

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 10/2021

SETTLEMENT OF DISPUTE

BETWEEN

EXCLUSIVE DENTAL CARE

AND

ALETHIA SMITH

AWARD

I.D.T. DIVISION

MR. DONALD ROBERTS, CD., JP.	-	CHAIRMAN
MRS. JACQUELINE IRONS, JP.	-	MEMBER
MR. CLINTON LEWIS	-	MEMBER

SEPTEMBER 19th, 2022

INDUSTRIAL DISPUTES TRIBUNAL

AWARDS

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

EXCLUSIVE DENTAL CARE

(THE COMPANY)

AND

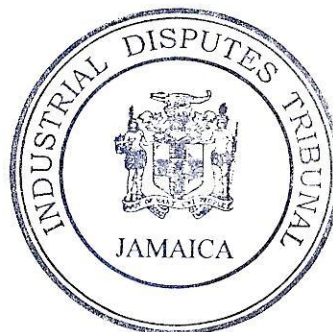
MS. ALETHIA SMITH

(AGGRIEVED WORKER)

REFERENCE

By letter dated August 25, 2021, the Hon. Minister of Labour and Social Security, pursuant to Section 11A (1)(a)(i) of the Labour Relations and Industrial Disputes Act, 1975 ("the Act") referred to the Industrial Disputes Tribunal ("Tribunal") for settlement, the dispute between **Exclusive Dental Care and Ms. Alethia Smith** with the following Terms of Reference: -

"To determine and settle the dispute between Exclusive Dental Care on the one hand and Ms. Alethia Smith on the other hand over the termination of her employment"



DIVISION

The division of the Tribunal selected in accordance with Section 8(2)(c) of the Act to deal with the matter comprised:

Mr. Donald Roberts, CD, JP -Chairman	
Mrs. Jacqueline Irons, JP	- Member, Section 8(2)(c)(ii)
Mr. Clinton Lewis	- Member, Section 8(2)(c)(iii)

REPRESENTATIVES OF THE PARTIES

The **Company** was represented by:

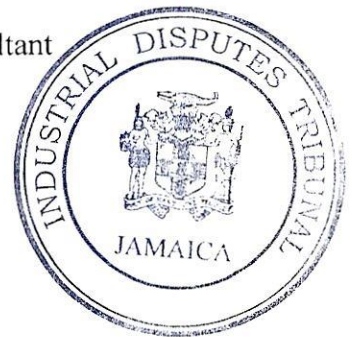
Mr. Donald A. Gittens	- Industrial Relations Consultant
Dr. Mark Edwards	- General Manager

The **Aggrieved** was represented by:

Mr. Robert L. Harris	- Industrial Relations Consultant
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In attendance:

Ms. Alethia Smith	- Aggrieved worker
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SUBMISSIONS AND SITTINGS

Both parties submitted briefs to the Tribunal and provided evidence through documentary and oral presentations over four (4) sittings covering the period March 23, 2022 to July 22, 2022.

BACKGROUND TO THE DISPUTE

1. Exclusive Dental Care is a private dental provider offering general and preventative dental care services. The practice is owned by Dr. Mark Edwards and the business operates from Main Street in Mandeville. Ms. Alethia Smith was employed by the Company as a dental hygienist.
2. Dr. Edwards, by way of an email dated December 18, 2019, invited Ms. Alethia Smith to a “working interview” on December 20, 2019 as well as “a tour of the

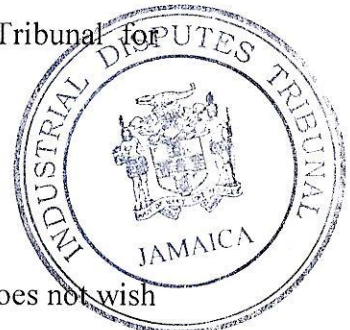
facility.” In the said email he advised her that the position offered to her was full-time and by return email she should indicate her acceptance of the offer.

3. No written contract of employment was provided to Ms. Smith and it is not clear as to the actual start date of her employment, whether she was notified of a probationary period, or the probationary period was waived. However, on March 9, 2020 Dr. Edwards emailed Ms. Smith informing her that her services were being terminated with immediate effect based on her poor record of performance.
4. The dispute was referred to the Ministry of Labour and Social Security and despite the attempts at Conciliation, the parties were unable to reach a settlement. Consequently, the matter was referred to the Industrial Disputes Tribunal for determination and settlement.

THE COMPANY 'S SUBMISSION

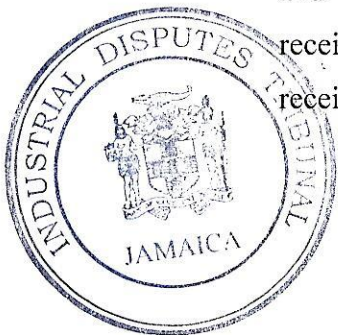
5. Counsel for the Company, Mr. Donald Gittens, said that the Company does not wish to dispute that the dismissal of the worker was not in keeping with the provisions of the Labour Relations Code. The focus, he said, would be on the amount of compensation to be awarded.
6. Dr. Mark Edwards, the Managing Director of the Company was the only witness called by the Company. He said that he recruited Ms. Smith initially by email and communicated to her by telephone and WhatsApp. He admitted that there was no written employment contract and that her termination took place through an email sent to her.
7. Dr. Edwards said the reason for Ms. Smith's dismissal had to do with 'clinical challenges'. He noted that although she was not a recent graduate and had some experience, the management of the patients was not being done satisfactorily. He outlined the areas in which her performance fell "below standard for sometime". [see exhibit 1]. These included:

- Diagnosis, treatment planning and patient management



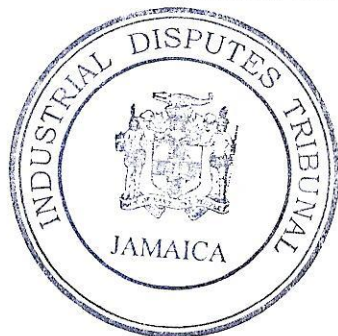
- Clinical charting
- Radiographs
- Explaining of procedures
- Scaling and root-planing procedures
- Polishing of periodontal cases with bleeding and suppuration

8. Dr. Edwards expressed the view that he is “almost certain” that the matter of her probationary period was raised with Ms. Smith during the interview, as this was normally the case. He opined he would not have waived the probationary period for Ms. Smith since he “was unaware of her capabilities.” Dr. Edwards recalled that there was a written notation to the effect that she would be placed on probation, but he was unable to locate the correspondence on the file.
9. Further in his testimony Dr. Edwards explained that Ms. Smith was paid on a commission basis, based on the number of patients treated and the procedures that had to be done. She would submit a log with the required information for him to check off and be remunerated at forty percent of the cost associated with the treatment.
10. He contended that the business was severely impacted by Covid-19 and between March and June 2020, there was a fall-off in business activities to around thirty-five percent, which forced him to reduce the work week of other employees.
11. Dr. Edwards said he was aware that Ms. Smith also had other jobs in Portmore and Kingston during her employment with Exclusive Dental and had to leave early some afternoons for work in Kingston. He said this was “not a major issue” as she earned income by commission and he had two other persons performing similar functions.
12. According to Dr. Edwards, Ms. Smith would have been earning between \$250,000.00 and \$300,000.00 per month, and consequent on her termination she would have received pay in lieu of notice and outstanding emoluments due to her based on receipts from the insurance company.



THE AGGRIEVED WORKER'S SUBMISSION

13. Mr. Robert Harris, the Industrial Relations Consultant representing the aggrieved worker, made the assertion that despite the Company's admission that the proper steps as outlined in the Labour Relations Code were not followed in respect of Ms. Smith's termination, the Tribunal should be reminded that 'ignorance of the law is no excuse.'
14. He noted that Ms. Smith had "clear expectations" that she would continue on a path to develop herself in the dental profession after leaving university, and pointed to the fact that she had obtained a degree from the University of Technology, Jamaica and was successful in an American dental examination which qualified her to practice as a dental hygienist in the Caribbean.
15. In her testimony, Ms. Smith said that she was interviewed by Dr. Edwards on December 18, 2019 at the College of Oral Health Sciences, UTech, Jamaica and was subsequently contacted by email to say that the job was full-time and she should present herself for a working interview on December 23, 2019.
16. She said she was never presented with any document about a probationary period and was not told by Dr. Edwards that she would be placed on a period of probation. Ms. Smith was of the view that based on her experience and the fact that she was told the position needed to be filled immediately, there was no need for a probationary period.
17. She admitted to having received all outstanding payments due to her in September 2020. She still has outstanding student's loan payment and shortly after her termination on March 9, 2020 she lost her part-time job at the end of March. She had been receiving assistance from her parents and would occasionally do one-off jobs during the period.
18. Ms. Smith said that since June 2021 she has been employed as a full-time assistant at NADS Family Health Care in Green Acres, Spanish Town.



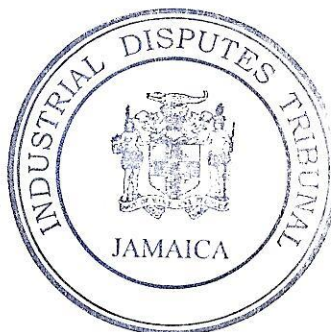
ISSUES

19. The issues to be decided by the Tribunal are as follows:

- a) What was the starting date of Ms. Smith's employment with Exclusive Dental Care Limited?
- b) Does the statute make any express reference to the right to a probationary period, and if not, is a period of probation implied at common law in the absence of a written employment contract or other documentary evidence?
- c) What are the factors to contemplate in determining the quantum of the award for Ms. Smith's based on the unjustifiability of her dismissal?

EVIDENCE

20. In the Company's brief the starting date of Ms. Smith's employment is said to be January 2, 2020 and that she was "ultimately employed for the period January 2, 2020 to March 31, 2020." This was however disputed by Ms. Smith who argued that her employment date was December 23, 2019, and that the position was full-time. There was, however, no evidence led by the Company to substantiate the claim that Ms. Smith's starting date was in fact January 2, 2020, as the brief stated and further, no evidence to support the point that her employment was for the period January 2, 2020 to March 31, 2020.
21. Reference was also made in the Company's brief about Ms. Smith completing "a period of employment" that the employer "erroneously treated as the statutory probationary period" and that her employment was "terminated because of redundancy type conditions caused by the onset of the COVID-19 pandemic." This proved to be a false claim as the evidence adduced from Dr. Edwards' testimony and exhibits clearly show that the reason for Ms. Smith's termination had to do with her alleged poor performance.

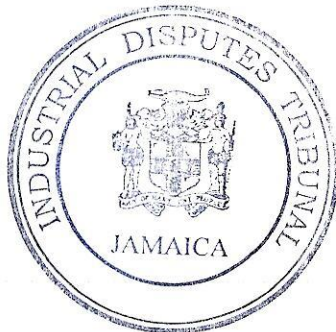


22. Of significance is the fact that the Company stated that it would not be contesting the unjustifiability of Ms. Smith's termination, as it did not observe the provisions of the Code, particularly as it relates to section 22.

ANALYSIS AND FINDINGS

What was the starting date of Ms. Smith's employment with Exclusive Dental Care Limited?

23. It is trite law that the contract of employment, whether written or oral, provides the foundation upon which most statutory employment rights are constructed. It is, therefore, the duty of the employer to provide to the prospective employee the terms and conditions on which an employment offer is made, including the commencement date of the contract. In this case, reference to the date of employment made in the Company's brief as January 2, 2020, was disputed by the aggrieved worker.
24. The Company provided no evidence to support its claim and Counsel for the Company did not seize on the opportunities presented during Dr. Edwards' examination-in-chief nor in cross-examination of Ms. Smith, to challenge the assertion made in the aggrieved worker's brief as to the commencement of employment date being December 23, 2019.
25. In the opinion of the Tribunal, the Company failed to discharge its burden of proof that Ms. Smith's date of employment was January 2, 2020. In fact, Dr. Edwards' email of December 18, 2019 (exhibit 3) may well have put the matter to rest as his invitation to Ms. Smith to have "**a working interview**" on December 20, 2019 (**our emphasis**), provides supporting evidence as to the probable commencement date of Ms. Smith's employment being in fact December 20, 2019.



Does the statute make any express reference to the right to a probationary period, and if not, is a period of probation implied at common law in the absence of a written employment contract or other documentary evidence?

26. Ms. Smith's termination took place on March 9, 2020, which would be less than three months from the date of her employment on December 20, 2019. The standard practice in employment relations would be to provide the employee with a probationary period of three (3) months, which section 3(4) of the Employment (Termination and Redundancy Payments) Act, reference.

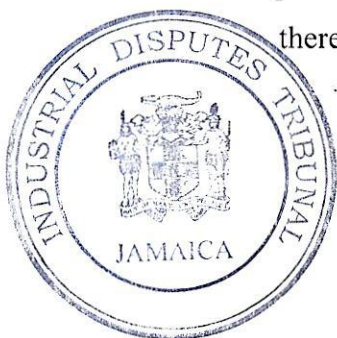
27. The relevant provision of section 3(4) the Act is delineated as follows:

"Where the contract of employment of any employee specifies a period, commencing on the date of commencement of the employment, as a probationary period, either party to the contract may, notwithstanding the provisions of subsections (1) and (2), terminate the contract without notice during the probationary period or, where the probationary period is more than ninety days, during the first ninety days thereof."

28. Section 3(5) of the Act highlights that what is set out in section 3(4), ---

"... does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it... or to treat a contract of employment for a fixed term as terminated at the expiration of the term..."

29. The termination of Ms. Smith's contract was clearly done within the probationary period. On a plain reading of the provision in the statute, the requirement for a period of probationary does not appear to be a necessary condition. Section 3(4) refers to *"where the contract of employment of any employee specifies a period, commencing on the date of commencement of the employment, as a probationary period..."* which would reasonably infer that the contract may not so specify, and therefore, no probationary period can be assumed.



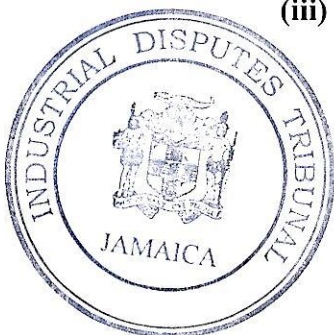
30. Dr. Edwards was not entirely definitive on whether he advised Ms. Smith that there would have been a probationary period, and while admitting that a notation was made for the file, he was unable to locate the correspondence for confirmation. Counsel, in his closing submission, however, noted that the employer was not relying *“on any probationary period that the recruitment and dismissal timeline suggests...”*, and pointed to the fact that *“... the dismissal took place within that period which the statute prescribes for both parties to the employment contract to terminate the contract without any liability to each other.”*
31. Taking all the above into account, it is the considered view of the Tribunal that there is no asserted right to a probationary period in a contract of employment, and we can find no reliance on the common law to compel an unending adherence to one. And, in concluding that there was no probationary period in respect of Ms. Smith’s employment, the matter of her dismissal ought to be subject to the principles of natural justice.

What are the factors to contemplate in determining the quantum of the award for Ms. Smith’s based on the unjustifiability of her dismissal?

32. The Tribunal is obliged to give due consideration to section 12(5)(c) of the LRIDA. The relevant sections states as follows:

“If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award –

- (i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated... order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;**
- (ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;**
- (iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine...”**



33. What, however, the Tribunal ought to take into account in making an award of compensation is set out in Halsbury's Law of England, 4th Edition under four (4) headings, namely: (i) immediate loss of earnings; (ii) the manner of dismissal; (iii) future loss of wages; and (iv) loss of protection in respect of unfair dismissal.
34. Counsel's pleading that the Tribunal ought not to punish the employer for failure to act with procedural fairness, or reward the dismissed worker for the denial of his right to due process, is, as the idiomatic expression goes: 'speaking to the converted.'
35. The discretion of the Tribunal in the determining compensation for unjustifiable dismissal, once the Tribunal so finds, is indeed circumscribed, as Morrison, JA (as he then was) opined, in Branch Development Limited t/a Iberostar v. Industrial Disputes Tribunal and University and Allied Workers Union [2015] JMCA Civ. 48, thus -

".... as with the exercise of any judicial discretion, the IDT's discretion to order such compensation as it "may determine" is not unfettered and must also be subject to the overriding criterion of reasonableness. In a word, the exercise of the discretion must be rational."

36. While the Tribunal will not trespass outside the bounds of the Wednesbury principle of unreasonableness, we are equally mindful of the common law position as expressed by Williams, J in the case of Garnett Francis v. IDT and Private Power Operators, [2012] JMSC Civil 55. The learned judge noted that there exist -

"...a discretion entrusted to the Tribunal where the level of quantum of compensation is concerned; and it is a wide and extensive discretion... reveals no limit or restriction placed on the exercise of the discretion and no formula, scheme or other means of binding or guiding the Tribunal in its determination of what might be a level of compensation or other relief it may arrive at as being appropriate." [page 21]

37. There has been no averment in counsel's pleadings to persuade the Tribunal that Ms. Smith may have provided reasonable grounds for her termination even where the principles of natural justice were abrogated.
38. We are nevertheless heedful of the fact that Exclusive Dental was severely impacted by the Covid-19 pandemic and the earnings of Ms. Smith in the pre-lockdown period



would not have been sustained during the lockdown. In fact, Dr. Edwards did indicate that the business was operating at about thirty-five percent of its capacity during the first three months of the lockdown.

AWARD

39. Having regard to the foregoing the Tribunal, in accordance with section 12(5)(c) of the LRIDA, finds that Ms. Alethia Smith's dismissal was unjustifiable.
40. Accordingly, the Tribunal orders that she be compensated in the sum of One Million Two Hundred Thousand Dollars (\$1,200,000.00), the equivalent to thirty-five percent (35%) of her average earnings, from the date of her termination to the time of her gainful employment.

DATED THIS 19th DAY OF SEPTEMBER 2022.



Mr. Donald Roberts, CD, JP
Chairman

Mrs. Jacqueline Irons, JP
Member

Mr. Clinton Lewis
Member

Witness:

Mr. Mario Ling
Acting Secretary of the Division