

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 6/2018

SETTLEMENT OF DISPUTE

BETWEEN

**BRANCH DEVELOPMENTS LIMITED
(T/A IBEROSTAR ROSE HALL BEACH AND SPA RESORT)**

AND

MR. MARLON MCLEOD

AWARD

I.D.T. DIVISION

MR. ERROL MILLER, JP.	-	CHAIRMAN
MR. LESLIE HALL, JP.	-	MEMBER
MR. CLINTON LEWIS	-	MEMBER

SEPTEMBER 28, 2022

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**BRANCH DEVELOPMENTS LIMITED
(T/A IBEROSTAR ROSEHALL BEACH & SPA RESORT)
(THE COMPANY)**

AND

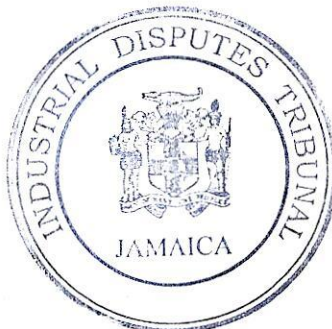
**MR. MARLON MCLEOD
(AGGRIEVED WORKER)**

REFERENCE:

By letter dated April 12, 2018, 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, the following Terms of Reference, the industrial dispute described therein:-

The Terms of Reference were as follows:

"To determine and settle the dispute between Branch Developments Limited (t/a Iberostar Rose Hall Beach and Spa Resort) on the one hand and Mr. Marlon McLeod on the other hand over the suspension 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. Errol Miller, JP	-	Chairman
Mr. Leslie Hall, JP	-	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. Gavin Goffe	-	Attorney-at-Law
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The **Aggrieved Worker** was represented by:

Mr. Lorenzo Eccleston	-	Attorney-at-Law
Mr. Howard Duncan	-	Industrial Relations Consultant

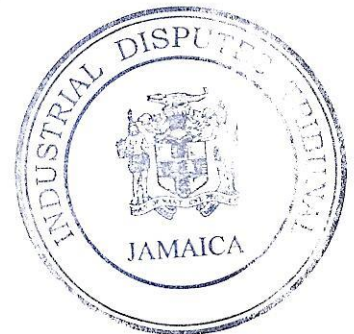
In attendance:

Mr. Marlon McLeod	-	Aggrieved Worker
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SUBMISSIONS AND SITTINGS:

The original division selected to hear the dispute comprised:

Ms. Marsha Smith	-	Chairman
Mr. Leslie Hall, JP	-	Member, Section 8(2) (c) (ii)
Mr. Clinton Lewis	-	Member, Section 8(2) (c) (iii)



The Company took the matter to Court and the Tribunal stayed the proceedings pending the outcome of the Court ruling. Consequent on the resignation of Miss Marsha Smith, subsequent to the 6th Sitting, Mr. Errol Miller JP, was selected to chair the division.

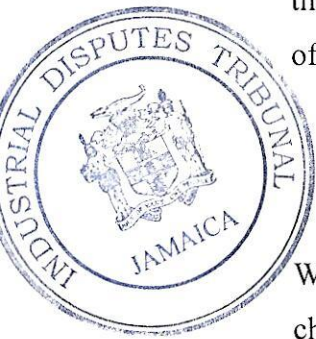
In light of the change to the original division of the Tribunal, the matter begun *de novo* in accordance with Section 8(4) of the Act after the Court had ruled that the Industrial Disputes Tribunal had the jurisdiction to make a final determination.

Briefs were submitted by both parties and oral and written presentations made during eight (8) sittings held from February 7, 2022 to July 26, 2022.

BACKGROUND:

Mr. Marlon McLeod was employed as a Concierge to Branch Developments Limited (trading as Iberostar Rose Hall and Spa Resort) in March 2011 in the Public Relations Department. He was suspended without pay by the Hotel effective February 2, 2016. Mr. McLeod challenged his suspension and the matter was referred to the Ministry of Labour and Social Security where attempts were made to resolve the matter through the conciliation process. That process having been unsuccessful, the dispute was referred to the Industrial Disputes Tribunal for determination and settlement with the following Terms of Reference:

"To determine and settle the dispute between Branch Developments Limited (t/a Iberostar Rose Hall Beach and Spa Resort) on the one hand and Mr. Marlon McLeod on the other hand over the suspension of his employment".



While the dispute was before the Tribunal, the Hotel filed an action in the Supreme Court challenging the Tribunal's jurisdiction to hear the matter. The Judgment of the Supreme Court that the Industrial Disputes Tribunal had the jurisdiction to make a final determination, was also challenged and the Court of Appeal substantially upheld the decision. As a consequence, the Tribunal reconvened its hearing into the matter.

Given that the initial Division of the Tribunal appointed to hear the matter was no longer in place, a new Division was appointed and the matter begun de novo. At the First Sitting, Counsel for the Hotel submitted that the Court held that the Tribunal does not have the powers to award compensation, neither can it reinstate and that it can only lift the suspension. However, he advised that the Hotel had already done so. Consequently, he submitted that there is no longer a dispute over suspension and he therefore questioned what the Tribunal would award in the circumstances. He said that **"we would not be submitting a brief, we would not be calling witnesses and we would not be making submissions, save and except with respect to any discussion concerning the powers of the Tribunal if it becomes necessary to do so"**. He later modified the Company's position

that **“I would be participating, I am just not calling evidence and I have no intention at this time to cross examine any witnesses”**. He subsequently submitted a brief to the Tribunal. He further requested to cross examine the witness after the examination - in - chief, using the questions posed by the Panel as the basis.

As a consequence of the position taken by the Company, Mr. Marlon McLeod, the Aggrieved Worker, was invited to commence his case.

CASE OF THE AGGRIEVED:

1. Mr. McLeod provided a Witness Statement and gave viva voce evidence in which he said that by letter dated October 27, 2015, he was permanently employed to the Hotel and promoted effective December 14, 2015 as Assistant Public Relations Manager in the Public Relations (PR) Department. He said that the PR Department has general responsibility for ensuring that all guests have the best experience while on vacation at the Hotel. He said further that his duties included making dinner reservations for guests, follow up on guests' complaints for speedy resolutions and submitting accident reports involving guests to the Hotel's insurance company. He averred that he was never disciplined or reprimanded whether orally or in writing by his employer and that he last took his annual vacation during the period November 29 – December 14, 2015.
2. Mr. McLeod said that on February 2, 2016, he received a letter from the Company which states:

**“Further to reports received by the HR Department, regarding an alleged incident of fraud on the Iberostar Property, please note the following:
The decision is now made to suspend your services pending further investigations.**

Kindly submit your name tag and identification card to the HR Department or to your Department Head immediately until the Company contacts you in accordance with the situation.

You will be contacted and advised as to the next step in the process within fourteen (14) days of the date of this letter”.



3. He said that he received a second letter dated February 17, 2016, the contents of which were as follows:

“Further to information submitted to the Human Resources Department regarding an alleged breach of Company policy, this serves to advise that your services will be further suspended pending further investigations. You will be advised as to the next step in the process.

If you have not yet done so, kindly submit your name pin and identification card to your Department Manager or to the HR Department.

Please be guided accordingly”.

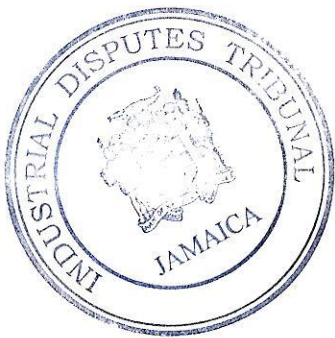
4. Mr. McLeod testified that he did not participate in any investigation and that no further information was conveyed to him as to the ‘next steps’. He said he was confused about the allegation and the investigation as he was not aware that he had breached any of the Hotel’s policies. The entire period of suspension, he said, was without pay. He said that he called the Hotel on several occasions to speak with the Director, Human Resources, Dr. Anthony Ferguson, but was unable to reach him and that on April 21, 2016, he sent the following email to Dr. Ferguson:

“As you are fully aware, I’ve been on suspension pending further investigation from the 2nd of February 2016 with no Expired Date visible on letter that I received by you to indicate the ending of my suspension period.

I strongly believe that by now there must be some form of conclusion/Closure on the investigation conducted by whomever as it’s now been well over two months and I’m anxious to know what the outcome is as I’m confident that I will be eliminated from any wrong doings and return to my job.

I’m simply querying the status of this investigation”.

5. Mr. McLeod said that he received no response to his email. As a consequence, he sought legal advice. His Attorney wrote several communications to the Hotel; all the contents of which he was fully aware. He tendered into evidence a number of correspondences which were exchanged between the Hotel’s Attorneys, Myers, Fletcher and Gordon and his Attorneys, Temple Law, during the period June to December 2016. Among those exhibits was a letter from the Hotel dated June 20, 2016 to Temple Law, an extract of which said:

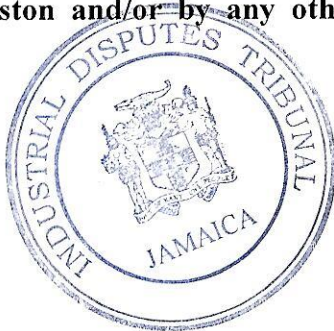


“Mr. McLeod was among a group of persons suspected of financial impropriety and was duly sent on administrative leave on February 2, 2016. Unfortunately, investigations into financial matters tend to be longer than investigations for other disciplinary issues. Our client has instructed us that they will communicate with Mr. McLeod shortly regarding the status of his employment”.

6. In another letter from the Hotel dated November 17, 2016, Mr. McLeod, through his Attorney was informed that **“Our instructions are that your client has refused to cooperate with the investigation. In particular, we are told that several attempts have been made by the police to interview him but he has steadfastly resisted”.**
7. Mr. McLeod denied the allegation and his Attorney requested contact information for the investigating officer who wished to interview his client. By letter dated December 7, 2016, the Hotel advised of the name of the officer who was attached to the Barrett Town Police Station. He said that he and his Attorney visited the Police Station on January 23, 2017 and met with the officer, Det. Cons. Denzil Kerr, who advised them that

“I was implicated in statements given by a guest of the hotel and by the accused person presently before the criminal court for the parish of St. James, Mr. Kashwayne Eccleston, in respect to the commission of a fraud on the Hotel’s property”.

8. Mr. McLeod testified that the **“Police Officer requested that I give a statement to him relative to my alleged involvement in the said allegations in order for there to be a determination as to whether charges should be brought against me or not”.**
9. He further testified that the Police had disclosed to them, the name of Mr. Kashwayne Eccleston’s Attorney and contact was made with her. He said that following discussions between his Attorney and the Attorney for Mr. Kashwayne Eccleston, **“it became clear that the said criminal prosecution involving Mr. Kashwayne Eccleston had concluded as far back as in or about the first half of 2016 and that no statement was given by Mr. Kashwayne Eccleston and/or by any other witnesses implicating me in any criminal activity”.**



10. In an email dated January 26, 2017, Mr. McLeod said that his Attorney wrote to Det. Kerr informing him that

“My client maintains his innocence despite you having informed us, *inter alia*, that Mr. Kash-Wayne Eccleston, who is now before the court, implicated my client in statements he provided to the police. I have not seen these statements, but in any event, I await the outcome of Mr. Eccleston’s trial which you have indicated is adjourned and soon to be completed”.

11. A further email from his Attorney dated January 31, 2017 was sent to Det. Kerr advising him that **“following new information received by my office, my client has decided not to provide a statement as promised”.**

12. He also gave evidence that his Attorney, by letters dated March 12, 2017 and May 30, 2017, wrote to the Commissioner of Police seeking to establish, among other things, whether there was an ongoing investigation involving his client. The Commissioner, in his response dated June 9, 2017 said:

“Please be informed that there is no ongoing investigation involving your client Mr. Marlon McLeod.

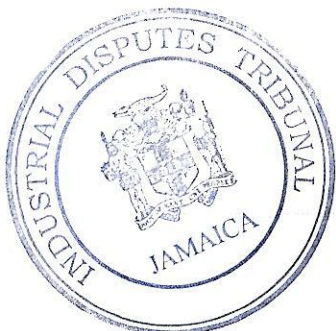
Regarding Mr. Kashwayne Eccleston, he was charged for both offences, Obtaining Money by Means of False Pretence and Attempted Larceny. However, those charges were dismissed”.

13. Mr. McLeod said that he was advised by his Attorney of a letter from the Hotel’s Attorneys dated January 8, 2020, an extract which says:

“We are instructed by our client to inform you that it will lift Marlon McLeod’s suspension effective Monday January 13, 2020. This is without prejudice to our client’s right to appeal against aspects of the decision of Pusey, J.

Mr. McLeod is expected to report to work at 10:00am and meet with the Human Resources Director, Dr. Anthony Ferguson. If your client does not attend the meeting at 10:00am on January 13, his absence will be treated as unauthorized and he may face disciplinary action and/or he may be deemed to have abandoned his job.

Consequent on the lifting of the suspension and with the application of the maximum remedy principle (see *Spur Tree Spices Limited v The Minister of*



Labour and Social Security [2018} JMSC Civ 103) it is our intention to advise the Industrial Disputes Tribunal that the dispute has ceased to exist”.

14. Mr. McLeod testified that he reported to the Hotel on January 13, 2020 and met with Dr. Ferguson who gave him a letter and asked him to sign as receiving it. He said he read the letter, the contents of which indicated that his position at the Hotel was being made redundant. He said he sought permission to consult his Attorney and having explained to his Attorney what had happened, Mr. McLeod said that he refused to accept the letter. In response to questions from the Panel, Mr. McLeod said:

“He gave me the letter, correct, when he gave me the letter I looked at it going through it and then I said to him – I asked him if it is possible for me to reach out (to) my Attorney, he said, yes. My Attorney was not on the property I had to call him by phone, so I stepped out of his office and contacted my Attorney, during that time he had to leave, that’s Mr. Anthony Ferguson, but he left instructions with his Secretary, his Secretary came to me and ask me what is it that I will be doing, I told her that I will not be accepting this letter that Mr. Ferguson gave to me, so that information would have been communicated to Mr. Ferguson through his Secretary. I also signed to say that I refused the letter and I also gave a written letter from me to (the) Company to say that I refuse this letter and that I am ready to return to work something to that sort, it was not much it was basically to say that I refused the letter, that’s really what happened”.

15. During re-examination, Mr. McLeod was asked the following questions:

Q When you were through talking to the Attorney how did you know that he left?

A She told me, his Secretary told me, she told me that he was no longer available, he was in a meeting.

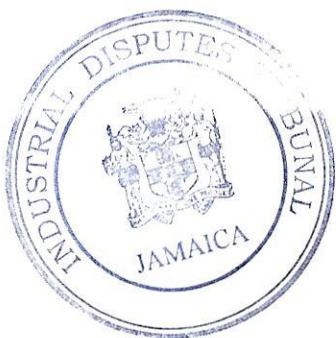
Q Did his Secretary tell you to wait to see somebody else or something?

A No I asked her if there was anything else they need from me and then she said no, that pretty much...

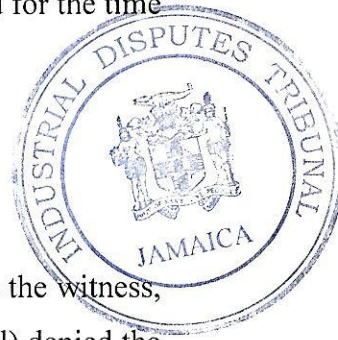
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A Yes, I didn’t just get up and leave off the property wilfully on my own, I didn’t the Secretary did not need anything else from (me) so I asked her if I could leave and she said yes, I could leave.

16. He said that he subsequently left the premises. He said neither he nor his Attorney has had any subsequent communication with the Hotel on the matter.



15. He testified that the impact of the suspension affected him psychologically and financially and he has never sought employment. He said further that the reason adduced for the suspension affected his character, particularly given that he is from a reputable family background. He said that his desire is to resume working and be compensated for the time out from 2016 until now.



ANALYSIS BY THE TRIBUNAL

16. The fact that the Hotel decided not to present any evidence or cross examine the witness, (but for the limited cross examination occasioned by questions from the Panel) denied the Tribunal the opportunity of considering evidence from both parties in arriving at a decision. Reliance was therefore placed solely on the evidence of the Aggrieved Worker.
17. In light of the lifting of Mr. McLeod's suspension by the Hotel, the issues that must therefore be determined are:
- a. Does the dispute continue to exist?
 - b. What solution, if any, should be applied for the period of the suspension? and
 - c. What pertains following the lifting of the suspension?
18. The evidence is that the Hotel suspended Mr. McLeod from his duties without pay effective February 2, 2016. By letter dated January 8, 2020, he was advised that the suspension was lifted effective January 13, 2020. Mr. McLeod was instructed to report to work by 10:00 a.m. on January 13, 2020 and meet with the Human Resources Director, Dr. Anthony Ferguson. Mr. McLeod conformed to the instructions and went to work.
19. While the evidence suggests that the suspension of Mr. McLeod was an administrative action on the basis that an investigation was being carried out, he was not paid his emoluments during the period. This action was therefore punitive and there was no evidence that he was guilty of any infraction.
20. The evidence is that the Hotel lifted the suspension on January 13, 2020 and the letter from the Hotel stated that **"the dispute ceased to exist"**. This means that Mr. McLeod would

have been restored to the position he occupied prior to the suspension. Therefore since no evidence was provided to incriminate him, he should have been paid for the period of suspension.


21. Mr. McLeod gave undisputed evidence that, in accordance with the Hotel's instructions, he reported for work on January 13, 2020. He testified that on reporting to the Human Resources Director on that morning, he was shown a letter which purports to make his position redundant. He said that he declined to accept the letter and there was no further evidence that the Hotel did more in that regard after he did not accept the letter. It would therefore suggest that the status quo as it relates to Mr. McLeod's employment was fully restored effective January 13, 2020 and that he continues to be an employee of the Hotel.


AWARD:


The Tribunal awards that Mr. Marlon McLeod be paid for all unpaid wages, allowances and benefits to include vacation leave for the period February 2, 2016 through to January 13, 2020, taking into consideration all the periodic increases.


DATED THIS 28th DAY OF SEPTEMBER 2022.



Witness: 
.....
Nicola Smith Marriott (Mrs.)
Secretary to the Division


.....
Mr. Errol Miller, JP
Chairman


.....
Mr. Leslie Hall, JP
Member


.....
Mr. Clinton Lewis
Member