

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.: 22 OF 2011

BETWEEN:

EILEEN MURRAINE

Employee

and

ANTIGUA COMMERCIAL BANK

Employer

Before:

**The Hon. Philip A. Pilgrim
The Hon. Samuel R. Aymer**

**President
Member**

Appearances:

Ms. Gail Christian and Ms. Joy Dublin - Attorneys-at-Law for the Employee

**Ms. C. Kamilah Roberts and Ms. Tracy Benn-Roberts of Roberts & Co.
Attorneys-at-Law for the Employer.**

2012: September 06, 12

November 22

2013: January 16

February 20

JUDGMENT

PILGRIM P.

INTRODUCTION

- [1] The Employer the Antigua Commercial Bank (the Bank) is one of eight (8) banks which carries on business as a commercial bank pursuant to the Banking Act Cap. 40 of the Laws of Antigua and Barbuda. It has its registered office situate at Thames and St. Mary's Street in St. John's, in Antigua.

- [2] The Employee Eileen Vanessa Murraine resides at Justin's Haven, Hodges Crescent, Hodges Bay, in St. John's. She holds professional qualifications in Banking and related areas.
- [3] By a written agreement dated May 18, 2007 the Employer engaged the services of Miss Murraine as a Corporate Portfolio and Business Development Specialist. This contract of employment was exhibited by the Employee. It shall afterwards be referred to as "the said contract". (It was marked "EM-11")
- [4] In accordance with the said contract Miss Murraine was engaged for the purposes of assisting the bank to grow and develop the Bank's loan portfolio with particular emphases being placed on (a) the Private and Corporate Banking Division and (b) enhancing the Division's credit quality and administration.
- [5] The stated commencement date of the contract was August 13, 2007. The said contract between the two (2) parties was for a period of three years with effect from August 13, 2007 to August 12, 2010.
- [6] The allowances, benefits and the Employee's monthly salary are contained at Clause 5 and Schedule A of the said contract. They are as follows.

Allowances and Benefits

a. Travel	EC\$ 600.00 per month
b. Entertainment	EC\$ 450.00 " "
c. Domestic telephone	EC\$ 30.00 " "
d. Clothing	EC\$2,000.00 per annum
e. Mobile telephone	150 minutes monthly
f. Gratuity	10% of each year's annual salary payable at the end of each year or \$43,200.00.
g. Salary	EC\$12,000.00 per month.
h. Performance bonus	In accordance with the Bank's reward and recognition policy.

- [7] The Employer also provided the Employee with Health Insurance coverage in accordance with a policy which was administered by State Insurance Corporation. This policy provided certain benefits which included health, dental and vision treatment. Some of these expenses were paid for by the Employer.
- [8] In accordance with clause 8 of the said contract each party had the right to terminate it by giving to the other three months written notice of an intention to terminate it.
- [9] Clause 8 of the said contract contained a provision which allowed the Bank to terminate the contract if there was "*Failure on the part of the contractor to observe any obligation*" as stated in the contract.
- [10] On August 13, 2007 Miss Murraine commenced employment with the Bank. By letter dated September 15, 2009 the Bank dismissed Miss Murraine with effect from September 16, 2009.
- [11] In accordance with a letter dated September 15, 2009 the Bank paid to Miss Murraine the sum of \$50,081.45. The Bank was of the view that this figure represented her "*final payment*."
- [12] Miss Murraine wrote the Bank a letter dated September 17, 2009. In that letter she stated that her services "*were not terminated in relation to any violation of clause 7 of the contract or (for) any other reasons*".
- [13] Miss Murraine also disputed the figure of \$50,081.45 which was paid to her. It is her view that she should have been paid for "*11 months of unpaid salary, allowances (her) gratuity and vacation*".

- [14] There being a dispute between the two (2) parties they sought the advice of an Arbitrator in accordance with clause 12 of the said contract. Upon completion of the Arbitration process the Bank stated that a Report was issued by the Arbitrator. It is the Bank's evidence that the Arbitration Report stated at page 22 as follows:

"I would however conclude that Miss Murraine was an employee at the Antigua Commercial Bank under a contract of service and not as an independent contractor. Clause 8.3 of the contract, if applicable, reasons ought to have been given for the dismissal. Consequently, Miss Murraine's tenure while at the Bank was protected by (the) Antigua and Barbuda Labour Code. Miss Murraine's contract of employment was terminated by the Bank without reasons and not in compliance with provisions of the Antigua and Barbuda Labour Code, her dismissal was therefore unfair. The necessary consequences will obviously follow."

- [15] The Bank accepted the arbitrator's ruling and also accepted that as Miss Murraine's contract was terminated by the Bank without reasons being given to her, that the dismissal was not in accordance with the Antigua and Barbuda Labour Code. The Bank commenced negotiations with Miss Murraine through its Attorney-at-Law with a view to settle the quantum of compensation which may be due to her. Regrettably these talks failed.

Legal proceedings

- [16] The Employee commenced legal proceedings by filing a Reference in this Court. It is dated September 22, 2011. In that Reference she claims that the issue in dispute between the parties is "*that of unfair dismissal*". The Employee's Memorandum was filed on November 17, 2011. Two Witness Statements were filed on November 23, 2011 and December 12, 2012 in support of the Employee's case.

- [17] The Employer's Memorandum was filed on June 05, 2012. Two Witness Statements were filed on its behalf on June 06, 2012 and November 23, 2012.
- [18] On September 12, 2012 Ms. Joy Dublin, Attorney-at-Law for the Employee and Ms. Tracy Benn-Roberts of Roberts & Co. Attorneys-at-Law for the Employer appeared in Court. By a Consent Order of the same date both Attorneys-at-Law agreed that (a) the matter be proceeded with on the basis that the Employee was unfairly dismissed and that (b) both parties do file Written Submissions on or before October 15, 2012 with regard to the quantum of damages which should be paid to the Employee.
- [19] The following three (3) issues fall to be determined:
- (i) **Is the Employee entitled to be paid EC\$10,000.00 or any part of that sum for dental treatment incurred by her from Dr. SenGupta and Associates on August 28, 2009 enumerated on a State Insurance Corporation Form dated September 14, 2009?**
 - (ii) **Is the Employee entitled to be paid a Performance Bonus from the Bank for the Bank's financial year October 1, 2008 to September 30, 2009?**
 - (iii) **What is the quantum of damages payable by the Employer to the Employee as compensation for unfair dismissal?**

The Employee's Submissions

- [20] The Written Submissions for the Employee were filed on October 19, 2012. In her Submissions Ms. Christian Attorney-at-Law for the Employee stated that compensation which is payable to an employee who has been unfairly dismissed may vary according to the four (4) established heads. Counsel further submitted that the legal principles to be applied in a matter which involves an employer's

breach of contract may be determined by reference to *Antigua Public Utilities Authority v Ferdinand Barriero Civil Appeal Nos. 9 and 12 of 1992*.

[21] In that case the employee was offered the position of Accountant, Head Office Division of the Appellant for a period of three years commencing April 17, 1989.

[22] The respondent worked until he was summarily dismissed by letter dated March 15, 1990. The Court of Appeal upheld the Industrial Court's award under the following heads namely:

- (a) immediate loss of earnings,
- (b) future loss of earnings, (the difference between his present job and his salary for the unexpired term of the contract with the appellant),
- (c) loss of protection,
- (d) loss of gratuity,
- (e) loss of certain fringe benefits.

[23] Learned Counsel for the Employee submits that Miss Murraine is entitled to the following awards:

(a) Fixed term contract loss:		
Salary (EC\$12,000.00 x 11)		EC\$132,000.00
Gratuity: Ten (10%) of one year's salary		EC\$ 14,400.00
Allowances		EC\$ 13,713.00
Vacation: 25 working days		EC\$ 13,846.25
Clothing Allowance		EC\$ 2,000.00
Total	EC\$175,959.25	
Less: Notice Pay	EC\$ 36,000.00	
Total		EC\$139,959.25
(b) Loss of job protection		EC\$ 24,000.00
(c) Exemplary damages		EC\$ 48,000.00
(d) Costs		EC\$ 10,000.00
Total		EC\$221,959.25

The Employer's Submissions

[24] The Employer's Written Submissions were filed on October 16, 2012. Ms. C. Kamilah Roberts of Roberts & Co. Attorneys-at-Law for the Employer submitted that in cases of the premature termination of fixed-term contracts, the correct measure of damages is the unexpired period of the contract less the relevant deductions. If this Court is minded to adopt such an approach the Employer should pay to the Employee the following sums under certain headings, less a deduction for certain statutory payments.

(a) Fixed term contract loss

Basic Salary (EC\$12,000.00 x 11)	EC\$132,000.00
Gratuity	EC\$ 14,400.00
Allowances	EC\$ 13,713.00
Clothing Allowance	EC\$ 2,000.00

Less: Notice Pay	EC\$36,000.00
Employee Earnings	EC\$18,736.00
	<u>EC\$54,736.00</u>

Amount due	EC\$107,377.00
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(b) Loss of job protection	EC\$ 24,000.00
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(c) Immediate loss

Six month's salary	EC\$72,000.00
Less: Notice Pay	EC\$36,000.00
Employee Earnings	EC\$18,736.00
	<u>EC\$54,736.00</u>
	EC\$17,264.00

Total	<u>EC\$148,641.00</u>
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- [25] Ms. Roberts asserts that no payment should be awarded to the Employee for a loss of vacation pay. Ms. Roberts states that a claim for vacation pay for the unexpired term of the contract cannot be sustained at the same time as a claim for compensation for the loss of salary for the unexpired portion of the contract. In support of her submission Counsel cites the *Barriero case (op cit)*.
- [26] Ms. Roberts also submits that the facts of this case do not support an award for exemplary damages. Ms. Roberts submits that the Bank acting under the honest belief that Miss Murraine was an independent contractor purported to terminate her services pursuant to the terms of the said contract.
- [27] With regard to future loss of earnings Ms. Roberts submits that there was no guarantee nor could Miss Murraine have reasonably held an expectation that the said contract would have been renewed. In these circumstances the Employee is not entitled to an award of future loss of earnings.
- [28] In similar vein Ms. Roberts submits that the facts of this case do not support an award of costs.

The matter of vacation pay

- [29] The matter of vacation pay for the unexpired term of the employee's contract of employment was considered in *Barriero*. The judgment was delivered by Byron, J.A. (as he then was). At page 10 of the judgment the learned Judge set aside this award on the grounds that it amounted to "*extra compensation*".
- [30] In light of *Barriero* I agree with Ms. Roberts' submission. In the circumstances of this case Miss Murraine is not entitled to an award for loss of vacation pay.

The matter of exemplary damages

[31] This Court is empowered pursuant to **Sections 10 (4) and (5) of the Industrial Court Act Cap. 214**, to make an award of exemplary damages in certain specific circumstances. This may be done where the employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice.

[32] I agree with the submission of Counsel for the Bank. The dismissal in this case was neither harsh nor oppressive nor did it offend good industrial relations practice. In these circumstances the Employee is not entitled to an award of exemplary damages.

The matter of future loss of earnings

[33] Although the Employee's Memorandum makes reference to a claim for Future Loss and Earnings, this head of damage was not argued by Counsel for the Employee. In any event however the facts of this case do not support the grant of an award under this heading.

The First Issue

Is the Employee entitled to be paid EC\$10,000.00 or any part of that sum by the Employer for dental treatment incurred by her from Dr. SenGupta and Associates on August 28, 2009 enumerated on a State Insurance Corporation Form dated September 14, 2009?

[34] Miss Murraine gave evidence in Court on January 16, 2013. She stated that she was entitled to certain benefits pursuant to the said contract of employment. These included health, vision and dental. State Insurance Corporation was the insurer.

- [35] Miss Murraine recalled that on August 28, 2009 she obtained dental treatment from Dr. SenGupta and Associates in the sum of EC\$10,000.00.
- [36] The claim was signed by the dentist on September 08, 2009. the State Insurance Corporation Form was dated September 14, 2009. This was admitted as “EM-4”.
- [37] Miss Murraine stated that it was her understanding that if she required a claim to be paid by the insurance provider it was her responsibility to submit that claim to State Insurance Corporation. Her further evidence was that if a claim was so submitted, the insurer would pay the dentist for a part of the claim. She never submitted her claim to the insurer to be paid by the insurer.
- [38] Miss Murraine also gave evidence that the claim should have been submitted to State Insurance Corporation to be honoured by the insurer.

Discussion

- [39] Miss Murraine is an experienced banker. She knew the procedure for the processing of dental claims as well as any other related claims. She was required to submit a claim to the insurance company. As a consequence there would have been some discussion between the insurance company and the medical and/or the dental provider.
- [40] Ms. Gail Christian, Attorney-at-Law for the Employee submits “*that the Bank should honour the Dental Insurance Claim as it was incurred at a time when Miss Murraine was duly covered by the policy extended to her by the Bank. Hence, she claims the full sum of \$10,000.00*”.
- see paragraph 16 of her Written Submissions

[41](a) Ms. C. Kamilah Roberts of Roberts & Co., Attorneys-at-law for the Bank at paragraph 29 of her Written Submissions state *inter alia* as follows:

“If Miss Murraine had submitted the claim in a timely manner to the Insurance Company, the claim would have been processed accordingly. We submit that it would be unjust to now require the Bank to pay for this dental claim from its own pocket. It should also be noted that there was no guarantee that the full amount of EC\$10,000.00 would have been refunded to Miss Murraine under the applicable medical insurance policy”.

(b) According to Ms. Roberts, Ms. Murraine’s claim to be accordingly compensated should be dismissed.

[42] The failure by Miss Murraine to submit the dental claim to the insurers within the recommended period is crucial to a determination of the issue. It is most likely that if Ms. Murraine had presented the claim for dental treatment in an acceptable manner and time, then in all probability it would have been honoured. The Bank can only discharge its obligation under the relevant contract if the insurance company requests the relevant payment for each employee from it. If it is not presented with such a demand for payment from a healthcare provider, then it has no lawful duty to pay any sum which is not due to be paid.

[43] In the circumstances of this case I hold that Miss Murraine is not entitled to be paid EC\$10,000.00 or any part thereof by the Bank for treatment which was incurred by her on August 28, 2009.

The Second Issue

Is the Employee entitled to a Performance Bonus from the Bank for the Bank’s financial year October 1, 2008 to September 30, 2009?

- [44] The Bank's Reward and Recognition Policy is set out in the Bank's Performance Bonus Plan (PBP). The PBP states as follows under the heading of the term "Bonus"

"Bonus"

Permanent full time members of staff and employees whose contracts include payment under PBP may be entitled to a bonus, which is based on the actual salary paid to the employee during the financial year October 1 to September 30. Any payment of bonus shall be in the absolute and sole discretion of the Board. Any bonus if agreed by the Board may be determined as outlined below. The Company reserves the right in its absolute discretion to vary the terms of and/or level of bonus payable".

- [45] Clause 4 of the Bank's Performance Bonus Plan states as follows:

"Performance will determine the amount of bonus an employee will receive under PBP.

Each employee's performance for the fiscal is assessed by his/her manager/supervisor using the performance ratings outlined below. After the performance rating is established, a Personal Performance Multiplier will be determined, which reflects performance relative to achievement of objectives for the fiscal and relative to peers in the same job"

- [46] At Clause 5 of the Bank's Performance Bonus Plan the "Performance Ratings and Job Categories" are as follows:

ACB Performance Rating	Non- Management	Management
5	11-14%	14-20%
4	7-10%	10-15%
3	3-6%	6-10%
1 & 2	0%	0%

[47] The Bank's Performance Evaluation Rating System is contained in Ms. Denise Armstrong's Witness Statement filed on November 23, 2012. She is the Bank's Assistant General Manager – Credit and Control. I shall make further reference to this at paragraph [55] below.

The evidence

[48] In her evidence Miss Murraine stated that she was awarded a bonus in the amount of EC\$9,590.40 for the period October 01, 2007 to September 30, 2008. This is contained in a letter from the Bank to Miss Murraine dated April 06, 2009. It was attached to Ms. Armstrong's Witness Statement. It was admitted as "DA-2".

[49] Miss Murraine stated that the payment of a bonus was in the absolute and sole discretion of the Bank.

[50] She made reference to Ms. Armstrong's Witness Statement. In her Witness Statement Ms. Armstrong stated at paragraph 11 *inter alia* as follows:

"In the period October 1, 2008 until the date of her termination in September 2009, the Employee performed below expectations. In March 2009 I conducted the mid-year assessment of the Employee's performance for the period October 1, 2008 to March 31, 2009 and found that the Employee was performing below expectations in key areas".

[51] At paragraph 12 of Ms. Armstrong's Witness Statement she stated as follows:

"I awarded the Employee an overall performance rating of "2". A copy of the Performance Evaluation Report dated March 31, 2009 is attached and marked "DA-3" for ease of reference. This Report was prepared by me but is not signed as it was not finalized due to back and forth communication between the Employee and me on some of the concerns raised in relation to her performance".

- [52] Miss Murraine confirmed that the Bank conducted a mid-year assessment of her performance, a grade of "2" was granted to her, but she could not provide an explanation of the system which was used by the Bank to weigh the areas utilized by the Bank to arrive at a grade of "2".
- [53] It is Miss Murraine's evidence that she should have been awarded a Performance Bonus of EC\$9,590.00 because she performed during the period October 1, 2008 to September 15, 2009. According to her she "*met the targets*".
- [54] The criteria which was utilized by the Bank to determine an employee's rating includes the following matters:
- a. Accountability
Solicit and acquire new business for the Private and Corporate Banking Division
 - b. Accountability
Manage a portfolio as assigned of more complex credit for the Unit
 - c. Accountability
Grow the Loans and Deposits Portfolio by mutually agreed targets
 - d. Accountability
Assist in enhancing Credit Quality and Administration to defined levels
 - e. Accountability
Submit progress report on a weekly basis
 - f. Accountability
Liaise with the Manager Private and Corporate Banking . . .
- [55] The Rating System which was utilized by the Bank is contained in the Employee's Performance Evaluation Report for the period October 01, 2008 to March 31, 2009. It was explained by Ms. Armstrong in her Witness Statement at paragraph 7. She stated as follows:
- "The amount of bonus to be awarded to each individual employee under the Performance Bonus Plan is determined by the Employee's performance. Each employee's performance for the fiscal year is assessed by his manager/supervisor using the performance ratings as outlined in the attached Performance Bonus Plan. Performance is rated on a scale of "1" to "5" with "5" representing*

performance which significantly and consistently exceeds performance expectations and 1 representing performance which is significantly below expectations. Only performance scores of “3” and above are considered for payment of Bonus under the Performance Bonus Plan.”

[56] In accordance with the Performance Evaluation Report a grade 2 represents “*Performance Below Expectation*” a grade 3 represents *Performance Fully Meets Expectation*” and a grade 4 means that the “*Performance Exceeds Expectations*”.

[57] Miss Murraine was dissatisfied with the Performance Evaluation Report for the period October 01, 2008 to March 3, 2009. She sent a Memorandum to Ms. Armstrong. It was dated May 13, 2009. In that Memorandum Miss Murraine raised certain concerns. These related to “*the absence of written policy guidelines to ensure a fair and transparent assessment of (her) performance and (b) “the Appraisal Report Format for which the Bank has no appraisal system to clarify the approach and appropriate benchmarking”*. In addition Miss Murraine was “*of the opinion that the targets are aggressive, and requires revision and adjustments.*” In this regard Miss Murraine stated that she was “*still open to learning of the Bank’s strategy given that every segment of the economy is under threat of a recession*”.

[58] Ms. Armstrong replied to Miss Murraine’s Memorandum dated May 13, 2009. In Ms. Armstrong’s letter dated June 08, 2009 she stated *inter alia* as follows:
“*The economic crisis is only now affecting us in 2009 so clearly this is not a factor contributing to your lack of performance in this accountability to date*”.

[59] Ms. Armstrong also stated that Miss Murraine was “*responsible for developing strategies to meet the target*”. She therefore (looked) forward to (Miss Murraine’s) strategy, especially in these difficult times, to meet the targets and (Miss Murraine’s) recommendation for revision where necessary”.

(The letter of June 08, 2009 was admitted ad “DA-)

[60] Miss Murraine's "General Responsibilities" are set out in paragraph 3 of the said contract. Paragraphs 3.1 to 3.1.3 state as follows:

"3.1 During the Term the Contractor shall –

3.1.1 Solicit and acquire new business for the Private & Corporate Banking Division

3.1.2 Manage a portfolio assigned of the more complex credits at the Unit

3.1.3 Grow the Loans and Deposits Portfolios by mutually agreed targets . . . "

[61] Some discussion arose between Miss Murraine and Ms. Armstrong which concerned the meaning of "**new business**". Ms. Armstrong wrote to Miss Murraine a letter dated August 27, 2009. This was in reply to Miss Murraine's letter to Ms. Armstrong dated June 08, 2009. The letter of June 08, 2009 was not presented to the Court. The relevant excerpt from Ms. Armstrong's letter states as follows:

"You will recall that this issue was raised by you in the first three-month assessment as at December 31, 2007 and when you persisted in your inquiries after I sought to clarify the issues, I referred the matter to the General Manager and a meeting was held on March 7th 2008 with the General Manager and Human Resource Executive. It was clearly articulated that the two accountabilities were distinctly different in that 3.1.1. meant to bring new business to the Bank from customers it never had before while 3.1.3 meant to get more business from the existing customers of the Bank. At that meeting you admitted that you had not done either of the two accountabilities".

[62] Ms. Denise Armstrong is the Bank's Assistant General Manager, Credit and Control. She resides at Carlisle Estate in St. John's. In her Witness Statement filed on November 23, 2012 she stated *inter alia* at paragraph 9 that she "*was the person who was primarily responsible for the assessment of the Employee's performance and (she) found that (Miss Murraine) performed significantly below expectation in the business results of soliciting and acquiring new customers for*

the Bank since during (Miss Murraine's) tenure, she did not acquire any new business for the Department".

[63] At paragraph 11 of Ms. Armstrong's Witness Statement she stated as follows:

"In the period October 1, 2008 until the date of her termination in September, 2009, the Employee performed below expectations. In March, 2009 I conducted the mid-year assessment of the Employee's performance for the period October 1, 2008 to March 31, 2009 and found that the employee was performing below expectations in key areas. In particular, the Employee had failed to acquire new business or new loans for the Private & Corporate Banking Division. Further, there was also poor performance in the area of managing a complex portfolio of credit. These are two critical areas for which her services were contracted".

(This mid year assessment was admitted as "DA-3")

[64] Miss Murraine in reply to Ms. C. Kamilah Roberts, Attorney-at-Law for the Bank made reference to *"my target of M\$40.0"*. This did appear to be the target which was set by the Bank for Miss Murraine to achieve in *"new business for the Private & Corporate Banking Division"* for the fiscal year October 01, 2008 to September 31, 2009.

[65] Miss Murraine sought to counter Ms. Armstrong's evidence to which reference was made at paragraph [63] of this judgment. In answer to Ms. Dublin, Miss Murraine produced a new document. That document referred to a number of the Bank's clients under the heading *"Solicit and acquire new business for Private & Corporate Banking Division"*. (This document was undated. It was admitted as "Appendix 1" for the Employee.)

[66] The presentation of this evidence in this from by Miss Murraine is most unfortunate. Here it is that she produced a list of corporate and personal clients of the Bank. This is a clear violation of clause 8.4 of the contract. Her action also offends the *"secrecy"* provision of clause 7 of the said contract. This relates

specifically to a restriction to which she agreed “*to prevent the publication or disclosure in any way or form and at any time both during and subsequent to the Terms, of any confidential information pertaining to the Bank whatsoever*”.

- [67] Surely the disclosure of the Bank’s clients is “*confidential information*”. The proper procedure that she and her legal advisers ought to have utilized is that such matters should have been discussed between both parties and their legal counsel.
- [68] In any event this list of the Bank’s customers was unfortunately produced. A large loan of several millions of dollars was lent by the Bank to an entity. Miss Murraine states that this loan represented “*new business*” for the relevant period. According to her, although it was approved in July 2008, it was drawn down in performance year 2009.
- [69] In answer to Ms. Roberts, Miss Murraine stated that the large loan was not taken into account for the prior fiscal year of 2007 to 2008. If this large loan was discounted for the relevant year, she would have been unable to reach her target of ECM\$40.0.
- [70] In her evidence Ms. Armstrong stated that the Bank sets targets for the performance of certain employees. These targets are discussed and agreed by the staff. The employees are evaluated in a formal way every six (6) months. This was the reason why a valuation at the end of the six month period from October 01, 2008 to March 31, 2009 was conducted.
- [71] Ms. Armstrong disagreed with Miss Murraine that the entities referred to in Miss Murraine’s Appendix 1 represented any “*new business*” with the Bank during the relevant period. According to her, these corporate and other persons were already the Bank’s clients. In this circumstance, according to Ms. Armstrong the loans which were generated by Miss Murraine from these existing customers were not “*new business*”.

- [72] Ms. Armstrong also perused the entry of the large loan which was lent by the Bank to a corporate entity. She stated that that large loan was taken into account by the Bank in the prior year from 2007 to September 2008. This was the period during which Miss Murraine was granted a bonus.
- [73] Miss Murraine also put forward a less large loan of a few million dollars as new business which presumably the Bank did not take into consideration. In answer to Ms. Roberts, Miss Murraine stated that the Bank did consider this loan up to March 31, 2009 in its assessment of her performance for the relevant period. An entry of this same loan was made in the Performance Evaluation Report in the section marked "*Accountability*" – "*Grow the Loans and Deposits folio. . . .*" for the relevant period. A grade of "2" was awarded by the Bank. According to Ms. Armstrong a grade of 1 was the more fitting one to award Miss Murraine. However a grade "2" was assigned as there was some evidence of the use of overdraft facilities by some customers.
- [74] In her Witness Statement filed on December 12, 2012 Miss Murraine presented a section which was entitled "Appendix 1". It is headed at the top and bottom "*Extracted from the books of the Antigua Commercial Bank*". "*Business Acquisition during the period August 13, 2007 to September 30, 2008*". This document clearly contains a reference to the very large loan to the same corporate entity.
- [75] Miss Murraine also presented "Appendix No. 2". It was marked "*Status of Delegated Accounts as at: September 15, 2009*". This document contained the names of several clients of the Bank. In answer to Ms. Dublin, Miss Murraine stated that this Appendix No. 2 was put forward to support her performance under heading 2(a). This dealt with the ability to "*Manage a portfolio as assigned of more complex credits for the Unit*".

[76] In response to Miss Murraine's information which is contained in Appendix 2, Ms. Armstrong stated that the grade 2 awarded to Miss Murraine was an average of the five (5) tasks which she was required to perform. According to her, Miss Murraine did not present any documentation to her which caused her to change any of the ratings which were awarded to her.

[77] Ms. Armstrong in her evidence also stated that for the period between March 31, 2009 and August 2009 Miss Murraine presented no correspondence to her which supported the areas which were assessed by her.

Discussion

[78] At paragraph 10 of her Witness Statement filed on December 12, 2012 Miss Murraine stated *inter alia* as follows:

"I was due a bonus whether I performed above or below standard. This is what the contract provided".

[79] I do not agree with Miss Murraine's statement at paragraph [78] above. It just does not make any sense. I am not sure whether or not she read the Termination Clause of the contract. Clause 8.1 and 8.2 state as follows:

"8.1 Failure on the part of the contractor to observe any obligation under this Agreement shall be grounds for termination of this Agreement.

8.2 Failure of the contractor to meet targets set and agreed upon".

(The emphasis in a highlighted manner is mine.)

[80] I made reference to Miss Murraine's "General Responsibilities" at paragraph [60] above in which some of her functions were highlighted. I have also perused the Performance Evaluation Report for the period October 01, 2008 to March 31, 2009. All of the functions mentioned therein and the criteria used by the Bank to judge Miss Murraine's performance are derived directly from clause 3 of the said contract.

- [81] So the Bank had a right to set her targets. These targets must of course be reasonable. They must be capable of being achieved. There must be agreement between the two (2) parties with regard to the nature of the targets to be achieved. The work done to achieve the targets must be measurable. The Bank must be fair in its treatment of the Employee as she endeavours to achieve the targets. In summary the Bank must act reasonably in its assessment of Miss Murraine.
- [82] In answer to Ms. Roberts, Miss Murraine stated that the same Performance Evaluation Report Form was used by the Bank for the year prior to her dismissal. The headings of accountability were not changed.
- [83] I am not aware of the targets which were set by the Bank for the fiscal year 2007 to September 31, 2008. I have not seen the Performance Evaluation Report for the same fiscal year. No evidence of this matter was presented by either party.
- [84] The evidence is that Miss Murraine agreed to achieve the targets of performance for the fiscal year October 01, 2008 to September 30, 2009. This was in accordance with clause 3 of the said contract.
- [85] The Performance Evaluation Report of the relevant areas contains the several headings which were used by the Bank to assess Miss Murraine. The Bank gave reasons for its assessment and the grade awarded to Miss Murraine. For example in section 2 which deals with the solicitation and acquisition of new business for the Private & Corporate Banking Division, Miss Murraine acquired no new business for the relevant period.
- [86] No evidence was presented by Miss Murraine that the targets which were assigned to her were unreasonable. It is my view that a bonus must be earned. It is not a gratuity which is payable after an employee has completed the

performance of a contract or otherwise determined by the employer not due to the employee's misconduct.

- [87] In the circumstances of this case Miss Murraine appears to have been mistaken that a bonus was payable by the Bank to her whether or not she "*performed above or below standard*". This misunderstanding is fatal to her claim under this heading. In addition, I find that the Bank acted reasonably in its determination that she did not meet the threshold of grade "3" to merit the payment of the bonus. Her claim for the payment of a bonus for the period October 01, 2008 to September 30, 2009 is denied.

The Third Issue

What is the quantum of damages payable by the Employer to the Employee as compensation for unfair dismissal?

- [88] In the *Barriero* case (*op cit*) **Byron, J.A.** (as he then was) stated *inter alia* at page 8 as follows:

"The issue as to whether termination is fair or not is regulated by sections C59 and C60 (now C58 and C59) of the Labour Code. The effect of these provisions is that as the respondent was employed on a three year contract, he could not be fairly dismissed before the contract was discharged by effluxion of time unless it was for a reason prescribed in section C60 (now C58)."

- [89] As both parties have agreed that the Employee was unfairly dismissed the award to her under the following headings is as follows:

Basic award

This award is similar to severance payment. The Employee was a monthly paid employee. She earned EC\$12,000.00 per month. She worked for 2 years with the Employer. Her entitlement is \$12,000.00 x 2. This amounts to EC\$24,000.00.

Immediate loss

[90] The Employee states that she obtained employment with Special Security Services during the period November 16, 2009 to December 24, 2009. She was paid EC\$10,000.00

[91] During the period February 08, 2012 to March 25, 2010 Miss Murraine stated that she worked for Elle Collona Resort and Spa. This is a new hotel establishment. She further stated that the company encountered serious financial difficulties. It closed in April 2010. She was paid a small percentage of the contract. This amounted to EC\$8,736.00.

[92] It is Miss Murraine's evidence that she sought employment from other entities. These included the ABI Group, Eastern Caribbean Amalgamated Bank, the American University of Antigua College of Medicine and the Antigua and Barbuda Institute of Technology. She established a consulting firm – Destiny Consulting Services in August 2010.

[93] Ms. Roberts submits that an award of six (6) months earnings is fair to award Miss Murraine. Learned Counsel further submits that the three months payment in lieu of notice or \$36,000.00 and the full income earned by her, namely EC\$18,736.00 should be deducted from this sum. The net award to her would be EC\$17,264.00.

- [94] This head of damages was not addressed by Ms. Christian, Attorney-at-Law for the Employee in her Written Submissions. Although there is a heading contained therein which is entitled "Immediate Loss of Earnings", this really refers to a claim for the unexpired part of the contract, a claim which I shall shortly address.
- [95] To determine what is fair and reasonable to award the Employee under this heading I have taken into consideration the Employee's age, that she was not dismissed for misconduct, the efforts which she made to obtain alternative employment, that she did obtain some form of short term employment, and the need for her to establish her own independent form of employment.
- [96] I agree with Ms. Roberts that an award of six (6) months salary for immediate loss of earnings for Miss Murraine is appropriate in this case. From this sum it is fair to deduct the sums paid to her in lieu of notice in addition to what she earned. This figure is EC\$54,735.00. The net sum payable to her is EC\$17,264.00.

Fixed term contract loss

- [97] Ms. Christian, Attorney-at-Law for the Employee submits at paragraph [23] above a method of computation of Miss Murraine's loss. The sum which learned Counsel claims in EC\$139,959.25.
- [98] Similarly Ms. Roberts at paragraph [24] above presents her formula for calculation of the Employee's claim under this heading. The net sum payable to Miss Murraine is EC\$107,377.00.
- [99] Both formulas are flawed. In the one proposed by Ms. Christian, there needs to be a deletion of the claim for vacation pay. The formula submitted by Ms. Roberts contains deductions for Notice Pay and the Employee earnings. These

identical sums were already deducted under the heading of Immediate Loss at paragraph [93] above.

[100] The award under this heading is as follows:

Basic salary (EC\$12,000.00 x 11 months)	EC\$132,000.00
Gratuity	14,400.00
Allowances	13,713.00
Clothing Allowance	2,000.00
	EC\$162,113.00

Summary

[101] A summary of the awards is as follows:

(a) Basic award	EC\$ 24,000.00
(b) Immediate loss	17,264.00
(c) Fixed term contract loss	162,113.00
	EC\$203,377.00
Less amount paid to her	50,081.45
	EC\$153,295.55

[102] At paragraph 13 of the Employee's Witness Statement filed on November 23, 2011 she stated that she "*was paid a small percentage of the contract*". No evidence was led by either party to show whether or not any further sums were paid to Miss Murraine. It is her duty to disclose to the Bank what additional sums if any, were earned by her from the hotel or elsewhere during the relevant period. If any sums were in fact earned, such fall to be deducted from the award under the heading "**Immediate Loss**".

[103] I commend the three (3) Attorneys-at-Law who appeared for both parties. Their diligence and research resulted in Written Submissions which were of great value

to the Court. With some greater effort however they should have been able to conclude successful negotiations of this matter.

[104] There shall be no order as to costs. The Bank shall pay to Miss Murraine EC\$153,295.55 on or before March 22, 2013.

Dated the 20th day of February, 2013

A handwritten signature in dark ink, appearing to read 'Philip A. Pilgrim', written over a horizontal line.

PHILIP A. PILGRIM
President

A handwritten signature in dark ink, appearing to read 'Samuel R. Aymer', written over a horizontal line.

SAMUEL R. AYMER
Member

I agree