

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 13 of 2013

BETWEEN:

TANIKA MARTIN

and

BOARD OF EDUCATION-1994

Employee

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. Dr. Hayden Thomas

The Hon. Samuel R. Aymer

President

Member

Member

Appearances:

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

Mrs. Maria Blackman-Lake, Attorney-at-Law for the Employer

2014: June 5

2016: August 12

DECISION ON ASSESSMENT OF COMPENSATION

Brown, P:

Background

1. These proceedings, whereby the Employee claimed that she was unfairly dismissed, were commenced by Reference filed on March 18, 2013. Her Memorandum of Claim was filed on December 2, 2013.
2. In its Memorandum, filed on March 14, 2014 the Employer disputed the Employee's claim.
3. At the commencement of trial, Counsel for the Employer conceded that the dismissal of the Employee was unfair by reason of the Employer's failure to state its precise reason for the dismissal as required under Section C10 of the Antigua & Barbuda Labour Code. Consequently, the main issue left before the Court was that of the quantum of compensation payable to the Employee.



The Periods of Employment

4. The documents in the Employer's Bundle of Exhibits show six (6) distinct periods of employment, the first five (5) of which the Employer labelled as temporary. The six (6) periods are:
 - (1) June 18, 2007 to July 6, 2007
 - (2) July 19, 2007 to July 31, 2007
 - (3) August 15, 2007 to January 18, 2008
 - (4) February 1, 2008 to January 30, 2009
 - (5) February 1, 2009 to February 27, 2009
 - (6) March 2, 2009 to October 10, 2011
5. Given their clear fixed term nature and the break of at least two (2) weeks between each of the first three periods of employment, we consider them to be separate and apart from the period of continuous employment from February 1, 2008 to October 10, 2011, a period of three (3) years and eight (8) months. At the date of termination, the Employee's salary was \$2,259.48.
6. It is common ground that Collective Agreement, certified by the Labour Commissioner on April 26, 2011, was in force at the date of the termination of the Employee's employment.

The Employee's Contribution to her Dismissal

7. Notwithstanding Counsel's concession that the Employee was unfairly dismissed, we are obliged to have regard for her conduct as a whole and assess her blameworthiness, if any. Having carefully reviewed the evidence of the witnesses and noted their demeanor, our findings of fact include the following:
 - (1) Up to September 2011 the Employee had engaged in misconduct for which she was sanctioned by suspension and a subsequent redeployment to a new position with new duties.
 - (2) As at September 2011 the Employer was concerned about the high number of "sick days" taken by the Employee.
 - (3) Prior to September 2011 the trust and confidence which the Employer previously reposed in the Employee were eroded by her misconduct.
 - (4) On or about October 5, 2011 the Employer was concerned about the Employee's failure to complete an assignment given to her by her Supervisor.
 - (5) On September 29 and October 5, 2011 the Employee reported sick and was absent from work. On both days, during working hours, while wearing the Employer's uniform, the Employee travelled to Freetown using a public bus and spent time there with her "boyfriend".
 - (6) As a result of her calculated misrepresentations and related misconduct, the fragile trust and confidence which the Employer reposed in the Employee were further eroded.

8. In the circumstances, we find the Employee blameworthy and fix her contribution to her unfair dismissal at (50) fifty percent. As a result, the total compensation which we assess below will be reduced by that percentage.

9. Assessment of Compensation

We assess compensation payable to the Employee under the respective heads as follows:

- (1) Payment in lieu of Notice

Given her entitlement of one month's notice of termination under Section C9 of the Labour Code, since she received no notice, she is entitled to one month's pay in lieu thereof. In that regard, according to the wage schedule under the 2009 Agreement, we accept, that with effect from June 15, 2011 the Employee's minimum salary in the "Junior Clerk" category should have been \$2,440.45. As a result, **we award the sum of \$2440.45** as compensation under this head.

- (2) Loss of Protection from Unfair Dismissal

When an employee is deprived of his right to protection from unfair dismissal, as established under C56 of the Labour Code, he is entitled to compensation calculated at the same rate as severance pay. The Collective Agreement provides that employees with a tenure of 1 to 4 years are entitled to one month's pay for each year of service. The Employee worked 3.7 years and her last salary should have been \$2,440.45. As a result, **we award the sum of \$9,029.67** ($\$2440.45 \times 3.7$) under this head.

- (3) Immediate Loss

Subject to her duty to mitigate her loss, the Employee is entitled to compensation for the period between her dismissal and the date of trial/ assessment. In the circumstances of this case we should consider the evidence of the Employee's efforts to mitigate and her alternative employment, if any. Unfortunately, the Employee did not testify in that regard.

On a balance of probabilities, based on our knowledge of the job market in Antigua & Barbuda at the material time, we consider that there was a period of time when the Employee remained unemployed with no income. We fix that period at two months. In the circumstances of this case, **we award the sum of \$4,880.90** being the equivalent of two (2) months salary under this head.

- (4) Future Loss

The evidence in this case discloses no sufficient basis for an award under this head.

(5) Retroactive balance of salary

Having determined that the Employee should have been paid at least \$2440.45 monthly since 01st June, 2011, **we award the sum of \$904.85**, being the difference between her salary and what she should have been paid, for a period of five (5) months up to the date of her termination: $\{(\$2,440.45 - \$2,259.48) \times 5\}$

(6) Fringe Benefits

For the period during which she worked as a Book Scheme Manager for eighteen (18) months between March 2009 and October 2010, the Employee was entitled to a telephone allowance at the rate of \$40.00 per month which she was not paid. Accordingly, we award the sum of \$720.00 (\$40 x 18). In addition, we award her the equivalent of the telephone allowance of \$20.00 for the said 18 months. As a result, we also award the sum of \$360.00 under this head. **The total award under this head is \$1,080.00**

(7) Exemplary Damages/ Costs

The evidence discloses no or no sufficient reason for an award of exemplary damages and/or Costs.

10. Summary of Awards

We summarize the awards as follows:

1) Payment in lieu of notice	\$ 2,440.45
2) Loss of Protection	9,029.67
3) Immediate Loss	4,880.90
4) Retroactive Balance	904.85
5) Fringe Benefits	<u>1,080.00</u>
Total	<u>\$18,335.87</u>

11. Given our assessment of her contribution to her dismissal, we reduce the total of the first three awards in the sum of \$16,351.02 by 50%.

12. Order

We order that:

- (1) The Employer do shall pay to the Employee the sum of \$10,160.36, being the said total award of \$18,335.87 less the Employee's contribution of 50% of the selected awards.

(2) The Employer shall pay the said sum of \$10,160.36 to the Employee no later than September 15, 2016.

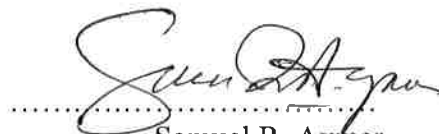
Dated this 12th day of August 2016.

A handwritten signature in black ink, appearing to read 'Charlesworth O.D. Brown', written over a dotted line.

Charlesworth O.D. Brown
President

A handwritten signature in black ink, appearing to read 'Dr. Hayden Thomas', written over a dotted line.

Dr. Hayden Thomas
Member

A handwritten signature in black ink, appearing to read 'Samuel R. Aymer', written over a dotted line.

Samuel R. Aymer
Member