[2024] JMSC Civ. 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV03721

BETWEEN	**OUTSOURCING MANAGEMENT INTERNATIONAL INC. LIMITED (T/A ALLIANCE ONE)**	**CLAIMANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**DEFENDANT**

Mr. Gavin Goffe and Mr. Jovan Bowes instructed by Myers, Fletcher & Gordon for the Claimant

Ms. Annaliesa Lindsay, Ms. Jevaughnia Clarke and Ms. Karessiann Gray instructed by the Director of State proceedings for the Defendant

IN OPEN COURT

Heard: 9th-10th & 31st January 2024

JUDICIAL REVIEW- Part 56 CPR –Order for Certiorari- Whether the award was illegal for being ultra vires Section 12(1), 12(4) (b), 12(4B) (b) and 12(5)(c)(i) of the Labour Relations and Industrial Disputes Act- Whether the award breached the Claimants' right to a fair hearing guaranteed under Section 16(2) of the Charter of Fundamental Rights & Freedoms-Whether the award was unreasonable and or irrational.

SIMONE WOLFE-REECE, J.

BACKGROUND & ISSUES

[1] On 17th January 2023, Outsourcing Management International Incorporated Limited (t/a as Alliance One) (Claimant) a limited liability company obtained the leave of the Court to apply for judicial review of a decision made by the Industrial Disputes Tribunal (IDT) (Defendant).

[2] The dispute was referred to the IDT after Mr. Alton Morris (the Dismissed Worker) laid a complaint that he was unjustifiable dismissed by the Claimant company. Mr. Morris was employed to the Claimant from December 31, 1999 to June 2015 when he was dismissed. In May of 2015, a female employee made a verbal complaint that she was being sexually harassed by Mr. Morris, who held a senior position to her.

[3] Mr. Morris was alerted about the complaint and On June 2, 2015, a disciplinary hearing was convened. By way of a letter dated June 3, 2015, Mr. Morris was dismissed. On June 18, 2015, Mr. Morris through his representative requested an appeal of the dismissal. The appeal was dismissed. Mr. Morris aggrieved by the outcome made a complaint to the Ministry of Labour and Social Security that he had been unjustifiably dismissed. The further failure of the conciliatory attempts to arrive at a resolution, the dispute was referred to the Defendant for resolution.

[4] The Defendant after a full hearing found that Mr. Alton Morris, a former employee of the Claimant, was unjustifiably dismissed and awarded him the sum of Eight Million Five Hundred and Eighty Thousand Dollars ($8,580,000.00).

[5] By Fixed Date Claim Form filed January 26, 2023, the Claimant seeks the following Orders:

1. *Certiorari to quash the award of the Industrial Disputes Tribunal in dispute between Mr. Alton Morris and Alliance One (a telephone performance company) dated August 31, 2022.*
2. *Costs to the Claimant.*
3. *Such further and other relief as this Honourable Court deems appropriate.*

[6] Both parties submitted full written submissions and made extensive oral submissions in this matter. The Court does not intend to reproduce same in this judgment; however, the Court has fully considered them and will refer to them as necessary when dealing with the specific issues before the Court in determining this Claim.

[7] The Claimant's case is grounded on firstly on the premise that the award made by the Defendant is illegal and fails to comply with the Labour Relations and Industrial Disputes Act (LRIDA) in the following ways:

I. There was inordinate and inexplicable delay in publishing the award which breached Section 12(1) of the LRIDA.

II. The Defendant failed to specify the date of dismissal and the and the date from which the Award would have effect as required by ss12(4)(b) and 12(4B) (b) of the LRIDA.

III. Mr. Morris having sought reinstatement, s. 12(4)(c)(i) of the LRIDA requires that any monetary award be expresses in terms of retroactive wages which was not done by the Defendant.

[8] Further the Claimant contends that the findings were unreasonable. Counsel posited this submission of unreasonableness. They grounded this submission on (i) Mr. Morris' admission to the charges made it an unreasonable award. (ii) the Defendant failed to ask itself the right questions, the Claimant contends that the question of whether the relationship between the Complainant and Mr Morris was disclosed was not a part of the dispute. (iii) the Defendant failed to use proper procedure in breach of the rules of natural justice; (iv) the quantum of the award was not accompanied by an explanation of how the Defendant arrived at the sum and (v) some of the findings made by the Defendant were not supported by the evidence before them.

[9] The Defendant disputes that the Award was unreasonable and submitted that the Tribunal acted reasonably and within the scope of its statutory powers They further contend that the award is final, and that the Claimant has provided no basis in law to challenge the award. Regarding the delay in handing down the decision, they submitted that delay by itself is not sufficient evidence to conclude the Claimants fundamental right to a fair hearing within a reasonable time as guaranteed under section 16(2) of the Constitution was breached.

ISSUES

[10] The issues for the Courts determination are identified as follows;

I. Whether the award breached the section 12(1) LRIDA & was illegal

II. Whether the failure to specify the date of dismissal and the date from which the Award would have effect as required by ss12(4)(b) and 12(4B) (b) of the LRIDA renders the award illegal

III. Whether the delay in the delivery of the award breached the Claimants right to a fair hearing within a reasonable time as guaranteed under Section 16 (2) of the Charter of Fundamental Rights and Freedoms

IV. Whether the Tribunals decision that Mr. Alton Morris was unjustifiably dismissed was reasonable

LAW & ANALYSIS

[11] In claims for judicial review, it has been pronounced and is best described as settled that the exercise of the Courts authority must fall within the recognized grounds of **illegality, irrationality or procedural impropriety** when reviewing the decision of a public decision maker. The function of the Court is therefore not to substitute the exercise of its mind for that of the Defendant in this case but to focus on the procedure used by the Defendant and operating within the parameters decide whether the decision can be impugned for anyone of abovementioned grounds.

[12] In the **Council of Civil Service Union v. Minister of the Civil Service**[1] Roskill LJ stated

> *"Thus far this evolution has established that executive action will the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand Wednesbury principles (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation) [1946] 1K.B. 223) The third is where it has acted contrary to what are often called the "principles of natural justice'*

[13] Lord Diplock further opined on the third category at page 410 as follows

> *".. I have described the third head as "procedural impropriety" rather than a failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also the failure by an administrative tribunal to observe procedural rules expressly laid down in the legislative instrument by which jurisdiction is conferred even where such failure does not involve the denial of natural justice"*

Issue: Whether the Award breached Section 12(1) of the LRIDA and therefore illegal

[14] Mr Goffe submitted that the Defendants Award breached the provisions of the LRIDA that the Defendant must make its award within twenty-one (21) days after the dispute arose. He described the delay as inexplicable and inordinate.

[15] Counsel argued that in this case the IDT published the award some four hundred and sixty- seven (467) days after the hearings concluded. He submitted that there was no reasonable explanation for the delay, and it was inexcusable in the circumstances.

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[1] 1985 AC 374 at 414

[16] Ms Lindsay however countered this argument and submitted that s. 12(1) requires that awards be made within twenty-one (21) days or as soon as may be practicable thereafter. She referred the Court to the judgment Jackson-Haisley, J in **Kevin Simmonds v. Ministry of Labour and Social Security and the Attorney General**[2]

[17] Section 12 (1) of the LRIDA provides that:

> *" Subject to the provisions of subsection (2) the Tribunal shall, in respect of any industrial dispute referred to it, make an award within twenty-one days after that dispute was so referred, or if it is impracticable to make the award within that period it shall do so as soon as may be practicable, and shall cause a copy of the award to be given forthwith to each of the parties and to the Minister."*

[18] It is accepted that the twenty- one days as per section 12(1) was not met by the Defendant. However, the Court is of the opinion that one must go further and assess whether the decision was delivered as soon as may be practicable. In the affidavit evidence of Samantha Brown, she indicated that the sittings in this matter commenced on August 24, 2020, and concluded on May 26, 2021. The award was not made until August 2022, one month after the last set of verbatim notes were received.

[19] In assessment of Section 12(1) I find that the imposition of a period by the Legislature was to seek to reduce the delay in the completion of matters. It is also important to note that a reasonable conclusion that the legislature from use of the words ***"as soon as may be practicable"*** considered circumstances where completion in the twenty- one (21) days period was not practical. In the evidence of Sadeera Shaw [3] who chaired the panel in the dispute she outlined contributing factors to the delay. She gave evidence that that the IDT Western Division where

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[2] [2022] JMFC FULL 02

[3] Affidavit of Sadeera Shaw sworn on 9th June 2023

the case was heard has one stenographer Miss Willie who was working on multiple matters. Further, to the numerous matters she was working on, Ms Willie went on 32 vacation days, during the relevant period. On Ms Willies return then she the affiant went on maternity leave ten days after the verbatim notes were completed. She concluded that based on these factors the decision was given as soon as was practicable in the circumstances.

[20] The same period has remained since the enactment of the legislation; however, I am not of the view that the fact that there is delay which causes non-compliance with the twenty-one (21) days provision in Act makes the award illegal. It is also noted that section 12(1) does not impose a consequence for failing to comply with the minimum time limit and I find that failure to comply does not invalidate the award.

[21] In assessing the evidence, the Court does not find that the delay was extraordinarily lengthy. I accept the evidence of Sadeera Shaw that the award was delivered as soon as was reasonably practicable in the circumstances.

Issue: Whether the failure to specify the date of dismissal and the date from which the Award would have effect as required by ss12(4)(b) and 12(4B) (b) of the LRIDA renders the award illegal

[22] Mr. Goffe submitted that the Award was illegal because it was ultra vires sections 12(4)(b) and 12(4B) (b). It is the Claimants contention that failure to specify the date of dismissal and the date from which the award is to take effect is contrary to the LRIDA and therefore illegal.

[23] The legislative provision governing the awards made by the IDT is found in Section 12(4) as follows

> ***"****(4) An award in respect of any industrial dispute referred to the Tribunal for settlement-*

a) may be made with retrospective effect from such date, not being earlier than the date on which that dispute first arose, as the Tribunal may determine;

(b) shall specify the date from which it shall take effect;

(*c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."*

[24] Section 12(4A) & (4B) states:

(4A) "Notwithstanding the provisions pf paragraph (a) of subsection (4), an award made in respect of an industrial dispute referred to the Tribunal for settlement may be made with retrospective effect from a date earlier than the date on which the dispute first arose in accordance with subsection (4B)

(4B) For the purposes of subsection (4A), where the dispute arose from-

(a) the re-negotiation of a collective agreement which has expired, the award, may be made with effect from the date of the expiry of that agreement.;

(b) the dismissal of a worker which is found to be unjustifiable, the award may be made with effect from the dismissal date.

(c) any claim made with respect to a new bargaining unit the award may be made with effect from such date as the Tribunal may determine".

[25] The Courts considered opinion is that Section 12 (4) should be looked at all together. The question is whether the Defendant by failing to specify a date the award is to take effect renders it illegal and of no effect. In the oft cited case of Council of Civil Service Union the Court described illegality as the first ground. Lord Diplock stated:

"By Illegality" as a ground for judicial review I mean the decision maker must correctly understand the law that regulates his decision making power and must give effect to it"

[26] In an overview of the illegality ground a public law expert described illegality in the context of judicial review as follows:

"Judicial review on the illegality ground is a claim that a public law decision-maker has acted unlawfully by exceeding its legal powers, or misunderstanding or in some way abusing them. Lord Diplock's label 'illegality' seems useful for referring to this ground of judicial review because a claim based on it essentially argues that a decision is unlawful

> *because it has no proper legal basis, or an inadequate or defective legal basis, or is otherwise legally flawed."* [4]

[27] The absence of an operative date rendering the award invalid or unlawful is not demonstrative of the approach taken in a determination of illegality in the context of Judicial review. The Defendant's award is not reflective of them exceeding their powers or misunderstanding or in some way abusing them. I find that that the object and purpose of the statute is to ensure and promote good and efficient labour relations. In keeping with the purpose and objective I find that in the absence of the operative date of the award it must take effect from the date it was delivered. I therefore find no merit in this submission.

Issue: Whether the delay in the delivery of the award breached the Claimants right to a fair hearing within a reasonable time as guaranteed under Section 16 (2) of the Constitution of Jamaica.

[28] Mr. Goffe submitted that the level of delay is a clear breach of Claimants right under s.16(2) of the Constitution of Jamaica which guarantees a right to a fair hearing within a reasonable time. He supported his submission relying on the evidence of cases during the relevant time which were dealt with more expeditiously.

[29] Ms Lindsay however countered this submission and submitted that Court should be guided by the approach of Jackson- Haisley, J in the case **Kevin Simmonds v Ministry of Labour and Social Security and The Attorney General**[5] paragraph 78-79 the learned Judge stated:

> *"The Claimant has contended that he has been deprived of the right to a fair hearing. In order to prove this, he would have to establish certain essential elements. Permit me to borrow from the definition accorded to a*

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[4] Lexis Nexis Grounds for Judicial Review Illegality 2024

[5] [2022} JMFC Full 02

> *fair hearing by Albert Fiadjoe in his text,* ***"Commonwealth Caribbean Public Law," where he expressed at page 239: "Fair hearing does not mean a hearing according to what would be required in a court of law. Basically, it means an opportunity to put one's side of a case before a decision is reached. Accordingly, the legal requirement on the adjudicator is nothing more than a basic duty of fairness. Of course, in deciding on what is fair, the courts have to balance several interests, such as those of the State, principles of good administration, speed, efficiency in decision making and the level of injustice suffered by the individual in having been denied the opportunity to present their case. There are no fixed rules, nor is there a requirement that any rules or evidence should be followed or applied. There is no insistence either that there must always be an oral hearing. It all depends on the circumstances of the case. It is however possible to identify from the practice of the courts what are the ingredients of a fair hearing."*** *[79] Fiadjoe went on to list some ingredients of "fair hearing" as being the right to make representations; the right to notice of the charge and full particulars thereof (applicable for criminal matters); and the right to legal representation. When these are taken together with the learning gleaned from the judgment of the court in the Al-Tec case, it is clear that the Claimant had all of those elements satisfied during the course of the hearing of his matter."*

[30] I conclude that on the evidence before me, I find that the claimant has failed to provide any evidence on a balance of probabilities for a finding that they were not afforded a fair hearing.

[31] The second aspect to be determined is whether there has been an infringement of the reasonable time guarantee. In the case of **Herbert Bell v. The Director of Public Prosecutions**[6] factors were identified to be considered when dealing with this issue. Lord Templeman stated four conditions must be satisfied, 1. the length of the delay. 2. The reasons given by the prosecution for the delay 3. The responsibility of the accused for asserting his rights 4. Prejudice to the accused.

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[6] [1985]1AC 937

[32] It is noted by this Court that the Bell case was concerned with criminal proceedings, however as noted by Jackson Haisley in **Kevin Simmonds** case that the ***"dictum has been followed in civil proceedings."*** At Paragraph 96 the learned Judge, identified the following questions:

> ***(i) How long has the delay been?***
>
> ***(ii) What are the reasons provided for the delay?***
>
> ***(iii) Is the delay reasonable in light of the particular circumstances of the case such its complexity and the conduct of the parties?***
>
> ***(iv)Has the Claimant contributed to the delay, or has he done anything to assert his rights?***
>
> ***(v) What is at stake for the Claimant, or what does he stand to lose?***
>
> ***(vi) Has there been any prejudice occasioned to the Claimant resulting from the delay.***

[33] The Claimant and the Defendant do not dispute that the Award was delivered way outside of twenty-one days of the dispute being referred. The Claimant however argues that the second requirement in section 12(1) of the Act, which is that in lieu of the twenty-one days awards be handed down as soon as may be practicable, also was not met, as the additional delay in delivering the award more than one year after its final sitting was avoidable and therefore breached the Claimant's right under section 16(2) of the Charter.

[34] Firstly, it is not every occurrence of delay will amount to a fundamental breach of the right to a fair hearing within a reasonable time guaranteed under section 16(2) of the Constitution. The reasons for the delay if any, the circumstances of the delay must be considered and any effect it has had on the parties in relation to their case. In relation to the issue of prejudice, the Claimant has no burden to prove that they were prejudiced by the delay, it is a factor the Court may consider in determining whether there was a breach.

[35] Based on the evidence, there seems to have been no inordinate, arbitrary, or unlawful conduct in handing down the award of the Defendant that amounted to a breach of the Claimant's right to a fair hearing within a reasonable time. Based on the usual periods the Defendant takes in handing down awards from the date of the last sittings in the other cases that were exhibited, the delay in the instant case was not excessive and can be regarded as normal. This Court therefore finds there was no breach of the "as soon as may be practicable" requirement. There is also no evidence that the circumstances of the delay in the Defendant handing down the award breached the Claimant's right to a fair hearing within a reasonable time guaranteed under section 16(2) of the Charter of Fundamental Rights and Freedoms.

[36] The Court therefore finds there was no breach of the Claimant's fundamental right to a fair hearing within reasonable time.

Issue: Whether the Tribunals finding that Mr. Alton Morris was unjustifiably dismissed was reasonable

[37] Mr. Goffe submitted that the award was unreasonable in a number of aspects. Firstly, he contended that based solely on Mr. Morris admission to sending sexual messages to his subordinate constituted sexual of sexual harassment Counsel referred the Court to **Fleetwood Jamaica Limited v Fredrick Hanson**[7] In that case Mr. Hanson claimed he was entitled to a disciplinary hearing, the IDT found that any possible defence he may seek to put forward would have been abolished by his confession.

[38] It was further argued that the Defendants failed to consider and ask itself the correct questions, resulting in them misdirecting themselves. Counsel opined that this misdirection was another basis of the unreasonableness of the

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[7] IDT 22/2014

Defendant's award. He put forward that the correct question the Defendant should have asked was whether Mr. Morris sexually harassed a subordinate. It instead asked the question whether the relationship between the complainant and Mr. Morris was disclosed. The conclusion that Mr. Morris and the complainant were in a romantic relationship was unnecessary and irrelevant, as it did not form part of the dispute between the parties. It had no bearing on whether Mr. Morris sexually harassed the complainant. By asking this irrelevant question, the Defendant went outside the terms of reference and misdirected itself.

[39] It was submitted the award was unreasonable also because of the way in which the Defendant admitted evidence during the proceedings. The Defendant admitted into evidence a transcript of text messages between the complainant and Mr. Morris which did not exist at the date of dismissal, without proving its authenticity and which was prejudicial to the complainant. This amounted to a denial of natural justice to the complainant.

[40] Regarding the quantum of the award rendered the Claimant contends it unreasonable. The amount of over $8.5m was equivalent to over two and a half years' worth of salary, which was clearly irrational, as it constitutes and order to the Claimant to compensate Mr. Morris as if he should have not been dismissed. Counsel submitted that the Defendant also failed to indicate how it arrived at this amount which it awarded.

[41] Counsel referred to the Defendant's findings and submitted that they were not supported by the evidence produced in the proceedings.

a. The first unsupported finding was that Mr. Morris had been given twenty-four hours to appear for a disciplinary hearing to answer to five charges was unsupported based on the evidence.

b. The second unsupported finding was that the evidence did not show that the person conducting the hearing was acting as a judge in her own cause.

c. The third and final unsupported finding was that there was no evidence that Mr. Morris was dismissed on the instructions of Ms. Giles, who co-chaired the disciplinary hearing.

[42] Ms. Lindsay submitted whether a decision is irrational depends on the case. The question the Court must ask is whether the decision of the Defendant was so irrational or unreasonable, so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the situation could have arrived at that decision. This question is to assess and analysed having regard to the Defendant's statutory powers under the LRIDA.

[43] She submitted that the Defendant heard and considered the evidence of both parties. The Defendant made both adverse and favourable findings in relation to Mr. Morris. Their finding was that Mr. Morris was unjustifiably dismissed and made an order for compensation. Ms. Lindsay contends that the IDT acted within its statutory powers. The award is therefore final and conclusive unless it is challenged on a point of law pursuant to section 12(4)(c) of the LRIDA. Ms. Lindsay relied on authorities of **R (Asif Javed) v Secretary of State for the Home Department[8], Kemper Reinsurance Co v Minister of Finance and others[9] and Council of Civil Service Unions v Minister of the Civil Service (supra)**.

[44] The Defendant having had the dispute referred to them for settlement now has a statutory responsibility to hear all evidence that is relevant and assist in

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[8] [2001] EWCA Civ 789

[9] [2000] 1 AC 1

resolving the dispute as stated in the terms of reference. The decision of the Tribunal shall be final and conclusive, and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law. [10]

[45] The focus of the Claimants argument is that the decision based on the evidence is unreasonable and irrational, the decision can only be regarded as irrational or unreasonable in the Wednesbury unreasonable sense that is if it is so unreasonable in its defiance of logic and accepted moral standards that no sensible person who directed his mind to the question could have arrived at it.

[46] The findings of the Defendant are found at paragraphs 48 to 59 of the award. In assessing the detailed findings of the Defendant, it is a fair conclusion that the finding of unjustifiable dismissal rested on the what the Defendant felt was the Claimants failure to observe the rules of natural justice. The findings of the Defendant are found paragraph 48- 59 of the award. Though lengthy I have reproduced same as it is important for the purposes of determining whether the award was reasonable and rational.

> *"48.* ***The tribunal, after careful examination of the evidence adduced by both parties to the dispute, must determine whether the Company was justified in the termination of Mr. Morris's employment.***
>
> *49. The evidence presented to the Tribunal confirmed that there was a sexual harassment policy in place at the Company. The Tribunal accepts that the Dismissed Worker was aware of the said policy and he participated in the sexual harassment trainings provided by the Company. In determining whether the Dismissed Worker breached the sexual harassment policy of the Company, the Tribunal accepts that the Dismissed Worker was at a managerial position and the Complainant was his subordinate. Within the sexual harassment policy it states that:*
>
> *"Sexual Harassment is one kind of discriminatory harassment. Sexual harassment can be defined as unwelcomed sexual advances for sexual favours and other statements or actions of a sexual or gender-based nature*

[10] LRIDA Section 4(c)

… At time, consensual romantic and/or sexual relationships between co-workers may occur. When such a relationship is between an employee who has a supervisory authority and one who does not, Alliance One's ability to enforce its policy against sexual harassment can be affected. Therefore, if such relationship arise, they will be considered carefully by Alliance One officials and appropriate action will be taken. Such action may include a change in the responsibilities of the individuals involved in such relationships or transfer of location within Alliance One. Any supervisory employee involved in such a relationship is required to report the relationship to his or her supervisor and to the Human Resources Manager."

50. The Dismissed Worker did not deny sending messages of a sexual nature to the Complainant. He was of the view that the said messages were not inappropriate if the individuals were in a disclosed consensual relationship in accordance with the Company's policy. This raises the question of whether the relationship was disclosed. The Dismissed Worker, in his examination-in-chief, was very detailed in how he relayed the Complainant's pursuit of him during and outside of work. He testified that he declared such pursuit to Mr. Beoker, Mr. Mattson and Ms. Brown.

51. The Dismissed Worker admitted that he was in a relationship with the Complainant and that it was declared to his superiors. In making such declaration, he stated that there wasn't a formal way of doing it and when it was done it was not coined as a relationship specifically. This was evidence from his reluctance in labelling the association as a relationship throughout his evidence. He then stated that he was not in a relationship with the Complainant but they had sexual contact. In determining whether the sexual contact was declared, the Dismissed Worker made contradictory statements. On the one hand, he stated that it was declared to his Manager and the Human Resource Manager, Ms. Brown. On the other hand, he stated that it was not declared prior to the disciplinary hearing nor the appeal hearing but that it was before the Tribunal that such a declaration was made.

52. It is the Tribunal's position that the term used is inconsequential as the Company's policy captured both romantic and sexual relationships. The Tribunal accepts the evidence of the Dismissed Worker and the company's witness Ms. Brown that the Dismissed Worker declared the complainant's pursuit of him. When the pursuit deepened into a romantic and/or sexual relationship the Tribunal finds that the Dismissed Worker failed to declare it in accordance with the Company's policy.

53. ***Based on the evidence presented and the aforementioned findings, the Tribunal finds that the Company had sufficient evidence at the material time to find that the Dismissed Worker breached the sexual harassment policy****.*

54. ***In considering the matter of procedural fairness during the disciplinary process, the Tribunal is tasked to look into the***

Company's dealings with the Dismissed Worker. The Dismissed Worker's contract was terminated for disciplinary reasons and therefore section 22 of the Labour Relations Code is applicable.

55. The often quoted rules of natural justice recognized by the Court are set out below:

a) *Audi Alteran Partem – the Accused has a right to be heard.*

This requires that the accused should be allowed a disciplinary hearing for him to put forward a defence against the charges laid against him. In doing so, the Dismissed Worker should be allowed the right to representation of his choice to assist him in his defence. In the instant matter, the Dismissed Worker gave contradictory evidence in relation to his representative in that he initially stated that he retained the services of Mr. Duncan prior to the hearing and that he was not able to choose his representative in full freedom. He further stated that Ms. Brown pressured him to choose Ms. Rosetta Malcom as his representative. He then admitted that he was unable to get in contact with Mr. Duncan by telephone prior to the 1st hearing which was adjourned. When he tried to contact Mr. Duncan before the 2nd scheduled hearing Mr. Duncan was busy. He further admitted that he retained Mr. Duncan's services after his termination.

Taking into consideration all of the evidence, the ***Tribunal finds that Ms. Malcolm's services was requested by the Dismissed Worker in full freedom.***

b) A man should not be a judge in his own cause

This requires that the procedure should show impartiality and be presided over and/or managed by persons who will be fair and objective, and certainly not a part of the institution which is making the accusation or bringing the charges against the accused. In the instant case the Tribunal notes the numerous roles played by the Human Resources Manager, Ms. Samantha Brown, Ms. Brown was the person who proffered the charges against the Dismissed Worker and invited him to a disciplinary hearing. It was the same Ms. Brown who conducted the investigations the day before the scheduled hearing.

In the disciplinary hearing it was submitted by the Dismissed Worker's representative that Ms. Brown chaired the hearing and not Ms. Giles. The Tribunal finds that Ms. Brown co-chaired the hearing with Ms. Giles who joined via teleconference. Ms. Brown's role was to be the eyes of Ms. Giles who was unable to attend physically. Ms. Brown took it further by taking the minutes of hearing asking questions of

the Dismissed Worker and the Complainant while giving directions as to the how the hearing flowed.

Finally, Ms. Brown along with taking the minutes of the hearing proceeded to terminate the Dismissed Worker. It is the Company's submission that Ms. Brown terminated the Dismissed Worker on the instructions of Ms. Giles. No evidence was provided to prove such instructions. As such, the Tribunal is of the view that the termination was executed by Ms. Brown whose name appeared in the termination letter. In doing so, Ms. Brown acted as Judge, jury and executioner as she was involved in every aspect of the disciplinary process.

c) A person accused or charged should know what case he has to meet

This requires that the person called upon to answer charges, should be informed of such charges will in advance to allow the person time to understand the charges and to seek legal representation or assistance where he feels this is necessary or helpful in determining the charges brought against him/her. In the instant case, the Company failed to meet this requirement as the Dismissed Worker was given approximately 24 hours to appear for a disciplinary hearing to answer five (5) charges. Further, the dismissed worker did not receive any of the evidence used against him prior to the hearing in order to prepare his case. In fact, the written complaint was not received by the Human Resources Manager until after the hearing had concluded and the investigation was not completed as the last person Ms. Brown interviewed walked out of her office the same time the Dismissed Worker walked in for the disciplinary hearing.

56. The Tribunal finds that the Dismissed Worker was not a credible witness as he was vague in his responses and provided contradictory statements throughout his evidence concerning his relationship with the Complainant whether the relationship was declared to his Manager and the Human Resources Department and his choice of representation. Notwithstanding the Tribunal's finding that the Dismissed Worker was not a credible witness it also finds that the Company did not follow the rules of natural justice.

57. The Tribunal must also consider Section 3(4) of the Labour Relations and Industrial Disputes Act, which states:

"A failure on the part of any person to observe any provision of a Labour Relations Code which is for the time being in operations shall not of itself render him liable to any proceedings, but in any proceedings before the Tribunal or a Board any provision of such code which appears to the

> *Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."*
>
> *58. Taking into consideration all of the evidence presented, the Tribunal finds that the Dismissed Worker contributed to his termination. Although the Company might have had reasons to terminated the employment of the Dismissed Worker, the Tribunal finds that the procedure that the Company followed and the failure to observe the rules of natural justice in the termination of the Dismissed Worker renders its decision to be unfair. The Tribunal notes that the Dismissed Worker made concentrated efforts to mitigate his loss in the circumstances.*
>
> *59. Thus, the Tribunal concludes that the Dismissed Worker was unjustifiably dismissed and awards accordingly."* ***(emphasis mine)***

[47] This Court in considering the findings is of the view that the question is whether on the totality of the evidence the finding that the procedure employed by the Claimant breached the principles of natural justice and procedural fairness. It is not the Courts function to impose its view on the evidence but to make an assessment that the finding was an irrational one that no sensible person having applied their mind could have arrived at that conclusion.

[48] In all disciplinary hearings the concern is not only on the evidence of some breach by the employee, but on equal footing for consideration is the procedure employed by the employer in making the decision to dismiss the employee. Natural Justice required that Mr. Morris know what he was being charged with, what case he had to meet, and that he had an opportunity to be heard. It is trite that no man should be judge in his own cause. It requires procedural fairness in the disciplinary hearing. The aim is that the proceedings were fair. In **National Commercial Bank Limited v. The Industrial Disputes Tribunal & Peter Jennings**[11] the Court of Appeal did not accept the submission that an employer is disqualified from presiding over disciplinary hearings. In keeping with the principles of natural justice the employee must be aware of the charge or charges laid against him, he must

[11] **[2016] JMCA Civ 24**

be afforded sufficient time to prepare his defence and put forward same. It is clear from the findings of the Defendant that is accepted that Mr. Morris knew what he was charged with and was given an opportunity to put up a defence. He was the one who indicated when he was able to have representation to proceed with the hearing.

[49] Mr. Morris was made aware of the allegations both verbally and in writing. The evidence is that he was given an opportunity to have representation of his choice. At the commencement of the hearing when he did not have his representation the matter was adjourned to facilitate him acquiring same. He was asked when he would be able to proceed, and he was the one who indicated same. The conclusion by the Tribunal that Miss Brown sat as judge jury and executioner arises from the evidence that she laid the charges, was physically present in the hearing chaired by Miss Giles and that the letter of dismissal was under her hand.

[50] The principles of natural justice do not preclude Ms. Brown from being present at the disciplinary hearing, the evidence is that she was not the decision maker, rather Miss Giles who resided outside of the jurisdiction. The evidence also reveals that Miss Giles drafted the dismissal letter. She went through the dismissal letter with Mr Morris sent the dismissal letter to Miss Brown who signed it. The finding that she co-chaired the meeting is not evidence that she made the decision to terminate Mr. Morris.

[51] The findings of the Defendant make no reference to the fact that the Dismissed Worker engaged the appellate process. The documents before them included a letter dated July 15, 2015, signed by Missy Farnschlader, Vice President–Human Resources at the Alliance One. There she refers to the decision taken by Kathy Giles to dismiss Mr. Morris for sexual harassment. There is no evidence that Miss Brown participated in the appeal and on assessment of the issues raised she upheld the decision to dismiss.

[52] On my assessment and acting within the parameters of judicial review, I conclude that the findings of unjustifiable dismissal of Mr. Morris on what is described by the Defendant as procedural failures by the multiple roles played by Miss Brown is irrational and unreasonable in the instant case. I find that on the evidence such a conclusion defies logic.

[53] In assessing the totality of the evidence, I find that no reasonable person could come to a similar conclusion. Miss Browns participation in the hearing to take notes and convey what was happening in the room to Miss Giles does not render the proceedings unfair nor is it evidence of procedural unfairness or a breach of the principles of natural justice.

[54] The Claimant raised other issues regarding the quantum of the award, however the Court is not of the view that in light of the reasoning above it is necessary or relevant to delve into the issue of quantum.

DISPOSITION

1. An order of Certiorari to quash the award of the IDT in the dispute between Alton Morris and Alliance One (A Tele performance Company) dated August 31, 2022, is granted.

2. Costs awarded to the Claimant to be agreed or taxed.

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S. Wolfe-Reece, J