

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 50/2013

SETTLEMENT OF DISPUTE

BETWEEN

THE BANK OF JAMAICA

AND

THE BUSTAMANTE INDUSTRIAL TRADE UNION

AND THE

AWARD

I.D.T. DIVISION

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

SEPTEMBER 30, 2015.

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

THE BANK OF JAMAICA

(THE COMPANY)

AND

THE BUSTAMANTE INDUSTRIAL TRADE UNION

(THE UNION)

REFERENCE:

By letter dated December 5, 2013 the Honourable Minister of Labour and Social Security pursuant to Section 11A (1) (a) (i) of the Labour Relations and Industrial Disputes Act of 1975 (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 Bustamante Industrial Trade Union on the one hand and the Bank of Jamaica on the other hand, over the termination of the employment of Mr. Frank Johnson.”

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, J.P. - Member, Section 8(2) (c) (ii)
- Mr. D. Trevor McNish - Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF PARTIES:

The **Company** was represented by:

- Mr. Patrick Foster, Q. C. - Attorney-at-Law
- Ms. Ayana Thomas - Attorney-at-Law

In attendance were:

- Mrs. Novelette Pantou - Deputy CEO
- Miss Arlene Tomlinson - Director Human Resources & Administration.

The **Union** was represented by:

- Mr. Rudolph Thomas - Island Supervisor

In attendance were:

- Mrs. Charlene Porteous-Henry - Chief Delegate
- Mr. Dave Dillon - Delegate
- Mr. Frank Johnson - Aggrieved Worker

SUBMISSIONS AND SITTINGS:

Briefs were submitted by the parties and oral submissions made during thirty-one (31) sittings, from April 08, 2013 to June 04, 2015.

BACKGROUND TO THE DISPUTE:

In December 2012, the Bank of Jamaica through its Audit process discovered that there was a breach of its telephone system whereby an unauthorized code in the name of an unknown individual was being used to access the system and made calls without making the requisite payments. Investigations led to the code and calls being made by Mr. Frank Johnson, one of the banks Senior Managers.

Following investigations in the matter and various discussions and meetings, the decision was taken to dismiss Mr. Frank Johnson. He however appealed the decision but this was disallowed. Consequently, the matter was referred to the Ministry of Labour & Social Security (MLSS) and having failed to arrive at a settlement, the Minister by letter dated November 26, 2013, sent it as a dispute to the Industrial Disputes Tribunal (IDT) to be determined and settled.

THE COMPANY'S CASE:

The Bank of Jamaica (BOJ) is the Central Bank of Jamaica. It is responsible for the regulation and supervision of the financial sector in the island, the issuing and redemption of currency, to keep and administer the reserves of Jamaica and to act as banker for the Government of Jamaica. It operates from its head office buildings, located at Nethersole Place, downtown, Kingston and various offices otherwise across the island.

In the above endeavours the Bank engages several hundred members of staff, who along with the varying policies and procedures, tools, equipment, furniture and fixtures are expected to efficiently carry out their duties. One such equipment is a telephone system through which members of staff may make calls from time to time in support of their daily duties as well as personal calls. In the process of control and to facilitate the recovery of costs for personal calls, each officer is given an authorized "Access Code" by which to access the system. This in turn allows for the collating of the bills for each extension on a monthly basis, so that each officer may denote his/her personal calls and make the relevant payment for personal calls.

During December 2012, the Bank through its routine audit of the Telecommunications System Department discovered that there was a code that was being used but there was no evidence that the personal calls were being paid for. Through its internal investigations commencing in January 2013, it was further discovered that the code was registered under the name of a staff member by the name of Sabrina Lewis. However, continued investigations revealed that there was no staff member ever employed by that name.

Consequently, Mrs. Joy Hermitt, Internal Auditor, held discussions with the Director, Management Accounts and the General Clerk in charge of telephones in the Accounting Services Department. She was thereafter directed to speak further with Mr. Norbert Brown, Customer Service Technician, and the officer responsible for issuing authorized codes to the staff. When asked to explain the possibility of such occurrence, he promised to investigate the matter and report to the Audit Officer. However, Mrs. Hermitt surprisingly received a call, at approximately 10:00 pm, on Friday 4th January, 2013; from Mr. Frank Johnson, a Senior Manager of the Bank employed as a Training Technical Specialist and who at that time, held the position of Assistant Director of the Training Institute of the Bank. Mr. Johnson advised her that he had heard that she was investigating a telephone matter in connection with one Sabrina Lewis and it was his fault. He indicated that he had made the calls and would see to the sorting out of the matter.

Regarding the results of the investigation, the Audit Officer was advised as follows:

- The code to Sabrina Lewis was linked to an extension in the Bank's lounge area but the calls were coming from the extension assigned to Mr. Frank Johnson.
- Mr. Johnson was in possession of two codes and must have been in possession of them before he assumed responsibility for issuing codes.
- Mr. Johnson had an authorization unrestricted telephone which meant that his extension was able to facilitate multiple codes and that was how he was able to use the additional code in his possession.

In his evidence before the Tribunal, Mr. Brown advised that on finding out that the calls originated from Mr. Johnson's extension. He recalled that Mr. Johnson's assigned code had been disconnected in February 2012, for nonpayment of bills. He therefore called Mr. Johnson and asked if he was using another code. After that, Mr. Johnson called back and asked that the bills associated with the said code, be sent to him. On a subsequent occasion, Mr. Johnson had explained to him that he knew the seriousness of the situation and asked what he Mr. Brown could do to help him but he Mr. Brown had told Mr. Johnson, he could do nothing. Mr. Brown subsequently made a verbal report to his supervisor, who instructed him to make a written report on the facts. Resulting from the Audit report on the matter, the Bank requested the Human Resources Department (HRD) to establish if any disciplinary action was necessary.

The evidence of Mrs. Novelette Panton, the then Senior Director of Human Resources, Pension & Training, was that she immediately started her own investigations and based on the fact that it was reported that Mr. Johnson had acknowledged using the unauthorized code to make calls, he was asked to provide a written report to the HRD, which he did. In his report he acknowledged that his telephone extension had been disconnected in February, 2012, for non-payment of outstanding bills. He further acknowledged, that upon discovering that his access code was deactivated thereby preventing him from making external calls, he proceeded to use the second code to enable him to undertake such activity. It should be noted that this second code was not issued by the Bank and that Mr. Johnson claimed to have received this code years ago, from a source external to the Bank. Mrs. Panton also obtained written reports from other relevant persons/departments, who she felt had been involved directly with the matter or those who could explain the telephone system and the issuing of codes. After receiving the various reports, she put in place a panel to conduct a hearing to ferret out the disciplinary action to be directed against Mr. Johnson and on a broader basis, to see where the breakdowns may have occurred and whether others were involved. She advised further, that for the hearing, allegations were to be heard against Mr. Johnson and another member of staff.

Both parties were invited to attend and given the opportunity to be accompanied by a representative. Based on the above, Terms of Reference (TOR), in general terms outlining five (5) allegations, were developed and given to the members of the selected panel and the Union delegates/representatives, named by the two

members of staff. On the other hand, the Terms of Reference given to Mr. Johnson were adjusted to refer specifically to the allegations against him in the following two areas:

- 1) To enquire into and determine the facts surrounding your possession of and use of an access code not issued by the Bank, to access the Bank's Telecommunication System.
- 2) To enquire into and determine culpability on the part of person or persons (if any) involved in facilitating your possession of and use of an access code not issued by the Bank, to access the Bank's Telecommunications System. (Emphasis ours)

The other three (3) items maintained their generality and referred mainly to possible circumvention of the Telecommunication System and disciplinary action, if necessary. Mrs. Panton gave evidence as to the rationale for these variations.

The evidence provided, indicates that the hearing was scheduled for over two (2) days, May 9 & 10, 2013, to which Mr. Johnson was invited to attend on May 9th, but actually testified on the 10th. Mrs. Panton submitted the names of the persons who gave evidence at the hearing and explained that apart from Mr. Johnson and Mr. Norbert Brown, the others spoke to their written reports and their knowledge about the Bank's Telecommunication System, the accounting/collection procedures and the part they played in the investigation of the breaches. None provided accusations or evidence for or against Mr. Johnson.

On the other hand, Mr. Johnson testified that he was given an authorized code to his telephone extension in 1996. Some time after, he started to have problems with the phone and a technician from Cable & Wireless Co. Ltd. came, but was unable to sort out the problems. Mr. Johnson claimed that the technician gave him the disputed code to be used on a temporary basis.

Subsequently, the technician advised him that everything was ok with his phone; however, he kept and continued to use the temporary code. When in February 2012, he noticed that, he could not make external calls from his extension and was advised that it had been disconnected for nonpayment of outstanding bills; he continued using the temporary code (which came up on the accounting delinquency listing, in the name of Sabrina Williams). He admitted that he could not recall when he had last paid a bill for calls made on his original code and when asked if he had advised anyone of the other code, he replied in the negative,

because he thought the code being attached to an extension, the billing would come to him so he would pay or not pay. He further admitted that he had used the temporary code alternately, over a three (3) year period.

At the hearing at BOJ, Mr. Johnson expressed only two (2) concerns, firstly, as to the time he had called Mrs. Joy Hermitt, reported to be approximately 10:00 pm and secondly, that he had told Mr. Brown, when he had enquired as to who had asked him to investigate the matter and was told that it was Mrs. Hermitt, that he had said "It is ok, Joy is my girl". However, when asked if he wished to have Mr. Brown attend to verify that statement, Mr. Johnson objected angrily, saying he would not be comfortable with that and would prefer not to. He said he and Mr. Brown had no work relationship. They never had one before the incident and he did not want to have anything to do with him since.

Following the hearing at BOJ and the deliberations of the panel, a report of its findings and a recommendation to suspend Mr. Johnson for thirty (30) days, was sent to the Committee of Administration (COA). The COA examined the recommendation, but felt that the HRA's recommended disciplinary action was not commensurate with their findings with respect with Mr. Johnson's conduct. The COA therefore requested the Disciplinary Panel to reconvene and reconsider fully all the issues which could impact their recommendation. The HRA panel reconvened and in giving further consideration to its previously recommended disciplinary action for suspension, was of the view that dismissal was indeed the appropriate sanction based on its findings from the enquiry. They felt that the review coalesced around "confidence and trust." Mr Johnson had shown no remorse and he maintained that he had done nothing wrong. As a Senior Manager, the deceit and dishonesty that was shown would not allow confidence and trust to return between the Bank and himself. The COA accepted the new recommendation and in-turn submitted its report and recommendation for dismissal to the Management Council (MC), which upheld the decision and by letter dated July 23, 2013, Mr. Johnson was dismissed effective July 25, 2013.

The Bank thereafter received a letter dated July 25, 2013, from the Bustamante Industrial Trade Union (BITU), noting the dismissal, but strongly objecting to the Bank's action on the basis that it was unjust and unwarranted. They also stated that they were demanding that Mr. Johnson be reinstated with immediate effect and would make themselves available for an appeal. The Bank replied by letter dated August 2, 2013,

acknowledging and noting the contents of the Union's letter, but advised them that all stages of the Bank's Grievance/Disciplinary Procedure had been completed. In this regard, the Bank through the evidence of Mrs. Panton as confirmed by Mr. Calvin Brown, Division Chief, Administration & Technical Services Division, outlined the practiced disciplinary procedure used by the Bank and the makeup of Management at each stage; whereby, the initial Panel to convene the disciplinary hearing is usually headed by someone from the Human Resources & Administration Department (HRD) and comprising other relevant staff members, union delegates and the accused's representative. Their report and recommendation is then sent on to the Committee of Administration, (COA).

The COA is made up of eight (8) members of the management staff up to the level of Deputy Governor. They adjudicate on the report and recommendation of the COA, and communicate their decision and recommendation to the Management Committee. The Management Committee has the responsibility to assess the report and recommendation from the COA and to make the final decision. This Committee is made up of five (5) Senior Managers, up to the level of the Governor and includes three (3) members of the COA group.

The Bank therefore contends that Mr. Johnson's case, having traversed the full spectrum of the disciplinary procedure, left no avenue to hear an appeal within its process. Consequently, the BOJ felt an external party would have had to be used and therefore facilitated the reference of the matter to the Ministry of Labour as has been the case in the past. The Company therefore contends that its actions have been procedurally consistent and as presented at the IDT, Mr. Johnson for his misdeeds, as a Senior Manager of long tenure, was fairly treated and thus justly dismissed.

Counsel for the Bank provided several references to support the bank's position of fair and justifiable dismissal e.g.:

- Reg v. The Minister of Labour & Employment, IDT/Devon Barrett ex parte West Indies Yeast Co. Ltd. Suit # M 26/84 of July 25, 1985 where Smith CJ stated:
"In my opinion, in the sense in which they are used, s. 12(5) (c) of the Act and in the corresponding UK legislation, the words "unjustifiable" and "unfair" are synonymous and

the use of one rather the other merely shows a preference of the respective draftsman. In my judgment unjustifiable refers to the reason for the dismissal and not the dismissal itself”.

- Village Resorts Ltd. v. The IDT (1998) 35 JLR & Uton Green 292 CA at 324 (para. I) Bingham J. A. stated that the crucial question was whether the actions of the employer were “just, fair and reasonable.”

He also noted that the same approach was up-held by the Privy Council in the Jamaica Flour Mills v. IDT (2005) U.K. P. C. 16, 69 of 2003.

- In the case of the University of Technology, Jamaica v. The IDT & UAWU, Supreme Court of Jamaica, delivered 23rd of April 2010, Mangatal J stated at paragraph 31 of her judgment that

“the IDT must focus, not only on the reason for the dismissal but on the dismissal itself and the surrounding circumstances” According to her “this in my view clearly suggests that the IDT has to examine the reasonableness of the employer’s actions and that requires an examination of the reason which led to the dismissal, as well as the circumstances in which the dismissal took place.”

Regarding the claim of breach of natural justice, the Bank contended that there was no breach and cited several authorities within the British Commonwealth to support its position, that it is not compulsory that the accused has to face the accuser or that the evidence of all witnesses must be tested by cross-examination. In this regard the Bank posited that:

“A plethora of authorities have settled the principle that natural justice only means that the tribunal must give the other side a fair opportunity of commenting on evidence and of contradicting any relevant evidence to his prejudice. This may simply require that what is said against the employee is communicated to him or what others have said against him is put orally to him and he be given an opportunity to comment on it”.

The Bank therefore concluded that based on all the factors presented, it submits that the dismissal of Mr. Frank Johnson was fair and justifiable and that the contentions of the BITU ought to be rejected and the decision of the BOJ to terminate him should be allowed to stand.

THE UNION'S CASE:

The Union in its submission called two (2) witnesses in support of its case. The aggrieved worker Mr. Frank Johnson, who attended all the sittings at the IDT, was not called to give evidence. Instead, the Union rested its case based on Mr. Johnson's written report and his comments/responses as expressed in Exhibit #21, the recorded "Minutes of Enquiry held regarding investigation into the Unauthorized Use of the Bank's Telecommunication System, on May 9 & 10, 2013."

Mr. Frank Johnson was employed to the Bank of Jamaica as a Computer Systems Training Officer in October 1987. During his tenure, he also served as Technical Training Administer and in July 2002, was promoted to the position of Assistant Director attached to the Training Institute as Training Technology Specialist. His positions qualified him to receive a telephone extension which is configured to make external calls by the use of an access code. He first received such a code sometime in 1996. Resulting from an Audit investigation, it was discovered that the unpaid calls reflected on the telephone delinquency report for the period January to December 2012, originated from Mr. Johnson's extension. Consequently, by memorandum dated 24 April, 2013, advising that arising from the report and various interviews with other members of staff, it was established that in one of the interviews he had acknowledged using an unauthorized code to make telephone calls. Based on a meeting with him on April 23, 2013, he was asked to provide a written report by 4:00 p.m. Wednesday 24 April, 2013. He provided the report. Following this, he received a letter dated May 7, 2013, from the Human Resources Administration Director, inviting him to a hearing on May 9, 2013.

According to the minutes of the hearing, Mr. Johnson reported to the Enquiry that sometime after receiving the code in 1996:

"There were times when, I could not make calls, could not receive calls there were sounds in the

line and I informed the custodian at the time; that was the members of the POES department as we now call it, what was happening with my phone. They asked a JTC or Cable & Wireless technician

to come to look at the phone, which is a person I would normally see coming in and out of the Bank with the telephone company van parked downstairs. After several attempts at fixing my phone the problem would still be or some of those problems would still be there until one day the telephone company man said since you having this problem use this code to make your calls while I sort out what was happening with your line, it seem to have been a problem with the line itself and not the instrument. I got that code that I use invariably since then. Then when it started working properly I saw him one day coming out of the elevator and he said ... Frank, by this time we were that familiar with each other, your phone alright now, everything is sorted out. I said okwhen I came up I was able to use my phone. Nobody instructed me that the phone was unauthorized; no letter came to me about that particular code that the access code was not given to me by the Bank of Jamaica, at the particular time the telephone company was the company that actually created the codes and they would give it to persons through the office of POES. Since POES had contracted these persons I was not of the opinion that I was using an illegal code so I continued using the code. Since I got back my own line I continue using my regular code that I had. Now in last year I recognize that there was a time when I could not make calls on my phone in a little discussion with Janice Gentles down on the 10th floor, I asked her what was happening cause she now the person sending out those bills. She said that my phone was disconnected for non-payment of bill but I said I haven't seen a bill for a while so I asked her to send me the bills so I can make my payments so we can get reconnected. Knowing that I have another code I came back and continued making calls using the other code. Now if you should check the records all the calls were made from that extension, from my extension 3409 using 3726, that's the other code, all the calls. I wasn't getting any bills so not getting a bill was not unusual, hoping I would make restitution so that we could resume my service with my regular code. This was not forthcoming until earlier this year when Mr. Brown called me to ask me if I know."

The call from Mr Brown was one enquiring if he was using a particular code to which he responded positively. He told Mr. Brown that it was his code, that he had two codes and that it was he who had made the calls. He also wanted to know what the issue was and Brown advised him that he was asked to investigate that particular code because there are no bills being paid for it. Consequently, he had discussions with other members of staff involved in the Bank's Telecommunication system

and the Audit Department, acknowledging that the calls were made by him and offering to pay the bills as soon as they were presented. The bills for the temporary code have since been paid but the ones for his original code which was disconnected remain outstanding as only a total amount has been provided. The schedule of calls have not been provided due to difficulties with the system and copy bills found on his desk were not sorted out to see if they related to the outstanding amount.

The Union contends that Mr. Johnson was not given a fair hearing as:

- 1) The letter of invitation to the hearing laid no specific charges but instead shared a set of Terms of References, which sought to enquire into and determine several facts. This would indicate that if facts were to be ascertained, there could have been no charges laid.
- 2) Mr. Johnson, the Chief Union Delegate and his representative received certain documents relevant to the issue at hand, but were never provided with copies of the full Audit Report; the critical document which informed the HRA with evidence for the need of a hearing. This therefore denied them the ability to ascertain from that Audit Report anything that may have been material to Mr. Johnson's defense.
- 3) From the beginning of the enquiry, the Chairman, indicated that the process would be handled differently from all previous processes and only one person being questioned would be allowed to be in the room at any given time. This created a situation where neither Mr. Frank Johnson nor his representative Mr. Ruel Hinds was in the room at all material times to be a part of the process, including when evidence was being given against him. It must be noted that representation is not only about refuting charges. It can include advice on how to manage proceedings etc. In this regard the Union referred to the Approved Judgment in the matter of Selwyn Strachan and the Law Society –Case No: C/1147/2013 in the Royal Court of Justice, Strand, London, as a profound statement when in regards to representation it states:
“Whatever the defendants' behavior, it in no way relieves the state of its duty to ensure that the defendants were legally represented at all times.”

As such, note is to be taken of the fact that the emphasis is on there being represented “at all times” and that was denied Mr. Johnson.

It is the Union’s view that in the face of what was recognized to be ‘unfair’ neither Mr. Johnson nor his representatives was permitted to join the proceedings.

The Terms of Reference presented to Mr. Johnson at the Enquiry were in general terms and not equivalent to specific charges being laid against him. Furthermore, it was felt that Mrs. Panton having contemplated over the matter for so long a duration, between February 2013 to May 9 – 10, 2013; having decided who to request reports from; having discussed the matter with members of her “team” and having been the person to decide if there was a matter to be heard at an enquiry, it was more likely than not, that she could not have remained impartial in the matter so as to serve as important a role as chairperson.

In the Union’s opinion, the event pursued from May 9-10, 2013, was not a fair Hearing or a hearing in any shape or form, but an Enquiry during which information was being gathered; during which the Bank sought to “enquire and determine”. This view was strongly confirmed by its two witnesses Dave Dillion, Union Delegate and Ruel Hinds, representative of Mr. Johnson, who both attended the Hearing/Enquiry and gave evidence that based on the process used, they felt arising from the deliberations, formal charges should have been brought against Mr. Johnson to facilitate a fulsome hearing.

Notwithstanding the forgoing, the Bank called Mr. Johnson to a meeting and issued a letter dated July 23, 2015, advising him of the decision to terminate his contract of employment, effective July 25, 2015. This was in excess of three (3) months after the initial request for a report from Mr. Johnson; a period of time through which the Bank displayed no concern over permitting him to continue carrying out his usual functions.

The Bank indicated that in accordance with Section 4. 3 of its policy, a recommendation for disciplinary action was made to the (COA). It is to be noted however, that the Policy speaks explicitly to recommendations being made to the Management Council where it states:

- “4.3 When the case is fully heard, the panel deliberates, records its finding and makes a recommendation to the Management Council for the decision”

In this case, the recommendation, as outlined in the Report of the Disciplinary Enquiry, was made to the COA for Frank Johnson to be suspended (without pay) for thirty (30) days. The Union also claimed that it is in this report, without the knowledge of Mr. Johnson, that for the first time charges against him are mentioned. The COA rejected the recommendation and returned the issue to the Disciplinary Committee, which stated that, in giving further consideration to their previous recommendation for suspension, they were now of the view that “dismissal was indeed” the appropriate sanction, based on its findings from the Enquiry. The Union saw it of importance to impress on the Tribunal that the language “dismissal was indeed” unequivocally indicated that the Panel was seeking to agree with instructions they had received and therefore did not act with a ‘freehand’ and that also the fact that Mrs. Panton, Chairman of the Disciplinary Committee, confirmed that “there was no new evidence looked at in changing the sanction” makes the process wrong. It contended that notwithstanding being contained in the Bank’s policy, did not make it right, as such actions removed the perception of transparency, objectiveness and fairness from the process, they being requirements of being fair and just in ascribing disciplinary sanctions.

The evidence reflect that the charges, though ascribed to Mr. Johnson after the fact of the enquiry, attracted either suspension or termination, however, the Panel was forced into making a decision to terminate Mr. Johnson. That action was tantamount to appealing the sentencing and in comparing this to the Jurisprudence System of Jamaica; the state cannot appeal against a sentencing. The Union also questioned the make-up of the Committees involved in the decision making process and notwithstanding, not being included in the Bank’s policy, the membership of the COA and the MC was disturbing; whereby 83.33% of the COA or 5 of its members are part of the 6 members of the MC. This ought not to be tolerated, as it creates a system where victimization or unfair treatment can easily occur as it did with Mr. Johnson. Consequently, in the Union’s opinion, the process that terminated the services of Mr. Johnson was an unwarranted overturn of the recommendations of the Disciplinary Panel, by a COA, which substantially reported to itself, rendering the termination, in breach of procedural fairness and was flagrantly unfair/unjustifiable.

The Union also challenged the use by the Bank of the 'seniority' of Mr. Johnson and the 'training received from the Bank' as basis on which to change the recommendation and quoted from the "Just Cause Seven Tests" to illustrate why these attributes should be best used to support his total twenty-eight (28) years of service.

Much emphasis is also placed on the first time the charges were so classified to Mr. Johnson and that these came in the letter of termination, certainly after the Enquiry, then he would not have had the opportunity to respond to them. In this regard the Union also pointed to examples of the IDT's own rulings in the disputes between JUTC vs UAWU, IDT #16/2007 and NCB vs Peter Jennings, IDT #8/2013. Based on these facts, Mr. Johnson should be held harmless against all charges contained in his letter of termination and the termination itself must therefore be considered "unjustifiable" and reversed in the interest of justice.

The Union also referred to the fact that the IDT was made aware that there were two persons who were indicted coming out of the Enquiry of May 9-10, 2013. Both sets of charges appear to have been parallel and both were found guilty but the sanction was different. The other party, who in the Union's view had the greater transgressions, was suspended for thirty (30) days but in the case of Mr. Johnson it was termination, due to the Disciplinary Panel reversing their original sanction of an equal thirty (30) days suspension. The sanction applied against Mr. Johnson was inconsistent and applied in a discriminatory fashion.

The Union also posited that in this case, there are three areas of fairness to prove: procedural fairness, substantive fairness – guilt and substantive fairness – appropriateness of sanction. To this end it claims that a simplified summary of Substantive Fairness in applying dismissal as an appropriate sanction would be that the employer may dismiss an employee for a fair reason after following a fair procedure. Failure to do so may render the dismissal procedurally or substantively (or both) unfair and in an effort to remedy this wrong, should result in reinstatement. Substantive fairness can be split into two elements, namely; establishing guilt and deciding on an appropriate sanction.

The Union submitted that, based on the evidence led and the other submissions made, the Tribunal would be obliged to return a finding that the dismissal of Mr. Johnson was unfair. Another area of claim that the

dismissal was unjustified was that of the Bank breaching its own policy, whereby while the policy speaks to the right to an appeal, Mr Johnson was denied that right.

The Union contends that the Bank's approach is a deliberate and unscrupulous contrivance to deny its workers a provision of its own policy, which if allowed to stand, then no employee of the BOJ would ever receive such a fundamental right as the 'right to an appeal'. In this case the Bank has several other Managers, who were not a part of those selected and used in the earlier process that could have served the appeal process. Additionally, the bank could have engaged external persons to preside over such an appeal. Furthermore the Union provided evidence of how a previous application for an appeal was amicably resolved in a matter concerning Messers Colin Avis, Radcliffe Jonas and Steven Lewis, between August 10, 2012 and October 29, 2012 (Exhibits 25 & 26). The claim to being unable to grant an appeal was therefore proven to be nothing but a fallacy, intended to disguise the unfairness which permeated specifically the matter of Mr. Johnson's termination.

The final area of challenge posited by the Union is that the Bank breached the Labour Relations Code of Jamaica by its abuse of natural justice exhibited in the treatment of Mr. Johnson. In this regard the Union relied on the provisions of Paragraphs 3, 22 (1) (a), (b), (c) (d) and (i) supported by reference to the dispute between NCB and Peter Jennings; Dispute # IDT 8/2013, to highlight the alleged breaches by the Bank, of procedural unfairness, bias, impartiality, transparency and denial of an appeal.

In conclusion, the Union stated that, having presented the facts and other considerations; having highlighted the multiple breaches in the conduct of the hearing, having reviewed the unfairness of the disciplinary action taken against Mr. Frank Johnson; having extrapolated the breaches in the Bank's own policy and having evidenced the various breaches of the Labour Relations Code, it submitted that there was no option but to rule that the dismissal of Frank Johnson was flagrantly unfair and unjustifiable.

Reinstatement must also be seen as the most appropriate remedy and that he be reimbursed for all lost wages, benefits, and other money lost as a result of the dismissal between the date of his termination and the date of the award from the Tribunal. To restore all privileged mortgage and loan rates, pension entitlements without affect of his termination on July 25, 2013; and be compensated as the Tribunal finds

fit for hurt, humiliation, loss of dignity, distress and moral damage, taking into consideration the personal circumstances of Mr. Johnson as the primary breadwinner of his family and the social prejudice he likely suffered over the extended duration July 25, 2013, the date his termination took effect and the date of an award.

THE TRIBUNAL'S FINDINGS:

Both parties to the disputes through their respective representatives made substantial submissions supported by well researched and relevant cases to the positions of each party.

We find that while the evidence and submissions were voluminous and took a long time to be completed, the resolution of the dispute rests with the considerations of guilt and procedural default.

Mr. Johnson at all material times was aware of the issue for him to answer. The letter to him of May 7, 2013, clearly spoke to "your" possession and use of an unauthorized code and based on his admission of these acts, we are satisfied that he was aware of the purpose of the Hearing.

The Union has submitted that the composition of the COA and the MC respectively is a source of concern in that the membership of the COA comprises 83.33% or 5 of the 6 members of the MC. This we find quite alarming as it displays a lack of transparency and gives rise to accusations of victimization, discrimination, bias and unfair treatment. It also gives support to the Union's substantive claim, **that the process that terminated the services of Mr. Johnson was an unwarranted overturn of the recommendations of the Disciplinary Panel by a COA which substantially reported to itself, rendering the termination in breach of procedural fairness.** We therefore use this medium to urge the Bank of Jamaica to urgently address this very anomalous situation, which if left unattended could lead to grave industrial strife at the workplace.

By virtue of Mr. Johnson's actions, he violated the Bank's Human Resources Manual Sections 1.2 3.1 and 5.1 (1), the sanction for which is suspension or dismissal. We considered Mr. Johnson's actions as being deceitful as well as dishonest.

Mr. Johnson, through his actions, sought to interfere and influence the outcome of the audit investigations by contacting the Audit officer. From the evidence provided despite Mr. Johnson's claim that he was only seeking to obtain information when he contacted the Audit Officer, the reported conversations with this Officer and others, following the commencement of the investigation (e.g. Norbert Brown, Mrs. Gentles and Messers Glenroy and Ian Williams), make it reasonable to assume that he was trying to influence the investigations.

We are well aware of the prominent position of the Bank of Jamaica in its regulatory role of the financial landscape in Jamaica and of the integrity that it must bring to these duties. Mr. Johnson is a senior Manager, with the position of Assistant Director, Training Technology Specialist, Level 14, attached to the Bank's Training Institute, a position of influence and guidance. Pleading guilty to acts, determined to be of deception and dishonesty, must therefore rank high on not only against the personal integrity of the individual, but also the organization he serves. More significantly, is the fact that the deeds of deception and dishonesty were not committed as a one off incident, which could be classified as an error of judgment or indiscretion. These acts occurred over an extended period and were only acknowledged when discovered by the Audit process, with no remorse being shown but with the system being blamed for the faults. It appears therefore evident and reasonable to assume, that, but for the Audit results, these practices of deception and the dishonesty of non- payment for personal calls, would have continued ad infinitum. For these reasons, it is our view that Mr. Johnson's actions contributed significantly to his dismissal.

Consequently, the Tribunal is of the view that the Bank had cogent reasons for terminating his service.

However, the Tribunal must take into consideration the Bank having arrived at a decision to dismiss the worker, were the rules of natural justice and the statutory requirement observed?

It is evident that Mrs. Panton participated in the groundwork investigations, conducted interviews, requested and reviewed the various reports and being the person to decide if there was a matter to be heard, was also the Chairperson of the Disciplinary Panel. It is our view that the Bank of Jamaica may have been misled by the up- front admission of guilt by Mr. Johnson, that it sought to focus more on the establishment of the extent of the exposure of its telecommunication and recovery accounting systems, that its required

attention to the details of the procedural process became muddled. In this regard it sought to have convened a dual meeting of both a hearing into the conduct of Mr. Johnson and a general fact finding enquiry. Mrs. Panton's multiple roles are a fundamental breach of the rules of natural justice. In future it would be best advised to separate such responsibilities and proceedings.

The Tribunal finds no evidence to contradict the contention of the Union that the Bank failed to observe the provisions of the Labour Relations Code as set out in Section 22 when Mr. Johnson's contract of employment was terminated, without the right to be represented at all material times, neither was he provided the right to an appeal. In this case it is most reasonable to believe that given the evidence and the circumstances, any well thinking panel would have come to the same conclusion. While the MC is said to include the Governor, the most senior decision maker in the Bank, we were never made aware if he was personally involved in this matter. The Labour Relations Code allows for an appeal to be heard by a level of management not previously involved and while it may be perceived that a manager below the Governor should not be over-ruling a decision collectively involving him that should not lead to a denial of the right to an appeal. Alternately, the Bank could have arranged for an external agent to provide that level of support, including the Ministry of Labour. But for the future, that will have to be clearly outlined in its policy and agreed to with the employees and their Union. We believe the Bank of Jamaica is sufficiently staffed at its management levels to be able to regularize this anomaly once and for all, by creating defined tiered Managerial Disciplinary Committees, up to the appeals level. We therefore strongly urge the Bank of Jamaica to correct this situation now.

In light of the above, the Tribunal must point out that under Section 3(4) of the Labour Relations and Industrial Disputes Act; it is obliged by statute to take this point into consideration, which states:

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

Mr. Frank Johnson by his own admission is guilty of a breach of the Bank's rule, fairly classified as deceptive and dishonest and is therefore liable for dismissal, under the Bank's **Disciplinary Code** but denied him the **right of appeal** provided for under the said **Code**. However, having examined the evidence before it and taking into account all the circumstances we came to the conclusion that the Bank did not follow the proper procedure in dismissing him and as such, cannot ignore the plethora of procedural blemishes attributable to the Bank in the handling of this matter, which has therefore rendered said dismissal unjustified.

Our position is further fortified by the recent judgment of the **Court of Appeal (Civil Appeal 153/2011)** in the case of **Karen Thames (Appellant) and National Irrigation Commission Limited (Respondent)** wherein the Court at paragraph 61 ruled that:

“if the disciplinary code was expressly or impliedly made a term of the appellant's employment contract then the respondents would have been bound to follow it.”

The Court further confirmed this position by the following response to a submission by Counsel for the employee, Miss Thames:

“I therefore find favour in the submissions made by Mrs Senior Smith that the respondents were bound to follow the disciplinary code since it had been an expressed term of the appellant's contract and furthermore they published, adopted and relied upon it.”

In the overall regard, it has not escaped the Tribunal's attention, that the Union has requested the remedy of reinstatement and while the Tribunal does not consider this employee worthy of reinstatement in the Bank; the state of the legislation only allows us to make the following Award in this circumstance.

AWARD:

In accordance with Section 12 (5) (c) (iii) of the Labour Relations and Industrial Disputes Act (LRIDA) the Tribunal awards that:

(a) The Company reinstate Mr. Frank Johnson on or before October 19, 2015

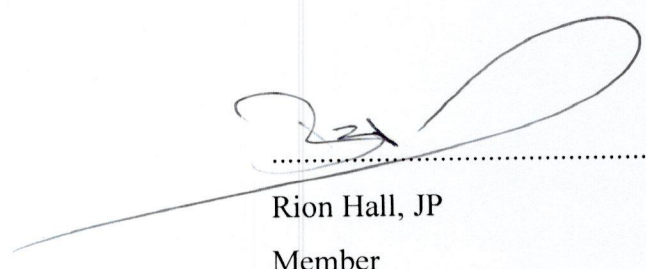
Or

(b) Failure to reinstate Mr. Frank Johnson as stipulated in (a) above, the Company shall pay to him compensation in the amount of Nine (9) months normal salary as relief.

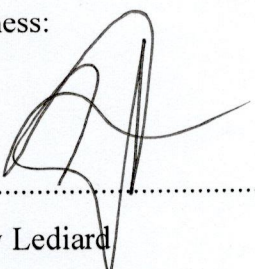
The Chairman appointed under Section 8 (2) (c) (i) is not in agreement with the Award and his opinion is appended hereto.

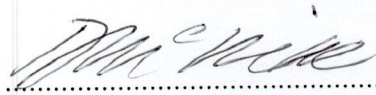
DATED THIS 30th DAY OF SEPTEMBER, 2015.




.....
Rion Hall, JP
Member

Witness:


.....
Gary Lediard
Secretary to the Division


.....
D. Trevor McNish
Member

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 50/2013

BANK OF JAMAICA

And

BUSTAMANTE INDUSTRIAL TRADE UNION

MINORITY AWARD

The Chairman has read the Award of the Members very carefully and is in full agreement with their conclusions up to page 19 of the Award. The Chairman has also taken note of the expressed concerns of the Members in the first paragraph at the top of page 20 and feels obliged to express his dissent from the views expressed therein as to “procedural blemishes” attributable to the Bank in the handling of this matter.

There is no evidence as to how much experience the Members of the Bank who participated in the hearing have had in presiding over hearings of this nature, but it is very clear that whatever “blemishes” and or “breaches” took place on the way to their conclusions were not in disregard of the rules of natural justice and the requirements of the code.

The Chairman feels obliged to note that Mr. Johnson was well represented at the hearing before the Tribunal, where he had every opportunity of addressing such “blemishes” or “breaches”, but he sat throughout the hearing and choose not to give any evidence. This would have given Mr. Johnson his day in court as well as the opportunity to explain any

justification he wished to advance by way of exoneration or in mitigation of what he was being accused of, but he sat throughout the hearing and said nothing.

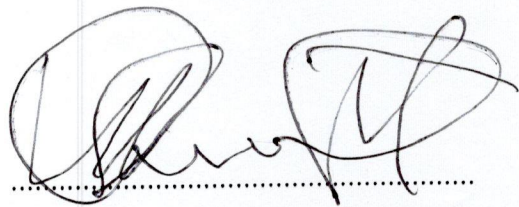
In light of the above, the Chairman fully supports the Members that Mr. Johnson's behaviour as a Senior Manager with 27 years of service in a position of influence in the Bank's training institute, was deceptive and dishonest and that his continued retention in the Bank could lead to a loss of confidence and trust in him as well as providing a poor example to fellow-workers in the Bank.

CONCLUSION:

Accordingly, the Chairman agrees with the dismissal of Mr. Johnson as being completely justified but does not agree to any financial award being made to him by way of compensation for what the Members describe as "procedural breaches" on the part of the Bank.

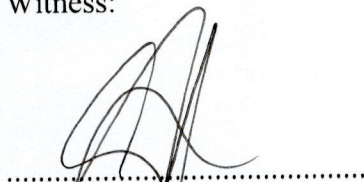
On the contrary Mr. Johnson should be required to pay to the Bank any sums outstanding, arising from his admitted use of the two (2) codes in question over a period of approximately three (3) years.

Dated this 30th day of September, 2015



Norman Wright, QC
Chairman

Witness:



Gary Lediard
Secretary to the Division

