



LABOUR APPEALS TRIBUNAL

CAYMAN ISLANDS GOVERNMENT

Department of Labour & Pensions

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LABOUR APPEALS TRIBUNAL <i>Extraordinary Gazette No. 15/2022</i>		
Chairperson	Deputy Chairperson	Members
Robert Jones	Trisha McElroy Ryan Charles	Dorothy Davis Garth Clarke Isidora Eden Richard Lewis Betty Baraud Janet James

Matter:

Date of Hearing:

1 September 2023

1:04pm (Local Time)

Department of Labour & Pension boardroom and via Zoom

Labour Appeal Tribunal Panel:

Ms. Trisha McElroy, Chairperson

Ms. Isidora Eden, Member

Ms. Betty Baraud, Member

Admin Support to Labour Appeal Tribunal

Ms. Ceta Fuentes and Ms. Leticia Goring

Employer/Appellant:

represented by Mr. Richard Barton, Barton Attorneys

Employee/Respondent/ Complainant:

Witness:

Observers:

Ms. Alyssa Herrera, Barton Attorneys

Introduction

1. This is the Decision and Order of the Labour Appeal Tribunal ("the Tribunal") in respect to the hearing of an Appeal filed by Pool Patrol ("the Appellant") against his former employee, ("the Respondent"). The Appeal was heard by the Tribunal on the 1st of September 2023 at 1:04 pm by way of an in-person and zoom hearing.

Background

1. The Appellant employed the Respondent as a approximately '
2. On 2 September 2021, a payment of \$. . . was deposited via transfer into the Respondent's bank account twice, at 9:14am and again at 9:18am (referred herein as the Overpayment).
3. On 14 September 2021, the Respondent and family entered mandatory quarantine due to COVID-19 exposure.
4. The Respondent returned to work on 21 October 2021, roughly five weeks later. According to a witness statement, the Respondent was paid during the quarantine period. Upon return to work, which according to the records was an official pay date, provided the Respondent with proof of the Overpayment, asked to check account and to advise how the Appellant should proceed with deduction of the Overpayment. According to the records, the Respondent was not paid on this date.
5. The Respondent was not paid on 28 October 2021 and queried why on 29 October 2021.
6. On 29 October 2021 at 7:05am the Respondent had a phone conversation with . . . of the Appellant in which . . . questioned the lack of salary payment (the Encounter). During the Encounter, the Overpayment and the Respondent's lack of response regarding the overpayment were discussed and was urged to come to the Appellant's office to discuss the matter further. It is stated that the Respondent refused to go to the office and became loud, belligerent and insubordinate to
7. According to witness statements, . . . of the Appellant) discussed the Encounter inclusive of events leading up to the Encounter. They collectively agreed that the employment relationship could not continue.
8. The Respondent was terminated from employment on 1 November 2021 via a letter dated 29 October 2021.
9. On 12 November 2021, the Respondent filed an unfair dismissal complaint with the Department of Labour and Pensions (DLP).
10. The matter was transferred to the Labour Tribunal on 13 July 2022.
11. The Labour Tribunal Secretary (Tribunal Secretary), on 19 July 2022 via email issued a hearing notification to the Appellant and Respondent for a Labour Tribunal meeting scheduled for 7 September 2022 at 10:00am.
12. On 25 August 2022, the Appellant's attorney requested an adjournment via email to the Tribunal Secretary.

13. The Tribunal Secretary issued a new hearing notice via email on 7 September 2022 to the Appellant and Respondent for a virtual hearing on 8 December 2022 at 10:00am.
14. On 29 November 2022, the Tribunal Secretary sent a reminder via email to all parties for the upcoming virtual hearing on 8 December 2022.
15. On 8 December 2022, the Tribunal Secretary advised all parties via email an hour before the hearing of the need to cancel the hearing due to the unexpected availability of the Chairperson.
16. The hearing was rescheduled for 7 March 2023.
17. On 27 February 2023 in anticipation of the hearing scheduled for 7 March 2023, Mr Barton emailed the Tribunal Secretary and the Respondent seeking to highlight a few matters prior to the hearing and asked for the contents of his email be relayed to the Tribunal for consideration.
18. On 7 March 2023, the Respondent advised via email of inability to attend the scheduled hearing and requested the Tribunal to proceed in his absence and use his statements as evidence. The hearing continued as scheduled on 7 March 2023 however ended early due to prior commitments of the panel members.
19. A continuance hearing notice was issued via email on 8 March 2023 by the Tribunal Secretary for 10 March 2023 at 11:00am. Both parties were afforded the opportunity to make final submissions.
20. The Labour Tribunal continuance hearing took place on 10 March 2023 via Zoom.
21. The decision of the Labour Tribunal was issued on 28 March 2023. The Tribunal found that the Respondent's (Employee) dismissal by the Appellant (Employer) was unfair under the Labour Act and awarded a payment to the Respondent in the sum of \$10,000.
22. The Appellant's attorney (Employer's attorney) submitted a notice of appeal on 5 April 2023.

Decision being Appealed

- This is an appeal against the findings of the Labour Tribunal (LT) that the Respondent was unfairly dismissed as the Appellant failed to carry out a reasonable investigation.
- The LT states in this case the Employer claims that the Complainant was guilty of misconduct so serious that the employment relationship could not reasonably be expected to continue but because the Employer did not come to that decision having carried out a reasonable investigation, it cannot be said that it was acting reasonably as required under the Act. As such the LT finds that the Complainant was unfairly dismissed.
- In arriving at this decision, the LT made the following findings:
 - Neither party's attention was drawn to the Overpayment of wages until sometime in mid to late October 2021 when [redacted] admittedly was able to reconcile the bank account after exiting quarantine.
 - The termination appears to be in one part for the Appellant's dissatisfaction with the Complainant's tone and attitude on the phone call of 29 October 2021.
 - Facts disputed are telephone discussion that took place between 28 and 29 October 2021 on one hand we have the Appellant stating that the Complainant was rude, threatening and aggressive during a telephone discussion about the non-payment of wages, and on the other hand we have the Complainant stating that [redacted] became offended when told in the same telephone discussion that [redacted] could not make a 100% deduction to [redacted] wages.
 - The Complainant had no history of warnings for either misconduct or performance issues, and the apparent failure by the Employer to sufficiently consult the Complainant. In this instance, its failure to

engage with the Complainant in connection with the telephone incident that transpired on 29 October 2021 was remiss.

- The Appellant made a decision to terminate the Complainant's employment having accepted LR version of the telephone discussion wholesale. The apparent decision maker was [redacted] whom the LT is of the view is biased as [redacted] was admittedly the one the incident took place with, and who's view that the employment relationship could not reasonably continue was taken at face value and simply supported by [redacted] without any reasonable attempt to hear the Complainant's side of the story and without investigation or intervention by [redacted] this one-sided view is procedurally unfair.
 - The Appellant's unilateral decision to dismiss the Complainant on 29 October 2021, makes this dismissal, for a potentially fair reason, an unfair dismissal because the Employer did not act reasonably in all the circumstances.
 - A simple telephone call from [redacted] to the Complainant on the morning of 29th October 2021 could have changed this.
- The hearing before the LT occurred on the 7th and 10th of March 2023 and the decision was rendered on 28th March 2023.
 - No written transcript of the hearing is available only an audio transcript, and the decision was within the 28-day time limit for delivery of decisions.
 - Reference to the Law is the Labour Act as amended and revised.

Grounds of Appeal

23. The Employer is seeking for the decision to be reversed, as it is unlawful, unreasonable, disproportionate, unfair and a breach of natural justice.
24. The Appellant's grounds of appeal are set out in the submissions dated 4 August 2023, prepared by the Appellant's representative Mr. Barton and are as follows:
 - 24.1. The LT decision was erroneous in law.
 - 24.2. The LT decision was unreasonable.
 - 24.3. The LT decision was contrary to the principles of natural justice.
 - 24.3.1. The Appellant was led to believe that there would be a full opportunity to present its case.
 - 24.3.2. No tribunal member appeared on camera whereas the appellant, its witnesses and the Tribunal Secretary were all on camera. The entire hearing would occur essentially by speaker phone.
 - 24.3.3. The hearing commenced on the morning of 7 March 2023 until the Appellant was informed that the afternoon was not available despite the hearing being set for the day. As a result, the Appellant was deprived of the chance to call a vital witness despite being told otherwise.
 - 24.3.4. The Chairman initially advised that the Appellant would be permitted to call [redacted] as a witness however for reasons that remain unclear, the LT rescinded this directive and deprived the Appellant the opportunity to rely on a key witness.
 - 24.3.5. The extract from the decision "*A simple telephone call from [redacted] to the Complainant on the morning of 29th October 2021 could have changed this. Therefore, the Tribunal finds that the Complainant was unfairly dismissed*" suggest that YT should have been permitted to give evidence. [redacted] can attest to the fact that [redacted] placed calls to the Respondent that had been unreturned and that it was plain [redacted] refused to speak. The Tribunal would have had a full opportunity to clarify any ambiguity but instead ruled to bar [redacted] from appearing and drew adverse inferences, from what appears to be central, to the unfavourable ruling.

- 24.3.6. The Respondent was permitted to provide further submissions in relation to the hearing that occurred on 9 March 2023. These submissions included further allegations and sought to introduce more evidence rather than "closing arguments".
- 24.3.7. The decision to allow the Respondent to litigate the trial by paper is a breach of natural justice. No additional information should have been admitted, especially where the Respondent did not appear at the hearing and so could not advance "closing arguments".
- 24.3.8. The Chairman and members of the Tribunal cross-examined witnesses for the Appellant in a way that trespassed beyond mere probing questions.
- 24.3.8.1. A witness was pressed unduly in relation to banking systems that bared little relevance.
- 24.3.8.2. Witnesses on behalf of the Appellant were exposed to direct questions from the Tribunal in the determination to test the veracity of their evidence. Worthy questions for the Respondent were never clarified which respectfully resulted in a breach of natural justice.
- 24.3.8.3. The Chairman in his interaction with the Appellant's counsel and witness openly invited speculation as to whether the Respondent may have been having a "bad day". There was no evidence from the Respondent in this regard and these and other remarks are regrettable.
- 24.3.8.4. The overall manner of questions reveals the Tribunal's lack of experience which was compounded where the Chairman seemingly invited counsel for the Appellant to swear an oath on the bible prior to addressing the Tribunal.
- 24.3.9. The Tribunal abridged the hearing suddenly and with no notice to the Appellant. What was initially scheduled to last a full day reasonably expected to fully ventilate the issues was abruptly terminated. This is a clear breach of natural justice.
- 24.3.10. Although not specifically advanced, the manner of the hearing as a whole, does not exclude features of bias, albeit unconscious. The extent to which the Chairman sought to preserve the credibility of the Respondent as evidenced by remarks noted above is quite striking.
- 24.4. It is respectfully submitted that no reasonable decisionmaker, if applied due process would have arrived at the Decision.
- 24.5. The Appellant submits that the Decision should be overturned and the compensation order to award the Respondent a severance pay of \$1 and unfair dismissal compensation of \$: I set aside.

The Law

The Labour Act provides the following:

"78. (1) Any person aggrieved by —

- (a) any decision of a Labour Tribunal upon a complaint where the award exceeds five hundred dollars;
- (b) the service of a remedial notice;
- (c) any decision of a Labour Tribunal that that person's dismissal was fair;
- (d) any refusal of a Labour Tribunal to register an overtime agreement; or
- (e) any decision of a Labour Tribunal that no award should be made,

may, within fourteen days of notification of the decision or service of the notice, appeal to the Appeals Tribunal:
Provided that an employee may appeal an award of less than five hundred dollars where that person claims that the award should have exceeded five hundred dollars.

(2) An appeal under subsection (1) is brought by giving notice in writing to the Chairperson of the Appeals Tribunal.

(3) The giving of a notice of appeal pursuant to subsection (2) operates a stay upon any award made by a Labour Tribunal"

Submissions and Observations

25. The LAT considered the submissions made by the Appellant ahead of the hearing; the bundle/documents on file including the decision of the Labour Tribunal.
26. The Respondent did not file a response to the appeal.
27. The Respondent did not attend the hearing of the appeal before the LAT, similarly the Respondent/Complainant did not attend the hearing before the Labour Tribunal. Both tribunals were left to consider only the statements and written complaint of the Respondent before them including the request to continue in his absence.
28. The LAT continued with the hearing to ensure overall fairness to both parties is consistent with the overriding objective and the assessment of fairness was made.
29. The LAT listened and considered the points raised by the Appellant's counsel during the LAT hearing.

Decision of the LAT

30. The LAT has listened to the audio of the hearing before the Tribunal, the documents on file, reviewed and considered the Tribunal's Decision. Additionally, we have considered the written and oral submissions by the Appellant and the Respondent's request to proceed in his absence at the appeal hearing despite rescheduling the initial appeal hearing.
31. On the grounds of the appeal filed by the Appellant, the LAT finds the following:
 - 31.1. The Tribunal was correct in stating that Counsel reserved YT's oral submission and asked the LT to peruse the contents of her statement affidavit as evidence after being satisfied that oral evidence was sufficient to convey the points. It is also important to note, prior to oral evidence on day one of the hearing, the Tribunal did ask if would be giving evidence in which Mr Barton responded that would. However due to technical difficulties and prior commitments of the panel, evidence was not allowed on day one. It was in the interest of time, Mr Barton suggested a short break for lunch after which they could reconvene, and witness statement could be taken as evidence with five minutes of questioning thereafter. Prior to closing for the day on 7 March 2023, Mr Barton advised that he reserved questioning for the next day but felt that the evidence presented by the others was sufficient at that time.

Upon 10 March 2023, parties were only allowed to provide closing submissions as indicated in an email dated 9 March 2023 from the LT Chairperson to the Tribunal Secretary which was sent to all parties. All

parties were advised that no new evidence would be entertained by the Tribunal which essentially meant the YT was unable to provide any evidence.

The LAT believes that if YT had the ability to provide oral evidence, the Tribunal may or may not have derived at the same conclusion, but they would have had the opportunity to gather more context to involvement in the decision of the Respondent's termination. Therefore, the statement made by the Tribunal *"A simple telephone call from [redacted] to the Complainant on the morning of 29th October 2021 could have changed this. Therefore, the Tribunal finds that the Complainant was unfairly dismissed"* alludes to a conclusion without clarity and ultimately leans toward a breach of natural justice in this case.

- 31.2. Whilst the LAT did find the Tribunal's questioning on [redacted] banking transaction meticulous, the relevance of that questioning did not aid in determining whether the Respondent was unfairly dismissed.
- 31.3. There is no ambiguity surrounding the occurrence of the Encounter between the Respondent and [redacted] on 29 October 2021. What is unclear are the contents of that discussion. It is not our position to dispute reaction to that Encounter but to determine if the Employer's reason to dismiss the employee following the Encounter is fair and reasonable. Three witness statements on behalf of the Appellant all recollect [redacted] reaction following the Encounter which are similar in that [redacted] was visibly shaken and upset. The Respondent's statement "obviously I would have been frustrated and confused" makes reference to an Encounter that may not have been cordial.
- 31.4. [redacted] confirms that it was a collective decision after the Encounter to dismiss the Respondent however [redacted] was the ultimate decision maker. It was their belief that [redacted] behaviour could not be tolerated and based upon the information available at the time, the Employer [redacted] made the decision that [redacted] employment could not continue and according to statements inclusive oral evidence collectively decided how to proceed with the dismissal. The LAT finds that the decision to terminate was reasonable.
- 31.5. The evidence confirms the Tribunal did end the hearing on 7 March 2023 abruptly due to time constraints. Additionally, the Tribunal did not allow the Appellant to continue with presenting their case on day two as previously suggested but rather chose to limit day two to closing submissions only which led the Appellant rely on written evidence of a witness that became the basis of the Tribunal's decision. The LAT finds this action was a breach of natural justice.

32. The LAT allows the appeal by the Appellant and orders/directs that:

- 32.1. The decision of the Labour Tribunal dated 28 March 2023 be set aside and substitutes that decision with its own findings that the dismissal was fair.

33. The decision of this Tribunal was unanimous.

Orders/Awards

34. The LAT finds that no compensation is payable, and no award of severance pay is due.

Right of Appeal

The Tribunal's decision, enforcement and appeals are governed by section 78 of the Labour Act (2021 Revision). An appeal may be made to the Grand Court from a decision of the Appeals Tribunal upon a point of law only as per S79 of the Labour Act (2021 Revision).

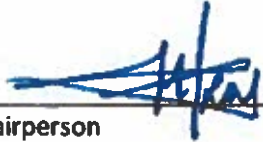
Appeals to Grand Court

79 (1) An appeal may be made to the Grand Court from a decision of the Appeals Tribunal upon a point of Law only.

(2) Subject to subsection (1), no decision of a Labour Tribunal or the Appeals Tribunal shall be open to challenge or review in any Court of Law upon any grounds whatsoever.

(3) An appeal pursuant to subsection (1) shall not operate as a stay of any award, order or decision of a Labour Tribunal or the Appeals Tribunal, or of the effect of any notice, unless the Grand Court so orders.

(4) An application for a stay shall be made by ex parte application.



Chairperson

28th September 2023

Compensation Ordered: \$

The Tribunal hereby awards the total amount of \$ to the Complainant.

Right to Appeal

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

Section 78(1)

Any person aggrieved by:

- (a) any decision of a Labour Tribunal upon a complaint where the award exceeds five hundred dollars;
- (b) the service of a remedial notice;
- (c) any decision of a Labour Tribunal that his dismissal was fair;
- (d) any refusal of a Labour Tribunal to register an overtime agreement; or
- (e) any decision of a Labour Tribunal that no award should be made.

may, within (14) fourteen days of notification of the decision or service of the notice, appeal to the Appeals Tribunal:

Provided that an employee may appeal an award of less than five hundred dollars where he claims that the award have exceeded five hundred dollars.

(2) An appeal under subsection (1) is brought by giving notice in writing to the chairman of the Appeals Tribunal.

(3) The giving of a notice of appeal pursuant to subsection (2) operates as a stay upon any award made by a Labour Tribunal.

(4) The notice of appeal under subsection (2) shall also be served upon a Labour Tribunal and in the case of an appeal from a decision of a Labour Tribunal upon a complaint, upon all persons who were invited to appear before a Labour Tribunal under section 75(6).

(5) Upon receipt of a notice the Chairman of the Tribunal shall fix a date for the hearing of the appeal, being not less than one month nor more than three months from the date of his receipt of the notice of appeal, and shall give notice of that date forthwith to the appellant and to all parties who were entitled to receive the notice of appeal pursuant to subsection (4).

(6) All persons entitled to receive the notice of appeal pursuant to subsection (4) shall be entitled to appear at and be heard upon the hearing of the appeal, or upon any adjourned hearing.



Vincent Frederick
Acting Chairperson
28-Mar-23

21. In this instance the Complainant was a long serving employee, with no history of performance or misconduct issues, who had made inquiries of the employer on the issue of non-payment of wages. It is reasonable to expect that an employee, having not received their wages, would inquire, it is also reasonable to expect that such a conversation might become heated on both ends. Upon inquiring, the Tribunal could not confirm from _____, the extent of alleged belligerence or threats on the part of _____ stating only that _____ was extremely loud, _____ said _____ had to be paid by the end of the day, and the manner _____ spoke it was deemed to me as a threat." It is reasonable to expect an employer, having no other independent witnesses, to, at minimum, make inquiries of both concerned parties as to the nature of the conversation prior to taking a unilateral decision to terminate immediately.
22. Only after a reasonable investigation (Burchell 3) can an employer say that it reached a conclusion about an employee's conduct having been informed on reasonable grounds (Burchell 2) and only after a reasonable investigation leading to a reasonable belief that the employee is guilty of misconduct can an employer say that it genuinely did believe the employee guilty of misconduct (Burchell 1).
23. If an employer does not investigate properly, it may still believe in the employee's guilt, but such a subjective belief does not pass the Burchell test.
24. Here the Employer claims that the Complainant was guilty of misconduct so serious that the employment relationship could not reasonably be expected to continue. However, since the Employer did not come to that decision having carried out a reasonable investigation, it cannot be said that it was acting reasonably as required by section 51(1) or that its decision was in accordance with equity and the substantial merits of the case (section 51(3)). A simple telephone call from _____ to the Complainant on the morning of 29th October, 2021 could have changed this. Therefore, the Tribunal finds that the Complainant was unfairly dismissed.
25. Based on the above the Tribunal is satisfied that the decision to dismiss does fall outside the band of reasonable responses that an employer could choose from.
26. Given this finding and the other factors mentioned in section 55, the Tribunal awards the Complainant compensation for unfair dismissal at the maximum rate of one week's wage for each completed year of service. The Complainant was a long serving employee with a _____ unblemished record with the Employer, who had yet to find alternative employment at the time of the Tribunal hearing. The fact that the Complainant was dismissed summarily, and the manner of that summary dismissal, leads the Tribunal to conclude that the degree of unfairness was very high.
27. As a consequence of the finding of unfair dismissal the Tribunal also allows the Complainant's claim for severance at the rate of _____ for each completed year of service, however, the Tribunal has taken into account the severance previously paid. The Tribunal has no jurisdiction to adjudicate on the contractual claim for notice pay and vacation pay and is aware from commentary during the proceedings that this matter is being addressed in the appropriate forum.

Decision

The Tribunal is unanimously agreed that the dismissal was unfair in the circumstances.

Orders/Awards

Severance Calculation: _____ = \$ _____ previously paid = _____

Severance Ordered: \$ _____

Unfair Dismissal Compensation: : _____ \$ _____

Burchell confirmed that in a case of suspected misconduct the test of fairness does not require that the employer proves the employee guilty and still less to prove guilt beyond a reasonable doubt. Rather, the employer only has to show that it genuinely believed on reasonable grounds in the employee's guilt. This involves a threefold test -

- i. (1). The employer must establish that it genuinely did believe the employee guilty of misconduct -
 - ii. (2). That belief must have been informed on reasonable grounds; and
 - iii. (3). The employer must have investigated the matter reasonably.
15. The Tribunal notes that the Complainant was paid partial severance on 1st November, 2021, leading to the question of why pay any severance at all if the dismissal was for gross misconduct, the Tribunal rejects the Respondent's position that the intention of the termination letter was to provide a notice and/or ex-gratia payment to the Complainant as opposed to the severance payment as stated in the termination letter of 29th October, 2021 and relied upon Section 12(3) of the Labour act in making this finding.
16. It is the employer's evidence that [redacted] made the decision there and then to terminate the Complainant's employment and they did not deem it necessary to engage the Complainant in any discussions upon receiving the report from [redacted] about the complainant's attitude on the phone that morning, more over the Tribunal has concerns that [redacted], being the one the telephone conversation took place with, was admittedly the one who decided the Complainant's fate, despite reporting the incident to [redacted], neither party saw it fit to have [redacted] conduct any inquiries of the Complainant in an attempt to get [redacted] side of the story, rather taking a one sided view and executing the termination the same day. Despite this, the Respondent further failed when it decided not to inform the Complainant about termination until days later on 1st November, 2021.
17. The Tribunal is of the view that [redacted] failed the threefold Burchell test in the fact that no investigations into the alleged misconduct/behavior of the Complainant on 29th October, 2021 took place. As a reputable employer, of good standing, in existence since 1986, [redacted] has an implemented Employee Handbook, Policies and Procedures as well as a designated [redacted] on staff, as such the Tribunal is of the belief that [redacted] being a sophisticated employer, had the wherewithal, and resources to carry out a reasonable investigation.
18. What the test in Burchell means, in practical terms, is that first an employer must investigate a case of potential misconduct and the investigations must be "reasonable". What constitutes reasonable investigation will depend on the specific circumstances of each case. The more straightforward cases may require less investigation, whilst less straightforward cases will require more. *"In one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end so the amount of enquiry and investigation, including questioning of the employee, which may be required, is likely to increase"* (see ILEA v Grant [1988] IRLR 497 referred to by Elias J in A v B [2002] UKEAT 1167).
19. The level of investigation required may also depend on the consequences of a finding of misconduct. Might a relatively junior employee receive a warning if misconduct is substantiated? Or might a long serving senior employee face termination?
20. In A v B (supra), at paragraphs 58 and 59 Elias J said *"[T]he relevant circumstances do in fact indicate a consideration of the gravity of the charges and their potential effect upon the employee ... The lay members of this Tribunal have no doubt from their own industrial experience that what would be expected of a reasonable employer carrying out, say an investigation into a disciplinary matter leading at worst to a warning would not be as rigorous as would be expected where the consequences could be dismissal"*.

5. The termination appears to be, in one part, for the Respondent's dissatisfaction with the Complainant's tone and attitude on the phone call of 29th October, 2021, and on the other part, for the overpayment which the Respondent states the Complainant failed to address leading to the deduction of the Complainant's wages, being the ultimate reason for the phone call on 29th October, 2021.
6. Subject to Section 29 of the Labour Act the Employer would only have been permitted to deduct one third of the Complainant's wages at any given time for the overpayment, hence the action of deducting the Complainant's entire salary that payroll was not reasonable considering the error was on the part of the Respondent and was admittedly an error that had occurred with others.
7. Facts disputed are telephone discussion that took place between 28th and 29th October, 2021, on one hand we have the Respondent stating that the Complainant was rude, threatening and aggressive during a telephone discussion about the non-payment of wages, and on the other hand we have the Complainant stating that !... became offended when told in the same telephone discussion that could not make a 100% deduction to wages.
8. The summary nature of the Complainant's dismissal appears out of character with the previous interactions between the Complainant and the Employer which all appeared very measured yet amicable over the Complainant's lengthy period of employment.
9. The spotlight in this case turns to the inquiries carried out by the Employer into the report it received on the morning of 29th October, 2021, that the Complainant had behaved in a rude manner towards during the course of a telephone call about unpaid wages.
10. The Complainant had no history of warnings for either misconduct or performance issues, and the apparent failure by the Employer to sufficiently consult with the Complainant, in this instance, its failure to engage with the Complainant in connection with the telephone incident that transpired on 29th October, 2021, was remiss.
11. The Respondent, made a decision to terminate the Complainant's employment having accepted version of the telephone discussion wholesale. The apparent decision maker was whom the Tribunal is of the view was biased as was admittedly the one the incident took place with, and who's view that the employment relationship could not reasonably continue was taken at face value and simply supported by !... without any reasonable attempt to hear the Complainant's side of the story for !..., and without investigation or intervention by !... This one sided view is procedurally unfair.
12. The Respondent's unilateral decision to dismiss the Complainant on 29 October, 2021, makes this dismissal, for a potentially fair reason, an unfair dismissal because the Employer did not act reasonably in all the circumstances.
13. That said, even if an employee is dismissed for a reason that is substantial. An employment tribunal must still go on to decide on the question of overall fairness. Therefore, the first stage of this Tribunal's enquiry is to decide whether the reason for the termination was one which could justify the dismissal of the employee and if it was, the second stage of the enquiry is whether on the facts of the case it was fair to dismiss the employee in question (see Dobie v Burns International Security Services (UK) Ltd [1984] ICR 812 CA.)
14. Given that the reason assigned to the Complainant's dismissal is section 52(a) conducted themselves in such a manner as clearly to demonstrate the employment relationship cannot reasonably be expected to continue, failing any referrals by Counsel for the Employer, the Tribunal in its own research refers to the often cited authority on what an employer does and does not have to prove in such misconduct situations and that is the case of British Home Stores Ltd v Burchell [1980] ICR 303n, [1978] IRLR 379.

(3) Where an employee has been given a written warning under subsection (2), if that person, within twelve months following the receipt of the written warning, commits misconduct of any kind in relation to that person's work, the employer may terminate the employment of the employee, or take such other action as may have been specified in the written warning, without further notice.

(4) For the avoidance of doubt, misconduct includes, but is not limited to, absenteeism.

Termination for failure to perform duties in satisfactory manner

53. (1) Where an employee is no longer performing that person's duties in a satisfactory manner, the employer may give the employee a written warning which shall describe in what manner that person's performance is unsatisfactory and state the action the employer intends to take in the event of continuance.

(2) Where an employee has been given a written warning under subsection (1), if that person does not, during the period of one month following the receipt of the written warning, commence performing that person's duties in a satisfactory manner, the employer may terminate that person's employment at the end of that one month period, or after the end of that period take such other action as may have been specified in the written warning without further notice.

Remedies for unfair dismissal

55. (1) Where, upon a complaint of unfair dismissal, a Labour Tribunal has determined that the dismissal was unfair it may order the payment by the employer to the person dismissed of a sum of money by way of compensation for unfair dismissal.

(2) In making an award of compensation under subsection (1), a Labour Tribunal shall have regard to —

- (a) the length of the continuous employment of the person dismissed immediately preceding the dismissal;
 - (b) the likelihood of the person dismissed finding other comparable employment;
 - (c) the salary of the person dismissed immediately preceding the dismissal;
 - (d) the period up to the likely retirement age of the person dismissed and any entitlement to a pension which that person may then have;
 - (e) the degree of unfairness of the dismissal; and
 - (f) such other matters as may be prescribed.
- (3) The amount of an award of compensation under subsection (1) shall not exceed one week's wages for each completed year of service.

The Tribunal's Findings

1. By and large the evidence of the Complainant and the Respondent appear to coincide relative to the Complainant's employment history, tenure, and salary with the company.
2. It is agreed and accepted that the Respondent overpaid the Complainant sometime in early September for additional clean up works undertaken after the tropical storm late August, 2021.
3. It is agreed and accepted that both [redacted] and [redacted] were in quarantine for a lengthy period of time, some 5+ weeks between mid-September and late October, 2021.
4. It is agreed and accepted that neither party's attention was drawn to the overpayment of wages until sometime in mid to late October, 2021 when [redacted] / admittedly was able to reconcile the bank account after exiting quarantine.

(4) The total which may be deducted in any period shall not exceed one-third of the gross money wage of the employee for that pay period, provided that this shall not apply to interest on and repayments of negotiated loans nor to the recovery of money advanced as contemplated in paragraph (b) of subsection (3) provided that the deduction accords with the agreement made at the time of the advance.

Statement upon termination

12. (3) An employer who furnishes a statement or certificate under subsection (1) or (2) shall be conclusively bound by the contents thereof in any proceeding under this Act concerning the fairness of the dismissal or the employer's liability for severance pay.

Right to severance pay generally

40. (1) Every employee whose term of continuous employment with an employer and any predecessor-employer has in aggregate exceeded one year is entitled to receive, in addition to any other payments which may be due to that employee, upon termination of that person's employment by that person's employer for any reason, other than a dismissal which is within paragraph (a), (b) or (c) of section 51(1), severance pay, being payment in money calculated in accordance with this Part.

(2) In the case of the bankruptcy or winding up of an employer any liability for severance pay shall be paid in priority to all other debts, secured or unsecured, and shall be paid in full unless the property available is insufficient to meet them.

(3) Severance pay shall be payable to an employee for the full period of that person's employment, including any period of employment prior to the 1st March, 1988, if that employment is terminated on or after the 1st March, 1988.

Computation of severance pay

41. (1) Severance pay shall consist of one week's wages, at the employee's latest basic wage, for each completed twelve month period of that person's employment with that person's employer and any predecessor-employer.

(2) In the case of part-time employees their entitlement to severance pay shall be calculated on the basis of the ratio that their actual hours of employment bear to the standard work week.

Termination for misconduct

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 that person's 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 themselves 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;
- (c) behaved immorally in the course of that person's duties; or
- (d) is under the influence of a controlled drug (other than one lawfully prescribed by a health practitioner) or alcohol during the hours of that person's employment.

(2) Where an employee commits misconduct in or in relation to that person's employment that is not sufficiently serious to justify that person's employer terminating that person's employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of any further misconduct.

I have no written warnings on file.
 I did not commit any criminal offense.
 I did not commit any acts of gross misconduct.
 I did not commit any act of misconduct after a written warning.
 I consistently performed my duties in an above satisfactory manner.
 I was not made redundant.
 I had no incidents of absenteeism.
 I did not contravene any Laws or any policies of Pool Patrol.
 I did not behave immorally at any time during the course of my duties.
 I have not been under the influence of controlled drugs or alcohol during the hours of my employment.
 Pool Patrol's reason for termination is not reasonable or substantial nor is it the action of a reasonable minded employer but more an action of sheer unadulterated spite because I pointed out where they should only deduct 1/3 of my salary at any given time.
 The employment relationship had been harmonious for many years and could have continued without incident.

The Law

Deductions

29. (1) An employer shall not make any deductions from the wages payable to an employee under any contract of employment except in accordance with subsections (2) to (4).

(2) Without prejudice to subsection (1) and notwithstanding paragraph (e) of subsection (3), an employer shall not make any deduction from the wages payable to an employee or require or receive any payment from an employee, or allow any other person to deduct, or require or receive any payment from an employee, in respect of —

- (a) the cost of anything done or required to be done by the employer under this Act or any regulations made hereunder;
- (b) obtaining or retaining employment with the employer;
- (c) any fine imposed by the employer;
- (d) bad or negligent work, other than a shortfall in cash collected by an employee on behalf of an employer or in a cash float provided to the employee by the employer; or
- (e) any injury to the materials or property of the employer, save when the injury is occasioned by the wilful misconduct of the employee.

(3) There may be deducted —

- (a) any deduction imposed by any law;
- (b) any money advanced by the employer (whether paid to the employee themselves or to some other person at that person's request) in anticipation of the regular payment of the employee's wages, provided the amount deducted accords with the agreement made between employer and employee at the time of the advance, and provided that no interest, discount or similar charge may be imposed on such advance;
- (c) the actual or reasonable estimated cost to the employer of any materials, tools and implements which, although not obliged to provide, the employer has supplied to the workman at the latter's request;
- (d) any payment into any welfare, insurance or other similar fund which an employee has authorised to be deducted;
- (e) subject to subsections (2) and (4), any sum of money the deduction of which an employee has expressly authorised in writing; and
- (f) any wages deducted by virtue of the suspension of an employee where the employee has been given a written warning under section 52(2) or 53(1) and the employee has been guilty of further misconduct or has continued to perform that person's duties unsatisfactorily.

At no time did I physically attend the office, statements about me becoming loud and alarming are a blatant lie. The truth is that management became offended when I expressed to them that I am a single parent and that they were not exercising consideration with the salary deduction for overpayment and they should check what the law says about deductions.

At no time was I ever dishonest with , as a hard working employee of almost with the company I have never had a warning letter or work place incidents. At no time was I insubordinate to and hold both of them in very high regard. I was only seeking to find out why I was not paid, at no time did discuss in any detail the over payment with me, simply handed me an envelope on 21 October and I was able to piece the details together myself based on the transaction times being 9:14am and 9:18am on 2 September, 2021, at no time did management discuss or explain the details. Obviously I would have been frustrated and confused after not receiving pay for 2 weeks and being on reduced pay for weeks prior due to quarantine, however I deny assertion that I was in any way insubordinate to as had always been kind to me over the years, I would have absolutely no reason to disrespect over something that could easily be rectified.

I continued working as normal on Thursday 28th and Friday 29th October despite not receiving my salary for that week, if I was insubordinate as asserts why was I allowed to continue working for the next 2 days.

Termination

I attended work as regular on Monday 1st November, 2021 and was immediately terminated at around 9am that morning. I was advised by to return I property, shirts etc. and I would receive my full amount. I returned the property at around 12pm on Monday 1st November, 2021, however I was not paid what they call final pay until Tuesday 2nd November, 2021.

Please note the following important facts regarding "final pay:"

termination letter dated Friday 29th October, 2021 was not given to me until Monday 1st November, 2021. This confirms that came to the decision to terminate my employment immediately after my telephone discussion with on 29th October, 2021, they made no efforts to discuss matters with me after that early morning conversation, however they still allowed me to work out the day, go through the weekend and commence work as normal at 6am on Monday morning.

The , which was the reason for the telephone discussion on 28th October, 2021, was not paid to me until late afternoon 1st November, 2021 therefore 's claim that they paid my salary on 29th October, 2021, is incorrect I was not paid this until Monday 1st November, 2021 after had a discussion with Labour Board and realized that I was due this amount as my ordinary salary for the week.

"After had a discussion with Labour Board and realized I was due this amount as my ordinary salary for that week. The \$: final pay was not paid to me until 2 November, 2021 at which time deducted \$ for overpayment."

"I was employed for as indicated by severance payment of 1 November, 2021."

"Kindly note that employment relationship was good, not only was I employed for without incident I was previously employed by ,

was also in quarantine during these weeks and it is not hard to see how the oversight could have happened."

"During my 5 weeks in quarantine I maintained regular contact with this time I was on reduced salary which I do not take issue with."

via whatsapp. During

Return to Work 21 October, 2021

I returned to work on Thursday 21st October, 2021, this was also pay day however I received no salary. I attended the office as it was my first day back to work from quarantine, I was provided with an envelope by

containing two bank transactions, there was no conversation at that time regarding what the transactions were, simply said that had left it for me.

I resumed work as normal from 21st October to 28th October, 2021 without issues. On Thursday 28th October, 2021, I again received no salary. At around 7am on Friday 29th October, 2021 I had a telephone conversation with I who reminded me that one week prior I was notified that I was overpaid on 2nd September, 2021. I informed that due to the vague pay slips I was not aware that I was overpaid, however I was in quarantine for 5 weeks and was not conducting regular banking which explains why I was not aware of it sooner. My bank account is fairly new and I do not yet have online banking set up, I will ordinarily attend the bank once per month, all other transactions are done at the atm usually consisting of withdrawals.

Discussions about No Salary and Prior Overpayment

For clarity the overpayment was on 2 September, 2021 in the amount of \$: my ordinary weekly salary is however the salary of \$ was as a result of additional clean-up work resulting from the tropical storm. The amount of) was deposited to my account twice.

Being in quarantine I was not in the position to go to the bank or atm to check my account as I normally would therefore the overpayment was not apparent to me for quite some time. did not inform me about being overpaid for and only brought it to my attention when I queried not receiving my salary for the week of 21st October and the week of 28th October, 2021. During my telephone discussion with on

"During my telephone discussion with on 28 October, I queried why I was not paid yet again this week at which time stated that its because they are deducting the overpayment which I failed to bring to their attention, I stated to that they also failed to notice the overpayment and also failed to bring it to my attention"

"I explained to that I felt it was unfair to deduct the entire salary as the other guys were given the option of repaying \$50.00 at a time whilst I was deducted 100% which obviously would create hardship for a single father who had just exited a 5 week long quarantine. I went on to advise that my research of the Labour Act states that they should not deduct more than 1/3 of the salary at any given time. became offended and went on to state that this was an overpayment and not a loan, at which time I responded that there could have been a better way to address the over payment rather than punish me for their accounting error which they themselves did not notice for and I had no problem repaying the funds but I was only asking for consideration as I like everyone else have bills to pay and children to take care of."

The Tribunal asked [redacted] who would have been in charge of that process to which [redacted] responded that [redacted] and possibly [redacted]

The Tribunal asked [redacted] if he had any conversation with the Complainant after handing [redacted] the envelope to which [redacted] responded no.

In [redacted] evidence [redacted] stated that [redacted] had been upset and annoyed with various staff in the past but in this instance [redacted] voice was shaking and quivering when [redacted] started to tell [redacted] what happened.

Counsel reserved [redacted] and asked the Tribunal to peruse the contents of [redacted] statement which the Respondent relies upon in affidavit form to complete the evidence, being satisfied the oral evidence of [redacted] and [redacted] was sufficient to convey the points.

The Tribunal referred to [redacted] sworn affidavit and noted the following as [redacted] evidence.

"On 29th October, 2021 [redacted] spoke with [redacted] in my presence in relation to an encounter [redacted] had with [redacted] appeared visibly shaken and upset and conferred with us as to the appropriate response to the conduct displayed towards [redacted] by [redacted] It was collectively agreed that based on the fact that [redacted] shouted boisterously, demanded payment and put the phone down suddenly on [redacted] the employment relationship could not continue. [redacted] was given a reasonable opportunity to verify an overpayment in error which [redacted] failed to account for. The company took appropriate steps to remedy the situation, due to [redacted] lack of communication and in response acted aggressively towards a senior member of staff. We did take into consideration [redacted] time with [redacted] and felt disappointed that our effort to accommodate [redacted] whilst in quarantine was rewarded with complete lack of cooperation and aggressive display of attitude when the company was essentially forced reasonable steps to remedy the situation. We did not feel a warning letter would sufficiently convey the gravity of the circumstances particularly where a senior member of staff was left completely distressed and a direct result of [redacted] unacceptable insubordinate conduct."

Evidence of the Complainant

The Tribunal referred to DLP/FORM1B the confidential complaint form of [redacted]

The Complainant was employed from 26 November, 2007 to 29 October, 2021 for a period of 14 completed years. The period of employment is not contested by the Respondent.

The Complainant was employed as a [redacted] and earned a weekly wage of [redacted]

The claims before the Tribunal are for severance and unfair dismissal.

Page 4 of DLP/Form1B was signed and dated by the Complainant 12 November, 2021 and states:

"I was terminated from my job on 1 Nov, 2021. I returned to work as regular after being in quarantine for 5 weeks. My first day back was 21 Oct, 2021. I worked without incident until 28 Oct, 2021 when I realize that I did not receive my salary. At this time I contacted [redacted] and things went downhill from there. Please refer to my typed statement outlining the full events that led to me being terminated."

The Tribunal referred the typed statement of the Complainant [redacted] Background Exhibit 1.

[redacted] I entitled Summary of Events and [redacted]