[2018] **JMSC Civ 103**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2016HCV04301**

| | | |
|---|---|---|
| **BETWEEN** | **SPUR TREE SPICES JAMAICA LIMITED** | **APPLICANT/ CLAIMANT** |
| **AND** | **THE MINISTER OF LABOUR AND SOCIAL SECURITY** | **RESPONDENT / DEFENDANT** |

**IN OPEN COURT**

Gavin Goffe and Jahmar Clarke instructed by Myers, Fletcher and Gordon for the Claimant

Christine McNeil instructed by the Director of State Proceedings and Khadrea Ffolkes, Senior Legal Officer in the Ministry of Labour and Social Security for the Defendant

Heard October 26, 2017 and July 17, 2018

**Accusation of theft –Summary dismissal of employees – Failure to comply with the Labour Relations Code – Offer of reinstatement – Meaning of reinstatement in fact and law – Disciplinary hearings on same facts which triggered improper dismissals – Propriety of condition subsequent to reinstatement – Definition of industrial dispute – Whether there was an extant industrial dispute at time of Minister's referral – Need for second complaint after second dismissal – Minister's referral *ultra vires* s. 11A Labour Relations and Industrial Disputes Act**

**D. FRASER J**

**BACKGROUND**

**[1]** On October 13, 2016, the claimant filed an application for leave to apply for judicial review supported by the affidavit of Albert Bailey. The claimant sought the following orders:

(i) leave is granted to the applicant to apply for a Declaration that the respondent's referral of the dispute between the applicant and its former employees, Raquel Russell, Teena Mattlock-Wright, Takita McDonald, Joan McDonald, Kerry-Ann Williams, Cornel Taylor and Nikesha Williams (hereinafter referred to as former employees) over the termination of their employment to the Industrial Disputes Tribunal (hereinafter referred to as IDT) is ultra vires as being in breach of s. 11B of the **Labour Relations and Industrial Disputes Act** (hereinafter referred to as **LRIDA**);

(ii) leave is granted to the applicant to apply for Certiorari to quash the respondent's referral of the dispute between the applicant and its former employees over the termination of their employment, to the IDT;

(iii) leave is granted to the applicant to apply for a Declaration that, at the time of the referral by the respondent, the only matter in dispute between the applicant and the former employees was not an industrial dispute as defined in the **LRIDA**;

(iv) the grant of leave shall operate as a Stay of the respondent's referral of the dispute and of any proceedings before the IDT regarding the dispute between the applicant and its former employees; and

(v) costs of this application to be costs in the claim.

**[2]** The following were the grounds of the application:

(i) The respondent's referral relates to dismissals which were effected on March 05, 2015. The former employees did not lodge any complaint with respect to those dismissals within the 12-month period, or at all, as required by s. 11B of the **LRIDA** in order for the Minister of Labour and Social Security (hereinafter referred to as the Minister) to have the power to refer the dispute to the IDT, or for the IDT to have the jurisdiction to enter upon the referral;

(ii) The dispute between the applicant and its former employees, according to the former employees themselves, relates to the applicant's decision to send them on leave of absence pending disciplinary hearings that they refused to attend. That is not the dispute that was referred to the IDT by the Minister. That dispute cannot be referred by the Minister based on the definition of "industrial dispute" in the **LRIDA**;

(iii) The dispute that the Minister purported to refer to the IDT was already settled between the parties by the unconditional withdrawal of the dismissal letters issued in December, 2014 and the reinstatement of the former employees, which they accepted with the offer of full pay. Alternatively, by their actions the former employees waived all right to challenge their dismissals in December 24, 2015;

(iv) The Minister has no jurisdiction to refer disputes that have already been settled by the parties;

(v) The Minister has no jurisdiction to refer a complaint of unjustifiable dismissal where the parties have agreed to the withdrawal of the dismissal letter and the reinstatement of the aggrieved workers;

(vi) The applicant was and is directly affected by the respondent's referral as it has been forced to retain attorneys to represent its interests; and

(vii) The time limit for making this application has not been exceeded.

**[3]** On December 01, 2016, Graham-Allen J granted leave to the applicant to apply for certiorari to quash the respondent's referral of the dispute between the applicant and its former employees over the termination of their employment, to the IDT. On December 15, 2016, the claimant filed a Fixed Date Claim Form, supported by an affidavit seeking, amongst others, orders i, ii and iii as stated in the application for leave above.

**[4]** On July 17, 2018, I handed down judgment with reasons to follow, in the terms outlined below:

a) It is declared that the defendant's referral of the dispute between the claimant and its former employees over the termination of their employment to the IDT is *ultra vires* as being in breach of s. 11B[1] of the **LRIDA**;

b) The defendant's referral of the dispute between the claimant and its former employees over the termination of their employment, to the IDT is quashed;

c) It is declared that, at the time of the referral by the respondent, the only matter in dispute between the applicant and the former employees was not an industrial dispute as defined in the **LRIDA**; and

d) Costs to the claimant to be agreed or taxed.

**[5]** Unfortunately, in error, in the first order the reference was made to section 11B of the **LRIDA,** whereas it should have been to **s.11A**. That inadvertent error is now corrected. Order a) therefore properly reads:

a) It is declared that the defendant's referral of the dispute between the claimant and its former employees over the termination of their

---

[1] Please see paragraph 5 below.

employment to the IDT is *ultra vires* as being in breach of **s. 11A** of the **LRIDA.**

**THE EVIDENCE**

**[6]** The relevant facts gleaned from the affidavits of Albert Bailey*, (CEO of the claimant company)*, and Michael Kennedy, *(Chief Director in the Industrial Relations Department responsible for all disputes referred to the Ministry of Labour and Social Security ("the Ministry")),* are as follows. After a period of some concern about lower than projected profit margins, the company in September 2014 and twice in December 2014, the second occasion being December 23, found a number of its products secreted in the staff restroom. On each occasion when these items were discovered staff were warned, including on at least one occasion, when it was indicated that theft was negatively affecting the company's profits and that disciplinary action, including dismissal, could be taken against them.

**[7]** Following suspicions that certain workers were stealing from the company they were summarily dismissed on December 24, 2014. On January 8, 2015 Mr. Howard Duncan Industrial Relations Consultant (IRC) representing the former employees wrote to the claimant company indicating that the manner of termination breached the Labour Relations Code (LRC) and the rules of natural justice. He requested an appeal hearing with a view to their reinstatement within five days without loss of pay, failing which the matter would be referred to the Ministry.

**[8]** Based on correspondence exhibited, the next steps in the process were that on January 16, 2015 the workers were told to return to work on January 19, 2015 at which time they collected undated letters unconditionally withdrawing the letters of dismissal dated December 24, 2014 and reinstating them effective December 24, 2014. Those letters advised that they would be paid all their outstanding emoluments from December 24, 2014 to January 16, 2015, minus the notice pay which they received upon termination. Also between January 19 and 20, 2015 they

were each handed another undated letter which invited them to disciplinary hearings on either January 20 or 21, 2015 and directing them to proceed on paid leave of absence until the decision of the disciplinary hearing was communicated to them. They were also advised that they could have representatives attend the disciplinary hearings with them.

**[9]** On January 26, 2015 Mr. Duncan the IRC wrote referring the matter to the Ministry indicating that he had advised the workers to report to work but not to participate in a disciplinary hearing as it was an appeal hearing that had been requested. He stated that the worker was being prevented from working and he was inviting the Ministry to intervene to settle the dispute.

**[10]** The Ministry wrote to the claimant company on February 11, 2015 advising of the receipt of the complaint on January 26, 2015 and proposing Friday, February 20, 2015 or Wednesday, February 25, 2015 for a conciliatory meeting to try and resolve the matter. The claimant's attorneys responded via letter of even date stating that the employees were still employed to the claimant and therefore the Ministry's invitation for them to attend a meeting was premature.

**[11]** Of the seven former employees, only Mr. Cornel Taylor attended his scheduled disciplinary hearing. After his hearing presided over by Mr. Dennis Hawkins, a director of the claimant, at which Mr. Taylor waived his right to representation, his services were terminated by letter dated February 12, 2015.

**[12]** On February 25, 2015 Mr. Duncan wrote to the Ministry indicating:

> We are aware that the employees are still employed to the company as their terminations were in the first instance unfair and then the company withdrew the termination, hence they are still employees.
>
> The matter is therefore that the employees are not able to attend work as the company refuses to allow them to work until they attend disciplinary hearings. This we object to as the termination was unfair in the first instance and then withdrawn. As we speak the workers are not on the job, therefore the Ministry was asked to arrange the meeting to settle the dispute as requested.

**[13]** Following the repeated failures of the other former employees to attend scheduled disciplinary hearings, Mr. Hawkins considered their cases in their absence and terminated their services by letters dated March 5, 2015. They, as had Mr Taylor earlier, were provided with their final payment inclusive of any notice and vacation pay due to them.

**[14]** By six identical letters dated May 21, 2015, from the Permanent Secretary in the Ministry the company was invited to a conciliation meeting on June 4, 2015 regarding the termination of the former employees. That meeting did not produce a settlement of any kind. Thereafter, the defendant Minister of Labour and Social Security by letter dated August 27, 2015, indicated that the Industrial Relations Department (hereinafter referred to as the IRD) of the Ministry was "advising themselves" and that as soon as a final decision was reached on the matter, the Ministry would revert to the claimant's attorneys-at-law.

**[15]** By letter dated December 8, 2015, the claimant's attorneys received a second request from the Permanent Secretary inviting the claimant to a conciliation meeting regarding the dispute. In response by letter dated December 9, 2015, the claimant's attorneys informed the Permanent Secretary that the claimant was awaiting the final decision of the Minister and his reasoning, which was at that time outstanding. By letter dated December 30, 2015, the Permanent Secretary informed the claimant's attorneys, that the letter of December 08, 2015, was an indication that a final decision had been reached, but gave no confirmation that the decision was reached by the Minister or by the IRD who had been advising themselves.

**[16]** In response to a request made under the **Access to Information Act**, the claimant's attorneys were provided with all correspondence between Mr. Duncan and the Ministry. There was no complaint lodged in respect of the dismissals effected on February 12 and March 5, 2015.

**[17]** By letter dated July 13, 2016, written by Michael Kennedy on his behalf, the Minister referred to the IDT, the dispute between the claimant and the former employees over their termination of employment in the following terms:

> I am directed by the Honourable Minister to refer to the Industrial Disputes Tribunal for settlement, the dispute between Spur Tree Spices Jamaica Limited and **Racquel Russell, Teena Matlock-Wright, Takita McDonald, Joan McDonald, Kerry-Ann Williams, Cornel Taylor and Nikesha Williams** in accordance **with Section 11A(1)(a)(i)** of the Labour Relations and Industrial Disputes Act with the following terms of reference:-
>
> **"To determine and settle the dispute between Spur Tree Spices Jamaica Limited and Racquel Russell, Teena Matlock-Wright, Takita McDonald, Joan McDonald, Kerry-Ann Williams, Cornel Taylor and Nikesha Williams on the other hand over the termination of their employment.".**

**ISSUES**

**[18]** With some modification, I have found it convenient to utilise the issues as identified by counsel for the defendant as follows:

a) Was the reinstatement of the former employees by the claimant company valid in fact and law, considering:

   i) The acceptance by the workers of termination benefits and then payments to cover the period from the date of dismissal to the date of reinstatement;

   ii) The refusal of the company to assign duties to the reinstated former employees until they attended disciplinary hearings; and

   iii) The institution of disciplinary proceedings upon reinstatement based on the same facts which triggered the improper dismissals?

b) Was there in law, an existing industrial dispute in relation to the dismissals of December 24, 2014, thereby justifying the Minister's referral of the matter to the IDT?

**SUBMISSIONS**

**[19]** It should be noted at the outset, that at the conclusion of the hearing the court invited counsel for the parties to provide their existing written submissions in electronic format. However when submissions from counsel for the defendant were received it was noted that, in light of some of the concerns raised during arguments, additional authorities were included in the electronic submissions provided. Counsel for the claimant did not have an opportunity to comment on those authorities. However, having realised that these authorities would not affect the outcome of the matter, the court decided to address them without inviting counsel for the claimant to provide further submissions.

*Counsel for the claimant*

**[20]** Initially in written submissions counsel for the claimant advanced that the Minister is the only person empowered by the **LRIDA** to refer matters to the IDT. As the evidence revealed it was Michael Kennedy who made the reference, counsel contended that the reference would have been inherently flawed unless it was authorized by the principle of necessary implication established in ***Carltona v Commissioner of Works*** [1943] 2 ALL ER 560. However in oral submissions, counsel indicated that having seen that advice had been given to the Minster who was involved in the decision making process, the issue was no longer live.

**[21]** Further, counsel noted that Mr Duncan, the IRC who communicated with the Ministry on behalf of the former employees, never submitted any complaint relating to the dismissals in February and March 2015. Consequently, the position taken by the Ministry and advanced by counsel for the defendant Minister, was that the referral was with respect to the December 24, 2014 dismissals. Counsel further submitted that there was no such thing as an “ongoing” or “rolling” termination. Whereas issues relating to suspensions or allocation of work could be viewed over a period, with respect to termination there was a definite date from which you could only look back not forward. Therefore, events after December 24, 2014, if they

were to be properly countenanced by the Minister, required another letter of complaint about a new separate breach. Such a letter was never written and it was now too late to submit one. See ***R v Industrial Dispute Tribunal and the Honourable Minister of Labour; Ex parte Wonards Radio Engineering Ltd*** (1985) 22 JLR 67 at page 76C.

**[22]** Counsel for the claimant having recognised that the concern was in relation to the initial dismissals, indicated that there was no need or basis to pursue the argument initially advanced in written submissions that the referral was in breach of section 11B of the **LRIDA**. That sub-section stipulates that where an industrial dispute exists in relation to disciplinary action, the complaint to the Ministry that triggers a referral, must have been made within 12 months of the date the disciplinary action becomes effective. Clearly, the complaint in relation to the December 2014 dismissals having been made in January and again in February 2015, fell well within the permitted window.

**[23]** Counsel therefore submitted that there was really only one remaining live issue, namely: *whether a dispute over requiring employees to attend a disciplinary hearing and the employees' decision not to attend such hearing constitutes an Industrial Dispute as defined in the* ***LRIDA.***

**[24]** He distinctly contended that the issue was not, whether in fact the former employees were actually reinstated, as framed by the Ministry. This as both the employer and employees had agreed that the former employees were reinstated. Thereafter the dispute related not to the initial dismissals but to what happened subsequently. Counsel argued that it was impermissible for the former employees to rely on letters after the date of dismissal without bringing a complaint to the Minister claiming that the dismissals in 2015 were unjustified because of what happened before. Counsel relied on the case of ***IDT v UTECH and UAWU*** **consolidated with** ***UAWU v UTECH and IDT*** [2012] JMCA Civ 46.

**[25]** Counsel further submitted that there was a difference in law between a dispute and an industrial dispute and different rights existed under the law for unionised and non-unionised workers. As non-unionised workers the former employees could bring the issues of termination or suspension to the Minister. In this matter the Minister had determined that termination was the industrial dispute. However, counsel argued that the Minister could not properly refer this matter to the IDT as the dispute was premature – See ***Mckay v London Probation Board*** [2005] ALL ER (D) 125 (May). Further the reinstatement of the employees without any loss of pay constituted a waiver of any prior breach as they received all they asked for. See ***Prakash v Wolverhampton City Council*** UKEAT/0140/06/MAA. Viewed another way counsel queried rhetorically whether if the second dismissals had not occurred and the matter had been referred to the IDT, could the former employees have received any further remedy than full reinstatement?

**[26]** The reinstatement counsel maintained was without a condition subsequent as the letters of reinstatement did not indicate that the former employees would be reinstated only if they attended disciplinary hearings. However, counsel argued that it would have been proper to make the reinstatement subject to that condition, as there could only be a disciplinary hearing if there was an employer/employee relationship. Counsel stoutly contended that an employer had to have the right to conduct a proper disciplinary hearing and it could not be a situation where because there had initially been a procedural error it could not be corrected. Counsel suggested that the situation was analogous to an employee being placed on interdiction. See ***Clayton Powell v IDT and the Montego Bay Marine Park Trust*** [2014] JMSC Civ. 196. Counsel contended that any argument that the reinstatement was a sham could only be raised in the context of the second dismissals, which related to the disciplinary hearings, in respect of which there was no complaint.

**[27]** Counsel noted that a part of the argument being made on behalf of the defendant was that there was no true reinstatement if the worker was not given something to do. However, counsel advanced that there was no obligation on an employer to

give an employee work to do save in certain exceptional circumstances, none of which applied in these circumstances (See **Smith & Woods Employment Law,** Eleventh Edition OUP at pages 141–144). There was, counsel maintained, "flexibility in reinstatement" – See ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union*** [2005] UKPC 16.

**[28]** Counsel maintained that ultimately a dispute is what the parties say the dispute is and it was not up to the Minister to characterise the dispute. See ***R v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins Ex parte West Indies Yeast Co. Ltd*** [1985] 22 J.L.R 407. The parties it was argued were in dispute concerning what happened in between the dismissals and not in relation to the dismissal of 2014 which had been resolved, nor the dismissals of 2015 in respect of which there was no complaint. The dismissal of December 2014 that the Minister referred, was therefore no longer an existing dispute capable of referral to the IDT and should be quashed.

*Counsel for the defendant*

**[29]** Counsel submitted that the **LRIDA** provides for the statutory definition of industrial dispute and the question is whether the employment of the workers was terminated at all material times to constitute an "industrial dispute" at the time the matter was referred to the IDT. It was submitted that the termination of December 24, 2014, remained a 'live' industrial dispute (for the purposes of the **LRIDA),** which subsisted up to March 2015 and continuing. Hence, the workers remained employees for the purpose of prosecuting their wrongful termination and the Minister's reference of the dispute to the IDT was supported in law and fact and not *ultra-vires*. Moreover, there was only one termination which crystallised on December 24, 2014 and all that happened afterwards could be referred back to it.

**[30]** Counsel also relied on S. 2 of the **Employment (Termination and Redundancy Payments) Act (ETRPA),** which defines the relevant date when an employee is

dismissed, as well as ***Makaya v Payless Supermarket (Pty) Ltd*** 2007 (1) BLR 521, a decision of the Industrial Court, Gaborone, Botswana which addressed how the effective date of termination should be determined.

**[31]** Counsel further argued that the claimant acted unlawfully by offering reinstatement while instituting disciplinary hearings on the same facts that led to the impugned terminations. (See ***Fawu et Ors v Premier Foods Limited t/a Blue Ribbon Salt River*** Case no. C722/2012). Accordingly, there was no reinstatement in law and fact. The contention that a second letter was required complaining of the dismissals in February and March 2015 was wrong as that would sanction an abuse of process;

**[32]** Counsel maintained that, *"The natural and primary meaning of to "reinstate"… was …to restore the status quo ante the dismissal."* (See ***William Dixon Ltd v Patterson*** (1943) SC (J) 78, at 85 quoted in **Words and Phrases Legally Defined,** 3rd Ed., London Butterworths 1990 at pages 40 – 41, and ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal*** SCCA 7/2002 jud. del. June 11, 2003 at p.31)**.** Counsel submitted that reinstatement is by nature consensus driven, (see ***Perkins v Grace Worldwide (Australia) Property Limited*** (1997) 72 IR 186, 191-192); and should not be conditional or coupled with any contrary qualification, especially a further punitive course of action. See ***Setcom (Pty) Ltd v Dos Santos and Others*** [2010] ZALC 193; (2011) 32 ILJ 1434 (LC).

**[33]** Counsel further advanced that reinstatement was not appropriate in circumstances where no mutual trust and confidence exists and *a fortiori*, no good prospects for the future employment relationship, as evidenced by the convening of a disciplinary hearing. (See ***Clayton Powell v the Industrial Disputes Tribunal and Montego Bay Marine Park Trust*** at paras 55-56; ***Coleman v Magnet Joinery Limited*** [1975] ICR 46; [1974] IRLR 343; ***Rawlins v Kemp t/a Centralmed,*** (2010) 31 ILJ 2325 (SCA) and ***Setcom (Pty) Ltd v Dos Santos and Others***.

**[34]** Counsel also advanced that the encashment of cheques cannot without more be interpreted as the employees waiving any rights to available redress, especially where the evidence is that they at all material times, as herein, mandated their representative to pursue their perceived rights. See ***The Jamaica Flour Mills Ltd v the Industrial Disputes Tribunal and Ano.*** That position is distinguishable on the facts from the decision in ***R v Minister of Labour and Employment, the IDT et Anor ex parte West Indies Yeast*** at 414A.

**[35]** Counsel also contended that, while as indicated in ***Collier v Sunday Referee Publishing Company Limited*** [1940] 2 KB 647 at 650, an employer will not be in breach of contract by failing to provide work, reinstatement requires demonstrated good faith, beyond that which would suffice in the ordinary course of the contract of employment. See ***Johnson v Fisher's Foils Ltd*** [1944] 1 K.B. 316, which adopted the definition of reinstatement in ***Hodge v Ultra Electric Ltd*** [1943]1 K.B. 462. (See also ***Blackadder v Ramsey Butchering Services Pty Ltd*** [2005] HCA 22/ (2005) 215 ALR 87, ***Retail Traders Association of New South Wales v Shop Distributive and Allied Employees' Association of New South Wales*** (1990) 36 IR 38 and ***Ramsey Butchering Services Pty Ltd v Blackadder*** [2003] FCAFC 20 which all considered the meaning of "reinstatement).

**[36]** Counsel further submitted that the LRC sets out a disciplinary procedure to be followed if statutory due process is to be achieved. However, where a worker was terminated without first being heard, it was not permissible for the employer in seeking to remedy the defect, to invite the workers to resume employment with a view to doing that which should have initially been done. Counsel maintained that the equitable remedy of reinstatement at the employers' instance, afforded an opportunity to right a wrong, but it did not allow the proverbial "second bite of the cherry".

**ANALYSIS**

**[37]** There is common ground between the claimant and the defendant that the former employees were dismissed on December 24, 2014, without the benefit of due process. It is also accepted that the employees were invited back to work by the claimant company in January 2015. There is however a dispute concerning whether the conduct of the company after this invitation, operated to vitiate true reinstatement. The answer to issue 1 necessarily impacts the resolution of issue 2.

***Was the reinstatement of the former employees by the claimant company valid in fact and law?***

**[38]** The claimant company has maintained that having conceded the flawed manner in which the former employees were initially dismissed on December 24, 2014 without a hearing, the employees were reinstated on January 19, 2015 retroactively from the date of dismissal without any loss of benefits. The rescission of that termination could not therefore form the basis of a referral by the Minister, especially as the letter of Mr. Duncan to the Ministry dated February 25, 2015 acknowledged that the workers were then employees. Therefore, only the second dismissals could form a basis of such a referral. However, no complaint was made in relation to the second dismissals and as such a complaint was now time-barred.

**[39]** The defendant has however contended that there was one dismissal on December 24, 2014, with the reinstatements falling short of legal and factual reinstatement. Hence the operating date of dismissal remained December 24, 2014. A corollary of that would be the complaint which related to that dismissal was made within time in keeping with section 11B of the **LRIDA** and was properly the subject of the Minister's referral. There would therefore have been no "second dismissal".

**[40]** The case of ***IDT v UTECH and UAWU*** **consolidated with** ***UAWU v UTECH and IDT***, addressed the question of what was a relevant consideration, in determining

the lawfulness of the dismissal of a worker for unauthorised absence from her job. At paragraph 40 Brooks JA stated that:

> In my view the IDT is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that **existed at the time of the dismissal**, even if those matters were not considered by, or even known to, the employer at that time. (my emphasis).

**[41]** Further at paragraph 44 he stated:

> [T]he IDT quite correctly concluded that "it could not sustain the dismissal of Ms. Carlene Spencer for not attending the Disciplinary Hearing that was convened on 3rd April 2007." That, in my respectful view, had nothing to do with whether or not her absence from work was unauthorised. I, respectfully, agree with Mangatal J that the IDT went into an area which was irrelevant to the question it was mandated to answer…

**[42]** The ***UTECH*** case is important to support the point, emphasised by counsel for the claimant, that the lawfulness of dismissal, cannot be judged retroactively based on matters that occurred post dismissal. As counsel for the claimant noted were it another type of dispute concerning for example suspension or allocation of work, examination of a period might have been relevant. However, a termination has a definite date from which one can only look back not forward. The dismissals in this matter occurred on December 24, 2014 and the propriety of those dismissals have to be judged based on the actions taken by the claimant company up to and on December 24, 2014. Anything occurring after, needs to be considered in terms of the effectiveness of the reinstatement and the implications of the company's decision to hold disciplinary hearings pending the former employees resumption of duties. But, such subsequent matters cannot be determined on and cannot determine whether the dismissals actually occurred on December 24, 2014 or were justified then.

**[43]** The effect of proceedings subsequent to a dismissal was considered in ***Makaya v Payless Supermarket (Pty) Ltd.***, relied on by counsel for the defendant. In that matter a disciplinary hearing was held in relation to a minor offence against a

worker. The hearing was chaired by the store manager who also brought the charge against the worker. The worker was dismissed. An internal appeal having been unsuccessful, an appeal was brought to the Industrial Court (IC). The IC held that the hearing had been substantively unfair as the punishment was too harsh for a minor offence and also procedurally unfair, given the conflicting roles played by the store manager. The court also noted at page 536 that, *"When an employee is dismissed at a disciplinary hearing, then that terminates his contract of employment. If he is dissatisfied with such dismissal he has the right to appeal…If his appeal is successful then the employer has to reinstate him retrospectively. If his dismissal is confirmed on appeal then he remains dismissed as from the date he was dismissed at the disciplinary hearing."*

**[44]** In the instant case there is no dispute that there were effective dismissals on December 24, 2014. The question is did the reinstatements cure or end those dismissals? Unlike the ***Makaya*** case there was no hearing before the former employees were dismissed on December 24, 2014. They were summarily dismissed. After they were reinstated they were each invited to take part in a disciplinary hearing, not an appeal from a hearing, as there was none that had yet taken place. Save for one person (Mr. Taylor), on the advice of the IRC, they declined to participate in those hearings. Given the different factual circumstances, I find the ***Makaya*** case unhelpful as it relates to the main concern whether the reinstatements were genuine, complete and effective, or merely a sham to give the colour of fairness to extant dismissals.

**What does it mean to reinstate?**

**[45]** Relying on ***William Dixon Ltd v Patterson*** (1943) SC (J) 78, at 85, the learned editors of **Words and Phrases Legally Defined** 3rd Ed. Butterworths, London 1990, indicate that, "The natural and primary meaning of to "*reinstate"* as applied to a man who has been dismissed, (*ex hypothesi* without justification), is to replace him in the position from which he was dismissed, and so to restore the *status quo ante* the dismissal."

**[46]** There is further guidance on the effect of reinstatement in ***Prakash v Wolverhampton City Council.*** Therein, Judge Serota QC referred with approval to the following passage on the effect of reinstatement.

> **[51]** In London Probation Board, McMullen HHJ QC had this to say at para 16 in a passage relied upon by Mr Moretto:
>
> "16 From this it is clear that the appeal board had all the powers of the Respondent. In our judgment, prior to any disciplinary incident occurring, the Claimant had an enforceable contractual right, if subjected to disciplinary action, to appeal to the appeal board which would treat his case dispassionately, be guided by the ACAS officer as to best practice, and if the finding was that there were not grounds for his dismissal he should go back to work in every respect as if the original decision had not been made. That is what occurred in this case. It was a breach of contract for the Respondent to dismiss him on 10 June 2003 for, as the appeal board made clear, there were no grounds for doing so. The Respondent made up for that breach by its decision to uphold his appeal and reinstate him. We accept Mr Pearman's analysis that the Claimant thereby waived the breach, or in any event accepted the reinstatement as an appropriate remedy for it. Contrary to the submission of Mr Brown, we hold that there was a contractual provision which entitled the Claimant to an independent hearing and implementation of any decision made in his favour. Conversely, it would not be a breach of contract for a decision to dismiss to be upheld following a properly constituted appeal board. It follows that a decision to reinstate the Claimant was binding as a matter of contract either by operation of the above procedure, or as a matter of direct promise made by the appeal board itself. This is put beyond doubt by the acceptance in Mr Brown's written skeleton argument of this 'The correct analysis is that the Appellant is in breach of contract. That cannot be disputed.' That will also be of assistance to the Claimant if he wishes to pursue a claim in the civil courts. The breach of contract is in dismissing the Claimant on 5 September 2003 following its promise to reinstate him."

**[47]** This principle was recognised in ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal***, where at page 31 paragraph (vi) of its judgment, the Court of Appeal, noted that "reinstatement involves '*restitution in integrum'* (restoration to one's original position)", which required that "the employer shall treat the (unjustifiably dismissed worker) in all respects as if he had not been dismissed", see Halsbury's Statutes of England and Wales (1990) at page 296.

**[48]** The law however recognises that for reinstatement to work, there will need to be an atmosphere within which the employer and the employee can resume a productive working relationship (See ***Perkins v Grace Worldwide (Australia) Property Limited***). There are often practical difficulties that may arise given that the need for reinstatement occurs in a context where there has been a breakdown of the relationship between an employer and employee, that led to an unfair dismissal.

**[49]** In ***Clayton Powell v the Industrial Disputes Tribunal and Montego Bay Marine Park Trust***, Simmons J quoted extensively from ***Cable and Wireless (West Indies ) Ltd. v. Hill and Others*** (1982) 30 WIR 120, 131 in which dicta from ***Coleman v Magnet Joinery Limited*** [1975] ICR 46; [1974] IRLR 343 was referenced as follows:

> [W]hen considering whether a recommendation [for reinstatement] is practicable, the tribunal ought to consider the consequences of re-engagement in the industrial relations scene in which it will take place. If it is obvious as in the present case that reengagement would only promote further serious industrial strife, it will not be practicable to make the recommendation…the likelihood of friction between supervisors or other employees and a re-instated worker should also be taken into account even where there is no prospect of collective action.

**[50]** Given the facts in ***Clayton Powell*** where the claimant's fixed term contract was terminated by the 2nd respondent prior to its expiry date, on the premise that he had utilized its equipment for personal profit without authorization, the IDT ruled that the dismissal was unjustifiable as the 2nd respondent had failed to conduct a disciplinary hearing before it terminated the claimant's contract. However, it declined to reinstate Mr. Powell and made an award. The claimant thereafter sought leave to apply for an order of certiorari in respect of that award. Simmons J in refusing leave, found there was no basis to overturn the IDT's exercise of discretion not to order reinstatement, in a context where the fixed term of Mr. Powell's employment had already expired and the industrial relations between the parties was likely less than ideal, given that the matter had arisen from an

allegation of dishonesty and there was also reports of friction between Mr. Powell and other employees.

**[51]** A worker may however not unreasonably refuse an offer of reinstatement and instead claim compensation, where it is clear that the employer is genuinely seeking to right a wrong of unfair dismissal. In ***Rawlins v Kemp t/a Centralmed***, where the claimant had been unfairly dismissed and repeatedly rejected the employer's offers of reinstatement it was stated that:

> [I]t is important to affirm the employers 'right to right a wrong' that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation.

**[52]** On the other hand the remedial action embarked upon by the employer must be genuine and not a ruse to cover the previous unlawful action. In ***Setcom (Pty) Ltd v Dos Santos and Others***, the applicant brought a review application to set aside an award issued by the third respondent (arbitrator) which found that the dismissal of the first respondent was both procedurally and substantively unfair and awarded her six months' remuneration as compensation. The court found that, amongst other things, the arbitrator did not err in making an award of compensation as the applicant did not offer reinstatement to restore the *status quo* before the dismissal, but contrived to portray its actions as an upliftment of a suspension in order to allow it to pursue a disciplinary enquiry. At paragraph 37 the court stated that:

> The situation confronting the employee, in this instance at the time of the purported upliftment of her 'suspension,' was not one of an employer that recognized its wrong doing and was seeking to rectify matters, but of an employer that was attempting to disguise its actions to avoid them being characterized as an unfair dismissal. Under such circumstances, it is perfectly understandable for the employee to have rejected the upliftment of the suspension as a stratagem, rather than a bona fide attempt to make amends and to restore the relationship. It does not matter that the upliftment of the suspension was not conditional on her accepting a variation of terms and conditions of employment: what was being proposed

> by the employer was an arrangement that entailed no acknowledgment of any wrongdoing and no undertaking to make redress, to which the employee would be acquiescing had she returned to work. In such circumstances, the employee can hardly have been said to have unreasonably rejected a bona fide offer of reinstatement, because there was none. The reasonableness of the employee's response must be assessed in relation to what was actually presented to her at the time, namely a disingenuous pretense that the employer was uplifting her suspension, whereas it had summarily dismissed her.

**[53]** The above analysis is being heavily relied on by counsel for the defendant. The central plank of the argument deployed on behalf of the defendant, is that the offer of reinstatement was disingenuous and flawed, as it was married to a condition subsequent that the reinstated former employees engage in a disciplinary process to cure the irregularity of the termination. There are however clear distinctions between the situation in ***Setcom*** and the facts of the instant case. Unlike in ***Setcom*** the claimant company was not trying to deny that it had wrongfully dismissed the former employees. It freely admitted that error, indicated that the employees were reinstated and paid them in full, retroactive to the date of dismissal less the amounts that had been paid for termination benefits. That was the redress the former employees had requested in their complaints, (save for the misconceived insistence on an appeal hearing), and the maximum remedy they could have received if the matter had been ruled on by the IDT.

**[54]** There however remained an outstanding matter, the reason for the dismissal. There was clearly an issue that needed to be resolved to facilitate the restoration of the desired positive industrial relations atmosphere of trust, or if the suspicions were lawfully established, provide a valid basis for fair separation. The company sought to address that issue through inviting the former employees to disciplinary hearings. The propriety of that approach, and whether that amounted to unreasonably marrying a condition subsequent to reinstatement that vitiated the reinstatement, I will address subsequently. However at this point it is sufficient to note that on the face of it, the company was not trying to deny its wrong doing, it

was seeking to cure it. My later analysis will determine if the curative procedure it adopted was appropriate.

**The effect of the acceptance by the former employees of termination benefits and payments to cover the period from the date of dismissal to the date of reinstatement**

**[55]** In ***R v Minister of Labour and Employment, the IDT et Anor ex parte West Indies Yeast*** at 414A, Gordon J in opining that *"once you accept payment then you are accepting the terms on which such payment is made or offered and the contract of employment is legally brought to an end,"* however noted on the facts that *"the respondents did not challenge their dismissal but accepted the letters as payment without demur"*.

**[56]** In ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union***, the appellant JFM took certain decisions which rendered the posts of certain employees redundant. Neither the employees nor their Union was informed of the impending redundancy. The employees were issued letters dismissing them with immediate effect and given cheques. Two of the employees encashed their cheques. On action being brought challenging the dismissals, the IDT, the Full Court, the Court of Appeal and the Board of the Judicial Committee of the Privy Council, all found the dismissals unjustifiable. One of the points raised by the appellant company was that waiver could be established from the act of the encashment of the cheques.

**[57]** Lord Scott of Foscote writing for the Board stated:

> **[20]** As to JFM's waiver point, which affects only Mr Campbell and Mr Gordon, their Lordships would reject the point for the same reasons as those given in the courts below. Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first

> requirement. JFM's case falls at this hurdle. The cashing of the cheques took place after the Union had taken up the cudgels on the employees' behalf, after the dispute had been referred to the Tribunal and after arrangements for the eventual hearing had been put in train. In these circumstances the cashing of the cheques could not be taken to be any clear indication that the employees were intending to abandon their statutory rights under s 12(5)(c). Nor is there any indication, or at least no indication to which their Lordships have been referred, that JFM or any representative of JFM thought that the two employees were intending to relinquish their statutory rights. Even assuming that the cashing of the cheques could be regarded as a sufficiently unequivocal indication of the employees' intention to waive their statutory rights, the waiver would, in their Lordships' opinion, only become established if JFM had believed that that was their intention and altered its position accordingly. There is no evidence that JFM did so believe, or that it altered its position as a consequence. The ingredients of a waiver are absent. Their Lordships would add that they do not see this as a case where the employees were put to an election between inconsistent remedies, ie cashing the cheques or pursuing their statutory remedy (see *Scarf v Jardine* 7 App Cas 345 at 351, 51 LJQB 612). Mr Scharschmidt did not advance any argument to the contrary but based his waiver contention on estoppel by conduct.

**[58]** The question therefore becomes whether in all the circumstances, objectively viewed, the former employees' conduct following their dismissals indicated an intention to waive their right to pursue a statutory remedy and the claimant believed this and altered its position accordingly. The former employees sought via the IRC and accepted from the claimant reinstatement. They also accepted the retroactive payments for the period they had been dismissed, less the termination benefits they had previously received. They were however still in consultation with the IRC and he referred the issue of the company requiring them to attend disciplinary hearings prior to resumption of duties, to the Ministry.

**[59]** Based on the ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union*** case, in light of the ongoing challenges to the actions of the company, the acceptance of these payments could not by itself, have amounted to a waiver of the workers' rights to pursue statutory action. However, though their statutory rights had not been formally waived, they had already received the maximum remedy pursuit of their statutory rights could have afforded

them. This finding is of course subject to the discussion concerning the propriety of the company requiring them to attend disciplinary hearings, based on the same facts for which they had been initially dismissed, prior to any resumption of duties.

**The refusal of the company to assign duties to the reinstated former employees until they attended disciplinary hearings**

**[60]** It is important to bear in mind that in the definition of industrial action in the **LRIDA**, the allocation of work as between workers or groups of workers, in and of itself, is only a basis for the finding that an industrial dispute exists where workers are unionised[2], which the former employees were not. This is however distinct from the defendant maintaining that the non-allocation of work in this case showed bad faith and was indicative that the reinstatements by the company were not genuine.

**[61]** The general common law rule is that there is no obligation to provide work for an employee; the only obligation being to pay wages due under the particular contract of employment concerned. The classic statement of Asquith J in ***Collier v Sunday Referee Publishing Company Limited*** at p. 650 starkly illustrates the principle: "*Provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out".*

**[62]** It is however the case that reinstatement requires demonstrated good faith, beyond that which would suffice in the ordinary course of the contract of employment. In ***Johnson v Fisher's Foils Ltd***, Humphreys J at p. 320, adopted the view of Tucker, J in ***Hodge v Ultra Electric Ltd*****,** that reinstatement involves putting the specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment. At page 322 Cassells J stated that:

---

[2] See s. 2 (a) (iii) of the LRIDA.

> [W]here work is available, a man who is not working is unemployed. He can scarcely be said to be reinstated in his employment or his work … by attending only at pay time.

**[63]** In ***Blackadder v Ramsey Butchering Services Pty Ltd***, an unfairly dismissed worker was ordered reinstated by The Australian Industrial Relations Commission (AIRC). Instead of a return to active duties, he was instructed by his employer to stay home, on full pay, where he remained for five years until the High Court ruled that 'reinstatement' means more than just the payment of a wage. There needed to be a restoration of duties attached to the position to ensure reinstatement achieved a meaningful outcome.

**[64]** As noted by Shae McCrystal in **"Unfair Dismissal, Reinstatement and Garden Leave…"** [2005] Federal Law Review 18, the danger of the contrary view is that:

> [W]hile the idea of full pay without duties may initially appeal, the reality of this situation continuing for more than a few weeks for the average employee is a loss of skills, professional development, personal satisfaction, the sense of community available to those engaged in paid work and potentially, the opportunity to obtain alternative future employment.

**[65]** In light of that statement of principle, the facts of the instant case have to be carefully considered. The analysis in this section will necessarily overlap with the more detailed discussion that will ensue in the following section, concerning the immediate requirement imposed by the claimant company upon the reinstatement of the former employees, for them to participate in disciplinary hearings before resuming any duties. The stated position of the company was not that the workers would never be allowed to return to work. They were put on paid leave of absence, in effect interdicted, pending the outcome of the disciplinary hearings.

**[66]** This was a wholly different situation than in the ***Johnson v Fisher's Foils Ltd*** and ***Blackadder v Ramsey Butchering Services Pty Ltd*** cases where it was clear that the employers, though forced to reinstate the workers, had no intention of making them actually work for the respective companies again. In the instant case

no claim was made by Mr. Taylor the former employee who went to the hearing and was subsequently dismissed, that that hearing was unfair. The other former employees, acting on advice, declined to attend the hearings and hence the posture of the company in relation to them was never tested nor found to be insincere. If there was a basis to hold disciplinary hearings, which I will address in the next section, it cannot be sustained that requiring the former employees to complete that process before resumption of duties, if such hearings exonerated the former employees, was improper.

**The institution of disciplinary proceedings upon reinstatement based on the same facts which triggered the improper dismissals.**

**[67]** It is fair to say that perhaps the lynchpin of the arguments of counsel for the defendant is that the requirement that the former employees submit to disciplinary hearings prior to resuming work duties vitiated their reinstatement. Counsel for the defendant relied on ***Fawu et Ors v Premier Foods Limited t/a Blue Ribbon Salt River***, a case from The Labour Court of South Africa, Cape Town. In that matter after a prolonged, violent strike an internal hearing was held by the company charging the applicants with serious misconduct. Due to evidential difficulties, including witnesses declining to come forward through fear and the main witness disappearing, the charge of misconduct was abandoned and the applicants were instead dismissed for operational requirements. The Labour Court found that the dismissals were unfair as they were on a different basis than for which the hearing had been convened. The Court ordered compensation rather than reinstatement. On appeal the Labour Appeal Court ordered that the applicants must be reinstated as there was no evidence that the applicants were linked to acts of violence or intimidation though that was obviously the basis on which they were selected for retrenchment. The respondent having given effect to the order, suspended the applicants and notified them of a fresh disciplinary hearing for misconduct on the same facts on which the first hearing was based five years earlier.

**[68]** It was held that as no new facts had come to light it would be unfair to the applicants to proceed to hold a fresh disciplinary hearing to potentially dismiss them based on the facts which the company had been unable to prove five years before. It is necessary to quote extensively from the judgment to demonstrate how different the facts and legislation are from the circumstances which engage this court. At paragraphs 34 – 38 Steenkamp J stated:

> 34. The scheme of the LRA[3] is such that an employer may dismiss its employees for a number of reasons; primary among these are conduct, capacity and operational requirements, in line with the guidelines provided by the International Labour Organisation. The forum for resolution of the dispute about an allegedly unfair dismissal depends upon the categorisation of the dispute.[15][4] And section 193 of the LRA contemplates that the remedy ordered by the adjudicator who finds that a dismissal is unfair, should finally determine the entire dispute in respect of that dismissal.
>
> 35. Although one should, in my view, eschew bright lines between the various categorisations of dismissal disputes, the legislature could not have contemplated that an employer could pin its colours to the mast of one type of dismissal, and should it fail in proving that it was fair, try again to dismiss its employees for another ostensible reason but based on the same facts.
>
> 36. This is not the type of case where, in my view, a new hearing would have been permissible in the following hypothetical scenario: The employer discovers that R50 000 goes missing from its books every month. Only three employees have access to the bank accounts. The employer dismisses all three for operational requirements. While the dispute winds its way through the courts, the employer finds hard evidence on X's computer that X has been siphoning off R50 000 a month to his private account. The Labour Court (and, on appeal, the LAC) finds the dismissal for operational requirements to have been unfair and the three employees are reinstated. Upon reinstatement, the employer institutes a disciplinary hearing against X for the theft of the money.
>
> 37. The employer surely cannot be faulted for taking disciplinary steps against – and dismissing – X in that scenario. But in the present case, no

---

[3] Labour Relations Act South Africa
[4] LRA s. 191

> new facts have apparently come to light. The employer wishes to discipline – and possibly dismiss – the applicants for the same reasons as those that pertained five years ago in 2007. It saddled the wrong horse then. Having been thrown off, it cannot start the race on a fresh horse. That would be unfair to the applicants, much as one sympathises with an employer whose non-striking employees have been subjected to atrocious and unacceptable acts of violence.
>
> 38. It is so that the respondent has never explicitly abandoned its intention to take disciplinary action against, and if necessary dismiss, the applicants; nevertheless, it elected to take one course of action and, having failed in that course, it does seem to me unfair to now embark on another course to achieve the same goal.

**[69]** It is significant in the ***Fawu*** case that a hearing had previously been held, and a conclusive finding made, even though it was due to evidential insufficiency. The facts had not changed in five years. The company having relied on misconduct they could not prove to justify dismissal on an alternate basis (operational requirements) now sought to resurrect proof of the initial basis five years later. This in a context where in Cape Town, *"The forum for resolution of the dispute about an allegedly unfair dismissal depends upon the categorisation of the dispute".* It is therefore not difficult to see why, despite the uncomfortable outcome, (considering the atrocious acts the applicants had been accused of), the court decided there was no option but to declare impermissible and unfair, the attempt five years later, to rehash the decided issues on the same facts.

**[70]** The instant case is wholly different. There had been no hearing conducted by the claimant company before the dismissal of the former employees. What the company did by requiring the former employees to submit to disciplinary hearings was propose to actually hold hearings immediately after reinstatement while the issue was still fresh. This was not an appeal process. There had been no process to appeal from. The company was attempting to do what it should have done in the first place, rather than summarily dismissing the former employees without a formal charge or a hearing at which they could defend themselves. Natural justice had been violated. This was an attempt to cure that error.

**[71]** Counsel for the defendant were resolute in maintaining their stance that the requirement to attend disciplinary hearings was a breach of trust and good faith, destructive of the spirit that should underpin true reinstatement. It was telling however that despite repeated queries from the court concerning how the company should have acted differently after acknowledging its error, counsel declined to offer a view, beyond the stout condemnation of the course that was adopted. It is important that sight is not lost of the fact that the company had a legitimate concern. Its goods were being stolen and at a rate that was affecting its bottom line. The finding of goods in the staff restroom was highly suggestive that a worker or workers was/were involved in the theft.

**[72]** Having acknowledged that the situation had been improperly handled, what should the company have done? Reinstated the workers without any inquiry and forget the matter and hope the thefts stopped? Would there have been a proper industrial relations atmosphere of trust if the suspicions were not ventilated and the workers given a chance to defend themselves and clear their names? Could it not have been possible that some of the workers accused were guilty of the suspicious conduct and others were not? If so, how was that to be determined but by disciplinary hearings? Would it have been better for them to have resumed duties and then weeks, or months later they be requested to attend disciplinary hearings? But then, would that not have been offensive and unfair if there were no new facts to justify a delayed hearing?

**[73]** I agree with counsel for the claimant that the reinstatement and the requirement to attend disciplinary hearings were two separate matters though closely connected in time. Unless they were reinstated, the former employees could not have been subject to disciplinary hearings. Reinstatement was a necessary condition for the disciplinary hearings to ensue. However, the reinstatements were not formally stated to be subject to the former employees attending disciplinary hearings.

**[74]** I go further. Even if in fact, the requirement to attend disciplinary hearings was a condition subsequent of the reinstatements, that was permissible. The matter of

the suspicion that led to the improper dismissals had to be addressed, before, in practical fact, things could return to normal. What the company did wrong was not in making the allegations of theft. The error of the company was in rushing to judgment without engaging the due process of a disciplinary hearing in which the allegations could be formally made, tested, responded to and adjudicated upon. Such a process would admit of scrutiny to see if the ultimate decision was supported by admissible facts and cogent reasoning.

**[75]** This court sees nothing wrong with the company reinstating the former employees, on paid leave of absence, pending the completion of disciplinary hearings. Had the former employees who did not attend the hearings participated in the process, they could then have assessed whether it was fair or a mere colourable device designed to legitimise the previous summary decisions. A process deemed fair would no doubt have led to acceptance of the outcome; an impugned process would have provided a basis for a further complaint. However, it was not open to the former employees to complain that they were denied their right to a hearing when dismissed on December 24, 2014 and then decline to participate in a hearing when they were reinstated.

**[76]** It cannot be that a company must be held “hostage” in a situation where a worker is suspected of wrongdoing, because it had initially acted summarily against the worker, in breach of due process. It cannot be that such a company will subsequently be unable to take steps to fairly ascertain whether the suspicions are substantiated. I therefore find that the advice given to and accepted by the former employees who failed to participate in the requested disciplinary hearings was misconceived. The requirement to participate in hearings in no way vitiated the reinstatements. The hearings would have been a necessary step towards discovering the truth. If there had been hearings and the workers were exonerated that would have provided a platform for the industrial relations atmosphere to be returned to what it should have been — a harmonious mutually beneficial relationship between employer and employee. If hearings had been held at which the allegations of theft were substantiated, appropriate disciplinary action including

separation, might then have been warranted, with the right of appeal available to any worker aggrieved by that process.

**Summary**

**[77]** Having considered all the arguments in relation to the issue of reinstatement I have found that the claimant company offered to reinstate the former employees and they all accepted the offer of reinstatement, which crystallised with their return to work on January 19 or 20, 2015. They were repaid all the entitlements they had lost during the period they were dismissed, less the termination benefits they had been paid. The decision of the company to require them to attend disciplinary hearings before resumption of duties was in no way unfair or inconsistent with the legal and factual reality of their reinstatement. That requirement was logical, reasonable and predicated on the effective reinstatement of the former employees.

***Issue 2: Was there in law, an existing industrial dispute in relation to the dismissals of December 24, 2014, thereby justifying the Minister's referral of the matter to the IDT?***

**[78]** S. 2(b)(ii) of the **LRIDA** defines an industrial dispute in the case of workers who are not members of a trade union having bargaining rights, as a dispute relating wholly to the termination or suspension of the employment of any such worker. In this case it is a dispute relating to termination.

**[79]** Counsel for the defendant sought to rely on section 2 of the **ETRPA** as being instructive to the extent that it defines *"the relevant date"* in relation to the dismissal of an employee as meaning-

> (a)…
>
> (b) where his contract of employment is terminated without notice, whether by the employer or the employee, the date on which the termination takes effect;...

**[80]** However that definition is not particularly helpful in this context, as it only reinforces that the services of the former employees were terminated on December 24, 2014.

It does not assist in the determination of the efficacy of the steps taken to reinstate them.

**[81]** Section 22 of the LRC sets out a disciplinary procedure that enshrines statutory due process. It provides:

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

(ii) 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;
   (c) action on any further misconduct, for example, final warning, suspension without pay, or dismissal should be recorded in writing;
   (d) details of any disciplinary action should be given in writing to the worker and to his representative;…"

**[82]** In ***Village Resorts Ltd v Industrial Disputes Tribunal*** (1998) 35 JLR 292 Rattray P. in describing the Code stated that, *"…essentially therefore, the Code is a road map to both employers and workers towards the destination of a co-operative working environment for the maximization of production and mutually beneficial human relationships".*

**[83]** It is undisputed that the claimant company breached the LRC by the manner of the dismissals on December 24, 2014. Therefore, when Mr. Duncan wrote to the company by letter dated January 8, 2018 there was a valid dispute relating to unfair

dismissal. However, those terminations were withdrawn and the workers received all they were requesting, reinstatement and full benefits. I have already determined that the reinstatements of January 19, 2015 were valid hence when Mr. Duncan wrote to the Ministry on January 26, 2015 requesting intervention to facilitate appealing of the terminations there were no longer any extant terminations. That was the basis on which counsel for the claimant company in response to the Ministry's request for a conciliation meeting by letter dated February 11, 2018 responded by letter of even date that the invitation was premature.

**[84]** Counsel no doubt anticipated that there might have been a further dispute following the outcomes of the disciplinary hearings, but at that point the employees were still employed though they were on paid leave of absence. The court agrees with counsel for the claimant concerning the significance of Mr. Duncan's letter to the Ministry dated February 25, 2015. He acknowledged that the workers were still employed to the company even up to that time, though this did not then apply to Mr. Cornel Taylor who had been dismissed on February 12, 2015. If even the workers at that point through their representative agreed they were still re-employed, there was clearly no termination dispute then in being.

**[85]** The implication of a premature intervention was discussed in ***Mckay v London Probation Board.*** In that case a letter sent by the respondent to the applicant gave the alternatives of summary dismissal or consideration of agreed termination, with a deadline for such agreement, which was subsequently extended. On appeal from a decision of the Employment Tribunal before which the termination of the applicant's employment was challenged, it was held upholding the Tribunal's decision, that the letter did not terminate the contract of employment as her employment continued while negotiations were attempted and was only terminated months later when those negotiations failed to arrive at an agreement. In ***R v Industrial Dispute Tribunal and the Honourable Minister of Labour; Ex parte Wonards Radio Engineering Ltd***, Vanderpump J noted at page 76C that the relevant date to determine if there was an industrial dispute was at the date of dismissal and not the date of reference to the Tribunal.

**[86]** Accordingly, in the instant case, there was an industrial dispute between December 24, 2014, the date of the first dismissals and January 19, 2015 when the workers were reinstated. A complaint about that dispute was made to the company on January 8, 2015 and brought to the attention of the Ministry on January 26, 2015, by which time the reinstatements, which I have found to have been effective, had already occurred.

**[87]** In ***R v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins ex p. West Indies Yeast Company Limited***, Smith CJ at page 410 highlighted the fact that there needed to be an industrial dispute already in existence before the Minister could make a reference to the IDT. The case was however not decided on that point, as counsel had proceeded on the assumption that an industrial dispute existed.

**[88]** The central question in this matter is therefore what dispute if any existed for referral by the Minister? In the letter of January 26, 2015 written on behalf of Ms. Kerry-Ann Williams, referring the dispute to the Ministry for settlement, Mr. Duncan made it clear that he had advised the worker to report to work but not to participate in a disciplinary hearing as it was an appeal hearing that had been requested. He stated that the worker was being prevented from working. In his subsequent letter of February 25, 2015 Mr. Duncan after acknowledging that the workers were employees as the terminations had been withdrawn indicated that:

> The matter is therefore that the **employees are not able to attend work as the company refuses to allow them to work until they attend disciplinary hearings.** This we object to as the termination was unfair in the first instance and then withdrawn. As we speak the **workers are not on the job**, therefore the Ministry was asked to arrange the meeting to settle the dispute as requested. (emphases added)

**[89]** Despite the steadfast attempt by Mr. Duncan to press for an appeal hearing in respect of the terminations of December 24, 2014 the process had moved on. The terminations had been unconditionally withdrawn, the workers restored their lost

wages and the company was now seeking to conduct the hearings they had initially wrongfully failed to hold. There was no appeal to undertake. However, the workers through their representative Mr. Duncan maintained that an appeal was what was requested, and objected to participating in disciplinary hearings. At this point the former employees were neither terminated or suspended but were workers disputing their attendance at disciplinary hearings. **That was the dispute that existed and it does not fall within the definition of "industrial dispute" contained in s. 2 of the LRIDA.** In any event what was referred to the IDT was termination of the employees and not disagreements as to the propriety or otherwise of holding disciplinary hearings.

**[90]** It is also worth remembering that the originating cause for the disciplinary hearings the company sought to hold was not the botched terminations of December 24, 2014. The originating cause was the ongoing theft which the company was seeking to cauterize. The reinstatements placed the company and the workers back in respective positions that facilitated the holding of disciplinary hearings. No disciplinary hearings could have been held with persons who were no longer employees. If the reinstatements had not been made there would have been a basis to challenge the unfair dismissals. The effective reinstatements having been made, there was no decision that remained to be challenged and no relief to be sought or obtained.

**[91]** It is common ground that the terminations of February 12 and March 5, 2015 were never the subject of a complaint to the Minister and hence were not amenable for referral by the Minister to the IDT. The termination that was referred to the IDT was therefore the dismissals of December 24, 2014 which had been fully cured by the reinstatements and were no longer a basis for maintaining that an industrial dispute existed.

**[92]** In relation to the failure to file a complaint after the second set of dismissals the centuries old proverb, “For the Want of Nail” comes to mind:

> For want of a nail the shoe was lost.
> For want of a shoe the horse was lost.
> For want of a horse the rider was lost.
> For want of a rider the message was lost.
> For want of a message the battle was lost.
> For want of a battle the kingdom was lost.
> And all for the want of a horseshoe nail.

**[93]** There might be a temptation to apply the proverb to these facts and surmise that “For the want of a letter the case was lost”. This as the opportunity to challenge the only operative dismissals of February 12 and March 5, 2015 was lost because no complaint was made in respect of them. Whether such a challenge would have borne fruit is perhaps doubtful given the deliberate attempts of the claimant company to correct their initially flawed process coupled with the misconceived advice to and decision of the majority of the former employees, to boycott the disciplinary hearings. I do not however need to decide that. What is clear is that at least such a reference, if it had occurred within 12 months of February 12 and March 5, 2015, would have been *intra vires* the **LRIDA**.

**CONCLUSION AND ORDERS**

**[94]** The foregoing discussion makes it clear that the claimant must succeed in this claim. I here repeat for convenience the orders granted on July 17, 2018 as corrected:

a) It is declared that the defendant’s referral of the dispute between the claimant and its former employees over the termination of their employment to the IDT is ultra vires as being in breach of s. 11A of the **LRIDA**;

b) The defendant's referral of the dispute between the claimant and its former employees over the termination of their employment, to the IDT is quashed;

c) It is declared that, at the time of the referral by the respondent, the only matter in dispute between the applicant and the former employees was not an industrial dispute as defined in the **LRIDA**; and

d) Costs to the claimant to be agreed or taxed.