

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 21/2022

SETTLEMENT OF DISPUTE

BETWEEN

AGRO-INVESTMENT CORPORATION

AND

MR. SANKOFA MUKULU

AND THE

AWARD

I.D.T. DIVISION

MRS. SHARON ANDERSON	-	CHAIRMAN
MR. ERROL BECKFORD	-	MEMBER
MR. CLINTON LEWIS	-	MEMBER

November 18, 2022



IDT 21/2022

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**AGRO-INVESTMENT CORPORATION
(THE CORPORATION)**

AND

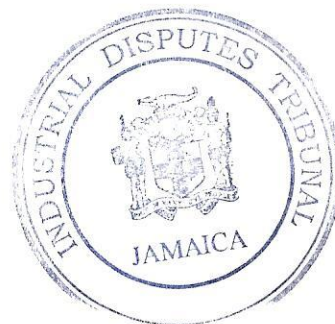
**MR. SANKOFA MUKULU
(THE DISMISSED WORKER)**

REFERENCE:

By letter dated July 12, 2022 the Honourable Minister of Labour and Social Security pursuant to Section 11A(1)(a) (i) of the Labour Relations and Industrial Disputes Act (hereinafter called "the Act"), referred to the Industrial Disputes Tribunal for settlement, in accordance with the following Terms of Reference, the industrial dispute described therein:-

The Terms of Reference were as follows:

"To determine and settle the dispute between Ago-Investment Corporation on the one hand, and Mr. Sankofa Mukulu on the other hand, over the termination of his Contract of Employment."



DIVISION:

The Division of the Tribunal which was selected in accordance with Section 8(2) (c) of the Act and which dealt with the matter comprised:

Mrs. Sharon Anderson	-	Chairman
Mr. Errol Beckford	-	Member, Section 8(2) (c) (ii)
Mr. Clinton Lewis	-	Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF THE PARTIES:

The **Corporation** was represented by:

Ms. Shari Smith	-	Senior Legal Counsel
Ms. Tiffany Turnbull	-	Senior Director, HRM & A

The **Dismissed Worker** was represented by:

Senator Lambert Brown	-	Industrial Relations Consultant
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In attendance was:

Mr. Sankofa Mukulu	-	Dismissed worker
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SUBMISSIONS AND SITTINGS:

Briefs were submitted by both parties who made oral submissions during three (3) sittings held between October 10, 2022 and October 12, 2022.

BACKGROUND TO THE DISPUTE:

1. Agro-Investment Corporation (*hereinafter referred to as the Corporation*) is an agency of the Ministry of Agriculture and Fisheries, and its mandate is to promote Agri-Business. In carrying out this mandate the Corporation controls several Agro-Parks.
2. Mr. Sankofa Mukulu was employed to the Corporation as a Cluster Coordinator on a fixed term contract of employment effective January 2, 2018 for a period of two (2) years ending on January 1, 2020.



3. Mr. Mukulu's contract of employment was terminated on May 29, 2018. He protested his termination and engaged the services of Senator Lambert Brown, Industrial Relations Consultant who challenged his dismissal.
4. The matter was referred to the Ministry of Labour and Social Security. No resolution was reached at that forum and the dispute was referred to the Industrial Disputes Tribunal for determination and settlement.

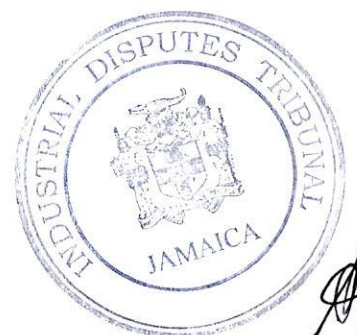
THE CORPORATION'S CASE BASED ON ITS BRIEF AND ORAL SUBMISSIONS:

5. The Corporation did not call any witness but in its presentation to the Tribunal made submissions that Mr. Mukulu was terminated within and under the terms of a mutually signed agreement.
6. Mr. Mukulu was employed as Cluster Coordinator on January 2, 2018 and as is customary, the Corporation provided him with an employment contract, which he would have read and endorsed, with his signature. It stipulated the terms and conditions of his employment. The employment contract under the rubric **"Probation"** states:

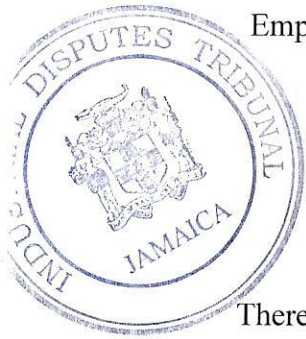
"You will be required to serve a probationary period of six (6) months. During this period either party to the Contract may terminate the Contract without notice. At the end of the probationary period, continuation of the contract will be based on a satisfactory review and evaluation of your performance."

7. Ms. Shari Smith, Senior Legal Officer referred to Section 3 (4) of the Employment (Termination & Redundancy Payments) Act (ETRPA) where it stipulates that:

"Where the contract of employment of any employee specifies a period, commencing on the date of commencement of the employment, as a probationary period, either party to the contract may, notwithstanding the provisions of subsections (1) and (2), terminate the contract without notice during the probationary period or, where the probationary period is more than ninety days, during the first ninety days thereof."



8. It is the Corporation's submission that the law explicitly states that the Employer, after ninety days has passed from the commencement of the employment, must give notice and can terminate within the probationary period.
9. By letter dated May 29, 2018, Mr. Mukulu's contract of employment was terminated prior to the expiration of his probationary period. The Corporation's position is that Mr. Mukulu was terminated within and under the terms of the mutually signed agreement. Section 3(3) of the Employment (Termination and Redundancy Payments) Act states that:



"The provisions of subsections (1) and (2) shall not be taken –

- a) to prevent either party to a contract of employment from waiving his right to notice at the time of termination, or from accepting a payment in lieu of notice..."*

Therefore Mr. Mukulu by signing and agreeing to the terms of the contract of employment waived his right to notice.

10. The Corporation submitted that it was within its right to terminate Mr. Mukulu's contract without Notice and he was aware of the terms of his contract and the possibility of this type of termination. Further, Ms. Smith submitted that Mr. Mukulu was compensated with one (1) month's salary in lieu of Notice and six (6) days' vacation leave pay. Mr. Mukulu would have read in his contract under the heading "*Termination*" that the contract may be terminated prior to the agreed expiration date by either party giving notice or by the Corporation paying the contract officer salary in lieu of notice. Mr. Mukulu never returned the funds to the Corporation or made any attempt to do so.
11. The Corporation exercised its right as established by law when it terminated Mr. Mukulu's contract of employment. The dismissal letter explicitly stated that Mr. Mukulu was terminated due to his inconsistent performance which is not in accordance with the standard expected requirements. This, Ms. Smith stated, would amount to a breach of the employment contract and grounds for termination. Although a performance evaluation report was not done for Mr. Mukulu, the Chief Executive Officer at the time felt compelled to remove Mr. Mukulu based on poor performance.
12. The Corporation contends that Mr. Mukulu was properly dismissed under the contract of employment and the Employment (Termination and Redundancy Payments) Act. They asked that

the Tribunal deny Mr. Mukulu full compensation for his contract of employment and finds that he was fairly dismissed.

THE DISMISSED WORKER'S CASE:

13. Mr. Mukulu was the sole witness called in support of his case.
14. Mr. Mukulu was employed to Agro-Investment Corporation on January 2, 2018 in the capacity of Cluster Coordinator by way of a two year Fixed Term Contract. His responsibility involved oversight of a number of Agro Parks among other duties. He testified that he has a Master's Degree in Plant, Soil and Environmental Science.
15. He further testified that he was never given a written job description but was told verbally by Mr. Sylburn Thomas, Chief Executive Officer that his duties were to train farmers and to develop Demonstration Plots or Discovery Plots. These Discovery Plots were supposed to help to assist investors who want to do different crops, in a scientific way. He stated that the assignment given needed funding for implementation. He approached the Chief Accountant at the Corporation who told him that there was no budget for the project. He therefore sought sponsorship and was successful in doing so.
16. Mr. Mukulu was on probation for a period of six (6) months. The probation Clause of the contract indicated that his employment could be terminated within the first six (6) months without notice. It is his evidence that he was invited to attend a meeting on May 29, 2018 with the then Chief Executive Officer, Mr. Sylburn Thomas. The meeting was ostensibly for a review and assessment of his performance. After waiting some time for the meeting to take place, he was handed a letter dated March 29, 2018 terminating his contract effective immediately stating inconsistency in his performance which was not in accordance with the standard expected.
17. He further stated that he communicated with Mrs. Judith Alexander, the then Human Resource Director from Agro-Investment via telephone about the date of the letter which was March 29, 2018 and the manner of his dismissal. He also communicated by email dated June 6, 2018, to Mrs. Alexander that he had asked Senator Lambert Brown, Industrial Relations Consultant to represent his interest.



18. Subsequent to the email, Agro-Investment sent him a new letter dated May 29, 2018 which again terminated his service with immediate effect.

19. Senator Brown in his submission referred to the (Employment Termination and Redundancy Payments) Act (ETRPA) (1974) which provides a right to an employee to be given notice before being terminated. This right can only be denied in certain limited circumstances. The ETRPA specifically states at Section 3(4) that an employee can only be terminated without notice in the first ninety (90) days of the probation. After the first ninety (90) days' notice must be given. Section 3(4) states:

“where the contract of employment of any employee specifies a period, commencing on the date of commencement of the employment, as a probationary period, either party to the contract may, notwithstanding the provisions of subsections (1) and (2), terminate the contract without notice during the probationary period or, where the probationary period is more than ninety days, during the first ninety days thereof.”

The effect of this Section is to make the probation clause in the contract of employment null and void to the extent that it breaches the ETRPA. Mr. Mukulu had completed more than ninety (90) days of his probation period.

20. Senator Brown also made reference to Section 2 (2) of the ETRPA which excludes contracting out of the provisions of the Act. The Section states that:

“Subject to the provisions of subsection (3) any provision in any agreement (whether a contract of employment or not) shall be void in so far as it purports to exclude or limit the operation of any provision of this Act.”

21. Parliament has treated the right of notice with such high importance that Section 2(2) of the ETRPA was included. This is to prevent the parties from disregarding Parliament's intention of protecting the right to notice, in that, they should not sign an agreement to exclude the operation of the law. This means that the relevant Clause dealing with probation in the contract is void to the extent that it purports to terminate the contract without notice after ninety (90) days of probation had passed.



22. The Employment Contract between Agro-Investment and Mr. Mukulu contains a Clause dealing with termination of the Contract. The termination clause has both an "A" and "B" Section outlining how the contract may be terminated prior to January 1, 2020. As the contract specifically stated that:

- A. *"This Agreement shall remain in effect until January 1, 2020 unless previously terminated by the occurrence of one or more of the events set out in Clause A or B hereof or one of the following:*
- 1. Each of the parties agreeing in writing to terminate this contract;*
 - 2. The contract may be terminated prior to the agreed expiration date by either parties giving notice or by the Corporation paying the Contract Officer salary in lieu of notice;*
 - 3. Either of the parties hereto terminating this Contract by giving the other party one months' notice of termination;*
 - 4. The Corporation shall be entitled to terminate this Agreement without notice and without pay in lieu of notice if at any time during the engagement the Employee:*
 - a) commits any serious misconduct or any serious breach or non-observance of this Agreement.*
 - b) willfully neglects or refuses to carry out the duties assigned to him under this agreement.*
 - c) is convicted of any criminal offence other than an offence which in the reasonable opinion of the Corporation brings your position into disrepute or impacts negatively on the Corporation/Government.*
 - d) Contravenes any of the Rules and Regulations in the Public Service which would render an employee subject to summary dismissal.*
 - e) Failure of the Contract Officer to abide by such reasonable rules of AGRO-INVEST which may be in effect from time to time and which are applicable to all Contract Officers."*



B. *IT IS HEREBY MUTUALLY UNDERSTOOD AND AGREED that this Contract shall immediately cease and come to an end should any of the following events occur:*

1. *The death or incapacity of the Contract Officer*
2. *The Corporation being declared bankrupt*
3. *The wind up or closure of Agro-Invest*
4. *The Contract Officer being in breach of the provisions hereof."*

23. Agro-Invest did not terminate Mr. Mukulu's Contract in accordance with any of the terms in the Termination Clause of his contract of employment. His termination was both wrongful and unfair.

24. The letter dated May 29, 2018 terminating Mr. Mukulu Contract indicated that Agro Investment had a right to terminate his contract without notice. Specifically the first sentence said, *"this serves to advise that as per your employment contract Agro-Investment Corporation reserves the right to terminate your contract without notice."* The letter specifically stated that Agro-investment was relying on the *"probationary clause"* to effect the termination without notice. As the letter stated, *"as such, in keeping with the probationary clause outlined in your contract, a decision has been taken to terminate your employment effective immediately."* This action by the Corporation clearly violated the ETRPA.

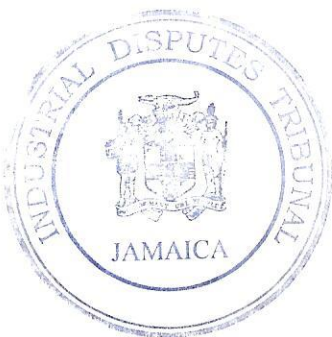
25. The letter of termination also made allegations of inconsistencies in the performance of Mr. Mukulu. There was no proper evaluation of his performance during the probation period that could allow for his termination. The assigned tasks were being successfully implemented by Mr. Mukulu and he was not aware that any complaint was ever made in writing or orally against him.

DISMISSED WORKER'S CONTENTION:

26. Mr. Mukulu contended that:

- a. He is covered by Clause 2 of the Labour Relations Code which states:

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



- b. It is a well-established principle of Industrial Relations that the services of a worker on probation cannot be dispensed with for tenuous reasons. An employer is not entitled at his will to terminate the appointment of a worker merely because he is on probation. An employer must act fairly notwithstanding that an employee is on probation.
- c. He was entitled to be told about the allegation of inconsistency in his performance and given an opportunity to respond to such allegation. The principle of natural justice demanded no less. The same applied to the claim that his performance was not in accordance with the standard expected requirements discussed with him.
- d. He was not given the benefit of due process and natural justice as is required by the Labour Relations Code.
- e. The Corporation acted contrary to the provisions of the ETRPA in purporting to terminate him without notice thus acting unfairly.

27. Senator Brown in his presentation, submitted that; given the fact that Mr. Mukulu was employed on a Fixed Term Contract, which had already expired, reinstatement is not being sought. However, Mr. Mukulu asked that the Tribunal makes an Award for full compensation of his contract as if he was allowed to complete same, but for the unjustified dismissal by the Corporation.

28. Mr. Mukulu said after his termination all efforts to mitigate his circumstances proved futile. He testified that he made several job applications both within the private and public sector without success.

FINDINGS OF THE TRIBUNAL:

29. The Tribunal gave careful consideration of the evidence presented. It should be noted that there was no evidence given by the Corporation.

30. The Corporation submitted that Mr. Mukulu was terminated in keeping with the probationary clause in accordance with his contract dated December 27, 2017. Mr. Mukulu's contract of Employment stated that:

'You will be required to serve a Probationary period of six (6) months, during this period, either party to the contract may terminate the contract without Notice.'



31. Consequently, the Corporation under this Clause, terminated Mr. Mukulu's Contract of Employment and the reason given for the termination states that *"this is due to the inconsistency in your performance which is not in accordance with the standard expected requirements discussed with you."*

32. The Tribunal finds it noteworthy to refer to Section 3 (4) of the Employment (Termination & Redundancy Payments) Act:



"Where the contract of employment of any employee specifies a period, commencing on the date of commencement of the employment, as a probationary period, either party to the contract may, notwithstanding the provisions of subsections (1) and (2), terminate the contract without notice during the probationary period or, where the probationary period is more than ninety days, during the first ninety days thereof".

The Tribunal finds that the Corporation was in breach of the above.

33. The Law clearly states that no Notice may be given in the first ninety (90) days of the probationary period, however, if the probationary period is longer than ninety (90) days for any termination, thereafter, Notice is required. Mr. Mukulu would have been in the employ of the Corporation for approximately five (5) months. He would have exhausted the ninety (90) days probationary period and as such notice would be required.

34. The Corporation made reference to Mr. Mukulu being compensated with one month's salary in lieu of notice as well as six (6) days' vacation leave pay. Mr. Mukulu in cross examination admitted that some money was sent to his account subsequent to his dismissal, however, he was not aware of what the money was for, as there was no accompanying document as to the purpose of same. The evidence is that Mr. Mukulu was terminated without notice. His evidence is that prior to receiving the funds he had engaged the services of Senator Brown and that the Human Resource Manager, Ms. Alexander was notified of same.

35. The Corporation would want this Tribunal to believe that because Mr. Mukulu was on six (6) months' probation the right to terminate exists. Notwithstanding the allegations by the Corporation that Mr. Mukulu's performance was not in accordance with the standard expected requirements, there was no evidence to substantiate same. There is no evidence of any assessment/ evaluation of

Mr. Mukulu's performance by management. The unchallenged evidence of Mr. Mukulu is that there was no budget for the project he was assigned to carry out and he sought sponsorship thus enabling its implementation.

36. Mr. Mukulu was on March 29, 2018 called to a meeting by Mr. Sylburn Thomas, CEO of the Corporation and after waiting for hours, Mr. Thomas arrived and handed him a letter terminating his contract of Employment with immediate effect.

37. The Tribunal, being a creature of statute, must take into consideration the rules of natural justice and the statutory requirement. Section 3 (4) of the Labour Relations & Industrial Disputes Act (LRIDA) states:

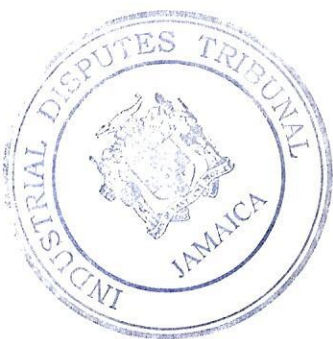
"A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceeding; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken in account by the Tribunal or a Board in determining that question."

The word "shall" is the operative word.

38. The Labour Relations Code Paragraph 22 (i) specifies that:

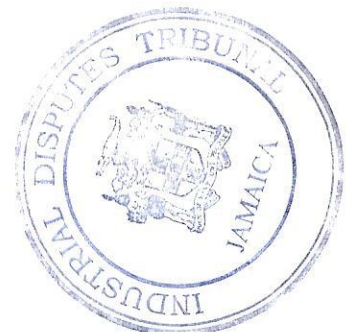
"Disciplinary Procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should:

- 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."*

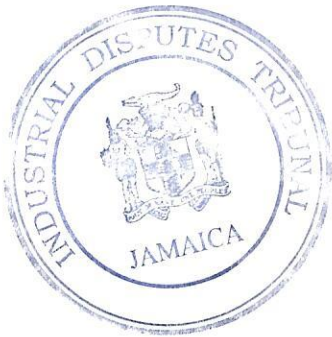
39. The Labour Relations Code expressly recognizes the principles that "*management in the exercise of its functions needs to use its resources (material and human) efficiently*". It also recognizes that "*work is a social right and obligation, it is not a commodity, it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction*".
40. The Tribunal finds that the way in which Mr. Mukulu's contract of employment was terminated was unreasonable and showed very little, if any, concern for his dignity and human feeling as a worker.
41. The fact that Mr. Mukulu's contract of Employment states that either of the parties can terminate the contract by giving the other party one month's notice of termination does not mean that a person's job should be treated as an article of trade. Further, the rules of natural justice dictates that the accused has a right to be heard and the person accused should know what case he has to meet. The Tribunal concludes that Mr. Mukulu was not afforded this right.
42. The Tribunal in coming to its decision agrees with the submission of Senator Lambert Brown that Mr. Mukulu was not in breach of any of the terms mentioned in his contract of employment, neither did the Corporation prove otherwise.
43. The Tribunal also took into consideration Mr. Mukulu's evidence that he was unable to gain employment subsequent to his termination from Agro-Invest. Mr. Mukulu was employed on a fixed term contract which expired in January 2020 and the Tribunal is not vested with the power to extend this fixed term contract beyond the expiry date stated in the contract.
44. Given all the circumstances, the Tribunal therefore finds that Mr. Mukulu was unjustifiably dismissed.





AWARD:


45. The Tribunal therefore awards that Mr. Sankofa Mukulu be compensated in the amount of nine million one hundred thousand (9,100,000.00) for his unjustifiable dismissal.

DATED THIS 18th DAY OF NOVEMBER, 2022





Sharon Anderson
Chairman


Errol Beckford
Member


Clinton Lewis
Member

Witness


Royette Creary
Secretary to the Division