REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2019-01509

BETWEEN

ANDY ACOSTA

Claimant

AND

SOUTH-WEST REGIONAL HEALTH AUTHORITY

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: May 3, 2022.

Appearances:

Claimant: Mr. L. Elcock instructed by Ms. G. Auguste

Defendant: Mr. R. Kawalsingh and Ms. A. Roopchandsingh instructed by Ms. C. Scipio.

JUDGMENT

Introduction

1. This is a claim for wrongful dismissal brought by the Claimant against the Defendant consequent upon a decision of the Disciplinary Tribunal of the Defendant (the Tribunal) in which the Claimant was found guilty of misconduct in connection with unlawful industrial action which in turn resulted in dismissal.

The Claim

2. The Claimant, a Medical Orderly at the San Fernando General Hospital, was issued a letter of dismissal by the Defendant on April 3, 2019, after the Tribunal found the Claimant guilty of inciting and instigating nine Medical Orderlies to engage in industrial action on January 8, 2019, at the San Fernando General Hospital's Accident and Emergency ("A&E") Department. The finding was that the action was illegal and violated the provisions of the Industrial Relations Act, Chapter 88:01 ("IRA").

3. The conduct of employees in the employ of the Claimant is governed by the Regional Health Authority's (Conduct) Regulations, Chapter 29:05 ("the Conduct Regulations"). The Claimant also contends that the Defendant breached the investigative procedure set out by the Conduct Regulations. Therefore, the Claimant seeks the following:[1]

    i. A declaration that the purported dismissal of the Claimant by the Defendant from its employ as a Medical Orderly by letter dated April 3, 2019, is wrongful and/or null and void and of no effect.

    ii. An injunction to restrain the Defendant, whether by itself or its servants or howsoever otherwise from treating the Claimant as a dismissed worker.

    iii. An order that the Defendant shall pay to the Claimant all of its emoluments for the month of April and subsequent months until the determination of this action of further order of this court.

    iv. *Damages for breach of his contract of his employment*.

[1] On the trial date of April 22, 2021, the Claimant abandoned the second relief in his Amended Statement of Case.

v. *Damages for breach of its statutory duties towards the Claimant.*

The Defence

4. It is the case for the Defendant that inducing or inciting the Medical Orderlies to engage in industrial action is an illegal act in circumstances where the service provider is deemed to be an essential service. The Defendant also alleges that the actions disrupted the A&E Department thereby endangering the lives of patients. As a result, the Claimant was dismissed.

5. The Defendant denied that it breached the procedural requirements set out in the Conduct Regulations. It asserted that the Claimant was investigated, given an opportunity to make a statement to the investigator, suspended on basic pay, and appeared at a disciplinary hearing into the allegations. The Tribunal's report was then forwarded to the Defendant's Board of Directors, which then decided to terminate the Claimant's employment with immediate effect by letter dated April 3, 2019.

6. The Defendant argued that an employee employed with an essential service in the capacity in which the Claimant was employed can only engage in industrial action if he believes his life to be in danger. The Claimant was at the time of the incident the President of the Unified Health Sector Workers Union ("the Union"), which comprised other Orderlies as members. Additionally, the Claimant served as the Union Representative. The Defendant asserts that a Union must obtain authorisation from its employer before engaging in such activities on its premises. The Defendant further alleges that the incident of January 8, 2019, was not an isolated incident as the Claimant has engaged in other instances of disruptive and disrespectful behaviour toward Authorities within the Defendant's organisation.

Issues to be determined

7. The parties agree that the issues to be determined subject to the court's ruling on a preliminary point now taken by the Claimant, are as follows:

    i. Did the Claimant call for and/or cause industrial action to be taken by Medical Orderlies on the night of January 8, 2019 at the A&E Department of the Hospital and/or induce and/or persuade the Medical Orderlies in such essential service to take industrial action placing the lives and limbs of patients seeking treatment at the A&E Department at risk;

ii. Whether the Claimant's contract of employment was wrongfully terminated by the Defendant;

iii. If yes to (ii), to what remedy is the Claimant entitled.

8. Regulations **19(1) (a)** to **(p)** of the Conduct Regulations set out the matters for which an employee may be found guilty of misconduct.

An employee may be found guilty of misconduct where he –

(a) willfully refuses or omits to perform his duty;

(b) performs his duties negligently;

(c) fails to discharge any other related duty which the Chief Executive Officer or other duly authorised officer may call upon him to perform;

(d) is absent from duty without leave or reasonable excuse;

(e) becomes indebted to the extent that it impairs his efficiency or is likely to bring the Authority into disrepute;

(f) fails to report his bankruptcy in accordance with Regulation 13;

(g) fails to report that he has been charged with a criminal offence which carries a penalty of imprisonment in accordance with Regulation 18;

(h) is inefficient, incompetent or persistently unpunctual for reasons which are within his own control;

(i) is unfit for duty through drunkenness or the use of illicit drugs;

(j) engages in inappropriate behaviour, obscene or disorderly conduct in the course of his duties;

(k) violates any oath or affirmation of his office;

(l) uses any property or facility of the Authority for some purpose not connected with his official duties without the necessary approval;

(m) engages in any gainful occupation during working hours without the requisite consent;

(n) is a full-time student of any school, university or other educational institution without the prior approval of the Board;

(0) is a part-time student of any school, university or other educational institution and attends studies during working hours without the approval of the Chief Executive Officer or other duly authorised officer; or

(p) contravenes any of the Regulations.

9. Regulations 20 to 39 of the **Regional Health Authority Regulations** (RHA regs.) sets out the process for disciplinary matters. In summary, it provides that where a supervisor reasonably believes that an act of misconduct has been committed by an employee under his supervision, he shall report same to the CEO who shall take a statement from the Supervisor. If the CEO is satisfied that misconduct has been made out then he shall report to the Board, inform the employee of the allegation in writing and refer the matter to a neutral employee who is senior to the employee to investigate the matter.

10. Upon appointment as investigator, the investigator must within three (3) days of appointment give written notice of the allegation to the employee and require him to give a written explanation within seven (7) days. He will also require the witnesses to provide written statements to him within seven (7) days. He must then within forty-five days (45) of his appointment submit all of the material to the Board. This period can be extended by thirty (30) days. The Board then considers the documents before it and decides whether to lay a charge of misconduct. If it so does then it must give notification to the employee within seven (7) days of its decision and provide particulars of the charge.

11. The Board may then appoint a Disciplinary Tribunal to hear and determine the charge of misconduct. Before any hearing can take place, the employee must be requested to admit or deny the charge or give an explanation or factors in mitigation to the Tribunal or the Board within a specified time. Where the employee admits the charge then the Board may proceed to determine the penalty to be imposed without further enquiry. Where the employee fails to give an explanation or gives one that does not exculpate him, then and only then is a hearing held by the Disciplinary Tribunal. The Board may direct the employee not to report for work with basic pay pending the determination of the matter where in its opinion the public interest requires it.

12. At the hearing the employee has the right to call witnesses but must give notification of same in writing. He must be afforded a full hearing and given a full opportunity to defend himself having been summoned to the hearing. Before the case is presented the employee may submit that the facts alleged in the charge are not such as to constitute the offence for which he is charged. In such a case the Tribunal must report same to the Board for its decision. At the hearing before the Tribunal, the employee may conduct his defence in person or may be represented by an Attorney at law, an employee of his choice or his Staff Association. The employee or his representative may cross-examine the witnesses. The hearing may proceed in the absence of the employee if he fails to attend two consecutive hearings without providing a reasonable excuse for his absence.

13. Where the Tribunal finds that the evidence does not support the charge it must report same to the Board before calling on the employee to present a defence. If the Tribunal finds that the charge has been made out they must report same to the Board within twenty-one (21) days. The report is confidential and is not to be disclosed to the employee. If the Board approves the report, within fourteen (14) days of receipt it notifies the employee in writing of the findings of the Tribunal, the penalty imposed on him and the right to apply for a review pursuant to Regulation 45. One of those penalties is dismissal.

14. There is also a comprehensive scheme for review by a Review Board appointed by the Minister and the decision can be overturned by the said Minister on review.

Preliminary Point

15. The Claimant was charged with, *Calling for and causing nine (9) Medical Orderlies to take illegal Industrial Action on January 8, 2019 at the Accident and Emergency Department of the San*

Fernando General Hospital, contrary to the Industrial Relations Act. It is noteworthy that no section of the law was set out in the allegation of breach of the Industrial Relations Act (IRA). Neither was the finding of guilt by the Tribunal one which specified the section of the law that the Claimant was found to have breached.

16. The Claimant submitted that the Defendant was not vested with the power to institute disciplinary proceedings against the Claimant for what is a criminal offence under the IRA. In essence the submission is that if the Claimant caused the Orderlies to engage in industrial action he may (without admitting same) have committed an offence under section 67(5) of the IRA. Therefore, by virtue of Regulation 20 of the Conduct Regulations, the Defendant was prohibited from instituting disciplinary proceedings against the Claimant.

17. In that regard, Regulation 20(3) of the Conduct Regulations reads:

> *Where a criminal offence appears to have been committed by an employee the Board shall ascertain from the Director of Public Prosecutions whether he contemplates criminal proceedings against the employee before instituting disciplinary action against the employee.*

18. Consequentially, the argument is that the entire process and procedure leading up to the Claimant's dismissal was null and void in that the Defendant exceeded its statutory powers and contravened the principles of natural justice. The Claimant pointed out that the Defendant is a public authority and is governed by a statutory provision and relied on the learning of the authors of Smith and Thomas,[2] where a dismissal is considered a nullity:

> *"In certain restricted cases, a dismissed employee may be able to invoke certain administrative law remedies to argue that his dismissal was invalid; if this is accepted, the legal result is that there was no effective dismissal, and so the contract of employment will be indirectly enforced. The two principal bases for the challenge are that the dismissal was contrary to the rules of natural justice or was in some way ultra vires."*

[2] Industrial Law, 8th edition, p. 474-483

Submissions of the Defendant

19. The Defendant submitted that this argument forms no part of the Claimant's pleaded case. The Defendant relied on the well-known decision of ***McPhilemy v Times Newspapers***[3] which decided that the purpose of pleadings is to set out the parameters of a party's case. As a result, the Defendant was not provided with an opportunity to respond thereto and lead evidence in respect thereof at the trial of this matter. Furthermore, the Claimant has not led any evidence at the trial of this matter in support to establish that it is an accepted fact.

20. Additionally, the Defendant contended that Regulation 20(3) may fairly be viewed as advisory. The Defendant's purported failure to co-operate does not render the subsequent disciplinary processes illegal, null and void.

Discussion and Finding

21. Section 67(5) IRA reads:

> (5) A trade union or other organisation, the holder of an office in a trade union or other organisation or any other person who calls for, or causes industrial action to be taken in an essential service or induces or persuades any worker in that service to take such action is liable on summary conviction:
>
> > (a) in the case of a trade union or other organisation to a fine of twenty thousand ($20,000.00) dollars, and the Board may cancel the certificate of recognition under Part Ill:
> >
> > (b) in the case of the holder of an office in a trade union or other organisation to a fine of ten thousand dollars ($10,000.00) and to imprisonment for twelve (12) months, and such person shall be disqualified from holding office in any trade union or other organisation for a period of five (5) years after conviction therefore…..

22. The Defendant is a statutory body established by Act of Parliament and operates within the walls of the legislation that governs it. The conduct regulations specify the acts of conduct for which a contracted employee can be found guilty of misconduct. The court accepts that the list is prescriptive and not exhaustive as the commission of a criminal offence may upon proof that the

[3] (1999) 3 All ER 775, per Lord Woolfe MR at p. 792-793

act occurred or that the Employee was convicted of the criminal offence be considered behaviour that is inappropriate or disorderly in contrary to Regulation 19(1) (j) of the regulations. In the latter case, the finding of guilt pursuant to section 67(5) of the IRA is a matter for a court of law but in both cases, the issue can validly be the subject of disciplinary proceedings. The difference is that in the former, the circumstances of the actions of the employee may be led in evidence to demonstrate that he is guilty of disorderly or inappropriate conduct without recourse to a conviction by a court of law. In the latter, the fact of the conviction may be used to demonstrate that the behaviour was inappropriate or disorderly. This must be the case, as the regulations cannot provide for every instance of misbehaviour.

23. Further, Regulation 19(1)(g) makes it a disciplinary offence not to report to the Defendant that the Employee has been charged with a criminal offence that carries a term of imprisonment. The rationale for this must be so that the Defendant is aware in the event that there is a conviction so it may choose to take its own disciplinary action thereafter, but nothing prevents the Defendant from so doing prior to a finding of guilt by a court.

24. It is equally clear that the Disciplinary Tribunal cannot pronounce on a finding of guilt under section 67(5) IRA as that is a matter for a court of summary jurisdiction under the Act. What it can do is make a finding that the Claimant is guilty of a disciplinary offence under Regulation 19(1)(j)) in that he engaged in inappropriate behaviour or disorderly conduct in the course of his duties by causing or calling for industrial action to be taken in an essential service. As set out above, it must be noted that the Disciplinary Committee did not purport to make a finding under section 67(5) of the IRA and stopped short of so doing.

25. When one peruses the charge laid by the Defendant it is abundantly clear that the Charge does not specifically allege the commission of an offence under Regulation 19(1)(j) but it is equally clear that this was the basis of the charge despite the fact that the specific regulation was omitted.

26. The court also accepts that the very regulations at Regulation 20(3) provides for the case where the allegation crosses into the realm of alleged criminal conduct. In such a case, where a criminal offence appears to have been committed by an employee, the Board is duty bound to ascertain from the Director of Public Prosecutions whether he contemplates criminal proceedings against the employee before instituting disciplinary action against the employee. There is good reason

for this as should there be a prosecution, that prosecution ought properly to take priority over a disciplinary hearing so as not to interfere with the rights of the accused or prejudice a fair hearing. For this reason, disciplinary matters that involve allegations of criminal conduct are usually delayed until the finding of the court is made known.

27. In this case, the Defendant owes a duty to the Claimant to fulfil its obligations under the contract of employment. This obligation includes the duty to abide by the process set out in the Conduct Regulations so as not to engage the employee in a process that is non-contractual. The allegation of the Defendant was that the Claimant committed an offence which is one defined as a criminal offence in law. The fact that it did not specify the section of the law in the IRA that the Claimant allegedly breached within the body of the charge is immaterial as it is pellucid that he was being accused of the commission of a criminal offence under section 67(5). The Defendant ought therefore, to have ascertained the position of the DPP before so doing but the failure so to do is not fatal to the case for the Defendant as no criminal proceedings were ever brought by the police against the Claimant so that the failure to so ascertain has resulted in no prejudice to either a criminal case or a disciplinary case against the Claimant which is the essence of the protection conferred by the regulation that required the Defendant to ascertain the position of the DPP before proceeding.

28. Further, the court accepts the submissions of the Defendant that the regulation can be reasonably regarded as being directory and failure to comply does not render the disciplinary proceedings null and void.

29. The Claimant therefore, cannot rely on this failure so as to assist his claim.

30. In answer to the preliminary point, the Defendant took the position that same was not pleaded and so it should not at this stage be allowed. It argued that as a consequence it would not have had the opportunity to reply to the point. There are two matters that mitigate against this argument. Firstly, the point is in fact taken in paragraph 13(b) of the Amended Statement of Case in which the Claimant averred that the alleged misconduct does not fall within the scope of Regulation 19 which specifies and particularises the types of misconduct of which an employee may be found guilty (although it did not treat with the issue of the enquiry of the DPP). In its Amended Defence, the Defendant purported to answer the allegation at paragraph 13(b) of the Amended Statement of Claim but in so doing failed to treat specifically with the point raised in

relation to the list of disciplinary offences set out in Regulation 19. In fact, the Amended Defence appeared simply to recite the steps taken prior to charge without treating specifically with that issue. So that it is not correct that the Claimant did not plead the point but it is correct that the Defendant did not respond specifically to the point so pleaded.

31. Secondly and in any event, the closing submissions of the Defendant were filed first after the close of evidence and the Defendant was provided with the opportunity to reply to the Claimants submissions but it chose to restrict its response to the pleading point.

32. The preliminary point is therefore, dismissed.

The case for the Claimant

33. The Claimant gave evidence and called one witness, Shermaine Dick.

Andy Acosta

34. On April 14, 2005, the Claimant entered into a contract with the Defendant whereby he was appointed as a Medical Orderly at the San Fernando General Hospital ("the Hospital") commencing on April 6, 2005. He earned the monthly sum of six thousand, two hundred and eighty-two dollars ($6,282.00) and a two hundred and twenty-five dollar ($225.00) cost of living allowance, a one hundred and sixteen dollar and thirteen cents ($116.13) laundry allowance, and a three hundred and thirty-eight dollar and seventy-one cents ($338.71) meal allowance.[4]

35. The Claimant is the President of the Unified Health Sector Workers Union ("the Union"). His wife is the General Secretary of the Union. It is comprised of employees of the Defendant. According to the Claimant, ever since the Union's inception, the Defendant has maintained a hostile and aggressive stance towards the Union.

36. From January 1, 2019, one Rossy Branker was designated as Supervisor of ten Medical Orderlies. Esther Blackburn, Shermaine Dick, Kerron Ferguson, Jamelia Cross, Colleen Hercules, Kamani Ramsundar, Brent Rodrigues, Maurissa Belasco, Rohan Ragbir, and Krystelle Paul are the names of the Orderlies. It is the evidence of the Claimant that Branker subjected the ten Orderlies to harsh, abusive and oppressive treatment throughout Branker's first week as Supervisor of the Orderlies. He also spoke of an alleged event in which Branker was incredibly insulting to Ramsundar. The

[4] See PDF 15 of TB 2 namely a letter appointing the Claimant to the position of Medical Orderly effective April 6, 2005.

Claimant says that a few days later, on January 4, 2019, the Orderlies initiated a 'pep talk' with Branker to foster a cordial working relationship but this did not bring about a change in attitude by Branker. According to him, things were so bad that on January 7, 2019, Branker accused the Orderlies of stealing the keys for her car. The evidence is though that the Claimant was on vacation leave at this time so these matters would have come to his attention via reports made to him.

37. The following morning, after their shift at 5:30 a.m., the Orderlies requested an urgent meeting with the General Supervisor of the Orderlies, Kathleen Delpesh and Branker. Although he was on vacation Shermaine Dick agreed that he, the Claimant, could attend the meeting to assist and represent the Orderlies. During the meeting while addressing his members, Branker chatted loudly on her phone and then exited the room. Delpesh then followed Branker without signalling the conclusion of the meeting. On the evening of January 8, 2019, Dick informed the Claimant that she had spoken with Hospital Administration personnel and that another meeting was set for that evening. Dick also agreed to the Claimant's attendance on that occasion.

38. Upon his arrival at the Hospital around 9:15 p.m., he observed the Orderlies standing outside by the Ambulance Bay. The Orderlies informed the Claimant that they signed in for their 9:00 p.m. shift. However, they were unable to obtain the attention of the Manager of Hospital Administration, Michelle St. John and the Assistant Manager of Hospital Administration, Rosalie Hackett. The Claimant thereafter observed Branker enter the Hospital around 10:20 p.m. Sometime thereafter, the Orderlies approached a doctor on duty, Dr. Narinesingh and requested that he speak with St. John and Hackett. Dr. Narinesingh was unsuccessful. However, another doctor on duty, Dr. Maharaj was successful. The Orderlies spoke for about ten minutes with St. John and Hackett around 11:00 p.m. The Claimant was present but moved beyond earshot and thus missed the dialogue. The Orderlies informed the Claimant they were assured a meeting would be scheduled with the Manager of Employee Relations, Dr. Selwyn Samaroo. It appears however, that this meeting never took place.

39. Subsequent to those events, a letter addressed to him by the Defendant regarding the January 8, 2019 incident was delivered to him but he refused to accept it. Hayley Ransome of the Industrial Relations Department subsequently informed the Claimant of a letter dated January 16, 2019, alleging that the Claimant convened unauthorised industrial action.[5] Another letter dated

[5] See PDF 21 of TB 2 namely, a letter addressed to the Claimant requesting a written report on the events that took place on the night of January 8, 2019. The letter also indicated that Dr. Samaroo had been appointed to conduct an investigation.

February 25, 2019, was delivered to the Claimant charging him with, *Calling for and causing nine (9) Medical Orderlies to take illegal Industrial Action on January 8, 2019 at the Accident and Emergency Department of the San Fernando General Hospital, contrary to the Industrial Relations Act*[6] and informing him that as a result of the charge against him, he was required to attend a disciplinary hearing three (3) days later.[7] In response to this letter, the Claimant's Attorney responded and advised the Defendant that the procedure leading up to the disciplinary hearing was flawed in that it breached Regulations 19 to 28 and as a result, the suspension of the Claimant was null and void.[8] In that letter of February 26, 2019, Samaroo informed the Claimant that if he had a representative, that person could not cross-examine the witnesses and he, the Claimant would have to do it personally. Advice that is wholly opposite to that set out in the regulations.

40. On the date of the hearing the Claimant attended and informed the panel that he could not answer any questions due to his Attorney's absence. As a result, the Claimant excused himself from the hearing.[9] The court noted that the disciplinary proceedings were conducted thereafter ex-parte. The Board heard the evidence from Rosalie Jeffery-Hackett and Michelle St. John.

41. Sometime after, Attorney for the Claimant wrote to the Defendant to advise it that in his view the disciplinary hearing was unlawful.[10] Thereafter, by letter April 3, 2019, the Defendant terminated the Claimant's employment.[11]

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[6] See PDF 23 of TB 2 namely, a letter addressed to the Claimant notifying him of the charge against him the Board' authority to resolve disputes without establishing a Tribunal.

[7] See PDF 24 of TB 2 namely, a letter from Dr. Samaroo notifying the Claimant of the date, time and location of the disciplinary hearing. The Claimant was also informed of his right to be represented and to notify the Authority of any witnesses who would be called. Additionally, the Claimant was immediately suspended from duty.

[8] See PDF 25 of the TB namely, a letter written on behalf of the Claimant requesting that the Defendant to cancel the March 1, 2019 hearing.

[9] See PDF 28 of TB 2 namely, the minutes of the disciplinary hearing dated March 1, 2019. According to the minutes, "Mr. Meade began to read the charges but was interrupted by Mr. Acosta who informed the Tribunal that he was advised by his legal counsel to not answer any questions and to refrain from taking part in the Hearing."

[10] See namely, the pre-action protocol letter of March 14, 2019.

[11] See PDF 34 of TB 2 namely, the letter sent to the Claimant informing him that the disciplinary panel had found him guilty of the charge laid against him and terminated his employment with immediate effect.

42. The Claimant contended that he was not responsible for the participation of the Orderlies in the industrial action. He referred to the letters of the Orderlies written to the Defendant that informed it that they, the Orderlies, spontaneously refused to assume duty.[12]

43. The Claimant contends that due to his dismissal, he is unable to find suitable employment and has suffered financial damage.

Cross-examination by the Defendant

44. The Claimant accepted that an Orderly plays a crucial role in healthcare management. He acknowledged that under the IRA, any health worker forms part of essential services and is prohibited from taking unlawful industrial action.

45. With regards to the appointment of Branker, the Claimant stated that he was not under the supervision of Branker but was appraised of Branker's alleged conduct while serving as the Union's President.

46. Delpesh was informed by the Orderlies of the Claimant's attendance at the meeting. It was his evidence that after Branker and Delpesh exited the meeting, they were nowhere to be found. He made no arrangements for a follow-up meeting with the Hospital Administration to discuss Branker's behaviour as President of the Union. He denied that he went to Delpesh's office following the meeting and notified her that the Orderlies would not be reporting for duty that night.

47. The Claimant admitted that he ought to have been acquainted with the Assistant Manager of Hospital Administration but was not. However, he was acquainted with the Manager of Hospital Administration, Michelle St. John. According to the Claimant, he sought unsuccessfully to contact St. John on around January 3 or 4, 2019, to arrange a meeting with Branker and the Orderlies to resolve the problem. The Claimant admitted that this information was not incorporated in his witness statement.

48. He admitted that before the conclusion of the meeting on January 8, 2019, Delpesh requested that Branker end her phone conversation and soften her approach toward the Orderlies. He was not

[12] See PDF 36 of TB 2 namely, the letter of Shermaine Dick dated January 21, 2019. She added that she and the other Orderlies were standing outside the Ambulance Bay "trying to decide on the best approach going forward."

privy to the conversation between the Orderlies and Hackett and St. John. The Orderlies informed the Claimant of what was said following the conversation. He was referred to a letter of response from Dick to the Manager of Employee Relations.[13] The Claimant accepted that this communication has no reference to Hackett and St. John confirming a meeting for January 8, 2019. On the other hand, the Claimant denied that Hackett and St. John requested that the Orderlies resume their duties and that two of the Orderlies did so. Despite the Claimant being referred to in his affidavit of May 14, 2019.[14] Additionally, the Attorney for the Defendant pointed out to the Claimant that there is no evidence that Branker threatened the two Orderlies if they did not return to their duties.

49. The Claimant confirmed that he refused the January 16, 2019 and February 25, 2019 letters.[15] He accepted that these letters, along with the letter dated February 26, 2019,[16] detailed the charge brought against him, the date, time and location of the disciplinary hearing, and the right to be represented by an Attorney.

Shermaine Dick

50. Dick has been employed as a Medical Orderly for approximately seventeen (17) years. She is also a member of the Union. At the time of the incident, Dick was assigned Assistant to the Medical Orderlies.

51. Dick claims that she attempted to speak with Branker about developing a positive relationship with the Orderlies in the future. According to Dick, Branker had a hostile and obnoxious attitude towards the Orderlies. For instance, she informed the Orderlies that it would be at her discretion to give a two-hour dinner break instead of one hour. As a result, Dick and the other Orderlies discussed the situation with the Claimant in his capacity as Union President. He informed them they have to abide by Branker's policy. According to Dick, Branker continued to bully and badger her, and the workplace became intolerable.

[13] See PDF 47 namely, a letter dated January 21, 2019, from Shermaine Dick denying she engaged in industrial action. She also reported that on the night of the meeting Hackett and St. John enquired as to why the Orderlies were outside and informed them that their problems could not be resolved at that time.

[14] See PDF 60 of the supplemental TB C specifically para. 5.

[15] See PDF 21 and 23 respectively of TB 2.

[16] See PDF 24 of TB 2.

52. Dick similarly stated that Branker accused the Orderlies of stealing her car keys to steal her car. As a result of that occurrence, an urgent meeting was held with Delpesh and Branker around 5:30 a.m. on January 8, 2019. Dick says Delpesh consented to the Claimant's attendance. At the meeting Dick aired the grievances of the Orderlies and the conduct of Branker. Afterwards, the Claimant began to address the meeting and Branker instantly proceeded on her mobile phone and exited the meeting. Delpesh then followed Branker out of the meeting. Dick also claims to have spoken with Delpesh in the corridor, who promised to attempt and organise another meeting with St. John and Hackett later that evening. As a result, Dick invited the Claimant to attend that meeting.

53. On the night of January 8, 2019, after signing in for her shift, Dick noticed St. John and Hackett and waved to them. However, they disregarded Dick and the other Orderlies. Following that, they congregated in the area of the Ambulance Bay and deliberated on a course of action. The Claimant arrived shortly after 9:15 p.m. and enquired whether the Orderlies were able to have the meeting.

54. Dick stated similarly that shortly after 10:00 p.m., the Orderlies spoke with Dr. Narinesingh and then eventually Dr. Maharaj around 11:00 p.m. Thereafter, Dick and the Orderlies chatted with St. John and Hackett for ten minutes about why they declined to assume duty that night and the issues they had with Branker. St. John and Hackett promised the Orderlies a meeting with Dr. Samaroo, but according to Dick, the meeting never took place.

55. Dick claims she received a letter from Dr. Samaroo dated January 16, 2019, accusing her of participating in an unlawful industrial action. Although this letter was misplaced, Dick says that the other Orderlies received similar letters.[17]

<u>Cross-examination by the Defendant</u>

56. Dick accepted that there is a system to follow if one has an issue with a supervisor. Dick stated that she verbally communicated her concerns to Delpesh following two fruitless sessions with Branker. These meetings took place before January 8, 2019. However, Dick accepted that this information was not stated in her witness statement. She concurred with the Attorney for the Defendant that should an Orderly fail to perform his duty, the Health Administration will likely suffer the consequences. This is so, particularly as the Orderlies were assigned to the Accident and Emergency Department.

[17] See PDF 46 of TB 2 namely, a letter of January 16, 2019, addressed to a Medical Orderly, Esther Blackburn.

57. Dick testified that following the incident with Branker's missing car keys, she sent a message to Delpesh requesting a meeting. This is the meeting that occurred on the morning of January 8, 2019, with the Claimant present as the Union Representative. Dick confirmed at the meeting, that Delpesh advised Branker to soften her approach in dealing with the Orderlies. After the meeting, she spoke with Delpesh and called her during the day. Delpesh did not confirm that a meeting would occur later that night.

58. Dick was still unsure whether a meeting with Hackett and St. John would occur when she arrived for her 9:00 p.m. shift that night although she anticipated that there would be one. When she and the Orderlies signed in, they checked to ensure that there was no pending work and then proceeded outside to await the meeting with Hackett, St. John and Branker. Dick acknowledged that this testimony contradicted her witness statement that she called the Claimant around 6:00 p.m. and invited him to the meeting. Dick said that she never saw Hackett or St. John assisting patients in the A&E Department. After the Claimant's arrival, Hackett and St. John approached the Orderlies, enquired why they were outside, and requested that they resume their duty. According to Dick, the Orderlies insisted on holding a meeting first, but Hackett and St. John declined at that time. Dick confirmed that two Orderlies had resumed their duty. She also stated that the doctors spoke with the Orderlies after speaking with Hackett and St. John.

59. After the incident, Dick was suspended for three (3) weeks. It was then that she penned her January 21, 2019 report. She testified that her report contained references to other incidents occurring after January 8, 2019.[18]

60. On the night of the incident, Dick says that the Claimant was present as the Union Representative for the Orderlies. Dick denied that the Claimant instructed the Orderlies not to go to work unless Delpesh agreed to a meet.

The case for the Defendant

61. The Defendant called three witnesses; Kathleen Delpesh, Michelle St. John and Denise Thomas.

[18] See PDF 47 of TB 2 namely, a letter in response dated January 21, 2019, from Shermaine Dick to Dr. Samaroo refuting the allegation of industrial action.

Kathleen Delpesh

62. Delpesh is the General Supervisor of Medical Orderlies. One of her responsibilities includes investigating and reporting on complaints made by the Orderlies. According to Delpesh, on January 7, 2019, during the 9:00 p.m. to 6:00 a.m. shift, she received a text message from Dick requesting a meeting with the Orderlies. The following morning, the day of the meeting, at around 5:15 a.m. Dick told Delpesh that the Claimant would be there. Also present at the meeting was Branker, Dick and eleven Orderlies. The Orderlies addressed their grievances on Branker's management style and she, Delpesh formed the view that the issue had more to do with differences in personalities. She nevertheless asked Branker to temper her approach. On the other hand, Delpesh informed the Orderlies that Branker possessed the authority to enquire and to be informed as to the whereabouts of the Orderlies.

63. After that, the Claimant was permitted to address the meeting. It is the evidence of Delpesh that he ranted and hurled insults at Branker, alleging that she was inept. He also used the metaphor "square peg in a round hole" in reference to Branker. The Claimant accused Branker of incompetence, attacked her style of management and questioned her skill in leading the shift. In the midst of it all, Branker chose to make a phone call causing Delpesh to ask Branker to end the call. Branker however, refused to co-operate and so the Orderlies and the Claimant left the meeting. The meeting thus ended at 6:17 p.m. While exiting the room, the Claimant indicated to Delpesh that since there was no resolution to the problem, the Medical Orderlies would not be working that night. This was fiercely denied by the Claimant in his testimony. He then stated that the Medical Orderlies would not assume duties on the night shift.

64. Delpesh would arrive at her office at the San Fernando Teaching Hospital to find the Claimant waiting. Delpesh says that the Claimant made insulting statements and comments to her about Branker and repeated that the Orderlies would not work the night shift. As a result, Delpesh contacted Hackett and informed her of the Claimant's threats.

Cross-examination

65. Delpesh denied following Branker out of the meeting on January 8, 2019. She testified that remarks made by the Claimant towards Branker were offensive and that she had no knowledge about supervising the Orderlies. Delpesh maintained that the Claimant stated that the Orderlies would not be working the night of January 8, 2019. Delpesh denied speaking with Dick after the

meeting, in the hospital corridor, or during the day and denied that Dick instructed her to convene another meeting to resolve the issue.

Michelle St. John

66. St. John was the Manager of Hospital Administration at the San Fernando General Hospital. She was responsible for co-ordinating operations and personnel activities to accomplish the Hospital and Health System's objectives related to the provision of services within designated areas.

67. Prior to the incident, on January 8, 2019, St. John notified the Chief Executive Officer and the General Manager of Human Resources of a potential service disruption with the 9:00 p.m. to 6:00 a.m. shift at the A&E Department. Hackett and St. John attended at the said Department as a precautionary measure. Fifteen minutes later, St. John observed the Claimant in the vicinity of the Ambulance Bay surrounded by eleven Orderlies.

68. As a result, Hackett and St. John conducted an assessment and discovered twenty-six (26) patients awaiting transfers, two (2) patients requiring CT scans and one (1) patient awaiting an x-ray. Additionally, the A&E department was also overcrowded with patients. As a result, Hackett and St. John approached the Orderlies and requested their attendance at duty. However, they asked for a one-hour meeting to discuss their problems with Branker.

69. St. John believed that the Orderlies concerns did not relate to health and safety so, she and Hackett proposed that the meeting be held at another time. The Claimant then stated, "well allyuh not working" to the Orderlies. Two of the Orderlies however, resumed duties. As a consequence Orderlies from other departments were called in to provide assistance in the A&E Department while St. John co-ordinated the transfer of patients to the San Fernando Teaching Hospital.

70. St. John says that around 11:00 p.m., while patients were being transferred, a doctor approached her and Hackett and requested that they speak with the Orderlies who asked for an hour of their time. A half hour later, another request was made on behalf of the Orderlies. As a result, around 11:45 p.m., St. John and Hackett briefly spoke with the Orderlies regarding their problem with Branker's behaviour. The Orderlies resumed duties when St. John and Hackett informed them that a meeting would be scheduled as soon as feasible with the Manager of Employee Relations.

71. St. John says she has an open-door policy and the Orderlies had the option of addressing their complaints to her. However, St. John received no written or verbal complaint against Branker.

Cross-examination by the Claimant

72. St. John says Hackett informed her that the Orderlies would not be working the 9:00 p.m. shift on January 8, 2019. St. John was unable to determine whether the comment meant that the Orderlies did not intend to work their shift or intended to engage in industrial action when their shift began.

73. At that time, no contingency measure was implemented, but if need be, St. John would have requested Orderlies from other departments to assist in the A&E Department.

74. On the night of the incident, St. John met with Branker but could not recall the time. When St. John approached the Orderlies, she alerted them that the A&E Department was overcrowded. St. John maintained that the Orderlies wanted an hour to discuss the Branker situation but were denied due to the A&E Department's disarray.

75. Later, when the first doctor sought the request on behalf of the Orderlies, St. John explained that she could not recall the amount of time requested by the Orderlies. St. John also maintained that she heard the Claimant state that the Orderlies would not be working.

Denise Thomas

76. Thomas is the General Manager of Human Resources of the Defendant. She is responsible for different units with the HR Department, including the Industrial Relations Unit and the Employee Services Unit. As a result, Thomas has access to the Claimant's personnel and industrial relations file.

77. On the incident date, St. John informed Thomas of a problem with the Orderlies attached to the A&E Department during the first meeting of January 8, 2019. As such, the Hospital Administration Department decided that St. John and Hackett attend the 9:00 p.m. shift at the A&E Department would monitor the situation.

78. The following morning, St. John informed Thomas that the Claimant led the Orderlies in an industrial relations action. Moreover, patient transfers were delayed and the A&E Department was overcrowded, jeopardising patients' lives.

79. St. Thomas asserts that the Defendant complied with the Conduct Regulations and submitted reports to the Chief Executive Officer by the General Supervisor and Supervisor of Medical Orderlies. A report was then forwarded to Defendant's Board of Directors on February 20, 2019. St. Thomas alluded to the Claimant's initial refusal to accept the letter of January 16, 2019. In that letter the Claimant was informed of the appointment of an investigator. Following the investigator's report, the Board of Directors charged the Claimant for and caused nine Medical Orderlies to participate in illegal industrial relations action. The letter of February 25, 2019, informed the Claimant of the said charge and the letter of February 26, 2019, notified the Claimant to attend a Disciplinary Tribunal carded for March 1, 2019. On March 20, 2019, the Board of Directors decided to dismiss the Claimant. Thomas says that the Claimant has not denied the charge against him despite the preceding.

80. Thomas painted a picture of previous insolence by the Claimant from 2007 to 2016.[19] One of example was his alleged submission of fraudulent medical certificates. Furthermore, the Claimant allegedly failed to report for duties, allegedly assaulted an Assistant Manager and used abusive and profane language toward other personnel within the Authority. If the Claimant is reinstated, Thomas asserts that his disruptive and disrespectful behaviour will persist. These alleged instances and her view on the effect of the reinstatement of the Claimant are not relevant to the facts of the case and so no weight whatsoever is attached to them by the court.

Cross-examination by the Claimant

81. Thomas could not say why there was no exhibit of the minutes from the Board from the time it decided to lay charges against the Claimant. Thomas also confirmed that no charges were laid against the Claimant for the alleged infractions.

The Court's Approach

82. In ***Horace Reid v Dowling Charles and Percival Bain***[20], Lord Ackner delivering the judgment of the Board, stated that where there is an acute conflict of evidence, the trial judge must check the impression that the evidence of the witnesses makes upon him against:

[19] See paras 22 to27 of the witness statement.

[20] Privy Council Appeal No. 36 of 1897 at page 6.

i. Contemporaneous documents;

ii. The pleaded case; and

iii. The inherent probability or improbability of the rival contentions.

Issue 1- Did the Claimant call for and/or cause industrial action to be taken by Medical Orderlies on the night of January 8, 2019 at the A&E Department of the Hospital and/or induce and/or persuade the Medical Orderlies in such essential service to take industrial action placing the lives and limbs of patients seeking treatment at the A&E Department at risk

83. It was submitted on behalf of the Defendant that the actions of the Orderlies constituted industrial action. The Defendant pointed out that the Claimant disclosed for the first time that he attempted to call St. John prior to the incident but was unable to reach her. Similarly, Dick never mentioned any meetings held prior to the meeting of the morning of January 8, 2019 concerning Branker's harsh and abusive management style. Furthermore, the Defendant submitted that there are no documents of written complaints against Branker.

84. The Defendant referred to the evidence of Delpesh that the Claimant informed her that the Orderlies would not be working the night of January 8, 2019. Whatever meaning is attributed to that statement amounts to industrial action within the meaning of section 2 of the IRA. The Defendant further relied on the testimony of Dick in which she confirmed that she received no assurance that a meeting would be held with the Orderlies on the night of January 8, 2019. The Defendant also submitted that Hackett and St. John were present at the A&E Department and outside of their normal working hours because of the earlier threat of the Claimant that the Orderlies would not be working on the night of January 8, 2019. Therefore, the Defendant believes that the Claimant attended the A&E Department on the night of January 8, 2019 intending to call/induce industrial action. Furthermore, the Orderlies' refusal to work amounted to industrial action.

85. The Defendant has asked the court to draw an adverse inference against the Claimant for his failure to call any of the Orderlies to give evidence on the alleged abusive treatment suffered under Branker's supervision.

86. The Claimant submitted that the Orderlies' actions were not to be considered industrial action as they were merely seeking a meeting with Management and that on the evidence as a whole the Claimant did not call or encourage the Orderlies to leave their jobs that night. That they would have spontaneously left after the actions of provocation by Branker.

Discussion and Finding

87. The Claimant is the President and representative of the Union. As a result, his presence and authority extended well beyond that of a bystander.

88. Section 2 of the IRA sets out a definition of what industrial action means:

> *"industrial action" means strikes and lockouts, and any action, including sympathy strikes and secondary boycotts (whether or not done in contemplation of, or in furtherance of, a trade dispute), by an employer or a trade union or other organisation or by any number of workers or other persons to compel any worker, trade union or other organisation, employer or any other person, as the case may be, to agree to terms of employment, or to comply with any demands made by the employer or the trade union or other organisation or by those workers or other persons, and includes action commonly known as a "sit-down strike", a "go-slow" or a "sick-out" except that the expression does not include –*
>
> *(a) a failure to commence work in any agricultural undertaking where work is performed by task caused by a delay in the conclusion of customary arrangements between employers and workers as to the size or nature of a task; and*
>
> *(b) a failure to commence work or a refusal to continue working by reason of the fact that unusual circumstances have arisen which are hazardous or infurious to health or life*.

89. Section 2 further reads:

> *"strike" means a cessation of work, a refusal to work, to continue to work or to take up work by workers acting in concert or in accordance with a common understanding, or other concerted activity on the part of workers in contemplation of, or in furtherance of, a trade dispute, except that the expression does not include action commonly known as a "sit-down strike", "go-slow" or "sick-out"*;

90. In the Second Schedule to the IRA, Health Services, Hospitals and Medical Institutions are included among the definition of essential services. The relevant section is provided by section 67 of the IRA. Section 67(2) reads:

> *(2) An employer or a worker carrying on or engaged in an essential service shall not take industrial action in connection with any such essential service*.

91. Section 67(4) goes on to say:

> *(4) A worker who contravenes subsection (2) is liable on summary conviction to a fine of one thousand dollars and to imprisonment for six months*.

92. So that it is clear and the court finds for the avoidance of doubt that the Medical Orderlies were workers engaged in an essential service that night and were prohibited from taking industrial action which action would have included slow down, cessation of work or refusal to work. It is a matter of evidence that the workers in fact refused to work and assembled outside of the A&E Department thereby causing a backlog in the movement of patients which required the assistance of staff from other departments. This much is not disputed on the evidence. The issue therefore, is whether the Claimant called for or caused same.

93. Upon examination of the evidence the court finds that it was more likely than not that the Claimant called for such action or caused such action.

<u>The Direct evidence</u>

94. Direct evidence came from the witness Delpesh, who testified that while exiting the room upon the abrupt cessation of the meeting, the Claimant indicated to Delpesh that since there was no resolution to the problem, the Medical Orderlies would not be working that night. She also testified that upon arrival at her office at the San Fernando Teaching Hospital the Claimant was waiting. He then made insulting statements and comments to her about Branker and repeated that the Orderlies would not work the night shift. This evidence remained unshaken in cross-examination save for the fact that it was put that no such thing happened.

95. Direct evidence also came from Michelle St. John, the Manager of Hospital Administration whose evidence in this case is of particular importance. It is her evidence that she and another administrator received word of an intended shut down and so came to the A&E where they observed the Claimant in the Ambulance Bay surrounded by the Orderlies. Upon telling the Orderlies that she was of the view that the issues had to do with a conflict in personalities and that they could arrange to meet another time she heard the Claimant say to the Orderlies, "well allyuh not working". Two of the Orderlies however, resumed duties while the others refused to work. This direct evidence has negated the need for inferences to be drawn as to whether the Claimant called or caused the Orderlies to take action. It is direct evidence of his call and encouragement and it shows the immediate response in that two Orderlies resumed work and the others did not. There can be no clearer evidence of calling for or causing the Orderlies to refuse to work and the court so finds.

96. That evidence is of course consistent as a matter of logic and plausibility with the evidence of Delpesh that the Claimant thereafter told her that the Orderlies would not be working and that he did so twice. The court therefore, accepts the evidence of Delpesh in that regard and does not believe the evidence of the Claimant. It is to be noted that he has called none of the Orderlies as witnesses so as to disprove the allegation that he told them not to work. This failure to call any of the Orderlies has not been explained and the court there draws an adverse inference against the Claimant on the issue.

97. The Claimant submitted that the court should draw an adverse inference against the Defendant as it failed to call Branker to testify. This argument is in the respectful view of the court devoid of merit as the absence of Branker is not relevant to the issue. The Claimant attempted to make an argument that Branker had earlier stated in her affidavit sworn to in the interim proceedings that the Claimant had told her that the Orderlies would "down tools" which is different to the words testified to by Delpesh. The court does not accept this to be a legal basis for the drawing of an adverse inference against the Defendant. The Defendant chose not to call Branker but has called other witnesses who have testified as to the events.

98. The court also found that the evidence of the witness for the Claimant, Dick was unsatisfactory and appeared largely to be an attempt to diminish the role of the Claimant that night to one of spectator. She was the one who called the Claimant who was on vacation duty and invited him to the meeting. This must have been for a purpose other than the performance of his orderly duties

and would surely have been to participate in the meeting as the leader of the Orderlies on matters involving the relationship between the employers and workers. That was his sole purpose for being there that night. So that the attempt by the witness to give the court the impression that the Claimant was a mere bystander is rejected.

99. It therefore, is abundantly clear to the court on the totality of the evidence that the Claimant was indeed the one who called for and caused the industrial action on that day and the court so finds.

Issue 2- Whether the Claimant's contract of employment wrongfully terminated by the Defendant

100. The Defendant argued that the Claimant's dismissal was in keeping with Regulations 20-42 of the Conduct Regulations. The Claimant was notified of the allegation against him and that the said charge amounted to misconduct within Regulation 19 of the Conduct Regulations. To begin with, after the incident, a report was submitted to the Chief Executive Officer. After that, Dr. Samaroo was appointed to investigate the allegations against the Claimant, but the Claimant refused to accept the letter of January 16, 2019. The said letter also invited the Claimant to provide a written explanation of the allegation. The Defendant also says it did not object to Dr. Samaroo's neutrality.

101. However, the Defendant submits that all that has to be shown is that the Board decided to lay a charge against the Claimant and suspend him. Therefore, the Defendant relied on its letter of February 25, 2019, that informed the Claimant that the Board decided to charge him with misconduct. The Defendant also made the point that the Claimant did not file a Reply and as such he is bound by the allegations in his Amended Statement of Case. Additionally, in the absence of a Reply, the Claimant has failed to challenge by way of alternate facts that the Defendant's Board decided to lay a charge against the Claimant, suspend him, and appoint a Disciplinary Tribunal to hear the charge. Thus, the Defendant relied on the case of ***Maharaj 2002 Limited v Pan American Insurance Company of Trinidad and Tobago Limited***,[21] where cited R. Mohammed J the decision of ***Nanan v Toolsie***,[22] at para. 7 per Jones J (as she then was):

[21] CV2015-003645

[22] CV2010-04210

"In the absence of any specific rule with respect to the effect of a failure to file a reply, in my opinion, the fact that the Claimant has not filed a reply to a defence while not amounting to an admission of any new facts raised in the defence will prevent the Claimant from raising at trial any facts, other than those already contained in the statement of case, in challenge of those new facts raised in the defence…The effect of the failure of the Claimant to file a reply is that the Claimant has not sought to challenge by way of the provision of alternate facts any of the new facts raised by the Defendants in their defence."

102. The Defendant was of the view that the Tribunal had the power to proceed with the hearing in the absence of the Claimant. The Regulations are silent on the power of the Tribunal where an employee fails to partake at the hearing. As a result, the Tribunal became a master of its proceedings and was entitled to proceed with the hearing in the absence of the Claimant where the Claimant left at the start of the hearing. The Defendant relied on the decision of ***Raj-Kumar v The Medical Board of Trinidad and Tobago***,[23] Mendonça JA says at paragraph 70:

"...The question in each case is whether the procedure adopted by the Council, in the bona fide exercise of the wide discretion as to procedure reposed in it, sufficiently complied with the requirements of natural justice. It must however be emphasised that it would not be enough for the Appellant to say that some other procedure which the Council failed to adopt would have been fairer. What must be shown is that the procedure in fact adopted was unfair."

103. The Defendant was firm in its stance that the Claimant was also informed of his right to appeal the decision of the Board and the word "appeal" used in the dismissal letter instead of "review" means the same thing namely an application or proceeding for review by a higher Tribunal.

104. The Claimant submitted that the Defendant failed to follow the proper disciplinary procedure under the Conduct Regulations. The Claimant says the letter of January 16, 2019, failed to provide him with sufficient notice to provide a written explanation. The same applied with the letters of February 25 and 26, 2019. The latter also did not allow the Claimant the time to call witnesses. The Claimant also highlighted that Dr. Samaroo suspended the Claimant without any indication that he was implementing a decision of the Board.

[23] Civ. App. No. 139 of 2005

Discussion

105. Halsbury's[24] sets out the following:

A tribunal enjoys a discretion to regulate its own method of proceeding. If there is some statutory or other express procedure which applies to the decision or inquiry, that procedure must, obviously, be complied with. However, in certain circumstances the courts will be willing to supplement an express procedure with implied obligations required by fairness.

The existence of an express or implied obligation to conduct a hearing of some kind does not necessarily imply that there must be an oral hearing. If there is an oral hearing, the parties will normally be entitled to make submissions and call evidence on all relevant issues. Natural justice does not impose on administrative and domestic tribunals a duty to observe all the technical rules of evidence applicable to proceedings before courts of law. In judicial proceedings, the parties will usually also be entitled to cross-examine the witnesses of other parties, but this is not necessarily the case in other types of hearing. It may also be contrary to natural justice to refuse an adjournment requested by a party who needs further time to prepare his case or to produce evidence.

A party to proceedings in a court of law will be entitled to be legally represented. However, in proceedings before a domestic tribunal natural justice does not necessarily imply the right to be thus represented. The Tribunal is not normally under any obligation to assist an unrepresented party with the presentation of his case, although in some cases it may be necessary to make him aware of his rights. There may be a right to legal aid for representation in certain circumstances.

106. The law concerning wrongful dismissal is relatively straightforward, and one applies the conventional contract test. Although Attorneys for the parties alluded to the primary legislation of the IRA and the subsidiary legislation of the Conduct Regulations, the court prefers to look at the contract of employment which bound the Claimant to the Defendant.

[24] Halsbury's Laws of England, Vol. 61A, para. 43

107. The learned authors of Halsbury's,[25] defines wrongful dismissal as:

A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

i. the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and

ii. his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily".

108. In Chitty on Contracts[26] the learned authors explained the nature of "misconduct" stating that 'the general rule is that if the employee does anything which is incompatible with the due or faithful discharge of his duty to the employer, he may be dismissed without notice; the employee's conduct need not be dishonest, since it is sufficient if it is "conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee.

109. Clause 10 of the contract contained the conditions under which the Claimant's employment could be terminated. It says:

Dismissal

If at any time after accepting this appointment you shall neglect refuse or any other cause (except ill health) become unable to perform any of your duties, fulfil any of your responsibilities or comply with any order given by your Manager or Chief Executive Officer or shall in any manner misconduct yourself, the Authority will consider such action to be grounds for disciplinary action including termination of contract.

[25] Halsbury's Laws of England, Vol. 39 (2014), para. 825

[26] Vol. 2, 29th Edn. (2004), para. 39-176.

110. The court is of the view that firstly the Tribunal was entitled to proceed in the absence of the Claimant; he having attended and indicated that he was not participating. This was not an application to adjourn but was a clear indication that consistent with his general attitude towards the entire process he would steadfastly refuse to participate. In so doing, the Claimant became the master of his own downfall in that there appeared to have been several procedural errors made by the Defendant throughout the process of the disciplinary proceedings such as the following.

111. The CEO did not inform the Claimant of the allegation as required under Regulation 20(2) and it was in fact the Manager, Selwyn Samaroo, who so informed the Claimant by letter of January 16, 2019 (which the Claimant refused to accept). The letter informed the Claimant of the allegations that he, Samaroo, had been appointed to investigate the allegations and he required a written report from the Claimant. This letter therefore, did not meet the requirement at Regulation 21(1) but is apparently a letter from the investigator under Regulation 21 (3). In any event however, he refused to accept the letter so that it may have not made a difference to the process had there been compliance with Regulation 21(1) in light of his refusal to accept same.

112. Seven (7) days' notice was not provided by the investigator for a response from the Claimant. The letter from the investigator gave two dates to respond, one of January 18, 2019 and the other of January 22, 2019, both in respect of the same information. Both dates were less than the period required by the regulations. Once again, this breach would have been of no moment as a matter of prejudice or unfairness to the Claimant as he refused to accept the letter.

113. By letter of February 25, 2019, Samaroo purported to inform the Claimant that the Board decided to charge him and set out the charge. The contents of the letter are in keeping with the requirements set out at Regulations 22 and 24(1) save and except that the letter does not emanate from the hand of the Board but from the Manager Employee Relations. The complaint of the Claimant in this regard is devoid of merit as the regulations do not specify the method by which the Board is to inform the Claimant of the charge and it appears on the evidence that Samaroo as the Manager Employee Relations was in fact conveying the Board's decision to the Claimant. The letter does in fact convey in pellucid terms that the decision is that of the Board. The Claimant does not dispute that he also refused to accept this letter.

114. The regulations prescribe that the employee be given the opportunity to respond within a specified time. Such a period must be a reasonable one. In this case the Claimant was given two (2) days. This period was an unreasonable one and was illusory in any event as without even awaiting the expiration of the two (2) day period promised, by letter of the next day, February 26, 2019, the Claimant was informed that a Tribunal had been appointed, that he was suspended from duty and that the date of hearing was set for March 01, 2019, some three (3) days away. This was in the court's view simply astounding as the letter of the 25th informed the Claimant that he was given two (2) days to respond and that a Tribunal had not yet been appointed. Before the two (2) days had expired, the Board met and appointed a Tribunal and the Tribunal immediately set a date for hearing three (3) days from then.

115. In that regard, the court is of the view that the letter of February 26, would have caused the reasonable apprehension that the letter of February 25, was a sham concocted for the purpose of attempting to fulfil the criteria of process. Certainly therefore, the process that the Defendant purported to employ was therefore an illusory one as under Regulation 25 a Disciplinary Tribunal Hearing can only occur after the time for the explanation has elapsed and the employee has refused to give an explanation or the one he has given does not exculpate him.

116. Matters appeared to become even more alarming when one considers that Regulation 30 (6) reads as follows:

> (6) At the hearing before a disciplinary tribunal, the employee may conduct his defence in person or may be represented by –
>
> (a) an employee of his choice who is a member of the Authority
>
> (b) his staff association; or
>
> (c) an attorney-at-law,
>
> and if the employee is represented, the employee or his representative may cross- examine the witnesses called in support of the case against him.

But in the letter of February 26, Samaroo informed the Claimant that if he had a representative, that person could not cross-examine the witnesses and he, the Claimant would have to do it personally. Advice that is wholly inconsistent to that set out in the regulations.

117. Once again however, the Claimant's refusal to participate would have assuaged any unfairness to him that would have occurred as consequence of the failure of Samaroo to correctly inform him of the entitlement to cross-examine. Not that it may have mattered in any event as the crux of the violation of the right would have been of fundamental importance as opposed to the right to be informed of the right. In other words, should the Tribunal have adopted the approach incorrectly articulated by Samaroo, there would have been fertile ground for complaint. But the Claimant simply refused to participate and left the hearing. No unfairness would therefore, have occurred in this regard when his refusal to participate is considered.

118. Regulation 32 empowers the Tribunal to proceed in the absence of the employee if he fails to attend on two consecutive occasions and does not provide a reasonable excuse. In this case he did in fact attend but refused to participate and left. The rational of the regulation is that of the establishment of a clear presumption that the employee will not appear and participate if he fails to do so without reason on two occasions however, the Tribunal had been directly informed by the Claimant himself that he was not going to participate so that there was no need to await his non-appearance on two occasions.

119. Finally, in the letter of dismissal of April 30, the Board did not inform the Claimant of his right to review. This letter is issued directly by the CEO on behalf of the Board. Regulation 38 (3) (c) is specific and clear. It requires the Board to inform the employee who is dismissed of his right to apply for a review pursuant to Regulation 45 and within a specific time. The letter simply sets out "you are informed of your right to appeal this decision". The court is of the view that the use of the word appeal in place of review makes no substantive difference to the information being given, namely that the Claimant was entitled to have the decision challenged elsewhere. As far as the time for so doing is concerned the court accepts that he was not informed of the time for so doing. But this is also a contextual matter. The status of the Claimant within the workers' environment reasonably leads one to the conclusion that he would have been aware of his entitlement to appeal. Secondly, there is no evidence that he intended to appeal or tried to appeal and was prevented from so doing. The failure to so inform him is therefore not germane to the issue under consideration.

120. When the chaff if dusted off therefore, the complaints by the Claimant of breaches on the part of the Defendant in engaging the disciplinary process (to the extent that they may have occurred) have been assuaged by his actions in refusing to participate on the one hand and on the other are not so egregious so as to result in a finding that the Defendant breached its contract with the Claimant by wrongful dismissal.

The interim order

121. On July 24, 2019, this court ordered that the Defendant preserve one position of Medical Orderly until the determination of this claim if the Claimant succeeds in establishing that he was wrongfully terminated. In light of the court's findings and ruling, the order will be discharged.

Disposition

122. The court makes the following order:

i. The interim order made by this court on July 24, 2019 is discharged.

ii. The claim is dismissed.

iii. The Claimant shall pay to the Defendant the prescribed costs of the claim on the basis of the claim being one valued at fifty thousand dollars ($50,000.00) in the sum of fourteen thousand dollars ($14,000.00).

Ricky N. Rahim
Judge.