

INDUSTRIAL DISPUTES TRIBUNAL
Dispute No: IDT 34/2023

SETTLEMENT OF DISPUTE

BETWEEN

KMS JAMAICA LIMITED
(T/A AZUL BEACH RESORT)

AND

MR. TREVIS PESSOA

AWARD

I.D.T. DIVISION

MR. DONALD ROBERTS, C.D., J.P.-	CHAIRMAN
MR. ERROL BECKFORD	- MEMBER
DR. DENESE MORRISON, J.P.	- MEMBER

JUNE 3 , 2025

DISPUTE NO. IDT 34/2023

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**KMS JAMAICA LIMITED
(T/A AZUL BEACH RESORT)**

AND

**MR. TREVIS PESSOA
(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 **KMS Jamaica Limited (t/a Azul Beach Resort)** and **Mr. Trevis Pessoa** with the following Terms of Reference: -

“To determine and settle the dispute between KMS Jamaica Limited (t/a Azul Beach Resort) on the one hand, and Mr. Trevis Pessoa 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 hear the dispute comprised:

Mr. Donald Roberts, C.D., J.P.	-	Chairman
Mr. Errol Beckford	-	Member, Section 8(2)(c)(ii)
Dr. Denese Morrison, J.P.	-	Member, Section 8(2)(c)(iii)

REPRESENTATIVES OF THE PARTIES

The **Company** was represented by:

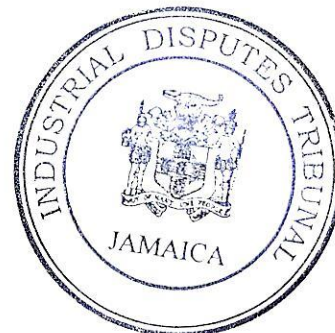
Mr. Matthew Royal	-	Attorney-at-law
Ms. Nicole Taylor	-	Attorney-at-law

The **Aggrieved** was represented by:

Mr. Robert Moore	-	Attorney-at-law
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In attendance:

Mr. Travis Pessoa	-	Aggrieved worker
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SUBMISSIONS AND SITTINGS

The parties submitted Briefs to the Tribunal prior to the commencement of the sitting.

The Tribunal held twelve (12) sittings between March 18, 2024 and April 22, 2025, and reviewed nine (9) exhibits as well as heard oral presentations from both sides.

BACKGROUND TO THE DISPUTE

1. KMS Jamaica Limited, operates under the brand name Azul Beach Resort (*hereinafter called the “Hotel”*), in the tourism and hospitality industry. It is located in Negril and has its registered offices at 1 Seaview Avenue, Kingston, St. Andrew. Mr. Trevis Pessoa was employed to the Hotel as a Waiter in the Food and Beverage Department.
2. On January 30, 2019, Mr. Pessoa was seen by the Chef, Mr. Magdiel Morales, washing dinner wares in the Palms Restaurant at a station specifically reserved for preparing raw meat. This was in clear violation of the Hotel’s health and safety policy of the Food and Beverage Department.
3. Mr. Morales confronted Mr. Pessoa about breaching the Hotel’s policy and his response was deemed to be ‘disrespectful’ and ‘insubordinate.’ Mr. Pessoa was charged for the offence and invited to a disciplinary hearing. The result of the disciplinary hearing was the termination of the services of Mr. Pessoa. An appeal was lodged but the decision was upheld. The matter was referred to the Ministry of

Labour and Social Security, however, the attempt at conciliation failed and the Minister referred the dispute to the Industrial Disputes Tribunal for settlement.

THE COMPANY'S CASE

4. Counsel told the Tribunal that Mr. Pessoa was accused by Mr. Morales, the Hotel's Chef of insubordination and failure to follow standard procedures for which he was charged and placed on "*administrative suspension*" pending the hearing. He said that the Tribunal should consider the offence "*a serious one*" as Mr. Pessoa's action was a flagrant violation of health and safety protocol which puts the guests "*at immediate health risk.*" "*To rub salt into the wound*", Counsel said that Mr. Pessoa's responded to the reprimand in an insubordinate manner.
5. The Hotel's sole witness was Miss Stacey-Ann Mitchell, the Staff Manager at the Azul Beach Resort, a position she has held since 2023. As the Staff Manager her duties would include overseeing all aspects of employee relations, staff benefits, employee engagement and training.
6. Miss Mitchell said that from her examination of the Hotel's records she was made aware of the incident with the Head Chef which led to Mr. Pessoa's termination. She said the records show that Mr. Pessoa was washing glass wares in an area reserved for "prepping", that is, the handling of vegetables and raw meat.
7. Miss Mitchell testified that a report was made by Mr. Morales which would have prompted an investigation after which Mr. Pessoa was issued a charge letter and provided with copies of the evidence supporting the charges prior to the commencement of the hearing.
8. Miss Mitchell averred to KMS's Handbook with the Disciplinary Code and Grievance Procedure, which would have been brought to the attention of the staff during a process of onboarding. She admitted that she could not speak to the incident involving Mr. Pessoa as she was not employed to KMS at the time of the incident, but can only make reference to the documents on the file outlining the incident.



9. Further in her testimony, Miss Mitchell stated that she could not confirm whether Mr. Carlos Flores, the Head of Department, had verbally warned Mr. Pessoa about the incident of insubordination on or about January 30, 2019. She conceded, under cross examination, that she could not confirm whether an investigation was conducted, that there is no record of the report from the investigation provided to Mr. Pessoa, and could not identify the specific nature of the behaviour deemed to be “disrespectful” from the charge letter.
10. She further acknowledged that she was familiar with the Labour Relations Code, and agreed that the details of the charges against Mr. Pessoa should have been clearly set out, and believed he should have had an opportunity to face his accuser.
11. Miss Mitchell conceded that Miss Tameka Elliott, who was the then Senior Human Resources Manager, chaired the disciplinary hearing and signed the letter of termination. She said she cannot accept that exhibit 8 represented disciplinary action against Mr. Pessoa as there was no notation in either of the columns - ‘First Warning’, ‘Second Warning’ or ‘Final Warning,’ to so indicate.

THE AGGRIEVED WORKER’S CASE

12. Mr. Pessoa was called to testify on his own behalf. He said he was employed as a Waiter at the Hotel in November 2017. As it relates to the incident on January 30, 2019, Mr. Pessoa said he was suspended with pay and was not aware of any investigation being conducted by the Hotel. He said he met with his Manager, Mr. Flores regarding the matter and was given a verbal warning.
13. He admitted under cross examination that it was not the practice to wash the dinner wares in the area provided for “prepping” of raw vegetables and meat. He said he concurred with the process outlined by Mr. Vidal at the February 7, 2019, disciplinary hearing for washing glasses and dinner wares [*see exhibit 4, page 2*], and agreed that to wash the dishes in the area designated for handling raw meat was “*a serious breach.*”



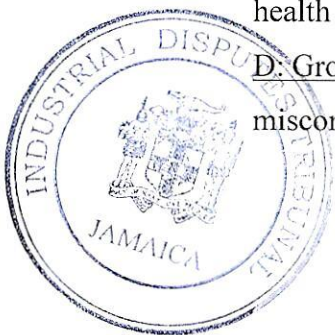
14. Mr. Pessoa admitted that Mr. Morales was in charge of the kitchen at the time of the incident, but was not sure if his comment to Mr. Morales that he (Mr. Morales) is not his boss was insubordinate.
15. Mr. Pessoa disagreed with the assertion that the termination was the only sanction instituted against him for the incident, but confessed that the only correspondence he received was the letter of termination dated February 7, 2019, from Miss Elliott. He confirmed that in the letter of termination he was advised of his right to appeal the dismissal.

ISSUES

16. The Tribunal has determined the following matters for consideration:
 - (a) Whether the Hotel had sufficient cause to institute disciplinary proceedings against Mr. Pessoa arising from an incident which occurred on January 30, 2019;
 - (b) Whether the process leading to the termination of Mr. Pessoa was just and fair in all the circumstances and carried out in conformity with the Labour Relations Code and good industrial relations practices.

A. Whether the Hotel had sufficient cause to institute disciplinary proceedings against Mr. Pessoa arising from an incident which occurred on January 30, 2019.

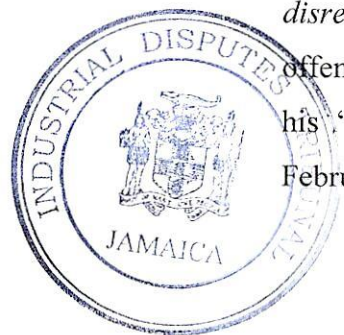
17. On January 30, 2019, Mr. Pessoa was observed by Mr. Magdiel Morales, the Head Chef, washing dinner glasses and silverwares in a station reserved exclusively for preparing raw meat. Mr. Morales took photographs of Mr. Pessoa, which were tendered as exhibits 1a, 1b and 1c. Mr. Morales approached Mr. Pessoa about his action and it is reported his response was “*you are not my boss, and I don’t work for you.*”
18. Mr. Pessoa’s action was said to be in clear breach of the Hotel’s policy regarding health and safety. The Hotel’s Disciplinary Code and Grievance Procedures, Section D: Gross Misconducts, outline twenty-nine (29) offences which it classifies as “gross misconduct”, and would “*result in the termination of employment for the first*



offence"; included among them is "**gross failure to observe safety rules.**" Section E of the Code and Procedures speaks definitively to "breach of safety, quality or cleanliness standards", stating that –

"The company has certain safety quality and cleanliness standards which cannot be compromised. Any employee that breaches safety or compromises quality or standards shall be disciplined consistent with the disciplinary code"

19. The disciplinary code, #6 makes reference to "**breach of safety, quality or cleanliness standards**", which would result in a three (3) days suspension for a first offence. Under the Code #20 is a "**failure to adhere to safety rules and regulations**", potentially an offence under which Mr. Pessoa's action could fall, and for which the first offence would result in seven (7) days' suspension.
20. Mr. Pessoa was issued a 'Disciplinary Action Form' dated January 31, 2019, which referenced "disciplinary action" taken against him. The form had: "date of the disciplinary action", as the 30th January, 2019; the "reason for Disciplinary Action" as – "**Insubordination towards the Executive Chef and failure to follow standard operating procedure.**" The form was signed by the Head of Department and Mr. Pessoa, along with a witness, Colleen Graham. Miss Mitchell, the Hotel's sole witness, said that although "disciplinary action" is used throughout the notice the absence of some indication as to whether this was the: 'first warning', 'second warning' or 'final warning' to her mind, would not constitute disciplinary action.
21. The notice to Mr. Pessoa mentioned two offences: the first is the "*insubordination towards the Executive Chef*" and the second is the "*failure to follow standard operating procedure*", which we believe had to do with the washing of the dinner wares and glasses in the station reserved for the handling of raw meat. The charge letter dated February 4, 2019, however, mentioned only the offence towards Mr. Morales, the Executive Chef, where it was reported that Mr. Pessoa "*displayed disrespectful behaviour to senior personnel*" without specifying the nature of the offence committed. It was for this offence that Mr. Pessoa was charged, and not for his 'failure to follow standard operating procedure'. The charge letter, dated February 4, 2019, stated as follows:



"Dear Mr. Pessoa:

*We are in receipt of a report of a disciplinary offence, where it is alleged that you displayed disrespectful behaviour to senior personnel. After careful examination we have taken the decision to suspend your services with pay pending investigations effective today and, to host a disciplinary hearing in accordance with the provisions of the **Grievance Procedures in the Labour Relation Code, 1976.***

Based on the alleged (sic) you are in breach of the following:

Pg. 23. Item 13

- Discourtesy to client/disrespectful or unaccepted speech or behaviour towards client, subordinates or senior personnel.

The disciplinary hearing will be held on Thursday, February 7, 2019 at 1:00pm in the Human capital Office.

The purpose of the disciplinary meeting is to formally put the allegations of misconduct to you so that the company can establish whether or not the allegation is well founded and, if so, can decide on the appropriate sanction. You will be given the opportunity to respond to the allegations and put your case forward.

You have the right to be accompanied at the hearing by a fellow Team Member or representative. Should you wish and we recommend that you exercise this right, please let us know the name of your representative in advance. You are responsible to ensuring that your chosen representative is aware of the date, time and location of the disciplinary hearing.

If you have any concerns in attending the hearing at the date and time specified please notify us of the concern as soon as possible.

Yours sincerely

*Kemneisha McIntosh-Barrett
Human Capital Officer"*



A handwritten signature in black ink, appearing to be "KMB", written over the bottom of the stamp.

22. Mr. Morales obviously reported the incident to Human Resources which the Disciplinary Action Form would have captured as two separate but inter-related offences, and which would have led to the belief that Mr. Pessoa had allegedly committed an act of misconduct so serious as to warrant his suspension pending an investigation. Needless to say, at the point of the charge letter, the Tribunal is obliged to focus solely on the single stated charge of 'discourteous' or 'disrespectful behaviour' and to disregard any consideration relating to Mr. Pessoa's breach of the safety and health standards.
23. We are therefore satisfied on the evidence, that reasonable grounds existed for the Hotel to have instituted an investigation on the basis of the report received from Mr. Morales, and exercised its prerogative to suspend Mr. Pessoa pending an investigation. We are inclined to accept Miss Mitchell's testimony that despite the title of the form as '**Disciplinary Action**', there is no indication of the nature of the action taken and Mr. Pessoa's contention that he was verbally suspended by his Manager remains doubtful in our mind.

B. Whether the process leading to the termination of Mr. Pessoa was just and fair in all the circumstances and carried out in conformity with the Labour Relations Code and good industrial relations practices.

24. In the charge letter of February 4, 2019, the Hotel said that it had "*taken the decision to suspend your [Mr. Pessoa's] services with pay pending investigations effective today and, to host a disciplinary hearing in accordance with the provisions of the Grievance Procedures in the Labour Relations Code, 1976.*" [Tribunal's emphasis]
25. Part VI, Paragraph 21 of the Code states in respect of 'individual grievance procedure' the following:



"All workers have a right to seek redress for grievances relating to their employment, and management in consultation with workers or their representatives should establish and publicise arrangements for the settling of such grievances. The number of stages and the time allotted between stages will depend on the individual establishment. They should neither be too numerous nor too long if they are to avoid frustration..."

26. The term '**grievance**' has received broad approvals from scholars, policymakers, industrial relations and human resource management practitioners. It is seen as *"primarily an employee mechanism... initiated by employees to express and resolve their dissatisfaction."*¹ A grievance arises where an *"employee may also have cause to complain about the managerial interpretation of organizational rules, particularly if they feel they have been treated unfairly... Therefore the grievance procedures are designed to offer a formal means of resolving a dispute that arises when an individual employee has a complaint regarding their treatment at work."*² As a noted US Scholar³ puts it: *"management acts and the union (individual worker) grieves."*
27. There was no formal complaint initiated by Mr. Pessoa, prior to February 4, 2019, about the action of management in respect to his 'treatment at work', therefore, any reference to the provisions of the grievance procedures in the Code, as applicable under the circumstance, has been misplaced.
28. What would undoubtedly be pertinent to the Tribunal, and by which the actions of the management will be judged, is Paragraph 22 of the Code relating to 'Disciplinary Procedure'. That section of the Code states:

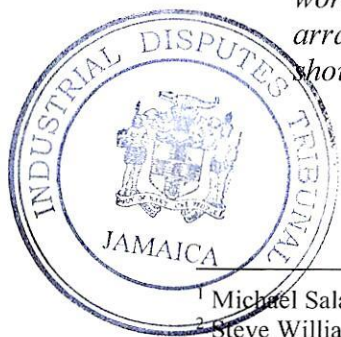
"(i) Disciplinary Procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should:

- (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;*

¹ Michael Salamon [2000] **Industrial Relations Theory and Practice**, 4th Edition, page 553.

² Steve Williams [2017] **Introducing Employment Relations: A Critical Approach**, Fourth Edition, page 319

³ John W. Budd [2018] **Labor Relations: Striking a Balance**, Fifth Edition, page 321



- (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 representative;*
- (d) *Provide for a right of appeal, wherever practicable, to a level of management not previously involved;*
- (e) *Be simple and rapid in operation."*

29. The Code goes on to state that –

"The disciplinary measures taken will depend on the nature of the misconduct but normally the procedure should operate as follows:

- (a) *The first step should be an oral warning, or in the case of more serious misconduct, a written warning setting out the circumstances;*
- (b) *No worker should be dismissed for a first breach of discipline except in the case of gross misconduct; [Tribunal's emphasis]*
- (c) -----
- (d) -----
- (e) -----."

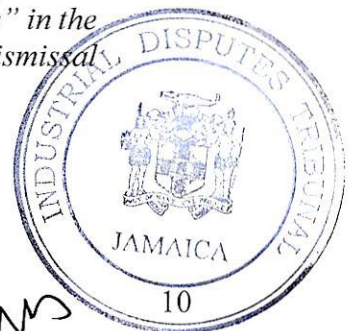
30. Section 12(5) of the Act makes reference to a dismissal being "unjustifiable", and the courts have fashioned a meaning to the concept of "unjustifiability" equating it was 'fairness', and allowing the Tribunal to craft remedies which are not restricted by the common law. In **Village Resort** the Court of Appeal expressed the view that:

"Parliament has given the Tribunal a very wide discretion as to the application of 'unfair'. This discretion appears to be wider in the Jamaican Act where unlike 'unfair' in the English Act the word 'unjustifiable' is undefined and not subject to the restrictions of descriptive examples."

31. The then Learned Chief Justice addressed the issue of 'unjustifiable' in the **West Indies Yeast case**, where he stated that:

"In my opinion, in the cases in which they are used in s. 12(5)(c) of the Act... the words "unjustifiable" and "unfair" are synonymous and the use of one rather than the other merely shows a preference of the respective draftsman. In my judgement, "unjustifiable" in the section refers to the reason for dismissal and not the dismissal itself..."

32. In **Village Resort** [supra] the Hon. Justice Rattray, P. had this to say:



“In an industrial relations setting and applying the provisions of the Labour Relations and Industrial Disputes Act, the Regulations and the Code as well as the new thinking introduced by the legislation, the onus then shifted to the hotel management to establish that their actions were justified within the meaning given to that term by the Act. This meant, as the Tribunal and the Full Court found, whether in all the circumstances of the case, their actions were just, fair and reasonable.”

33. The question of fairness and justice are fundamental legal concepts embodying the principles of natural justice. They are based on common law tradition and aim to safeguard individuals from arbitrary actions. This is what we understand the Code to be enforcing. Far from being doctrinal, it rests on a background idea that all those who perform work (worker and management) must be treated with dignity and respect, and are to be protected in the conduct of their relations one with the other, against unfair and unjust labour practices.

34. In fact, what is foundational to the efficacy of the Code is set out in Section 3(4) of the Act where it states that ---

*“A failure on the part of any person to observe any provision of a labour relations code...shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or Board to be relevant to any question arising in the proceedings **shall be taken into account by the Tribunal or Board in determining that question.**” [Tribunal’s emphasis]*

35. It is our duty to, therefore apply the relevant legal principles to the facts of the case in determining whether the Hotel had discharged its burden by “*establish[ing] that their actions were justified*”, that is to say, “*whether in all the circumstances of the case, their actions were just, fair and reasonable.*”

36. As the learned authors of Commonwealth Caribbean Employment and Labour Law argued:

“In determining what actions would constitute an ‘unjustifiable dismissal’, the IDT uses its own judgement, guided by industrial relations practice and natural justice considerations, in considering the facts in any case.”



37. In the February 4, 2019, letter to Mr. Pessoa inviting him to a disciplinary hearing, the letter states in part –

“We are in receipt of a report of a disciplinary offence, where it is alleged that you displayed disrespectful behaviour to senior personnel. After careful examination we have taken the decision to suspend your services with pay pending investigations effective today and, to host a disciplinary hearing in accordance with the provisions of the Grievance Procedures in the Labour Relations Code, 1976.” [Tribunal’s emphasis]

38. Both from the standpoint of “*industrial relations practice*” and “*natural justice considerations*”, red flags have emerged regarding the fairness of the process, beginning with the ‘charge letter’. Firstly, in that February 4, 2019, letter to Mr. Pessoa, we assume that Mrs. McIntosh-Barrett, the Human Capital Officer, in reference to being in “*receipt of a report*” and “*after careful examination*” (of the report) was suggesting that the report was in writing; and indeed, it ought to be, given the seriousness attached to the offence as set out in the Hotel’s Disciplinary Code and Grievance Procedures. However, no written report was tendered into evidence before the Tribunal, or even at the disciplinary hearing, which was troubling to say the least. The act of ‘disrespectful behaviour’ was directed towards the Head Chef, Mr. Morales, and no doubt, had he considered it sufficiently serious, that is, rising to the level of ‘gross misconduct’ he would have lodged his complaint in writing on his own initiative, or requested by the HR Department to do so. In the absence of a written report from Mr. Morales to formally commence the disciplinary process, and his absence from both the disciplinary hearing and the Tribunal proceedings we cannot conclude from the paucity of evidence that Mr. Pessoa’s behaviour was of ‘exceptional gravity.’

39. Secondly, Mr. Pessoa was ‘suspended pending an investigation’, but in the same letter he was invited to a disciplinary hearing to take place three (3) days after. Where the letter states “**pending an investigation**”, a fair disciplinary process, we submit, requires that the investigation be first completed by gathering all the relevant information and evidence before deciding whether there is the need for a disciplinary hearing. One important and relevant information would be a statement from Mr.



Pessoa after providing him with a copy of the report containing the accusation from the “senior personnel”. This was clearly not done. One cannot argue *uno flatu* on the suspension ‘pending an investigation’ and the proffering of a charge along with a date for a disciplinary hearing.

40. Thirdly, as Miss Mitchell, the sole witness for the Hotel conceded, and we concur, the ‘charge letter’ did not conform to the provisions of Section 22(i)(b) of the Code, which is to “*indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties.*” There was no date, time and place mentioned in the letter regarding the incident; we are not clear as to which “senior personnel” Mr. Pessoa “*displayed disrespectful behaviour*” towards, and what exactly constituted this ‘disrespectful behaviour’. The Code mandates us to scrutinize the validity of the charge letter to ensure fairness and compliance with natural justice principles, and the employer’s burden to prove that it acted fairly, in our view, goes well beyond simply casting expressions about ‘discourtesy’ and ‘disrespect’ without more.

41. Fourthly, issues of proper industrial relations practices and natural justice considerations further surfaced in the actual disciplinary hearing held on February 7, 2019. Miss Tameka Elliott, the Senior Human Resource Manager, acted as chairperson of the proceedings and had the following exchange with Mr. Trevis Pessoa at the start of the hearing:

“Ms Elliott: Are you aware of the charges? Was it explained to you, when you got the letter? Did you understand the letter given to you?”

Trevis: Yes

Ms. Elliott: Did you meet with your manager?

Trevis: Yes, I was given a verbal warning.

Ms. Elliott: “We have received a report from you and chef regarding the incident on January 30, 2019. Can you recall what happened?”

Trevis: It was a busy night as usual, I went to the back of the kitchen to wash some items as the guests were waiting on me.

Ms Elliott: Where did you get the soap from as we use soap dispenser?

Trevis: I did not know that Chef took my picture. He said that was not the correct procedure. He said I should put the glass and silverware in the tray and I did that and left.”

[See Exhibit 4].



42. Although the charge against Mr. Pessoa was singularly about 'discourteous/disrespectful' speech, the disciplinary proceedings dealt substantively with the breach of the safety regulations. In fact, when Miss Elliott asked him about the report from Chef regarding the incident, he proceeded to speak about breaching the protocol by washing the dishware and glasses in the wrong station. The suspension form mentioned his "*failure to follow standard operating procedure*", but this was not stated in the charge letter, and therefore should not have been addressed in the proceedings.
43. In fact, it is clear that the decision to dismiss Mr. Pessoa was influenced by the breach of the procedure as set out in Miss Elliott's summary at the end of the hearing, [see Exhibit 4] where she said:



"I thought about it and heard what you have to say I admire your honesty in admitting the exchange you and Chef had. I applaud you were trying to assist the situation to help our guest, but you go about it the wrong way. If you are having a challenge, then you should bring it to the attention of someone that is above you. What you have done was done in the presence of other team members. We cannot tolerate this type of behaviour in the hotel and it does not matter who you report to. Chef said you report to Karisma."

44. The third paragraph of the letter of dismissal dated February 7, 2019, from Miss. Elliott underscores that fact:

"There is no excuse for this type of poor behavior and disregard for our Senior Personnel, Karisma Operational Practices, Established Hygiene Standards, your job and your duties. It is expected that as an employee of Karisma, you conduct yourself according to the set company standards and guidelines at all times."

45. Fifthly, the Hotel's Disciplinary Code & Grievance Procedures, adopted in June 2018, was not followed in this case. The "**principles**" enunciated by the Procedures stated that "*no formal disciplinary action will be taken against an employee until the matter has been properly investigated and until a disciplinary hearing has taken place...*". In that regard, "*...an employee will be informed in writing of the allegation against them (sic) and where possible given all relevant information before any hearing.*" As mentioned earlier, even before the commencement of the investigation

Mr. Pessoa was charged and invited to a hearing, and the “relevant information”, in this case the statement of the Chef was not given to him although acknowledged as having being received by the chairperson.

46. The Disciplinary Procedure sets out the **“Procedure for conducting Enquiry/Hearing”** and the areas relevant to the case at bar are set out below:

“1) -----

2) *Based on the outcome of the inquiry and if the investigation support the complaint, the employee will be notified of the charge in writing laid against him/her*

3) *The employee must be provided with the documentary, electronic or any other evidence being relied on prior to the hearing (total disclosure) and ask for his written report of his knowledge of the accusation/s*

4) -----

5) *Those making the accusation must be present to give further oral evidence at the hearing*

6) *If it is not practicable for the accusers to be present, arrangements must be made to provide the accused an opportunity to question the accusers*

7) -----

8) *The final outcome must support the charge laid against the accused*

9) *The final outcome will be communicated to the accused and his/her representative within ten working days setting out the reasons for the decision.”*

46. The Hotel, it would appear, have accepted the approach adopted by the ‘Burchell test’ in an effort to ensure that its decision to dismiss for misconduct is not arbitrary or unjust, and that the employee is afforded due process. That is, the employer must have carried out a proper investigation, and the investigation must have resulted in establishing reasonable grounds for termination.

47. On the facts, it is pellucid and beyond peradventure that the Hotel’s actions did not comport with its own disciplinary procedures where:

(a) It took the decision to notify Mr. Pessoa of the charge to be laid against him before the commencement of the investigation;



- (b) The statement from the accuser and the investigative report. (if one was conducted) was not supplied to Mr. Pessoa at the time of the hearing
- (c) Mr. Morales, the person “*making the accusation*” was not present at the disciplinary hearing and no evidence provided to show that efforts were made for Mr. Pessoa “*to question the accuser(s)*”
- (d) The final outcome of the disciplinary hearing included alleged offence that was not laid against Mr. Pessoa
- (e) The termination letter to Mr. Pessoa contained a reason which was not included in the charge letter

48. In an online blog from a leading legal firm specializing in business and workplace solutions, employers were advised that –

“Before taking disciplinary actions such as terminating or suspending an employee, the employer is required to ensure that they comply with the Labour Relations Code and rules of Natural Justice to ensure that it is a fair and impartial process.”⁴

SUMMARY

48. While the Code makes no express reference to protecting employees against unfair dismissal, Brooks, JA in the **Edward Gabbidon** case asserted that such protection is, however, provided for “*in Part 1, second paragraph of section 2*”, where it states that –



“Recognition is given to the fact that management in the exercise of its function needs to use its resources (material and human) efficiently. Recognition is also given to the fact that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction.”

49. Section 3(4) of the Act makes any provision of the Code imperative rather than permissive in deciding on a question arising in the proceedings before the Tribunal.

⁴ See: <https://myersfletcher.com/navigating-the-disciplinary-process/>

In this case, the question before the Tribunal is whether the employer acted fairly in termination the services of Mr. Pessoa by “*comply(ing) with the Labour Relations Code and rules of natural justice to ensure that it is (was) a fair and impartial process.*” In that regard the Tribunal seeks only the strictest fidelity to ‘fairness.’

50. On the findings, there seemed to have been a determined intention on the part of the Hotel to find a basis for removing Mr. Pessoa from his employment when one takes into account the fact that: (i) the letter suspending him ‘pending an investigation’, also contained the charge against him and an invitation to a hearing; (ii) there was no formal complaint tendered into evidence and the report of Mr. Morales was not provided to Mr. Pessoa; (iii) no report from the investigation was evidenced; (iv) the Hotel breached its own procedure by denying Mr. Pessoa the opportunity to face his accuser; (v) the hearing proceeded to discuss a matter which was not properly before it, and which formed the basis of the reason for Mr. Pessoa’s termination.
51. The Tribunal is of the view that, taking into account all the circumstances of the case, both as a matter of substance and procedure, Mr. Pessoa’s dismissal:
- (a) was in breach of the spirit of the Labour Relations Code and the principles of Natural Justice, and
 - (b) violated the Hotel’s Disciplinary Code and Grievance Procedures which extends to a general duty on the part of management to act fairly in following the disciplinary process.
52. In determining the quantum of the award the Tribunal is mindful of Willams, J. exhortation in the case of **Garnett Francis v. IDT and Private Power Operators**, [2012] JMSC Civil 55, where he opined that there exist –

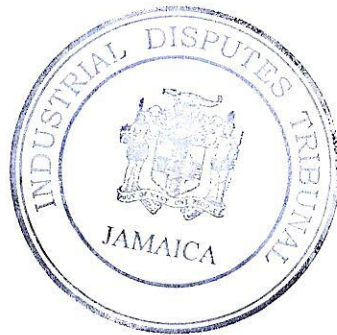
“...a discretion entrusted to the Tribunal where the level of quantum of compensation is concerned; and it is a wide and extensive discretion... reveals no limit or restriction placed on the exercise of the discretion and no formula, scheme or other means of binding or guiding the Tribunal in its determination of what might be a level of compensation or other relief it may arrive at as being appropriate.” [page 21]



53. In the **Branch Development Limited T/A Iberostar Rose Hall Beach and Spa Resort Limited and the Industrial Disputes Tribunal**, [2021] JMCA Civ 44, Straw, JA quoted from the judgement of Rattray, P in the **Village Resort** case where he said “...*the mandate of the Tribunal, if it finds a dismissal ‘unjustifiable’ is the provision of remedies unknown to the common law.*” However, as Morrison, JA, opined in the **Branch Developments** (supra):

“... the IDT discretion to order such compensation as it “may determine” is not unfettered and must also be subject to the overriding criterion of reasonableness. In a word, the exercise of the discretion must be rational.”

54. Mr. Pessoa has been unemployed since 2019, save and except for odd-jobs he would have been engaged in over the period.



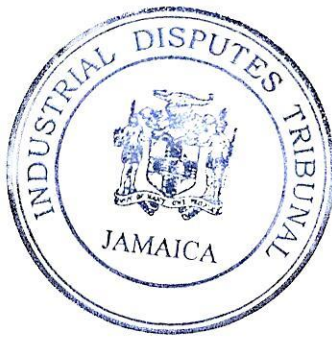
A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of loops and a final flourish.

AWARD

55. Accordingly, in exercise of the powers conferred by Section 12(5)(c) of the Act, the Tribunal finds as follows:

- (a) Mr. Trevis Pessoa was unjustifiably dismissed by his employer, KMS Jamaica Limited (trading as Azul Beach Resort) on February 7, 2019.
- (b) KMS Jamaica Limited shall pay by way of compensation to Mr. Pessoa the amount of Four Million Five Hundred Thousand Dollars (\$4,500,000.00).
- (c) In addition, Mr. Pessoa should be reinstated in his job at KMS Jamaica Limited with effect from June 30, 2025.
- (d) Failure to reinstate Mr. Pessoa by the date stated in (c) above, he shall be paid an additional sum of Two Million Dollars (\$2,000,000.00).

Date this 3rd day of June, 2025



.....
Mr. Donald Roberts, C.D., J.P.
Chairman

.....
Mr. Errol Beckford
Member

.....
Dr. Denese Morrison, J.P.
Member

Witness:

.....
Miss Tasha Pearce
Acting Secretary of the Division