

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 27/2023

SETTLEMENT OF DISPUTE

BETWEEN

FIESTA JAMAICA LIMITED

(T/A GRAND PALLADIUM JAMAICA RESORT & SPA)

AND

MR. GARTH JAMES

AWARD

I.D.T. DIVISION

MR. DONALD ROBERTS, CD., JP.- CHAIRMAN

MR. ERROL BECKFORD - MEMBER

DR. DENESE MORRISON, JP. - MEMBER

OCTOBER 22, 2024

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FIESTA JAMAICA LIMITED

(T/A GRAND PALLADIUM JAMAICA RESORT & SPA)

(THE COMPANY)

AND

MR. GARTH JAMES

(AGGRIEVED WORKER)



REFERENCE

By letter dated August 28, 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 **Fiesta Jamaica Limited (t/a Grand Palladium Jamaica Resort & Spa)** ("the Hotel") and **Mr. Garth James** with the following Terms of Reference: -

"To determine and settle the dispute between Fiesta Jamaica Limited (t/a Grand Palladium Jamaica Resort & Spa) on the one hand, and Garth James on the other hand, over the termination of his 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. Gavin Goffe - Attorney-at-law
- Mr. Jovan Bowes - Attorney-at-law
- Miss Nicole Taylor - Attorney-at law
- Miss Tara Francis - Attorney-at-law



The **Aggrieved** was represented by:

- Mr. Howard Duncan - Industrial Relations Consultant

In attendance:

- Mr. Garth James - Aggrieved Worker

SUBMISSIONS AND SITTINGS

The parties submitted briefs to the Tribunal and made oral presentations over fifteen (15) sittings covering the period November 13, 2023 through to August 20, 2024. Over the course of the sittings the Tribunal examined fifteen (15) exhibits along with testimonies by way of oral evidence.

BACKGROUND TO THE DISPUTE

1. Fiesta Jamaica Limited is a limited liability company (trading under the name Grand Palladium Jamaica Resort & Spa) with its registered offices at Point Lucea, Hanover, Jamaica. It is part of an all-inclusive chain of hotels and operates as an exclusive adults-only resorts in Jamaica.
2. Mr. Garth James was employed to the Hotel in March 2015 as the Guest Relations Manager and remained in that position until his termination in June 2021.
3. On November 25, 2020, Mr. James was issued with a Notice of Suspension advising him that he would be suspended from active duty without pay the following day. The suspension arose from a report from the Hotel's Corporate Offices alleging falsification of the Hotel's records and misconduct. On the same day the notice was issued, Mr. James received a letter from the Hotel inviting him to a disciplinary hearing scheduled for December 4, 2020, to answer to the charges.
4. The disciplinary hearing was convened on December 4, chaired by an Independent Human Resource Consultant, Mr. Andrew Silburn. Mr. James was represented by Mr. Howard Duncan, Industrial Relations Consultant. Mr. Silburn found that the letter of 'suspension without pay' *"settled the matter as it relates to further disciplinary action"* and recommended the reinstatement of Mr. James with full pay. The Hotel disagreed with the recommendation.
5. As a consequence, Mr. James was sent a letter dated December 24, 2020, inviting him to attend a disciplinary hearing scheduled for December 31, 2020, to be chaired by Mr. Garfield McGhee, a trained Supreme Court Mediator. The attempts to have the hearing over a period of time did not materialise.
6. However, on March 15, 2021, an email from the Human Resource Department to Mr. James invited him to a mediation session with Mr. McGhee with a view to arriving at a mutually agreeable settlement.



7. As a result of the parties' failure to arrive at a settlement, Miss Yvonne Joy Crawford, an attorney-at-law, was asked to adjudicate on the disciplinary sanctions against Mr. James. Miss Crawford, in a letter dated June 16, 2021, to the Company on her findings found that Mr. James was guilty of the offence proffered against him and recommended his dismissal.
8. A letter from Miss Teca Whyte, People & Culture Senior Manager, to Mr. James, dated June 25, 2021, informed him of the termination of his employment on the said date and advised him of his right to appeal.
9. The appeal was heard by Mrs. Carla-Anne Harris-Roper, attorney-at-law and her decision handed down on the 19th August 2022. Mrs. Harris-Roper upheld the Hotel's decision to dismiss Mr. James. The matter was subsequently referred to the Ministry of Labour & Social Security for conciliation; however, the process failed to yield a settlement and consequently was sent to the Tribunal.

THE HOTEL'S CASE

10. Mr. Goffe reminded the Tribunal that Mr. James was a member of the management team at the Hotel, and an assessment of the Hotel's performance through feedback from guests would undoubtedly reflect on him as the Guest Relations Manager.
11. Mr. Franklin McKenzie was the Hotel's first witness, he currently serves as the Quality Manager at Grand Palladium and has been in the position for more than six (6) years. He said his functions and responsibilities cover all the standard operating procedures of the Hotel, including standards relating to guest satisfaction.
12. Mr. McKenzie testified that the Hotel's use of a 'ReviewPro' platform to assess the level of guest satisfaction at the end of their stay is a *"a very important matrix which speaks to the performance of the hotel."* He said guests are emailed a 'Post Stay Survey' for completion with the Net Promoter Score (NPS) or overall ratings ranging from 0 through 10, with 0-6 viewed as "detractors"; 7-8 "passive"; and 9-10 as "promoters".



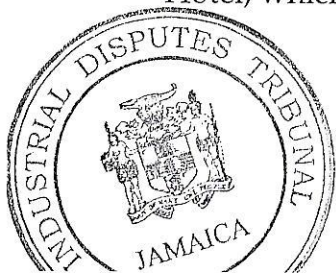
13. He said the Hotel would want more ratings in the “promoters” category, rather than the “passive” as this would boost the Hotel’s position vis-à-vis other hotels in the Americas. The NPSs would be submitted to the Hotel’s General Manager by way of a Report. He noted that while some persons, like himself, would only be able to view Clients’ comments, the General Manager and Guest Relations Manager would have unlimited access to the platform. He added that ‘access credentials’ are not to be shared with other members of staff.
14. Miss Yvonne Joy Crawford, a practising attorney-at-law for nearly 30 years, was the Hotel’s second witness. She asserted that she was asked to review all that had transpired up until June 2021 in relation to the allegations against Mr. James. This, she said, included all the materials that formed part of the hearings, and to determine whether or not the charges against Mr. James had been established, and if he could have been terminated based on the evidence as presented to her. She acknowledged receiving the bundle contained in exhibit 8 and reviewed them.
15. Miss Crawford admitted that no meetings were held as she was tasked to review the documents provided to her “*and make a determination on the next step.*” She agreed that she had no opportunity to verify whether the contents of the documents were true, but upon review of them came to the conclusion that Mr. James had “*knowingly and wilfully modified emails*” that were the subject of the dispute before the Tribunal.
16. Miss Crawford asserted that where “*Mr. James’ persistent refusal to participate in any hearing*” can be established, the Hotel had a right to proceed with the disciplinary hearing in his absence. She pointed to several correspondences contained in exhibit 8 to confirm her understanding that Mr. James refused to participate in the disciplinary hearing and that her instructions were that he did not participate in the mediation session. Miss Crawford said she was not aware of the correspondences from Mr. Howard Duncan, the representative of Mr. James, requesting a copy of the findings from the disciplinary hearing chaired by Mr. Silburn.



17. Further in her testimony, Miss Crawford pointed to the several statements from employees in response to Mr. James' own statement concerning the incident, from which she concluded was part of the investigative process, but admitted that apart from the witness statements she did not receive an investigative report.
18. The Hotel's third witness was Mrs. Carla-Anne Harris-Roper, attorney-at-law who was the independent arbitrator appointed to hear the appeal. She stated that the appeal process was to conduct "*a review of the proceedings leading up to the termination of Mr. James*", and confirmed that Mr. James and his representative participated in the appeal hearing held virtually over two days. Mrs. Harris-Roper said she had requested and received Mr. James' payslips which confirmed that he was actually paid during the period of his suspension, although she could not say when the payment was actually made.
19. Mrs. Harris-Roper said she concluded from correspondences from Mr. Duncan that Mr. James would not be attending any hearing, and confirmed that this was stated in her findings in paragraphs sixteen (16) and fifty (50).

THE AGGRIEVED WORKER'S CASE

20. Mr. Duncan argued that the Hotel had not shown that Mr. James committed an offence, and in that regard it is for the Tribunal to consider whether Mr. James had in fact been disciplined prior to the hearing and whether the principles of natural justice were breached.
21. Mr. James was called to testify on his behalf. He stated that he did not commit the offence as stated by the Hotel in the letter of November 25, 2020, which he received, and also acknowledged receiving the Notice of Suspension on the same day. He averred that prior to the charge laid against him he was not aware of any investigation conducted by the Hotel, which he argued, was in breach of section 69 of the Hotel's Disciplinary Code.



22. Mr. James was insistent that the memorandum to the General Manager, Mr. Enrico Pezzoli, dated November 21, 2020, regarding 'NPS Discrepancy Report' was not sent by him, but that he was responsible for the email to the General Manager dated November 21, 2020, which was sent at 10:30 a.m.
23. Mr. James said he attended the disciplinary hearing called by Mr. Silburn, and was invited to a second hearing on December 31, 2020, but it was postponed because his representative was not available on that date. It was Mr. James' testimony that he was told the Hotel no longer wanted to proceed with the hearing, but would wish to pursue the route of mediation, and that he was present at the mediation session. Mr. James said the Hotel did not get back to him after the mediation session and he was not invited to attend any further mediation nor disciplinary hearing.
24. Mr. James, under cross-examination said the contents of the memorandum of November 21 are not accurate, that he was not aware of any 'strategy' to interfere with the emails of guests, was not aware of anyone changing email addresses to reflect that 'strategy', and was not part of the investigation outlined in the second paragraph of the November 21 memorandum. He conceded that a number of guests were unhappy over the National Heroes Week weekend and that many of those removed from the database were in fact guests during that weekend.
25. Mr. James admitted that he accused the Villa Concierges of tampering with the email addresses as set out in the email to the General Manager of November 21, and further admitted that he shared his Prestige Access Code with staff in violation of the Hotel's policy.
26. Mr. James informed the Tribunal that the suspension left him feeling embarrassed, humiliated and depressed. He said that although he continued to reside on the property he could not go to the staff canteen to eat. He said that after his termination he was able to gain employment for just over a year at Caribbean Coffee Baristas Limited, starting in



February 2022. He said he is currently employed to the Princess Hotel and was recruited by Mr. Pezzoli, the former General Manager at Grand Palladium.

ISSUES

27. In reviewing the circumstances surrounding the case, the pertinent issues in the minds of the Tribunal that have given rise for consideration are as follows:

A. Was there established reasonable grounds on which the Hotel had probable cause to charge Mr. Garth James for gross misconduct, and if so, whether Mr. James was negligent in his duties

B. Whether there was procedural fairness on the part of the Hotel in its conduct with Mr. Garth James

A. Were there established reasonable grounds on which the Hotel had probable cause to charge Mr. Garth James for gross misconduct, and if so, whether Mr. James was negligent in his duties

28. The Tribunal is bound to carry out a full examination of the circumstances surrounding the case to ensure that the requirements of the Act in determining whether the dismissal was justifiable or not, are met. A corollary of that is an obligation to accept that every worker has the right not to be unfairly dismissed.

29. It is well known that the common law principle in dismissal cases is for the employer to show that the dismissal was fair. This principle is expounded further in Halsbury's Law of England, fourth edition, volume 16, where it states that the employer "*... must show what was the reason (or, if there is more than one, the principal reason) for the dismissal; and he must also show that it was a reason which the law regards as acceptable; and that in the circumstances, having regard to equity and the substantial merits of the case, he acted reasonable in treating it as a sufficient reason for dismissing the employee.*"

[page 413].



30. In that regard, we are obliged to begin *a priori* with what is commonly referred to as the 'Burchell Test'. This means we have to consider the reasonableness of the employer's action in dismissing Mr. James, and to satisfy ourselves that Grand Palladium genuinely believed Mr. James was guilty of misconduct; had reasonable grounds on which to base that belief; and the belief was formed only after conducting a reasonable investigation. For this we must turn to the evidence.

31. By letter dated November 25, 2020, Mr. James was invited to a disciplinary hearing to answer to the following breaches of the Hotel's Policies outlined in the letter -

(1) *"Section 55(ix) Falsification of Hotels (sic) record, including but not limited to employment applications, payroll documents, timecard, financial reports, expense claims, self-certification forms, reports, etc.*

(2) *Section 68(ii) of the Team Member's Handbook:
The Team Member is guilty of any misconduct whether or not in the performance of his duties or commits any act which in the opinion of the hotel is likely to bring the Hotel or any of the Hotel's Officers or other Team Members into disrepute whether or not such act is directly related to the affairs of the Hotel or committed on the Hotel property or outside of working hours.*

(3) *Section 54(xx) Any other reason not specified above which in the hotel's opinion merits disciplinary action."*

32. These charges emanated from a report received from the Hotel's Corporate Office on November 19, 2020, as set out in the Notice of Suspension issued to Mr. James and dated November 25, 2020, the same date as the charge letter. The heading of the Notice indicated that the suspension of Mr. James was *"pending investigation"*, and stated that he would *"be suspended from active duty without pay effective Thursday November 26, 2020."*

33. The Company led evidence to show that a very detailed analytical report was received from the Hotel's Corporate Office in Spain outlining *"email modifications"* done in respect of the guest evaluation process. The report, (tendered as exhibit 8E), stated that the email modifications were intentionally done to alter the email addresses of guests resulting in *"the e-mails being "hard bounced" and ultimately contaminating other bases*



of the company". The months of "September, October and November" were particularly identified as 'most significant' where it was observed that "*Garth James stands out in October and November with the United States and Jamaican nationalities*" as one of the persons allegedly involved in the email modification.

34. The evidence remains incontrovertible, despite Mr. Duncan's pleadings, that the Hotel had reasonable grounds on which to form the view that Mr. James had committed an offence and that the belief was formed only after an initial investigation was carried out by the Head Office.
35. The Act, it is important to state, invests the Tribunal with an original jurisdiction to investigate matters as 'finders of fact', requiring us to take a fully objective view of the case. In that regard, we are obliged to carry out a detailed examination of the material and evidence on which we can ground our opinion on whether Mr. James can be held accountable for his involvement in this matter.
36. Mr. James, as the Guest Relations Manager, had full access to the Hotel's online database system through the use of his "Prestige credentials". In a memorandum dated November 21, 2020, from "**Garth James - Guest Relations Manager**" to the General Manager, Mr. Enrico Pezzoli, which he (Mr. James) vehemently denied authoring, or having any knowledge of, the following disclosures were made as outlined below:

"In September, a meeting was held by Mr. Pezzoli to address improving our Net Promoter Score (NPS). The idea to create and install a Villa Concierge system was raised. I was asked to prepare a proposal that would outline the team's role in directly impacting the guests during their stay. This was to primarily ensure the stay as pleasant as possible and to address any issues or concerns with utmost urgency, thus improving problem resolution... The proposal outlining this strategy was prepared and submitted to our GM approximately 3 days after the meeting. The proposal was approved and the plan was executed.



Numerous meetings were held by the GM concerning the NPS and during one particular meeting a strategy was raised to have been employed by other properties to improve their NPS. One of such strategies raised included limiting/controlling survey distributions primarily to guests who we knew would provide good reviews...

Since our July reopening, the Guest Relations team member (sic) have not had independent access to Prestige. The practical nature of our business requires the presence of management to limit probable oversights in the daily operations. The Guest Relations Operations requires (sic) Prestige access for various tasks and functions that are a requisite to a successful Operation. As such, in an effort to meet the team's need for frequent access to Prestige to complete their tasks and duties, the GR Manager Garth James Prestige credentials was given to the team until their updated codes were provided..."

37. On November 21, 2020, a WhatsApp message from Mr. James to the General Manager acknowledged receiving the Head Office report regarding inconsistencies in the Hotel's guest evaluation process. He further stated in his message that based on his own investigation he found *"that the Villa Concierges were the ones tampering with the email addresses of guests."* The WhatsApp message continued -

"Given the duties of the concierge team, they were the ones closest to the guests and based on their assessments, they determined in certain circumstances that the guests would not give a positive review, hence they took this action on their own volition..."

° ° The concierges were entrusted with Mr. James' code and were distinctly given clear instructions to verify guest email addresses ONLY, to ensure all guests would receive the survey after three days.... (3 days from departure?). They among themselves created this strategy. Clearly, they took devious actions in an attempt to make themselves look good and demonstrate their effectiveness."

38. Mr. James, under cross-examination, admitted that he shared his Prestige credentials with staff and that this was in violation of the Hotel's policy. On the strength of that admittance Mr. James, as the guest relations manager, must therefore bear some responsibility for the inconsistencies evident in the guest evaluation report.



39. From our enquiry into the facts on their merits, and some obvious gaps in Mr. James' testimony, the Tribunal believes that he was not totally oblivious of what had occurred and must therefore bear some responsibility for the inconsistencies in the evaluation report.

B. Whether there was procedural fairness on the part of the Hotel in its conduct with Mr. Garth James

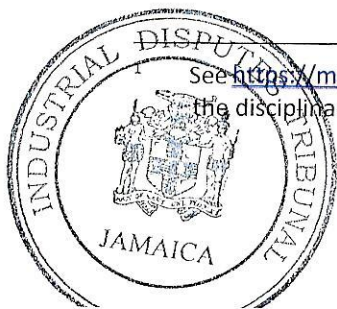
40. Before embarking upon the issue of Mr. James' suspension we want to focus on the process leading up to the disciplinary hearing of December 4, 2020, at which he along with his representative was present. The charge letter inviting him to the hearing outlined three breaches of the Hotel's policy, but did not specify *"the matter giving rise to the disciplinary action"*, a point of note raised by both Messrs Silburn and Duncan.

41. An Online Blog, 'Navigating the Disciplinary Process' by the law firm, **Myers, Fletcher & Gordon (MFG)**, articulated its own view on the matter where it noted that employers should *"set out in writing the allegation made against the employee so that they know the exact case they are required to answer. This is called "a charge letter" and it should also fix the time for a disciplinary hearing..."*¹ The Hotel was not compliant with MFG's recommendation to include the specific nature of the allegations in the charge letter to Mr. James. We do recognise that this procedure is not a *"magic formula"* and are therefore prepared to accept on the evidence that Mr. James was duly advised in advance by way of the report from the Head Office.

42. The letter also advised him of his right to representation and the opportunity to state his case. It further stated on page 2, point 4 that -

"No conclusions have been reached nor will any be reached or any decisions taken prior to your providing the Panel with an explanation for your actions or lack thereof in relation to the issues set out herein or any others that may come up

See <https://myersfletcher.com/navigating-the-disciplinary-process/>. 'What do I need to know about navigating the disciplinary process.'



during the Disciplinary Hearing. However, the charges set out herein are serious enough to warrant Disciplinary Action up to and including termination of your contract of employment. Should the outcome not be in your favor you will have the right to appeal the same." [Tribunal's emphasis].

43. We are at this juncture obliged to carry out a closer examination of the circumstances surrounding the suspension of Mr. James in order to satisfy ourselves that the threshold of procedural integrity and fair treatment were met, and that it showed a logical, consistent and fair approach by the Hotel in making its decision.
44. It must be made clear that the Tribunal, in coming to a conclusion, will be guided by the dictum of Sykes, J. in the **NCB v. Peter Jennings**'s case where he said that *"the IDT is entitled to arrive at its own conclusion where there is evidence to support it regardless of how slender that evidence is."* This we shall do, having regard to notions of fairness, justice and equity and the substantial merits of the case.
45. At the commencement of the first disciplinary proceedings Mr. Duncan complained that witness statements were received on the day of the hearing and no investigative report was provided to his client. The suspension of Mr. James was 'pending an investigation,' and at the very least the Hotel should have offered an explanation for the absence of the investigative report and recognised that it would be unfair to proceed without it.
46. Further, in a review of the Hotel's Employee Handbook, there were some factual inconsistencies relating to the Notice of Suspension and Charge Letter to Mr. James which piqued our curiosity. First, the principal offence for which Mr. James was charged, that is, the falsification of Hotel records, appeared under Section 55(ix) of the Employees' Handbook under the heading: 'Offences warranting the termination of the Contract of Employment'. In the previous Section, 54, a list of offences warranting 'disciplinary action, up to and including termination of the contract of employment' were outlined.



The letter to Mr. James, where the offence fell under section 55, was, however expressed in his letter as likely to result in disciplinary action "*up to and including termination...*", suggesting the offence could or should be under Section 54 and not 55.

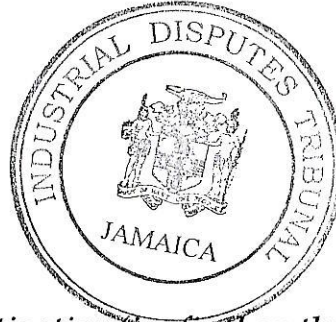
47. Second, Section 69 of the Handbook contains the Disciplinary Code, and we feel obliged to highlight important aspects of that section which were the subject of disagreements between the parties. The section states that -

"... Before commencing any disciplinary hearing all investigations should be completed and the under mentioned should be carried out by the HR Department. They should then:

- *Inform the Team Member in writing of all allegations and invite the Team Member to a hearing and provide the Team Member with all relevant documentation.*
- *Inform the staff member of the possible disciplinary sanctions*
- *-----*
- *-----*

Any sanctions that are imposed on the staff member as part of a disciplinary process must be in proportion to the breach. Sanctions can include but are not limited to:

- *Oral Warning*
- *Written Warning*
- *Final Written Warning*
- *Suspension without pay*
- *Demotion or transfer*
- *Dismissal*



Nobody can be dismissed without any investigation (i.e. fired on the spot). This is not the case regardless of how cut and dry the issue appears to be. In cases like this the staff member should be suspended with pay or without pay (depending on the issue) pending an investigation by the Hotel of the breach and a disciplinary hearing."

48. Mr. James received both the letter of suspension and the charge letter inviting him to a hearing on the same day, November 25, 2020. The Notice of Suspension, we are told, follows a standard format with the heading: 'Notice of Suspension Pending Investigation'. In this Notice Mr. James was told that he was "*suspended from active duty*

without pay" and the charges against him were enumerated in the letter (see paragraph 31 above).

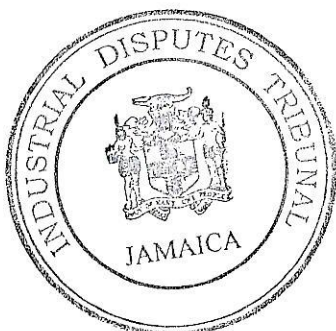
49. Because it is a format letter, little or no emphasis will be placed on the title heading, so that the focus will be on the type or classification of the suspension. The charge letter did not say which of the Hotel's policy was breached in respect of the falsification of records, but section 55(ix) turns out to be an offence contained in the Hotel's Team Members Handbook. The specific section reads:

"Falsification of Hotel records, including but not limited to employment applications, payroll documents, time cards, financial reports, expense claims, self-certification forms, reports, etc.

50. Two other charges were laid relating to sections 68 and 54 of the Handbook, but the breach in respect of section 55(ix) remains for us the principal reason for which Mr. James was charged. He was also advised in the letter to the scheduled hearing for December 4, 2020, that the sanction can either be *"suspension or termination."* Section 55 of the Handbook is however clear that the nature of this kind of offence warrants dismissal, which, therefore, leads us to conclude that the management was prepared to exercise its discretion on the matter and offer the possibility of a less severe punishment.

51. But the suspension "without pay" is, in fact, the rub, for the question is whether an investigatory suspension, being administrative in nature could reasonably be accepted as such when the initial suspension is "without pay", or that the very act of suspension "without pay" signals the intent on the part of management to be punitive.

52. On a plain reading of the highlighted sections of the Handbook, 'suspension without pay', constitutes a sanction imposed on staff members for a breach. Elsewhere in the Handbook, however, it states that it could also be seen as purely administrative, pending



an investigation. There seems to be an asymmetry of meaning and consistency between the two, with such inconsistencies, as evident in the Handbook, leading us to apply the 'law of parsimony' and to accept that the suspension of Mr. James without pay would constitute the imposition of a sanction.

53. Taking a broader view on the matter and in keeping with our focus on protecting "*workers and employers against unfair labour practices*", we note that quite often our attitudes on notions of fairness and equity- viewed for our unique vantage point as experts in the field of industrial relations - have found comports in the hallowed halls of Inner Temple and Lincoln's Inn. In making the distinction between suspensions which are punitive and those for administrative purposes, Lord Denning opined that -

"...Very often irregularities are disclosed in a government department or in a business house; and the man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending, himself, and so forth. The suspension in such a case is merely done by way of good administration. [Tribunal's emphasis]"²

54. In a 2023 ruling by the Supreme Court of Ireland³, the court ruled that -

"...a person who is being suspended must be informed of the reason for his suspension... An open-ended suspension, particularly one without pay, can only be seen as a form of punishment, and a severe one at that. In contrast, a short period of suspension with pay against a clearly defined backdrop of consecutive steps to resolve the disciplinary issue is less likely to warrant the courts' intervention on the basis that the procedures, or their application, is unfair to the person concerned." [Tribunal's emphasis]



² See Lord Denning MR in *Lewis v. Heffer* [1978] 3 All ER 354

³ The Supreme Court of Ireland's ruling on the matter of *Ray O'Sullivan v Health Service Executive* [2023] IESC 11

55. The Court further ruled with regards to remuneration and benefits –

“... in the circumstances where an employee is suspended on a precautionary basis, that employee has the right to be suspended with full pay and benefits. The converse applies in circumstances where an employee is suspended on a punitive basis. The latter means that the employee is suspended without full pay and benefits. [Tribunal’s emphasis]

56. Mr. Silburn in his report concluded that *““the suspension without pay” pending investigation letter given to Mr. Garth James has completely settled the matter as it relates to further discipline.”* His recommendation was for the reinstatement of Mr. James with full pay, or in the alternative, for the Hotel *“to enter into a dismissal settlement with Mr. James and his representative.”*

57. It is instructive to note that although the issue of ‘suspension without pay’ was raised by Mr. Duncan at the Disciplinary Hearing chaired by Mr. Silburn, the Hotel did not seize the opportunity to inform the hearing that it had reversed its previous decision, if in fact it did, and advised that Mr. James would be receiving his full pay on December 5. Neither is there evidence of any written correspondence to Mr. James, prior to receiving his salary, that he would be receiving his full pay.

58. The fact that his full pay was reflected on his December payslip is of no moment as the Hotel’s failure to address this issue at the most opportune time during the hearing, would reasonably lead to the conclusion that the ‘suspension without pay’ subsisted up to December 4.

59. The Hotel was dissatisfied with Mr. Silburn’s recommendations, or one aspect of it, and as such embarked upon another disciplinary hearing which it scheduled for December 31, 2020. We make no findings on whether Mr. Silburn’s decision not to complete the hearing was a correct one; what we do know is that within the two weeks between December 11, when Mr. Silburn submitted his report and the second hearing letter issued on December 24, neither Mr. James nor his representative was advised of the outcome of



the first disciplinary hearing or provided with a copy of the report. What is more, the Hotel was quite disingenuous in denying that there was in fact a report, and Mr. Duncan, we believe, was in his right to request a copy of it.

60. The failed attempts to convene a second hearing, based on Mr. Duncan's insistence, and rightly so, on a copy of the conclusion/recommendation in respect to the first hearing, seems to have led the Hotel to pursue the alternative offered by Mr. Silburn. The invitation to pursue a mediated settlement was set out in a message from Ms. Terrina Davis, Human Resource Assistant. A section of it reads as follows:

"Despite differences that have arisen between the parties, Grand Palladium Hotels & Resorts would like to invite you to a mediation session at the Human Resources Department on Thursday March 18, 2021 at 10 a.m. The mediation will be conducted by Mr. Garfield McGhie, a Supreme Court Mediator.

It is the view of Grand Palladium Hotels & Resorts that these differences are best settled by the parties in the spirit of good faith. The mediation session is not a hearing..."



61. Since the Hotel was not prepared to accept Mr. Silburn's recommendation of reinstatement they sought instead to pursue the alternative of a negotiated settlement. Mr. McGhie, who was first appointed as chairman of the second disciplinary hearing, reverted from an arbitrator to a mediator, but was not successful in reaching a settlement. The Hotel thereafter proceeded to treat the matter once again as a disciplinary matter, with apparently no communication to Mr. James beforehand of its intent. In effect, it converted an offer of compromise, which it initiated, to a disciplinary matter, but did not proceed as such, which was highly prejudicial to Mr. James.

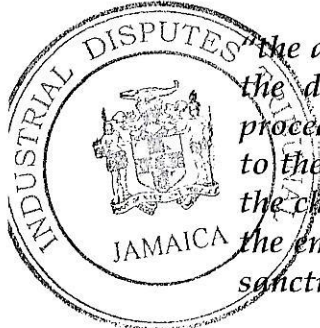
62. We should make it abundantly clear that it is certainly within the right of the Hotel to review the decision of its disciplinary panel and where it finds that the factual findings and sanctions are so inappropriate that they warrant interference, is entitled to do so. In this case they concluded that Mr. Silburn did not conduct a hearing for which he was contracted. At all times the Hotel's disciplinary code should serve as a guideline *"to protect the worker and employer against unfair labour practices,"* and while procedural

deviations may be allowed in pursuit of justice and fairness, the substance of these ideals must be maintained so that neither the Hotel nor Mr. James would be unduly prejudiced.

63. The Hotel, we believed, in overturning the recommendation of Mr. Silburn, should have given Mr. James the opportunity to hear its arguments as to why it could not agree to reinstatement. But Mr. James was deliberately kept in the dark because he knew not what recommendations were made by the chairman of the disciplinary panel.

64. In a 2015 Court decision involving South African Revenue Service v CCMA & others (C683/11) [2015] ZALCCT 14 (10 February 2015), the Labour Court in determining the right of the employer to overturn the decision of a disciplinary hearing chairman, noted that at the very least “... *the employee must be given a fair hearing regarding the possibility of altering the sanction.*” The Court further argued that –

the applicant (meaning the employer) was abrogating to itself a right to alter the decision of the disciplinary enquiry chairperson even though its own procedures only provided a right of appeal to the employee. The only avenue open to the employer in the case under consideration was a review of the decision of the chairperson, which it did not make use of. The employer did not explain to the employee why it disagreed with the sanction or why it believed a stronger sanction should be imposed, despite the employee asking for such detail.”



65. This was not the case involving Mr. James. The Hotel failed to demonstrate what exceptional circumstances existed which entitled them to disregard one aspect of the recommendation, namely, the recommendation to reinstate.

66. Mr. James' services were terminated on June 25, 2021, six months after the allegations of misconduct were levelled against him. In the letter of termination it was stated in the first paragraph that the attempt at a settlement proposal was unsuccessful “*and that the matter would return to the disciplinary hearing.*” This was as a result of failed attempts to convene a second disciplinary hearing because of the refusal of Mr. James and his representative to attend. Whatever may have been the reason for Mr. Duncan's refusal to have his client participate in the disciplinary hearing, cannot trump the Hotel's right to

proceed with a hearing in the absence of Mr. James if he refuses or fails to attend or participate in the hearing without good cause.

67. The letter of termination further stated that –

“We then retained the services of Ms Yvonne Joy Crawford to consider all the material and determine whether the disciplinary charges had been made out. She was supplied with all relevant material in our possession, including statements collected during the investigation and your own responses to the allegations. Ms Crawford has now issued her report as per the attachment in which she has found that the charges were substantiated. She has recommended your dismissal and the company has accepted that recommendation.

We hereby formally terminate your employment contract effective today June 25, 2021...”

68. In her evidence Miss Crawford said that she was asked by the Hotel to review all the materials up to June 2021 in respect of the disciplinary hearing and to determine whether or not the charges had been determined. She said she was not asked to conduct a hearing, only to review the documents presented to her, and therefore no invitation was sent to Mr. James to attend, certainly depriving him of the right to be heard and to be accompanied by his representative. *“The fundamental pinnacle of a right to a fair hearing”, as Carr, J. opined, “is that all sides must be heard.”*

69. This matter of procedural fairness was addressed by the authors in the scholarly work on **Commonwealth Caribbean: Employment and Labour Law**, the authors noted that *“... at the basic intrinsic level of common law fairness, the concepts of natural justice, due process and particularly...a fair hearing...”* were crucial⁵. These are provided for by the Labour Relations Code, and despite the fact that the Hotel said it *“would return to the disciplinary hearing”* this did not happen.

⁴ See Island (Jamaica) Limited and Industrial Disputes Tribunal [2022] JMSC Civ. 172, page 10

⁵ See Natalie Corthesy & Carla-Anne Harris-Roper, [2014] **Commonwealth Caribbean: Employment and Labour Law**, New York, page 227



70. It is pellucid and beyond peradventure that the provisions of the Code were not complied with.
71. What is more, the subject-matter in Miss Crawford's June 16, 2021 letter/report to Grand Palladium, to our mind, further compounds the issue as it betrays a completely different purpose than that expressed. The letter bore the title: Adjudication - Disciplinary Sanction against Mr. Garth James, Guest Relations Manager, giving the distinct impression that her adjudication was merely to impose disciplinary sanctions against Mr. James and not - as she testified under cross examination - to determine "*what should be the outcome if any*" from her review of the document.
72. The Report from the Appeal Hearing conducted by Mrs. Carla-Anne Harris-Roper, attorney-at-law, and dated August 19, 2022, in striking down the first grounds of appeal, supported the view that a hearing should be held. The grounds of appeal stated that -

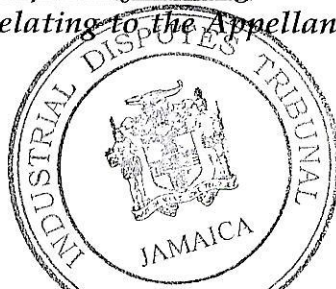
"There was no need for another disciplinary hearing to be conducted by Miss Yvonne Joy Crawford, attorney-at-law, as a disciplinary hearing was already held by Mr. Andrew R. Silburn and a recommendation was made by Mr. Silburn for the Appellant's reinstatement."

73. Counsel, in her Report, however, argued that -

"... in the context of the present case, as the substantive matter had not been explored in the first "proceedings" presided over by Mr. Silburn, I form the view that in fact there was no substantive disciplinary hearing held in the first instance. Hence Miss Crawford's jurisdiction to hear the matter was in fact quite permissible. Her inquiry could not therefore be considered as being a "new" hearing but was simply a continuation of the ongoing disciplinary process which had not at that point been concluded."

She concluded in her findings as such -

"The Appeal Chairperson therefore finds that in the context of the present case, the Company could have held a disciplinary hearing under the auspices of Miss Crawford to properly ventilate the issues relating to the Appellant's alleged misconduct." [page 6].
[Tribunal's emphasis]

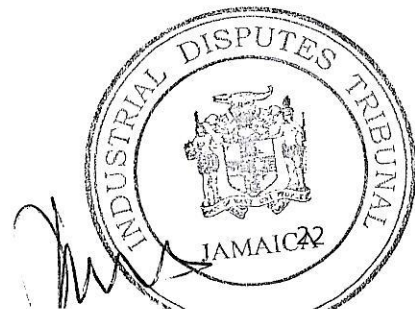


74. On all accounts the general duty to act fairly was not complied with, and the defects could not have been cured by Miss Yvonne Joy Crawford's intervention, nor the appeal process conducted by Mrs. Carla-Anne Harris-Roper. The proceedings over which Miss Crawford presided was a nullity.

CONCLUSION

75. Based on the evidence, and an enquiry into the overall substance and procedures surrounding the dismissal, we have concluded that the termination of Mr. James was unjustifiable. The findings from the evidence are summarised below:

- a. Having regard to the circumstances of the case, the suspension of Mr. James without pay constituted a disciplinary sanction, as the Hotel, at the material time, failed to advise the Disciplinary Hearing Chairman that it intends to pay Mr. James and therefore the 'suspension with pay' would have subsisted at the time of the first hearing.
- b. The Hotel failed to provide Mr. James with a copy of the first hearing report, did not inform him that it would not be accepting the recommendation to reinstate, and did not give him an opportunity to enquire upon that decision.
- c. Counsel argued that Mr. Silburn did not fulfil the task for which he was contracted and that the disciplinary hearing was not actually conducted. However, the Hotel's dismissal of Mr. James on the recommendation of Miss Crawford was a fatal breach of the rules of natural justice and the provisions of the Code as Miss Crawford did not conduct a hearing in accordance with due process, and was not asked to do so.
- d. Mrs. Harris-Roper, in her findings from the Appeal Hearing, concluded that "*the Company could have held a disciplinary hearing under the auspices of Ms. Crawford to properly ventilate the issues...*" relating to Mr. James. It did not, depriving Mr. James of his right to be treated fairly.



- e. The Hotel had reasonable grounds on which to proffer the charges against Mr. James, and on a balance of probabilities established a degree of culpability on his part.
- f. Mr. James took steps to mitigate his loss.

AWARD

76. Consequent on its findings that the dismissal of Mr. Garth James was unjustifiable, the Tribunal, in accordance with Section 12(5)(c) of the Act, hereby makes the following award.

- That Mr. Garth James be paid the amount of Two Million Eight Hundred Thousand Dollars (\$2,800,000.00) as compensation for his unjustifiable dismissal.

DATED THIS 22 DAY OF OCTOBER, 2024.



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

.....
Mr. Errol Beckford
Member

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

Witness:

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