

IN THE INDUSTRIAL COURT

ANTIGUA AND BARBUDA

REFERENCE NO. 43 of 2019

BETWEEN:

PASCUAL DE LOS SANTOS

Employee

AND

CLEVELAND SEAFORTH

Employer

Before:

The Hon. Samantha May-Francis

President

The Hon. Kari-Anne Reyonlds

Member

The Hon. John H.R. Benjamin

Member

APPEARANCES

Mr. Samuel A. James and Mr. Simon Leonard of the Antigua and Barbuda Free Trade Union, for the Employee.

Mr. Loy L.A. Weste of Thomas, John & Weste, Attorneys-at-Law, for the Employer.

2025: October 6

2026: April 10

Introduction

1. This matter concerns a claim of unfair dismissal brought by Pascual De Los Santos ("the Employee"), against Cleveland Seaforth ("the Employer"), arising from events on or about April 21, 2018.
2. The Employee by Reference filed on September 5, 2019, claims he was summarily dismissed without notice, without a dismissal letter, and without any prior disciplinary proceedings. The Employer denies that the Employee was an employee within the meaning of the Labour Code, contending that he was an independent contractor engaged to provide landscaping services. In the alternative, the Employer contends that if any employment relationship existed, it was brought to an end by the Employee's own voluntary conduct when he left the premises on April 21, 2018 and did not return.

Factual Background

3. The following facts are either common ground or established on the evidence:



- (i) The Employee, a national of the Dominican Republic, began providing landscaping and grass-cutting services at the Employer's private residence located at Fitches Creek. The Employee contended his employment commenced on or around June 6, 2004.
 - (ii) The Employer accepted that a working relationship commenced around that time, though he characterised it as that of an independent contractor.
 - (iii) A work permit was stamped into the Employee's Dominican Republic- issued passport bearing the date March 20, 2006, issued by the Antigua and Barbuda Department of Immigration, identifying Mr. Cleveland Seaforth as the employer and the Employee's occupation as Gardener.
 - (iv) Medical Benefits Scheme (MBS) records show Mr. Seaforth registered as employer from October 18, 2007 through December 2018.
 - (v) Antigua and Barbuda Social Security Board (ABSSB) records confirm contributions were made by Mr. Seaforth as employer from October 31, 2009 to April 30, 2018, a total of 102 months. The vacation days column throughout all records is marked "N" indicating no vacation was taken or paid.
 - (vi) The Employee was paid EC\$125.00 per day and worked primarily on Fridays and Saturdays, and sometimes on Thursdays when requested. His weekly earnings were EC\$375.00.
 - (vii) No written contract of employment was ever issued by the Employer.
 - (viii) No termination letter was ever issued. This fact is conceded by both parties.
 - (ix) No disciplinary proceedings of any kind were conducted prior to the end of the working relationship.
 - (x) The Employee never received vacation pay at any point during the relationship.
 - (xi) On April 21, 2018, a dispute arose at the Employer's premises concerning the disposal of plant waste material, following which the Employee left the premises and did not return.
4. The Court will now determine the following issues:
- (i) Whether the Employee was an employee or an independent contractor.
 - (ii) Whether the Employee was dismissed by the Employer or whether he abandoned his employment.
 - (iii) The application and effect of Division C10 of the Labour Code.
 - (iv) What compensation if any, the Employee is entitled to.

Summary of Witness Evidence

5. The Court heard evidence from the following witnesses. Their evidence is summarised below.

The Employee's Evidence

6. The Employee gave evidence through the use of Interpreter Ms. Elida A. Santiago who was appointed Interpreter without objection.
7. The Employee's evidence was that he was employed as a Landscaper by Mr. Seaforth on or around June 6, 2004. He stated that he worked a three-day work-week, specifically Thursdays, Fridays and Saturdays, and earned EC\$375.00 per week or EC\$125.00 per day. He said he worked exclusively for Mr. Seaforth on those days, though he accepted under cross-examination that he had also performed landscaping services for other people in the neighbourhood. The Employee also gave evidence that he also worked for C.O. Williams Construction Company.
8. The Employee stated that on or around April 21, 2018, Mr. Seaforth was speaking to him in a disrespectful manner. According to the Employee, he asked Mr. Seaforth to stop speaking to him in that way, but he continued. He said that he became angry, removed his hat and tossed it to the ground, then picked it up again and once more asked the Mr. Seaforth to stop addressing him in a disrespectful manner. He gave evidence that the Employer then told him that he did not need him to work for him anymore.
9. The Employee testified that he never received a termination letter, that no disciplinary proceedings were ever brought against him, and that throughout his employment he never received any vacation pay. He expressed his belief that he was unfairly dismissed and asked the Court to so find.
10. Under cross-examination, the Employee accepted that he did not return to work after April 21, 2018 and that he made no attempt to contact Mr. Seaforth after that date. He maintained, however, that this was because he had been told his services were no longer required.

The Employer's evidence

Cleveland Seaforth

11. Mr. Seaforth denied that the Employee was ever an employee. He stated that the Employee was an independent contractor who was engaged during two separate periods. First from approximately 2004 to 2007, and again from around 2010 to April 2018. He said that the Employee performed landscaping services and was paid EC\$125.00 per day, working primarily two days per week (Fridays and Saturdays) and sometimes on Thursdays if he so requested.

12. In relation to the statutory deductions, Mr. Seaforth acknowledged that he had facilitated the payment of both Medical Benefits Scheme and Social Security contributions on behalf of the Employee from around 2010. He explained that he did so as a matter of convenience and personal assistance, because the Employee had approached him for help in understanding how to complete the relevant statutory forms, as he did not understand the process. Mr. Seaforth maintained that this action did not create an employment relationship between them.
13. In respect of the Work- Permit endorsed in the Employee's passport on March 20, 2006, Mr. Seaforth denied making the application on behalf of the Employee. Under cross - examination he admitted to not having made any inquiries surrounding the issuance of the Work-Permit to the Employee on which he was stated as the Employer.
14. Mr. Seaforth gave a different account of the events of April 21, 2018. He stated that he asked the Employee to place plant waste material in the waste disposal bins located at the front of his yard. He said that the Employee on a prior occasion placed the waste beside the rabbit pen instead which created an eyesore. He denied speaking to the Employee in a disrespectful manner when he made his request on April 21, 2018.
15. Mr. Seaforth gave evidence that the Employee became irate and refused to remove the waste material. He stated that the Employee began to swing his cutlass in a threatening manner and repeatedly struck the rabbit cage. As a result, Mr. Seaforth said he retreated towards his garage for his own safety. He stated that the Employee then abruptly announced that he was going home and left the premises. Mr. Seaforth denied that he told the Employee that he did not need him to work for him anymore.
16. Under cross-examination, Mr. Seaforth acknowledged that after April 21, 2018, he made no attempt to contact the Employee. He also acknowledged that the MBS and ABSSB records listed him as the employer, though he maintained that this did not reflect the true nature of the relationship. He stated that he was aware of the Employee's documentary exhibits since 2022 but took no steps to verify or dispute their contents.

Joycelyn Seaforth

17. Mrs. Joycelyn Seaforth, wife of the Employer, also gave evidence that the Employee performed landscaping work at their residence covering two separate periods around 2004 to 2007, and again from around 2010 to April 2018. She stated that he worked two days per week, Fridays and Saturdays, and sometimes on Thursdays, and that he also performed landscaping services for other neighbours and households in the area.
18. Mrs. Seaforth stated that on April 21, 2018 she was initially inside the house when she heard a raised voice and commotion. She came outside and observed her husband moving towards the garage, with the Employee following him. She gave evidence that she observed her husband and did not see him speaking to the Employee in an aggressive or disrespectful manner. She stated that the Employee appeared to be cursing and that she told him not to use bad language.

19. Under questioning by the Court, Mrs. Seaforth acknowledged that she had only heard part of the conversation between her husband and the Employee, as she had been inside the house when the incident began. She accepted that she was therefore not in a position to say what had been said or how her husband had spoken to the Employee at the outset of the incident. She noted that the Employee's behaviour that day was out of character and that she had never previously had any issues with him. She also acknowledged that her husband had made no attempt to contact the Employee after April 21, 2018.

Analysis of the Evidence

20. The Court has carefully considered the evidence of all three witnesses. Where the accounts of the parties conflict, the Court is required to make findings of fact on the balance of probabilities, having regard to the consistency of each account, its inherent plausibility, and its compatibility with the contemporaneous documentary evidence.
21. In relation to the Employee, the Court found his account of the events of April 21, 2018, to be consistent throughout. His version of the exchange between him and the Employer particularly that the Employer told him that his services were no longer required remained consistent throughout these proceedings. The Court found him to be a witness who gave his evidence straightforwardly.
22. Pertaining to Mr. Seaforth, the Court notes that his oral evidence contained averments that were not present in his written Witness Statement in particular, allegations concerning the use of expletives by the Employee. The Court further notes that Mr. Seaforth's position that the Employee was not an employee sits in direct tension with the official records of the MBS and ABSSB, which consistently identify him as the employer over an extended period. The Court has taken these inconsistencies into account in assessing the weight to be given to his evidence.
23. In relation to Mrs. Joycelyn Seaforth, the Court accepts that she gave her evidence honestly as she understood events. However, her own evidence confirms that she was inside the house when the incident began and that she was not present for the initial exchange between the parties. She was therefore not in a position to speak to what was said or how Mr. Seaforth addressed Employee at the outset. The weight the Court can attach to her evidence on the critical question of what was said is accordingly limited.

Resolving the Issues

Was the Employee an independent contractor?

24. The distinction between a contract of service and a contract for services is fundamental to the jurisdiction of this Court. To obtain compensation for unfair dismissal under the Labour Code, a claimant must establish that he is an "employee" as defined by the Act. The Interpretation Section of the Labour Code defines an employee as:

"any person who enters into or works under or stands ready to enter into or work under a contract with an employer personally to perform any services or

labour whether the contract be oral or written express or implied."

25. It is well settled law that no single test is determinative of whether an employee is an employee or independent contractor. The Court must examine the totality of the relationship, having regard to multiple factors. In the case of **Performing Right Society Ltd v Mitchell and Booker [1924] 1 KB 762**; applying the control test the Court held that the key question is whether the alleged employer has the right to direct not only what work is to be done, but the manner in which it is done. Where a person is subject to detailed direction as to how to carry out their duties, this points toward a contract of service.
26. The case of **Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173** established the economic reality test, directing the court to ask whether the worker is in business on their own account. The Court identified relevant factors including whether the worker provided their own equipment, whether they hire helpers, what degree of financial risk they bear, whether they have an opportunity of profiting from sound management, and how far they have responsibility for investment and management. Where a worker bears no financial risk and does not stand to profit or loss from the engagement, this points toward employment rather than independent contracting.
27. The authority **Carmichael and Another v National Power PLC [1999] UKHL 47** addressing the mutuality of obligation test, the House of Lords held in that case for a contract of employment to exist there must be mutuality of obligation between the parties that is, an obligation on the employer to offer work and an obligation on the worker to accept it. The case arose from casual workers who were engaged intermittently and claimed employment rights. Their Lordships held that the absence of a mutual commitment to provide and accept work could preclude the existence of a contract of service, though each case turns on its own facts and the absence of formal mutual obligation does not automatically defeat an employment claim.
28. Importantly the Court of Appeal in the case **Young & Woods Ltd v West [1980] IRLR 201** held that the label applied by the parties to their relationship and whether they call it employment or contracting is not conclusive. The Court must look at the substance and reality of the arrangement rather than the form in which it is dressed. An arrangement described as independent contracting may in law constitute employment if the underlying facts support that conclusion.
29. This Court in Reference **ANUHCv Ref No. 21 of 2017, Julio Payne v Edmund Cornelius** have adopted a multi-factorial approach to determine the employment status of an employee engaged in circumstances broadly similar to those in this Reference. In that the case this Court in its analysis confirmed that the control test, the integration test, the economic reality test and the mutuality of obligation test should all be considered together. It was concluded that no single factor is determinative of such a finding and the Court must weigh all the relevant circumstances.

30. Maintaining that approach, on the evidence before this Court in this Reference, the Court's view is that the Employer directed what work was to be done at his property and, importantly, how it was to be done. On the occasion being considered, the Employer gave specific instructions regarding the disposal of plant waste material, including directing where it was to be placed. The ability to issue such operational instructions is a marker of employment.
31. Notably, the Court considered the Employer's evidence that the Employee came to work 'when he wanted to' and worked for other clients. However, in the Court's view this speaks to the flexible nature of the arrangement rather than negating control during the periods when the Employee was working at the premises. The Court finds that the control test, considered in the context of the arrangement that existed between the parties to this Reference weighs in favour of an employment relationship.
32. It is equally noteworthy, that the Employee was paid a fixed daily rate of EC\$125.00. He did not invoice the Employer, did not bear any financial risk from the engagement, did not employ others, and did not have the opportunity to profit or suffer loss based on how efficiently he worked. The Employer's evidence that the Employee used some of his own tools to include a weed whacker, cutlass and gloves is noted. However, the provision of basic hand tools is not unusual in domestic horticultural work and does not, of itself, convert an employment relationship into independent contracting. Viewed as a whole, the economic reality of the arrangement is more consistent with an employment relationship than the Employee operating a landscaping business and thereby classified as an Independent Contractor.
33. The Court acknowledges that the mutuality of obligation in this case was not of the conventional form found in full-time permanent employment. The Employee did not have a guaranteed minimum number of hours per week and, on the Employer's evidence, sometimes worked only two days per week. However, the Social Security records disclose uninterrupted contributions for a period of 102 consecutive months. This sustained and unbroken pattern of engagement over more than eight years, in the Court's view, reflects a stable and settled working relationship with a mutual expectation of continuity. This is sufficient mutuality to support the existence of a contract of service.
34. Further, the Court attaches significant weight to the official records of the MBS and the ABSSB. Both statutory bodies list Cleveland Seaforth as the employer over an extended period. The Court emphasizes that these are official government records maintained for the purposes of statutory compliance. Under Division F5(1) of the Labour Code, a work-permit application must be completed by the intended employer. The work permit stamped in the Employee's passport records Cleveland Seaforth as the employer. These documents are contemporaneous records which pre-date this litigation and carry considerable evidential weight.
35. The Employer's explanation that he paid statutory deductions as a personal favour because the Employee did not understand the relevant forms was noted. The Court

observes, however, that the MBS records show contributions under the description of 'employer' from as far back as October 2007, a period during which the Employer now says the Employee was not engaged at all. The discrepancy between the statutory records and the Employer's account of the relationship is a matter that the Court took into account in its overall assessment.

36. Therefore, having regard to the totality of the evidence and applying the legal tests identified above, the Court finds that the Employee was an employee of Cleveland Seaforth and not an independent contractor. The sustained duration and regularity of the engagement, the direction and control exercised over his work, the official statutory records consistently identifying Mr. Seaforth as the employer, the work permit naming him as such, and the economic circumstances of the arrangement all support this conclusion. The Employer's contention that the relationship was one of independent contracting has not been established on the evidence.

Was the Employee dismissed or did he abandon his job?

37. Once a dismissal is alleged by an employee, the legal burden lies on the employer to establish the reason for the dismissal and to satisfy the Court that the dismissal was fair. This position is well established in this Court's jurisprudence.
38. It has been equally established that a job abandonment arises where an employee, by his own conduct, unilaterally brings the employment to an end with an evident intention not to return. The Court must be satisfied that the circumstances clearly demonstrate an intention on the part of the employee to permanently abandon the employment before such a conclusion of job abandonment can be drawn.
39. The principle governing this analysis is well established in employment jurisprudence. In **Kwik-Fit (GB) Ltd v Lineham** [1992] ICR 183, the Employment Appeal Tribunal held that where an employee leaves the workplace in anger or in the heat of a confrontation following provocation by the employer, special circumstances arise which impose a duty on the employer to make reasonable inquiry to ascertain the employee's true intentions before treating the employment as having ended. Wood J stated that an employer may not simply rely upon conduct or words used in such circumstances as conclusive evidence of an intention to terminate, and that the failure to allow a reasonable cooling-off period or to make any inquiry before treating the employment as at an end may itself constitute dismissal. Although that case arose in the context of an apparent resignation, the principle applies with equal force where an employer seeks to rely upon an employee's departure as evidence of abandonment.
40. The central factual question is whether, on April 21, 2018, the Employer told the Employee that he no longer needed him to work for him. The Employee asserts that he did. The Employer denies it. The Court must determine this question on the balance of probabilities.
41. In favour of the Employee's account the Court notes the following; Mrs. Seaforth acknowledged under questioning by the Court that she was not present when the

incident began and did not know what had been said between the parties at the outset. Secondly, and significantly, is that the Employer made no attempt to contact the Employee after April 21, 2018. A person who genuinely believed that a worker had walked off the job in anger and might return would ordinarily be expected to make some inquiry. The complete absence of any contact is a circumstance that the Court considers relevant.

42. Having weighed these considerations, the Court finds, on the balance of probabilities, that the Employer told the Employee on April 21, 2018 that he did not need him to work for him anymore. The Court accepts the Employee's account of this critical exchange. This in the Court's view constituted an oral dismissal. Accordingly, the Court finds that the Employee was dismissed by the Employer on April 21, 2018.
43. In the further alternative, even if the Court is wrong on this finding and the Employee did leave the premises of his own accord, the Court is not satisfied that the circumstances established abandonment of employment. The Employee's departure followed what he describes as disrespectful treatment by the Employer. An employee's emotional departure in the heat of such a confrontation does not without more constitute a clear and unequivocal intention to permanently relinquish employment. No steps were taken by the Employer after April 21, 2018 to contact the Employee, to invite his return, or to initiate any formal process.

Section C 10 of the Labour Code

44. Section C10(1) of the Labour Code imposes a mandatory obligation on an employer who dismisses an employee to furnish, within seven (7) days of the date of dismissal, a written statement setting out the precise reason or reasons for the termination of employment.
45. Section C10(4) provides as follows:
"An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate, in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable."
46. In **Reference No. 48 of 2019, Norkesa Thomas v A.S. Bryden and Sons (Antigua) Limited**, this Court affirmed that the paramount obligation arising from Section C10(1) is the timely issuance of a written termination statement setting out the reason for the dismissal. This Court confirmed that where an employer fails to furnish such a statement, the estoppel provision of C10(4) is engaged and the employer is barred from introducing testimony as the facts relating to the dismissal. The Court expressed at paragraphs 17 and 18 that this obligation is not merely procedural but goes to the heart of an employee's right to know the basis for his dismissal and to challenge it.
47. Moreover, in **Reference No. 44 of 2014, Rhondell Stewart v Coco's Hotel and Restaurant**, this Court was faced with a dismissal in which no letter of

dismissal had been issued. The Court at paragraph 23 determined that where it is not in dispute that no letter of dismissal was issued, the Court is constrained to conclude that the employee was unfairly dismissed and is entitled to compensation. This authority established that the absence of a termination letter is itself sufficient to ground a finding of unfair dismissal, without the need to examine the substantive fairness of the decision to dismiss.

48. It was conceded by both the Employer and the Employee in their respective evidence that no termination letter was ever issued. This is a matter of considerable significance. It engages the mandatory estoppel provision in Division C10(4), which bars the Employer from introducing testimony as to facts which would have been recited in such a statement.
49. The absence of a termination letter is itself sufficient to ground a finding of unfair dismissal. The dismissal is therefore found to be unfair by operation of law, independently of the Court's findings on the primary factual issues.

Is the Employee entitled to compensation?

50. Having found that the Employee was an employee who was unfairly dismissed, the Court turns to the question of compensation. In considering the appropriate compensation, the Court has taken into consideration the following findings -the Employee served the Employer for a period of approximately fourteen years; he was dismissed in the course of a verbal altercation without any prior warning, investigation, or disciplinary process; no termination letter was issued, in breach of Division C10(1); throughout the period of employment, no vacation pay was ever provided, notwithstanding the mandatory entitlement under Division C18 of the Labour Code; the Employer disputed the existence which the Court has found to have existed on the evidence; and the Employee, as a Spanish-speaking foreign national within the lowest income quintile, the employee incurred costs in securing interpretation services throughout the proceedings.
51. Accordingly, the Court considered the following heads of compensation:

(a) Loss of Protection

The Employee had approximately fourteen (14) years of continuous service. He is entitled to compensation reflecting the loss of the accrued protection his length of service afforded him. However, considering that the evidence before us show that the Employee was first issued a work permit on March 20, 2006, we assess the Employee's entitlement from that date when it appears that he became legally entitled to hold employment within this jurisdiction.

Accordingly, we award loss of protection equivalent to severance pay at one day per month per year for every year worked from March 20, 2006 to April 21, 2018, a total of 11.92 years (143 months) in the sum of \$17,875.00 (143 days x \$125.00) under this head.

(b) Notice Pay

The Employee is award sum of **\$375.00** which is one weeks' basic wage.

(c) Outstanding vacation pay

Section C18(1) of the Labour Code provides that each employee who has successfully passed his probationary period shall be entitled to vacation leave without loss of pay of at least one day per month of employment. Section C18(7) further provides that any person whose employment is terminated shall receive remuneration for each day of vacation leave accrued and not taken.

The ABSSB records confirm contributions for a period of 102 months (October 2009 to April 2018). The vacation days column throughout all records is consistently marked "N", confirming that no vacation was taken or paid. Taking into account the period for which the most reliable records exist, the Court adopts the Employee's calculation of 143 days of accrued vacation at EC\$125.00 per day, giving a total of EC\$17,875.00. The Court notes that this calculation is conservative and does not extend to the full period of employment from 2004 as claimed by the Employee.

(d) Immediate Loss

The Employee claimed four (4) month immediate loss in the sum of \$6,500.00. Compensation under head requires the Employee to demonstrate that he has suffered loss between the date of dismissal and the date of assessment of the loss, subject always to the employee's duty to mitigate. The Court has carefully considered the evidence. The Employee gave no evidence as to whether he sought or obtained alternative employment after April 21, 2018, the period during which he was without income, or the steps he took to find work in the aftermath of his dismissal. In the absence of the any such evidence, the Court is unable to quantify immediate loss of earnings and this head is accordingly not awarded.

(e) Exemplary Damages

In the **Antigua and Barbuda Transport Board v Anderson Carty Privy Council** Appeal [2025] UKPC; the Board confirmed that Section C10(4) of the Industrial Court Act confers on the Industrial Court the power to award exemplary damages where an employee has been dismissed in circumstances that are harsh, oppressive or not in accordance with principles of good industrial relations practice.

The Court finds that the circumstances here satisfy this test. The Employee was summarily dismissed without any prior warning or process after fourteen (14) years of service. Throughout that period, he was never afforded his mandatory vacation entitlement. No termination letter was issued. These circumstances, taken together, constitute a dismissal that was not in accordance with good industrial relations practice. The Court accordingly awards exemplary damages in the sum of EC\$7,000.00.

(f) Costs

Section 10(2) of the Industrial Court Act provides that the Court may not ordinarily make an order as to costs in any dispute before it, unless for exceptional reasons it considers it proper to order otherwise.

The Court finds that exceptional circumstances exist in this case for the same reasons that it found that an award of exemplary damages has been satisfied. Additionally, the Employee, a foreign national of limited means, was required to pursue this Reference over a period of approximately six years. He incurred translation costs in the sum of \$4,000.00. In these circumstances the Court considers it proper to make an award of costs in the sum of EC\$6,500.00.

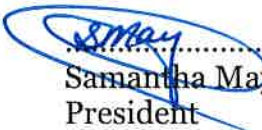
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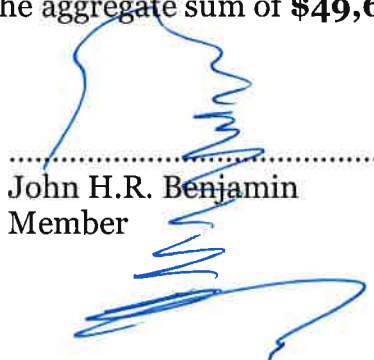
52. In the premises, we order that:

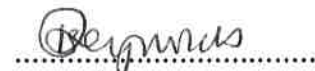
- i. The Employer shall pay compensation to the Employee for unfair dismissal in the aggregate sum of **\$49,625.00** comprised as follows:

(a) Loss of Protection from Unfair Dismissal	\$ 17,875.00
(b) Notice Pay	\$ 375.00
(c) Outstanding Vacation Pay	\$ 17,875.00
(d) Exemplary Damages	\$ 7,000.00
(e) Costs	\$ 6,500.00
TOTAL	\$ <u>49,625.00</u>

- ii. The Employer shall pay the aggregate sum of **\$49,625.00** on or before May 10, 2026.


Samantha May-Francis
President


John H.R. Benjamin
Member


Kari-Anne Reynolds
Member

Judgement delivered by John H.R. Benjamin