

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO. C/53 of 2017

BETWEEN:

CLAIR THOMAS

Employee

and

ANTIGUA MASONRY PRODUCTS LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Megan Samuel Fields

Member

The Hon. Collin R. Maynard

Member

Appearances:

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

Miss Kema Benjamin of Marshall & Co., Attorney-at-Law for the Employer

2022: March 9
2022: October 28

JUDGMENT

Brown, P:

Background

1. The Employer is a company incorporated under the laws of Antigua and Barbuda. At all material times it carried on the business of producing building construction aggregates, blocks and ready-mixed concrete at its principal place of business situate at Green Castle in the Parish of St. Mary in Antigua.
2. The Employee commenced his employment with the Employer on April 27, 2013, as a Mechanic. With his consent, he was assigned to perform the duties of a

Concrete Truck Driver during the course of his employment. His last rate of pay was \$19.35 per hour or \$774.00 per week for a forty-hour work-week.

3. The employment relationship was subject to the terms of a Collective Agreement dated January 5, 2016, between the Employer and the Antigua and Barbuda Workers' Union, the bargaining agent for the bargaining unit of workers of which the Employee was a member.
4. On November 16, 2016, the Employee was assigned to deliver ready-mixed concrete to the residential premises of Andrew Hadeed, one of the Employer's Directors, at Blue Waters. Two other concrete trucks were already on the site as the Employee approached the area. Mr. Jamal Bright, one of the Employee's co-workers who had been assigned to assist the pump operations, was already on site performing his duties.
5. Unlike the two drivers who had arrived before him, the Employee approached the site by driving his truck down the slope towards it. On the instructions given to him through Mr. Bright, the Employee was required to reverse his truck up the incline, turn it around and reverse down hill towards the site. In complying with the instructions, the Employee was "cautious" in the process of reversing the vehicle "at a very low speed" while manoeuvring it so as to avoid "low hanging electrical wires". In doing so, the Employee was assisted by Mr. Bright who was standing nearby on the ground outside the vehicle giving him directions to ensure that it did not come into contact with the wires.
6. Mr. Bright was distracted by a noise which caused him to temporarily turn his attention away from the Employee and his truck. When he refocused his attention on the Employee, Mr. Bright suddenly realized that there was an electrical post behind the truck. Mr. Bright then immediately shouted out to the Employee and signalled for him to stop. His efforts were too late with the result that the truck accidentally collided with the utility pole and caused the electrical wires to emit sparks and be severed. The accident resulted in the suppression of electricity in the residential area for several hours.
7. By letter dated November 17, 2016, the Employer notified the Employee that the matter was under investigation and requested that he provide a written report by the following day. Mr. Bright was also required to submit a written report.

8. On November 18, 2016, upon reading the reports, the Employer concluded that the Employee had driven its vehicle recklessly or without due care and attention. Taking into consideration the public place where the accident occurred and the threat posed to the public, it made a decision to terminate the services of the Employee. On that date the Employee was invited to attend a meeting on November 21, 2016, at which the matter would be discussed. He was not informed that the decision had been taken to dismiss him or that his employment was in jeopardy. Moreover, the Employee was not advised that the meeting would be a disciplinary hearing and that he was entitled to be accompanied by a representative of his choice.
9. At the meeting on November 21, 2016, the Employee was confronted by Mr. Lamont Frederick, the Employer's Chief Executive Officer, Mrs. Christine Steele, Human Resources Manager, and Dr. Austin Josiah, the Employer's Labour Consultant. During the meeting, he expressed his sorrow and explained that the accident resulted from the instructions given to him by Mr. Bright to reverse up the hill and turn around the truck.
10. Upon hearing his apology and explanation, Dr. Josiah informed the Employee of the Employer's intention to dismiss him "for cause", in which case he would receive no "severance pay". In light of the Employee's apparent sorrow and distress, the Employer, "in a moment of kindness", offered the Employee the opportunity to resign, as an alternative to being dismissed. Dr. Josiah also told him that if he resigned, he would receive his "severance pay". In the circumstances, the Employee chose to resign and requested that his outstanding loan balance owing to Advance Caribbean be paid out of the payment he would receive.
11. Upon the Employee's oral indication that he would prefer to resign, Dr. Josiah insisted that the resignation had to be in writing and gave the Employee a fresh option to write the resignation letter himself or have the Employer type it for him. The Employee chose the latter. Accordingly, Mrs. Steele prepared the one-line resignation letter which the Employee signed, and Dr. Josiah witnessed during the meeting. The resignation letter reads:

"Antigua & Barbuda

21st November, 2016

To: Antigua Masonry Products Ltd.

Subject: Resignation

I Clair Thomas hereby resigns (sic) from Antigua Masonry Products effectively (sic) 21st November 2016"

**Sincerely
C Thomas
Clair Thomas**

**Witness
Dr. Austin Josiah**

12. In addition to the resignation letter, Dr. Josiah also demanded that the Employee sign a "Release" to confirm that he received the "severance pay", was satisfied with the payment, and had no claim against the Employer. Mrs. Steele then prepared the Release during the course of the meeting. When she passed it to the Employee for his signature, he looked at it and then declared that he could not read. Upon hearing his utterance, "I cannot read", Mr. Frederick read the Release to the Employee, after which he signed it. The Release was witnessed by both Mr. Frederick and Mrs. Steele. The terms of the Release are as follows:

"RELEASE FORM

I Clair Thomas agree to accept as full and final satisfaction and discharge of any part (sic), existing or future claims, actions, proceedings or accounts wherever and howsoever arising from or in connection with the severance payment EC\$6,656.40 arising from my employment with Antigua Masonry Products Ltd. to the intent that the said Antigua Masonry Products Ltd. be absolutely and finally exonerated and discharged from all further and other claims, proceedings, actions, suits and demands of every nature and kind whatsoever by me or on my behalf arising out of or connected with my said severance.

IN WITNESS THEREOF I have hereunto set my hands (sic) this 21st day of November, 2016

Signed by Clair Thomas

C. Thomas

Before and in the presence of

L Frederick 11/21/16

**Lamoth Frederick
CEO**

Witness: Christine Steele C Steele 21 Nov. 2016

13. Being dissatisfied with the termination of his employment, the Employee commenced these proceedings contending that, despite signing the resignation letter and the Release, he was unfairly dismissed and is entitled to compensation therefor. The grounds of the opposing positions of the parties are set out below.

Overview of Opposing Cases

14. In his Memorandum of Claim, the Employee relied on the following grounds:

- (a) Immediately before the accident, he was following specific instructions and relying on the assistance of Mr. Bright. When the vehicle collided with the post it stalled. The impact caused the live electrical wires to snap, ignite and fall onto the truck causing the Employee to experience bolts of electrical shock. Although the situation caused him to panic, he was able to regain his composure, remain in the truck, restart it and move it away from the post.
- (b) The Employer was well aware of the Employee's "literacy handicap", as a result of which he had to obtain assistance in preparing the report which he submitted to the Employer on the day immediately after the accident.
- (c) When he was summoned to the meeting on November 21, 2016, the Employee had absolutely no knowledge whether it was going to be a disciplinary hearing; or whether the Employer had been contemplating his dismissal; or whether it had already decided to dismiss him. Moreover, immediately before he was presented with the resignation letter and the Release documents, which the Employer had prepared in advance, the Employee had no intention to resign.
- (d) In the circumstances, in causing the Employee to sign the resignation letter and the Release, the Employer took advantage of the Employee's inability to read and write; his lack of understanding generally as to what was transpiring at the meeting; and his legal rights in relation to the particular situation.
- (e) The accident did not give rise to a redundancy situation so that the issue of severance pay did not arise. Consequently, the Employee was

constructively and unfairly dismissed, in the process of which the Employer acted in an abusive, harsh and oppressive manner without any regard for the law and good industrial relations practices.

15. In disputing the Employee's claim, the Employer relied on the following grounds as outlined in its Memorandum of Defence:

- (a) The Employee "struck down" the utility pole thereby causing the suppression of electricity in the area for approximately 5 hours, which in turn caused a severe disruption in the Employer's business in that deliveries to customers had to be rescheduled because all of its trucks were "blocked in could not move".
- (b) The Employee had a history of committing infractions as a result of which he had received several written and oral warnings, including a written warning dated August 4, 2016, in respect of his pouring of concrete into a pothole in a public road in Golden Grove.
- (c) The Employer had previously received numerous complaints about the Employee's reckless driving, speeding and driving without due care and attention while driving the Employer's vehicle during the course of his employment. In particular, the Employee was "found to have caused an accident while driving one of the Employer's vehicles. Moreover, the Employee had been suspended on two occasions in November 2014 in relation to allegations of dangerous driving on his part.
- (d) Within the two weeks immediately before the termination of the employment, the Employer also received two complaints against the Employee. One was in relation to his driving of the Employer's vehicle at an excessive speed, and the other alleging that he had picked up a pedestrian near Country Pond and gave him a ride to Bendals.
- (e) Based on the incidents and complaints mentioned above, and the related "outstanding disciplinary proceedings" pending against the Employee, he was aware that the last incident at Blue Waters "would and/or could result in his termination".
- (f) The meeting on November 21, 2016 "was convened with the Employee to discuss the incident ...". At the meeting the Employee was "advised that he was going to be terminated" and reminded about the warning letter

issued to him in August 2016 and the other verbal and written warnings he had received.

- (g) The Employee offered to resign, and the Employer accepted his resignation on condition that it be put in writing, in respect of which the Employee did "by his own free will and volition, recited the contents of his resignation letter". Afterwards, both the letter and the Release were drafted in his presence, and he signed them.
- (h) In relation to the Release, "the Employee indicated that he could not read it and asked that it be read over to him". After Mr. Frederick complied with his request, the Employee signed the document.
- (i) Both the resignation letter and the Release were signed by the Employee without any force, duress or coercion by or on behalf of the Employer.
- (j) The Employee was not told that he would not receive "the severance package" if he did not sign the Release.
- (k) Upon the signing of the Release, the Employee released and discharged the Employer from any further liability arising from his employment. In the circumstances, the Employee was not unfairly dismissed and is not entitled to any of the reliefs claimed.

Discussion and Resolution

16. Having regard to the law, the pleadings, the evidence and the closing submissions, we will consider this matter in terms of the following selected questions:

- (1) Was the resignation letter signed by the Employee under undue influence?
- (2) What was the effect of the resignation letter?
- (3) Did the resignation amount to a dismissal?
- (4) If there was a dismissal, was the Employee unfairly dismissed?
 - a. Did the Employer have good cause for the dismissal?
 - b. Did the Employer act reasonably in executing the dismissal?
- (5) If he was unfairly dismissed, to what extent, if any, did the Employee contribute to his dismissal?

Was the resignation letter signed by the Employee under undue influence?

17. **Black's Law Dictionary, 10th Ed**, defines "undue influence" in the following terms: **"The improper use of power or trust in a way that deprives a person of free will and substitutes another's objective; the exercise of enough control over another person that a questioned act by this person would not have otherwise been performed, the persons free agency having been overmastered..."**

18. In his witness statement, the Employee asserted that at all material times during his employment, the Employer was aware that he could not read or write. He stated that on November 16, 2016, the very day of the incident, he got the impression from Mr. Frederick that they were going to fire him. He also stated that "I really needed the job...I begged him please not to fire me. I wanted to keep the job because I know it is not easy finding a good job". Further, the Employee stated that, although he did not know what was going to happen at the meeting on November 21, 2016, he was praying that he would not lose his job.

19. Given his state of mind and his understanding of what Dr. Josiah was saying to him at the meeting, he further stated: "It was never my desire to resign my job; I wanted my job. I was not given any choice in the matter since Dr. Josiah told me my action warranted instant dismissal because of the previous warnings I received".

20. Moreover, the Employee stated: "I believe that my Employer took advantage of me and the fact that I cannot read and write and had no proper understanding of what was happening. I did not know my legal rights in the matter, and no one explained my rights to me."

21. Under cross examination, the Employee testified that upon his return to the Employer's premises after the accident he spoke to both Mr. Frederick and Mr. Hadeed acknowledging that what happened was bad and offering to pay for any consequential damage.

22. The Employee also testified that when Dr. Josiah told him he was going to be dismissed, he asked, "why?" and Dr. Josiah responded that there is no "Why", "you are going to have to sign these forms. I am going to give you something. You are lucky because we don't normally give anything". It was his further

testimony that Dr. Josiah told him that if he signed, he would get money and if he didn't sign, he would still get fired and receive nothing. The Employee further testified that at that point, "I started crying and I beg, and I beg for my job".

23. It is noteworthy that, according to the Employee, at the start of the meeting, Dr. Josiah asked him to confirm that if he did not have a phone or other recording device with him. And at the end of the meeting, Dr. Josiah told him not to show the documents he signed to anyone and not to discuss the matter with anyone.
24. As to the evidence elicited on behalf of the Employer, in his witness statement, Mr. Frederick stated that after the Employee was told that he would be dismissed for cause and would receive no payment, he "appeared most distraught and after discussion with myself, Mrs. Steele and Dr. Josiah, Dr. Josiah offered the Employee an opportunity to resign" and if he did so, "he would get severance".
25. Further, Mr. Frederick stated that after he signed the resignation letter, "Dr. Josiah told the Employee he needed the Release signed, upon seeing which, the Employee declared, "I cannot read". In relation to that declaration, Mr. Frederick stated: "I was surprised by his statement. The others in the room were just as surprised as I was by that statement. I then read the document for him and then handed it back to him. He signed the document and returned it to me".
26. During his oral testimony, Mr. Frederick testified that the Employee "signed the resignation letter. Whether he could read or write, I'm not sure but he looked at it and signed." In relation to the Release, he confirmed that he read it for the Employee who said he understood and then signed.
27. Mr. Frederick further testified as to his empathy to the Employee. He said, "I was sympathetic to the Employee...at no time was he coerced...I was very tolerant and compassionate".
28. Mrs. Steele's witness statement and oral testimony are factually consistent with those of Mr. Frederick. For her part, she testified under cross examination that the Employee did not request the opportunity to consult with anyone or have the

documents reviewed on his behalf before signing them. According to her, if he had requested, he would have been given the opportunity to take away the documents so that he could receive independent advice on them. In her opinion, the Employer acted reasonably in the circumstances.

29. Having carefully considered all the facts and surrounding circumstances, it is our opinion that the Employee was acting under undue influence when he signed both the resignation letter and the Release. Having not being warned of the precise purpose of the meeting and given the opportunity to be accompanied by a representative of his choice, we surmise that the Employee might have considered himself to be in an overwhelming situation in which he was outnumbered and perhaps out manoeuvred.

30. The reality was that the Employee was singlehandedly facing up to three of the most senior officers of the Employer who held his fate in their hands. In our view, the offer of "severance pay" was an irresistible inducement under the circumstances. And his declared literacy level made bad matters worse. In the final analysis, the Employee's "free agency" had been "overmastered".

31. It is well settled that a resignation in certain circumstances where an employee is given an ultimatum to resign or be dismissed, may amount to a dismissal. That position is asserted by **Harvey on Industrial Relations and Employment Law, Issue 191, February 2008, Butterworths** at paragraphs [320] and [321]. The learned authors quoted the dictum of Sir John Birmingham in **East Sussex County Council v Walker (1972) 7 ITR 280, NIRC**, who summarized the basic position as follows:

"Suppose that the employer says to the employee, 'Your job is finished. I will give you the opportunity to resign. If you don't you will be sacked'. How, we would ask, how is it possible to reach a conclusion other than that the employment is being terminated by the employer, even though the employee takes the first and more respectable alternative of signing a letter of resignation rather than being the recipient of a letter of dismissal? We feel that in such circumstances there really can be no other conclusion than that the employer terminated the contract."

32. We reiterate our findings, as confirmed by the testimony of Mrs. Steele, that the decision to dismiss the Employee was taken on November 17, 2016. On

November 18, 2016, he was invited to the meeting scheduled for November 21, 2016, but was not told anything about the purpose of the meeting or that the decision had already been taken to dismiss him. Perhaps most importantly, we find that at the meeting the Employee was first told that he would be dismissed, immediately after which he was offered the opportunity to resign.

33. In our opinion, what was said to the Employee was tantamount to telling him, "resign or be fired". In the circumstances, applying the reasoning of Sir John Birmingham, we find that the resignation letter was void of no effect to terminate the employment relationship. In reality, the Employee was dismissed with immediate effect from November 21, 2016, the date of the resignation letter.
34. In addition, and in any event, in our consideration of the Release, it is open to us to determine its validity in light of its terms and the circumstances under which it was executed. In **Ref. No. C/ 47 of 2017: Alphonso David Henry v Beresford Romeo**, the employee was first hired as a Caretaker / Gardener / Handyman for an indefinite term. The employer caused the employee to sign a mutual separation agreement which ended the permanent employment and substituted it with a one year fixed-term contract. The employee challenged the validity of the separation agreement. At paragraphs 10 to 14 of its judgment, this Court held:

[10]. As to the circumstances under which he signed the separation agreement, the Employee contends that he was under pressure at that time. He maintained that he had not seen the documents before they were presented to him for signing. Moreover, the Employee asserted that he did not understand the nature and content of the document, the fact of and reasons for which the Employer was well aware.

...

[12]. It is common ground that the Employee suffered from a significant limitation of his literacy skills. In our view, that fact required the Employer to be particularly sensitive and circumspect in his dealings with the Employee in matters which required his understanding and appreciation of documents, especially those requiring his signature to signify acceptance of and / or agreement with their contents.

...

[14]. We are of the opinion that at all material times the Employer was mindful of the obvious inequality between his bargaining abilities and those of the Employee. In the circumstances, we find that the Mutual separation agreement was prepared by or on behalf of the Employer without any consultation with the Employee. Further, we find that the Employee had no opportunity to obtain assistance and advise so that he could make a proper informed decision whether or not to agree to the then proposed mutual separation agreement. We have no doubt that the Employee was ill-equipped to either fully appreciate what was proposed or to negotiate on his own behalf.

...

[20] By reason of matters aforesaid, we would vary the terms of the mutual separation agreement to reflect the Employee's entitlement to severance pay, as claimed..."

35. We will apply the reasoning in the **Henry case** and adapt the conclusions therein for present purposes. Apart from our conclusions above that the resignation letter was void and of no effect and that Employee was effectively dismissed, we also make the following findings:

- (a) As he was when he signed the resignation letter, the Employee was under considerable pressure to sign the Release.
- (b) The Employee was in no position to understand the nature, content and potential effect of the Release.
- (c) At the material time, the Employee was labouring under a serious literacy handicap which he expressly brought to the attention of the Employer.
- (d) Both the resignation letter and the Release were prepared without any or any proper consultation with the Employee.
- (e) The Employee was given no opportunity to obtain assistance in either making representations in his own defence or to understand the documents which he was required to sign.

36. For the reasons stated above, as was the case with the resignation letter, the Release as signed by the Employee is void and of no effect for the purpose intended by the Employer.

What was the effect of the resignation letter?

37. The resignation letter had the effect of terminating the employment relationship. In the circumstances, notwithstanding the Employee's signature, a dismissal was actually done by the Employer.

If there was a dismissal, was the Employee unfairly dismissed?

- (a) Did the Employer have good cause for the dismissal?**
- (b) Did the Employer act reasonably in executing the dismissal?**

38. The Employee's right not to be unfairly dismissed is established by section C 56 the Antigua and Barbuda Labour Code. In testing the fairness of the dismissal and resolving the issue of unfair dismissal now before us, we are conclusively bound by the provisions of sections C 10 and C 58 of that Act.

39. Given its overriding contention that the Employee resigned, there is no doubt that the Employer omitted to issue a statement of termination under section C 10 of the Act. As a consequence, it was in no position to prove that it had a good reason with a good factual basis for the dismissal. By extension, it was in no position to prove that it acted reasonably under the circumstances. Our inevitable conclusion is that the Employee was unfairly dismissed and is entitled to compensation. We declare accordingly.

If he was unfairly dismissed, to what extent, if any, did the Employee contribute to his dismissal?

40. We have noted the Employer's several allegations of misconduct on the part of the Employee prior to the accident on November 16, 2016, for one of which he was suspended in 2014. The allegations of misconduct against the Employee in relation to the accident did not involve a repeat of the behaviour or the occurrence of similar behaviour like that for which he was given the written warning in August 2016. In relation to the other specific allegations and complaints, we are not convinced that the Employer carried out proper investigations and followed acceptable disciplinary procedures.

41. As to the accident itself on November 16, 2016, in respect of which he was held guilty of reckless driving or driving without due care and attention, it appears that the Employer considered it to be the last straw in a series of infractions. In our

consideration of the evidence surrounding the accident, we make the following observations:

- (a) The involvement of the Employee's co-worker, Jamal Bright, and the Employee's reliance on his directions raise the question as to whether the Employer had established a safe system of work generally and at the particular location.
- (b) Having regard to the Employee's written report and that of Mr. Bright, notwithstanding the Employer's assertion in that regard, we are not convinced that a proper investigation was carried out. In any event, the process appeared to have excluded the Employee after he submitted his report.
- (c) No proper disciplinary process or procedures appear to have been implemented before or after the Employer decided to dismiss the Employee. As a result, the Employee was deprived of the opportunity to defend himself.
- (d) The loss allegedly suffered by the Employer as a direct result of the accident was vague and unsubstantiated.

42. Having regard to all the surrounding circumstances predating the accident on November 16, 2021, we find the Employee blameworthy and limit his contribution to 10%. His compensation as assessed below will be reduced accordingly.

43. In our consideration and determination of the issues arising in this Reference, we have benefitted from the written closing submissions of both Mr. Carty and learned Counsel, Ms. Benjamin. Needless to say, we found those of Mr. Carty to be more persuasive and convincing both in terms of liability and the consequential quantum of compensation.

Compensation

44. We award compensation under the respective usual headings as follows:

(a) Notice Pay

At the commencement of his employment in 2013, the Employee's rate of pay was \$19.35 per hour. Under clause 22 of the 2016 Collective Agreement, he was entitled to an increase of \$0.45 per hour with effect from September 1, 2014. Thus, his rate of pay at the date of his dismissal should have been \$162.00 per day $\{(\$19.35 + 0.45 + 0.45) \times 8\}$.

Accordingly, **we award the equivalent of one week's pay in the sum of \$810.00** under this heading.

(b) Basic Award for Loss of Protection

As the equivalent of severance pay, if there was a redundancy situation, **we award the sum of \$6,966.00** in accordance with the rates under clause 19 of the Agreement. From that amount we will subtract the sum of \$6,656.40, paid to the Employee at the time of his dismissal, leaving a **net award of \$309.60**

(c) Immediate Loss

Having regard to the Employee's evidence of his attempts to mitigate, we award the sum of \$21,060.00 (\$810 x 26), being the equivalent of the employee's former wages for the 6 months immediately after his dismissal. In addition, we award the sum of \$5,265.00 (\$405 x 13), being 50% of his former wages for the ensuing 3 months, **making a total award of \$26,325.00 under this heading.**

(d) Exemplary Damages

In our estimation, the Employer's action in dismissing the Employee under the circumstances, apart from being contrary to good industrial relations practices, was harsh and oppressive. In the process, the Employer evinced a clear intention and did subject the Employee to intense pressure and unreasonable inducement in order to obtain his signature on the resignation letter and the Release. In the circumstances, **we award the sum of \$10,000.00.**

(e) Payment in lieu of accrued vacation

Having regard to the commencement of the Employee's employment, he was entitled to 7 days accrued vacation. Applying his daily rate of \$162.00, **we award the sum of \$1,134.00 as payment in lieu of vacation.**

(f) Outstanding Wage Increments

Under Article 22, the Employee is entitled to outstanding wages by which amounts he was short paid. Thus, **we award the total sum of \$2,106.00**, being \$18.00 per week for each week between September 2014 and November 2016 (\$18 x 117)

45. For the reasons stated above, we will reduce the total sum of \$37,444.60 under items (a) to (d) above, by 10% to \$33,700.14 in addition to which the Employee is entitled to the total of \$3,240.00 under items (e) and (f).

Costs

46. In our opinion, the exceptional circumstances disclosed above justify an award of costs in the sum of \$2,000.00

Order

47. By reason of matters aforesaid, we order that:

The Employer shall pay the aggregate sum of \$38,940.14, including the net sum of \$33,700.14 as compensation for unfair dismissal, \$3,240.00 as outstanding accrued entitlements and \$2,000.00 as costs, to the Employee no later than November 30, 2022.

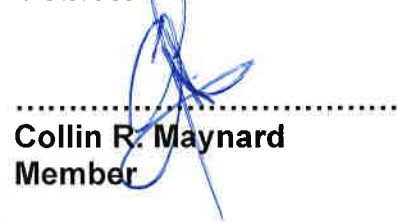
Dated this 28th day of October 2022



Charlesworth O.D. Brown
President



Megan Samuel Fields
Member



Collin R. Maynard
Member

