

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

XXXXX

Claimant

-and-

XXXXX

Respondent

DECISION

Hearing Date: 12 August 2024

Members of the Tribunal: Ms. Charlene A Scott FCI Arb
Chairman
Ms. Jocene Wade, Deputy Chair
Mr. Orin Simmons, Panelist

Mr. Craig Rothwell for the Claimant
Ms. Sarah Ann Tucker for the Respondent

Witness for the Claimant – Mr. Xxxxx

Witness for the Respondent- Mr. Xxxxx, Deputy Chairman for the
Respondent

1. There had been a Directions Hearing on 11 December 2023 and a Further
Directions Hearing on 18 March 2024. The Tribunal convened on 12 August

2024. The Chairman confirmed the issue to be considered by the Tribunal. The Chairman stated that the Employment and Labour Relations Tribunal Hearing was to be conducted in accordance with section 44B(2) and section 44C, the General Powers and that the Tribunal shall regulate its own proceedings as it sees fit pursuant to Schedule 2 (20) of the Employment Act 2000 (the 2000 Act).

2. The parties were given an opportunity to make remarks and then the Chairman afforded the parties the opportunity to meet without the Tribunal's assistance to engage in meaningful dialogue to attempt to reach a settlement to their dispute. After a short period of time, the Tribunal returned to the table, still at an impasse.
3. The Claimant's and the Respondent's Written Submissions as well as Counsel submitting Closing Submissions as well as engaging in closing oral arguments which later formed the basis of the Tribunal's deliberations and Award.
4. The Tribunal referred the Parties to section 44E- Power to Exclude the Public of the 2000 Act that provides, unless both parties consent, to exclude the public or any representative of the press where it considers it necessary or desirable to protect privacy to a hearing. The parties consented to exclude the press and the public.

BACKGROUND

5. What happens when someone does not know what they are doing or thinks they know better than someone else and proceeds blindly with a plan with no proof of why they are doing whatever it is they are doing - you get one big

mess. And worse yet, what happens when a lie goes unchecked and egregiously damages someone's reputation and integrity? The words terminate and dismiss will be used interchangeably throughout the Decision.

6. Xxxxx, the Claimant in this case, had been working as a xxxx xxxx, at both Xxxxx and Xxxxx since July 2009, first being employed as an Assistant Xxxxx xxxxxx. He was responsible for the operations and maintenance of the grounds. There were no infractions against his work record at any time.
7. Unbeknownst to the Claimant, in April 2021, one of the mechanics at the xxxxx, a Mr. Joseph Dore (also known as Xxxxx) had contacted a Mr. Daniel xxxxx about purchasing a John Deere Sand Pro (JDS Pro) machine which was no longer used at the xxxxx xxxxx. Apparently Xxxxx had a long-standing relationship for over 20 years with Mr. xxxxx and had sold various items to him throughout the years. The Claimant had no prior knowledge of this inquiry. He was not the one who discussed selling the JDS Pro machine to Mr.xxxxx as he, the Claimant, had a monumental task of preparing the grounds at Xxxxx for the upcoming xxxxx XXXXX Xxxxx scheduled to take place later in xxxxx.
8. Mr.xxxxx saw the unused JDS Pro machine and said that he would like to purchase it. A price of \$500.00 was agreed on by the Claimant. During that same visit, Mr.xxxxx saw a second unused JDS Pro machine. This particular one supposedly did not even start. With that said, Mr.xxxxx was not deterred and stated that he would use it for parts. A price of \$250.00 was agreed between the two of them and the sum of \$750.00 was paid in cash to the Claimant for the two JDS Pro machines. When asked by the Claimant if a bill of sale was required, Mr.xxxxx said no.

9. The money exchanged was then placed in the Claimant's office drawer for safekeeping. He was busy doing other things and the money was soon forgotten about.
10. Xxxxx was present at the time of the price negotiation and was aware that the sale for the two machines was \$750.00. He, Xxxxx, being a mechanic, had also managed to get the second JDS Pro machine to start. Xxxxx was also present on two separate days when Mr.xxxxx collected the JDS Pros.
11. On the other hand, the Claimant was not present when either of these machines were collected.
12. None of these circumstances were made known to the Respondent or for that matter, the Claimant. The actual important instances of this story did not become known until the evidence was presented at a Magistrates' Court trial held in 2022 against the Claimant, months later to the actual transactions.
13. The Tribunal was informed that this Xxxxx along with another employee, had met up with one of the trustees of the Respondent - Mr. Hollinsid, the Deputy Chairman for the Respondent, and on 26 May 2021, informed him that the Claimant had sold the two JDS Pros to Mr.xxxxx at the price of \$7000.00; not \$750.00 as was agreed between the Claimant and Mr.xxxxx and such amount paid for them.
14. The Tribunal also learned from the Claimant that he had disciplined Xxxxx sometime earlier in 2021 for using abusive language. Perhaps Xxxxx had a grudge against the Claimant for disciplining him and was causing trouble against the Claimant. We never heard from Xxxxx at this hearing nor did Xxxxx attend the Magistrates' Court when requested to do so.

15. After meeting with Xxxxx, that next day 27 May 2021, Mr.xxxxx for the Respondent, checked with the Financial Board Trustee to ascertain whether an amount of \$7000.00 had been deposited into the Respondent's bank account. No such funds were discovered in there. Nor did he confront the Claimant about this allegation of having sold the JDS Pros for \$7000.00. This would have been the earliest opportunity to do just that.
16. Given these circumstances and this damning allegation hanging over the Claimant's head, what might be the next 'best practice' and the sensible thing for Mr.xxxxx to do - perhaps have a meeting with the Claimant and ascertain if there is any truth to this allegation.
17. No, that did not happen or even the thought of conducting a proper meeting with him until after the Claimant had been arrested on 31 August 2021 and charged by the police for obtaining property (namely the two John Deere Sand Pros) by deception.
18. Just under two (2) months had now passed since the Respondent had been informed about this alleged \$7000.00 sale of the two JDS Pro machines in April 2021. No due diligence on their part was taken to ascertain the truth of what really took place and neither had it been fully investigated by the Respondent. They were told where the JDS Pro machines could be located and in early July 2021, two of the Respondent Trustees plus the acting head manager located them on Mr. property. They were out in the open and not hidden away from sight.
19. They never inquired as to how they arrived there. Instead, the Respondent Trustees of the xxxxx xxxxx opted for the police to be involved in this situation and left matter to them. On 31 August 2021, the Claimant was invited to the Police Station and was blindsided by what he was told. He was being charged

with theft of the two JDS Pro machines. One could only imagine his shock and dismay at this charge.

20. Then on or about 9 September 2021, at short notice, the Claimant was invited to a meeting with the Respondent Board to be held the next day on 10 September 2021. On the advice of his attorney not to say anything as it might prejudice the criminal proceedings yet to be held, the Claimant notified the acting general manager, Mr. , of this and respectfully requested an adjournment until after the finalisations of any Court proceedings and declined to attend.
21. The Respondent Board chose to hold the meeting in any event, suspended the Claimant for non-attendance and later informed him that they were going to investigate the theft of the JDS Pros.
22. The Claimant was placed on unpaid suspension at the beginning of October 2021 and then, on 9 October 2021 was effectively terminated from his position. On 10 October 2021 when the Claimant went to collect his belongings, he handed over the \$750.00 to Mr. Xxxxx, the sum previously agreed with and paid by Mr.xxxxxfor the JDS Pros.
23. The Claimant was then left to face a Magistrates' Court trial for theft of the JDS Pros and through no fault of the Claimant, this trial did not occur until September 2022, a whole year later and not drawn to a conclusion until February 2023. Again, the Magistrates' Court scheduling was not the Claimant's responsibility; the Claimant was in attendance each time.

EMPLOYMENT LAW

24. The Claimant's employment contract was at all times between himself and the Respondent. The offer letter given to the Claimant after he accepted the

terms and conditions of his employment at the xxxxx xxxxxs, had been negotiated by the Bermuda Public Service Union (BPSU), who was the collective bargaining agent together with the Civil Service General Orders. These General Orders had been updated back in 2001 and amended into what later became known as the Conditions of Employment and Code of Conduct (CECC). The updated version of the CECC was referenced in the hearing.

25. Given that a union was involved with the contract and given that there were likely procedures to follow if there was a disagreement between the parties, at no time was a proper disciplinary Charge ever laid before the Claimant.

26. Prior to the Claimant's arrest in August 2021, no disciplinary meeting was ever requested or held between either the acting general manager or the Respondent and the Claimant. Even if the Respondent deemed whatever occurred to be 'gross misconduct', the Claimant had a right to know what was going on and even more importantly, a right to be heard. The Claimant was never given an opportunity at the earliest opportunity to state his case.

27. Further, the 2000 Act, section 24(1) provides that –

'An employer shall be entitled to take disciplinary action, including giving an employee a written warning, or suspending an employee, when it is reasonable to do so in all the circumstances...'

28. Reasonableness was not a factor in this matter. It was a one-sided affair where another employee went and told lies about his superintendent. The Claimant was never questioned at any point prior to being arrested about his part in all of this so that the Respondent could begin figuring out what was reasonable in all of the circumstances. How one arrives at what is reasonable for the purposes of section 24(1) is laid out in section 24(3). There are 9 aspects of how to identify aspects and behaviours of the employee to assist and guide an employer when faced with what is reasonable and what is not

in all of the circumstances. None of those aspects were looked at or reviewed.

29. As the Grounds Superintendent for both xxxxx xxxxxs, the Claimant would have the authority to make decisions regarding the sale of or the disposal of old equipment since there was no written policy anywhere at that time which spoke to who, what, when, where, how any of the old equipment could be disposed of under the Xxxxx Act 199x or any other Act or policy pertaining to same. It was not in any policy manual or in his employment contract signed back in 2009. There were no addendums to his employment contract provided. Given that he had spent 11 years maintaining and supervising the two xxxxx xxxxxs, he would be deemed to have knowledge of what equipment, etc. is needed and what needs to be disposed of. The JDS Pro machines had been put to the side and were collecting dust.
30. At no time in the Claimant's 11 years or so of employment at the xxxxx was it ever discussed or put on the table at any of the meetings he attended what should be done with old equipment. The Tribunal thinks that more often than not, there would be other pressing matters pertaining to the running of and the maintenance of the xxxxx that the Respondent had to attend to; old equipment being one of the least of their concerns. And that year, the focus of the Respondent more than likely would have been on the Xxxxx looking incredible for the upcoming XXXXX international xxxxxing event which was to take place in October 2021.
31. The \$750.00 never left the Xxxxx property. On 10 October 2021, the monies were handed over to Mr. Xxxxx, the acting general manager. On that day, the Claimant had to collect his belongings from xxxxx. Both he and the acting general manager went to another worker's locker on the premises where the

monies were safely stored within a notebook. As the Claimant rightfully stated, he had no control over his desk drawer once they suspended him and he needed a safe place to store the money until he handed it over to someone. These monies were then handed over to the acting general manager who counted it and later in the day, handed it over to the police.

32. The Claimant did not at any time benefit or profit from the sale of the missing equipment as the documents regarding the case can confirm. There was no theft of the items. There was a proper exchange of monies for old, unused equipment that was laying around on the property collecting dust. Later, Mr.xxxxx would verify the amount of the sale of the JDS Pro machines in the Magistrates' Court hearing. The monies remained at all times on the xxxxx xxxxx property, until handed over to the acting general manager who in turn handed it over to the police. There was an appropriate chain of custody of the funds.
33. Much ado was made in the hearing about why the Claimant did not hand the monies over earlier. As he said in evidence, he placed it in his drawer and forgot about it until he was suspended. He was busy working long days and weekends getting the grounds in order for the xxxxxing event. Once the safety of the monies was in jeopardy and he needed to find a safer place to hold it. His friend's locker became that safe place.

CONTRACTUAL OBLIGATIONS

34. For all intents and purposes, the Claimant is a government officer who had to abide by the terms and conditions of his contract. If anything relating to job

conditions and status came into question, procedures had to be followed, no matter how inconvenient they may seem at the time.

35. Clause 11 of the Claimant's contract states as follows:

Employment Agreement

'This offer letter together with Civil Service General Orders and the current Collective Agreement between The Board of Trustees and the B.P.S.U. constitutes your agreement of service. This contract shall supersede any other contract previously made between the parties...'

36. The Conditions of Employment and Code of Conduct (CECC) were once termed 'Civil Service General Orders' which were later updated and the title changed in 2001 to the CECC. The CECC govern both the Claimant's contractual obligations as well as management's contractual obligations. All the necessary steps in a disciplinary proceeding are clearly laid out in the CECC. Unless otherwise negotiated, there are no exceptions to these contractual obligations. As per section 7.2.3, third paragraph in the CECC:

'... Dismissal is considered a last resort. There is an obligation on the part of the manager to encourage the required change and to document evidence of the infraction, the improvement and all efforts to resolve the situation. ...'

7.2.4 Public Officers shall be required to follow all internal grievance procedures in accordance with this CECC, the Collective Bargaining Agreement and the Public Service Commission Regulations 2001, as amended...'

*7.3 It is **imperative** [our emphasis] for ... managers to **initiate disciplinary action promptly** [our emphasis] in accordance with the appropriate schedule of the Public Service Commission Regulations 2001...'*

37. The Claimant was not afforded any of these opportunities prior to him being arrested for theft in August 2021. In fact, Clause 7.4.2 in the CECC set out the penalties for gross misconduct as the theft allegation against the Claimant for xxxxx xxxxx property, such penalties, including dismissal, are

imposed only [our emphasis] by the Head of the Public Service. This did not happen as no referral was made to the Head of the Public Service.

38. In the Agreement between The Bermuda Government and The Bermuda Public Services Union (BPSU), Article 22 - Termination references the CECC and states as follows: '**As defined in the Conditions of Employment and Code of Conduct**'. [our emphasis]

39. The bottom line is that the processes and procedures set out in the CECC reigns/takes precedent in all disciplinary matters of government employees and more particularly, in situations where there is an allegation of theft which is considered gross misconduct under the CECC. These processes and procedures must be adhered to by all parties to the contract.

40. The BPSU Agreement Clause 14.2 states as follows:

'The procedure for discipline shall be described in the CECC and the PSC Regs. 2001 and subsequent amendments...'

41. The Respondent tried to say that they could manage their own affairs. None of these regulations or procedures apply to how the Respondent themselves operate their affairs in their meetings or what they have to do with managing the grounds, but they are very much a part of how government employees are to be managed and disciplined. None of these procedures and protocols were followed at all by the Respondent. It was truly a case of the blind leading the blind as well as the fact that the Respondent had prejudged the Claimant without even ascertaining his side of the case before having him arrested and set in motion a dangerous set of affairs.

42. The Claimant was suspended without pay for not attending a scheduled meeting, despite the fact that he duly advised the acting general manager

that his legal counsel advised him of his unavailability to attend due to a conflict with his court schedule on the day of the meeting. The Claimant was also warned not to say anything for fear it would jeopardise the Magistrates' Court hearing which was yet to be scheduled. The Claimant had 'a right to silence'.

43. This suspension was not only unwarranted but also contrary to the principles of natural justice. Under Bermuda Labour laws, an employee cannot be penalised twice for the same alleged misconduct. The subsequent termination without clear evidence of wrongdoing after the suspension amounts to double punishment. We will repeat that all of this happened without a proper investigation of the facts and the Tribunal might add that this is legally and ethically questionable.

44. The Respondent's decision to terminate the Claimant was heavily influenced by the testimony of Xxxxx, a subordinate who later failed to appear in the Magistrates' Court as a witness when summoned. This entire case was instigated by Xxxxx and his account of this situation Xxxxx's account of the situation was a bold face lie. Through the evidence given by Mr.xxxxx in the Magistrates' Court proceedings, this lie was later found to be untrue, inaccurate and misleading. The Respondent's reliance on this uncorroborated testimony from this other employee, without conducting a legitimate independent investigation, calls into question the fairness of this termination process. Such a critical decision should have been based on verified facts at the earliest opportunity rather than on unreliable second-hand information provided by this subordinate, a couple of months after the alleged event.

45. The manner in which the Claimant's case was handled did not comply with the established grievance procedures or Human Resource 'best practices'. No thorough and independent investigation was ever conducted by the Bermuda Government's Department of Employee and Organisational Development to verify facts of the case and the purported theft allegations.
46. Additionally, at the earliest instance, the Claimant was never afforded the opportunity to present his case or to defend himself through the appropriate channels. His clean work record of over 11 years of service, with no prior disciplinary actions or warnings, was completely disregarded in the decision-making process. The failure to follow due process not only undermines the integrity of the termination but also reflects on a lack of commitment to fair employment practices.
47. Following on from the Respondent's report to the police, the Claimant was arrested and charged with theft of the JDS Pros. However, some 18 months later in 2023, the Magistrates' Court case was ultimately dismissed due to a lack of substantial incriminating evidence and thus the Claimant had 'no case to answer' and was acquitted of the charge on 22 February 2023. This discharge in the Magistrates' Court highlights the premature and unfounded nature of the accusations that led to the Claimant's termination. The absence of credible evidence in the Magistrates' Court further supported the conclusion that the Claimant was wrongfully accused and unfairly dismissed.
48. The Claimant's termination, given his long-standing service and clean record, has caused undue harm to his professional reputation and personal well-being. The then acting general manager and the Respondent failed to exercise the necessary due diligence, caution and fairness in their actions, resulting in an unjust outcome. Moreover, the mishandling of this case reflects poorly on the Respondent's commitment to upholding human

resource principles and labour laws, potentially exposing them to legal and reputational risks should something like this occur again.

49. The Tribunal have taken into account the procedural failures, reliance on unreliable testimony of a subordinate, and the lack of substantial evidence in assessing the fairness of the Claimant's unfair dismissal.
50. It is evident that the then acting general manager and the Respondent did not follow the appropriate disciplinary processes, leading to an unjust outcome for the Claimant. The wrongful termination has to be re-evaluated in light of these significant oversights and breaches of both legal and ethical standards.

LAW

51. Section 25 of the 2000 Act reads as follows:

'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 employee's business,
Such that it would be unreasonable to expect the employer to continue the employment relationship....'

52. The employer must show that the employee committed an action that required immediate dismissal. The employer has failed to discharge his duty. There was no act done or committed by the Claimant that required his immediate dismissal. In fact the Respondent held on to the information concerning the JDS Pros for some three (3) months before it ever became known by the Claimant that there was an issue.

53. The Respondent would like the Tribunal to appreciate that under the Xxxxx Act 199 (the Xxxxx Act), the Respondent could regulate their own procedures which in their minds included terminating the services of an employee of the xxxxx xxxxx. When one refers to section 3(4) of the Xxxxx Act, it states that *'... the Schedule has effect with respect to the constitution and proceedings of the Board.'*
54. When one reads the Schedule in the Xxxxx Act, it refers to how the Respondent will manage and conduct themselves in their meetings. There is no reference to disciplinary proceedings and more particularly, to the termination of employees. The Schedule to the Xxxxx Act advises the Respondent on how they will manage their affairs in any and all meetings held pertaining to the running and maintenance of the xxxxx xxxxxs, but this Schedule does not apply to the hiring and the dismissal of Bermuda Government employees.
55. The Respondent may vote on whether to keep or release someone and then direct that the general manager follow through on it. Thereafter, the manager or acting general manager, in this instance, must ultimately follow the steps as are laid out in the CECC and the Public Service Regulations as well as all other applicable agreements such as the Collective Bargaining Agreements that have been agreed between the BPSU and government. None of that was adhered to. It appears that everyone went rogue and failed to act on signed agreements. Worse yet, basic common sense went out of the window.
56. The BPSU's role in this matter was effectively diminished and thwarted because the Claimant was arrested before he knew anything about the allegation of theft of the JDS Pro machines and the possibility of any disciplinary proceedings that might ensue. The Claimant, given that there

was now police involvement at that time chose to work with his attorney and advised the BPSA representative' of that. The BPSA representative came back on the scene once the Court matters were resolved.

57. Given how matters unfolded, be it custom or just common sense, when something of a criminal nature occurs with one of its members and legal counsel have been hired, the BPSU defers any involvement until the matter is resolved one way or the other. The Tribunal noted that the BPSU did write to the Respondents on 1 March 2023 until after the Magistrates' Court dismissed the charges against the Claimant. He reminded the Trustees about PSC Regs 27(2)(a) and (b). This was ignored.
58. From the Respondent's evidence, it also seemed that they discovered other untoward things happening at the xxxxx and it may be that they wished to direct their attention to the Claimant and make him a scapegoat. The other person Xxxxx, seemed to have had a 20 year long standing relationship with Mr. Xxxxx, selling him various articles from the xxxxx xxxxx from time to time. The Tribunal was informed that he, Xxxxx is still working there. The Claimant had never involved himself with this kind of thing. But this one time, accepts \$750.00 for two old and unused pieces of equipment and because of his position, made that determination on the selling price and the decision to let them go.
59. The Respondent said in evidence that the Claimant ought to have known about the contents of the CECC. Knowledge of the rules is a double edge sword: the same applied to the Respondent because it became very clear that all such contracts and agreements applicable to the termination of Government employees were seemingly unknown to the Respondent and thus were not adhered to especially in this case before this Tribunal.

60. It was also clear from the lack of evidence led by the Respondent that the acting head manager failed to advise them of procedures to be followed for a suspension and/or a dismissal of an employee or it may have been that the Respondent failed to adhere to any such suggestions or directions. What the Tribunal notes is that there was a clear disregard to the Claimant's rights to a fair hearing and his constitutional rights to silence if he is charged with a criminal offence.

61. In the updated CECC, there is a letter on page 5 of the revised and updated CECC dated 1 June 2021. This version of the CECC was in effect as at the time of the unfolding of these events. The then Head of the Public Service - Dr. Derrick Binns stated the following in the 2nd paragraph of that same letter:

' ... As a reminder, your employment contract comprises your signed contract of employment, the Conditions of Employment and Code of Conduct (CECC), the Public Service Commission Regulations 2001, and the Collective Bargaining Agreement between the Government and the Bermuda Public Services Union. ... All Public Officers are required to become familiar [our emphasis] with the CECC's Contents and with all of the changes ...'

62. Under the 2000 Act, section 25 which pertains to summary dismissal for serious misconduct, it states as follows:

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.

63. None of what occurred could fit in either of those two categories as are listed in section 25 of the 2000 Act. What was alleged to have occurred happened back in April 2021 and the Respondent had no real clear evidence of gross

misconduct. Having then been informed by a subordinate of the Claimant in May 2021, the Claimant was not dismissed until 9 October 2021. The Respondent strung him along until they no longer had any use for his services. Then they, in the first instance, suspended him for a week and thereafter, they terminated the Claimant's services without any assistance from someone knowledgeable in human resources or taking the time to review the various Acts and Regulations providing them with the correct knowledge of disciplinary procedures and protocols. It was very apparent that they were operating 'on a frolic of their own'.

64. None of these protocols and procedures were followed in the manner they were supposed to be. All that was said in evidence by the Respondent's Deputy Chairman was that the Claimant did not attend a meeting when they invited him to attend; a meeting which the Tribunal are reminded, was scheduled after the Respondent had him arrested and after the Claimant's attorney told him he had a right to silence and to say nothing as it might damage his case in the Magistrates' Court, and may we add, before the Respondent decided to ascertain what really happened.
65. It appears that the Respondent failed to know or ought to have known that there were necessary disciplinary steps to follow before the termination of an employee could be enacted. They failed to consult with someone in the Department of Employee and Organisational Development (7.2.2 which equate to a human resource officer) to ascertain 'best practices' in a situation such as they faced. Worse yet, the protocol as set out in the CECC stated that **only** the Head of the Civil Service could terminate.
66. The seemingly most egregious behaviour in this case is that Respondent strung the Claimant along for some three (3) additional months while he, the

Claimant, prepared Xxxxx by himself. We were told in evidence that his assistant had resigned back in June 2021 and only he was working long days and weekends on the xxxxx xxxxx grounds for the international XXXXX Xxxxx event which was to take place on xxxxxxxxx.

67. From what the Tribunal heard and what it looked like was that the Respondent obtained free labour out of him. As they neared the actual international event start date, that is when it appeared that a decision was made to suspend him without pay on 30 September 2021 and then terminate his services on 9 October 2021. At no time did the Respondent acknowledge the Claimant's hard work and preparation of the xxxxx xxxxx for the international XXXXX event as well as offer some form of a bonus for his dedicated work. Instead, it was the complete opposite: the Claimant's employment was terminated.
68. In conclusion, the Tribunal takes into account the procedural disciplinary failures, the reliance on unreliable testimony, and the lack of substantiated evidence in assessing the fairness of the Claimant's termination.
69. It is evident that the acting general manager and the Respondent failed to follow the appropriate processes as set out in the CECC, Article 22 of the Agreement between the Bermuda Government and the Bermuda Public Service Union that refers to the CECC and the Second Schedule of the Public Service Commission Regulations 2001 (PSC Regs 2001), which ultimately lead to an unjust outcome for the Claimant. The Second Schedule was pre-empted by the failure to inform the Claimant at the earliest opportunity of what they deemed to be gross misconduct.

70. In considering the case of wrongful dismissal, it is important to also note any of the mitigating circumstances surrounding the actions of the Claimant in question. The Claimant, while acknowledging the events that led to his termination, acted in good faith and in accordance with the expectations set by his role. The dismissal was based on a gross misunderstanding of the employee's actions or performance, which, upon further investigation, did not constitute a breach of company policy or grounds for termination. Furthermore, the Claimant demonstrated a consistent record of professionalism, diligence, and commitment to his responsibilities throughout his tenure without any form of disciplinary actions against him. The circumstances that led to the termination were isolated and do not reflect on the Claimant's overall contributions to the organisation. Had a fair and thorough investigative process been conducted, it is likely that a more constructive resolution could have been reached, rather than dismissal. Considering the Claimant's past performance and the nature of the incident, the Tribunal considers that the dismissal was disproportionate to the alleged infraction, if there was even one. A more appropriate xxxxx of action would have involved a conversation with the Claimant and that should have cleared up any misunderstandings, sooner than later. If that did not resolve the matter, an attempt at mediation would have been sufficient to address the situation.

71. Because of how the events played out, the Claimant had to secure employment that paid far less than what he normally received as the Grounds Superintendent and attempted to mitigate his losses as best as he was able.

CONCLUSION

72. All in all, the Respondent has failed to discharge his duty to show that the Claimant was fairly terminated. The Second Schedule of the PSC Regs 2001 were never followed and the Claimant was wrongfully dismissed.
73. Through a series of blatant missteps and failure to follow outlined disciplinary processes, the Respondent unfairly terminated the Claimant's contract. This matter was never referred to the Head of the Public Service (the Head) as it should have been (Reg. 24(2)) as the Head is the only one who could effect such a dismissal after conducting a hearing.
74. Given the Claimant's clean employment record, the number of years in the position as well as the lack of existing policies at the time regarding the disposal and sale of old equipment, we order that pursuant to section 40(1)(a) of the 2000 Act, the Claimant be reinstated and be treated in all respects as if he had never been dismissed.
75. In the 2000 Act, section 2(3) states as follows:
- 'Where any of the rights of an employee established by any other Act, agreement, contract of employment, custom or practice are more favourable than this Act requires, the provisions so established prevail over this Act.'*
76. Through no fault of his own, the Claimant was unfairly dismissed from his position as the xxxx Xxxxx. Without a proper hearing before the Respondent at the earliest opportunity and without the Respondent hearing the Claimant's side of the story, he was dismissed. The Respondent found him 'guilty of an offence' where they had only the hearsay evidence from a subordinate to the Claimant and half a picture of what was alleged to have happened. The matter went before a Magistrate and because of the lack of evidence to show

that a theft had actually occurred, the Magistrate dismissed the case and the Claimant was found 'not guilty'. In law, the Claimant had 'no case to answer' in respect of the alleged theft.

77. In respect of PSC Regs 27(2), where an officer has been dismissed from the public service under this regulation on account of a criminal conviction (in this case the criminal conviction was pending) which is then quashed on appeal-

(a) the officer shall, if he wishes, forthwith be reinstated in the office that he held immediately before he was dismissed; and (b) any emoluments that were withheld from him on account of the criminal conviction shall forthwith be restored to him.

DETERMINATION & AWARD

78. An Order for reinstatement immediately, whereby the Claimant is to be treated in all respects as if he had never been dismissed. (PSC Regs 2001 27(2))

79. Alternatively, the Claimant be re-engaged elsewhere in Government in a xxxxx role in one of the currently advertised positions in the Eastern or Western parishes.

80. An Award for compensation pursuant to PSC Regs 2001 pursuant to Regulation 27(2)(b) where an officer that has been dismissed have all of his emoluments restored within 30 days of this Decision.

81. The parties to this Hearing are reminded that the Determination and Award of this Tribunal is binding.

82. Any party aggrieved may appeal to The Supreme Court of Bermuda on a point of law.

83. The Tribunal makes no further determination in this matter and as such is *functus officio*.

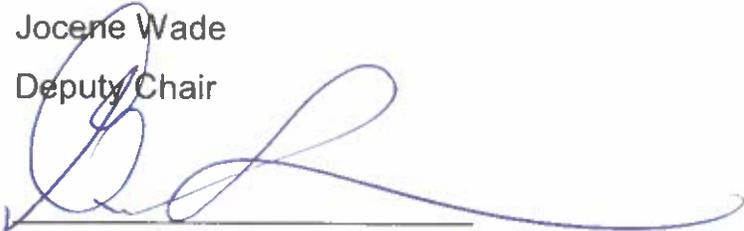
Dated this 11th day of September 2024.



Charlene A Scott FCI Arb
Chairman



Jocene Wade
Deputy Chair



Orin Simmons
Panelist

