms. Therefore, the court erred in finding that there was a conflict between the employment contract and the Collective Agreement.

[36] It was submitted that the court erred further by taking into account irrelevant matters and wrongly applying legal principles. In this regard, the bank argued that the court's reliance on an extract from **Reference No. 3 of 1999, St. Lawrence DeFreitas v E Alex Benjamin Limited** runs contrary to the Court of Appeal's pronouncement that an employer can impose a mandatory retirement age policy by mutual consent or after reasonable notice is given. It was argued that as a result of its failure to consider the evidence in light of the applicable principles and statutory provisions, the court erred in law and fact when it held that the retirement age was unenforceable and the notice invalid.

- [37] Another criticism made by the bank is that there was no evidential basis on which the Industrial Court could find that there was 'no mandatory retirement age' or that the bank had not instituted a retirement age policy. It was submitted that the bank appeared to make a distinction between 'mandatory' and 'normal' retirement age. It was argued that the bank produced evidence that it had implemented a retirement age policy, as documented in its letter dated 8th February 2008 to Ms. Prophet, clause 6 of the Trust Deed, the contract signed by Ms. Prophet in which she agreed to the retirement age and the letter to her informing her of her impending retirement. All these actions were in keeping with the learning on this issue.
- [38] Placing reliance on **Benjamin v DeFreitas**, the bank contended that there was ample evidence before the court on which to find that the bank had imposed a retirement age policy which was mandatory in the sense that employees could not opt out of it. Learned counsel Ms. Roberts stated that in that case, the Court of Appeal confirmed that the issue would be whether there was reasonable notice of such a retirement. Accordingly, the learned trial judge erred by drawing such inferences that are not supported in law or on the facts and by failing to apply the legal principles to the evidence in the case and by ruling that a normal retirement cannot be interpreted to mean mandatory retirement in the circumstances.
- [39] Regarding the court's pronouncement of how a mandatory retirement age policy may be instituted, it was submitted that the court erred in law by finding that 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 respondent reasonable notice that the respondent's employment would be terminated on a specified date by reason of the establishment of that policy'.
- [40] The bank contended that the court failed to have regard to the express provisions of the **Labour Code** referenced earlier, which allows an employer to conclude an agreement with an employee (even where there is a Collective Agreement) provided that the terms in the contract are not to the employee's disadvantage or conflict with

the Collective Agreement. It was submitted that there is no legal requirement for the employer to agree with the Union on the imposition of a mandatory retirement age. The bank reasoned that to the extent that the court so held, it erred by applying the principles of the **Benjamin v DeFreitas** case and not those in the **Labour Code**.

[41] It was submitted further that **Benjamin v DeFreitas** is distinguishable from the instant case on the basis that no retirement age was stipulated in the employment contract with Mr. DeFreitas. Another distinguishing feature was that the court was determining the terms under which it would be reasonable for an employer to impose a mandatory retirement age in the absence of mutual agreement between the parties, while in this case the employment contract did provide for a retirement age. Learned counsel argued that although no official negotiation took place as to Ms. Prophet's retirement age, the court ignored the evidence from her that the Union negotiated the September 2004 contract with the bank, being fully aware of the bank's retirement age policy.

[42] Learned counsel stated that neither judicial precedent nor the **Labour Code** requires that the Union's consent be obtained or notice be given to the Union before imposing a mandatory retirement age policy. Consequently, the court's decision to invalidate the notice in the employment contract and letter of 4th February 2008 for those reasons amounts to a vitiating illegality. In addition, the court erred in applying the principles in the **Benjamin v DeFreitas** case to the circumstances in this case which are significantly different from the former.

[43] It was submitted that the court erred further by taking irrelevant factors into consideration. Among them, being references to 'previous contracts of employment where the employees held permanent positions, including those with Sharon Carlos, Nigel Benjamin and Sylvia Orr between 1994 and 1998, [in which] there was no clause specifying any age of retirement.' Citing **Humphrey Michael Blackburn v LIAT (1974) Ltd.**,¹¹ learned counsel argued that the court erred in considering this

¹¹ ANULTAP2017/0001 (delivered 20th September 2018, unreported).

evidence as it was not admissible or admitted into evidence. Further, even if the court was entitled to rely on that material, it was submitted that those contracts relate to employment periods some eight to ten years prior to Ms. Prophet's, therefore, the absence of reference in those contracts to a retirement age ought not to have been determinative in the instant case.

[44] The bank's legal counsel also pointed to Ms. Prophet's testimony about employees who had worked beyond the age of 60 years at the bank and submitted that the Industrial Court failed to take that evidence into account and did not appreciate that such evidence does not negate the retirement age policy. Likewise, it was submitted that the court appeared to draw an adverse inference from the absence of a retirement provision in the fixed term contracts executed between the parties between 2000 and 2003 and in doing so, erred.

[45] Regarding whether Ms. Prophet consented to the retirement age policy, the bank's contention was that the evidence leads to no other conclusion than a finding that she agreed to the retirement age of sixty years in the contract by signing the employment contract and is bound by that agreement. As a result, she is estopped from claiming that she is not bound by the retirement age clause in her contract. Learned counsel Ms. Roberts argued that the court erred by applying the *non est factum* principle and finding to the contrary, even though no evidence was adduced that could have led to such an inference being drawn and although the court astutely noted during the hearing that Ms. Prophet did not plead that she was not bound by those terms. Additionally, the bank argued on the authority of **Sundry Workers v Antigua Commercial Bank**¹² that even if the principle could be validly invoked there is no factual or legal basis for doing so.

[46] Learned counsel submitted further, that by letter dated 2nd September 2004 the Union wrote to the bank requesting a change to terms in the employment contract but no objections were taken to the retirement age clause. It was argued that the

¹² ANULTAP2015/0005 (delivered 17th January 2017, unreported).

retirement clause was expressed in clear and simple terms that needed no further elucidation and, in any event, contrary to the court's ruling, the bank had no obligation to provide further explanation to the employee or seek her concurrence with the provision and there is no legal basis for such a finding. It was submitted further that the bank was deprived of the opportunity to respond to such contention in its pleadings and evidence at the trial and that the court erred by not holding that Ms. Prophet agreed to the terms of the offer letter.

[47] It was submitted that the errors made by the Industrial Court regarding those matters informed its erroneous finding on the central issue of whether Ms. Prophet was given reasonable notice of her retirement. Further, the Industrial Court erred in considering whether reasonable notice was given when, as held in the **DeFreitas** case, such a consideration becomes relevant only if there was no mutual agreement as to the retirement age.

[48] Alternatively, it was submitted that the court erred in holding that Ms. Prophet received no proper, adequate or reasonable notice of the bank's requirement for her compulsory retirement when she attained sixty years. It was argued that the offer letter, the employment contract and the 4th February 2008 letter were adequate notice of the bank's retirement age policy and was acknowledged by Ms. Prophet approximately four years before her sixtieth birthday. Additionally, she admitted in cross-examination that by signing the contract she accepted that she would work until age sixty, that she knew that as a permanent employee she would have to stop working at age 60 and that she received the 4th February 2008 letter which would have constituted five months' written notice. Furthermore, she said that 'she understood the retirement age was 60'.¹³ There was therefore no legal basis for invalidating those documents on the ground that they did not amount to notice to the Union, especially since the Union assisted in negotiating the 2006 employment contract.

¹³ Record of Appeal pg. 563, Transcript pg. 232, paras. 19-21.

- [49] It was argued that the Industrial Court erred by disregarding Ms. Prophet's documentary and oral evidence and was blatantly wrong when it held that no notice was given and by concluding that Ms. Prophet ought to be paid twelve months' pay in lieu of notice. Further, even if the court found that the employment contract and/or the 4th February 2008 letter did not constitute notice, there was no basis for ruling that Ms. Prophet was entitled to twelve months' notice and the court advanced no reasons for finding that twelve months' notice was reasonable in the circumstances.
- [50] Learned counsel stated that while the court appears to have relied on and adopted the twelve month notice period and corresponding salary in lieu of notice award applied by the Court of Appeal in the **Benjamin v DeFreitas** case and in **Theresa Gregory v St. John's Co-operative Credit Union Ltd.**,¹⁴ it would have erred in doing so because it failed to take into account important distinguishing factors between those cases and the case at bar and failed to apply the principles established in the **DeFreitas** case with respect to determination of a reasonable notice period by reference to the particular facts of this case.
- [51] The bank relied on **Julie Sanders et al v St. Kitts Sugar and Manufacturing Corporation**,¹⁵ **DeFreitas** and the Canadian case of **Bardal v The Globe & Mail Ltd.**¹⁶ as authorities for the proposition that in determining the appropriate period of notice and award in lieu of notice, the court is required to have regard to several factors. Those non-exhaustive factors include the duration of the employment, the employee's seniority, the length of the employee's employment and responsibilities of the position held by the employee, her age, qualifications, skill, training, whether similar employment is available elsewhere and the realistic period of time that it would take the employee to obtain similar employment.
- [52] It was submitted that the court failed to have regard to Ms. Prophet's advanced age; the non-specialized nature of her job title which suggests that she would not have

¹⁴ Reference No. 32 of 2015.

¹⁵ Saint Christopher and Nevis Court of Appeal No. 1 of 1993 (delivered 6th April 1995, unreported).

¹⁶ [1960] O.J. No. 149 (H.C.).

had difficulty in finding similar employment; that she did not hold a senior position at the bank and that while she was aware of the 60-year retirement age policy from February 2008 she expressed no desire to the bank not to retire at her 60th birthday. In the circumstances, the court did not give any consideration to the foregoing factors and fixed reasonable notice at twelve months without identifying the circumstances that warranted that period of notice or giving reasons for so doing and thereby erred.

Ms. Prophet's submissions

[53] Ms. Prophet acknowledged that the case of **E. Alex Benjamin Limited v St. Lawrence DeFreitas** is authority for the principle that an employer may impose a mandatory retirement age in relation to an employment contract for an indefinite period provided that there is mutual agreement between the employer and employee or the employer gives adequate notice to the employee of the retirement date. She argued, however, that this is not a principle of general application. It would not apply where a Union is involved as the bargaining agent for employees but rather applies only to agreements between an employer and employee. She submitted that it does not apply to circumstances where a Union is recognized as the sole bargaining agent for the bank's employees and in those circumstances any agreement as to the retirement age would necessarily have to be concluded between the bank and the Union for it to have binding effect.

[54] It was contended that no evidence was adduced that the Union and the bank had negotiated and agreed on the retirement clause and it could not therefore be said that there was mutual agreement between the parties as to the retirement age being 60 years, even though the bank had a declared policy of such retirement age for its employees. It was submitted that in the premises, Ms. Prophet's signature signifying concurrence with the terms of the 6th September 2004 employment letter does not make the retirement age clause in that letter a binding term of her employment. Consequently, she is not estopped from asserting that she is not bound by that clause in the contract. No legal authority was advanced in support of these arguments.

- [55] As to notice, Ms. Prophet contended that the 4th February 2008 letter was not sufficient notice of the retirement date. Accordingly, she relied on the cases of **Benjamin v DeFreitas** and **Julie Sanders et al v St. Kitts Sugar and Manufacturing Corporation** in defence of the Industrial Court's award of 52 weeks' notice pay as being reasonable in the circumstances.
- [56] Learned King's Counsel, Mr. Justin Simon, submitted on Ms. Prophet's behalf that neither the **Labour Code** nor the Collective Agreements between the Union and the bank made provision for a retirement age and therefore none could be invoked in her case. Additionally, the **Labour Code (Amendment) Act 2019**¹⁷ that introduced the definitions of 'contract worker' and 'fixed term contract' should not be used to clarify the meaning of 'permanent employee' or its use prior to 2019. He argued that while the Staff Pension Scheme Rules outlined in the Schedule to the Trust Deed mention 'normal pension age', this deals with pensions payable under the Pension Scheme established by the Trust Deed to which neither the Union nor the employees are parties. He stated that it follows that the Trust Deed cannot and does not assist the bank in furnishing proof of its retirement age policy.
- [57] It was submitted further that Ms. Prophet signed her consent to the terms and conditions to the employment contract without bringing it to the attention of the Union. Learned King's Counsel accepted that there is no evidence that Ms. Prophet did not understand that the term of her employment meant that she would retire at age 60. He contended however that in the absence of a retirement age policy being stipulated in the Collective Agreements, it is doubtful that her signing of the employment contract signifying consent to a retirement age is binding on her as an individual employee. He stated that any matter that deals with employment terms cannot be unilaterally imposed on an employee and rejected any suggestion that an employer can impose a retirement age without consultation or representation from a Union.

¹⁷ Act No. 9 of 2019 of the Laws of Antigua and Barbuda.

Discussion

[58] The Industrial Court found that Ms. Prophet became a permanent employee of the bank in September 2004 when her previous successive fixed-term contracts were, together with the ensuing period of her employment, converted into a single continuous term of permanent employment commencing on 7th November 2000. It construed the expression 'permanent employment' to mean employment for an indefinite period, holding:

“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 could 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.”¹⁸

[59] No case law, legal principles or other legal precedent was cited in support of this conclusion or analysed in arriving at this determination. Referencing Article 10 of the Collective Agreement, the court reasoned that in circumstances where the Collective Agreement contained no provision for a fixed-term of employment or for compulsory retirement on any determinable date, the bank's reliance on the retirement age clause in the employment letter is contrary to the bank's undertaking to 'ensure maximum job security' in Article 10 which states:

“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.”

[60] The court held further that the retirement clause in the employment letter constituted the bank'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

¹⁸ Record of Appeal pg. 284, at paras. 63 and 64 of the Industrial Court's judgment.

sixtieth birthday'. It concluded that this was differential and discriminatory treatment from that accorded to other similarly placed employees and had no reasonable justification. The court ruled that in the circumstances the employment contract contained no enforceable retirement date, there was no mutual consent to a termination date and no valid or reasonable notice had been given to Ms. Prophet that the bank would terminate the agreement by implementing a mandatory retirement age.

[61] The Industrial Court observed that in **E. Alex Benjamin Limited v St. Lawrence DeFreitas** this Court signalled a departure from the conventional unfair dismissal route in cases involving termination due to the imposition of a retirement policy by the employer. It quite rightly interpreted this Court's reasoning and disposition as having replaced the unfair dismissal consideration in such cases with a single consideration as to the reasonableness of the notice given to the employee of the impending retirement. The Industrial Court made no finding that Ms. Prophet had been unfairly dismissed but instead ruled that she had not received adequate notice of the retirement date proposed by the bank.

[62] The Industrial Court reasoned:

"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." (Emphasis added)¹⁹

¹⁹ Record of Appeal pg. 288, paras. 82 and 83 of the Industrial Court's judgment.

- [63] This Court's decision in **E. Alex Benjamin Limited v St. Lawrence DeFreitas** is instructive on several counts. In it, this Court determined an appeal against a decision of the Industrial Court that the employee Mr. DeFreitas had been unfairly dismissed under the employer's compulsory retirement policy that was imposed unilaterally (for all employees) a mere three months before he was retired. Mr. DeFreitas was notified officially of his impending retirement just two months before the retirement date.
- [64] This Court ruled that the Industrial Court erred in law in finding that Mr. DeFreitas had been unfairly dismissed. It quashed the Industrial Court's determination to that effect and substituted its own ruling that: 'Mr. De Freitas had been retired but in circumstances where it was obligatory for his employers to have first given him reasonable notice.'²⁰ The rationale for this Court's decision was that the implementation of a retirement policy *per se* is neither unreasonable nor unfair. This Court also noted that the **Labour Code** does not address the issue of retirement as a basis for dismissal and therefore rejected the notion that the unilateral imposition of a retirement policy for all employees by an employer could in such circumstances found a claim for unfair dismissal.
- [65] Learned King's Counsel's observation that no Union was involved in the **DeFreitas** case which distinguishes it from the case at the appeal at bar, is apt. It follows that there was no Collective Agreement under consideration in **DeFreitas**. Another distinguishing feature is that unlike in this case, in **DeFreitas** there was no dispute as to whether the employer had in place a retirement age policy for all of its employees. In this instance, the bank contends that such a policy exists and points to the Trust Deed as one of the documents that instituted the retirement age policy. The other documents relied on are the offer letter dated 6th September 2004 and the letter dated 4th February 2008.

²⁰ Antigua and Barbuda Civil Appeal No. 12 of 2002 (delivered 16th September 2003, unreported) at para. 18.

- [66] Ms. Prophet maintained that no compulsory retirement age policy was in effect for all employees. Her witness, Mr. Leonart Matthias, the Union's Shop Steward, asserted in his witness statement that he was aware that 'the Union and the Bank never discussed and/or reach agreement on a 'Retirement Age' for Bank employees that fell within the applicable bargaining Unit. In fact, the issue is not addressed anywhere (sic) in the Collective Agreement.'²¹ The question of whether there was a retirement age policy for all employees is central to resolution of these related issues. I shall therefore consider the evidence on this point in light of the competing submissions and the court's ruling.
- [67] It is self-evident that the letter dated 6th September 2004 and the 8th February 2008 letter were both addressed to Ms. Prophet and relate to her individual and personal employment contract with the bank. Neither letter purported to or could reasonably be construed as affecting the employment status of the other employees of the bank in any matter and could not and did not introduce a compulsory retirement age policy for the bank. Therefore, the bank's contentions to such effect are not sustainable.
- [68] In relation to the Trust Deed and the Explanatory Booklet, the bank's reliance on clause 6 is worth considering. Clause 6 of the Explanatory Booklet has been outlined above. The Trust Deed was exhibited to Mr. Matthias' witness statement. It is made between the bank as the Principal Employer, the ACB Mortgage & Trust Company Limited as the Associated Employer and seven individuals named as trustees. The Trust Deed's beneficiaries are those staff of the bank who have been admitted to the Pension Scheme as members. Clause 3 of the Trust Deed provides that the normal pension age is 60 years for male and female members who have not attained age 50 at the date of his/or her admission to the Scheme and stipulates that any member who is admitted to the Scheme after attaining 50 years must retire after at

²¹ Record of Appeal pg. 17 to 19, para. 11 of Leonart Matthias witness statement filed on 11th December 2014.

least 10 years membership in the Scheme and his normal retirement age shall be determined accordingly.

[69] Clause 3 states:

“NORMAL PENSION AGE

The **Normal Pension Age** for any Member who has not attained his 50th birthday at the Date of Commencement (or at any later date of admission to the Scheme) is 60 for males and females. Any Member who is over age 50 at the Date of Commencement of the Scheme (or at any later date of admission to the Scheme) shall retire after at least 10 years Membership of the Scheme and his Normal Pension Age shall be determined accordingly.”
(Emphasis added)

[70] Clause 6 of the Trust Deed simply provides for payment of a benefit equivalent to all contributions paid by him or her with or without an additional sum at the Trustees’ discretion. It adds nothing useful to the discussion or outcome of this case and is therefore disregarded.

[71] It seems clear to me that in presenting their respective submissions, the bank and Ms. Prophet conflated the terms ‘retirement age policy’ and ‘retirement age’. This led the bank to submit that it was entitled as the employer to impose a mandatory retirement age on Ms. Prophet. In Ms. Prophet’s case, it led her to conclude that based on the ruling in **DeFreitas** the Union could, on her behalf by mutual agreement with the bank, include a retirement age clause in the employment contract or the bank could lawfully stipulate a binding retirement age provided that it gave her and the Union adequate notice. In both cases, the bank and Ms. Prophet appeared to overlook or miss the distinction between a policy of retirement and a contractual term as to retirement.

[72] Further, in presenting their submissions much emphasis was placed unnecessarily, in my view, on the adjective ‘mandatory/compulsory’ to qualify policy. It goes without saying that a retirement age policy is not defined by or restricted to stipulations as to a mandatory or compulsory age of retirement but is equally applicable where the term ‘normal’ is deployed, which conveys the usual or accepted age of retirement.

[73] To my mind, a retirement policy as contemplated and described by this Court in **E. Alex Benjamin Limited v St. Lawrence DeFreitas** is not limited to the establishment and institution of a compulsory retirement age for a single employee. As clearly articulated by the Court, the policy must be applicable to all employees. Obviously, it may be captured in each employment contract or it can be set out in a policy document that is readily available and communicated to the affected employees. The policy need not establish a compulsory retirement age (although it might) but must set out the main features of the company's position on retirement of employees generally. The fact that such a policy is implemented is not intrinsically unreasonable or unfair. However, the employer must ensure that its application is reasonable and fair so that adequate notice of retirement is given to an affected employee. There is no dispute that in the absence of a policy, a company is entitled to agree with individual employees the terms and conditions of their retirement in an employment contract limited to that discrete relationship. Additionally, as was held in **E. Alex Benjamin Limited** on similar facts to those in the instant case, since the **Labour Code** is silent about whether retirement affords a basis for dismissal, it is clear that the circumstances in this case do not give rise to a claim by Ms. Prophet for unfair dismissal, by virtue of the bank's unilateral imposition of a retirement policy.

[74] In the case at the appeal bar, it seems to me that the bank's policy on a retirement age for its employees is captured in the Trust Deed as supplemented and explained in the Explanatory Booklet. There, a normal retirement age of 60 years is specified at clause 3 of the Trust Deed with provision for a negotiated departure in certain instances such as early retirement or delayed retirement. The Trust Deed makes provision for negotiations with respect to shortening or delaying the period to retirement. While it is true that a primary objective of the Trust Deed is to establish a pension benefit scheme for employees of the bank who are members of the Pension Scheme, it clearly articulates the bank's position regarding the usual age of retirement of employees and outlines the exceptions to that normal age and procedures for accessing such exceptional facilities. In my opinion, the Trust Deed

and Explanatory Booklet, which came into force in 1991 by the bank's unilateral initiative, comprehensively capture the bank's retirement age policy.

[75] As is clear from the language of the Trust Deed, the normal, usual or customary age of retirement for bank employees who are members of the Pension Scheme is 60 years, unless such an employee is either unable to continue working to age 60 years due to incapacity to fulfil his duties by reason of illness or injury; or where he initiates and succeeds in concluding arrangements with the bank for an agreed deferral of retirement for a period up to but not extending beyond his or her 70th birthday. This policy in practical terms translates to a mandatory retirement age of 60 years subject to either exception and an upper retirement age of 70 years, not indefinite employment as contended by Ms. Prophet and found by the Industrial Court. The Industrial Court therefore erred in determining that the term 'permanent employee' had the effect of employment of indefinite duration.

[76] There is no evidence that the Union was involved in negotiating or implementing the terms of the Trust Deed which predated both Collective Agreements. In my opinion, the Trust Deed, having been instituted by the bank satisfies the requirements of a retirement age policy that was imposed unilaterally by the bank. In such circumstances, it was not necessary for the bank to negotiate those terms with the Union for inclusion in the Collective Agreements that were subsequently finalised. It sufficed that the retirement age policy was outlined in the Trust Deed in 1991 and was open to membership by all employees. In this way, the bank published its retirement age policy, albeit unilaterally in conceptualization and implementation. The evidence is that the Union and Ms. Prophet were aware of the terms of the Trust Deed at all material times. It was unnecessary for those terms as to retirement to be negotiated with the Union and incorporated as part of the Collective Agreement, they already having been settled years before the Collective Agreements were executed and well before the negotiation and execution of the employment contract with Ms. Prophet. It follows that on the facts of this case the Industrial Court erred in law by holding that there was no retirement age policy in the absence of a negotiated position with the Union with respect to such a policy. Applying the

learning from **E. Alex Benjamin**, in the circumstances, Ms. Prophet was properly and lawfully retired in accordance with the bank's retirement age policy.

[77] Turning next to the question of notice, the undisputed evidence is that Ms. Prophet and the Union were aware of the Trust Deed and its importance in relation to the bank's retirement age policy. Ms. Prophet was informed of the existence of the Trust Deed and of the normal retirement age by letters to Ms. Prophet dated 6th September 2004 and 4th February 2008. The fundamental question is whether either or both letters and, by extension, the Trust Deed and Explanatory Booklet provided adequate notice of the bank's retirement age policy and Ms. Prophet's retirement age of 60 years in the absence of a negotiated extension beyond her 60th birthday.

[78] By mathematical calculation, the length of notice effected by the September 2004 letter exceeds three years. The 4th February 2008 letter was issued just over 5 months before Ms. Prophet's 60th birthday. Beyond question, the September 2004 letter would constitute more than adequate notice of the retirement age policy. However, the language used in that offer letter did not stipulate that Ms. Prophet's retirement date was 21st July 2008. It stopped short of applying the retirement age of 60 years to her. This failure assumes greater significance in light of the fact that she had already attained age 50 by then. In view of clause 3 of the Trust Deed, retirement for her at age 60 years would not have been automatic since it was open to her to seek an extension of her retirement. In those circumstances, I would hold that the September 2004 letter could not and did not in law supply notice that her retirement would take place in July 2008.

[79] The notification that she was required to demit office in July 2008 came only in February 2008. As indicated above, the bank wrote to her, 'Having regard to your birth date of July 21, 1948, you will turn 60 on Monday July 21, 2008, which would be your last day of work with the Antigua Commercial Bank.' This implied that the normal retirement age was being invoked in relation to her. The Industrial Court quite properly held the issue of unfair dismissal did not arise and the essential question was whether Ms. Prophet had received adequate notice and ruled that it

was not. I am satisfied that the Industrial Court did not err in finding that no proper, adequate or reasonable notice was given of Ms. Prophet's retirement or her compulsory retirement when she attained the age of 60 years.

[80] But that is not the end of the matter. It is noteworthy that in arriving at this conclusion, the court simply applied the notice period that was utilized in previous decisions of that court and in **E. Alex Benjamin** by this Court. No other analysis was undertaken as to other relevant factors.

[81] In **E. Alex Benjamin**, this Court affirmed the pronouncement of the British Columbia Court in **Brown v Coles**²² and this Court in **Julie Sanders et al v St. Kitts Sugar and Manufacturing Corporation** that in deciding whether the notice is reasonable the Court should consider the relevant circumstances of the case such as the employee's qualifications, the stature in the position held, period of employment, the post held, the duties performed, the employee's age, expertise, skill, training and the reasonable length of time it would take him to obtain alternative employment. In this case, the Industrial Court did not advert to any of those factors in settling on a period of twelve months as reasonable notice. Moreover, the Court did not discount that period by the five months between February and July 2008 during which time Ms. Prophet remained in the bank's employ. In failing to conduct this analysis, it erred. This Court would have to conduct that evaluative exercise.

[82] From the evidentiary record, it is discernible that Ms. Prophet appeared not to be incapable of continuing to perform the functions for which she was employed. She was 60 years old and could be reasonably expected to give at least another 2 to 5 years of competent service as a maid/cleaner. Realistically, it should not have taken her more than 3 – 6 months to obtain another job suitable to her competence. It appears that she provided the bank with eight years faithful service. In the premises, I am of the opinion that in all the circumstances eight months would have afforded her a reasonable period of notice. Having received five months' notice by letter

²² (1986) 5 B.C.L.R. (2d) 143.

dated 4th February 2008, she would be entitled to receive three additional months' pay in lieu of notice. I would therefore substitute the Industrial Court's award of twelve months' pay in lieu of notice with three months (twelve weeks) pay in lieu of notice which amounts to \$5,472.00.

- [83] As to whether the Industrial Court erred in holding that the term of the employment contract stipulating the retirement age was null, void and unenforceable as being in contravention of the Collective Bargaining Agreement, based on the foregoing conclusion that a retirement policy existed which applied to Ms. Prophet and that she was properly retired, it is not necessary to consider this question.

Exemplary Damages **The bank's submissions**

- [84] The thrust of the bank's criticism of the exemplary damages award rests principally on a contention that the Industrial Court exceeded its authority in making the award purportedly in reliance on section 10(4) and (5) of the **Industrial Court Act**.²³ On the bank's behalf, learned counsel Ms. Roberts noted that under those provisions the Court is empowered to award exemplary damages only where in its opinion an employee has been dismissed not in accordance with the principles of good industrial relations practice but under harsh and oppressive circumstances. She noted that in the absence of a finding of unfair dismissal or evidence that supports such a finding the Court erred in invoking section 10 to make such an award.
- [85] Citing **Rookes v Barnard**,²⁴ **Comble Deterville v Castries Constituency Council**,²⁵ and **Torres v Point Lisas Industrial Port Development Corporation Ltd.**²⁶ learned counsel submitted that exemplary damages are available as remedies in claims involving findings of oppressive, unconstitutional conduct by civil servants, conduct calculated to result in profit, or where authorized by statute and

²³ Cap. 214 of the Laws of Antigua and Barbuda.

²⁴ [1964] AC 1129.

²⁵ SLUHCv2018/0144 (delivered 22nd May 2019, unreported).

²⁶ (2007) 74 WIR 431.

in breach of contract cases on determination that a defendant's conduct was reprehensible. She argued that the bank's behavior was not characterized by such features. Instead, the Industrial Court gave a broad generalization of the bank's conduct as being in disregard of the principles and practices of good industrial practices, without condescending to details of the conduct at which the award was directed.

Ms. Prophet's Submissions

- [86] On Ms. Prophet's behalf, learned King's Counsel Mr. Simon properly conceded that in the absence of a finding of unfair dismissal there was no basis for the Industrial Court to award her exemplary damages. He accepted that in the circumstances a finding of unfair dismissal is a precondition to such an award.

Discussion

- [87] This is a short point which turns on the application of section 10 of the **Industrial Court Act** on which the court relied to make the award of exemplary damages. Paragraph 92 of the judgment set out the reliefs granted to Ms. Prophet. Sub-paragraph (4) states succinctly:

"(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.' (Underlining supplied)

- [88] The relevant parts of section 10 of the **Industrial Court Act** are sub-sections (4) and (5) which provide:

"(4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the **Court may, in any dispute concerning the dismissal of an employee, order the re-employment or re-instatement (in his former or a similar position) of any employee, subject to such conditions as the Court thinks fit to impose**, or the payment of compensation or damages

whether or not *in lieu* of such re-employment or re-instatement, or **the payment of exemplary damages *in lieu* of such re-employment or re-instatement.**

(5) An order under subsection (4) may be made **where, in the opinion of the Court, an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice**; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.” (Emphasis added)

[89] Properly construed, sections 10(4) and (5) of the **Industrial Court Act** confers on the court a discretion to award exemplary damages to an employee whom the court determined was dismissed from his employment, but only where the court first finds that the circumstances of the dismissal were harsh and oppressive or not in accordance with the principles of good industrial relations practice. The court did not find that Ms. Prophet was dismissed from her employment. Such a finding is a condition precedent to awarding exemplary damages. It follows that the court erred in awarding exemplary damages to Ms. Prophet in contravention of the clear and unambiguous language of sections 10(4) and (5) of the **Industrial Court Act**. For this reason the award of exemplary damages must be quashed.

[90] I consider it important to point out and underscore that the bank’s reliance on the court’s common law to award exemplary damages as articulated in **Rookes v Barnard**, has no applicability to cases involving an award of exemplary damages by the Industrial Court. The court’s power to make such an award in those cases in lieu of an order for re-employment or re-instatement emanates from the express provisions of the **Industrial Court Act** and is not conditioned on a finding of harsh, oppressive, injurious or outrageous conduct by a defendant. Moreover, as is well-settled and as explained by the Privy Council in **Antigua and Barbuda Transport Board v Anderson Carty**²⁷ an award of exemplary damages as compensation for oppressive, arbitrary or unconstitutional action is limited to and recoverable only in cases against servants and agents of government and is not available against

²⁷ [2025] UKPC 38.

private corporations and individuals. To the extent that **Rookes v Barnard** was cited as a possible basis for the Industrial Court to award exemplary damages generally, the learning is to the contrary. The Industrial Court's jurisdiction for doing so is wholly statutory.

Pension Award Bank's submissions

- [91] The bank's challenges to the court's finding regarding its liability to pay a pension to Ms. Prophet were premised on four grounds. Firstly, it was submitted that the court disregarded or gave insufficient weight to the fact that the Pension Scheme was contributory in nature as set out in the Trust Deed and the Explanatory Booklet and as stated in the employment contract and Collective Agreements, and that Ms. Prophet made no contributions to the Scheme. Therefore, there was no legal basis for holding the bank liable for the non-contribution and the court erred in finding that payment of Ms. Prophet's pension by the bank was not contingent on her contributions to the Scheme. Secondly, the bank contended that the court failed to take into account and attach sufficient weight to the rules and procedures specified in the Pension Scheme and Explanatory Booklet that explained that employees over age 50 are not eligible automatically to join the scheme; or clause 12 of the employment contract to like effect and the provisions in the contract advising that Ms. Prophet must make an application to the Board of Trustees. Further, it failed to consider that the Collective Agreement contained no stipulation as to automatic admission to the scheme, therefore it did not conflict with the employment contract. In addition, the court failed to attach sufficient weight to the evidence that Ms. Prophet was aware of and understood that her eligibility was not automatic and demonstrated this by applying to the Board of Trustees to be admitted to the scheme indicating in that letter that she understood that her eligibility was not automatic. The bank argued that the court's failure to take these matters into account caused it to err in finding that Ms. Prophet's participation in the Scheme was automatic.
- [92] Thirdly, it was submitted that the court failed to apply the statutory requirements in the **Labour Code** by which it could legitimately hold that a term in the employment

contract was null and void, either because it falls below the minimum employment standards in the **Code** or the provision albeit beneficial to the employee, conflicts with the terms of the Collective Agreement. It was argued that the court erred in dismissing the express binding terms of the contract and Pension Scheme by substituting its own view when it held that membership should be automatic and that Ms. Prophet should have been eligible for membership in the scheme retroactively from 1st October 2002.

- [93] Fourthly, the bank contended that the court erred by not having regard or giving adequate weight to the fact that it is not responsible for the scheme which is run by a board of trustees which is a separate legal entity from the bank. For this proposition, reliance was placed on this Court's decision in **Montserrat Utilities Limited v Mildred Kirwan**.²⁸ It was submitted further that there are no other substantial merits which would demand that the bank should make the pension payments with provision to recoup such payment from the Pension Scheme. In addition, the bank argued that there is no evidence to support the court's finding that the bank had an obligation to acknowledge or respond to Ms. Prophet's application letter and that its lack of action smacks of irresponsibility or indifference and its conduct was unreasonable. Therefore, the court erred in so concluding and in awarding to Ms. Prophet pension at the rate of 50% to be paid for by the bank.

Ms. Prophet's submissions

- [94] It was contended on Ms. Prophet's behalf that although the court failed to state why they awarded her a reduced pension, on a proper construction of the Trust Deed the court arrived at a correct determination. Learned King's Counsel accepted that the court was obliged to provide reasons for the award and erred by not ascribing any reasons. Nonetheless, it was submitted that the award was justifiable and should be upheld.

Discussion

²⁸ MNILTAP2013/0002 (delivered 17th April 2015, unreported).

[95] The Industrial Court dealt with the issue of pension towards the end of the judgment under the rubric 'The Awards'. It hinged its decision on Articles 38 and 39 of the respective Collective Agreements which contain undertakings by the bank to make certain contributions on behalf of each employee to a Pension Scheme. The material part of the Article states:

"38.01 ... The Bank agrees to contribute a minimum of 5% of the employee's earnings to a Pension Scheme and the employees will contribute 5%."²⁹

[96] It is useful to set out that part of the decision at this juncture. The court's decision on the pension award states:

"(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.

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."³⁰ (Underlining added)

²⁹ Article 38.01 of the first Collective Agreement is used here for purposes of illustration. The identical Article appears in the second Collective Agreement as Article 39.01.

³⁰ Record of appeal pgs. 291 – 292, at para. 92(3) of the Industrial Court's judgment.

[97] From the foregoing, it is readily apparent that the court strictly interpreted the bank's contractual obligation to make pension contributions to the pension scheme on Ms. Prophet's behalf and elected to disregard the pre-condition highlighted in the employment contract by reason that the contract was deemed to be subordinate to the Collective Agreement. The court stopped short of indicating why the contract was relegated to a subordinate position for purposes of interpretation and application of the contractual obligations.

[98] It is noteworthy that the court found that Ms. Prophet had applied to the bank to join the scheme. This observation by the court is inaccurate and likely contaminated its analysis of the evidence and its ultimate determination on this issue. The documentary evidence supplied by Ms. Prophet disclosed that she applied not to the bank, but rather to the Board of Trustees by letter dated 14th September 2004.³¹ The letter is addressed to Miss Sharon Nathaniel, Secretary to the Board of Trustees, Antigua Commercial Bank Staff Pension Scheme. Ms. Prophet stated in her letter:

“By letter dated September 06, 2004 from the Antigua Commercial Bank I was made an offer to take up permanent employment retroactive from November 07, 2000.

I understand that as a result of my being over the age of fifty years the Board of Trustees must consider my application on a special case basis.

I therefore make application to join the Scheme retroactive from October 01, 2002, having completed one year of continuous service on November 07, 2001.”

[99] Having erroneously found that Ms. Prophet applied to the bank to join the Scheme, the court attributed to the bank, the Board of Trustees' failure to respond to the letter, ultimately characterizing that failure 'by the bank' as being 'irresponsible, indifferent and unreasonable'. In my estimation, this is unfortunate for three reasons. Firstly, it was an unfair criticism of the bank since there is no evidence that it was either the addressee or a recipient of the letter. Secondly, as a matter of law although the bank is a named party to the Trust Deed, its sole function is as one of the two settlors and

³¹ Record of Appeal pg. 118.

not as trustee. It therefore has no role in the administration of the trust fund as trustee, agent or lawful attorney for the trustees, as recipient or processor of applications by its employees or as payer of benefits to members or other beneficiaries under the Trust Deed or other capacity.

[100] Thirdly and more fundamentally, it seems to me that, since the trustees were not joined as parties to the claim in the Industrial Court, the court's finding that the bank is 'wholly blameworthy and liable for the deprivation of the Employee's benefits under the Pension Scheme' was made without all of the relevant material being presented and in the absence of a critical party. In my opinion, the court erred in law in not having regard to principles of trusts law alluded to above, in holding the bank liable to pay Ms. Prophet pension at the rate of 50%.

[101] I agree with learned counsel Ms. Roberts for the reasons articulated by her, that the court erred in law by not attributing sufficient weight to the evidence that the pension scheme is run by a board of trustees which is separate from the bank. Critically, it overlooked the fact that Ms. Prophet did not address her application to the bank. In my view, this led the court to conclude wrongly that it was the bank who received and did not respond to the 14th September 2004 letter, and ultimately to the finding that the bank was wholly blameworthy and liable for deprivation of benefits to Ms. Prophet under the scheme. The foundation on which the court arrived at this conclusion is evidentially and legally flawed. Accordingly, its determination regarding payment of pension to Ms. Prophet is thereby fatally undermined and cannot stand. I would therefore allow the appeal on this ground.

[102] In relation to the court's finding that the bank's payment under the scheme was not contingent on the payment of contributions and that Ms. Prophet's participation in the scheme was automatic, these findings ignore the clear and unambiguous language of the Trust Deed, the Explanatory Booklet and the employment contract, which were accepted and acted on by Ms. Prophet. It also disregards the fact that the bank is not a trustee of the scheme or agent of the trustees for any purposes of the scheme and is not contractually bound by the contract to make contributions

unless and until an employee is accepted as a member of the scheme. The Industrial Court therefore erred in finding that Ms. Prophet's participation in the Scheme was automatic and that the bank's payment under the Staff Pension Scheme was not contingent on such participation and her contribution to the Scheme. It erred in holding that the bank is responsible for paying 50% of Ms. Prophet's pension. I would quash that award.

Costs

The bank's submissions

- [103] On the issue of costs, the bank contended that the Industrial Court erred in law in ordering costs in the amount of EC\$5,000.00 which it based on the reasons for the award of exemplary damages. It was submitted that the court was not justified in awarding exemplary damages and such reasons did not amount to exceptional reasons as required by section 10(2) of the **Industrial Court Act**. Citing **Kenard Byron v Eastern Caribbean Amalgamated Bank**³² the bank contended that there are no exceptional reasons that justify an award of costs to Ms. Prophet. It submitted that contrary to the court's ruling there is no evidence that its conduct was harsh, oppressive and unconscionable or that it acted contrary to the spirit and letter of the **Labour Code**, the Collective Agreements or in a discriminatory manner towards Ms. Prophet.

Ms. Prophet's submissions

- [104] Ms. Prophet also relied on section 10(2) of the **Industrial Court Act**. She submitted that the court's power at first instance and on appeal to award costs is discretionary. She indicated that she would be guided by the Court's disposition in respect of the costs issue at this level.

Discussion

³² ANUHCVP2010/0010 (delivered 31st May 2017, unreported).

[105] As noted by the parties, the court's power to award costs is to be exercised in exceptional cases as provided in section 10(2) of the **Industrial Court Act**. It provides:

"(2) The Court shall make no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise, and the Court of Appeal shall in disposing of any appeal brought to it from the Court make no order as to costs, unless for exceptional reasons the Court of Appeal considers it proper to order otherwise."

[106] In making the costs order, the Industrial Court justified it by virtue of its reasons for awarding exemplary damages and it quantified the amount based on previous awards in similar cases. In view of the conclusion earlier that the exemplary damages award was made in error, the court's basis for the costs award falls away. I would allow this ground of appeal. Turning immediately to the question of costs on appeal I am satisfied that there are no exceptional or other justifiable reasons to award costs to either party on this appeal. I would therefore quash the \$5,000.00 costs made against the bank and make no order of costs on appeal.

Disposition

[107] For all of the foregoing reasons I would allow the appeal in part. I would quash the basic award of \$23,712.00 being fifty-two weeks' wages in lieu of notice of compulsory retirement and substitute it with the sum of \$5472.00 being twelve weeks' wages in lieu of notice of retirement. I would also quash the award of pension to Ms. Prophet at the rate equivalent to 50% of the rate set out in Part 4 of the Trust Deed; the award of exemplary damages in the sum of \$20,000.00 and the costs order of \$5,000.00. I would make no order as to costs on appeal.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Trevor M. Ward
Justice of Appeal

By the Court

Chief Registrar