

**COMMONWEALTH OF THE BAHAMAS
INDUSTRIAL TRIBUNAL
NASSAU**

IT / NES / 00088 of 2020

In The Matter of the Industrial Relations Act

RICARDO HART

Applicant

And

ODYSSEY AVIATION BAHAMAS

Respondent

Appearances: Ms Theresa Mortimer for the Applicant

Mrs Lakeisha Hanna for the Respondent

Before: Her Honour Vice President Simone Fitzcharles

DECISION

Introduction

1. This is an application for unfair dismissal which was referred to the Industrial Tribunal by the Minister of Labour under his Certificate issued on 16 October 2020. The matter was filed in the Tribunal by an Originating Application on 13 January 2021. The claim is brought by Ricardo Hart ("Mr Hart" or "the Applicant"), against his former employer, Odyssey Aviation Bahamas ("Odyssey" or the "Respondent") for compensation as he alleges that he was "unfairly targeted for dismissal."
2. Ricardo Hart was employed with Odyssey Aviation Bahamas from 27 July 2010 until the time of his summary dismissal on 6 May 2020. He was first hired as an Assistant Manager at the General Centre of the Respondent. He was eventually promoted to Safety and Security Manager and earned \$4,307.70 monthly.

3. Mr Hart's dismissal came about as a result of an incident which occurred when three employees of Odyssey – Mr Hart, Thaddeus Symonette (Line Service Manager of the Respondent) and Louie Joseph (Building Maintenance and Line Service Technician of the Respondent) – attempted to tow a G450 aircraft bearing registration number N904TS ("the Aircraft") into the western hangar at the Lynden Pindling International Airport ("LPIA"). The Aircraft was damaged when its tail struck a wall beam in the hangar. Odyssey's evidence was that the company eventually had to pay some \$27,000 plus to repair the damage to the Aircraft.
4. The Applicant's main contention in support of his claim is that the accident involving the Aircraft occurred on the premises of the Respondent which involved 3 employees. He argues that he was the only one of the 3 who was summarily dismissed by reason of the accident. During the course of the trial he also argued that his dismissal was unfair because the Respondent did not have adequate safeguards in place to prevent the accident from occurring. Specifically, he contended that a third person should have been included to watch the tail of the aircraft. He also contends that the investigation was unfair because he was never called in and asked questions during the process.
5. The Respondent entered its Defence to the claim on 22 February 2021 by which it stated that Mr Hart was not unfairly dismissed as alleged or at all. The Respondent contended that the Applicant "was terminated for gross negligence and incompetence" because he failed to watch the Aircraft as he was tasked, and he failed to warn his coworkers of the position of the tail of an aircraft as it was being placed into the hangar. The Respondent stated that the Applicant was distracted or not paying attention and this led to the collision with, and damage of the tail of the aircraft by, a wall beam. During the course of the trial Odyssey also submitted that its procedure in towing the aircraft was in compliance with minimal industry standards and substantially met the standards which the Applicant contended ought to have been in place for the towing of the aircraft.

Factual Matrix

6. In relation to the events which occurred on 1 May 2020 and subsequently, the Tribunal heard the direct evidence of the Applicant and three of the Respondent's witnesses – Thaddeus Symonette, Louie Joseph and Anissa Musgrove (Odyssey's Manager of Human Resources). The Tribunal also reviewed the contemporaneous incident reports given by Mr Symonette, Mr Hart and Mr Joseph, and the witness statements of all witnesses who appeared to give evidence at the trial. The Tribunal considered all documents filed by the parties.
7. The Tribunal accepts the facts as follows:

- (1) On Friday 1 May 2020, Mr Symonette requested that Mr Hart and Mr Joseph assist him in towing the Aircraft into the western hangar. Mr Symonette drove the towing vehicle and was positioned in front of the nose of the Aircraft.
- (2) Mr Hart was given the task by Mr Symonette of left wing walker and Mr Joseph was assigned by Mr Symonette to be right wing walker. The personnel involved were formally trained in the job of wing walking and towing procedures. Both wing walkers were to walk alongside the Aircraft as it was being towed into the hangar and in the process to watch parts of the aircraft which were on their side of the Aircraft. They were also supposed to communicate with Mr Symonette who did not have a view or full view of the wings and tail of the Aircraft as it entered the hangar. Mr Hart, during the trial, stated that Mr Symonette was in charge of the operation and ultimately responsible for managing the towing of the Aircraft.
- (3) There were no formal written towing procedures at Odyssey, but the Respondent saw that its personnel involved in such procedures were trained. Mr Symonette also testified that from the training received, he extracted procedures for Odyssey's personnel to follow and posted the same in the Line Service area of the Respondent's premises.
- (4) The Applicant attended formal training in 2019 for towing procedures and when he returned, the Respondent formed a Safety and Security Committee to draw up a formalized set of safety policies and procedures. However, it was still a work in progress by the time of the incident which led to the dismissal of the Applicant.
- (5) The Applicant testified that the policy current at Odyssey was that tow truck drivers would be assisted by one wing walker for the towing of an aircraft. However, the Applicant stated that industry standard dictated that 3 wing walkers should be used in the hangar. He then referred to an article he accessed from the internet. (See Exhibit 'RH004'). The standard set out in the article called for using "a minimum of two wing walkers for hangar stacking" and 3 were recommended for "night operations". The towing of the Aircraft on 1 May 2020 was a daytime operation. The Tribunal accepts that in terms of the number of wing walkers used, Mr Symonette in utilizing Mr Hart and Mr Joseph, complied with the standard set out in Mr Hart's article. As well, the Tribunal notes that Mr Hart eventually admitted in cross-examination that Odyssey's standards complied with minimum industry standard for towing an aircraft. Further, the Tribunal accepts that not all of the standards contained in the article produced by Mr Hart would have applied so as to prevent the type of damage the Aircraft sustained.

- (6) On 1 May 2020, Mr Symonette towed the Aircraft while Mr Joseph wing walked with him up to the door of the hangar. They met Mr Hart at the hangar. However, just prior to approaching the door of the hangar, Mr Joseph could see into the open door of the hangar that Mr Hart was engaged in positioning the mats which were intended to be placed under the wheels of the Aircraft. The Aircraft had been in the hangar earlier that morning and was brought out. This towing exercise was therefore to bring about the re-entry of the Aircraft into the hangar. Because the Aircraft had already been parked in the hangar, the mats were already properly positioned, according to Mr Joseph. He stated that there was no need for Mr Hart to move the mats again, but he saw Mr Hart doing so. The Tribunal accepts Mr Joseph's testimony that the mats were in place when the Aircraft was first moved out of the hangar and that they was no need to move them again, but Mr Hart moved them again.
- (7) The floor of the hangar was covered with an epoxy finish and the mats were put there to prevent the floor from getting scuffed or dirtied by the wheels of aircrafts which were parked there. It was important to protect the floor in this way. It was also vital to ensure that towing of aircrafts was done safely so that such aircrafts would not be damaged.
- (8) When Mr Symonette and Mr Joseph brought the Aircraft to the door of the hangar, they met Mr Hart there. Mr Symonette asked each wing walker to watch their areas of the Aircraft – with Mr Hart assigned to the left and Mr Joseph assigned to the right. Another aircraft was already parked in the hangar ("the parked aircraft").
- (9) The Aircraft was moved into the hangar by Mr Symonette and it cleared the nose of the parked aircraft. Mr Symonette then stopped. Mr Hart ran to the mats and moved them again. Mr Symonette then assigned Mr Hart to watch the tail of the Aircraft and for Mr Joseph to continue to watch the left wing. As he moved the Aircraft Mr Symonette asked for feedback from Mr Hart and Mr Joseph so that he could make any adjustments required to be made to his driving and positioning of the Aircraft. Mr Joseph communicated that his end was clear. Mr Hart said nothing. Mr Joseph asked Mr Symonette to stop. Mr Joseph told Mr Hart not to worry about the mats (which the Applicant was again adjusting) and to watch the tail of the aircraft. Mr Symonette also told Mr Hart not to adjust the mats but to watch the tail of the Aircraft.
- (10) Mr Symonette asked Mr Hart if he could proceed and Mr Hart answered in the affirmative. As the Aircraft was moved further into the hangar the tail of the Aircraft collided with a wall beam. Mr Joseph told Mr Symonette to stop and informed him of the collision with the tail. Mr Symonette stopped the

Aircraft towing, got out of the vehicle and went to the rear of the Aircraft. He asked Mr Hart what happened. Mr Hart said nothing. Mr Symonette was upset and told Mr Hart, "You don't need to be here." Mr Symonette then called the President of Odyssey, Mr Kelly, to report the incident.

- (11) The dent in the Aircraft was temporarily straightened out and the Aircraft was taken for an assessment. Mr Hart was directed to the Human Resources Department, where he gave a hand-written account of what occurred in the presence of Anissa Musgrove, Human Resources Manager. Mr Hart took responsibility for the accident and told Ms Musgrove that he was willing to pay for the damage.
- (12) Odyssey launched an investigation into the incident. In Mr Hart's first hand-written report he appended his name at the top of the page with other basic information and then stated:

"On Friday 1st May, 2020, I was wing-walking G-450 N904TS along with Louie and Thaddeus was driving the ...tug. I was watching the tail of the aircraft when it collided with the beam of the hangar. I accept full responsibility for not alerting Thaddeus to this beam sooner. The pilots were notified of the incident. Time of incident 12:15 pm."

- (13) Some days later, Mr Hart produced a typed account of the incident and resiled from taking full responsibility for the accident. He stated that he was assigned to wing-walk but he was also "lining up the mats for arrival of the aircraft's main gears. He said he was "busy between the area of the aircraft's tail, the wing-tip and adjusting the mats." He then wrote: "In my opinion there should have been a third wing walker in place to be directly focused on watching the tail solely. I acknowledge my role in this incident and am of the opinion that this incident is collectively responsible by all persons involved along with the lack of a third wing walker."
- (14) Mr Symonette also produced a hand-written report of the incident on 1 May 2020. In this report he documented that he and Mr Joseph met Mr Hart moving the mats around. He assigned them their wing walking jobs. He stated:

"As I was pushing the aircraft into the hangar, I ask Ricardo to watch the right wing passing the nose on HBIVJ. When N904TS left wing passed the Nose of HB-IVJ and all was clear, I came to a complete stop with N904TS. Ricardo then proceed to move the mats again. At this time, the mats had to be realigned. I then ask Ricardo to watch the tail and Louis to watch the right wing. The left wing was clear. I then proceed to push the aircraft back slowing and as I was pushing back, I ask both Louis and Ricardo to talk to me. Louis shouted my end clear, at this point Ricardo still was not sayng anything. He then ran to the mats again to try to align them. Both Louis and I said to him don't worry about those mats now, just watch the tail. I then proceed to push back on N904TS. Within a few moments Louis said to me stop Thaddeus, the tail hit!"

- (15) In cross-examination, Mr Hart admitted he did not tell Mr Symonette he felt that a 3rd wing walker was necessary on 1 May 2020. He also admitted that he was not “solely” focused on the tail of the Aircraft which approached the wall, but was also looking at the mats. He admitted that he was told to watch the tail and not to worry about the mats. He clearly did not obey this directive from the person responsible for managing the operation (Mr Symonette). He also ignored the similar advice given him by his co-wing walker, Mr Joseph.
- (16) The Applicant was suspended with pay pending the investigation, which involved Mr Joseph and Mr Symonette who gave verbal and written reports. Parts of the investigation were conducted by Mr Holowesko (General Manager), Mr Shervin Penn and Mr Nathaniel Rappel (of the Respondent's Safety and Security committee).
- (17) Ms Musgrove stated that she was surprised to receive a 2nd incident report from Mr Hart after he had already submitted his same-day report of the incident. Both reports were considered by the Respondent, and in a second meeting which took place on 6 May 2020, Mr Hart was given an opportunity to explain his position. The meeting included Mr Rappel, Mr Anthony Hinsey (a member of Odyssey's executive team), Ms Musgrove and Mr Hart. Mr Hart stated that he had nothing further to say. Mr Hinsey then explained that the Respondent felt, as a result of its investigation that the accident occurred because he was not paying attention and he was not communicating with Mr Symonette. Mr Hinsey further explained to the Applicant that the Respondent decided it could not continue to employ a Security and Safety Manager who did not take responsibility for his actions and sought to place the blame on others. Mr Hinsey told Mr Hart that if he felt a 3rd wing walker was necessary he should have suggested it. As a result of his actions the company had to expend money to fix the damaged aircraft.
- (18) The Applicant was therefore summarily dismissed for gross negligence and incompetence. He was given a letter from the General Manager, Mr Holowesko, which stated these reasons for his dismissal and he was paid \$5,520.77 as pay for work performed and vacation, less national insurance and other deductions. This was the process afforded Mr Hart before his summary dismissal.
- (19) After his summary dismissal, a report was finalized on 18 May 2020 in which Mr Penn and Mr Rappel concluded that:
- “At the crew request, the aircraft was being towed for parking into the western hangar by a team of 3 persons. Mr Thaddeus Symonette was driving the tug while Mr Ricardo**

Hart and Mr Louie Joseph acted as wing walkers respectively on the left and right wings.

“As the aircraft was being pushed into parking position inside the hangar, the tug driver requested feedback from the wings walkers to make necessary adjustments to his driving and aim. Mr Hart did not respond promptly as he engaged in tidying up mat markers while the aircraft was being pushed closer to the hangar walls. The lack of feedback from Mr Hart resulted in the aircraft tail coming into contact with a wall beam. The tip of the tail stabilizer was dented.

“Describe the specific ramp system failure:

“Absence of communication from the wing walker at the aircraft tail interrupted the continuous flow of information the tug driver needed to adjust his driving. The lack of prompt response from Mr Hart to Mr Symonette’s request for obstacle distance information, resulted in inaccurate feedback being passed on as the tail wing walker was not fully focused on the aircraft being maneuvered closer to the hangar walls.”

- (20) The Tribunal accepts that Mr Hart’s decision to divide his attention between the Aircraft mats and the Aircraft was a major contributor to his

the tail of the Aircraft. Further, his failure to tell or signal to Mr Symonette to stop before the Aircraft’s tail hit the wall beam – a responsibility which was solely assigned to him – was the direct cause of the accident. If he wanted to have time to fix the mats he ought to have asked Mr Symonette to stop to allow him to do so. The Tribunal is satisfied that the Applicant’s failings caused the accident. Further, his earlier movement of the mats caused the requirement for further repositioning of the mats when the Aircraft was again brought to the hangar.

Law & Disposition

8. It is imperative to note that in this case the Tribunal is not asked to determine whether Sections 31 to 33 of the Employment Act (which deal with justification for summary dismissal) were contravened by Odyssey. This is not a claim for wrongful summary dismissal. Rather, it is a claim in which the fairness of the dismissal is being challenged. This claim is therefore governed by Sections 34 and 35 which provide:

“34. Every employee shall have the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer.

“35. Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case.”

[Emphasis added].

9. In *Cartwright v US Airways*¹ the Court of Appeal considered what is meant by “the substantial merits of the case” and the manner in which courts are to go about fulfilling the requirement of section 35. In that case the Court stated:
“37 What does the phrase “the substantial merits of the case” mean? At paragraph 26 of West v Percy Community Centre UKEAT/0101/15/RN, (Transcript), a case decided on 20 January 2016, Langstaff, J, speaking for the tribunal said, *inter alia*:

[26] ...The question is whether what the employer thought had happened, in the circumstances in which the employer thought the conduct to have occurred, was or was not sufficient to justify the employer’s actions so as to be held not unfair within s98(4)...

39 At paragraph 23 Langstaff, J stated: ‘That the statutory question is answered by a factual inquiry.’

40 Thus, it was incumbent upon Winder, J to look at the case in the round, at all of the circumstances of the case, and arrive at a decision based on the substantial merits of the case. This he did do.”

10. Unfair dismissal claims can take manifold forms. There are some reasons for dismissal deemed by statute to be unfair. These reasons are provided in sections 36 through 38 and section 40 of the Employment Act, and are irrelevant to this matter.
11. All other circumstances of unfairness in a dismissal are covered by virtue of section 35. See the judgment of the Court of Appeal in *BMP Limited d/b/a Crystal Palace Casino v Yvette Ferguson*.²
12. The Tribunal considers that the question in the instant case is whether after conducting a factual inquiry into the substantial merits of the case, there is anything which occurred in the procedure afforded Mr Hart during the investigation and/or termination process which made his dismissal unfair. The Applicant alleges unfairness primarily on the basis of three arguments. He states that he was not asked questions during the investigation. As well, he has complained that he was discriminated against or singled out for punishment when his view was that Mr Symonette and Mr Joseph should have been punished also. He also argues that Odyssey ought to have used a third wing walker in the operation of moving the Aircraft.

¹ SCCivApp No 130 of 2015.

² IndTribApp No 116 of 2012 at paragraph 38 in particular.

13. The Tribunal takes further guidance from the case of *Paul F Major v. First Caribbean International Bank (Bahamas) Limited*.³ In that case, Her Ladyship Crane-Scott JA in the leading judgment of the Court of Appeal explained how the fairness principle applies in the *Employment Act* and the effect of procedural defects in certain circumstances. There the Court stated:

“140. As we have already stated in our discussion in relation to the earlier grounds, unlike section 98 of the ERA, in The Bahamas the “fairness principle” in section 35 of the BEA contains no reference to “equity”. Furthermore, nothing in sections 33 or 35 expressly requires a court or tribunal to have regard to natural justice or the *Audi Alteram Partem* rule when determining whether an investigation is reasonable or unreasonable; or when considering whether a dismissal is fair or unfair. Whether a dismissal is fair or unfair will always depend on “the substantial merits of the case” which will include an evaluation of the circumstances of the dismissal and its reasonableness (or otherwise) and an overall assessment of the fairness or unfairness of the dismissal, based on the factual inquiry which must necessarily be undertaken in each individual case.”

“141. We have examined the Bahamas Industrial Tribunal decision of Thurston and another v John Bull Limited relied on by Mrs Rolle. Admittedly, between paras 38-40 the Tribunal adverted to a number of English decisions where the rules of natural justice are specifically discussed. What emerges from those cases, however, is that it does not follow that an alleged breach of the rules of natural justice will inexorably lead to a finding that a particular dismissal was unfair. Despite Mrs Rolle’s urgings to the contrary, the authorities show that even in the face of an employee’s allegation that the rules of natural justice have been breached, what has to be determined in each individual case is whether the process that led to the employee’s dismissal was in the particular circumstances fair and reasonable and the dismissal fair or unfair...”

“144. We do not believe that the 3 Bahamian authorities relied on by Mrs Rolle assist her arguments on this issue either. Unlike the Appellant’s case, the dismissal in Omar Ferguson was not based on misconduct on Ferguson’s part. He was terminated by his employer simply because his security clearance was withdrawn by the Airport Authority (a third-party agency). Following his factual inquiry pursuant to section 35, the judge found (and the Court of Appeal agreed) that Ferguson’s dismissal was unfair because he had been denied natural justice as he had never been given an opportunity before his dismissal to make representations to his employer or to the Airport Authority for the restoration of his security pass...”

“145. In our discussion in relation to the earlier grounds we have already identified the distinguishing features of the employee’s dismissal in Ferguson v Island Hotel Company Limited on which Mrs Rolle also relies here. There is no need to repeat them. The evidence showed that this was a case where actions

³ SCCivApp No 77 of 2021.

which the Appellant had taken in April/May 2011 in relation to Mr Blazer in obvious breach of FCIB's US Persons Policy had come to light several years later in the US Indictment and could not be denied. Rather than cooperating with the investigation and admitting his involvement, the Appellant failed to cooperate. As we have said, the situation in which the Appellant found himself on 28 May 2015 was akin to his having been caught in the act, albeit years later. As the judge found, no further investigation or form of disciplinary proceedings were necessary before he was dismissed." [Emphasis added].

14. Materially, later in that judgment, the Court of Appeal opined, by use of authority, on the degree of inquiry needed in any give case:

"173. In rejecting Mrs Rolle's submission on this issue, we can do no better than to highlight the following observation of Wood J in ILEA & Gravette [1988] IRLR 497, reproduced at para 80 of A v B which is directly relevant to the circumstances of this case:

"...in one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end so the amount of inquiry and investigation, including questioning of the employee which may be required, is likely to increase." [Emphasis added].

"174. As the EAT also said at para 84 of its decision in A v B, "ultimately, fairness is a broad concept and must be considered in the round." This means that each case must necessarily be determined on its own facts. The authorities clearly show that it is not every procedural defect or failure which will inexorably result in an investigation being held to be unreasonable and a dismissal unfair. In our view, the fact-sensitive nature of the inquiry is further underscored by the EAT's further observation at para 88 which speaks for itself:

"88. We accept that there is no hard and fast rule that statements should always be provided. Often it is enough for an employee to know the gist of the case against him, and in such cases it will not infringe the principles of fairness to fail to provide the detailed evidence: see Hussain v Elonex [1999] IRLR 420...". [Emphasis added].

15. The Tribunal is of the view that the employer conducted its inquiry and gave Mr Hart a chance to state his case. Mr Hart was well aware the accident of 1 May 2020 was being investigated and specifically whether his actions caused the damage. He met with Ms Musgrove and gave her verbal and hand-written representations concerning the incident. He was able some days later to give a second account. Both accounts were taken into consideration. The Applicant was then afforded another opportunity to state his position on 6 May 2020, which he declined.

16. The parties seemed for the most part to agree the facts concerning the accident. All accounts were similar and Mr Hart admitted at the trial that he was not watching the tail alone as he was asked to do by the manager in charge of the towing operation. He instead decided to divide his attention at a crucial stage of the towing of the Aircraft. The Tribunal does not therefore hold the view that Mr Joseph or Mr Symonette should have been dismissed or punished along with Mr Hart. There is no satisfactory support for his claim of discrimination.
17. Having considered the guidelines for towing procedures produced by Mr Hart, the Tribunal is satisfied Odyssey's procedure on the day of the towing of the Aircraft was within minimal requirements. Further, Mr Hart as Safety and Security Manager did not raise a red flag concerning whether there were adequate wing walkers. Additionally, in the Tribunal's view it was not for lack of an extra wing walker that the accident occurred but rather because Mr Hart ignored specific instructions and did not communicate to stop the towing of the Aircraft so that he could assess the distance of the tail to the wall beam of the hangar or so that he could fix mats if the same was necessary, or alternatively, so that he could ask Mr Joseph to fix the mats while he watched the tail of the Aircraft.
18. Again, the Tribunal is not asked to find whether the dismissal was wrongful, that is whether it was justified as a result of the employer's honest and reasonable belief Mr Hart committed gross negligence or was incompetent. The sole remit of the Tribunal is to gauge the fairness of the Applicant's dismissal on the basis of his contentions.
19. At the end of the day, the Tribunal could find no circumstance in this case sufficient to support the claim Mr Hart had been unfairly dismissed. The Tribunal is satisfied that the process afforded Mr Hart in the investigation leading up to his eventual dismissal was reasonable and fair. In the circumstances, the Tribunal orders that the Originating Application be dismissed.

THIS IS THE DECISION OF THE TRIBUNAL

Dated this 03 day of January 2023

Simone Fitzcharles

Vice President