

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 21 of 2011



BETWEEN:

ANDRE THOMAS
and
MILL REEF CLUB

Employee

Employer

Before:

The Hon. John H. R. Benjamin
The Hon. Collin R. Maynard

Member
Member

Appearances:

Ms. Kivinee Knight-Edwards of May Knight Law, Attorney-at-Law for the Employee

Ms. Nelleen Rogers Murdoch of Simon Rogers Murdoch, Attorneys- at -Law for the Employer

2025: July 7
October 17

ASSESSMENT OF COMPENSATION

Benjamin, C

The Honourable John H. R. Benjamin, The Honourable Hesketh A. Williams and The Honourable Collin R. Maynard heard the Reference. It has become necessary in delivering the Judgment to invoke Section 3 (6) of the Industrial Court Act, The Honourable Hesketh A. Williams having died before the delivery of this Judgment. Section 3 (6) provides:

“The Court may act notwithstanding any vacancies in its number or in the absence of any member from the hearing or any part thereof; and no act, proceeding or award of the Court shall be called in question or invalidated by reason of any such vacancy or absence”.

Accordingly, this judgment is being delivered.

1. These proceedings were commenced by filing of the Reference on April 29th 2011. In the Reference the issues in dispute between the parties were identified as “unfair dismissal and adequate compensation”.

2. The Court found in favour of the Employee and deferred quantifying the awards until it received adequate information on the Employee's earnings, a prerequisite for calculating compensation.

Findings

3. The following findings were relevant in performing the award calculations:
 - a. The Employee was a permanent fulltime seasonal worker, who during the majority of his working life with the Employer, worked for approximately 6 unbroken months per year during the high occupancy winter season when service charge would have been highest.
 - b. The Collective Bargaining Agreement governing the employer-employee relationship stated that in the event of a redundancy the Employee was entitled to 16 days' severance pay for each year of service.
 - c. The Employer destroyed the Employee's file and financial records related to payments made to the Employee during the currency of his employment. Consequently, in assessing awards, the Court did not include any consideration of overtime pay the Employee may have received. For all intents and purposes therefore, the Employee received only service charge and his basic pay.
 - d. The Employer considered and treated basic pay and service charge as inextricable elements of its employees' earnings. Accordingly, all weekly payments made to the Antigua & Barbuda Social Security Fund on behalf of the Employee comprised the summation of service charge and basic pay.
 - e. Based on the records provided by Antigua & Barbuda Social Security Board, during the Employee's last full season with the Employer, the Employee worked for the 20-week period spanning November 1997 to May 1998, and his average weekly earnings were \$461.00, inclusive of basic pay and service charge.

The Awards

4. We make the following awards:
 - a. **Notice Pay**
 - i. In keeping with the Antigua & Barbuda Labour Code and current industrial practice, we award one week's pay in lieu of notice. Given the inseparable bond between basic pay and service charge in this instance, we award \$461.00 to cover notice pay.

b. Loss of Protection

- i. The Employee's employment lasted 6.17 years and he is entitled to 16 days' pay per year for that period. His weekly pay was \$461, therefore he earned \$92.20 per day. Accordingly, we award him \$9,102.00 under this head ($6.17 \times 16 \times \$92.20 = \$9,102.00$).

c. Immediate Loss

- i. At the time of his dismissal very early in the high season, most hotels would already have recruited their seasonal workforce. The Employee reported that he expended some effort to find alternative employment but was unsuccessful. Except for the very occasional day's work in gardening, he was wholly unsuccessful in obtaining gainful employment, prompting him to take up an offer to journey to the UK in search of work in 2010. He reported that his UK experience was disappointing, and he subsequently returned home in 2012.
- ii. Having taken into consideration the above, we award the Employee under this head \$11,986.00, representing the equivalent of 6 months' pay, inclusive of service charge ($6 \times \$1,997.67 = \$11,986.00$).

d. Suspension Pay Reimbursement

- i. The Employee was suspended on November 13, 1998 and his employment terminated on November 16, 1998. He is therefore entitled to 3 days' suspension pay. We award under this head \$276.60 ($\$92.20 \times 3 = \$276.60$).

e. Exemplary Damages

- i. Exemplary damages may be awarded by the Court under Section 10 (5) of the Industrial Court Act in circumstances where *"an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice"*.
- ii. In the context of Section 10(5) of the Industrial Court Act, a harsh decision is one which is adjudged as particularly severe based on the underlying circumstances, accepted standards or established principles. An oppressive decision refers to one which is unjustly burdensome and designed to suppress, control or disadvantage someone. It tends to be discriminatory, arbitrary or disproportionate to any need, lacks proper justification or is downright unfair. Taken together, the two key words, harsh and oppressive, describe a decision which is excessively severe and unjust, given the circumstances.

- iii. The Court is mindful that the Employer breached a historically important tenet of the Constitution of Antigua & Barbuda when it infringed on the civil rights of the Employee by denying him his right to continue to wear a specific hairstyle of his choice. Reportedly, the previous manager of the Employer's business, a local Antiguan, never expressed any concern with the hairstyle, nor did any guests of the resort. A new manager from a European country took over management of the business and immediately issued an ultimatum for the Employee to cease using the hairstyle. Within three days of suspending the Employee, the Employer terminated his services, a traumatic experience which no doubt took a serious psychological toll on the Employee.
- iv. The difficulty the Court faces is this: the incident occurred in 1998 when most businesses were of a similar mindset as the Employer. The liberal thinking which prevails today was not a part of the 1990s' thinking. Even the wearing of the same hairstyle by women in those times was considered inappropriate in certain workplaces like banks, insurance companies and elite hotels. The question this begs is, was it considered unreasonable at that time for the male receptionist at the most exclusive resort property in Antigua & Barbuda to wear an unconventional hairstyle? It would be reasonable to argue that the Employer's dress code did not address the hairstyle restriction because its occurrence may not have been anticipated. It is not necessary to cover every eventuality in the dress code, especially those the Employer considers are so obvious that they need not have mentioned them.

Question-1

- v. The question we therefore seek to answer is: Was the Employer harsh in terminating the Employee's employment for using a hairstyle the Employer's new manager did not consider appropriate?
- vi. Applying the ultimate sanction of employment termination for such a simple matter was especially extreme and severe, particularly given that the Employee was not even invited to call on his trade union representative to advocate on his behalf, as good industrial relations would have dictated. His job was terminated three days into his suspension. Indeed, the more frivolous the reason for the dismissal, the harsher one would judge the injudicious action of the Employer. Worse yet, the Employer failed to consider the Employee's uncontroverted oral evidence that neither his fellow employees, staff and management alike, nor the Employer's guests, ever raised objections to his hair style, which he had used on several previous occasions.
- vii. The analysis shows that the decision was indeed harsh and without legal justification. There were no internal company rules published to

employees prohibiting the use of certain hairstyles by employees. The decision also breached the fundamental right of the Employee to use a hairstyle of his choice.

Question-2

- viii. Was the decision unjustly burdensome and designed to suppress, control, or disadvantage someone?
- ix. Unless there is a previous agreement between employees and the Employer governing permissible hairstyles, demonstrable via a previously published internal rule or a clause in the collective bargaining agreement covering the subject, imposition of the decision in the circumstances was unjustly burdensome to the Employee.
- x. The decision was designed to suppress the Employee's right to wear a hairstyle of choice to work. The Employer sought to unjustly control the Employee's behaviour and took the ultimate action when the Employee remained steadfast in his view that he was acting within his constitutional rights.

Question-3

- xi. Was the termination in compliance with good industrial relations practice?
- xii. The Employer did not lead any evidence suggesting that it invited the Employee to seek representation from his union, solicitor or other trusted individual to participate in the internal hearing of the matter.
- xiii. The Employer never indicated whether it conducted an internal investigation to, inter alia, ascertain whether in previous seasons the Employee used the hairstyle without objections from the Employer, fellow employees or guests.
- xiv. The Employer clearly violated some of the tenets of good industrial relations practice.
- xv. The above analysis shows good cause to apply exemplary damages as a punitive penalty for the Employer's harsh and oppressive decision to terminate the Employee's employment in circumstances where the rules of good industrial relations practice were not observed.
- xvi. We award **\$5,000.00** under this head.

f. Legal Costs

- i. Regarding the matter of legal costs, after giving consideration to the extremely unjustified basis for the termination, the Employee's lack of resources at the time of termination as well as subsequently, the virtual summary dismissal meted out by the Employer, harsh and oppressive action of the Employer, infringement of the Employee's constitutional right to use a hairstyle of his choice, and frivolous reason for the dismissal, we further order the Employer to pay legal costs in the sum of **\$2,500.00.**

g. Summary of Awards

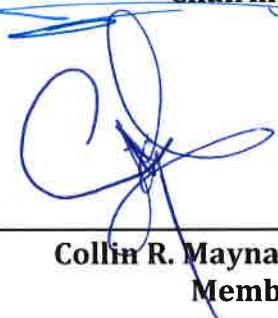
i. Notice Pay	461.00
ii. Loss of Protection	9,102.00
iii. Suspension Pay	276.60
iv. Immediate Loss	11,986.00
v. Exemplary Damages	5,000.00
vi. Costs	2,500.00
vii. <u>Total Award</u>	<u>29,325.60</u>

The Order

5. We hereby order the Employer to pay the Employee the sum of \$29,325.60 by November 17, 2025.



John H. R. Benjamin
Chairman



Collin R. Maynard
Member