

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO HCV 2141 OF 2003

BETWEEN	DOREEN THOMAS	CLAIMANT
AND	THE BANK OF NOVA SCOTIA JAMAICA LIMITED	DEFENDANT

CONSOLIDATED WITH:

CLAIM NO HCV 2142 OF 2003

BETWEEN	JANETTA CAMPBELL	CLAIMANT
AND	THE BANK OF NOVA SCOTIA JAMAICA LIMITED	DEFENDANT

CONSOLIDATED WITH:

CLAIM NO. HCV 2255 OF 2003

BETWEEN	DONNA DALEY	CLAIMANT
AND	THE BANK OF NOVA SCOTIA JAMAICA LIMITED	DEFENDANT

IN COURT

Ian Wilkinson and Shashawa Grant instructed by Ian G. Wilkinson &  
Company for Doreen Thomas and Janetta Campbell

Adolph Edwards for Donna Daley

David Batts and Kelly Wong instructed by Livingston Alexander and Levy  
for the Bank of Nova Scotia

April 8, 10, July 18, 25, 2008, April 1, 17 and May 8, 2009

## REDUNDANCY PAYMENTS - WHETHER THERE WAS CONTRACT BETWEEN EMPLOYER AND EMPLOYEE ON CALCULATION OF REDUNDANCY PAYMENTS

SYKES J.

1. This is a claim brought by three former senior managers of that venerable Canadian institution, the Bank of Nova Scotia ("the bank"). The claimants allege that the bank underpaid them when it recalculated their redundancy payments after the Bustamante Industrial Trade Union ("the union") settled a three year wage contract on behalf of all unionised employees.
2. The claimants are not part of the union and it is common ground that the union agreement did not apply to them.

### The background

3. The three claims raise identical issues and other than the specific sum being claimed by the claimants, the evidence adduced was substantially the same and so there is no need for me to address each case more specifically in respect of the central issue before the court. In all three claims, the issue is whether there was a binding contract between the bank and each claimant that obliged the bank to recalculate the multiplicand (i.e. the weekly salary) by including allowances when the agreement between the union and the bank was concluded. I have concluded that there was no such contract between the claimants and the bank. In the alternative, if I am wrong in that the claimants received what they contracted for consequently, the claims against the bank are dismissed with costs to the bank to be agreed or taxed. These are my reasons.
4. Between November 1, 2001 and January 11, 2002, the claimants were made redundant. Specifically, Mrs. Doreen Thomas was informed on November 2, 2001, that she would be made redundant effective January 25, 2002. She opted to take twelve weeks pay in lieu of notice and on November 2, 2001, received \$5,055,843.88 as redundancy payment. Miss Janetta Campbell was made redundant in January 11, 2002. On January 15, 2002, she received \$5,002,717.59 as well as payment in lieu of notice. Mrs. Donna Daley was told by

letter dated October 26, 2001, that she would be made redundant effective January 25, 2002. She also took pay in lieu of notice. She was made redundant on November 2, 2001 and on that date received \$5,339,968.10. Thus both Mrs. Thomas and Mrs. Daley were made redundant on November 2, 2001 with Miss Campbell being made redundant on January 11, 2002.

5. Each claimant was issued with a statement detailing the calculations. The claimants subsequently received cheques consistent with the statement and in the amounts already stated.
6. The statements in respect of Mesdames Thomas and Daley were dated, November 2, 2001, and in respect of Miss Campbell, January 11, 2002. Each statement ended with a release and discharge which reads:

*I hereby declare and confirm that I have no further claim for any redundancy sums due to me arising out of my employment to the Bank (sic) of the termination thereof against the Bank (sic), its officers or employees and I acknowledge and accept the amounts stated above my signature as being accurate and in full and final settlement of all redundancy sums due to me from the Bank (sic).*

7. Submissions were made on the effect of this release and discharge but having regard to my decision, I need not address the issues raised in respect of this release.
8. At the time the claimants were made redundant, it was well known that the union was negotiating with the bank for improved benefits, wages and salaries for unionised employees. This union had secured bargaining rights at the bank in 1978.
9. It was well established that the bank would adjust the total salary package of the senior managers after the union settled with the bank. This was the practice ever since the union secured bargaining rights.
10. On April 2, 2002, the union and the bank agreed a wage agreement for unionised workers, and this agreement was effective from November

1, 2001. The agreement came into effect at a date when the claimants were still employed to the bank. This agreement, provided among other things, a formula for redundancy which was better than the provision of the Employment (Termination and Redundancy Payments) Act ("the Act"). The relevant clause of the union agreement is clause 3 (d). It reads:

*The amount of redundancy payment to which an employee who has been dismissed by reason of redundancy after 31<sup>st</sup> October 2001 is entitled in respect of any period, ending with the effective date of such dismissal, during which the employee as been continuously employed shall be*

- (a) ...*
- (b) ...*
- (c) ...*
- (d) in respect of a period of more than twenty (20) years of employment -*
  - i. for the first five (5) years reckoned, the sum arrived at by multiplying two (2) weeks' pay by that number of years;*
  - ii. for the second five (5) years reckoned, the sum arrived at by multiplying three (3) weeks' pay by that number of years;*
  - iii. for the next ten (10) years reckoned, between the eleventh and twentieth years, the sum arrived at by multiplying four (4) weeks' pay by that number of years, and*
  - iv. for the years remaining, the sum arrived at by multiplying five (5) weeks' pay by that number of years.*

*The abovementioned provisions shall not apply to any dismissal by reason of redundancy of any employee, the effective date of which is prior to the 1<sup>st</sup> day of November 2001.*

11. This was the first time since union negotiations began at the bank in 1978 that there was an agreement of this nature. Prior to this, whenever an employee was being made redundant, the bank, in its sole discretion, decided which allowances would be added to the basic

salary for the purpose of establishing the multiplicand (the weekly salary). There was never any contractual provision binding the bank to take account of allowance when calculating the multiplicand. The multiplier (the number of weeks per year) used by the bank was that set out in the regulations made under the Act.

12. The significance of this agreement cannot be overstated. When one looks at the regulations under the Act dealing with redundancy, one sees that they state that for the purposes of calculating redundancy, the multiplier is two weeks pay per year for a period not exceeding ten years and the rest of the years is three weeks pay per year. When one looks at the statements of redundancy signed by the claimants, one sees that the bank used the statutory multiplier. The great achievement by the union was it managed to break the first ten years into two periods of five years. The multiplier for the first five years is two weeks pay per year; the multiplier for the second five years is three weeks pay per year. For the next ten years, the union, secured a multiplier of four weeks pay and for the years beyond this, that is to say, twenty years, the multiplier is five weeks pay. It is to be noted, though, that as favourable as this agreement was, it did not spell out what should be included in the multiplicand.
13. Needless to say, there had to be quid pro quo coming from the union. For the purposes of redundancy calculation, the union agreed to use basic salary only to determine the size of the multiplicand. In practical terms, what this meant was that the bank no longer had any discretion to exercise when it came to what else, other than basic salary, should be included in multiplicand, once an employee is to be made redundant. In effect the union and the bank agreed to use the statutory definition of normal wages as the multiplicand.
14. The definition of normal wage is found in regulation 2 (1) which was made pursuant to the Act. It reads:

*normal wages means in relation to an employee, the remuneration regularly paid to him by his employer as wages or commission, and includes any amounts*

*regularly so paid by way of bonus as part of such remuneration but does not include ...*

15. This definition does not include allowances. It refers simply to remuneration regularly paid and amount regularly paid by way of bonuses.
16. Regulation 11 states that the regulations do not prevent the employer from paying more than what the employee is strictly entitled to under the redundancy law. This provision is permissive but not binding. It is essentially, a reminder to the employer that the statute and regulation set a floor but not a ceiling.
17. Before this 2002 agreement, as stated earlier, the bank in its sole discretion decided on what made up the multiplicand for the purpose of redundancy payments. It must not be thought, though, that the employees objected to this. According to Mr. Rion Hall, the sole witness for the bank, the unionised workers, before the April 2002 agreement, did not wish to be pinned down to a specific multiplicand because, they found from experience that, the bank exercised its discretion in a manner that they found acceptable, that is to say, the bank tended to include allowances even though there was no statutory or contractual obligation to do so. They feared that if they specified what should be included in the multiplicand and using the statutory multiplier, they might be worse off. This, in part, explains why the multiplier was higher under the agreement once the normal wage would be used to determine the multiplicand.
18. There is further explanation that is necessary concerning this multiplicand under the 2002 agreement. In the case of unionized workers, some of the allowances were rolled into basic salary but it was not a dollar-for-dollar addition. Thus one would not arrive at the new basic salary simply by adding all the pre-existing allowances to the old basic pay.
19. Let me explain more about the allowances. From all the evidence in the case, this is what I have gathered on this question of allowances. The practice of having allowances as part of the total remuneration was an

attempt by the bank and the union to improve the actual net income of the employees without increasing their tax burden. Taxes were paid on the basic salary but the allowances were non-taxable. Non-taxable allowances were paid to unionised and senior managers.

20. Over time, the allowances, from the bank's point of view, were an administrative nightmare. The bank wanted to get rid of them by including them in salary. This was not attractive to the employees because it would mean that all their income would be taxed.

21. I now deal with remuneration of senior managers and how redundancy calculations were approached by the bank in relation to this group. Even though the union settlements over the years were taken into account when setting the total salary package of the senior managers, the salaries were not arrived at by negotiation. It was the bank, in its sole discretion, that decided the amount that the senior managers should be paid, and how the salary package was composed.

22. Mr. Hall was careful to emphasise that there was no direct proportionate relationship between increases granted to the unionised employees and the senior management group. For example, if the union secured an overall increase for their members of 10%, the senior managers' remuneration would not necessarily increase by 10%. Also, two senior managers' salary might vary even if they were at the same grade level. This was possible because the actual compensation package for each senior manager depended on the result of a performance appraisal. He also added that the bank had a policy of remunerating senior managers at higher levels than junior staff.

23. What I gathered from the totality of Mr. Hall's evidence, (and there was no challenge on this) is that while actual remuneration of individual members of the senior management group would depend on the results of performance appraisal, it was generally the case that the senior managers always got more than unionised staff. The rationale for the increase to senior managers was that it would be an anomaly for there to be a junior member (read union member) earning more than their supervisor. The bank ensured that this did not happen.

24. According to Mr. Hall, (and, again, there was no challenge on this aspect of his testimony) by 1998, the multiplicity of allowances for the senior managers was eliminated and replaced with a single figure representing a taxable allowance. The bank was able to achieve this, in 1998, in respect of the senior managers because their emoluments were not arrived at by negotiations. The bank decided the quantum. The senior managers either took it, or, if they were sufficiently disgruntled then, presumably, they had the option of leaving but there was no haggling.
25. As far as allowances were concerned, the single figure arrived at was \$375,000.00. Mr. Hall also stated that over the years, there were a number of arrangements regarding motor cars. Eventually, there was an arrangement whereby the senior managers received the sum of \$437,940.00. These were the two figures in place at the time the three claimants were made redundant. I have dealt with the remuneration of senior managers.
26. On the issue of redundancy payments, Mr. Hall made a critical point which effectively scuttled the claimants' cases. He distinguished, on the one hand, between the determination of the total emolument of a senior manager who is in the employment of the bank, and, on the other hand, the determination of the multiplicand for the purpose of calculating the redundancy payments. The two are not synonyms. Regrettably, the claimants have lost sight of this, and are of the mistaken view that the bank is under a legal obligation to use the total salary package (including allowances) to calculate the multiplicand for redundancy purposes, that is to say, use the old discretionary approach, and apply to that the higher multiplier secured by the union in the April 2002 agreement.
27. Mr. Hall also testified that when the bank sent the revised calculations to the claimants, it was not based on any increased salary (although not stated by him, I understood him to mean that the revised calculation was not based on increased salary to senior managers that would arise out of the union agreement) but based on a change in the redundancy formula, which, at the risk of repetition was



higher multiplier multiplied by basic pay alone with no allowances. The revised payments used the increased multiplier.

28. It seems to me that having left the determination of the multiplicand solely in the hands of the bank, the ability to rest this claim in contract was always going to be a difficult proposition. Let me make it clear that during the case, no other basis for the claim was relied by the claimants but contract.

29. This current claim was precipitated by a letter dated, April 15, 2002, in which the bank stated that it was now "*pleased to provide an update of the recalculation of your benefit*" because of "*improvements of the redundancy formula as stipulated in our new labour contract commencing November 1, 2001 - October 31, 2004.*" The letter went on to say specifically that by "*virtue of Regulation 2 (sic) of the Employment (Termination and Redundancy Payments) Regulations please note that the retroactive payment is now calculated by reference to the basic salary alone.*" The letter ended by indicating "*the revised acknowledgment for your acceptance to facilitate our release of the additional amount*" was enclosed. The claimants declined to accept the additional sum because the multiplicand did not include allowances that were previously used to make up the multiplicand. I now turn to the specific claims.

### **The claimants' case**

30. The claimants say that before November 1, 2001, the bank had always used the same formula for calculating redundancy payments for unionised and non-unionised employees. This assertion by the claimants needs explanation for it to be properly understood. What is clear to me, at least in this case, is that the bank used the statutory multiplier. The bank could not go below that so when it is said that the bank had the same policy it must be understood, at least on the evidence presented, that all employees (senior managers and unionised employees) were subject to the statutory multiplier. There is no evidence that the bank used a different multiplier for any employee, including senior managers.

31. The only difference, then, would be the size of the multiplicand which, as we now know, was determined solely by the bank. In other words, if the bank chose not to include allowances, there is no contractual term, express or implied, that an aggrieved employee could point to as the basis of their complaint. All they could do is complain that this had not been done in the past. It is against this background that I examine the particular claims.

32. The claimants seemed to have been suggesting that bonuses were to be taken into account in the revised calculations. I do not think this is sustainable because, all the claimants, when they accepted the redundancy payments never raised the issue that bonuses were excluded from the calculations. Indeed, the very claims before the court do not include bonuses. The initial payment made to the claimants was accepted as true and accurate even though it did not include bonuses. The conclusion I have come to is that although bonuses were paid, no one has asserted that they were paid often enough to come within the definition of "normal wage" in the regulations. I therefore analyse the claims on the basis that bonus payments were not and are not part of this claim.

33. Mrs. Doreen Thomas' case is that when she was made redundant, she was being paid \$56,210.38 per week. This was arrived, she said by taking into account her basic pay, allowances and bonuses. This was the policy of the bank at the time of the redundancy. She expected that, the improved multiplier would apply to the \$56,210.38. On this view, her calculations look like this:

Total redundancy due  $\$56,210.38 \times 135$  (weeks) = \$7,558,401.30

Less payments received  $\$56,210.38 \times 92$  (weeks) = \$5,171,354.96

Balance owed = \$2,417,046.34

34. The bank used, for the updated redundancy payment, the basic salary of \$40,576.92 which meant that she would receive an additional \$358,870.31.

35. Miss Janetta Campbell's evidence is to the same effect. Her multiplicand was based on a weekly salary of \$56,210.31. Her calculations are as follows:

\$61,282.42 for 130 weeks = \$7,966,714.60  
Less amount already paid = \$5,002,717.59  
Balance outstanding = \$2,963,977.01

36. She, like Mrs. Thomas, claims that her updated payment should be based on a weekly salary of \$61,281.42 which was comprised of basic pay, allowances and bonuses. Miss Campbell was distressed to note that the bank used a weekly salary of \$40,576.85 to calculate the additional redundancy payments. Based on the bank's calculation she was offered an additional \$272,272.91.

37. Mrs. Donna Daley's account is quite similar. By her calculations, her weekly salary was \$56,210.38. After the agreement, the bank used a weekly salary of \$40,576.92. This meant that she was offered an additional \$340,782.70. She rejects this and says that she is owed \$2,529,467.10.

38. In all three cases, the bank used the revised multiplier.

#### **The bank's case**

39. The bank's response to all this has been the same in all three cases. The bank's position is this: first, when the claimants signed the release after receiving the first redundancy payments they acknowledged that they were not entitled to any further payment. Second, in light of the release signed, any further payment was purely gratuitous on the part of the bank. Third, the union agreement did not apply to the senior management group to which the claimants belonged at the time of redundancy. Fourth, the bank was not under any legal obligation to recalculate any of the claimants' redundancy payments based on the union agreement.

40. The first two bases rested on the effect of the release signed by each party which I have said I need not decide. The third basis was

conceded by the claimants. The fourth basis is the one on which the bank ultimately succeeded.

#### The analysis

41. At the risk of repeating some of the statements already made, I need to refer to the cross examination of Mr. Hall to reinforce my conclusion. I shall refer to that aspect of the cross examination what was conducted by Mr. Wilkinson on behalf of Mrs. Thomas. I will not refer to the cross examination in respect of Miss Campbell because it was essentially the same. I mean no disrespect to Dr. Edwards when I do not examine his cross examination (on behalf of Mrs. Daley) in great detail. I decline to do so because it was quite similar to Mr. Wilkinson's.
42. Mr. Wilkinson confronted Mr. Hall with exhibits 2 and 3. Exhibit 2 is the statement of redundancy, dated April 22, 2002, in respect of Mrs. Thomas showing the revised redundancy payment based on a multiplicand of \$40,578.92 as the weekly salary and multiplier of 135 weeks. Exhibit 3 is Mrs. Thomas' statement of redundancy, dated November 2, 2001, with a multiplicand of \$56,210.38 as the weekly salary and a multiplier of 92 weeks.
43. When he was asked to explain the additional number of weeks, Mr. Hall indicated that because the bank had no formal policy on redundancy when the agreement was reached with the union in April 2002, the multiplier was increased substantially above the statutory position. In return, the union agreed that the bank would no longer use its discretion to include any allowances but that computation for the purpose of redundancy would be based on normal wages as defined in the regulation under the Act.
44. Mr. Hall was next taxed with the difference in weekly wages. His response was that when one looks at exhibit 3, one sees that that calculation included the taxable allowance of \$375,000.00, motor car allowance of \$437,940 and a basic salary of \$2,110,000.00, giving a total salary of \$2,922,940.00 and yielding a weekly wage of \$56,210.38. Exhibit 2 used basic salary alone, hence a multiplicand of \$40,576.90.

45. Mr. Hall was next referred to exhibit 5 which was a document dated September 25, 2002, and headed "Human Resources Union Negotiations." Mr. Wilkinson directed the witness' attention to page 3 of that document. The document indicated in respect of the example given of a female S4 officer the following: whereas under the old formula the basic salary of \$1,307,605.00 along with allowances would yield a multiplicand of \$27,653.81 using a multiplier of 65 weeks, under the new formula the basic pay alone would be \$1,395,305.25, giving a multiplicand of \$26,832.79 and a multiplier of 90 weeks. Mr. Wilkins was using this to suggest that the higher basic salary under the new formula was arrived at by including allowances, so by parity of reasoning that should have been done for Mrs. Thomas and Miss Campbell, that is to say, the allowance of \$375,000.00 should have been added to the \$2,110,000.00 for the purposes of calculating redundancy. Dr. Edwards pursued a similar line of reasoning.
46. The point being made here by Mr. Wilkinson was that in the same way the bank rolled allowances for the female S4 into basic salary, thereby having a higher basic salary, the same should have been done for Mrs. Thomas and Miss Campbell. Again, where is the legal obligation for this? Bearing in mind what I have said earlier about the determination of emoluments for senior managers, as well as the multiplicand for redundancy purposes, the proposition of Mr. Wilkinson is not sustainable.
47. However, taking Mr. Wilkinson's logic in the S4 example, it must be observed that the actual multiplicand for the purpose of redundancy under the new contract was actually less than the multiplicand under the old discretionary policy. What makes the package worthwhile is the higher multiplier. This only serves to reinforce the distinction between emoluments for the purpose of payment while being employed and the multiplicand for the purpose of redundancy calculations.
48. If there was a contract between the parties governing the redundancy payment issue, at best, the contract would be a promise to revisit the redundancy payment of the claimants once the union agreement was settled. There was no expressed or implied agreement

on what form this revisiting would take bearing in mind that the senior managers were not members of the union.

49. Counsel for the claimants sought to seize upon the words of Mr. Hall when he said that there was an agreement, at the time of the redundancy, that the claimants' payments would be revisited. Counsel also preyed in aid the evidence that the bank owed money to the claimants. This was said to be the contract. Well, if this is so, then the bank fulfilled its obligation when it made that offer by the letter of April 15, 2002, which the claimants have all rejected. Also that offer was indeed an increased payment using a higher multiplier but a lower multiplicand, which, if there was a contract between the parties, was what the claimants contracted for, given that their initial premise was that what was done for the unionised employees would be done for them. This is exactly what the bank did: it offered higher multiplier and lower multiplicand. What this means is that the bank has met its legal obligation. There is no contractual provision stating what the size of the multiplicand would be since this was determined by the bank in its sole discretion.

50. Dr. Edwards, on behalf of Mrs. Daley, returned to this theme of allowances and introduced exhibits 17 and 18. Exhibit 17 is a letter dated March 10, 1999, in which it is stated that in respect of allowances the current ten individual allowances will be combined into two allowances: taxable and non-taxable. It goes on to say that taxable allowances were housing, utilities, travel, clothing, laundry, gardener/helper, janitorial and telephone. The non-taxable allowances are entertainment and petrol. The letter ends by saying that under the revised payment structure there will be a taxable allowance of \$375,000.00.

51. Exhibit 18 was a letter dated May 18, 2001 to Mrs. Daley. In that letter the taxable allowance remained at \$375,000.00. The car allowance was \$437,940.00.

52. What these two exhibits have done is to reinforce the explanations given by Mr. Hall regarding the allowances for senior managers. This has been detailed above and need not be repeated here. The claims are dismissed.