TRINIDAD AND TOBAGO:
Trade Dispute No. 15 of 2000

IN THE INDUSTRIAL COURT

Between

BANK & GENERAL WORKERS' UNION
- Party No. 1

And

PUBLIC SERVICE ASSOCIATION OF TRINIDAD & TOBAGO
- Party No. 2

CORAM:

His Honour Mr. L.D. Elcock - Chairman
His Honour Mr. A. Aberdeen - Member

APPEARANCES:

Mr. K. Jack Chief Grievance Officer	))	for Party No. 1
Mr. J. Manswell and Mr. B. St Louis Labour Relations Consultants	)))	for Party No. 2

DATED this 27th day of April, 2001

J U D G M E N T

Delivered by His Honour Mr. A. Aberdeen.

Dale Boxhill (hereinafter called "the worker") was dismissed from his employment with the Public Service Association (herein after called "the Association") with effect from the 18th

April 1999. The reasons given for the worker's dismissal were contained in a letter dated 19th April 1999, and centered on alleged "breaches of security..." and "breach of instruction..." The full text of the letter is hereunder set out.

> *"April 19, 1999*
>
> *Mr. Dale Boxill*
> *Security Officer*
> *Public Services Association*
> *#89 Abercromby Street*
> *Port Of Spain*
>
> *Sir*
>
> *I refer to my letter of 19/03/99 wherein you were warned that the General Council had taken the decision that should you become involved in any further infraction, your services will be terminated.*
>
> *In this context, reference is also made to the following letters that are reflective of your continuing infractions.*
>
> *(1) 9th November, 1998*
> *(2) 30th November, 1998*
> *(3) 5th January, 1999*
> *(4) 13th January, 1999*
> *(5) 4th February, 1999*
> *(6) 19th March, 1999*
>
> *On Tuesday 13th April 1999 at 9.00 p.m. the Secretary/Treasurer approached the Lobby from the 1st Floor. The said Lobby was in total darkness. You were discovered sitting in the darkness. The Secretary/Treasurer than enquired of you whether you were aware of the instruction from the President that the Lobby should be kept lit at all times. You stated "yeah, but people only passing and looking in at me." You were then instructed by the Secretary/Treasurer to ensure that the Lobby lights are kept on.*
>
> *In addition, the 2nd Vice President reported that on Wednesday 14th April 1999, at approximately 10.40 a.m. he drove up to the PSA gates. He observed you on the telephone talking and laughing which appeared to be a personal call. Dr. Misir after a few minutes recognized that you were not about to open the gate to him. As a consequence, the 2nd Vice President was forced to get out of his car and open the gate himself.*
>
> *Dr. Misir parked his car in the basement, returned to ground level, closed the gates and entered the Lobby. You were still on the telephone, you paid the 2nd Vice President absolutely no attention, and neither proffer an apology nor an explanation.*
>
> *A short time later, Assistant Secretary Kumar Persad enquired of you whether Dr. Misir was in the building. You responded in the negative. Assistant Secretary Kumar*

Persad again enquired of you whether you were sure that Dr Misir was not in the building. You again indicated that he was not.

This is a serious breach of security on your part.

On Friday 16th April 1999 you were on duty 7.00 a.m. to 3.00 p.m. On two occasions during your tour of duty you sent a member and another person to the 1st Floor without informing an officer or Secretarial Personnel. This is a breach of instructions given to you as well as other Security Personnel in the Public Services Association. As President, I have had cause to advise you of this instruction previously. In one case the person you sent up to the 1st Floor was a non-member requiring photocopying services.

In view of the foregoing, I am to inform you that your services are hereby terminated with effect from 18th April 1999.

You are entitled to 55 days Vacation Leave and 81 days Compensatory Days. Salary for the period 1st – 18th April 1999 is enclosed.

With respect to payment of your Vacation and Compensatory Leave, as soon as they are computed, I will communicate with you regarding the period over which this payment will be effected.

In this vein a further communication will be forwarded to you.

Yours faithfully

Jennifer Baptiste
President
PUBLIC SERVICES ASSOCIATION

The Bank and General Workers' Union (hereinafter called "the Union") alleges that the worker's dismissal was unfair, unjustified and contrary to good industrial relations, practice. The Union is seeking compensation "to meet the justice of the case." For its part, the Association contends that on the 13th, 14th and 16th April 1999 the worker committed breaches of duty which separately and cumulatively were considered sufficiently serious to warrant his dismissal.

Both the Union and the Association submitted written statements of evidence and arguments upon which they relied during the hearing of this matter in support of their respective

cases. The Union in addition to its written and oral submissions called the worker as its only witness at the hearing of the matter. The worker testified that, the Association first employed him as a Messenger, on August 17th, 1987. He was later transferred to work as a Security Officer. He was not precepted and did not carry a firearm. He was stationed at the Lobby in the main entrance of the Association's Head Office building, at Abercromby Street, Port of Spain. The Building was comprised of several floors, access to which was gained via the main entrance on Abercromby Street. Access to the upper floors was by way of an elevator and stairway, which were all located in the Lobby area where the worker was stationed. There was also a basement car park, access to which could only be gained via a gate located outside of the building on Abercromby Street.

The worker said, that apart from his duty to secure the building and property as a Security Officer, he was also required to perform the duties of a Receptionist by way of answering the telephone and treating with members of the Association and other visitors to the Association, directing them to the appropriate offices and officers of the Association. He was also required to exit the building to open and close the gate to the basement car park, in order to permit officers and members of the Association and other authorized persons to enter and exit the car park. He said that he worked an 8 hour shift that rotated around the clock – 7:00 am. to 3:00 pm; 3:00 pm to 11 pm; 11:00 pm. to 7:00 am. There were other security officers but only one was assigned to each shift at any one time. On the 13th April 1999 he was at work on the 3:00 pm to 11.00pm shift. He said that at about 9:30 pm he observed a man through the front glass door and partition of the Lobby area where he was stationed. The man had walked back and forth along the pavement outside the front of the building several times and was looking into the building. He

became suspicious and decided to turn the lights off in the Lobby and to position himself in such a manner that he could observe the man to see what he was up to without himself being seen. He said that the Secretary/Treasurer of the Association Mr Bernard Cropper, came downstairs from his office and questioned why the lights were off. He put the lights back on and explained to Mr. Cropper why he had taken them off in the first place. Mr. Cropper said "okay" and left the building.

The worker said that he never again heard anything about the incident until he received the dismissal letter and saw reference to it made therein. The worker said that on 14/4/99 while working the 7:00 am. to 3:00 pm. shift around 8:30 am., he saw the 2nd Vice President of the Association Mr. Misir, drive up to the gateway entrance to the basement car park. At that time, the worker said, he had just answered the telephone and was speaking to a member of the Association, who had called on Association business. Recognizing that Mr. Misir was waiting to be let into the car park, he tried to hurriedly conclude his conversation with the member, so that he could proceed outside to open the gate to allow Mr. Misir to enter the car park. However, by the time he had done so and had gone outside, Mr. Misir had already gotten out of his car and opened one side of the car park gate. The worker said that he opened the other side of the gate and allowed Mr. Misir to drive in. He waited until Mr. Misir parked his car and exited the car park. He then closed the gate and went back to his post in the lobby of the building.

Later that same day at about 10:30 am., the Assistant Secretary of the Association Mr. Persad, came to the Lobby and asked him whether Mr. Misir was in the building. The worker said that he told Mr. Persad that he was not sure whether Mr. Misir was still in the building or

not. He stated that Persad did not say anything else to him, nor did he hear anything or any complaint from anyone else in connection with Mr. Misir, until he received the letter of dismissal, wherein allegations were made about his not opening the gate for Mr. Misir and also about his response to Mr. Persad, concerning Mr. Misir's whereabouts on the 14th April, 1999.

The worker also stated that on the 16th April 1999, he worked the 7:00 am. to 3:00 pm shift. He denied sending any member or other person to the first floor, without first informing an officer or secretarial personnel. No one raised any such matter with him before his dismissal on the 18th April 1999, and he only knew of an allegation in that regard, when he saw it in the letter of dismissal. He said that it was possible for members or other persons to enter and leave the building without his knowledge, during occasions when he would have had to vacate his post at the Lobby, in order to perform some other of his duties, e.g. opening the car park gate, since he was the only security officer on duty at that time.

The worker admitted that he received several letters and written warnings concerning his conduct, performance, punctuality and attendance during his employment at the Association. These included the six letters to which reference was made in the letter of dismissal. He identified those and other letters that he received from the Association and gave evidence about how he responded to each of them.

In summary the Union's case according to its written and oral submission is as follows:

- ***That the worker's explanation for the incident of the 13th April, 1999 is reasonable since his action was in the interest of the Association and that he***

was.... under the impression that the Secretary/Treasurer accepted his explanation since he was not told that he would be charged for an offence.

- *That with respect to the incidents of 14th and 16th April 1999, the worker was only made aware of the allegations against him in connection with those dates when he received the letter of dismissal.*
- *That the worker was not given any opportunity to be heard by the Association in answer to any charge or allegation in connection with his conduct on the 13th, 14th and 16th April, 1999, and that such a denial is a fundamental breach of the rules of natural justice and therefore a breach of good industrial relations practice.*
- *That the worker's past record does not cause a forfeiture of his right to be heard and that he was still entitled to be treated fairly by being allowed an opportunity to defend any charge against him.*
- *That the Association in dismissing the worker acted in contravention of its own constitution by not informing him in writing about allegations made against him and affording him reasonable opportunity to defend himself before taking disciplinary action against him.*
- *That there was no just cause for the dismissal of the worker, that his dismissal was contrary to good industrial relations practice and that he should, as a consequence be compensated.*

In support of its submission the Union cited the Court's judgment in Trade Dispute No 20/1990 between UCIW and American Stores Ltd.

The Association's case is succinctly summarized in its written submission to the Court as follows:

> *"3. Mr. Dale Boxill was employed by the Association as a Security Officer and during the course of such employment displayed characteristics which were totally incompatible with the duties attached to his office. Repeated warnings in writing to him proved to be of no effect. On the 13th 14th and 14th (sic) April, the worker again committed breaches of duty which separately and cumulatively the Association considered to be sufficiently serious to warrant his dismissal. On the 19th April 1999 he was dismissed. Copies of the relevant documents are attached as Appendices A-O."*
>
> *4. The Association contends that the worker's conduct on the relevant occasions referred to at paragraph 3 above together with his past conduct justifies his dismissal."*

No witnesses were called by the Association to give oral testimony in support of its allegations against the worker. It however puts into evidence several letters and documents regarding the worker's past unfavourable disciplinary record. These included six letters to which reference was made in the letter dated 19th April 1999, by which the worker was terminated. The Association further relied on its cross examination of the worker who was the Union's sole witness and on the submissions of its representative at the close of its case before the Court.

Mr. Manswell for the Association admitted that the Association had dismissed the worker without giving him a hearing, but argued that they were justified in so doing because of the

circumstances of the worker's behaviour over a period of time and the fact that they had warned him about it before. He argued that the worker had admitted in Court, that he had disobeyed that one order of the Association to leave the lights on in the Lobby. He submitted that the fact that the worker was not given a hearing before being dismissed did not necessarily render the dismissal unjust or contrary to good industrial relations principle. He cited ILO Convention 158 and the judgment of the Court in Trade Dispute 98/1977 between Barclays Bank of Trinidad and Tobago and Bank Employees Union as persuasive authorities in support of his contention, that the Court should excuse the Association for summarily dismissing the worker. He further submitted that even if the Court decides not to excuse the Association and is minded to award some form of damages to the worker, the Court should consider that the worker lost absolutely nothing by his dismissal and any award of damages should be nominal. He argued further that the worker was now employed as an S.R.P. and that between the time of his dismissal and his employment as an S.R.P. he earned income from the operation of his car for private hire (PH). In support of this contention Mr. Manswell cited the Court's judgment in TD253/97 between Tobago Hospitality Trade Union and Anthony Sinanan and Bon Accord Drug Mart Ltd Trading as Scarborough Drugs, in which the Court awarded nominal damages to a worker who had been dismissed without being given the opportunity to be heard in his defense.

With few exceptions the main facts in this matter are not in dispute. I find these to be as follows:

> ***The worker was first employed on the 17th August 1987 as a Messenger and was later transferred to the post of Security Officer. He was stationed at the Lobby of the main entrance of the Head Office of the***

Association and his duties included inter alia, ensuring the security of the entire building; performing generally as a Receptionist in relation to members and other persons visiting the office; answering the telephone and opening and closing the gate to the basement car part of the Association located on the outside of the head office on Abercromby Street. He was not precepted and carried no firearm or other weapon of any sort and he was paid a monthly salary of $2280.00. During the course of his employment the worker received several letters from the Association, warning him about the performance of his job and his attendance and punctuality, among other things. Some of these letters were exhibited in the course of the hearing and included a letter dated March 19th 1999, in which he was warned that his services would be terminated if he became "...involved in any further infractions."

The worker responded to some of those letters verbally and in writing giving explanations and apologizing in some cases, while flatly denying the allegations made against him in other cases.

The worker was dismissed by a letter dated 19th April 1999 signed by the President of the Association which alleged that he had committed certain breaches of his duties on the 13th, 14th and 16th April 1999. None of the allegations contained in the letter were made known to the worker prior to his being dismissed nor was he part of any investigation or disciplinary enquiry nor was he afforded any opportunity to be heard by the president of the Association who issued the letter of dismissal.

The question this Court has to determine is whether the dismissal of the worker occurred in circumstances that were harsh and/or oppressive and/or contrary to good industrial relations practice. We have been greatly assisted in this task by the input of the very learned and experienced representatives of the Union and Association for which we are grateful.

In TD98/1997 between Barclays Bank and Barclays Employees Union, cited by representative for the Association, the Court held that the dismissal of Wayne Corbie, a worker who had been dismissed for writing an abusive and insulting letter to his Manager, was not in accordance with the principles of good industrial relation practices. The court found that

> ***". the management section dealing with discipline never interviewed him. The Managing Director who alone could dismiss an employee, did not interview him and so he had no opportunity to put his case or to apologize before dismissal..."***

In coming to its conclusions, The Court reviewed certain cases cited as the case of Bryden & Co. v C. Thomas reported in IRLA Vol.5 No.6 pg 174 and Charles Lett & Co. Ltd v A.E.C.T Howard I.R.L.R Vol.5 pg 246. The Court also reviewed Recommendation of the ILO No.119, and concluded that:

> ***" a fundamental principle of natural justice developed under the common law is that a person has the right to be heard in defense of his person or property and the ILO recommendation only restate this principle."***

The Court declared that

> ***"...the cases cited emphasize the right to be heard in one's defense which is embodied in our system and with respect we adopt the conclusions therein."***

They are in essence that:

1. ***"Whatever the circumstances, whatever an employee is alleged to have done and however serious it might be, it is always necessary that an employee be afforded some opportunity of explaining himself to the person in management who will in the first instance take the decision whether or not he is to be dismissed.***
2. ***When this procedure has not been followed in order to sustain a dismissal, management must prove that the result would have been the same if it had been followed..."***

In TD15A/1982 and TD15B/1982 between the OWTU and Trinidad & Tobago Electricity Commission, the Court after hearing the two disputes separately, ordered the reinstatement of the two workers who had in each case been dismissed by the Commission for alleged acts of gross misconduct. In each case the Court found that the involved worker had been dismissed without first being given an opportunity to be heard in his defense. In TD15A/1982 the Court found that:

> ***"There was a breach of fundamental principles in law and industrial relations in the Commission's denying of the worker the right to be heard on the issue."***

The Court went on to hold that:

> ***"The dismissal of the worker Mr. Kurt Murray was harsh and oppressive and contrary to the principles and practice of good industrial relations."***

In TD15B/1982 the Court declared that:

"It should be noted that the right to be heard is not only a rule of natural justice but a fundamental principle of industrial relations. (See I.L.O recommendations 119). 'Dismissal for serious misconduct should take place only in cases where the employer cannot in good faith be expected to take any other course'. 'Before a decision to dismiss a worker for serious misconduct becomes effective, the worker shall be given an opportunity to state his case promptly'..."

In TD 140/97 between B.G.W.U. and Home Mortgage Bank Ltd at page 9. His Honour A.M. Khan then Vice President of the Court, stated:

"The principles of good industrial relations practice dictate that no worker's employment may be terminated except for a valid reason connected with his capacity to perform the work for which he was employed or which is founded on the operational requirements of the employer's business ... these principles have been enshrined in Convention 158 of I.L.O..... it ... affords evidence of good industrial relation practices which have been accepted at an international level. ...The principles of good industrial relation practice require an employer not only to inform a worker of the reason/reasons for a proposed dismissal but also give a worker, save in exceptional circumstances a fair opportunity to be heard before proceeding to dismiss him for such reason/reasons. The two requirements are inseparable one from the other, since without being informed of the proposed reason/reasons the

worker will not have a fair opportunity to present to the employer material which may cause the employer to change his mind from his proposed course of action..."

The effect of these and the numerous other judgments of this Court including that cited by the able representative of the Union in TD 20/1999 between UCIW and American Stores, as well as ILO Convention 158 cited by the learned representative of the Association, is to establish, that in our system of industrial relations, every worker has the right to a fair opportunity to defend himself against any charge or allegation made against him, as well as to be heard in mitigation of any possible penalty (especially dismissal) by the person/s in management responsible for taking such decisions, before they are effected. This is not a trifling matter to be taken lightly or viewed as a mere technicality. It is a fundamental principle of good industrial relations. It is to industrial relations practice what natural justice is to the common law. Its omission from common law practice, would make a fair trial impossible to achieve and would nullify any finding of guilt by common law courts. Its omission by an employer from any disciplinary process, would amount to a fundamental breach of the principles of good industrial relations practice and render any disciplinary action by an employer (especially dismissal) harsh and oppressive and unsustainable, except in the most exceptional circumstances. An employer seeking to sustain and justify the dismissal of a worker in such circumstances, places on his own shoulders, the very difficult task and perhaps unbearable burden of proving on the one hand, that he could not reasonably have been expected to provide the worker with the opportunity to be heard; and on the other hand, that even if he had done so, it would have made no difference to the outcome.

In this instant case, the worker has stated and the Association has admitted, that he did not know of any of the allegations against him prior to being dismissed. He was never charged with anything; there was no investigation or disciplinary inquiry in which he was involved; he never had any opportunity to be heard in his own defense. He never had an opportunity to be interviewed by or to give any explanations to or make any plea in mitigation, to the President of the Association, who in the final analysis issued the letter of dismissal. His dismissal was executed by the President of the Association, who did not have the benefit of the worker's explanations in response to the allegations contained in the letter of dismissal. There was no process undertaken before hand, to determine his guilt in relation to "reports" which we assume, must have been made by the Association's Secretary Treasurer, 2nd Vice President, and Assistant Secretary. There was also no opportunity provided to the worker, to be heard in mitigation of the possible-penalty of dismissal. His guilt and punishment were decided without charge or trial or chance to speak in his own defense.

The Representative of the Association has argued, that the worker had a bad disciplinary record and that he was given a final warning by letter dated 19/3/99, to the effect that should he engage in any further infractions, his services would be terminated. This, he explained meant, that if the worker was found guilty of any further infractions he would be dismissed. He further posited, that the worker's admission that he disobeyed the Association's instructions and turned off the lights, left no doubt as to his guilt and as such the Union's case was without foundation. The Association, he submitted, in frustration as a result of the numerous infractions by the worker, acted summarily in terminating his employment and as such should be excused by the Court for so doing.

During the hearing in Court the worker admitted that he did on 13/4/99 turn off the Lobby lights contrary to the instructions of the Association, but explained that he had done so only in the interest of security considerations, because of the suspicious behaviour of a person outside of the building that night. He explained this to the Secretary Treasurer of the Association who had at that time inquired as to the reason why the lights were off. The Secretary Treasurer appeared to have accepted his explanation. The worker also gave explanations about the other allegations in relation to the 14th and 16th April 1999.

We find the explanations of the worker as to what transpired on the 13th, 14th and 16th April 1999, to be plausible and not unreasonable. It is impossible to say therefore, what the outcome would have been had he been given a fair opportunity to explain his side of the story, before the decision to dismiss him was executed.

In Trade Dispute No. 12 of 1994 between the OWTU and Trinmar Ltd, the Court comprised of their Honours A.M. Khan Vice President and C. Tull, found that a worker who had been dismissed for gross negligence, had in fact been given a full and fair opportunity to be heard and that his dismissal was not harsh and oppressive and/or not in accordance with good industrial relations practice. In coming to its decision, however, the Court commented that the opportunity to be heard before termination of employment is:

> *"... one of the very important principles of good industrial relations practice. If such an opportunity is not given by the employer a Court may, depending on the circumstances, find the dismissal to be harsh and*

oppressive or not in accordance with the principles of good industrial relation practice."

The Court cited the Holy Bible in Genesis 4:9-18 and posited thus:

"When Cain killed Abel, no less a person than the Lord God Almighty himself condescended to ask Cain, 'why have you done this terrible thing?' By asking this question, he gave Cain the opportunity to offer an explanation for his action before punishing him. Cain offered no such explanation but made a stirring plea in mitigation of the penalty imposed on him by telling the Lord, 'This punishment is too harsh for me!' The record shows that Cain succeeded in obtaining an alteration of the terms of the original sentence."

The Court also cited the dictum of Megarry J. in John v Rees (1969) 2 ALLER 274 at p.309 where he said:

"It may be that there are some who would decry the importance that the Court's attach to the observation of the rules of natural justice. 'When something is obvious', they say, 'why force everybody to go through the tiresome waste of time in framing charges and giving the opportunity to be heard? The result is obvious from the start.' Those who take this view do not I think, do himself or herself justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow were not; of unanswerable charges which, in the event, were completely answered; of

inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change."

We fully agree with these dicta and also with the position of Brown-Wilkinson J, when he commented in Sillifant v Powell Duffryn Timber Ltd(1983) IRLR 91 that:

"It will be a very rare case indeed when an employer can reasonable take the view that there could be no explanation or mitigation which would cause him to alter his decision to dismiss."

We find in this present dispute that the Association has not shown evidence of any circumstance that could be said to have reasonably prevented it, from undertaking its obligation to inform the worker of the charges or allegations against him and provide a fair opportunity to him to be heard in his defense. The Association has not proven that, had the worker been heard, it would have made no difference to the penalty of dismissal that it imposed on him. Indeed the reasons for the worker's dismissal are in our view, not such as could in themselves, justify the action of summary dismissal.

The worker certainly had an unenviable record of employment, with numerous letters recording his persistent breaches and infractions. It is clear that the Association became frustrated by this and had reached the point where it considered the worker to be more of a liability than an asset. This appears to be what the Association was most influenced by, when it dismissed the worker in the way that it did. But bad though it maybe, a worker's past disciplinary record, is relevant only after he has already been heard and found guilty of any alleged misconduct or breaches. His past record goes not to a finding of guilt or innocence, but to determining the nature of the consequence or

to a finding of guilt or innocence, but to determining the nature of the consequence or penalty an employer may reasonably impose, after guilt has already been established; it should not be allowed to predetermine a worker's guilt or prejudice the employer's mind in relation to present allegations. In deed, it is by no means an excuse for denying a worker a fair opportunity to seek to establish his innocence, or to be heard in mitigation of any possible penalty, by the person with whom the authority to take disciplinary action resides.

Having heard and evaluated all the evidence and in particular the oral evidence of the worker; and having heard the oral submissions of the learned and experienced representatives of the Union and the Association, for which we are grateful, it is our opinion and we so hold, that the worker Dale Boxhill, was dismissed in circumstances that were harsh and oppressive and not in accordance with the principles of good industrial relations practice.

By section 10(4) of the Act (IRA) the Court is empowered to order the re-employment or reinstatement of any worker or the payment of compensation or damages whether or not in lieu of such re-employment or reinstatement, or the payment of exemplary damages in lieu of such re-employment or reinstatement. And by section 10(5) of the Act, the Court in making an order for compensation or damages is, not bound to follow any rule of law for such and may make an assessment that is in its opinion, fair and appropriate. The union's prayer in this matter is for ***"...compensation to meet the justice of the case."*** We have considered the Union's view in this regard as well as the views of the Association. We have considered also the evidence of the worker regarding

his earnings and employment since his dismissal. We are of the view that this is an appropriate case for an award of damages. We consider it fair and just that the worker Dale Boxill, be paid the some of $13,000.00 as damages, on or before the 30th May 2001.

We so order

His Honour Mr. L. Elcock
Chairman

His Honour Mr. A. Aberdeen
Member