

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 7 OF 2014

BETWEEN:

JOY-ANN A. GEORGE

Employee

And

MEINL BANK (ANTIGUA) LIMITED

Employer

Before:

The Hon. Dr. Hayden Thomas

Chairman

The Hon. St. Lawrence de Freitas

Member

The Hon. John Benjamin

Member

Appearances:

Cherissa Roberts-Thomas, of C. Roberts Thomas & Associates, Attorney-at-Law, for the Employee

Dr. David Dorsett of Watt, Dorsett & Company, Attorneys - at -Law, for the Employer

2016: October 12

2018: November 19

JUDGMENT

Thomas, Chairman

Background

- (1) At all material times the Employer Meinl Bank (Antigua) Limited, was carrying on business as a bank situate at Long Street in the city of St. John in the State of Antigua and Barbuda.
- (2) The Employee Joy-Ann A. George was employed by the Employer in April 2006 as an Accountant. She was terminated by the Employer on 29th January, 2013 by letter of the same date at which time she was earning a salary of EC\$6,360.00 per month.



(3) The termination letter reads:

"MEINL BANK (Antigua) Limited

29th January 2013
Ms. Joy-Ann A. George
#2 Cassada Gardens
St. John's, ANTIGUA

Dear Ms. George:

Meinl Bank continues the process of restructuring its operations. As part of the restructuring process the functions now performed in house by the Accounting Department is been outsourced and as a result your position at Meinl is now redundant. In the circumstances I must advise that your employment with Meinl Bank will be terminated with immediate effect on account of redundancy. Your employment with our bank commenced on 3rd April 2006. Your term of service has been 6 years and 10 months. You are entitled to the following terminal benefits:

Item

Monthly Salary	\$ 6,360.00
Length of service (in years)	6.83
Severance pay (one month per year of service)	\$43,460.00
One month's salary in lieu of notice	\$ 6,360.00
Holiday, 20 days per year, 1 and two-thirds of a day per month, with 260 working days per year at a rate of \$293.54/ day	\$ 293.54
Holidays accrued up to January 2013	\$ 1.67
Holiday Pay	\$ 489.23
Total	<u>\$50,309.23</u>

Please find enclosed a cheque in the amount of \$50,309.23

The sums due to you with respect to your thrift fund contribution will be available for pick up on 15th February 2013.

We thank you for your service to the bank and wish you every success in the future endeavours.

Yours truly,
(Sgd.) Liuz A. Franca
Managing Director"

(4) The Employee's Representative filed a Reference with the Industrial Court on 28th February, 2014 stating the following issues in dispute:

- “(a) Whether or not the Employee was wrongfully and/or unfairly dismissed on the 29th day of January 2013?
- (b) Whether or not the Employee is entitled to compensation for wrongful and/or unfair dismissal?
- (c) Whether or not the Employee is entitled to compensation for unpaid salary, vacation and payment in lieu of notice?”

The Employee's Memorandum

(5) The Employee's Memorandum outlines the case for the Employee. It states *inter alia*:

(i) In or around December, 2010 *the* Employer acquired new business as a result of receiving new majority shareholders. This increased the Employee's workload significantly. Consequently, the Employee found it difficult to complete tasks allotted by the Employer. She informed the Employer of the problem with a view to obtaining a solution but the matter remained unresolved. She emphasized that she nevertheless, “took all steps within her power to complete her work in a timely and efficient manner despite the increasing demands and inadequate resources”.

(ii) In or around November, 2011 the Employee became aware that other Employees of the Employer had received salary increases but she was excluded. She challenged her exclusion and as a result was promised an increase of \$500.00 per month by her Employer with effect from 1st September, 2012 but this never materialized.

(iii) The Employee was informed in writing by the Employer on 29th January, 2013 that “the functions of the Employer's accounting department had been outsourced and her contract of employment as an Accountant would be terminated with immediate effect on grounds of redundancy”. She was given no prior warning that she would have been made redundant and was not consulted about the same.

(iv) The Employee “disputes that the genuine reason for her dismissal was redundancy and contends that the purported outsourcing was a calculated effort to terminate her”. Alternatively she contends that if the reason for her dismissal was redundancy the Employer acted unreasonably. She further contends that the Employer embarked upon a course of action designed to dismiss her on the pretense of cause where there was none.

(v) In addition to the issues raised in the Reference mentioned in Paragraph (4) above, the Employee sought "such interest as the court may deem fit" and "costs".

The Employer's Memorandum

(6) The Employer contends the following *inter alia*:

(i) "In December 2010 there was a change of shareholders and with this change of shareholders the business strategy and operations of the Employer changed from being a captive bank to being that of a commercial international bank. This change resulted in an increase in business activity and accounting work to be performed by the Employee".

(ii) Salary increases are granted to employees based upon a review of their performance by the executive team of the Employer. That team awards increases based on merit. They determined that "for the period 2011 the Employee's performance did not merit a salary increase" and in any event the Reference pertained to wrongful and/or unfair dismissal and sought related remedies.

(iii) In 2012 the Employer proposed that the Employee perform additional duties i.e. accounting duties for Meinel Antigua Land and Properties Ltd., a subsidiary company for the Employer. For this, "the Employer proposed a \$500.00/month uplift to the Employee's salary". The Employee produced one accounting report for June 2012 and no other for this new subsidiary company. Because of the failure to produce any other reports the proposed \$500.00/month was not put into effect.

(iv) The Employer re-emphasized that the Employee's termination was due to redundancy on the basis of sound economic and business reasons. It was said to have been caused by the fact that the accounting functions were now outsourced and performed by Concord Business Associates, Chartered Accountants.

(v) The Employer contends that "outsourcing is a common feature of modern commercial life and to contend otherwise is unreasonable." Therefore the memorandum should be dismissed.

(7) The main issues to be considered will be those stated in Paragraph [4] above within the ambit of relevant laws.

Relevant Laws

- (8) Section C56 of the Antigua and Barbuda Labour Code (the Labour Code) establishes an employee's statutory right not to be unfairly dismissed. It states:

"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."

- (9) Section C58 (1) of the Labour Code states:

"A dismissal shall not be unfair if the reason assigned by the employer therefor

- (a)
- (b)
- (c) Is that the employee was made redundant.
- (d)
- (e)

Provided, however, that there is a factual basis for the assigned reason."

- (10) "Redundancy" is defined in C3 of the Labour Code thus:

"redundancy" means a situation in which by virtue of lack of customers 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 diminished.

- (11) C58 (2) of the Labour Code states:

"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 of the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

- (12) Cognizance must also be taken of the Industrial Court Act (Cap. 214), Section 10 (3) which states:

"(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall –

(a) Make such order or award in relation to a dispute before it as it considers fair Just having regard to the interests of the persons immediately concerned and the Community as a whole;

(b) Act in accordance with equity, good conscience and the substantial merits of the case before it, having regards to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code”.

The First Issue

Whether or not the Employee was wrongfully and/or unfairly dismissed on the 29th day of January, 2013.

(13) A sworn Witness Statement was submitted by the Employee. She gave evidence in Court and was also subjected to cross examination under oath. In summary, the Employee is of the view that her dismissal purported by the Employer to be due to redundancy caused by outsourcing of its accounting functions, was really a sham to terminate her employment. In support of her views, the Employee recounted several events which occurred leading up to her termination. These were as detailed in her Memorandum and summarized in Paragraph [5] above. In particular, she stressed the difficulties she experienced in completing her tasks in a more timely manner due mainly to difficulties in obtaining relevant information from the office in Brazil. She also mentioned the increased workload situation following the Bank’s receipt of new majority shareholders, as well as the Employer’s unfulfilled promise of paying her a \$500.00 per month increase on her salary. The Employer, however, attributed this to the Employee’s lack of performance in that she only submitted one report.

(14) Let us now deal with the question of outsourcing of the Bank’s accounting services. According to Ms. Heather Williams, General Manager of the Bank, outsourcing was purely a business decision. There can be no doubt that an employer has the right to organize its affairs in such a way as to legally obtain the best returns on its investments. According to the Employer’s Memorandum, outsourcing constitutes “any other reason” provided for in C 3 of the Labour Code with respect to the definition of “redundancy”.

(15) Mrs. Cherissa Roberts Thomas, Counsel for the Employee, noted during cross examination that nothing was put forward by the Employer to prove sound economic business reason for the decision to outsource. For example, no financial record was presented in support of such need. We agree that this would have made the argument for redundancy even more compelling. It is also noted that although the Employee’s Assistant Ms. Suzette Anthony was made redundant that she was later re-hired but not so the Employee. When everything is taken into consideration the

fact is that the functions once performed by the Employee as Accountant were now being performed by Concord Business Associates, Chartered Accountants. From this standpoint, therefore, it has to be agreed that a redundancy situation now existed.

- (16) Having come to the above conclusion, it is now necessary for us to look further into the matter to make a determination as to whether the Employer acted reasonably in the circumstances of this case. In this regard, we are guided by and fully adopt the comments made in Paragraphs 47 and 48 in the judgment in a case considered in this Court - Case No. 66 of 2015, *Antigua and Barbuda Workers' Union vs Cable and Wireless (Antigua and Barbuda) Limited* as follows:

"47. Since its establishment in 1976 this Court and the Court of Appeal have consistently applied the provisions of Section 58 of the Labour Code. As early as 1988 in the *Antigua Gases case*, after discussing the meaning and existence of a redundancy situation this Court (then differently constituted) asserted:

"Nonetheless, the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that a dismissal was fair; for the determining factor is whether the employer acted reasonably in handling the situation."

"48. ...According to Harvey at paragraph 778:

"But the justification for declaring redundancies may become indirectly relevant, if the true reason for a dismissal is put in issue. If the employer contends that the employee has been dismissed given to the offering of a package by reason of redundancy, the question may arise whether an apparent redundancy situation is a genuine redundancy situation, or whether the employer is seeking to use the alleged redundancy situation as a pretext to cover its unfair acts..... And even if there is a genuine redundancy situation, the law of unfair dismissal still asks the question whether the employer acted reasonably in treating redundancy as a sufficient reason for the dismissal in all the circumstances of the case".

- (17) In the instant case there was no consultation process; no prior warning was given by the Employer. The Employee's termination was dropped like a bombshell in the Employer's letter of 29th January, 2013. A reasonable employer in our view would have at least discussed the impending termination with the Employee. Consideration could, for example, have been given to the offering of a package accompanying voluntary termination. This alternative approach would have been more reasonable and most likely have been easier to bear. Unfortunately, the Employer dismissed such a thought by deciding that it was under no obligation to consult or give any prior warning. We feel that consultation, wherever possible, assists in promoting good industrial relations. **Taking all the factors into consideration, we have decided that the dismissal was unfair.**

The Second Issue

Whether or not the Employee is entitled to compensation for wrongful and/or unfair dismissal.

(18) Since the dismissal was deemed to be unfair, the Employee is entitled to compensation which is provided under various established Heads as shown below:

(a) Basic Award

This is similar to severance pay and is calculated on the basis of one month's pay for each year of service.

The Employer had calculated Mrs. Joy-Ann George's severance pay as \$6,360.00 x 6.83 which was rounded off as \$43,460.00. It is, however, necessary for us to examine the figure used by the Employer as monthly salary. The salary should have included a \$500.00 increase which was promised since March 2012 but which was never paid plus an additional 6% (\$381.60) increase due which all staff members received in October, 2011 but was not paid to her. Had these payments been made the final salary would have been \$7,241.60 per month (\$6,360.00 + \$500 + \$381.60). We therefore use this figure in our calculation.

Basic award is thus \$7,241.60 x 6.83 which is equal to \$49,460.13. Since \$43,460.00 was already paid, an amount of \$6,000.13 is now due under this head.

(b) Immediate Loss

An amount is usually awarded for loss obtained following a dismissal. The Employee is, however, expected to mitigate the loss by seeking reasonable employment. The Employee testified that since her termination, she obtained a job at Special Security Services in June 2013, earning a salary of \$3,000.00 per month for about six weeks. It was uncontroverted. This means that in the first place she was out of a job for five months. For the period up to June, 2013, we therefore, award her an amount of \$36,208.00 (\$7,241.60 x 5).

During this period at Special Security Services she earned \$36,000.00 per year or \$692.31 per week. This amounts to \$4,153.86 for the six weeks. On the other hand, the calculated monthly salary which she would have previously earned amounts to \$7,241.60 which is equivalent to \$86,899.20 per year or \$1,671.14 per week. This equates to \$10,026.83 for the six weeks. The difference between the two salaries for the period is \$5,872.97 which represents the second part of her immediate loss.

The Employee said that she subsequently obtained a better job with First Domestic Industry and Commerce Insurance Company where she earned

\$5,500.00 per month. She mentioned that this was short lived due to illness, but did not give a precise period. We will therefore not give this any further consideration.

She later obtained employment in July, 2014 with the Tabatha Memorial Foundation in Accounting and Administration earning \$3,150.00 per month. This represented a shortfall of \$4,091.60 per month (\$7,241.60 - \$3,150.00) when compared to her Mehl Bank salary. We award her two months' salary shortfall of \$4,091.60 which amounts to \$8,183.20.

The total award under Immediate Loss is thus \$50,264.17.

(c) Future Loss

We make no award under this head.

(d) Pay in Lieu of Notice

We award one month's salary in lieu of notice. This amounts to \$7,241.60.

An amount of \$6,360.00 was already paid. This leaves a balance of \$881.60 to be paid.

(e) Holiday

This amounts to \$558.16. Of this amount, \$489.23 was already paid which leaves a balance of \$68.93 to be paid.

(f) Manner of Dismissal

No award is made under this head.

(g) Exemplary Damages

We do not consider it appropriate to make an award under this head.

(h) Other - Retroactive Pay

(i) The \$500.00 increase in pay discussed earlier is payable with effect from September, 2012 to January, 2013. This represents a period of five months and amounts to \$2,500.00.

(ii) We award the 6% increase in salary to Mrs. George which is the same amount that was paid to other employees. It is payable for the period October 2011 to January, 2013. The total amount under this sub-head is \$381.60 x 16 which is equal to \$6,105.60.

The total retroactive pay awarded is therefore \$8,605.60.

Summary of Awards

Basic Award (net)	\$ 6,000.13
Immediate Loss	\$ 50,264.17
Pay in lieu of Notice (net)	\$ 881.60
Holiday (net)	\$ 68.93
Other (Retroactive pay)	\$ 8,605.60
TOTAL	<u>\$ 65,820.43</u>

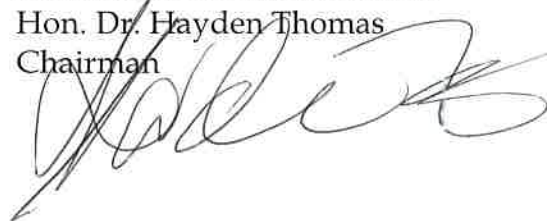
The Employer shall pay to the Employee the total amount of **\$65,820.43** on or before December 15, 2018.

There shall be no Order with respect to Costs.

Dated this 19th day of November, 2018.



.....
Hon. Dr. Hayden Thomas
Chairman



.....
Hon. St. Lawrence de Freitas
Member



.....
Hon. John Benjamin
Member

