

# INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT 17/2015

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## SETTLEMENT OF DISPUTE

BETWEEN

TERRA NOVA ALL SUITE HOTEL

AND

MS. FELICIA SHEPHERD

AND THE

***AWARD***

I.D.T. DIVISION

MR. DONOVAN HUNTER	–	CHAIRMAN
MR. TREVOR GRAHAM, J.P.	–	MEMBER
MR. CLINTON LEWIS	–	MEMBER

FEBRUARY 18, 2016

**IDT 17/2015**

**INDUSTRIAL DISPUTES TRIBUNAL**

**AWARD**

**IN RESPECT OF**

**AN INDUSTRIAL DISPUTE**

**BETWEEN**

**TERRA NOVA ALL SUITE HOTEL  
(THE COMPANY)**

**AND**

**MS. FELICIA SHEPHERD  
(THE DISMISSED WORKER)**

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**REFERENCE:**

By letter dated July 3, 2015 the Honourable Minister of Labour and Social Security in accordance with Section 11 (1) 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 Terra Nova All Suite on the one hand and Ms. Felicia Shepherd 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:

- Mr. Donovan Hunter - Chairman
- Mr. Trevor Graham, 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:

- Ms. Debbie Ann Gordon - Attorney-at-Law
- Ms. Stephanie Sterling - Attorney-at-Law

The **dismissed worker**, Ms. Felicia Shepherd was represented by:

- Ms. Denise Hinson - Attorney-at-Law
- Ms. Roxaine Smith - Attorney-at-Law

In attendance:

- Ms. Felicia Shepherd - The Dismissed Worker

**SUBMISSIONS AND SITTINGS:**

Briefs were submitted by both parties who made oral submissions during eight (8) sittings held between August 26, 2015 and November 16, 2015.

**BACKGROUND TO THE DISPUTE:**

Ms. Felicia Shepherd was employed on contract as a Server in the Regency Bar and Lounge at the Terra Nova All Suite Hotel. The contract was for the period of August 22, 2014 to February 21, 2015. The agreed work days as per contract were Fridays, Saturdays and Sundays, with remuneration of \$3000.00 per 8 hour shift and \$3,700.00 per 10 hour shift. All statutory payments were to be deducted.

It was alleged that on Thursday, November 6, 2014 Ms. Shepherd was advised by a telephone call that her contract of employment was terminated.

**THE HOTEL'S CASE:**

On Tuesday, October 28, 2014, Miss Shepherd sent an email to Ms. Michelle Hussey's Personal Assistant seeking explanation as to why she was not assigned to continue working on Wednesdays and Thursdays (extra days which was not a part of her contract).

On the same day, October 28, 2014 a response from the Personal Assistant explained that her contract stipulated that Fridays, Saturdays and Sundays were her assigned week days and "additional shifts of Wednesdays and Thursdays were given only if deemed necessary and convenient for both parties."

Ms. Shepherd was advised that her email had been copied to the relevant Regency and Lounge personnel for their response. On the same day Mr. Thomas Masterson, Regency Bar and Lounge Manager responded to Ms. Shepherd stating that there was a reduction in business, hence the staff level for Servers had been reduced between Mondays and Thursdays.

In response, Ms. Shepherd opined that she had been informed that the real reason why she was not assigned to work the extra days, Wednesdays and Thursdays was because she would not be allowed to work outside her stipulated contractual hours. Importantly also she said she had been the sole Server working those shift (Wednesdays and Thursdays) and as far as she was aware she was not working on another server's assigned shift.

The General Manager sent an email to Ms. Shepherd and copied same to the Regency Bar and Lounge Manager and Supervisors. The email thanked Ms. Shepherd for highlighting her concerns and seemed to assume that Ms. Shepherd considered herself one of their senior server in the Bar and as such should be given more work days than others. With that in mind, the General Manager requested a four (4) week evaluation for a review of Ms. Shepherd's performance.

The General Manager sought the opinion of the Food and Beverage Manager who said she had advised Ms. Shepherd that the email to the General Manager came off very rude and that she should have requested a meeting with the Human Resources Manager to discuss the matter.

A statement was sought from the Regency Bar and Lounge Manager on Ms. Shepherd's performance and he said that he found Ms. Shepherd to be argumentative with regards to tasks asked of her and would not carry out duties assigned to her. A statement was also sought from her immediate supervisor, Mr. Valentine Witter who said that Ms. Shepherd did not accept instructions as to her duties and would back answer him. This happened on more than one occasion. She always wanted to have her own way. After reviewing Ms. Shepherd's work performance with the Regency Bar and Lounge Manager and her immediate supervisor it was decided that the management had no confidence in Ms. Shepherd's ability to carry out her function, hence, a decision was made to terminate her contract effective November 6, 2014.

**CASE OF THE AGGRIEVED:**

Ms. Felecia Shepherd's termination on November 6, 2014 was unjustified and un-lawful.

During her tenure with the hotel, Ms. Shepherd was never the subject of any disciplinary proceedings. She had never been accused of any misconduct and she was never informed as to why she was dismissed. Ms. Shepherd's representative contends that Ms. Shepherd was an employee/worker at Terra Nova All Suite Hotel rather than that of a contractor.

The employer acted contrary to the Act, its regulation, the Labour Relations Code, Natural Justice and its own policies and proceedings in dismissing Ms. Shepherd on November 6, 2014 and in the manner in which it was carried out. Ms. Shepherd contrary to the email on October 29, 2014 did not receive an evaluation at anytime during the course of her employment and particularly between October 29, 2014 (the date of Ms. Hussey's email) and that of her termination on November 6, 2014.

Further, the dismissal of November 6, 2014 did not conform to the statutory requirement that it must be in writing and it was in circumstances that suggested that it was retaliatory in its motive.

Ms. Shepherd was dismissed via telephone call, callously, a day before she was scheduled to return to the work for an approved shift and one which remained unfulfilled as a result of the termination, although she was willing and available to work.

The dismissal of Ms. Shepherd on November 6, 2014 and in the manner in which it was done served to deprive her of the security of employment which she had reasonably expected and the right to a humane manner of dismissal which the Act and Code afforded her.

### **TRIBUNAL'S RESPONSE:**

The Hotel's employment arrangement carries two categories of staff. One set referred to as employees and the other as contract workers.

Contract workers are divided into two categories, those that are employed and needed, depending on the circumstances and those contract workers who are employed on a fixed term.

The Tribunal will have to determine whether those contract workers employed on a fix term are really workers as defined under the Labour Relations and Industrial Disputes Act and as a result are employees employed by an employer and have a contract of service.

Section 2 of the Labour Relations and Industrial Disputes Act defines the worker:

***“worker means an individual who has entered into or work or normally works ( or where the employment has ceased worked) under a contract, however, described in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work , nature of work, management of discipline and such other conditions as are similar to those which apply to an employee”.***

The evidence shows that Ms. Shepherd operated under the following criteria as required under the definition of a worker:

- She worked under the supervision of a supervisor
- She took directions from her supervisors and was assigned fix days of work

- She was subjected to disciplinary measures
- Statutory deduction was taken from her salary
- She was supplied with uniform

When considering the above, the Tribunal has concluded that Ms. Shepherd was subjected to the control of the Hotel as it applies to an employee working under a contract of service that created an employee/employer relationship and not a contractor relationship as the Hotel contends.

### **THE DISMISSAL:**

The evidence clearly indicates that the email trail between Ms. Shepherd and the Management and the subsequent unusual request from Ms. Hussey, the General Manager for an evaluation of Ms. Shepherd's performance in the middle of her six (6) months contract with the Hotel was the basis of her dismissal as it was relayed to her over the telephone.

The Tribunal is at a loss as to why Ms. Shepherd should have been terminated only because she sought an explanation about her work schedule for good reasons. In order to elaborate on this point from an industrial relations perspective, the Tribunal will refer to the Labour Relations Code.

Section 3 (4) of the Labour Relations and Industrial Dispute Act read as follows:-

*“A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or a Board in determining that question.”*

Section 22 of the Labour Relations Code, Disciplinary Procedure:-

*(1) Disciplinary Procedures should be agreed on 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.”*

**What went wrong:**

Ms. Michelle Hussey requested an unusual mid-term evaluation of Ms. Shepherd but never discussed the results with her. A genuine evaluation ought to have been discussed with the employee concerned.

To have dismissed Ms. Shepherd via the telephone was disrespectful and unprofessional. At this point, the Tribunal find it appropriate to refer to the following:

- **Smith C.J. quote, R. v Ministry of Labour and Employment, the Industrial Disputes Tribunal, Devon Barrett et al exparte West Indies Yeast Co. Ltd from the learned author ‘*The Impact of Unfair Dismissal*’**

*“A person’s job can no longer be treated purely as a contractual right which the employer can terminate by giving the appropriate contractual notice.”*

- **Clause (2) of the Labour Relations Code States:**

*“Recognition is given to the fact that management in the exercise of its function needs to use its resources (material and human) efficiently. Recognition is also given to the fact that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction.”*

In the case of Ms. Shepherd no notice was required as stipulated in the contract. This does not mean her job should be treated as an article of trade.

Refer to Disciplinary Procedure:

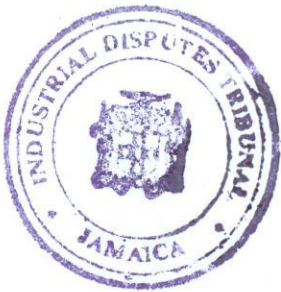
- a) Ms. Shepherd was never accused of any infractions in writing that would require her to be given a hearing (see (1) (b) above).
- b) Ms. Shepherd was never given an opportunity to state her case and was not given the right to have a representative if she so desired (see (1) (c) above).
- c) Ms. Shepherd was denied a fair and proper hearing prior to her termination hence the principle of Natural justice was compromised.

Based on the facts gleaned the Tribunal finds that Ms. Felicia Shepherd was unjustifiably dismissed.

**AWARD:**

In keeping with the provisions of Section 12 (5)(c)(ii) of the Labour Relations and Industrial Disputes Act the Tribunal awards that Ms. Felicia Shepherd be compensated with One Hundred and Thirty Thousand Dollars (\$130,000.00).

DATED THIS 18<sup>TH</sup> DAY OF FEBRUARY 2016.



*Donovan Hunter*

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Donovan Hunter  
Chairman

*Trevor Graham*

.....  
Trevor Graham  
Member

*Clinton Lewis*

.....  
Clinton Lewis  
Member

Witness:

*Royette Creary*  
.....  
Royette Creary  
Secretary to the Division