

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT 41/2013

SETTLEMENT OF DISPUTE

BETWEEN

MONTEGO BAY INVESTMENT LIMITED

AND

KEVIN FARQUHARSON

AND THE

AWARD

I.D.T. DIVISION

MR. NORMAN WRIGHT Q.C. - CHAIRMAN

MR. RION HALL, J.P. - MEMBER

MR. TREVOR MCNISH - MEMBER

JANUARY 28, 2015

INDUSTRIAL DISPUTES TRIBUNAL
AWARD
IN RESPECT OF
AN INDUSTRIAL DISPUTE
BETWEEN
MONTEGO BAY INVESTMENT LIMITED
(THE COMPANY)
AND
KEVIN FARQUHARSON
(THE AGGRIEVED)

REFERENCE:

By letter dated October 4, 2013, 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 described therein:-

The Terms of Reference were as follows:

“To determine and settle the dispute between Montego Bay Investment Limited on the one hand, and Mr. Kevin Farquharson on the other hand over the termination of his 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:

Mr. Norman Wright, Q.C. - Chairman
Mr. Rion Hall, J.P. - Member, Section 8(2) (c) (ii)
Mr. D. Trevor McNish - Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF THE PARTIES:

The **Company** was represented by:

Mr. Christopher Honeywell - Attorney-at-Law & Company Secretary

The **Aggrieved Worker** was represented by:

Mr. Gavin Goffe - Attorney-at-Law
Mr. Jermaine Case - Attorney-at-Law

In attendance Mr. Kevin Farquharson - The aggrieved

SUBMISSIONS AND SITTINGS:

Briefs were submitted by both parties who made oral submissions during eight (8) sittings held between February 18, 2014 and November 28, 2014.

BACKGROUND TO THE DISPUTE:

Mr. Kevin Farquharson while employed at Sunset Jamaica Grande, Ocho Rios, under the General Manager, Mr. Ian Kerr, was seconded in August 2008, to work for Montego Bay Hospitality owned by Kerr. Montego Bay Hospitality had an arrangement with Montego Bay Investment Limited, to refurbish its hotel, the Gloucestershire, after which a lease agreement would be established with Montego Bay Hospitality to operate the hotel. Mr. Kevin Farquharson was to be the Project Manager, to oversee the refurbishing.

Sometime in 2011, Montego Bay Investment Company Limited took the decision to sever the relationship with Kerr/Montego Bay Hospitality and Mr. Farquharson was requested to continue to oversee the refurbishing and to prepare the hotel for opening on the understanding that he would be appointed General Manager. There was no formal contract of employment and no evidence of payment of any salary to Mr. Farquharson, up to the termination of his employment.

In February of 2012, Farquharson was summarily dismissed on the grounds of non-performance, with the terms of compensation to be worked out subsequently between himself and the Owner/Chairman of Montego Bay Investment Limited, Mr. John Sinclair. Discussions with Mr. Sinclair took place but nothing formal was documented and Mr. Sinclair died shortly thereafter, in February 2012.

Claims made thereafter on Montego Bay Investment Limited, for salaries due and other sundry expenditures claimed by Mr. Farquharson, were never acknowledged or paid. This led to the dispute being referred to the Ministry of Labour and Social Security; but the Company never attended any of the scheduled conciliatory meetings. On the application of Mr. Farquharson's representative, the Minister of Labour and Social Security referred the matter to the Industrial Disputes Tribunal under letter of October 4, 2013, to determine and settle the dispute.

CASE FOR THE COMPANY:

Montego Bay Investment Limited, hereinafter called "the Company" is a Company incorporated under the Companies Act of Jamaica and the owner of a hotel known as the Gloucestershire Hotel, situated in Montego Bay, St. James, Jamaica.

The Company provided evidence in support of its decision to dismiss Mr. Kevin Farquharson, through its legal representative and Company Secretary, Mr. Christopher Honeywell.

The Company, in presenting its case, informed the Tribunal that during the course of Mr. Farquharson's relationship with the Company, there was no formal contract and admitted that most arrangements were verbal and informal. It contended that Mr. Farquharson for all intents

and purposes, went to work at the Gloucestershire as an agent of a company known as Montego Bay Hospitality Limited, owned or controlled by Ian Kerr.

Mr. Ian Kerr owed money to Mr. John Sinclair, Owner/Chairman of Montego Bay Investment Limited, and an arrangement to repay this sum was made between them, for Mr. Kerr to refurbish the Gloucestershire Hotel. It was also agreed, that at the completion of the refurbishing, the Company would enter into a lease agreement with Montego Bay Hospitality Limited, to lease the hotel and to operate it while paying a monthly rental. Mr. Kevin Farquharson was employed by Mr. Kerr/Montego Bay Hospitality Limited, to oversee the refurbishment exercise. This was substantiated by the provision of a letter dated August 16, 2011, from Montego Bay Hospitality Services Limited, signed by Mr. Kevin Farquharson as Director/General Manager, to Mr. John Sinclair, of Montego Bay Investment Limited. He was being paid by the said employers.

The cost of the refurbishing exercise exceeded the amount initially agreed and it took substantial input from the personal resources of the owner and three subsequent bank loans, to complete the project. Furthermore, it also took more than double the time anticipated and agreed upon at the inception and in the latter part of 2011, the Company took the decision to end the relationship with Mr. Kerr/Montego Bay Hospitality Limited and not to follow through with the lease arrangements. At that time, discussions were being held between Mr. Farquharson and Mr. Sinclair; however, nothing formal was established regarding terms and compensation. In fact, no formal contract of employment was ever entered into, between Mr. Sinclair and Mr. Farquharson.

Notwithstanding the above, Mr. Farquharson continued to oversee the refurbishment whilst preparing the hotel for the start up of operations. This dual role continued for a few months. During the transition period, the Directors of the Company became increasingly dissatisfied with the performance of Mr. Farquharson, particularly in connection with the following:

- (1) He continued to maintain a close personal and professional relationship with Mr. Ian Kerr whereby he allowed Mr. Kerr to make decisions affecting the hotel, which at times were in conflict with the instructions of the Directors.

- (2) He was in a position of conflict of interest, e.g. he was required to recover items from Mr. Kerr/Sunset Limited, which were due and owned by Mr. Sinclair/ the Company, but he displayed a lack of resolve in doing so. This resulted in only partial recovery and ultimate financial loss to the Company.
- (3) Repeated and serious allegations against the integrity of Mr. Farquharson, whereby complaints were made by workers and artisans that they had not been paid for work done despite Mr. Farquharson being provided with the sums to do so.
- (4) Mr. Farquharson caused the Company to enter into financial arrangements with Companies such as Celect Hotel & Restaurant Supplies Limited, which were inimical to the Company's interest and resulted in financial loss, and
- (5) He further, made several management decisions which were unsatisfactory to the Directors and which resulted in losses to the Company.

Arising from the above, the Directors lost confidence in the ability of Mr. Kevin Farquharson to operate in its best interest as General Manager of the hotel and took the decision in October 2011, to employ the services of a Consultant Manager, for the start-up and early management of the hotel. At this point, the relationship with Mr. Farquharson started to wane and soon after, discussions were held leading to a separation. As there was no formal full-term employment contract or salary arrangement in place, he was not paid. He was terminated during what was at best, a trial period, or more accurately, a watch and see period.

Mr. Farquharson was summarily dismissed on February 15, 2012, at a meeting convened with the owner/Chairman and others including a representative of the new Consultant Manager entity and at no time was the matter of a redundancy payment discussed or contemplated. Regarding payment for separation, the Company is not aware of any promise to give a property in Ocho Rios in settlement. The Company owns no property other than the Gloucestershire, furniture, fixtures, equipment and goodwill.

The Company received information after the dismissal that some equipment, particularly electronic equipment, had gone missing. At the same time, it was aware that there were discussions between Sinclair and Farquharson about the payment of salary for the brief period of

employment, and the decision was taken to have reconciliation on the missing equipment before any payment was made. The matter of the equipment was brought up under correspondence with Mr. Farquharson, to which he responded by providing certain information and suggesting a meeting of the parties. No meeting was held and the matter remains unresolved and no payment was made to Mr. Farquharson.

Mr. Farquharson's termination from the Company was not wrongful, as it had just cause to terminate the arrangement with him and as such he is not entitled to any relief from the Tribunal. The Company contended that whatever relationship Mr. Farquharson held in the interim, with the Company, was terminated for due cause.

In closing, however, the Company submitted that the start date of employment of Mr. Farquharson by the Company is important and contended that it be set at no time before October 2011. It maintained that Mr. Farquharson was employed to Sunset Jamaica Grande and took instructions from Ian Kerr and continued to do so until he was asked to take over at the Montego Bay Investment Limited/Gloucestershire, in October 2011.

The Company contended that the salary claim is unfounded, in that there is nothing in writing or claimed to have been advised by anyone connected to the hotel. Mr Kerr is not an Officer of the Company and the kind of evidence put before the Industrial Disputes Tribunal by the aggrieved party should not be relied on. It suggested that a salary of approximately \$250,000 - \$350,000 per month was the range assumed for a General Manager in the hotel industry. Consequently, it suggested that the Tribunal should use reasonableness in considering a salary payment to Mr. Farquharson and that any payment should be at the lower end at \$250,000 per month and beginning as of October, 2011. Redundancy should not be considered as a reasonable ground, because the qualification period was not achieved.

The justification for the offer that a consideration for payment be made, was based on the fact that Mr. Farquharson was employed for two months after his dismissal and under Cross-Examination, indicated that he was not interested in returning to the hotel industry and as such, reinstatement would be inappropriate. The Company therefore submitted that the Tribunal

consider compensation of between seven (7) months to One (1) year at \$250,000 per month as reasonable, with a preference for the lower end, of seven months at \$250,000.

CASE FOR THE AGGRIEVED WORKER:

Mr. Kevin Farquharson, currently a part owner of a small business, was employed to Sunset Jamaica Grande, Ocho Rios, St. Ann as General Manager, Operations, with a salary of US\$2800 per month and rental allowance of J\$45,000 per month. He was paid up to July 2011, by Sunset Jamaica Grande. Whilst being employed at Sunset Jamaica Grande, he reported to Mr. Ian Kerr the General Manager, who, during November 2008, reassigned him to the Gloucestershire Hotel, in Montego Bay, where he reported to both Mr. Kerr and Mr. John Sinclair, the Owner. His reassignment was discussed between Mr. Kerr and himself. As at July 2011, he was no longer with Sunset Jamaica Grande and took instructions only from Mr. John Sinclair and Mr. Christopher Honeywell. At the Gloucester, he was assigned as a Project Manager to oversee construction activities, maintaining the construction budget, signing and verifying financial documents and overseeing the reopening of the hotel.

During the period of the refurbishing of the hotel, Mr. Farquharson was requested to personally settle some of the expenses, due to the financial constraints which the hotel experienced from time to time. He has never been reimbursed for these sums which formed a part of an invoice dated February 17, 2012, addressed to the Company's principal, Mr. John Sinclair. At all material times, Mr. Farquharson was employed by the Montego Bay Investment Company Limited, the entity in charge of operating the hotel.

While performing his work, he believed he performed creditably and without any warning, verbal or otherwise, he was called to a meeting on February 15, 2011, and advised of his termination. He was asked to hand over to a Mr. Chris Jarrett and then leave the property and was duly escorted to his car. The hotel would be operating under new management and he would be made redundant in accordance with the directives of the hotel's creditors. He was also asked to meet with Mr. Sinclair the next day, February 16, 2011, to discuss his separation package and to put on paper what was owed to him. He prepared the invoice and gave it to Mr. Sinclair, copied to Mr. Christopher Honeywell, which was handed to him on leaving Mr. Sinclair's office.

The only response he received was in a letter dated March 12, 2011, enquiring about missing equipment, to which he responded on March 19, 2011.

He also gave evidence that at the meeting with Mr. Sinclair, he offered to transfer a lot of land in Ocho Rios to him in settlement, in lieu of the funds owed, since the Company was short of finances at that time. He accepted the offer but to date, he has received no such compensation. Mr. Sinclair died sometime in February, 2012, after the meeting.

Mr. Farquharson believes that he had a good relationship with Mr. Honeywell (Company Secretary), up to the time of the opening of the hotel but things started to get sour after he enquired about employment contracts for the hotel workers. He advised that in 2008, when he joined the Gloucester, he was given a letter outlining his duties with the intention that he would take over the management of the hotel after the completion of the refurbishment. He however could not locate his copy of the letter. Montego Bay Hospitality Limited was an umbrella company, which, as far as he was aware, was owned jointly by Messers. Mr. Kerr and Mr. Sinclair and with which he was associated during the refurbishing exercise. By this association, and as advised by Mr. Isaac Gordon, he had no job title but was to oversee operations in the transition from one hotel to the next, see to the refurbishing and then would become General Manager.

Under cross examination, Mr. Farquharson testified that while being a Director of Montego Bay Hospitality, he was not aware of the formal arrangements between Ian Kerr and John Sinclair, regarding the ownership of the entity. His letter of employment never specified any salary but that he would continue to be paid at his then current salary, with new arrangements to be made at the start-up of the hotel. He did not believe there was any conflict of interest with his working relationship between Messers. Kerr, Sinclair and himself.

Mr Farquharson's representative believes the matter is a simple one with a few unique features. The parties agreed that Farquharson was employed to the Company, albeit a difference in dates, whether from August, 2008 or October 2011, which should have little bearing on the Tribunal's decision. He was employed to the Company from 2008, even though he was also employed elsewhere and then exclusively in 2011.

The Aggrieved Worker is contending:

1. that he was unjustifiably dismissed without regard for the Rules of Natural Justice;
2. that there were flagrant breaches of the Labour Relations Code;
3. that there was also agreement that there was no defined probationary period therefore he was due all rights of any other worker;
4. that there is no disagreement that he was not paid any salary but that he had made claims for such. At the time of his dismissal, his salary was \$326,250, supported by his payslip from Sunset Jamaica Grande and the memorandum to Mr. John Sinclair. His evidence was that both Mr. Kerr and Sinclair told him that his salary would remain until the opening of the Gloucestershire.

Mr. Honeywell (Counsel for the Company), acknowledged awareness of the Labour Relations Code but claimed that it was not relevant in this case. He admitted that based on Farquharson's experience, he should be in receipt of approximately \$250,000 - \$350,000 per month.

He was asked to hold discussions with Mr. Sinclair, after his dismissal, which he did, but Mr. Sinclair has died and only Mr. Farquharson can now speak to the arrangements made. There was no evidence of any objection to his claims as set out in the invoice submitted.

Furthermore, Mr. Farquharson was summarily dismissed in February, 2012, and under cross-examination, Mr Honeywell admitted that Mr. Farquharson was only hearing for the first time, of the charges for his dismissal and as such was not in a position to address the various issues.

He is looking to the Tribunal for the appropriate redress as:

- i. The manner in which the dismissal was carried out was unfair and without regard for his rights as a worker or his stellar service to the employer.
- ii. The Company has failed to make the agreed severance payments owed to him, and
- iii. The Company is penalizing Mr. Farquharson for misconduct without observing the

principles of fairness and natural justice and is in breach of the Employment (Termination and Redundancy Payments) Act.

Mr. Farquharson had sought employment since his dismissal but was unsuccessful, hence his current self-employment status, which provides earnings of much less than he earned previously. He was dismissed with disrespect to him and despite the harsh situation he would wish to be reinstated as it would serve some vindication. Accordingly, he is requesting reinstatement without loss of pay, at the rate of \$326,250 per month, from the date of dismissal to the date of the Award and if there is no position at the hotel, that he be compensated from the date of the commencement of his employment.

THE TRIBUNAL'S FINDINGS:

Mr. Kevin Farquharson was employed at the Sunset Jamaica Grande Hotel in 2008 and held the position as General Manager Operations. He reported to a Mr. Ian Kerr who was the General Manager.

During 2008, and resulting from discussions between Mr. Kerr and Mr. Farquharson, the latter was reassigned to a company named Montego Bay Investment Limited to oversee the refurbishing of its hotel known as the Gloucestershire and according to Farquharson, to assume the General Manager's position, when the hotel reopened.

Further evidence provided, indicated that a company known as Montego Bay Hospitality Limited, under the control of Mr. Ian Kerr, was the entity with the arrangement to carry out the refurbishing and Mr Farquharson was designated Director and General Manager to oversee the work. During this period from 2008 to July 2011, he continued to receive his salary from Jamaica Grande Hotel. At that time there was an agreement between Montego Bay Hospitality Limited and Montego Bay Investment Limited, for the former to obtain a lease to operate the Gloucester Hotel after the refurbishment.

On October 7, 2011, the Directors of Montego Bay Investment Limited, took the decision to cancel the lease arrangements with Mr. Kerr/Montego Bay Hospitality Limited, but continued

with the services of Mr. Farquharson, who by now, was in the preparation for reopening the hotel for the 2011 winter season.

On February 15, 2012 Mr. Farquharson was called to a meeting, where he was advised that he was being summarily dismissed, that he should hand over the operations to the new Management Consultant, leave the premises and meet with Mr. John Sinclair, the Chairman/Owner of Montego Bay Investment Limited, the following day, to work out his separation compensation and any claims for funds owed to him.

An invoice in an amount of \$3,218,000, covering outstanding salary of \$1,305,000 for the period October 2011 – February 2012 at the rate of \$326,250 per month and other amounts claimed as reimbursement for funds spent on behalf of the hotel, totalling \$1,913,000, was tendered as evidence.

Overall, we find that from the beginning of the relationships, all the arrangements were informal, with much left to word of mouth. It is however clear that Mr. Farquharson worked for the Company and had expectation to be made General Manager of the Gloucester Hotel, at the end of the refurbishment exercise. The uncontested evidence is that he never received any salary from Montego Bay Investment Limited and is therefore due such payments, at least for the period October 2011, until his dismissal in February 2012.

We find the Company's claim for non-performance as the basis for Mr. Farquharson's dismissal, questionable and unfounded, and was admittedly, only being brought to the attention of the aggrieved worker, in the Company's presentation before this Tribunal.

We further find that his dismissal was unjustified and done in disregard of the provisions of the Labour Relations Code.

While Mr. Farquharson's brief and his representative's submissions requested reinstatement, in cross examination, he changed this position and advised that he no longer desired reinstatement at this time and as such he was seeking compensatory redress.

THE AWARD:

Based on the evidence provided which support our findings, we conclude that Mr. Farquharson's dismissal was unjustified. Given that Mr. Farquharson specifically indicated a preference not to return to the Hotel Industry at this time, the Industrial Disputes Tribunal will not order reinstatement. We therefore, giving particular attention to and taking into account; the circumstances of the dismissal, including the fact that Mr. Farquharson became self employed two (2) months after his dismissal, award in accordance with Section 12 (5) (c)(ii) of the Labour Relations and Industrial Disputes Act, that Mr. Farquharson be paid compensation in an amount of \$4,000, 000.00, in settlement of the dispute.

DATED THIS 28th DAY OF JANUARY 2015.



Mr. Norman Wright Q.C.
Chairman.

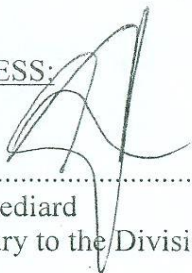


Mr. Rion B. Hall J.P.
Member.



Mr D. Trevor McNish
Member.

WITNESS:



Gary Lediard
Secretary to the Division.