

LT 121



Department of Labour & Pensions
Cayman Islands Government
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Labour Tribunal

Tuesday, 9 February 2021

Via Email: [Redacted]

Via Email: [Redacted]

Ref: 197156 -- [Redacted]

The enclosed ruling of the Labour Tribunal, resulting from the proceedings of Monday, 8 February 2021, in the matter of [Redacted] is provided in accordance with section 75 of the Labour Act (2011 Revision).

Decision

In the absence of any evidence to the contrary, the Tribunal does not accept that the drug test was completely random.

There were no other witnesses to the conversation wherein [Redacted] allegedly admitted to recent marijuana use. The Complainant denies that [Redacted] made such an admission. The Tribunal is of the view that a prudent employer would have at a minimum made a contemporaneous file note or preferably had an employee sign a statement confirming their refusal to undergo testing.

The Tribunal is inclined to believe that the requirement to undergo a drug test was made to [Redacted] with the Respondent's hopes of finding grounds to terminate [Redacted] employment.

The Tribunal notes and empathizes with [Redacted] who said at the outset of the hearing that [Redacted] was just returning from a medical absence and understands that [Redacted] may not have been fully prepared. However, the lack of any evidence is detrimental to the Respondent's case.

Orders/Awards

[Redacted] claim for severance pay succeeds. [Redacted] is entitled to CI \$ [Redacted] (CI [Redacted] per hour x [Redacted] standard hours x 3 years).

[Redacted] claim for unfair dismissal similarly succeeds. The Tribunal awards the maximum amount of CI \$ [Redacted] (CI [Redacted] per hour x [Redacted] standard hours x 3 years).

Right to Appeal

Any person aggrieved by this Tribunal Decision, by virtue of the Labour Act (2011 Revision), 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.



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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
Ministry of Education, Employment, and Gender Affairs
2nd Floor Government Administration Building, Box 108
133 Elgin Avenue, George Town
Grand Cayman KY1-9000
Cayman Islands
Tel: (345) 244 3226 Fax: (345) 949-9343
Email: Lat@gov.ky
Alternative Email: labourtribunal@dip.ky

Please be guided accordingly.

Faithfully


Kara Connor
Labour Tribunal Secretary



DEPARTMENT OF LABOUR & PENSIONS

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LABOUR TRIBUNAL <i>Extraordinary Gazette No. 45/2019</i>		
Chairpersons	Deputy Chairpersons	Members
Gregery Barnes	Ryan Charles	Melanie Bodden
Robert Jones	Angelita Edwards	Martha Bush
James Kennedy	Brando Rankin	Ludivene Dilbert
Jennodell Myles	Stephanie Suckoo <i>(Resigned)</i>	Ian Charlerly
Kathryn Rowe	Noel Webb	Brando Rankin
		Edward Solomon

Proceedings

Matter:



Date of Hearing:

8 February 2021

Location:

Main Conference Room
Department of Employment Relations, 2nd Floor Royal Plaza
Cardinal Avenue, George Town, Grand Cayman

Labour Tribunal Panel

Chairperson:

Gregery Barnes

Deputy/Member:

Angelita Edwards

Member:

Jennodell Myles

Labour Tribunal Secretary:

Kara Connor

Employee/Complainant:



Employer/Respondent:



Witnesses:



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

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 former employer, [REDACTED] ("the Employer" or "the Respondent"). The Complaint was heard by the Tribunal on the 8th February 2021, commencing at 9:30am via the virtual video conference platform Zoom.
2. The Tribunal has reviewed and carefully considered the Complaint and reviewed and carefully considered the oral and written submissions of the Complainant and the oral and written submissions of the Respondent. The Tribunal has also reviewed the relevant sections of the Cayman Islands Labour Law (2011 Revision) ("the Law").

Background

3. [REDACTED] was employed by the Respondent from 20th May 2016 through to 8th June 2019.
4. At the time [REDACTED] employment came to an end, [REDACTED] was working in the capacity of a Food & Beverage / Banquet Server earning [REDACTED] per hour and working a standard [REDACTED] work week.
5. On 8th June 2019, the Respondent terminated [REDACTED] employment pursuant to section 52(1)(d) on the basis that the Complainant admitted to [REDACTED].
6. The Respondent testified that prior to 6th June 2019, after discussions with the Company's head office, a decision was taken to commence [REDACTED] of employees. [REDACTED] said that the Company had committed to testing about four or five employees at a time, in alphabetical order.
7. On 6th June 2019, [REDACTED] was selected to go for a drug test along with two other employees. [REDACTED] said that on their way to the medical facility for testing, [REDACTED] asked [REDACTED] whether they could talk and during that conversation admitted to recent marijuana use with some friends and that it was the first time [REDACTED] had used. The Complainant denies this admission (see clause 15 below).
8. [REDACTED] said that [REDACTED] encouraged [REDACTED] to undergo the drug screening test in spite of [REDACTED] recent use, because there was always the possibility that the results would be negative. However, according to [REDACTED] declined.
9. [REDACTED] said that other employees who had taken the d[REDACTED] and [REDACTED] e had still been able to retain their employment. [REDACTED] said that other factors would be taken into consideration such as the employee's overall performance history.
10. [REDACTED] said that the decision to terminate was based on the fact that [REDACTED] had refused to [REDACTED] [REDACTED] said that the recent number of issues they have been having with [REDACTED] including written warnings were also taken into consideration. However, [REDACTED] explained that the Respondent was not relying on the recent written warnings and did not include them because the issue of [REDACTED] refusal to [REDACTED] was itself serious misconduct.
11. However, under cross examination, when [REDACTED] wanted to discuss the written warning that was issued on or about 19th April 2019, [REDACTED] did not think it was appropriate or relevant to discuss.

12. [redacted] explained that the written warning issued in April 2019 was for insubordination and verbal assault. [redacted] went on to explain that on this occasion, [redacted] and [redacted] manager were trading jokes/insults and at some point [redacted] manager grabbed [redacted] by the arm and the neck and pushed [redacted] out through a door. [redacted] was more guarded as to the details of the exchange that may have triggered the physical attack.
13. However, [redacted] confirmed that [redacted] did at some point see the video footage of the physical altercation and more specifically, when the Manager grabbed [redacted] and pushed [redacted] through the door. [redacted] testified that it was [redacted] understanding that immediately before the altercation became physical, the manager called [redacted] "faggot", to which [redacted] responded by referring to the manager as a "small [redacted]."
14. [redacted] told the Tribunal that [redacted] reported the incident to the police and that [redacted] wanted to pursue the matter further legally. [redacted] claimed that [redacted] had asked the [redacted] for the video footage in order to assist with this but that no footage was forthcoming. [redacted] confirmed that [redacted] was aware that [redacted] wanted to pursue the matter further and that [redacted] had been asking about obtaining the video footage.
15. The Complainant denies admitting to [redacted] that [redacted] used marijuana. [redacted] said that [redacted] told [redacted] that [redacted] would not submit to the drug test because [redacted] suspected some unfairness.
16. When asked if the Respondent could provide evidence to show that the Company had made a decision to commence random drug testing, [redacted] said that those decisions were made during conference calls with the head office.
17. The Respondent was also unable to provide the names of the other two individuals whom [redacted] said were scheduled to be tested along with [redacted]. [redacted] testified that no other persons were with him when [redacted] and [redacted] set off towards the medical facility for testing.

18. The Law

19. The Labour Law (2011 Revision) provides:

51 (1) Subject to subsections (2) and (3), a dismissal shall not be unfair if the reason assigned by the employer for it is –

- (a) Misconduct of the employee within section 52(1);*
- (b) That it is under section 52(3), namely misconduct following the receipt of a written warning;*
- (c) That it is under section 53(2), namely a failure of the employee to perform his duties in a satisfactory manner following the receipt of a written warning;*
- (d) That the employee was redundant;*
- (e) That the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of this or any other law; or*
- (f) Some other substantial reason*

And under the circumstances the employer acted reasonably...

52 (1) An employer may terminate forthwith the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has:-

- (a) Conducted himself in such a manner as clearly to demonstrate that the employment relationship cannot reasonably be expected to continue;*
- (b) Committed a criminal offence in the course of employment without the consent, express or implied, of the employer.*

(d) Is under the influence of a controlled drug (other than one lawfully prescribed by a health practitioner) or alcohol during the hours of his employment.

"It is well established that in a case of suspected misconduct the test of fairness is not whether the employer has provided the employee guilty, and still less whether he has done so beyond reasonable doubt, but rather whether the employer genuinely believed on reasonable grounds in the employee's guilt. This involves a threefold test:

- 1) The employer must establish that he genuinely did believe the employee guilty of the misconduct;
- 2) That belief must have been formed on reasonable grounds; and
- 3) The employer must have investigated the matter reasonably"

(See Halsbury Laws of England, paragraph 651)

If this test is met, the Tribunal need only consider further whether the Employer acted reasonably in the circumstances.

"The key consideration for an employment tribunal is, therefore, the reasonableness or otherwise of the employer's conduct, not the injustice to the employee. In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry, to determine whether a reasonable employer could have decided to dismiss on those facts. The basis for this approach (the 'range of reasonable responses test' is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee falls within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but, if the dismissal falls outside the band, it is unfair."

(See Halsbury Laws of England, paragraph 642)

The Tribunal's Findings

Decision

20. In the absence of any evidence to the contrary, the Tribunal does not accept that the [redacted] was completely random.
21. There were no other witnesses to the conversation wherein [redacted] allegedly admitted to recent [redacted]. The Complainant denies that [redacted] made such an admission. The Tribunal is of the view that a prudent employer would have at a minimum made a contemporaneous file note or preferably had an employee sign a statement confirming their refusal to [redacted].
22. The Tribunal is inclined to believe that the requirement to [redacted] was made to [redacted] with the Respondent's hopes of finding grounds to terminate [redacted] employment.
23. The Tribunal notes and empathizes with [redacted] who said at the outset of the hearing that [redacted] was just returning from a medical absence and understands that [redacted] may not have been fully prepared. However, the lack of any evidence is detrimental to the Respondent's case.

Orders/Awards

24. [REDACTED] claim for severance pay succeeds. [REDACTED] is entitled to CI \$ [REDACTED] (CI [REDACTED] per hour standard hours x [REDACTED])

25. [REDACTED] claim for unfair dismissal similarly succeeds. The Tribunal awards the maximum amount of CI [REDACTED] (CI [REDACTED] per hour x [REDACTED] standard hours x [REDACTED])

Appeals

The Tribunal's decision, enforcement and appeals are governed by section 75 to 78 of the Labour Law. Any persons 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.



Gregory Barnes, Chairperson
Signed this 9 day of February, 2021