

**IN THE MATTER OF A LABOUR DISPUTE UNDER THE EMPLOYMENT ACT 2000 BEFORE THE  
EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL ["The Tribunal"]**

|                |                    |                    |
|----------------|--------------------|--------------------|
| <b>BETWEEN</b> | <b>XXXXXXXX</b>    | <b>Complainant</b> |
|                | <b>And</b>         |                    |
|                | XXXXXX      XXXXXX | <b>Respondent</b>  |

**DECISION**

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**Date of Directions Hearing:** 31<sup>st</sup> January 2025

**Date of Substantive Hearing:** 21<sup>st</sup> March 2025

**IN ATTENDANCE**

**Members of Tribunal:** Mr. John Payne, Chairman  
Mr. Robert K. Horton, Deputy Chairman  
Ms. Michelle Scott, Member

**TERMS OF REFERENCE**

*To determine if the Complainant was unfairly dismissed by the Respondent.*

**For Complainant:**

Ms. XXXXXXXXXXXX who represented herself.

**For Respondent:**

Mr. XXXXXXXX, Head of Human Resources and XXXXXXXXXXXX, XXXXXX Group ["Head of Human Resources and XXXXXXXXXXXX"] and XXXXXXXX Human Resources XXX/Operations Assistant, XXXXXXXXXXXX Limited ["Human Resources XXXXXXXX"].

**BACKGROUND**

1. At the beginning of the Directions Hearing, the parties were given an opportunity to reach a settlement without the involvement of the Tribunal. This effort failed.
2. At the beginning of the Substantive Hearing, the Chairman stated that the Hearing was being held in accordance with the following provisions of the Employment Act 2000

[“the Act”]: section 44B (2), section 44C General powers and section 44D Power to obtain information. Further, the Chairman pointed out that pursuant to provisions of Schedule 2 (20) of the Act, the Tribunal will regulate its own proceedings as it sees fit.

3. The matter is brought in accordance with provisions of section 28 Unfair dismissal of the Act.

#### **RESPONDENT’S POSITION**

4. The Complainant was employed by the Respondent from 15th January 2007 until 6<sup>th</sup> September 2024 when she was dismissed by the Respondent. At the time of her dismissal, the Complainant served as XXXXXXXXXXXX and XXXXXXXXXXXX Sales Manager, a position that she held from 1st January 2012.
5. The Complainant was terminated for serious misconduct after three written warnings.

**First Written Warning, 28<sup>th</sup> June 2024.** Reason: Abuse of cellphone usage

**Second Written Warning, 20<sup>th</sup> August 2024.** Reason: Insubordination -- Failure to comply with company policy regarding work dress code.

**Third Written Warning/Dismissal, 6<sup>th</sup> September 2024.** Reason: Misconduct – Serious neglect of duties; failure to respond to voicemails.

6. The Respondent maintains that the Complainant was required to use a company issued cell phone because of the nature of the business and for interaction with customers, financial institutions, insurance companies, TCD, XXXXXXXXXXXX detailers, manufacturers, and colleagues. She alleged to have declined a company cell phone, but used a company issued SIM XXXXXXXXXXXX in her personal phone.
7. The Respondent maintains that in June 2024, after a company-wide audit of cellular telephone usage, it was determined that the Complainant had *“an unusually high amount of telephone conversations during working hours using her company issued sim XXXXXXXXXXXX”*.
8. The Respondent claims that after further investigation, a significant number of calls were found to be personal in nature, with many to the Complainant’s mother and husband with multiple calls extending beyond thirty minutes.
9. The Respondent refutes the Complainant’s statement that *“she received permission from management to engage in this amount of personal telephone conversation during the workday.”* The Complainant was issued the first written warning on 28th June 2024 for being in breach of the Respondent’s phone usage policy as set out in the XXXXXX Companies Employee Handbook.

10. The Respondent maintains that during a meeting of 28<sup>th</sup> June 2024, the Human Resources Administrator observed the Complainant wearing an Adidas sports jacket which was in breach of the Company's dress code policy that forbade the display of logos.
11. The Respondent maintains that during this meeting of 28<sup>th</sup> June 2024, the Complainant was informed that she must not wear the Adidas jacket while working and denies giving permission for the continued use of the jacket.
12. On 20<sup>th</sup> August 2024, the Respondent's Managing Director observed that while working the Complainant was wearing an Adidas jacket in breach of the company's dress code policy. On the same day, the Complainant received her second written warning for breaching the company's dress code policy.
13. On 3<sup>rd</sup> September 2024, during a meeting with the Head of Human Resources and XXXXXXXXXX and the Human Resources Administrator, the Complainant was asked to explain why during July 2024, 69 calls to her cell phone had been redirected to voicemail.
14. The Respondent maintains that throughout July and August 2024, the Complainant *"missed all phone calls to her cell phone and was completely unaware that 146 voicemails were left for her during that period, in breach of her obligation to perform the duties of the job"*.
15. The Respondent maintains further that the Complainant's removal of the company issued SIM Card from her cell phone resulted in continued excessive cell phone use and continued nonadherence to company policy, but now on her personal device that could not be monitored by the Respondent.
16. The Company determines that the Complainant's decision not to use her company issued SIM Card and, instead, to use her personal phone was in breach of the company's phone usage policy.
17. On 6<sup>th</sup> September 2024, a third written warning, a formal notice of dismissal for serious misconduct, was issued to the Complainant.

#### **COMPLAINANTS POSITION**

18. The Complainant, in her Statement of Claim dated 12<sup>th</sup> February 2025, states that on 28<sup>th</sup> June 2024, she was asked by the Head of Human Resources and XXXXXXXXXX to attend a meeting in the office of the Human Resources Administrator. During that meeting, the Head of Human Resources and XXXXXXXXXX informed her that following

a review of her call log over the prior six months, she was being given a first written warning for breach of company cell phone usage policy.

19. The Complainant states that while she understood there were many calls, she *"had been given permission by a former General Manager and supervisor to use the (cell) phone for personal (use) and work, since the data was unlimited."*
20. She declined to sign the first written warning, contending that a complaint of this nature had never been an issue during her eleven years of service as XXXXXXXXXXXX and XXXXXXXXXXXX Sales Manager.
21. The Complainant points out that during the meeting of 28<sup>th</sup> June 2024, she advised the Head of Human Resources and XXXXXXXXXXXX and the Human Resources Administrator that the cell phone was her personal device, but that it had a company issued SIM XXXXXXXXXXXX. She further advises that during that meeting, she had stated that she would return the company issued SIM Card, but that the cell phone was hers.
22. The Complainant states that during the same meeting, the Head of Human Resources and XXXXXXXXXXXX asked her to limit her personal calls and that when she sought clarification, the Head of Human Resources and XXXXXXXXXXXX told her to use her discretion and that *"they would get back to (her) regarding the company cell phone"*.
23. Also, during that meeting, the Complainant states, the Human Resources Administrator advised that the company *"is in the process of rolling out a new handbook on uniforms and what is appropriate"* and asked her *"to wear (her) XXXXXXXXXXXX issued uniform."*
24. The Complainant maintains that she informed the Head of Human Resources and XXXXXXXXXXXX and the Human Resources Administrator that she was *"cold natured"* and that an air conditioner above her desk required her to wear extra clothing in order to keep warm. There followed a conversation on what was appropriate dress which concluded with the Human Resources Administrator words, *"yes, that is fine for you to wear, but (I) just do not want to see any logos."*
25. In her Statement of Claim, the Complainant rejects the Respondent's assertion that the issues of excessive cell phone usage and uniform violations had been discussed with her supervisor, as stated in the first and second warning letters. She writes: *"...on the warning letters it says that the above has been discussed with my supervisor who was XXXXXXXXX. He nor I have ever had any conversation about the disciplinary action before, during nor after any meeting with XXXX and XXXX about the cell phone nor jackets that I have worn being inappropriate."*
26. The Complainant maintains that having waited longer than expected for the Head of Human Resources and XXXXXXXXXXXX to *"get back to (her) regarding the company cell*

phone" as promised during the meeting of 28<sup>th</sup> June 2024, she felt forced to open an account to get her own her personal SIM Card on 3<sup>rd</sup> July 2024 to prevent any further non-work-related calls on the company issued SIM Card.

27. On 3<sup>rd</sup> September 2024, the Complainant was asked to attend the Human Resources Administrators office, where she was joined by the Head of Human Resources and XXXXXXXXXX. During the meeting that followed, she was questioned about wearing an Adidas jacket under the company vest, as it was a breach of the company's uniform policy. She states that she was wearing the Adidas jacket to keep warm as she awaited the arrival of the company's long-sleeved jackets that had been promised. She also states that no logos could be seen when she was wearing the jacket.
28. The Complainant acknowledges that she was wearing an Adidas jacket with striped sleeves under her company vest to stay warm. However, she maintains that no logos could be seen. The Complainant's explanations notwithstanding, the Head of Human Resources and XXXXXXXXXX informed her that he had to write her up because she had worn an Adidas jacket under her company vest.
29. Also, during the meeting of 3<sup>rd</sup> September 2024, the Head of Human Resources and XXXXXXXXXX requested an explanation about 69 voicemails that had been unanswered. The Complainant states that she responded that she alternated using her personal SIM Card with the company issued SIM Card as she awaited an update concerning a company issued cell phone as promised during the meeting of 28<sup>th</sup> June 2024.
30. In her Statement of Claim, the Complainant indicates that she did not receive any proof of unanswered voicemails and that the cell phone bill did not list voicemails.
31. The Complainant states that on 6<sup>th</sup> September 2024, she was again invited to the Human Resources Administrator's office where she was advised by the Head of Human Resources and XXXXXXXXXX that *"they are bringing me in today because they spoke with management, and they are not happy that there are 69 unanswered voicemails. He said they are moving to dismissal effective today."*
32. The Complainant was given the opportunity to resign first. However, she refused the offer.
33. The Complainant believes that she was unfairly dismissed by the Respondent. She questions why she, an employee of fifteen years' service with the Respondent, was not issued with a verbal warning before issuance of the first written warning. She maintains that when on 28<sup>th</sup> June 2024 she received the warning regarding excessive cell phone usage, she took what she believed were necessary steps to end all personal calls on the company issued SIM Card by purchasing her own SIM Card as she awaited the promised further direction from the Head of Human Resources and XXXXXXXXXX

regarding a company cell phone. She also believes that she had permission to wear the Adidas shirt as long as no logos were shown, as she awaited the arrival of the company-issued long-sleeved jackets.

## **DELIBERATION**

34. The Tribunal in its deliberation, took note of the demeanor of the Complainant who presented herself as an honest, logical, and deliberate person. During her testimony, she stated that while she may not have wanted the position of XXXXXXXXXX and XXXXXXXXXX Sales Manager when it was first offered to her in 2011, she had grown to love the role and was totally committed to the company. In fact, she stated that prior to the termination, the only way she would have left the company would have been if she had been made redundant.

## **DISCIPLINARY PROCEDURE**

35. The Tribunal questioned the Respondent regarding the disciplinary process. The Human Resources Administrator, citing sections 24 and 26 of the Act, stated that the Respondent had followed the letter of the law in reaching the decision to terminate the service of the Complainant.

36. The Tribunal noted that the Complainant's supervisor had not been present during the three warnings issued to her, nor more importantly, the supervisor had not had a conversation with the Complainant regarding the issues. When questioned in this regard, the Respondent stated that the supervisor was aware of the issues and, therefore, was not needed at the meetings.

37. The Tribunal was advised that it was the Respondent's practice to send memos to all staff as a reminder of breaches or changes to policy.

38. The Tribunal noted that the Respondent had at least two groups of workers, unionized and non-unionized. When asked how a similar disciplinary matter would be dealt with for a unionized worker, the Human Resources Administrator responded that an oral warning would have been given in the first instance.

39. The Tribunal opined that it would be inappropriate for different groups of staff to be treated differently for similar infractions.

40. It is normal practice and considered an industry (human resources standard) that before a written warning is given, there is first a conversation regarding the inappropriate behaviour with an oral warning.

41. Management/employee relations specialists often speak of progressive discipline when addressing an infraction.

42. A generally accepted narrative on disciplinary procedure as set out succinctly in the Employee Manual of Stevedoring Services Limited states as follows: *"In most cases where employees do not act in accordance with expectations of behaviour and performance, their manager/supervisor will work with them to mutually develop an effective solution. If, however, an employee fails to respond to these attempts, or repeats their misconduct, progressive discipline may be the result."*

43. Progressive discipline normally consists of:

- a. Verbal warning
- b. Formal verbal warning
- c. Written warning
- d. Termination

## INTERPRETATION OF THE LAW

44. The Tribunal considered section 24 of the Act that *'entitles an employer to take disciplinary action, including giving a written warning or suspending an employee, when it is reasonable to do so in all the circumstances.'*

45. Section 24 (3) of the Act provides that *'in deciding what is reasonable for the purposes of subsection (1), regard shall be had (a) the nature of the conduct in question; (b) the employee's duties; (c) the terms of the contract of employment; (d) any damage caused by the employee's conduct; (e) the employee's length of service and his previous conduct; (f) the employee's circumstances; (g) the penalty imposed by the employer; (h) the procedure followed by the employer; and (i) the practice of the employer in similar situations.'*

46. Section 26, Termination for repeated misconduct of the Act further sets out the options available to an employer when an employee is guilty of misconduct, but which is not serious misconduct. Section 26 (1) states: *'the employer may give him a written warning setting out the misconduct complained of and appropriate instructions as to how to improve his conduct'*. [Emphasis ours]

47. Clearly, a written warning is optional in the first instance.

48. The Tribunal is not satisfied that the Respondent gave due consideration to the requirements of section 24 (3) of the Act.

## WARNINGS

49. When considering the **first written warning** related to the excessive number of calls and the extended duration of some of the calls, it is unfortunate that the Complainant,

when questioned by the Tribunal regarding this matter, indicated that she did not feel the need to justify her phone usage. In her Statement of Claim, she does concede that there were a lot of calls. She maintains that she had been given permission by a former General Manager and supervisor to use the phone for personal calls and work use since the data was unlimited. She also provided for the Tribunal's consideration in support of her position the copy of an e-mail of 5<sup>th</sup> March 2025 from former XXXXXXXXXX Limited XXXXXXXXXX who worked at the company from 1999 to 2020. He writes as follows: *"...in 2011 the use of cell phones was implemented. During the time there I was using my personal phone equipped with a sim card provided, and bill paid for by the company. There was nothing presented to me limiting the use only to company business."*

50. The Tribunal noted and supported the Complainant's statement: *"I was confused as I wondered why they would issue a first written warning instead of giving a verbal warning or my supervisor bringing this to my attention."*

51. Permission or lack thereof for use of the cell phone for personal and work use was never resolved to the Tribunal's satisfaction. Whether permission was granted previously or not, the Complainant did concede that she made an excessive number of personal phone calls. However, does this meet the standard required for a first written warning? The Tribunal is of the view that it does not in the case of an employee with seventeen years of exemplary service at the company. Here, the Tribunal notes that the Respondent provided no evidence of misconduct on the part of the employee before the alleged excessive cell phone use in 2024.

52. The Tribunal did note the narrative of the first written warning which advised as follows: *"On a going forward basis we expect you to cease all non-work-related use of the company's cell phone. Your personal calls must be kept to a minimum and should be made during breaks using your personal phone."* The corrective action required for this offence follows: *"Ensure future aligns with the expected standards of behavior within our organization."*

53. The **second written warning** related to an alleged breach of the Respondent's dress code policy. Again, the Tribunal questions the manner in which the Respondent addressed this matter.

54. Section 26 of the XXXXXX Handbook, Dress Code & Appearance, states in part: *"the Company has a business casual dress code but emphasizes some positions and situations may require more formal business attire."*

55. It is accepted that the role of XXXXXXXXXX and XXXXXXXXXX Sales Manager requires a certain level of dress as these are high-end brands. At section 26, the XXXXX Handbook also provides Dress Code & Appearance guidelines for everyone [Respondent's package, page 3]. The Tribunal notes that there is no reference to logos, except the

statement that clothing with sexually suggestive slogans, XXXXXXXXXX or drawings is not acceptable.

56. However, the Tribunal notes the General Manager's Internal Memo of 9<sup>th</sup> November 2023 entitled 'Dress Code' which advises, inter alia, that *"Any outerwear with visible logos is not permitted and should not be worn as part of the uniform"*.

57. The Respondent alleges that the Complainant was wearing an Adidas jacket which the General Manager felt was a violation, as it was considered sportswear. While both the Complainant and the Respondent agreed that the jacket worn by the Complainant on 20<sup>th</sup> August 2024. had stripes on the sleeves, the Complainant countered that the Adidas logo was covered by her company issued vest. The Respondent provided no evidence that the Adidas logo was seen. The Tribunal accepted that the visible three stripes on the jacket worn by the Complainant were commonly associated with the Adidas brand, but there were non-Adidas products that also had similar striped sleeves. The three stripes, while commonly associated with the Adidas brand, are in fact not the Adidas logo.

58. The **third written warning** that resulted in termination of the Complainant's service was with respect to an alleged 69 voicemail messages that remained unanswered by the Complainant. In the Tribunal's view, this allegation was unproven. At no time in its written submissions or during questioning by the Tribunal did the Respondent state that complaints from customers had been received because of the unanswered voicemails. The Respondent provided no evidence to support its assertion that the business of the company was harmed in any way because of the alleged unanswered voicemails.

59. The Tribunal could not accept that a staff member of seventeen years' service, one who had received on 1<sup>st</sup> May 2024 a salary increase and a thank you for the work that had been performed during the previous year, could be issued with a written warning for an arguably simple dress code infringement.

#### **DETERMINATION ORDER**

60. The Tribunal, having heard from the parties and having reviewed the documentation presented, has determined that:

- a. The Complainant was not given due process before she was terminated.
- b. The Respondent did not demonstrate that the provisions of section 24 (3) of the Act were properly considered before invoking section 26 of the Act.
- c. The standard for the disciplinary process whereby a supervisor speaks with an employee accused of misconduct before the issuance of written warnings was not followed in this instance.

- d. The sending of company memos in lieu of speaking to staff individually is not a part of the disciplinary process.
- e. The first written warning was excessive, based on the provisions of section 24 of the Act.
- f. The second written warning was not proven through proper investigation. No evidence was shown that the stripes were a part of any logo.
- g. The Respondent provided no evidence to show that the company was harmed because of the alleged unanswered voicemail or that there was a breach of company policy in that regard, hence the warning was not deserved.
- h. The Complainant was unfairly dismissed in accordance with provision of section 26 of the Act.

## **AWARD**

- 61. The Tribunal, having determined that the Complainant was unfairly dismissed in accordance with section 26 of the Act, considered an award as required under section 40 Remedies: unfair dismissal of the Act.
- 62. Section 40 (1) makes provision for the Tribunal to consider three options:
  - a. *an order for re-instatement, whereby the employee is to be treated in all respects as if he had never been dismissed:*
  - b. *an order for re-engagement, whereby the employee is to be engaged in work comparable to that in which he engaged prior to dismissal, or other reasonably suitable work, from such date and on such terms as may be specified in the order or agreed by the parties.*
  - c. *a compensation order in accordance with subsection (4).*
- 63. In accordance with provisions of section 40 (3) of the Act, *"Where the Tribunal finds that the employee engaged in misconduct notwithstanding the unlawful nature of the dismissal, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement."* The Tribunal did not find that the Complainant's conduct contributed in any way to her dismissal.
- 64. The Tribunal does not believe that reinstatement would be appropriate in the circumstances, especially given the time from the termination to the Hearing.
- 65. Section 40 (5) of the Act states the amount of compensation ordered to be paid shall be not less than-
  - a. *Three weeks wages for each completed year of continuous employment, for employees with no more than two complete years of continuous employment.*
  - b. *Four weeks wages for each completed year of continuous employment, in other cases,*  
*up to a maximum of 26 weeks wages.*



73. Pursuant to section 44K (1) of the Act, if any question arises as to the interpretation of the award or any alleged error therein, either party may apply to the Tribunal for a decision on that question.

74. Pursuant to provisions of section 44O of the Act, either party that is aggrieved by this Determination Order has a right to appeal to the Supreme Court on a point of law only within 21 days after receipt of notification of the Determination Order.

75. The Tribunal does not award legal costs to any party to these proceedings.

**Dated this 31<sup>st</sup> day of March 2025**

A handwritten signature in black ink, appearing to be 'John Payne', written over a horizontal line.

John Payne  
**Chairman**

A handwritten signature in black ink, appearing to be 'Robert K. Horton', written over a horizontal line.

Robert K. Horton  
**Deputy Chairman**

A handwritten signature in black ink, appearing to be 'Michelle Scott', written over a horizontal line.

Michelle Scott  
**Member**