

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 23/2021

SETTLEMENT OF DISPUTE

BETWEEN

LLEWELYN L. ALLEN AND ASSOCIATES

AND

RUTHLYN DONALDSON

AWARD

I.D.T. DIVISION

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

JULY 15, 2022

DISPUTE NO. IDT 23/2021

INDUSTRIAL DISPUTES TRIBUNAL

AWARDS

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**LLEWELYN L. ALLEN & ASSOCIATES
(THE COMPANY)**

AND

**RUTHLYN DONALDSON
(AGGRIEVED WORKER)**



REFERENCE

By letter dated November 10, 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 **Llewelyn L. Allen & Associates** and **Ms. Ruthlyn Donaldson** with the following Terms of Reference: -

"To determine and settle the dispute between Llewelyn L. Allen & Associates on the one hand and Ms. Ruthlyn Donaldson 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 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:

Ms. Camaleta Davidson	-	Attorney-at-law
Mr. Courtney Williams	-	Attorney-at-law
Ms. Abbey Miller Lawrence	-	Attorney-at-law



The **Aggrieved** was represented by:

Mr. Kemar Robinson	-	Attorney-at-law
Mr. Matthew Simms	-	Attorney-at-law

In attendance was:

Ms. Ruthlyn Donaldson	-	Aggrieved worker
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SUBMISSIONS AND SITTINGS

Both parties submitted briefs to the Tribunal and made oral presentations over ten (10) sittings covering the period January 28, 2022, through to June 24, 2022. Over the course of the sittings, the Tribunal heard oral evidence and examined nine (9) exhibits.

BACKGROUND TO THE DISPUTE

1. Llewelyn Allen and Associates is a Commissioned Land Surveyors and Mapping Consultants, with offices at the Trade Centre, 30-32 Red Hill Road, Kingston 10. The

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Company offers a wide range of services covering all aspects of Land Surveying and Mapping.

2. Ms. Ruthlyn Donaldson was employed to the Company in 1991 as an Administrative Clerk, and subsequently promoted to the position of Office Manager in 1996. By letter dated May 22, 2014, Mr. Llewellyn Allen, the Managing Director, advised Ms. Donaldson that she was suspended from duties effective June 16, 2014, when the period of her vacation leave would have expired.
3. The letter is quoted in full for ease of reference:

"May 22, 2014

*Miss Ruthlyn Donaldson
C/o Llewellyn Allen & Associates
Suite 4A, The Trade Centre
30-32 Red Hills Road
Kingston 10.*



Dear Miss Donaldson,

I refer firstly, to your recent declaration of intent to take certain steps which would amount to a breach of confidentiality in your employment especially as it relates to your appointed responsibilities; secondly, to your threat to use violence against a member of staff who has in no way been offensive to you and thirdly, to the unbearable working relationship which now exists between us due to your continued unexplained and erratic behaviour in the office, all of which potentially jeopardizes the business of this office.

In light of the foregoing, I am at the stage where I can no longer maintain confidence in your faithfulness to the office or to the business conducted therein.

I currently have plans to be away from the office for a period in excess of three weeks, during which time I must ensure that the office continues to function normally. Accordingly, it would be imprudent to maintain your presence in office during my absence as this would be inimical to the best interest of all concerned. I am therefore temporarily suspending your services effective June 16, 2014 when the period of your leave expires.

Your suspension does not constitute a disciplinary sanction and as such, will be kept under review and will not be extended for any period longer than necessary.

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You will continue to be employed throughout your suspension but will not be required to carry out any of your regular day-to-day duties. You will, however, continue to receive your salary and contractual benefits in the normal manner.

You should not attend the workplace unless authorised by the undersigned to do so. You will therefore not communicate with any of our customers or contractors during the period of suspension.

If you have any queries regarding the terms of your suspension, please feel free to contact the undersigned.

Yours sincerely,

Llewelyn Allen
MANAGING DIRECTOR"

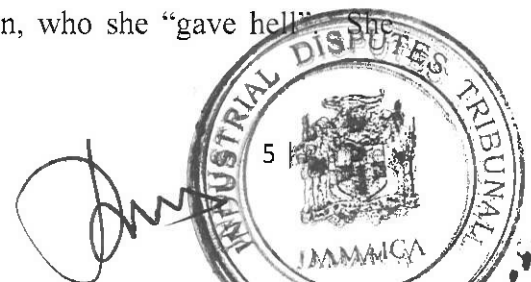
4. Ms. Donaldson responded to the letter on May 26, 2014, refuting the allegations, which triggered a subsequent response from Mr Allen, setting out in detail the points of his contentions.
5. A letter from Mr. Paul Hines, Chairman of the Disciplinary Panel, setting out its findings and outlining its recommendation was sent to the Mrs. Georgia Gibson Henlin, Counsel for the Company.
6. On February 27, 2017, Mr. Allen wrote to Ms. Donaldson advising of the termination with effect from February 28, 2017 and advising that she would receive her salary up to the date of termination and any unpaid vacation leave from the date of her suspension to the date of her termination.
7. Ms. Donaldson, by way of an email reply, dated March 13, 2017, informed Mr. Allen that she is not in agreement with the ruling from the Disciplinary Panel and will therefore be seeking further legal advice.
8. The matter was referred to the Ministry of Labour & Social Security for conciliation. The efforts at conciliation failed to arrive at an agreement; consequently, by letter dated November 10, 2021, the Minister of Labour and Social Security, pursuant to his powers under Section 11A (1)(a)(i) of the Labour Relations and Industrial Disputes Act (LRIDA), referred the matter to the IDT for determination and settlement.



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LLEWELYN ALLEN & ASSOCIATES' CASE

9. In her opening submission, Ms. Camaleta Davidson, attorney for the Company, informed the Tribunal that Ms. Ruthlyn Donaldson was employed to Llewelyn Allen & Associates from 1991 to 2017, when her services were terminated. An intimate relationship developed between Mr. Allen and Ms. Donaldson which led to her misunderstanding her role in the Company.
10. Ms. Davidson said Ms. Donaldson was disrespectful and abusive to female members of staff and to Mr. Allen as her supervisor. Her behaviour intensified over the years and was inimical to the interest of the Company.
11. Counsel for the Company said that as a direct result of Ms. Donaldson's behaviour a number of persons resigned from the Company. This led to her suspension, the convening of a disciplinary hearing and the subsequent termination of her services. She argued that the Company's position was that Ms. Donaldson's behaviour constituted "gross misconduct", and that the Company acted fairly in all circumstances in dismissing her.
12. The Company called four (4) witnesses, including Mr. Allen, who was the first witness. Mr. Allen, in response to questions posed during the examination-in-chief by Mr. Courtney Williams, said that he knew Ms. Donaldson from about 1989 or 1990 and offered her a job as an office clerk. The intimate relationship began about 1991 or 1992. Because of her willingness to work he encouraged her to further her education and the Company paid for her to do supervisory management courses which subsequently led to her being promoted to the position of Office Manager.
13. Mr. Allen said that as Office Manager, Ms. Donaldson was given the authority to sign cheques; however, he found out that she was paying personal bills without his authorization, and on one occasion, prior to 2011, she gave herself "a significant pay increase." Mr. Allen said he removed the authority to sign in 2011, although she was still responsible for salary computation.
14. According to Mr. Allen, Ms. Donaldson accused him of sleeping with other women employed to the Company, including Ms. Salina Solomon, who she "gave hell". She



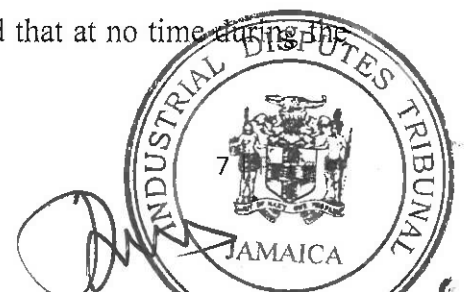
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refused to compute Ms. Solomon's salary and refused to provide her with her salary even when instructed by him to do so.

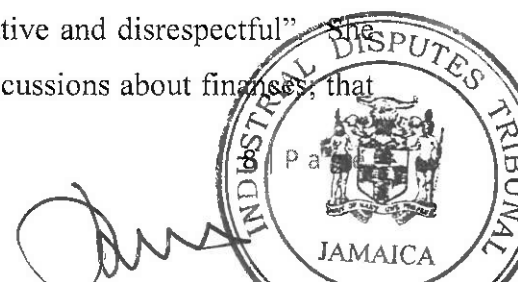
15. Mr. Allen testified that Ms. Donaldson refused to speak with him for long periods leading up to the suspension, and on previous occasions repeatedly expressed her desire to leave the Company and for him to pay her \$20M to leave.
16. He said that prior to her suspension she attached a 'post-it' to documents handed to him with the words: ***"I can make your life very uncomfortable."*** She also threatened, he said, to throw Salina's ***"ass out of the office!"***, and he was not prepared to risk her disrupting the office during his absence and so issued a letter of suspension to take effect at the end of her leave.
17. Mr. Allen informed the Tribunal that during Ms. Donaldson's suspension she continued to receive her monthly salary and a special allowance of \$50,000.00 per month, which was paid up to the time of her termination. He said he continued to pay other bills which he assisted her with for about 6 months during her suspension but stopped when she made demands for it to be paid on time.
18. The Company provided evidence to show (exhibit 4) that the charges were laid out in a letter to her dated January 14, 2016, which sets out a summary of the allegations as follows:
 - "a. That prior to your suspension you refused to carry out your duties and had a poor working relationship with each and every female co-worker, which in most situations ended with them leaving the Company.***
 - b. That you threatened to use violence against a current female member of staff.***
 - c. That despite numerous warnings concerning these unprofessional and what may be described as erratic behaviours that jeopardized the success of the business you failed to curb your behaviour."***
19. The letter further indicated that an investigation was carried out during the course of Ms. Donaldson's suspension, which led to a listing of eleven (11) charges. The charges are listed below:
 - "a. You failed to transfer telephone calls to Mr. Allen, your employer when his child's mother called***
 - b. You fail to transfer calls to Mr. Allen whenever females to whom you did not know requested to speak with him.***



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- c. *You failed to advise Mr. Allen of the above mentioned above (sic) calls when you refused to transfer them.*
 - d. *You went outside your job description and questioned female callers to the office, who asked to speak to him.*
 - e. *You questioned female visitors to the office in Mr. Allen's absence.*
 - f. *Despite Mr. Allen's instruction, you refused to sign salary cheques each month for a female member of staff whose service you determined must be terminated.*
 - g. *You refused to deliver said cheque to the employee once Mr. Allen signed the cheque himself.*
 - h. *You had a poor interpersonal relationship with each and every female staff.*
 - i. *You constantly expressed a desire to leave the company in the presence of the staff.*
 - j. *You handed Mr. Allen, your employer, documents with a "post it" note attached where you threatened him with the words "I can make life very uncomfortable".*
 - k. *You have breached the trust and confidence required by your employer."*
20. A letter to Ms. Donaldson dated January 14, 2015 (which both parties agreed was an error, and should correctly be January 14, 2016), under the caption: 'Disciplinary Hearing' was exhibited. The letter from Henlin Gibson Henlin, attorneys-at-law, representing Llewelyn Allen & Associates, was an invitation to Ms. Donaldson to attend a hearing at the Dispute Resolution Foundation, scheduled for 19th February 2016 regarding "*allegations of misconduct during the course of your [her] employment at Llewelyn Allen & Associates...*", which led to her suspension on the 16th June, 2014.
21. Mr. Allen referenced the letter dated February 8, 2017, sent by Paul Hines, chairman of the disciplinary panel, to Mrs. Georgia Gibson Henlin, the Company's attorney-at-law, advising that four (4) witnesses were called, "*along with both Mr. Llewelyn Allen and Ms. Ruthlyn Donaldson [who] gave their statements and were cross-examined.*" The letter further stated that the panel "*heard all the statements, read all the written witness statements and the summaries submitted on behalf of Llewelyn & Associates (sic) and Ms Donaldson by their respective Attorneys along with the facts and evidence....*", and ruled that the charges against Ms. Donaldson was made out and that she should be dismissed in accordance with the Employment Termination & Redundancy Payment Act.
22. Mr. Allen noted that during the period of Ms. Donaldson's suspension, a monetary settlement was offered to her which was not accepted. He said that at no time during the



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- suspension was there any indication from her that she wanted to return, and he did not signal any interest in having her return.
23. Under cross-examination, Mr. Allen admitted that at no time did he write to Ms. Donaldson regarding disciplinary matters, and that the letter of suspension was the first such occasion. He only spoke to her the first time she granted herself a "hefty increase" but did not reverse the unauthorised payment.
24. He acknowledged that no objection was raised by Ms. Donaldson's attorney about the composition of the panel, and that the letter of termination did not indicate to Ms. Donaldson that she had a right of appeal.
25. Mr. Leon Woon Chin was the Company's second witness. He was employed to Llewelyn Allen & Associates for 29 years and is currently self-employed. He said he suspected that Mr. Allen and Ms. Donaldson had a romantic relationship, and he believed she took advantage of it and "did basically what she wanted to do at the Company."
26. Mr. Woon Chin said Ms. Donaldson was jealous of any female employee at the Company and "gave them a hard time." In his testimony, Mr. Woon Chin stated that Ms. Andrea Williamson left the Company because of problems with Ms. Donaldson, and her continued questioning as to why she (Ms. Williamson) was getting so much money. There was also constant quarrelling between Ms. Donaldson and Ms. Sophia Johnson, Mr. Allen's secretary, who, after leaving the employ of Llewelyn Allen & Associates wanted to return and that Ms. Julia Chin, a draughtsman at the Company was told aloud in the office by Ms. Donaldson, that "she is a lesbian."
27. Ms. Salina Solomon, a land surveyor at Llewelyn Allen & Associates, who has been employed full time since 2014, also gave testimony and spoke of the uneasy relationship that existed between her and Ms. Donaldson.
28. The fourth witness for the Company, Mrs. Sophia Johnson-Bailey was formerly employed to Llewelyn Allen & Associates as Mr. Allen's secretary. She declared that Ms. Donaldson and herself had a good relationship in the early years. In later years, however, Mrs. Johnson-Bailey said that Ms. Donaldson became "manipulative and disrespectful" ^{she} said she overheard Mr. Allen and Ms. Donaldson having discussions about finances, that



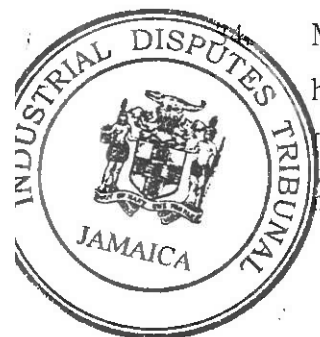
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Ms. Donaldson behaved as if she owned the Company, and that the female members of staff did not relate well to Ms. Donaldson.

THE AGGRIEVED WORKER'S CASE

29. Mr. Kemar Robinson, counsel for the aggrieved, in his opening submission said that all the Tribunal had to determine is whether or not the rules of natural justice were followed when Ms. Donaldson was terminated. He reminded the Tribunal that when she was suspended in 2014 it was not a disciplinary action.
30. In 2015, Ms. Donaldson sought clarification on her status as an employee. He questioned whether a disciplinary hearing should be held when she was not suspended for disciplinary reasons, and that her termination must be judged on whether the law and code were followed in arriving at a decision. Counsel concluded that, in his opinion, Ms. Donaldson's termination cannot stand up to the requirements in law.
31. Ms. Donaldson, during examination-in-chief, said she was currently unemployed, and was last actively employed in 2014. She said that the relationship between herself and Mr. Allen was good over the years but began to deteriorate in 2013 when she broke off the intimate relationship with him. His behaviour towards her changed.
32. As Office Manager, Ms. Donaldson said she was responsible for the day-to-day operations of the office, which included overseeing aspects of Human Resources, helping with bids and quotations and overseeing the work of the staff. She was also responsible for the disbursement of cheques and statutory deductions. She signed cheques between 2002 and 2011.
33. She said she was authorised by Mr. Allen to use Company cheques to pay her personal bills. She requested a pay increase in 2002 from Mr. Allen who suggested that she compile her utility bill which he would pay instead of granting her a wage increase.

Ms. Donaldson said she never received a written warning, nor was she disciplined before her suspension in 2014. She testified that she worked long hours, including on weekends. In addition to her basic salary of \$287,000.00 per month, she received \$50,000.00 per month, which was initially for housing but subsequently became motor vehicle allowance.



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In addition, she received numerous other benefits along with the utility bill payments, including international health insurance, local health insurance, life insurance, pension, motor vehicle insurance and motor vehicle servicing.

35. She said she had a good relationship with the staff and at no time was she verbally warned about any issue by Mr. Allen, nor was there ever a clash between them during her employment.
36. Ms. Donaldson told the Tribunal that she was represented at the disciplinary hearing and that there were correspondences she wanted to access in her defence at the hearing, but never brought this to the attention of her representative.

ISSUES

37. The Tribunal had to wade through a labyrinth of issues and considerations of a personal nature that entangled the employment relationship and ultimately led to the dispute at hand. From the arguments presented by both sides, the Tribunal was able to extract the following matters for consideration:
- a. Did Mr. Allen have probable cause to suspend Ms. Donaldson in light of the fact that her suspension was not one of discipline?
 - b. Were the disciplinary charges against Ms. Donaldson justified under the circumstances?
 - c. Was the lengthy period between Ms. Donaldson's suspension and termination unreasonable, sufficient to be materially prejudicial to her case?
 - d. Was the procedure adopted by the Company, in terminating Ms. Donaldson's employment, in breach of the principles of natural justice and therefore at variance with the relevant provisions of the Labour Relations Code?



EVIDENCE

38. In his suspension letter to Ms. Donaldson, Mr. Allen stated: "... *I am at the stage where I can no longer maintain confidence in your faithfulness to the office or to the business conducted therein.*"
39. The reason for Mr. Allen's 'loss of confidence' was clearly set out in the opening paragraph of his letter, and included issues of breach of confidentiality, threat to an employee and the poor working relationship, particularly between himself and Ms. Donaldson.
40. Ms. Donaldson made a number of points in her refutation against the allegations. These are summarized as follows:
- a. She indicated that not only is she unclear, but unaware of any declaration of intent made by her that would amount to a breach of confidentiality.
 - b. She has never threatened to use violence against any member of staff during her twenty-four (24) years of employment at Llewelyn Allen & Associates.
 - c. In her nineteen (19) years in a managerial position, she has always "*adhered to appropriate work ethics and there has never been a warning or complaint against me for misconduct or unacceptable behavior in the workplace.*"
 - d. She spoke of her twenty-four years of loyalty to the Company, contributing to its success, and "*the approximately twenty-two years of which I have committed myself to a relationship with you.*"
 - e. She indicated in her letter that over the years Mr. Allen has threatened to terminate her employment and has "*consistently disrespected*" her in the presence of staff because of what she claims to be "*personal decisions*" she has made.
41. The letter made reference to attachments including witness statements on behalf of the Company and requested Ms. Donaldson to provide, no later than the 8th February, 2016, the names of "*any relevant witnesses*" and "*any further documents*" she may wish to be considered at the hearing.



42. A hearing was convened by external parties at which Ms Donaldson was represented by the law firm, Knight, Junor & Samuels and was given the opportunity to state her case and cross-examine the Company's witnesses.

ANALYSIS AND FINDINGS

43. The intimate relationship between Mr. Allen and Ms. Donaldson undoubtedly invited a host of issues – perceived or actual conflict of interest, abuses of authority, biased treatment and favouritism – which potentially interfered with the integrity of professional roles and threatened to damage the working relationship at the Company.
44. Having regard to its peculiar nature, the Tribunal believes it is important at the outset to remind itself that pursuant to the statute, as expressly interpreted by the common law, its role is to settle disputes in the **industrial context**, as well as to take into account “a fully objective” view of all the circumstances of the case. As Brooks, JA. opined in the matter of **The Industrial Disputes Tribunal v. The University of Technology**:

“... the I.D.T. is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of the dismissal, even if those matters were not considered by, or even known to the employer at that time.” (Tribunal's emphasis)

45. A second important consideration, derived from the common law, which we feel compelled to highlight, is the need to consider the conduct of both Mr. Allen and Ms. Donaldson. To view -

“whether there was any action or inaction on the part of the employee (Ms Donaldson) which warranted dismissal... and if so whether the proper procedure was followed in dismissing him [her] or whether it was handled in such a way as to attract criticism of unfairness.”

[Alcoa Minerals of Jamaica v The IDT and UTASP, (2012 HCV02454)]

46. In so doing, the focus, therefore, is on the consequences of their conduct, insofar as it relates to the issues surrounding the termination, and not the causes which may have given rise to it.



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Did Mr. Allen have probable cause to suspend Ms. Donaldson in light of the fact that her suspension was not one of discipline?

47. Mr. Allen's letter of suspension to Ms. Donaldson, sets out the three (3) reasons mentioned above for her suspension, and is worth quoting in full:

"I refer firstly, to your recent declaration of intent to take certain steps which would amount to a breach of confidentiality in your employment especially as it relates to your appointed responsibilities; secondly, to your threat to use violence against a member of staff who has in no way been offensive to you and thirdly, to the unbearable working relationship which now exists between us due to your continued unexplained and erratic behaviour in the office, all of which potentially jeopardizes the business of this office."

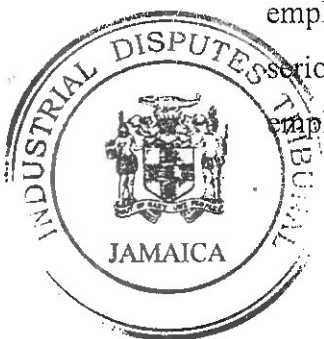
48. The letter further stated that -

"I currently have plans to be away from the office for a period in excess of three weeks, during which time I must ensure that the office continues to function normally. Accordingly, it would be imprudent to maintain your presence in office during my absence as this would be inimical to the best interest of all concerned. I am therefore temporarily suspending your services effective June 16, 2014 when the period of your leave expires."

49. He goes on to state in the following paragraph that her *"suspension does not constitute a disciplinary sanction and as such, will be kept under review and will not be extended for any period longer than necessary..."*; and that she will *"continue to be employed throughout your [her] suspension but will not be required to carry out any of your [her] regular day-to-day duties. You will, however, continue to receive your salary and contractual benefits in the normal manner."*

50. The letter of suspension did indicate that Ms. Donaldson was being 'temporarily suspended', that it would be *"kept under review"* and would not be *"extended for any period longer than necessary."* The intention, clearly, was not to make the suspension indefinite.

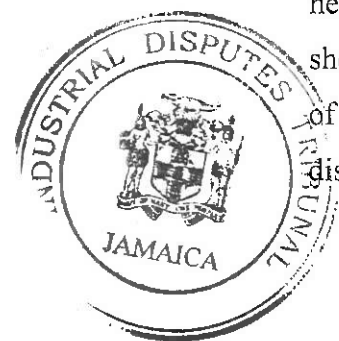
51. An employment contract whether oral or in writing, does contain an implied term that the employer and employee ought not to conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence. This is particularly so, in the case of the employee, if he or she occupies a position of trust in the organisation.



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52. The Tribunal accepts the evidence of Mr. Woon Chin and Mrs. Johnson-Bailey that Ms. Donaldson abused her position and committed acts that would have resulted in the forfeiture of trust. Issues surrounding Mr. Allen and Ms. Donaldson's intimacy certainly played itself out, which led to an uncomfortable working relationship for all concerned.
53. Mr. Allen's letter of suspension did indicate a discomfort with having Ms. Donaldson attend the office during his absence, the probable cause of what amounts to her 'administrative suspension.' He argued that based on the reasons outlined in the opening paragraph of his suspension letter (previously referred to) *"it would be imprudent"* to maintain her presence in office during his absence and would be *"inimical to the best interest of all concerned."*
54. From the facts adduced, the Tribunal reasoned that Ms. Donaldson's continued presence at the office posed a potential embarrassment and an inconvenience for Mr. Allen and would be detrimental to the discipline and good working relationship at the Company. In all the circumstances, the Tribunal therefore concludes that reasonable grounds existed for the loss of confidence in Ms. Donaldson and would have justified her suspension.

Were the disciplinary charges against Ms. Donaldson justified?

55. The circumstance under which this arise is rooted in the fact that Ms. Donaldson was never suspended for disciplinary cause and continued to receive her full pay and other benefits as an employee. The suspension was administrative. Counsel for the aggrieved argued in his closing submission that Ms. Donaldson was unaware of the specific allegations and that her suspension was indefinite. We respectfully disagree. Ms. Donaldson was fully aware of the allegations, to which she responded at length. Her denial or disagreement does not mean it was not stated; and her claim to be "unaware" and her expression of "disbelief" regarding the allegations, were unconvincing to the Tribunal.
56. There are no statutory guidelines to help us to address the issue of whether a discipline hearing, flowing from an 'administrative suspension', and not a 'disciplinary suspension', should be rendered nugatory. Neither is the statute helpful as regards the treatment of 'loss of confidence' and whether it amounts to gross misconduct or a reasonable cause for dismissal.



57. However, the *dicta* of Pusey, J in the case of **Branch Development Limited v. IDT [2019] JMSC Civ. 226** clearly states that on the matter of administrative suspension, the Tribunal has the jurisdiction to hear such matters. She stated that the Tribunal has the right --

“...to examine the facts in this matter to ascertain whether this continued suspension is fair, irrespective of it being an administrative suspension or otherwise.”

58. The administrative suspension of Ms Donaldson does not preclude the Tribunal from enquiring into the facts on their merits and determining in the circumstances whether they were grounds for a disciplinary hearing leading to termination. Mr. Allen’s letter of suspension referred to the matter as being “under review.” What ought to be inferred from the phrase “*kept under review?*” Is it the same as ‘conducting an investigation?’ According to Selwyn’s Law of Employment, Eleventh Edition, (2000) “*it is not the actual words which are used which are significant, but the intention behind them, and this must be ascertained from all the surrounding circumstances and the accompanying words...*” [p. 332].
59. The intention seemed to have been made clear in the letter of January 14, 2016 (inadvertently stated as ‘2015’), inviting Ms. Donaldson to a disciplinary hearing. The letter stated that “*during the course of your suspension an investigation was carried out as a consequence of which the following charges are necessary in respect of which a hearing will be conducted.*” [Tribunal’s emphasis]
60. In reviewing the list of eleven (11) charges set out in the letter of January 14, 2015 (2016), and examining all the background circumstances, the Tribunal concludes that the principal charge was the alleged breach of ‘trust and confidence’. The other allegations of misconduct, seemingly stemming from Ms. Donaldson’s traits of jealousy, would not, in the view of the Tribunal, amount to a dismissible offence, in the absence of prior warnings or suspension. The Tribunal was left with insufficient evidence to conclude that there were.
61. Ms. Donaldson certainly held a position of trust and confidence, a position which entitles the employer, once it is forfeited, to regard it as a ‘substantial reason’ and grounds for termination. Loss of confidence, as a just cause for termination, must therefore be based on the position of responsibility, trust and confidence which the employee holds.



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62. We have summarised some general principles from the literature on the subject of 'the doctrine of loss of confidence'; and foremost among them is that the grounds of loss of confidence for dismissal must be preceded by a disciplinary hearing; a position we are obliged to accept without fail. In our analysis of the facts, we believe it reasonable to bear in mind those principles which postulate the need to ensure that 'loss of confidence': (i) should not be used as a subterfuge for causes which are improper, illegal or unjustified; (ii) it must not be arbitrarily asserted in the face of overwhelming evidence to the contrary; and (iii) it must be genuine, not a mere afterthought to justify an earlier action taken in bad advantage of the opportunities of her position to enrich herself through the unauthorised use of Company funds for her personal benefit. Mr. Allen, in his testimony, said he did not pursue any form of disciplinary action regarding these alleged breaches, and Ms. Donaldson has strongly denied them, claiming she had the prior consent of Mr. Allen.

64. The benefits which Ms. Donaldson enjoyed from the intermingling of the personal and the professional, and her willingness to work beyond the call of duty is one thing. The Tribunal must, however, keep clear the lines of demarcation and bear in mind that Ms. Donaldson was not bound positively to do more for her employer than her contract requires, but cannot wilfully obstruct the employer in the course of her employment, which, from the evidence, and a balance of probabilities, we accept may have occurred as a result of the break-down in the personal relationship.

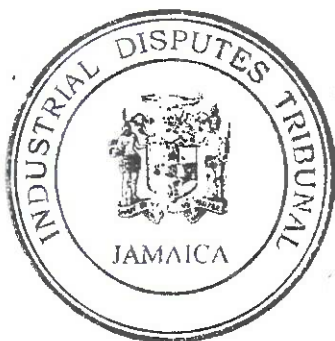
65. The Tribunal accepts that Ms. Donaldson's conduct was in the end insubordinate to such a degree as to be incompatible with the continuation of the relation of employer and employee. The breach of trust stemmed from Mr. Allen's belief that he could no longer repose confidence in Ms Donaldson as the office manager, based on her conduct, influenced, no doubt, by the blurring of the lines between 'intimacy' and 'contractual responsibility'. It ultimately impacted the organisation negatively providing, on a balance of probabilities, sufficient grounds for disciplinary charges to be laid against her.



RECOMMENDATION

84. By majority, with Mrs. Irons dissenting only in respect to the recommendation, the Tribunal, taking into account the peculiar circumstances of the case, and having regard to Ms Donaldson's age, recommend for serious consideration by the management, a payment to her of the sum of Four Million Six Hundred Thousand Dollars (\$4,600,000.00) as an ex gratia payment.

DATED THIS 15 DAY OF JULY 2022.



Mr. Donald Roberts, CD, JP

Chairman

Mr. Clinton Lewis

Member

Witness:

Mr. Mario Ling

Acting Secretary of the Division

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INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 23/2021

SETTLEMENT OF DISPUTE

BETWEEN

LLEWELYN L. ALLEN AND ASSOCIATES

AND

RUTHLYN DONALDSON

MINORITY AWARD

I.D.T. DIVISION

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

JULY 15, 2022

INDUSTRIAL DISPUTES TRIBUNAL
MINORITY AWARD
IN RESPECT OF
AN INDUSTRIAL DISPUTE
BETWEEN
LLEWELYN L. ALLEN & ASSOCIATES
(THE COMPANY)

AND
RUTHLYN DONALDSON
(AGGRIEVED WORKER)

REFERENCE

By letter dated November 10, 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 **Llewelyn L. Allen & Associates and Ms. Ruthlyn Donaldson** with the following Terms of Reference: -

"To determine and settle the dispute between Llewelyn L. Allen & Associates on the one hand and Ms. Ruthlyn Donaldson on the other hand over the termination of her employment"



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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:

Ms. Camaleta Davidson	-	Attorney-at-law
Mr. Courtney Williams	-	Attorney-at-law
Ms. Abbey Miller Lawrence	-	Attorney-at-law

The **Aggrieved** was represented by:

Mr. Kemar Robinson	-	Attorney-at-law
Mr. Matthew Simms	-	Attorney-at-law



In attendance was:

Ms. Ruthlyn Donaldson	-	Aggrieved worker
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SUBMISSIONS AND SITTINGS

Both parties submitted briefs to the Tribunal and made oral presentations over ten (10) sittings covering the period January 28, 2022, through to June 24, 2022. Over the course of the sittings, the Tribunal heard oral evidence and examined nine (9) exhibits.

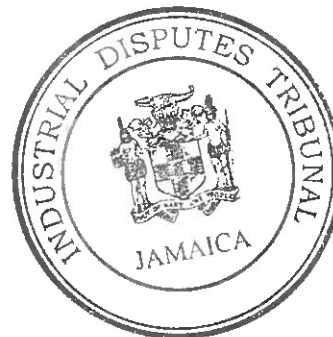
BACKGROUND TO THE DISPUTE

1. Llewelyn Allen and Associates is a Commissioned Land Surveyors and Mapping Consultants, with offices at the Trade Centre, 30-32 Red Hill Road, Kingston 10. The Company offers a wide range of services covering all aspects of Land Surveying and Mapping.

2. Ms. Ruthlyn Donaldson was employed to the Company in 1991 as an Administrative Clerk, and subsequently promoted to the position of Office Manager in 1996. By letter dated May 22, 2014, Mr. Llewellyn Allen, the Managing Director, advised Ms. Donaldson that she was suspended from duties effective June 16, 2014, when the period of her vacation leave would have expired.

3. The letter is quoted in full for ease of reference:

**"May 22, 2014
Miss Ruthlyn Donaldson
C/o Llewellyn Allen & Associates
Suite 4A, The Trade Centre
30-32 Red Hills Road
Kingston 10.**



***Dear Miss Donaldson,
I refer firstly, to your recent declaration of intent to take certain steps which would amount to a breach of confidentiality in your employment especially as it relates to your appointed responsibilities; secondly, to your threat to use violence against a member of staff who has in no way been offensive to you and thirdly, to the unbearable working relationship which now exists between us due to your continued unexplained and erratic behaviour in the office, all of which potentially jeopardizes the business of this office.***

In light of the foregoing, I am at the stage where I can no longer maintain confidence in your faithfulness to the office or to the business conducted therein.

I currently have plans to be away from the office for a period in excess of three weeks, during which time I must ensure that the office continues to function normally. Accordingly, it would be imprudent to maintain your presence in office during my absence as this would be inimical to the best interest of all concerned. I am therefore temporarily suspending your services effective June 16, 2014 when the period of your leave expires. Your suspension does not constitute a disciplinary sanction and as such, will be kept under review and will not be extended for any period longer than necessary.

You will continue to be employed throughout your suspension but will not be required to carry out any of your regular day-to-day duties. You will, however, continue to receive your salary and contractual benefits in the normal manner.



You should not attend the workplace unless authorised by the undersigned to do so. You will therefore not communicate with any of our customers or contractors during the period of suspension.

If you have any queries regarding the terms of your suspension, please feel free to contact the undersigned.

Yours sincerely,
Llewelyn Allen
MANAGING DIRECTOR"

4. Ms. Donaldson responded to the letter on May 26, 2014, refuting the allegations, which triggered a subsequent response from Mr Allen, setting out in detail the points of his contentions.
5. A letter from Mr. Paul Hines, Chairman of the Disciplinary Panel, setting out its findings and outlining its recommendation was sent to the Mrs. Georgia Gibson Henlin, Counsel for the Company.
6. On February 27, 2017, Mr. Allen wrote to Ms. Donaldson advising of the termination with effect from February 28, 2017 and advising that she would receive her salary up to the date of termination and any unpaid vacation leave from the date of her suspension to the date of her termination.
7. Ms. Donaldson, by way of an email reply, dated March 13, 2017, informed Mr. Allen that she is not in agreement with the ruling from the Disciplinary Panel and will therefore be seeking further legal advice.
8. The matter was referred to the Ministry of Labour & Social Security for conciliation. The efforts at conciliation failed to arrive at an agreement; consequently, by letter dated November 10, 2021, the Minister of Labour and Social Security, pursuant to his powers under Section 11A (1)(a)(i) of the Labour Relations and Industrial Disputes Act (LRIDA), referred the matter to the IDT for determination and settlement.

LLEWELYN ALLEN & ASSOCIATES' CASE

9. In her opening submission, Ms. Camaleta Davidson, attorney for the Company, informed the Tribunal that Ms. Ruthlyn Donaldson was employed to Llewelyn Allen & Associates

from 1991 to 2017, when her services were terminated. An intimate relationship developed between Mr. Allen and Ms. Donaldson which led to her misunderstanding her role in the Company.

10. Ms. Davidson said Ms. Donaldson was disrespectful and abusive to female members of staff and to Mr. Allen as her supervisor. Her behaviour intensified over the years and was inimical to the interest of the Company.
11. Counsel for the Company said that as a direct result of Ms. Donaldson's behaviour a number of persons resigned from the Company. This led to her suspension, the convening of a disciplinary hearing and the subsequent termination of her services. She argued that the Company's position was that Ms. Donaldson's behaviour constituted "gross misconduct", and that the Company acted fairly in all circumstances in dismissing her.
12. The Company called four (4) witnesses, including Mr. Allen, who was the first witness. Mr. Allen, in response to questions posed during the examination-in-chief by Mr. Courtney Williams, said that he knew Ms. Donaldson from about 1989 or 1990 and offered her a job as an office clerk. The intimate relationship began about 1991 or 1992. Because of her willingness to work he encouraged her to further her education and the Company paid for her to do supervisory management courses which subsequently led to her being promoted to the position of Office Manager.
13. Mr. Allen said that as Office Manager, Ms. Donaldson was given the authority to sign cheques; however, he found out that she was paying personal bills without his authorization, and on one occasion, prior to 2011, she gave herself "a significant pay increase." Mr. Allen said he removed the authority to sign in 2011, although she was still responsible for salary computation.
14. According to Mr. Allen, Ms. Donaldson accused him of sleeping with other women employed to the Company, including Ms. Salina Solomon, who she "gave hell". She refused to compute Ms. Solomon's salary and refused to provide her with her salary even when instructed by him to do so.



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15. Mr. Allen testified that Ms. Donaldson refused to speak with him for long periods leading up to the suspension, and on previous occasions repeatedly expressed her desire to leave the Company and for him to pay her \$20M to leave.
16. He said that prior to her suspension she attached a 'post-it' to documents handed to him with the words: ***"I can make your life very uncomfortable."*** She also threatened, he said, to throw Salina's ***"ass out of the office!"***, and he was not prepared to risk her disrupting the office during his absence and so issued a letter of suspension to take effect at the end of her leave.
17. Mr. Allen informed the Tribunal that during Ms. Donaldson's suspension she continued to receive her monthly salary and a special allowance of \$50,000.00 per month, which was paid up to the time of her termination. He said he continued to pay other bills which he assisted her with for about 6 months during her suspension but stopped when she made demands for it to be paid on time.
18. The Company provided evidence to show (exhibit 4) that the charges were laid out in a letter to her dated January 14, 2016, which sets out a summary of the allegations as follows:

"a. That prior to your suspension you refused to carry out your duties and had a poor working relationship with each and every female co-worker, which in most situations ended with them leaving the Company.
b. That you threatened to use violence against a current female member of staff.
c. That despite numerous warnings concerning these unprofessional and what may be described as erratic behaviours that jeopardized the success of the business you failed to curb your behaviour."
19. The letter further indicated that an investigation was carried out during the course of Ms. Donaldson's suspension, which led to a listing of eleven (11) charges. The charges are listed below:

"a. You failed to transfer telephone calls to Mr. Allen, your employer when his child's mother called
b. You fail to transfer calls to Mr. Allen whenever females to whom you did not know requested to speak with him.
c. You failed to advise Mr. Allen of the above mentioned above (sic) calls when you refused to transfer them.





- d. *You went outside your job description and questioned female callers to the office, who asked to speak to him.*
- e. *You questioned female visitors to the office in Mr. Allen's absence.*
- f. *Despite Mr. Allen's instruction, you refused to sign salary cheques each month for a female member of staff whose service you determined must be terminated.*
- g. *You refused to deliver said cheque to the employee once Mr. Allen signed the cheque himself.*
- h. *You had a poor interpersonal relationship with each and every female staff.*
- i. *You constantly expressed a desire to leave the company in the presence of the staff.*
- j. *You handed Mr. Allen, your employer, documents with a "post it" note attached where you threatened him with the words "I can make life very uncomfortable".*
- k. *You have breached the trust and confidence required by your employer."*

20. A letter to Ms. Donaldson dated January 14, 2015 (which both parties agreed was an error, and should correctly be January 14, 2016), under the caption: 'Disciplinary Hearing' was exhibited. The letter from Henlin Gibson Henlin, attorneys-at-law, representing Llewelyn Allen & Associates, was an invitation to Ms. Donaldson to attend a hearing at the Dispute Resolution Foundation, scheduled for 19th February 2016 regarding "*allegations of misconduct during the course of your [her] employment at Llewelyn Allen & Associates...*", which led to her suspension on the 16th June, 2014.
21. Mr. Allen referenced the letter dated February 8, 2017, sent by Paul Hines, chairman of the disciplinary panel, to Mrs. Georgia Gibson Henlin, the Company's attorney-at-law, advising that four (4) witnesses were called, "*along with both Mr. Llewelyn Allen and Ms. Ruthlyn Donaldson [who] gave their statements and were cross-examined.*" The letter further stated that the panel "*heard all the statements, read all the written witness statements and the summaries submitted on behalf of Llewelyn & Associates (sic) and Ms Donaldson by their respective Attorneys along with the facts and evidence....*", and ruled that the charges against Ms. Donaldson was made out and that she should be dismissed in accordance with the Employment Termination & Redundancy Payment Act.
22. Mr. Allen noted that during the period of Ms. Donaldson's suspension, a monetary settlement was offered to her which was not accepted. He said that at no time during the suspension was there any indication from her that she wanted to return, and he did not signal any interest in having her return.

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23. Under cross-examination, Mr. Allen admitted that at no time did he write to Ms. Donaldson regarding disciplinary matters, and that the letter of suspension was the first such occasion. He only spoke to her the first time she granted herself a "hefty increase" but did not reverse the unauthorised payment.

24. He acknowledged that no objection was raised by Ms. Donaldson's attorney about the composition of the panel, and that the letter of termination did not indicate to Ms. Donaldson that she had a right of appeal.

25. Mr. Leon Woon Chin was the Company's second witness. He was employed to Llewelyn Allen & Associates for 29 years and is currently self-employed. He said he suspected that Mr. Allen and Ms. Donaldson had a romantic relationship, and he believed she took advantage of it and "did basically what she wanted to do at the Company."

26. Mr. Woon Chin said Ms. Donaldson was jealous of any female employee at the Company and "gave them a hard time." In his testimony, Mr. Woon Chin stated that Ms. Andrea Williamson left the Company because of problems with Ms. Donaldson, and her continued questioning as to why she (Ms. Williamson) was getting so much money. There was also constant quarrelling between Ms. Donaldson and Ms. Sophia Johnson, Mr. Allen's secretary, who, after leaving the employ of Llewelyn Allen & Associates wanted to return and that Ms. Julia Chin, a draughtsman at the Company was told aloud in the office by Ms. Donaldson, that "she is a lesbian."

27. Ms. Salina Solomon, a land surveyor at Llewelyn Allen & Associates, who has been employed full time since 2014, also gave testimony and spoke of the uneasy relationship that existed between her and Ms. Donaldson.

28. The fourth witness for the Company, Mrs. Sophia Johnson-Bailey was formerly employed to Llewelyn Allen & Associates as Mr. Allen's secretary. She declared that Ms. Donaldson and herself had a good relationship in the early years. In later years, however, Mrs. Johnson-Bailey said that Ms. Donaldson became "manipulative and disrespectful". She said she overheard Mr. Allen and Ms. Donaldson having discussions about finances; that Ms. Donaldson behaved as if she owned the Company, and that the female members of staff did not relate well to Ms. Donaldson.



THE AGGRIEVED WORKER'S CASE

29. Mr. Kemar Robinson, counsel for the aggrieved, in his opening submission said that all the Tribunal had to determine is whether or not the rules of natural justice were followed when Ms. Donaldson was terminated. He reminded the Tribunal that when she was suspended in 2014 it was not a disciplinary action.
30. In 2015, Ms. Donaldson sought clarification on her status as an employee. He questioned whether a disciplinary hearing should be held when she was not suspended for disciplinary reasons, and that her termination must be judged on whether the law and code were followed in arriving at a decision. Counsel concluded that, in his opinion, Ms. Donaldson's termination cannot stand up to the requirements in law.
31. Ms. Donaldson, during examination-in-chief, said she was currently unemployed, and was last actively employed in 2014. She said that the relationship between herself and Mr. Allen was good over the years but began to deteriorate in 2013 when she broke off the intimate relationship with him. His behaviour towards her changed.
32. As Office Manager, Ms. Donaldson said she was responsible for the day-to-day operations of the office, which included overseeing aspects of Human Resources, helping with bids and quotations and overseeing the work of the staff. She was also responsible for the disbursement of cheques and statutory deductions. She signed cheques between 2002 and 2011.
33. She said she was authorised by Mr. Allen to use Company cheques to pay her personal bills. She requested a pay increase in 2002 from Mr. Allen who suggested that she compile her utility bill which he would pay instead of granting her a wage increase.
34. Ms. Donaldson said she never received a written warning, nor was she disciplined before her suspension in 2014. She testified that she worked long hours, including on weekends. In addition to her basic salary of \$287,000.00 per month, she received \$50,000.00 per month, which was initially for housing but subsequently became motor vehicle allowance. In addition, she received numerous other benefits along with the utility bill payments, including international health insurance, local health insurance, life insurance, pension, motor vehicle insurance and motor vehicle servicing.



35. She said she had a good relationship with the staff and at no time was she verbally warned about any issue by Mr. Allen, nor was there ever a clash between them during her employment.
36. Ms. Donaldson told the Tribunal that she was represented at the disciplinary hearing and that there were correspondences she wanted to access in her defence at the hearing, but never brought this to the attention of her representative.

ISSUES

37. The Tribunal had to wade through a labyrinth of issues and considerations of a personal nature that entangled the employment relationship and ultimately led to the dispute at hand. From the arguments presented by both sides, the Tribunal was able to extract the following matters for consideration:
- a. Did Mr. Allen have probable cause to suspend Ms. Donaldson in light of the fact that her suspension was not one of discipline?
 - b. Were the disciplinary charges against Ms. Donaldson justified under the circumstances?
 - c. Was the lengthy period between Ms. Donaldson's suspension and termination unreasonable, sufficient to be materially prejudicial to her case?
 - d. Was the procedure adopted by the Company, in terminating Ms. Donaldson's employment, in breach of the principles of natural justice and therefore at variance with the relevant provisions of the Labour Relations Code?

EVIDENCE

38. In his suspension letter to Ms. Donaldson, Mr. Allen stated: "... *I am at the stage where I can no longer maintain confidence in your faithfulness to the office or to the business conducted therein.*"



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39. The reason for Mr. Allen's 'loss of confidence' was clearly set out in the opening paragraph of his letter, and included issues of breach of confidentiality, threat to an employee and the poor working relationship, particularly between himself and Ms. Donaldson.

40. Ms. Donaldson made a number of points in her refutation against the allegations. These are summarized as follows:

- a. She indicated that not only is she unclear, but unaware of any declaration of intent made by her that would amount to a breach of confidentiality.
- b. She has never threatened to use violence against any member of staff during her twenty-four (24) years of employment at Llewelyn Allen & Associates.
- c. In her nineteen (19) years in a managerial position, she has always ***"adhered to appropriate work ethics and there has never been a warning or complaint against me for misconduct or unacceptable behavior in the workplace."***
- d. She spoke of her twenty-four years of loyalty to the Company, contributing to its success, and ***"the approximately twenty-two years of which I have committed myself to a relationship with you."***
- e. She indicated in her letter that over the years Mr. Allen has threatened to terminate her employment and has ***"consistently disrespected"*** her in the presence of staff because of what she claims to be ***"personal decisions"*** she has made.



41. The letter made reference to attachments including witness statements on behalf of the Company and requested Ms. Donaldson to provide, no later than the 8th February, 2016, the names of ***"any relevant witnesses"*** and ***"any further documents"*** she may wish to be considered at the hearing.

42. A hearing was convened by external parties at which Ms Donaldson was represented by the law firm, Knight, Junor & Samuels and was given the opportunity to state her case and cross-examine the Company's witnesses.

ANALYSIS AND FINDINGS

43. The intimate relationship between Mr. Allen and Ms. Donaldson undoubtedly invited a host of issues – perceived or actual conflict of interest, abuses of authority, biased treatment and favouritism – which potentially interfered with the integrity of professional roles and threatened to damage the working relationship at the Company.
44. Having regard to its peculiar nature, the Tribunal believes it is important at the outset to remind itself that pursuant to the statute, as expressly interpreted by the common law, its role is to settle disputes in the industrial context, as well as to take into account “a fully objective” view of all the circumstances of the case. As Brooks, JA. opined in the matter of The Industrial Disputes Tribunal v. The University of Technology:

“... the I.D.T. is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of the dismissal, even if those matters were not considered by, or even known to the employer at that time.” (Tribunal’s emphasis)

45. A second important consideration, derived from the common law, which we feel compelled to highlight, is the need to consider the conduct of both Mr. Allen and Ms. Donaldson. To view -



“whether there was any action or inaction on the part of the employee (Ms Donaldson) which warranted dismissal... and if so whether the proper procedure was followed in dismissing him [her] or whether it was handled in such a way as to attract criticism of unfairness.”

[Alcoa Minerals of Jamaica v The IDT and UTASP, (2012 HCV02454)]

46. In so doing, the focus, therefore, is on the consequences of their conduct, insofar as it relates to the issues surrounding the termination, and not the causes which may have given rise to it.

Did Mr. Allen have probable cause to suspend Ms. Donaldson in light of the fact that her suspension was not one of discipline?

47. Mr. Allen's letter of suspension to Ms. Donaldson, sets out the three (3) reasons mentioned above for her suspension, and is worth quoting in full:



"I refer firstly, to your recent declaration of intent to take certain steps which would amount to a breach of confidentiality in your employment especially as it relates to your appointed responsibilities; secondly, to your threat to use violence against a member of staff who has in no way been offensive to you and thirdly, to the unbearable working relationship which now exists between us due to your continued unexplained and erratic behaviour in the office, all of which potentially jeopardizes the business of this office."

48. The letter further stated that -

"I currently have plans to be away from the office for a period in excess of three weeks, during which time I must ensure that the office continues to function normally. Accordingly, it would be imprudent to maintain your presence in office during my absence as this would be inimical to the best interest of all concerned. I am therefore temporarily suspending your services effective June 16, 2014 when the period of your leave expires."

49. He goes on to state in the following paragraph that her *"suspension does not constitute a disciplinary sanction and as such, will be kept under review and will not be extended for any period longer than necessary..."*; and that she will *"continue to be employed throughout your [her] suspension but will not be required to carry out any of your [her] regular day-to-day duties. You will, however, continue to receive your salary and contractual benefits in the normal manner."*
50. The letter of suspension did indicate that Ms. Donaldson was being 'temporarily suspended', that it would be *"kept under review"* and would not be *"extended for any period longer than necessary."* The intention, clearly, was not to make the suspension indefinite.
51. An employment contract whether oral or in writing, does contain an implied term that the employer and employee ought not to conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence. This is particularly so, in the case of the employee, if he or she occupies a position of trust in the organisation.
52. The Tribunal accepts the evidence of Mr. Woon Chin and Mrs. Johnson-Bailey that Ms. Donaldson abused her position and committed acts that would have resulted in the

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forfeiture of trust. Issues surrounding Mr. Allen and Ms. Donaldson's intimacy certainly played itself out, which led to an uncomfortable working relationship for all concerned.

53. Mr. Allen's letter of suspension did indicate a discomfort with having Ms. Donaldson attend the office during his absence, the probable cause of what amounts to her 'administrative suspension.' He argued that based on the reasons outlined in the opening paragraph of his suspension letter (previously referred to) *"it would be imprudent"* to maintain her presence in office during his absence and would be *"inimical to the best interest of all concerned."*
54. From the facts adduced, the Tribunal reasoned that Ms. Donaldson's continued presence at the office posed a potential embarrassment and an inconvenience for Mr. Allen and would be detrimental to the discipline and good working relationship at the Company. In all the circumstances, the Tribunal therefore concludes that reasonable grounds existed for the loss of confidence in Ms. Donaldson and would have justified her suspension.

Were the disciplinary charges against Ms. Donaldson justified?

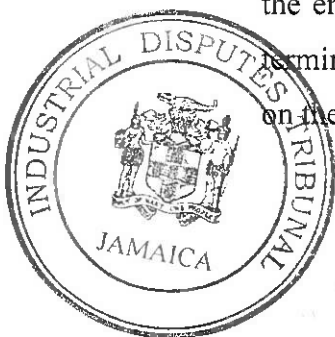
55. The circumstance under which this arise is rooted in the fact that Ms. Donaldson was never suspended for disciplinary cause and continued to receive her full pay and other benefits as an employee. The suspension was administrative. Counsel for the aggrieved argued in his closing submission that Ms. Donaldson was unaware of the specific allegations and that her suspension was indefinite. We respectfully disagree. Ms. Donaldson was fully aware of the allegations, to which she responded at length. Her denial or disagreement does not mean it was not stated; and her claim to be "unaware" and her expression of "disbelief" regarding the allegations, were unconvincing to the Tribunal.
56. There are no statutory guidelines to help us to address the issue of whether a discipline hearing, flowing from an 'administrative suspension', and not a 'disciplinary suspension', should be rendered nugatory. Neither is the statute helpful as regards the treatment of 'loss of confidence' and whether it amounts to gross misconduct or a reasonable cause for dismissal.



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57. However, the *dicta* of Pusey, J in the case of **Branch Development Limited v. IDT [2019] JMSC Civ. 226** clearly states that on the matter of administrative suspension, the Tribunal has the jurisdiction to hear such matters. She stated that the Tribunal has the right --

“...to examine the facts in this matter to ascertain whether this continued suspension is fair, irrespective of it being an administrative suspension or otherwise.”

58. The administrative suspension of Ms Donaldson does not preclude the Tribunal from enquiring into the facts on their merits and determining in the circumstances whether they were grounds for a disciplinary hearing leading to termination. Mr. Allen’s letter of suspension referred to the matter as being “under review.” What ought to be inferred from the phrase “*kept under review?*” Is it the same as ‘conducting an investigation?’ According to Selwyn’s Law of Employment, Eleventh Edition, (2000) “*it is not the actual words which are used which are significant, but the intention behind them, and this must be ascertained from all the surrounding circumstances and the accompanying words...*” [p. 332].
59. The intention seemed to have been made clear in the letter of January 14, 2016 (inadvertently stated as ‘2015’), inviting Ms. Donaldson to a disciplinary hearing. The letter stated that “*during the course of your suspension an investigation was carried out as a consequence of which the following charges are necessary in respect of which a hearing will be conducted.*” [Tribunal’s emphasis]
60. In reviewing the list of eleven (11) charges set out in the letter of January 14, 2015 (2016), and examining all the background circumstances, the Tribunal concludes that the principal charge was the alleged breach of ‘trust and confidence’. The other allegations of misconduct, seemingly stemming from Ms. Donaldson’s traits of jealousy, would not, in the view of the Tribunal, amount to a dismissible offence, in the absence of prior warnings or suspension. The Tribunal was left with insufficient evidence to conclude that there were.
61. Ms. Donaldson certainly held a position of trust and confidence, a position which entitles the employer, once it is forfeited, to regard it as a ‘substantial reason’ and grounds for termination. Loss of confidence, as a just cause for termination, must therefore be based on the position of responsibility, trust and confidence which the employee holds.



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62. We have summarised some general principles from the literature on the subject of 'the doctrine of loss of confidence'; and foremost among them is that the grounds of loss of confidence for dismissal must be preceded by a disciplinary hearing; a position we are obliged to accept without fail. In our analysis of the facts, we believe it reasonable to bear in mind those principles which postulate the need to ensure that 'loss of confidence': (i) should not be used as a subterfuge for causes which are improper, illegal or unjustified; (ii) it must not be arbitrarily asserted in the face of overwhelming evidence to the contrary; and (iii) it must be genuine, not a mere afterthought to justify an earlier action taken in bad faith.
63. We heard evidence from Mr. Allen and other witnesses, of Ms. Donaldson taking advantage of the opportunities of her position to enrich herself through the unauthorised use of Company funds for her personal benefit. Mr. Allen, in his testimony, said he did not pursue any form of disciplinary action regarding these alleged breaches, and Ms. Donaldson has strongly denied them, claiming she had the prior consent of Mr. Allen.
64. The benefits which Ms. Donaldson enjoyed from the intermingling of the personal and the professional, and her willingness to work beyond the call of duty is one thing. The Tribunal must, however, keep clear the lines of demarcation and bear in mind that Ms. Donaldson was not bound positively to do more for her employer than her contract requires, but cannot wilfully obstruct the employer in the course of her employment, which, from the evidence, and a balance of probabilities, we accept may have occurred as a result of the break-down in the personal relationship.
65. The Tribunal accepts that Ms. Donaldson's conduct was in the end insubordinate to such a degree as to be incompatible with the continuation of the relation of employer and employee. The breach of trust stemmed from Mr. Allen's belief that he could no longer repose confidence in Ms Donaldson as the office manager, based on her conduct, influenced, no doubt, by the blurring of the lines between 'intimacy' and 'contractual responsibility'. It ultimately impacted the organisation negatively providing, on a balance of probabilities, sufficient grounds for disciplinary charges to be laid against her.



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66. Although issues of alleged misuse of funds surfaced during the hearings, and at least one example was highlighted by Mr. Allen in his testimony regarding the unauthorised wage increase, this was not pursued as a disciplinary measure by him, we content, because of the nature of the relationship with Ms Donaldson. We accept counsel's plea that the effluxion of time would not give rise for those allegations to be given due consideration as an 'immediate cause' for a disciplinary hearing. We therefore give no weight to this evidence. The reliance on 'loss of confidence' as grounds for dismissal, however, may very well have been construed as a 'termination simpliciter' in the circumstance, even though such grounds for dismissal, it is said, normally imputes a 'stigmatic character.'¹.

Was the lengthy period between Ms. Donaldson's suspension and termination unreasonable, sufficient to be materially prejudicial to her?

67. As a general rule a disciplinary enquiry must be held within a reasonable time from the date at which the alleged misconduct occurred, or from the date the employer first became aware of it. Mr. Allen in his suspension letter of May 22, 2014 spoke of "recent" happenings which triggered Ms. Donaldson's suspension. The investigation and alleged charges should have been completed in a reasonable time following the suspension. The length of time between the suspension and the laying of the charge was 20 months – from May 2014 to January 2016 - unusually long and, frankly, cannot be explained by the length of the investigation.
68. The Labour Relations Code at paragraph 22, notes that disciplinary procedures must be "*simple and rapid in operation,*" for any unreasonable delay could conceivably be prejudicial to the employee. While we note that during the period of Ms. Donaldson's suspension she was not deprived of any employment benefits to which she was entitled, the notion of work as a "social right" suggests that a person deprived of performing work - even while on suspension and is being paid – could lead to them suffering a loss of identity, self-worth as well as an effect on his or her emotional well-being.

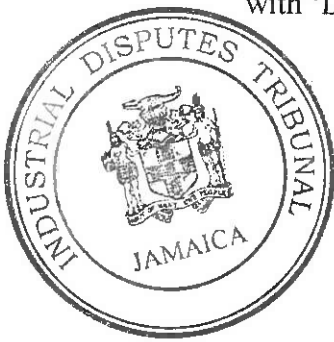
¹ See *Amarjit Singh v. Punjab National Bank and Others* [(1986) 2 LLJ 354].



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69. While the delay itself does not constitute unfairness, the length of the delay must, nevertheless, be considered in context. In that regard, the Tribunal is mindful of the attempts made after Ms. Donaldson's suspension to arrive at a negotiated settlement. This was not successful. In a review therefore of all the circumstances, we are of the opinion that the 20 months' delay between the suspension and the laying of the charges (which included a period of local level negotiation), however unsettling, did not materially prejudice Ms. Donaldson's right to a fair hearing.

Did the process for her termination meet the statutory requirements as set out in the Labour Relations Code?

70. In an effort to determine the fairness of the dismissal, the circumstances of the case must be subject to the provisions 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."

70. The letter of January 14, 2015 (corrected to 2016), initiating the disciplinary hearing, provided a summary of the charges and a list of eleven (11) specific alleged breaches by Ms. Donaldson. It indicated the enclosure of the relevant witness statements the Company intended to rely on, along with identifying the four (4) witnesses in support of its case. The letter gave Ms. Donaldson approximately three (3) weeks to provide the names of her witnesses and copies of documents she would wish to be considered at the hearing. It further indicated that –

"...If you do not have those documents, please provide details so that they can be obtained."

71. The letter further advised that Ms. Donaldson was entitled to be accompanied by her counsel. In fact, on February 19, 2016, Mr. Paul Hines, the chairman of the disciplinary panel wrote to Ms. Donaldson's attorney, Mr. Leon Stewart of Knight, Junor & Samuels,

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advising of a new date of Monday, March 21, 2016, for the commencement of the hearing; a change in the composition of the panel; and seeking ***“witness statements for Miss Donaldson, as well as a list of her witness(es) to attend on her behalf.”***

72. The evidence adduced bears out that at all material times Ms Donaldson was represented at the hearing and was given an opportunity to state her case and cross-examine the witnesses of the Company. The Tribunal is therefore of the view that paragraphs 22 (b) and (c) of the Code were met.
73. The letter terminating Ms. Donaldson’s service was written on February 27, 2017 with the effective date of her termination being February 28, 2017. The letter did not provide for any right of appeal as stated in paragraph 22 (d). The general principles regarding fairness turn not only upon the wording of the statute, but on the circumstances. A careful read of this provision indicates that the right to appeal exist ***“... wherever practicable to a level of management not previously involved.”***
74. While an appeal is normally part of a fair procedure, but not invariably so, the feasibility of relying on it even in circumstances where it is not practicable to do so, must be given due consideration by the Tribunal to include equity and the substantial merits. Mr. Allen is the managing director of the Company and there was no evidence to support a claim that a hierarchical structure of management above the position of managing director exists, which would invariably be the board of directors. For all intent and purposes, the internal procedures at Llewelyn Allen & Associates, at the level of the managing director, came to an end.
75. Our reading of the Code suggests that once the internal procedures for hearing a grievance have been exhausted, the ***“recourse to the Ministry of Labour and Social Security conciliation services”*** remains an option for the aggrieved worker. The employer is under no obligation to advise the dismissed worker as such. The Tribunal, therefore, accepts that the inclusion of the right of appeal in Ms. Donaldson’s letter of termination, when it was not practicable to do so, would be purposeless. Moreover, no injustice had in the end been perpetrated against Ms Donaldson, as upon receipt of her termination letter she indicated that she would be seeking further legal advice.



76. The letter of termination, we admit, did not specify the reasons for the decision, a point emphasised by counsel for the aggrieved. Section 22 of the Code, however, makes no reference to it as a standard the Tribunal ought to apply in determining whether the aggrieved worker's right to natural justice had been affected. As such, even in our inexorable desire for fairness, it simply cannot be imputed into the Code, nor in the alternative, can its exclusion from a letter of termination rise *pari-passu* to the conditions expressly set out in section 22.
77. What is more, taking all the circumstances into account, we are confident that our position holds true in light of the fact that: (i) the charges were clearly set out in the letter to Ms Donaldson of January 14, 2016; (ii) Mr Paul Hines' letter to Mrs. Georgia Gibson Henlin, QC, dated February 8, 2017, did state that – *"Having heard all the statements, read all the written witness statements and the summaries submitted on behalf of Llewellyn & Associates and Ms. Donaldson by their respective Attorneys... the charges against Ms. Ruthlyn Donaldson are made out,"* and (iii) Mr. Allen's letter of termination to Ms. Donaldson indicating that she *"would have been advised by your legal representative that the Panel has ruled in favour of the termination of your services..."*.
78. Ms. Donaldson's email response of March 13, 2017, to the letter of termination indicated that she would be seeking further legal advice on the matter. The issue of the absence of the reasons for her termination in her letter did not surface until the closing submission of counsel. For good order, the letter ought to have included the charges which have been made out, a flaw however, which is not, in the minds of the Tribunal, fatal.
79. We make one final point in respect to Ms Donaldson's dismissal. We note that the dismissal panel in its ruling, agreed that Ms Donaldson should be terminated in accordance with the Employment Termination & Redundancy Payment Act. In the letter of termination from Mr. Allen he said the based on his advice, **"that pay in lieu of notice is not required..."** We disagree, and support our contention with reference to section 3(5)(a) of that Act. The section states as follows:



"if 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 employee has a right to terminate the contract without notice, he shall not thereafter terminate the contract without notice by reason of that conduct."

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80. Whatever generous consideration Mr Allen may have given is outside of our consideration. We believe that circumstances dictate that Ms. Donaldson should be awarded a sum equivalent to payment in lieu of notice as set out in section 3 of the Employment (Termination and Redundancy Payments) Act.
81. In summarising the issues, we conclude as follows:
- a. That from the evidence, and given the nature of the case, Mr. Allen actually believed that Ms. Donaldson was guilty of misconduct;
 - b. He had reasonable grounds on which to base his belief that Ms Donaldson's conduct constituted a breach of trust;
 - c. The letter inviting Ms Donaldson to a hearing alluded to the continued investigation which took place during her administrative suspension. On the face of it we accept that investigation was conducted even although we lament the inordinate length of time, notwithstanding the period of attempted negotiated settlement, to bring the charges against her.
82. The Tribunal found that 'on all fours', the principles of natural justice were observed and Ms Donaldson was provided in writing with the details of the allegations against her; was advised of her right to be represented by counsel; and had the opportunity to question the witnesses of the Company.

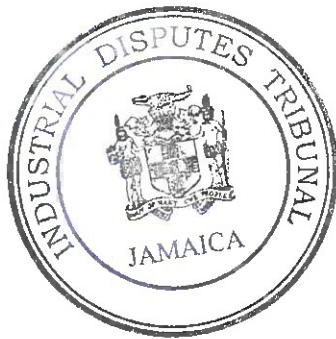


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MINORITY DECISION

83. (a) The Tribunal finds that the dismissal of Ms. Ruthlyn Donaldson was justifiable.
- (b) We do not believe that this is a case which warrants summary dismissal and accordingly order that Ms. Donaldson be paid an amount of Eight Hundred Thousand Dollars (\$800,000.) as payment in lieu of notice.
84. Member appointed under Section 8 (2) (c) (ii) strongly disagrees with the recommendation that the Tribunal, taking into account the peculiar circumstances of the case, and having regard to Ms. Donaldson's age, recommend for serious consideration by the management to consider a payment to Ms. Donaldson of the sum of Four Million Six Hundred Thousand Dollars (\$4,600,000.00) as an ex gratia payment.

DATED THIS 15 DAY OF JULY 2022



Mrs. Jacqueline Irons, JP

Member

Witness:

Mr. Mario Ling
Acting Secretary of the Division