



TRINIDAD AND TOBAGO
TRADE DISPUTE NO. 205 OF 2004

IN THE INDUSTRIAL COURT

Between

**NATIONAL UNION OF GOVERNMENT AND
FEDERATED WORKERS** – Party No. 1

And

JUSAMCO PAVERS LIMITED – Party No. 2

CORAM:

Her Honour Mrs. H. Seale – Chairperson
Her Honour Ms. B. Mahabir – Member

APPEARANCES:

Mr. U. Cabralis)
Labour Relations Officer) - for Party No. 1

Mr. O. Francis)
I.R. Consultant) - for Party No. 2

DATED: July 27, 2005

J U D G M E N T

Delivered by Her Honour Mrs H. Seale

This Trade Dispute between the National Union of Government and Federated Workers (“the union”) and Jusamco Pavers Limited (“the employer”) as set out in the Certificate

of Unresolved Dispute, is in respect of the dismissal, effective September, 4, 2003, of Nandlal Omar (“the worker”).

Pursuant to the Court’s directions, both parties submitted written statements of Evidence and Arguments. In addition they both opted to call witnesses in support of their respective cases. The worker was the sole witness for the union, while the employer called three witnesses. Closing submissions were made orally.

THE UNDISPUTED FACTS

From the written evidence and arguments of the parties, there was no dispute that on September 4, 2003, the worker was requested by his employer to leave the Jusamco compound and go to Couva to effect repairs to a roller that had broken down on a job site. The worker failed to carry out that instruction and as a result he was dismissed on the same day, by letter issued by the Maintenance Manager. The parties also agreed that the worker’s rate of pay at the time of his dismissal was \$14.50 per hour. The letter of dismissal reads as follows:-

“September 4, 2003

Nandlal Omar
Mechanic
Present

Dear Mr. Omar,

I refer to your refusal this morning to effect repairs on a roller, which was faulty at one of our operating job sites. I consider this a refusal to carry out a legitimate instruction to the jeopardy of the continuity of our operations and company’s performance.

As a result I wish to inform you that your services cannot be maintained with immediate effect.

Please be guided accordingly

(Signed) Gerald Primchan
GERALD PRIMCHAN
MAINTENANCE MANAGER

xc: D.Aqui
Security at the gate”

THE MATERIAL FACTS IN DISPUTE

From the case put forward by the Union, the worker was employed as a Tyreman with Jusamco Pavers Limited from 1997 to his dismissal on September 4, 2003. Prior to that he was first employed with Junior Sammy as a Handyman, from 1992 to 1995 and then with Jusamco Readymix until his transfer to Jusamco Pavers. (All three companies are related entities.) He worked from 7.00 a.m. to 5.00 p.m., seven days a week. Throughout his employment he was not given a vacation. The worker assisted his employer at times by performing the duties of a Mechanic without being paid as such. The worker did not refuse to carry out the employer’s instruction as it relates to his job classification of Tyreman.

However, the employer in its Evidence and Arguments claimed that the worker began his employment with the company in February 1998, as a Mechanic and was a “B” class Mechanic at the time of his dismissal. A pass issued by the Airports Authority bearing a photograph of the worker with his name and the designation of ‘Mechanic’ was exhibited

to the employer's Evidence and Arguments in support of its claim. The employer asserted that the worker refused to carry out a legitimate instruction which was given to him by the Maintenance Manager and was unable to give any good and proper reason or explanation for his refusal to so do. The worker's action placed the company's contractual obligations to its client in jeopardy and as a result he was dismissed.

THE EVIDENCE

The Union

In his evidence, the worker stated that he was employed with the company from 1992 as a Tyreman. His hours of work were from 7.00 a.m. to 5.00 p.m. He said he worked every weekend and never received overtime pay for such work. He also said that he received neither vacation leave nor payment in lieu thereof while working for the employer.

On the incident which led to his dismissal, on the day in question between 9.00 a.m. and 9.30 a.m., the worker was asked by Mr. Primchan, the Maintenance Manager, to go to a job site at Point Lisas to effect repairs to a roller. He did not carry out the instruction but told Mr. Primchan that **“it has the other Mechanics there”**. He named four Mechanics who he said were present at the time. He claimed that Mr Primchan used obscene language and told him to sit on a box that was in the yard and he [Mr. Primchan] would get back to him. He sat on the box until about half past two to three at which time Mr Primchan brought him a **“dismissal paper and told me I am fired that my service was no longer needed here.”** He also said that he did not speak to Mr. Aqui, the Chief Executive Officer (CEO) at any time during that day.

He described the nature of his duties as **“tyre work”**. He did repairs to tyres and changed tyres. He attended to punctures to tyres received on the road by going to the location of the vehicle and attending to the problem. He denied being paid as a Mechanic and stated that he received a salary as a Tyreman.

With regard to a pass which was issued by the Airports Authority, the worker said that he received the pass the same month he was dismissed. He said also, under cross examination, that the employer gave him that pass because he was asked to perform **“mechanical work”** at Piarco International Airport, which work was to be performed at night. His response to the employer’s request was **“I am not doing no mechanic work, I am doing tyre work alone because I have wife and children.”**

Under further cross-examination, he described in some detail his repairs to tyres, including the instruments used to carry out such repairs. He indicated that the firm of **“A. Maharaj Tyre Service”** located at Southern Main Road Claxton Bay, did only vulcanising of tyres for the employer. He maintained that he assisted the employer by performing the duties of a Mechanic, **“now and then”**. Some of the mechanical duties he performed were the fixing of broken axles and attending to airlocks. However, he said that he never fixed a roller when the wheel became locked which was what he was asked to do on the day of his dismissal. He added that the employer wanted him to work in the day and in the night. He was in the habit of being called out during the night, sometimes

two to three times per week when there were “**breakdowns**”. He was provided with the employer’s van to facilitate his work in the night.

The Employer

The Maintenance Manager, the Chief Executive Officer (CEO) and a senior Mechanic gave evidence on behalf of the employer.

The employer’s Maintenance Manager, Mr. Gerald Primchan, testified that the worker was already employed when he, the Manager, joined the company and from that time the worker performed “**mechanical duties**”. He stated emphatically that the employer has no “**Tyre Repairmen**” in its employ. The mechanics changed tyres on the employer’s vehicles. There are some thirty vehicles owned by the employer that use rubber tyres. Some vehicles use four tyres, others six and some as many as ten tyres. The employer does not have the facilities at its workplace to do specialised repairs to tyres. All specialised repairs to tyres are performed by “**A. Maharaj**”, a Tyre Service Company at Claxton Bay.

With regard to the pass issued by the Airports Authority in the worker’s name, he indicated that the worker had attended an orientation programme at the airport before he received the pass and was required to fill out a form before receiving the pass. The pass was intended for use at Piarco International Airport in the course of the project to “**...do the overlay of the Piarco runway**”. Work in that regard was performed at night, since it had to be done during the closure of the airport.

He said that on the day of the worker's dismissal he asked him to go to a job site in Couva to effect repairs to a roller that had broken down. He asked the worker because **“He is the one that goes out to do most of the breakdowns...He effects most of the breakdowns on the outside.”** The worker's response to that instruction was that he did not have his tool kit. He said when he repeated his instruction, the worker bluntly refused to go. He told the worker to sit on a box and wait for him and that he would be dealt with later.

At lunch time the worker asked to use the van to go home for his lunch and he gave him permission to do so. He had expected the worker to apologise to him during the course of the day, although he demanded no apology. The worker did not apologise. He issued the letter of dismissal to the worker. He also discussed the matter with the CEO. The worker subsequently spoke to the CEO about the dismissal letter. He admitted under cross-examination that that he did not give the worker the opportunity to explain his refusal.

In response to certain questions posed by the Court, the Maintenance Manager said that the worker was not in the habit of refusing to perform his duties. The behaviour displayed on the day of the incident did not reflect a pattern of behaviour. It was an isolated case. He admitted that there was an ongoing issue with the worker regarding the performance of the duties of a Mechanic. The worker had insisted that he wanted to be a Tyreman. In his view the worker's grouse stemmed from the fact that Mr. Balmon Roberts, a senior Mechanic, enjoyed a higher wage rate than the worker. In addition to his work during the day, the worker usually performed repairs to vehicles for the employer at night and for

that reason, he kept the employer's service vehicle. The worker received the same hourly rate of pay for work performed at night. On the day following the worker being called out to perform repairs at night, he was required to report to work at 7.00 a.m., the normal starting time.

Mr. Dave Aqui, the CEO in his evidence confirmed that after the worker received the letter of termination from the Maintenance Manager, he spoke to him. He said that the worker asked to see him and at his request the worker recounted what had transpired with Mr. Primchan. From the worker's own account he concluded that Mr. Primchan's earlier account to him was accurate and he told the worker that he agreed with the decision taken by the Maintenance Manager and **"the decision stands."** He also admitted under cross-examination that he did not give the worker the opportunity to explain his refusal to go and repair the roller. In his view the worker was given a hearing when he agreed to the worker's request to have an audience with him.

With regard to the worker's job classification he felt certain that the worker knew that he was operating at the level of a 'Mechanic B' as some time before the incident, Mr. Primchan and the worker had made representations to him, that the worker had developed certain skills and capabilities sufficient to be **"upgraded at the level of Mechanic B"**. The CEO questioned the worker on his ability to perform certain tasks and thereafter upgraded him to the level requested.

Mr. Balmon Roberts, the employer's third witness was a First Class Mechanic who worked for the employer. His testimony was similar in most respects to that of both the Maintenance Manager and the worker on the events giving rise to the worker's dismissal. The worker had said that he had no tools with him and so was unable to do mechanical work. Furthermore, the worker added that he would only be working as a Tyreman. Mr. Primchan told the worker that if he did not want to perform the duties of a Mechanic, he would have to leave since there was no vacancy for a Tyreman. An argument then ensued between the worker and the Manager. During his employment at the company he knew the worker to be a Mechanic and a Tyreman.

FINDINGS OF THE COURT

Based on the evidence presented to the Court, we are to consider whether the worker refused to obey a legitimate instruction and if so, was the penalty of summary dismissal warranted. In so doing we must first make a determination on the worker's job classification. The Court is also required to make a finding on the union's claim that the worker never received vacation leave during his years of employment at the company.

On all of the evidence before us, we find that at the time of his dismissal, the worker performed duties consistent with those of a Mechanic and we so hold.

The instruction issued to him on September 4, 2003, by the Maintenance Manager was to perform a duty that properly fell within the class of duties he was required to perform as a Mechanic. We find that the worker's reluctance and eventual refusal to perform that duty

coupled with his insistence that there were other mechanics present who could have been sent, constituted an act of insubordination which warranted disciplinary action.

It is generally the Court's view that a worker who receives a legitimate instruction, even if he disagrees with it, must comply and subsequently file a complaint via the grievance machinery.¹ Two exceptions to this rule that normally operate are in cases where compliance requires an illegal act and where the worker's life would be endangered by complying with the instruction. In TD Nos 78 and 90 of 1975², the Court said "... the refusal to carry out an order in these circumstances can be justified only if obedience to it would endanger life or limb and in certain other cases as where professional reputation and integrity are involved." The instruction issued to the worker in the instant case does not fall within the exceptions.

The worker's act of insubordination, serious though it was, did not form part of a pattern of behaviour, it was an isolated incident. The evidence of the Maintenance Manager was that this worker was the one normally called upon to perform off-site repairs, both at day and night. He received his basic hourly rate for the work he performed at night and was required to report for work at the normal starting time on the days following his being called out at night. This was a regular occurrence. From the evidence this worker rendered yeoman service to his employer. We consider this to be a mitigating factor that the employer ought to have taken into account in disciplining the worker.

¹ TD No 135 of 1975, Neal and Massy Limited v TIWU delivered on March 30,1976

² Catelli Primo Limited v.UFHIW delivered on February 18,1976.

In addition, we find that the worker was not given a hearing prior to his dismissal in which he could have offered an explanation or raised mitigating circumstances. The meeting with the CEO, which we accept did take place, was not a hearing since he had already been dismissed. The worker was not even warned by the Maintenance Manager of the serious view that he took of the worker's conduct. It seems that the worker did not appreciate the seriousness of the situation, since he asked and was given approval to use the employer's vehicle to go home for his lunch after the incident occurred and then returned to the workplace.

Of relevance also was the fact that the Maintenance Manager was the person who gave the worker the instruction and the worker's refusal was directed at him. This made him a witness to the incident and any investigation thereof. Selwyn's Law of Employment, 12th Edition at paragraph 12.51, states "A person who is a witness in investigatory proceedings should not act as a judge in disciplinary proceedings, otherwise this could be regarded as a breach of the principles of natural justice." The writer acknowledges the inevitability of such a situation on occasion and states that "...while this can be acceptable...it is preferable for this dual role to be avoided".

A worker who acknowledges an instruction and refuses to obey it runs the risk of disciplinary action up to the point of dismissal, since it shows a complete disregard of a condition essential to the contractual relationship. However, there is no proposition of law that every act of disobedience entitles the employer to dismiss. The circumstances surrounding the act of disobedience are important.

DECISION

On all of the evidence, we find the worker's dismissal was harsh, oppressive and not in keeping with good industrial relations practice.

With respect to the union's claim that the worker never received vacation leave, throughout his employment, we hold that there is merit in this claim. The employer made no serious attempt to refute it and we accept the worker's evidence in this regard. However, the Court is constrained by the lack of details relating to the worker's vacation leave entitlement and is not in a position to make a separate award in this regard but takes account of this in our Order.

ORDER

On the whole of the evidence and for the reasons given and in accordance with equity, good conscience and the substantial merits of the case, we order the employer to pay the worker, Nandlal Omar the sum of \$40,000 as compensation for his dismissal on or before August 17, 2005.

Mrs. H. Seale
Chairperson

Ms. B. Mahabir
Member