

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT15/2022

SETTLEMENT OF DISPUTE

BETWEEN

CARABANA ENTERPRISES LIMITED

AND

MR. OWEN FRANCIS

AWARD

MR. ERROL MILLER, J.P. - CHAIRMAN

MR. LESLIE HALL, J.P. - MEMBER

DR DENESE MORRISON, J.P. - MEMBER

MAY 15 2024

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**CARABANA ENTERPRISES LIMITED
(THE COMPANY)**

AND

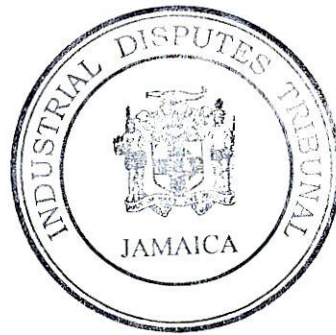
**MR. OWEN FRANCIS
(THE AGGRIEVED)**

REFERENCE

By letter dated March 11, 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:

“To determine and settle the dispute between Carabana Enterprises Limited on the one hand, and Mr. Owen Francis on the other hand, over:

- a. Whether or not Owen Francis was a worker, and***
- b. the termination of his employment.”***



DIVISION:

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

Mr. Errol Miller J.P.	-	Chairman
Mr. Leslie Hall J.P.	-	Member, Section 8 (2) (c) (ii)
Dr. Denese Morrison, J.P.	-	Member, Section 8 (2) (c) (iii)

REPRESENTATIVES OF THE PARTIES:

The Company was represented by:-

Miss Lisamae Gordon	-	Attorney-at-Law
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In attendance:

Mr. Dennis Wright	-	Managing Director
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The Aggrieved Worker was represented by:

Miss Ashley Clarke	-	Attorney-at-Law
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In attendance:

Mr. Owen Francis	-	the Aggrieved Worker
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SUBMISSIONS AND SITTINGS

Briefs were submitted by both parties and they made oral submissions during eleven (11) sittings, held, from March 29, 2023 to February 20, 2024. Three sittings were held prior, however, the parties agreed for the Tribunal to assist in Mediation as they tried to reach a settlement. Mrs. Chelsea Shellie-Vernon who was one of the Members of the Panel at that time, who assisted in the process, was replaced by Dr. Denese Morrison, J.P., when the parties failed to settle the dispute.

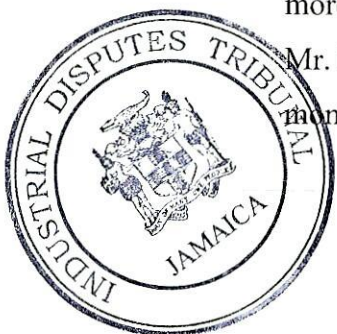
BACKGROUND

1. Carabana Enterprises Limited [the Company/Carabana] operates a distribution business located at 11A Cargill Avenue, Kingston 10. Part of its business is the importation and distribution of perishable goods such as chicken back and salt fish.

2. Owen Francis commenced driving for Carabana Enterprises Limited on 11th March 2019, doing pickup and delivery of the Company's goods. On July 2, 2019, while making a delivery, the Company's vehicle broke down. It was while attending to the Company's vehicle, that he was hit by another motor vehicle and broke one of his arms. However, the accident did not involve the Company's vehicle or goods. As a result of his injury, Mr. Francis was absent from work on sick leave for forty-two days.
3. On September 9, 2019, on the expiration of the sick leave, Mr. Francis presented himself to Carabana Enterprises Ltd., to resume driving for the Company. He said that he was told by the Managing Director that the truck he last drove was still not fixed, so there was no vehicle for him to drive. He was also told that he would be called when a truck is available, but he never received a called.
4. He felt aggrieved over the Company's action and as a result, the Ministry of Labour and Social Security was asked to intervene, through its conciliatory process, but was unsuccessful in finding a resolution. The dispute was then referred to the Industrial Disputes Tribunal for determination and settlement.

CARABANA ENTERPRISES LIMITED CASE

5. The Company began presenting its case on 28th June 2023, with opening remarks by its Attorney, Ms. Lisamae Gordon, followed by the calling of its only witness Mr. Dennis Wright, Managing Director of the Company.
6. Mr. Wright, during examination in chief, stated that Carabana Enterprises Ltd., occupies premises with a number of other businesses at 11A Cargill Avenue, Kingston 10. Carabana's business includes importing and distributing items such as chicken back and salt fish. The Company also sells motor vehicles, including motor trucks and motor vehicle parts.
7. He stated that Mr. Owen Francis was engaged as a Trainee Driver in March 2019 for a little more than two and a half months. However, during re-examination, he said that Mr. Francis' tenure with the Company was about four and a half months or just under five months. Mr. Wright indicated that during Mr. Francis' stay at the company, there were



numerous complaints and reports about his driving and that he met in a number of accidents during his engagement. One incident, he stated, happened when Mr. Francis backed up the Company's vehicle into somebody's property. Although the damage was not great, it gave insight into his incompetence. However, he admitted that the only written report of accidents was Exhibit 1, a report dated 19th June 2019 written by Mr. Francis relating to an accident which occurred on the 13th June 2019.

8. Mr. Wright indicated that Mr. Francis and other Drivers were engaged on the basis that they were independent contractors. He said they would do several assigned tasks and submit an invoice either bimonthly or monthly to be paid. He then added:

.. they are not direct employees; they are responsible for all their obligations and that is understood by virtue of the consultation/ discussions with them before they are engaged...



9. He stated that there was no record of attendance of Drivers as independent contractors were only required to be on the compound when needed. During examination in chief, he was asked;

Q So, the Drivers were basically enlisted as and when needed?

A Yeah

He added that, if a Trainee was assigned, but did not turn up, then that Trainee would not be paid.

10. Mr. Wright further indicated that the invoice submitted by the Driver would take into consideration the number of trips made, the type of vehicle that he drove, the kind of customers he served and the length of time that he has been with the Company. Later, in cross examination, he clarified the method of submission of invoice for payment, saying that the personnel within the office acts on behalf of the independent contractors in preparing the documentation for submission to accounts. He said that the payments are done by cheque but added that notwithstanding the method of payment, the Driver is given a minimum situation that is a figure negotiated between the parties for the period when they are getting to know each other. He added that a daily allowance was given to these independent contractors to offset expenses when they are away from base.

11. Mr. Wright also clarified who is considered to be an independent contractor. He said:

“An independent contractor would be one who would have had a relationship where they are not under any specific directions in the course of what they are doing, they are given broad outlines, if you have a group of deliveries to be done you are given a list to say these are the people who you are going to take the stuff to and it is expected that they would leave and when they complete these deliveries they return to base. It is always clearly understood that they would be responsible for all their obligations to the state and that the Company in itself would have had no other responsibility to them other than the submission of their invoice and if we are in agreement with the invoice, it is paid”

12. Mr. Wright stated that Mr. Francis was not an employee and as a result, he was not given a letter of employment, but instead he got a verbal briefing on his engagement. He made it clear that the Company’s employees would get a letter (meaning a letter of employment). He said that they also receive their pay monthly, and they get vacation leave and sick leave. Depending on the employee’s length of stay with the organization, they would also be given identification cards.
13. Mr. Wright said the Drivers were not given a probation period but instead they were given a trial period of three months. He argued that during this period, reports are received about the Driver from persons, including customers. These reports are used to determine the suitability of the Driver to perform the driving function.
14. As it relates to working hours for Mr. Francis, Mr. Wright testified that he had no working hours as it would be based on the requirement and the location to which he would go. He added that the normal working hours for other employees are between 8:30 a.m. and 5:00 p.m. If they are required to work on Saturdays or Sundays, they would be paid a special payment.
15. Mr. Wright said he was aware that in July 2019, Mr. Francis went to make some deliveries and the truck he was driving broke down. He said that the technical person who examined the vehicle afterward, said that it was the result of poor driving. He said he was also aware that while the Company’s vehicle had broken down, Mr. Francis met in an accident with another vehicle (not with the Company’s vehicle) and that he sustained a broken arm.

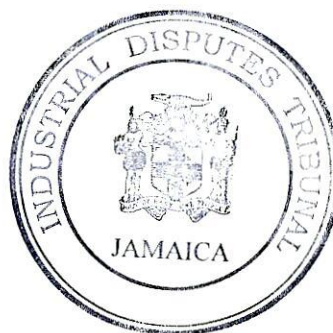


Because of this injury, Mr. Francis was unavailable to drive. He initially testified that as a result of the accident and the injury, Mr. Francis was not paid for the remainder of the month of July 2019. He further stated that sometime later in September 2019, Mr. Francis came to the office and demanded an exorbitantly large sum of money as assistance to seek medical treatment for his injured hand. Mr. Wright said that out of sympathy he gave Mr. Francis \$25,000 for medical assistance.

16. When Mr. Wright was asked the reason for not re engaging Mr. Francis as a Driver, he said that Mr. Francis was unavailable due to the injury sustained in the accident in July 2019. He further stated that Mr. Francis never came back to him personally and say he wanted a truck to drive.

17. The Company contends that:

- a. Mr. Francis was not an employee but that he was engaged as an independent contractor in the capacity as a Trainee Driver. He was never given any identification or uniform and was not on probation, but on a three-month trial period.
- b. He was paid for work done after the submission of an invoice. As an independent contractor, he was not entitled to sick leave, and therefore was not paid when he was injured.
- c. Mr. Francis had not received any letter from the Company terminating his engagement. He was not called back because he was not available. However, if the Tribunal is minded to rule in favour of Mr. Francis, it must take into consideration his short stay at the Company and that he became engaged in other work activities, shortly after his 'self- termination'. Therefore, if any compensation should be considered, it should be in line with redundancy, made under the ambit of the Employment (Termination and Redundancy Payments) Act.



CASE OF THE AGGRIEVED

18. Ms. Ashley Clarke, the Attorney representing the Aggrieved Worker, made her opening statement, following which, Mr. Owen Francis, the Aggrieved, was sworn in as the only witness. Mr. Francis stated that he was employed to Carabana Enterprises Limited on 11th March 2019. He was interviewed by a Mr. Watson, who accompanied him on a driving test on the first day. He never drove with anyone else to assess his driving, therefore, he never considered himself as a Trainee Driver.
19. Mr. Francis submitted a memorandum dated 20th March 2019 [Exhibit 2], which he stated that he got from the Company. This memorandum indicated that he was contracted for a three-month period effective 11th March 2019 in the position of a Trainee Driver. The memorandum also stated that **at the end of the contractual period, the Company must confirm in writing, renewal of the contract.** He said that at the end of the three months, no one said anything to him, neither did he get any letter from the Company and so he continued working as a Driver.
20. Mr. Francis stated that when he started working at Carabana Enterprises, the Company had two Drivers, three trucks and three sidemen. He continued by saying that Ms. Shanice Fletcher was the Supervisor, who would provide the list of places that they would pick up or deliver goods. He also stated that the Security at the front gate would record their names and the time they arrived at work in a logbook. He said that on Mondays to Thursdays and sometimes on Fridays, they would do pickups. Deliveries in Kingston were done on Mondays, Wednesdays, and Fridays while rural deliveries would be done on Tuesdays and Thursdays. The Drivers would check the engines of the truck which would be serviced by the mechanic before they drove out.
21. Mr. Francis indicated that he worked Mondays to Saturdays, 8:00 a.m. to 5:00 p.m. He stated that whenever he drives to the country, he would be accompanied by two sidemen and he would be in constant communication through Closed User Group (CUG) telephone, with the Supervisor, Ms. Fletcher.

22. He indicated that his pay was roughly the same each month and it was paid into his bank account. He said he was paid fortnightly, that he received less on the first fortnight but more at the end of the month when he would be paid an additional \$15,000. He said that



each Driver was given cash of one thousand dollars (\$1000) each day, when they are going on the road. He said he never submitted any invoice to get his pay, neither did he pay any taxes.

23. Mr. Francis said that on July 2, 2019, he and the sidemen left Carabana to do deliveries in Manchester and St. Elizabeth. When they got to Osbourne Store in Clarendon, the truck developed temperature problems. By the time they reached Junction in St. Elizabeth, the temperature problem had recurred some three times and the truck finally broke down on the incline of a road, where he managed to run it back and stopped it. Mr. Francis said that the road was narrow and a vehicle, in attempting to pass the broken-down truck, hit him and broke his hand. He said that he had to seek medical attention and the doctor gave him forty-two (42) days sick leave.

24. At the expiration of the sick leave, he returned to Carabana to his job, although he was not fully recovered. He said that Mr. Wright told him that the truck he had driven was not yet repaired and he would call him later, whenever he had a truck available. Mr. Francis said that Mr. Wright gave him \$25,000 to assist with his medical expenses. After that, he had no further communication with Mr. Wright, and did not receive the promised call.

25. Mr. Francis indicated that he had only met in one accident with the Company's vehicle, while as a Driver at Carabana for which he made a written report dated 19th June 2019 (Exhibit 1). He said he was not aware of any written or verbal report about his driving and being involved in other accidents and that he was first hearing about these allegations during the Sittings of the Tribunal. He said from time-to-time Mr. Wright would have meetings with the staff to discuss general issues, but he never had any one-to-one meeting with Mr. Wright to discuss poor performance or poor driving skills, neither did he receive any verbal or written warning.

26. Mr. Francis indicated that he remained unemployed until February 2022 when he re-gained employment.

27. The Aggrieved contends that:

- a. He was employed as a Driver with an open-ended contract with Carabana Enterprises Limited.



- b. His employment was terminated by the Company on the 9th September 2019, the last time he spoke with Mr. Wright, the Managing Director.
- c. He never had a history of poor performance or carelessness driving.
- d. His employment was unjustifiably terminated as he was not given any reason why he was not called back to work.
- e. There was no natural justice involved in his termination.
- f. That he be compensated from the date of his termination

TRIBUNAL'S RESPONSE

28. The Tribunal's task was to examine the oral and written evidence and to arrive at acceptable conclusions as to:

- a. whether or not Mr. Owen Francis was employed as a worker at Carabana Enterprises Ltd., and
- b. If he was employed, was his employment justifiably terminated?

29. The evidence presented by the Company is that Mr. Francis was an independent contractor engaged as a Trainee Driver and who had to submit invoices to be paid. The only written evidence in that regard was provided by Mr. Francis, which is Exhibit 2, a memorandum outlining his terms of engagement. Initially, Mr. Wright, the Managing Director, refused to acknowledge that his signature was that which appeared on the Exhibit. However, during a later sitting of the Tribunal, he acknowledged that it was his signature. This document entitled a '*Contract for Service*', would be in line with that expected of an independent contractor. However, it stipulated the period of work being '*Monday – Saturday.*' and that Mr. Francis will be advised when he will be needed to work late evenings or on Sundays. Mr. Wright, in responding to a question during examination-in-chief stated:

- Q.** *What about working hours for Mr. Owen Francis, did you have a set time for him to come in to work and a set time for him to leave.*
- A.** *The answer would be no, it would be based on requirement, and the location that he would have had to go.*





But, Mr. Francis, in his evidence, stated that he worked Mondays to Saturdays, 8:00 a.m. to 5:00 p.m. and that the Security Guards record his presence at work. The working hours which are mandated by the Company are therefore contrary to the requirements of a 'Contract for Service' or 'Independent Contractor'.

30. Exhibit 2 also speaks to the amounts to be paid to Mr. Francis as follows:

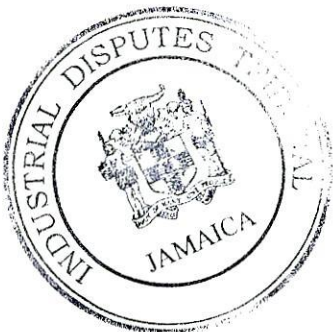
\$50,000.00	Monthly Professional Fees
\$15,000.00	Duty Allowance per month
\$1,000.00.	Daily Allowance

In respect of his engagement, Mr. Wright's evidence is that independent contractors were engaged through dialogue and that the fees negotiated for their services were not in writing. This was contrary to the contents of Exhibit 2.

31. The memorandum also states that the contract period was for three months and that **the Company must confirm in writing, renewal of (the) contract.** The three months ended in June 2019 and Mr. Francis continued to work after its expiration. The Company took no action to terminate or renew the contract in writing, contrary to the memorandum. This suggests that it deemed that Mr. Francis was an employee and not an independent contractor.

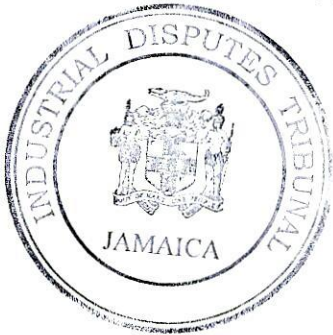
32. Mr. Wright stated that the independent contractor had to submit invoices and that if the Company is in agreement with the invoice, it will be paid. The invoice, he said, would take into consideration the number of trips made by the Driver, the type of vehicle that the person drove, the kind of customers they served and the length of time that the Driver has been with the Company. Mr. Wright later stated that persons in the office were the ones who prepared these invoices on behalf of the independent contractor. But there is no mention in the contract (Exhibit 2) of submitting an invoice to be paid. The Tribunal was also not afforded the opportunity to see one of the invoices to which Mr. Wright referred, neither was there any testimony from anyone who prepared such invoices. On the contrary, Mr. Francis, in his evidence, said that he never prepared or submitted any invoice for payment and that payments of similar amounts were made monthly into his bank account.

33. Mr. Wright, also stated in his evidence that the 'Independent Contractor' was responsible to make his own statutory deductions such as Income Tax, NIS, etc. and submit same to the appropriate authority. Mr. Francis said he personally never submitted any deductions to the Government and there was no evidence that he was instructed to do so.
34. A classical principle relating to independent contractors is that they function without day-to-day supervision. Mr. Francis said in his evidence that Ms. Shanice Fletcher was the Supervisor who provided his daily assignments and maintained constant communication with him while on such assignments through CUG telephone. Although Mr. Wright had said previously that Drivers were not supervised, this evidence by Mr. Francis went unchallenged by the Company and Ms. Fletcher was not brought as a witness to debunk this statement.
35. An independent contractor would normally provide the tools and staff to carry out his function. The Company suggested that Mr. Francis' hands were the only tools he needed to function. However, to perform a driving function, the major equipment or tool needed is a motor vehicle. In this particular case, the motor truck provided was owned by the Company. In addition, the sidemen who worked on the trucks were engaged and paid by the Company. It would be difficult for a reasonable Tribunal to agree that merely using one's driving skills makes one an independent contractor, when all the other major components in the operations are provided by the Company, inclusive of staffing.
36. In order to determine the status of the employment relationship between Mr. Francis and Carabana Enterprises Limited, we refer to Section 2 of the Labour Relations and Industrial Disputes Act, 1975. The Act defines a worker as:



“Worker” means an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee.

37. During Mr. Wright's examination- in- chief, the following exchange took place:-



Q And what are the arrangements with respect to those employees? Tell me what that arrangement looks like?

A The arrangement of an employee would be one who regimentally reports to work, prescribe hours, and that employee would be someone that is paid on a monthly basis with the company being responsible for its legal obligations to an employer (sic) in the context of what is known as an employee, and would come under the specific direction of another employee at a senior level in giving specific directions. That is the best way I think I can describe what a company employee specific as I know it would be.

38. In applying the definition under the LRIDA and Mr. Wright's understanding to the employment status of Mr. Francis, we note that he:-

- a. had in his possession a written contract with a relatively fixed monthly pay
- b. had a specific work week and work times
- c. had his time of attendance recorded by the Company
- d. was under the supervision of the Company
- e. did not provide the tools and staff to carry out his function.

39. The evidence presented, therefore, leads the Tribunal to conclude that Mr. Francis was indeed a worker as defined by the LRIDA and not an independent contractor as the Company asserts.

40. Having concluded that Mr. Francis was a worker, was his employment terminated by the Company?

41. The evidence is that on July 2, 2019, Mr. Francis drove the Company's truck to make deliveries in Manchester and St. Elizabeth. The truck developed mechanical problems and eventually broke down in St Elizabeth. In the process of trying to 'repair' the truck, Mr. Francis was hit by a passing motor vehicle, resulting in one of his arms being broken. He sought medical assistance and in the process was given sick leave. Since he could no longer drive, the Company sent and retrieved the truck from where it had broken down. The Company was aware that because of Mr. Francis' injury, he was unable to carry out his

function as a Driver. Mr. Wright alluded to this injury as the reason he said that Mr. Francis was not available and why he did not reengage him.

42. However, Mr. Francis stated that he returned for his job on 10th September 2019, met with Mr. Wright, who informed him that the truck, which had experienced mechanical problems, was not yet repaired. He said that Mr. Wright promised to call him when the Company had things to do. This obviously left Mr. Francis with the impression that his engagement with the Company was still intact. The Company provided no evidence to indicate that during the meeting with Mr. Francis, he was made aware that his engagement with the Company was no longer valid. Mr. Wright confirmed this, when he stated that Mr. Francis was not given a termination letter.

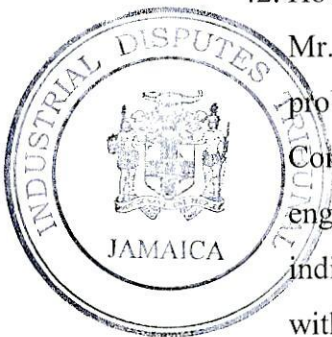
43. We find that a substantial amount of the Company's evidence was unsupported. The Tribunal is therefore reminded of *Regina v IDT ex parte Palace Amusement Company (1921) Ltd.- Suit M. 43 of 1981 in which Parnell J. said*

“...this power does not permit the Tribunal to allow a trade union official who appears before it to give an eloquent and lengthy address which is laced with facts which have not been proven and in which the employer was given no opportunity to challenge by way of cross-examination or otherwise”

44. After the accident, Mr. Francis was told that the truck he drove was not yet repaired, he was then promised to be called back, when something is available, but this never happened. Mr. Wright indicated at one time that he did not re-engage Mr. Francis because he was unavailable. On another occasion, he said that if Mr. Francis had personally come to him and said he wanted a truck to drive, he would have given him one. The evidence of Mr. Wright varied throughout the hearing and therefore, he was found not to be a reliable witness.

45. Among the questions contemplated by the Tribunal are:

- a. Why did the Company not take any action regarding Mr. Francis' employment at the end of the training period, as stipulated in Exhibit 2? Instead, it continued his engagement unabated, despite the many alleged complaints or negative reports it claimed to have received about his driving.
- b. If indeed Mr. Francis was engaged as an independent contractor, why did the Company not advise him that his services were no longer required when he



returned to work on 10th September 2019? It would, therefore, appear that the Company had accepted that Mr. Francis was a regular employee and had intended to call him back when the truck was repaired.

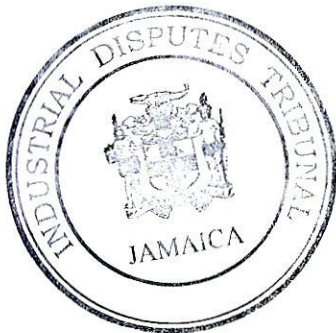
46. The Tribunal finds that by virtue of the reasons already outlined,

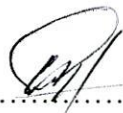
- a. Mr. Francis was a worker, and
- b. That by not calling him back to work, it was tantamount to a termination of his employment. In the circumstances, we find that the termination of the services of Mr. Owen Francis was unjustified.

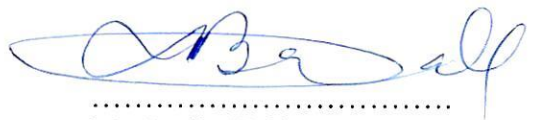
AWARD


The employment of Mr. Owen Francis was unjustifiably terminated and in accordance with Section 12(5) (c)(ii) of the Labour Relations and Industrial Disputes Act, the Tribunal awards that Mr. Francis be compensated in the sum of One Million Nine Hundred Thousand Dollars (\$1.9M).

DATED THIS 15 DAY OF MAY, 2024.

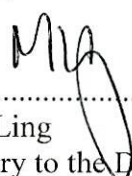



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Mr. Errol Miller, J.P.
Chairman


.....
Mr. Leslie Hall, J.P.
Member


.....
Dr. Denese Morrison, J.P.
Member

Witness:


.....
Mario Ling
Secretary to the Division