

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT 16/2013

SETTLEMENT OF DISPUTE

BETWEEN

KEY MOTORS LIMITED

AND

MR. DAMION SMITH

AND THE

AWARD

I.D.T. DIVISION

MR. NORMAN WRIGHT, Q.C.	-	CHAIRMAN
MR. RION HALL, J.P.	-	MEMBER
MR. D. TREVOR MCNISH	-	MEMBER

AUGUST 26, 2015

IDT 16/2013

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**KEY MOTORS LIMITED
(THE COMPANY)**

AND

MR. DAMION SMITH

(THE DISMISSED WORKER)

REFERENCE:

By letter dated May 8, 2013, the Honourable Minister of Labour and Social Security in accordance with Section 11A (1)(a)(i) of the Labour Relations and Industrial Disputes Act referred to the Industrial Disputes Tribunal for settlement, in accordance with the following Terms of Reference, the industrial dispute described therein:-

The Terms of Reference were as follows:

“To determine and settle the dispute between Key Motors Limited on the one hand and Mr. Damion Smith on the other hand, over the termination of his employment.”

DIVISION:

The Division of the Tribunal which was selected in accordance with Section 8(2)(c) of the Act and which dealt with the matter comprised:

- Mr. Norman Wright, Q.C. - Chairman
- Mr. Rion Hall, J.P. - Member, Section 8(2) (c) (ii)
- Mr. D. Trevor McNish - Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF THE PARTIES:

The **Company** was represented by:

- Mr. Abe Dabdoub - Attorney-at-Law
- Mr. Desmond Panton - Managing Director
- Ms. Marie Longmore - Administrative Assistant

The **Aggrieved worker** was represented by:

- Mr. Courtney Smith - Attorney-at-Law

In attendance was:

- Mr. Damion Smith - the Aggrieved Worker

SUBMISSIONS AND SITTINGS:

Briefs were submitted by both parties and oral submissions made during eight (8) sittings held from July 31, 2013 to July 20, 2015.

BACKGROUND:

Key Motors Limited (hereinafter referred to as 'the Company') is a registered company under the Laws of Jamaica, with its registered office located at 29 Hagley Park Road, Kingston 10. The core functions of the business are the sale and servicing of motor vehicles and the operation of a car dealership in the island of Jamaica. Damion Smith was employed to the Company on February 9, 2011 in the position of Service Advisor.

By letter dated February 14, 2012, his service was terminated after he had delivered a repaired motor vehicle to a customer. The reason set out in the letter of termination of his service is:

'As a result of your repeated failure to comply with the directives, rules and regulations of the Company as stipulated by the Managing Director.'

Attempts to have the matter settled amicably at the Ministry of Labour failed, thus the reference of a dispute to the Industrial Disputes Tribunal to be determined and settled.

THE COMPANY'S CASE:

The Company called one witness in the form of Mr. Desmond Panton, in support of its case. The Company submitted that before Damion Smith was employed, the Company had introduced a policy that no customer is to be given credit in respect of repairs to motor vehicles unless approved by the Managing Director, Mr. Desmond Panton or the Chief Accountant, Mrs. Eng. This policy was subsequently formalized in writing and issued to relevant officers of the Company, including Damion Smith.

On February 15, 2012, it was discovered that, contrary to Company policy as communicated to the relevant officers, including Mr. Damion Smith, the said Mr. Damion Smith had released, without the required permission of the designated officers, a Hyundai Tuscon motor vehicle belonging to a customer, without receiving the required payment from the customer's insurance company.

Upon learning of the alleged matter, Mr. Damion Smith was summoned to the Managing Director's office and given a hearing in which he was asked if he had released the car without:

- (i) ensuring payment of the repairs and
- (ii) authorization to do so from the Managing Director or Chief Accountant?

The Company contended that it is significant that during the hearing in Mr. Panton's office, Damion Smith:

- (i) confirmed that he knew of the Company's policy that there should be no credit without the approval of the Managing Director or the Chief Accountant.
- (ii) admitted that he delivered the car.
- (iii) admitted that the repairs were not paid for.
- (iv) stated he did not seek the approval of either Mr. Panton or Ms. Eng but instead released the vehicle on the instructions of Mr. Granville Smith.

The Company contended that based on Damion Smith's answer under oath to the Chairman's question regarding the instructions he received in relation to the vehicle:

"Well, he called me and said 'Mr. Smith, Mr. Dwyer is coming to collect his vehicle, get it ready so he can have it when him come...'"

It is clear that Mr. Granville Smith's instruction was merely to prepare the vehicle for delivery and not an instruction to deliver the vehicle prior to the payment for the repairs.

It is also significant that at the hearing in Mr. Panton's office, Mr. Damion Smith could have, but did not request that Mr. Granville Smith be called in support of his statements. Mr. Granville Smith was not called as a witness at the Tribunal. Mr. Panton, in evidence, further stated that:

- (i) based on his recollection, he has had to speak to Mr. Smith for breaching the company's policy, a minimum of three times prior.
- (ii) he summoned Mr. Smith to his office and afforded him a hearing in which he was asked whether he authorized the release of the vehicle to the customer without the receiving of payment and the reasons why he did so.
- (iii) Mr. Smith's first response was that the customer became boisterous, nagging him in a threatening way and he decided to give him the car, really to get him out of the place.
- (iv) Mr. Smith insisted that he should have a discretion as to whether he should release a vehicle or not.

Further, that under examination in chief and under cross-examination it was clearly established that Mr. Smith was given the opportunity to defend his action in light of the fact that his dismissal resulted from his assertion that he had discretion to release a vehicle before the repairs were paid for.

It is the Company's submission, that the outcome of the case turns more on the question of fact rather than on a question of law and further that based on the abovementioned, the facts are preponderously in its favour and requests that the Tribunal find that the Company was justified in dismissing Damion Smith and should dismiss the complaint that he was unjustifiably dismissed.

THE AGGRIEVED WORKER'S CASE:

The Attorney representing Mr. Damion Smith, called him as a witness in support of his case. It is the aggrieved worker's evidence that on February 14, 2012, he received a telephone call from his supervisor Mr. Granville Smith, instructing him to prepare a motor vehicle for delivery to a customer.

Mr. Smith testified that the customer came for the said vehicle and upon presentation of a payment receipt from the Company's accounts department for an amount consistent and in accordance with an undertaking contained in a letter from an insurance company, the vehicle was delivered.

As a result of the vehicle being delivered to the customer, he was called to Mr. Panton's office, where a brief conversation on the matter took place during which he informed Mr. Panton that:

- The supervisor had given him instructions to deliver the vehicle to the customer.
- There was a commitment letter from the insurance company and the customer had paid his portion of the cost.

At the end of the meeting, he was informed that he would be dismissed. After the expiration

of about ten to fifteen minutes, he received a letter of dismissal, handed to him by his supervisor, Granville Smith to which he responded "*I got dismissed for following your orders*", and Mr. Granville Smith responded that he "*...didn't know it was company policy.*"

It is Mr. Smith's contention that the Company's action in dismissing him, in the manner that it did, was devoid of a number of fundamental procedural obligations which accordingly render his dismissal unreasonable, unfair and unjustifiable.

Further:

- The Company did not, prior to dismissing him, conduct a reasonable inquiry into the allegations that he granted unauthorized credit to one of its customers. The resulting dismissal is therefore unfair and cannot be allowed to stand.
- The Company did not dismiss him for just cause nor did it dismiss him in accordance with procedure set out in Paragraph 22 of the Labour Relations Code. The effect is that its decision to dismiss him is procedurally unfair and should now be overturned.
- He was dismissed by the Company in a manner that did not recognize and/or respect his right to natural justice prior to dismissal, to be formally informed of the charges against him and to be permitted to confront his accuser(s), to answer to the charges against him, to call witnesses, and to be represented at a hearing.

It is Mr. Smith's submission that it took him approximately three years from the date of dismissal to complete training as a teacher and acquire alternative employment. Mr. Smith prays for an award which is commensurate with the time it took him to complete his training as a teacher and acquire alternative employment.

THE TRIBUNAL'S RESPONSE:

The Tribunal is grateful to counsel on both sides for the submissions, both verbal and written, by Mr. Abe Dabdoub on behalf of the Company and Mr. Courtney B. Smith, on behalf of the Aggrieved Worker, all of which assisted the Tribunal greatly in coming to its conclusion in this matter.

It is clear from the submissions, that this dispute should be considered in light of the Disciplinary Procedures contained in the Labour Relations Code, and in particular with reference to Paragraph 22 of the said Code and the extent to which the requirements of this section were complied with by the parties.

Paragraph 22 (i) of Labour Relations Code 1976, outlines in relation to Disciplinary Procedures that it should:

- “(a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;*
- (b) indicate that the matter giving rise to disciplinary action be clearly specified and communicated in writing to the relevant authority;*
- (c) giving the worker the opportunity the right to state his case and the right to be accompanied by his representatives;*
- (d) provides for a right of appeal wherever practicable to a level of management not previously involved...”*

It was submitted ^{on} of the behalf of the aggrieved worker that his right to natural justice was not recognized when the company dismissed him in the manner it did. Natural justice is based on the two principles namely: *nemo iudex in causa sua* (the rule against bias) and *audi alteram partem* (the right to a fair hearing).

The rules against bias, within the context of labour relations, embodies the concept of impartiality and prevents an employer from deciding any disciplinary matter in which he or she maybe, or may fairly be suspected to be, biased. Fundamentally, the right to a fair

hearing incorporates a fair procedure in which both sides should be heard. The right to a fair hearing requires that individuals are not penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the allegations against them, a fair opportunity to answer them, and the opportunity to present their own cases.

The procedure pursued by Mr. Panton in accordance with his sworn testimony, as set out in Paragraph 5A-M of the closing submissions on behalf of the Company, makes it quite clear that Mr. Panton was acting as judge, jury and executioner, when, having called Mr. Smith to his office and after addressing a number of questions to him, took the decision that Mr. Damion Smith should be “dismissed.” This represents a clear breach of the rule against bias.

The Tribunal further notes that without being afforded the right to any form of representation, the right of an appeal or the opportunity to call any of his fellow workers (e.g.) Mr. Granville Smith, in support of his version of the events leading to the delivery of the vehicle to its owner, on completion of the repairs, Mr. Smith’s right to a fair hearing was similarly breached. The process followed by Mr. Panton was very strongly reminiscent of the approaches which were generally followed and adhered to, prior to the coming into existence of the Labour Relations and Industrial Disputes Act 1975, and the Code made thereunder.

The written submissions of Mr. Courtney Smith, attorney for the dismissed employee, contained a passage taken from Calvin Cameron v Security Administrators Ltd [2013] JMSC Civ 95: which the Tribunal finds to be of great assistance and which, pages 25 and 26 thereof states:-

*“ A **fair hearing** must necessitate giving the party against whom the allegations are made, a **reasonable opportunity to respond** to those allegations, including if necessary, the **affording to him or her of the opportunity to consult perhaps with an attorney, or any other appropriate person and also, in most cases, to afford the person whose conduct is being impugned, sufficient time, within which to formulate an appropriate***

response. In most cases, where such a procedure is not followed, a court may very well conclude that the relevant employee's dismissal from employment was unfair, this even though the particular allegations against that employee are such that they can and would likely easily be proven, perhaps even, beyond all doubt." (Emphasis of the IDT)

Counsel for the Company, Mr. Dabdoub, entered into evidence Inter- Office Memo dated August 11, 2011 outlining the no credit policy. The Tribunal noted that the addressees did not include Mr. Granville Smith and without the calling of this employee, as a witness, the Tribunal is unable to verify the correctness or truthfulness of the statement that Mr. Granville Smith *'was not aware of the policy.'*

The Tribunal further accepts the evidence of Damion Smith, that he acted on the instruction of his Supervisor to deliver the vehicle to the customer. It is a well established principle in the field of labour relations, that an employee complying with the reasonable and legitimate instructions of his supervisor cannot be guilty of any misconduct arising therefrom.

It follows from the above, that the Tribunal has no alternative but to come to the conclusion that Mr. Damion Smith was unjustifiably dismissed in light of all the considerations set forth above, and in disregard of the principles of Natural Justice and further, the procedures outlined in the Labour Relations Code, in particular Paragraph **22** thereof.

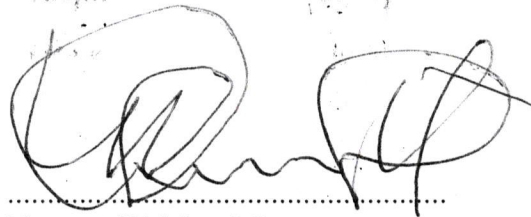
In light of the above, the Award of the Tribunal is as follows:

AWARD

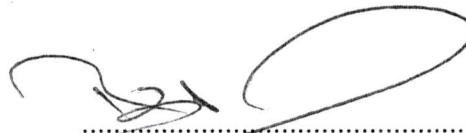
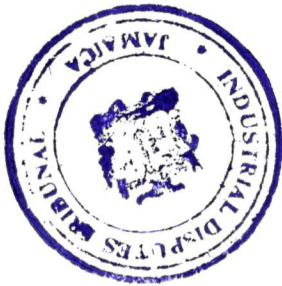
THE TRIBUNAL HEREBY ORDERS in accordance with the provisions of Section 12(5) (c) (ii) of the Labour Relations and Industrial Disputes Act (LRIDA) that the Company:

Pay COMPENSATION in the amount of one hundred and four (104) weeks basic wage to said employee, Damion Smith.

DATED THIS 26th DAY OF AUGUST 2015.



Norman Wright, QC.
Chairman.



Rion B. Hall
Member.



D. Trevor McNish
Member.

Witness:



Deidre Hector
Secretary to the Division.