INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT 48/2017

SETTLEMENT OF DISPUTE

BETWEEN

MANOR COURT LIMITED

AND

MRS. BARBARA RIGBYE

AWARD



I.D.T. DIVISION

MISS MARSHA SMITH - CHAIRMAN

MR. LESLIE HALL, JP - MEMBER

MR. CLINTON LEWIS - MEMBER

AUGUST 13, 2020

IDT 48/2017

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

MANOR COURT LIMITED
(THE COMPANY)

AND

MRS. BARBARA RIGBYE
(THE AGGRIEVED WORKER)

REFERENCE:

By letter dated August 30, 2017 , the Honourable Minister of Labour and Social Security in accordance with Section 11a (1) (a) (i) of the Labour Relations and Industrial Disputes Act (hereinafter called " the Act"), referred to the Industrial Disputes Tribunal for settlement, in accordance with the following Terms of Reference, the industrial dispute describe therein:-

The Terms of Reference were as follows:

> ***"To determine and settle the dispute between Manor Court Limited on the one hand and Mrs. Barbara Rigby 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 Marsha Smith	-	Chairman
Mr. Leslie Hall J.P.	-	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. Demetri Adams	-	Attorney-at-Law
Mr. Bruce Terrier	-	Board Member

The **Aggrieved Worker** was represented by:

Ms. Angela Robertson	-	Attorney-at-Law
Ms. Kimberley Morris	-	Attorney-at-Law

In attendance:

Mrs. Barbara Rigbye	-	the Aggrieved Worker

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SUBMISSIONS AND SITTINGS:

Briefs were submitted by both parties who made oral submissions during seventeen (17) sittings held between June 25, 2018 and February 4, 2020.

BACKGROUND TO THE DISPUTE:

Manor Court Limited, (*hereinafter called the Company)* is situated at Manor Park Drive, Kingston 8. Mrs. Barbara Rigbye (*hereinafter called the Aggrieved Worker)* was employed to the Company in 2010 as its Manager of its apartment complex. By way of letter dated August 2, 2016, the Aggrieved Worker's employment was terminated. Set out below is the letter of termination.

" *August 2, 2016*

Mrs. Barbara Rigbye
C/o Manor Court Limited
17 Manor Park Drive
Kingston 8

Dear Mrs. Rigbye ,

Re :Retirement

The Directors (of Manor Court Ltd) discussed your employment which commenced on January 6, 2010 at our meeting on July 21, 2016, and again at our meeting on July 27, 2016.

As you know, the retirement age under Jamaican law is 65 years. You are well past retirement age. The decision has been taken to retire you with immediate effect. We will in the near future be putting together a retirement package and will present same to you.

Of course, notwithstanding the presentation of the retirement package, Manor Court Ltd reserves all its rights against you in relation to claims (whether in relation to your employment or otherwise).

We thank you for your years of service and we wish you all the best in the future.

Yours truly,
Malcolm McDonald (Chairman)"

The Aggrieved Worker protested the termination of her services. The matter was referred to the Ministry of Labour and Social Security. No resolution was reached, and the dispute was sent to the Industrial Disputes Tribunal for determination and settlement.

THE COMPANY'S CASE:

The Company's sole witness, Mr. Bruce Terrier, a member of the Board of Directors gave evidence it was his understanding that the Company terminated the employment of the Aggrieved Worker because she had reached the age of retirement. He became a director of the Company in August 2016. He agreed that the Aggrieved Worker's contract of employment made no reference to a retirement age or a retirement policy.

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THE COMPANY'S CONTENTIONS:

1. The law recognizes the validity of termination of employment by reason of retirement. Termination of employment by reason of retirement is not governed by Section 22 of the Labour Relations Code. There is no due process, right to be heard or to face one's accusers that arises in the context of retirement.
2. Once there are fixed criteria between the parties as to the manner in which termination of employment by reason of retirement is to take place, and those criteria are met, the contract of employment comes to an end. The single most important criterion is that of notice, i.e., that the age of retirement has been attained, justifiably end by reason of retirement. The single critical question which arises is whether there was an agreed retirement age between the parties.
3. Further, the question of the extent to which the Retirement Policy was applied prior to 2016 is not conclusive as its applicability. Once an employee is aware of a policy that is promulgated by an employer and governs the terms and conditions of the employment, constructive notice has been given and the employee is bound by it. The extent to which an employer may choose to exercise a discretion regarding a contractual right, does not remove that contractual right.
4. It is respectfully submitted that retirement at the age of sixty five (65) is an implied term in the Former Manager's Contract of Employment on the basis of custom and practice as it was notorious as to be generally known that the Policy as administered existed and that there was also a statutory age of retirement in place. It is also submitted that the Former Manager was unable to provide proof of any Manager being hired after attaining the then retirement age of sixty (60).
5. It is therefore respectfully submitted that on the evidence before the Tribunal, there is no basis in law on which the Tribunal can find that the Retirement Policy of the Company was not incorporated into the Contract of Employment and inapplicable to the Former Manager.
6. Once the Tribunal agrees that a right to terminate by reason of retirement has arisen, the question then arises as to whether there is a particular manner in which retirement should be carried out. There is no criteria or process that is set out in any statute or procedural code that governs how retirement should be effected. The concept of consultation, as

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arises in the context of a potential the redundancy would not be applicable, as the purpose of consultation in the context of a redundancy scenario is to attempt to avoid a redundancy if possible and to potentially explore other ways in which the objective of the redundancy can be achieved.

7. It is respectfully submitted that whether there was a bad relationship or not between the Former Manager and anyone at the Company is irrelevant in the absence of a termination for cause. If there was a good relationship at the time of termination by reason of retirement, that is also irrelevant.
8. There is therefore no legal basis on which the Tribunal could find that the Former Manager was unjustifiably dismissed. The Tribunal should therefore resolve this dispute in favour of the Company.

THE AGGRIEVED WORKER'S CASE:

The Aggrieved Worker gave evidence on her behalf. She was started working at the Company when she was 61 years old. She detailed the terms of her employment contract as Manager and stated that there was no reference to a retirement age in it. At no time during her tenure did anyone from the Company speak to her about the retirement policy. She was aware of a retirement policy at the Company that applied to two weekly paid former staff members being paid as per the policy. She was privy to the employment files of previous Managers and no mention was made to the retirement policy applying to them. Several managers that preceded her were advanced in age. During her initiation she was told that the Company preferred older Managers. There were no discussions between the Company and her regarding retirement when she attained 65 years. The only document she got in relation to her employment was her 2010 employment contract.

Mr. Malcolm McDonald became the Chairman of the Company's Board of Directors in 2014. In the beginning the relationship was respectful, cordial and gracious but it became toxic after Easter 2016, This was when the Aggrieved Worker refused to take responsibility for a poor pruning job of trees on the apartment grounds done under the direction of the Chairman and also for damage to newly laid lobby tiles occasioned by a cleaning protocol instituted by the Chairman. During the last three months of her employment the Chairman's attitude to her

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changed and he showed hostility and contempt. During cross-examination she was grilled about her accounting of tea party expenses and petty cash expenses.

THE AGGRIEVED WORKER'S CONTENTIONS:

1. The Aggrieved Worker was presented with the Termination Letter which was served without notice yet was expected to take immediate effect. Prior to its presentation no indication was given to the Aggrieved Worker that the Company had any intention of discontinuing the employment relationship. Not only was the Aggrieved Worker advised that she was being retired with immediate effect but also that the Company reserved all its rights against her in relation to claims (whether in relation to her employment or otherwise). The inclusion of this statement suggests that there were in fact other underlying issues of a disciplinary nature which gave rise to an apparent need on the part of the Company to terminate the Aggrieved Worker's contract of employment. The credibility of the Termination letter is further eroded by way of its false suggestion that all the Directors were party to the decision to terminate the contract.
2. The Company has failed to lead any evidence in support of its contention that the Policy was applicable to the Aggrieved Worker or that it was incorporated as a contractual term, the Policy clearly refers to hourly and weekly paid staff of which the Aggrieved Worker was neither. If indeed the Company had acted in this case in reliance on the terms and conditions contained in the Policy, this would amount to a unilateral variation of the Aggrieved Worker's contract of employment. At common law, an employer is precluded from unilaterally varying contractual terms without the agreement of the employee, unless such a right is reserved to the employer by way of contract. No such right was reserved to the Company in this case.
3. In the instant case that notwithstanding the reasons given by the Company for the Aggrieved Worker's dismissal, she was in fact dismissed for cause and accordingly the Company had an obligation to adhere to the principles and express requirements as set out in section 22 of the Labour Relations Code. They failed to do so. The evidence before this Tribunal is that the Company, through its Chairman, had taken issue with the manner in which the Aggrieved Worker executed her duties as Manager, most notably post May 2016. This gave rise to several instances in which the Chairman made disparaging

disrespectful and defamatory comments about the Aggrieved Worker. The behavior by the Company's Chairman placed it in breach of its duty of mutual trust and confidence.

4. The Company has failed as required to discharge the burden placed on it to prove that the dismissal was justified. The Company has failed and/or refused to lead any evidence whatsoever in relation to several assertions and accusations made by the Company regarding the Aggrieved Worker. The only direct evidence before this Tribunal in relation to events which occurred at the material time has been provided by the Aggrieved Worker unchallenged.
5. In 2010 the Aggrieved Worker was hired by the Company to manage its Manor Court Apartments. She was engaged on a contract of indefinite duration at the age of 61. In 1999 the Company implemented a Retirement Policy which inter alia prescribed a retirement age for weekly and hourly paid employers of the Company. The Aggrieved Worker was neither a weekly nor hourly paid employee of the Company. There was no reference whatsoever in the Aggrieved Worker's contract of employment to retirement, retirement age, a pension scheme or the Policy. In addition, neither at the commencement of her employment or at any stage during was the Aggrieved Worker made aware by the Company, the Board or any relevant authority that the Policy was applicable to her.
6. The evidence before the Tribunal is that the Company had an established practice of hiring more senior persons as Manager as it was felt that the residents/shareholders, many of who are senior persons themselves, would better relate to a Manager who they could view and consider as a peer. Mrs. Rigbye gave evidence that the Policy was not applied or referred to in the contracts of employment of her five (5) predecessors who were all senior persons at the time of their hire like herself. For the above reasons the Aggrieved Worker maintained that the Manor Court Retirement Policy was not applicable to Mrs. Rigbye.
7. It is however submitted that the true reason for Mrs. Rigbye's dismissal had nothing to do with her age rather it related entirely to the deterioration in the relationship between the Chairman of the Manor Court Board and Mrs. Rigbye. The evidence before the Tribunal, as summarized in these submissions, is that there were two separate but related incidents involving the laying of tiles on the lobby floor and the pruning of trees in the Manor

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Court Gardens which gave rise to a series of events in which the Company through the Chairman breached the duty of mutual trust and confidence owed by employers to its employees.

8. If it is that the Company or its Chairman truly had issue with the performance or conduct of Mrs. Rigbye, they were under an obligation to comply with the provisions set out in section 22 of the Code in taking disciplinary action against her. The Company however failed to do so and rather sought to retire in breach of contract, taking a broad view of the circumstances as the Tribunal must makes it clear that the true cause of dismissal is the seemingly personal issues which the Chairman had with Mrs. Rigbye, this does not constitute just cause for dismissal and further the procedure employed to effect this dismissal was similarly unjust and in breach of the principles of natural justice.
9. The Tribunal is therefore asked to make an Award that the dismissal of Mrs. Rigbye was unjustified and award that she is entitled to compensation in the amount of fifteen (15) Million Jamaica Dollars being salary from date of dismissal date of Award and compensation for the inability to find alternative employment and compensation for three (3) days outstanding salary for the period 1-3 August 2016 which was never paid to her on termination in the amount of Twenty-Six thousand Nine Hundred and Eighty-Two dollars and Forty -Six cents (J$26,982.64).

THE TRIBUNAL'S RESPONSE AND FINDINGS:

1. The Aggrieved Worker was employed when she was 61 years. Her employment was terminated when she was 67 years on the basis that she had reached the Company's retirement age.
2. During the course of her employment the Company never discussed the issue of retirement with the Aggrieved Worker.
3. In the months leading up to the termination of the Aggrieved Worker's employment, the relationship between the Chairman of the Company's Board of Directors and the Aggrieved Worker had deteriorated and he expressed dissatisfaction with her conduct and performance directly to her and other directors of the Company.
4. The Company did not resolve any of the disciplinary and/or performance issues.

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5. The Retirement policy did not apply to the Aggrieved Worker. The policy spoke to weekly paid workers. The Aggrieved Worker was not a weekly paid worker. In addition, there was no evidence that the during the course of her employment, that the retirement policy ever factored in her relationship with her employer. The retirement policy spoke to persons working beyond retirement age if there was a mutual agreement. There was no evidence led that there was an annual review of the contractual arrangements between the Company and the Aggrieved Worker once she attained the age of 65. It was never communicated to her verbally or in writing that the retirement policy applied to her.
6. Notwithstanding that the retirement policy did not apply to the Aggrieved Worker, it was open to the Company to retire the Aggrieved Worker. However, such a course of conduct would have required the Company to communicate and consult with the Aggrieved Worker in keeping with its obligations under Section 19 of the Labour Relations Code, before the implementation of the retirement. In the absence of consultation and communication, the immediate termination of the Aggrieved Worker's employment was arbitrary.
7. The process that leads to a dismissal must be fair. Section 19 of the Labour Relations Code places an obligation on the employer to communicate matters of interest as it relates to the operation and future prospects of the undertaking especially as they affect the worker and also to take the initiative in establishing and regularizing consultative arrangements. There was no evidence led by the Company that there was effective communication and/or consultation with the Aggrieved Worker prior to the retirement. For the reasons stated above, Tribunal finds that the termination of the Aggrieved Worker's contract of employment was in breach of the Labour Relations Code and therefore unjustifiable.

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AWARD:

In accordance with Section 12 of the Labour Relations and Industrial Disputes Act, the Tribunal awards that Mrs. Barbara Rigbye was unjustifiably dismissed and she is to be paid $4,000,000.00.

DATED THIS 13th **DAY OF AUGUST 2020**

Marsha Smith
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Miss Marsha Smith
Chairman

.....
Mr. Leslie Hall, J.P.
Member

.....
Mr. Clinton Lewis
Member

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Witness

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Gary Lediard
Secretary to the Division