

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 30/2016

SETTLEMENT OF DISPUTE

BETWEEN

NOVELTY GIMMICK LIMITED

AND

MR. ANIFE SMITH

AND THE

AWARD

I.D.T. DIVISION



HON. MRS. JUSTICE MARJORIE COLE-SMITH - CHAIRMAN
(Retd.)

MR. ERROL BECKFORD - MEMBER

MR. CLINTON LEWIS - MEMBER

JUNE 11, 2021

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**NOVELTY GIMMICK LIMITED
(THE COMPANY)**

AND

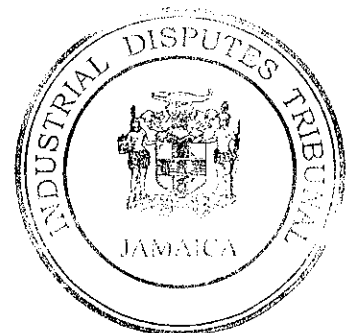
**MR. ANIFE SMITH
(THE DISMISSED WORKER)**

REFERENCE:

By letter dated June 6, 2016 the Honourable Minister of Labour and Social Security in accordance with Section 11(1) 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 Novelty Gimmick Limited on the one hand, and Mr. Anife Smith on the other hand, over the termination of his employment."



DIVISION:

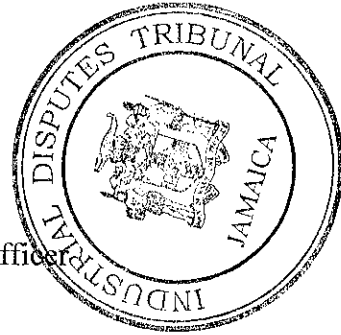
The Division of the Tribunal which was selected in accordance with Section 8(2) (c) of the Act and which dealt with the matter comprised:

Hon. Mrs. Justice Marjorie Cole-Smith (Retd.)	-	Chairman
Mr. Errol Beckford	-	Member, Section 8(2) (c) (ii)
Mr. Clinton Lewis	-	Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF THE PARTIES:

The **Company** was represented by:

Mr. Ken Carter	-	Attorney-at-Law
Mrs. Katrina Gregory	-	Chief Executive Officer



The **Dismissed Worker** was represented by:

Mr. Howard Duncan	-	Industrial Relations Consultant
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In attendance

Mr. Anife Smith	-	Dismissed Worker
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SUBMISSIONS AND SITTINGS:

The Panel that was initially selected to hear and settle the dispute consisted of Mr. Donovan Hunter, Chairman, Mr. Errol Beckford, Member and Mr. Clinton Lewis, Member. In August 2017, Mr. Donovan Hunter demitted office. He was replaced by Mr. Charles Jones, Chairman. The parties were written to in accordance with Section 8 (4) of the Labour Relations and Industrial Disputes Act (LRIDA) and they agreed for the Tribunal to continue as though the matter was never interrupted. On July 18, 2020, Hon. Mrs. Justice Marjorie Cole-Smith, Chairman replaced Mr. Charles Jones. Both parties were again written to in accordance with Section 8 (4) of the LRIDA. Mr. Howard Duncan, Industrial Relations Consultant, responded informing the Tribunal that he wished for the matter to begin de novo. The parties made oral submissions during twelve (12) sittings held between September 10, 2020 and May 20, 2021.

BACKGROUND TO THE DISPUTE:

1. Novelty Gimmick Limited hereinafter referred to as the Company is a registered Company located at 5 Downer Avenue, Kingston 5.

2. Mr. Anife Smith was employed to the Company in the capacity of a Guillotine Operator on April 4, 2011. Mr. Smith alleged that he was dismissed while the Company on the other hand alleged that Mr. Smith walked off the job. Mr. Smith engaged the services of Mr. Howard Duncan, Industrial Relations Consultant who protested his dismissal.
3. 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 DISMISSED WORKER'S CASE:

4. Mr. Howard Duncan, Industrial Relations Consultant initially represented Mr. Anife Smith at the Industrial Disputes Tribunal. However, after examination-in-chief of Mr. Smith, Mr. Duncan informed the Tribunal that he was no longer representing Mr. Smith. In light of the foregoing, Mr. Smith, although encouraged by the Panel to find another representative, chose to represent himself for the remainder of the hearings.
5. Mr. Smith was employed to the Company, Novelty Gimmick Limited on April 4, 2011, to fill the position of Guillotine Operator. His starting salary was five hundred and seventy two thousand dollars (\$572, 000.00) per annum or twenty two thousand dollars (\$22, 000.00) gross per fortnight. His hours of work were between 7:30 am to 4:30pm, Mondays to Fridays.
6. On January 27, 2014, Mr. Smith made a call to the Company to report that he was ill. He spoke to Mr. Demar Gordon who he asked to relay the message to Mr. Dennis Tingling, the Managing Director of the Company. Mr. Smith was advised by Mr. Gordon that the message was given to Mr. Tingling.
7. It is Mr. Smith's evidence that on January 28, 2014, he turned up for work and was told by a worker that Mr. Tingling said he should not punch his timecard until Mr. Harry Gregory, Production Supervisor, arrived at work. They both had a meeting with him and said things were slow and that when things picked up, they would give him a call. He asked Mr. Gregory for a letter to outline the situation but was told it would be for a short time. Mr. Smith said that he called Mr. Tingling twice while at home trying to find out when he should return but did not get him. The next thing he saw was an advertisement in the Sunday Gleaner dated February 23, 2014, advertising his position. He said that he reported the matter to the Ministry



of Labour who advised him to write to his employer. By letter dated March 19, 2014 he wrote to Mr. Tingling. He took the letter for Mr. Tingling who he said was in the parking lot and therefore, gave it to Ms. Beverly Murray to deliver to Mr. Tingling. He did not receive a response from Mr. Tingling.

8. By letter dated October 27, 2014, Mr. Howard Duncan wrote to Mr. Dennis Tingling on Mr. Smith's behalf appealing his unfair and unjustifiable termination. He did not receive a response from Mr. Tingling.
9. Mr. Smith submitted that, he, at no time resigned from his employment neither did he abandon his job as he returned to work the following day January 28, 2014. He said that he also wrote to the Managing Director appealing his termination and as such could not have abandoned his job.

The Dismissed Worker's Contention:

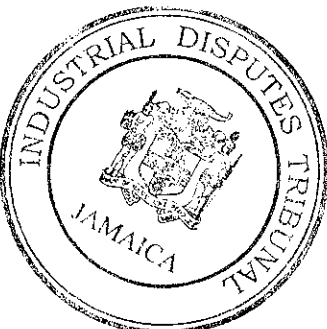
10. The Dismissed worker contended that:

1. his services were terminated without the right to a fair and proper disciplinary hearing on the basis that he was sent home and the post was later advertised.
2. he did not commit any offence, neither was he charged for any offence
3. he was not provided with any evidence to which he could defend himself
4. he was not provided with the right to representation
5. there was a total violation of the Labour Relations Code and the Principles of Natural Justice.

11. Mr. Smith asked the Tribunal to find that he was unjustifiably terminated and that he be reinstated in his job without any loss of pay from the date of the termination to the date of the Award.

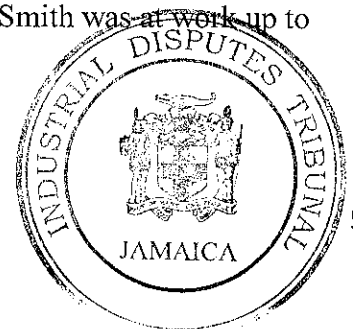
THE COMPANY'S CASE:

12. The Company called three (3) witnesses in support of its case. It is the Company's case that Mr. Anife Smith resigned, walked out and quit his job. At no time did the Company fire or dismiss Mr. Anife Smith. Mr. Smith walked off his job and he never returned. The Company submitted that the advertisement for the position of Guillotine Operator in the Sunday Gleaner



that Mr. Smith alluded to was not his (Mr. Smith's) position but that of another Guillotine Operator whose position became vacant.

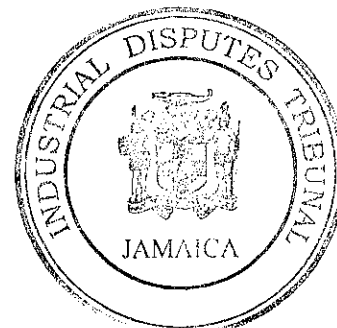
13. Mr. Harry Gregory, General Manager was the first witness called by the Company. At the time of Mr. Smith's termination, he was the Production Manager. His evidence is that Mr. Smith was one of the best Guillotine Operators he has ever come across, however, Mr. Smith was not a team player, he tells lies without remorse and he seems to have an anger problem. He would curse and threaten management and would flatly deny and refuse to carry out his duties
14. Mr. Smith was issued with warning letters and at one point suspended for his behavior. Mr. Gregory testified that Mr. Smith resigned from his job, multiple times, as he did so in November 6, 2012 when he wrote on a piece of paper, "I Anife Smith resigned." Mr. Smith, he said, had a propensity for walking off his job. There is also evidence of Superintendent Dixon, Handwriting Expert, who established that the said resignation note was in fact written by Mr. Smith. Mr. Gregory testified that the last day of Mr. Smith's employment with the Company was February 21, 2014, the same day he verbally resigned and not January 28, 2014 as Mr. Smith claimed to be his last day at work. Mr. Gregory said that on February 21, 2014, Mr. Smith came to his office and told him that he resigned. Mr. Gregory said that he told him to put it in writing but he never did.
15. Mr. Gregory said that based on Mr. Smith's habit of walking off the job and then asking back for same to which Mr. Tingling would accede; he was placed on temporary employment prior to him finally walking off the job for good.
16. Mr. Gregory's evidence is that the Company does not take disciplinary action or dismiss staff without giving them a letter concerning the same and at no time did the Company or anyone representing Novelty Gimmick fire or dismiss Mr. Smith.
17. Mr. David Edwards the second witness for the Company in corroborating the evidence of Mr. Smith's last date of employment testified that tax was deducted from Mr. Smith's salary up to the period ending February 21, 2014 and that all statutory deductions were made over that period. There was also evidence of a time card indicating that Mr. Smith was at work up to February 21, 2014.



18. It is the Company's submission that Mr. Smith by his own words and action demonstrated an intention not to return to his employment.
19. The Company asked the Tribunal to dismiss the claim by Mr. Smith that his employment was terminated.

TRIBUNAL'S RESPONSE AND FINDINGS:

20. There are two issues for the Tribunal to determine:
1. was Mr. Anife Smith dismissed by the Company
 2. did Mr. Anife Smith abandon his job.
21. Mr. Smith's evidence was that he turned up for work but was sent home by Mr. Harry Gregory who told him there was a downturn in the business. Mr. Smith said that he made numerous calls to the company trying to find out when he should return to work but his efforts were futile. It is Mr. Smith's evidence that Mr. Tingling was a very good man yet at no point did Mr. Smith inform the Tribunal that he tried to speak with Mr. Tingling personally concerning his job. The evidence showed where Mr. Smith resigned from his job and notwithstanding the resignation, he still had a job. The unchallenged evidence of Mr. Gregory is that whenever Mr. Smith walked off the job, Mr. Tingling would always take him back in his employ.
22. The evidence before the Tribunal indicates that Mr. Smith was at work up to February 21, 2014 and not January 28, 2014 as Mr. Smith stated in his evidence. The time card, the pay advice, as well as a statement from the Bank to which Mr. Smith's salary was lodged all showed that he was at work up to February 2014. Of importance is Novelty Gimmick Limited, 2014, SO2 Employer's Annual Return which showed that Mr. Smith worked eight (8) weeks for that year.
23. Mr. Smith in evidence submitted a letter dated March 19, 2014 with regards to the status of his employment. This letter the Company has stated that they did not receive and the evidence by Mr. Smith did not indicate otherwise. There is not one scintilla of evidence that supports Mr. Smith's contention that he was terminated.



24. As it relates to the second issue to be determined, the Tribunal finds the Full Court decision of the Jamaica Public Service Company v Bancroft Smikle (1985) 22 JLR 244 very instructive where it stated that:-

“Abandonment is clearly a matter of intention, to be gathered or inferred from the person intending to abandon his job...”

25. Abandonment is to be inferred from the employee’s conduct. An assessment of the conduct of Mr. Smith is therefore necessary. The Tribunal accepts Mr. Gregory’s evidence that Mr. Smith came to his office on February 21, 2014, which is a pay day and again told him that he was not coming back to work. The Company on this occasion accepted that Mr. Smith walked off his job as he did not return to work.

26. The Tribunal finds that it was reasonable for the Company to infer from the conduct of Mr. Smith that he no longer had any interest in the job and therefore had an intention to abandon his job.

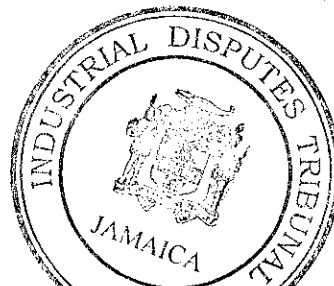
27. In the case of the Jamaica Public Service Company v Bancroft Smikle (1985) 22 JLR 244, Justice Wolfe reiterated what he said in the R v the Industrial Disputes Tribunal and the Hotel Four Seasons Ltd. Exparte the National Workers Union at page 35 that:

“... abandonment is conduct which evidences an intention to repudiate.”

28. The Jamaica Public Service Company v Bancroft Smikle (supra) further stated:

“Repudiation is conduct on the part of the employer or employee which unequivocally demonstrates that the employer or employee no longer regards himself as being bound by the contract of employment. Mere repudiatory conduct is not enough to terminate a contract. There must be acceptance of the repudiation, acting upon the well-established principle of law that a contract cannot be unilaterally terminated...”

29. Mr. Smith’s action and conduct amounted to an intimation of an intention to abandon the contract of employment. It takes two to end a contract of employment, repudiation on the one side, and acceptance of the repudiation on the other side. The evidence is that the company accepted that Mr. Smith walked off the job on February 21, 2014 and did not return and therefore repudiated his contract of employment.

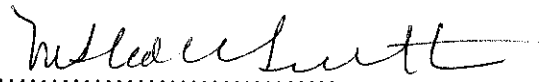



AWARD:


- (a) Mr. Anife Smith was not terminated from his job
- (b) Mr. Anife Smith abandoned his job thereby repudiating his contract of employment.

DATED THIS ¹¹ DAY OF JUNE 2021





Justice Marjorie Cole-Smith (Retd.)
Chairman


Errol Beckford
Member


Clinton Lewis
Member

Witness:


Royette Creary (Miss)
Secretary to the Division