

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/ UD/5 OF 2019



BETWEEN:

GEOFFREY SIMMONS

Employee

AND

ANTIGUA COMMERCIAL BANK LTD

Employer

Before:

The Hon. Samantha May-Francis

Vice President

The Hon. Judith A. Dublin

Member

The Hon. Hesketh A. Williams

Member

Appearances:

Mr. Kendrickson K. Kentish of Lake, Kentish & Bennett Inc., Attorneys-at-Law for the Employee

Mr. Septimus A. Rhudd of Rhudd & Associates, Attorney-at-Law for the Employer

2022: December

2023: November 17

Breach of Section B3 of the Antigua and Labour Code- Employee suspended for more than four (4) weeks; Constructive dismissal- was the Employee constructively dismissed having been suspended for more than 4 weeks; Unfair dismissal -did the Employee commit gross misconduct in relation to his employment which rendered his continued employment untenable and justified his dismissal?

JUDGMENT

May- Francis, VP:

Background

1. The Employer is the first indigenous financial institution in Antigua and Barbuda, having been incorporated as a limited liability company on October 25, 1955. Its core business of providing commercial banking services is regulated by the Eastern

Caribbean Central Bank in accordance with the Banking Act, No. 10 of 2015 and the Eastern Caribbean Central Bank Act, No.10 of 1983.

2. After commencing his employment with the Employer as a Teller in August 1986, the Employee was promoted several times during his 32 years of unbroken service. At the date of his dismissal, he held the position of Manager of Retail Lending and Recoveries and was earning a monthly salary of \$11,983.00. He also received monthly allowances totaling \$2,030.00 and yearly bonuses averaging \$8,000.00.
3. On April 16, 2018, the Employer issued the Employee a suspension letter on allegations he had committed serious misconduct in sexually harassing another employee Ms. Ivalin Murrain.
4. In the suspension letter, the Employer indicated that it *"maintains a no tolerance stance with regard to breaches of its policies*. The Employer referred to its Workplace Harassment Policy and stated, *"Additionally, the Bank's Workplace Harassment Policy confirms how seriously the Bank treats these types of allegations and that such conduct would be considered misconduct. In the circumstances, we hereby give you notice that depending on the findings of our investigations, you may be subject to disciplinary action, up to and including summary dismissal"*.
5. A disciplinary hearing was held on May 16, 2018, with the Employee. Subsequently, by letter dated May 26, 2018, the Employee was dismissed. The dismissal was based on the Employer's conclusion after investigation and hearing that the Employee had engaged in gross misconduct in relation to his employment so serious that the employment relationship could not reasonably be expected to continue.
6. The following are excerpts from the dismissal letter, which reads:

"....

This letter serves to formally advise the Bank has since completed its investigations which included a Disciplinary Hearing being convened with both you and your appointed legal representatives on May 16, 2018.

The Bank's findings are that during the period April 2015 to February, 2018, you engaged in sexually explicit conduct, particularly conversations via WhatsApp, with Ms. Murrain. WhatsApp transcripts provided by both you (covering the period October, 2015 to February, 2018) point to a relationship between the parties that was clearly more than a cordial relationship with a shared interest in tennis as posited by you.

....

In April, 2016 when Ms. Murrain was employed as a Securities Clerk in the Retail Lending & Recoveries Department, in which you had overall managerial responsibility, the Bank was not made aware of your pre-existing and continuing relationship with Ms. Murrain. There is also no evidence that you ever curtailed your sexually explicit interaction with Ms. Murrain via WhatsApp after she joined the Department.

....

Following the above findings, please be informed that the Bank has made the decision to terminate your employment with immediate effect on the ground of gross misconduct in (sic) relation to your employment. You have been found to have engaged in conduct which falls significantly below the standards of professional behavior expected of you as senior manager of a regulated financial institution, and to have irreparably damaged the trust and confidence required for continued employment. It had been determined that you conducted yourself in such a manner as to clearly demonstrate that your employment relationship with the Bank cannot reasonably be expected to continue...."

The Dispute

7. The Employee's contentions, as set out in his Memorandum filed on January 16, 2018, may be summarised in three parts as follows:
 - (a) On April 16, 2016, he was suspended indefinitely pending an investigation into allegations of sexual harassment against him. That suspension exceeded the four-week statutory limit established by section B 3 of the Labour Code.
 - (b) The Employer failed to observe the fundamental principles of natural justice in that it failed to allow him to confront his accuser and otherwise provide him with an opportunity to answer the allegations of improper conduct in relation to his employment for which he was dismissed.
 - (c) The disciplinary hearing convened by the Employer was a sham because the Employer had already predetermined his guilt of misconduct on matters other than the allegation of sexual harassment for which he had been charged.
8. In its Memorandum of Defence filed on May 8, 2019, the Employer disputed the Employee's claim and contended the following:
 - (a) it had received a report of allegations of sexual harassment against the Employee;

- (b) based on the position held by the Employee and, following their investigation, the Employee's actions amounted to gross misconduct, which is a good cause for dismissal, and therefore, its decision to dismiss the Employee was justified;
- (c) the Employee's misconduct exposed it to litigation and placed its reputation at risk;
- (d) the dismissal was an exercise of its right to dismiss the Employee summarily; and
- (e) the dismissal was effected in accordance with good industrial relations practices.

The Main Issues

9. Having regard to the Memoranda, the main issues arising are:
 - (a) Was the Employee constructively dismissed, having been suspended for more than four (4) weeks?
 - (b) Did the Employee commit gross misconduct in relation to his employment which rendered his continued employment untenable and justified his dismissal?
 - (c) Did the Employer act reasonably or unreasonably when it dismissed the Employee?

The Legal Framework

10. Given the pleadings, the resolution of these issues will be determined within the parameters of the provisions of Sections B3, C58, and C59 of the Antigua & Barbuda Labour Code (the Labour Code), which read as follows:

"B3"suspension" means temporary lay off from work for not more than four weeks with or without pay as a penalty or pending investigation of the employee's alleged misconduct."

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 C 59 (1) and (2);
- (b) ...
- (c) ...
- (d) ...

Provided, however, that there is a factual basis for the assigned reason.

C 58 (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.

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) ...

C59 (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.

C59 (3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning."

Resolving the Issues

11. In resolving the issues, a chronology of events is useful:

- (i) On April 12, 2018, via email correspondence, an employee, Ms. Ivalin Murrain, wrote to Ms. Sherene Bird, the Employer's Human Resource Executive, putting it on notice that she intended to file individual harassment claims against the Employer, Ms. Bird and the Employee in this Reference.
- (ii) On April 16, 2018, the Employer wrote to the Employee advising that an allegation of sexual harassment had been made against him and suspended the Employee with pay pending an investigation. In addition, the Employer requested that the Employee provide a written response to the allegations by April 20, 2018.

- (iii) The Employee responded on April 17, 2018. He denied the allegations against him and stated his case to show that he had not sexually harassed Ms. Murrain.
- (iv) On April 20, 2018, the Employer wrote to Ms. Murrain asking her to formally detail her claim and submit the same by April 27, 2018.
- (v) On April 24, 2018, the Employer acknowledged receipt of the Employee's letter of April 17, 2018, and advised the Employee that a disciplinary hearing would take place on May 4, 2018.
- (vi) On May 3, 2018, the Employer wrote to the Employee advising that the hearing date was postponed to May 16, 2018.
- (vii) Ms. Murrain submitted her formal complaint on May 15, 2018.
- (viii) A disciplinary hearing was held on May 16, 2018, with the Employee. The Employer presented the Employee with Ms. Murrain's report, but Ms. Murrain was absent.
- (ix) On May 16, 2018, the Employee, who was still on suspension, through his Attorneys-at-Law, brought Section B3 of the Labour Code to the Employer's attention and demanded that he be reinstated.
- (x) On May 16, 2018, the Employer wrote to Employee's Attorney-at-Law, Mr. Kentish, stating, among other things, that it would communicate its decision to the Employee by May 24, 2018.
- (xi) On May 18, 2018, Mr. Kentish responded to the Employer's correspondence of May 18, once again demanding that the Employee be reinstated.
- (xii) On May 25, 2018, the Employee was dismissed for gross misconduct related to his employment.

Issue 1 -Constructive Dismissal

12. The Employee contends that he was constructively dismissed because the suspension was for an indefinite period, eventually exceeding the four-week statutory limit stipulated in Section B3 of the Labour Code. In his Memorandum, he pleaded that:

" ...

(b) The Employee was suspended indefinitely from April 16, 2018 to May 25, 2018 pending investigation for sexual harassment allegation."

13. The Employer, in its Memorandum, denied the Employee's claim that he was constructively dismissed. Ms. Sherene Bird, gave evidence that, in the circumstances, the protracted suspension was necessary as interviews had to be conducted with other employees and there was a delay in Ms. Murrain presenting her formal complaint, which was not received until the morning of the disciplinary hearing. Ms. Bird however contended that no prejudice was caused to the Employee as he was still receiving his full pay.

14. In considering the opposing contentions, we revisited the decisions of this Court in **Reference No. 35 of 2012 Wayne Weaver v St. James Club** and **Reference No. 56 of 2016 Otis Teague v Antigua & Barbuda Utilities Authority**. In **Wayne Weaver v St. James Club**, this Court determined four (4) fundamental requirements for a claim grounded on constructive dismissal. It held that:

“ a constructive dismissal will be fully constituted when:

- (i) The conduct is such that it demonstrates that the Employer no longer intends to be bound by the contract of employment;*
- (ii) The repudiatory conduct must be such that it undermines or erodes or destroys the contractual relationship;*
- (iii) The employee’s response to the employer’s repudiatory breach is directly referable to the Employer’s conduct;*
- (iv) The Employee must get his timing right. He must not work too long after the breach and must not conduct himself in such a way as to waive his right and thereby affirm the contract “.*

15. In **Otis Teague**, this Court examined the statutory provisions regarding suspensions. It concluded that although there are no express provisions in the Labour Code dealing with investigatory suspensions, the suspension period must not exceed the four-week limit established by the definition of suspension under Section B3. Further, the continuance of an investigative suspension beyond the four-week statutory limitation will likely constitute repudiatory conduct and probably lead to a finding of constructive and unfair dismissal.

16. Having revisited these decisions and considering the evidence, we find that there was insufficient evidence to conclude that there was a repudiatory breach of the contract for the following reasons:

- (a) The Employer continued to treat the Employee as employed, paying him all his salary and benefits during the suspension period.
- (b) The Employee did not resign, nor did he declare in his letters of May 16 and 18, 2018, that the extended suspension was a repudiatory breach of the terms of his employment.
- (c) Though he demanded reinstatement, the Employee fell short of stating that he considered the employment ended if he was not reinstated.
- (d) After the suspension ended and in the face of the Employer’s breach, which was known to the Employee, he participated in the disciplinary hearing and awaited the outcome.
- (e) The employment relationship did not end due to the suspension going beyond the statutory limit but ended when the Employer communicated its decision in the dismissal letter on May 25, 2016.

17. In the final analysis, we find that the Employer breached Section B3 of the Labour Code. However, irrespective of that breach, there was no constructive dismissal of the Employee. Notably, Section B12 (1) (b) of the Labour Code provides the remedies available when an Employer is deemed to have breached Section B3- which is either compensation and or reinstatement.

Issue 2- Gross Misconduct

18. The Employer admits to dismissing the Employee; therefore, the burden is on it to prove that the dismissal was fair. Section C58 (1) of the Labour Code conditionally provides that misconduct may properly constitute a good cause for dismissal. The primary condition is that there must be a factual basis for that assigned reason. Moreover, the assignment of misconduct as a good cause for dismissal is subject to the limitations imposed by Section C58.
19. Accordingly, for the dismissal to be fair, the onus is on the Employer to prove: (a) it had just cause for the dismissal under section C58 (1) of the Labour Code in that it had reasonable grounds to believe, based on its investigation that the Employee had engaged in gross misconduct, and (b) it acted reasonably in dismissing the Employee in the particular circumstances prevailing at the material time.
20. The Employer, in its Memorandum, contends that it is justified in dismissing the Employee based on the allegation of sexual harassment, which the Employer says he admitted to. Further, they argued that the Employee, by virtue of his seniority, ought to have been aware of what conduct would be acceptable within the workplace. Based on the Employer's Statement of Precise Reason for Dismissal, the allegation of gross misconduct was grounded on the Employer's finding that:
- (i) the Employee had engaged in sexually explicit conduct, particularly WhatsApp conversations between May 2015 to September 2016 with his subordinate;
 - (ii) in April 2016, the Employee and Ms. Murrain worked in the same Department, but the Employee failed to disclose his relationship with her;
 - (iii) the Employee was deceptive when confronted by Management; and
 - (iv) the Employee admitted to making sexual advances to Ms. Murrain
21. Having heard the witnesses' testimonies and analysed the evidence, we see no admission of sexual harassment by the Employee, nor does the evidence support a finding that the Employee sexually harassed Ms. Murrain. It is also important to note that Ms. Bird, in her evidence and Mr. Austen Gittens, the Employer's witnesses, both conceded that the Employee was not dismissed for sexual harassment. This fact is also supported by the contents of the dismissal letter.

22. On the evidence, it is clear that the Employee fraternized with Ms. Murrain outside the workplace and during his personal time. Accordingly, the Employer did not dismiss the Employee for misconduct on the job, but rather he was dismissed for what the Employer deemed to be misconduct in relation to his employment.
23. Section C59(1) of the Labour Code permits an employer to dismiss an employee for conduct related to employment; however, the Employer must first prove that the Employee is guilty of serious misconduct, and secondly, the Employer must pass the test of reasonableness when it formed the view that it had no choice but to end the employment relationship.
24. In the dismissal letter, the Employer states:
- “ In February 2018, when Ms. Murrain was cautioned regarding her punctuality and the overdrawn position of her staff chequing account, among other matters, our Human Resource Executive, Mrs. Sherene Bird, noted Ms. Murrain’s often defensive behaviour, her tendency to blame you as her Manager and her suggestion that you had some sort of responsibility in all of the Banks identified grievances with her. In a follow-up conversation with you at the time, Mrs. Bird asked you “What is Ms. Murrain’s fixation with you? “What did you do or not do her, since in everything she calls your name?” Your response was that you had done nothing to her and was unaware of her issues with you”.*
25. The Employer contended that the Employee could not carry out his duties and responsibilities and exposed the Employer to reputational risk or placed its operations into disrepute. To support this contention, the evidence must be found to be probable. In other words, pertinent facts must emerge when all the evidence is taken together and evaluated. Apart from the above-reproduced portion of the dismissal letter, there is no evidence that before the alleged sexual harassment, the Employer had presented to the Employee the complaints or grievances that Ms. Murrain had made against him in February 2018 or any other prior time. Notably, the Employee's response to Ms. Bird was that he was unaware that Ms. Murrain had issues with him.
26. We appreciate the Employer’s contention of potential risk and the possible effect such relationships may have on its business. Such relationships may cause a superior to become vulnerable. He may be unable to discipline or highlight the underperformance of his subordinate. We further understand that a surreptitious relationship between superior and subordinate creates dramatically greater vulnerability than one out in the open, both for the individual and the employer.
27. Considering the entire evidence of the Employer, we found that the Employer fell short of providing much-needed evidence. No evidence emerged to prove that the

Employee violated any essential conditions or terms of his employment, as the Employer had no policy that prohibited superior-subordinate relationships or a policy which required employees to report their interest in each other.

28. Similarly, no evidence unfolded in either the testimony of Ms. Bird or Mr. Gittens to show that the Employee's interest in Ms. Murrain hindered him in carrying out his obligations to the Employer. Equally, their testimony did not reveal that the Employee made any employment-related decisions based on his interest in Ms. Murrain, which was not in the best interest of and which impacted the Employer's business. There was no evidence presented to suggest that the Employee provided advice or recommendations to the Employer beneficial to Ms. Murrain, nor did he provide Ms. Murrain with information about Employer-related matters. On the whole, we could not infer from the evidence that the Employee's conduct placed the Employer and its business operations at risk and that he had been compromised in the execution of his duties.
29. The Employer contended that the Employee was deceptive in his responses during the investigation. We note that initially, the Employee denied the allegations of sexual advances towards Ms. Murrain. However, of equal importance is the fact that he rejected from the onset that there was any sexual harassment. Unfortunately, we did not have the benefit of the minutes or any report setting out the findings of the investigation and the statements of the various persons interviewed or their oral evidence. Perhaps had the Employer presented these, we would have been better positioned to determine whether the Employee was deceptive and the impact any such deception would reasonably have had on the relationship of trust and confidence. In the end, the evidence presented was simply inadequate to enable us to make a finding in that regard.
30. In the final analysis and having considered the documentary evidence and oral testimony of the witnesses on a balance of probabilities, we find:
 - (i) there is no evidence of unwanted persistence and unwelcomed conduct by the Employee to give rise to a finding of sexual harassment;
 - (ii) that the exchanges and fraternization occurred outside the working hours and workplace;
 - (iii) that the Employee's conduct was not one prohibited by law or any defined policy of the Employer;
 - (iv) no evidence that the Employee failed to carry out his duties and responsibilities;
 - (v) no evidence to suggest that the Employee misconducted himself in relation to his employment; and

- (vi) the evidence does not support the Employer's contention that the Employee exposed the Employer to reputational risk or placed its operations into disrepute.

Issue 3- Reasonableness

- 31. In the event we are wrong, the Employer must pass the test of reasonableness, which requires us to determine whether, based on the evidence, the Employer was reasonable in forming the view that it had no choice but to terminate the employment relationship. Our duty is to decide upon the reasonableness of the action taken by the Employer and not to substitute our view as to what the Employer should have done.
- 32. Considering the constitutional rights of individuals and fundamental human rights which guarantee all individuals the right to privacy and family life, prohibiting a consensual relationship between two adults could amount to a breach of these rights. This may account for the lack and rarity of judicial precedents involving dismissals under policies prohibiting employee relationships, even between managers and subordinates. In this reference, the Employer did not have any policy that expressly prohibited staff relationships, moreso relationships between managers and subordinates. In any event, considering the fundamental rights under the Constitution and the protection of same, a breach of such policy, even if it existed in our minds, ought not to amount to "gross misconduct", which would justify dismissal.
- 33. On another note, Learned Counsel, Mr. Kentish, contended that the Employee was denied natural justice. He submitted that any semblance of the denial of natural justice after the occurrence of the alledged misconduct could render a dismissal unfair. The Employee argued that he ought to have been given an opportunity to confront Ms. Murrain, especially since the evidence showed that she had other grievances with the Employer which were bundled with the allegation of sexual harassment; she provided the Employer with an allegedly altered version of the WhatsApp exchanges; the genuine WhatsApp exchange dispelled any possible conclusion of sexual harassment; and that he was dismissed without being given an opportunity to answer the charge for which he was dismissed.
- 34. We agree with Learned Counsel Mr. Rhudd that, generally, the failure of the Employer to permit the Employee to confront his accuser does not automatically render the dismissal unfair and depends on the circumstances and facts of each case. The evidence showed that the WhatsApp record submitted by Ms. Murrain and the Employee's WhatsApp record contradicted each other. It appears that Ms. Murrain only provided the Employer with portions of the WhatsApp exchange that supported her allegation. It is noteworthy that according to Mr. Gittens, the

disciplinary panel had concerns with Ms. Murrain's overall credibility due to her omissions.

35. We note that Ms. Murrain had other issues with the Employer, which were bundled with the allegation of sexual harassment. In addition, Ms. Bird and Mr. Gittens gave evidence that the Bank had to meet with Ms. Murrain and her representative on several occasions about this allegation and others against the Employer. Moreover, both correspondences from Ms. Murrain to the Employer clearly show the intermingling of the issues. Therefore, considering all these circumstances, the fairness of the matter warranted an opportunity for the Employee to confront Ms. Murrain and not merely respond in writing to her written complaint.
36. Moreover, and of even greater significance is the Employer's submission that by the time the suspension had reached the statutory limit on May 14, 2018, it had already determined that the Employee would be dismissed for gross misconduct in relation to his employment and to recall him back to work would have been an "*academic exercise*". Based on the chronology of events and the Employer's admission, it is clear that the Employer predetermined that the Employee would be dismissed before receiving Ms. Murrain's formal complaint and before the disciplinary hearing, both of which occurred on May 16, 2018. Likewise, we believe that the Employer's predetermined position ultimately led to the disregard of the maximum statutory limit and the Employer excluding Ms. Murrain from the disciplinary hearing, denying the Employee the opportunity to confront his accuser and, in the final analysis, have led us to conclude that the Employee did not benefit from a fair hearing and due process.
37. Additionally, Mr. Kentish submitted that the charge the Employee was asked to answer differed from the charge for which he had been suspended. However, we do not wish to belabour that contention as it is equally clear that it is unlikely that the outcome of the disciplinary hearing would not have been different given the Employer's predetermined position.
38. Ultimately, the lack of evidence and the Employer's failures have caused the Employer to fail the statutory test of reasonableness under Section 58(2) of the Labour Code. We, therefore, conclude that the Employer acted unreasonably when it dismissed the Employee. Accordingly, we are satisfied and have determined that the Employee was unfairly dismissed.

Compensation

39. Having regard to the submissions and evidence of the parties, we award compensation as follows:

(a) Loss of Protection from Unfair Dismissal

The Employee worked for 32 years from August 1986 until his dismissal in May 2018. Accordingly, we award loss of protection equivalent to severance pay at one month per year for every year worked in the sum of \$383,456.00 (\$11,983.00 x 32).

(b) Immediate Loss

This head is considered when an Employee who has been unfairly dismissed suffers loss between the date of dismissal and the date of assessment of the loss, subject always to the employee's duty to mitigate. In his Memorandum, the Employee stated that since his dismissal, he has been unable to find work in his chosen field and has suffered loss. The facts show that the Employee who held a managerial position was dismissed after 32 years of unbroken service. Given his position, in our estimation, all things being equal, it would have taken him about six months to find a job. However, the Employee provided no evidence of his efforts to find employment, whether in his chosen field or otherwise. Nonetheless, the Employee has claimed immediate loss, and the Employer has not challenged his claim in that regard; we must recognise the loss and do our best to quantify a reasonable sum. We, therefore, award the sum of \$71,899.92 (\$11,983.32 x 6) under this head plus \$12,180.00 (\$2,030.00 x 6) as for allowances in the total sum of \$84,069.92.

(c) Loss of Fringe Benefit

The Employee's evidence is that he received an annual bonus of approximately \$8,000.00. The Employer did not contest this evidence. There was no evidence of non-performance. Therefore, having regard to the Employee's evidence, we accept his evidence that he would have been entitled to a yearly bonus. We therefore award the Employee the sum of \$8,000.00 for the year 2018.

(d) Outstanding vacation

In his Memorandum, the Employee claims he is due 26 days outstanding vacation; the Employer did not dispute this. However, in closing submissions, the Employee did not list this head as one of the relevant heads for compensation. However, we are under a duty to ensure that the Employee receives any outstanding statutory entitlement. We, therefore, award the sum of \$14,379.98 (\$553.08 x 26) as pay in lieu of vacation, provided that the sum remains outstanding to date.

(e) Notice Pay

Similarly, we are under a duty to ensure that an employee who has been dismissed receives, at minimum, the statutory entitled notice or pay in lieu of notice. Therefore, in the circumstances, we award the sum of \$14,013.32, which

is one month's basic wage and allowances provided same was not paid to the Employee at the time of dismissal.

(f) Manner of Dismissal

Mr. Kentish requested that an award be made under this heading. He contended that the Employee, because of the allegation of harassment and subsequent unfair dismissal, was rendered less attractive to potential employers. 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 renders him more liable to selection for dismissal. The evidence does not support such a finding. We therefore make no award under this head.

(g) Exemplary Damages

Additionally, as in the case of exemplary damages, the Court will make an award under this heading only where the Court finds that the Employee was dismissed in circumstances that were harsh and oppressive or not in accordance with the principles of good industrial relations practice. In the final analysis, after carefully considering the evidence and submissions, we believe that the Employer's predetermined position to find the Employee guilty of misconduct, dismissing the Employee without affording him the opportunity to answer the charge of misconduct in relation to his employment and denying the Employee the opportunity to confront his accuser sufficiently justifies an award being made for exemplary damages. We therefore award the sum of **\$15,000.00**.

Costs

Mr. Kentish also requested that costs be paid in this matter. Section 10(2) of the Industrial Court Act, provides for costs to be awarded where exceptional reasons exist. For the same reasons already stated we award the Employee \$2,500.00 costs.

Order

40. In the premises, we order that:

- i. The Employer shall pay compensation for unfair dismissal to the Employee in the aggregate sum of **\$520,819.22** comprised as follows:

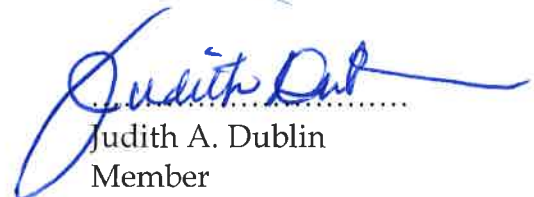
(a) Loss of Protection from Unfair Dismissal	\$383,456.00
(b) Immediate Loss of Earnings	\$ 84,069.92
(c) Loss of Fringe Benefits	\$ 8,000.00
(d) Accrued Vacation Pay	\$ 14,379.98
(e) Exemplary damages	\$ 15,000.00

(e) Exemplary damages	\$ 15,000.00
(f) Notice Pay	\$ 14,013.32
(g) Costs	\$ 2,500.00
TOTAL	\$ 520,819.22

- ii. The Employer shall pay the aggregate sum of **\$520,819.22** by three (3) equal monthly instalments commencing on December 15, 2023, January 15, 2024, and February 15, 2024, respectively.
- iii. The said aggregate sum of **\$520,819.22** be set off against any sum that the Employer may have paid to the Employee for accrued vacation and notice pay at the time of or since his dismissal.

Dated this th17 day of November 2023


 Samantha May-Francis
 Vice President


 Judith A. Dublin
 Member


 Hesketh A. Williams
 Member

