

INDUSTRIAL DISPUTES TRIBUNAL
Dispute No.: IDT 46/2018

SETTLEMENT OF DISPUTE

BETWEEN

ALLIED PROTECTION LIMITED

AND

MR. KIRKLAND McKINTOSH

AND THE

AWARD

I.D.T. DIVISION

MR. CHARLES JONES, CD, JP	-	CHAIRMAN
MR. ERROL BECKFORD	-	MEMBER
MR. FREDRICK EVANS	-	MEMBER

MAY 28, 2020



IDT 46/2018

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

ALLIED PROTECTION LIMITED

(THE COMPANY)

AND

MR. KIRKLAND McKINTOSH

(THE AGGRIEVED)

REFERENCE:

By letter dated December 24, 2018, 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 Terms of Reference, the industrial dispute described therein.

The Terms of Reference were as follows:

"To determine and settle the dispute between Allied Protection Limited on the one hand, and Mr. Kirkland McKintosh on the other hand, over the termination of his employment."



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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. Charles Jones, CD, JP - Chairman
- Mr. Errol Beckford - Member, Section 8(2) (c) (ii)
- Mr. Fredrick Evans - Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF PARTIES:

The **Company** was represented by:

- Mr. Lemar Neale - Attorney-at Law

In attendance were:

- Mr. Everton Smith - Former Human Resources Manager
- Mr. Devon Brown - Human Resources Manager

The **Aggrieved** was represented by:

- Mr. Robert Harris - Industrial Relations Consultant
- Mr. John Levy - Industrial Relations Consultant

In attendance was:

- Mr. Kirkland McKintosh - Aggrieved Worker



SUBMISSIONS AND SITTINGS:

Briefs were submitted by the parties and oral submissions made during nine (9) sittings held between May 27, 2019 and February 12, 2020.

The original division of the Tribunal which was selected in accordance with Section 8(2) (c) of the Act to deal with the matter comprised:

- Mr. Charles Jones, CD, JP - Chairman
- Mr. Errol Beckford - Member, Section 8(2) (c) (ii)
- Mr. D Trevor McNish - Member, Section 8(2) (c) (iii)

However, after the second sitting of the Tribunal, Mr. McNish died and the parties agreed in writing to the appointment of Mr Fredrick Evans as a Member of the division to complete the hearing and determination of this matter. This was in keeping with the provisions of Section 8(4) of the Labour Relations and Industrial Disputes Act of 1975 which states as follows:

(4) Where three members of the Tribunal constitute a division thereof and any one of those members dies or is incapacitated or ceases to be a member thereof for any other reason after the division begins to deal with the industrial dispute in relation to which it was constituted but before it has made its award, another person shall be selected in accordance with the provisions of paragraph (c) of subsection (2) to fill the vacancy; thereafter the proceedings of the division shall be begun de novo unless all the parties to the dispute agree in writing that those proceedings may be continued as if they had not been interrupted by reason of such death or incapacity or cessation

BACKGROUND TO THE DISPUTE:

1. Allied Protection Limited (the Company) is a limited liability company incorporated under the Laws of Jamaica providing security services to clients throughout the island of Jamaica.
2. Mr. Kirkland McKintosh was employed to the Company as a Security Officer with effect from May 25, 2003. His services were terminated by letter dated January 31, 2018.
3. Mr. McKintosh engaged the services of Mr. Robert Harris, Industrial Relations Consultant, to accede on his behalf. Mr Harris then wrote to the Ministry of Labour and Social Security seeking its intervention into the matter. There was no resolution of the dispute and consequently, the Honourable Minister in accordance with Section 11 A (1) (a) (i) of the Labour Relations and Industrial Disputes Act of 1975 referred the matter to the Industrial Disputes Tribunal for determination and settlement.



THE COMPANY'S CASE:

4. Mr. Lemar Neale, Attorney-at-Law represented the Company, in his opening remarks stated:

“On November 14, 2017 Mr. McKintosh was scheduled to work at Berger Paints Limited situate at 256 Spanish Town Road in the parish of Saint Andrew. Mr. McKintosh arrived at work at 6:25 p.m. When he entered the guardhouse at the entrance of the compound he was wearing a tall shirt covering his uniform shirt. He was asked by the Supervisor [of the Company] to remove his shirt for inspection to ensure that he was properly attired for work. He informed the Supervisor that he was only at the guardhouse to sign the book.”

5. He cited the legal issues that would need to be determined as:
- i) Whether Mr. McKintosh had committed the infractions for which he was charged; namely, whether he refused to change for inspection before assuming his duty and leaving the location without permission after assuming duty.
 - ii) Whether Mr. McKintosh was given a fair hearing prior to his termination.
 - iii) Whether Mr. McKintosh's termination was justifiable in the circumstances.

6. The Company contended as follows:
- i) Mr. McKintosh had committed the infractions for which he was charged.
 - ii) Upon being charged for the said infractions, Mr. McKintosh was given a fair hearing.
 - iii) Mr. McKintosh's termination was justifiable in the circumstances.

7. Mr. Neale called three witnesses to testify on the Company's behalf.



8. The first witness called was Mr. Everton L. Smith, former Human Resource Manager. Mr. Smith testified that:

- Mr Kirkland McKintosh was employed with effect from May 25, 2003. He had interactions with him and the relationship was respectful.
- On November 14, 2017, he received information from Mr. Eunel Phillips, the Zone Manager, that Security Officer McKintosh reported for duty at Berger Paints and basically abandoned his job.
- On November 16, 2017, he received a Disciplinary Action Report form with charges that indicated that when Mr. McKintosh was spoken to by the Supervisor, Mrs. Arlene Notice Gibson, who had instructed Mr. McKintosh to be properly dressed for duty and report to her, he failed to do so and left the location where he was detailed for duty after having relieved a Security Officer.



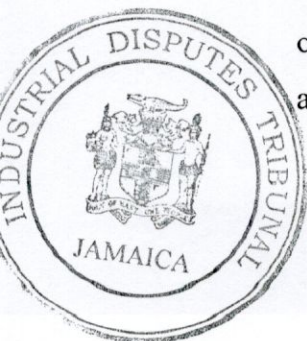
9. The Disciplinary Action Report was handed to Mr. McKintosh but had to be changed as Page 2 of the document did not have correct information as to representation. As a result, the hearing date, November 22, 2017, was cancelled.
10. The hearing was then set for January 15, 2018 but was postponed as Mr. McKintosh's representative was not available.
11. After the incident Mr. McKintosh was placed on administrative leave. The disciplinary hearing was then held on January 29, 2018. At that time Mr. McKintosh had no representative but agreed that the hearing should continue and that he would defend himself.
12. Mr. Smith further testified that he was the sole enquirer and that present at the hearing were Mr. McKintosh and Mrs. Notice Gibson, Supervisor who had laid the charges.
13. The charges were read to Mr. McKintosh and he pleaded not guilty. He (Mr. McKintosh) stated that he had reported for duty and had gone to the guard room. He stated that the Supervisor had an attitude towards him, and he did not like her approach. He said he was not told to dress and return to be inspected. He said that he was at his post when Security

Officer Wright was called and that he (Security Officer Wright) had stated that Mr. McKintosh had come to his post dressed for duty.

14. Mr. McKintosh was found guilty of the charges, the Directors of the Company were all advised, and a letter dated January 31, 2018, terminating his services was given to him and he did not appeal the decision.
15. During Cross Examination, Mr. Smith reaffirmed that he had called a disciplinary hearing for November 22, 2017 which was not held, as the charges were written on an out-dated form. The hearing was then held on January 29, 2018 and present were Mrs. Notice Gibson and Security Officer, Nelson Wright. He further stated that Mr. Eunel Phillips had conducted the investigation into the matter but was not at the hearing.
16. In answer to further questions during Cross Examination, Mr. Smith testified that following the incident on November 14, 2017, Mr. McKintosh was sent on administrative leave without pay, pending findings into the incident. At the end of the leave he was rostered for duty at the UDC Craft Market.
17. The second witness called was Mr. Eunel G. Phillips, Zone Manager, Kingston & St. Andrew.
18. Mr. Phillips testified that Mr. McKintosh was rostered to work at Berger Paints Limited on November 14, 2017, from 7:00 a.m. to 7:00 p.m. Mrs. Arlene Notice Gibson, Supervisor, was also rostered to work. He stated that at approximately 6:45 – 6:50 p.m., he received a phone call from Mrs. Notice Gibson advising that Mr. McKintosh had left the location.
19. He further testified that he had instructed Mrs. Notice Gibson to prepare disciplinary charges against Mr. McKintosh and to call the Operations Supervisor for a guard to replace Mr. McKintosh. He became aware that the disciplinary charges were written on the wrong form and he instructed Mrs. Notice Gibson to have them written on the correct form.



20. After November 14, 2017, he called Mr. McKintosh and invited him to come to his office. Mr. McKintosh did not come on the day he called. He stated that he had called Mr. McKintosh to hear his side of the story and at that time he had handed him the charge sheet instructing him to attend orderly room.
21. On the day of the orderly room, Mr. McKintosh advised that his representative was not available. Having heard Mr. McKintosh's side of the story, he called two security guards from the location including Mr. Nelson Wright and questioned them as to what had happened on November 14, 2017. He further stated that after he had completed his investigation, Mr. McKintosh returned to work. A disciplinary hearing was held but he (Mr. Phillips) was not present.
22. During Cross Examination, Mr. Phillips testified that he had the authority to decide whether the Company should proceed with disciplinary action against Security Officers.
23. He further testified that Mr. McKintosh had told him that he had left the premises. In addition, Security Officer, Nelson Wright had informed him that when Mr. McKintosh arrived at his designated location he was in uniform.
24. In response to the question as to the mode of communication used by the Company to instruct security officers if and when to report for duty, Mr. Phillips responded that this was done verbally. When asked further if the Company issued letters instructing guards when to report for duty, he replied in the negative.
25. The third witness called was Mrs. Arlene Notice Gibson, Security Supervisor.
26. Mrs. Notice Gibson testified that at about 6:25 p.m. on November 14, 2017, Mr. McKintosh came to the guard house wearing a long shirt which at the time she classified as an overall. She asked him to change, return for inspection and then sign the register. He told her that he had come to sign the register and that if he left the guard house before signing, he would not be returning. After further instructions to change before being allowed to sign he left the guard house. Not seeing him return she called to speak with the officer who Mr. McKintosh was rostered to relieve. Mr. McKintosh answered the phone and informed her that Mr. Wright had left. She reminded Mr. McKintosh of the



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instructions to change and his reply was that if he came back there he was going straight through the gate.

27. She further testified that she was then called by the Security Officer at the gate who informed her that Messrs McKintosh and Wright were in their cars and about to leave the premises. She then contacted Mr. Wright who stated that Mr. McKintosh was in his uniform and he thought that everything was in order. She then instructed Mr. Wright to return to the post. During this time, Mr. McKintosh departed the premises. She had not told Mr. McKintosh to leave but to change and return to sign the register.
28. During Cross Examination, Mrs. Notice Gibson testified as follows:
- She was aware of the disciplinary hearings but did not attend the first scheduled hearing.
 - She was present at the hearing of January 29, 2018 and was questioned by Mr. Smith, who was the sole enquirer. Mr. Nelson Wright was also present.
 - A Security Officer should be inspected by the Supervisor before the book is signed. On November 14, 2017, these steps were not followed, and she had not been advised by Security Officer Wright that the handing-over process had been completed.

CASE FOR THE AGGRIEVED:

29. Mr. Robert Harris, Industrial Relations Consultant who represented Mr. McKintosh in his opening statement, submitted that the matter involved what he considered the unjustifiable dismissal of an employee who had been employed since May 2003. He further submitted that it was Mr. McKintosh's practice to dress in his uniform from home but wore what he called a cover shirt over his uniform shirt. He then called Mr. McKintosh to testify on his own behalf.



30. Mr. McKintosh testified that on the evening of November 14, 2017, he arrived at Berger Paints Limited at about 6:25 p.m. He went to the guard house and saw Supervisor, Mrs. Notice Gibson, who asked him why he was wearing an overall although his uniform shirt could be seen underneath.
31. He further testified that he had not taken over duty from Security Officer Wright and that when the phone rang, he had answered it. At that time Mr. Wright was still at his post. He stated that Mr. Wright had not said that he was asked to hand over duties and he (Mr. McKintosh) had left the location at 6:40 p.m.
32. Mr. Phillips had called him on November 15, 2017 and had requested that he come to see him which he did on November 16, 2017.
33. On November 16, he was questioned by Messrs Phillips and Fletcher, following which he was sent home for two weeks. He was not sent back to Berger Paints but to the UDC Craft Market.
34. On January 25, 2018, he received a replacement Disciplinary Action Report and on January 29, he was called to the office and was told by Mr. Smith that the Company had wanted to put the matter to rest and had asked whether he was ready to proceed with the matter without any representation.
35. During Cross Examination, Mr. McKintosh testified that at the meeting with Messrs Phillips and Fletcher they had told him that he had done nothing wrong.

CLOSING ARGUMENTS:

36. Mr. Harris in his closing arguments submitted that Mr. Everton Smith had played “the role of judge, jury and executioner” and that Mr. McKintosh had not been afforded the right of representation in keeping with the provisions of the Labour Relations Code. He further submitted that Mr. McKintosh’s employment was terminated on charges that were previously heard by Messrs Eunel Phillips and Hartman Fletcher in November 2017, following which he was suspended for two weeks.



37. Mr. Harris also stated that the wording of the charges on the Disciplinary Action Report and in the letter of dismissal was at variance. In closing, Mr. Harris requested the Tribunal to reinstate Mr. McKintosh with effect from the date of his dismissal.
38. Mr. Neale in his closing submitted that Mr. McKintosh had displayed no regard for persons in authority. He requested the Tribunal to consider:
1. whether Mr. McKintosh committed the infractions for which he was charged.
 2. whether he was given a fair hearing and;
 3. whether his termination was justifiable.
39. He also stated that should the Tribunal not find favour with the Company's decision, the Tribunal's award should be for compensation.

TRIBUNAL'S DELIBERATIONS/FINDINGS:

40. The Tribunal, in its deliberations, gave careful consideration to the evidence and submissions made by the parties to the dispute.
42. The Tribunal noted the events that led to the termination of Mr. McKintosh's employment.
- Mr. McKintosh on arriving at work at Berger Paints Limited on November 14, 2017, was requested by the Supervisor to present himself properly dressed for work. He however left the compound
 - Mr. McKintosh was issued with a Disciplinary Action Report Form dated November 14, 2017, outlining the following charge –

“Refused to change for inspection before taking up duty, then leaving the location after it was handed over to him by Security Officer Nelson Wright”



- On November 16, 2017, Mr. McKintosh was questioned by Messrs Eunel Phillips and Hartman Fletcher, two (2) Senior Managers, following which he was sent on leave without pay. He was advised that at the expiration of the leave, he was to have reported to the UDC Craft Market.
- The charge was written on an out-dated disciplinary report form and this resulted in the cancellation of the disciplinary hearing set for November 22, 2017.
- A disciplinary hearing was then set for January 15, 2018 but was postponed due to the unavailability of Mr. McKintosh's representative.
- On January 25, 2018, Mr. McKintosh received a second disciplinary report form. The wording of the charge on this form varied from the first and read –

“Refuse[d] to change for inspection before taking up duty, then leaving the location after taking-up duty without permission from Security Officer Nelson Wright”

- A disciplinary hearing chaired by Mr. Everton Smith, former Human Resource Manager, was held on January 29, 2018. The evidence provided by Mr. Smith was that Mr. McKintosh had no representative at the hearing but had agreed that the hearing could continue and that he would defend himself.
- He was found guilty of the charge and by letter dated January 31, 2018, his service was terminated with effect from January 29, 2018, which was the date of the hearing, on the following ground:

“Refusing to change for inspection before taking up duty and leaving the location without authorization”



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43. The Tribunal noted that Mr. McKintosh who had been employed to the Company for over fourteen (14) years had five previous breaches of the Company's disciplinary code and that his action on November 14, 2017, prompted the Company's decision to take steps to terminate his service.
45. The Tribunal acknowledged that while the Company had engaged in certain aspects of Due Process as enunciated in the Labour Relations Code, there were weaknesses identified in the process:
- 1) Mr. McKintosh who had met with Messrs Phillips and Fletcher on November 16, 2017, had been instructed to proceed on leave without pay and to report to the UDC Craft Market on resumption. The Tribunal deduced that this action taken by the Company signified that the matter had been resolved.
 - 2) A disciplinary hearing held on January 29, 2018 was chaired by Mr. Smith - the same person who subsequently signed the letter dismissing Mr. McKintosh, which was not in keeping with the principles of natural justice.
 - 3) The wording in the letter of termination varied from the wording of the charge proffered
46. It is for the reasons stated above that the Tribunal finds that the disciplinary process engaged in by Allied Protection Limited against Mr. Kirkland McKintosh was flawed, thereby rendering his termination unjustifiable.



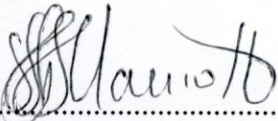
AWARD:

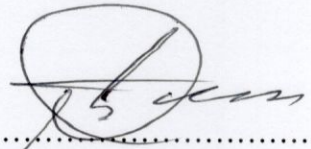
47. The Tribunal's award is that Mr. Kirkland McKintosh be paid Twenty-Four (24) weeks' salary as compensation for his dismissal.


DATED THIS 28th DAY OF MAY 2020

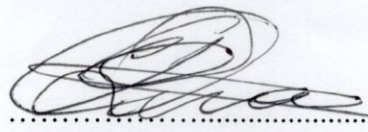


Witness:


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Mrs. Nicola Smith Marriott
Secretary to the Division


.....
Mr. Charles Jones, CD, JP
Chairman


.....
Mr. Errol Beckford
Member


.....
Mr. Fredrick Evans
Member