

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 22 OF 2012

BETWEEN:

KERRY ANN ALLEN-LUKE

Employee

and

NCO FINANCIAL SERVICES (ANTIGUA) LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel R. Aymer

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Ms. Kema M. Benjamin and Mr. Mark Harris of Marshall & Co for the Employee

Ms. C. Kamilah Roberts and Mrs. Andrea Roberts-Nicholas of Roberts & Co for the Employer

2014: May 7

2016: August 12

JUDGMENT

Brown, P:

Background

1. The Employer was duly incorporated in Antigua and Barbuda and at all material times carried on the business of a "Call Centre" providing customer service support and debt collection services to its clients.
2. The Employee commenced her employment with the Employer's predecessor, Caribbean Media Group, in September 2005. At the date of her termination on July 30, 2011 the Employee earned \$2, 500.00 per month as a Customer Service Representative.
3. It was a settled and approved practice among employees of the Employer that any two of them could from time to time agree to swap their shifts provided that a completed Shift Swap Form was signed by them and submitted to the Employer.
4. On June 22, 2011 the Employee and her co-worker, Ama Williams, agreed to swap three shifts on three days, namely, June 29, June 30 and July 1, 2011. They completed a single



Shift Swap Form which they both signed. Upon presentation of the form to her supervisor, Eddie, Ms. Williams was instructed to complete a separate form for each swap. However, she was authorized to effect the switch on June 29 pending the completion of the required forms.

5. On June 29, 2011 the Employee completed a fresh set of forms. She signed her name and forged the signature of her co-worker Ama Williams on the forms.
6. On or about June 29th 2011 the Employee's forgery came to the attention of the Employer. On June 30, 2011 the Employee was summoned to a meeting where she admitted to the forgery and explained that Ms. Williams had previously agreed to the swap but was unavailable to sign the forms.
7. At the said meeting, the Employer expressed its view to the Employee that her actions constituted a breach of its integrity policy, which breach was so serious that it had no choice but to terminate her employment. The Employer's position was orally communicated to the Employee during the meeting. However, after the oral information was given, the Employee was presented with a letter which reads as follows:

"NCO

Date: June 30, 2011

Name: Kerry Ann Allen Luke

...

Re: Nature of Discussion: Termination

Topic of Discussion: Violation of CO Policy- Integrity

Dear Ms. Allen Luke,

NCO Policy also states it is each employee's responsibility to conduct their daily business with honesty and integrity. NCO will not tolerate any acts of fraud or theft against the company, our clients, insurance companies, 401K plans or other employees.

June 29, 2011, it was brought to management's attention that you acted in a dishonest and unprofessional manner, by forging the signature of another employee on three shift swap documents. Two of these documents were dated June 28th, 2011, and covers switches on the dates of June 29, 30 and July 1 & 2, 2011. Management has held discussions with the other agent noted on the Shift Swap documents you submitted for processing and she not only did not consent or sign the documents submitted. Your behaviour, which includes

dishonesty and fraud, evidences extremely poor judgment and calls question to your ability to adequately perform the tasks assigned you.

Your behaviour violates NCO policy and will not be tolerated.

Action To Be Taken:

You are to review and understand the Integrity Policy found in the Employee Handbook on page 14 as well as the Workplace Behaviour Policy on page 35. If the company at any time in the future has any occasion to question your conduct in relation to the above, or if the company receives any information that you have retaliated in any way against any employee you believe may have made accusations about your conduct, you will be subject to further progressive discipline, up to and including termination.

Employee Comments:

Regards,

Signed: C. Roberts__June 30, 2011

Human Resources/Witness Signature/ Date

Print Human Resources/Witness Name

Signed: M. Warner__June 30, 2011

Manager/ Supervisor Signature/ Date

Print Manager/ Supervisor Name

Signed: K. Luke

Employee Signature/ Date

...”

8. By letter dated July 04th, 2011 Marshall & Co, Attorneys-at-Law, wrote to the Employer in the following terms:

“04th July, 2011.

Ms. Celia Roberts
Human Resource Manager
NCO Financial Services (Antigua) Ltd

...

Dear Ms. Roberts,

Re: Kerry Ann Allen- Luke

We act for and on behalf of Mrs. Kerry Ann Allen-Luke of Complex Drive, Fort Road, in the Parish of Saint John, in the State of Antigua and Barbuda.

Reference is made to your letter of the 30th June, 2011, wherein you indicated under “Action to be Taken” that:

“If the company at any time in the future has any occasion to question your conduct in relation to the above, or if the company receives any information that you have retaliated in any way against any employee you believe may have made accusations about your conduct, you will be subject to further progressive discipline, up to and including termination”.

Accordingly, this letter can at the most be construed as a “warning letter” within the meaning of Section 59 (c) of the Antigua and Barbuda Labour Code.

We are further instructed that our Client was advised not to return to work on Friday 01st July, 2011, and to hand over the company’s property being her headphones and swipe card.

In light of the above, we seek forthwith your confirmation that our Client is employed with yourselves, and that she will sustain no loss of pay or benefits. Please let us have your reply, as well as the date that our Client is to report to work within 48 hours.

Failing to receive an adequate response from you shall result in the appropriate legal action to compel your adherence to Contract of Employment.

Please be advised that such procedures will be commenced without any further notice to you.

Please be guided accordingly.

Yours sincerely,

Denise Marshall

...”

9. The Employer responded to the said letter from Marshall & Co by writing directly to the Employee as follows:

“Wednesday 06th July

Mrs. Kerry Ann Allen- Luke

...

Dear Mrs. Allen- Luke,

Re: Statement of Termination of Employment

This letter will serve as formal clarification and notification of your termination of employment as reflected in the document dated June 30th, 2011 and within the context of Section C 10 (1) of the Antigua & Barbuda Labour Code.

On June 29, 2011, it came to the attention of management that you breeched the company’s Integrity policy by falsifying the signature of another employee without their consent on two company documents both dated June 28, 2011. During your disciplinary hearing on June 30, 2011, it was determined based on your admission to local Human Resources and your Division Manager, that you falsified these signatures in order to gain time off for which you were not approved.

NCO’s Integrity policy contained on pg. 14 of NCO Antigua Employee Handbook states “*It is each employee’s responsibility to conduct their daily business with honesty and integrity. NCO will not tolerate any acts of fraud or theft against the company, our clients, insurance companies, 401(K) plans or other employees. NCO reserves the right to prosecute to the fullest extent of the law each and every instance of fraud or other actions against the company by an employee or ex-employee.*”

NCO policy also states that ‘*falsification of company records, including but not limited to the misrepresentation or omission of pertinent facts in client or debtor records, phone activity reports, time cards, medical forms, claim or benefits, employment applications or other documents will lead to immediate dismissal*’. On August 29, 2008, you signed a copy of NCO’s Business Conduct and Work Rules indicating your awareness of this policy.

Further, Section 59 C (1) of the Antigua & Barbuda Labour Code provisions that an employer ‘*may terminate the employment of an employee where the employee has been guilty of misconduct in relation to his employment so serious that the employer cannot be reasonably expected to take any course other than termination.*’

The ‘nature of discussion’ contained in your termination letter dated June 30, 2011 is clearly identified as ‘Termination’. Based on your signature on this document and your admission to the misconduct as stated above, you are acknowledging that your employment has been terminated for ‘just cause’. We acknowledge that the subtopic “Action to be Taken” does not state termination however the action and result of the disciplinary hearing was termination of employment as identified and acknowledged by you in the presence of a witness.

NCO maintains its’ decision to terminate you effective June 30, 2011 on the basis of breach of the company policy. The company will not expose itself to the risk of a repetition of such misconduct.

Sincerely,

Celia Roberts
Human Resources Manager, NCO Antigua
...”

The Memoranda

10. By her Memorandum of Claim filed on September 11, 2012 the Employee contended:

- That the said letter dated June 30, 2011 amounted to a warning letter and did not effect her dismissal.
- The letter dated July 06, 2011, purporting to clarify and expand the first termination letter dated 30th June, 2011, is in clear contravention of Section C10 (3) of the Antigua and Barbuda Labour Code.
- The statement given to an employee upon termination, setting out the reasons for their termination is conclusive and binds the employer to the reasons contained therein. The reasons given for the termination in the termination letter dated 30th June 2011 could not be clarified and/or expanded.
- The letter of July 6, 2011 was null and void. The Employee was unfairly dismissed and is entitled to compensation.
- She accepts that she was not authorized to sign the Shift Swap Forms for Ms. Williams. It was in breach of the Employer’s policy so to do.
- Since there is no further evidence of misconduct on the part of the

Employee after being issued with the letter dated June 30, 2011, which was not retracted, then there was no proper basis for dismissing the Employee.

11. In her prayer for relief at paragraph 22 of her Memorandum the Employee claimed:

- (1) A declaration that the letter issued by the Employer to the Employee on 30th June 2011 was a warning letter;
- (2) A declaration that the Employer's action on 30th June 2011 amounted to wrongful and/or unfair dismissal;
- (3) A declaration that the letter issued by the Employer to the Employee on 6th July 2011 is null and void and in contravention of Section C10 (3) of the Antigua and Barbuda Labour Code;
- (4) A declaration that the Employee be compensated for her wrongful and/or unfair dismissal;

12. By its Memorandum of Defence filed on June 03, 2013 the Employer pleaded that:

- After her initial denial that she had forged the signatures, the Employee admitted to the forgery.
- The Employer had a strict no tolerance policy in respect of fraud and dishonesty as articulated in its Employee's Handbook.
- The Employee's actions were so serious that, based on section C59 of the Labour Code, it had no choice but to terminate the Employee's employment.
- The letter of termination contained a "crucial error" in that instead of dealing with termination, it erroneously dealt with a warning.
- In its letter to the Employee dated July 06, 2016 it corrected the error within the statutory period of seven (7) days established by Section C10 of the Labour Code.
- The Employee's conduct in committing the forgery and breaching the integrity policy, which she acknowledged, was such that the Employer could not be expected to take any course other than termination.

The Issues

13. The main issues for determination in this Reference are:

- (1) Whether the Employee was dismissed by the letter dated June 30, 2011.
- (2) Whether the letter dated July 06th, 2011 is a valid statement of the precise reasons for dismissal under Section 10 (3) of the Labour Code.

(3) Whether the Employer acted reasonably or unreasonably in dismissing the Employee.

Relevant provisions of the Labour Code

14. Section C10 of the Labour Code provides for the issuance of a statement of the precise reason for the termination:

C10. (1) Upon termination by an employer of an employee's employment subsequent to the expiration of the latter's probation period, the employer shall, within seven days of termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination.

(2) ...

(3) An employer who furnishes a statement or certificate required by subsection (1) or (2) respectively, shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal as covered by Part 5 herein of his liability for severance pay covered by Part 4 herein.

(4) An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable.

15. Section C58 sets out reasons which could constitute good causes for dismissals. Moreover, it establishes the statutory test of reasonableness to be applied to the Employer's reaction in the face of misconduct on the part of the Employee.

C58. (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) Relates to misconduct of the employee on the job, within the limitations of section C59 (1) and (2);

(b) ...

(c) ...

(d) ...

(e) ...

(2) 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 for 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.

16. Section C59 establishes the two major options open to an employer in the face of an employee's misconduct:

C59. (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;**
- (b) ...**
- (c) ...**

(2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of

- (a) a repetition of the misconduct; or**
- (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.**

Whether the Employee was dismissed by the letter dated June 30, 2011.

17. Although she was silent on the point in her Witness Statement, under cross-examination the Employee admitted that she understood that her employment was about to be terminated on June 30, 2011. Further, she said that she was required to return the "swipe card", by which she gained access to the building, and the telephone handset that had been assigned to her. Moreover, she said that she understood that because of the forgery, which she admitted, her employment would be terminated. In particular, the Employee said that during the meeting Celia Roberts, the Human Resources Manager, told her that "because of the forgery they would have to terminate me."
18. When giving evidence on behalf of the Employer, Michelle Warner, the General Manager, testified that at the meeting on June 30 2011, although she initially denied it, the Employee admitted her forgery. She further stated that the Employer had "strict no tolerance policy towards acts of fraud and dishonesty." Ultimately, she testified that the Employer decided to terminate the Services of the Employee on June 30, 2011. In addition, Ms. Warner said that the "letter of dismissal" was written prior to the meeting

on June 30, 2011. She confirmed that the letter was not intended to be a warning letter. It was intended to be a letter of termination.

19. Based on the oral testimony of both the Employee and Michelle Warner there is no doubt in our minds that the Employer intended to dismiss the Employee on June 30, 2011. In that regard, the Employer's intention to dismiss was effectively communicated to the Employee orally by Ms. Roberts.
20. In the circumstances, it is clear that on or before June 30, 2011 the Employer had evinced an intention to dismiss the Employee on that date under C59 (1) of the Labour Code.
21. The intention to terminate or the actual termination of an employee's employment is subject always to the provision by the employer of a written statement of the precise reason within seven days of the termination or notice thereof. In other words, the Employer's written statement under section C 10 of the Labour Code must provide the first essential ingredient of "just cause" under section C 58 (1). The second essential ingredient is the existence of a factual basis. If there is no statutory written statement, the employer does not meet the threshold for the establishment of a dismissal which is not unfair.
22. The fact that the letter was prepared by the Employer before the meeting on June 30, 2011 and not delivered to her until afterwards suggest that the Employer intended it to be the culmination of the actual dismissal process. Accordingly, to be effective, the written words in the letter would have to supersede or at least confirm the spoken words of "dismissal" or "termination".
23. Based on the spoken words, we are inclined to conclude that the Employer intended to dismiss the Employee by the end of the meeting on June 30, 2011. However, we are duty bound to consider the superseding letter. Whatever the Employer's intention, we have to construe the actual content of the written words in the letter.
24. Although it refers to the Employee's "dishonest and unprofessional" conduct and complained that she had exercised "extremely poor judgment", the first part of the letter issued on June 30, 2011 (reproduced at paragraph 7 above) does not convey the Employer's unequivocal intention to dismiss the Employee.
25. The second part of the letter under the sub-head "Action To Be Taken" directs the Employee to review the Handbook and warns her that any repetition of her conduct could result in the termination of her employment. Clearly, that part of the letter is inconsistent with dismissal. In their ordinary meanings, the words in that section of the letter constituted a mere warning. In other words, contrary to what might have been communicated orally, the Employer elected to proceed under Section C59 (2) of the Labour Code.
26. It is noteworthy that the letter was signed by the Employer's General Manager, Michelle Warner and its Human Resources Manager, Celia Roberts.

27. It is also noteworthy that the statement of the “Honesty and Integrity” policy provides that **“Any discovery of company policy violations relating to criminal or illegal conduct will result in progressive disciplinary action up to and including immediate termination,...”**. The last clause of that provision is virtually repeated towards the end of the letter.
28. The second part of the Employer’s letter dated June 30, 2011 clearly nullifies or militates against its effectiveness as a letter of dismissal. In the final analysis, we feel constrained to resolve this issue in favour of the Employee. We find that the letter dated June 30, 2011 was a warning letter and not a letter of dismissal.

Whether the letter dated July 06th, 2011 is a valid statement of the precise reason for dismissal under Section 10 (3) of the Labour Code.

29. In light of our earlier conclusion that the letter of June 30, 2011 was a warning letter, the letter of July 6, 2011 cannot constitute a valid statement of the precise reason for termination of the Employee’s services on June 30, 2011. In our view, the Employer’s letter of July 6, 2011 cannot stand as clarification of the earlier warning letter which was never retracted.
30. In the absence of a full retraction of the earlier warning letter, the letter of July 6, 2011 must be read in its wake. Accordingly, we accept Ms. Benjamin’s submission that the latter letter is “null and void” in so far as it attempts to give notice of and /or clarify an earlier “termination”.
31. In the circumstances, we believe that we have no choice but to treat the letter of July 6 2011 as the effective letter by which the Employee’s employment was terminated on that date “on the basis of breach of the company policy”. In other words, we consider that letter to be a valid statement of the precise reason for dismissal as effected on July 6 2011.
32. At the end of the day, given our findings that (a) the letter dated June 30, 2011 was a warning letter, and (b) the letter dated July 6, 2011 was a dismissal letter, we must subject the Employer’s conduct as a whole to the test of reasonableness under section C 58 (2) of the Labour Code. The question is: Was the assigned reason for the dismissal sufficient to justify the dismissal in the particular circumstances which existed on July 6, 2011?

Whether the Employer acted reasonably or unreasonably in dismissing the Employee

33. The application of the test of reasonableness under section C 58 of the Labour Code requires consideration of all the circumstances under which the Employer acted.

34. It is common ground that the Employer's policy regarding its shift system, allowed the swapping of shifts. Given the existing practice, the swapping of the shifts between the Employee and Ms. Williams was clearly acceptable to the Employer. What was not clear is the correct procedure in filling out the Shift Swap Forms. In that regard, it appears that before being told by their Supervisor, Eddie, neither the Employee nor Ms. Williams knew of or understood the requirement for the completion of a separate form for each swap.
35. In any event, based on the Employer's evidence and the testimony of Ms. Williams, we accept as a matter of fact that both the Employee and Ms. Williams signed the single form whereby they both agreed to three swaps for the period June 29 to July 1, 2011. It appears that Eddie was satisfied that swaps were agreed and he allowed the first one to proceed on July 29, 2011 in the absence of the correctly completed forms. In that regard, it is noteworthy that Eddie was not called as a witness.
36. On June 30, 2011, when the Employer noticed an "unfilled space on a shift" and carried out its investigation, it discovered that the Employee had committed a breach of the integrity policy by forging the signature of Ms. Williams on two of the forms. The Employee admitted her forgery and breach of the integrity policy.
37. To the extent that the allegations were put to the Employee and she was given an opportunity to speak in her own defence, we find no fault with the procedure adopted by the Employer. Perhaps the most pertinent question in that regard is whether the conduct of the Employee was serious enough to properly ground the Employer's reaction under Section C59 (1) of the Labour Code.
38. The Employer has established that, given the nature of its business, honesty and integrity were paramount. It had taken the reasonable steps in ensuring that its policy was in writing and brought home to the Employee since 2008. The Employer's zero tolerance for fraud and dishonesty is well grounded. Its employees are routinely exposed to credit card details and other confidential customer information.
39. In assessing the significance or weight of the breach, we are mindful that the "forgery" is in fact the "breach of the company policy". There is no additional or separate misconduct apart from the forgery which could otherwise constitute the breach complained of or any other breach. Accordingly, we are obliged to assess the seriousness of the breach in that context.
40. There is no evidence that the Employee's misconduct caused any real or potential financial or other loss to the Employer. Further, there is no evidence that the Employee's misconduct gave rise to any risk of injury or damage to the reputation of the Employer in the eyes of its customers or the general public. Moreover, there was no testimony that the Employee's misconduct had any adverse effect on the internal administration of the Employer's business.
41. These observations are made in the context of the Employer's own policy to allow the swapping of shifts. It appears that, notwithstanding its strict no tolerance policy

regarding fraud and dishonesty, the Employer routinely allowed the swapping of shifts between employees provided that a request was made on the prescribed form and 24 hours notice is given. The form is silent on the requirement for a separate form for each swap. Further, the form has no provision for the vetting or written approval of a Supervisor or Manager.

42. Based on the evidence, we find that the Employee's misconduct was largely a matter of practical convenience/ inconvenience between the Employee and Ms. Williams. We have no evidence that the Employee was motivated by an intention to deceive or any other improper motive. In fact, it appears that in the absence of its observation of the "unfilled space on a shift" on June 30, 2011, the Employer's management might have been oblivious to the swaps agreed between the Employee and Ms. Williams.
43. In light of the acknowledged the forgeries and breach of its policy, the question is: What should the Employer have done in the circumstances? It had open before it the whole range of responses from a mere warning under Section C 59 (2) at the one end, to dismissal under section C 59 (1) at the other end or some intermediate disciplinary action such as suspension. Being mindful of its options, the Employer issued the letter of warning dated June 30, 2011. It is noteworthy that that letter was signed by both the General Manager and the Human Resources Manager.
44. In assessing the Employer's reaction, this Court must consider whether it fell within a band of conduct which any reasonable employer in the Employer's position could have reasonably taken in those circumstances.
45. Given the circumstances, it was within the purview of the Employer whether to proceed under Section C 59 (1) or C59 (2) of the Labour Code. Although it orally indicated that it would proceed under Section C 59 (1), in the end, its final position as stated in writing was to proceed under Section C 59 (2) by issuing the warning letter.
46. In our view, the seriousness and potential adverse effect of the forgeries and breach of the integrity policy must take into account the following:
 - (a) The Employer's policy of allowing shift swaps;
 - (b) The explanation provided by the Employee that Ms. Williams had previously agreed to the swaps and signed the forms;
 - (c) The explanation provided independently by Ms. Williams that she had agreed to the swaps;
 - (d) The permissive action of Eddie in allowing the swap to be effected on June 29 without the proper form.
47. Having regard to the foregoing facts, the issuance of the warning letter was squarely within the band of reasonable responses that the Employer could have taken.
48. In doing our analysis of the facts and surrounding circumstances of this case, we carefully considered the Employer's actions following the issuance of the warning letter. According to Mrs. Warner, the "error" in issuing the warning letter came to the

Employer's attention only after it received the letter dated July 4, 2011 from Mrs. Denise Marshall, Attorney-at-law for the Employee.

49. Contrary to settled protocol, the Employer's reaction to Mrs. Marshall's letter was to write directly to the Employee by letter dated July 6, 2011 offering a "formal clarification and notification of your termination". In our view, that attempt was misguided and futile. We are not persuaded that the latter letter could convert the warning letter into a dismissal letter.
50. Most importantly, we do not find that the Employer's reaction in issuing the letter dated July 6, 2011, without even attempting to retract the warning letter, could fall within the band of reasonable responses that an employer should take in the circumstances then facing the Employer.
51. Although we do not find that the authorities cited by Miss Benjamin are on all fours with or applicable to the instant case, the following pertinent question arises: Did the Employer attempt to punish the Employee twice for the same offence? On the facts, it is clear that the Employee committed no further offence after the meeting on June 30, 2011. It follows that the Employer unreasonably attempted to mete out two successive disciplinary actions, 5 days apart, in relation to the same offence.

Conclusion

52. For the reasons stated above, we find that the Employer failed the test of reasonableness under Section C 58 (2) of the Labour Code. Although the Employee's misconduct constituted a potentially good cause for dismissal, the Employer acted unreasonably by treating that misconduct as a sufficient reason for dismissal under section C 59 (1) of the Labour Code. In other words, the Employer has failed to discharge the burden of proving that the dismissal as effected by the letter dated July 6, 2011 was justified in the circumstances

Declarations

53. Based on her prayer for relief, we will grant the following declarations in favour of the Employee:
- (1) The letter issued by the Employer to the Employee on 30th June 2011 is a warning letter.
 - (2) No dismissal or termination was effected 30th June 2011.
 - (3) The letter issued by the Employer to the Employee on 6th July 2011 is null and void in so far as it attempts to clarify the warning letter or convert it into a dismissal letter.
 - (4) The letter dated July 6 2011 is deemed to be a letter of dismissal *de novo* containing a valid statement of the reason for dismissal.
 - (5) The Employee was unfairly dismissed and is entitled to compensation.

Employee's Contribution

54. Before determining the amount of compensation due to the Employee, it is important to comment on her blameworthiness. Although it was unfair, we find that the Employee contributed to her dismissal. Notwithstanding the mitigating circumstances, the forging of Ms. Williams' signature was clearly wrong. Based on the evidence in this particular Reference, we assess her contribution at 40%. In the final analysis, the award which we make below will be reduced to reflect her contribution.

The Award

55. In the circumstances, we assess compensation as follows under the respective heads:

(1) Pay in lieu of Notice of Termination

Under Section C9 of the Labour Code the Employer had an obligation to give at least 30 days notice of the termination of the Employee employment. Accordingly, **we award the sum of \$2,500.00**, being the equivalent of the Employee's monthly salary.

(2) Loss of Protection from Unfair Dismissal

Section C56 of the Labour Code clothes an employee with the right not to be unfairly dismissed. It is well settled that the measure of compensation to which an employee is entitled for loss of this protection is the equivalent of severance pay under Section C 41 of the Labour Code. The modern practice adopted by this Court, is to compensate monthly paid employees at the rate of one month's salary per year of employment. The Employee worked from September 23, 2005 to June 06, 2011, a period of approximately 6 years and 9 months or 6.75 years. In the circumstances, **we award the sum of \$16, 875.00** (\$2,500 x 6.75).

(3) Immediate Loss

An employee who has been unfairly dismissed has a duty to mitigate his loss. Subject to that duty, loss under this head is for the period between the date of dismissal and the date of trial or assessment.

The Employee testified that at the date of trial she was employed and earning net income of \$925.00 per fortnight. There is no other evidence regarding her income and attempts to mitigate her loss since the date of her dismissal.

Given the lack of evidence to the contrary, we have no basis in the evidence at trial for determining when that employment commenced or whether reasonable efforts to mitigate were made. Based on our knowledge of the job market in Antigua & Barbuda at the material time, there was likely to be a period of time

when the Employee remained unemployed with no income. We fix that period at two months. Accordingly, **we award the sum of \$5,000.00**, being the equivalent of her previous salary for two (2) months.

(4) Future Loss

We accept that the Employee was earning \$925.00 per fortnight or \$24,050.00 per year at the date of trial. The difference between her new salary and her previous salary of \$2,500.00 per month (\$30,000.00 per year), is \$5,950.00 per year. **We award the sum of \$2,975.00 being the difference in salary for 6 months.**

(5) Other Heads of Loss and Costs

The evidence discloses no bases for any additional awards.

Order

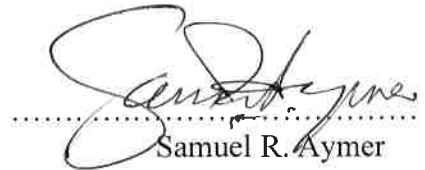
56. In the premises, we order that:

- (a) The Employer do pay to the Employee the total sum of \$16,410.00, being the total award of \$27,350.00 less the Employee's contribution of 40%, in full or final settlement of her claim.
- (b) The Employer shall pay the said sum of \$16,410.00 to the Employee no later than September 15, 2016.

Dated this ¹⁴ 12 August 2016



Charlesworth O.D. Brown
President



Samuel R. Aymer
Member



Dr. Hayden Thomas
Member