

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: 12/2021

SETTLEMENT OF DISPUTE

BETWEEN

ROYAL DeCAMERON HOTEL

AND

KEVIN FACEY

AND THE

AWARD



I.D.T. DIVISION

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

JANUARY 17, 2023

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF AN INDUSTRIAL DISPUTE

BETWEEN

**ROYAL DeCAMERON HOTEL
(THE COMPANY)**

AND

**KEVIN FACEY
(THE DISMISSED WORKER)**



REFERENCE:

By letter dated September 2, 2021 the Honourable Minister of Labour and Social Security pursuant to Section 11A (1) (a) (i) of the Labour Relations and Industrial Dispute 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 Royal DeCameron Hotel on the one hand and Kevin Facey 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:

Ms. 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. Jahmar Clarke	-	Attorney-at- Law
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Also in attendance:

Mr. Victor Mojica	-	Regional Manager
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The **Dismissed Worker** was represented by:

Mr. Alexander Nicholson	-	Industrial Relations Consultant
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In attendance:

Mr. Kevin Facey	-	Dismissed Worker
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SUBMISSIONS AND SITTINGS

Briefs were submitted by both parties who made written and oral submissions during five (5) sittings from November 4, 2021, and January 13, 2022.





BACKGROUND TO THE DISPUTE:

1. Royal DeCameron Hotel, *hereinafter referred to as "the Company"*, is described as a world leading all-inclusive hotel with resort chains in Haiti, Jamaica, Mexico, Panama, Costa Rica, El Salvador, Colombia, Ecuador and Peru. In Jamaica, the hotels are located in Runaway Bay, St Ann and Montego Bay, St James.
2. Mr Kevin Facey, *hereinafter referred to as "the Dismissed Worker"*, was employed to the Company in February 2005 as a Bartender in the Montego Bay location and later promoted to Bar Supervisor. The Dismissed Worker was later promoted to the position of Cost Controller. By letter dated January 31, 2019, the employment of the Dismissed Worker was terminated.
3. The Dismissed Worker engaged the services of Mr. Alexander Nicholson, Industrial Relations Consultant, who contested his termination and sought the assistance and intervention of the Ministry of Labour and Social Security. No resolution was reached, and the dispute was referred to the Industrial Disputes Tribunal for determination and settlement.

THE COMPANY'S CASE

4. The Company made oral submissions and called its sole witness, Mr. Victor Manuel Mojica, Regional Manager, in support of its case. Mr. Mojica testified that he has been working with the Company for twenty (20) years and has been based in Jamaica for four (4) years. He gave evidence that he is the Regional Manager for the three (3) properties in Jamaica where he manages approximately six hundred and fifty (650) employees. He testified that his duties consist of being in charge of the overall operation of the hotels in Jamaica, to ensure guest satisfaction, to ensure that the Company's operation runs smoothly and the protocols are followed. It is his evidence that he knew the Dismissed Worker as he (the Dismissed Worker) was the Cost Controller when he (Mr. Mojica) started working in Jamaica.
5. Mr. Mojica testified that the Dismissed Worker was dismissed for cause on January 31, 2019. He further testified that the Dismissed Worker was dismissed for tardiness as per the Company's handbook. He gave evidence that the Dismissed Worker had a history of tardiness and he was warned several times. Mr. Mojica specified that the Dismissed Worker was late in

the months of September, October and November of 2018. He stated that the Dismissed Worker was given a written warning on December 11, 2018. He further stated that the Company showed leniency towards the Dismissed Worker when they issued a written warning as the Company's handbook stated that the disciplinary action should have been a suspension.

6. It is his evidence that there was a logbook at the service entrance gate of the hotel which showed employees' time in and time out from work. He stated that based on an attendance audit conducted, the Company issued a letter dated January 17, 2019 which relieved the Dismissed Worker of his duties pending a disciplinary hearing. He testified that the Dismissed Worker was charged with the offence habitual tardiness without notification. He also testified that habitual tardiness is a serious misconduct. As per the Company's handbook, Mr. Mojica stated that the disciplinary action for 1st offence under serious misconduct was a suspension. Mr. Mojica stressed that it was not the Dismissed Worker's 1st offence and disagreed that the Company didn't follow its own policy for tardiness. He reiterated that the Dismissed Worker received a warning letter for tardiness in December 2018. He later testified that what the Dismissed Worker received on December 11, 2018 was a memo due to absenteeism and not habitual tardiness.
7. Mr. Mojica testified that the Dismissed Worker's tardiness affected the Company's revenue. He spoke of the Dismissed Worker's responsibility in preparing reports required for each department of the hotel to align itself with the budget. Without such reports, a department can go over the budget. He further testified that the Company is an all-inclusive hotel where cost is vital. The said report must be sent within an appropriate time or the Company will lose money.
8. The disciplinary hearing was scheduled on January 24, 2019. Mr. Mojica gave evidence that the said disciplinary hearing was conducted and the Dismissed Worker, accompanied by his representative, Mr. Alexander Nicholson, participated in it. Mr. Mojica testified that the persons present at the hearing were:



Ms. Lavern Smith	-	HR Manager
Mr. Hugh Rowe	-	Accountant
Mr. Jamie Medina	-	Control Management Director
Mr. Gavin Goffe	-	Company Lawyer (on the phone)
Mr. Kevin Facey	-	Dismissed Worker
Mr. Alexander Nicholson	-	Dismissed Worker's Representative



He testified that the Dismissed Worker's behaviour was considered gross and his (the Dismissed Worker's) employment was terminated as a result.

9. He testified that after the hearing the Company received a letter from Mr. Nicholson requesting an appeal. Mr. Mojica stated that Mr. Nicholson, in his letter, referred to the Dismissed Worker's illness and that the Dismissed Worker was receiving treatment. Mr. Mojica stated that Ms. Smith and Mr. Rowe from the Company were aware of the Dismissed Worker's illness. He testified that the issue was not the illness but that the Dismissed Worker didn't inform the Company that he was going to be late by calling one of his supervisors.
10. Mr. Mojica gave evidence that he responded to the request for an appeal where he suggested February 4, 2019 for the appeal hearing to be held. It didn't materialize on that date and was held on February 7, 2019. He testified that he didn't have any involvement in the matter prior to the appeal. At the appeal hearing, it is Mr. Mojica's evidence that the persons present were: himself, Mr. Goffe, the Dismissed Worker and his representative, Mr. Nicholson. He stated that at the appeal hearing, the Dismissed Worker was given an opportunity to state his case. Mr. Mojica testified that he does not recall whether Mr. Nicholson had put forward the argument that the Dismissed Worker was charged with one offence and terminated for another offence. He stated that Mr. Nicholson was of the view that the Company's decision to terminate was too harsh.
11. He gave evidence that the outcome of the appeal hearing was that he upheld the decision of the Company after deliberation with Mr. Jaime Medina from corporate management. In response to Mr. Nicholson's view, Mr. Mojica stated that the Company followed the right procedure.

He further stated that he was confident that the decision was reasonable. He testified that the Dismissed Worker committed numerous breaches. It is his evidence that the decision of the appeal hearing was communicated by letter dated February 13, 2019.



THE COMPANY'S CONTENTIONS

The Company contends that:

- a. Due process was observed and it followed the Labour Relations Code when it arrived at its decision to terminate the Dismissed Worker;
- b. The Dismissed Worker was guilty of the offence and the egregious nature of his misconduct caused it to escalate to gross misconduct; and
- c. The decision to terminate the Dismissed Worker was proportionate to the offence for which he was charged.
- d. The Company asked that the Tribunal finds that the Dismissed Worker's dismissal was justified in that he was given due process, the charges against him were substantiated and the punishment matched the charge.

THE DISMISSED WORKER'S CASE:

12. The Dismissed Worker, Mr. Kevin Anthony Facey, was the sole witness in his case and testified that he was employed to the Company for fourteen (14) years. He stated that he was first employed as a Bartender and later promoted to a Bar Supervisor then to the position of Cost Controller. He gave evidence that he was the Cost Controller at the Montego Bay and Cornwall Beach locations up to the time of his dismissal. He explained that he was required to traverse between both locations and his duties consisted of ensuring that the reports were followed, conduct inventory as well as daily spot checks for each department. It is his evidence that he was required to work between the hours of 8am- 5pm. He agreed that his job was an important one which was demanding. He also agreed that if his job of preparing reports concerning each department's monthly budget was not done it could affect the Company.

13. It is Mr. Facey's evidence that on November 29, 2018 he wasn't feeling well whilst he was at work. He testified that he visited the Company's nurse who gave him a sick pass. It was the

Company's policy that a sick pass had to be sign by either the Resident Manager or the General Manager. He gave evidence that when he visited the Resident Manager, Ms. Monica Gonzales, with the sick pass she called him to a meeting to discuss his absences. He testified that the reason for the meeting was that the Company wanted an explanation for his absences.

14. It is his evidence that as a result of the meeting held on November 29, 2018, he received a letter dated December 11, 2018. The letter requested further clarification than what was previously provided by him in the form of a medical report to be submitted to the Human Resources Department before December 21, 2018. He explained that he submitted sick leave certificates on September 20 and 21, 2018 as well as November 10, 11, 15, 16 and 17, 2018. He further explained that on November 27 and 28, 2018, he was not feeling well and proceeded to the hospital. He did not get an opportunity to be examined so he went home. He returned to work on November 29, 2018. He later gave evidence that sick leave certificates were not submitted for September 22, October 10, 11, 13 and November 19, 2018 but he called in sick.

Mr. Facey gave evidence that after leaving the meeting with Monica Gonzales, he went to his doctor who referred him to the hospital where he was admitted for one week and a few days. He stated that he informed the HR Manager, Ms. Smith and his immediate Supervisor Mr. [redacted] of his hospitalization. He also stated that while he was in the hospital he received a call from Ms. Gonzales to wish him a quick recovery.

16. He testified that he received a letter on January 17, 2019 where he was charged with tardiness. He gave evidence that he was diagnosed with diabetes since 2015 but it was in December 2018 when his diabetes began to affect him due to the hectic operation of the hotel at that time of year. He further testified that although December was usually a busy month for the Company, in December 2018 there was a change of system so they were learning the new system while performing their duties so it took a toll on his body. He explained that one day in December 2018 he wasn't feeling well and went to the hospital. He gave evidence that the personnel at the hospital told him that he had to wait on his next clinic date so he proceeded to his private doctor. He stated that his doctor gave him a different set of medications after explaining how he was feeling. He further stated that the new medication made him feel drowsy and he

experienced blurred vision. It is his evidence that when he took the medication, he had to wait for the side effects to pass in order for him to drive to and from work which resulted in him being late for work.

17. It is also his evidence that he didn't inform his employer that he was diabetic prior to the submission of the medical report and he didn't inform them about the side effects he experienced. He continued by stating that whenever he was late he called his supervisor, Mr. Rowe, to inform him after he had arrived at work and not before. He testified that the reason he didn't call Mr. Rowe before arriving at work knowing he was late was because he wasn't sure he was going to make it to work. He later gave evidence that he was not aware that arriving more than ten (10) minutes late was a breach of the Company's policy. Further, he disagreed that the thirteen instances of tardiness as stated in letter dated January 17, 2019 was more than one offence.
18. Mr. Facey stated that he attended a disciplinary hearing on January 24, 2019. He further stated that he was never warned in the past for the said offence. He testified that he was asked if he could visit his doctor to ascertain whether the medication could be reduced or changed which he agreed. Mr. Facey gave evidence that on January 31, 2019 he was called to a meeting by Ms. Smith where he was informed that he was terminated and was issued a termination letter.
19. Upon receiving the termination letter, Mr. Facey stated that he sought representation. He further stated that his representative contacted Mr. Mojica to request an appeal of the Company's decision. He confirmed that an appeal hearing was held and the decision of the appeal was that the Company's decision was upheld. He testified that he sought employment after being terminated but was not successful in gaining employment.





THE DISMISSED WORKER'S CONTENTIONS

The Dismissed Worker contends that:

- a. He was terminated in breach of the Company's own handbook, procedural fairness and the principles of natural justice;
- b. He was terminated for an offence that he was not charged for in that he was charged for 'Habitual Tardiness without Notification' and later unjustifiably dismissed for 'Gross Misconduct';
- c. His action did not amount to gross misconduct and as such the punitive action administered was grossly disproportionate to the charge which made the process unfair;
- d. He asked that the Tribunal finds that he was unjustifiably terminated and that he be awarded compensation for his years of service as well as gratuity from the time of separation to the ending of the matter.

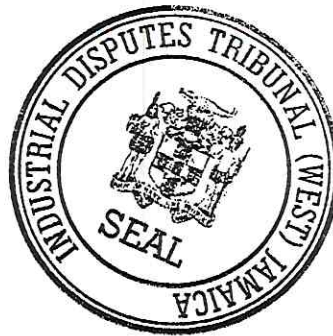
THE TRIBUNAL'S RESPONSE AND FINDINGS

20. The Tribunal, after careful examination of the evidence adduced by both parties to the dispute, must determine whether the Company was justified in the termination of Mr. Facey's employment.
21. The Tribunal accepts that the Dismissed Worker was employed in the position of Cost Controller and that his duties were important to the efficient operation of the Company. On December 11, 2018, the Dismissed Worker received a letter from the Company concerning his habitual absences for the months September to November 2018. The Tribunal does not accept the Company's evidence that the said letter was a warning letter for tardiness. The Tribunal finds that the document was a memo which spoke of what transpired in the meeting with the Dismissed Worker on November 29, 2018 where a medical report was requested for further clarification as to the reason for his absences.
22. On January 17, 2019, the Dismissed Worker was invited to a disciplinary hearing scheduled for January 24, 2019 to answer to the charge 'Habitual Tardiness without Notification'. Based on the evidence provided, the Tribunal finds that the Dismissed Worker was guilty of the offence he was charged with. It was argued by the Dismissed Worker that he was charged for one offence (habitual tardiness without notification) and terminated for another offence (gross

misconduct) based on the termination letter dated January 31, 2019. The said termination letter (exhibit 3) is set out below:

"January 31, 2019

*Mr. Kevin Facey
C/o Hescov Investment Limited
2 Gloucester Ave,
Montego Bay*



Dear Mr. Facey:

Re: Habitual Tardiness Without Notification

You were invited to participate in a meeting held on Thursday, January 24th, 2019, where you were allowed to explain the consistent tardiness for the month of January 2019.

Present in the meeting along with yourself were Ms. Lavern Smith (HR Manager), Mr. Hugh Rowe (Accountant), Mr. Jaime Medina (Control Management Director), Mr. Gavin Goffe (Company Lawyer) via phone and your representative Mr. Nicholson.

On January 16th, 2019 an audit of your attendance was conducted, the below reveals the findings:

- *January 3rd -10:40 Am (1hr 40 mins late)*
- *January 4th -9:40 Am (40 mins late)*
- *January 5th -9:35 Am (35 mins late)*
- *January 7th -10:55 Am (1 hr 55 mins late)*
- *January 8th - 9:20 Am (20 mins late)*
- *January 9th -8:16 Am (16 mins late)*
- *January 10th -8:25 Am (25 mins late)*
- *January 11th -8:28 Am (28 mins late)*
- *January 12th - 10:09 Am (1hr 9 mins late)*
- *January 15th - 8:45 Am (45 mins late)*
- *January 16th - 8:52 Am (52 mins late)*

During the meeting, it was explained to you that your lateness has negatively impacted your performance; and that it has been a challenge for the corporate accounting team to obtain pertinent information from you. It was also mentioned that you have failed to communicate your lateness with the heads of department, of which is a requirement as per company policies.

Mr. Nicholson (representative on your behalf), expressed that he did voice to you that your lateness was caused for concern and further went on to say that he was not disputing the fact as the records are there as proof. However, he said you mentioned to him that it was a result of you having a personal issues.

Mr. Goffe (Company representative) sought to obtain more clarity as “personal issue” is vague and can be construed anyway. After which, you disclosed that due to a medical condition (diabetic) you were unable to report to work on-time as you have to take medication and wait until its effect before you can leave home. Notwithstanding, Ms. Smith mentioned that both herself and Mr. Rowe are aware of your medical condition and that does not compensate for you mishandling the situation. There is always the option of a phone call to advise or inform in person, upon arrival. Additionally, you have been warned in the past for unauthorized absence.

By your admittance, you acknowledged being consistently late and apologized. You also mentioned that you did not think of informing anyone.

Based on the above infraction the company has sanctioned your behavior as “GROSS MISCONDUCT” and a breach of operational guidelines. This is a serious breach of company policies and procedures. Please be reminded that as an employee of Decameron Hotel and Resorts you are required to adhere to all company’s policies.

In light of the above-mentioned findings, the Company has taken the decision to terminate your service as a Cost Controller, effective today, January 31, 2019. All outstanding payments will be made in the usual manner on February 25th, 2019.

Payments will include:

- Two (2) weeks’ notice pay; and
- Accrued vacation-Eleven (11) weeks’

You are hereby advised to return to the company, any property including ID, uniforms and all other that was given to you during your time with the company to the HR Department. You have the right to appeal against this decision in writing to the Regional Manager within five (5) days of receiving this disciplinary decision.

We regret the circumstances under which your tenure with the Company has ended.

Sincerely,
Decameron All Inclusive Hotels & Resorts

Lavern Smith
Human Resources Manager

Employee Name

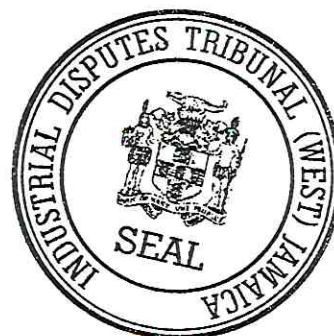
Date”



The Tribunal does not accept the Dismissed Worker's argument that he was charged for habitual tardiness without notification and dismissed for another offence, namely gross misconduct. The Tribunal finds that gross misconduct as mentioned in the termination letter was referring to a category of offences as set out in the Company's Human Resources Policy Employee Handbook and not a specific offence. It was also argued by the Company that the Dismissed Worker's behaviour in being habitually late was sanctioned as gross misconduct taking into consideration that the Dismissed Worker was warned about absenteeism one month prior and the importance of his duties at the Company. As such, the Company elevated the offence of tardiness to gross misconduct which warranted the disciplinary action of termination.

23. The Tribunal notes that the offence that the Dismissed Worker was charged with was categorized under the heading "Serious Misconduct" as evident in the Company's Human Resources Policy Employee Handbook which warranted suspension as the disciplinary action for the 1st offence. The Tribunal finds it important to refer to page 19 of the said Handbook (exhibit 4):

	1 st OFFENCE	2 nd OFFENCE	3 rd OFFENCE	4 th OFFENCE
MISCONDUCT	Verbal Warning	1st Written Warning	Final Warning	Suspension /Dismissal
SERIOUS MISCONDUCT	Suspension 14 days	Dismissal		
GROSS MISCONDUCT	Dismissal			



NEGLIGENCE	Written Warning	Final Warning	Suspension 14 days	Dismissal
GROSS NEGLIGENCE	Dismissal			

The Tribunal does not accept the Company’s evidence that it wasn’t the Dismissed Worker’s first offence for habitual tardiness as no evidence was provided to substantiate this.

24. Notwithstanding that the Tribunal is of the view that the Dismissed Worker was guilty for tardiness, the Tribunal does not accept that the Company can derogate from the established policy as set out in the Company’s Human Resources Policy Employee Handbook on its own by moving an offence from one category to another category of offences without notifying its employees beforehand. Thus, the Tribunal finds that the Company’s decision to terminate Mr. Facey was made in contravention of its own disciplinary policy.

25. In considering the matter of procedural fairness during the disciplinary process, the Tribunal is tasked to look into the Company’s dealings with the Dismissed Worker. The Dismissed Worker’s employment was terminated for disciplinary reasons and therefore section 22 of the Labour Relations Code is applicable.

26. Section 22 of the Labour Relations Code states that:

Disciplinary Procedure

- 1) *Disciplinary Procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should:*
 - a) *specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;*
 - b) *indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;*



- c) *give the worker the opportunity to state his case and the right to be accompanied by his representatives;*
- d) *provide for a right of appeal, wherever practicable, to a level of management not previously involved;*
- e) *be simple and rapid in operation.*

The Tribunal notes that Mr. Mojica chaired the appeal in which he handed down his decision in letter dated February 13, 2019. In the said letter, it stated:

"I am now writing to inform you that after much deliberation with corporate management, the decision to terminate your employment still applies."

Mr. Mojica gave evidence that the person from corporate management whom he deliberated the appeal with was Mr. Jaime Medina who was previously involved in the matter.

27. The Tribunal is of the view that the rationale for the appeal to be heard by a level of management not previously involved is to ensure that the decision of the said appeal is not tainted by any previous knowledge of the matter. The Tribunal finds that although the appeal was heard by Mr. Mojica, who was not previously involved, it is difficult to rule out bias as the decision of the appeal was made with consultation with someone previously involved. As such, the Tribunal finds that the Company failed to observe the strict principles of natural justice.

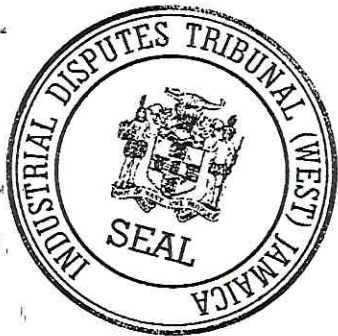
28. Thus, the Tribunal finds that the Mr. Facey was unjustifiably terminated. The Tribunal also finds that Mr. Facey contributed to his termination and that he made an effort to mitigate his loss. The Tribunal makes no award for gratuity as no evidence was provided to substantiate this claim.



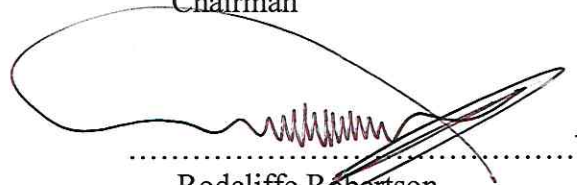
AWARD

In accordance with Section 12(5)(c)(ii) of the Labour Relations and Industrial Disputes Act, the Tribunal awards that Mr. Kevin Facey be compensated in the amount of Two Million Eight Hundred and Fifty-Two Thousand Dollars (\$2,852,000.00) for his unjustifiable dismissal.

DATED THIS 17th, DAY OF JANUARY 2023



Sadeera Shaw
Chairman




Rodcliffe Robertson
Member



Keith Fagan
Member

Witness



Jody-Ann Lindo (Ms.)
Secretary to the Division