

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 7 OF 2012

BETWEEN:

CLAUDETTE SIMON

Employee

And

ANTIGUA COMMERCIAL BANK

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Samuel R. Aymer

Member

Appearances:

Sir Keithlyn B. Smith, Senior Industrial Relations Officer, of the Antigua and Barbuda Workers Union for the Employee.

Miss C. Kamilah Roberts, Attorney-at-Law, of Roberts & Co. for the Employer.

2014: June 3, 4

2015: October 16

Background

1. The Employee commenced her employment with the Employer on September 15, 1983. Her services were terminated by letter dated February 26, 2010. Her last position was Collections Representative for which, she was paid a monthly salary of \$6,588.00.
2. The terms and conditions of employment were largely governed by successive Collective Agreements between the Employer and the Antigua and Barbuda

Worker's Union. The Agreement dated November 19, 2009 was in effect at the date of dismissal.

3. The Employee was absent from work due to illness from July 19, 2006 to March 3, 2008.
4. The Employer embarked on a restructuring exercise between late 2006 and 2010 with the objective of improving productivity and customer satisfaction levels. The restructuring included the reorganization of the Customer Support and Care Department and the Information Technology Department.
5. In the process of restructuring to improve efficiency and productivity, the Employer decided to merge the Finance and Accounting Department with the Customer Support and Care Department.
6. Ultimately, the Employer determined that the Employee's employment be terminated with effect from February 28, 2010 on the ground of redundancy.

The Employee's Case

7. The Employee commenced these proceedings by Reference filed on March 21, 2012. In her Employee's Memorandum filed on May 3, 2012, she contends:
 - (a) By letter dated January 29, 2009, the Employer wrote to the Employee transferring her laterally to the Customer Support and Care Department.
 - (b) By letter dated February 19, 2010, the Employer wrote to the General Secretary of the Union informing him of the reorganization, job realignment and redundancy resulting from the restructuring process.
 - (c) On February 22, 2010, the Employee was instructed to report to the Employer's Human Resource Department where she met Dr. Austin Josiah and Ms. Julie Purcell, its Human Resource Executive and Compensation Benefits / Industrial Relations Coordinator respectively.
 - (d) At the meeting the Employee was told that she would be made redundant and that a letter to that effect would follow informing her of her termination.
 - (e) As a result of hearing of her impending termination the Employee felt "lost" and went into a "state of shock".

- (f) On February 26, 2010 the Employee was called to the Human Resource Office and asked by Dr. Josiah to sign a letter of the same date terminating her employment. The Employee refused to sign but requested a copy of the letter. Her request was denied.
- (g) The Employer never held discussions with the Union regarding the Employee's redundancy prior to her dismissal.
- (h) There was no redundancy. The Employee was unfairly dismissed and she should be reinstated.

The Employer's Case

8. The Employer's Memorandum was filed on April 26, 2013. In it the Employer disputed that the Employee was unfairly dismissed on the following grounds:
 - (a) During the period of her employment, the Employee was absent due to illness from July 19, 2006 to March 3, 2008.
 - (b) Between 2006 and 2010 when the Employer carried out a restructuring exercise, it delayed the merger the Finance and Accounting Department with the Customer Support and Care Department for 3 months to explore options for redeployment of the 6 affected employees.
 - (c) Based on their skills and qualifications, 5 of the 6 affected employees were redeployed but there was no room for the Employee in the new structure.
 - (d) As a result, the Employee's employment was terminated on the ground of redundancy and she was paid her full severance entitlement under the Collective Agreement for her tenure of 25 years.
 - (e) The Employee was first informed of her impending termination due to redundancy at the meeting on February 22, 2010. After that meeting, another one was held with the Employee and the Union's Shop Steward at which the Employer addressed the Employee's concerns and explained its position.
 - (f) Although the Employee had initially refused to sign the letter of termination on February 26, 2010, she did so "without prejudice" one year later in February 2011 and was then paid her severance entitlement.

- (g) The Employer admitted writing to the Union by letter dated February 19, 2010 advising it of the merger of the two Departments.
- (h) As early as January 2007, the Employer had engaged the Union in discussions and by correspondence regarding its proposed restructuring.
- (i) In particular, discussions were held between the Employer and the Union regarding the restructuring of the Customer Support and Care Department and consequence that some employees would have diminished responsibilities.
- (j) The Employer denied the Employee's contention that no redundancy existed at the time of termination. It also denied that the Employee was unfairly dismissed or was otherwise treated unfairly.

The Main Issues

9. The main issues for determination are:

- (a) Whether a redundancy situation existed as at February 26, 2010 which could properly ground the Employee's dismissal.
- (b) If a redundancy situation existed, whether the Employer acted reasonably or unreasonably in dismissing the Employee.
- (c) If, upon the determination of (a) and/or (b) above, the Employee was unfairly dismissed, whether she should be reinstated or compensated.

The Employee's Evidence

- 10. (1) The Employee's testimony was consistent with her Memorandum. Her job description showing her position level at "C3" and "key accountabilities" was admitted into evidence.
- (2) On 22 February, 2010 the Employee received a message requiring her to report to Human Resource Department. At the time of receiving the message, she did not know the reason for the request. During the meeting, the Human Resource Executive, Dr. Josiah, told her of the restructuring and that "some persons will be made redundant".
- (3) The Employee was surprised when she realized that the purpose of the meeting was to inform her that her position had been made redundant. She

told Dr. Josiah that if she knew of the purpose of the meeting she would have requested the presence of a representative from the Union. His response was that the Employee had "no choice" in the matter. He also told her that she would be given a dismissal letter.

- (4) The Employee testified that towards the end of the meeting she was given her letter of termination to read and asked to sign it. The Employee refused to sign the letter and requested a copy of it for the purpose of reviewing it with Mr. Thomas Greenaway, the Shop Steward. Dr. Josiah rejected her request.
- (5) The Employee was told by Ms. Purcell that her last working day would be February 26, 2010.
- (6) The Employee formed the view that signing the letter would bar her from challenging the fairness of her dismissal.
- (7) Upon her refusal to sign and after being refused a copy of the letter, the meeting ended. The Employee then made contact with Mr. Greenaway who attended a meeting with Dr. Josiah later the same day.
- (8) As a result of her refusal to sign the letter, the Employer refused to pay the Employee her severance entitlement. Despite the intervention of the Union's Representative, Mr. Chester Hughes, she did not receive payment until one year later when she attended the Employer's premises with the Union's Senior Industrial Relations Officer, Sir Keithlyn Smith, and signed the letter "without prejudice".
- (9) The Employee further testified that after her termination she tried several times to find a new job but was unsuccessful. She said she applied to "numerous places" including banking institutions and insurance companies but did not get a new job until December 2010 when she started working at Bargain Centre at a salary of \$808.00 per week. The Employee provided no documentary evidence of her efforts to find alternative employment.
- 10) In relation to her duties, the Employee testified that they still existed. She also stated that since her dismissal, new employees were hired by the Employer.

- 11) In her witness statement, the Employee also complained that the Employer had refused to grant her request for copies of her certificates and diploma and other documents, the originals of which she lost during the passage of Hurricane Luis in 1995.
- 12) The Employee also testified that her tenure with the Employer was in fact 27 years and not the 25 years for which she was paid severance.
- 13) Among the documents tendered by the Employee was a letter dated 29 January, 2009 whereby her assignment to the Customer Care and Support Department was formalized and she was presented with a job description showing her "key accountabilities". In the letter the Employer stated that her job description "will be reviewed shortly".

Evidence of Chester Hughes

11. Mr. Chester Hughes, Industrial Relations Officer of the Union also testified on behalf of the Employee. The main points of his evidence are as follows:
- (a) The Employer engaged in negotiations with the Union in 2007 when Mr. Charles Xavier was the Human Resource Executive. Subsequently, it appeared that the Employer abandoned the negotiations as nothing further was said and the Collective Agreement was signed in November 2009 without any reference to the restructuring of the Employer's business.
 - (b) The Union was notified of the reorganization, job-reassignment and redundancy at the bank by letter dated February 19, 2010 which the Union received on February 22, 2010.
 - (c) On the same day the letter was received, the Employee reported to him that she was called into a meeting with the Human Resources Executive and told that she was being made redundant.
 - (d) By letter dated February 26, 2010, the Union requested a postponement of the proposed merger until after discussions were held in accordance with the Collective Agreement.

- (e) Despite the Union's request for a postponement, the Employer carried out its planned dismissal of the Employee on February 26, 2010.
- (f) Upon his request, the Labour Commissioner attempted to convene a meeting to discuss the matter of the Employee's dismissal but the Human Resource Executive refused to attend. In particular, a conciliatory hearing was scheduled at the Labour Department for the third time on August 26, 2010 but neither the Human Resource Executive nor any other person attended on behalf of the Employer.

The Employer's Evidence

12. Dr. Austin Josiah's gave evidence on behalf of the Employer. His testimony was consistent with the Employer's Memorandum to the effect that::

- (a) The Employer carried out consultations with the Union in 2007 regarding the restructuring as is evident by the correspondence passing between them that year.
- (b) The merger of the Financing and Accounting Department with the Customer Support and Care Department resulted in the redundancy of the Employee's position.
- (c) The merger was delayed for a period of three months to allow the Employer to explore various options for the redeployment of the Employee.
- (d) Six employees of the Employer were affected by the merger. In the end five of them were redeployed to other positions leaving the Employee as the only person whose employment had to be terminated because of redundancy.
- (e) The resulting difficulties in aligning the Employee into the new structure was due in part to the diminished need for certain manual operations.
- (f) The termination of the Employment of the Employee was effected by his letter dated February 26, 2010.
- (g) The Employee received a severance package amounting to \$263,694.78 calculated in accordance with the Collective Agreement and included

payment for 41 days vacation and one month's pay in lieu of notice. The Severance component was calculated at the rate of one and a half month's pay for each year of service.

- (h) Dr. Josiah did not simply refuse to attend the scheduled meetings at the Labour Department but had objected to the procedure that had been adopted.
- (i) The Employer denied that the Employee was unfairly dismissed or otherwise treated unfairly.

The Legal Framework

13. Section C 10 of the Antigua and Barbuda Labour Code (the Labour Code) requires an Employer to provide an Employee with a written statement of the precise reason for his termination. The relevant sub-section provides:

C10 (1) "Upon termination by an employer of an employee's employment subsequent to the expiration of the latter's probation period, the employer shall, within seven (7) days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination."

14. Section C58 of the Labour Code provides the basis for the determination of whether a dismissal is fair or unfair. Sub-section (1) of that section provides that a dismissal is not unfair if the reason assigned therefor is redundancy, provided that there is a factual basis for that reason.

15. Section C58 (2) provides for the test of reasonableness in the following terms:

"C58(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstance which existed, if known to the employer, would have reasonably led to the employee's dismissal."

16. Redundancy is defined in the Labour Code to be:

“a situation in which by virtue of of a lack of customer orders, retrenchment, the installation of labour saving machinery, an employer’s going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished”.

17. By its letter of termination, the Employer has stated “redundancy” as the reason for the dismissal. Since the Employee has challenged the fairness of the dismissal, the onus is on the Employer to establish that a redundancy situation actually existed and that it acted reasonably in dismissing the Employee.

18. In her submissions filed on 22 August, 2014, Ms. C. Kamilah Roberts, Counsel for the Employer, reminded the Court of the following judicial pronouncements of the Court of Appeal and this Court in respect of the interpretation of the statutory definition of redundancy.

(1) In *Sundry workers (Veronica Joseph and others) v. Kings Casino Limited*; Civil Appeal No. 28 of 2001, Byron C. J. as he then was stated:

“the definition seems to contemplate the removal of superfluous workers. This could occur even where the task or work still exist but the employer requires fewer workers or there is less work for existing workers”.

(2) In Reference No. 26 of 2010, *Kenard J. Byron v Bank of Antigua Limited and Eastern Caribbean Amalgamated Bank* the Court referred to its earlier judgment in *Linda Richardson v. Deep bay Development Co. Ltd.* where Justice H.S.R. Moe, then President of the Court, gave an more detailed statement of the meaning of redundancy as follows:.

“what section 3 of the Antigua Labour Code seems to contemplate therefore is that redundancy may occur as a result of retrenchment, which itself is ordinarily defined as removing that which is superfluous, or reducing the amount , or economizing. Thus a reorganization which results in a reduced workforce is a redundancy. Also redundancy may occur where there is a reallocation of duties

following a reorganization of the business and the employee is dismissed as a result of there being a diminution of work previously carried out by the employee, and it matters not, that there has been no overall reduction in the employer's business as was demonstrated in *Cowen v Haden Ltd.* Another situation which may give rise to redundancy is where, because the work has been reorganized, fewer employees are required to do the same work, or it may be because of the introduction of labour- saving devices...".

The Collective Agreement

19. Articles 1.01, 4.02 and 10.01 of the 2009 Collective Agreement provide:

"1.01: The purpose of this Memorandum of Agreement is to record agreement between the Bank and the Union on the regulation of salaries , hours of work, and general conditions of employment applicable to the employees of the Bank covered by this agreement in order to consolidate employee/ employer relations, to secure the prompt and fair disposition of employee's grievances, and to help achieve the highest level of performance consistent with safety and good health."

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

.....

b) Where the Bank is considering the introduction of new technology or change in working method s which will affect the employee, there shall be early communication and /or consultation between the parties. Where terms and conditions of employment are affected , negotiations will begin as early as practicable and will take into

account the desirability of providing , as far as possible, for the interests of staff and their security of employment.”

10.01: The Bank shall continue to use its best efforts to ensure a maximum degree of job security for all of its employees consistent with its obligation to maintain efficient operations . The Bank shall therefore before laying off any employee covered by this agreement due to lack of work, notify the Union of its intent. Should the Union, within 14 calendar days of receipt of notification by the Bank hereunder, request discussion as to the method by which such lay off shall be effected, the Bank shall meet with the Union for the purpose of discussing the procedure to be followed. The Bank shall advise and discuss with the Union the possibilities of redeployment or alternative employment within the organization of the workers so affected.”

Issue No. 1: Was there a Redundancy Situation

20.As I understand the burden placed on the Employer in the circumstances of this case, it must establish on a balance of probabilities that a redundancy situation existed as a matter of fact and law. Naturally, Counsel for the Employer submits that it has discharged its evidentiary burden. I now consider whether or not the Court should adopt her submission.

21.The evidence of Dr. Josiah is most instructive. His oral and documentary evidence establish that the Employer embarked on a restructuring exercise since late 2006. According to him, the exercise continued up to 2010 and culminated with the dismissal of the Employee on 26 February, 2010.

22.There can be no doubt that the restructuring exercise generally, and the reorganization of the Customer Support/Care Department and the upgrade and redesign of the Information Technology Department in particular carried with them the real and then present possibility of redundancy.

23. The exchange of letters between the Employer and the Union between January and March, 2007 suggests that they considered and promoted continuing negotiations to ensure a smooth transition in accordance with the spirit and letter of the Collective Agreement generally and in particular, the Articles quoted above. .

24. The Employer's commitments in relation to the fairness of the process is stated in its letter to the Union dated 20 February, 2007 which reads in part:

"In keeping with Article 10.01 the Bank will continue to maximize job security of its employees while effecting its obligations to maintain efficient operations. We have examined your concerns and the issues objectively and we look forward to discussing with the Union the procedures to be implemented re the redundancies that should ensue."

25. It appears that a good working relationship between the Employer and the Union had been established by March 2007. In its letter dated 5 March, 2007, the Employer specifically stated its approach in respect of a particular "C3" position like the one which the Employee held: It stated:

"As indicated, the "C3" position represented in the old structure had been made redundant, unfortunately dislocating Mr. Leonart Matthias who, it was agreed, could apply for available IT jobs in the new structure, or indeed other available jobs in the ACB Group".

26. In my view, by 2010, the restructuring framework had been established whereby the Employer could indicate specifically to the Union in advance which Employee at a particular level or grade would become redundant. It would follow that, upon notification, the Union would take the opportunity to satisfy itself as to the factual basis of the redundancy, discuss the possibilities of redeployment and ultimately agree to the redundancy and redeployment, if any .

27. In the present case, there was no advance notification to the Union giving the latter the opportunity to ascertain or verify that a real redundancy existed in relation to the Employee. It was therefore left to the Employer at trial to establish the particular factual basis (or bases) for the redundancy of the Employee. On careful analysis of his evidence, Dr. Josiah failed to establish the factual basis of the

redundancy. His evidence was full of generalizations but lacked specific factual details to ground a real redundancy situation.

28. It is clear to me, that the Employer glossed over the factual basis for the redundancy by merely referring generally to the restructuring exercise and the merger of the Financial and Accounting Department with the Customer Support and Care Department. The evidence does not provide any or any sufficient specific details by which this Court could identify the factual basis for a redundancy situation affecting the Employee in particular.
29. After glossing over the existence of the redundancy of “6 affected employees” Dr. Josiah went on to focus on the result of the Employer’s efforts to “redeploy” them. At the end of the day, the Employer’s position is that:

- (a) the Employee and 5 other employees became redundant and
- (b) of the redundant employees, it was unable to redeploy the Employee.

In my view, my conclusion as to the “lack of any or any sufficient evidence” in relation to the redundancy also applies with equal force in relation to the Employer’s efforts at redeployment.

30. On a careful consideration of the evidence, I am inclined to conclude that the Employer fell short of discharging its evidentiary burden of proof at the trial.
31. Although I am tempted to conclude that the Employer has failed to prove that a redundancy situation existed as at February 2010, I refrain from doing so. Instead, I move on to consider the reasonableness of the Employer’s conduct in dismissing the Employee. In that regard, I adopt Mrs. Roberts’ submission, that when considering the issue of redundancy, the Court must not only consider whether there was a factual basis of the redundancy, it must also, perhaps more importantly, apply the test of reasonableness under Section C58 (2) of the Labour Code.

Issue No. 2 – Reasonableness

32. I will examine the reasonableness of the Employer’s conduct in dismissing the Employee in the context of the overall restructuring process and the timing of the

declaration of the redundancy of the Employee. I will consider the test of reasonableness while bearing in mind the Employee's long tenure of over 25 years.

33. It is common ground that the restructuring process started in late 2006 and was actively pursued during 2007. In that regard, parts of the evidence of Chester Hughes are particularly instructive. Firstly, the process seemed to have gone dormant after 2007 with the result that the 2009 Collective Agreement was signed without reference to the restructuring process or any of its effects up to the date of the agreement signed on November 17, 2009. In any event, there is no evidence of consultations or correspondence between Employer and the Union between March 5, 2007 and February 19, 2010 when Dr. Josiah wrote to Senator D. Massiah, General Secretary of the Union.
34. It is also instructive to note that the Employer's evidence shows that the Employee was absent from work due to illness for the period July 19, 2006 to March 3, 2008. Clearly, on the evidence, the Employee was absent when the restructuring exercise started "late 2006", she was absent during the entire period of active negotiations and correspondence up to March 2007.
35. In my view, in those circumstances, the Employer had a clear and then urgent obligation to inform the Employee of the restructuring exercise upon her return to work in March 2008. On the evidence no lingering issue arose as a result of the Employee's extended absence.
36. Dr. Josiah's evidence does not disclose when the decision "to merge" the two departments was taken or when the decision was "finalized". Based on his letter dated February 19, 2010 to the Union, the merger was effective from March 1, 2010. However, in his Witness Statement, Dr. Josiah stated that the bank delayed the merger "for a period of three months so as to allow the bank to explore the various options of redeployment".
37. In the circumstances, looking backwards from the effective date of March 1, 2010, I would have to conclude that the decision was finalized by December 1, 2009. Clearly, at that date the Employer had determined that the Employee's position was redundant. At that date, at the latest, the Employer should have at the very

least informed the Employee that her position became redundant. Naturally, the better practice should have dictated that she should have been informed specifically of the potential redundancy of her position several months earlier.

38. In the circumstances, I reckon that the Employee and the Union should have been advised firstly of the potential redundancy of her position at a date, say, at least in June 2009. Secondly, the Employee should have been advised of the imminent redundancy of her position at a date prior to December 1, 2009.

39. On the facts, as I find them, the Employee was notified for the first time on February 22, 2010 that her position had been made redundant. This was two months after the Employer had already determined that the redundancy situation existed.

40. In my view, the date of the decision of redundancy which I fix at December 1, 2009 marked a watershed. The Employer's efforts to redeploy the Employee or reassign her (together with the other 5 affected employees) must be treated as a distinct and separate phase which it ought not to have embarked upon without the express consent of the Employee. For clarity, I note the position on both sides of the watershed:

(a) Good industrial relations practices dictate that the Employer should have consulted with the Employee well in advance of the determination that her position had become redundant.

(b) Further, good industrial relations practices dictate that after December 1, 2009 the Employee's consent should have been obtained in respect of her possible redeployment after the redundancy had taken effect. At both stages the Employer failed to discharge its clear contractual obligations.

41. Instead of discharging its obligations as identified above, the Employer did too little too late by its letter to the Union dated February 19, 2009. I can't help but to conclude that Dr. Josiah's statement to the Employee at the meeting on February 26, 2010 that she had no choice was symptomatic of the Employer's general attitude towards the "redundancy" and redeployment of the Employee.

42. Another instructive part of the evidence is also revealed by the Employer's letter to the Employee dated January 21, 2009 only 10 months before the decision that her

position was redundant had been finalized. Based on that letter, the Employee and the Union were entitled to conclude that her "lateral transfer" was part and parcel of the restructuring process. At that point the Employee was entitled to have a reasonable expectation that her role at the bank would remain in tact after the restructuring process was completed. At that date there was no hint of redundancy but rather a confirmation of her employment at the C3 level albeit in a different department.

43. The existence of that letter effecting her lateral transfer, notwithstanding the proviso for review of her job description, made the need for early consultation on the potential redundancy and notice of imminent redundancy more vital or critical. The Employee had been expressly lulled into a sense of job security a short 10 months before her position was made redundant.
44. I have already stated my view that Dr. Josiah's statement to the Employee at the meeting on February 26, 2011 is symptomatic. Over and above that, I feel obliged to record my disapproval of the treatment meted out to the Employee at the meeting and for the ensuing year. Dr. Josiah's decision that the Employee should not get a copy of her termination letter, in the circumstances, cannot be condoned.
45. In my view, the condition that she had to sign the letter before being paid her entitlement is wholly unreasonable. Under no circumstances should that pre-condition have been set and insisted upon by the Employer. The Employee is entitled to reserve the unconditional right to sign or not sign her termination letter. Moreover, in the circumstances, she had an unconditional right to review, take a copy of and obtain advice in relation to the termination letter.
46. Upon examination of the evidence, I conclude that Dr. Josiah's non-attendance at the Labour Commissioner for the conciliatory hearing was consistent with his remark to the Employee that she had no choice, his notice to her regarding her redundancy and his failure to discuss the matter with the Union prior to terminating the Employee.
47. In light of Articles 1.01, 4.02 and 10.01 of the Collective Agreement and the course of conduct evident in the 2007 letters between the Employer and the Union, I get a

hint of bad faith in the conduct of the Employer in relation to the termination of the employment of the Employee.

48. For the reasons stated above, I find that the Employer has failed the test of reasonableness established under Sec. C58 (2) of the Labour Code.

49. In the premises, I do not think it is necessary to follow through with my earlier inclination to find that no redundancy situation was proved at the trial. I find that the Employer acted unreasonably in dismissing the Employee under the then prevailing circumstances. Accordingly, I conclude that the Employee was unfairly dismissed.

Reinstatement or Compensation

50. On the facts of its case, especially taking into account the considerable passage of time since the termination I do not think that reinstatement would be reasonable in the circumstances. As a result, I decline to order reinstatement as submitted by Sir Keithlyn. Instead I award compensation as follows:

(1) **Loss of Protection from Unfair Dismissal / Balance of Severance:**

It is well settled that the amount to be awarded under this head is the equivalent of severance pay. The formula for the computation of severance pay as used by the Employer in accordance with Article 21 is $\$6,588 \times 1.5 \times 25.13 = \$248,344.66$. It appears that the Employer erroneously excluded the period when the Employee was absent on sick leave. In my estimation, the Employee should be compensated for 25 years and 6 months (September 15, 1983 to February 28, 2010). As a result the correct formula should be $\$6,588 \times 1.5 \times 26.5 = \$261,873.00$. The Employee is entitled to the sum of **\$13,528.34**, being the equivalent of the difference between the severance to which she is entitled and the amount she was actually paid.

(2) **Immediate Loss of Earnings**

The amount recoverable by an employee who has been unfairly dismissed under this head is to compensate her for her loss for the period

immediately after dismissal up to the date of trial or the date when she finds alternative employment with equivalent pay or more. During this period and at all times after her dismissal the employee has a duty to mitigate her loss. In this case, the Employee gave evidence of her efforts to find alternative employment. She was not successful until she found a job at Bargain Centre in December 2010 for which she was paid \$808.00 per week or \$3,501.33 per month.

Taking into account her testimony as a whole and that under cross-examination in particular, I am satisfied that she made reasonable efforts to mitigate her loss. In the circumstances, I award the sum of **\$39,528.00** being the equivalent of 6 months pay under this head.

(3) Future Loss of earnings

The assessment of an award under this head is necessarily speculative. In any event, I am of the view that earnings from any employment the Employee may find in the future will be less than what she earned from the Employer. Taking all things into consideration, including pronouncements of the Court of Appeal, I will award an additional sum less than her previous salary under this head . Using her monthly earnings of \$3,501.33 from Bargain Centre as a benchmark, I would award the sum of **\$18,520.02**, being the difference between the two amounts for a period of 6 months: $(\$6,588.00 - \$3,501.33) \times 6$

(4) Exemplary Damages

Under section 10 (4) of the Industrial Court Act, this Court has the power to make an award of exemplary damages in lieu of reinstatement or reemployment . I do not hesitate to conclude that the Employee was dismissed in circumstances that were harsh and oppressive and not in accordance with the principles of good industrial relations practice. Therefore, I award the sum of **\$26,352.00** which is the equivalent of 4 month's salary.

51. Before closing, I express my gratitude to Ms. Roberts and Sir. Keithlyn for their invaluable submissions. In particular, I acknowledge the very informative authorities which they cited.

52. In closing, I order that Employer do pay to the Employee the sum of **\$97,928.36** on **or before November 16, 2015** as compensation for unfair dismissal.

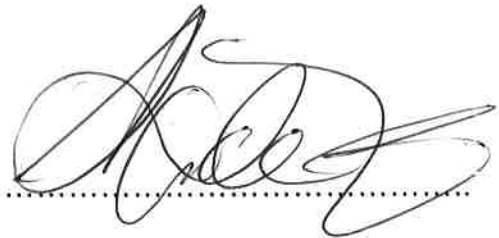
DATED the 16th day of October 2015



Hon. Charlesworth O. D. Brown

President

I concur.



Hon. St. Lawrence Defreitas

Member

I also concur.



Hon. Samuel R. Aymer

Member