

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 24/2023

SETTLEMENT OF DISPUTE

BETWEEN

UC RUSAL JAMAICA LIMITED

AND

THE UNION OF CLERICAL ADMINISTRATIVE & SUPERVISORY
EMPLOYEES

AWARD

I.D.T. DIVISION

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

NOVEMBER 15, 2024

DISPUTE NO. IDT 24/2023

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

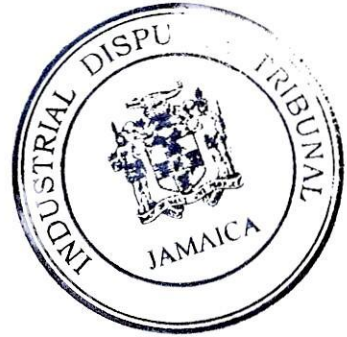
UC RUSAL JAMAICA LIMITED

(THE COMPANY)

AND

THE UNION OF CLERICAL ADMINISTRATIVE & SUPERVISORY EMPLOYEES

(THE UNION)



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 **UC Rusal Alumina Jamaica Limited** and the **Union of Clerical Administrative and Supervisory Employees**, with the following Terms of Reference: -

"To determine and settle the dispute between UC Rusal Alumina Jamaica Limited on the one hand, and the Union of Clerical Administrative and Supervisory Employees on the other hand, over the termination of Paul Brown."

DIVISION

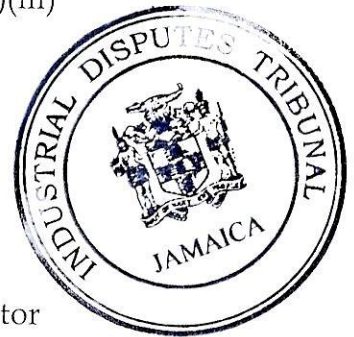
The division of the Tribunal selected in accordance with Section 8(2)(c) of the Act to deal with the industrial dispute comprised:

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:

Miss Kelley C. Wong	-	Attorney-at-law
Mr. Stephen Nelson	-	Attorney-at-law
Mr. Glendon Johnson	-	Human Resource Director



The **Aggrieved** was represented by:

Mr. Vincent Morrison	-	President, UCASE
Mr. Garth Cheese	-	Chief Union Delegate, UCASE
Mr. Michael Moore	-	Chief Delegate, Port Esquivel, UCASE
Mr. Paul Works	-	Organiser, UCASE

In attendance:

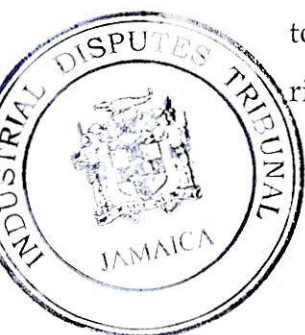
Mr. Paul Brown	-	Aggrieved Worker
----------------	---	------------------

SUBMISSIONS AND SITTINGS

The parties submitted briefs to the Tribunal and made oral presentations over nineteen (19) sittings covering the period November 1, 2023 through to August 22, 2024. Over the course of the sittings the Tribunal examined thirty-two (32) exhibits along with testimonies by way of oral evidence.

BACKGROUND TO THE DISPUTE

1. UC Rusal Jamaica Limited ("the Company") is a company incorporated and domiciled in Jamaica with its registered offices at Kirkvine, Manchester. The primary activity of the Company is the mining and refining of bauxite ore into alumina.
2. The Union of Clerical Administrative and Supervisory Employees ("the Union") is a registered trade union under the Trade Union Act of 1919. The Union has representational rights for certain categories of workers employed by the Company. Mr. Paul Brown was employed by the Company as *Facilities Repairman (AI)* by way of a fixed term contract beginning on September 30, 2022. He, however, has been working with the Company since it reopened in 2010 in a temporary capacity and as a lead man under the new fixed-term contract arrangement.
3. On November 4, 2022, a vehicle driven by Mr. Brown was routinely searched on its way out of the compound. The search resulted in the discovery of five (5) pieces of fabricated steel plates wrapped in two (2) pieces of cloth behind the seat of the vehicle. The Company commenced an investigation into the matter, and upon its conclusion, Mr. Brown was charged for attempting to remove the steel plates from the Port without proper authorisation.
4. A disciplinary hearing conducted on November 16, 2022, found that Mr. Brown was not culpable of intentionally attempting to remove the fabricated steel plates and consequently should be given a warning letter for failing to check the vehicle before attempting to leave the compound.
5. Subsequent to that, the Company, by way of letter dated November 29, 2022, wrote to Mr. Brown terminating his contract of employment and advising him of his right to appeal. The appeal was lodged and the hearing held on January 4, 2023.

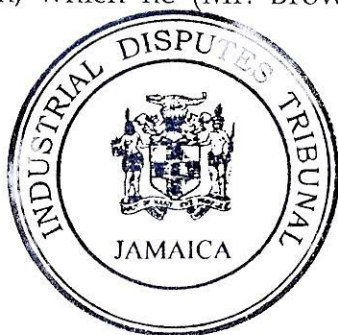


The finding from the appeal hearing was that the Company's decision to terminate was upheld. A second appeal hearing took place on January 19, 2023 and the decision to terminate was also upheld.

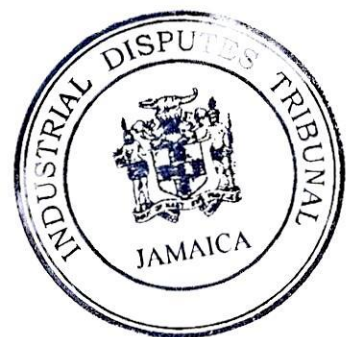
6. The matter was referred to the Ministry of Labour & Social Security; however, the dispute remained unresolved and thereafter was referred to the Industrial Disputes Tribunal for settlement.

THE COMPANY'S CASE

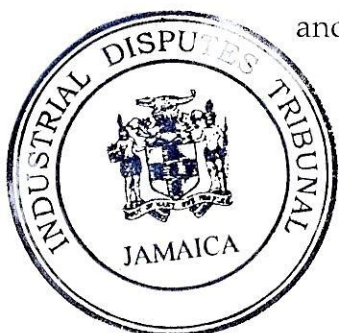
7. Counsel for the Company informed the Tribunal that the dismissal of Mr. Brown was a fair one and in keeping with the judgements of previous court rulings. She cited the cases of **Institute of Jamaica, Village Resorts, Utech and Alcoa Minerals of Jamaica** in support of her argument.
8. Mr. Dwayne Wellington was the Company's first witness. He said he has been employed at UC Rusal for over eight (8) years and is currently the Resource Protection Coordinator. His primary function, he said, is to ensure adequate security measures are in place to protect the Company's employees as well as its property.
9. Mr. Wellington informed the Tribunal that vehicles are subject to "*a comprehensive search upon entering and exiting the premises*". He said he received a call from Mr. Clive Gordon about two parcels of items wrapped in cloth which were discovered behind the seat of the vehicle driven by Mr. Brown, which was exiting the premises. He testified that he was asked to conduct an investigation, and received a report from Mr. Gordon. He had requested a statement from Mr. Brown, which he (Mr. Brown) initially declined to do, but subsequently complied.



10. According to Mr. Wellington, he visited the scrap metal area and concluded from his assessment that the five fabricated metals found at the back of the vehicle driven by Mr. Brown would have been taken from the scrap metal area. Mr. Wellington confirmed that the five pieces were of a rectangular shape which he believed were designed and cut for a specific purpose.
11. He asserted that 'scrap metals' are stored in a designated area and are available for sale and therefore should not be removed from the Company's premises without the appropriate authorisation.
12. Mr. Wellington further testified that from the recordings in the log book, Mr. Brown was assigned to drive the vehicle P065 and that he was the only person assigned to drive the vehicle during the period October 31 to November 4, 2022.
13. Mr. Wellington averred that the Manual of General Safety Rules is given to all employees and that paragraph 16 deals with 'Mobile Equipment' which sets out a check-list for the operation of vehicles. He said Mr. Brown would be required to sign for the keys on reporting to work; to check the vehicle off to ensure there are no defects, and if he is to give another employee the vehicle to drive he would have to sign out the key and the new driver would have to sign in for it. At the end of each day Mr. Brown, he said, is expected to return the vehicle to the designated area and return the key to the Resource Protection Department (RPD) before leaving the premises.
14. In his further testimony, Mr. Wellington said that the crew members Mr. Brown reportedly said he was checking on at the car park were not present there but were said to be on the compound. He contended that Mr. Brown's vehicle was located in the car park which would have been easy for him to switch the items.



15. Mr. Wellington asserted that Mr. Brown has to take full responsibility for the items found in the vehicle as it was his duty to conduct a thorough check. He observed that the items were found behind the seat where the jack and lug tools belonging to the vehicle were located. The vehicle, he said, was searched between 12:00 p.m. and 12:30 p.m. on the day the metals were discovered, and had exited and entered the compound at least three previous occasions on that day.
16. Mr. Wellington, under cross examination, agreed that the vehicle could be driven by several persons on the compound, and that there were "rare occasions" when the security would drive vehicles off the premises. He noted that all employees are expected to take lunch between 12:00 p.m. and 12:30 p.m. and that Mr. Brown would have known that the workers were at lunch when he attempted to exit the premises at 12:08 p.m.
17. The Company's second witness was Mr. Hilton Pinnock, who has been employed at UC Rusal for twenty six (26) years and currently serves as Resource Protection Manager. Mr. Pinnock said he was made aware of the investigations regarding the fabricated metals found in the vehicle driven by Mr. Brown. He said that all vehicles are expected to be searched once they are leaving the compound, the search includes the entire vehicle - inside, under the seats and inside the bonnet. He informed the Tribunal that scrap metals are sold by the Company and if an employee wishes to obtain the scrap metal he would have to first obtain permission from his supervisor and then the RPD would have to verify that it is in fact scrap metal.
18. He stated that the keys for vehicles are secured by a senior security officer in a key box which is kept locked and managed through a log-in system. Once the driver of a vehicle collects the key, he is responsible for it during the course of the day and should be returned to the senior security officer at the end of his shift.

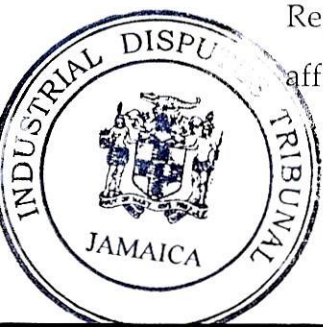


 6

19. Mr. Pinnock confirmed that the vehicle was leaving the premises on the fourth occasion when the items were discovered. He asserted that looking behind the vehicle seat is routine and that the driver is expected to exit the vehicle once it is a single cab so that a thorough search can take place. Mr. Pinnock confirmed that no camera exists in either the store or scrap metal areas, the two locations identified as the possible source for the metal.
20. Mr. Glendon Johnson, the Director of Human Resources was the Company's third witness, and has been employed to UC Rusal for over 30 years. He said he played no part in the incident involving Mr. Brown, but was aware of the investigation and the report of the disciplinary panel.
21. Mr. Johnson averred that the disciplinary panel can only recommend, and it is the management's responsibility to decide whether those recommendations should be accepted. He said the management took the decision to terminate Mr. Brown's contract, which is the usual practice once the person is found guilty of attempting to remove material without permission. He made reference to the two appeals which upheld the decision to dismiss.

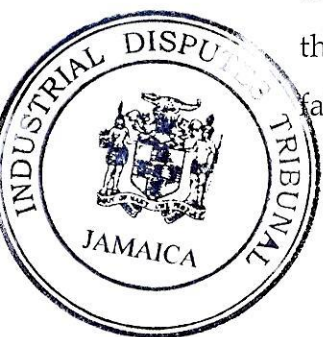
THE AGGRIEVED WORKER'S CASE

22. Mr. Morrison said the Company failed to provide evidence to prove that Mr. Brown attempted to remove the scrap metal from the Port Esquivel premises. He said that the Union would provide evidence to show that vehicles are regularly used by other employees and that the key to the vehicle is not controlled or kept by Mr. Brown during the day.
23. Mr. Brown was called to testify on his own behalf. He said as the Facilities Repairman his responsibilities included landscaping, carpentry and masonry, and affirmed that he is not a welder.



 7

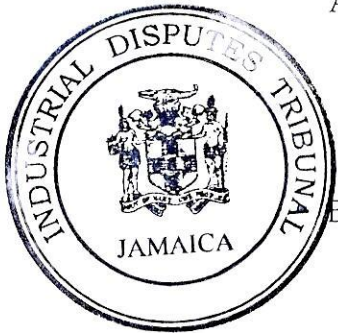
24. Mr. Brown testified that on November 4, 2022, he was assigned to cut down trees, clear the debris and conduct a general cleaning of the car park. He said he is aware that once the vehicle is to leave the compound it will be subject to search, and confirmed that he has never driven the vehicle outside the premises without being searched.
25. According to Mr. Brown, *"almost everybody drives the van"*, particularly the 'rolling-stock crew' as well as security personnel. On the day in question, Mr. Brown stated that he would have left the compound about three or four times prior to the incident, and that it was on his attempt to leave the premises sometime after 12:00 p.m. that the search took place and the metals were discovered.
26. He admitted that no worker was at the carpark but the tools were left there and two of the workers were on the outside of the premises but not at the carpark. He said that he is aware of the 'Standard Practice Instructions', which outlines the entry and exit search and screening procedures for motor vehicles and pedestrians, as well as the Code of Conduct, but have never seen the 'General Safety Rules' applicable to Mobile Equipment use [exhibit 11].
27. Mr. Brown was emphatic in stating that he did not place the fabricated metals in the van and was not aware they were behind the seat. He admitted that he did not check the vehicle on the occasion before exiting the premises, but did so earlier that morning. He said his responsibility was to check the vehicle's fluid levels, lights, and tyres but not to carry out a check behind the seat of the vehicle.
28. The Union's second witness was the Chief Union Delegate, Mr. Garth Cheese. Mr. Cheese has been employed to UC Rusal since 2007 as an Equipment Operator. He acknowledged his involvement in the disciplinary hearing for Mr. Brown and said the Company could not provide any evidence to determine the source of the fabricated metal.



29. Mr. Cheese spoke of complaints received from workers about the attitude of the security personnel towards them and that on a previous occasion he had to email Mr. Johnson about the harassment of employees by a member of the security team.
30. Mr. Cheese further testified that the Disciplinary Code extracted from the Employee Handbook was never discussed with the Union and they had no input in its development. Further, the disciplinary panel set up to hear the matter was selected by the Company.

ISSUES

31. In reviewing the circumstances surrounding the case, the pertinent issues given rise for consideration are set out as follows:



- A. Were there established reasonable grounds on which the Company had probable cause to charge Mr. Paul Brown for gross misconduct, and if so, the extent to which Mr. Brown's action was a causal or contributory factor.
- B. Whether there were procedural propriety and fairness on the part of the Company in the proceedings leading to the termination of Mr. Brown.
- C. Whether the Company has the right to overturn the recommendation of the Disciplinary Panel having regard to the circumstances of the case.
- A. Were there established reasonable grounds on which the Company had probable cause to charge Mr. Paul Brown for gross misconduct, and if so, the extent to which Mr. Brown's action was a causal or contributory factor

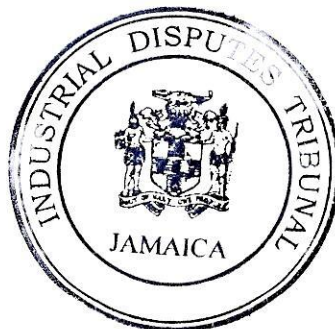
32. The Tribunal is bound to carry out a full examination of the circumstances surrounding the case to ensure that the requirements of the Act in determining whether the dismissal was justifiable or not, are met. A critical starting point would be to ensure that even where managerial prerogative may be exercised, it

should not deprive the worker of the implied statutory provision to not be unfairly dismissed.

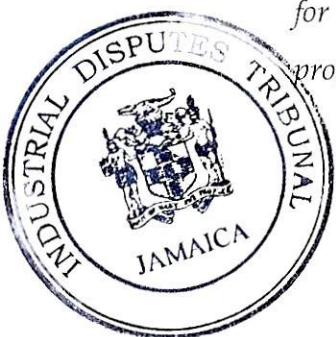
33. It is well known that the common law principle in dismissal cases is for the employer to show that the dismissal was fair. This principle is expounded further in Halsbury's Law of England, Fourth Edition, Volume 16, where it states that the employer "... must show what was the reason (or, if there 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].

34. In that regard, we are obliged to begin with what is commonly referred to as the 'Burchell Test'. This test calls upon us to consider the reasonableness of the employer's action in dismissing Mr. Brown, and to satisfy ourselves that UC Rusal genuinely believed Mr. Brown was guilty of misconduct, had reasonable grounds on which to base that belief, and the belief was formed only after an investigation was conducted. And for this, we must turn to the evidence.

35. On November 4, 2022 at approximately 12:11p.m., the vehicle assigned to Mr. Paul Brown, P065, was the subject of a routine search as it attempted to exit the compound. The back of the vehicle was checked along with the inside of the single cab where two pieces of fabric were discovered behind the seat. The fabrics contained five (5) pieces of 8 inches by 9 inches $\frac{1}{4}$ inch fabricated plates. Mr. Brown denied any knowledge of it, although he was the only person driving the vehicle on that day.



36. The evidence showed that the vehicle had exited the compound on three previous occasions on November 4: at 8:04 a.m., 8:36 a.m. and 9:18 a.m. On the fourth occasion, when the vehicle was attempting to exit, the search uncovered the fabrics behind the cab seat. The vehicle eventually left the compound at 12:28 p.m. and returned at 12:29 p.m. [see exhibit 4].
37. Mr Brown, in a statement provided on November 14, said that he was on his way *"to the car park to supervise his [my] work crew who were on a cleaning and debushing exercise..."*. He acknowledged that it was at that time during the routine search that the fabrics were discovered behind the seat, after he complied with a request from the senior security officer to exit the vehicle.
38. The allegation against Mr. Brown is set out in item 13 of the Company's Disciplinary Code, which is *"stealing or removing Company property without permission,"* for which the penalty is dismissal. The letter of November 14, 2022, inviting Mr. Brown to a disciplinary hearing was more specific in alleging that he *"breached Company policy by attempting to remove steel plates from the Port compound without permission"*
39. It is important to state that the Act 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. Brown can be held accountable in this matter.
40. The Company Employee Handbook requires that *"all movement of Company property from the premises must be accompanied by a duly completed and approved gate pass. A Gate Pass shows that permission has been granted by the appropriate authority for an employee to leave the Company premises in possession of Company vehicles or property."*



41. The WINDALCO/UC RUSAL Alumina Jamaica Code of Conduct specify that employees must not:

"without prior management approval, remove WINDALCO/UC RUSAL Alumina Jamaica's property from WINDALCO/UC RUSAL Alumina Jamaica's premises or use WINDALCO/UC RUSAL Alumina Jamaica's services."

42. The WINDALCO Resource Protection Department Standard Practice Instructions sets out the procedures for entry and exit search for motor vehicles and pedestrians. Of note and relevance is No. 7 which states that:

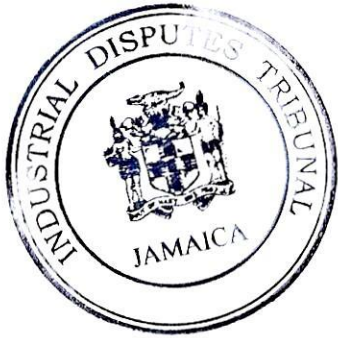
"Personal items within vehicles or otherwise must be declared to the Security Officer prior to being taken into any of the Company's facilities. The security officer must inform the incumbent SRPO of this declaration, who will then vet the purpose of such item(s) being brought onto the compound. Item(s) authorized to be brought on the compound the (sic) will be logged in detail in the respective log book and photographed by the SRPO where applicable."

43. Further, the instructions in relation to the Search Procedures for Vehicles specify the co-operation required of the drivers of the vehicles to, among other things, switch off ignition during inspections, and to exit the vehicle upon instruction to facilitate a more detailed search. The vehicle checks to be conducted by the Screening Officer will include **"vehicle interior"** to cover **"glove compartments"** and **"under and behind seats."**

44. Where unauthorised items are found in the vehicle the standard practice requires that such items *"be photographed, confiscated and a statement recorded immediately from the individual found in possession of the item(s) by the SRPO/Coordinator on duty."*



45. There are General Safety Rules which apply to employees when it comes to the operation of the Company's vehicle. In Mr. Brown's case, before operating the unit he would be expected to check:



- i. *"All fluid levels for proper levels e.g. oil, coolant, windshield washer brake & clutch.*
- ii. *That lights are functioning e.g. head, park, tail & stop.*
- iii. *That warning signals turn indicators and horn are working.*
- iv. *For vehicle body damage.*
- v. *Tyres for inflation and tread wear and ensure that tyres are all the same.*
- vi. -----
- vii. -----"

46. It is clear on the evidence that the scrap metal found behind the vehicle's seat was regarded as Company property, and that Mr. Brown had no permission or authority to remove the items from the premises. Mr. Brown's responsibility as the driver of the vehicle can be said to be purely mechanical/operational, and would include, among other things, checking behind the seat where the lug tool and car jack are located. This he would be required to do in the morning before operating the vehicle, and not periodically throughout the day. To, therefore, suggest that he was derelict in his duty in not checking behind the seat on each occasion that the vehicle exited the premises, would be absurd.

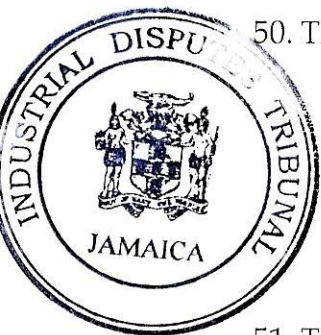
47. Needless to say, from our enquiry into the facts on their merits, we find that the Company had probable cause on which it could initiate disciplinary proceedings against Mr. Brown, as he was bound to provide answers as to how the items could have been hidden behind the seat without his knowledge, and how the person who would have placed it there (were it not him) could have retrieved it from the vehicle in his possession.

48. Furthermore, there was evidence which pointed to inconsistencies in respect to:

- a. Mr. Brown's written statement that he was going to check on his crew when they were on lunch break and not in the car park, and
- b. His oral testimony where he stated that the tools were left in the car park, however, the vehicle's 'time in' and 'time out' was 12:28 p.m. and 12:29 p.m. respectively.

B. Whether there were procedural propriety and fairness on the part of the Company in the proceedings leading to the termination of Mr. Paul Brown.

49. Mr. Brown was notified on November 14, 2022, ten (10) days after the incident, that he would be required to attend a disciplinary hearing scheduled for November 16 at 10:00 a.m. In the charge letter to him it was alleged that he **"breached Company policy by attempting to remove steel plates from the Port compound without permission."** He was advised in the letter that he has a right to be heard and to be accompanied by a representative of his choosing.



50. The penultimate paragraph of the letter stated that -

"Given the seriousness of the allegation the management of the Company will consider what disciplinary action to take, if any. You need to be aware that all disciplinary matters are considered serious and a range of sanctions are available."

51. The Disciplinary Policy, however, makes it clear that it is a dismissible offence to remove Company property without authorisation, and it regards 'scrap metal' as the property of the Company because of the possibility that it could be sold. The word 'scrap', by definition, means **"a small piece or amount of something, especially one that is left over after the greater part has been used,"** or **"discarded or removed from service."** Where scrap metals are not intended to be

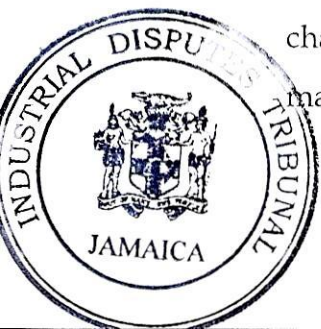
sold the worker, with appropriate authorisation, can remove it from the compound.

52. We can conceive of no other Company property, (except for scrap metals), that authorisation could ever be obtained to have it removed from the compound: no equipment, motor vehicle, tools, etc., would ever be regarded as **"left overs"** or **"discarded or remove from service"** and therefore subjected to the same conditions for removal as scrap metals.

53. That distinction, we contend, must have influenced the management in not purposefully stating in the charge letter, what is unequivocally stated at #13 of the Disciplinary Code, that the removal of Company 'property' is a dismissible offence. Certainly, scrap metal does not carry the general meaning of 'property', a point the management seemed well aware of, and therefore exercised its discretion in formulating the 'charge letter' to indicate that **"the management will consider what disciplinary action to take, if any"** and the **'range of sanctions available,'** in the circumstances.

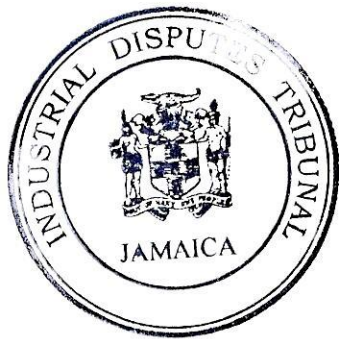
54. The disciplinary panel met on November 16, 2022, and its purpose was **"to ascertain the facts, to examine them in relation to the allegations/concerns and to reach a conclusion as to whether or not a disciplinary sanction is necessary."** In the undated report of its findings, it recommended that Mr. Brown be given a written warning, however, this was overturned by the management. We will later address the management's right to set aside a recommendation from its disciplinary committee, but at this juncture we want to complete the examination of the disciplinary process of which an appeal is determinative of a fair disciplinary procedure.

55. The evidence showed that two appeals were lodged but they did not result in a change in the decision to terminate Mr. Brown. In fact, the second appeal hearing may be seen as highly prejudicial to a fair appeal process, based on statements



attributed to the chairman, Mr. Laziz Mardonov. The appeal was to review whether a decision that had been made to terminate Mr. Brown should be overturned or sustained.

56. Mr. Mardonov's state of mind in relation to the matter before him was evident, for even before the commencement of the proceedings, and without hearing the grounds of appeal, he ventured to say this –



"Actually, I learnt about this case and saw papers, etc. Definitely I can't give you my decision right now because I do not have the power to do so right away. It is the decision of the disciplinary committee of WINDALCO/UC Rusal Alumina Jamaica which I trust that that committee is competent enough to make decisions. If they are not competent enough then we have to change that committee because they are not fulfilling their task."

57. We hold to the view that Mr. Mardonov's statement foreshadowed the outcome of the appeal, as it obviously betrayed his strong disapproval of the committee's recommendation, and suggested that they did not 'fulfill their task'. This is the kind of comment that undoubtedly would be prejudicial to a fair disciplinary procedure.

C. Whether the Company has the right to overturn the recommendation of the Disciplinary Panel having regard to the circumstances of the case

58. The matter of the employer's right to overturn a recommendation from its disciplinary panel has been the subject of authoritative reviews for some time. Employers often tend to have expectations that the disciplinary panel, after having found the worker guilty of the alleged misconduct, would impose a sanction of dismissal depending on the gravity of the case.¹ This is not always so, and the

¹ See Hlwatika, S and Van der Wait, A. (2023) 'An Employer's ability to substitute a Disciplinary Enquiry Sanction'. DOI 10.17159/obiter.v44i1.16265

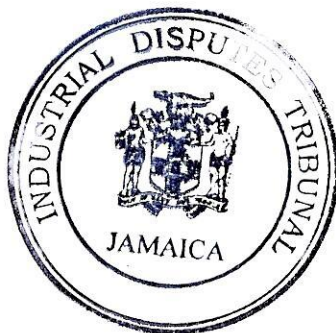
employers often feel obliged to ignore the recommendations and impose its own sanctions.

59. Both case laws and scholarly works have acknowledged the Company's right to decide whether or not to accept the recommendation of its disciplinary panel; and even where this is so, the hubris of management must be deferential to notions of equity, fairness and the substantial merits of the case.

60. The disciplinary panel, having met on November 16, produced a report with the following findings:

- "1. The fabricated metal could in fact, based on their size, come from discarded or scrap metal sheeting used by the Company*
- 2. It is possible that someone other than Mr. Brown could have concealed the items as the custom and practice is for pool vehicles to be made accessible for transport within the compound*
- 3. RPD posited that Mr. Brown was not going to supervise any workers as he knew that they were all at lunch. However, checking the status of the work they had done so far is his supervisory role and he would have needed to verify that they were gone to lunch and therefore the time of their expected return."*

61. The panel concluded that Mr. Brown did not have access to the tools and equipment that would have enabled him to fabricate the steel plates and therefore **"is not culpable of intentionally attempting to remove the fabricated steel plates from the compound without the requisite authorization and approval."** Their recommendation is that he should be given a warning letter for failing to check the vehicle before attempting to leave the compound.



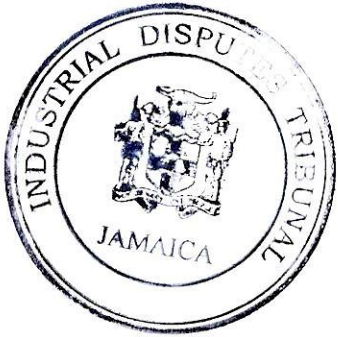
 17

62. On November 29, 2022, Mr. Brown received a letter from Mr. Dillon Fraser, Manager, Port and Rail Services, terminating his service with immediate effect. He was given the right to appeal, which he did on two occasions and on both the decision to dismiss was upheld.
63. The decision of the management to impose a sanction of summary dismissal despite the disciplinary panel's recommendation of a written warning for Mr. Brown, has to satisfy the common law conditions that make for equity and fairness. To be clear, we are well aware of the dictum of Sykes, J. (now Chief Justice) in the **NCB v. Peter Jennings's case** which entitles us to make a determination from the evidence before us. The IDT, he said *"... 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.
64. In considering the matter before us, it would have been fair, in our view, if the management had instituted an internal review process to examine the recommendation of the disciplinary panel. Where it believed it had the right to act unilaterally, then the right to do so must be evident in the provisions of the disciplinary code and procedure or the collective agreement. In circumstances where there is no provision for the substitution of the disciplinary sanction, the Company's decision to dismiss raises questions regarding the applicability of the 'double jeopardy' principle.
65. The Company, in overturning the recommendation of the disciplinary panel should at least have given Mr. Brown the opportunity to hear its arguments as to why it cannot accept a warning letter. 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."

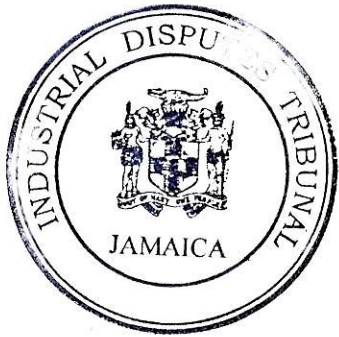


66. This was not done in respect of the matter involving Mr. Brown. The management failed to demonstrate what 'exceptional circumstances' existed which entitled it to disregard the recommendation, particularly where, in the 'charge letter' Mr. Brown was advised that a range of options would exist in his case, which would, of necessity, included a written warning. This, as we previously stated, would seem both logical and common sensical since the construct of the 'charge letter, acknowledged the intent on the part of management to recognise that the removal of 'scrap metal', although in breach of policy, cannot be *pari passu* with the removal of other properties, such as equipment, tools, etc.

67. We maintain that based on the substantial merits of the case, it would be morally impermissible to summarily dismiss a worker with over 10 years of unblemished record for the removal of waste metals from the Company's premises. Such a punishment is to be considered harsh to the point of being unjust, and inconsistent with the spirit and intent of the Labour Relations Code. The Code makes it clear that the praxis of industrial relations cannot be **"confined to procedural matters but includes in its scope human relations..."**. It recognises work as **"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.”

68. The harshness of the dismissal is even more palpable in the face of prevailing attitudes of the common law where it has come to regard a man’s job as his property. In a 2022 judgement by the Caribbean Court of Justice (CCJ), the Learned Judges opined that:



“In practice there is usually no comparison between the consequences for an employer if an employee terminates the contract of employment and those which will ensue for an employee if he is dismissed. In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families.”²

69. In 2001, Lord Hoffman made the following profound remarks in one of his judgements:

“... over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality...”³

70. Even where the common law has adapted itself to the new attitudes in employment relationship (hopefully to be embraced by management and union in a dynamic industrial relations’ climate), the factual findings and sanctions imposed by the disciplinary panel remain apposite to the circumstances set out in the charge letter. Its recommendation would therefore be both reasonable and

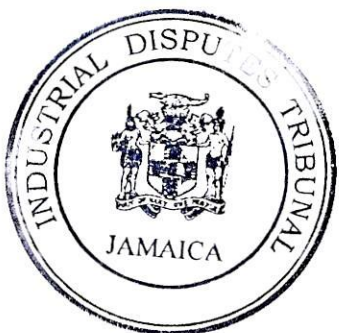
² See **Sandy Lane Hotel Company Limited v. Juliana Cato, Wayne Johnson and Charmaine Poyer** [2022] CCJ 8 (AJ) BB.

³ See **Johnson v Unisys Limited** [2001] UKHL 13.

appropriate, and negate any justification for interference. Moreso, we hold firmly to the view that it would be unfair and unreasonable for the management to unilaterally review its own disciplinary action in a manner not expressly or by necessary implication catered for in its disciplinary code.

71. Mr. Brown, through his Union, expressed a desire to be reinstated if the Tribunal were to find that his dismissal was unjustifiable. He had entered into a contract of employment for two (2) years commencing on October 1, 2022, which meant that his contract would have expired on September 30, 2024. Mr. Brown's services were terminated on November 29, 2022, effectively two months into the new contract period.
72. Mr. Brown has had successive fixed-term contracts over an extended period spawning more than ten years, and no evidence of poor performance or previous disciplinary action against him was offered to counter the assertion that he was a good and faithful employee.
73. The introduction of fixed-term contracts in the employment relationship has been the subject of extensive research by the International Labour Organisation (ILO). The ILO argues that this kind of arrangement typifies "**special forms of temporary dependent employment**", and that they are "**distinct from regular employment that is open-ended, "permanent", or "of indefinite duration."** In the ILO Recommendation 1982 (No. 166), tripartite bodies across the globe are encouraged to provide "**a legal framework aimed at limiting the abusive recourse to fixed-term contracts...**" The guidelines set out are -

"a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;



(b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;

(c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration"

74. Countries such as France, Germany, Spain, Belgium, the Netherlands, Indonesia, Czech Republic, Greece and Luxembourg limit the number of fixed-term contracts authorised by law. In the United Kingdom an employee automatically becomes a permanent employee after four years of continuous fixed-term employment, unless the employer can justify not doing so.

75. In fact, in a 2019 article published by the Society for Human Resource Management (SHRM)⁴, it noted that –

"In Europe, all member countries are subject to the EU Directive 1999/70/EC of June 1999 which requires the member countries to curtail the abuse of recurring fixed-term employment contracts by passing local laws that introduce one or more of the following measures:

- *Objective reasons justifying the renewal of such contracts or relationships*
- *The maximum total duration of successive fixed-term employment contracts or relationships*
- *The number of renewals of such contracts or relationships."*

76. Under Russian Employment Law fixed-term contracts are used when the nature of the work makes an indefinite term contract impractical, such as for seasonal

⁴ Johan Lubbe (April 2019). Requirements for Fixed-Term Contracts Vary Around the Globe.

<https://www.shrm.org/topics-tools/employment-law-compliance/requirements-fixed-term-contracts-vary-around-globe>



work, temporary projects, or to replace an employee who is temporarily absent. The limited circumstances are set out in article 59 of the Labour Code, and the extension or renewal of fixed-term contracts, it is said, justifies the possibility of having it categorized as open-ended.

77. While the Jamaican legislation does not yet provide a legal framework to **“curtail the abuse of recurring fixed-term employment contracts”**, such practices as we have just described, are analogous to what we believe are notions of ‘fairness’ within the jurisdiction of the Act. This, therefore, would entitle us, as Sykes, J. opined, to arrive at our own conclusion as to whether or not Mr. Brown’s contract would have been renewed at the end of its expiration. We have concluded on reasonable grounds that it would, based on the facts that: (a) he has had successive renewal of his contracts; (b) his performance and conduct are beyond reproach; and (c) the circumstances of the case do not, to our mind, warrant his summary dismissal.

78. In a recent case in South Africa, the Labour Court overturned the ruling of an Arbitrator who held that while the dismissal of the worker was substantively unfair, she nevertheless sought to exercise her discretion against reinstatement, arguing that **“... compensation for an unfair dismissal had to be limited to the balance of the employee’s fixed-term contract...”** The case involved **Toyota SA Motors (Pty) Ltd v. Commission for Conciliation, Mediation and Arbitration and Others**, and the Court thought otherwise and ordered the reinstatement of the worker **“as if he was not dismissed”**, even where the date of the finding of unfair dismissal occurred after the expiration of his fixed-term contract. The Court further argued that **“it was the employee’s suspension and subsequent dismissal that prevented him from being offered permanent employment and if there was any other reason, no evidence appears to have been led.”**

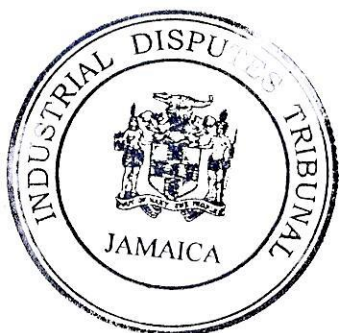


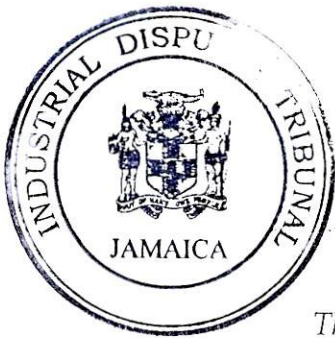
79. Section 12(5)(c) of the Act empowers the Tribunal to reinstate an employee where his dismissal was unjustifiable, a matter, which Simmons, J. argued in the case of **Clayton Powell v. IDT and Montego Bay Marine Park Trust**, "... that [it] is... purely within the discretion of the IDT." [Tribunal's emphasis]
80. In the case cited above, counsel for Mr. Powell (the applicant), submitted that "the IDT had improperly exercised its discretion when it declined to reinstate the applicant on the basis that at the time of its ruling his contract would have already expired." He argued that "if the IDT has the discretion to order reinstatement where the position that the employee previously occupied no longer exists, it should enjoy similar powers where the contract had already expired at the date of hearing."
81. Reference was made to the **Prakash v Wolverhampton City Council** [2006] judgement, where the Employment Appeals Tribunal argued that –

"Where an employee on a fixed term contract is dismissed prior to the expiry of the fixed term, but on appeal overturns the dismissal, the appeal does no more than reinstate the original fixed term contract. If the appeal takes place after the expiration of the original fixed term, the successful appeal does not, without more, have the effect of extending the fixed term contract beyond the date when it would expire according to its terms" [Tribunal's emphasis].

82. In considering the application alleging the Tribunal's failure to make an award for Mr. Powell to be reinstated under section 12(5)(c)(i) of the Act, the Learned Judge made the following submission:

*"The effect of this section was examined by the Privy Council in **Jamaica Flour Mills v. Industrial Disputes Tribunal & Anor** (supra) where it was noted that the concept of reinstatement is flexible in nature. The court stated:*





"Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal, If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code".

This section was also the subject of analysis in Garrett Francis v. The Industrial Disputes Tribunal and the Private Power Operators Ltd. [2012] JMSC Civil 55 (delivered May 11, 2012). In that case, F Williams J, stated that the use of the word "may" gives the court the option to reinstate the worker and provides for the payment of wages if that is not done. The amount of such wages is also left to the discretion of the IDT. The award of the IDT in this matter states that it took into consideration the fact that the applicant had been employed under a fixed term contract which had already expired at the date of the hearing. I have also noted that the IDT did not say that it had no power to extend fixed term contracts generally. It specifically stated that there it had no power to reinstate Mr. Powell as his contract had already expired. The question arises as to what effect an order of reinstatement would have had in the circumstances of this case."

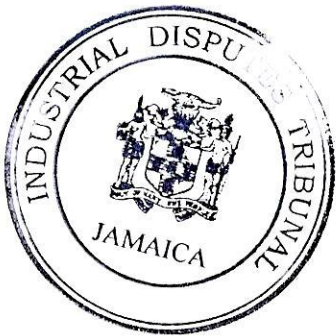
83. In examining the circumstances, context and background to the case, we therefore feel obliged to exercise our discretion in favour of reinstatement. There is, from the evidence, a legitimate expectation that Mr. Brown's contract would have been renewed, and no evidence was led otherwise.

84. In that regard, and in the consideration of an award both Halsbury's Laws of England, 4th Edition and the opinion of Williams, J. in the case of **Garnett Francis** provided useful guidance within the jurisdictional framework of the Act. The pertinent section from Halsbury's Law of England stipulates that in making an

award of compensation, a Tribunal can assess it under four headings, namely: (a) the immediate loss of salary; (b) the manner of the dismissal; (c) future loss of wages; and (d) loss of protection in respect of unfair dismissal.

85. The Act empowers the Tribunal, under section 12(5)(c)(iii), where it finds the dismissal unjustifiable and the worker wishes to be reinstated, to “**order the employer to pay the worker such compensation or grant him such other relief...**” as it deems appropriate under the circumstances.

86. Williams, J, in his judgement in the case of Garnett Francis v. IDT and Private Power Operators, [2012] JMSC Civil 55, noted 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]

CONCLUSION

87. In coming to our conclusion, the Tribunal based its findings on the fact that, first, the removal of scrap metal without authorisation cannot equate with the removal of what would substantially be regarded as Company property to include tools, equipment, vehicles, etc.

88. Second, the factual findings of the disciplinary panel concluded that Mr. Brown did not knowingly attempt to remove the scrap metal without authorisation. We have not been provided with any evidence sufficient to disturb those findings.

89. Third, the disciplinary panel's recommendation was in keeping with the 'charge letter' which at no point emphatically stated that the offence could lead to his dismissal, but was ameliorative in offering a range of disciplinary sanctions.
90. Fourth, the management's decision to overturn the disciplinary panel's recommendation does not meet the threshold of fairness and equity, and is at variance with prevailing attitudes of the common law.
91. Fifth, the decision to dismiss Mr. Brown is harsh and unjust and violates the spirit and intent of the Code. Furthermore, the second appeal hearing we believed was prejudicial to Mr. Brown receiving a fair review of the decision based on statements made by the appeal hearing chairman.
92. We therefore, based on the evidence and an enquiry into the overall substance and procedures surrounding the dismissal, concluded that the termination of Mr. James was unjustifiable.



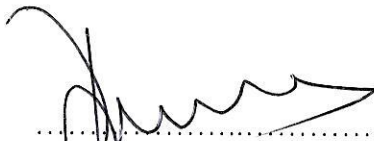
AWARD


93. Consequent on our findings that the dismissal of Paul Brown was unjustifiable, the Tribunal, in accordance with Section 12(5)(c) of the Act, hereby makes the following award.


- a. That Mr. Paul Brown be reinstated and be paid outstanding wages (excluding travel allowance) from the date of his termination to the date of his reinstatement;
- b. That his reinstatement should take effect no later than December 6, 2024, failing which, the employer shall, in addition to (a) above, pay to him an additional sum as relief of Three Million Five Hundred Thousand Dollars (\$3,500,000.00).

Dated this 15th day of November, 2024.





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


.....
Mr. Errol Beckford
Member


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

Witness:


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