4 Ellesmere Road
Kingston 10

IDT 20/2021-21/2021-22/2021

June 20, 2022

Mrs. Colette Roberts Risden
Permanent Secretary
Ministry of Labour
1F North Street
Kingston

Dear Mrs. Roberts Risden,

Re: Dispute between E.W. Abrahams & Sons Limited and Messrs. Ricardo Whyte, Romaine Rassiawarn and Kevin Samuels over the termination of their employment

Enclosed please see copies of the Awards handed down by the Industrial Disputes Tribunal in connection with the above dispute.

Yours faithfully,

Mario Ling
for Secretary/Director

Encl.

Similar letters sent to:

Hon. Minister of Labour
Ms. Gillian Corrodus - Director, Industrial Relations & Allied Services
Mr. Michael Kennedy - Chief Director, Industrial Relations
Mr. Christopher O. Honeywell - Attorney-at-Law
Senator Lambert Brown - Industrial Relations Consultant

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 20/2021

SETTLEMENT OF DISPUTE

BETWEEN

E.W. ABRAHAMS & SONS LIMITED

AND

RICARDO WHYTE

AWARD

I.D.T. DIVISION

MR. DONALD ROBERTS, CD, J.P.	-	**CHAIRMAN**
MRS. JACQUELINE IRONS, J.P.	-	**MEMBER**
MR. CLINTON LEWIS	-	**MEMBER**

JUNE 20th, 2022

IDT NO. 20/2021

INDUSTRIAL DISPUTES TRIBUNAL

AWARDS

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

E. W. ABRAHAMS & SONS LIMITED
(THE COMPANY)

AND

RICARDO WHYTE
(AGGRIEVED WORKER)

REFERENCE

By letter dated November 1, 2021, the Hon. Minister of Labour and Social Security, pursuant to Section 11A (1)(a)(i) of the Labour Relations and Industrial Disputes Act, 1975 ("the Act") referred to the Industrial Disputes Tribunal ("Tribunal") for settlement, the dispute between **E. W. Abrahams & Sons Limited and Mr. Ricardo Whyte** with the following Terms of Reference: -

> **"To determine and settle the dispute between E. W. Abrahams & Sons Limited on the one hand and Mr. Ricardo Whyte on the other hand over the termination of his employment"**

DIVISION

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

Mr. Donald Roberts, CD, JP -Chairman

Mrs. Jacqueline Irons, JP	-	Member, Section 8(2)(c)(ii)
Mr. Clinton Lewis	-	Member, Section 8(2)(c)(iii)

REPRESENTATIVES OF THE PARTIES

The **Company** was represented by:

Mr. Christopher Honeywell	-	Attorney-at-law
Mr. Andrew Gauntlett	-	Warehouse Manager

The **Aggrieved** was represented by:

Senator Lambert Brown	-	Industrial Relations Consultant
Mr. Clifton Grant	-	Industrial Relations Consultant

In attendance:

Mr. Ricardo Whyte	-	Aggrieved worker
Mr. Romaine Rassiawarn		
Mr. Kevin Samuels		

SUBMISSIONS AND SITTINGS

Both parties submitted briefs to the Tribunal and made oral presentations over six (6) sittings covering the period February 3, 2022, through to May 18, 2022.

BACKGROUND TO THE DISPUTE

1. E. W. Abrahams & Sons Limited is involved in an island-wide distribution network that comprises the selling and distribution of products, including cosmetics. The Company is incorporated under the Companies Act of Jamaica, with its registered offices and warehouse located at 35 Hagley Park Road, Kingston 10.

2. Mr. Ricardo Whyte was employed to the Company on June 27, 2011 as a driver. His main functions were delivering the products to the Company's clients across the island, and having responsibility for the products during transportation and delivery.

3. On the morning of Monday, February 29, 2016, during the on-loading of products intended for distribution, Mr. Andrew Gauntlett, the Warehouse Supervisor, discovered that two of the boxes, labeled 'hair cream', contained Nadinola/Silken skin cream products. The discovery was made in the presence of a number of warehouse workers and Mr. Gauntlett instructed that the two boxes be returned to the warehouse.

4. Mr. Whyte was not asked any questions regarding the boxes and continued to carry out his duties as a driver during the week up to March 4, 2016. He was called to a meeting on Friday, March 4 and received a letter terminating his employment with immediate effect on the grounds of loss of confidence. Hawkeye security was present at the meeting.

5. Mr. Clifton Grant, Vice President/Industrial Relations Consultant at the University and Allied Workers Union ("UAWU"), on March 23, 2016, wrote to Mr. Michael Abrahams, the Managing Director of the Company, challenging the termination of the services of Messrs. Kevin Samuels, Ricardo Whyte and Romaine Rassiawarn on grounds that they were unjustifiably dismissed in **"breach of natural justice and the Labour Relations Code"**. *(See Exhibit 3)* There was no response from the Company.

6. The matter was subsequently reported to the Ministry of Labour & Social Security. However, efforts at conciliation failed to arrive at an agreement and the dispute was referred to the Tribunal for settlement by way of a letter dated November 1, 2021.

7. In a joint letter to the Secretary of the Tribunal of 18th January, 2021 (inadvertently dated '2021' instead of '2022') signed by Mr. Christopher Honeywell, attorney for the Company and Mr. Grant, Industrial Relations Consultant on behalf of Messrs. Ricardo Whyte, Kevin Samuels and Romaine Rassiawarn, the parties requested that the matters "be consolidated and heard as one."

E. W. ABRAHAM'S CASE

8. Counsel for E. W. Abrahams & Sons Limited, Mr. Honeywell, in his opening submission, said that the Company is not taking issue with or defending the manner in which the termination of the services of the three (3) workers, namely Messrs. Romaine Rassiawarn, Kevin Samuels and Ricardo Whyte took place.

9. He said the Company has issues with the way in which the dismissal occurred and they would not wish to 'trouble' the Tribunal with the issue of whether or not the dismissals were unjustifiable. He said the workers were not accused of any wrongdoing; not given a chance to respond to any accusation; not having allowed them the option of representation; or the right to an appeal.

10. Counsel argued that the Company will put before the Tribunal "**much evidence of a relevant nature...**" (*Notes of Proceeding of 2nd Sitting, dated March 14, 2022, page 13*), that can assist the Tribunal in determining what would be a reasonable award, having accepted that the workers were unjustifiably dismissed. He noted that reinstatement was not a feasible option.

11. Mr. Honeywell submitted that the Tribunal, as a matter of law, should apply the established contract law principle which imposes on Mr. Whyte, the legal duty to mitigate his loss.

12. Mr. Andrew Gauntlett, Warehouse Manager, was the only witness called for the Company. He said that prior to 2016 he had noticed empty boxes of Nadinola/Silken products hidden inside the warehouse and these products are not 'break bulk', that is, they do not sell less than an entire case. His investigations revealed that the Nadinola/Silken skin creams were being placed in larger hair cream boxes and passed off as hair cream.

13. Mr. Gauntlett said that in 2016 the Company was facing significant losses and after some period of observation and investigation it was discovered that products were deliberately been mislabeled. He noted that the hair cream box would sell for approximately $900.00 at the time, and that four of those boxes would be placed in a large box, so the total cost of the hair cream would be $3,600.00. He said that the cost of the Nadinola skin cream

was $8,000.00, so that if you remove four (4) hair creams and packed seven dozen two and-a-quarter Nadinola skin cream this would amount to roughly $56,000.00 at 2016 price.

14. He believed that the two or more boxes which contained 'skin cream' instead of 'hair cream', would be substituted by the purchase of hair cream products to ensure there is no shortage in the delivery of the products to the customer.

15. Mr. Gauntlett testified that on discovering the mislabelled boxes he spoke to the directors of the Company. He decided that he would allow the warehouse staff to work out the week, and terminated their services at the end of that week. He further testified that he contacted Hawkeye Security to tell them that he was **"going to do an exercise..."** and that he wanted **"...to have additional security on the compound because I do not know if anybody will retaliate in anyway..."** *(Ibid. page 56)*

16. It was revealed that the entire warehouse staff, totalling about 17 or 18 workers, were also served with letters terminating their services.

17. Under cross-examination Mr. Gauntlett said there were no cameras in the warehouse at the time, and that he allowed the three workers to continue to work during the week of February 29, 2016 through to March 4, 2016, delivering goods to the customers **"...so that they would get their salary at the end of the week**." *(Ibid, page 74)*

THE AGGRIEVED WORKER'S CASE

18. Senator Lambert Brown, in presenting the case on behalf of Mr. Whyte said that no evidence was led to show that he was guilty of the alleged misconduct. There was no investigation, no written notice and no hearing involving the worker.

19. He said that the issue before the Tribunal was therefore "the level of redress" and this could include either compensation or reinstatement.

20. Mr. Whyte was called to testify in his defense. He said he was employed as a driver/import distributor from 2011 until his termination in March 2016. He told the Tribunal that he had a good relationship with Mr. Gauntlett, and would run errands for him, including the lodgment of monies.

21. Mr. Whyte testified that he was injured and placed on sick leave for a period of less than two (2) weeks and only returned to work on the morning of February 29, 2016. He further testified that he was not responsible for loading the goods onto the truck on February 29, 2016 and would not have known if he would have been assigned to work on the morning of February 29, as the driver and side-men would be decided by Mr. Gauntlett at the time the trucks were to depart from the compound.

22. According to Mr. Whyte, when the discovery of the skin cream in the hair cream boxes was made by Mr. Gauntlett, he began using profanities and made the comment that "they were trying to rob the Company." He was able to see in one of the boxes which, he said contained "Sulphur 8 in hair cream boxes."

23. Mr. Whyte informed the Tribunal that the drivers were the ones responsible for the goods on the truck and would be assigned to open the back of the truck, allowing the sidemen to unload the goods. Mr. Whyte explained that the drivers should not leave the truck unattended.

24. It was Mr. Whyte's testimony that about 4:00 pm on March 4, 2016, he was called to a meeting by Mr. Gauntlett in the lobby. He observed armed Hawkeye security personnel, and was concerned about the positions at which they were stationed.

25. He received a letter of termination from Mr. Gauntlett during the meeting, which did not explain why he was terminated. He did not receive any pay, however, Mr. Gauntlett was issuing $5,000.00 to some members of staff, but he did not take the money.

26. He said that he was not assigned to work on the morning of February 29, and was not questioned by Mr. Gauntlett or the police about the mislabelled boxes. From the period of March 1 to 4 he was however assigned driving duties.

27. He told the Tribunal that he made several applications for jobs (a total of eight or nine) but was unsuccessful in obtaining employment. He said a number of the companies to which he applied were aware of his termination, and at one particular Company, after his interview, he was told that he stole from his former employer. He has still not been able to obtain employment since his termination.

28. Under cross-examination, Mr. Whyte told the Tribunal that he is the holder of an open general license which allows him to drive any truck with the exception of trailers. He enrolled in City College in September 2019 and completed a business management course in about 2020. He also went on to do a course at the Tourism Product Development Company Limited (TPDCo) in November 2020, which was completed in early 2021. He has since sent out other applications.

ISSUES

29. The issue before the Tribunal is to determine what would be a just and equitable compensation in all the circumstances having regard to the following:

    (i) The application of common law damages principles which allows for mitigation.

    (ii) A determination as to whether there are any contributory actions on the part of the former employee which could be attributable to his guilt, and reduce the amount of the compensation.

    (iii) Whether to consider compensatory award based on the manner of the dismissal.

    (iv) The loss of earnings sustained by the worker, where such loss is attributable to the action of the employer.

EVIDENCE

30. Mr. Whyte was employed to the Company for a period of approximately five years up to the time of his dismissal in March 2016. There was no evidence of any disciplinary action taken against him prior to his dismissal.

31. At the time of the discovery of the mislabelled boxes, which led to his dismissal, Mr. Gauntlett admitted that he did not speak to Mr. Whyte at any time about the incident prior to his termination, a point corroborated by Mr. Whyte. He was allowed to work from March 1, 2016 and for the remainder of the week up to March 4, 2016, when he received his letter of termination.

32. Mr. Whyte said that the day in question he was not responsible for packing the boxes or loading them on the flatbed truck. The discovery by Mr. Gauntlett of two boxes containing skin cream products in boxes labelled 'hair products' came to his attention on February 29, 2016, and he was never asked by Mr. Gauntlett or any other manager about the discovery, nor did he make any enquiries.

33. At the meeting of March 4, 2016 called by Mr. Gauntlett, at which letters of termination were handed out to the entire warehouse staff, there was the presence of two "additional" Hawkeye security personnel. Mr. Gauntlett saw this as necessary in anticipation of any 'retaliatory' action on the part of the workers. However, there was conflicting evidence as to whether the entrance to the warehouse was blocked to prevent persons from leaving the meeting. There were also disputing evidence as to the location of the Hawkeye personnel and their mannerism and behaviour during the meeting.

ANALYSIS AND FINDINGS

34. Both Mr. Honeywell and Senator Brown provided this Tribunal with useful references for contemplation in arriving at our decision. While counsel for the Company promised but never cited any judicial authorities in support of the common law principles on mitigation, he did, however, referenced three (3) fairly recent IDT cases which, he argued, should provide precedents to guide the Tribunal on the extent of the remedy it should apply in the case at bar.

35. In the alternative, Senator Brown spoke about the Tribunal's jurisdictional competence which is rooted in Statute, with the full endorsement of the Courts. This, he contended can be "completely at variance" with the common law.

36. It serves well to remind ourselves of the trinity of legislative sources from which the Tribunal derives its jurisdiction: The Labour Relations & Industrial Disputes Act ("LRIDA"), the Regulations and the Labour Relations Code ("the Code"). It is to those we shall first turn to see if they provide the appropriate guidelines to address the issue of compensation for unjustifiable dismissals, in the ways which both parties would want us to consider.

37. Before turning to the issues, however, it is important for the Tribunal to assert within the statutory regime provided for in the legislation, that our decision must be guided by **"...concepts of fairness, reasonableness, co-operation and human relationships..."** which the common law never contemplated. [Rattray, P, **Village Resorts Limited v. Industrial Disputes Tribunal and Uton Green**].

38. In that regard, the award of the Tribunal in relation to the dismissal of a worker is set out in section 12(5)(c) of the LRIDA. The section considers the following:

> **"If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award –**
>
> **(i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of such wages, if any, as the Tribunal may determine;**
>
> **(ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine...."** [*our emphasis*]**.**

39. In relation to the Code, it is the view of the Tribunal that its tendency and effect amount to a recognition of a man's job being 'akin to his property.' That work is embodied and enshrined in the International Labour Organisation's (ILO's) Fundamental Principles and Rights at Work, from which the Code bears much relevance in stating that –

> **"The Code recognises the dynamic nature of industrial relations and interprets it in its widest sense. It is not confined to procedural matters but includes in its scope human relations..."**
>
> **"Recognition is given to the fact that management in the exercise of its function needs to use its resources (material and human) efficiently. Recognition is also given to the fact that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it..."**

40. Lord Hoffman, in **Johnson v Unisys** [2001] puts it eloquently when opined that:

> **"... over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem..."**

41. It is axiomatic that the Statute provides the Tribunal with the powers to **"...order the employer to pay the worker such compensation or to grant him such other relief as the [Tribunal] may determine..."**. At common law, the declaration of Sykes, J (as he then was) is that "**no court can tell the IDT what weight to give to any fact or inference drawn from a fact..."** [**NCB v. Jennings**]. We therefore contend that the Tribunal is on safe ground to examine common law principles and previous IDT rulings to guide it in deciding in relation to Mr. Whyte's *quantum meruit*.

42. In the case of Mr. Whyte's dismissal, even where the employer admittedly is the 'party in default', the Tribunal would **not** be contemplating any award that is designed to be either gratuitous to the worker or by any means seeking to punish the employer. The Tribunal is bound to ensure that proportionality is maintained and that the award is manifestly just and equitable in the circumstances.

THE COMMON LAW

43. Although counsel for the Company, on whom the burden of proof lies, provided no authority in support of the common law principle of the mitigation of loss, the Tribunal, in examining all the circumstances and in 'the round', took that into consideration.

44. The case, **The Epicurean Limited v Madeline Taylor in Antigua and Barbuda** Court of Appeal [Civil Appeal No. 4 of 2003], provided useful guidance on the matter. The Court affirmed the need –

> **"to allow for mitigations which the principles of compensation in general and the principles and practices of good industrial relations**

require to be made in protection of those interests and on behalf of the general fairness and justice of the award."

45. To be fair to the employer, we therefore have to consider Mr. Whyte's efforts to mitigate his loss through seeking subsequent employment.

46. Mr. Whyte in his testimony, said he sent out eight to nine applications for jobs after his termination. At a number of his interviews he produced the letter of dismissal, and even passed the driving test at one of the companies but was never contacted. While his letter stated the reason for his termination as loss of confidence', in the view of the Tribunal the doctrine of "loss of confidence" was used as a subterfuge to disguise the Company's unsubstantiated claim of Mr. Whyte's participation in what counsel described as a "dishonest scheme." Any prospective employer would reasonably want to enquire into the circumstances leading to an employer's 'loss of confidence' in his employee.

47. Mr. Whyte must be commended for completing a course in business management at City College and a further course at TPDCo. He has still not been able to obtain employment and has expressed his wish to return to E W Abrahams since the management has conceded that his dismissal was unjustifiable.

48. In examining all the evidence before us, the Tribunal is satisfied that Mr. Whyte did make some amount of effort to mitigate his loss by seeking future employment. There was no evidence to suggest that he refused any form of employment, or acted unreasonably in disclosing the circumstances of his termination. In those circumstances, the Tribunal concludes there was no neglect of duty on the part of Mr. Whyte to mitigate his loss in the period after his termination.

CONTRIBUTORY NEGLIGENCE

49. Both Mr. Honeywell and Senator Brown cited rulings of previous IDT awards in support of their well-argued submissions, taking into account all the issues for determination.

50. Counsel for the Company cited three such cases, all delivered in 2017, to support his case that the Tribunal is not obligated to make an award to cover the period between the unjustifiable termination and the date of the award. These cases were: **Tastee T/A**

Orange Way Limited and Misses Janet Cooper, Paula Franks and Latoya DePass, Dispute No. IDT 6/2017; Correctional Services Production Company Limited and Winston Brown, Dispute No. IDT 20/2017; and Vanguard Security Limited and Mr. Roshane Duffus, Dispute No: IDT 32/2017.

51. In a careful examination of the three cases, the Tribunal is of the opinion that the case at bar is distinguishable on the facts and circumstances of the cases cited by counsel for the Company. In the **"Tastee"** case the Tribunal found **"...that there were grave irregularities and derelictions of duties as it relates to Miss Cooper, Miss Franks and Miss DePass...."** and concluded that the **"Company may have had cogent reasons for terminating..."** their services. They however found that **"the Company breached the principles of natural justice and the Labour Relations Code..."**

52. In the **"Vanguard"** case, the Tribunal had in its evidence letters addressed to Mr. Duffus alleging misconduct, although no evidence was provided to prove that he was aware of these allegations and given an opportunity to defend himself.

53. In respect to the **"Correction Services case"** the Tribunal in making its award took into account **"... the evidence presented with regard to the Company's submission that his [Mr. Brown's] performance was unsatisfactory..."**

54. In Mr. Honeywell's pleadings he provided no evidence to implicate Mr. Whyte in any misconduct, and his further attempt to convert Mr. Whyte's reticence, after the discovery made by Mr. Gauntlett on February 29, into an admission of an act prejudicial to him, is at best, a nuanced approach.

55. There are no findings of facts to support the assertion that there was any contributory action on the part of the Mr. Whyte which could be attributable to his guilt and reduce the amount of his compensation.

56. Senator Brown submitted the cases of **ATL Group Pension Fund Trustees Limited and Miss Catherine Barber, Dispute No: IDT 34/2011, and Jamaica Dairy Development Board and Mr. Hugh Graham, Dispute No: IDT 23/2019** for consideration

57. In the former case, Miss Catherine Barber was dismissed on April 18, 2011 and the Tribunal handed down its award on September 23, 2015, some two hundred and sixteen weeks (216) weeks after her termination. In arriving at its decision the tribunal took into account –

> **"... the manner in which Miss Barber was dismissed and the ignominious way in which she was sent home and her house searched by the police.... [which] were totally unjustified, demeaning, unwarranted and in total disregard of the Labour Relations Code, as well as her dignity."** [Page 21]

58. We note that the award was for her reinstatement or **"compensation in the amount equivalent to two hundred and sixty (260) weeks total emoluments at the current rate..."**, which is in excess of the period of time she was out of employment.

59. In respect of the latter case, Mr. Graham's termination took place on May 14, 2016. The Tribunal found **"...no evidence that any charges were formally preferred (sic) against Mr. Graham for the alleged breaches..."** and that although the Board indicated his dismissal was for cause it provided no reason. He was however engaged in a previous three (3) year contract at a salary of approximately $5.68 million. The Tribunal ordered reinstatement, failing which he was to be paid **"...compensation in the sum of $35.5M."** [page 21].

60. A similar case, **Axis (Jamaica) Limited and Kerry Fullerton (Dispute No: IDT 20/2013)**, resulted in the dismissal of Miss Fullerton. The following relates to the findings of the Tribunal adduced from the evidence of Mrs. Sharon McDaniel, the Managing Director of the Company –

> **"The evidence from Mrs. Sharon McDaniel is that an employee at Axis became ill and it was suspected that this illness was caused by the ingestion of contaminated products. Mrs. McDonald told the Tribunal that on August 21, 2012 Axis received a letter indicating that they should be careful because Mrs. Fullerton intended to cause harm and so they needed to be cautious of what they eat. As a result**

of this Mrs. Fullerton was taken to the police station where she was questioned." [page 8]

61. Miss Fullerton was out for sixty-nine (69) weeks and the Tribunal ordered her re-instatement, failing which she should be compensated for ninety-eight (98) weeks.

MANNER OF DISMISSAL

62. In the three cases referenced, where the compensation was in excess of the period of unemployment, the manner of the dismissal looms large. The powers of the Tribunal to "determine and settle" within its jurisdiction, evidently provides the latitude to take into the extent to which the spirit and intent of the Code have been breached.

63. The manner of the employer's actions in carrying out the dismissal, however lawfully correct, have been addressed at common law. The seminal case of **Jamaica Flour Mills vs. the NWU**, comes readily to mind. In that case the IDT not only found the dismissal of the three workers "**unfair, unreasonable and unconscionable**" in the way it was effected, but concluded that it showed **"...very little of any concern for the dignity and human feelings of the workers..."**

64. The matter of unfair dismissal was addressed in the case of **Edwards v. Chesterfield Royal Hospital NHS Foundation**, where the learned judge opined that:

> **"... a dismissal may be unfair because it is substantively unfair to dismiss the employee in the circumstances of the case and/or because the manner in which the dismissal was effected was unfair. The manner may be unfair because it was done in a humiliating manner or because the procedure adopted was unfair.... [and] defamatory findings were made which damage the employee's reputation and which, following a dismissal, make it difficult for the employee to find further employment..."**

65. In making an award of compensation to be paid by the employer to a dismissed worker, Halsbury's Law of England, 4th Edition provides four (4) headings to include: (i) immediate loss of earnings; (ii) the manner of dismissal; (iii) future loss of wages; and

(iv) loss of protection in respect of unfair dismissal. The authors in Commonwealth Caribbean: Employment and Law (2014), page 257, cited the following:

> **"...It should also be noted that exemplary damages are available in appropriate cases, as was illustrated in Stanford Financial Group Ltd v. Hoffman, where the sum of US$30,000.00 was awarded to the employee in consideration of the harsh and crude manner of dismissal which the court thought was meant to humiliate her..."**

66. In the opinion of the Tribunal, Mr. Whyte's dismissal rises to that threshold. The presence of two additional Hawkeye security personnel at the meeting called by Mr. Gauntlett with the entire warehouse staff could reasonably be seen as intimidating. Mr. Gauntlett may have been well-intentioned in believing that the presence of adequate armed security would be necessary to stave off any possible 'retaliation' which may arise from the 'bad' news he was about to deliver to the workforce. But 'the road to hell, is paved with good intentions', and so regardless of his virtuous explanation, unintended negative consequences befell his action.

67. We certainly do not support counsel's contention that the testimonies of Messrs. Rassiawarn, Whyte and Samuels, about the activities and presence of the security guards during the meeting of March 4, 2016 were necessarily contradictory. The security guards were not on a passing-out parade, requiring them to be stationary at all times, and certainly, in the words of Mr. Gauntlett, was invited in anticipation of possible disturbance from the workers. The security guards' demeanour would likely, therefore, reflect a defensive posture that could be seen as intimidating.

LOSS OF EARNINGS/EMPLOYER'S CONDUCT

68. The willful mislabeling of boxes does constitute improper conduct, if not an illegal activity that goes to the root of one's contract of employment. Gross misconduct is incompatible with the continuation of the relationship between the employer and the employee, and E. W. Abrahams & Sons Limited would be justified in terminating the

services of any worker, once the investigation implicated him and due process is faithfully observed.

69. This is not the case before us. No allegations or charges were levelled against Mr. Whyte, nor even a mere substratum of evidence brought before this Tribunal, linking his involvement with the willful mislabeling of the two boxes.

70. The employer's action was manifestly unfair and in breach of every known provision of section 22 of the Code. As much as they have conceded the wrongfulness of their action, it does not shield justice through their confession and remorse.

71. The avoidance of future egregious missteps of this nature is set out in section 5(vi) of the Code where it is the employer's responsibility to ensure that not only are supervisory staff provided with clearly defined responsibilities, but that they ***"... understand their responsibilities and have the necessary qualities, and industrial relations training and exposure to do the job." [our emphasis].***

72. In summary, the Tribunal is of the view that section 12(5)(c)(ii), in its proper construction, allows for the making of an award, even outside of the 'band of opinion' suggested by counsel and Senator Brown, but which does not violate the Wednesbury principle of reasonableness. Williams, J, in his judgement in the case of **Garnett Francis v. IDT and Private Power Operators,** [2012] JMSC Civil 55, noted that there exist –

> **"...a discretion entrusted to the Tribunal where the level of quantum of compensation is concerned; and it is a wide and extensive discretion... reveals no limit or restriction placed on the exercise of the discretion and no formula, scheme or other means of binding or guiding the Tribunal in its determination of what might be a level of compensation or other relief it may arrive at as being appropriate."** [page 21)

73. The Tribunal was therefore obliged to examine all the circumstances of the case and to take into account Mr. Whyte's desire to return to his job at E. W. Abrahams.

AWARD

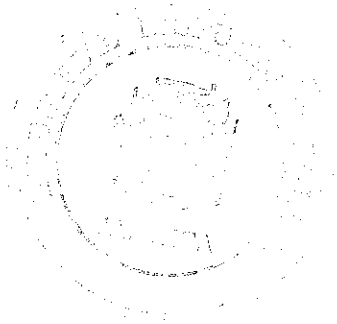
74. In light of the fact that the Company accepted the unjustifiability of Mr. Whyte's termination, and that his request is to be reinstated; the Tribunal, in accordance with section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act, order the following:

(a) That E. W. Abrahams & Sons Limited reinstate Mr. Ricardo Whyte with effect from July 4, 2022, without any loss of income and entitlements

or

(b) failure to reinstate him as stipulated in (a) above, pay him compensation in the sum of Four Million and Five Hundred Thousand Dollars ($4,500,000.00).

DATED THIS 20th DAY OF JUNE 2022.



.....
Mr. Donald Roberts, CD, JP
Chairman

.....
Mrs. Jacqueline Irons, JP
Member

.....
Mr. Clinton Lewis
Member

Witness:

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