IN THE MATTER OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021
AND IN THE MATTER OF A LABOUR DISPUTE BETWEEN THE UNION (on behalf of the Employee) AND the Employer

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DECISION

Dates of Arbitration Hearing: 16th and 30th November 2021

Present:	Mr. Marc Daniels, Counsel for the Union (on behalf of the Employee) Applicant Mr. Dantae Williams, Counsel for the Employer
Tribunal Panelists:	Ms. Charlene Scott (Chair) FCIArb Mr. Eugene Creighton and Mr. Clevelyn Crichlow ACIArb
Main Witnesses:	The Employee The Employer

Background

1. The Employee has been employed by the Respondent company for the past 19 years and has worked there in varying positions as a Garage Helper, XXX, XXXXX and a Foreman. He is currently XXXXXXX of the XXXXXX Division (XXXXX). However, he did not have this title throughout 2020 when certain incidents occurred and more particularly, when the last incident occurred in November 2020 which is what brought this matter before the Tribunal. He was a signatory to the then Collective Agreement (CA, also referred to it as the Collective Bargaining Agreement - CBA) which was effective from April 1st, 2018 to January 1st, 2021 (Article 37 of the CA).

2. Some months prior to and leading up to 19th November 2020, the Employer did not know who the elected Union Representative of the XXX was, as he had not been duly informed (Article 30(1) of the CBA), despite the Respondent company allowing the workers time off to duly elect someone. The previous president resigned back in September/October 2020 and the position was left vacant.

3. The Employer is the CEO of the Respondent company which is a XXXX and a XXXX of XXXXXX. The Respondent company operates at the City of Hamilton XXXXX handling XXXXX and is the XXXXXX supplier of such services.

4. We pause to make note that the year 2020 had its many challenges in these Bermuda Islands, not the least of which was a major concern for the general health and well-being of the community at large as containing the infectious COVID virus was causing persons, if contacted, to become deathly ill from it, if contracted. Managing the staff by way of safety protocols as well as the XXXXXXXXXXX were all aspects of the Respondent's mandate.

5. On the morning of 19th November 2020, a XXXXXX was expected to XXXX at the the workplace. The Employee had informed the workers via a text message of an urgent meeting at the Union headquarters scheduled for 8:00 am that morning. Some workers failed to attend to their duties and instead, attended this meeting whilst others did not and they reported to work. What also was a problem was that the Employee and all of those workers who attended the Union meeting did not have the approval of the CEO to attend the meeting (Article 30(2)), which is necessary and a key requisite to ensuring coverage for the work that needs doing on the XXXX.

6. The Employee was requested to return to the CEO's office after the meeting. He, along with Union Organizer , did meet with the Employer, had a brief discussion and was duly suspended for 5 working days. Once the Employee was suspended, the other workers in solidarity with, the Employee only did only whatever was necessary at the workplace and then left their respective posts.

7. Over the next 5 days, meeting between the Applicant, the Employer and the Manager of the Labour Relations Department and others took place to mediate the situation. The Employee accepted responsibility for what he did and the part he played in this labour dispute. Most of the outstanding issues were resolved, except for the 5 day suspension metered out to the Employee. The Applicant felt that it only necessitated a Warning but the Employer did not relent from his decision.

8. When the Minister of Labour (the Minister) was informed of the outcome of the conciliation and mediation efforts with the Labour Relations Manager, the Minister directed that the unresolved matter be referred to a tribunal. He then directed that it be placed in the Official Gazette and instructed that a Labour Disputes Tribunal be convened to settle the case.

Jurisdiction of the Minister

9. On 24th November 2020, a Notice was published in the Gazette pursuant to section 4 of the Labour Disputes Act 1992 (the 1992 Act) wherein the Minister declared that a labour dispute existed between the Union (the Applicant) and Respondent Company (the Respondent). Thereafter, in accordance with section 11 as read with section 4 of the 1992 Act, the Minister referred the said labour dispute for settlement to the Labour Disputes Tribunal established under section 5 of that Act.

10. At the start of this labour dispute, the Minister initially appointed Mr. William Francis as Chairman of the Labour Disputes Tribunal (the Tribunal) along with Mr. Clevelyn Crichlow and Mr. Eugene Creighton to serve as Panelists on the Tribunal. The Minister notified the

parties of these appointments but when Mr. Francis could no longer continue as the Chairman the Minister duly appointed another Chairman on 21st May 2021.

11. As stated above, the Minister's appointment letter stressed that this dispute was in accordance with provisions of section 11 as read with section 5 of the 1992 Act and further, that the exact terms of reference of the dispute were to be determined by the Tribunal after hearing representations from the parties.

12. Directions were set on 7th July 2021 and the agreed terms of reference set by the parties were 1.) *'to determine whether it was more appropriate to hear the matter under* the *Labour Relations Act 1975 as opposed to The Labour Disputes Act 1992 as was determined by the Minister and* 2.) *to determine whether The Employee (the Complainant) was unfairly suspended whilst in his employ with the Respondent.'*

13. Various representations were made at the virtual Directions Hearing, the main issue being that the Minister erred in appointing the Labour Tribunal under the 1992 Act instead of under the Labour Relations Act 1975 (the 1975 Act) and that the Labour Tribunal should advise the Minister that he erred in law by choosing the 1992 Act to settle this matter.

14. The Arbitration Tribunal contends that it was appointed to settle the outstanding issue concerning the 5-day suspension of The Employee. It is not for the Arbitration Tribunal to advise the Minister that he, the Minister, mistakenly chose the wrong act to effect a settlement of one issue that could have been resolved between the parties and was not. Rightly or wrongly, the legal aspect of which Act to apply can be dealt with in another forum by way of a judicial review application made in the Supreme Court of Bermuda, but not through the Tribunal itself. There are no such powers existing within the ambit of the 1992 Act for an Arbitration Tribunal to recuse itself from hearing a case where the Minister has duly appointed them nor returning to the Minister and informing him that the wrong labour act was followed.

15. Both the 1975 Act and the 1992 Act handle labour disputes; the actual meaning assigned to it is found in the 1975 Act in Part I, Interpretation which states that a labour dispute is a dispute *'... between an employer ...where the dispute relates wholly or mainly to ... suspension of employment ... of one or more workmen; or ...'*

16. The 1975 Act goes on to say at section *3(1) Any labour dispute, whether existing or apprehended, may be reported to the Director by a person authorized by any of the parties to the dispute. (2) The Director shall consider any labour dispute so reported and he, ...shall endeavour to conciliate the parties and to effect a settlement by all means at his disposal. (3) Where the Director, ...is unable to effect a settlement of a labour dispute, the Director shall report such dispute to the Minister who* ***may*** *...* ***if he thinks fit*** *...'* The emphasis is on the word *'may'* which has the following definition given to it in the Interpretation Act 1951 (IA 1951)- *'... in relation to any statutory provision whereby a power is conferred, shall be construed as permissive...'* It gives discretion to the Minister to proceed as he thinks fit unless otherwise directed. On the other hand, in the IA 1951, the word *'shall'... in relation to any statutory provision whereby a duty is imposed, shall be construed as imperative...'* In other words, the Minister must proceed in a particular way and the word *'shall'* is not there.

17. What the Tribunal must keep at the forefront of its mind is the main issue that caused the Minister to direct that the Tribunal, proceed under the 1992 Act rather than the 1975 Act. Outstanding issues had already been canvassed and sorted out through mediation and conciliation via the Labour Relations Manager. Most of the issues raised by the Applicant were answered and/or at the very least, agreed to be answered at a later date. However, the last area not agreed on by the Applicant was the existing five (5) day suspension of the Employee . The Applicant thought that the Employee should only receive a Warning and the CEO felt that he was justified in meting out the five (5) day suspension.

18. Finally, the issue with respect to the Minister's decision is a procedural rather than a substantive one and any decision by the Tribunal on this issue would not be subject to appeal if one party disagreed with the Arbitrators decision.

19. It is clear that the Minister chose to use the 1992 Act to settle this matter rather than the 1975 Act. There was one unresolved issue at hand which did not require several more appointed persons to make a decision on management's right to discipline a worker.

20. If the Tribunal must decide as to whether the Applicant should be suspended or not and whether a suspension was warranted or not in the given circumstances, it is now squarely in the realm of the Collective Agreement and the CEO's right to manage the Respondent company's affairs. It is set out very clear in Article 3 of the CA and is as follows:

> CA **Article 3** ... **MANAGEMENT RIGHTS** - *The Union recognizes the Employer's right to manage its own operations, to direct the working force, including the right to hire those workers it considers most suitable for its operation,* ***to suspend*** *or discharge* ***for just cause****, to transfer, and the right to relieve Employees from duty because of lack of work or other legitimate reasons and to decide at its sole discretion all other matters connected with the Employer's business, provided that the Employer's rights specified above are used in a proper manner, and are not used in violation of any of its obligations under the terms of the Agreement. However, an Employee who believes he has been unjustly treated shall have the right to submit his claim by following the Grievance Procedure set out in this Agreement."*

The Case of the Respondent

21. The Employer provided the Arbitration Tribunal with a background of events that greatly assisted the panel. Most, if not all of what has occurred seems to be the result of the Collective Agreement (CA) (or Collective Bargaining Agreement- CBA as some others may call it) not being followed or adhered to. It may be that lip service is paid to it but it is not seriously followed. Two of the relevant clauses at issue are reproduced below.

> CA **Article 1 PURPOSE** *To set forth an Agreement for the regulation of wages and rates of pay, hours of work and other conditions of employment, ...to improve the Employer-Employee relations, ... and to achieve the highest level of efficiency consistent with safety and good health and for the profitable operation of the Employer.*
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> *CA* ***Article 4*** *...* ***UNION RIGHTS*** *- ... 3. The Union shall have the right to represent its members in all matters pertaining to employment and working conditions.*

22. Misunderstandings are rife throughout the case before this Tribunal. It is to be noted that there is a huge onus on the Respondent to provide jobs, benefits, to put safety mechanisms in place, etc. to the workers who in return are to show up for work and fulfill the responsibilities imposed on them by the CA. Article 9 states as follows:-

> CA **Article 9** ***MUTUAL GOODWILL*** *- ... 1. Both the Employer and the Union recognise and agree to fulfill the responsibilities imposed by this Agreement, and to co-operate in good faith for the establishment and continuance of harmonious relationships within the framework of this Agreement. 2. The Union undertakes to co-operate with the Employer in encouraging a responsible and reliable attitude on the part of the Employees covered by this agreement, and in discouraging any conduct detrimental to the operation, and it recognizes that Employees will be expected to fulfill and complete job responsibilities during the hours each in which they are employed.*

23. When asked, the Employer added that 'goodwill' is the reason why the workers are allowed to hold union meetings during the workday, if they have permission from the CEO and if a XXXX is not in XXXX. Or at the very least, the CEO is notified in a timely manner and can notify any interested parties that have to receive the goods from the XXXX. Again Article 9 (2) (see above) and Articles 10 and 26 (see below) are expected to be adhered to.

> CA Article 10 ... ***VISITATION*** *... It is agreed that meetings may be held between Union representatives and Employees during working hours, when approved by the Employer, and if held on the premises, such meetings must be held in a place which has been arranged with the Employer.*
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> CA Article 26 ...***CONDITIONS OF WORK*** *-... this Agreement 1. (a)* ***When XXXX are in XXXX, they will be worked in accordance with the terms of*** *and as the Company is directed by the XXXX accredited Agent. ... (c) The Union undertakes to provide labour as necessary, to make up gangs or work units...'*

24. On Friday 13th November 2020, the Employee asked the CEO to hold a Health & Safety (H&S) meeting in respect of only one mechanic working there alone and that he noted the same garage mechanic pulled a 'clock' (an all-nighter) and continued to work into the next day. This happened some two weeks prior. The Employer explained that the mechanic is outsourced through another company and was not an employee of the Respondent. The H&S Co-Chair was in attendance and did not seem to know anything about the issue raised by the Employee. Usually, the Employer will have a discussion with the H&S Co-Chair and work through the various issues presented.

25. On Monday evening 16th November 2020, the Employer received a text from a Union Organizer asking him if he is available to attend an H&S meeting on the Tuesday morning. As The Union Organizer is not on the H&S Committee, the Employer met with the H&S Co-Chair to discuss protocols for a visiting crane operator. At that time, the H&S Co-Chair did not raise any health & safety concerns about anything else.

26. The Employer did call The Union Organizer on the Tuesday and at that time, the Employer advised The Union Organizer about his concerns for the lack of elections. He did not know who was president or who was supposed to be acting on behalf of the XXX. The Union Organizer alluded to the fact that a meeting still needed to be had in respect of what the Employee had raised on the Friday. The Employer repeated what he shared with the Employee

in that it was not a health & safety issues and that there was an H&S meeting scheduled for Friday.

27. Later that day, the Employer received a phone call from the Union Head asking why the Employer did not meet with The Employee and The Union Organizer concerning the mechanic.

28. In the short span of three working days, the Employer received a call about something that he deemed a non-Union issue. Then on the 18th November 2020 at 11:37 am, he received an email from the Employee seeking permission for a meeting of the XXX workers for 8:00 am on Thursday 19 November 2020, to which he refused to agree. The Employee did apologise in advance for any inconvenience this meeting would cause.

29. With respect to his letter to the Union Organizer, the Employer was simply pointing out the fact that he had not as yet been notified of any results of elections when he had afforded the Division two opportunities to have them and had to close the XXXX earlier than usual. He was following up on CA Article 30 which states as follows: -

> *CA **Article 30** - ... 1. The Union shall have the right to elect or appoint one Shop Steward from each Department in the Company ... plus one Chief Shop Steward. **The Employer will be immediately informed of all such appointment or elections in writing**... 3. Shop Stewards shall have the authority to deal with matter other than those specified in this Agreement... 6. **No Shop Steward shall be subjected to any pay deduction when properly carrying out his duties as a Shop Steward, provided he does not leave the place of work without the permission of Management.** Such permission will not be withheld unreasonably.*

30. Any and all issues raised by the Employee could have been sorted out in meetings held either under Articles 23 or 24 or 27; Article 24 being the one that the Employee, if he was sincere, could have waited for the Friday meeting to address his concerns. The various Articles are as follows:-

> CA **Article 23** ...'... ***JOINT CONSULTATION*** – *It is agreed that a Joint Consultation Committee shall be set up between the parties to this Agreement, comprising three representatives from each side, ... to consult with each other on such matters as the health, ... and general welfare of the Employees.*
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> CA **Article 24** ... ***HEALTH AND SAFETY*** - ... *4. ... The parties to this Agreement shall establish a Joint Safety Committee, consisting of an equal number of representatives of both parties, ... The Joint Safety Committee shall update the safety Manual applicable XXXXXXX for the guidance of all concerned. It shall also promote and supervise a regular continuing educational campaign of safety consciousness addressed both supervisory personnel and to Employers alike. 5. The Joint Safety Committee shall establish machinery under which potential hazards or unsafe practices can be settled immediately at the pier level between Union and the Employer. Failing such settlement, the matter shall be referred to the Joint Safety Committee for a solution and the Committee shall be empowered to seek such technical assistance as it deems necessary to assist in reaching a solution. 6. Should a satisfactory solution not be reached, the Grievance Procedure outlined in Article 27 may be invoked...*
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> CA **Article 27** ... ***GRIEVANCE PROCEDURE*** - ... *1. Should there be any Employee, covered by this Agreement, who wishes to settle any grievance, dispute, misunderstanding, every effort will be made by*

both parties to settle such grievances promptly. ... 2. It is further agreed that every effort will be made to work until all steps of the Grievance Procedure are exhausted.

The Case for The Employee

31. On 13th November 2020, the Employee had approached the Employer about having a Health & Safety (H&S) meeting about only having one mechanic in the garage and more particularly, that the mechanic had worked through the night and had reported to work that same day. The Employee thought it was something to discuss under the H&S banner. Attending that meeting were the H&S Co-Chairman and the Operations Manager. The Employer informed them that it was not an H&S matter and that the mechanic was not a member of the Union.

32. On 17th November 2020, the Employee again requested a meeting on 18th November with the Employer about a H&S matter. The other persons to be in attendance would be TS, the H&S Co-Chairman, the Union Organizer and Union Head. That meeting did not take place. instead, on the 18th November 2020, The Employee receives a letter from the Employer stating *'...with immediate effect, XXX will not entertain or attend any meetings with The Employee or any other individual or group of individuals "representing" the XXXXX until/unless elections occur and XXXX receives official confirmation of the elected executive...'*

33. In his evidence, the Employee stated that was when he was instructed by the Union Head, to get the men around there and that this was the first time that the Union Head had called such a meeting. The reason for this staff meeting was because of what the Employer wrote in his email. To him, the letter meant that the Employer was no longer recognizing the Union and it was urgent for the workers to know this. It was no longer a health & safety issue; rather it was now a bigger issue as the Employer was telling the Applicant that they should hold elections. So one asks the question why is Union Head calling meetings? What prevented the Employee from saying to Union Head that there was a XXXX arriving in XXXX the next morning and that they push the meeting back to a more convenient time such as 10:00 am or 1:00 pm? The Employer's letter was not addressed to all of the workers. It was only a select few. Those are the persons that the Employer could have met with or he could have arranged a meeting with the signatories to the CA or met with Union Head and The Union Organizer later in the day to provide clarity to his letter.

34. The Tribunal examined the witnesses but except for the, testimony of the Employer and the Employee, evidence from the others witnesses was not deemed crucial to the tribunal's final decision.

Deliberation of the Tribunal

35. The Tribunal wishes to note that all parties involved in this dispute including the Employee have indicated that the Employee is guilty of misconduct. The only question for the Tribunal is thus the fairness of the punishment meted out by the Respondent.

36. What is painfully obvious to the Tribunal is that there is a clear lack of trust and poor communication between the workers in the XXX and the management of the Respondent. Some of the workers seem to have little confidence in the current management. This was evidenced in the Respondent's bundle where it is noted on an internal memo dated some years back, that the Employee asked for a meeting with a XXXX agent which is something that is squarely in the hands of management. Or the Employee and others meeting with persons from XXXXX in an effort to terminate the Respondent company's contract at the workplace thinking that they could do a better job or running the XXXX. Rumors abound without any sort of supporting truth to the same whether a visiting contract worker was following the Covid protocols in the same manner as the workers. If only someone had taken a moment to check-in with management and ascertain the validity of these rumors, clarity might have prevailed.

37. The Employee was involved with at least 2 other work stoppages that took place in 2020 prior to his suspension in November; one of which occurred in August 2020 where the Employee is seen to apologise to the Employer after the fact for causing a disruption to services on the XXXX.

38. Agreements whether in writing or oral, seem to be easily broken or conveniently overlooked or applied when it suits one. Setting up a JCC meeting in accordance with Article 23 seems to have flown out of the window. The purpose of having such meetings is to add clarity to aspects that are misunderstood or are not followed properly. The Grievance Procedure, Article 27, sections 1-2, seems to have been pushed to the side as opposed to seriously following procedures that will assist in resolving matters, oftentimes those very issues that have arisen through lack of understanding. Articles 23 and 27 state the following: -

> CA .. **Article 23** ... ***JOINT CONSULTATION*** – *It is agreed that a Joint Consultation Committee shall be set up between the parties to this Agreement, comprising three representatives from each side, ... to consult with each other on such matters as the health, ... and general welfare of the Employees.*
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> CA .. **Article 27** ... ***GRIEVANCE PROCEDURE*** - *... 1. Should there be any Employee, covered by this Agreement, who wishes to settle any grievance, dispute,* ***misunderstanding*** (my emphasis), *every effort will be made by both parties to settle such grievances promptly, ... 2. It is further agreed that every effort will be made to work until all steps of the Grievance Procedure are exhausted.*

39. Tempers may have been short in 2020, especially in light of attempting to manage safely in a pandemic. Where picking up the phone and having a conversation between the Applicant and the CEO might calmed the situation instead what was done was to call an urgent meeting with the workers which acerbated the situation. Further, the explanation for calling an urgent meeting because that the Employer was no longer recognizing a particular section of the Union was a nonsense. The CA clearly has it written into it that it is in effect for a period of three

years. It was November 2020 and any modification after January 2021 would need 3 months notification.

40. The Employer may have been exasperated in the moment he wrote that email of the 18th November 2020. Perhaps it would have better to have waited and written a clearer email before sending it. It may not have made a difference, but at the end of the day, he would know that he said what needed to be said. He had demonstrated good will by allowing time out for elections and had heard nothing back from the Division. See Article 30.

41. Additionally, there is a stringent set of rules to decertify a Union and one email can hardly be interpreted as fulfilling those conditions. As a reminder, Article 37 of the CA follows:-

> CA **Article 37** - ... *This Agreement shall **come into effect on April 1st 2018, and shall remain in effect for a period of three years** and thereafter shall continue in effect, provided that at any time after January 1st 2021, three months' notice of modification may be given by either party hereto.*

42. As guidance for the Tribunal making a decision on whether the suspension was fair in the circumstances and pursuant to section 24(3) of the Employment Act 2000, the Tribunal took into consideration the areas as laid out there:

(a) *the nature of the conduct in question-*
The Employee notified staff members of the Division that an urgent meeting was being called/held at 8:00 a.m. on the 19th November 2020 at the Union Headquarters. This meeting was without the approval of the CEO. Past agreements were that meetings were not to called while a XXXX was in XXXX. This meeting was in defiance of that agreement that it was being called when a XXXX was expected to XXXX between 8:15 am- 8:30 am. This is most unusual as Union meetings have never been called when XXXXs are in XXXX. The CEO's permission was not given and that goes against Article 10 of the CA. This meeting could have very easily been held at a later time or been sorted the next day when a JCC meeting was already scheduled and issues could have been placed on the agenda under 'Any Other Business'.

(b) *the employee's duties-*
to assist in the XXX and XXX of XXX to and from the XXXXs in XXXX. Bottom line is to assist the Respondent company in discharging their respective duties to the the workplace. In this instance he left without permission or failed to show up and report to work as would be the norm or as in accordance with the CA.

(c) *the terms of the contract of employment-*
as per the CA, the Employee is do whatever is necessary to unload/load XXXXs while they are in XXXX.

(d) *any damage caused by the employee's conduct-*
the XXXX arrived into XXXX and other workers along with management had to perform the task of XXX up the XXXX and securing it. XXXX of the same was delayed and could not begin until the other workers were on site; and while the damage to the Respondent's business was cited as dire, it appears to be minimal as there was no evidence produced to substantiate this assertion.

(e) *the employee's length of service and his previous conduct-*

as at the Tribunal hearing date, the Employee had been with the Respondent company for some 19 years. He would have been with them for 18 years in 2020 at the time of this infraction. Through evidence, it was revealed that he had a few Warnings as well as a previous one day suspension, albeit all of them occurring some years ago.

(f) *the penalty imposed by the employer-*
five (5) day suspension without pay.

(g) *the procedure followed by the employer-*
the CEO met with the Employee along with a Union Organizer and 2 others. He was asked if he knew that the meeting he just attended was not approved and he acknowledged that it was not. He was asked if he notified staff in spite of the lack of permission to hold a meeting and he agreed. The CEO told him that there had to be a sanction and then informed him that he was suspended for a period of five (5) days. The Union Organizer requested that the suspension be put in writing and it was so done.

(h) *the practice of the employer in similar situations-*
This was a novel situation; it had never happened before. Staff in the Division have never left their posts when a XXXX is needing to be XXXX up or is in XXXX. Notice is given and arrangements are made to accommodate circumstances.

43. Finally, the Tribunal, while accepting that the letter by the CEO was somewhat unclear, we do not believe it was so important that a meeting had to be called during working hours in defiance of a direct refusal by the CEO

Determination and Order

44. Having provided the parties full opportunity to present evidence on oath or via affirmation and to make submissions, it is the Determination of this Tribunal that

1. *In all of the circumstances, the Respondent acted within his authority to suspend the Employee. However, the number of days of suspension was excessive. The Tribunal holds that a 3 days suspension would be more appropriate.*

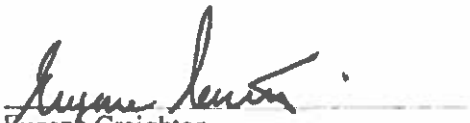
2. *The return of 2 paid days is hereby ordered and that the monies be allocated to the Employee within 14 business days of receipt of this Decision.*

3. *That there be no Order for Costs*

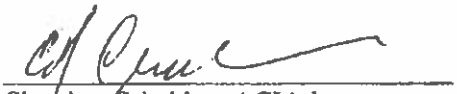
4. *The Tribunal make no further Order in this matter*

Dated this 17th day of December 2021

Charlene A Scott FCIArb
Chair



Eugene Creighton
Panelist



Clevelyn Critchlow ACIArb
Panelist