

THE INDUSTRIAL COURT

ANTIGUA AND BARBUDA

REFERENCE NO. 57 OF 2015



BETWEEN

BERNADETTE MERCHANT-JOSEPH

Employee

and

ANTIGUA COMMERCIAL BANK LIMITED

Employer

Before:

The Hon. Judith A. Dublin
The Hon. Sir Samuel Aymer

Member
Member

Appearances:

Mr. Anderson E. Carty, of the Antigua and Barbuda Tradesmen & United Workers Federation, Representative for the Employee

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

2016: November 22
2026: June 26

JUDGMENT

Voluntary Separation Agreement- construction of Release and Settlement Agreement; Whether benefits accruing under subsequently concluded Collective Bargaining Agreements extend to recalculation of the separation package; Whether payment was made to Employee in error; whether voluntary separation package should be recalculated at final adjusted salary pursuant to Collective Bargaining Agreement

Introduction

1. This matter comes before the Court by way of a Reference filed on September 16, 2015, in respect of an Industrial dispute between the Employee and Antigua Commercial Bank Limited the Employer. The issue in dispute, as identified in the Reference is a Breach of Voluntary Separation Agreement.

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2. The Employee, served in both a clerical role, and subsequently in a supervisory capacity. The overall term of her employment was nineteen (19) years and eight (8) months. She was separated from her employment on April 30, 2007, pursuant to a Voluntary Separation Arrangement. The separation package was documented in a Final Settlement and Release executed on that date. The Employee now contends that the Employer has failed to honour a savings provision expressly contained within that Release, which preserved her entitlement to any benefits accruing to her under subsequently concluded Collective Agreements between the Employer and the Antigua and Barbuda Workers' Union ('the Union').

3. The Employer, for its part, denies that it is in breach of the Voluntary Separation Agreement. It contends that its obligations under the savings provision were fully discharged by the payment of retroactive salary differences following the conclusion of the relevant Collective Agreements, and further asserts that a payment made in August 2008 purporting to recalculate the voluntary separation package was made in error.

Background Facts

4. The following background facts are either admitted or not materially in dispute between the parties.
5. The Employee was engaged by the Employer from August 10, 1987 to April 30, 2007, and at the time of her separation was stationed at the Employer's banking operation situated at the V.C. Bird International Airport. Her basic monthly salary stood at \$5,391.00.
6. During the material period, a Collective Agreement was in force between the Employer and the Union, the Union being the recognised bargaining agent for categories of employees and included the position of Supervisor held by the Employee.
7. In or about 2005, the Employee was diagnosed with chronic hypertension. The condition progressively worsened and exerted a serious and worrying effect upon her physical and mental health, resulting in her being absent from work for extended periods. By letter dated March 26, 2007, the Employee applied to the Employer for voluntary separation, citing her medical condition as the basis for her application.
8. By letter dated April 10, 2007, the Employer accepted the Employee's application and offered a Voluntary Separation Package equivalent to five (5) weeks' salary for each completed year of service. The Employee confirmed her acceptance of the offer by endorsement dated April 12, 2007.

9. On April 30, 2007, the Employee executed a Final Settlement and Release in favour of the Employer. In consideration of the payment of \$122,698.00, the Employee released and discharged the Employer from all actions, claims and demands relating to her employment and its termination. The Release contained, however, an express savings provision in the following terms:

"SAVE THAT any benefits which have accrued to the Employee as a result of or under any Collective Agreement between the Bank and the Antigua & Barbuda Workers Union will become payable to the Employee on conclusion of the issues outstanding being resolved".

10. Based on a letter also dated April 30, 2007, the Employee also received, a separate payment of \$3,426.43 representing eighteen (18) days' vacation pay.
11. At the time the Release was executed, negotiations were being undertaken between the Employer and the Union for two consecutive Collective Agreements covering the periods October 2002 to September 2005, and October 2005 to September 2008. The negotiations had been protracted and remained unresolved and were not ultimately concluded until 2008 and 2009 respectively.
12. In December 2006, with an Addendum executed in January 2007, the first Collective Agreement covering the period 2002 to 2005 was signed and given retroactive effect from October 1, 2002 to September 30, 2005. In November 2009, the second Collective Agreement covering the period 2005 to 2008 was signed and given retroactive effect from October 1 2005 to September 30, 2008. Both agreements made provision for salary increases for the relevant periods.
13. Following the signing of the 2002 to 2005 Collective Agreement, the Employer paid the Employee the sum of \$16,127.55 through the issuance of a Banker's Draft dated May 27, 2008, representing retroactive salary adjustments for the period October 2002 to September 2005.
14. By letter dated August 12, 2008, the Employer wrote to the Employee advising that her Voluntary Separation Package had been recalculated at the adjusted salary rate of \$5,988.00 per month, and enclosed a payment of \$13,584.00 representing the difference between the Separation Package calculated at the original monthly salary of \$5,391.00 and the same package recalculated at the adjusted monthly salary of \$5,988.00. The Court notes that in its Memorandum filed in these proceedings, the Employer has sought to characterise this payment as having been made in error. The Court will address this characterisation in due course.

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15. On December 18, 2009, following the conclusion of the 2005 to 2008 Collective Agreement, the Employer made two further payments to the Employee in the sum of \$12,662.13 again by a Banker's Draft representing retroactive salary for the period October 2005 to September 2008; and \$4,219.56 also through the issuance of a Banker's Draft representing retroactive salary for the period October 2004 to September 2005.
16. By letter dated January 18, 2010, the Employee wrote to the Employer's Human Resources Executive requesting that her terminal benefits be further adjusted pursuant to the savings provision of the Release, given that the recently concluded Union negotiations had resulted in a final salary of \$6,942.00 per month. The Employer replied by letters dated January 20, 2010 and April 21, 2010, declining to make any further adjustment and asserting that all its obligations under the Release had been satisfied.
17. The Employee thereafter sought representation before the Labour Commissioner. A conciliation hearing was held on February 26, 2014, but did not result in voluntary settlement. The Employee subsequently brought the present Reference.

Issues for Determination

18. Having considered the pleadings, the evidence of the Witnesses and the exhibits tendered by both parties, the Court identifies the following issues for determination:
 - (i) What is the proper construction of the savings provision ('SAVE THAT' clause) contained in the Final Settlement and Release of April 30, 2007?
 - (ii) Did the savings provision obligate the Employer to recalculate the voluntary separation package at the Employee's final adjusted salary upon conclusion of each Collective Agreement, or did it merely preserve the Employee's entitlement to retroactive salary payments?
 - (iii) Has the Employer discharged whatever obligations were imposed upon it by the savings provision?
 - (iv) Is the Employer's characterisation of the August 2008 payment as having been made 'in error' tenable?
 - (v) What, if any, relief is the Employee entitled to?

Submissions of the Parties

The Employee's Submissions

19. Learned Representative, Mr. Carty, on behalf of the Employee, submitted that the savings provision was clear and unambiguous in its effect and that any and all benefits accruing to the Employee under any Collective Agreement were preserved and payable upon conclusion of the outstanding negotiations. He argued that the voluntary separation package, being computed by reference to

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salary, was an obligatory benefit linked to the Collective Agreement, since the salary rates upon which it was based were determined by those very agreements.

20. Mr. Carty further submitted that the Employer's own conduct in August 2008 was determinative. The Employer did not merely pay retroactive salary at that time; it expressly recalculated and paid the difference in the Voluntary Separation Package itself, as its letter of August 12, 2008, plainly states. Having done so in respect of the first Collective Agreement, the Employer was equally obligated to do likewise upon conclusion of the second. For the Employer to characterise the 2008 payment as an error, is untenable and constitutes according to Mr. Carty an attempt to resile from a clear and unequivocal act of performance.
21. The Employee claims an outstanding balance of \$22,316.00, representing the difference between the Voluntary Separation Package recalculated at the final adjusted salary of \$6,942.00 per month, yielding \$158,598.00 at 5 weeks per year for her 19 years and 8 months of being in the employ of the Employer, and the amounts already paid by way of separation package \$122,698.00 plus \$13,584.00.

The Employer's Submissions

22. Learned Counsel, Ms. Roberts, on behalf of the Employer submitted that the savings provision, on its true construction, preserved only the Employee's entitlement to retroactive salary payments arising from the Collective Agreements and not any obligation to adjust or recalculate the voluntary separation package itself. Counsel argued that the voluntary separation payment was a mutually agreed, one-time, lump-sum payment that was distinct from and independent of any benefit accruing under the Collective Agreements. The Collective Agreements, she submitted, do not govern the terms and conditions of voluntary separation.
23. Learned Counsel, Ms. Roberts further submitted that the Employer had fully honoured the savings provision by paying the Employee all retroactive salary differences due under both Collective Agreements, and that those payments fully discharged the Employer's obligations. With respect to the August 2008 payment of \$13,584.00, the Employer acknowledged that the letter accompanying that payment did describe it as a recalculation of the separation package, but maintained that the payment was made in error, as the Employee had no legal entitlement to such an adjustment. The Employer's position is that the employee's Representative was mistaken as to the Employer's legal obligations, and that the payment cannot operate to create an obligation which did not otherwise exist.
24. At its most emphatic, the Employer in its Memorandum, asserted that it is the Employee who is in breach of the Voluntary Separation Agreement by bringing

these proceedings seeking funds which are, in the Employer's submission, outside the scope of that Agreement.

Analysis and Findings

25. The Court approaches the construction of the savings provision by reference to the well-established principle that contractual language is to be given its natural and ordinary meaning, read in the context of the document as a whole and having regard to the circumstances in which it was made. Where the language is clear and unambiguous, the Court will give effect to it as written as was stated in the established authority of **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896** per Lord Hoffmann.
26. The savings provision reads- "*SAVE THAT any benefits which have accrued to the Employee as a result of or under any Collective Agreement between the Bank and the Antigua & Barbuda Workers Union will become payable to the Employee on conclusion of the issues outstanding being resolved.*"
27. The Court finds this language to be broad in its scope and deliberately so. The provision was inserted into the Release precisely because, at the time of execution, significant collective bargaining negotiations remained outstanding, the outcome of which would directly bear upon the financial entitlements of employees in the bargaining unit including the Employee.
28. The question of construction is whether the phrase "any benefits which have accrued to the Employee as a result of or under any Collective Agreement" is limited to retroactive salary payments, as the Employer contends, or extends to encompass the voluntary separation package itself, as the Employee contends.
29. The Court finds the Employer's interpretation to be unduly restrictive and contrary to the intention and spirit and evident purpose of the savings provision. The word "any" is expansive and unqualified. The provision does not limit itself to "retroactive salary" or "back-pay" as language that would readily have been used had that been the parties' intention. The Voluntary Separation Package, being calculated at a rate of five weeks' salary for each year of service, is inherently and inextricably linked to the salary rates negotiated, agreed to and documented in the Collective Agreements. A benefit "accruing under a Collective Agreement" is not confined to salary payments made during employment; it extends to the quantification of entitlements that are measured by reference to salary scales established by those agreements.
30. The Court further notes that Article 21.03 of both Collective Agreements expressly provides that redundancy and severance payments "*shall be computed on the basis of the employee's final salary during his period of employment with the Bank.*"

31. The Court does not treat Article 21.03 as directly governing the Voluntary Separation Package, which the Court accepts was a distinct, consensually negotiated arrangement falling outside the four corners of the Collective Agreements. Rather, Article 21.03 is admissible, and relevant, as part of the factual matrix and contractual context against which the savings provision falls to be construed. It demonstrates that, within the employment relationship between these parties, the principle that terminal payments on separation are referenced to an employee's final salary was a familiar and established one. Against that background, a savings provision drafted in deliberately broad terms and entered into at a time when final salary rates remained unsettled is more naturally read as intended to capture exactly this kind of recalculation, rather than as confined to retroactive in-service salary arrears alone. The savings provision is to be read in that context.

The August 2008 Payment- Error or Performance?

32. The Employer's characterisation of the August 2008 payment of \$13,584.00 as having been made "in error" is, in the judgment of this Court, not only legally untenable but also commercially improbable. The payment was not a casual clerical error; it was preceded by a formal letter from the Employer's own Training and Recruitment Officer, written on Employer's letterhead, expressly identifying the calculation methodology as the differential between the separation package at \$5,391.00 and the recalculated package at \$5,988.00. The letter specifically described the payment as pertaining to the "Voluntary Separation Package."
33. The Court is mindful that, as a matter of strict construction, evidence of a party's subsequent conduct is generally inadmissible as an aid to interpreting a written contract as has been settled in **Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38**. The Court's finding on the proper construction of the savings provision, set out above, is accordingly reached independently of the August 2008 payment and rests on the language of the Release read in its contractual context. The significance of the August 2008 payment lies elsewhere in the doctrines of affirmation and estoppel by representation. The Employer through its authorised officer, represented to the Employee in unequivocal terms that her Voluntary Separation Package would be recalculated upon conclusion of each Collective Agreement, and acted upon that representation by making payment accordingly. The Employee, for her part, relied upon that representation and took no steps to pursue any alternative remedy at that time. Having made an unequivocal election to perform the savings provision in that manner, and having allowed the Employee to order her affairs on the faith of that election, it is not now open to the Employer to resile from it. The Court is accordingly not satisfied that the 2008 payment was made in error. It was made in fulfilment of the

Employer's obligations as the Employer itself then understood and represented them to be, and it is bound so to do by that election.

34. Even if, contrary to the Court's finding, the payment was to be characterised as having been made under a mistaken apprehension of legal obligation, the Employer took no steps at any material time to seek recovery of the allegedly erroneous payment, nor did it put the Employee on notice of any error prior to the filing of these proceedings. Having stood by, while the Employee organised her affairs on the basis of the Employer's conduct, the Employer cannot now rely upon a self-serving characterisation of that conduct to defeat the Employee's legitimate expectations.

The Scope of the Obligation-Which Agreements Apply?

35. The savings provision extends to benefits accruing "under any Collective Agreement" meaning that it encompasses both the 2002 to 2005 and the 2005 to 2008 Collective Agreements. The Employer performed its obligation in respect of the first agreement by making the August 2008 recalculation payment. Consistency and fidelity to the terms of the savings provision require that the same exercise be performed in respect of the second agreement.
36. Upon conclusion of the 2005 to 2008 Collective Agreement, the Employee's final adjusted salary for the period October 2006 to April 2007, the last period of her service was established at EC\$6,942.00 per month. The Voluntary Separation Package, properly recalculated at that salary at the rate of five weeks per year over 19 years and 8 months, yields \$158,598.00. The amounts previously paid by way of the Voluntary Separation Package being \$122,698.00 and \$13,584.00, totaling EC\$136,282.00 leaves an outstanding balance of \$22,316.00.

Interest

37. The Employee, at paragraphs 18 and 19 of her witness statement requested that interest be paid on the outstanding sum due to her. The Court considered her claim but declines to make any order for the payment of interest. Neither the Labour Code, nor the Industrial Court Act, Cap 214, contains provisions empowering this Court to award interest on a sum of this nature in the circumstances of this case. The Court observes further that while the Voluntary Separation Package is calculated by a formula analogous to that used for severance pay under the Collective Agreement, the present award is not made pursuant to, or by strict application of, the severance provisions of the Collective Agreement. The voluntary separation arrangement was a negotiated and mutually agreed basis of separation, distinct in character from severance entitlement arising as of right under the Collective Agreements, and the Court's award is confined according to the sum found due under the savings provision of the Release.

The Employer's Counter-Assertion of Breach

38. The Court treats with scant regard the Employer's assertion at paragraph 20 of its Memorandum that the Employee herself is in breach of the Voluntary Separation Agreement by bringing these proceedings. The Employee has done precisely what the savings provision contemplates in that she sought payment of a benefit she rightly contends has accrued to her under the Collective Agreements. The Court dismisses this assertion.

Conclusion

39. For the foregoing reasons, the Court finds:

- (i) that the savings provision ("SAVE THAT") clause in the Final Settlement and Release of April 30, 2007 is to be construed broadly and extends to the recalculation of the Voluntary Separation Package upon the successful negotiations of each applicable Collective Agreement.
- (ii) The Employer's payment of \$13,584.00 in August 2008 constituted a performance of its obligations under the savings provision in respect of the 2002 to 2005 Collective Agreement and was not made in error.
- (iii) Upon successful conclusion of negotiation of the 2005 to 2008 Collective Agreement and the establishment of the Employee's final adjusted salary at \$6,942.00 per month, the Employer became obligated to carry out a further recalculation of the Voluntary Separation Package.
- (iv) The Employer's refusal to perform that recalculation constitutes a breach of the savings provision of the Final Settlement and Release.
- (v) The Employee is entitled to the sum of \$22,316.00 representing the balance of her Voluntary Separation Package properly recalculated at her final adjusted salary.

ORDER:

40. In the premises, the Court makes the following Orders:

1. The Employer shall pay to the Employee, the sum of \$22,316.00 representing the outstanding balance of her Voluntary Separation Package, properly recalculated at her final adjusted monthly salary of \$6,942.00 on or before the 26th day of July, 2026.
2. The Employer shall also pay to the Employee costs in the sum of \$1,500.00 on or before the 26th day of July, 2026.

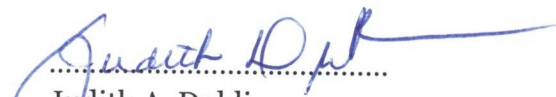
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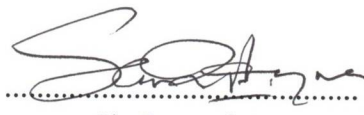
41. The Court records that former President the Honourable Charlesworth O. D. Brown, who presided over the hearing of this Reference, has since become unavailable to participate further in these proceedings. The remaining Members of the Court as constituted for this Reference, namely Sir Samuel Aymer and Ms.

Judith Dublin, have continued with and concluded these proceedings pursuant to section 4(6) of the Industrial Court Act, Cap. 214.

42. The Court is acutely aware that the time elapsed between the hearing of this matter and the delivery of this Judgment is considerable and wholly unsatisfactory. For this delay, the Court extends its sincere and unreserved apology to both parties.

Dated the 26th day of June, 2026


Judith A. Dublin
Member


Sir Samuel Aymer
Member