

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 49 OF 2014

BETWEEN:

D. GISELE ISAAC

Employee

and

BOARD OF EDUCATION

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Sir Hayden Thomas

Member

The Hon. St. Lawrence DeFreitas

Member

Appearances:

Mr. Justin L. Simon QC of Simon Rogers Murdoch, Attorneys-at-Law for the
Employee

Dr. David Dorsett of Watt, Dorsett, Hewlett Law, Attorneys-at-Law for the Employer

2020: December 14

2021: March 31

December 8

DECISION ON ASSESSMENT OF COMPENSATION

Brown, P

Introduction

1. This decision involves the determination of the quantum of compensation, if any, due to the Employee as a result of her unfair dismissal on August 22, 2014. In light of concessions made by the Employer during the course of these proceedings, the assessment is limited to the following categories:
 - (a) Immediate Loss of Earnings
 - (b) Future Loss of Earnings
 - (c) Loss due to the Manner of Dismissal



(d) Exemplary or Punitive Damages

Background

2. The Employee was appointed by the Cabinet of Antigua and Barbuda as Executive Secretary of the Employer, a body corporate established by the Board of Education Act 1994. She held that position for a period of 13.7 years until she was constructively dismissed with effect from August 22, 2014.
3. In response to the Employee's Memorandum of Claim averring that she was unfairly dismissed and is entitled to compensation, the Employer contended that this Court had no jurisdiction to entertain the claim and applied for an order that it be struck out accordingly. The main ground for the application was that the Cabinet, not the Employer, was the Employee's true employer.
4. After unsuccessful attempts to strike out the claim in this Court and the Court of Appeal (**ANULTAP 2018/0009**) the Employer, belatedly, admitted that the Employee was unfairly dismissed and is entitled to compensation therefor.
5. Notwithstanding, its attempts to strike out the claim, the Employer acknowledged and subsequently met the Employee's entitlements to (a) her share of the Employer's Thrift Fund and (b) payment in lieu of accrued vacation.
6. In the course of negotiations towards an amicable settlement the parties agreed the terms of a Consent Order which were approved by the Court and filed herein on December 14, 2020. Pursuant to that Order, the Employer has also paid the sums of \$150,000.00 and \$25,000.00, as interim payments of "damages" and costs, respectively, to the Employee.
7. At the commencement of the assessment hearing, **the Employer also conceded the Employee's claim for the equivalent of one month's salary in the sum of \$14,144.00 as Notice Pay.**
8. In respect of her Loss of Protection from Unfair Dismissal, **the Employer also conceded that the Employee is entitled to be compensated in the sum of \$297,024.00, being one and a half times her former monthly salary of \$14,144.00 for each of her 14 years (rounded) of employment.**
9. Those concessions left the Court to consider the evidence and determine additional compensation, if any, due to the Employee, having regard to the submissions of Counsel as supported by the selected authorities.

Salient Facts

10. Following the general elections and change of government in June 2014, the Employer's Board was reconstituted with new members appointed with effect from July 2014.
11. By letter dated July 18, 2014, the Employee was suspended with immediate effect for 28 days. The reasons for the suspension included the Minister's intention to carry out "detailed investigations" in the Employee's absence. The Employee was assured that she would "have the opportunity for due process in accordance with the industrial relations practices in the state of Antigua & Barbuda".
12. By letter dated July 21, 2014, the Employee's Attorneys-at-Law, Simon Rogers Murdoch, wrote to the Secretary of the Cabinet requesting clarifications in respect of certain statements in the letter of suspension.
13. By letter to the Minister dated July 28, 2014, the Employee's Attorneys-at-Law also wrote to the Minister questioning the basis of the suspension and inquiring if it was with or without pay.
14. By letter dated August 7, 2014, the Employee's Attorneys-at-Law wrote to the Employer enquiring whether they had approved her suspension and whether the same was with or without pay.
15. The Employee received no response to any of the said three (3) letters.
16. After the 28-day suspension, the Employee reported to the Employer's premises for work on August 18, 2014, but she was unable to gain access to her office because the three locks thereto had been changed. While on the premises, the Employee was informed by one of her subordinates that the period of her suspension had been extended. The Employee never received any communication to that effect.
17. On August 18, 2014, the same day that the Employee reported to work, a Press Release, issued by the Employer under its letterhead, was delivered to the offices of the Observer Media Group. It was published by the Observer Radio the same day to inform the listening public that the Employee's 28 days suspension meant 28 working days and that she should not return to work until August 29, 2014.
18. In a series of articles published in the Daily Observer Newspaper between July 22 and August 27, 2014, the issues of the Employee's suspension, her lock-out, and the investigative report into the conduct of the Employee were discussed.
19. On September 2, 2014, excerpts from the preliminary investigative report requested by the Minister were read and commented upon by a commentator

who called in to a talk-show on ZDK Radio. The comments were adverse to the Employee.

20. The Employee was also the target of adverse on-line comments in relation to what was contained in the preliminary report. The final report was subsequently issued but the Employee did not receive a copy of it from either the Employer or any other relevant authority.
21. The Employee never received any communications from the Employer informing her when she was expected to return to work or that the final report had been issued.
22. By letter dated August 22, 2014, the Employee, through her Attorneys-at-Law, informed the Employer that she considered herself to have been constructively dismissed.
23. After her dismissal the Employee made efforts to find alternative employment but was unable to do so save for two short stints with Caribbean Leadership Project, based in Barbados, and Special Security Services Ltd. Her other efforts, including her applications to the Sunnyside Tutorial School, the Anglican Church (in Anguilla), the Mill Reef Club, were all frustrated directly or indirectly by her arrests and prosecution on the occasions mentioned below.
24. The Employee was first arrested in June 2015, in respect of 4 charges of Larceny, Conspiracy, Fraudulent Conversion and Corruption. She was arrested a second time in December 2015 on 4 similar charges. Thirdly, the Employee was again arrested in December 2015 on 17 similar charges. All the several charges were based on offences allegedly committed by the Employee during the course of her employment.
25. The series of connected events, of which the Employee complains, directly or indirectly, in these proceedings started with her suspension in July 2014 and culminated with her complete acquittal in the criminal proceedings in the High Court in March 2020.
26. The criminal proceedings against the Employee were at least facilitated by the Employer. They were all grounded on allegations of misconduct committed during the course of her employment. The investigative report which disclosed the alleged wrong doings relied on documents and related statements made by

officials of the Employer. Moreover, the prosecution witnesses who testified against the Employee “mostly came from” the Employer.

Statutory Powers

27. Our mandate to award compensation as set out below, is established by section 10 of the Industrial Court Act, subsection (3) of which provides:

(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

- (a) Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;**
- (b) Act in accordance with equity, good conscience and substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.**

Compensation

Immediate Loss of Earnings

28. It is common ground that, by definition, “Immediate Loss” is the loss suffered by an unfairly dismissed employee between the date of dismissal and the date of assessment of the loss, subject always to his duty to mitigate. In this case, the relevant period is between August 22, 2014, and March 31, 2021, a total of just over 6 years and 7 months.

29. Learned Counsel for the Employee, Mr. Simon QC, boldly submitted that we should consider the equivalent of 6 years’ salary under this heading. On the other hand, Learned Counsel for the Employer Dr. Dorsett submitted that the award under this head should be limited to the equivalent of 3 months’ net pay.

30. In relation to her Immediate Loss, the Employee’s evidence is sketchy at best. She testified that she was not able to get employment “on island”. In that regard she asserted that she first found alternative employment as a Consultant with Caribbean Leadership Project, based in Barbados, which was terminated in July 2015 after her first arrest. She gave no evidence of her earnings from that engagement.

31. The Employee also testified that in December 2015, she found employment at Special Security Services, but the same was terminated after her second arrest. Again, she gave no details of her earnings. In relation to both short periods of employment, Mr. Simon QC submitted that it could reasonably be deduced that her earnings were less than her previous monthly salary. However, we have no sufficient evidence to properly ground such a deduction.
32. The Employee testified that in or about December 2015, her prospects of employment at the Sunnyside School, Mill Reef Club and the Anglican Church in Anguilla, all well established as reputable institutions, did not materialize on account of her bouts of arrest and the related bail conditions.
33. In countering the submissions of the Employee, Dr. Dorsett emphasized the Employee's failure to provide any or any adequate evidence of the immediate loss she suffered. He submitted that that failure cannot be cured by any assumption by the Court. However, he reminded us of the Court's duty to recognize the loss where it occurs even though it is not adequately quantified, provided that any award we may make "is not out of scale".
34. Mr. Simon submitted that the Employee obtained only "short stints of temporary employment". That assertion is not supported by the Employee's testimony. There is no evidence to suggest that those stints were embarked upon as temporary. Moreover, according to her, the notices of termination of the periods of employment with both the Caribbean Leadership Project and Special Security Services were given on account of her first and second arrests and not because they were temporary in nature. In any event, she gave no evidence of the precise start dates of those "stints", when they were expected to end and her related earnings.
35. In the circumstances, although we have some general knowledge of the negative publicity surrounding the Employee's dismissal, her three arrests and prosecution between August 2014 and March 2020, we are nonetheless constrained by the limited evidence. **Accordingly, in making an award which is not out of scale, we limit our award under this heading to \$169,728.00, the equivalent of 12 months' salary.**

Future Loss of Earnings

36. On behalf of the Employee, Learned Queen's Counsel, Mr. Simon QC, pursued a claim for the equivalent of "up to 24 months' salary" under this heading. He relied on the principles laid down in the **Jennifer Watt case** and submitted that we should take into consideration the probability that the Employee's earnings

from future employment will be less than those earned in her former employment with the Employer.

37. On the other hand, Dr. Dorsett submitted that there is no proper ground for such an award. In his view, in the absence of any evidence as to the permanency of her tenure or equivalence in her salary when she found alternative employment, no award should be made to the Employee under this heading.
38. In considering the opposing submissions, we remind ourselves of two of the guiding principles as laid down in **Civil Appeal No. 6 of 1992, Antigua Village Condo Corporation v Jennifer Watt**: (a) compensation for future loss must be predicated on the probability that an employee's earnings from future employment or self-employment will be less than those from the former employment; and (b) the onus is on the employee to prove the probability of future loss and the probable duration of the same.
39. Upon the careful consideration of the Employee's evidence, we find no or no sufficient basis for an award under this heading.

Manner of Dismissal

40. As pointed out by Dr. Dorsett, we note that an award under this heading is only made on those rare occasions when the manner and circumstances of the dismissal give rise to the real risk of financial loss in instances where the employee is rendered less attractive to potential new employers and/or rendered more liable to selection for dismissal. Thus, the exercise of the Court's power to make an award under this heading usually occurs in situations where the employee was dismissed in circumstances that were harsh and oppressive, or with blatant disregard for the principles and practices of good industrial relations. Applying the selected dicta of Sir Vincent Floissac CJ in the **Jennifer Watt case**, we focus on the "financial consequence" of the manner and circumstances of the dismissal.
41. On behalf of the Employee, Mr. Simon QC submitted that the dismissal was not in accordance with good industrial relations practice. Not only do we agree, we consider that to be an understatement. While the breach of or blatant disregard for the principles and practices of good industrial relations, by itself, may not be enough to ground an award under this heading, we are obligated to consider it in conjunction with the harsh and oppressive nature of the dismissal as well as the surrounding circumstances.
42. In considering whether the Employee suffered loss under this heading, we had particular regard to her testimony in respect of her efforts to mitigate her loss.

We find that her dismissal caused her to be less attractive to potential employers to the extent that it was difficult for her to find alternative employment "on-island". Moreover, we accept her evidence that she suffered considerable damage to her reputation to the extent that her worth was diminished in the eyes of the community, which in turn limited her job opportunities.

43. Further, as to her liability to selection for dismissal, we find that on the two occasions when she found alternative employment, the actual terminations of her services were attributable to the manner and circumstances of her dismissal.
44. In the final analysis, we have no doubt that the Employee's dismissal and the surrounding circumstances rendered her less attractive to potential new employers. Further, she was clearly more susceptible to be selected for dismissal after she found new alternative employment. For those reasons, having regard to her former monthly salary, **we award compensation in the global sum of \$45,000.00 under this heading.**

Exemplary Damages

45. In reliance on the case of **Lesley Hoffman v Stanford Financial Group Limited, Ref. No. 4 of 1999**, Mr. Simon QC submitted that this case "cries" out for an award of exemplary damages. In that regard, it is instructive to note that at paragraph 38 of his judgment, Maundy P held as follows:
- "... the dismissal was harsh, crude and without just cause and had a grave and disturbing effect on the Employee and, in the circumstances, I believe this is an instance where Exemplary damages are justified and would so award in the sum of US\$30,000.00 - indeed she testified of the stress, shock and humiliation she had to suffer and all through no fault of her own."**
46. That award of exemplary damages was unanimously upheld by the Court of Appeal in **Civil Appeal No. 4 of 1999, Stanford Financial Group Limited v Lesley Hoffman**, in which Redhead JA held:
- "... It cannot be said in my judgment, that the award was out of all proportion and unjustifiable so as to cause this court to interfere with the discretion of the Industrial Court when it awarded US\$30,000.00 as exemplary damages."**
47. We are not persuaded by Dr. Dorsett's spirited submission that no award should be made under this heading. Considering the evidence as a whole, we do not think it appropriate to wholly separate the actions of the Police, the Director of Public Prosecutions, the Minister or Cabinet and treat them as wholly supervening occurrences. In our view, the action of the Employer in dismissing the Employee established a causal link with the previous or subsequent actions

taken by those other authorities. That causal link was never severed. Inevitably, the Employer did, voluntarily or otherwise, provide vital input to ground the actions taken by the law enforcement authorities. We find that all relevant and causally linked actions taken against the Employee contributed, in one way or the other, to firmly ground an award under this heading.

48. As compared with the **Lesley Hoffman case**, we have noted the differences in the manner in which the dismissal was effected. In our estimation, there is no doubt that the effects on the Employee in this case are no less severe and adverse. In the words of Learned Queen's Counsel, the Employee "had become subject to adverse public comment laced with ridicule and contempt". The Employee's testimony, which we wholly accept as being well grounded in fact, is that she felt "thoroughly victimized". **In the circumstances, in order to satisfy the justice of this case and in the cautious exercise of our discretion, we award the sum of \$100,000.00 under this heading.**

Costs

49. Having regard to provisions of section 10 (2) of the **Industrial Court Act** and the earlier agreement between the parties for the interim payment of costs in the sum of \$25,000.00, **we award additional costs in the sum of \$10,000.00 making a total award of \$35,000.00 under this heading.**

Order

50. In the premises, we order that:

1. The Employer shall pay compensation for unfair dismissal to the Employee in the aggregate sum of \$625,896.00 comprised as follows:

(a) Payment in lieu of notice	\$ 14,144.00
(b) Loss of Protection from Unfair Dismissal	297,024.00
(c) Manner of Dismissal	45,000.00
(d) Immediate Loss of Earnings	169,728.00
(e) Exemplary Damages	100,000.00

<u>TOTAL</u>	<u>\$625,896.00</u>
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2. The said aggregate sum of \$625,896.00 and costs in the sum of \$35,000.00 be set off against the sums of \$150,000.00 and \$25,000.00, previously paid pursuant to the Consent Order dated December 14, 2020, leaving the respective net sums of \$475,896.00 and \$10,000.00 due and owing to the Employee.

3. The Employer shall pay the aggregate sum of \$485,896.00, inclusive of net compensation and net costs, to the Employee by four equal monthly instalments of \$121,474.00 on or before December 31, 2021, January 31, 2022, February 28, 2022, and March 31, 2022, respectively.

Dated this 28th day of December 2021



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Charlesworth O. D. Brown
President



.....
Sir Hayden Thomas
Member



.....
St. Lawrence DeFreitas
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

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Employee

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DECISION ON ASSESSMENT OF COMPENSATION

Hon. Charlesworth O.D. Brown, President
Hon. Sir Hayden Thomas, Member
Hon. St. Lawrence DeFreitas, Member