

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 48/2013

SETTLEMENT OF DISPUTE

BETWEEN

NEW ERA FINANCE LIMITED

AND

GLENROY BERNARD

AND THE

AWARD

I.D.T. DIVISION

MR. NORMAN WRIGHT, Q.C. - CHAIRMAN

MR. RION HALL, J.P. - MEMBER

MR. D. TREVOR McNISH - MEMBER

JULY 14, 2015.

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

NEW ERA FINANCE LIMITED

AND

GLENROY BERNARD

REFERENCE:

By letter dated November 26, 2013 the Honourable Minister of Labour and Social Security pursuant to Section 11A (1) (a) (i) of the Labour Relations and Industrial Disputes Act (hereinafter called "the 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 New Era Finance Limited on the one hand and Mr. Glenroy Bernard 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 PARTIES:

The Company was represented by:

- Mr. Leroy Equiano - Attorney-at-Law
- Ms. Kaydian McGlashan - Legal Assistant

In attendance were:

- Mr. Andrew Mais - Deputy CEO
- Mr. Franklin Arboine - Shareholders Representative

The Aggrieved Worker was represented by:

- Mr. Alexander Williams - Attorney at Law

In attendance was:

- Mr. Glenroy Bernard - Aggrieved Worker

SUBMISSIONS AND SITTINGS:

Briefs were submitted by the parties and oral submissions made during seven (7) sittings, from April 24, 2014 to February 11, 2015.

BACKGROUND TO THE DISPUTE:

Mr. Glenroy Bernard was employed to New Era Finance Limited on July 12, 2010, as the Operations Manager. On November 13, 2012, he was called to a meeting with the Deputy CEO, Mr. Andrew Mais and the Shareholders Representative, Mr. Franklin Arboine, to discuss his performance and at the end he was told that his service was being terminated due to his poor performance.

Consequently, the matter was referred to the Ministry of Labour & Social Security (MLSS) and having failed to arrive at a settlement, the Minister by letter dated November 26, 2013, sent it as a dispute to the Industrial Disputes Tribunal (IDT) to be determined and settled.

THE COMPANY'S CASE:

New Era Finance Limited t/a OBF Finance Company (hereinafter called the Company) is an Industrial and Provident Society, carrying out activities as a lending institution through a number of branches island-wide. Mr. Glenroy Bernard was employed in July 2010, in the capacity of Operations Manager. As Operations Manager he was responsible for the day to day operational oversight of the branches.

The Company submitted that over a period of two (2) years it had come to the conclusion that Mr. Bernard was incompetent in the job he was employed to do. His dismissal related solely to his poor performance and nothing else. Since his employment there has been growing discontent with his performance as the Operations Manager. It is the Company's submission that all the concerns that they had were well documented and cover the entire period of his engagement culminating in his dismissal.

There were grave concerns regarding the manner in which as Operations Manager, he took care of the Company's property, namely the Company's car which he used from time to time. Mr. Bernard was written to repeatedly regarding his poor performance, reporting to work late, taking naps on the job and no aggressive promotion of the branch services. Over the period, several audits were carried out on various branches indicating varying levels of breaches and non-compliant behaviour on which he was copied, advising him of the need to attend to these matters.

On May 14, 2012 a notice of termination was issued to Mr. Bernard effective May 15, 2012. However, he solicited the support of other Officers of the Company, seeking for leniency/reconciliation and to be given a second chance. The letter was not signed by Mr. Mais but by Mr. Arboine, the Shareholders Representative, who Mr. Mais testified was his nominee for the purpose of signing in his absence. The decision was taken to give him a second chance with reduced responsibilities, as it was felt he could not cope with the wider responsibilities of his list of duties, as well as to demonstrate improvement in his performance.

After the above second chance was given, failings, resulting from poor performance, continued. This was particularly highlighted by an incident in the Ocho Rios Branch, where funds were being released inappropriately. Consequently, Mr. Bernard was summoned to a meeting on November 13, 2012, to review his performance. Present at that meeting were, Mr. Bernard, Mr. Arboine and Mr. Mais. Issues of non-performance, including fraud at the Linstead Branch, were discussed. At the meeting, Mr. Bernard was advised of the Company's position with respect to his poor performance, at which point Mr. Bernard told them that it was clear that they had made up their minds and so he would not contest the issues. The decision was taken to dismiss him and an agreement to pay him one (1) month's salary in lieu of notice. This was effected and a copy of the pay statement tendered as an Exhibit.

The Company contends that Mr. Bernard's claims as to why he was dismissed are highly unfounded, based on the following:

- After the complaint by Mr. Arboine that as the Operations Manager he needed to come out on weekends to drive the systems, Mr. Bernard started to come out on structured Saturdays and there was no evidence of any further issues about that. This claim was disingenuous and considered even more so, as he shared the same faith with the Deputy CEO.
- In regard to breaches of procedure, the uncontested evidence of Mr. Mais as to what took place at the meeting of November 13, 2012, including Mr. Bernard's response, clearly negated this claim.
- Mr. Bernard was given a letter of recommendation, based on the fact that he had agreed not to question/contest his termination and the belief by the author, the Deputy CEO, Mr.

Mais, that the contents were in order despite Mr. Bernard being dismissed for non-performance.

The Company submits that the dismissal was not unlawful or unfair as the Company had acted in accordance with the provisions of Part II Section 3, of the Employment (Termination and Redundancy Payments) Act, whereby the employer is required to give notice to an employee it intended to dismiss. Notice is required to be in writing, unless it is given in the presence of a credible witness. The dismissal and agreed payment in lieu of notice, occurred in the presence of Mr. Mais and Mr. Arboine and was in keeping with the provisions of the contract of employment.

The dismissal was not one of discipline and based on the Company's ongoing dialogue and correspondence by way of letters, memoranda and reports with/to Mr. Bernard, it had sufficiently emphasised its dissatisfaction with his performance. On each occasion, he had been given opportunities to respond and improve his performance. Consequently, the Company had not breached the Labour Relations Code.

It is the Company's submission that Mr. Glenroy Bernard's dismissal was justified as he was unable to perform in the position for which he was employed by the Company.

THE AGGRIEVED WORKER'S CASE:

In support of his position of unjustifiable dismissal, Counsel for Mr. Glenroy Bernard called two (2) witnesses in support of his case. The main evidence was provided by Mr. Bernard.

By letter dated June 30, 2010, he was employed by New Era Finance Ltd as its Operations Manager, commencing July 12, 2010. The Company operated twelve (12) branches and as Operations Manager he had responsibilities for them. In this capacity, he was in charge of Policy Direction, Credit & Collection Management, Recruitment of staff up to a certain level, Training and Relief of Managers until the positions were filled.

Mr. Bernard contends that he is a Seventh Day Adventist who worships on Saturdays. This had been disclosed to New Era, prior to his employment. During the course of his employment, the Company started to ask him to work on Saturdays. Consequently, he had a meeting with Mr. Arboine, who pointed out various areas that needed correction. Mr. Arboine also outlined what he, Mr. Bernard, needed to do to retain his employment.

It is Mr. Bernard's submission, that the Company had a very poor and backward operational processing system. Mr. Arboine met with him and advised that he wanted the accounts on the system purged from approximately fifteen (15) years back. This required working longer hours and on Saturdays. While he agreed with Mr. Arboine that he would work on weekends, he had made it clear that Saturdays were his days of worship but he would be available for Sundays. Mr. Arboine felt that as the Operations Manager, he should be driving the process of the purging and based on this, he agreed and began to work on Saturdays, but not on every weekend. This became cause for concern for Mr. Arboine and he was given a letter of "*Notice of Termination of Employment*" dated May 14, 2012, and this eventually became a part of the reason for his dismissal.

Mr. Bernard said that he then started to come out on Saturdays and mobilized the staff to do the job. After that, there were no further discussions with Mr. Arboine. Mr. Bernard in evidence told the Tribunal that he discussed the letter of May 14, 2012, with Mr. Mais, the Deputy CEO, on his return from overseas, as in his absence, Mr. Arboine had dictated the letter in his (Mr. Bernard's) presence, to the legal officer. Mr. Mais expressed surprise and concerns about the contents.

On November 13, 2012, he was visited in his office by Mr. Mais, who asked him to step into his (Mr. Mais's) office because Mr. Arboine wished to speak with him. Mr. Arboine greeted him and asked him to have a seat, while saying that he had good and bad news for him. He referred to a report generated by another member of staff, the HR Trainee, Miss Sasso, and advised him that his services were being terminated and he had to leave the premises immediately. He left for his office to retrieve his personal things and the security guard came and told him, that he was asked to escort him off the premises. Mr. Bernard then packed up his things and left in full view of everyone and with the security guard behind him.

During the meeting and after, he never requested pay in lieu of notice, although Mr. Arboine had mentioned it. He did not agree to be terminated. Regarding the exhibited letter of June 10, 2011, written by Miss Maureen Hassan, the then Human Resources Manager, regarding his demeanour, conduct and poor performance, he had spoken to her about it. She had told him that she had not observed the issues herself but she was instructed to write the letter by Mr. Arboine. He had also discussed the letter with Mr. Mais regarding the inaccuracies contained therein and had requested that it be removed from his records to which Mr. Mais had agreed.

Mr. Bernard contends that Mr. Arboine is the Shareholders' Representative, whose responsibility is to protect the interest of the shareholders. He is not a Director or a Manager; however, he operated like the CEO, even though Mr. Mais should be the one operating in that capacity. He had the responsibility of oversight and the power of veto, but not for day to day operations. In this regard, he did not have the authority to dismiss an employee and it is his opinion that, Mr. Arboine acted outside of his authority in the role he played in his dismissal.

He has had several conversations with Mr. Arboine during his tenure and believe that over time, by his behaviour/actions, he was assuming the role of CEO. Most of the memoranda copied to him were normal routine Audit Reports, which would contain matters affecting all departments in the organization, including Operations. He would from time to time discuss them with Mr. Mais and decisions taken as to how to fix them on an ongoing basis. None of the memoranda spoke to his personal performance.

While he was aware of the letters/memoranda, written to him directly and of the incidents of fraud at the Linstead and Ocho Rios branches, these were not brought up in the meeting of November 13, 2012. The two (2) in branch incidents occurred sometime before his dismissal and while they were not detected by him, their happening or non-detection, could not be attributed to lack of his performance.

Miss Maureen Hassan gave evidence in support of the fact that she had written the letter of June 10, 2011, under the instructions and dictation of Mr. Arboine.

All the observations/opinions were Mr. Arboine's and she did not speak with Mr. Bernard or carry out any investigations before signing off and issuing the letter.

On November 13, 2012, without any reason being given, without prior warning, knowledge/consultation and without any of the procedures being followed as contained in the policy and procedures manual, Mr. Bernard's employment was forcibly terminated by the Company. He received no letter of allegations, was not allowed a hearing and was given no letter of termination.

Counsel for the aggrieved party submitted that Mr. Bernard was a Senior Manager and nothing has been given in evidence to say what went wrong, to justify summary dismissal and despite the claim of dismissal for non-performance, a letter of recommendation in superlatives about his experience and abilities, was given to Mr. Bernard by the Deputy CEO. This of course begs the question as to why would an employee that is so highly regarded, be terminated in this manner?

Mr. Bernard has been actively seeking employment since his dismissal, without any success, despite having had several interviews, and attributes this to the manner in which he was terminated from his job. He has resorted to becoming self-employed and currently operates as an External Sales Contractor with Bank of Nova Scotia Jamaica Ltd., on a variable commission basis. His income is now substantially less than what it was when employed to New Era.

Mr. Bernard, it was submitted, must be treated as not having been dismissed, is entitled to all back pay and emoluments and ought to be reinstated, or otherwise fully compensated.

THE TRIBUNAL'S FINDINGS:

The panel in its deliberations gave careful consideration and asked itself whether the Company had acted fairly and reasonably in dismissing Mr. Bernard, in the manner it did.

The evidence in Mr. Bernard's case is replete with references to the involvement of Mr. Arboine, the Shareholders' Representative, in the daily operations of the Company and particularly in Mr. Bernard's employment record.

To this end, we note, that while the Deputy CEO, Mr. Mais, who was Mr. Bernard's direct supervisor, tried to claim responsibility for the various decisions taken against Mr. Bernard, the evidence unquestionably showed that the initiation and involvement of Mr. Arboine, was substantial. Furthermore, it is also significant to note, that Mr. Arboine was present for most of the sittings of this dispute, but was never called as a witness, to corroborate/defend or refute any of the positions attributed to him.

The Tribunal also found, that while the Company brought several letters and memoranda to support its case of poor performance by Mr. Bernard, most of them were of general operational findings in the branches and never pointed to his personal failings. It was also the evidence of Mr. Mais, that the findings that related to Mr. Bernard's operational areas, were usually attended to and corrected.

The evidence of Miss Maureen Hassan, the former Human Resources & Administration Manager, concerning the letter of June 10, 2011, signed by her, was that it was dictated to her by Mr. Arboine and none of the allegations were observed or investigated by her, neither were they discussed with Mr. Bernard before or after being signed off.

While Counsel for the Company submitted that Miss Hassan's evidence was her efforts of being vindictive to the Company for her own dismissal, he never refuted the substantial fact that even if the allegations of the letter were true, Mr. Bernard was never given the opportunity to have a hearing or to properly respond to them.

We therefore conclude that, while the Company may have had cogent reasons to dismiss Mr. Bernard, it failed miserably in its procedural handling of the issues. Consequently, they breached the Company's own Policy and Procedures Manual and the Labour Relations Code in all respects and failed to have regard to the rules of natural justice.

The Tribunal therefore finds that the dismissal of Mr. Glenroy Bernard was unjustified and not withstanding his wish to be reinstated without any loss of compensation or to be fully compensated, accordingly makes the following award:

AWARD:

In keeping with the provisions of Section 12, (5) (c) iii of the Labour Relations and Industrial Disputes Act, the Tribunal orders that:

- a) Mr. Glenroy Bernard be reinstated by July 27, 2015

or

- b) failing to reinstate as stipulated in (a) above, he be compensated with eighteen (18) month's salary at the current rate of the position held at the time of his dismissal.

DATED THIS DAY OF JULY 14, 2015.



Norman Wright, QC.
Chairman.

Rion B. Hall
Member.

D. Trevor McNish
Member.

Witness:

Royette Creary
Secretary to the Division.