

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION  
2011/COM/LAB/FP/00006

BETWEEN

CLAUDINE GREEN

*Plaintiff*

AND

GRAND BAHAMA SHIPYARD LIMITED

*Defendant*

BEFORE                      The Hon. Mrs. Justice Estelle Gray-Evans  
APPEARANCES:         Mr Sidney Campbell for the plaintiff  
                                   Mr Jacy Whittaker along with Mrs A Kenra Parris-Whittaker  
                                   for defendants  
  
HEARING DATES:        2014: February 3  
WRITTEN CLOSING SUBMISSIONS  
DEFENDANT:             2014: February 17  
PLAINTIFF:               2014: March 17

**JUDGMENT**

**Gray Evans J.**

1. The plaintiff is a former employee of the defendant, a limited company incorporated under the Companies Act of the Commonwealth of The Bahamas and carrying on the business of ship repairs on the island of Grand Bahama.

2. By letter dated 4 October 2010, the defendant informed the plaintiff that as of that date, her services would no longer be needed by the company and that her employment was, therefore, terminated immediately in accordance with Part VI of the of the Employment Act, 2001. In that letter the plaintiff was informed that her final cheque included the following:

- (1) Hours worked October 1-4, 2010
- (2) 6.5 Vacation days
- (3) Prorated Christmas bonus
- (4) 2 weeks pay in lieu of notice
- (5) 2 weeks pay for each year of service (6 years and 3 months).

3. In response to that letter, the plaintiff, by letter dated 15 October 2010 to Mrs Marilyn Johnson, the defendant's Human Resources/Personnel Manager, wrote:

"Dear Ms Johnson

I write with reference to your letter dated October 4<sup>th</sup> 2010, which outlines what is included in my final check. I wish to point out an error in the calculation of the same and request that I be paid 4 weeks pay in lieu of notice, as well as 4 weeks pay for each year of service listed, in accordance with section 29(1)(c) of the Employment Act 2001 regarding payment for termination of a supervisor or manager. In addition, I refer to Grand Bahama Shipyard's Collective Labour Agreement's "General Conditions" Article 4 No 3 (p 6 Collective Labour Agreement) which states:

*The company recognizes the Union as the Sole Collective Bargaining Agent for all matters affecting the Industrial Relations of all Employees of the company in the supervisory and professional posts and above. Subject to the provisions of this agreement, the Union recognize the right of the Company to manager the business, provided, however, that the Company in the exercise of this right does not violate the terms and condition of this Agreement. (a copy of this section is included with this letter).*

I would at this point remind you that my employment with the company explicitly restricted me from being a part of the Union and therefore put me in the category of 'Employees who hold supervisory and professional posts and above', as mentioned above.

Further, I also hereby request that I be reimbursed the cost of the CPA software purchased by the company on my behalf from Becker CPA review earlier this year. This software was purchased after being formally advised by the Finance Manager both verbally and in writing that the CPA certificate was a requirement for my job role (a copy of this is included with this letter). In accordance with her direction I requested and was approved for the cost of this individual study (a copy of this approval is included with this letter). During the year, I have been making payments to the company in the form of a loan and was guaranteed reimbursement upon completion of the studies. Recent actions taken by the company has [sic] lead to me being unable to complete this program on the same basis, as I am told that management has decided that my services are no longer required by the company. As these studies were only undertaken on the instruction of the Finance Manager as a requirement of my role, I now request that I be reimbursed as per the agreement.

Today, I formally request payment in the amount of \$37,043.03 which represents \$31,157.30 severance pay, \$135.00 application fee for CPA fee (initial one-time) \$5,263.36 for cost incurred for the CPA software, and \$487.37 for cost paid to schedule current exams (see attached).

Finally, please accept this letter as my formal request for a reference letter from the company based on my performance during my employment.

Thank you for your consideration. I look forward to your response within seven (7) days.

Sincerely  
Claudine Green"

4. The defendant's response was set out in the following letter from Mrs Johnson dated 20 October 2010:

"Dear Ms Green

Termination Pay

I received your letter dated October 15, 2010 in reference to your termination pay. Please be advised that the position that you held as a Treasury Accountant was not considered a supervisory or managerial position in accordance with the Company's Organizational Chart. In your position you were entitled to overtime pay which does not put you in that category.

Also, any employee undertaking studies to improve themselves in their profession, as agreed, the company would advance them a loan. Only if the employee successfully completes his/her studies they were guaranteed reimbursement, which was not your status at the time of termination.

Regards  
Marilyn L Johnson  
Personnel Manager  
cc: Ms Linda Turnquest, Finance Manager – Finance Department"

5. The plaintiff commenced this action on 13 May 2011 by a specially indorsed writ of summons in which she alleges, inter alia, that she was wrongfully dismissed and/or inadequately compensated by the defendant when she was terminated on 4 October 2010.

6. The crux of the plaintiff's claim is set out at paragraphs 10 through 14 of her statement of claim in which she states:

- (1) On 15 October 2010, the plaintiff wrote a letter to Ms Marilyn Johnson pointing out that as a manger she ought to have been paid four (4) weeks for each year of service as per section 29 (1)(c) of the Employment Act. Since as a manager the plaintiff was restricted from being a part of the collective bargaining unit. Further, the plaintiff requested that the defendant pay for the CPA software, which was purchased after being, advised verbally and in writing, that such qualification was a requirement of the job. In addition, the plaintiff indicated that had her employment not been terminated she would have completed the said program.
- (2) By letter dated 4 October 2010 the defendant wrongfully dismissed the plaintiff and breached the contract of employment; by failing to give the plaintiff adequate pay in lieu of notice and compensation for her pecuniary benefits. [underline added]

- (3) At the time of the wrongful dismissal, the plaintiff was thirty three (33) years of age and was employed with the defendant for six (6) years and three (3) months and held the position of Supervisor/Manager in the Finance Department.
- (4) The plaintiff was paid a salary of One Thousand Two Dollars and Seventy-Five Cents (\$1,002.75) per week.
- (5) And the plaintiff claims \$38,208.31 as special damages with interest at 10% per annum pursuant to the Civil Procedure (Award of Interest) Act 1992 from 4 October 2010 until payment. The said sum of \$38,208.31 is made up as follows:

<u>Items</u>	<u>Total</u>
a) Salary (Oct 1-4, 2010)	\$ 517.55
b) 4 Weeks pay in lieu of notice (\$1,002.75 p/w)	\$ 4,011.00
c) 4 Weeks pay for each year of service (6 yrs 3 mths)	\$25,068.75
d) Vacation pay – 6.5 days	\$ 1,203.30
e) Christmas bonus pro-rated	\$ 1,521.98
f) Cost incurred for CPA	\$ 5,263.36
g) Application fee for CPA	\$ 135.00
h) Cost paid to schedule current exams	<u>\$ 487.37</u>
<b>Total</b>	<b><u>\$38,208.31</u></b>

7. In its defence filed 15 June 2011, the defendant denies that the plaintiff was at the date of her termination a supervisor or manager with the defendant company or that she was wrongfully dismissed or inadequately compensated. Instead, the defendant avers that the plaintiff's employment was terminated pursuant to Part VII, section 29(1) of the Act and that the plaintiff was provided with a cheque in the amount of \$16,617.42 made up as follows:

Salary	1-4 Oct 2010 (\$4,011*4/31)	\$ 517.55
Termination Pay:	6 yrs 3 mths (\$4,011/4*12.5 wks)	\$ 12,534.38
Notice Pay:	2 weeks (\$4,011/4*2 wks)	\$ 2,005.50
Vacation Pay:	6.5 days (\$48,132/52/5 days*6.5 days)	\$ 1,203.50
Christmas Bonus-Prorated		<u>\$ 1,521.98</u>
Total Earnings		\$ 17,782.72
Less:		
National Insurance	\$ 67.97	
Medical Insurance	\$ 75.32	
Loan	<u>\$1,022.00</u>	
Total Deductions		<u>\$ 1,165.29</u>
Total Separation Check:		<u>\$ 16,617.42</u>

8. Evidence at the trial was given by the plaintiff, and by the defendant's witnesses: Marilyn Johnson, Linda Turnquest and Kim Connolly. All of the witnesses provided witness statements and were subjected to cross examination.

9. In relation to the aforesaid sum of \$16,617.42, the following items were included amongst the agreed bundle of documents:

- a. A copy of the defendant's separation form for the plaintiff requesting, inter alia, payment for the above-mentioned items and a request to deduct loan;
- b. A copy of the defendant's exit review/release form for the plaintiff showing, inter alia, two cheque numbers and their amounts: 36700/36878 - \$16,617.42/\$2,632.84;
- c. A copy of cheque No 36700 dated 4 October 2010, for the sum of \$16,617.42, made payable to the plaintiff;
- d. A breakdown as to how the said sum of \$16,617.42 was calculated.

10. Provision is made on the exit interview/release form for the employee to acknowledge receipt of the cheque in full and final settlement of all claims and monies owed to the employee by the defendant and to release the defendant from any liabilities or claims.

11. The plaintiff, however, says she is entitled to be paid the aforesaid sum of \$38,208.13 rather than the said sum of \$16,617.42 offered by the defendant because, as an employee who was exempted from membership in the Grand Bahama Port Authority Workers Union ("**the Union**"), bargaining agent for non-management employees, her positions, firstly as Finance Officer and then as Treasury Accountant, were supervisory or managerial.

12. The defendant denies that the plaintiff was a supervisor or manager and says that she was exempted from membership in the Union because of an agreement between the Union and the defendant which provided that certain positions within the defendant company would be exempt from Union membership due to the sensitive and confidential nature of their work". Both positions held by the plaintiff during her employment with the defendant, Finance Officer and Treasury Accountant, were included in that list.

13. The issues to be determined are, therefore, as follows:

- (1) Whether the plaintiff held a supervisory or managerial position within the defendant's company?
- (2) Whether the plaintiff was exempted from membership in the Union because she was a supervisor or manager?
- (3) How much was the plaintiff entitled to receive when she was terminated by the defendant?
- (4) Whether the defendant was obliged to pay the plaintiff for the CPA course which she did not complete?

14. It is not disputed that the plaintiff's contract of employment was contained in a letter dated 21 June 2004 from Mrs Johnson, to the plaintiff, in which Mrs Johnson wrote:

"Dear Ms Green

Employment Offer

This letter serves as an employment offer for the position of Finance Officer within the Finance Department, which will commence on July 5, 2004 with a salary of \$30,000.00 per annum.

Your probationary period of three months will commence on July 5, 2004 and at the end of this period a determination will be made on your future with the company.

The basic hours of work will be 8:30 a.m. to 5:00 p.m. Monday through Friday. However, at the Company's discretion based on its workload, you may be required to work hours in excess of this amount. You will be entitled to overtime.

Please report at 8:30 a.m. on July 5, 2004 to Ms Linda Turnquest, Finance Manager. Welcome and best wishes for the future.

Please sign below to indicate your acceptance of the above referenced terms and conditions of employment."

Sincerely,  
Grand Bahama Shipyard Ltd

Mrs Marilyn L Johnson  
Administration Manager

15. On 30 June 2004, the plaintiff accepted the defendant's terms and conditions of employment by signing at the bottom of that letter.

16. By a memorandum dated 20 November 2007 the plaintiff was notified by Ms Johnson that she had been promoted from Finance Officer to Treasury Accountant effective 19 November 2007 and that her salary was increased to \$43,000.00.

17. The plaintiff claims that when she began her employment with the defendant as a Finance Officer she was informed that her position was supervisory one, thus she was not able to join the Union.

18. The defendant denies this and maintains that the reason the plaintiff was exempt from joining the Union was because of the sensitive nature of the positions which she held.

19. In any event, counsel for the defendant points out, there was nothing in the plaintiff's contract of employment which expressly designated her role as supervisor or managerial nor could it be implied by its terms, one of which was that she was entitled to overtime.

20. In the case of Duran Cunningham v Bahama Development Company Limited SCCivApp No 116 of 2010, the Court of Appeal in dealing with the issue of whether the plaintiff/employee in that case held a supervisory or managerial position said at paragraphs 12 through 16:

"12. There is no definition in the Act which gives any insight as to what is a 'supervisory or managerial' position. However, paragraph 3 of the First Schedule to the Fair Labour Standards (Exceptions) Order, provided that sections 5-7 of the Fair Labour Standards Act (Ch 295), which provided for standard hours of work, days off and overtime pay respectively, were not applicable to:

*“Any employee disentitled upon his contract of employment to the payment of overtime pay and performing managerial or supervisory functions, that is to say, having authority on behalf of, and independently of, his employer to hire or lay off or promote or transfer or exercise disciplinary power over persons employed by hi employer or to adjust the grievance of such persons.”*

“13. Admittedly, the Fair Labour Standards Act (Ch 295), under which the order was made was repealed in its totality by the Fair labour Standards Act 2001 (Ch 321A). However, by virtue of section 33 of the Interpretation and General Clauses Act, such an order is deemed to continue after the repeal of the Act under which it is made, so far as it is not inconsistent with the provisions of the repealing Act.

“14. In my view, the Vice President erred when he determined that pursuant to section 33 (above), the definition in paragraph 3 of the first schedule to the above order, is itself repealed because it is inconsistent with the Act.

“15. To the contrary, the order excepted supervisory and managerial positions from the entitlement, inter alia, to overtime payable under the Fair Labour Standards Act (Ch 295) as does section 8(4) of the Act. Moreover, the Act does not define 'supervisory or managerial' employment and the old definition fills that gap. In my view, the definition survives the repeal of Chapter 295.

“16. Under the definition, there are three essential elements of supervisory or managerial status: (i) authority to exercise one or more of the functions stated in the definition; (ii) the exercise of such authority in the employer's interest, and (iii) the exercise of independent judgment in performing one or more of the functions stated.”

21. The plaintiff admitted that she, along with all other employees in her department, reported to Linda Turnquest, the Finance Manager. Her offer of employment required her to report to Ms Turnquest on 5 July 2004, when she began her employment with the defendant and her employee evaluation was done by Ms Turnquest.

22. Moreover, by her own admission the plaintiff did not supervise or manager anyone in the Finance Department in which she worked during the entire period of her employment with the defendant. She did not hire any employees; none reported to her; she performed no evaluations for any employees or approve overtime or vacation for any employee; and she did not attend management meeting. She had no authority to hire or lay off or promote or transfer or exercise any disciplinary power over any of the defendant's employees.

23. Although I note that when asked if any employees reported to her, the plaintiff responded: “Indirectly. I reviewed all of the work that came out of the finance Department before they are signed off by Linda”, I also note that she was entitled by her contract to receive overtime pay, which she admitted having done.

24. In the circumstances, I am satisfied that the “three essential elements of supervisory or managerial” status referred to in *Duran Cunningham v Bahama Development Company Limited* SCCivApp No 116 of 2010 were missing from the plaintiff's employment relationship with the defendant.

25. It seems to me that the only reason the plaintiff says she was a supervisor was because she was not allowed to join the Union.

26. However, the evidence, which I accept, is that the reason the plaintiff was exempted from Union membership was not because she was supervisor but because of the agreement between the defendant and the Union which exempted persons in certain sensitive positions within the defendant's employ from joining the Union, one of whom was the plaintiff.

27. I note counsel for the plaintiff's submission that the action of the employer in excluding the plaintiff from the Union's bargaining unit without her consent was a fundamental breach of her rights under section 24(1) of the Constitution to form or belong to a trade union. However, as pointed out by counsel for the defendant, that was not the case pleaded by the plaintiff and she is bound by her pleading.

28. In the circumstances, I find that the plaintiff has failed to prove that she held a supervisory or managerial position with the defendant at any time during the period 5 July 2004, when she commenced her employment, to 4 October 2010, when she was terminated without notice, from the defendant's employ.

29. In their termination letter, the defendant informed the plaintiff that she was being terminated in accordance with Part VII of the Employment Act, 2001.

30. Part VII, Section 29 of the Employment Act provides, inter alia, as follows:

(1) For the purpose of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be –

(a) Where the employee has been employed for six months or more but less than twelve months –

- (i) One week's notice or one week's basic pay in lieu of notice; and
- (ii) One week's basic pay (or a part thereof on a pro rata basis) for the said period between six months and twelve months;

(b) Where the employee has been employed for twelve months or more –

- (i) Two weeks' notice or two weeks' basic pay in lieu of notice; and
- (ii) Two weeks' basic pay (or part thereof on a pro rata basis) for each year up to twenty-four weeks;

(c) Where the employee holds a supervisory or managerial position –

- (i) One month's notice or one month's basic pay in lieu of notice; and
- (ii) One month's basic pay (or a part thereof on a pro rata basis) for each year up to forty eight weeks.

(2) Notwithstanding subsection (1), the employer shall have the right to appropriate any monies owing to him by the employee from any monies payable under subsection (1)."

31. Based on the aforesaid provisions, and the circumstances of this case, the plaintiff was, in my view, entitled to be paid pursuant to section 29 (1) (b) aforesaid, less, of course, any monies owing by her to the defendant.

32. The plaintiff alleges at paragraph 11 of her statement of claim that the defendant wrongfully dismissed her and breached the contract of employment by failing to give her adequate pay in lieu of notice and compensation for her pecuniary benefits. The defendant denied the plaintiff's claim and put her to strict proof thereof.

33. At paragraph 18 of her witness statement filed 18 June 2012, the plaintiff states that at the time of her termination she was offered no severance pay or pay in lieu of notice pursuant to the Employment Act, 2001.

34. That statement has been refuted by the defendant's witnesses.

35. Ms Linda Turnquest, the defendant's Director of Finance and Information Technology, in her witness statement filed 13 February 2013, states that on the date the plaintiff was terminated she was given a cheque for \$16,617.42 made up as shown above. However, under cross examination, Ms Turnquest said that the defendant prepared the cheque for the aforesaid amount but the plaintiff refused to accept it.

36. Ms Johnson's evidence is that the cheque was prepared but the plaintiff refused to accept it.

37. Under cross examination, the plaintiff maintained that she was not offered severance pay or pay in lieu of notice. As I understood her evidence, in addition to the termination letter showing the breakdown of the funds the defendant intended to pay to her, the plaintiff said that she was asked to sign another letter and when she refused to do so, she was not offered the cheque for \$16,617.42.

38. No other letter was produced and the defendant's witnesses denied that any such letter existed, although it was suggested that the plaintiff may have been referring to the above-mentioned exit interview/release form.

39. In any event, it is clear, in my view, from the plaintiff's above-mentioned letter of 15 October 2010 to Ms Johnson that she was aware of what the defendant intended, or was offering, to pay her in lieu of notice.

40. Having found that she was not a supervisor or manager with the defendant company, I find that the plaintiff was, at the date of her termination from the defendant's employ, entitled pursuant to section 29(1) (b) of the Employment Act, to be paid the sum of \$16,117.44, made up as follows:

Salary	1-4 Oct 2010 (\$4,011*4/31)	\$ 517.55
Termination Pay:	6 yrs 3 mths (\$4,011/4*12.5 wks)	\$ 12,534.38
Notice Pay:	2 weeks (\$4,011/4*2 wks)	\$ 2,005.50
Vacation Pay:	6.5 days (\$48,132/52/5 days*6.5 days)	\$ 1,203.50
<b>Total Earnings</b>		<b>\$ 16,260.73</b>
<b>Less:</b>		
National Insurance	\$ 67.97	
Medical Insurance	\$ 75.32	\$ 143.29
		<b><u>\$16,117.44</u></b>

41. The plaintiff also claims to be entitled to be reimbursed the sum of \$5,885.73 being moneys paid for a Certified Public Accountant (CPA). She contends that she was "advised" or "forced" by the defendant to pursue the CPA program in order to be eligible for promotion and that she was promised to be reimbursed for the cost therefor upon completion.

42. The defendant denies "forcing" the plaintiff and confirmed its position was that in order to be reimbursed the plaintiff was required to complete the course and that she had to pass the same with a certain grade level, which she failed to do.

43. The plaintiff's response is that had she not been terminated by the defendant, without cause, she would have completed the course. Therefore, she should be reimbursed.

44. It is common ground that the defendant operates a scheme for employees whereby the defendant advances funds by way of loans to employees to fund their training. The loan is

conditional. If certain standards are met, the loan is written off. Otherwise normal repayment conditions apply and employees are obliged to reimburse the defendant.

45. The plaintiff admits that she was informed by the defendant that she had to pay for the course and be reimbursed as there was no guarantee that she would ever complete the same. Yet under cross-examination she said that she was not aware that she needed to complete the course or to receive a particular grade in order to get reimbursement from the defendant for the moneys paid by the defendant on her behalf.

46. Moreover, although in her witness statement the plaintiff said that "everybody in the company was aware that [she] was interested in pursuing the CPA program", and she admitted that she wanted to pursue more training so that she could move up within the department, she nevertheless, maintained under cross-examination that she was "forced" to pursue the CPA program.

47. I am satisfied, on the evidence which I accept, that the plaintiff decided to embark upon a particular course of training on her own volition; that although she would have been told by the defendant that if she wished to be considered for a more senior post, she would have had to undertake more training, the decision whether or not to do so was the plaintiff's alone.

48. In that regard, I accept the submission on behalf of the defendant that although the defendant facilitated opportunities for its employees, including the plaintiff, to pursue continuing education opportunities, it did not demand such activity as part of their employment or as a condition of their employment continuing.

49. I also accept the submission of counsel for the defendant that the nature of the arrangement between the plaintiff and the defendant was expressly outlined in the form of the written request submitted by the plaintiff for the advance, which document the plaintiff signed, acknowledging receipt of the sum of \$5,110.00 and indicating that she understood that the repayments in the sum of \$511.00 per month, beginning in February 2010, were to be deducted from her salary.

50. Accordingly, I agree with the defendant that there is no basis on which the plaintiff can reclaim the sums which were lent to her to assist her in pursuing the CPA course and I find that the defendant was entitled to make the final deduction of \$1,022.00 in settlement of the plaintiff's debt to the defendant.

51. The plaintiff also claims to be entitled to a pro-rated Christmas bonus.

52. Counsel for the defendant argued that the sum offered to the plaintiff as a pro-rated Christmas bonus was discretionary. However, by offering a pro-rated Christmas bonus to the plaintiff as a part of her severance pay, the defendant is, in my view, obliged to pay the same.

53. Although the plaintiff said that she was offered no severance pay or pay in lieu of notice, at the time of her termination, I am satisfied that she was offered a cheque for the sum of \$16,617.42, made up as shown at paragraph 7 hereof.

54. Indeed, counsel for the plaintiff in his opening skeleton arguments indicated that "on termination the defendant tendered the plaintiff a cheque which included, inter alia, two weeks' pay in lieu of notice and two weeks' pay for each year of service (6 years and 3 months)".

55. I accept the defendant's evidence that the plaintiff refused to accept the aforesaid cheque for \$16,617.42, not on the basis, as intimated by her counsel that she had to sign a release in order to receive it, but because it was not for the amount she thought she ought to have received, as she was of the view that her position was supervisory.

56. In the circumstances, I find that the plaintiff was not wrongfully terminated as the funds offered to her at the time of her termination were in accordance with section 29(1) (b) of the Employment Act aforesaid.

57. In the result, the plaintiff's claim is dismissed, and judgment is given in favour of the defendant, with costs to be taxed if not agreed.

58. It seems to me that as cheque #36700 in the sum of \$16,617.42, which was issued on 4 October 2010, has now become stale-dated, a new cheque for the sum of \$16,617.42 ought now to be issued to the plaintiff.

Dated this 16<sup>th</sup> day of May A.D. 2014

Estelle G. Gray Evans  
Justice