

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 32/2019

SETTLEMENT OF DISPUTE

BETWEEN

JERKY'S LIMITED

AND

MS. MELISA DONALDS

AND THE

AWARD

I.D.T DIVISION

MS. SADEERA SHAW	-	CHAIRMAN
MR. RODCLIFFE ROBERTSON	-	MEMBER
MR. KEITH FAGAN	-	MEMBER

NOVEMBER 24, 2020



INDUSTRIAL DISPUTE TRIBUNAL

AWARD

IN RESPECT OF AN INDUSTRIAL DISPUTE

BETWEEN

JERKY'S LIMITED

(THE COMPANY)

AND

MELISA DONALDS

(THE DISMISSED WORKER)

REFERENCE:

By letter dated September 13, 2019 the Honourable Minister of Labour and Social Security, in accordance with Section 11A (1)(a)(i) of the Labour Relations and Industrial Dispute Act (hereinafter called "the Act"), referred to the Industrial Dispute Tribunal for settlement, in accordance with the following Terms of Reference, the industrial dispute described therein:-

The Terms of Reference were as follows:

"To determine and settle the dispute between Jerky's Limited (t/a Jerky's Bar and Grill) on the one hand and Melisa Donalds on the other hand, over the termination of her employment."



DIVISION:

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

Miss Sadeera Shaw	-	Chairman
Mr. Rodcliffe Robertson	-	Member, Section 8(2)(c)(ii)
Mr. Keith Fagan	-	Member, Section 8(2)(c)(iii)

REPRESENTATIVES OF THE PARTIES:

The **Company** was represented by:

Mr. David Wong Ken	-	Attorney-at-Law
Mr. Julie-Ann Bailey	-	Attorney-at-Law

Also in attendance:

Mr. Nathan Thompson	-	Human Resource /Industrial Relations Specialist
Mr. Tor Moe	-	General Manager/Owner

The **Dismissed Worker** was represented by:

Mr. Khurt Fletcher	-	Industrial Relations Consultant
--------------------	---	---------------------------------

In attendance:

Ms. Melisa Donalds	-	Dismissed Worker
--------------------	---	------------------

SUBMISSIONS AND SITTINGS:

Briefs were submitted by both parties who made written and oral submissions during four (4) sittings held between March 12, 2020 and July 8, 2020.



BACKGROUND TO THE DISPUTE:

1. Jerky's Limited, *hereinafter referred to as the Company*, opened its restaurant in Fairview Montego Bay in December 2003. The Company employs approximately fifty (50) persons operating on a shift basis seven (7) days per week. The restaurant attracts the support of locals and tourists providing them a wide range of Jamaican dishes.
2. Melisa Donalds, *hereinafter referred to as the Dismissed Worker*, was employed in the capacity of Restaurant Manager on May 24, 2010. By way of letter dated August 16, 2016, the employment of the Dismissed Worker was terminated.
3. The Dismissed Worker engaged the services of Nigel Jones and Company, Attorneys-at-Law, who contested her termination by way of letter dated August 25, 2016. In response to said letter, the Company made an offer of reinstatement to the Dismissed Worker by way of letter dated September 8, 2016 which was not accepted.
4. The Ministry of Labour and Social Security was asked to intervene. However, despite attempts at conciliation, the dispute was not resolved and hence the matter was referred to the Industrial Disputes Tribunal for determination and settlement.

THE COMPANY'S CASE

5. The Company, through its Attorney Mr. David N. Wong Ken, called its sole witness Mr. Tor Moe, one of the owners and General Manager in support of its case.
6. Mr. Moe stated in examination-in-chief that he became the General Manager in 2003 when the restaurant opened in Fairview, Montego Bay. The Dismissed Worker was hired in 2010 as the Restaurant Manager where she was given a job description. After she had worked for approximately one (1) year she became responsible for all the items listed in the said job description.



7. In July 2016, the Dismissed Worker expressed her dissatisfaction with her salary which resulted in discussions being held between herself and Mr. Moe. Throughout the discussions, Mr. Moe indicated that he sensed her unhappiness even after they had arrived at an agreed increase in salary. The discussions ended August 2016 where it was agreed that the Dismissed Worker would receive approximately 50% salary increase which would be applied retroactively from the 1st of July 2016.
8. Within two weeks of finalizing the Dismissed Worker's salary increase, the Company terminated her services on August 16, 2016. He stated that it wasn't a performance issue or grievance and explained that he was frustrated with a lot of things that she was doing that seemed to indicate that she was not happy. He mentioned the "last straw" and made reference to an incident where the Dismissed Worker covered for an employee's shift and she wanted the Company to pay her the salary due to her and salary for an additional three (3) extra shifts covered at her manager's rate. He expressed his frustration with the incident as the Company had just given her a raise and she had never asked for additional payment if required to cover for someone as it was part of her job as the Restaurant Manager.
9. After the termination, he had discussions with the Dismissed Worker via email on August 22, 2016 with regards to amounts due to her which were agreed and payment made. On August 25, 2016, the Company received a letter from the offices of Nigel Jones & Company contesting the termination. In response to the said letter, the Company sought legal advice from Yolande Small, Attorney-at-Law. Upon review of the matter, Ms. Small advised the Company that the manner in which they had terminated the Dismissed Worker was not carried out properly and that they needed to correct the error. The Company corrected the wrong by subsequently reinstating the Dismissed Worker without condition by letter dated September 8, 2016. The letter stated that the Dismissed Worker was to report to work on September 12, 2016 at 8:30am with full pay and benefits as of August 17, 2016.
10. On September 12, 2016, the Dismissed Worker's Attorney responded declining the offer of reinstatement by stating *"we view the same as nothing but an endeavor by the Company to right its wrongs and thereafter terminate our client in any event...Furthermore, we are of the view that reinstatement is a highly inappropriate means of redress in this case in any*



event, bearing in mind that the relationship between both our clients has broken down irretrievably and our client has already lost the confidence and respect of the subordinates that she once managed at the Company.”.

11. Mr. Moe testified that the Company did not have any intention to simply reinstate the Dismissed Worker so as to terminate her again as that's not how he does business. He wasn't concerned about the working relationship between the Company and the Dismissed Worker as they had disagreements in the past but they would always get over it and move forward. With regards to the loss of respect of the staff, Mr. Moe gave evidence that he did not discuss the termination with the staff but knew that the staff were aware of the termination. He indicated that the Company acted hastily in terminating the Dismissed Worker and reconsidered its decision.
12. During cross-examination, Mr. Moe stated that the Dismissed Worker's employment had a positive impact on the Company. In relation to her job description, the Dismissed Worker did not have total autonomy as approval was required to carry out some of her duties. Leading up to the termination, there were a number of discussions about the issues at the Company which required Mr. Moe's authorization. In particular, the meeting on either the 8th or 9th of August 2016 was highlighted where the Dismissed Worker spoke in length about the issues she was experiencing. These issues included the repair of the exhaust, kitchen plumbing, flooding, pest control and a leaking refrigerator. Mr. Moe stated that the Dismissed Worker had authority to handle issues which were considered day-to-day operating expenses such as pest control. In relation to the other work-related issues, the Dismissed Worker had leeway to tackle those issues but if the cost seemed out of the norm or expensive, they would have a discussion. There was no formal procedure with regards to obtaining authorization for repairs as there were instances where monies were spent for repairs and he was informed afterwards. He also stated that he signs the cheques so the final stop would be with him.
13. He further stated in evidence that not all the work-related issues were continuous complaints. They didn't have formal meetings but would have informal discussions where some of the issues would be brought up. He described some of the issues as simple ongoing



things that needed to be controlled better and were regular restaurant business issues. With regards to the exhaust, he explained that it gives trouble a few times because the Company generates a lot of smoke in its operation. Those issues were resolved.

14. When asked if there was a performance issue with the Dismissed Worker, Mr. Moe reiterated that there were no performance issues or grievances. He also reiterated that the Dismissed Worker's termination was not done properly on August 16, 2016 but it was corrected by re-instating her. There was no official retraction of the termination letter.
15. Mr. Moe, in evidence, stated that although there wasn't an official retraction of the termination letter, he thought that a reinstatement letter would void the termination letter that came before. By not returning to work on September 12, 2016, the Dismissed Worker abandoned her job at the Company.

THE COMPANY'S CONTENTIONS:

- a. The Company on August 16, 2016 recognized that the termination of Melisa Donalds was not carried out properly and hence on September 8, 2016 reinstated Melisa Donalds to her employment ante termination;
- b. Melisa Donalds unreasonably rejected the reinstatement thereby abandoning her job as of September 12, 2016; and
- c. There was no decision that remained to be challenged and no relief to be sought or obtained.

THE DISMISSED WORKER'S CASE:

16. Mr. Khurt Fletcher, the Dismissed Worker's representative, adduced documentary evidence and made oral submissions in support of their contention that the Company's decision to terminate her contract of employment was unfair and unjustifiable.
17. The Dismissed Worker was employed to the Company in May 2010 for approximately five (5) years as Manager where her functions included but were not limited to "oversee and co-ordinate the smooth running of the operations necessary to achieve stated objectives in



sales, costs, employee retention, guest service and satisfaction, food quality, cleanliness and sanitation.”

18. After several communications and discussions about her concerns over the general working conditions, the health hazards it presented the staff as well as herself and her taking up of additional work, she asked management not only for a raise in pay but also that they corrected all those unsafe situations at the restaurant. Such unsafe situations led to the fire on March 8, 2015 which she feared could happen again with more lasting and deadly consequences. An increase in salary was approved after negotiations which was to be applied retroactively from the 1st of July 2016.
19. She complained of several situations and practices in meetings, such as the meeting of August 8, 2016, held with Mr. Tor Moe as well as it being documented that they were hindering her ability to function effectively and efficiently in her role as Manager. She also complained that it would ultimately lead to failures in the business and loss of client confidence both internally and externally. On August 16, 2016, she was presented with a termination letter with immediate effect due to irreconcilable differences.
20. She engaged the services of Nigel Jones & Company to contest her unjustifiable termination. By letter dated August 25, 2016 from Nigel Jones & Company addressed to the Company's Managing Director, Mr. Tor Moe, they sought to address the alleged breaches, namely:
 - a. She was not charged with an offence;
 - b. She was not invited to a disciplinary hearing;
 - c. She was not advised of her right to have a representative of her choice; and
 - d. She was not granted the right of appeal.
21. A meeting was held on September 8, 2016 where a part of the discussion touched on the Company not being opposed to removing the termination letter from the Dismissed Worker's file and allowing her to resign. In the same meeting, the company also stated its intention to correct its egregious decision to terminate by reinstating the Dismissed Worker.



22. The Dismissed Worker was advised by her Counsel not to accept that position and subsequently a letter was sent dated September 12, 2016 informing the Company that the offer of reinstatement was declined as it was not a genuine intent on the Company's part to have her reinstated in said position. Furthermore, her position and authority would have been severely compromised and the description of the circumstances in her termination letter further highlighted the unreasonableness of a return. In effect, the Company sought to only reduce the amount being claimed rather than accept and right a wrong/breach that had been committed on their part.
23. The remedy of reinstatement is one which is only considered by the Industrial Disputes Tribunal in circumstances where the employee has expressed his/her desire to return to work for the former employer.

THE DISMISSED WORKER'S CONTENTIONS:

- a. She was summarily dismissed;
 - b. She was not afforded her rights under Section 22 of the Labour Relations Code;
 - c. The attempt to reinstate her was not genuine as the company sought during negotiations to have her resign in lieu of compensation;
 - d. Her reasons for not returning to work was borne out of her concern for her physical and mental well-being;
 - e. Those concerns that she wrote to senior management re conditions of work had not changed; and
 - f. There was no commitment to address those issues that was the source of Ms. Donalds's concerns.
24. Mr. Fletcher submitted that if the Tribunal should find that Dismissed Worker was unjustifiably dismissed, she should be awarded compensation in the form of salary from the time of separation to the ending of this dispute bearing in mind her inability to find similar managerial employment.



25. He further submitted that, as is the case then and still is, reinstatement would not be in the best interest of all parties concerned.

THE TRIBUNAL'S FINDINGS AND RESPONSE

26. The Tribunal, after careful consideration of the evidence presented, must determine how the employment of the Dismissed Worker with the Company ended. In determining such, the Tribunal must ask itself whether it ended when the Dismissed Worker received the termination letter dated August 16, 2016? or did it end because the Dismissed Worker abandoned her job by failing to return to work in accordance with the reinstatement letter dated September 8, 2016?
27. The evidence presented to the Tribunal confirmed that the Dismissed Worker was employed at the Company in the capacity of Restaurant Manager since May 2010. The evidence also showed that there were several discussions held with regards to work-related issues such as approval of funds to carry out duties and equipment not being up to standard.
28. The Tribunal accepts the evidence that despite such discussions, the Dismissed Worker received a salary increase of approximately 50% after negotiations which ended on August 3, 2016 which would apply retroactively to commence on July 1, 2016. Within two (2) weeks of being approved for the salary increase, the Dismissed Worker was handed a termination letter on August 16, 2016 with immediate effect.
29. There is no evidence that the Company terminated the Dismissed Worker's employment for misconduct or poor performance (disciplinary reasons). As such, Section 22 of the Labour Relations Code does not apply.
30. Upon being written to by Counsel representing the Dismissed Worker at the time, the Company sought legal advice. The Company was informed that they did not carry out the termination properly which was admitted in examination-in-chief by the Company's sole witness, Mr. Moe and re-iterated in cross-examination. In an effort to right its wrong, the Company reinstated Ms. Donalds without condition by letter dated September 8, 2016.



31. In the case of *William Dixon Limited v Patterson* (1943) S (J) 78 at 85, the learned editors of *Words and Phrases Legally Defined* 3rd Ed. Butterworths, London 1990, indicated that, *“The natural meaning of to “reinstate” as applied to a man who has been dismissed, (ex hypothesi without justification), is to replace him in the position from which he was dismissed, and so to restore the status quo ante the dismissal.”* This principle was recognized in *Jamaica Flour Mills Limited v The Industrial Disputes Tribunal* SCCA 7/2002, where at page 31 paragraph (vi) of its judgment, the Court of Appeal, noted that *“reinstatement involves ‘restitution in integrum’ (restoration to one’s original position)”*, which required that the employer shall treat the (unjustifiably dismissed worker) in all respects as if he had not been dismissed.
32. It is important to note that the reinstatement of an employee can occur in two (2) ways. Firstly, there is the equitable remedy at the employer’s instance to right its wrong which was accepted in *Rawlins v Kemp t/a Contralmed* (2010) 31 ILJ 2325 (SCA) at paragraph 26 where Zondo JP stated:

“It is important to affirm the employer’s ‘right to right a wrong’ that he or she has made in these kinds of circumstances. If an employer dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation.”

This position was accepted in the case of *Spur Tree Spices Jamaica Limited v the Minister of Labour and Social Security* [2018] JMSC Civ 103.

33. Secondly, an employee can be reinstated by the Tribunal after careful examination of the evidence presented and in accordance with Section 12 (5) (c) of the Labour Relations and Industrial Disputes Act. The Tribunal accepts that in the instant matter, the reinstatement in issue is that of the former which occurs between the employer and the employee before the intervention of the Ministry of Labour and Social Security.



34. In letter dated September 12, 2016, the Dismissed Worker, through her representative at the time, declined the offer of reinstatement. In *Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security* [2018] JMSC Civ 103, D. Fraser J. said at paragraph 51 that:

“A worker may however not unreasonably refuse an offer of reinstatement and instead claim compensation, where it is clear that the employer is genuinely seeking to right a wrong of unfair dismissal.”

This raises two (2) questions with the first being whether the reinstatement was genuine. The Tribunal accepts that it was genuine taking into consideration that the Dismissed Worker would have been placed in the position she held prior to the termination without condition along with payment of all salaries and benefits between August 17, 2016 to September 9, 2016 and no evidence was put forward to the contrary. Further, it is the position of the Tribunal that the Company was not trying to deny its wrongdoing as it admitted that the termination was not carried out properly and was genuinely seeking to cure it.

35. The second question is whether the reasons for declining the reinstatement was reasonable. The Dismissed Worker was of the view that it was an endeavor by the Company to right its wrong and to terminate her in any event. In addition, the Dismissed Worker had already lost the confidence and respect of the subordinates that she once managed at the Company. The Tribunal rejects the Dismissed Worker's reasons for declining the reinstatement as reasonable as no evidence was presented to prove that the Company had any intention to terminate her services after reinstating her and she was being placed in her original position where she suffered no loss. With regards to the second reason, no evidence was provided that the Dismissed Worker had any issue with the subordinates she managed for the five (5) years she worked at the Company. All the complaints and issues presented to the Tribunal were with regards to safety standard, equipment and the lack of funds to carry out such duties. The Tribunal accepts the evidence of the Company that the issues were resolved for the most part and the others were ongoing issues expected from a restaurant business that required better control and follow ups which fell under her responsibility as Restaurant Manager.



36. The next question for the Tribunal to answer is whether the Dismissed Worker abandoned her job. In the Full Court decision of *The Jamaica Public Service Company v Bancroft Smikle* (1985) 22 JLR 244 it was stated:

“Abandonment is clearly a matter of intention to be gathered or inferred from the conduct of the person intending to abandon his job...”

37. On the day the Dismissed Worker was to return to work, namely September 12, 2016, her Attorney wrote to the Company’s Attorney stating in their response to the reinstatement that *“However, for the removal of any doubt, the writer uses this medium to unequivocally decline on behalf of our client any offer for reinstatement that is being made by your client.”* With that said, she did not return to work to resume her duties as Restaurant Manager. As such, the Tribunal finds that such a response/conduct from the Dismissed Worker was sufficient to infer her intent not to return to work and thereby abandoning her job.

38. Thus, the Tribunal finds that the Company did not terminate the Dismissed Worker’s employment.



AWARD

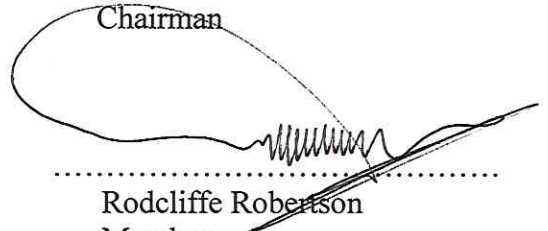
In accordance with Section 12 of the Labour Relations and Industrial Disputes Act, the Tribunal awards that:

- (a) Ms. Melisa Donalds was not terminated from her job;
- (b) Ms. Melisa Donalds abandoned her job, thereby repudiating her contract of employment.

DATED THIS DAY OF NOVEMBER 2020



Sadeera Shaw
Chairman

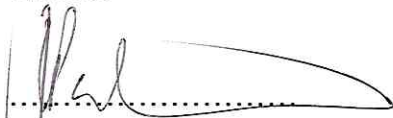


Rodcliffe Robertson
Member



Keith Pagan
Member

Witness



Secretary to the Division

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**JERKY'S BAR AND GRILL
(THE COMPANY)**

AND

**MELISA DONALDS
(THE DISMISSED WORKER)**

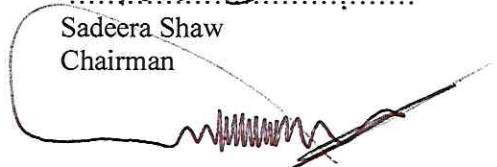
ADDENDUM

Line 5 under the rubric **AWARD** it should read "DATED THIS 24th DAY OF NOVEMBER, 2020." 24th was inadvertently omitted.

DATED THIS 26 DAY OF NOVEMBER, 2020



Sadeera Shaw
Chairman

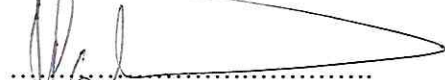


Rodcliffe Robertson
Member



Keith Fagan
Member

Witness:



Juliet Palmer
Secretary to the Division

