



Labour Tribunal

CAYMAN ISLANDS GOVERNMENT

Thursday, 15 February 2024

Via Email

Via Email

The enclosed ruling of the Labour Tribunal, resulting from the proceedings of 9 November, 2023, in the matter of [REDACTED] is provided in accordance with section 75 of the Labour Act.

Orders/Awards

24. The tribunal finds by a majority that [REDACTED] was fairly dismissed for the reasons set out above. [REDACTED] entitled to severance pay of one week's wage for every full year worked and we calculate this sum as [REDACTED] (as per the 1B form).

Right to Appeal

Any person aggrieved by this Tribunal Decision, by virtue of the Labour Act may within **fourteen (14) days** of the date of this letter of notification, appeal this Decision. The appeal application must be made in writing and addressed to the Chairman of the Labour Appeals Tribunal. The appeal application should provide the reasons why you assert that the Tribunal has made an error of fact or Law.

Should an appeal not be filed within the prescribed timeframe, full payment of the award will become due within fourteen (14) days of the date of this letter.

Please direct appeals to:

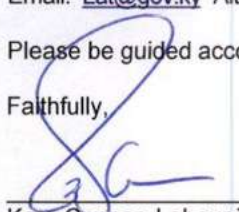
Secretary to The Labour Appeals Tribunal

2nd Floor Mid Town Plaza
Elgin Avenue, George Town
Grand Cayman KY1-9000
Cayman Islands
Tel: (345) 945-8960

Email: Lat@gov.ky Alternative Email: labourtribunal@dlp.ky

Please be guided accordingly.

Faithfully,


Kara Connor, Labour Tribunal Secretary



Department of Labour & Pensions

Cayman Islands Government

2nd Floor, Mid Town Plaza

Elgin Avenue, George Town

P.O. Box 2182

Grand Cayman KY1-1105

Direct Ext: (345) 244-4015 Direct Email: kara.connor@gov.ky

Labour Tribunal General Email: labourtribunaldlp@gov.ky

Main Phone Contact #: (345) 945-8960

Confidential Hotline Contact #: (345) 945-3073

Department's General Email: dlp@gov.ky

Freedom of Information Email: FOI.DLP@gov.ky

Website: www.dlp.gov.ky

Facebook: www.facebook.com/cidepartmentlabourpensions

LABOUR TRIBUNAL

Extraordinary Gazette No. 15/2022

Chairpersons	Deputy Chairpersons	Members
James Kennedy Jennodell Myles Samantha Bennett Keith Myers	Angelita Edwards Vincent Frederick Michelle Coleman Nadine McBean Cashema Clarke	Petrina Moore Jaron Leslie Denise Farrington Pamela Duncan Nanalie Cover Harwell A. McCoy Jr. Davina Ebanks Vaccianna Franklin Shelly-Ann Davis

Decision

Matter:

[REDACTED]

Date of Hearing:

9 November 2023

Location:

Department of Labour & Pensions, Midtown Plaza, George Town, Grand Cayman

Attendees

The Tribunal

James Kennedy, Chairperson

Jennodell Myles, Deputy

Davina Ebanks, Member

For the Complainant

[REDACTED]

[Click here to enter text.](#)

For the Respondent

Magda Embury – Counsel

[REDACTED]

Observers

None

The Proceedings were recorded.

The Proceedings were closed to the press and the general public.

Introduction

1. This is the Decision and Order of the Labour Tribunal ("the Tribunal") in respect of the hearing of a Complaint ("the Complaint") filed by [REDACTED] ("the Complainant" or [REDACTED]) against [REDACTED] former employer, [REDACTED] ("the Employer" or [REDACTED]).
2. The Complaint was heard in person, on 1 November 2023, commencing at 10.00 a.m.
3. The Tribunal has reviewed and carefully considered the Complaint; the written representations made by the Employer together with the other documentation referred to in this Decision.

Background

1. [REDACTED] initially engaged with the [REDACTED] by signing onto a [REDACTED] with them on the [REDACTED].
2. The [REDACTED] required [REDACTED] to pay the [REDACTED]. During the training programme the [REDACTED] are required to intern and work 8.30 to 5pm with 50% of those hours being assigned as training and the other 50% as work where [REDACTED] will be performed at an hourly rate of [REDACTED]. The status of this agreement which seems to include paid work as an employment contract or a contract for services is not dealt with in this judgment as it does not impact the decision but it, alongside the badly drafted contracts that are amended or terminated frequently do add some confusion to the issues.
3. The [REDACTED] completion was delayed as a result of covid-19 and [REDACTED] finished the course and commenced part-time employment as a [REDACTED] on the [REDACTED]. [REDACTED] part-time engagement was increased to full time by September 2020 and [REDACTED] salary at that time was [REDACTED] per annum.
4. Between [REDACTED] [REDACTED] took [REDACTED] sick days and a meeting was held between [REDACTED] and [REDACTED] at which the employer intended to terminate [REDACTED]. Instead, it was agreed to reduce her salary and make some adjustments to her work to make it less physically demanding in the hope that the employment relationship could be salvaged.
5. Almost immediately [REDACTED] took further sick leave and a further amendment was made to the terms of employment, these were stated to be that [REDACTED] role would be as a [REDACTED] with more [REDACTED] and [REDACTED] salary reduced to [REDACTED] per annum with [REDACTED] paid hourly for hours [REDACTED] actually worked but with an expectation that [REDACTED] would work no less than [REDACTED] hours per day.
6. Between April and August 2021, [REDACTED] took another [REDACTED] days sick and the employer indicated that [REDACTED] work was poor and even when [REDACTED] did attend, [REDACTED] didn't stay for [REDACTED] hours, sometimes only for [REDACTED] hours.
7. [REDACTED] also let [REDACTED] lapse during 2021.
8. By letter dated 23rd August 2021, Wellness Centre terminated [REDACTED] employment. That letter stated as follows:

[REDACTED]

As per your Employment Contract Revision dated February 1st, 2021 [signed February 1st, 2021] your hours of employment should be no less than [REDACTED] hours daily. However, you have only worked a total of [REDACTED] hours so far across [REDACTED] available working days (60 hours of expected work time) during the month of August.

Given the continued nature of your [REDACTED] and your inability to meet minimum working requirements I am unable to continue your current employment contract with The Wellness Centre Ltd.

Evidence at Hearing

9. [REDACTED] narrated the story for the Employer and it was consistent with the above and the written responses to the complaint on file. In summary, [REDACTED] over a year and this was impacting the business. Attempts to accommodate [REDACTED] who was a young Caymanian with an accepted [REDACTED] had been tried but both on-going performance issues with billings and time off [REDACTED] meant a decision was eventually taken and actioned by letter to dismiss the employee summarily.
10. [REDACTED] did not dispute most of the factual background including the [REDACTED] hours work over 15 days in August. [REDACTED] accepted being [REDACTED] and off work for [REDACTED] and indicated that after the first few months of work [REDACTED] was increasingly [REDACTED] and struggling to work. [REDACTED] indicated that [REDACTED] was at times blamed for errors that were not [REDACTED] fault and that an incident with a client in the playroom resulted in [REDACTED] suffering to the extent that [REDACTED] was not the same after it. [REDACTED] believed the decision to terminate [REDACTED] was as a result of an attempt to accommodate another [REDACTED]

The Tribunal Observations

11. The first issue is that it was not disputed by the employer that [REDACTED] was in fact [REDACTED] from an [REDACTED] that was having a sustained impact on [REDACTED] ability to attend for work.
12. That situation i.e. a genuine, [REDACTED] causing incapability to perform [REDACTED] to a necessary degree or standard over a prolonged period can be contrasted with persistent intermittent [REDACTED] without an [REDACTED]. Those cases that fall into the latter category are dealt with primarily as disciplinary matters of absenteeism particularly where the individual instances are minor and not [REDACTED] verifiable. As a further point, employers are entitled to look behind a [REDACTED] or a [REDACTED] if they suspect that the employee is not actually [REDACTED] and misuse of such a [REDACTED] is a disciplinary offence.
13. The Cayman Islands Labour Act recognises for the purposes of claims for unfair dismissal that misconduct includes absenteeism and thus, if the employer alleged that this was persistent intermittent absence without underlying [REDACTED] it would be a termination under section 52(1) or 52(3) and thus be a termination that would not trigger any severance payment – see 40(1) of the Act. But either written warning would need to be given or the conduct so serious as to justify immediate termination and fair procedures followed to ensure natural justice was observed.
14. But as stated above, this is not a termination for absenteeism. Here, the employer simply seeks to assert that the employee was incapable of doing their job. Section 17(6) of the Labour Act states *"In the event that the employer considers that the extent of sick leave taken renders the employee unfit to continue in that person's*

[REDACTED]

employment and terminates the employment therefore, the fairness of the termination shall be determined under Part VII."

15. Thus, there is a legal gateway for the employer to terminate in the event of [REDACTED] but it will be a termination under section 51(1)(f) as being for some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held. And the reasonableness of such a decision shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances.
16. The reasonableness of the decision includes the necessity to follow a proper procedure which can include consultation with the employee to discover the true medical position and seeking a medical opinion and then assessing the situation in light of the medical evidence as to the nature of the illness and the likely length of the absence, the urgency of the need to replace the employee, the employee's length of service and whether there is a possibility of alternative employment, or a phased return to work.
17. Applying the law to this case, it is clear that the employee had suffered from [REDACTED] that was impacting [REDACTED] and that this was persistent and persisting and that it was causing issues for the employer.
18. [REDACTED] was frequently calling in [REDACTED] at short notice and [REDACTED] employer deserves credit for making provision for an amended role in February 2021 in an attempt to keep [REDACTED] employed and covered by health insurance given [REDACTED]
19. [REDACTED] was at the time of [REDACTED] termination working part time and was employed for a short period of time and these are factors which we take into account in considering the reasonableness of the decision and the shortcomings that we find existed in the procedure followed, primarily being the lack of proper consultation with the employee before terminating.
20. In all the circumstances, we find that the Employer acted reasonably in terminating for incapability and that the decision to terminate, being for the reason that the employee was unfit to carry out her role, was for some other substantial reason pursuant to s51(1)(f) of the Act.
21. [REDACTED] is therefore entitled to severance pay calculated in accordance with section 40 of the Labour Act but not to compensation for her dismissal.
22. As an aside, the case presented by the employer was confused and confusing and no proper consideration was seemingly ever given by the employer as to what the dismissal was actually for and how to follow the Labour Act. The Labour Act is there to protect employees from termination without cause and that includes some protection for those suffering from ill-health and before terminating any employee consideration has to be given on how to do so legally and avoid turning a seemingly reasonable act into an unreasonable one.
23. The employer can note that if they had claimed that this was a misconduct offence which would not necessitate payment of severance, the failure to provide any evidence that the time off work amounted to absenteeism would have resulted in a finding that the termination was unfair.

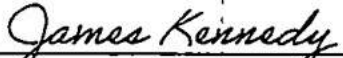
Decision

24. The tribunal finds by a majority that [REDACTED] was fairly dismissed for the reasons set out above.
- [REDACTED]

25. [REDACTED] is entitled to severance pay of [REDACTED] weeks wage for every full year worked and we calculate this sum as [REDACTED] (as per the 1B form).

Appeals

The Tribunal's decision, enforcement and appeals are governed by section 75 to 78 of the Labour Law. Any person aggrieved by this Tribunal decision by virtue of section 78 of the Labour Law may, within 14 days of notification of the decision, or service of notice, appeal to the Appeals Tribunal.


James Kennedy, Chairperson
Signed this 16th day of December 2023

[REDACTED]



Department of Labour & Pensions

Cayman Islands Government

2nd Floor, Mid Town Plaza

Elgin Avenue, George Town

P.O. Box 2182

Grand Cayman KY1-1105

Direct Ext: (345) 244-4015 Direct Email: kara.connor@gov.ky

Labour Tribunal General Email: labourtribunaldlp@gov.ky

Main Phone Contact #: (345) 945-8960

Confidential Hotline Contact #: (345) 945-3073

Department's General Email: dlp@gov.ky

Freedom of Information Email: FOI.DLP@gov.ky

Website: www.dlp.gov.ky

Facebook: www.facebook.com/cidepartmentlabourpensions

LABOUR TRIBUNAL

Extraordinary Gazette No. 15/2022

Chairpersons	Deputy Chairpersons	Members
James Kennedy Jennodell Myles Samantha Bennett Keith Myers	Angelita Edwards Vincent Frederick Michelle Coleman Nadine McBean Cashema Clarke	Petrina Moore Jaron Leslie Denise Farrington Pamela Duncan Nanalie Cover Harwell A. McCoy Jr. Davina Ebanks Vaccianna Franklin Shelly-Ann Davis

Decision

Matter:

[REDACTED]

Date of Hearing:

9 November 2023

Location:

Department of Labour & Pensions, Midtown Plaza, George Town, Grand Cayman

Attendees

The Tribunal

James Kennedy, Chairperson

Jennodell Myles, Deputy

Davina Ebanks, Member

For the Complainant

[REDACTED]

[Click here to enter text.](#)

For the Respondent

Magda Embury – Counsel

[REDACTED]

Observers

None

The Proceedings were recorded.

The Proceedings were closed to the press and the general public.

Introduction

1. This is the Decision and Order of the Labour Tribunal ("the Tribunal") in respect of the hearing of a Complaint ("the Complaint") filed by [REDACTED] ("the Complainant" or "[REDACTED]") against [REDACTED] former employer, the [REDACTED] ("the Employer" or "[REDACTED]").
2. The Complaint was heard in person, on 1 November 2023, commencing at 10.00 a.m.
3. The Tribunal has reviewed and carefully considered the Complaint; the written representations made by the Employer together with the other documentation referred to in this Decision.

Background

1. [REDACTED] initially engaged with the [REDACTED] by signing onto a [REDACTED] [REDACTED] with them on the [REDACTED].
2. The [REDACTED] required [REDACTED] to pay the [REDACTED] for a [REDACTED]. During the training programme the [REDACTED] are required to intern and work 8.30 to 5pm with 50% of those hours being assigned as training and the other 50% as work where [REDACTED] duties will be performed at an hourly rate of [REDACTED]. The status of this agreement which seems to include paid work as an employment contract or a contract for services is not dealt with in this judgment as it does not impact the decision but it, alongside the badly drafted contracts that are amended or terminated frequently do add some confusion to the issues.
3. The [REDACTED] completion was delayed as a result of covid-19 and [REDACTED] finished [REDACTED] and commenced part-time employment as a [REDACTED] on the 15th of August 2020. Her part-time engagement was increased to full time by [REDACTED] and [REDACTED] salary at that time was [REDACTED] per annum.
4. Between August 2020 and 28 January 2021, [REDACTED] took [REDACTED] and a meeting was held between [REDACTED] and [REDACTED] at which the employer intended to [REDACTED]. Instead, it was agreed to reduce [REDACTED] salary and make some adjustments to [REDACTED] work to make it less physically demanding in the hope that the employment relationship could be salvaged.
5. Almost immediately [REDACTED] took further [REDACTED] leave and a further amendment was made to the terms of employment, these were stated to be that [REDACTED] role would be as a [REDACTED] support with more [REDACTED] duties and [REDACTED] salary reduced to [REDACTED] per annum with [REDACTED] paid hourly for hours [REDACTED] actually worked but with an expectation that [REDACTED] would work no less than [REDACTED] hours per day.
6. Between April and August 2021, [REDACTED] took another [REDACTED] and the employer indicated that [REDACTED] work was poor and even when [REDACTED] did attend, [REDACTED] didn't stay for [REDACTED] hours, sometimes only for [REDACTED] hours.
7. [REDACTED] also let her [REDACTED] lapse during 2021.
8. By letter dated [REDACTED] [REDACTED] terminated [REDACTED] employment. That letter stated as follows:

[REDACTED]

As per your Employment Contract Revision dated [REDACTED] your hours of employment should be no less than [REDACTED] daily. However, you have only worked a total of [REDACTED] so far across [REDACTED] available working days ([REDACTED] hours of expected work time) during the month of August.

Given the continued nature of your [REDACTED] and your inability to meet minimum working requirements I am unable to continue your current employment contract with [REDACTED] Ltd.

Evidence at Hearing

9. [REDACTED] narrated the story for the Employer and it was consistent with the above and the written responses to the complaint on file. In summary, [REDACTED] was [REDACTED] over a year and this was impacting the business. Attempts to accommodate [REDACTED] who was a young Caymanian with an [REDACTED] had been tried but both on-going performance issues with billings and [REDACTED] meant a decision was eventually taken and actioned by letter to dismiss the employee summarily.
10. [REDACTED] did not dispute most of the factual background including the [REDACTED] work over [REDACTED] in August. [REDACTED] accepted being [REDACTED] and indicated that after the first few months of work [REDACTED] was [REDACTED] and struggling to work. [REDACTED] indicated that [REDACTED] was at time blamed for errors that were not [REDACTED] fault and that an incident with a client in the playroom resulted in [REDACTED] suffering to the extent that [REDACTED] was not the same after it. [REDACTED] believed the decision to terminate [REDACTED] was as a result of an attempt to accommodate another therapist.

The Tribunal Observations

11. The first issue is that it was not disputed by the employer that [REDACTED] was in fact [REDACTED] that was having a sustained impact on her ability to attend for work.
12. That situation i.e. a genuine, [REDACTED] causing incapability to perform work to a necessary degree or standard over a prolonged period can be contrasted with persistent intermittent [REDACTED] without an [REDACTED]. Those cases that fall into the latter category are dealt with primarily as disciplinary matters of absenteeism particularly where the individual instances are minor and not [REDACTED]. As a further point, employers are entitled to look behind a [REDACTED] if they suspect that the employee is not [REDACTED] and misuse of such a certificate is a disciplinary offence.
13. The Cayman Islands Labour Act recognises for the purposes of claims for unfair dismissal that misconduct includes absenteeism and thus, if the employer alleged that this was persistent intermittent absence without [REDACTED] it would be a termination under section 52(1) or 52(3) and thus be a termination that would not trigger any severance payment – see 40(1) of the Act. But either written warning would need to be given or the conduct so serious as to justify immediate termination and fair procedures followed to ensure natural justice was observed.
14. But as stated above, this is not a termination for absenteeism. Here, the employer simply seeks to assert that the employee was incapable of doing their job. Section 17(6) of the Labour Act states *"In the event that the employer considers that the extent of [REDACTED] the employee unfit to continue in that person's*

[REDACTED]

employment and terminates the employment therefore, the fairness of the termination shall be determined under Part VII."

15. Thus, there is a legal gateway for the employer to terminate in the event of [REDACTED] but it will be a termination under section 51(1)(f) as being for some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held. And the reasonableness of such a decision shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances.
16. The reasonableness of the decision includes the necessity to follow a proper procedure which can include consultation with the employee to discover the true medical position and seeking a [REDACTED] and then assessing the situation in light of the [REDACTED] as to the [REDACTED] and the likely length of the absence, the urgency of the need to replace the employee, the employee's length of service and whether there is a possibility of alternative employment, or a phased return to work.
17. Applying the law to this case, it is clear that the employee had suffered from [REDACTED] that was impacting [REDACTED] ability to work and that this was persistent and persisting and that it was causing issues for the employer.
18. [REDACTED] was frequently calling [REDACTED] and [REDACTED] employer deserves credit for making provision for an amended role in February 2021 in an attempt to keep [REDACTED] employed and covered by health insurance given [REDACTED]
19. [REDACTED] was at the time of [REDACTED] termination working part time and was employed for a short period of time and these are factors which we take into account in considering the reasonableness of the decision and the shortcomings that we find existed in the procedure followed, primarily being the lack of proper consultation with the employee before terminating.
20. In all the circumstances, we find that the Employer acted reasonably in terminating for incapability and that the decision to terminate, being for the reason that the employee was [REDACTED] was for some other substantial reason pursuant to s51(1)(f) of the Act.
21. [REDACTED] is therefore entitled to severance pay calculated in accordance with section 40 of the Labour Act but not to compensation for [REDACTED] dismissal.
22. As an aside, the case presented by the employer was confused and confusing and no proper consideration was seemingly ever given by the employer as to what the dismissal was actually for and how to follow the Labour Act. The Labour Act is there to protect employees from termination without cause and that includes some protection for those suffering from [REDACTED] and before terminating any employee consideration has to be given on how to do so legally and avoid turning a seemingly reasonable act into an unreasonable one.
23. The employer can note that if they had claimed that this was a misconduct offence which would not necessitate payment of severance, the failure to provide any evidence that the time off work amounted to absenteeism would have resulted in a finding that the termination was unfair.

Decision

24. The tribunal finds by a majority that [REDACTED] was fairly dismissed for the reasons set out above.
- [REDACTED]

25. [REDACTED] is entitled to severance pay of one weeks wage for every full year worked and we calculate this sum as [REDACTED] as per the 1B form).

Appeals

The Tribunal's decision, enforcement and appeals are governed by section 75 to 78 of the Labour Law. Any person aggrieved by this Tribunal decision by virtue of section 78 of the Labour Law may, within 14 days of notification of the decision, or service of notice, appeal to the Appeals Tribunal.

James Kennedy

James Kennedy, Chairperson

Signed this 16th day of December 2023

[REDACTED]