

JUNE 6, 2025

INDUSTRIAL DISPUTES TRIBUNAL
AWARD
IN RESPECT TO
AN INDUSTRIAL DISPUTE
BETWEEN
BERNMAR LIMITED
(t/a ACTION CHEMICALS AND EQUIPMENT)
(THE COMPANY)
AND
MS. CONSTANCE JACKSON
(THE AGGRIEVED)

REFERENCE

The Honourable Minister of Labour and Social Security, by letter dated December 22, 2023, and in accordance with Section 11A (1) (a) (i) of the Labour Relations and Industrial Disputes Act (hereinafter called "the Act") referred to the Industrial Disputes Tribunal for settlement, in accordance with the following Terms of Reference, the industrial dispute described therein:

"To determine and settle the dispute between Bernmar Limited (t/a Action Chemicals and Equipment) on the one hand, and Constance Jackson on the other hand, over the termination of her employment"



DIVISION:

The division of the Tribunal which was selected in accordance with Section 8(2) (c) of the Act and which dealt with the matter comprised:

Mr. Errol Miller, JP	-	Chairman
Mr. Leslie Hall, JP	-	Member, Section 8(2) (c) (ii)
Mrs. Chelsie Shellie Vernon	-	Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF PARTIES:

The **Company** was represented by:

Mr. Novar McDonald	-	Industrial Relations Consultant
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In attendance:

Mr. Clement Bernard	-	Managing Director
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The **Aggrieved** was represented by:

Mr. Nickardo Lawson	-	Attorney-at-Law
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In attendance:

Ms. Constance Jackson	-	Aggrieved Worker
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SUBMISSIONS AND SITTINGS:

Briefs were submitted by both parties and oral and written submissions made during Eleven (11) sittings held February 19, 2024 to July 8, 2024.

BACKGROUND

1. Bernmar Limited (t/a Action Chemicals and Equipment) (hereinafter called Action Chemicals or the Company) manufactures and distributes specialty chemicals and equipment throughout Jamaica.
2. Constance Jackson is a sales professional who was engaged by Action Chemicals on October 15, 2013, as a Technical Sales Representative on a commission based salary. Miss Jackson's services were terminated by the Company on April 30, 2020, on the grounds of poor performance. She contends that the dismissal was unjustifiable. The parties sought the conciliatory assistance of the Ministry of Labour and Social Security in an attempt to resolve the matter. However, the process was unsuccessful and consequently, the Honourable Minister referred the dispute to the Industrial Disputes Tribunal for determination and settlement.

CASE OF THE COMPANY

3. The Company's representative, in his opening submission, said that the relationship between the Company and Ms. Jackson was not one of worker/employer as defined in Section 2 of the Labour Relations and Industrial Disputes Act (LRIDA) but was that of an independent contractor. Consequently, he submitted that the dispute was not properly referred to the Tribunal. However, while he registered that objection, the Company had no difficulty with the Terms of Reference and therefore agreed for the Tribunal to proceed in hearing the matter.
4. The Company contends that Ms. Jackson's dismissal was justifiable as it was due to lack of performance. It said that natural justice was adequately served as the opportunity was given for Ms. Jackson to improve but in the absence of that improvement, her 'contract for service' was terminated.
5. Mr. Clement Bernard, the Managing Director of the Company, was the first witness to testify. He outlined what he said were the main elements of the contract for service between the Company and Ms. Jackson. These included that:
 - a. She was paid on a monthly commission basis which was dictated by sales.
 - b. There was no requirement for her to report to the office except for sales or individual meetings
 - c. She manages her own time with no compensation outside of the commission earned and was not entitled to vacation leave but would ask the Company for time off to go on her own vacation time
 - d. She was not subject to disciplinary process and the Company only reacted when its set objective was not achieved. The Company's reaction then would be to find out the reason for failure to meet the objective.
6. The following is an extract from Ms. Jackson's Contract of Employment (Exhibit 1):

"The company will:

 1. Set and communicate monthly sales quota which you will be required to meet.
 2. Provide you with ongoing training throughout your period of employment.
 3. Supply you with promotional items and the necessary working tools to effectively carry out your work.
 4. Implement internal competition among sales representatives as a part of our motivational programme and incentives.
 5. Provide you with \$2,000.00 per month towards telephone calls for business use *only within your service area.*



6. Assess your performance at the end of four months and make adjustments to commission where necessary.

You are expected to:



- maintain your motor vehicle in good working condition to facilitate timely completion of duties
- submit daily and weekly sales plans by Tuesday of each week which must adhere to the company's standards
- provide the highest level of attention and service to clients
- attend scheduled sales meetings
- communicate regularly with the main office (Kingston)
- meet your monthly sales quota as set by the company
- collect payments on schedule in accordance with the company's credit policy (15 days)"

7. Mr. Bernard's evidence was that he did not determine Ms. Jackson's hours or place of work but rather he determined if she made the monthly quota. He said that she was expected to make her quota by physically visiting customers or contacting them by telephone and submitting daily and weekly sales plans to the Company. The weekly sales plan, he said, sets out approximately ten customers in a geographic area that were to be seen each day. Further, that plans served to guide sales representatives so that they do not default on the required customer service.
8. Mr. Bernard testified that Ms. Jackson was required to attend all scheduled meetings set by the Company which were normally held monthly and stated that she frequently attended such meetings. He said, however, that Ms. Jackson failed to meet her sales quota and was tardy in submitting her weekly reports. He further testified that he had many discussions with her regarding her performance and the failure to meet her quota.
9. He said that branded shirts were issued to her, not as an indication that she was a worker, but that it was part of the advertisement of the Company. He also said that the Company provided her with free health and life insurance coverage as it did for everybody.
10. In his evidence, Mr. Bernard said that the Company had a responsibility to make deliveries of its products to customers and that this is normally done through contracted delivery service. Occasionally, he said, Sales Representatives voluntarily make deliveries which assists the Company's operational costs. Ms. Jackson would often approach him and volunteer to make deliveries in return for gas money to which he would agree. Despite this, there were occasions when he was unable to provide her with gas money, and the product may or may not be delivered.

11. He described Ms. Jackson as being very aggressive and stated that she makes demands and at times can be disruptive. He related that in July 2018, she had refused to deliver an order and that he had discussion with her about the matter. He said that subsequent to that discussion, Ms. Jackson sent him the following email on July 12, 2018 (Exhibit 5):

"Dear Mr. Bernard,

This letter is to confirm discussion on Thursday July 12, 2018, sometime after 10:00 am, (Clement Bernard/Constance Jackson) when you told me that you will no longer be working with me because I refuse to deliver Action Chemical's products with my personal vehicle. Further, when I got into the office, I called you and enquired if I should do the product demonstrations which I had planned for today and you told me not to do them and leave it alone. I asked you, based on our earlier discussion if you had a dismissal letter for me and you told me that you will handle it.

I am now requesting said dismissal letter from you within three (3) working days from the date of this letter".

12. In response to Ms. Jackson's email, Mr. Bernard said he sent her a letter dated July 13, 2018 (Exhibit 2), extracts of which are quoted below:

"Our conversation resulted based on a report from the office that you were refusing to deliver some supplies to a customer and in that discussion:

- 1) No reference was made to termination of your employment because of your refusal to deliver 2 five-gallon containers of chemicals to one of the customers in the portfolio for which you have responsibility.

As you are aware, the company's policy is that supplies are made to customers by staff with that job function. However, periodically, our sales personnel as requested to make small deliveries as a matter of expediency and enhanced customer service.

As you may recall, in the past you have assisted as well as refused to carry out this reasonable request. In instances where you have complied, agreement was reached to provide the cost of petrol.

- 2) I highlighted again, as I have done on several occasions, the impact of your general work attitude, uncooperative behaviour and poor performance on productivity and staff morale and how challenging this was becoming for me as your manager.

I also pointed out that feedback from customers has been very negative and they have requested that you be withdrawn as the representative for their account.

- 3) You enquired if your services were being terminated and asked about the timeline for collecting a letter of dismissal.

I did not pursue this as the purpose of our discussion was not about termination.

I note that you have again raised the matter of being dismissed and indicated you would like to collect the termination letter within three (3) days. I find this very curious that as



an employee you are requesting to be dismissed, as this is a matter reserved for employers”.

13. He said that he did not threaten to terminate her services and referred to Exhibit 3, a letter dated August 13, 2018, that he subsequently sent to Ms. Jackson, extracts which are below:

“Based on the discussions, it is clear that we both have different interpretation/understanding of the conversation we had on July 12, 2018 and subsequently and as Ms. Sundar pointed out is difficult to validate what was discussed between us both. However, what we have been able to establish is that:

- 1) Your performance has been below the standard required by the Company for some time now and this has been discussed as recently as May 2018, when I again reiterated the importance of meeting targets and the implications of poor performance on the company, the team and your obligations to the company.

The attached spreadsheet details your performance versus quotas since 2016.

- 2) You are averse (sic) to making occasional small deliveries to customers, based on request from your manager and have presented many excuses for your refusal.
- 3) You have been tardy in submitting the mandatory weekly report that allows me to have visibility of the activities in which you are engaged. These are outstanding for more than a year.

Your poor performance has affected the company's revenue, the motivation of other team members and the quality of service to our customers. This, is unacceptable and constitutes a breach of the terms of your contract and requires improvement.

Please note that over the next two (3) months (sic), August - October 31, 2018, we will monitor your progress against targets. This serves as a warning that failure to meet these targets will give rise to further disciplinary action up to and including dismissal”.

14. He said Ms. Jackson was placed on a Performance Improvement Plan (PIP) between August and October 2018 to assist her in improving her sales. He testified that her performance initially improved but that it fell back to an even worse position. He said that is where the breakdown began, and she never recovered. He said that she was placed on another PIP in July 2019 which should end in October 2019. He said that he tried in the last PIP to encourage her to increase her sales quota, but it did not improve.

15. Mr. Bernard said the non-delivery of one item did not influence the decision to dismiss her but that the cause of Ms. Jackson's employment being terminated was due to poor performance. This, he said, was after several counselling sessions with her. He said that he thought enough was enough, therefore, leading to the decision to terminate her services. The following letter dated April 29, 2020, was sent to her (Exhibit 4):

“As you may recall, multiple discussions and formal assessments have been held with you surrounding your performance vis-à-vis the performance criteria and objectives assigned to you as a Sales Representative.

In a meeting on July 31, 2018, it was highlighted that:

- 1) Your performance had been below the standard required by the company for some time. Reference was made to the meeting of May 2018, when the importance



of meeting targets and the implications of poor performance on the company, the team and your obligations to the company was highlighted. A spreadsheet detailing your performance versus quotas since 2016 was provided to substantiate the findings.

- 2) You have been tardy in submitting the mandatory weekly report that allows me to have visibility of the activities in which you are engaged.

Based on the above, you were placed on a performance improvement plan for three (3) months, August – October 31, 2018 and a warning issued that failure to meet these targets would give rise to further disciplinary action up to and including dismissal.

This confirms that I remain concerned about your performance, specifically, the non-achievement of the targets assigned from 2019 to present. The attached spreadsheet shows the achievement versus targets assigned for the period up to the 31st March 2020.

To date I have provided you with support to assist in the areas identified and you agree to ensure there was enhanced performance; However, I do not believe that your performance has improved sufficiently, and this is substantiated by the various assessments.

Therefore, the decision is that you have failed to reach an acceptable level of performance, despite extensive efforts to provide you with support and opportunities to improve.

It is with regret that I must therefore inform you that this point has been reached and you will be terminated on the grounds of non-performance due to your continued unsatisfactory work performance.

This letter gives formal notification of the termination of your employment with Action Chemical effective Thursday April 30, 2020.

Payment for commission earned up to April 30, 2020 will be made subject to the terms and conditions included in your contract of employment".



16. Mr. Bernard referred to an assertion in Ms. Jackson's Brief of **"inappropriate conduct of Managing Director during working hours"**. He said that the allegation was that he made the comment about how sexy Ms. Jackson looked in her outfit and that he wished he had met her earlier. He said the assertions were not true. He said he often made comments to both male and female employees as well as to customers that they were looking nice but not to the extent as she alleged.

17. During Mr. Bernard's testimony, objections were raised by Counsel for Ms. Jackson regarding the accuracy/authenticity of the evidence on the spreadsheet appended to the letter at Exhibit 3. The parties agreed that the evidence being provided by Mr. Bernard be suspended while the Company engaged the services of an Auditor to extract the information from its records. On completion of the audit, the Tribunal heard evidence from the Auditor, Mr. Gladstone Johnson, who was the second witness for the Company. Mr. Bernard subsequently completed his testimony.

18. Mr. Gladstone Johnson testified that he is a Registered Public Accountant and the Chief Executive Officer of Gladstone Johnson & Associates. He said that he was engaged by the

Company to provide a Special Purpose Audit which was a review of the annual sales presented for Ms. Jackson. The focus of the audit dealt primarily with the sales as presented and a verification of sales information.

19. Mr. Johnson explained that a Special Purpose Audit has a limited scope and in that limited framework, an examination is done of a document, or a process or an activity. He said that in this limited scope, the focus was on matters related to Ms. Jackson's sales during the period of her employment. He said the audit was conducted in accordance with International Standards on Auditing (ISAs).

20. Mr. Johnson testified that:

- He looked at the system overall to understand the client's business; how the processes worked and flowed and how one document flowed into another and eventually how it manifested itself into a sales report.
- He examined and assessed the risks that would have been involved such as the possibility of invoices not being properly captured in the report.
- In his examination, he saw no gaps and there was a sequential flow of invoices. He said he found some variances between what was in the report and what was generated by the system.
- He evaluated the appropriateness of the accounting policies used.

21. Mr. Johnson further testified that during the audit, which was done over a period of one week, he examined sales invoices generated over the period of Ms. Jackson's engagement and traced the invoices to the customers' accounts. He also generated a Sales Report in which he found total negative variances of \$65,402.50. He compared the "Actual as per Sales Report", a regenerated report from the Company's system, with what he received from the Company under the "Actual" column. He explained that the variance could be the result of adjustments such as goods being out of stock and a credit note issued, removal of GCT and delivery charges. He said that he concluded that it was a fair and accurate representation of the statement presented by the Company. The Report was tendered into evidence as Exhibit 4A and the following matrix represented the schedule to the Exhibit:





**BERNMAR LIMITED T/A ACTION CHEMICAL & EQUIPMENT
ANNUAL SALES QUOTA VS ACTUAL PERFORMANCE**

CONSTANCE JACKSON

Auditors Verification

DATE	QUOTA	ACTUAL	VARIANCE - Actual vs Budget	Actual As Per Sales Report	Variance [Sales Statement v Client Sales Report]
	\$	\$			
MAY 2014-MARCH 2015	8,100,000	8,129,279.66	29,279.66	7,926,695.96	(202,583.70)
APRIL 2015-MARCH 2016	9,495,000	12,584,246.78	3,089,246.78	12,584,246.78	-
APRIL 2016-MARCH 2017	14,740,490	11,738,883.67	(3,001,606.33)	11,738,883.61	(0.06)
APRIL 2017-MARCH 2018	12,912,772.04	10,776,227.91	(2,136,544.13)	10,918,255.64	141,797.73
APRIL 2018-MARCH 2019	14,458,000	13,804,659.04	(653,340.96)	13,804,659.04	-
APRIL 2019-MARCH 2020	14,458,000	12,485,704.44	(1,972,295.56)	12,481,087.97	(4,616.47)
Total Sales for period		69,519,001.50		69,453,599.00	(65,402.50)

22. The Company contended that

- a. Ms. Jackson was engaged on a contract for service and the Tribunal should make no Award in the matter; and
- b. Her contract was terminated on the grounds of unsatisfactory performance.

CASE FOR THE AGGRIEVED

23. In his opening submission, Counsel for Ms. Constance Jackson, contends that her dismissal was callous and without due process. He said that the relationship between herself and Mr. Bernard deteriorated due to her refusal to make deliveries of products and that her dismissal was arbitrary and was not for poor performance. He further contends that at the time of her dismissal she was entitled to commission which has not been paid.

24. Ms. Jackson provided testimony in support of her case. She said that she had been a Sales Representative for close to thirty years. She was employed by Action Chemical in October 2013, as a Technical Sales Representative and was paid a monthly commission based on collection of cheques from clients. She said that initially she was accustomed to getting invoices of her sales, but that she was subsequently advised that instructions were given to the office to desist from providing her with invoices. As a result she was unable to verify the correctness of her payments.



25. Ms. Jackson gave evidence that she was accused of not making her sales target for the third year of her employment, but she related how she had an accident by falling into a hole at Sovereign Mall causing damage to her foot in 2017. As a result, she had surgery and was fitted with a cast and had to be assisted with crutches to walk. She said that as a consequence of the accident, she spent about five months at home recuperating. However, she continued to work by calling customers, taking their orders and having her son transport her to collect the cheques from clients.
26. She testified that the other factors generally impacting her not meeting her quotas at Action Chemicals included prices and late delivery of products, and lack of promotional items for customers. She said these factors resulted in some customers cancelling orders. Ms. Jackson explained that the promotional items include bun and cheese during Easter as well as Christmas and birthday gifts. She averred that she had a sales list of between 40 - 50 customers at the end of 2018, but that she was told that there were no promotional items left for her customers. She explained that during the years when she was provided with promotional items for her clients, she made her targets.
27. She explained that she normally made deliveries but due to a series of incidents, she stopped. She related that on one occasion she was asked to deliver about three or four 5-gallon bottles of engine degreasers to JPS Stores. She said that it was raining, and her car windows were up. While driving she kept smelling the degreaser which she later discovered had splashed around and spilt all over her car trunk and the fumes were circulating in the car. This resulted in her later having a headache, severe chest pain and challenges with her breathing. On visiting her doctor, she was advised that she was suffering from chemical poisoning. She admitted that the Company paid the medical bill, and she was sent on sick leave. She related another occasion when a similar incident occurred in delivering bleach to Rubis on Windward Road. At that time, she had to stop by her brother's house where he washed the carpet in the car trunk before taking the product to Rubis. Ms. Jackson said that despite these experiences, she was still being pressured to make deliveries on the grounds that **sales reps must do deliveries**.
28. Ms. Jackson said that her insurers advised her that her car was not licensed as a commercial vehicle and that under the circumstances, she should not use it to do deliveries as she would be operating contrary to the licence for the vehicle and could be prosecuted by the Police. She said that she shared this advice with Mr. Bernard. However, she said that in 2018, he asked her to make a delivery to Portmore Community College, but she refused to do so.

Following that incident, he had a meeting with her during which she said that he told her **"well, I no longer worked with him"**. She said that since then, the good relationship she previously enjoyed with Mr. Bernard began to change negatively.

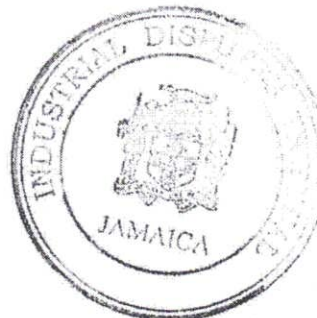
29. Ms. Jackson testified that she began receiving adverse feedback from the Company. She said that Miss Genieve Sundar, the Human Resources Consultant, wrote her advising her that there was nothing wrong in her delivering a few 5-gallon orders. She said that Mr. Bernard also stopped her from doing a "demonstration" of a product. She explained that she became concerned about the change in attitude and sought advice from the Ministry of Labour as to whether she could be dismissed for refusing to make the deliveries, but she was informed that she would need to be given a letter of dismissal.
30. Based on the behaviour of Mr. Bernard and the advice from the Ministry of Labour, she said that she sent him an email (Exhibit 5). She said that in response to her email, a meeting was eventually held involving herself, Mr. Bernard and Ms. Sundar. She said that in the meeting, Mr. Bernard denied saying that **"I no longer work with him"** and the focus of the meeting shifted from the issues relating to her refusal to make deliveries to her performance in meeting her quota, staff morale and customer complaints. She said these were issues she was hearing about for the first time. She explained that it was not abnormal for sales reps not to meet their quota every month. She said that she was told in the meeting that she would be placed on a Performance Improvement Plan (PIP). Ms. Jackson testified that no plan was communicated to her and that in respect of counselling, she had one meeting with Ms. Sundar.
31. Ms. Jackson said that contrary to Mr. Bernard's assertion that she is lazy, she considered herself to be a good sales representative. She testified that she had approximately 50-odd clients and that her best individual sales was approximately \$2M which was considered to be very good. However, she said her sales over the last two years were impacted by price, product quality and late deliveries, factors which often resulted in cancelations of sales. She said that the Company was aware of these issues as she had often complained about them. She therefore, refuted the allegations contained in the letter to her, dated August 13, 2018 [Exhibit 3].
32. She said that contrary to Mr. Bernard's evidence that she was on a contract for service, she was not allowed to work for other companies during her employment to Action Chemicals and cited examples in support of her claim.



33. In support of the allegation in her Brief about inappropriate conduct, she cited situations when Mr. Bernard made inappropriate sexual remarks to her, which, she said, caused her to feel uncomfortable.
34. She said that her sales collections during 2018 and 2019 were approximately \$15M each year and opined that to achieve 80% of one's sales target in a year was considered reasonable performance.
35. Ms. Jackson claims that she was unjustifiably dismissed but that she does not want to be reinstated due to the hostility she experienced by the Company. She stated that she was 61 years old when she was dismissed from the Company and that it was in the midst of the COVID-19 Pandemic. She said she subsequently applied for many positions after her termination including positions at many Call Centres, but despite her best efforts, she was unable to obtain employment. Her unemployment has created a financial burden to her family.
36. Ms. Jackson is, therefore, seeking to be compensated in the amount of \$9,617,262 .80 for being unjustifiably dismissed. She said that commission due to her on termination was \$233,412.80, which has not been paid. Ms. Jackson supported her claim by tendering the following into evidence:
- a. Projected loss of income for the years 2020 through to 2024 of \$8,825,850
 - b. Claims for outstanding commission
 - c. Payment for 14 weeks' vacation leave and 4 weeks' pay in lieu of Notice.

ANALYSIS BY THE TRIBUNAL

37. The issues that the Tribunal must determine are:
- a. The status of the working relationship that existed between Bernmar Ltd. (t/a Action Chemicals and Equipment) and Ms. Constance Jackson.
 - b. If the relationship was an employer/employee relationship, was the termination of her services justified?



**THE STATUS OF THE WORKING RELATIONSHIP BETWEEN
BERNMAR LTD. AND MS. CONSTANCE JACKSON**

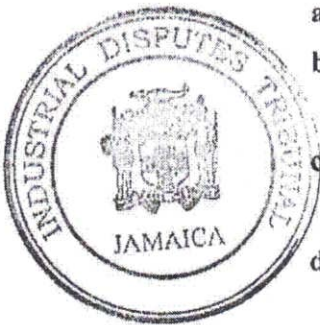
38. The Company said that Ms. Jackson was engaged as an independent contractor, and not as a worker as defined by the Labour Relations and Industrial Disputes Act. The definition of a worker outlined in Section 2 of the Act is: -

“...an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee”. (Tribunal’s emphasis)

Given this definition, did Action Chemicals and Equipment exercise direction, supervision, and control over Ms. Jackson during her employment?

39. Mr. Bernard, in his testimony, outlined certain factors that he said determined that the engagement of Ms. Jackson was that of an independent contractor. These included that: -

- a. She was paid on a monthly commission basis which was dictated by sales.
- b. There was no requirement for her to report to the office except for sales or individual meetings.
- c. She manages her own time with no compensation outside of the commission earned.
- d. She was not entitled to vacation leave but would ask the Company for time off to go on her own vacation time.
- e. She was not subject to disciplinary process and the Company only reacted when its set objective was not achieved. The Company’s reaction then would be to find out the reason for failure to meet the objective.



40. During cross-examination, Counsel for Ms. Jackson spent some time seeking to determine from Mr. Bernard whether the contract that he presented to her upon engagement was an employment contract or was it that of an independent contractor. For the most part, the witness obfuscated his response. He declined to explain his response on the pretext that he did not know the difference but concluding that it was a contract as an independent contractor. However, in Exhibit 2, the Company wrote to Ms. Jackson indicating that:

“.... I note that you have again raised the matter of being dismissed and indicated you would like to collect the termination letter within three (3) days. I find this

very curious that as an employee you are requesting to be dismissed, as this is a matter reserved for employers". (Tribunal's emphasis)

41. The responses provided by the Company to certain questions have served to convince the Tribunal that Ms. Jackson was engaged on a contract of service. The following are some examples: -

- a. Mr. Bernard said that Ms. Jackson was assigned to specific parishes; these being Kingston, St Andrew and St. Catherine and that given the nature of her job she would not need to be in office on a daily basis. He also agreed that the Company used this method to restrict her in an effort to manage or control where she worked.
- b. Mr. Bernard agreed that the performance of the Technical Sales Representative is important to the operations of the Company and that such performance should be **carefully monitored**. He also agreed that it was important to document the steps taken by the Company in monitoring such performance. He said he met Ms. Jackson and discussed her performance during the first two years of her engagement, but he did not document the one-to-one discussion he had with her. He also said in his letter (Exhibit 4) that **"As you may recall, multiple discussions and formal assessments have been held with you surrounding your performance vis-à-vis the performance criteria and objectives assigned to you as a Sales Representative"**.

c. The following exchange took place during the cross examination of Mr. Bernard:

Q Would you agree with me that the performance of a Technical Sales Rep is important especially given the nature of the Company's operations?

A Yes.

Q And would you agree with me that given its importance that the Company should monitor the performance carefully, you would agree?

A Yes.

Q And in monitoring this performance would you agree with me that it's important to document the steps taken by the Company in monitoring these performance?

A Yes.

d. Her contract of employment stipulates that she would be **"supplied with promotional items and the necessary working tools to effectively carry out**



your work". The provision of working tools to an individual has been one of the tests to differentiate an independent contractor from a worker.

- e. Mr. Bernard testified that Ms. Jackson was not subject to any disciplinary process and that she manages her own time. In Exhibit 3, the Company advised Ms. Jackson that:

"Your poor performance has affected the company's revenue, the motivation of other team members and the quality of service to our customers. This is unacceptable and constitutes a breach of the terms of your contract and requires improvement.

Please note that over the next two (3) months (sic), August - October 31, 2018, we will monitor your progress against targets. This serves as a warning that failure to meet these targets will give rise to further disciplinary action up to and including dismissal."

- f. Exhibit 4 bears further evidence that the Company was treating Ms. Jackson as an employee engaged on a contract of employment: -

Based on the above, you were placed on a performance improvement plan for three (3) months, August – October 31, 2018 and a warning issued that failure to meet these targets would give rise to further disciplinary action up to and including dismissal.

....

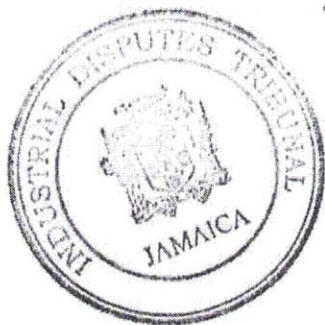
This letter gives formal notification of the termination of your employment with Action Chemical effective Thursday April 30, 2020. (Tribunal's emphasis)

42. Mr. Bernard, in his testimony, indicated that he had over 50 years' experience as a manager and that he understood Jamaica's general labour laws. However, later during cross-examination the following exchange took place: -

Q Sir, what I am saying is that I put something to you and you said you don't agree, she is a contractor and you also said you don't understand the difference between a contractor and an employee, so I am asking you if you don't understand the difference how can you then determine whether she is a contractor or an employee, that is all I am asking you?

A. I don't understand the differences in law or in practice as it relates to whatever, I don't know where that would end up if I had to do it the way you want me to do it.

He then confessed that "I am really not knowledgeable about the Labour Laws because if that were the case I wouldn't have consulted a HR person".



43. These interventions justify the argument that Ms. Jackson was engaged on a contract of employment described in Section 2 of the Act. The term used in correspondence to her “as an employee” confirms her employment status.

The following points were evident both in the oral as well as the written evidence by the Company: -

- a. Ms. Jackson’s assignment was confined to three parishes- St Catherine, Kingston and St Andrew. This, Mr. Bernard said, was to manage and control where she worked.
- b. Ms. Jackson was employed under a contract in which her performance was assessed. The evidence is that her performance was assessed in every year of her employment although no written assessment was provided. The assessment of performance is a mechanism used to manage not only the productivity of an employee but to determine training and development needs, wage adjustments and other factors relating to the employment of workers.
- c. The Company has warned Ms. Jackson on occasions that she could face disciplinary action if areas of her performance were not improved.
- d. Her contract specified that she would be provided with training by the Company.
- e. She was provided with working tools by her employer. On more than one occasion she was officially referred to by the Company as an employee.
- f. She was provided with uniform and enrolled on the Company’s health plan indicating that the relationship was something other than that of an independent contractor.
- g. Neither Ms. Jackson’s letter of employment (Exhibit 1) nor the letter terminating her services (Exhibit 4) mentioned the phrase ‘independent contract or contractor’. However, both documents referred to her relationship with the Company as an “employment” relationship. The phrase “independent contractor” was only emphasized in the Opening Statement to the Tribunal by the Company’s representative.

44. The Tribunal concludes that, based on the foregoing, Ms. Jackson was in an employment relationship with the Company, contrary to claim by Mr. Bernard.

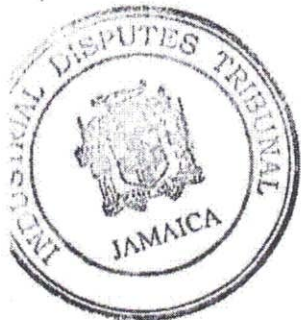


B. WAS THE TERMINATION OF HER SERVICES JUSTIFIED?

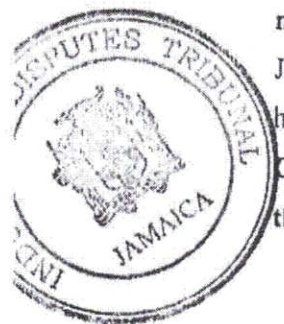
45. Ms. Jackson's employment as a Technical Sales Representative was terminated by the Company effective April 30, 2020, on the basis that her work performance was unsatisfactory. She has taken issue with the reason for her termination and contends that following her refusal to make a product delivery in July 2018, the good relationship she enjoyed with Mr. Bernard began to deteriorate, and she believed it may have been the genesis of her dismissal.
46. The Company's evidence is that Ms. Jackson was tardy in meeting her annual sales quota. Exhibit 4A, a matrix of her sales quota and actual performance, indicates that of the six years of her employment, she has met and exceeded her quota in 2014/15 and 2015/16 but that in respect of the other four years her achievements were above 80% in each year. Under cross examination, Mr. Bernard agreed that her performance for the years 2014-2016 was good while the other years were reasonable. Ms. Jackson contends that in 2016/17 she had an accident which immobilized her, confining her at home for five months with one leg in a cast. However, she persisted in reaching her clients and recorded \$11.7M sales from her quota of \$14.7M. The impact of COVID-19 in 2020, she said, added to the fall in sales.
47. Mr. Bernard recalled her accident in 2017, and that she was unable to visit her customers and to undertake certain critical parts of her work. He eventually agreed that it was one of the major reasons why she did not make her sales quota for the period.
48. Ms. Jackson said there were other factors that affected her sales performance; factors for which she kept complaining to Mr. Bernard. She indicated that customers complained about prices, late delivery, the product quality and lack of promotional items, all of which resulted in the cancellation of orders. She said that she raised these issues with Mr. Bernard and cited occasions on which she invited his intervention. Mr. Bernard agreed, during cross examination, that these factors were brought to his attention.

Q And at any point in time for this period, we are at the 2017 period, did Ms. Jackson ever point out to you that there were complaints by some of her clients, some of her customers within her service area about pricing of the products and the tardiness of the delivery of products?

A Yes.



49. It appeared from Ms. Jackson's testimony that, not only had the relationship with Mr. Bernard deteriorated over the delivery to Portmore Community College in 2018, but that even the provision of promotional materials for her clients was affected. This also impacted her sales volume. She said that following her refusal to make deliveries, she began receiving adverse correspondence about her general work attitude, uncooperative behaviour, poor performance on productivity and staff morale.
50. The evidence is that following Ms. Jackson's refusal, Mr. Bernard had discussions with her in which he made certain remarks to include **"you will no longer be working with me"**. His response caused her to seek advice from the Ministry of Labour regarding whether she could be dismissed for refusing to make the delivery. She indicated that based on the advice received from the Ministry, and in order to obtain clarification of his statement, she sent him an email on July 12, 2018 [Exhibit 5]. She said that she enquired if he was dismissing her and if so, she requested to have the dismissal letter within three days.
51. Mr. Bernard responded by letter dated July 13, 2018, [Exhibit 2] and without any reference to the reason she provided for refusing to make the delivery, he raised performance issues namely **"the impact of your general work attitude, uncooperative behaviour and poor performance on productivity..."** He also spoke to negative feedback from customers and a request from them for her to be withdrawn as representative for their account. The Tribunal was not provided with any evidence to support the allegations. She was never provided with a formal performance assessment in which the areas of weaknesses were discussed. Ms. Jackson referred to the reprimand over her refusal to make product deliveries and the allegation about complaints by her customers. She said she was hearing the latter for the first time but attributed both charges to Mr. Bernard's resentment to the email she sent him on July 12, 2018.
52. After she provided reasons by her insurers to cease using her motor vehicle to make deliveries and some two months after her refusal, Mr. Bernard informed her by letter dated August 13, 2018, Exhibit 3, that, **"You are aversed (sic) to making occasional small deliveries to customers, based on request from your manager and have presented many excuses for your refusal"**. This clearly suggests that he was still unhappy that Ms. Jackson did not make the delivery in spite of her explanation and earlier reprimand. He highlighted that **"Your performance has been below the standard required by the Company for some time now"** and **"reiterated the importance of meeting targets and the implications of poor performance"**.



53. Mr. Bernard testified that he placed Ms. Jackson on a Performance Improvement Plan (PIP) for three months, August – October 2018, but Ms. Jackson disputed that the PIP was implemented. No evidence was provided to support Mr. Bernard's testimony nor was the Tribunal advised of the details of the Plan. He admitted under cross examination that he did not have a proper PIP in place.

Q So basically what you are saying in response to me is that you had no Performance Improvement Plan signed by Miss Jackson and signed by you, in a nice vault in your office somewhere, you don't have anything like that, Mr. Bernard?

A No

54. The Tribunal finds that Mr. Bernard was adept at not providing clear responses to questions asked during cross examination. His ability to either circumvent the issue or provide ambiguous responses did not assist the Tribunal in getting a better understanding of the issues. For example, he agreed in cross examination, that he was aware of complaints from Ms. Jackson that price, late deliveries and product quality were impacting her sales. He was asked to share what were the managerial responses to these complaints. His reply was, "I have nothing to share". Pressed further with the question, "So you are saying the Company did nothing". He responded, "Yes, I have nothing to share at this time". The Tribunal is therefore uncertain if any action was taken to correct that situation.

55. The series of negative correspondence to Ms. Jackson regarding her performance subsequent to the incident on July 12, 2018, seems to support her opinion that the incident was the catalyst for the termination of her services.

56. Ms. Jackson's employment was terminated by letter dated April 29, 2020, to take effect on April 30, 2020. The reason provided by the Company was that her performance was unsatisfactory. However, the evidence supporting the poor performance has not been established. The Tribunal was not provided with any evidence regarding the levels of performance below quota that constituted poor performance nor was any comparative performance data for other salespersons provided to support his claim. It appears from the various correspondence from the Company to Ms. Jackson, that there were a number of factors being attributed to her poor performance. These included: -

- a. Not meeting her annual sales quota. The reasons for such failure have been fully established.

