

DETERMINATION & ORDER

**THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021
BEFORE THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL.**

TRIBUNAL HEARING

Members of Tribunal: Edward Ball Jr, JP, LLB, FCMI Chairman
John W. Payne, Deputy Chair
Jocene Wade, JP, FCMI

Directions Hearing: March 15, 2024

Hearing Dates: September 23 – 24, 2024

Hearing Places: Department of Labour
23 Parliament Street
Hamilton HM 12.

Complainant Representative: Marc Daniels, Counsel
MarcGeoffery
Barristers & Attorneys
Carmel Building
61 King Street
Hamilton HM 19
2nd Chair Reverend Nicholas Tweed

HEARING

IN THE MATTER OF A DISPUTE UNDER THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 2021 BEFORE THE EMPLOYMENT &
LABOUR RELATIONS TRIBUNAL.

Pursuant to Sections 67 & 80 of the Trade Union and Labour Relations
(Consolidation) Act 2021,

BETWEEN

CHRIS FURBERT JR

Complainant

-and -

THE r

-v-

Respondent

Respondent Representative: Dante Williams Counsel
Marchall & Diel & Myers
31 Reid Street
Hamilton 12

STATUTORY AUTHORITY TO HEAR THE MATTER

1. The Tribunal Hearing was convened on September 23, 2024. The Chairman confirmed the points to be considered by the Tribunal. The Chairman stated that the Employment and Labour Relations Tribunal Hearing was to be conducted under **section 44B(2), section 44C the General Powers, section 44D Power to Obtain Information** and that the Tribunal shall regulate its proceedings as it sees fit under **Schedule 2 (20) of the Employment Act 2000 (“the Act”)**.
2. The Chairman made opening remarks, and the Parties elected not to engage in meaningful dialogue to resolve their dispute but to have the Tribunal hear the matter.

PRELIMINARY MATTERS BEFORE THE TRIBUNAL

3. As this matter was referred under **Schedule 3 Essential Services subsection 6 of the TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021 TULRC (“Labour Code) 2021**, the Tribunal was mindful of the interest in a speedy resolution to this 4.5-year dispute.
4. The Tribunal referred the Parties to **section 44E Power to exclude the Pubic** that provides, unless both parties consent, to exclude the public or any press representative where it considers it necessary or desirable to protect the privacy of parties to a Hearing. The parties did not consent to exclude the press or the public.
5. The Tribunal informed the Parties that there would be no tape recording taken by a third party attending the public proceedings without the permission of the Tribunal.

6. The Parties were informed that the Tribunal possessed the authority to summon additional documents and persons following **section 44D Power to Obtain Information** of the **Act**.
7. **Section 2(3) of the Act** states *where the contract of employment, agreement and custom and practice is less favourable or silent , then the provisions of the Act will prevail.*
8. The Complainant's Counsel raised written objections to the Tribunal concerning the Defendant's Counsel September 18, 2024, letter related to the Union's Witness Statement of
9. The Complainant's lawyer also appealed to the Tribunal that the Defence lawyer, upon submitting the Defendant's Closing arguments on October 21, 2024, was then instructed by his client to submit an additional document upon reading the Complainant's lawyer's October 18, 2024, Closing Arguments.
10. Before the close of the September 24, 2024 Hearing, the Tribunal instructed both Counsels, as an undertaking, to agree on a date and time to submit their closing arguments.
11. On October 28, 2024, the Tribunal wrote to both Counsels stating that the Defendant's additional document post the Defendant's October 21, 2024, Closing Submission was not accepted, which was contrary to the Tribunal's September 24, 2024, undertaking instruction.

Background

Historical Industrial Relationship between the Bermuda Industrial Union ('BIU') and _____)

12. When the _____ (_____) of the Bermuda Industrial Union (**'the Union'**) and the employer, _____, mutually signed the Collective Bargaining Agreement ("CBA") in good faith, the parties pledged to abide by the terms of the CBA.

13. The Labour - Management partnership and the industrial relationship climate were generally respectable, with the Parties resolving unionised matters through the CBA's Grievance Steps and Disciplinary Procedure.
14. The matter before the Tribunal arose from the Bermuda Court of Appeal's decision to uphold the Supreme Court judgment that the dispute was lawfully referred to the Employment and Labour Relations Tribunal by the Minister of Economy and Labour.

The Origins of the 2019 Dispute

15. The labour dispute commenced via an off-site altercation between the Complainant and another worker, ("JB"), at a boxing event, and the relevant events flowed from this assault into the
16. The following events between the , the Union and . flowed from this altercation, resulting in the Complainant's dismissal by the Defendant 8 months after that June 29, 2019 skirmish.
17. The Complainant's and the Defendant's Written Submissions, Statement of Facts ("SoF') and Amended Statement of Facts, Sworn Witnesses' Statements, Objection Letters and Written Closing Submissions form the basis of the Tribunal's deliberations on the Award.

SUMMARY OF SUBMISSIONS

The Collective Bargaining agreement

18. The Complainant's terms and conditions were governed by the Collective Bargaining Agreement ("CBA") between Limited and the Division of the Union. 2015 – 2018 and 2019 – 2021.
19. Further, in the context of collective bargaining, the Union had the right to initiate labour disputes and represent its members in grievances as contained in the CBA, which continued in effect until superseded by a new Agreement.

Complainant's Claim of wrongful termination on February 6, 2020.

20. The Complainant, who was examined and cross-examined under oath, contended that:

1. By his admission, the Defendant's conduct on February 6, 2020, was unreasonable and aggressive towards him.
2. The grounds for dismissal of the Complainant by the CEO were unfounded and did not rise to serious misconduct.
3. The Complainant stated he was not insubordinate to the Defendant or any managers.
4. Other workers who displayed incidents of serious misconduct as threats to other staff members were not terminated.
5. That the Defendant was not willing to agree to a Step 3 Grievance Procedure with the BIU to allow the Union to dispute the wrongful dismissal of the Complainant on the charge of serious misconduct.

Defendant's Arguments on the Termination of the Complainant

21. The Defendant's case was set out in his Defence ("**Defence**"), upon which he was examined and cross-examined under oath.
22. The Defendant was the Chief Executive Officer ("**CEO**") of [redacted] from January 2014 until his resignation on October 31, 2023.
23. On December 10, 2019, a dispute arose between nine members of the Union's [redacted]. The nine Union members downed tools related to work matters and opposed scheduled Overtime for their fellow [redacted] ("**JB**"), who was the party in the assault charge against the Complainant.
24. On December 11, 2019, a Joint Consultation Committee Meeting ("**JCC**") was held with Senior Officers of the Union, the [redacted] and [redacted] managers to discuss the dispute and the requirement for the Complainant and JB to attend the Employee Assistance Programme ("**EAP**") for mediation and counselling concerning the two men's private non-work tussle.
25. The Complainant and JB were issued a 3-day without pay suspension and suspended indefinitely with pay pending the outcome of the Magistrate's court assault charge against the Complainant.
26. The CEO confirmed that the Complainant objected to the EAP mediation process because his Bail condition Court Order prevented him from having physical contact with JB. However, the CEO insisted that the EAP order was firm for both [redacted].

27. On December 12, 2019, the Defendant sent the EAP referral, and an EAP staffer revealed to the CEO that they were unsuccessful in contacting the Complainant that day.
28. On the same date, Defendant sent a letter to the _____ managerial staff announcing the Complainant's and JB's indefinite suspensions with pay and stating that following the _____ Policy, suspended _____, were not allowed on _____ premises except for bona fide managerially approved appointments. The CEO confirmed to the Complainant's Counsel that JB, the Complainant, and the Union were not sent a copy of the December 12, 2019, Suspension Order.

Summary of The Defendant's decision to dismiss the Complainant

29. On February 6, 2020, the _____ Operations Manager, _____, informed the CEO that the Complainant breached a condition of his paid suspension: not to enter the _____ premises. A _____ security officer escorted the Complainant off the _____ and wrote an incident report.
30. Shortly after noon on the same day, the Complainant entered the _____ Managerial offices and met with Payroll/HR Administrator _____. He did not have an arranged appointment with the Payroll/HR Administrator.
31. Once the Defendant saw the Complainant, he approached him and told the Complainant that he had breached the paid suspension order, and ordered him to leave the _____ offices.
32. The CEO explained that the Complainant did not immediately leave the _____ Office but instead headed to Ms. _____ office and sat down.
33. The Defendant repeated his order to the Complainant to leave the _____ Offices. As the Complainant passed the CEO, the Complainant threatened the Defendant, stating, **"I'm going to get you"**.
34. The CEO considered that the Complainant's words were threatening and serious misconduct and that the Complainant was also insubordinate in disregarding the CEO's edict to leave the _____ premises immediately.
35. The CEO testified that the _____ Employee Handbook gave him the right to dismiss the Complainant immediately for serious misconduct.

36. The Defendant also reported the Complainant's threatening words to the Hamilton Police Service and asked if charges could be issued against the Complainant.

CEO meeting with the [redacted] and Union Executive Officers on the Complainant's termination.

37. The CEO affirmed that on February 12, 2020, at a Special JCC meeting with [redacted] and Senior Union officers, the Union President shared with the CEO that until the matter of the Police investigation of the Defendant's complaint was completed, the CBA Grievance Process would be suspended on the Complainant's termination.

38. Meanwhile, Counsel for the Complainant challenged the Defendant, who said he intended to dismiss it because of the CEO's biasness against the Complainant historically was because of his disruptive attitude toward authority and work processes on the [redacted].

39. However, the CEO emphasised that historically, based on the Complainant's employment record, he was issued formal written warnings and had been suspended twice, with the condition that he was prohibited from entering the [redacted] premises unless he was granted an appointment.

40. The CEO was adamant that the Complainant's assertion that his historical work-related disciplinary charges, the failure of the Complainant to attend the EAP counselling, nor the Complainant breaching the paid suspension order not to enter the [redacted] premises did not contribute to the Complainant's dismissal.

41. The Complainant's threatening words towards the CEO and his insubordination to leave the [redacted] office when asked by the Defendant on February 6, 2020, formed the basis for the Complainant's dismissal for serious misconduct.

The Employee's Case

42. The Complainant's case was set out in his Statement of Facts ("SoF"), upon which he was examined and cross-examined under oath.

43. On January 29, 2014, the Complainant was hired by [redacted] as a [redacted] i.

44. The Employee also offloaded and [redacted] as a Relief [redacted]

45. The Complainant considered himself a good worker despite receiving a verbal and written warning and being suspended without pay for an incident in January 2017 for two days and for a month in March 2018.

The Assault of _____ by the Complainant

46. The two men had previously displayed anti-social behaviours towards each other at work before and after the June 29, 2019 assault.
47. The Complainant stated that JB reported the June 30, 2019 altercation to the Bermuda Police Service. Following JB's formal Police complaint, the Employee's legal counsel wrote to JB insisting that JB desist any continued negative behaviour towards the Complainant.
48. The then _____ President _____, the CEO, and _____ Management Officers met to discuss the Complainant's and JB's antisocial incidents and their general demeanour towards each other.
49. The Complainant averred that on September 17, 2019, at a second Union – _____ meeting was held to discuss the unpalatable work environment that the Complainant endured from JB, even into November 2019. _____ took no action to address the Complainant's grievance against JB.
50. On October 25, 2019, the Complainant pleaded not guilty to the assault charge against JB on June 29, 2019.
51. The Complainant shared that a third meeting was held on November 5, 2019, between the _____ JB and the _____.
52. During that _____ – Union meeting, the Defendant issued a letter to and met with JB but sent the exact correspondence to the Complainant without meeting him.
53. _____ letter stated that the Complainant and Mr. _____ were required to work together, and if they couldn't, they would have to go home.
54. On December 10, 2019, the Complainant shared that while on unpaid leave, the general work environment for the Unionised _____ workers concerning JB's lack of regard for work safety procedures intensified upon learning that JB was scheduled to work Overtime ("OT").

55. Eight workers downed tools and refused to work. The President and Secretary of them, saying they did not support the eight actions. They allowed JB to work his scheduled OT.
56. Later that day, the eight unionised and another Union member downed tools and refused to work. The Complainant was not present and did not participate.
57. On December 11, 2019, the Defendant and the Executive Officers of the BIU met with the Defendant and jointly decided to issue a one-day suspension without pay to the nine unionised, plus a 3-day suspension without pay to JB and the Complainant and agreed that the two men be referred to EAP for counselling.
58. The two would be placed on paid leave after their 3-day suspension without pay and to attend mandatory EAP counselling.
59. Upon examination by the Defendant's counsel, the Complainant said his conduct towards the CEO on February 6, 2020, was unreasonable and aggressive.
60. The Complainant expressed that the CEO was aggressive towards him. The Complainant was firm that the grounds for his dismissal were unfounded and did not rise to serious misconduct.
61. The Complainant declared that he was not insubordinate to the Defendant or any managers in being told to leave the
62. The Complainant emphasised that he was aware that suspended JB attended Christmas December 2019 party and was not ordered by the CEO to leave, especially after Brother I raised JB's presence to the Defendant.
63. The Complainant emphasised that he knew of other who displayed incidents of serious misconduct as threats to other staff members were not terminated. The precedent had been set, and he saw no reason why he could not be reinstated.
64. The Defendant's lawyer questioned the validity of the Complainant's claim to be reinstated and the list of headings that the Complainant sought if the Tribunal ruled in his favour.
65. The Complainant stated that the Relief he sought reflected the hardship he sustained from legal costs for the Supreme and Appeals Courts against and the other damages that flowed from his dismissal.

- (a) Reinstatement of employment with no loss of seniority and benefits per Article 29 of the CBA;
- (b) Four years compensation for lost wages totaling \$461, 914.55 BM dollars;
- (c) Fifty-nine days (59) of Overtime from December 19, 219 to February 2021;
- (d) Loss of pension;
- (e) loss of 7 years BFM Life insurance;
- (f) Loss of health insurance;
- (g) Compensation for private counselling;
- (h) Compensation for financial loss;
- (i) Reimbursement of legal fees.

- 66. The Defence Counsel asked the Complainant if he sought alternative work after his dismissal.
- 67. The Complainant stated he attended to his private business, which did not bring in a similar income to his job. Hence, he incurred debt and had to borrow money, and the list for Relief reflected his losses.

The Tribunal's Observations on the negative impact of the Complainant's and JB's Skirmish on the

- 68. The Tribunal noted that Employee Handbook contained no statement on unacceptable misconduct outside of workplace and the impact, effect, and consequences of unacceptable misconduct by a negatively influencing the day-to-day operations.
- 69. *The Tribunal was not presented with any documentation as to why the Complainant and JB received a 3-day suspension without pay if the Union and acknowledged that the Complainant was not involved in the unauthorized work stoppage or evidence of any incidents against the Complainant and JB's that resulted in disruption of the operation of the*
- 70. The illegal work stoppage was of their own making against the wishes of the Union.

71. Once the Union and the Defendant agreed to the 3-day suspension for the Complainant and JB, the Defendant allowed the non-work assault matter to affect some attitudes and day-to-day operations.
72. The Defendant was duty bound to address in writing the Company's expectations of the Complainant's and JB's anti-social behaviours, personal attitudes and mannerisms towards each other on the job by issuing at least a written warning.

The Mandatory EAP Referral of JB and the Complainant

73. The Defendant's Counsel questioned why the Complainant refused to participate in the mandatory EAP counselling with JB.
74. The Complainant asserted that the scheduled December 19, 2019, mandatory EAP meeting for JB and him, as proposed by the Defendant, breached the Magistrates Court directive as a condition of the bail not to have interactions with JB.
75. The Union stressed that the joint EAP referral meeting between the two and the EAP counsellor was unreasonable and untenable.
76. The Complainant stated that the CEO was stern that the EAP referral was a mandatory condition for JB and the Complainant (*"that is the agreement"*) for the two men's continued employment.
77. The Complainant attended one EAP referral and a private counselling session. However, on December 19, 2019, EAP informed the Complainant that he had to participate in a joint "face-to-face" meeting with JB. The EAP counsellor was not focused on the bail condition of the court order against the Complainant, who could not interact with JB.
78. The Complainant averred that EAP sent two unsigned letters from the Defendant on the EAP attendance record of JB and himself.
79. The Complainant also testified that the Defendant provided boxing tickets to ;, including JB to attend a boxing event at Southampton Princess. No reason was shared as to why the Defendant's action mocked the authority of the court to condition a bail order and policy that no suspended employee attend and functions.
80. On December 24, 2019, Defendant shared the contents of the EAP letter with the Union President at a Special JCC meeting. The Defendant insisted that the

Complainant was "*resisting the process of working together*", while the Union remained firm that the Court conditional bail order mandated no contact between JB and himself.

81. The Complainant also reported that Defendant *threatened to terminate* him for refusing to participate with JB in the EAP counselling sessions jointly.
82. On January 13, 2020, the BIU Executive, the Officers and Mr. attended the offices of EAP.
83. The EAP Counsellor *met privately with the Defendant* and not the Union and without soliciting the views of the Union on the effect of the bail conditional order preventing the Complainant's joint counselling with JB.
84. The Defendant's Counsel reminded the Complainant that he was defiant on the attendance to EAP and that the Defendant was not swayed by the Complainant's verbal account from the Senior Magistrate and the Court's edict attached to the conditional bail order that remained enforceable.
85. The Complainant reemphasized that he could not participate in any joint EAP counselling sessions unless JB or consented to vary the Court's bail conditional order to allow EAP joint counselling meetings for the two

The Tribunal's Observation of the Defendant's Stern EAP Joint Referral Mandate.

86. Once JB's assault matter was before the Magistrate's Court, the Complainant, the Union, and hands were tied in adjudicating a resolution on the EAP joint counselling sessions.
87. While the Defendant offered the complimentary December 2019 boxing tickets to all the , the Tribunal was surprised that JB was invited to attend the boxing event, especially under the veil of the Complainant's bail condition court order.
88. If JB was sincere in accepting the Defendant's EAP instruction, the oneness was on him to ask the Court to vary the bail condition court order to enable meaningful EAP dialogue between the Complainant and himself
89. The Tribunal was also perplexed by the obvious bias of the two separate meetings with JB and the Defendant and the Defendant with the EAP Counsellor and the inability to extend the same meetings and privileges to the Complainant and the Union.

90. The purpose of EAP was for the Union and the Employer to jointly agree on the benefits of providing timely counselling as an intervention and support to any employee exhibiting undue behaviours affecting their work performance and the workplace.
91. A representative of the Union, the Defendant, and the EAP counsellor needed to have met to discuss the purpose of the EAP referral of JB and the Complainant and the resolution the Union and sought from the EAP.
92. Unfortunately, no alternative EAP plan for the joint union-management referral was discussed, such as the EAP conducting separate counselling sessions for the two men to address their interactions with each other, other the Union, and

The events leading up to the Complainant's dismissal by the Defendant.

93. In January 2020, the Complainant testified that the Union President and the Defendant exchanged their positions on the force of a bail conditional Court Order on the Complainant versus position of mandatory EAP counselling for both .
94. At a special JCC meeting on February 5, 2020, the Union requested the reinstatement of the two .
95. The Complainant professed that the Defendant asked for *one week's grace* to arrive at his decision *on reinstating JB and the Complainant* to the jobs.
96. Acting on the Complainant's lawyer's (another lawyer) advice to apply for unpaid leave, the Complainant entered the premises of the while suspended with pay.
97. The Complainant passed several Managers () and four security officers who asked him if he officially returned to work.
98. The Complainant explained that he was retrieving an item from his locker and wished to file a document with the Management.
99. While in the lunch room with Witnesses and I, a female security officer informed the Complainant that he must leave the premises.

100. The Complainant stated he was not informed that **he was not allowed on the** and left the ; escorted by the security guard.
101. The Complainant was surprised at the order to leave the , as JB was allowed to attend the Christmas party and was not asked to leave when the Defendant was informed that JB was suspended.
102. The Complainant headed for the Office and entered the open . Office Reception door, which was generally locked. He entered the inner offices and saw the Defendant, who was close to ' s Payroll/HR Administrator's office. The Complainant proceeded and then entered Ms. office.
103. Shortly after entering Ms. office and sitting, the Complainant testified that the Defendant shouted: *"You shouldn't be here, you have to leave."*
104. On more than one occasion, Ms. told the Complainant: , *just leave, just leave*", who obeyed the Payroll/HR Administrator's request.
105. To exit the Office without approaching the Defendant, the Complainant stated to the Defendant, *"I get you."*
106. The Defendant retorted: ***"Is that a Threat"***.
107. In response, the Complainant replied: ***"No, it's a fact."***
108. On February 7, 2020, Defendant sent a termination letter to the Complainant along with the calculation of outstanding wages owed to him.
109. The Union President was sent a copy of the termination letter.
110. From February 7th to June 2020, the Officers of the BIU and the Union President solicited first the Operation Manager for a meeting, who indicated that the termination had turned into a criminal complaint.
111. That is when the Union and the Complainant learned that the Defendant had notified the Bermuda Police Service, emphasizing that the Complainant would be prosecuted for expressing threatening words.
112. The Complainant reinforced that the Officers met with the Defendant concerning the reason for the Complainant's dismissal.
113. The Defendant shared that the Complainant had threatened him.
114. The Defendant said: *"It was either him (the Complainant) or me"* and that *"he could drive his taxi if the Complainant returned to work"*.

115. The [redacted] Officers asked the Defendant if he would mutually agree to bypass Step 2 of the Grievance Procedure and proceed to Step 3 as set out in Article 27 of the CBA to discuss the termination of the Complainant.
116. The Defendant was unwilling to bypass any step of the Grievance Procedure and stated that *no matter what the BIU did, he was not prepared to rehire the Complainant.*
117. At the Special JCC meeting on February 12, 2020, the BIU President asked about the status of grieving the dismissal of the Complainant, the issues of the Complainant not being allowed on the [redacted] premises during his 3-day unpaid suspension and paid suspension periods and wished to raise other [redacted] work issues.
118. However, the Defendant wished to discuss only JB's return to work, and the Defendant was not prepared to agree to mutually bypass Step 2 of the Grievance Procedure as the [redacted] issues could be discussed through Step 1 of the Grievance Procedure.
119. The Defendant also confirmed to the BIU President that he told [redacted] Divisional Officers, *"It was either [redacted] or him."*
120. The BIU President affirmed that once the Defendant lodged a criminal complaint against the Complainant, the Union could not proceed to Step 3 of the Grievance Procedure.
121. On June 4, 2020, the DPP informed the Defendant in writing, the BPS, and the Complainant's counsel that the Complainant's words did not rise to criminal threat:
- a. : *"...the verbal's as described by the Complainant [redacted] in his witness statement dated 6 February 2020 are quite borderline and notably, his evidence does not satisfy the proviso in section 12.. Provided that no person shall be convicted under this section unless the threat is to commit an unlawful act and the person threatened believes on reasonable grounds that the threat will be carried out. By the complainant's evidence did not actually threaten to commit an unlawful act (emphasis added) as required by the section.*
 - b. *The DDP's office further stated I note that the Summary of Evidence indicated that [redacted] has been relieved of his duties since the incident. If this is inaccurate and [redacted] is still employed, the Complainant is at liberty to deal with the matter internally."*

122. On June 12, 2020, the Defendant notified the Union President of the DPP's opinion. However, the Defendant remained steadfast that the Complainant was terminated.
123. For six months, the BIU and _____ were unsuccessful in conducting any Grievance Hearings per the CBA with the Defendant and _____ Board to reinstate the Complainant.
124. The Defendant's counsel questioned the Complainant's credibility and accused the Complainant's actions of not being a team player, refusing to adhere to _____ policies, and having an authoritarian attitude on the job.
125. The Complainant denied these assertions but emphasised that he was keen on job safety and adherence to the CBA and _____ Workers' Rights.
126. The Complainant was firm that the Defendant had no intention to respect the Grievance Procedure and to hear any arguments for the CEO to reinstate him.

Brief Summaries of the relevant evidence given by the Complainant's witnesses

127. The Tribunal asked the Complainant's lawyer to determine which of the eight witnesses should be sworn. The names are listed below, and the summaries are noted.

Witness SSL Payroll/HR Administrator _____ ("CC").

128. CC was employed by _____ in 2001 as a Human Resources Administrator. CC returned to _____ on February 6, 2020, while on vacation. There were no pre-arranged appointments scheduled for the Complainant.
129. CC was not sent a copy of the _____ notice stating that JB and the Complainant were on paid suspension leave until further notice and any other HR matters concerning JB and the Complainant's employment status.
130. Upon questioning by the Defendant's counsel, CC stated it was customary for the _____ to see her without appointments about their leave, salary, insurance, etc., and while on suspension, Chris saw her on three consecutive occasions before she went on vacation.
131. CC explained that no one had asked Chris to leave the _____ offices.
132. CC stated she was in her office with the Complainant dealing with his vacation form when the CEO said, "*Chris, you should not be here, or you know you should not be*

here, and you have to leave." CC stated that the Complainant had a legitimate reason for being in the office".

133. Although Chris was surprised to hear the CEO ask him to leave, CC told the Complainant, "Chris, **just leave, just leave.**"
134. CC said Chris was not angry; he did not shout but shook his head and chuckled as he left her office.
135. Upon questioning by the Defendant's Counsel, CC stated she could not recall what the Complainant used; however, CC thought she heard him say to the CEO, "***I see what you are trying to do,***" and "***Your day will come.***"
136. The Defendant's Counsel asked CC if she recalled the CEO asking her if she had heard the verbal exchange between him and the Complainant.
137. CC replied, "*I hear many things around here*".
138. CC said she later learned Chris was dismissed and was firm that she heard no threatening words from the Complainant towards the CEO.

Tribunals Discussion of CC's testimony

139. As the only employee who witnessed the direct interaction between the CEO and the Complainant on February 6, 2020, the Tribunal was keenly aware of the importance of whether there was credible evidence to substantiate the threat against the CEO by the Complainant.
140. CC recalled the Complainant's words to the Defendant: "*Your day will come*", still smacked of disrespect towards the CEO and reinforced, at least, the CEO's charge of insubordination by the Complainant to leave the office.
141. However, CC heard no words she considered as threatening the Defendant. The Tribunal noted that CC's words "**Chris, just leave, just leave**" indicated that the Complainant did not immediately leave when asked by the CEO.

Witness ("OM")

142. On May 18, 2002, OM was employed as a Garage helper. He is now a Supervisor with
143. OM was an Officer of the Union's and was a party to the events flowing from the JB and the Complainant assault incident, the petition, ; downing tools,

including the Complainant's dismissal by the Defendant and the Complainant's legal challenges in the Supreme and Appeals Courts.

144. OM confirmed with the Defendant's Counsel that he signed two witness statements, one on February 14, 2020, following the termination of the Complainant and the Witness statement on June 24, 2024.
145. OM confirmed that JB was consistently jeered, swore and had a bad attitude towards the Union and the Complainant.
146. It was OM's opinion that *Management treated JB more favourably than Chris Jr.*
147. In answering the Defendant's Counsel's question, did the Petition against JB consisted of signatures from the majority of the present at the walkout? OM reported no. The signed Petition had 15 of the 30 signatures.
148. Replying to the Defendant's Counsel's question of December 10, 2019, OM stated that the work stoppage by nine was also for several complaints and against JB. OM testified he was off.
149. In response to the Defendant's questions about suspended ; not being allowed on the premises, OM saw JB at the Christmas party. asked why JB was present.
150. The asked the CEO to agree to bypass the Grievance Steps so that Senior Union officers could grieve Brother Chris Jr.'s February 6, 2019 dismissal.
151. In reply to the Defence Counsel, OM acknowledged that the CEO said on two occasions at Union and JCC meetings that: *"It was either him (Bro Chris) or me (Mr.) and that "he () could drive his taxi if [Bro Chris returned to work]"*.

Tribunal observation of Witness OM testimony.

152. At Tab 6 of the Complainant's Bundle the Petition contained 12 signatures not 15 which was less than 50% of the workforce of 30.
153. OM painted a picture of double standards being applied as it pertained to Management's acceptance of JB and displeasure with the Complainant. As the suspended JB was not asked to leave the Christmas party, this introduced bias and inconsistency in the CEO's adherence to the custom and practice suspension policy.

Witness ("SR") Testimony

154. Mr. [redacted] was employed as an apprentice, promoted to Holdman and Operator, and worked in the Garage. He was also the Assistant Secretary of the Union's [redacted].
155. The testimony was consistent with OM's testimony.

Tribunal observation of Witness SR testimony

156. SR's personal opinions of the CEO and ongoing grievances were not and were not relevant to the dismissal of the Complainant. Those matters were addressed before a special JCC meeting and the [redacted] Board meeting. These were ongoing grievances best handled through the CBA's Grievance procedure.

Witness ("AB") Testimony

157. The Witness was hired as [redacted] in November 1979.
158. AB and the Complainant were friends, and he was aware of the June 29, 2019 assault; JB continued unsocial behaviour at work, and AB signed his name to the December 20, 2019, Petition and was present when Chris was escorted from the [redacted] lunch room.
159. AB did approach Defendant at the [redacted] Christmas party concerning suspended JB's presence, contrary to [redacted] policy, which states that no suspended worker could attend the [redacted] premises or events.
160. AB testified that the CEO allowed JB to stay because the CEO did not wish to cause a scene at the Christmas party by asking JB to leave.
161. AB testified that other [redacted] workers, such as [redacted] (employed for 20-plus years), had a physical altercation on the [redacted] with [redacted]. [redacted] cursed a lady who reported the incident to the Hamilton Police Station.
162. AB declared that no disciplinary action was taken against [redacted] th. Instead, he was promoted twice as a [redacted] and now a foreman.

Tribunal's observations of [redacted] testimony

163. The Tribunal had no written proof that the [redacted] Management knew of the [redacted] behavioral incidents. However, the Defence Counsel did not examine the Witness concerning the [redacted] incident.

164. The key take-away from AB's testimony was that all suspended _____ were forbidden to be on the _____ to participate in _____ social activities. On that appointments were approved to meet with _____ managers during suspension.

Witness _____ witness statement read into the record

165. Witness _____ did not give oral evidence, and his statement was read into the record and left to the Tribunal to determine its probative value.

Witness Union President Chris Furbert Sr

166. The Union President is known to the Community, and his witness statement was not challenged by the Defence Counsel or the Complainant's Counsel.

167. The Tribunal asked the Union President if _____ employees were reinstated for serious misconduct.

168. The Union President responded yes.

169. The Tribunal asked if the Union President excused himself from the hearings of his son Chris Jr.

170. The Union President replied that he asked senior members of the Union's Executive to handle the Chris Jr. case, especially the EAP meetings and the Complainant's dismissal, to minimize perceived bias.

171. CF Sr also stated that as President, he acted on principle, just as he expressed his displeasure with the nine dock workers who downed tools on December 20, 2019, and received a one-day suspension.

172. The Union President stated that the CBA's Grievance procedure was vital to resolving grievances. Management and the Union had to discuss the issues to seek resolutions the parties could accept. The resolution may not be what each Party wanted, but the resolution and agreement were mutually agreed upon.

173. The Tribunal asked what caused the breakdown with the CEO not wishing to bypass the Step 2 Grievance Procedure.

174. The President stated he was stunned that on February 5, 2020, at the Special JCC meeting, the Defendant CEO asked the Union to give him a week to decide on the reinstatement of JB and the Complainant.

175. Then, on February 6, 2020, Complainant was fired without the Defendant calling the Union to discuss the matter.
176. The Union President stated he worked on the _____ and knew the _____' work atmosphere and general attitudes. However, the CBA's Grievance and Disciplinary procedures were written to enforce the partnership between _____ and the union.

General Observations on the 5 _____ 'Witness' Statements

177. All the witnesses' statements from paragraphs 129 to 162 attested that the Claimant was a dedicated worker, a professional, very conscious about health and safety violations, and possessed good leadership skills.
178. The witnesses all stated that CF Jr was a leader and concerned with health and safety. This is indeed laudable however CF was not a union official, a shop steward or a member of the health and safety committee. The CBA, the Employee Handbook and the Occupational safety at Work Act 1982, make provisions on how issues with health and safety and other matters should be address. No evidence was provided that indicate CF followed those procedures. His failure to do so created or at a minimum contributed to the toxic atmosphere within the organization. The Tribunal opined that his behaviour over the years was a significant contributor to the bad working relations between _____ management and the Union, as the Complainant was referred to as the son of the Union's President.
179. However, it did not escape the Tribunal that most of the verbiage in each _____' Witnesses statement mirrored each other and raised questions of impartiality and probative value.
180. Each witness had a duty to act independently, be honest, trustworthy, objective, and sincere, and not be influenced by what their colleagues wrote or read before the individual witness wrote their witness statements. Witnesses were expected not to allow their personal views to affect the evidence.
181. The Defendant's Counsel raised his objections to the credibility of the witnesses' statements but still examined the witnesses.
182. However, the Tribunal exercised its right to a fair and equitable hearing and was mindful that the witnesses' testimonies were sworn.

Deliberations by the Tribunal on the Six Questions to the Parties' Counsels

183. On 27 September 2024, Counsels were sent six Tribunal questions on themes that echoed throughout the September 23 – 24, 2024 Hearings.
184. The Tribunal summarised the Complainant's Counsel's October 18, 2024, answers and the Defendant's Counsel's answers of October 21, 2024, below.

Question 1

185. On 23 October 2019, the Magistrates Court issued a restraining order to the Complainant. Was the referral to EAP for both men frustrated (law of frustration), or was the mutual contract by the Parties to attend EAP null and void?
186. The Complainant's Counsel argued that the agreement for Mr. [redacted] and the Complainant to attend EAP was frustrated by an external third party and external circumstances.
187. Thus, Mr. [redacted] and the Complainant were automatically discharged from any further obligation under the agreement to attend the EAP sessions jointly. Mr. Daniels declared that under the law, for frustration, the contract was automatically discharged and that both parties were discharged from further obligations.
188. The Defendant's Counsel referenced incidents in which Port worker JB and the Complainant had close interactions contrary to the bail condition order, such as the JB door incident and multiple JB verbal disputes. These instances suggested that the Complainant and Mr. [redacted] were within proximity to each other despite the bail conditional order.
189. Mr. Williams reiterated the Defendant's position that the Complainant should have asked the Magistrates Court to vary the bail condition order so that the Complainant could attend EAP.
190. The Tribunal noted that this point was exhausted when the Magistrates Court and the DPP agreed that the condition bail order protected JB until the Magistrates Court decided the charge.

191. Mr. Williams reinforced [redacted] position on adherence to bail conditions.
192. Regarding the law of frustration and nullity, Mr. Williams submitted that neither applied to the current case.
193. However, Mr. Williams accepted that the doctrine of frustration could apply in circumstances where mediation would violate a no-contact order since compliance would be unlawful. In this case, the meetings with EAP were both one-on-one sessions and joint sessions.
194. Mr. Williams was firm that [redacted] took the correct approach in suspending both parties with pay until the criminal trial was determined or until the matter was resolved in-house. This would have been the case but for the Complainant's serious misconduct to the CEO on 6 February 2020.

Question 2

What is the Status of the Restraining Order?

195. Both Counsels agreed that once the Magistrates Court trial concluded, the Complainant was no longer subjected to bail conditions.
196. Mr. Daniels reinforced that the Parties were aware of the bail condition order. With Mr. [redacted] retirement as the CEO, [redacted] J [redacted] and Managerial staffers Mr. [redacted] and I [redacted] were no longer employed with [redacted].

Question 3

197. Is the [redacted] Handbook clear on termination for serious misconduct for threatening behaviours?
198. Mr. Daniels opined that the Complainant did not threaten the Defendant on 6 February 2020.
199. Noting the eighth bullet point read in the Handbook stated: "acts of violence or making threats of violence toward anyone on company premises or while representing [redacted]", Mr. Daniels recounted that the Defendant was clear that the Complainant's words amounted to a threat of violence.
200. In referencing, Crown Counsel Sofianos (now Magistrate Sofianos) of the Office of the Director of Public Prosecutions opined that: "by the complainant's evidence, Mr. Furbert does not threaten to commit an unlawful act as required by the section."

201. Mr. Daniels stressed, as a matter of fact and law, that the alleged words did not amount to a threat of violence to contravene the Company Handbook.
202. Mr. Daniels continued that the Crown Counsel's suggestion that the employer was "at liberty to deal with the matter internally" does not change the fact that the Handbook only contemplates an act of violence (which did not occur) and a threat of violence (which did not happen).
203. However, Mr. Williams was stern that the Handbook and the Complainant's SoE not only explained serious misconduct but also referenced criminal acts and activity and threats of violence. Item 7 and Item 10 in the Handbook were examples of serious misconduct.

Question 4

204. The Union and Management have reinstated /employees for serious misconduct or performance issues, as a precedent has been set; what makes this case different?
205. Mr. Daniels referenced the Complainant's witnesses' statements, where examples given of ' behaviours that could constitute serious (serious) misconduct. The Tribunal noted that the Defendant did not challenge witnesses of those serious misconduct incidents by naming
206. Mr. Daniels referred to the case of **MBNA Limited's** serious misconduct case where the cases are: "effectively parallel.

"24. ... Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked or at least will not be dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made with other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for dismissal. ... Thirdly ... evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's

conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.”

207. Mr. Williams affirmed that besides the Complainant's termination for serious misconduct, dealt with a case related to negligence—the other terminations related to performance issues for positions outside the collective bargaining unit.
208. Mr. Williams opined that those individuals, either through Management's decision or via consultation with the Union (sometimes following industrial action), and as there were vacancies in the organization, . employees were demoted to positions within the bargaining unit.

Question 5

209. As there were no witnesses to the February 6, 2020, incident, who bears the burden of proving the words were threatening?
210. Mr. Daniels emphasized that the burden was on Mr. ;, who also conceded that there was a witness to the events on 6 February 2020, as noted in the termination letter, which reads: “4. *threatened the CEO in front of a witness*”.
211. Mr. Williams argued that had the burden of proof to establish on the balance of probabilities that the words were stated.
212. Mr. Williams encouraged the Tribunal to consider the case of ***Trust Houses Forte Leisure v Aquilar [1976] IRLR 251***, which sets out the correct test to be applied to determine whether the employer has proven the reason for dismissal.
- In Aquilar, it was held according to the EAT that the reason for dismissal is a fact that exists at the moment of dismissal — it is what the employer genuinely believes. Whilst it is up to the Industrial Tribunal to determine the real reason, there is no burden of proof on the employer under paras. 6(1) and (2) to prove that the reason was well-judged and justified. Thus, the employer does not have to establish, for example, that a man dismissed for drunkenness was, in fact, a victim of drink.”*

Question 6

213. The legal axiom – the Court will not enforce an employee **on** an unwilling employer. What are your opinions on this case?
214. Mr. Daniels referenced *sections 44c and 44 L* of the **TULRC Act** that gave the Tribunal authority *to* order reinstatement and damages. If the Defendant refused to be bound by the Tribunal's Order, despite agreeing to be bound by the findings of the Tribunal, then either Party could appeal to the Supreme Court to enforce the Tribunal's reinstatement order.
215. Mr. Daniels stressed that the Tribunal legislatively had the authority to award general damages that cover additional damages, such as loss of pension, loss of medical coverage, the cost of private counselling arising from the stress of this unjustified job loss, and other financial loss, if it thought fit, under the general damages heading, having regard to the egregious circumstances of an employer refusing to honour the Union.
216. Counsel Daniels also requested the Tribunal to consider legal costs for causing the delay and disrespecting any such award the ELRT made.
217. Conversely, Mr. Williams affirmed that if the Tribunal determined that the Complainant was unfairly dismissed, it would not be equitable to order either reinstatement or re-employment of the Complainant. . shared that:
- a. The Complainant caused the circumstances of his dismissal by entering property twice on February 6, 2020, whilst suspended.
 - b. The Complainant challenged the CEO and then threatened him. Not only did the behaviour amount to serious misconduct, but it was also unprofessional, which colored reinstatement / re-employment.
 - c. The Defendant's Counsel stressed that the relationship between and the Complainant had irretrievably broken down and noted by the Complainant's evidence and that of his witnesses.
 - d. That the atmosphere was free of "schisms" that prevented . and the Union's ' executive from working together efficiently and effectively.

- e. The Complainant's behaviour eroded the implied term of mutual trust and confidence on February 6, 2020 and his attacks on [redacted] management.
- f. After 54 months off, the Complainant's job function was now performed by another [redacted] employee, and the Company had no vacancies.
- g. That the Complainant never filed a grievance and only filed a report of a labour dispute 1 year after he was terminated.
- h. The Complainant was convicted of a criminal offence 5 months after he was terminated for assaulting his colleague. In any event, the criminal conviction gave rise to [redacted] to dismiss the Complainant summarily.

Tribunal Discussion on both Counsels' responses to the 6 questions

218. The Defendant failed to enforce JB's suspension order to leave the Christmas party. Likewise, the Complainant, knowing of the JB incident, was bold in entering the [redacted] Office shortly after being escorted off the [redacted] by a security guard.
219. Witness [redacted] testified that appointments were needed to enter the [redacted] offices. No evidence was given during the Hearing to disavow that the Complainant had an appointment with [redacted] Payroll/HR Administrator [redacted]; who returned to work on February 6, 2020, from vacation.
220. Mr. [redacted] took the Complainant's words to heart and felt threatened by the Complainant. Hence, he reported the Complainant's words to the Hamilton Police Station.
221. As stated by Mr. Daniels, despite the DPP dismissing the Defendant's threat complaint against the Complainant (4 months after the February 6, 2020 dismissal) The Tribunal noted:
- "The DDP's office further stated I note that the Summary of Evidence indicated that Mr. Furbert has been relieved of his duties since the incident. If this is inaccurate and Mr. Furbert is still employed, the Complainant is at liberty to deal with the matter internally."*
222. The Tribunal noted that all the witnesses stated that CF Jr was a leader and concerned with health and safety. This is indeed laudable however, CF was not a union official, a shop steward or a member of the health and safety committee.

223. The CBA, the Employee Handbook and the Occupational Safety at Work Act 1982, made provisions on how issues with health and safety at work and other matters should be address.
224. No evidence was provided that indicated CF followed those procedures. His failure to do so created or at a minimum contributed to the toxic atmosphere within the organization. The Tribunal opined that his behavior over the years was a major contributor to the bad working relations between management and the union as he was deferred to as the son of the union president,

Discussions and Deliberations

Tribunal analysis and discussion on the matter of unfair dismissal based on the *Raynor's Service Station v Earlston Bradshaw*

225. Section 25 of the Employment Act 2000 is headed: "Summary dismissal for serious misconduct." It provides:

"An employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct –

(a) which is directly related to the employment relationship; or

(b) which has a detrimental effect on the employer's business, such that it would be unreasonable to expect the employer to continue the employment relationship."

Thus, in order for an employer to dismiss an employee without notice, two conditions must be satisfied. First, the employee must be guilty of serious misconduct, and second, it must be such that it would be unreasonable to expect the employer to continue to employ him".

226. Counsels cited the Tribunal with a plethora of authorities. The main contention and mitigating factors that the Union and the . put forward regarding February 6, 2020, **only** formed the Defendant's reason for the Complainant's dismissal.

227. Both Counsels cited ***British Home Stores vs Burchell [1978] IR: R 379***. However, to set out the test to be applied in assessing the decision to dismiss, in the Bermuda Court of Appeal case of ***Raynor's Service Station v Earlston Bradshaw Civil Appeal No. 12 of 2016***, ruled that the *correct test* to be adopted when assessing a dismissal for serious misconduct was set out:

"The crucial point is, however, that the legislation governing appeals to a tribunal in employment cases is different in Bermuda from that in the United Kingdom".

228. Citing with approval Chief Justice Kawaley in ***Matthews v Bank of Bermuda Limited [2010] SC 48 Civ (20 August 2010)***, the Chief Justice referred to Section 38(2) of the **Act** providing:

"In any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair" (emphasis added).

229. None of the provisions of **Section 28(1) items** for various prohibited grounds for unfair dismissal are applicable to the current matter.

230. The Chief Justice continued:

"Section 25 must be read with section 24 of the Act. Summary dismissal is the most severe form of disciplinary penalty known to employment law. Deciding whether misconduct which potentially justifies summary dismissal is "such that it would be unreasonable to expect the employer to continue the employee relationship" in my judgment brings into play the further consideration whether summary dismissal would be a "reasonable" penalty within the principles set out in section 24".

231. *"In my judgment the draughtsman had plainly in mind that serious misconduct which is often, but not invariably, threat was likely to warrant the most serious sanction of summary dismissal. Thus it was necessary to establish as the first gateway through which the employer must pass that the conduct had actually occurred rather than that he reasonably thought that it had occurred. This seems to be entirely consistent with the subsequent requirement in the latter part of section 25 then to consider reasonableness as described by the Chief Justice in Matthews."*

232. "I note also what the Chief Justice said in ***Elbow Beach Hotel Bermuda v Lynam*** [2016] Bda LR 112 at para 14: "... Section 25 of the Act most importantly requires the Tribunal to decide, objectively, "It would be unreasonable to expect the employer to continue the employment relationship". This calls for an objective assessment of whether a reasonable employer would or would not have made the summary decision, assuming of course, that summary dismissal was justified because serious misconduct occurred. Because section 25 requires the employer to establish first and foremost that the employee "is guilty of serious misconduct."

For further guidance from the Court of Appeal in ***Raynor's Service Station*** CA stated:

"In determining for this Schedule whether the dismissal of an employee was fair or unfair, it shall be for the employer to show—." Then, the reasons must be shown. Para 8 then provides: "Subject to sub-paragraphs (4) to (7) above, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee".

233. Two points are of particular relevance to the Defendant's case based on the above guidance. The first is that in cases of serious misconduct, the focal point is when the Tribunal makes its decision on the evidence before it, not an assessment of the moment that the employer takes the decision on the facts known to him. This places the Complainant in a very difficult position to justify that his words as received by the Defendant were indeed threatening.

234. The other point is that it is necessary to establish that the conduct *had actually* occurred rather than that the employer *reasonably thought* that it had occurred.

235. Despite, the DPP June 4, 2020, argument that the Complainant's words were bore line and insufficient to meet the criminal standard of proof, but the Defendant was free to

handle the matter internally (despite the Complainant being dismissed on February 6, 2020).

236. The Defendant did not have to prove guilt to a criminal standard or adopt a procedure comparable to that of a criminal investigation. The Tribunal accepted that the threatening evidence was enough for the Defendant to form the basis for a reasonable belief of serious misconduct. Therefore, question 2 of the test was satisfied and that the dismissal had been fair.

237. **Counsel Daniels Counter arguments on the Complainant's Threatening words**

238. However, in considering the Complainant's position that his words towards the CEO could be ambiguous and misinterpreted by the Defendant, neither Party presented evidence as to whether a lesser disciplinary action (such as a warning or a suspension) might be considered more appropriate.

239. Ultimately, Counsel Daniels argued that the severity of the disciplinary action of immediate dismissal was too harsh and lacked the proportionality of the Disciplinary Action, such as the Complainant's genuine perceived threat to the Defendant to cause him fear and reasonably endanger the CEO's safety.

240. The Union was correct that, by established custom and practice, if a criminal matter concerning its members was before the Courts, the formal CBA grievance procedure was suspended until the Court had rendered its decision.

241. Both [redacted] and the Union attested to this practice by suspending JB and the Complainant pending the Magistrates Court's final assault charge decision, which was made in June 2020.

242. The Tribunal stressed that even in cases of perceived threats, procedural fairness was crucial, and from the evidence, the Defendant (and in his words: "*it's was either him (the Complainant) or me*") failed to:

(a) Investigate the incident.

(b) Not allow the Complainant to explain or defend his actions.

(c) Examined if there were any mitigating circumstances to counter the Complainant entering the office and the weight of the Complainant submitting a vacation entitlement request.

243. But, what defeats the mitigating argument for the Complainant was that besides being escorted off the by the security guard, he breached the suspension order a second time within a short window that same day.
244. If the Defendant believed the Complainant was guilty of serious misconduct, he had to follow the correct disciplinary procedures by gathering evidence, reviewing documentation, speaking to the employee, speaking to any potential witnesses, and ensuring that conducted a reasonable investigation into that potential serious misconduct.
245. Suppose the Defendant had acted reasonably in investigating before deciding to dismiss. In that case, he might have opted for a lesser disciplinary penalty by considering the relevant circumstances, albeit the Complainant was on extended paid suspension. Nevertheless, the Tribunal opined that the Defendant failed to conduct a Step 3 Grievance hearing and to conduct a reasonable investigation, the Complainant was unfairly dismissed. It is therefore submitted that there should be no question that the Tribunal should conclude that the dismissal was substantively unfair as well as procedurally unfair.
246. In Counsels' Williams' closing arguments in providing answers to the Tribunal's Question 6 in paragraph 217, concerning the legal axiom: the Court will not force an *employee or an unwilling employer*. What is your opinion on this case?
247. The Tribunal considered the question of reinstatement, re-engagement, as well as compensation as requested by the Complainant.
248. The law recognizes that at common law claims for the Complainant's wrongful dismissal by the Defendant breaching the Complainant's employment contract is permissible, and that a separate claim for unfair dismissal under the EA flowed because the Defendant did not conduct a reasonable investigation.

249. The Tribunal was mindful of the 4.5 years that this matter took to be completed, such as the original notice of the labour dispute filed on 7 December 2020, and given the Defendant's legal challenges that preceded the eventual Hearing before the Employment Tribunal.

What is just and reasonable?

250. The Tribunal, then cast its attention to the persuasive Canadian case ***Lethbridge Community College, supra***, to support its position. The Tribunal concentrated its deliberation on "**just and reasonable**," as the Supreme Court of Canada recognised an arbitrator's decision to award damages in lieu of reinstatement as a reasonable exercise of remedial jurisdiction.

251. The question of "*whether it is realistically possible to restore the [employment] relationship upon appropriate terms*" was set out in Ontario in the ***Re DeHavilland Inc and CAW-Canada, Loc 112 (Meyer)***. That case stated that mitigating factors to be considered in assessing whether reinstatement was possible included:

1. *The refusal of coworkers to work with the grievor.*
2. *Lack of trust between the grievor and the employer.*
3. *Inability or refusal of the grievor to accept responsibility for wrongdoing.*
4. *The demeanour and attitude of the grievor at the hearing.*
5. *Animosity on the part of the grievor towards management or co-workers*
6. *The risk of a "poisoned" atmosphere in the workplace.*

252. The Defendant had to objectively evaluate whether his decision to dismiss was within the scope of reasonable responses to all the circumstances.

253. The Defendant's Counsel in his Closing Submission in Response noted in Employment & Labour Relations Tribunal at page 5, section 15 (b) stated: "*.....that the relationship between and the Complainant has broken down irretrievably.* Counsel Williams stated, "*To have the Complainant return to the invites these*

obstructions and prevents management and the executive from working together efficiently and effectively”.

254. The Defendant took this position that the Parties had a dysfunctional relationship for several years and that the Complainant took it upon himself to challenge Management in a manner that suggested that the Complainant believed he knew what was best for everyone irrespective of Management’s wishes. Counsel Williams also stressed that the return of the Complainant was severe and that there was a lack of trust on their part that the Parties could work amicably again.
255. Counsel Daniels' counterarguments purported that [redacted] has a new CEO, Mr. [redacted] / [redacted], and that the Defendants, Mr. [redacted], [redacted] and [redacted] managerial staff, Mr. [redacted], Mr. [redacted] and Ms. [redacted], were no longer employed by [redacted].
256. Counsel Daniels provided no evidence demonstrating that the relationship between BIU and [redacted] had improved. It could be said that the problematic relationship between the two Parties to the matter was no longer with [redacted].
257. Even where Counsel Daniels advanced such factors as mitigation for the Complainant’s actions, the dismissal could be viewed as within the range of reasonable responses available to [redacted].
258. Considering the factors as set out in the *Re DeHavilland Inc.*, the Tribunal noted that at no time was it stated that the current [redacted] staff would refuse to work with the Complainant if he were reinstated.
259. At no time did the Complainant indicate that either he was at fault or in any way contributed to his termination.

Reinstatement, or Re-engagement, or Compensation

260. The Tribunal affirms in revisiting the *Aquilar* case that "***the employer does not have to establish, for example, that a man dismissed for drunkenness was, in fact, a victim of drink.***"
261. Therefore, in following *Aquilar*, the Tribunal **does not order Reinstatement or Reengagement of the Complainant.**
262. Notwithstanding the Counsel's Williams arguments, the Defendant did not follow the Grievance procedure as set out in the CBA and referred to by Counsel Daniels. Hence, the Complainant was **unfairly dismissed** on February 6, 2020.
263. The Court of Appeal referred this matter to the Tribunal by its decision of November 17, 2023 under Section 70(1) of the Trade Union and Labour Relations (Consolidation) Act 2021 as it involved a dispute between an employer and unionised worker.
264. By Section 70(2), the Tribunal is empowered to determine the matter by any means under the ***Employment and Labour Code***. Section 3A of the Employment Act 2000 defines the Code as the ***Employment Act 2000*** and the ***Trade Union and Labour Relations (Consolidation) Act 2021***.
265. By reference to Section 44C of the **Act**, it is clearly envisaged that the Tribunal's powers include the remedy of reinstatement or re-employment or compensation separate from its powers under the ***Employment Act 2000*** to award reinstatement, re-engagement and compensation under Sections 39 and 40 of that **Act**.
266. However, there is no doubt that the Tribunal **can award compensation** for the Complainant's losses over 4.5 years.

Losses suffered by Complainant for 4.5 years

267. The Tribunal recognised that this matter has been ongoing for 54 months, and the Complainant has been out of meaningful work. The Complainant stated that he worked at his own business to obtain income and mitigated his losses, which was not comparable to his _____ job. However, the Complainant did, by his actions and decisions on February 6, 2020, contribute to his dismissal.

268. The ELRT is also guided by Counsel Daniels's closing submission in paragraph 238 on page 34:

“(1)the Tribunal may award the payment to an employee where the employee cannot be re-instated or re-employed in his former position

269. Besides the Complainant's wage slip at **Tab 17** of the Complainant's bundle with these submissions, the *Complainant did not supply any evidence of health insurance monthly premiums, pay advice slips, private counselling receipts, the value of his loss earnings, income from his business to mitigate his loss, or any vendor bills as set out as his relief and listed in the Complainant's SoE and his Closing arguments for the Tribunal to assess the quantum for 4.5 years.*

270. At the pleading of the Complainant's Counsel, the Tribunal examined the legal concept of **stigma loss** (*Small v The Shrewsbury and Telford Hospitals NHS Trust*) and applied it to the current case. Counsel Daniels argued that the Tribunal should consider awarding his client stigma **loss compensation**. In reviewing the definition of **stigma loss** in the above-cited case, did not dismiss CF Jr on the grounds of whistle-blowing or discrimination.

271. The Complainant presented no evidence at the Tribunal hearing that he found it difficult to secure new employment (or that he applied for any jobs) because of the proceedings against the

272. **For the Tribunal to assess a quantum to the Complainant, the Tribunal orders the Parties to supply financial evidence that the Complainant and the Defendant wish to rely on as the Complainant's Relief for 4.5 years.**

273. The Parties are given **21 business days** to submit the requested information to the Department of Labour Tribunal Officer.

Post Tribunal Procedural Matters

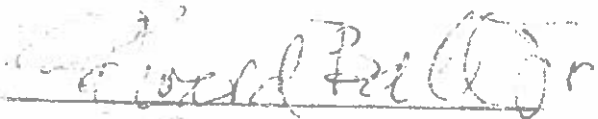
274. According to section 44E, no report on or comment on this matter may be made by either party that is not a fair and accurate report or summary of the proceedings.

275. If either party makes any report on or comment on this matter contrary to **section 44E**, such party shall be liable to a civil penalty.
276. Both Parties have the right to apply to conceal any matter of the Hearing/Award as outlined in **section 44F (3) Notification and Publication of Award of the Act**.
277. According to **section 44 K**, either party aggrieved by this decision has the right to ask a question about interpreting the Tribunal award.
278. Under **section 44O**, either party aggrieved by this decision has the right to appeal to the Supreme Court on a point of law within 21 days after receipt of notification of this award of the Tribunal.
279. The Tribunal does not award legal costs to any party to these proceedings.

The Award

280. *In conclusion, it is submitted that the Defendant unfairly dismissed the Complainant, and reinstatement or re-engagement is not ordered.*
281. The Complainant is to be granted Relief for his 4.5 years of losses upon receipt of the Party's financial evidence so that the Tribunal can examine and decide on the quantum to be awarded to the Complainant.

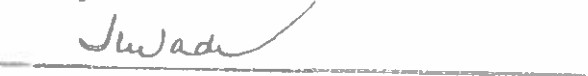
Edward Ball Jr, JP, LLB, FCMI Chairman



John W Payne, Deputy Chairman



Jocene Wade, JP, FCMI Tribunal Member



Date: November 27th, 2024

