



INDEPENDENT  
INVESTIGATION  
COMMISSIONED BY THE FAIR  
LABOR ASSOCIATION AT  
BAY ISLAND SPORTSWEAR  
HONDURAS,  
S. DE R.L. DE C.V.  
SAN PEDRO SULA,  
HONDURAS

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## I. BACKGROUND

This report contains the results of the independent investigation conducted at the request of the Fair Labor Association (FLA), pursuant to the FLA's specified Safeguard procedures, at the company Bay Island Sportswear, S. de R.L. DE C.V. (hereinafter, "Bay Island" or "the Factory"), located at Zip San Jose, Buildings 3-4, 20-27 at Calle 2do Anillo Periferico, San Pedro Sula, Honduras.

The FLA request for this independent investigation was the result of communications received by FLA affiliates Fanatics Apparel LLC and adidas AG, joined by adidas' licensee Streetwear, Inc. and by The Walt Disney Company, all of which source produce from Bay Island. Those companies jointly expressed an interest in having an investigation undertaken concerning allegations of noncompliance at the Factory with the FLA Workplace Code of Conduct and Compliance Benchmarks regarding Freedom of Association, specifically with respect to harassment and dismissal of workers that wished to join a union. (The relevant portions of the Terms of Reference establishing this independent investigation are attached to this Report.)

These allegations were founded in part on communications from the Independent Federation of Workers of Honduras ("FITH") during the course of an audit requested by one of the above-referenced companies.

Based on the aforementioned communications with the referenced companies, the FLA requested this team of three experienced investigators to conduct an onsite visit to Bay Island in order to gain knowledge regarding the reported issues and, subsequently, to analyze the practices and procedures for terminations at the Factory and determine if they and related practices violated the FLA Workplace Code of Conduct and Compliance Benchmarks regarding Freedom of Association.

## II. SCOPE OF THE INVESTIGATION

The scope of the investigation, as set forth in the Terms of Reference, focused on the information concerning worker dismissals presented by the FITH beginning in 2016 and the analysis of procedures and practices for terminations at the Factory, written procedures and regulations at the Factory for terminations, and any other relevant documentation in order to evaluate if the workers were dismissed for trying to organize a union or unjustly for any other reason.

Specifically, the investigators were tasked to determine the following:

- a) How long the relevant practices and procedures have been in place;
- b) How many workers were potentially affected;
- c) Whether the practices and procedures for terminations at the Factory are unfair or discriminatory in any way, as well as how practices may diverge in any respect from by-laws and any other written guidelines;
- d) How the factory management selects workers for termination or other personnel decisions (such as non-promotion) and who makes the termination decisions, including whether these procedures may diverge in any respect from by-laws and any other written guidelines;
- e) The reasons given by management to justify the termination of a particular worker or any other action (such as denying a promotion) as well as any written information to endorse the decision;

- f) Any other justification provided by management for termination or any personnel action that can demonstrate that the decision is in no way related to union activities; and
- g) Whether the dismissed workers were immediately replaced by new workers.

### III. INVESTIGATIVE METHODOLOGY

The investigators conducted an onsite visit to the Factory from September 17-20, 2018 to obtain information through interviews with the interested parties, including Factory representatives, a sample of workers given notice of termination in 2018 who are still working at the Factory (selected from a list of all workers given notice of termination provided by the Factory), a sample of active workers selected randomly directly by the investigators,<sup>1</sup> a sample of workers dismissed in 2016, FITH representatives, and officials from the Ministry of Labor and Social Security<sup>2</sup>

The investigation process also included the review of documents and information provided by the Factory, FITH, dismissed workers, and the Ministry of Labor and Social Security from San Pedro Sula.<sup>3</sup>

### IV. APPLICABLE REGULATORY FRAMEWORK

Freedom of association is a fundamental freedom which consists of grouping as a collective in order to defend common legal interests. The legal term in the labor market is the right to organize. Thus, a relationship of class and kind is shown between freedom of association and the right to organize.<sup>4</sup>

The right to freedom of association in Honduras is recognized in the Constitution in article 78,<sup>5</sup> and specifically the right to organize is recognized in article 128 which outlaws all acts, contractual agreements and conventions that imply a waiver, curtailment, restriction or misrepresentation of the following guarantee: "14) Workers and employers have a right, in accordance with the law, to associate freely for the sole purpose of their economic and social activity, organizing unions or professional associations." (It is necessary to clarify that workers organize into unions and employers organize into professional associations.)

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<sup>1</sup> The investigators showed up at the plant and personally selected the workers at random and led them to a site outside the factory in order to be interviewed.

<sup>2</sup> The investigators note that they initially encountered delays in the delivery of certain relevant information requested from the Factory, specifically the list of workers terminated in 2016, personnel files for workers terminated in 2016, list of active employees in 2018, payroll for social security for 2016, the information relating to production at the Factory during the last three years as well as the retrenchment plan for that period.

In this respect, Factory officials told the investigators that the information requested prior to the onsite visit did not establish the years under the scope of the investigation and for this reason certain documents were unavailable at the start of the visit. With regard to the 2016 information, they stated that due to the amount of time elapsed it was difficult to promptly provide said information since Factory information system had not been updated beginning in 2017. With regard to the employee files for workers dismissed in 2016 and the social security payroll for 2016, they stated that because this information was older, Factory personnel had to look for it in the warehouse.

Over the course of the four-day onsite investigation, the team did press for this information and, with the support of the companies that requested the investigation, was able to gain the cooperation of factory management. While the team thus ultimately was not impeded in its ability to complete the investigation, certain issues did arise concerning the completeness and reliability of certain important data provided; see, in particular, the discussion in Section VII.A. below.

<sup>3</sup> The sources of information consulted are detailed in this document's Appendix.

<sup>4</sup> *La Libertad Sindical en Honduras*. Miguel F. Canessa Montejo. Peruvian lawyer and sociologist. International Consultant. *Revista Red Card*.

<sup>5</sup> Article 78 states: "The freedoms of association and assembly are guaranteed as long as they are not contrary to public order or morality."

Furthermore, freedom of association is recognized in various international treaties ratified by Honduras.<sup>6</sup> Specifically, Honduras has ratified Conventions 87 and 98 of the International Labour Organization, which recognize the right to organize and offer protection for the exercise of the right to organize and collective bargaining.

According to article 18 of the Honduran Constitution, international treaties ratified by Honduras have a supra-legal regulatory status and make up part of the legal order subsequent to ratification and entry into force; consequently, if there is a conflict between the treaty and national law, the treaty prevails.

Within Honduran law, the exercise of the right to organize is regulated in Title VI of the Labor Code; within this title the limits and scopes of the right are established, as well as the procedures for the constitution of unions.

In regard to the protection against anti-union discrimination, article 1 of ILO Convention 98 on the right to organize and bargain collectively establishes that: a) nobody can be discriminated in their employment on account of their union activity or affiliation, and b) nobody can be dismissed or be subjected to harmful measures in their employment on account of their union affiliation or participation in legitimate union activities. The protection covers union leaders as well as former union representatives and members and also covers hiring (selection processes/access to employment), dismissals, and any other discriminatory measures during employment (transfers, deferment of promotions and any other harmful actions).

Articles 516 and 517 of the Honduras Labor Code recognize "*fuero sindical*", the legal rights of organized labor, both for members of the board of directors of a labor organization as well as for workers forming a union or founding members.<sup>7</sup>

Article 90 (c) of the Labor Inspection Act<sup>8</sup> imposes a sanction of 300,000 lempiras (currently equivalent to slightly less than 13,000 US dollars) for in any way infringing upon freedom of association, and in addition sets a fine of 250,000 lempiras when labor inspection is hindered.<sup>9</sup>

## V. HONDURAS IN THE INTERNATIONAL ARENA REGARDING FREEDOM OF ASSOCIATION

The investigative team believes that it is pertinent to relate in this report the situation that the Honduran Government is facing internationally regarding the respect of freedom of association in the country, particularly with regard to the protection of the right to organize, because it is an

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<sup>6</sup> International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; American Convention on Human Rights, Protocol of San Salvador, among others.

<sup>7</sup> ***Fuero sindical. Art. 516.*** The workers who are members of the Executive Committee of a union, from the time of their election until six (6) months after their functions cease, cannot be dismissed from their employment without first proving before a Judge of the Labor Court or before a Civil Court, in its absence, that there is just cause for contract termination. The judge, acting within a summary hearing, will resolve the case as appropriate. This provision is only applicable to the members of Executive Committee, in the case of unions are organized into sections and subsections. Violation of the dispositions of the previous paragraph, subject the employer to pay the corresponding labor organization a compensation equivalent to six (6) months of the worker's salary, without prejudice to the rights under the law corresponding to the worker. ***Fuero sindical for promoters. Art. 517.*** A formal notification from thirty (30) workers, made to the employer in writing, communicated through the General Labor Directorate or the Public Prosecutor for Labor Affairs with jurisdiction, of their intent to organize a union, grants the signers of the aforementioned notification special protection from the State. Consequently, as of the date of the notification until the official reception of the legal status of the union, none of these workers may be dismissed, transferred or demoted, without just cause, previously qualified by the corresponding authority.

<sup>8</sup> Legislative Decree No 178-2016.

<sup>9</sup> With regard to this point, a Commission of Experts from the ILO has requested that the Honduran State report on the application and impact of the fines corresponding to antiunion actions contained in the new Labor Inspection Act. General Observations for 2017, published during the 107<sup>th</sup> Session of the International Labor Conference in 2018.

important parameter to consider concerning the implications for workers seeking to exercise this fundamental right.

The Government of Honduras has received reprimands on repeated occasions from the ILO Committee of Experts regarding the principle that the rights of organizations of workers and employers can only be exercised in a climate free from violence, pressure or threats -- in which human rights are respected completely and it is the responsibility of governments to guarantee the respect of these principles.<sup>10</sup> As a member of the ILO, the Honduran Government is subject to the ILO's<sup>11</sup> system under which Honduras has been the object of admonishments from the supervisory bodies with regard to the protection of union leaders, particularly due to noncompliance with ILO Conventions 87 and 98.

As a result of this process, Honduras was selected (among the 24 individual cases) to be reviewed by the Conference Committee on the Application of Standards ("the Committee") of the 107<sup>th</sup> Session of the International Labor Conference -- specifically due to the high rate of antiunion violence in Honduras and the lack of effective protection. The Government informed the ILO about 22 cases which occurred between 2009 and 2017, which are currently in different stages of investigation and/or prosecution.

Among the recommendations given to the Government by the Committee is that "it should adopt the necessary measures in order to create an environment in which workers can exercise their right to organize without being threatened by violence or other violations to their civil liberties"; additionally, it requests that the Government move forward with reforming the Labor Code in order to bring it in line with Convention 87 and exhorts the government to accept a Direct Contact Mission before the next session in 2019.<sup>12</sup>

## VI. EVIDENTIARY TECHNIQUES

The protection afforded to workers and to union leaders against acts of anti-union discrimination is an essential element of the right to organize because these acts can lead in fact to the denial of the guarantees provided by ILO Convention 87. This entails in particular that anti-union dismissals cannot be considered as equal to other types of dismissals, since the right to organize is a fundamental right – a distinction highlighted by ILO supervisory bodies that has consequences for the weighing of the evidence presented, the types of remedial actions considered, and so on.<sup>13</sup>

By its very nature, anti-union behavior is difficult to prove since it is usually concealed behind decisions or actions that on their face may appear neutral and lawful. To that effect the Committee on Freedom of Association and the Committee of Experts, both supervisory bodies of the ILO,<sup>14</sup>

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<sup>10</sup> General Observation (CEACR, adopted in 2017 and published in the 107<sup>th</sup> session of the 2018 ILC. [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3341631](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3341631)

<sup>11</sup> The International Labor Organization is the specialized agency devoted to adopting international standards in labor matters. It has 187 countries as members. It was created in 1919 and in 1945 became part of the United Nations System.

<sup>12</sup> Report by the Conference Committee on the Application of Standards, 107<sup>th</sup> session, 2018. [https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/WCMS\\_643937/lang--en/index.htm](https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/WCMS_643937/lang--en/index.htm)

<sup>13</sup> ILO Committee of Experts on the Application of Conventions and Recommendations. General Survey of Freedom of Association and Collective Bargaining, Report III, part 4B, paragraph 202. 1994.

<sup>14</sup> The decisions of the ILO control organisms contribute to clarify the purpose of international treaties. Their application falls within the obligation of the States to comply in good faith with the treaties that bind them, which implies meeting the criteria issued by organisms entitled by the same international authorities to define the purpose of the instruments endorsed. In the matter of freedom to organize, the criteria set in the General Surveys and in the observations issued by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the decisions of the Committee on Freedom of Association (CFA) must be met.

have established that in cases of anti-union discrimination the burden of proof must not fall on the party that alleges the discriminatory conduct due to its difficulty or impossibility and therefore, it is the employer who has the burden of proof to justify the actions taken.<sup>15</sup>

In order to address this evidentiary challenge, the investigative team triangulated the evidence documented within the Factory with the internal and external testimonial evidence, as well as with documents provided by FITH and the Ministry of Labor and Social Security based in San Pedro Sula.

The resultant analysis and conclusions utilize as a framework the applicable legal system referenced above and the FLA Workplace Code of Conduct and Compliance Benchmarks, as well as the policies and procedures utilized by the Factory.

## VII. RESULTS OF THE INVESTIGATION

### A. Overview of FITH Allegations and Factory Responses

According to FITH, starting in October 2015 its leadership made an effort to form a union at Bay Island, obtaining legal status in February 2016, under the name SITRABAYISLAND. Upon obtaining legal status, a request was made – consistent with the standard practice in Honduras – to the Ministry of Labor (via an inspector) for accompaniment in order to formally notify the company of the existence of the union. This request is dated June 10, 2016 and signed by the President of the FITH Executive Committee.

In response, inspector Raúl Barahona Rubi was designated and he subsequently appeared at the factory to make the corresponding notification – which according to FITH could not be carried out because the Factory's Human Resources Coordinator did not receive the notification. After the notification attempt occurred, FITH states that the same afternoon, the Factory initiated dismissals, including of union members and members of the Executive Committee (four of the interviewees), which continued progressively for various weeks affecting a total of 77 union members -- including 59 union founders.

The four interviewees mentioned that their dismissals were notified by a letter that stated that the employment termination occurred in the context of a personnel retrenchment (FITH provided the investigators with copies of these letters). These workers stated that they did not file any administrative or legal action due to their economic needs: upon finding themselves without a job, they had to accept the severance payment offered by the Factory after which under Honduran law they could no longer file suit.

FITH representatives further pointed out that, in light of the dismissals, the union was left without an Executive Committee, and since the dismissed workers accepted the severance payments because of their economic needs, they did not seek any legal recourse, nor did they follow up on the obstruction of the procedure conducted by the inspector. Furthermore, since that time FITH has not attempted to affiliate workers at Bay Island because, it reports, the workers are afraid due to the earlier dismissals.

In this regard, the investigators note that they raised questions during the interview process concerning the lack of further action by FITH in the wake of these dismissals. This failure to utilize available recourse measures in a timely manner remains troubling over two years later – and, as noted below, has ramifications for the remedial actions now recommended by the investigators.

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<sup>15</sup> General Survey on Freedom of Association and Collective Bargaining. ILO Committee of Experts on the Application of Conventions and Recommendations from 1994. Paragraph numbers 217 and 218. And, ILO Committee on Freedom of Association Digest of Decisions and Principles. Fifth Edition revised in 2006, paragraph number 819.

Bay Island representatives, when consulted regarding the alleged dismissals, claimed to have no knowledge that a union had been formed at the Factory and therefore said that they could not have executed dismissals due to this reason. In addition, they stated that they have not had any inspection undertaken on this account.

Further, Bay Island has made two personnel reductions this year (2018) in accordance with Factory policy and procedure for terminations; according to factory management, these have been made due to a considerable reduction in work orders from the brands, primarily from Disney (the largest buyer), and workers have been selected taking into account various criteria such as performance, probationary period status, and temporary status. These workers are paid 100 percent of their fringe benefits and are given prior notice according to their seniority.

Finally, the Factory stated that it has provided training to workers about Freedom of Association and has not had any communication with FITH or any other central union federation.

In light of the conflicting information provided by FITH and the Factory, the investigative team proceeded to analyze the information provided – including crosschecking between those sets of information and factoring in the testimony obtained directly.

According to the documentation provided to the team, the union obtained legal status on February 10, 2016, and this was recorded in the Register of Labor Organizations undertaken by the Department of Social Organizations of the Ministry of Labor and Social Security on April 11, 2016.<sup>16</sup> The above recording was published up to three times in the Official Gazette.<sup>17</sup>

In order to establish whether the people on the list provided by FITH were in fact workers at the Factory and were in fact dismissed in 2016, a list of hirings and terminations of workers for that year was requested. According to the list provided by the Bay Island Human Resources Manager, 36 people affiliated with SITRABAYISLAND were identified. Regarding the rest of the members not identified on the list provided by the Factory, the Human Resources Manager was consulted about the existence of another record or about the possibility of an omission, and in response she stated clearly that there was no such possibility.

For this reason, the team proceeded to show two termination letters with a signature, having recognized the signature as her own. When consulted about why those names were not included in the list provided, she proceeded to look for them and in fact found them; expressing that the omission had been in error. Altogether, the dismissal of 40 workers was verified from the total of 77 indicated by FITH.

The above leads to the conclusion that the lists provided by the Factory to the investigators were in fact incomplete. This in turn created doubts for the investigators regarding the reliability of the data that were provided.

Moreover, the information provided by FITH with respect to the accompaniment of an inspector and the refusal of the Factory to receive the notification have been established through official documents provided by the Ministry of Labor and Social Security<sup>18</sup>, detailing the request referred to by the President of the SITRABAYISLAND Executive Committee dated June 10, 2016 and the report from the inspector who conducted the procedure.

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<sup>16</sup> Copy of the certifications issued by the Administrative Secretary of the Ministry of Labor and Social Security dated April 13, 2016.

<sup>17</sup> Copy of the three publications of the Official Gazette.

<sup>18</sup> Copy of file Ref. 95836 which contains a copy of the report mentioned.

That report states that the inspector arrived at Bay Island and that “*at the moment of delivering the notice of legal status, Karen Hernandez, Human Resources Coordinator left promptly and closed the door, for this reason it was impossible to fulfill the commitment (...)*”<sup>19</sup> The Ministry of Labor and Social Security was consulted regarding the existence of legal remedies for the obstruction of a related inspection proceeding as established by the legislation in effect at that time.<sup>20</sup> It responded that at that time (2016) the practice was to initiate such proceedings after three visits, and since FITH did not insist on another visit, the file was then closed.

The Human Resources Coordinator mentioned in the inspector’s report was consulted concerning the above and expressed no recollection of those facts, stating that she has been responsible for receiving the labor inspectors on various occasions, but does not recall closing the door on the inspector and thereby preventing the referenced notification.

### **B. Worker Dismissals in 2016: Procedures Utilized and Rationale Provided**

When asked about personnel cuts in 2016, Factory representatives said that they had not been considerable and that due to variations in the industry it is normal to retrench personnel each year – adding that the greatest reductions had been made in July and August 2018.

The list of 2016 dismissals shows that 342 workers were affected, with the reason given for their exits as personnel retrenchment, restructuring, temporary employment, and probationary period status. When the Human Resources Manager was consulted, she stated that the term “retrenchment” is used for large-scale dismissals and “restructuring” is used when fewer workers are dismissed (regardless of cause). When there is a need to dismiss personnel, the first ones affected are “temporary” workers and those in their “probationary period”.

The investigators observed from the list that during 2016 dismissals occurred as follows:

#### **Terminations year 2016**

<b>MONTH</b>	<b>01</b>	<b>02</b>	<b>03</b>	<b>04</b>	<b>05</b>	<b>06</b>	<b>07</b>	<b>08</b>	<b>09</b>	<b>10</b>	<b>11</b>	<b>12</b>	<b>TOTAL</b>
<b>QUANTITY</b>	52	42	19	9	24	61	23	43	23	10	8	28	342

Between January and May, it can be established that those terminated were temporary workers and workers in their probationary period (and in some cases due to restructuring). Beginning the last day of May, the category “personnel retrenchment” is used, with 18 people dismissed then, followed by the above numbers in June and July – resulting in a total of 102 workers dismissed due to personnel retrenchment. Terminations continued during the following months with the motives listed as “temporary work” or “restructuring”, although in some cases “personnel retrenchment” was used but to a lesser degree than during the final day of May through July.

The investigative team verified that at least 22 workers affiliated with SITRABAYISLAND – among them, all members of the Executive Committee – were included in the personnel cuts and dismissed in June. Of this total, 18 occurred between June 16-29, meaning after the action preventing the labor inspector from delivering the notification that the union had obtained legal status, as

<sup>19</sup> Art. 617 Labor Code (repealed). Regarding the value of the reports or inspector’s acts, the applicable law at that time stated: Art. 617 subparagraph G) “The records taken and reports filed in terms of their powers, are fully valid so long as its inaccuracy, misrepresentation or partiality is not demonstrated evidently: (...).”

<sup>20</sup> Art. 625 subparagraph B) of the Labor Code (repealed): “Fines will be set of L. 50.00 up to L. 5,000.00 corresponding to the particular circumstances of each case, recurrence and economic capacity of the offending company for the following violations: B) The obstruction of the fulfillment of duties which legally correspond to labor inspectors.”



established in the inspector's report cited above. Furthermore, this is likely not the complete figure given the omissions from the Factory information as described previously.

On the other hand, through the examination of 38 employee files for workers dismissed in 2016, it was verified that prior to their dismissal a form titled "Evaluation for personnel retrenchment" was annexed, which evaluated "production, performance, quality, attendance and conduct". This evaluation did not establish how a worker's performance was assessed based on each of the criteria evaluated; each file included a form signed by the Production Manager but not by the evaluated worker.

When the Production Manager was interviewed regarding this, he expressed that he is responsible for signing these evaluations, but they are prepared by the supervisors because those officials know the workers best. During the interview of a supervisor, it was confirmed that these evaluations are not prepared for all workers; only workers who will be leaving due to performance are evaluated, without taking into account other criteria such as seniority. (This was confirmed through a review of the employee files, which indicated that the evaluation was the sole basis for their dismissal, even after years of work at the Factory.) The Production Manager also confirmed that this evaluation is not shared with the affected worker.

Taken together, the above shows that the evaluations were prepared in order to justify the decision to terminate the employment relationship, without any information included drawing on objective and measurable criteria, and that the evaluations were undertaken without informing the affected worker of either the criteria used or the results.

This practice violates FLA Benchmarks ND.2.1 and E.R.29.1, which establish that evaluation practices must be free from discriminatory prejudice and must be provided in writing and with an opportunity for the worker to provide feedback and agree or disagree in writing.

Taken together, the above shows that a union had been formed, that a Factory official prevented formal notification about its existence, and that the dismissals of union Executive Committee members and other union members occurred in the two weeks immediately after that event.

Therefore, based on a review of all of the evidence and drawing further on its experience in analyzing situations of this type, the investigative team believes there is sufficient indication that the dismissals from mid-2016 did indeed have anti-union motivations intended to prevent the organization of workers – and thus are discriminatory, violating FLA Benchmark FOA 5.1 (*"Employers shall not engage in any acts of anti-union discrimination or retaliation, i.e. shall not make any employment decisions which negatively affect workers based wholly or in part on a workers' union membership or participation in union activity, including the formation of a union, previous employment in a unionized facility, participation in collective bargaining efforts or participation in a legal strike"*).

In contrast, the investigators cannot assert that the dismissals which occurred prior to June 2016 had anti-union motivation; the reasons for those remain uncertain.

That said, given the elapsed time since these dismissals occurred and taking into account that FITH did not take any administrative or legal action in their aftermath more than two years ago, the investigative team believes that it is not possible to now redress the losses incurred by the affected workers through reinstatement or some comparable remedy. Honduran law provides for a two-month limitation to seek redress for dismissal, and FITH did not exercise that avenue to seek relief.

Moreover, FITH has not been able to establish that it has had contact with any dismissed workers who now seek to return to work at the factory; the small number of workers it did manage to contact have since found other employment

Therefore, the recommendations below instead focus on what the Factory should do moving forward in order to ensure that personnel retrenchment is not used again in the future to conceal union discrimination, and is in fact carried out according to applicable law, the FLA Workplace Code of Conduct and Compliance Benchmarks, and written internal policies.

### C. Retrenchment Practices since 2016 and the Number of Workers Affected

According to Factory management, the implementation of personnel retrenchment responds to the amount of work solicited by its clients, the garment styles solicited, and the delivery time requested; these often necessitate the Factory to hire temporary workers who later are terminated. This was indeed verified by the lists of personnel hirings and terminations provided by Bay Island for the years 2016-2018, which showed high rates of terminations.

In order to verify and determine the scope of the termination practices as well as the motivations, the following tables were completed – based on lists provided by the Factory – to show hirings and terminations for personnel during those three years.

**Table No. 1**

Hirings and terminations for 2016						
Month	Hirings		Terminations			
	Temporary	Permanent	Restructuring / Retrenchment	Temporary	Probation period	Others <sup>21</sup>
January	210	65	1	49	2	19
February	27	35	7	12	23	21
March	0	28	6	9	4	11
April	0	23	6	0	3	12
May	0	8	21	0	3	16
June	0	3	59	0	2	16
July	35	2	23	0	0	14
August	4	3	12	31	0	7
September	0	24	21	1	1	9
October	0	25	8	1	1	6
November	5	40	4	0	4	7
December	9	0	1	17	10	4
<b>Total</b>	<b>290</b>	<b>256</b>	<b>169</b>	<b>120</b>	<b>53</b>	<b>142</b>

<sup>21</sup> Resignations, abandonment, death.

Table No. 2

Hirings and terminations for 2017					
Month	Hirings		Terminations		
	Temporary	Permanent	Restructuring/ Retrenchment	Temporary	Probation Period
January	24	43	6	0	7
February	0	68	5	0	9
March	6	48	11	6	7
April	0	34	5	0	11
May	35	123	12	0	6
June	0	85	18	0	12
July	32	66	9	1	27
August	14	70	12	14	13
September	10	43	9	0	11
October	13	53	7	1	4
November	81	59	19	24	14
December	0	5	11	107	13
<b>Total</b>	<b>215</b>	<b>697</b>	<b>124</b>	<b>153</b>	<b>134</b>

Table No. 3

Hirings and terminations for 2018					
Month	Hirings		Terminations		
	Temporary	Permanent	Restructuring/ Retrenchment	Temporary	Probation Period
January	89	112	10	39	7
February	0	107	23	6	2
March	1	45	68	0	12

April	9	43	85	3	7
May	36	40	17	3	7
June	1	48	8	1	3
July	0	32	3	2	5
August	1	3	51	33	17
September	0	1	41	0	0
<b>Total</b>	<b>137</b>	<b>431</b>	<b>306</b>	<b>87</b>	<b>60</b>

The previous tables reflect constant changes in hirings and terminations within Bay Island and the fact that, even as retrenchments were carried out, significant hirings continued. For example, in March and April 2018 a reduction in personnel was carried out totaling 153 workers, even as from March through July, 208 permanent workers were hired.

According to the Factory, when a personnel retrenchment is carried out, the termination of temporary workers and of workers ending their probation period is preferred; however, based on the numbers provided and analyzed, this is not applied consistently.

For example, from May-July 2016 and March-June 2017, the number of terminations due to personnel retrenchment was always greater than terminations of temporary workers and of those in their probation period. The same occurred from February-September 2018, during which there were 296 personnel cuts, far above the 48 terminations of temporary workers and 53 in their probationary period.

The above indicates that the Factory does not have clear criteria for implementing termination procedures (as discussed further below in the coverage of Factory termination policies, procedures and practices).

**Table No. 4 Comparison of total hirings and terminations, 2016-2018**

2016		2017		2018	
Hirings	Terminations	Hirings	Terminations	Hirings	Terminations
546	484	912	411	568	453

#### **D. Factory Termination Policies, Procedures and Practices**

##### **1. Content of the written policy and procedure regarding terminations**

According to the Factory policy, four forms of termination are considered:

- (1) Willingly on both sides,
- (2) Causes beyond the will of both sides, such as the death of a worker, loss of freedom of a worker, and total incapacity of a worker, among others.
- (3) Unilateral will of one of the parties: resignation of a worker, justified dismissal (committing a serious offense) or unjustified dismissal (personnel reduction corresponding to production needs and the administrative internal requirements of the company).
- (4) Expiration of time in the case of temporary contracts.

In the case of personnel retrenchment, according to the policy, the affected workers are selected based on the following criteria:

- (1) Employees with the lowest levels of performance, quality, discipline or attendance.
- (2) Workers in their probationary periods.
- (3) The newest workers without family.
- (4) The newest workers with a family.
- (5) Workers with seniority without family.
- (6) Workers with seniority with a family.
- (7) Personnel with a disability or sickness.
- (8) Elderly workers.
- (9) Pregnant women.

In cases of personnel reduction, the policy defines that the company can retrain personnel to occupy other positions within the same department, as long as vacant positions are available, the salary of the position is equal to or superior to the current salary, and that after retraining, the worker meets performance standards for the new position. To that effect, it should be noted that the examination of the Factory's employee files from 2018 found two cases in which termination notices were given and the dismissals were then annulled – after which those workers were relocated.

The policy also states that in cases of unjustified dismissals, the company will pay the worker the acquired fringe benefits (proportional thirteenth month, proportional fourteenth month, proportional vacations, severance, and the termination notice).<sup>22</sup>

With respect to the termination procedure at the Factory, in cases of dismissals it states that all terminations must be made in writing and that the worker must be informed of the motive for the dismissal and the calculation of the severance payment and that the amounts to be paid will be reviewed with the worker. At the same time, the procedure also defines that any outstanding debts the worker has with the cooperative or with banks will be checked in order to deduct outstanding balances from the employee benefits. Finally, the procedure states that the worker must sign the pink slip for the corresponding severance payment owed by law, thereby releasing the company from any future responsibility.

Upon evaluation of the content of the policy and procedure the Factory will follow in the cases where it is obligated to carry out personnel reductions, there are gaps related on how the decision

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<sup>22</sup> When an employment contract terminates before its contractual time for a cause attributable to the employer, workers have the right to be paid their vacations, bonuses and benefits in proportion to the time worked; in accordance with articles 120, 345, 349(2), of the Honduran Labor Code

will be made, who will be involved in the process to define production requirements, and the manner in which the retrenchment criteria will be communicated to workers (and whether it states a way to consult with workers prior to making the decision to terminate workers in order to evaluate other options besides doing so).

The investigators conclude that the lack of definition of the points highlighted above may cause workers to be selected for personnel cuts in a highly discretionary manner.

For example, the first criteria for selection of workers establishes that it will be based on levels of performance, quality, discipline, or attendance. However, this does not indicate how performance and quality will be evaluated, who will perform the evaluation, or whether after this evaluation is completed the worker will have the opportunity to disagree with an evaluation considered to be unfair. Nor does it contemplate whether the Human Resources Manager will be involved in the study of these criteria in order to determine objectively the worker's adherence with attendance requirements, or whether there are written records of disciplinary issues that allow for an objective evaluation.

Taken together, the above reflects that the written policy and procedure at the Factory do not comply with FLA Benchmark E.R.32.1, which requires employers to regulate all aspects and modes for retrenchment.

## **2. Use of the policy and procedure for employee retrenchment**

According to the interview conducted with Bay Island factory management, personnel cuts are carried out when there is a reduction in production orders from clients and when the factory owner decides that such a reduction in personnel is applicable. For example, the Factory maintains that the cut carried out in August 2018 was due to a reduction in production orders from its main customer, after which the owner decided to proceed with the employee retrenchment.

Subsequently, the Factory requests the Engineering Department to conduct an analysis, based on a projection of future orders, to determine how many workers each department or Factory area needs to operate. When the engineering analysis is completed, the Factory proceeds to determine how many workers will be retrenched, taking into account performance, temporary status, and workers still in their probationary period in order to carry out the retrenchment; subsequently, the production area is notified of the decision and of the number of employees to reduce so that they may evaluate the employees.

In order to verify the way the retrenchment procedure is implemented, the investigators requested the Factory to provide the latest plan for the retrenchment carried out in August 2018<sup>23</sup> (when asked about the plans for the retrenchments in 2016 and 2017, Factory management stated that these were not available because of the time that had elapsed).

Based on the documents provided, the investigators observed that, in order to carry out the reduction, the above-referenced procedure was not followed, particularly with regard to the order of the criteria used to select the affected personnel.

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<sup>23</sup> This was only provided on the last day of the onsite visit, despite prior specific requests for the information..

For example, the plan identifies the source of the reduction by department (production order reduction and low performance) and takes into account the required structure, based on installed capacity and customer orders. It establishes what needs to be evaluated and determines the workers who will be dismissed based on the following criteria (depending on the work area):

- (1) For personnel in sewing, screen-printing and quality: evaluate production, quality, attendance and attitude; and workers with the least seniority.
- (2) For personnel in maintenance: consider workers with the least seniority and the lowest levels of knowledge/ production.
- (3) For personnel in screen-printing samples: evaluate production, quality, attendance and attitude.
- (4) For personnel in packing: temporary workers.
- (5) For personnel in cutting and engineering: workers with the least seniority.
- (6) For workers in sewing samples: workers with the least seniority and relocation to production floor.

With regard to the 2018 retrenchment cited above, the Factory posted a memorandum on its notice board regarding the start and end of the retrenchment, but did not publish the plan developed to proceed with the retrenchment nor consult with workers about the ways to avoid or minimize the cuts.

In this regard, it was inconsistent with FLA Benchmarks E.R.32.3 and E.R.32.5, which require employers to communicate the Plan for retrenchment to employees, consult with workers, and to activate a communication channel for feedback that permits workers to consult or clarify doubts regarding the cuts.

Upon reviewing the file for workers dismissed during a retrenchment, the investigators observed that the files contained an "evaluation form for personnel reduction" covering "production, performance, quality, attendance and conduct". This evaluation did not establish how it was determined whether an employee's performance was good, bad, or regular in each of the criteria evaluated. It was signed by the Production Manager but did not include the evaluated worker's signature.

When asked about the evaluation, the Production Manager reported that he is responsible for signing the evaluations, but that they are actually carried out by the supervisors because it is they who have knowledge of the personnel's work. As previously noted, the Production Manager as well as the interviewed supervisor stated that the evaluation is not completed for all personnel and that only personnel who will be dismissed due to performance are evaluated, without considering other criteria such as seniority (despite its inclusion in the procedure and the retrenchment plan).

The workers given termination notices were interviewed and they expressed that they had no knowledge that they had been evaluated prior to receiving notice of termination; one of the workers who received a termination notice said she was surprised by the notice because she always performed her job well and never had any problems with her conduct.

Active workers expressed the following during the interviews:

1. "They removed coworkers who were good at their job";

2. "I was surprised because they removed hardworking people";
3. "I did not understand how they removed people, some coworkers remained working who were not that good and others who did their jobs well, left".

The fact that an evaluation was performed with the purpose of ending the employment relationship demonstrates the absence of a consistent and objective performance evaluation process. Rather than employing a process that has the purpose of identifying requirements for workers (i.e., how to improve performance), the Factory has in place a mechanism designed with the objective of carrying out terminations of specific workers.

The fact that evaluations are not carried out for all workers, but rather are directed at workers who will be dismissed at the discretion and subjective judgement of a supervisor, violates FLA Benchmarks ND.2.1 and E.R.29.1, which provide that evaluation practices must be free from any type of discriminatory prejudice and that these must be provided in writing with an opportunity for feedback and opportunity for the agreement/disagreement of the workers in writing.

When consulted regarding the evaluations, the Human Resources Manager stated that workers were not informed about the evaluation because of the safety of the supervisors and to prevent workers from feeling badly based on low performance.

Another aspect of the process that demonstrated the lack of objectivity in the evaluations is findings of results of "bad conduct" even though the files for the workers had no personnel actions, disciplinary measures, or reprimands for such conduct.

Furthermore, in the files for terminations reviewed for 2016-2018, the investigators observed that workers signed a pink slip for the payment of their labor benefits, reaching an agreement that the payment would be made in installments (up to eight in some cases) – establishing in addition, that workers released the company from any responsibility. According to the Human Resources Manager, the pink slip is only valid when payment of the benefits is made, which is verified within the content of the document. The manager then presented bank receipts for the deposits for severance payments made to workers.

The signature on the pink slip places workers in a vulnerable position because they are releasing the factory from any responsibility **before** the payment is made effective – with the added factor that the workers sign an agreement with the Factory that their severance payment can be paid in up to eight installments.

This process is contrary to article 379 of the Labor Code, which requires that "All compensation, settlement, transaction or agreement concluded between the worker and employer, in order to be valid, must be carried out before the corresponding labor authorities".

In addition, interviewed workers who had received termination notices expressed disagreement with receiving severance payments in installments and said that when they inquired with Human Resources whether they could receive their payment in a single installment, the answer they received was that they should inquire with the Ministry of Labor – leaving them feeling obligated to sign. In addition, in interviews with active workers, several mentioned being aware that dismissed workers were upset because they were getting their severance payment in installments and that they had signed because of their economic needs.



According to the information provided by the Factory, as of September 10, 2018 there were no legal actions pending against Bay Island;<sup>24</sup> however, the investigative team was able to verify based on documents reviewed that there are indeed complaints about the payments. In fact, there are currently 16 cases pending with the Ministry of Labor and Social Security regarding personnel severance payments.

The facts expressed and verified, as described above, demonstrate a violation of FLA benchmark E.R.19.3 which establishes: “Employers shall not compel workers to sign (...), a *release from responsibility or consent form regarding other rights as conditions for receiving severance payment and other fringe benefits from the company, and shall not threaten to withhold fringe benefits if workers do not sign.*”

Finally, the Factory stated that it made every effort to relocate personnel affected by the retrenchment, issuing a communication on August 27, 2018 to the Ministry of Labor and Social Security which contained the names and phone numbers of these workers, so that they may be referred to other companies that required this type of personnel. We verified that the same communication was sent to other companies by Bay Island.

### **3. Decisions for the promotion of personnel at Bay Island**

Bay Island has a written policy and procedure for carrying out promotions of its personnel. In this respect, Factory management mentioned that they are willing to provide opportunities to workers who are competent to perform a new job position or a job opening.

Within the scope of the investigation, a request was made to the Factory to provide records for promotions from 2017 and 2018 in order to verify how the process is carried out. From the files reviewed, the investigative team found that there were promotions carried out based on performance evaluations, and that in other cases, workers were promoted through a job bidding. However, the files had no record of the rules and the tests and results for the applicants.

For this reason, a request was made to the Human Resources Manager to show a case of how promotions were carried out. Management provided a series of e-mails calling for a job bidding for the position of “*Spending Assistant,*” detailing the requirements to apply for the position. Subsequently, within those same e-mails there is a communication regarding the end of the candidate evaluation process and that a decision had been made in favor of one worker. However, there is no evidence in the e-mail exchange regarding the other applicants, the tests that they were subjected to and their results, and how the final decision was adopted in an objective form.

Not documenting the criteria for the decision to assign a position in this framework creates doubts as to whether it will be carried out justly and free from discrimination, as required by FLA Benchmark E.R.29.

According to the interviewed workers, the factory discloses the existence of job openings but mentioned that only people with degrees can have access, because they take into account degrees received more than experience.

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<sup>24</sup> Record issued by the Labor Court in San Pedro Sula, from September 10, 2018.

#### **4. Factory measures to guarantee respect of freedom of association**

The Factory expressed that it is currently making an effort to guarantee the respect of freedom of association by:

1. Placing the policy and procedure for freedom of association within its production plant, for all personnel to learn of it.
2. Coordinating with the non-profit organization PROCINCO<sup>25</sup> to impart training on the subject of freedom of association to personnel at the plant.

To this effect, the attendance records for workers were verified, to show a total of 392 participants in the training process conducted in 2018. However, during the interviews, there were workers who expressed that they had not received that information and had no knowledge about the right to organize, but rather that they relate the idea of a union with the possibility of being terminated by the factory.

Other workers mentioned that they had received training on harassment, non-discrimination, freedom of association and company regulations, but do not understand the relationship between freedom of association and the right to organize. This raises questions about the adequacy of the training to date in this regard.

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<sup>25</sup> Honduras Manufacturers Association (AHM) is a non-profit private sector organization created to serve its associates, representing them before public and private institutions. It arose due to the rapid growth of the manufacturing industry in Honduras, one of the main generators of exports and job creators in the nation, with the purpose of promoting and developing the investment and the exports of the manufacturing industry at a national and international level. [http://www.ahm-honduras.com/?page\\_id=1854](http://www.ahm-honduras.com/?page_id=1854)

## VIII. RECOMMENDATIONS

1. Bay Island should recognize that there is in fact at present a legally-constituted union within the factory, namely SITRABAYISLAND; even though because of actions taken by the factory in 2016 this union currently is without a leadership structure or members within the factory, this does not change the fact that it was legally recognized in 2016 pursuant to the efforts of FITH. This is in fact the legitimate union at Bay Island and FITH should have the opportunity to resume the process of seeking to organize workers that ended with the dismissals undertaken by the factory in June 2016.
2. The FLA-affiliated brands, as well as the other companies engaged in this Safeguard investigation, should work with Bay Island on a document in which respect for workers' freedom of association is expressed clearly and without any qualification. This document would be read by a senior factory management official in full to all workers, in the presence of representatives of the companies engaged in this Safeguard investigation.
3. With oversight from the FLA and the companies, Bay Island should commission a credible and independent external expert in labor rights to provide annual training for all personnel (both workers and management) covering freedom of association and the right to organize; the selection of this expert as well as the training content must be authorized by representatives of the companies. Evaluations should be conducted at the end of the training session in order to measure whether the workers comprehended the content of the training or if greater efforts are required, and in relation to this, concerning the adequacy of communication channels between management and workers concerning the issues covered in the training.
4. Bay Island should review and revise the policy for retrenchment, in particular to define clearly how workers will be consulted in advance in order to evaluate if there are other options; the methods under which a decision will be adopted; objective criteria in order to decide which workers will be affected by the retrenchment; the obligation to develop a written plan to carry out the cuts; who will participate in the process; and which communication channel will be used with workers in the scope of the retrenchment.
5. Bay Island should cease the practice of signing agreements with workers for severance payments in installments, without the presence of an authority from the Ministry of Labor; in addition, it should end the practice of signing a pink slip prior to disbursement in cash of the severance payment because this also places the worker in a vulnerable position.
6. Bay Island should also cease the practice of conducting performance evaluations with the specific purpose of carrying out employment terminations.
7. Bay Island should review and revise the policy and procedure for promotions in order to match its content with the other standards in the FLA Compliance Benchmarks, especially the definition of objective evidence and participant feedback.
8. With oversight from the FLA, Bay Island and the companies engaged in this Safeguard investigation should support conduct of an investigation regarding the use of temporary or indefinite contracts, in order to guarantee that their application meets FLA standards; in addition, as part of this oversight, Bay Island and the companies should review the agreements of the indefinite contracts to determine if the provisions comply with the law and FLA standards.

APPENDIX

<b>Interviews outside of the factory</b>	A group interview conducted with two FITH representatives and 4four workers dismissed by Bay Island who were members of SITRABAYISLAND in 2016
	Two interviews with officials from the Ministry of Labor and Social Security of San Pedro Sula.
<b>Interviews within the factory</b>	One group interview with the owner of Bay Island, the Human Resources Manager and the Plant Manager
	One group interview with the Operations Manager, Human Resources Manager and owner of Bay Island
	An individual interview with the Human Resources Manager
	An individual interview with the Human Resources Coordinator
	An individual interview with the Production Manager
	An individual interview with a production plant supervisor
<b>Documents obtained outside of the factory</b>	50 individual interviews with workers from Bay Island -- of which nine had been given termination notices and 41 were active workers.
	List of members of SITRABAYISLAND
	Membership forms for SITRABAYISLAND
	Termination letters of union members and Executive Committee members from Bay Island in 2016
	Publication of the legal status of SITRABAYISLAND in The Official Gazette
	Request for Inspection to the Ministry of Labor and Social Security
<b>Documents reviewed within the factory</b>	Report of Inspection by the Ministry of Labor and Social Security
	Policy and procedures from Bay Island regarding freedom of association, collective bargaining, nondiscrimination, promotions and employment terminations
	Internal Labor Code for Bay Island

	Content of the Factory training on freedom of association
	List of hires and terminations of workers in 2016, 2017, and 2018
	List of active workers at Bay Island
	List of workers who received notice of termination in 2018
	List of workers promoted in 2017 and 2018
	Presentation prepared by the Factory reflecting shifts in production in 2016, 2017 and 2018
	38 employee files for workers dismissed in 2016
	35 employee files for workers dismissed in 2017
	34 employee files for workers dismissed in 2018
	9 employee files for workers given termination notices in 2018
	9 employee files for workers promoted in 2017
	5 employee files for workers promoted in 2018
	Social Security payroll for 2016
	Letters sent to the Ministry of Labor and Social Security and other companies notifying of personnel cuts at Bay Island Sportswear and to see if they would be willing to hire dismissed workers
	Personnel reduction plan for 2018
	List of citations from the Ministry of Labor and Social Security
	Notice of conciliatory hearing at the Ministry of Labor and Social Security
	Deposits of severance payments in bank accounts
	Memoranda of information regarding start and end of personnel reduction
	Record from the Labor Court in San Pedro Sula
	E-mail exchange regarding the promotion of a worker