

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 16/2022

SETTLEMENT OF DISPUTE

BETWEEN

DESNOES & GEDDES LIMITED (TRADING AS RED STRIPE)

AND

MS. TANNISHA MIRANDA

AWARD

I.D.T. DIVISION

MR. DONALD ROBERTS, CD., JP.	-	CHAIRMAN
MRS. JACQUELINE IRONS, J.P.	-	MEMBER
DR. DENESE MORRISON, JP.	-	MEMBER

SEPTEMBER 17, 2024

INDUSTRIAL DISPUTES TRIBUNAL
AWARD
IN RESPECT OF
AN INDUSTRIAL DISPUTE
BETWEEN
DESNOES & GEDDES LIMITED (TRADING AS RED STRIPE)
(THE COMPANY)
AND
MS. TANNISHA MIRANDA
(AGGRIEVED WORKER)

REFERENCE

By letter dated March 16, 2022, the Hon. Minister of Labour and Social Security, pursuant to Section 11(1) of the Labour Relations and Industrial Disputes Act, 1975 ("the Act") referred to the Industrial Disputes Tribunal ("the Tribunal") for settlement, the dispute between **Red Stripe (Part of the Heineken Company)** and **Ms. Tannisha Miranda** with the following Terms of Reference: -

"To determine and settle the dispute between Red Stripe (Part of the Heineken Company) on the one hand, and Ms. Tannisha Miranda on the other hand, over the termination of her employment".

DIVISION

The division of the Tribunal selected in accordance with Section 8(2)(c) of the Act to deal with the industrial dispute comprised:

Mr. Donald Roberts, CD, JP	-	Chairman
Mrs. Jacqueline Irons, JP	-	Member, Section 8(2)(c)(ii)
Dr. Denese Morrison, JP	-	Member, Section 8(2)(c)(iii)



REPRESENTATIVES OF THE PARTIES

The **Company** was represented by:

Mr. Gavin Goffe	-	Attorney-at-law
Ms. Nicole Taylor	-	Attorney-at law

The **Aggrieved** was represented by:

Mr. John Junor, CD, JP	-	Attorney-at-law
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In attendance:

Ms. Tannisha Miranda	-	Aggrieved Worker
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SUBMISSIONS AND SITTINGS

The parties submitted briefs to the Tribunal and made oral presentations over twenty (20) sittings covering the period November 30, 2022 through to July 18, 2024. Over the course of the sittings, the Tribunal examined sixty-four (64) exhibits along with testimonies by way of oral evidence.

At the start of the proceedings, Mr. Goffe indicated that the terms of reference were incorrect as Red Stripe was not the registered name of the Company. He emphasised that the correct reference should be 'Desnoes & Geddes Limited trading as Red Stripe'. He further pointed out that both parties had agreed to the referral and therefore the appropriate section of the Act to be cited would be 11(1).

By way of a letter dated April 27, 2023, the Tribunal, and subsequently the parties were advised of the amended terms of reference as set out below:

"To determine and settle the dispute between Desnoes & Geddes Limited (trading as Red Stripe) on the one hand and Ms. Tannisha Miranda on the other hand, over the termination of her employment ".



BACKGROUND TO THE DISPUTE

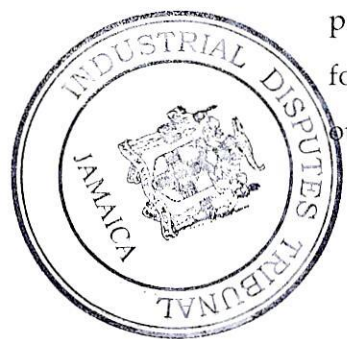
1. Desnoes & Geddes Limited, herein referred to as the Company, was founded as a Jamaican company specialising in the beverage industry spanning over several decades. In 2015 the Heineken Company acquired the majority shares and continued to trade under the brand name "Red Stripe".
2. Ms. Tannisha Miranda was employed to Red Stripe in 2007 as an Events Marketing Executive. She enjoyed accelerated promotions over the years and as of April 2017 held the position of National Key Accounts Manager up to the time of her dismissal.
3. Ms. Miranda proceeded on maternity leave in December 2018 and returned to her position in April, 2019. A series of discussions between Ms. Miranda and her line Manager, Ms. Jean Look Tong followed, as Ms. Miranda had indicated her intention to leave Red Stripe and would wish to benefit from an 'exit package/redundancy package' which was previously paid to employees wishing to leave the company. Her Line Manager persuaded her to stay with the Company until at least December 2019.
4. Ms. Miranda was selected to participate in the Company's "accelerate" programme, which was a core leadership programme designed to enhance talents, but it became clear in the ensuing months that Ms. Miranda was displeased with what she perceived to be a *"lack of career opportunity"*, and her *"lack of confidence in the leadership and culture of the company"*, among other grievances she filed. She subsequently declined to participate in the 'accelerate' programme.
5. Issues regarding Ms. Miranda's performance surfaced and she was placed on a Performance Improvement Plan (PIP) in September 2019. She had, prior to that, lodged a grievance claim with the Company through its "Speak Up" forum. During the period of the PIP her performance did not improve and the Company, in June 2020, initiated a disciplinary hearing using an external Hearing Manager.



6. The recommendation from the disciplinary hearing was for the termination of the services of Ms. Miranda. She was subsequently dismissed and appealed the dismissal, but this was upheld. The matter was thereafter referred to the Ministry of Labour; however, the conciliation process failed to arrive at a settlement, and as a consequence, the dispute was sent to the Tribunal.

THE COMPANY'S CASE

7. Mr. Goffe in his opening submission said that the two briefs have a lot in common in so far as they address the central issues surrounding the dispute. In outlining the Company's case he said that at the root of the Aggrieved Worker's claim is her belief that she was entitled to be dismissed by reason of redundancy by 'Red Stripe' on the grounds of her perceived 'lack of opportunity' for career advancement at the Company. Counsel asserted that Ms. Miranda was seen by the Company as "*a good and talented employee*" who had been tapped for advancement in the organisation as part of their leadership development programme.
8. The Company's only witness was Mr. Damion Newell, the Human Resources Business Partner. He said when he joined the Company in July 2019 the matter of Ms. Miranda's "*disruptive*" behaviour was brought to his attention and he was tasked with finding a solution to the *impasse* between her and her Line Manager, Ms. Jean Look Tong.
9. Mr. Newell said Ms. Miranda "*performed consistently well*" as an employee and there is no record of any "*disruptive behaviour*" prior to the period leading up to her maternity leave. He said her performance, like all other employees, would have been rated through a calibrated system for the twelve-month period January to December of each year. In Ms. Miranda's case, for the January to December 2018 period her Line Manager, Ms. Jean Look Tong, would have done a presentation before the Calibration Committee and recommended a rating score for the Committee's approval. The rating is on a five-point scale, that is, outstanding; exceed expectations; fully meet; partially meet; and unsatisfactory.



10. Mr. Newell testified that prior to going off on maternity leave in December 2018 Ms. Miranda's rating was 'fully met' with "*promotable potential*," and that - as set out in the performance policy - this could take place in a period of one to three years. He however noted that there is no guarantee that this would happen in the period prescribed as the policy was merely permissive.
11. He asserted that an employee who is rated "*partially meet*" or "*unsatisfactory*" would be put on a Performance Improvement Plan (PIP). As there is also a mid-year review before the final review, Mr. Newell said that where the employee's performance "*falls significantly*" at any time during the twelve-month assessment period, the performance management process would dictate that the person also be placed on the PIP.
12. Mr. Newell stated that Ms. Miranda was confirmed in her new position in April 2017 and would have been in that post for one and a half years before proceeding on maternity leave in December 2018. He contended that it was "*not unusual*" for an employee with "*promotable potential*" to remain in the same position for over one and a half year.
13. Mr. Newell said when he was asked to settle the disagreements between Ms. Miranda and her Line Manager, Ms. Jean Look Tong, he met with them both. He noted the issues Ms. Look Tong had with Ms. Miranda, *viz*: the change in her attitude and behaviour since returning from maternity leave, and this was reflected in her failure to attend meetings, and when attended would be late; and her 'bad mouthing' the Company, and making untrue statements about the Managing Director. On Ms. Miranda's part, Mr. Newell alleged that she believed she was being blocked from advancing her career, and was displeased with the Company's unwillingness to provide her with an exit package as other employees in the past were recipients of this offer.
14. Further in his testimony, Mr. Newell asserted that Ms. Look Tong had requested of Mr. Jesus Martinez, the Human Resource Director, "*a gratuity payment*" for Ms. Miranda and had made it clear that this was not a redundancy package. He



said Mr. Martinez's response was that he would not be paying an exit package to such talent, and indicated that she had the option to resign.

15. Mr. Newell noted that Ms. Miranda was identified as a successor to Ms. Look Tong as Sales Director, a post classified as "a job grade 30" (as against her existing job grade 25). He said Ms. Miranda had expressed an interest in the position of Business Development & Marketing Operations Manager, but that this would only represent a lateral transfer.
16. He said based on his own assessment he thought the best solution would be to introduce a Performance Improvement Plan for Ms. Miranda, which was accepted by the Human Resources Management team.
17. Mr. Newell informed the Tribunal that Ms. Miranda declined to participate in the 'accelerate' programme citing the *impasse* over the exit package. He said the 'accelerate' programme selects a few outstanding persons to participate in a programme which strengthens their leadership and strategic thinking. Persons are recommended by their Line Managers and supported by HR after which it is endorsed by the senior management team. The HR Director has the ultimate say, with a review from the Managing Director.
18. Mr. Newell expressed the view that he did not find that the Company refused to provide opportunities for Ms. Miranda's advancement, or that the Company did anything to try and harm Ms. Miranda's prospects.
19. He added that Heineken's Code of Business Conduct contains a 'Speak Up Policy' which allows employees to raise concerns about suspected misconduct in confidence and without fear of retaliation, "*and to raise any grievances they might have.*" He said the concerns can be raised locally or through the international channel. Ms. Miranda had raised her grievance with Heineken's Global Social Affairs without the knowledge of Red Stripe's management.



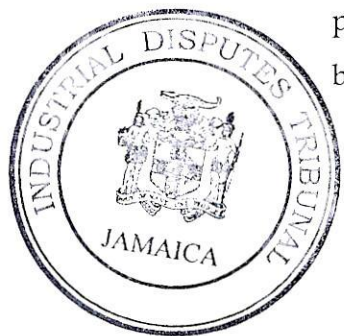
20. According to Mr. Newell, Ms. Miranda declined an invitation to attend the standard meeting of her mid-year review, which was mandatory, prompting Ms. Look Tong to write to her on August 23, 2019 [see exhibit 5]. She also refused to attend a subsequent meeting scheduled by Ms. Look Tong.
21. Mr. Newell testified that the PIP was introduced in September 2019 and a meeting was set for September 25 to discuss the expectations under the PIP. Although Ms. Miranda attended the meeting Mr. Newell noted that she did not sign off on the PIP document before leaving the meeting. Ms. Miranda did not complete her self-assessment, he said, as part of a review of her performance under the PIP. The PIP was for a period of six (6) months, and the last three months of her assessment was done by Mr. Luis Prata, the new Managing Director. Mr. Newell affirmed that Ms. Miranda failed the PIP and as a consequence her performance for 2019 was deemed "unsatisfactory".
22. Mr. Newell said the Company initiated disciplinary proceedings and used an external Hearing Manager to conduct the hearing. The charges laid out were: (i) failure to pass PIP; (ii) breach of section 22 of the Company's Disciplinary Policy; and (iii) failure to follow instructions. The Hearing Manager recommended the termination of her services which was accepted by the Company. Ms. Miranda appealed the decision and an appeal panel chaired by Ms. Adella Rose upheld the dismissal.
23. Under cross examination Mr. Newell admitted that instructions were given for a file to be created for Ms. Miranda but could not say whether it was with a view for her dismissal. He held that the Company has a standard letter of warning, but could not speak for Ms. Look Tong in relation to her letter of August 23, 2019, constituting a warning.
24. Mr. Newell took responsibility for the decision to place Ms. Miranda on the PIP after consultation with his boss, and informed the Tribunal that Ms. Look Tong took no part in that decision. During his investigation he became aware that Ms. Miranda had made a presentation regarding the diminishing of her role; and that



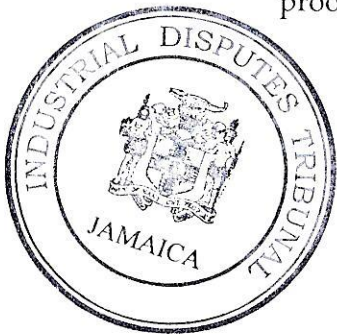
former employees were given exit packages, but Mr. Martinez said this would not continue.

THE AGGRIEVED WORKER'S CASE

25. Mr. Junor spoke of the "*enviable record of performance*" of Ms. Miranda to which he said both parties agreed. He stated that as far back as 2015, there were commitments made to Ms. Miranda regarding "job opportunities", but up to July 2019 these were not honoured. Ms. Miranda, he asserted, "*sought to negotiate a redundancy payment*" which would have been offered to other employees in the past, but this was denied, following which there were attempts to frustrate her and the PIP was designed to ensure her failure.
26. Ms. Miranda was called to testify on her own behalf. She said that during her years at Red Stripe she transitioned through accelerated promotions from performing local functions to undertaking regional responsibilities resulting from changes in the ownership structure over the years.
27. She said that prior to going off on maternity leave she had discussions about the partnership with Red Stripe, Pepsi and Celebration Brands Limited (CBL). CBL is a joint venture between Red Stripe and Pepsi, responsible for sales and distribution. She stated that she had presented an update on Red Stripe Key Accounts which showed "*that 70 percent of the scope assigned to Red Stripe shifted to CBL.*"
28. Ms. Miranda stated that upon her return from maternity leave she enquired if her post would be made redundant as she believed there was a reduction in her job functions. She also expressed an interest in a position for Business Development Manager, which she became aware of, but was told that such a position did not exist. She declared that it was her intention to leave the Company but was persuaded by her Line Manager to remain until December 2019 when she would be given an exit package.



29. Ms. Miranda testified that sometime in June 2019 she was told by Ms. Look Tong that the exit package was not approved and confirmed her earlier statement that no post existed for a Business Development Manager. However, in a meeting with the Managing Director, she asserted that she was told that a vacant position did exist.
30. It was Ms. Miranda's evidence that she believed she was being misled, that the Company had no intention of giving her the job since it was not advertised internally first, but was only done externally, and that this *"betrayed a sense of mistrust"* and *"tarnished her reputation."*
31. She indicated that she was encouraged by the Managing Director, HR Director and her Line Manager to use the 'Speak Up' platform to air her grievance, and did so. Subsequent to that, she said she was invited to a meeting on August 29 for the mid-year review, but indicated that she did not believe the process would be fair as her Line Manager was upset about her reporting the grievance.
32. Ms. Miranda said she received an email response to her grievance sometime after to say that the case was closed. She said she continued to voice her concerns and took the liberty of putting it in the form of a letter to the organization.
33. Ms. Miranda stated that she was called to a meeting on September 27, 2019, with her Line Manager and was told that since the matter of the 'Speak Up' was now closed she would be placed on a PIP beginning October 1, 2019.
34. Under cross examination, Ms. Miranda admitted that the 'accelerate' programme would be beneficial to her as she was promised a promotion in 2018. She added that if the promise was not fulfilled she would no longer have an interest in participating in the 'accelerate' program. She referenced her 2018 Performance and Development Form and pointed to the comments of her Line Manager as proof of the promise [See exhibit 26].



35. She admitted that she advised Ms. Lacey that she would not be completing the self-assessment, and believed she had a right to redundancy payment.

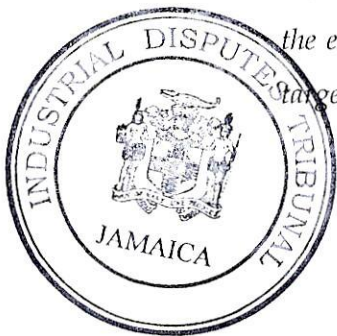
ISSUES

36. There are several issues emanating from this case compelling us to step back and identify the salient points which would fall squarely within our jurisdiction, and to which we are obliged to give due consideration. We enumerate those below:
- (a) What ought to be the remit of the Tribunal having regard to the separate and distinct approaches by the parties to the dispute
 - (b) Whether the Company had probable cause to initiate capability and/or disciplinary proceedings against Ms. Miranda
 - (c) Whether the process leading to Ms. Miranda's termination would meet the threshold of fairness in light of (a) the HR Regional President's instruction to prepare a '*file for her dismissal*', and (b) the provisions of the Labour Relations Code (the Code) and the principles of natural justice.

ANALYSIS

A. What ought to be the remit of the Tribunal having regard to the separate and distinct approaches adopted by the parties to the dispute

37. Ms. Miranda has been dismissed because the Company terminated her contract without notice in circumstances where they believed they were entitled to do so by reason of Ms. Miranda's conduct. They submitted that her "*conduct during the performance of the Performance Improvement Plan*", was "*unsatisfactory*," leading to a process resulting in her dismissal. [exhibit 10]
38. Counsel for the Aggrieved Worker has, however, pleaded the case that Ms. Miranda's dismissal was "*contrived and executed by the company, who sought the advice of their lawyer in how to achieve this end*". His argument rests on the notion that the Company's poor industrial relations practice "*resulted in the frustration of the employee's attempts to obtain justice, even while she maintained all her production targets, a factor that had characterized her entire fifteen (15) years of working with the*



company and even during the period of her return from maternity leave and up to her termination.”

39. Counsel also raised the argument “about the reduction in the scope” of Ms. Miranda’s job functions, which would give rise, as Ms. Miranda herself testified, to her entitlement to receive redundancy payment.
40. The terms ‘exit package’ and ‘redundancy payment’ seemed to have been conflated. At best, it appears that Ms. Miranda was requesting, immediately upon her return from maternity leave, an ‘exit package’, since she intended to leave the Company. This we understand to be equivalent to an ‘ex gratia payment’ which usually is a discretionary payment made by the employer to employees without any legal obligation. It undoubtedly has been the practice of the Company to offer an ‘exit package’ to employees leaving up to that time.
41. The Company’s decision not to pay an ‘exit package’ seems to have morphed into ‘an entitlement for redundancy payment’ based on Ms. Miranda’s claim that “her charge” was doing the same work that she was doing even upon her return from maternity leave, resulting in a diminishing of her role.
42. Where the law recognizes redundancy as one reason for dismissal, the Tribunal’s terms of reference would, in those circumstances, specify that the dismissal was ‘by reason of redundancy’, and as such it would be “clothed with the requisite jurisdiction to hear the issue...”¹. Since the terms of reference in this case did not include ‘redundancy’ as the reason for dismissal it obviates the possibility of any such consideration by the Tribunal.
43. The matter of an ‘exit package’ is not an obligation under law, and would unquestionably remove any notion of a ‘right’; redundancy payments, on the other hand, are legal entitlements as set out in Section 5(2) of the Employment (Termination and Redundancy Payments) Act (ETRPA). The ETRPA states that –



See Spectrum Insurance Brokers and Industrial Disputes Tribunal, [2024] JMSC Civ 85, page 19.

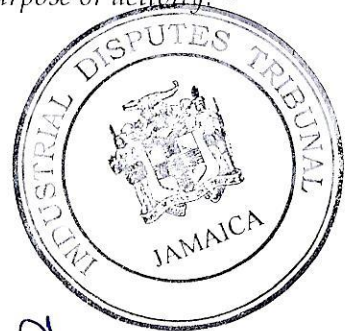
"For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to

- (a) the fact that his employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed by him or has ceased, or intend to cease to carry on that business in the place where the employee was so employed; or*
- (b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or*
- (c) -----"*

44. Outside of dismissal by reason of 'redundancy', two other sections of the ETRPA address the issue of dismissal by reason of 'conduct'. Section 3(5) of the Act gives either party the right *"to treat the contract as terminable without notice by reason of such conduct by the other party..."*, provided that the employer *"...terminate the contract of employment without notice during the first four weeks after he becomes aware of the conduct by the employee by reason of which the employer has a right to terminate the contract without notice..."*. And for completeness, Section 6(2) states that *"an employee shall not be entitled to a redundancy payment by reason of dismissal where his employer, being entitled to terminate his contract of employment without notice by reason of the employee's conduct, so terminates it."*

45. There is another 'gateway' for dismissal which is perhaps inferred from Section 3(4) of the LRIDA regarding termination, but limited to new employees during their probationary period, and that is dismissal for lack of 'capability'. Even where employees have satisfied the probationary period and have been confirmed, the common law recognizes 'capability' as one of the more substantial reasons for fair dismissal. 'Capability', in the ordinary dictionary meaning of the term is *"having the ability, power or fitness for some specified purpose or activity."*²

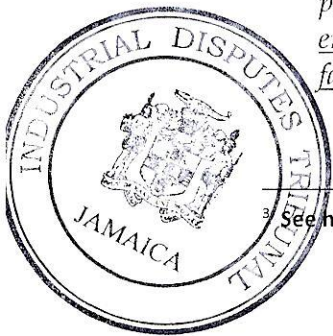
² The New Shorter Oxford Dictionary, Oxford University Press, 1993.



46. There is an emerging body of literature and scholarly articles on dismissals by reason of 'conduct' versus 'capability'. The distinction between the two may not always be straightforward, and while some cases may be clear, others will be more complicated and could involve elements of both conduct and capability.³
47. What can be derived as a common theme from a review across the body of literature is the distinction between 'poor performance' arising from a lack of capability, that is, the employee's willingness, but inability to perform at the required standard, and 'poor performance' because of the employee's unwillingness to perform despite his/her proven ability. The former relies on 'capability procedures', while the latter relies on the 'disciplinary procedure'.
48. In the case at bar, the crucial question before this Tribunal is to determine whether the dismissal of Ms. Miranda was fair based on the procedures adopted by the Company having regard to our understanding as to the reason for her termination.
49. It is settled law in cases of unfair dismissal that the onus of proving the dismissal was fair rest squarely with the employer, who must show a legitimate reason for the decision to dismiss, and then to convince a tribunal that the process adopted in the dismissal was fair. And the question as to what constitutes 'fairness' has had some amount of judicial scrutiny in the Jamaican jurisdiction. In that regard we rely on guidance from the dicta of Sykes, J (as he then was) in the **National Commercial Bank Jamaica Limited and Industrial Disputes Tribunal and Peter Jennings** [2015 JMSC Civ. 105, where he enunciated the following –

"...It {Tribunal} must look and is duty bound to examine at all the relevant circumstances, find facts, interpret them, draw conclusions and apply the statute. Once it makes its findings of fact then it goes on to answer the ultimate question of whether the dismissal was unjustifiable. This process is not a strict black letter law process. It takes into account notions of fairness, justice and equity. The IDT is entitled to ask whether, in their view, what happened accords with notions of justice, fairness and equity. These are abstract concepts not capable of exact and precise

³ See <https://www.btoemploymentlaw.co.uk/when-is-it-fair-to-dismiss-an-employee-conduct-vs-capability/>



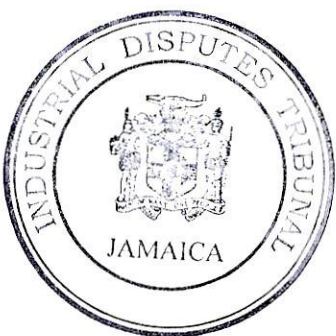
definition. It is their view, not the court's view that matters." [Tribunal's emphasis]

50. Even if Ms. Miranda's scope of work was diminished (and we accept that it may have been), there is, however, nothing consequential about the right to redundancy payment unless the employer dismisses the employee as a result of the reduced or diminished work. This was not the case, and so neither the claim asserted by counsel nor relief requested could be entertained. The reason for Ms. Miranda's dismissal had nothing to do with the reduction in her scope of work, and Ms. Miranda can make no legitimate claim to redundancy payment in circumstances where she has not been so dismissed. The lines between the issue of the redundancy payment and the settling of a dispute arising from conduct must remain pellucid.

B. Whether the company had probable cause to initiate capability and/or disciplinary proceedings against Ms. Miranda

51. The Tribunal, having examined the necessary and sufficient evidence, concludes that the matter of redundancy payment is beyond our remit and, as such, we are compelled to act within the confines given to us under the Statute and the Code. In that regard, the issues to be explored by the Tribunal in relation to the reason(s) for Ms. Miranda's dismissal and the proceeding leading thereto, fall well within the proper bounds as set out in the Terms of Reference.
52. In dismissal cases, Halsbury's Laws of England, Fourth Edition, Volume 16, states the following –

"...the burden lies upon the employer to show that the dismissal was fair. He must show what was the reason (or, if there is more than one, the principal reason) for the dismissal; and he must also show that it was a reason which the law regards as acceptable; and that in the circumstances, having regard to equity and the substantial merits of the case, he acted reasonably in treating it as a sufficient reason for dismissing the employee."



53. A clear framework for further evaluating the fairness of dismissals is what has become known in employment law as 'the Burchell test'. Once again, under the tutelage of Justice Sykes, we assert our right to apply the test to this case, moreso, because of its complexity. Desnoes & Geddes, the employer, must, therefore, provide reasonable answers to the following questions:

- a. Whether they actually believed that Ms. Miranda was guilty of misconduct
- b. Whether they had reasonable grounds on which to base that belief
- c. Whether the management had carried out as much investigation as was reasonable in the circumstances of the particular case.

54. Ms. Miranda was dismissed after a disciplinary hearing found that her *"conduct during the Performance Improvement Plan was considered unsatisfactory..."* However, before we get into the reason(s) for her dismissal it is important to note what were the offences she allegedly committed.

55. In a June 9, 2020 letter to Ms. Miranda, Mr. Damion Newell, Human Resource Business Partner – Commercial & Support Functions wrote to her setting out what may be considered the reasons for a disciplinary hearing. The letter stated in parts:

"As you know, your supervisor determined that you failed your Performance Improvement Plan. This prompted an investigation by the Human Resource Department, which has prepared a report and initiated the disciplinary process. The report was shared with you on April 29, 2020 and you were invited to provide a written response by May 4, 2020. We did not receive that written response.

In keeping with the Company's Disciplinary Policy, we are required to refer the matter to a hearing. Failure to show any or sufficient improvement in your performance after being placed on a Performance Improvement Plan is grounds for termination of your employment.

Additionally, it is alleged that you breached Section XXII of the Disciplinary Policy – "Covert electronic, audio or video recording, by any device, of meetings or discussions in the workplace or whilst on Company business without express authorization" when you recorded the conversation between you and me on April 30, 2020 without my knowledge or consent.

You are also charged with breaching Section IV of the Disciplinary Policy – "Failure to follow either operating instructions/procedures or reasonable



instructions" in that you have refused repeated requests from the company, communicated through our respective attorneys, for you to submit transcript of the recording of our telephone conversation on April 30, 2020...

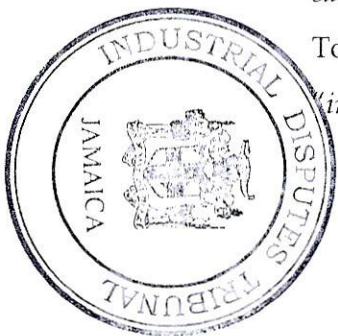
...Employee Representative: Please note that an attorney-at-law, work colleague or companion of your own choice may represent you at the hearing if you so desire, but that person cannot answer questions on your behalf..."

56. The Company identified three breaches allegedly committed by Ms. Miranda, namely:

- a. Failure to show any or sufficient improvement in her performance
- b. Breach of Section XXII of the Company's Disciplinary Policy regarding the recording of meetings or discussions without the knowledge or consent of the other party or parties
- c. Breach of Section IV of the Disciplinary Policy regarding failure to follow reasonable instructions or procedures.

57. It is clear on the evidence that the relationship between Ms. Miranda and particularly her Line Manager, Ms. Jean Look Tong, became strained sometime after her return from maternity leave. In a July 23, 2019 email to Ms. Look Tong and Patricia Lacey, this became evident when Ms. Miranda declined participation in the 'Accelerate' programme, having come to the position that from discussions earlier in April there was a *"lack of career opportunity"* for her and that *"the exit conversations in April and those of July in particular"* has led her to have lost 'confidence' and 'trust' in the Company.

58. Ms. Look Tong responded to her email on July 24, 2019 reiterating that *"the company is absolutely not in an exit negotiation"*, that she is seen as *"a talent to the organization"* and they are prepared to continue investing in her personal leadership and development as long as she is prepared to remain and grow with the Company. She stated further - in relation to Ms. Miranda's request for a redundancy package - that *"there will be no restructure of the Modern trade area within sales; which means that none of the Modern trade sales roles are redundant."* Ms. Look Tong noted her reference to a *"lack of confidence and trust"* and suggested that she *"initiate the grievance process."*

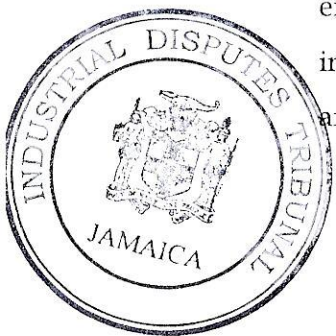


59. On August 7, 2019 Ms. Miranda again raised the issue of the 'Exit Negotiation & Accelerate Program'. She highlighted in her email to Ms. Look Tong and copied to Ricardo Nuncio-Arratia, Managing Director; Jesus Martinez Ramirez, Human Resources Director; and Patricia Lacey, the following issues arising from the exit negotiation discussions:

- a. Lack of career opportunity
- b. Precedent and equity with approving exit packages for other employees
- c. Lack of confidence in the leadership and culture of the Company
- d. Accelerate
- e. Defamation of character

60. The content and tone of the email clearly demonstrate an employee totally dissatisfied and frustrated with the manner in which she perceived the Company to have treated her. Part of the rub, it would seem, is her own expectations. Based on her testimony, she believed a promise was made for a promotion upon her return from maternity leave and she expected to have gotten it; she felt entitled to receive an 'exit package' based on precedent; she believed she had a right to redundancy payment because she saw a reduction in her role; she argued that the Company was attempting "*to tarnish her reputation*" although no evidence was provided in support of that claim; and sense that there is something "*disingenuous*" about the leadership environment in not promoting her.

61. Ms. Miranda felt sufficiently strong about these issues to raise a grievance not only against her supervisor, but the entire leadership team at 'Red Stripe', which is quite an unusual step. Both the tone and tenor of her email, as well as her own testimony, betrayed her 'displeasure, disenchantment and distress' which apparently affected her state of mind and eventually her attitude to work. The evidence bears out a decline in her performance; levels of co-operation and enthusiasm (in an otherwise highly competent top performer as she was) which instigated the several emails and letters exchanges regarding her performance and conduct.

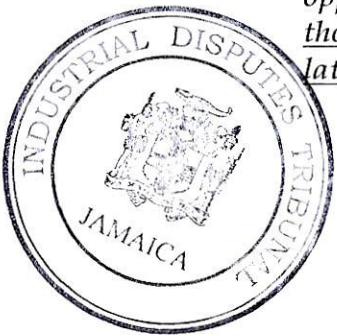


62. There is sufficient evidence to show that the process set out in the PIP Review and the required investigation were carried out. Much effort seemed to have been made to accommodate the concerns raised by Ms. Miranda regarding the fear that her supervisor may not conduct her assessment fairly in light of her (Ms. Miranda's) criticisms. The use of a 'trusted representative' in Mr. Chester Grant was offered to obviate that concern. The appropriate steps taken in following the process for the PIP appeared to have been observed.
63. Ms. Miranda had achieved accelerated promotion over the years, her last been in 2017, less than two years before proceeding on maternity leave. Her 2018 Performance and Development Report, disclosed that she 'fully met' her performance expectations and showed "*promotable potential*." The comments from her Line Manager noted that she "... has the opportunity to grow within Heineken.", but must "*be open to developing the leadership and functional capabilities required for her next role.*"
64. In the 2019 Performance and Development Report, her manager made the following comments –

"...Tannisha has good learning agility and can grow functionally into broader roles if she is willing to be open to her opportunity areas, and support from myself and the business to grow her. However, her leadership behaviors as per HEINEKEN standards particularly Role Model and Connect are unsatisfactory... Her behaviour has demonstrated a lack of emotional intelligence specifically as it relates to self-management, self-awareness communicating with flexibility, disagreeing constructively and non-verbal communication skills... I continue to be willing to support her development, as long as she is open. However, once Tannisha remains in the role she must demonstrate the behaviors required of a senior leader." [our emphasis]

65. Ms. Miranda's (employee's) comments are summarised below:

"...Upon my return from maternity leave, I enquired about my next job opportunity and was told that there was no further job opportunity, even though the company was conducting an external recruitment for a local lateral role that I was not considered for..." [our emphasis].



66. She went on to mention the joint venture with CBL in 2016 and its impact on both the work flow and the 'reduced scope' in her own responsibilities. She further noted that *"these changes over a 3-year period created a feeling of reduced scope; therefore the communication on no further job opportunity immediately resulted in frustration to leave."*
67. The fact is within the 3-year period Ms. Miranda mentioned, her post was upgraded as of July 2017, resulting in her receiving an increase in salary. She was a part of the 'accelerate' programme, and benefitted from a number of training offers for upward mobility. She was slated to succeed Ms. Look Tong as Head of Sales which would have resulted in her being promoted within the 1 to 3 years period as set out in the Performance Policy; but her focussed seemed to have been on the Business Development post which amounted to a 'lateral transfer.'
68. The weight of evidence strongly suggest that the Company had high expectations for Ms. Miranda and was taking steps to develop her leadership potential. Therefore, any claim that the Company refused to provide an opportunity for her career advancement, is spurious at best, and whatever loss of trust and confidence she may have entertained about the leadership of 'Red Stripe' is not founded on a compelling argument rooted in rationality and reasonableness.
69. The evidence adduced, has led the Tribunal to form the view that Ms. Miranda's failure to cooperate in her mid-year performance review; her refusal to complete the self-assessment as required; her unwillingness to fully participate in the periodic assessment under the PIP, even with her 'trusted representative', Mr. Chester Grant; and what appears to be her churlish behaviour at meetings, cannot be condoned, and, in fact, is totally unacceptable under any circumstances, even moreso for a person in a managerial position.
70. The Performance Improvement Plan Process Overview sets out the situations that may merit placing an employee on PIP, what may be recognised as the causes for the underperformance and what are the considerations based on performance.



Where the performance is deemed "unsatisfactory" the document states that "significant and immediate corrective action" may be required [See exhibit 20].

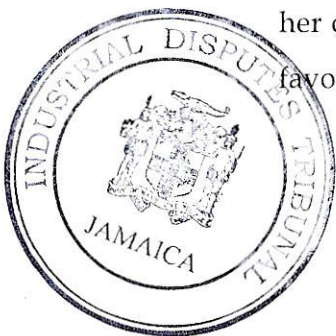
71. The Company's Disciplinary Policy, appendix 1 sets out a number of disciplinary offences deemed as an inexhaustible list of 'misconduct'. The subsequent paragraph following the list notes that depending "upon the circumstances and seriousness of a particular case the above examples of misconduct may be regarded as gross misconduct. Except in the most exceptional circumstances, gross misconduct will result in summary dismissal, without notice."

72. Nowhere in the PIP Process Overview is the question of how to deal with 'unsatisfactory' performance included; and although a particular breach from the list of disciplinary offences in appendix 1 was not cited in the 'charge letter' to Ms. Miranda, Section V seems the most obvious from that list where it states as an offence one's "failure to achieve required levels and/or quality of performance, through carelessness or lack of application."

73. However, Ms. Miranda's employment contract [exhibit 33, page 4] does provide for disciplinary action to be taken in the event of poor performance. Under the heading Disciplinary Procedures it states:

"The Company operates a disciplinary procedure, which is designed to ensure that all employees are treated fairly and consistently. Full details are available from the Human Resource Department. The Company will take disciplinary action against employees whose performance or conduct is unsatisfactory and in the case of gross or repeated misconduct, gross negligence or persistent unsatisfactory performance, the Company may terminate your employment with or without notice."

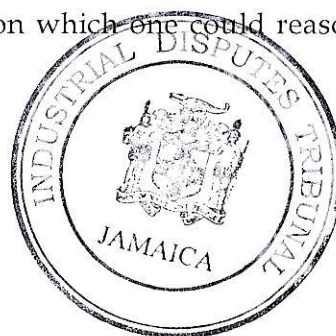
74. While the primary reason for her dismissal was based on her poor performance, two other reasons were cited in the charge letter, namely, the alleged unauthorised recording of a meeting, and the failure to carry out lawful instructions. The case of her refusing to do the self-assessment and deciding on her own to put the PIP on hold until her grievance is settled, presumably in her favour, were in defiance of the Company's policy.



75. The need to maintain mutual trust and confidence, and the expectation of an employee to serve his/her employer in good faith and fidelity, are implied terms in any contract. Ms. Miranda cannot act against the Company while working for them, and where she believes, as she has argued, that trust and confidence has been broken on the part of the employer, these are the grounds typically relied on - as Mr. Goffe averred in his closing submission - to pursue a claim for constructive dismissal, and not for the employee to resort to bad faith or infidelity.
76. The authors of *Commonwealth Caribbean Employment and Labour Law* (2014) puts it far more eloquently when they said -

"As with the employer, employees are also bound by certain implied terms or duties attached to the employment contract, to promote balance and equity in workplace relationships. These include the duties to obey reasonable and lawful orders, to co-operate with the employer, to exercise reasonable care and skill and a duty of fidelity and to act in good faith."

77. Where an employer's behaviour leads to his or her employee harbouring 'feelings of betrayal', 'disloyalty' or 'frustration', without the assertion that such behaviour has rendered the contract inoperable leading to the employee's resignation and claim for 'constructive dismissal', the employee's acts of disloyalty and bad faith will, in all probability, lead to his/her termination. This is the case of Ms. Miranda, her actions and stubborn refusal to cooperate with her employer represented a challenge to 'management prerogative' and resulted in her suffering the fate of dismissal.
78. Having applied our minds to the questions to be decided, the Tribunal, acting within the domain of its statutory framework, could not pursue the dispute as if it were a 'constructive dismissal' case; for it is not. Nor can it be about 'capability' since Ms. Miranda had previously proven her worth as an exceptional employee. The dispute has to be treated as one of misconduct, and the Company has established sufficient grounds upon which one could reasonably conclude that Ms. Miranda has a case to answer.



C. Whether the process leading to Ms. Miranda's termination would meet the threshold of fairness in light of (a) the HR Regional President's instruction to prepare a 'file for her dismissal', and (b) the provisions of the Labour Relations Code

79. It is the view of the Tribunal that fairness and reasonableness are paramount issues for disciplinary action. In a disciplinary proceeding, the employer is under an obligation to ensure that no prejudice is caused to the employee, and such a principle implies a duty to act fairly. Equally, we have to measure the Company's action against the Labour Relations Code to ensure procedural and substantive fairness were observed in arriving at the decision to terminate Ms. Miranda.

80. In an email dated August 19, 2019, from Mr. Luis Guillermo Rodriguez Yturria, the HR Regional President, to Ms. Look Tong and Jesus Martinez Ramirez and copied to Ricardo Nuncio-Arratia, regarding the 'Mid-Year Review', he suggested the following –

"I'd suggest to create a report to include on her file.

Document that she refuses to conduct this type of regulatory meeting and have her sign it. If she refuses, put it in the document and let it be signed by 2 witnesses.

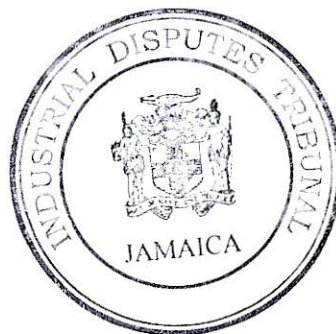
You can start creating a file for a dismissal with cause. Ask the labour lawyer what kind of documents will be needed.

Best."

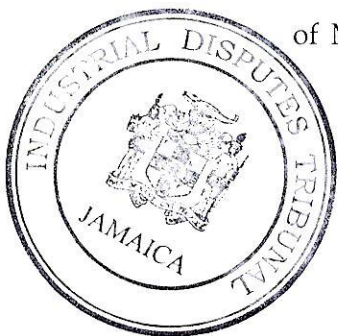
81. The HR Regional President was responding to a request from Ms. Look Tong for guidance in how "to manage performance of Tannisha". Ms. Miranda had earlier sent her an email stating that –

"The mid-year process has to consider the holistic life of the employee.

Given that there is an impasse with the exit negotiation and you indicated use of the grievance process, this and all other meetings/conversations will be cancelled until that process is completed."



82. Ms. Miranda's refusal to participate in the Mid-Year Review, which forms part of her contractual obligation, further compounded by her email to Ms. Look Tong, 'cancelling' all meetings and conversations until the grievance process is completed, is indeed alarming. It was the duty of Ms. Miranda to obey the Company's lawful instructions and while she cannot be bound positively to do more for the Company than her contract requires, she nevertheless cannot wilfully obstruct the employer in the course of conducting the business.
83. However, notwithstanding Ms. Miranda's alleged behaviour, and any justifiable reasons so perceived to commence disciplinary proceedings, Mr. Yturria's email could be viewed as prejudicial, and raises question as to whether it is of a substantial nature to affect Ms. Miranda's right to a fair hearing. The areas of procedural and substantive fairness must exist in the minds of the employer, and even the disciplinary and appeal hearing chairpersons. Moreso, in light of Mr. Yturria's email, the Tribunal is being called upon to examine the evidence to determine what level of influence, if any, did the email have in the decision to terminate Ms. Miranda's contract.
84. In the months following the unfortunate wording of the August 19 email from Mr. Yturria, he had reason to communicate directly with Ms. Miranda in response to her concerns about the decision of the 'Speak Up' case. His November 21, 2019 email to her betrayed no animus towards her, rather it expressed the Company's willingness to work with her in fostering " *a positive working relationship*" [see exhibit 21].
85. It was some nine months after Mr. Yturria's August 2019 email that a charge against Ms. Miranda was initiated, on June 9, 2020. The facts established from the evidence are that there was an investigative process; that the steps leading to the establishment of the PIP had the benefit of Ms. Miranda's input through her 'trusted advisor', Mr. Chester Grant; that an external sole enquirer in the person of Mrs. Yvonne Joy Crawford as Hearing Manager conducted the disciplinary



hearing; and only Mr. Martinez, who was copied in on the August 19, 2019 email, was present as a representative of the Company.

86. It is the view of the Tribunal when 'looked at in the round' that there is no evidence to suggest that the right to a fair hearing was denied Ms. Miranda, notwithstanding the email of August 19, 2019. The other aspects of determining the fairness of the dismissal are set out in paragraph 22 of the Labour Relations Code, dealing with 'Disciplinary Procedure'. The relevant sections are quoted below:

"(a)...

(b) *indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;*

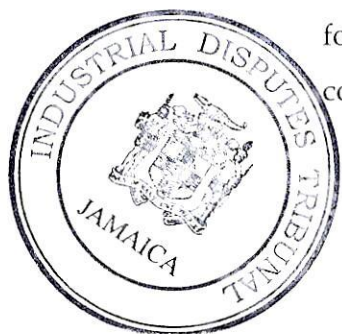
(c) *give the worker the opportunity to state his case and the right to be accompanied by his representatives;*

(d) *provide for a right of appeal, wherever practicable to a level of management not previously involved;*

(e) *be simple and rapid in operation."*

87. The letter of June 9, 2020, initiating the disciplinary hearing, specified the charges against Ms. Miranda. The first was her failure to meet the targets outlined in her Performance Improvement Plan; the second was her breach of section xxii of the Company's disciplinary policy. This section refers to - *"convert electronic, audio or video recording, by any device, of meetings or discussions in the workplace or whilst on Company business without express authorization"* The third was a breach of section iv, that is, *"failure to follow operating instructions/procedures or reasonable instructions."* The date of the hearing was set for June 22, 2020, she was advised of her right to be accompanied by a representative, and her right to appeal in the event she is not satisfied with the outcome of the hearing.

88. The Disciplinary Hearing Report from Mrs. Crawford, dated June 30, 2020 focused primarily on the first charge, that is, failure of the PIP. The email correspondences between Ms. Miranda and Ms. Look Tong, showed that Ms.



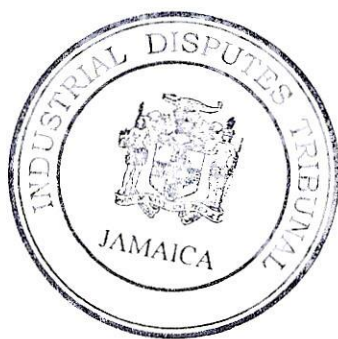
Miranda was not willing to participate in the PIP until her grievance was resolved. And even when the grievance was settled (albeit not in favour of Ms. Miranda), the evidence of her non-cooperation continued. Ms. Crawford's recommendation was that "*the company terminate Ms. Miranda for failure to pass her PIP.*" The Company accepted the recommendation and terminated Ms. Miranda's services on July 8, 2020.

89. Ms. Miranda appealed her dismissal. In a letter from her attorney, Mr. John Junor to the Company's attorney, Mr. Gavin Goffe, the grounds of the appeal were set out in summary below:

- a. The letter of dismissal is in breach of the Company's Disciplinary Policies and Procedures (DPP), in that it "*excludes a summary of the employees view of events*" as contained in page 5 of the DPP.
- b. The absence in the report of evidence presented to show that in respect of the grievance concerning Ms. Miranda, it was the intention of the Company "*to force her to resign and to frustrate all her efforts to obtain her redundancy, to which she was entitled because of the overwhelming evidence of reduction in scope of her job.*"
- c. For the reasons above, "*the decision was unfair and inconsistent with the evidence produced.*"

90. The appeal was heard by Ms. Adella St. Rose, and in her November 2, 2020, report upheld the decision of the Hearing Manager, but failed to address the very first grounds of the appeal, namely, the procedural impropriety alleged in respect of the Company's policy and procedures.

91. To weigh the substance of the procedural issue raised in the appeal, we want to set out the relevant section of the Policy & Procedures in some details. But before doing so we take note of the Company's use of the terms interview and hearing interchangeably in discussing the disciplinary procedure.



92. The related provisions of the Policy & Procedures in respect to a 'discipline hearing' are set out below:

"The Decision

Following the presentation and discussion of the evidence, the Hearing Manager should adjourn the interview in order to investigate any new facts emerging, consult with the HR and the disciplinary panel where appropriate and made a decision

After the Interview

Any disciplinary action taken should be recorded including its time limit. A copy should be sent to the employee and another should be retained on the employee's personnel file

This document should include

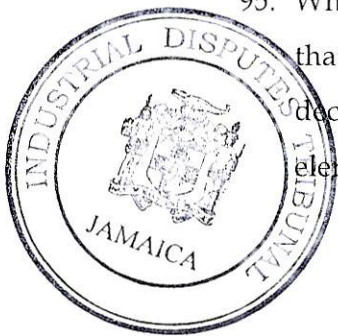
- I. The date of the interview*
- II. The attendees, including whether the employee chose to be accompanied and by whom*
- III. A statement of the disciplinary issued concerned*
- IV. A summary of the facts including a summary of the employee views of the event*

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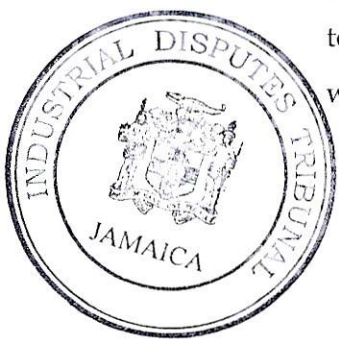
93. Much of what should be recorded in the 'document' suggest to us that this is in relation to the Disciplinary Hearing Report, and not the letter of dismissal. The Report of the Disciplinary Hearing [see *appendix 14*] satisfies the conditions referred to on page 5 of the DPP, and the Appeal Hearing's failure to address that point, to our mind, does not cause a defect in natural justice which would needed to have been cured.

94. The second grounds of appeal is inconsequential as we are not dealing with a case of 'constructive dismissal' and must act within the confines given to us under the LRIDA and the common law.

95. When Section 22 of the Code is applied, it is clear on the findings of the Tribunal that the provisions of the Code to guarantee fairness was complied with, and the decision to terminate the services of Ms. Miranda was reached within the elementary rules of natural justice.



96. The dismissal of Ms. Miranda was, however, without notice. Ms. Miranda - according to the 'Confidential Report' [*exhibit 7*] - was advised in a meeting with Mr. Prata, the Managing Director on or about March 30 or 31, 2020 (the end of the PIP review period) that she had "*failed PIP for not meeting the expectations of HEINEKEN's leadership behaviour on Role Model and Connect.*"[Page 20]. The 'charge letter' of June 9, 2020 indicated that the PIP Report was shared with her on April 29, 2020.
97. The DPP entitles the Company to terminate Ms. Miranda's contract without notice as "*the severity of any disciplinary action taken will depend on the circumstances of each case and mitigating factors...*" Ms. Miranda's contract of employment, which came into effect on August 1, 2007, also entitled the employer to terminate the contract with or without notice for cases of unsatisfactory performance. [*Exhibit 33, Page 4*]. In this case it is clear that the management deemed her unsatisfactory performance as 'gross misconduct' justifying their decision to summarily terminate her services.
98. The legal provisions for termination with or without notice are clearly set out in the Employment Termination & Redundancy Payment Act. Section 3(5)(a) states that where-
- "... an employer does not terminate a contract of employment without notice during the first four weeks after he becomes aware of conduct by the employee by reason of which the employer has a right to terminate the contract without notice, he shall not thereafter terminate the contract without notice by reason of that conduct."*
99. The termination of Ms. Miranda took place on July 8, 2020, more than twelve (12) weeks after the Company became aware that her performance was unsatisfactory. Where the Company, in exercise of its right, decides that her unsatisfactory performance rises to the level of 'gross' misconduct, such right remain deferential to any statutory obligation. Therefore, the termination of Ms. Miranda's contract without notice or pay in lieu of notice has no legal foundation and cannot stand.

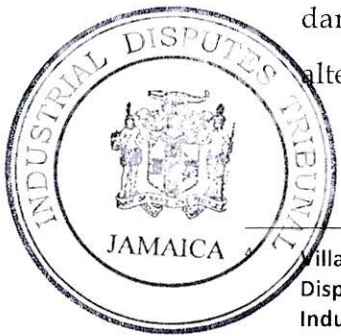


100. Finally, we feel obliged to comment on the case laws upon which counsel based his pleadings before the Tribunal. In the first place it is our considered view that there are distinguishing factors between the six (6) cases cited⁴ and the case at bar. Two central issues appear to emanate for counsel's references in support of his contentions; one, is related to the implied terms of trust and confidence in the employment relationship, and Ms. Miranda's view that this was broken; and two, whether the entire process leading to her dismissal was fair in all the circumstances.

101. We know, for example, that although the basic conceptual framework of the employer-employee relationship is derived from the common law of contract, not all rights and obligations are based on express agreement between them. There are implied terms of the contract that places obligation on both the employer and employee. In *Smith and Wood's Employment Law, Fifteenth Edition*, the authors opined that there is "... *an obligation upon the employer to treat the employee with respect and not to act in a manner likely to destroy or seriously damage the relationship of trust and confidence without good cause...*" and should generally be seen "... *as a corollary of the employee's general duty of faithful service...*"

102. Respectfully, however, there is no evidence to lead the Tribunal to conclude that the Company's actions in respect of the handling of the exit package and the promise of promotion amounted to 'a betrayal of trust and confidence'.

103. There are several cases, including the **Malik** case where employees have sued for damages in respect of breach of trust and confidence. This clearly was an alternative that Ms. Miranda could pursue, as it falls well outside the Tribunal's



Village Resorts Limited v. The Industrial Disputes Tribunal and Others (1988) 35 JLR; R. v. The Industrial Disputes Tribunal, ex parte, Esso West Indies Limited (1977) 16 JLR; University of Technology, Jamaica v. Industrial Disputes Tribunal and others [2017] UKPC 22; Malik v. Bank of Credit and Commerce International SA [1977] UKHL 23; United General Insurance Company and Marilyn Hamilton, [2020] JMCA Civ 29; United Management Services Limited and Industrial Disputes Tribunal and Ministry of Labour and Social Security [2022] JMCA Civ. 14.

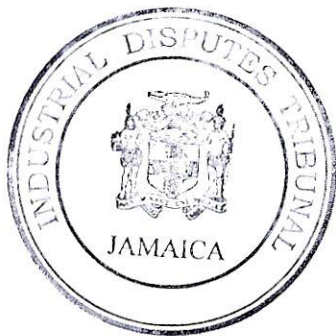
jurisdiction to adjudicate on matter of unlawful dismissal and to award damages for suffering and distress endured as a result.

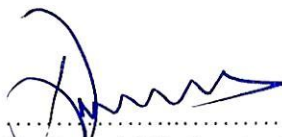
DECISION


104. Having examine all the background circumstances of the case, and in consideration of Section 12(5) of the Act, the rulings of the Tribunal are set out below:


- a) That the termination of employment of Ms. Tannisha Miranda by Desnoes & Geddes Limited (t/a Red Stripe) was 'not unjustifiable'.
- b) That Ms. Miranda is entitled to payment in lieu of notice in accordance with the applicable provisions as set out in Section 3(1) of the Employment (Termination & Redundancy Payments) Act, 1974.


Dated this 17 day of September, 2024




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Mr. Donald Roberts, CD, JP
Chairman


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Mrs. Jacqueline Irons, JP
Member


.....
Dr. Denese Morrison, JP
Member

Witness

.....
Mr. Mario Ling
Secretary of the Division