ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 448 OF 1998

In the Matter of an Application by Andrea Young for an Order of Certiorari

- and -

In the Matter of a Decision dated the 20th of April 1998 by the Chairman and Members of the Appellate Authority constituted under and by virtue of Section 24(2) of the Protection of Employment Act Chapter 150 of the Revised Laws of St Vincent and the Grenadines

BETWEEN:

ANDREA YOUNG

Applicant

and

BANK OF NOVA SCOTIA

Respondent

Appearances:

PR Campbell Esq and Ms C McSheen with him for the Applicant
BE Commissiong Esq QC for the Respondent

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2000: January 26,28

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JUDGMENT

[1] MITCHELL, J: By a Notice of Motion filed on 2nd November 1998, the Applicant seeks an order of certiorari to remove into the High Court for the purpose of its being quashed a Decision of 20th April 1998 of the Appellate Authority (hereinafter

"the Authority") constituted under section 24 of the Protection of Employment Act, Cap 150 of the Revised Laws of St Vincent and the Grenadines (hereinafter "the Act").

[2] The facts are not in dispute. From the Statement and Affidavit of the Applicant filed at the time of the application for leave, it appears that the Applicant had been employed by the Respondent for some 13 years. At the time of her dismissal, she was at a supervisory level. On 18th December 1996, she had received a letter of the same date signed by the Manager, TV Wilkins, suspending her with pay pending investigation into certain unnamed irregular practices in which she was alleged to have been involved. The letter informed her that, depending on the outcome of the investigation, she could be subject to disciplinary action up to and including termination.

[3] On 16 January 1997, she received another letter of the same date signed by Mr Wilkins terminating her employment with the Respondent effective immediately, and enclosing a cheque for $13,396.36 as severance pay. The cause for dismissal was given as follows:

> Further to our letter of December 18, 1996, informing you of your immediate suspension, we have now completed our investigation into the irregular practice perpetrated by yourself at St Vincent branch and advise that we have no alternative but to terminate your employment, for cause, effective January 16, 1997.
>
> The decision to dismiss is based upon the following irregular practices of which you are aware:
>
> > While in the position of supervisor, you allowed the vault door to be left open overnight.

A technician servicing the combinations was allowed to remove cash from the treasury while you were custodian.

You were a custodian of sub-treasury when $10,000.00 disappeared during the ABM servicing.

You were Lock-up Officer when $2,500.00 disappeared from the tellers cash as a result of improper procedures being followed.

[4] Being aggrieved by the decision of the Respondent to dismiss her, she sought legal advice. As counsel for the Applicant put it, she had two choices. She could have issued a writ for wrongful dismissal, and have hoped to have it heard in the High Court after waiting a minimum period of 5 years. Alternatively, she could have applied to the Labour Commissioner for relief under the provisions of the Act, and have hoped to have the matter go through all the steps within one year. She made her choice and authorised her counsel to lodge a formal complaint and to seek appropriate redress on her behalf pursuant to the provisions of the Act. On 24th January 1997 her counsel complained in writing to the Labour Commissioner that the Respondent had dismissed her unfairly contrary to the provisions of section 5 of the Act. The Applicant was upset because of the adverse imputations to her character, her honesty and her integrity. She applied to be reinstated if it was determined that her dismissal was unfair.

[5] At this point, it is appropriate to look at the regime for settlement of industrial disputes established for the State of St Vincent and the Grenadines by the Act, so that we can understand how the dispute in this case was handled at the various levels through which it proceeded. The Act is a short one of 28 sections. No Regulations as contemplated by section 27 of the Act for carrying out the purposes of the Act have been made by the Minister. Some of the more important and relevant provisions of the Act are:

3(1) Every employee engaged in a protected employment in a notified establishment shall, on and after 1st July, 1980, stand protected against unfair termination of service by his employer. …

5(1) Notwithstanding anything contained in section 3, the services of any employee may be terminated for good cause, and any employee whose service is terminated for good cause shall not be eligible to receive from the employer severance pay under Part II.

(2) The termination of service shall be deemed to be terminated for good cause if

(a) the employee has

(i) been guilty of misconduct in or in relation to his employment;

(ii) committed a criminal offence in the course of employment without the consent, express or implied, of the employer;

(iii) behaved immorally in the course of his duties; or

(iv) conducted himself in such a manner as to clearly demonstrate that the employment cannot reasonably be continued;

(b) the employee does not have the capacity or qualification to perform the work of the kind he was employed to do;

Provided that the employer has given the employee at least two written warnings to that effect and that within three months thereafter the employee does not rectify the defect or make up the deficiency pointed out to him;

(c) the employee cannot be continued in the position he held without contravention (by him or the employer) of some existing law.

6(1) Where an employer desires to terminate the services of an employee for any reason other than those set out in section 5(2) on the ground that no reasonable employer can continue to employ him in that position, the employer may file a petition before the Labour Commissioner seeking permission for such termination. …

7. In deciding a question as to whether a termination of service of an employee was unfair or not, due regard shall be had to the fact whether the employer acted reasonably or unreasonably, and where the employer has acted under a mistaken belief as to the factual basis for the termination, the question may be decided on the basis as to whether the actual circumstances which existed, if known to the employer, would have reasonably led him to terminate the service of the employee.

8. If it is found that the employee was unfairly or unjustifiably dismissed, the employee may elect either to be reinstated in his job or receive severance pay if he is entitled thereto. …

19(1) Any employer or employee, or any person or organisation acting on his behalf, who alleges that the employer or employee respectively has failed to comply with any provisions of the Act, shall make a complaint in writing in the first instance to the Labour Commissioner. …

20(1) The Labour Commissioner shall, in the case of any dispute referred to him under section 19, give notice thereof to all interested parties and try to bring about a settlement with the parties.

(2) If, within fourteen days of the filing of the petition referring the dispute, the Labour Commissioner does not succeed in bringing about a settlement, he shall refer the matter, with his report thereon, to the Minister. …

21(1) On receipt of any report from the Labour Commissioner in pursuance of section 20, the Minister shall refer the matter to an officer hereinafter referred to as a hearing officer. …

22(1) The hearing officer shall, after issue of notice to all the interested parties, either

(v) hold a hearing conference and attempt to narrow down the issues and then adjudicate on the dispute; or

(vi) proceed to trial straight away and adjudicate on the dispute. …

23. Every decision of the hearing officer shall be final if no notice of appeal is filed within twenty-one days of his decision.

24(1) Any party to the proceeding before the hearing officer may, within twenty-one days of the decision by the hearing officer, appeal against the decision to the authority. …

(3) The decision of the authority on any matter shall be final. …

[6] The Minister duly appointed a Hearing Officer, George L Bailey, MBE, JP, (hereinafter the "Hearing Officer") to deal with this dispute. On 4th November 1997, the Hearing Officer heard evidence for the Respondent from Mr Wilkins, the manager; Mr Carl Dickson, Operations Officer in Customer Service; Ms Sabrina DeFreitas, in charge of operations; and Gwen Ollivierre, a teller. At the close of the case for the Respondent, the Applicant's solicitor submitted that the Act did not authorise an employer to dismiss an employee for failing to perform unless the employer follows the requisite procedure at section 5(2)(b) supra. He also submitted that the evidence of the witnesses for the Respondent showed that the Applicant's performance and conduct had been impeccable. He submitted that

there was no case for the Applicant to answer, and asked the Hearing Officer to rule, on the evidence of the Respondent's witnesses, that the dismissal of the Applicant had been unfair. In response, counsel for the Respondent submitted that the evidence was that the Applicant had been reasonably dismissed for cause under section 5(2)(a)(iv) of the Act. The Hearing Officer reserved his decision.

[7] On 10th November 1997, the Hearing Officer communicated his decision on the no case submission to the parties in writing. His decision read:

> Having carefully considered all of the evidence presented by the parties concerned and aided by the Protection of Employment Act No 16/80 and by legal advice, I hereby give DECISION that the dismissal of Andrea Young was unreasonable, unjustifiable, and unfair more particularly because the grounds given for the dismissal were in no way validated by the evidence put forward to support the same.
>
> In accordance with section 8 of the Protection of Employment Act No. 16/80 Ms Andrea Young must be reinstated in her job as she has requested.

In addition to the above decision, the Hearing Officer submitted to the parties a 15 page Record which consisted of his notes of the evidence taken before him from each witness, the legal submissions made to him by each of the lawyers, and his decision on the no case submission supported with 2 pages of his reasons for having come to his decision.

[8] The Respondent was dissatisfied with the decision of the Hearing Officer. It appealed to the Authority. The Authority consisted of Mr Denniston Bobb as Chairman, and Mr Walden Ryan and Ms Lesline Bess as members. The Respondent submitted to the Authority a document entitled "Amended Notice of Appeal and Skeleton Arguments Combined" dated 2nd March 1998. This

document consisted of 10 closely printed legal-length pages. It contained the grounds of appeal, together with all of the law, argument, and submissions relied on by the Respondent The Respondent's first ground of appeal was:

> (i) The decision of the Hearing Officer is unreasonable and cannot be supported by the evidence in that he failed to consider adequately or at all: …

There followed 6 matters set out about which complaint was made that the Hearing Officer had not considered adequately or at all. The second ground of appeal was that:

> (ii) The Hearing Officer was wrong in law in holding as he did … that: …

Two matters were set out as being matters of law that the Hearing Officer had erred on. Detailed legal argument on each of the grounds were set out in the Notice of Appeal in support of the two grounds. The third ground of appeal was as follows:

> (iii) The Hearing Officer misdirected himself and fell into error by failing adequately or at all to consider the provisions of section 7 of the Protection of Employment Act in arriving at his decision, and was wrong in law and fact in holding that the evidence led by the employer was contrary to a dismissal under section 5(2)(a)(iv). …

The above ground was broken down into several sub-grounds. Detailed legal argument and analysis of the law and of the evidence that had been led before the Hearing Officer were set out in the Notice of Appeal on the above ground of appeal. The fourth ground of appeal was as follows:

> (iv) The Hearing Officer failed to consider adequately or at all the circumstances in which an order for reinstatement of an employee should be made: that is to say whether it is automatic or whether he (the Hearing Officer) should take into consideration matters other than the request of the employee to be reinstated. …

Again, there were contained in the Notice of Appeal detailed argument and submissions on the law and the evidence on the above ground. The final ground of appeal was:

> (v) The Hearing Officer erred in law in upholding the no case submission by the Respondent in that he failed to appreciate that on the close of the case for the [Respondent] it was for the [Applicant] to satisfy him that in the circumstances of the case no reasonable employer would have dismissed her. As a consequence the Hearing Officer misdirected himself and made a wrong decision in law when he did not call on Miss Young to give her side of the story. …

The Respondent concluded the Notice of Appeal by asking the Authority to set aside the finding by the Hearing Officer that the dismissal of the Applicant was unreasonable, unfair and unjustifiable, and in its place [to make] a finding that the dismissal was for good cause; to quash the decision of the Hearing Officer to reinstate the Applicant; and to have the Hearing Officer directed to discontinue the improper and unfair practice of taking legal advice outside the hearing of the dispute behind the backs of counsel for the employer and employee.

[9] On 8th April 1998, the Respondent's Appeal was heard by the Authority. At the end of the hearing of argument by counsel, the Authority reserved its decision. By a letter to counsel for the Respondent copied to counsel for the Applicant and dated 20th April 1998, the Authority delivered its decision. The decision was to the following effect:

> … The Hearing Officer erred in law in upholding the no case submission by the respondent, in that he failed to appreciate that on the close of the case for the [Respondent] it was for the [Applicant] to satisfy him that in the circumstances of the case no reasonable employer would have dismissed her.
>
> As a consequence the Hearing Officer misdirected himself and made a wrong decision in law when he did not call on Miss Young to give her side of the story.
>
> After taking all the circumstances into consideration we have decided to accept the submissions put forward by the [Respondent].
>
> Miss Young's termination of service is therefore held to be termination for good cause. Section 5(2)(a)(iv) – Act No 16/1980 …

[10] On 19th October 1998, the Applicant applied for leave to apply for an Order of Certiorari, which was duly granted by Baptiste J. At the same time, she filed her Statement and Affidavit in Support as required by Order 44 of the Rules of the Supreme Court. There were 4 grounds set out upon which the Applicant relied. They were:

> (1) The Appellate Authority was wrong in law in holding that the Hearing Officer had failed to appreciate that on the close of the case for the Bank of Nova Scotia it was for the Applicant to satisfy him that in the circumstances of the case no reasonable employer would have dismissed the Applicant.

(2) The Appellate Authority was wrong in law in holding that the Hearing Officer had misdirected himself and had made a wrong decision in law when he did not call on the Applicant to give her side of the story.

(3) The Appellate Authority was wrong in law in failing to appreciate that the evidence tendered before the Hearing Officer did not support and could not support the Bank's decision to terminate the Applicant's employment on any reasonable or rational view, and thus the Authority failed to appreciate that the evidence did not rise to the threshold of sufficiency as would have made it necessary for the Applicant's "side of the story" to have been given before the Hearing Officer.

(4) The Appellate Authority was wrong in law in failing to appreciate that soundness of judgment had to be imputed to the Hearing Officer and that in the exercise of that judgment as to whether or not he should have called upon the Applicant to testify the Hearing Officer acted reasonably and exercised that judgment in a judicial manner given the state of the evidence tendered before him by the Bank of Nova Scotia; consequently the Appellate Authority erred in law in either

   (a) not recognising the soundness of judgment residing in the Hearing Officer; and/or
   (b) not assessing the integrity and reasonableness of the exercise by the Hearing Officer of that judgment; and/or
   (c) not applying any or any correct legal principles in overruling the exercise of that judgment by the Hearing Officer.

(5) The Appellate Authority erred in law in ignoring or in failing to appreciate or understand the findings of fact by the Hearing Officer whereon the Hearing Officer based his decision in ruling that the Applicant had been unfairly dismissed by the Bank of Nova Scotia.

[11] The Affidavit in Support of the Applicant exhibited not only the correspondence previously mentioned, but also the entire record from the Hearing Officer, the Amended Notice of Appeal with the "skeleton argument" of the Respondent before the Authority, the "Summary of [Applicant's] Case" before the Authority, and the decision of the Authority. The Record before this court, in short, was as complete as a Record could be.

[12] Both counsel for the Applicant and counsel for the Respondent supplied the court with detailed notes of their submissions and copies of the authorities on which they relied. The court is very grateful to both counsel not only for the extensive research they both carried out to prepare their respective cases, as well as for the comprehensive and complete copies of the authorities on which they relied that they supplied to each other and to the court, but also for the lucidity of their respective presentations.

[13] It is appropriate at the outset briefly to confirm that in the present application this court is not sitting as a court of appeal against the Authority. Section 24(3) of the Act prohibits any such appeal. This is an application for an order of certiorari. An application for an order of certiorari is not the same thing as an appeal. The procedure that applies to an order of certiorari is provided by Order 44 of the Rules of the Supreme Court. Certiorari is the proper process whereby the High Court supervises the application of the law by magistrates' courts and administrative and other tribunals exercising a judicial or quasi-judicial function. The High Court ensures that such tribunals do not act without or in excess of the jurisdiction given to the tribunal by an Act of the House of Assembly. The High Court will act where

on the face of the record it appears that the decision was erroneous in point of law. Certiorari lies even where by statute the decision of the administrative tribunal under question was "final." The word "final" as used in section 24(3) means only that a decision of the Authority is unappealable. The High Court is empowered by the certiorari procedure found in Order 44 to examine the record of the proceedings before the Authority to determine whether or not the Authority was guilty of an error of law that led it improperly to carry out its function and powers. The order is discretionary, and the court may refuse it if the circumstances make it right to refuse it.

[14] The consequence of the above general observations is that in this matter this court is not concerned with such questions as whether or not the Hearing Officer was correct to rule as he did. We are not concerned with whether or not the Hearing Officer had before him sufficient evidence of the unfair dismissal of the Applicant. Nor are we concerned with whether or not the Authority found in the record sufficient to justify it in coming to the decision that the termination of the Applicant by the Respondent was fair. Nor is this court concerned with whether a reasonable employer would either have been entitled to dismiss the Applicant or would have continued to employ the Applicant. We are not concerned with whether or not the dismissal of the Applicant was fair or reasonable.

[15] Let us now take the grounds set out in the Applicant's Statement [supra] one by one and consider them. The first ground is set out above, and is essentially that the Authority erred in law in finding that the burden of proof in unfair dismissal cases in St Vincent and the Grenadines lies on the employee. Is it the law in St Vincent that it is for an employee before a Hearing Officer to establish by evidence that her dismissal was unfair, as submitted by the Respondent? Or, is it the law that it is for the employer to prove that the dismissal was fair, as submitted by the Applicant? The Act contains no provision as to where lies the burden of proof, only a definition section to the effect that "proof" means proof on a balance of probability. In some other States within our OECS jurisdiction with legislation

similar to the Act, their legislation states clearly where the burden of proof lies in unfair dismissal cases. In those States the matter is beyond doubt. In the UK Industrial Relations Act, while the general burden of proof is on the employee, the evidential burden of specific matters is placed on the employer. So, for example, section 24 of the UK Act provides:

> (1) In determining for the purposes of this Act whether the dismissal of an employee was fair or unfair, it shall be for the employer to show (a) what was the reason … for the dismissal, and (b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held. …

In St Vincent, the question as to where the burden of proof lies has to be deduced as the Act does not deal expressly with it. Reliance was placed by counsel for the Respondent on The Right to Dismiss by Michael Whincup, 2nd Edition, at page 54 dealing with the state of the law in the United Kingdom:

> From the employee's point of view, while strictly he need not prove more than the fact of dismissal in order to launch his claim, it must still be very difficult for him to persuade a tribunal that 'no reasonable employer' would have dismissed him, which is implicitly the burden on him. From the employer's point of view the burden of disproving liability is reduced accordingly. All he needs is a good prima facie case, ie, that in the light of information reasonably available to him at the time … his decision to dismiss was a reasonable one.

The question for this court is what was the intention of the House of Assembly of the State of St Vincent and the Grenadines on the matter. In the absence of any express statutory provision, the better view must be that the general common law rule that "he who alleges must prove" must have been intended by the legislature

to apply. The general burden of proving unfair dismissal under the Act lies on the employee. There is no contradiction between that finding and a conclusion that the proof of specific matters peculiarly within the knowledge of the employer may have been intended by the legislature to shift to the employer. Given that the title of the Act and the intention of the Act are the protection of employment; and given the words of sections 3 and 7 quoted above; and given the constraints and limitations on termination of employment set out in sections 5 and 6 of the Act; I conclude that the burden of proof in St Vincent and the Grenadines in matters of unfair dismissal of the issues, first, whether or not one or more of the circumstances set out in section 5(2) applied in a particular case, and, second, whether or not the employer acted reasonably or unreasonably, is on the employer and not on the employee. It could not have been the intention of the legislature for an employee to have to prove that none of the circumstances in sections 5, 6 or 7 of the Act applied to her case. An employee need only show that there was a dismissal and that she complains that it was unfair. She shows this by putting in writing her complaint to the Hearing Officer. Once she has done this, the Hearing Officer, is entitled to require that the employer must then give evidence to and satisfy the Hearing Officer that the dismissal was justified by one of the causes set out in sections 5 or 6 of the Act. In the absence of prescribed rules of procedure for the Hearing Officer to follow, it was proper for the Hearing Officer to lay down the procedure that was to be followed in this case. The procedure he lay down was that the employer went first and gave his evidence about the circumstances he alleged justified the dismissal about which the complaint has been made. He must further show whether or not he acted reasonably under section 7. Only after he had done so would it have become necessary for the employee to give her evidence. The onus was on the Respondent to prove the cause of dismissal and the reasonableness of his decision to dismiss. Only the Respondent could have given the evidence of what operated in its mind, what were the reasons for the dismissal, at the time it made the decision to dismiss. Only the Respondent could have produced the evidence on the other matters set out in section 7. The burden lay on the Respondent to prove that in the circumstances of the case, on a

balance of probability, it acted under one of the legally permitted causes and a reasonable employer could have dismissed the Applicant. There was nothing inherently unfair, improper, or unjust, in the procedure laid down by the Hearing Officer. To have done otherwise, given the lack of Regulations, and the lack of specificity of the alleged "practices" of the Applicant in this case, would have meant that the Applicant would have had to have given evidence at large. She would have had to cover in her evidence every possibility, to dredge up every incident that might have occurred over the past years of her employment, to attempt to establish the proper practices she followed, not knowing what exactly would be complained about later by the Respondent in his evidence. It was much more in keeping with the intention and purpose of the Act for the Respondent's witnesses first to have given their evidence about the cause of dismissal and the circumstances that made the dismissal reasonable. In effect, I find that the procedure followed by the Hearing Officer in this case was a procedure impliedly contemplated or authorised by the Act. In any event, the Respondent did not object at the time the Hearing Officer called upon the Respondent to go first in giving evidence. By acquiescing in the procedure laid down by the Hearing Officer, the Respondent must be held to have accepted that the evidential burden lay on him to satisfy the Hearing Officer as to the matters set out in sections 5, 6 and 7 of the Act. The Authority was in error when it stated in its decision that "it was for the [Applicant] to satisfy him that in the circumstances of the case, no reasonable employer would have dismissed her."

[16] The second ground found in the Statement and set out above, is to the effect that the Authority was wrong in law in when it found that the Hearing Officer misdirected himself in upholding the no case submission of the Applicant, and in not calling on the Applicant to give evidence. The Respondent submits, relying on Walker v. Josiah Wedgewood & Sons Ltd [1978] IRLR 105, that there is no merit in the contention. In the Walker case, the Appeal Tribunal in the UK held that:

> The first matter upon which guidance is sought relates to the matter of submissions of no case to answer. The general approach, as we think, must be that in cases concerned with unfair dismissal, whether it be constructive dismissal or direct dismissal, the concept of no case to answer is somewhat out of place. In Buskin v Vaccutech (Successors) Ltd [1977] ITR 107, in a constructive dismissal context this Tribunal indicated that it was always, or at any rate most often, desirable to hear both sides. But if ever there was a case in which that desirability is demonstrated it is this case; for in the Reasons of this Tribunal, at paragraph 22, there appears this passage:
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> > '… [W]e find that the applicant has established that his employers were guilty of conduct which would have entitled him to determine his employment without notice.' …

Unlike the situation that prevails in St Vincent, in the UK there are rules of procedure to guide the UK tribunal in its hearing. In the UK, the employee gives a certain amount of evidence before the employer is called upon the testify. The meaning of the Walker case is that the UK employer should go on after the employee, and give his evidence which will be tested by being subject to cross examination before the tribunal rules on whether it is satisfied that the employer acted reasonably. The dicta in the case of Walker [supra] is to the effect that the Hearing Officer should not allow a no case submission at the conclusion of the evidence of the employee, but should hear the evidence of the employer as to the circumstances in which the employee was dismissed. A no case submission should not be allowed to be made by the employer at the close of the case for the employee who had gone first in giving his evidence; the employer should be heard on his reasons for the dismissal. The case of Walker is of no assistance to and does not support the submissions in this case of the Respondent. Whatever the procedure followed in the UK, in St Vincent the employer gives evidence first before the employee. If the employer in St Vincent having given his evidence has not established at the close of his case by evidence satisfactory to the Hearing

Officer that the cause of the dismissal claimed by the employer was one permitted by section 5(2) involving grounds upon which a reasonable employer would have dismissed an employee, is the Hearing Officer required to call upon the employee to give evidence as submitted by the Respondent? Or, once the Hearing Officer had embarked upon the hearing, did not the normal principles of civil adversarial litigation apply, as submitted by the Applicant? Is one such principle not that if the person on whom the burden of proof lies fails to discharge the burden then there is no procedural or substantive necessity for the other party to be called upon to establish his case? The answer must be in the affirmative. The burden of proof in St Vincent on the matters set out above is on the employer, not the employee. To have called upon the employee to give her evidence when, for example, as the Hearing Officer had found in this case, the employer had failed to produce a shred of evidence that his action in dismissing the employee fell under one of the provisions of sections 5 or 6, and that he had failed to satisfy the test of reasonableness provided by section 7, would have been to have allowed the employer to have gone on a fishing expedition, to have let him try to establish his case through the evidence of the witnesses for the employee, having failed to establish it through his own witnesses. That would not have been just, nor was it required by the Act. The Hearing Officer was entitled to accept a no case submission on behalf of the Applicant if he found as he did that there was no shred of evidence on the matters alleged by the Respondent. The Authority was wrong in law to find as it did that the Hearing Officer misdirected himself and made a wrong decision in law when he did not call on the Applicant to give her side of the story.

[17] The third ground on which the application is based is the failure of the Authority to appreciate that the evidence tendered before the Hearing Officer did not support the decision of the Respondent to terminate the Applicant on any reasonable view. It is important to review the evidence that was before the Hearing Officer. First, there was the letter of dismissal. The letter of dismissal on its best interpretation accused the Applicant of incapacity to perform her duties. Second, there was the

evidence of the Respondent's witnesses. It is important to emphasise that the witnesses for the Respondent in this case were insistent that no suspicion fell on the Applicant in relation to the missing money. No complaint was made in either the letter of dismissal or in the evidence of any of the witnesses for the Respondent of any of the matters provided at section 5(2) of the Act, that, if the Hearing Officer had found they had existed, would have deemed the termination to have been for good cause, ie, that the Applicant was guilty of some misconduct; or had committed a crime; or had behaved immorally; or had conducted herself in such a manner as to clearly demonstrate that the employment cannot continue; or the employment was in contravention of some law. Counsel for the Respondent submitted before the Hearing Officer, before the Authority, and before this court, that the dismissal was and was intended to be under section 5(2)(a)(iv), ie, that the Applicant had conducted herself in such a manner as to clearly demonstrate that the employment cannot continue. If that were so, I can only observe that the Hearing Officer had found that neither did the letter of dismissal give any hint of it, nor had any witness for the Respondent given a shred of evidence to that effect. The claim of a right to dismiss the Applicant under section 5(2)(a)(iv) first arose in the submissions of counsel for the Respondent. The only complaint I can find in the letter, as did the Hearing Officer, was that her alleged "practices as a supervisor" (which boiled down to 4 isolated incidents spread out over a number of years, hardly meriting the designation of "practices," ie, once of having left the vault door open overnight; once of having supervised a technician visiting from Barbados who stole money from the vault; and twice of having been acting in a supervisory capacity when money was taken by some person unknown) was irregular. Besides the words in the dismissal letter, the only witness for the Respondent at the hearing who complained about the capacity of the Applicant was the manager. The Hearing Officer recorded that the manager merely said that the bank had "lost confidence in the Applicant's ability to do her accountabilities in a responsible fashion." This alleged lack of confidence does not get a mention in the letter of dismissal. It first appears without any further explanation from any of the witnesses in the testimony of this one witness for the

Respondent. This evidence was at best a complaint under section 5(2)(b) as to the capacity of the Applicant to carry out her supervisory responsibilities. Where the complaint against an employee is that she is not performing her duties correctly, the Act at section 5(2)(b) requires the employer to give the employee 2 written warnings to that effect, and only if after 3 months the employee has not made up the deficiency can the employer dismiss the employee. That procedure was not followed by the employer in this case. That was the evidence at its best. At its worst, the letter of dismissal and the evidence of the manager showed the desire of the Respondent to terminate the employment of the Applicant for a cause other than one of those set out in section 5(2). Section 6 requires the Respondent in such a case to petition the Labour Commissioner seeking permission for such termination. That procedure was not followed in this case. The Authority did not appreciate that the Respondent was bound by the cause for dismissal given in the letter of dismissal, and the evidence given at the hearing. The Respondent did not set out in its letter of dismissal any cause that could have fallen within any of the provisions of section 5(2) other than the capacity question in section 5(2)(b). The Authority did not grasp that the question of reasonableness on the part of the employer did not arise until the Respondent had met what I shall call the above conditions precedent set out in the Act for an employer to justify a dismissal.

[18] Having found as above on the first three grounds upon which the application for relief are based, it becomes unnecessary to deal with the two remaining grounds. Ground 4 stretches the argument beyond matters of law. Ground 5 is a wrapping up ground which, moreover, reaches into questions of fact. I make no findings on them.

[19] The question is, having found as above, what is this court to do? The Respondent makes the attractive argument that certiorari is a discretionary remedy, and that the relief of reinstatement sought by the Applicant is inappropriate even if the court finds that the Authority acted outside of its jurisdiction, and should not be granted. Both counsel submit that it is not open to this court to grant any other relief than

merely quashing the decision of the Authority. The effect of quashing the decision of the Authority would be to restore the decision of the Hearing Officer to reinstate the Applicant in her position at the Respondent bank. The only other remedy available to the Hearing Officer under the Act was severance pay, and the Applicant has already received what she has not disputed was a correct calculation of severance pay. Having already received severance pay, the Applicant at the hearing before the Hearing Officer obviously did not apply for severance pay. It is difficult to imagine how, in these circumstances, in a small community such as St Vincent is, and in a small bank branch as the Respondent is, either the Applicant would be happy returning to work, or the management of the Respondent would be able to function with the Applicant back on the premises after the manner and circumstances of her dismissal. Counsel for the Applicant has suggested that the Applicant is not interested in returning to her post, but principally in the vindication of her good name, and that she will be negotiating a proper settlement with the Applicant if the court rules in her favour. That may well be the proper solution. In the event, it is not for this court to consider the inadequacies of the remedies available under the Act to an employee unfairly dismissed. Nor is it for this court to puzzle over how the Applicant will benefit from a quashing of the decision of the Authority . It is sufficient in this case to find, as I do, that the Authority applied entirely incorrect principles of law in coming to their decision to overturn the decision of the Hearing Officer, that there are no sufficient grounds for the court not to exercise its discretions to make the order applied for, and to order brought into the High Court the decision of the Authority in this matter dated 20th April 1998 and to quash it.

[20] Counsel for the Respondent submits that there is no complaint by the Applicant against the finding by the Authority that her dismissal was fair within section 5(2)(a)(iv); and that there was abundant evidence upon which the Authority could properly have come to that conclusion; and that as there was no complaint against it, it should stand and not be interfered with. Several authorities on the law relating to the reasonable employer were relied on by the Respondent. I have

examined the decision of the Authority and I conclude that the finding by the Authority referred to is a bald one, unsupported by any reason or explanation offered by the Authority, almost by way of an aside. The finding flowed from the erroneous principles of law applied by the Authority in the earlier part of its decision. I do not accept that the Applicant was required to set out either in her Statement or in her Notice of Motion each and every finding of the Authority, and to complain against each and every one of those findings, for this court to be able to deal with all of the decision. A quashing of the decision would necessarily be a quashing of all the decision.

[21] There will be judgment accordingly for the Applicant who is entitled to her costs against the Respondent to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge