

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 32/2023

SETTLEMENT OF DISPUTE

BETWEEN

CUNA CARIBBEAN INSURANCE JAMAICA LIMITED

AND

VALRIE CYRUS

AWARD

I.D.T. DIVISION

MR. DONALD ROBERTS, CD., JP.	-	CHAIRMAN
MR. ERROL BECKFORD	-	MEMBER
DR. DENESE MORRISON, JP.	-	MEMBER

DECEMBER 20, 2024

DISPUTE NO. IDT 32/2023

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

CUNA CARIBBEAN INSURANCE JAMAICA LIMITED

(THE COMPANY)

AND

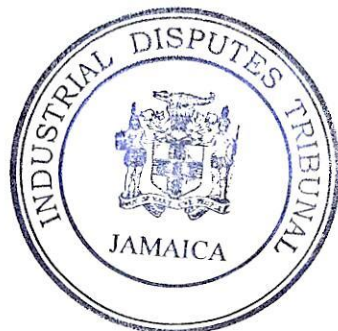
VALRIE CYRUS

(AGGRIEVED WORKER)

REFERENCE

By letter dated December 18, 2023 the Hon. Minister of Labour and Social Security, pursuant to Section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act, 1975 ("the Act") referred to the Industrial Disputes Tribunal ("the Tribunal") for settlement, the dispute between **Cuna Caribbean Insurance Jamaica Limited** and **Valrie Cyrus** with the following TerMiss of Reference: -

"To determine and settle the dispute between Cuna Caribbean Insurance Jamaica Limited on the one hand, and Valrie Cyrus on the other hand, over the termination of her employment ."



DIVISION

The division of the Tribunal selected in accordance with Section 8(2)(c) of the Act to deal with the industrial dispute comprised:

- | | | |
|----------------------------|---|-------------------------------------|
| Mr. Donald Roberts, CD, JP | - | Chairman |
| Mr. Errol Beckford | - | Member, Member, Section 8(2)(c)(ii) |
| Dr. Denese Morrison, JP | - | Member, Section 8(2)(c)(iii) |

REPRESENTATIVES OF THE PARTIES

The **Company** was represented by:

- | | | |
|-------------------|---|------------------------------|
| Mr. Gregory Reid | - | Attorney-at-law |
| Miss Gillian Babb | - | Assistant Vice President, HR |

The **Aggrieved** was represented by:

- | | | |
|-------------------|---|---------------------------------|
| Mr. Howard Duncan | - | Industrial Relations Consultant |
|-------------------|---|---------------------------------|

In attendance:

- | | | |
|-------------------|---|------------------|
| Miss Valrie Cyrus | - | Aggrieved Worker |
|-------------------|---|------------------|



SUBMISSIONS AND SITTINGS

The parties submitted briefs to the Tribunal and made oral presentations over sixteen (16) sittings covering the period April 17, 2024 through to October 28, 2024. Over the course of the sittings the Tribunal examined twenty-one (21) exhibits along with testimonies by way of oral evidence.

BACKGROUND TO THE DISPUTE

1. Cuna Caribbean Insurance Jamaica Limited (hereinafter called "the company") is an insurance provider for Credit Unions and their members. Miss Valrie Cyrus (hereinafter referred to as "the aggrieved worker") was employed to the company as an Accountant with effect from July 3, 2017.

2. In September 2017 a three (3) month appraisal of her performance was done and the outcome was satisfactory. Following that initial assessment, a five (5) month appraisal was conducted in November 2017 and her performance was again rated as "satisfactory". A number of areas were, however, identified for improvements, and Miss Cyrus had her employment confirmed on January 8, 2018.
3. During the 2018 performance review, both the mid-year and annual performance ratings were "unsatisfactory", and in February 2019 a Performance Improvement Plan (PIP) was developed for her. She was invited to a meeting on May 20, 2019 to discuss and assess her performance, and this was once again rated "unsatisfactory".
4. The company, thereafter, took the decision to hold a formal performance evaluation meeting to determine whether, based on her continued poor performance, her contract of service needed to be terminated.
5. The evaluation meeting took the form of a hearing and was held on July 10, 2019. Miss Cyrus was invited to have a representative and advised that she will be given an opportunity to respond to the specific allegations surrounding her poor performance.
6. On July 30, 2019, Miss Gillian Babb, Assistant Vice President, Human Resources and Corporate Services, wrote to Miss Cyrus advising that her services will be terminated with immediate effect. She was advised that she could appeal the decision, this she did, but the Company's position to terminate was upheld.
7. The matter was subsequently referred to the Ministry of Labour & Social Security, however, the conciliation process failed to arrive at a settlement, and as a consequence, the dispute was sent to the Tribunal.



THE COMPANY'S CASE

8. Counsel for the Company, Mr. Reid, said that the matter was one in which CUNA Caribbean was obliged to terminate the services of Miss Cyrus based on her continued poor performance. He said the evidence will be presented to show that the Company tried to "motivate, encourage and assist" Miss Cyrus for a period of time before coming to a decision. He reiterated that her dismissal was based on 'capacity' and not 'conduct', and concluded that reference to the Disciplinary Code would not be relevant in these circumstances.
9. Miss Gillian Babb was the Company's first witness. She is the Assistant Vice President, Human Resources & Corporate Services at CUNA, with regional responsibilities, and based in Trinidad.
10. Miss Babb testified that she was involved in the matter concerning Miss Cyrus and that she had worked very closely with Miss Sacha Romain, the Manager, Finance to oversee the process for the performance evaluation, and to ensure that due process was observed.
11. She said that she was copied on the letter from Miss Romain to Miss Cyrus, dated July 2, 2019, inviting her (Miss Cyrus) to the performance review hearing. She was the Company's representative and assisted Miss Romain in presenting the case before the panel. Miss Babb gave evidence confirming that Miss Cyrus was asked to either bring a representative or forego the hearing and respond to the alleged charges in writing. She opted to be accompanied by a representative, and on the Saturday before the Wednesday meeting (July 10), Miss Babb said she was notified by Miss Cyrus that she was unable to find one.



12. Miss Babb said Miss Cyrus was asked to find an alternate person to represent her, but advised the Company on Tuesday, July 9 at about 4:30 pm that she was still without a representative.
13. According to Miss Babb's testimony, the Company's representatives from Trinidad who were to attend the hearing had confirmed travel arrangements to be in Jamaica before being informed by Miss Cyrus that she would be without a representative. The 'performance hearing', she said, proceeded nevertheless.
14. Miss Babb informed the Tribunal that she was not a member of the panel and did not take part in the decision. She, however, admitted to signing the letter of termination as the Head of Human Resources. She further testified that she was not part of the appeal hearing.
15. Miss Babb deposed that during the 2018 mid-year review, Miss Cyrus' self-assessment was 'satisfactory', although her supervisor, Miss Romain, assessed her performance as 'unsatisfactory'. She stated that Miss Cyrus' comments did not express a disagreement with her supervisor's assessment, and she, in fact, acknowledged the feedback.
16. Miss Babb declared that the Company's Employee Development Plan was designed to allow management to assess the performance of the employees, provide feedback on areas of weaknesses, and where there is inadequate improvement in performance, would proceed to invite the employee to a performance hearing. She averred that Miss Cyrus signed to the Employee Development Plan, which covered the period February 28 to May 20, 2019. She noted that it was as a result of the unsatisfactory performance at the end of the 2018 annual assessment that the PIP was developed.



17. Miss Babb acknowledged that she was aware of Jamaica's Labour Relations Code and was satisfied that Miss Cyrus was subjected to a fair process and given every opportunity to state her case.

THE AGGRIEVED WORKER'S CASE

18. Mr. Duncan argued that Miss Cyrus' dismissal was a disciplinary matter related to her performance. He averred that her dismissal had to be for reason or reasons set out in the Company's Policy and for which the sanction would be dismissal.
19. Miss Cyrus was called to testify on her own behalf. She said her manager, Miss Sacha Romain, had assessed her on all three (3) occasions and had found her performance 'unsatisfactory' on the last two. Miss Cyrus said that based on her own assessment she had scored her performance as 'satisfactory'.
20. Miss Cyrus informed the Tribunal that she was sent on 'administrative leave' from July 2 to the date of her dismissal, and was in receipt of her full pay for the month of July.
21. Further in her testimony, she said that the Finance Department had a vacancy for a senior staff member during the period of the PIP, but she was provided with no support and had to take on the additional responsibilities. Miss Cyrus declared that she had every intention of being represented at the performance hearing based on her interpretation of the July 2 letter which cast in her mind "a **foregone conclusion**" that she was going to be dismissed as a result of management's assessment that her performance was poor.
22. At the commencement of the hearing she was asked about her representative. Miss Cyrus said she informed the meeting that the date was not convenient for her representatives, but after a brief recess the chairperson returned and advised that the meeting would continue.



23. Miss Cyrus said she received a letter dated July 30 from Miss Babb terminating her services, which she appealed. The appeal hearing was chaired by Miss Rayon Kirby which upheld the management's decision to dismiss.
24. Under cross examination, Miss Cyrus admitted that there were performance issues arising after the commencement of the PIP and further admitted that the PIP was neither complex nor unachievable. She said the situation with the short staff was the main factor contributing to performance issues. Although disagreeing with the assessment done by her supervisor, Miss Cyrus acknowledged that she did not document the areas of concerns regarding the review as required by the Employee Policy Manual.

ISSUES

25. The following have been identified as germane to the matters for consideration by the Tribunal:



- a) Was the issue surrounding Miss Cyrus' termination one of capacity or conduct?
- b) In either circumstance, were the steps necessary to ensure a fair procedure in accordance with equity, good conscience and the substantial merits of the case observed?

ANALYSIS

A. Was the issue surrounding Miss Cyrus' termination one of capacity or conduct?

26. As counsel for the Company quite rightly pointed out, there is a differentiation between misconduct and incapacity due to poor performance, and the procedures adopted are different in some respects. The bottom line, however, is whether the dismissal was effected in a manner which the Tribunal considers fair and just having regard to the circumstances surrounding the case. The

Company contended that Miss Cyrus' dismissal was a 'capacity issue', while the aggrieved worker argued that it was a matter of conduct.

27. There is an emerging body of literature and scholarly articles on dismissals by reason of 'conduct' versus 'capability'. The distinction between the two may not always be straightforward, and while some cases may be clear, others will be more complicated and could involve elements of both conduct and capability.¹ What can be derived as a common theme from a review across the body of literature is the distinction between 'poor performance' arising from a lack of capability, that is, the employee's willingness, but inability to perform at the required standard, and 'poor performance' because of the employee's unwillingness to perform despite his/her proven ability. The former relies on 'capability procedures', while the latter relies on the 'disciplinary procedure'.

28. One key element for consideration is whether there was 'willfulness' or 'deliberateness' leading to the poor performance; in the case of misconduct it would have to be proved to be present, whilst in the case of poor performance due to capacity, it must be absent.

29. In a 2018 case before the Labour Court of South Africa² the Learned Judge stated that "*employees cannot be "charged" for poor work performance only to be dismissed following a disciplinary process and applying the considerations for misconduct...*" The court opined that where an employee is -



"found "guilty" and sanctioned as is the case for misconduct, the process for incapacity for poor work performance has other objectives, such as being to identify the poor performance, establish what is required to resolve it, providing the employee with assistance to resolve it, and then allowing the employee a reasonable opportunity to achieve what is required."

¹ See <https://www.btoemploymentlaw.co.uk/when-is-it-fair-to-dismiss-an-employee-conduct-vs-capability/>

² See *Midas Group Komatipoort v. NUMA and Others*(JR1585/14)[2018]ZALCJHB 83

30. In the case at bar, the crucial question before this Tribunal is to determine whether the dismissal of Miss Cyrus was fair based on the procedures adopted by the company having regard to our understanding as to the reason for her termination.
31. It is settled law in cases of unfair dismissal that the onus of proving the dismissal was fair, rests squarely with the employer, who must show a legitimate reason for the decision to dismiss, and then to convince a tribunal that the process adopted in the dismissal was fair. And the question as to what constitutes 'fairness' has had some amount of judicial scrutiny in the Jamaican jurisdiction. In that regard we rely on guidance from the dicta of Sykes, J (as he then was) in the **National Commercial Bank Jamaica Limited and Industrial Disputes Tribunal and Peter Jennings [2015 JMSC Civ. 105**, where he enunciated the following -

"...It [Tribunal] must look and is duty bound to examine at all the relevant circumstances, find facts, interpret them, draw conclusions and apply the statute. Once it makes its findings of fact then it goes on to answer the ultimate question of whether the dismissal was unjustifiable. This process is not a strict black letter law process. It takes into account notions of fairness, justice and equity. The IDT is entitled to ask whether, in their view, what happened accords with notions of justice, fairness and equity. These are abstract concepts not capable of exact and precise definition. It is their view, not the court's view that matters." [Tribunal's emphasis]

32. Miss Cyrus was employed to the Company in the position of Accountant in the Finance Department with effect from July 3, 2017. The terms and conditions of her employment included an initial probationary period of six (6) months. It stated that:

"Confirmation of your employment will be subject to the satisfactory completion of a six-(6) month Probationary Period. The Company reserves the right to extend the Probationary Period, save that the total Probationary Period shall not extend beyond nine (9) months. Within one



week prior to the completion of the Probationary Period (or extended period as appropriate) the Company shall advise you in writing whether the Probationary Period has been successfully completed."

33. The Employment Contract further stated, in respect to termination, the following:

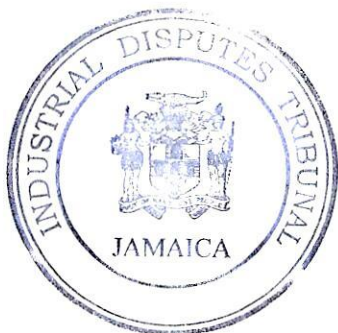
"Either party may terminate this agreement without notice during the probationary period. However, subsequent to confirmation of appointment, one (1) month's notice in writing to the Company is required in the event that you wish to terminate your services. The Company will issue (1) month's notice or one (1) month's pay in lieu of notice, in the event it becomes necessary to terminate your services other than for just cause."

34. It further noted that *"all other Terms and Conditions of Employment related to this position are outlined in the Company's Employee Policy Manual and its Code of Conduct..."*

35. The Probationary Record (**exhibit 2**) showed the first three-month review covering the period July 3 to October 27, 2017. With the exception of 'attendance' all other criteria assessment, including: **"ability to meet deadlines"** and **"quality and accuracy of work"** among others, were satisfactory. Her supervisor, Miss Sacha Romain's comments indicated that there were **"no major areas for concerns"** and that Miss Cyrus was **"progressing as expected."**

36. There was a five-month appraisal signed off by her supervisor on November 13, 2017. Miss Romain's comments, as her manager/supervisor, are noted below:

"Valrie has been in the accountant role for approximately 4 ½ months and is currently still in the probationary phase. Valrie has given a solid performance to date in the tasks that she has assumed. She has been able to build a working relationship with not only her team but also external parties such as our bankers/FSC and tax contacts etc."

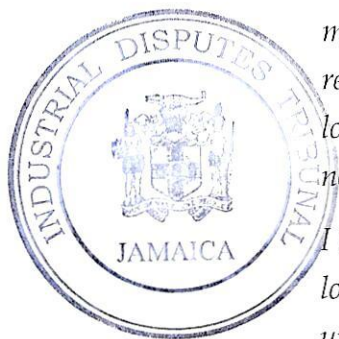


37. Miss Romain completed the annual performance review for Miss Cyrus in July 2018 in which the overall rating was "unsatisfactory". Pertinent aspects of her comments are noted below:

"Valrie has been in the Accountant position for approximately one year. The first quarter of the year is usually a challenging one for the finance department with the execution of the year end audit as well as tax and FSC...

While a fair performance was noted; there is one significant pervasive area for improvement which relates to her time management. At times poor time management was observed which resulted in the untimely submission of regulatory reports for my review; ad hoc urgent requests for reports take longer than they should and proper prioritisation of departmental duties were not always achieved..."

I believe Valrie has the ability to exceed her current performance level and I look forward to working with her over the next few months to move her rating up to satisfactory or higher."

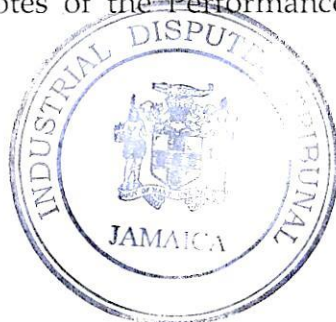


38. Arising from this, an Employee Development Plan was developed for reviews to be carried out on February 28, March 31 and May 20, 2019. The 'pervasive area' of time management was factored in the Development Plan through an assessment of the "**quality and timeliness of deliverables**", and the need for her to "**diligently attend to details and pursue quality in accomplishing tasks**". Miss Cyrus in her comments stated that "**serious efforts are made to meet productivity standards, deadline and work schedules notwithstanding the decrease in manpower in the department.**"

39. We first have to settle, on the evidence, whether this is a matter that related to 'capacity' or 'conduct'. It is clear that the time leading up to the six months' probation period, Miss Cyrus' performance was satisfactory. Indeed, her supervisor regarded her performance during the 4 ½ months review as "**solid**". The company, did in fact acknowledged, in the July 2, 2019 letter, that Miss Cyrus

received confirmation of her employment on January 8, 2018, suggesting that there were no issues of concern regarding her performance.

40. In the 2018 annual review, Miss Cyrus' supervisor highlighted the **"one significant pervasive area for improvement which relates to her time management"**, while noting an overall **"fair performance"**, but concluded in her ratings that Miss Cyrus' performance was **'unsatisfactory'**. The two statements are at best inconsistent. The 'time management' issue, it would seem, began to surface sometime between January and July 2019, and it should be noted, according to Miss Romain, that **"the first quarter of the year is usually a challenging one for the finance department..."**
41. What is more, Miss Romain's own assessment is that **"Valrie has the ability to exceed her current performance level"** and was looking forward **"to working with her... to move her ratings up to satisfactory or higher."** [*Tribunal's emphasis*]. There was no evidence put before this Tribunal to indicate that there was an extension to her probationary period beyond the first six (6) months, and no evidence of a problem with her time management (which the management deemed to be of extreme significance) during her probationary period, or even the period leading up to the annual review.
42. The decline in her performance overlaps with the period in which the Finance Department was without a senior staff member, before one was appointed in February 2019. What impact that would have had in a small department, in which the 'first quarter of the year is usually a challenging one', was never a factor for consideration by the company. That may have been the 'crucial support' the PIP needed to address, but it did not. In fact, the following extract taken from the Notes of the Performance Hearing held on July 10, 2019, is poignant -



"The chairperson then asked the Company's representative if changes in staff complement may have impacted any of the incidents presented at any particular time.

In response Ms. Babb made reference to Appendix 7 and the July 2nd letter and the fact that both documents detailed the events from Ms. Cyrus' hire date leading up to last letter received on July 2nd 2019. She further emphasized that the Company's concern was not the result of a recent or one-off event, but ongoing issues with Ms. Cyrus's performance..."

43. This response to our mind was less than forthright, and the reduction in staff complement remains a crucial factor that separates Miss Cyrus' 'satisfactory' performance from her 'unsatisfactory' performance during that 'challenging first quarter of the year' when one of two senior officers in a department of four, was no longer with the company. This would have given rise to other issues identified outside of the PIP having to do with *"not responding to emails in a timely manner or not at all"*, and *"failure to execute on instructions given."*
44. What further puts the matter beyond doubt was the unchallenged testimony of Miss Cyrus that she was sent off on 'administrative leave' from July 2 to the date of her dismissal. In effect, she was relieved of the very duties the PIP was intended to assess by way of continued performance, which by clear implications, put the issue squarely in the realm of discipline.
45. In light of the foregoing, the Tribunal has formed the view that Miss Cyrus' dismissal would have to be treated as a matter relating more to conduct than to capability.



In either circumstance, were the steps necessary to ensure a fair procedure in accordance with equity, good conscience and the substantial merits of the case observed?

46. We have reasoned that the circumstances of the case led us to conclude that Miss Cyrus' dismissal appeared to be more related to conduct. Even if we were wrong on this score, the company felt compelled to rely on a hearing procedure to determine the outcome of the case, and for this reason, relied on the tenets for a fair hearing as set out in the Labour Relations Code ("the Code"). We are therefore obliged to subject the procedures adopted by the company to the crucible of the Code.

47. In matters of a disciplinary nature, the applicable sections of the Code which an employer is expected to observe, would be to:

"(a)...

(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;

(c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;

(d) provide for a right of appeal, wherever practicable to a level of management not previously involved;

(e) be simple and rapid in operation."

48. The crucial consideration of this case is point (c), where the management clearly gave due consideration to Miss Cyrus having a representative at the hearing as stated in the July 2, hearing letter. The chairperson, Mrs. Rosemarie Henry, at the commencement of proceedings, stipulated "that the meeting will be conducted in accordance with due process", and in the same breath, noted that Miss Cyrus was without a representative. The tone was, therefore, clearly set for the matter to proceed with due regard for the observance of fair procedures and natural justice.



49. Regrettably, what transpired at the hearing betrayed all that. The evidence showed that despite Miss Cyrus' best efforts she was unable to confirm a representative for the hearing date. But her acknowledged right to be represented was sacrificed on the altar of cost and convenience. Miss Babb, at the hearing said that *"... Miss Cyrus' attendance had already been confirmed with the company and flight arrangements were already in place it was not possible to re-schedule the meeting at that time."*

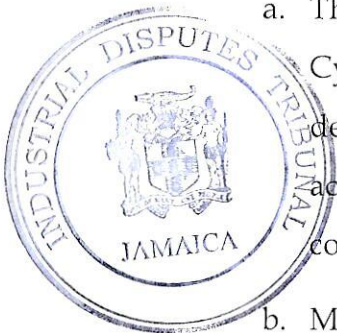
50. Miss Cyrus' future hung in the balance because her job was on the line. As she stated in her testimony, she felt that the letter of July 2 signalled an intent on the part of the management to terminate her services regardless. She was therefore desperate to have a representative, and was entitled to have one. With the greatest of respect to Miss Babb, the principles underpinning justice and fairness are not tools of convenience, for it is not wisdom, but authority that determines right from wrong, and to deny Miss Cyrus her right to have a representative of her choice was plainly wrong. The chairperson's decision to continue undoubtedly belied the inherent motivation of her earlier comments, as her claim about fairness and due process should have been demonstrated and not simply asserted.

CONCLUSION

51. The evidence, therefore, pointed us to the following conclusions:

a. That the matter before us was a complex one as regards whether Miss Cyrus' dismissal was about her performance or conduct. We have determined from the evidence, reinforced by her suspension, that the actions of the management equated to treating the matter as one of conduct.

b. Miss Cyrus' unsatisfactory performance coincided and overlapped with the absence of one of two senior staff members in the Finance Department.



When weighed against the fact that her performance was satisfactory up to that point, the management's failure to address the staff deficiency before terminating the services of Miss Cyrus was unfair.

- c. Despite the fact that the management recognised Miss Cyrus' right to be represented, and outlined at the start of the hearing that the procedures adopted would follow due process, nevertheless, abandoned these sacred principles. Knowledge without justice, as in this case, betrayed, not wisdom in the decision to continue the hearing, but convenience and indifference in not postponing it.
- d. Miss Cyrus had mitigated her loss and has been gainfully employed since December 2021.



AWARD

52. The Tribunal, therefore, acting in accordance with Section 12(5)(c)(ii) finds that the dismissal of Ms. Valrie Cyrus was unjustifiable and order the employer to compensate her in the amount of Seven Million Dollars (\$7,000,000.00).

Dated this 20 December, 2024



.....
Mr. Donald Roberts, CD, JP
Chairman

.....
Mr. Errol Beckford
Member

.....
Dr. Denese Morrison, JP
Member

Witness

.....
Mr. Mario Ling
Secretary of the Division