BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

CV NO. 1006 of 2012

BETWEEN

BRIAN LASHLEY **CLAIMANT**

AND

FIRSTCARIBBEAN INTERNATIONAL BANK LIMITED **DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2014: October 22
2015: February 09
April 30
May 14
2018: January 16: Claimant's further submissions filed.
February 02: Defendant's further rebuttal submissions filed.
2020 May 13

Mr. Brian Weekes, Attorney-at-Law for the Claimant.
Mr. Kevin Boyce, Mr. Omari Drakes and Mr. Matthew Gooding, Attorneys-at-Law of Messrs. Clarke Gittens Farmer for the Defendant.

DECISION

Introduction

[1] This is a claim for damages for wrongful dismissal.

Background Facts

[2] The Claimant was initially employed by the Defendant Bank on 05 January 2004 as a Software Support Manager. The terms of his employment were contained in correspondence bearing the same date. One of the express terms of the contract of employment provided for the termination of that contract.

[3] The parties agree that clause 19 (a) of the employment contract permitted the Claimant to be terminated in the following circumstances:

(1) by the Bank with severance pay, with advance notice, or with pay in lieu of notice in accordance with applicable statutory provisions;

(2) by the Claimant in accordance with applicable statutory provisions;

(3) by mutual agreement; or

(4) at anytime whether during or following the Claimant's probationary period by the Bank without severance pay, advance notice or salary in lieu thereof for good and sufficient cause or an urgent reason.

[4] By correspondence dated 29 April 2008, the Claimant was promoted to the position of Head of Technology Solutions, Channels and Cards. This correspondence set out his remuneration, and also stipulated that all the terms and conditions of his employment, except those referring to his probationary period, remained unchanged.

[5] The Claimant was invited to a meeting at the Bank on 04 May 2009. At that

meeting he was issued with a letter dated 29 April 2009 that terminated his services with the Bank. The letter informed him *inter alia:*

> "We advise that as a result of the restructuring of the Technology Department, your position has been eliminated. In this regard, your employment with [the Bank] will end effective May 4, 2009. The purpose of this letter is to provide you with written notice that your employment with [the Bank] will conclude on that date.
>
> .....
>
> Upon your returning a signed copy of this letter signifying your acceptance of these terms, and providing a duly executed original of a Deed of Final Settlement and Release, [the Bank] will provide you with a severance payment in the amount of BBD$55,034.00 and a lump sum payment in lieu of notice in the amount of BBD$40,279.00. These payments will be combined and shall be paid at the same time, after May 4, 2009, and within two weeks of receiving the appropriately executed [documents]. These payments are inclusive and in full satisfaction and discharge, of any and all amounts that you may be entitled to receive in respect of your employment, whether under the provisions of your employment contract, or under any applicable statute or law".

[6] After the meeting, the Claimant was escorted to collect his personal belongings. His access to the Bank was removed and he was prevented from reentering the Bank. The Claimant did not execute the documents, but he received a total sum of $95,313.00, which represented a severance payment and payment in lieu of notice. The Bank paid his car allowance for three

additional months; permitted his benefits under the medical scheme to continue for the month of May 2009; and continued to offer preferred interest rates on his loans for another six months.

The Pleadings

[7] The Claimant filed his wrongful dismissal claim on 15 June 2012. He claimed damages for wrongful dismissal, interest and costs. His particulars of damage included pay in lieu of eighteen months notice, and the payment of a bonus for 2009.

[8] The Bank filed its amended defence on 29 October 2013. The gravamen of the defence is that the Claimant was not wrongfully dismissed. Rather, he was entitled to a severance payment because he was dismissed by reason of redundancy. The redundancy occurred as a result of restructuring by the Bank. The Claimant received three months pay in lieu of notice together with additional benefits. According to the defence, the Claimant was fully compensated.

The Issues

[9] The parties agreed that the issue to be determined by the Court is whether or not the Claimant received his full legal entitlement when his contract of employment was terminated by the Bank. This Court has a different perspective. In the Court's view there are two main issues to be resolved,

namely:

(1) on the facts of this case, was the Claimant wrongfully dismissed, or was he dismissed because of redundancy; and

(2) in either scenario, what was an adequate period of notice?

There is a minor issue relating to the Claimant's eligibility for a bonus payment.

Wrongful Dismissal or Redundancy?

(1) The Statutory Context

[10] At paragraph 10 of its amended defence the Bank pleaded that:

> "The Claimant's employment with the [Bank] was terminated on May 4, 2009 by way of a letter dated April 29, 2009 as a result of redundancy due to the restructuring of the [Bank]. The [Bank] provided the Claimant with severance pay and 3 months payment in lieu of notice and additional benefits in accordance with the terms of the Claimant's contract of employment and the Laws of Barbados. The Claimant was also provided with a Termination of Services/Lay-off Certificate dated May 25, 2009 which stated that the reason for termination was "Redundancy"."

[11] It is evident from paragraph 10 that the Bank admitted that the Claimant was dismissed. The Bank also purported to dismiss the Claimant in accordance with clause 19 (a) of the contract of employment dated 05 January 2004. (See para. [3] (1) supra). The contract was not determined by the Claimant, or by

mutual agreement, or for good and sufficient cause, or for urgent reason. (See paras.[3] (2), (3) and (4) supra).

[12] According to clause 19 (a) of the employment contract, any severance payment or payment in lieu of notice was to be calculated "in accordance with applicable statutory provisions". The applicable statutory provisions are contained in the Severance Payments Act, Cap.355A, ("The Act"). The Act describes itself as an act to provide for the making by employers of severance payments to employees who cease to be employed in circumstances amounting to redundancy and for related matters. (Long title to Act). The circumstances indicative of a redundancy are delineated in section 3 (3) of the Act.

[13] Section 3(3) provides in part that:

> "For the purposes of this Act, an employee who is dismissed shall be deemed
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> (a) to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to
>
> (i) ....
>
> (ii) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish;".

The parties are agreed that any question of redundancy, in this case, is to be determined within the context of section 3(3) (a) (ii) of the Act.

[14] Section 3 (3) (a) (ii) has regional and extra regional parallels. For example, the Employment Act 2001, Bahamas, s.72 (b); the Employment Protection (Consolidation) Act 1978, England, s.91 (2) (b); the Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965, s.11 (2) (b); and the Redundancy Payments Act 1965, England, s.1(2)(b). As these legislative precedents are "closely aligned" or "identical" to the Barbados section, this Court will be referring to cases decided on similar legislation. This is in keeping with what the Caribbean Court of Justice, ("the CCJ"), referred to as the legitimacy of placing reliance on the general principles emerging from other jurisdictions. (Per Mr. Justice Anderson, JCCJ, in **Chefette Restaurants Limited v. Orlando Harris [2020] CCJ 6 (AJ) (BB)** at para.[84], referring to observations by the Privy Council in **Blackburn v. LIAT (1974) Ltd [2020] UKPC 9).** Speaking for a united bench, Justice Anderson confirmed that:

> "We are of the view that cases that provide judicial interpretations of general concepts and principles in employment legislation can be helpful, whatever their source, provided that the interpretations are mined from provisions which are similar, and similarly situated, to local provisions being considered". (At para.[85] of **Chefette** judgment).

[15] Our Court of Appeal has endorsed the test to be applied to section 3 (3)(a)(ii) as adumbrated by Lord Irvine of Lairg LC. In **Murray et al v. Foyle Meats Ltd [1999] 3 All ER 769,** Lord Irvine was considering the Northern Ireland statute, (supra at para.[14]), and he opined that:

> ".....the language of the [the section] is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exist. In this case the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation". (P.771; see **Trimart Incorporated v. Cox, Civ. Ap. No.1 of 2014, decision dated 20 September 2016,** at paras. [33] – [34] of judgment; see also **Neely v. Credit Suisse Trust Limited, Bah. Sup. Ct. COM/LAB 15 of 2005 (28 Jan. 2009);** and **Safeway Stores Plc v. Burrell [1997] ICR 532).**

[16] This Court is also guided by the observations of Sir Marston Gibson CJ that:

> "What is therefore clear is that there is no short-hand or automatic answer to the question whether a redundancy has occurred upon the dismissal of an employee in the course of an alleged "reorganization" or "restructuring". In every case, recourse must be had to the situation outlined in section 3 (3) (a)(ii) of Cap.355A, described by Lord Irvine LC as "simplicity itself". The question to be resolved, therefore, is always to what is the dismissal attributable, namely, whether the "dismissal is attributable to....the fact that the requirements of that business for employees to carry out the work of a particular kind or for employees to carry out work of a particular kind in

> the place where he was so employed, have ceased or diminished or are expected to cease or diminish". Nothing more, and nothing less, than that is required". (See **Trimart** supra para. [15] at para.[15]).

[17] In the case at bar, this Court must first decide if the requirements of the Bank's business for employees to carry out work of a particular kind had diminished when the Bank dismissed the Claimant. This requires the perusal and analysis of any evidence as to the existing state of affairs at the Bank, at the time of the dismissal, and post the dismissal.

(2) The Evidence

[18] The correspondence of 29 April 2009 informed the Claimant that his position was eliminated as a result of the restructuring of the Technology Department. His evidence confirmed a restructuring, and that the posts of the four technical heads of department, which included his post, were reduced to three posts. The post eliminated was the Claimant's.

[19] The amended defence refers to the termination of the Claimant as a result of redundancy due to the restructuring of the Bank. One of the Bank's witnesses was the Claimant's immediate supervisor. In his witness statement Mr. Wilson explained that the Bank:

> ".....as a regional company is required to constantly restructure its business to stay competitive in the market. It was as a result of such a restructuring that the 4 business support groups

> within the Technology Department were realigned into 3 new business support groups. This realignment resulted in the Channels and Cards business group and the Retail and Support Systems business support group merging to become the Retail and Wealth business support group. The then Head of Retail and Support Systems ....became the Head of Technology Solutions Retail & Wealth and the Claimant's role with the Defendant was thereby made redundant". (Para.8 of witness statement filed on 15 October 2013).

[20] In his oral evidence Mr. Wilson informed the Court that:

> "The term 'redundant' meant that the role [the Claimant] was performing was made redundant; no longer necessary. The functions he performed were no longer necessary".

[21] However, when referred to paragraph 8 of his witness statement by counsel for the Claimant, Mr. Wilson stated that:

> "The functions that [the Claimant] performed were managed with [the Technology Solutions Retail & Wealth] group. The actual functions of Channels and Cards functioned properly. Those functions that [the Claimant] oversaw remained. And someone still had to manage those functions".

[22] The Bank's Head of Human Resources filed two witness statements on behalf of the Bank. Neither statement tendered a reason for the Claimant's termination. There is, however an inference in paragraph 3 of the second statement that the Claimant left the Bank "as a result of job redundancy". But no explanation is offered therein about the circumstances of the redundancy.

[23] In her oral evidence the Human Resources manager informed that the national insurance termination certificate, generated by the Bank, indicated that the reason for the Claimant's termination was redundancy because "...the role which [the Claimant] held was not going to be in the new structure". She added that:

> "...In this case it was a redundancy. In a case of redundancy it is usually a business decision. This came about due to restructuring....The technical department had four streams (verticals) in how they supported the Bank. They moved from four to three verticals and the position which [the Claimant] held was impacted. I do not recall if the technical department had less work before the re-structuring. I do not recall which three of the streams (verticals) remained. I don't recall if in 2009 there were other terminations other than for redundancy".

(3) Findings of Fact

[24] There is no evidence of a bank-wide restructuring when the Claimant was dismissed. And there is no evidence that anyone other than the Claimant was terminated at the time. The Court has made the following findings of fact based on the unchallenged evidence of the Bank's witnesses. What occurred may be described as a departmental reorganization or consolidation, as distinct from a general restructuring process within the Bank.

[25] When the Claimant parted company with the Bank, his work areas did not disappear. This work was distributed to and absorbed by another employee

of the Bank. This employee performed the Claimant's functions in addition to her existing functions. No new employees were contracted by the Bank to replace the Claimant and perform his duties as Head of Technology Solutions, Channels and Cards.

[26] The parties also agree that soon after his managerial appointment, the Claimant took on the duties pertaining to the vacant post of Head of Technology Systems Finance and Business. He acted in that post for about thirteen months until the time of his dismissal. This post was filled a few months after the Claimant left the Bank. There is no claim for damages in relation to the Claimant's execution of the duties of the vacant post.

[27] On the particular facts of this case, there is no evidence of a diminution or cessation of the work carried out by the Claimant or by the Technical Department. This is not a case where the bank was downsizing because there was less work required to be done by either the Claimant or his department. Likewise, it is not a case where the work done by the Claimant was no longer necessary. There was, however, a diminution in the Bank's requirements for the same number of employees to carry out that work. And this was the reason for the Claimant's dismissal.

(4) Analysis

[28] There is support in the case law for the Court's finding of a diminution in the

Bank's requirements for the same number of employees to carry out the work previously done by the Claimant. In **Bromby & Hoare Ltd. v. Evans et al [1972] ICR 113**, it was held that employees were made redundant where the work they did was contracted out. The court in this case considered legislation in *pari materia* with section 3 (3)(a)(ii) of the Act. It was held that the test of whether a redundancy situation arose did not depend on the amount of work to be done, but on whether there was any need for the employees to carry out the work which they performed. In **Bromby** the court found that there was no longer such a need because the work could be performed more efficiently by other means.

[29] In **Sutton v. Revlon Overseas Corporation Ltd. [1973] IRLR 173**, the work of a company's chief accountant was absorbed by remaining members of staff consequent upon a reorganization. It was held that the employee was dismissed by reason of redundancy. (See also **Carry All Motors Ltd. v. Pennington [1980] IRLR 455).**

[30] Another relevant case is **McCrea v. Cullen & Davidson Ltd [1988] IRLR 30**, where a manager took over the work of a dismissed employee, in addition to his own work. Speaking on behalf of the Northern Ireland Court of Appeal, Gibson LJ determined that the relevant statutory provision:

> "....when applied to the facts of this case may be reduced to the proposition that an employee is

> dismissed by reason of redundancy if the dismissal is attributed to the fact that the requirements of the business for employees to carry out the work of management has diminished. It will be seen that what the section is directed towards is not a diminution in the work of management but a diminution in the requirement of the company for employees to do the work of management. Though the work of management remains to be done the applicant will be redundant if the company has so organized its affairs that the work is done by fewer employees. So the question resolves itself into one of fact, namely, is [the employee] merely doing the work formerly done by the applicant in which case there is no redundancy but the replacement of one employee by another to do the work of the other, or has he undertaken the work of the applicant additional to his own, in which case there has been a reduction in the number of employees required to do the work and the applicant's dismissal is attributed to redundancy". (At para.11 of judgment; see also **Pierre v. West Bay Management Limited, Sup. Ct. Bah., Cm. Lw./ Lab. Div. No.00049 of 2003, decision dated 31 January 2007**, where a redundancy occurred when the claimant was dismissed and her duties distributed between remaining employees).

[31] One academic writer identified this as an area of difficulty in employment law:

> "...where there is a reorganization of tasks among employees with the end result that someone's job disappears. In these circumstances, the employee may feel that he is not redundant but unfairly dismissed: his job is still there, but has been carved up among people; there has been no diminution in the work. However, once more it seems clear that if such a reorganization leads to management

> deciding that it needs fewer people, this is probably to be regarded as a redundancy". (Professor Gwyneth Pitt, "Employment Law", 2014 at para.9-008 citing **Robinson v. BI Airways Ltd [1978] ICR 304).**

[32] Counsel for the Claimant urged the Court to find that the Claimant was wrongfully dismissed by the Bank, and not dismissed because of redundancy. In the further submissions filed on 16 January 2018, counsel drew the Court's attention to two decisions from our Court of Appeal. These are the **Trimart** case, (supra at para. [15]), and **Brydens Insurance Inc. v. Gibson, B'dos Civ. Ap. No.6 of 2014, decision dated 09 February 2017.** Counsel concluded that:

> "Applied to the facts of this case the guidance in **Brydens** should lead [the Court] to the conclusion that the Claimant was not made redundant by the [Bank] and is entitled to be compensated in accordance with common law principles, that is to say, in accordance with what in the circumstances would have been the length of notice to which he would have been entitled or payment of a sum in lieu of such notice…". (Para.8 of Further Submissions).

[33] Having considered the **Brydens** case the Court notes that the facts in that case differ from the present facts. In **Brydens** the dismissed employee was replaced by a new employee who was paid less. The Court of Appeal found that the employer had rebutted the presumption of redundancy, in circumstances where there was evidence that the work previously done by the

employee had not diminished or ceased. By way of contrast, in this case the Claimant's work was consolidated with that of another employee at the same pay grade. This demonstrated a diminution in the requirements of the Bank for employees to carry out the work previously performed by the Claimant.

[34] The **Trimart** case is likewise of no assistance to the Claimant. In that case the Court of Appeal was persuaded that:

> "[23] .....the evidence adduced was not sufficient to rebut the presumption contained in [the Act]. The only evidence on record came from Mr. Cox himself who had testified to being told that his dismissal was due to a re-structuring. There was no witness for, nor any countervailing evidence adduced by, Trimart....
>
> [24] It is glaring that no one from Trimart's management was called to testify as to the true state of affairs regarding Mr. Cox's employment....This left an evidentiary vacuum as to what the requirements of Trimart were and whether they were diminished within the purview of section 3.
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> [25] We conclude, therefore that the....presumption that Mr. Cox's dismissal was the result of a redundancy has not been rebutted, and the employer, Trimart, has failed to discharge its burden of disproving redundancy. It follows that Trimart's appeal fails and must be dismissed". (Per Gibson CJ).

[35] The *ratio decidendi* in **Trimart** is that the employer provided no evidence that something other than a redundancy occurred when the employee was

dismissed. There was no evidence to negative the presumption of redundancy. But on the present facts, the Bank's unchallenged evidence confirmed that the Claimant was dismissed by reason of redundancy.

Adequacy of Notice

[36] Having determined that the Claimant was not wrongfully dismissed, it follows that any determination of the reasonableness of the period of notice falls within the provisions of the Act. The claim here is for eighteen months pay in lieu of notice, as part of the damages for wrongful dismissal. The submissions by counsel, on behalf of the Claimant, are confined to common law principles extrapolated within the context of a wrongful dismissal. The Claimant's pleadings as drafted do not require the Court to rule on the reasonableness of notice if the Claimant was made redundant. In fact counsel for the Claimant argued that the Court had no jurisdiction to determine this issue. On the other hand, part of the Bank's defence is predicated on the submission that its payment to the Claimant, of 3 months' pay in lieu of notice, was reasonable and in keeping with section 20(1) of the Act. Therefore, the Court's assessment as to whether this was reasonable, would not be surprising or prejudicial to the Bank. In addition, the parties agreed a single issue for the Court, that is, whether or not the Claimant received his full legal entitlement when he was dismissed. (See para.[9] supra).

[37] Section 20(1) provides that:

> "For the purposes of this Act, the notice required to be given by an employer to terminate the contract of a person who has been continuously employed for one hundred and four weeks or more
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> (a) shall be not less than two weeks' notice if his period of continuous employment is two years or more but less than five years; and
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> (b) shall be not less than four weeks' notice if his period of continuous employment is five years or more".

[38] The Claimant was continuously employed by the Bank for more than five years, therefore he was entitled to a statutory minimum of four weeks' notice. The Bank contends that it paid the Claimant the equivalent of three months salary in lieu of notice; and that the Claimant was adequately compensated in that regard.

[39] At least three local cases have considered section 20(1) of the Act. The decisions perused by this Court are **Clarke v. American Life Insurance Company, Ct. Ap. No.21 of 2002, decision dated 02 July 2002; Agard v. Caribbean Data Services Limited 358, Ct. Ap. No.15 of 2003, decision dated 03 October 2003; and Hoyte v. The Transport Board, Hg.Ct. No.25 of 2002, decision dated 02 August 2002.** And it should be noted that no question of jurisdiction arose in two of these cases. **Clarke** and **Hoyte** were filed as wrongful dismissal claims in the High Court.

[40] In **Clarke**, the Court of Appeal noted basic yet fundamental differences between wrongful dismissal and redundancy. Whereas a successful claim for wrongful dismissal redounds to the claimant in damages, termination by reason of redundancy entitles the employee to "compensation calculated in accordance with a statutory formula". (Per Sir David Simmons CJ at para. [29] of judgment). The Court of Appeal analysed the drafting technique engaged by section 20 as a means of determining Parliament's intention. (Perhaps foreshadowing the CCJ in **Chefette** and Justice Barrow's comment that "With statutory compensation, the policy behind the particular legislation must be ascertained", at para.[108] of judgment. In **Chefette** the CCJ undertook a comparison between wrongful dismissal and the Barbados statutory schemes for redundancy and unfair dismissal).

[41] The Court of Appeal analysed section 20 as follows:

> "[39] The periods of notice mentioned in section 20 are statutory minima. These periods are relatively short when compared with the approach of the common law to reasonable notice in wrongful dismissal cases. Awards at common law tend to be far more generous. It is more than likely that Parliament recognised that where redundancy was the consequence of cessation of business or diminishing requirements, a business in trouble would hardly be able to give long periods of notice or make liberal payments in lieu thereof.
>
> [40] Thus Parliament must have intended that there should be at least some notice given to a redundant

> employee but quantitatively different from that in the common law action for wrongful dismissal. Viewed in this context, the introductory words to section 20, namely, "For the purposes of this Act" have a significant and limited application. The statutory periods of notice apply to cases of redundancy only".

[42] The Court of Appeal went on to interpret section 20 (1)(b) as implying a term into the contract of employment of a dismissed employee, who was entitled to severance, and who had been a long serving employee. In **Clarke** the employee was dismissed after 25 years of service. The Appeal Court held that she was entitled to more than the minimum period of notice, based on the implied term. An award was made for 5 months' salary in lieu of notice.

[43] It would be appropriate to quote here the reasoning of the Court of Appeal in construing section 20:

> "[42] As a matter of construction, we have no hesitation in holding that the phrase "not less than" appearing in section 20 envisages that the statutory minimum period of notice may be enlarged. We think further that, within the elasticity of the statutory language, there is scope in a proper case and in the absence of existing statutory criteria, for an employer or a Court to enlarge the minimum period of notice in fulfilment of the purposes of the Act.
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> [43] The Act itself offers no guidance as to what criteria should be applied in order to determine an enlarged period of notice. Thus there must be resort to principle. It is our view and, we insist, that an enlargement of the statutory minimum

period of notice cannot be achieved by the importation of the common law principles usually applicable to the determination of what is reasonable notice in a wrongful dismissal case.

.....

[45] Equally, however, we are of opinion that a long serving employee should not be peremptorily severed with just the statutory minimum notice. It would not accord with notions of fairness, reasonableness and good industrial practice.

[46] It is clear in section 20 that Parliament intended employees with different lengths of service to be given different periods of notice. Hence, an employee with more than five years' service is given a right to a longer period of notice than an employee with less than five years' service. However, it appears to us that there is a gap in the legislation to the extent that no separate provision is made for long service employees, say, for example, employees who have worked in a business for 12 or more years. As it presently stands, such employees are entitled to the same minimum period of notice as an employee of 5 years' service.

.....

[53] Having regard to the wording of section 20 and the absence of a provision for long-service employees but bearing in mind that Parliament has provided only two minimum periods of notice for employees intended to be made redundant, we are of the opinion that it would be reasonable, for the purposes of redundancy, to imply a term along the lines following in the contract of employment of the appellant: "That the employer, was under a duty, for reasons of fairness and the requirements of good industrial practice, to give reasonable

> notice of redundancy beyond the statutory minimum period".
>
> [54] We do not think that employers in a redundancy situation should escape paying adequate severance payments to long-service employees by merely giving the minimum notice enacted in section 20 (1)(b) of the Act. Such practices could lead to hardship, in that aggrieved long-service employee would then be forced to test their rights…".

[44] Finally, the Court of Appeal offered guidelines for the criteria to be followed in determining a reasonable period of notice beyond the statutory minimum:

> "No doubt a core of precedent will be built up in which factors such as the length of service, status of the employee and the nature of the employment will be determinative of reasonable notice for the purposes of redundancy". (Para.[55] of judgment).

[45] In **Clarke** the employee worked for 25 years and was awarded 5 months' pay in lieu of notice. The **Agard** award was 3 months pay after 16 years of service. And **Hoyte** attracted 2 months' pay for 13 years with the employer. This Claimant was employed for 5 plus years. Applying the reasoning in **Clarke** would lead to the conclusion that the Claimant here was not a long service employee, and that he cannot benefit from an implied term pertaining to long service employees.

[46] This Court is of the opinion that the resolution of this issue is not achieved by a "slam dunk" application of **Clarke** to the facts of the case. True, the

Clarke court identified a gap in section 20 of the Act in relation to long service employees. However, it was the interpretation of the words "shall be not less than", as importing statutory minima that could be expanded in a proper case, which gave the Court of Appeal the leeway to carve out an implied contractual term for long service employees.

[47] Neither **Clarke, Ashby** nor **Hoyte** should be interpreted as precluding the expansion of the statutory minima for individuals like the Claimant, who have worked for more than 5 years, but cannot be described as long service employees. Rather, the question for the Court should be, in any case falling within the provisions of section 20 (i)(a) or (b) of the Act, whether in the particular circumstances of the case the statutory minima should be expanded.

[48] It is the respectful view of this Court that the carving out and defining of the implied contractual term for long service employees was an artificial construct. The implied term was already defined by section 20(1) of the Act as either "not less than two weeks' notice", or "not less than four weeks' notice", as the case may be. Therefore, the framing of the implied term to say, "That the employer, was under a duty, for reasons of fairness and requirements of good industrial practice, to give reasonable notice of redundancy beyond the statutory minimum period", was an unnecessary

conceptual contrivance. Either the parties agree, or the Court imposes, the period of notice appropriate to a particular case.

[49] The route that this Court has chosen is not a heretical assault on the doctrine of *stare decisis*. Rather, it is a path around the Court of Appeal decision by way of distinguishing the present facts. The **Clarke** decision did not close the door to individuals, who are not long service employees, receiving notice above the statutory minima. What is difficult to circumvent is the fact that the courts have not been generous with their awards of additional periods of notice. (See para.[45] supra). If a long service employee of 25 years deserves no more than 5 months' notice, then an employee of 5 years may be tied to a statutory minimum of four weeks' notice.

[50] In the absence of any direction from the Act, as to the principles to be applied in the determination of a reasonable period of notice under section 20(1) of the Act, the Court is drawn again to the guidelines formulated in **Clarke.** The factors mentioned are length of service, the status of the employee, and the nature of the employment. (Supra at para.[44]). This is not an exhaustive list. The **Hoyte** decision was delivered by Chase J, as he then was, exactly one month after the **Clarke** decision. And incidentally, Chase J was a member of the **Clarke** panel.

[51] Chase J took additional factors into consideration before concluding that for

13 years of service the employee in **Hoyte** was entitled to two months' pay in lieu of notice. The first additional factor was that the employee was unable to find alternative employment. And the second additional factor was all the other circumstances of termination. (See paras.[16]-[21] and [54] of **Hoyte**).

[52] Fourteen months after **Hoyte**, the Court of Appeal handed down the **Agard** judgment. The Chief Justice mentioned **Hoyte** in the first, second and seventh paragraphs of **Agard.** But there was no disavowing of the additional factors mentioned by Chase J in **Hoyte.** The **Agard** court also considered the circumstances in that case, as well as the employee's length of service. (See para. [12] of **Agard**).

[53] These are the very factors applied by courts when assessing what is a reasonable period of notice in wrongful dismissal claims. They are conveniently referred to as the **Bardel** factors. In **Bardel v. Globe & Mail Ltd (1960) 24 DLR (2d) 140,** McRuer CJHC opined that:

> "There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the [employee], the age of the [employee] and the availability of similar employment, having regard to the experience, training and qualifications of the [employee]". (At p.145 of judgment).

[54] **Bardel** has been applied by local courts in wrongful dismissal cases. (See eg. **Caribbean Airways Limited v. Waithe, Civ. Ap. No. 3 of 1988, decision dated 14 December 1990;** and **Mottley v. National Cultural Foundation, Hgh. Ct. No.325 of 1987, decision dated 30 September 1988).** And the **Bardel** factors are the same principles espoused in **Clarke** and **Hoyte** as appropriate to any consideration of what is a reasonable period of notice for severed long service employees. Unless **Clarke** was wrongly decided, there is no valid reason why these principles should not be applied in the case of an employee who argues for a period of notice greater than the statutory minimum applicable to his case.

[55] There is a lingering question as to whether Parliament intended to repeal the common law principles in any consideration of reasonable notice periods under section 20(1) of the Act. Referring to section 15 of the 1997 Guyana Termination of Employment and Severance Pay Act, the CCJ in a majority judgment observed *obiter* that this section:

> "....does not abrogate the common law but sets out minimum not prescribed periods of notice where a contract of employment is being terminated.....". (per Justice Nelson in **Guyana Sugar Corporation v. Dhanessar [2015] CCJ 4 (AJ)** at para. [28]).

[56] The Guyana provision is drafted in this way:

> "15(1) Where a contract of employment for an unspecified period of time is being terminated for any reason of redundancy under section 12, or by notice undersection 7(c)(ii) such contract of employment, shall except during the probationary period, be terminated by the employer upon giving the following minimum period of notice in writing-
>
> (a) two weeks where the employee has been employee by the employer for less than one year;
>
> (b) one month, where the employee has been employed by the employer for one year or more".

[57] Both the Guyana provision and section 20(1) of the Barbados Act contain the same drafting technique of referring to statutory minimum periods. Had Parliament intended to curtail the exercise of any judicial oversight, or the notion that a court could determine what was a reasonable period of notice, it was a simple matter to legislate that the period of notice "**shall be**" a fixed period.

[58] Applying, the abovementioned principles to this case, it is immediately obvious that the Claimant was not a long service employee. Neither **Clarke** nor the other cases mandated that any one factor should be given more weight than the other factors. Therefore, what the Claimant lacked in service may be balanced against his managerial responsibilities, and the other circumstances that impacted on his dismissal.

[59] The Claimant held a mid management position with the Bank. The managerial positions ranged from FC6 to FC11, and his level was at FC9, two tiers away from the uppermost FC managerial level. The Claimant's evidence about his responsibilities was not challenged. He told the Court that:

> "I had more responsibilities as Head of Technology Solutions, Channels and Cards than when I started. Persons reported to me from FC6 to FC8, about 12 to 14 people. I managed these persons. I had to do budgets for my area. There were 12 to 14 personalities and problems to deal with daily and the systems we were supporting.
>
> I dealt with cards and echannel applications. Myself and the team liaised with vendors of the [Bank] in addition to the development of interfaces, programming and other technical tasks related to operation of the system. My functions fell under the spectrum of IT....
>
> [The Bank] hosts its data centre in Barbados and the Bahamas, and the functions of my department supported applications in Barbados and the Bahamas which served all the branches within the region. Other banks in Barbados do not have their support done in Barbados, it is done in their home countries.
>
> My IT function had a regional dimension and my team was distributed within the region and Toronto. The 12 to 14 persons I managed were not all in Barbados. Some were in the Bahamas, Jamaica and Toronto. The persons outside of Barbados reported to me using email and IT technology".

[60] As Head of Technology Systems, Channels and Cards, the Claimant was responsible for all of the Bank's electronic banking systems, including credit/debit card systems, internet banking and electronic pay roll throughout the region. He travelled as a result of his regional responsibility. Within the Bank's management structure, the Claimant was more senior than a branch manager. Mr. Wilson described the Claimant's job as "a demanding job", and he never gave the Claimant a negative performance appraisal.

[61] It is not to be forgotten that at the time of his dismissal the Claimant carried additional responsibility as the acting Head of Technology Systems Finance and Business Intelligence. This was another FC9 position with regional responsibility. Fourteen people reported to the Claimant. It does not appear that the Claimant was remunerated for the 13 months that he undertook these additional responsibilities. The Bank found someone to fill this position soon after the Claimant was dismissed. His service as an acting manager in this area was unrewarded.

[62] The Claimant was dismissed at the age of approximately 41 years, with seemingly as much responsibility as the employee in **Clarke.** He was highly qualified in IT, and worked in a specialized area. The employee in **Clarke** was dismissed at age 52. She was the Administrative Manager of the Barbados office of an insurance company, with responsibility for its business

in the sub-region. As the principal representative for her employer, she managed budgets, investments and mortgages. She was responsible for more than 20 agents and other part time agents, and her job entailed regional travel.

[63] The **Agard** employee was the business manager of operations in a data processing business with a large workforce. Her age at the time of dismissal is unknown. The **Hoyte** employee was a supervisor at the national bus company, and aged 40 at the time of his dismissal. He dispatched bus crews from a duty roster prepared by someone else, and supervised about 7 workers. His duties were not specialized or managerially intense as compared to the duties of the Claimant.

[64] Long service should not be the only basis for providing this category of worker with the benefit of an implied term, to the detriment of all others who qualify for a period of notice under section 20(1) of the Act. As noted previously, section 20(1) offers an implied term to all who qualify for a minimum period of notice. (Supra at para.[48]).

[65] At age 41 it can be challenging to find a new employer subsequent to dismissal. The Claimant's evidence is that:

> "I tried my level best to find alternative employment at the equivalent of FC9 with other corporate entities, but I found that there were very few companies with positions at this level in Barbados, meaning senior positions with regional responsibility and there were very few vacancies at

> the time". (Para.7 Witness Statement filed on 20 December 2013).

[66] In his oral evidence the Claimant admitted that:

> "I have not put before the court any correspondence of seeking employment. At the time I was terminated BNB, BNS, Royal Bank, RBTT, Butterfield Bank were there. Goddards, BS&T, NIS. I monitored newspapers and on line channels for jobs. I applied at a number of these institutions. I was called for interviews with 3, but I was not successful. My job specification was that it would pay my mortgage. I applied for similar jobs. Not many companies were hiring in 2009".

[67] The Court accepts the Claimant's evidence about his efforts to find another job. The Court also accepts that it took him some time to find alternative employment. His evidence is that:

> "It took me another 8 months to find temporary contract work in a self employed capacity and the rate of remuneration was on average $5,000 per month and it was not in the field which I was employed in with the [Bank]. It took me another 21 months to find a regular job". (Para.17 Witness Statement filed on 27 November 2012).

[68] The inability to find work was a factor considered in **Hoyte.** The **Hoyte** employee was very close in age to the Claimant when terminated. Indeed, courts have recognized the challenges of the job market for individuals around this age. One judge remarked about a 42 year old employee that:

> "This age is not considered as young and attractive to prospective employees. It is very likely that it

> will have an adverse effect on the plaintiff's prospects of employment". (See **Pierre** supra at para. [30], per Watkins J at para. [69] of judgment).

[69] In rationalizing the generosity of wrongful dismissal payments when compared to severance payments, Sir David Simmons CJ opined that Parliament had likely recognized that a business in trouble "would hardly be able to give long periods of notice or make liberal payments in lieu thereof". (**Clarke** at para.[40]). This was true in **Clarke** where the employer was downsizing and restructuring its Barbados office. The employer in **Agard** was moving the business to Mexico, and the **Hoyte** employer was forced to restructure because of heavy financial losses.

[70] There is no evidence in this case that the Bank was in trouble. And there is no evidence of its inability to give either a longer period of notice, or to make a more liberal payment in lieu of notice. The fact that the Claimant was paid three months' salary in lieu of notice, indicates the Bank's recognition and acceptance that the Claimant should receive more than the statutory minimum under section 20(1)(b) of the Act. The Bank must also be taken to have recognized and accepted that it would be neither fair nor in keeping with good industrial practice to restrict the Claimant to the statutory minimum required by the Act.

[71] The computation of an amount to be paid in lieu of notice under section 20 is

a different exercise from the calculation of severance pursuant to section 3(1) of the Act. The payment in lieu of notice is not a severance payment. The Act does not describe it as a severance payment. In fact section 20 is found in Part IV of the Act which is headed "Provisions relating to notices to terminate contracts of employment". It is "a completely separate entitlement". (See **Chefette** at fn 76 to para.[144] of judgment, where the CCJ refers to notice and the payment of salary in lieu of notice in relation to compensation for unfair dismissal). In a severance payments Act described by the CCJ as designed for "greater generosity", it is questionable whether it can be inferred that Parliament intended to restrict both the severance payment and any pay in lieu of notice. (See para.[122] of **Chefette** judgment). What may be said is that the Barbados Parliament deliberately legislated for two streams of compensation under the Act, the severance payment and a payment in lieu of notice.

[72] This Court is persuaded that in all the circumstances of the Claimant's dismissal, he was entitled to six months' pay in lieu of notice under section 20(1)(b) of the Act. He should not be constrained by the decision in **Clarke** and cases of that ilk. There is nothing in **Clarke** to suggest how the Court of Appeal arrived at 5 months' pay in lieu of notice, other than that the employer opened negotiations with the employee 5 months before she was handed her

letter of dismissal. (See paras.[61] and [62] of judgment). It was difficult for the courts in **Agard** and **Hoyte** to go beyond this period so soon after the **Clarke** decision, and where the employees in these cases did not work for the same length of time considered in **Clarke. Clarke** is now an eighteen year old precedent which may need to be revisited by an appeal court at an appropriate time.

Bonus Payment

[73] There is an additional claim for a bonus payment for 2009 in the sum of $38,689.95. Eligibility for bonus payments is governed by the Employer of Choice document. The Claimant agreed that this document was incorporated into his contract of employment.

[74] At page 44 of the Employer of Choice document it states under the caption 'Who is Eligible for a VIP Bonus?':

> "Permanent full-time and permanent part-time employees who leave [the Bank] through redundancy, subject to personal performance and the following criteria:
>
> - the individual is employed on the last business day of the fiscal year (i.e., October 31); and
> - has worked in the organization for the full fiscal year (November 1 to October 31)". (See Exhibit MS4 annexed to the 2nd Witness Statement of Margaret Simmons filed on 04 November 2013).

[75] During cross-examination the Claimant candidly informed the Court that he was not employed by the Bank on the last business day of the fiscal year, and that he did not work in the bank for the full fiscal year. This evidence excluded the Claimant from any lawful claim to a bonus for the fiscal year 2008 to 2009.

Disposal

[76] The Court finds that the Claimant was not wrongfully dismissed, and that in the circumstances of his dismissal he was made redundant. In addition to the severance paid by the Bank he was entitled to pay in lieu of notice for six (6) months.

[77] The Bank shall pay the Claimant an additional sum representing three (3) months' pay in lieu of notice.

[78] The Claimant is not entitled to a bonus for the Bank's fiscal year 2008 to 2009.

[79] I shall now hear the parties on the issues of interest and costs, and any consequential orders to be made.

Sonia L. Richards

Sonia L. Richards
Judge of the High Court