

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 6/2014

SETTLEMENT OF DISPUTE
BETWEEN
NATIONAL SOLID WASTE MANAGEMENT AUTHORITY
AND
MR. OTHNIEL DAWES
AND THE
AWARD

I.D.T. DIVISION

MR. NORMAN WRIGHT, Q.C.	-	CHAIRMAN
MR. RION HALL	-	MEMBER
MR. D. TREVOR McNISH	-	MEMBER

MARCH 20, 2015

INDUSTRIAL DISPUTES TRIBUNAL
AWARD
IN RESPECT OF
AN INDUSTRIAL DISPUTE
BETWEEN
NATIONAL SOLID WASTE MANAGEMENT AUTHORITY
AND
MR. OTHNIEL DAWES

REFERENCE:

By letter dated February 05, 2014, the Honourable Minister of Labour and Social Security pursuant to Section 9 (3) 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 the National Solid Waste Management Authority on the one hand, and Mr. Othniel Dawes on the other hand, over 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. Norman Wright, Q.C.	-	Chairman
Mr. Rion Hall	-	Member, Section 8(2)(c)(ii)
Mr. D. Trevor McNish	-	Member, Section 8(2)(c)(iii)

REPRESENTATIVES OF PARTIES:

The Authority was represented by:

Miss. Marlene Chisholm	-	Attorney-at-Law
General's Chambers	-	Attorney-at-Law

In attendance were:

Mrs. Deniesha A.M. Darling	-	Legal Director/Company Secretary
Mrs. Chelsea Shellie Vernon	-	Industrial Relations & HR Manager

Mr. Dawes was represented by:

Mr. Canute Brown	-	Attorney-at-Law
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In attendance was:

Mr. Othneil Dawes	-	Aggrieved Worker
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SUBMISSIONS AND SITTINGS:

Briefs were submitted by the parties and oral submissions made during nine (9) sittings, from July 15, 2014 to February 2, 2015.

BACKGROUND TO THE DISPUTE:

The National Solid Waste Management Authority (NSWMA) is established as a body corporate by Section 3 of the National Solid Waste Management Act which sets out its functions at Section 4 (1). In order to achieve its mandate the NSWMA operates and manages four regional limited liability companies, namely, Metropolitan Parks & Markets Waste Management Limited (MPM) located at 61 Half Way Tree Road, Kingston 10, North Eastern Parks & Markets Waste Management Limited (NEPM) located at 2 Stormount Road, New Backfield, Ocho Rios, St. Ann, Southern Parks & Markets Waste Management Limited (SPM) located at 4A Mandeville Plaza, Manchester and Western Parks and Markets Waste Management Limited (WPM) located at A1 Life of Jamaica (LOJ) Freeport, Montego Bay, St. James.

Mr. Dawes commenced employment with WPM on October 8, 1987, as a Public Cleansing Inspector and subsequently transferred to NSWMA, as at April 4, 2003, and in July 2003, became a Senior Public Cleansing Inspector. He reported to the Regional Operations Manager, and was in charge of the parishes of Westmoreland and Hanover

On March 10, 2009, while attending a meeting at the Regional Office, in Montego Bay, St. James, he was given a letter of transfer, to be effective on March 16, 2009. He wrote to the NSWMA requesting a reconsideration of the transfer based on personal circumstances being experience at the time. He subsequently became ill and under certificate from his medical practitioner, was given fourteen (14) days sick leave. He had no response to his request and due to illness did not report for work on March 16, 2009. However on March 18, 2009, he was summarily dismissed.

The matter was referred to the Ministry of Labour and Social Security for mediation but no resolution was received. The party's request to have the matter sent to the IDT was initially denied on the basis that the dispute occurred before the LRIDA was changed in March, 2010 to allow individual disputes to be referred. Mr. Dawes took the matter to the Supreme Court and based on an order in May, 2013, the Minister's decision was overruled and the dispute then referred to the IDT by letter dated February 7, 2014.

The Aggrieved Worker's Case.

Mr. Dawes contends that he obtained employment with the Health Department of the Westmoreland Parish Council in 1974, as a Public Cleansing Inspector. By letters dated June 23, 2003 and July 2, 2003, he was transferred to the NSWMA in the same capacity. He was subsequently promoted to be a Senior Public Cleansing Inspector.

From inception, he was assigned to the parishes of Westmoreland and Hanover, reporting to the Regional Office, located in Montego Bay, St. James. He also advised of acting as Manager of Operations in 2005, in the Montego Bay office and of telling his Supervisor that he would not wish to do that job again, due to its inconveniences.

During his employment, he worked diligently and was held in high esteem by his peers and Management at the NSWMA, as one who was fully committed to the organization and its goals. He received letters of commendation from the highest level of management for his competence, dedication and loyalty and in an article in the NSWMA's newsletter of October to December, 2008; he was saluted as one of the organization's "Unsung Heroes".

On Wednesday, March 11, 2009, the then Executive Director of the NSWMA, Mrs. Joan Gordon-Webley, convened a meeting of all the Officers in the MPM region, at the regional office in Freeport, St. James, which he attended. During the meeting an open letter from the Executive Director, dated March 10, 2009, was relayed to him, advising that he was being transferred to the St. James Region, effective March 16, 2009. He was taken by surprise since there were no previous discussions or consultations with him. At the end of the meeting, he sought to have dialogue with the Executive Director, but she objected. He wanted to speak to her concerning family issues which were affecting him at the time; e.g. his father's illness, for whom he was responsible and the imminent departure of his daughter-in-law, a nurse at the Savanna-lamar Hospital, who was about to take up a job in Bermuda and leaving two young children in his care.

The following day, March 12, 2009, he wrote the Executive Director, advising her as follows:

"I acknowledge receipt of your letter dated March 10, 2009 regarding transfer of services to St. James; which because of other family commitments I will be unable to respond to your directive. Thanks in advance for your meaningful considerations."

He had hoped that his letter would have led to the dialogue he desired, as a transfer to the St. James Region would see him having to travel on a daily basis or relocating. He faxed the letter to the Executive Director, so she could get it immediately while the original was sent in the usual manner, through the Regional Office. He never received an answer.

On Friday, March 13, 2009, he was not feeling well and did not go to work. On the Saturday he went to the doctor and for the first time he learnt that he was hypertensive. He received a doctor's certificate for fourteen (14) days sick leave. After leaving the doctor he called his immediate Supervisor, Mr. Milverton Munroe, and advised him of his illness and the sick leave certificate. On the Monday morning of March 16, 2009, he sent the medical certificate and a sick leave application form to the Regional Office. He also attended the Office in Savanna-la-mar to sign off the bills for the period March 1 – 15, 2009 to facilitate the bi-monthly payments to the workers. On the same day, while being on sick leave, a memo dated March 16, 2009, was written to him by Mr. Neville Black, the Acting Regional Manager, under the subject "Communication in a timely manner". It posited that as directed by the Executive Director he should have taken up the position of Senior Public Cleansing Inspector that morning at 6:00 a. m. His behaviour was unprofessional and unacceptable in that he had not communicated with himself or the Regional Administrator, of his intention to be late or absent. Furthermore as a Manager he was not only expected to lead but lead by example. Consequently, in future he was to endeavour to communicate in a timely manner.

He again wrote to the Executive Director on March 19, 2009, advising that he had reconsidered and would take up the transfer notwithstanding his family challenges and that he would be seeking travelling allowance. Again he never received a response.

Following the end of his sick leave on March 27, 2009, he turned up for work in St. James on March 30, 2009. He was surprised to receive a letter dated March 18, 2009, from the Regional Supervisor, Mrs. Marcella Foote. The letter was signed by Ms. Sonia Ball, the Human Resources

Manager and copied to the Executive Manager, advising that his services were terminated with immediate effect. The letter referred to the Executive Director's letter of transfer of March 10, 2009, and acknowledging his response of March 12, 2009. It then went on to advise that:

"In your letter of said date you have blatantly refused to carryout the instructions of the Executive Director. In addition, the tone and content of the letter shows discourtesy towards your Supervisor and blatant disregard to the Executive Director's position and authority and abandonment of your position.

The National Solid Waste Management Authority, Schedule of Disciplinary Measures, Item 9 "Insubordination, refusing to carry out reasonable request of your Supervisor" is a breach tantamount to instant dismissal. Therefore, a decision has been made for your services with the organization to be terminated with immediate effect."

He adamantly denied the charges, and reiterated that his letter, in his opinion was neither discourteous nor was his action an act of insubordination, but was simply asking for consideration not to be transferred, due to his personal family challenges being encountered at that time.

On receiving the letter he took it to his immediate Supervisor, who reacted in surprise and commented adversely as to how he was being treated. Up to that point, he had not been given an opportunity for a hearing; neither did he receive a warning or suspension.

Subsequent to the above, he received a telephone call to attend the Regional Office, where after waiting for 2 1/2 hours he was asked to sign as receiving five documents; however he only got three with a cheque attached. He refused to sign when the others were not provided and he left. Consequently to date he has not received any benefits from the NSWMA.

It is contended that: -

- Although the LRIDA does not prescribe any procedure to be followed by an employer before an employee is dismissed for misconduct, the rules of natural justice dictate in labour or industrial relations, when dealing with misconduct dismissal cases that there must be valid and fair reason for such dismissal and to establish that, a fair procedure must be followed by the employer prior to the dismissal.

- The Labour Relations Code, Section 22, enjoins management and workers to ensure that fair and effective arrangements exist for dealing with disciplinary matters and should, *inter alia*, “give the worker the opportunity to state his case.”
- In this case the employer did not conduct a disciplinary hearing and Mr. Dawes was dismissed by way of a letter dated at a time when he was on approved sick leave.
- Articles 4 and 7 of the ILO convention 158 of 1982 suggests that employment of a worker should not be terminated unless there is a valid reason for such termination based on the capacity or conduct of the worker.
- A Public Sector worker has a legitimate expectation that he will be dealt with fairly, therefore when he is being transferred from one geographic area to another, he expects to be dealt with fairly in that he should be consulted on the transfer and his views taken into account before a final decision is made.
- Family responsibilities and other considerations should be taken into account when transferring workers from one locality to another (ILO Recommendations 165 of 1981- Article 20).
- It is clear from the Memorandum from Mr. Neville Black and the dismissal letter, that there was no consultation with the employee before the decision was taken to transfer him despite the fact that:-

a) Dawes was a senior employee, carrying out supervisory duties and has a family and a settled place of abode.

b) The employee’s representations were not considered and even if they were, they were unfairly seen as discourtesy and insolence, warranting immediate termination.

c) The decision maker did not apply her mind to the merits of the representation as to why the employee was unable to take up the transfer. Hence no further information was sought and areas of doubt clarified before the decision was made.

- Insubordination occurs when an employee refuses to accept the authority of his employer. The test is whether the employee's conduct demonstrates an intention to defy the employer's orders, instructions or directives.
- It must be shown that the employee had no reasonable excuse for the act of disobedience, since it must be a wilful and deliberate refusal to carry out the instructions amounting to a repudiation of the contract of employment.

It is further contended that both on the grounds of substantive fairness and the total disregard for the rules of natural justice, the dismissal of Mr. Dawes by the NSWMA was not justified.

Subsequent to his dismissal, Mr. Dawes has had two instances of temporary employment with the NSWMA, November, 2013 – January 2014 and September 3, 2014 - November, 2014, both as a "Remedial Supervisor." At the time of his dismissal his salary was One million, three hundred thousand (\$1,300,000) per annum, with motor vehicle upkeep, medical insurance and duty allowances. In his temporary employment he received substantially less in salary. He also assists his fiancée in the operations of her cook-shop but receives no financial benefits from it. His waiting on the resolution of this dispute has stymied his efforts to source alternate employment.

Should the IDT find that he was unjustifiably dismissed, he has no intentions of returning to the NSWMA, based on the way he was treated by them, after thirty-four years of service. He therefore seeks compensation for his years of service and for any other redress the IDT considers appropriate.

The NSWMA's Case.

The NSWMA's representative from the outset of its presentation made the Tribunal aware that the Authority was at a disadvantage in presenting the case since none of the Officers involved with the dispute is available to give evidence in support of the issues concerning the matter.

Consequently, they would be relying on documentary evidence, entered through Mrs. Chelsie Shellie – Vernon, currently employed at the NSWMA since May, 2014, as Acting Manager for Industrial Relations & Human Resources as well as oral submissions.

The Authority's Brief outlined that Mr. Dawes commenced employment with Western Parks and Market (WPM) on October 8, 1987, as a Public Cleansing Inspector and was transferred to the NSWMA effective April 1, 2003, in the position of a Senior Public Cleansing Inspector up to his dismissal on March 18, 2009. He was at all material times responsible for the parishes of Westmoreland and Hanover.

Mr. Dawes provided no documentary evidence that when he commenced working with WPM, it was on a transfer from the Parish Council, therefore his employment should be calculated only from October 1987 to March, 2009.

By way of letter dated March 10, 2009, the former Executive Director of the NSWMA, Mrs. Joan Gordon-Webley, advised Mr. Dawes that he would be transferred to the St. James Regional Office effective March 16, 2009. In response, Mr. Dawes wrote to her by letter dated March 12, 2009, as previously mentioned.

On March 16, 2009, Mr. Dawes did not assume duties at the St. James Regional Office as directed. Consequently, by letter dated March 18, 2009, the NSWMA advised Mr. Dawes that his contract of employment was terminated with immediate effect. The contents of which were previously mentioned.

On March 24, 2009, the former Executive Director, received a letter from Mr. Dawes, dated March 19, 2009, advising that he had reconsidered the matter of his transfer and notwithstanding his family challenges, he was prepared to travel to Montego Bay on given days. He also

indicated a wish to meet with the Executive Director and expressed the view that as a member of the Team, he remained committed to the growth of the organization and that he would continue to support and adapt to changes. Of course by then the decision to dismiss him had already been made and the letter of March 18, 2009 prepared.

The NSWMA further contends that, while Mr. Dawes' contract of employment contained no clause allowing him to be summarily transferred, it is however, implied in the staff manual. As such, Mr. Dawes had a responsibility to have taken up the transfer as directed by the former Executive Director. Instead, his letter of March 12, 2009, supports the charges of a blatant refusal to carry out a reasonable request and a disregard for the Executive Director's authority. The tone of the letter might be interpreted to mean that he will not take up the transfer at all because he has family challenges and that it was not up for discussion. Consequently, it was just, fair and reasonable to summarily dismiss him in the manner in which it was done.

At the time of the dismissal on March 18, 2009, it would appear that neither the former Executive Director nor the Human Resource Manager at the Head Office was aware that Mr. Dawes had submitted a medical certificate or sick leave application. The memorandum of March 16, 2009, from Mr. Neville Black, indicates that there was no communication forwarded to either himself or the Regional Administrator, regarding his absence or lateness to work. It was also the evidence of Mrs. Shellie-Vernon that there was no evidence of the sick leave application on Mr. Dawes' personnel file at the Head Office and the copy presented was incomplete, because it lacked the approval of the Administrative Officer and the section for "Personnel Use" was not completed, which is normally completed and approved. There is a signed "Received" stamp of the 19th March 2009, from the Regional Operations Manager (ROM) and the initial of an inspector on March 18, 2009; however, there was no approval. It is questioned therefore, whether Mr. Dawes submitted an application for sick leave at all and if he did, whether it was done on the date of his dismissal of March 18, 2009 and to an Inspector, who is junior to him and not being faxed to his immediate Supervisor or Mrs. Foote, the Regional Administrator (RA). The Medical Certificate provided in Mr. Dawes' Brief, showed the signature of an inspector and was dated March 18, 2009, and a received stamp dated March 19, 2009, signed off by the ROM. On the other hand, the one found on the personnel file at the Head Office, differed as it showed a receipt

date of March 24, 2009, by the RA, March 25, 2009, by the ROM and March 26, 2009, by the Human Resource Manager of the Head Office.

All the above inconsistencies, begs the question as to whether Mr. Dawes was genuinely sick at the time, and if so, why was he in the Office signing off bills on March 16, 2009.

Should the Tribunal find that the dismissal was unjustifiable, reinstatement is not a reasonably practical option; having regard to the fact that Mr. Dawes has indicated he does not wish to be reinstated. In this circumstance also, the Tribunal must take into consideration the delay, not attributable to the NSWMA, in the dispute being referred to the IDT. Furthermore, it is submitted that Mr. Dawes had a duty to mitigate his loss by seeking alternative employment. Regarding this, he gave evidence that he secured employment towards the end of 2013 and otherwise he depended on the support of his brother. Consequently, he should not be awarded full pay and benefits from the date of his dismissal.

TRIBUNAL'S FINDINGS:

The NSWMA's representative from the outset acknowledged that under the LRIDA and the spirit of the Labour Relations Code (LRC) the burden of proof in an unjustified dismissal case rests with the employer. In this case, the employer faced a challenge in doing so, as all the persons involved with the dismissal of Mr. Dawes, no longer work with the NSWMA and the Authority had difficulties in locating witnesses to support its case. The only witness called, Mrs. Shellie-Vernon, has a very short tenure in her position as Acting Manager Industrial Relations & Human Resources and apart from the limited documents found on Mr. Dawes' personnel file, had no knowledge of the case.

- Mr. Dawes had a long employment of commendable service in the public health field. His evidence is that he commenced working with the Westmoreland Parish Council's in 1974 and following transfers to the WPM in 1987 he was transferred to the NSWMA in June of 2003. Although the NSWMA's representative made statements that there was no transfer and that Mr. Dawes resigned from the Parish Council in 1987 before joining the

WPM, Mr. Dawes strongly denied this and the NSWMA provided no evidence to support this claim.

- Mr. Dawes was transferred by letter handed to him at a meeting on March 10, 2009, effective March 16, 2009, without any prior discussions and contrary to the provisions of the NSWMA's Staff Manual, which is silent on the matter of employer rights to transfer a worker, but addresses the course to be taken by an employee to seek a transfer. Mr. Dawes' evidence that his efforts to speak with the then Executive Director after the meeting were rebuffed, leading to his letter of March 12, 2009. The letter, in our opinion, though brief, supports the author's position that he was simply seeking to have a reconsideration/dialogue on the transfer. It in nowhere appears to be a blatant refusal to be transferred, discourteous or insubordinate to anyone.
- The evidence adduced indicated that there was no known emergency vacancy/need for the urgent transfer to have been effective within two (2) working days, while denying dialogue with the worker.
- Mr. Dawes', evidence is that he became ill and visited his doctor, who provided him with a sick leave certificate for fourteen (14) days, which would see him returning to work on March 27, 2009.
- Internal communication within the Regional Office and between the Head Office appears to be weak. Mr. Dawes advised that he submitted his letter of March 12, 2009, the medical certificate and sick leave application on March 16, 2009, and letter of March 19, 2009, advising of his reconsideration of the transfer, by the normal courier service used between the local office in Savanna-la-mar and the Regional Office in Montego Bay, while copies exhibited indicate delivery delays and cross correspondence, oblivious of previous or same date writings. Hence the letter of March 12, 2p009, was not acknowledged until he received the dismissal letter dated March 18, 2009. Memorandum from Mr. Neville Black, Regional Operations Manager, chiding Mr. Dawes for failing to

advise lateness/absence dispatched, despite Medical Certificate/Sick Leave Application, claimed to have been submitted same date. The letter of dismissal dated March 18, 2009, was written while Mr. Dawes was on sick leave.

- Despite all the above “criss crossing” of correspondence no one in the Regional Office or Head Office sought to have dialogue with Mr. Dawes or appeared to have conducted any investigation into the issue.
- Note must also be taken of the fact, that according to the disciplinary code in the NSWMA’s Staff Manual, for an employee’s service to be terminated for “*insubordination*”, he would have to be in breach of this offence on at least three (3) separate occasions. The evidence is that Mr. Dawes had a clean disciplinary record.
- The charges laid seem at best unfounded and even if the most extreme view is taken of the claimed offensive letter of March 12, 2009, we do not accept that the contents are serious enough to warrant dismissal.

The Tribunal further notes that although the dismissal took place in March 2009, the matter was only referred to the IDT by letter dated February 5, 2014. The delay in the process, we understand, was due to the fact that the claimant’s efforts to resolve the issues at local levels and at the Ministry of Labour and Social Security remained unresolved until September 2010. Whereupon, the Jamaica Civil Service Association (JCSA), which represented Mr. Dawes up to that time, requested the Minister to refer the dispute to the IDT, under the amendment of the LRIDA of March 23, 2010, which provided for non-unionized workers’ disputes to be referred. The Minister however, having concluded that the dispute arose before the amendment to the Act, formed the view that it fell outside the ambit of the amendment and declined the request.

The (JCSA) appealed against this decision, resulting in a judgment that the Minister had erred in his decision; the matter was returned to him to exercise his discretion in accordance with the provisions of the LRIDA as amended March 23, 2010. Subsequently, the dispute was referred to the IDT.

The Tribunal finds that the NSWMA did not follow the procedure of due process and was in breach of the provisions of the LRIDA and particularly the LRC, in that:

- Nothing was outlined to the employee regarding his alleged charges of blatant refusal to carry out the instructions of the Executive Director, discourtesy to his Supervisor, blatant disregard and insubordination to his Supervisor.
- No hearing was held to facilitate the employee answering the charges and giving his side of the story.
- Mr. Dawes in evidence stated that based on how he was treated after his thirty four (34) years of unblemished service, he would not consider reinstatement. He is therefore seeking compensation for his years of service and any other redress the IDT considers deserving.

The Tribunal accordingly finds that the termination of the services of Mr. Othniel Dawes was unfair, unreasonable and therefore unjustified.

In determining an appropriate redress, the Tribunal must take into consideration the lapse in time and the circumstance from which this dispute has evolved. This delay cannot be attributed entirely to the NSWMA, however giving consideration to the fact that having dismissed Mr. Dawes unjustifiably in the first place it would, of necessity, have to bear the consequence of any weight applied. It is also the case that the aggrieved worker has testified, that since his dismissal, he has had two instances of temporary employment with the NSWMA, during October 2013 to January 2014 and September to November 2014; otherwise he received financial assistance from his brother, thus mitigating his loss of income from the NSWMA.

Given all the foregoing circumstances and having found that Mr. Dawes was unjustifiably dismissed, the Tribunal makes the following Award.

AWARD:

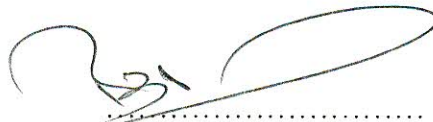
That Mr. Dawes' dismissal is unjustified and in keeping with the LRIDA Section 12, (5)(c)ii order that:

- A) He be compensated with four (4) year's salary at the current rate of the position held at the time of his dismissal.

DATED THIS 20th DAY OF MARCH 2015.



Mr. Norman Wright, Q.C.
Chairman

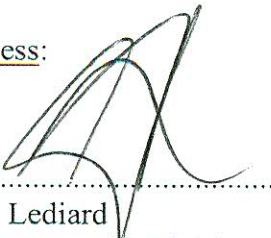


Mr. Rion Hall, J.P.
Member



Mr. D. Trevor McNish
Member

Witness:



Gary Lediard
Secretary to the Division