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LABOUR TRIBUNAL		
<i>Extraordinary Gazette No. 15/2022</i>		
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: .
Date of Hearing: 19 September 2023
Location: Remote hearing via Zoom

Attendees

The Tribunal
 James Kennedy, Chairperson
 Davina Ebanks, Deputy
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For the Complainant
 Not present
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For the Respondent
 . . .

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] "the Employer" or "[redacted]" former employer, [redacted].
2. The matter was heard by the virtual video conference Zoom, on 19 September 2023, commencing at 10.30 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.
4. On the date of the hearing, [redacted] was not in attendance albeit prior to the commencement of the hearing, [redacted] was in the virtual waiting room for the Zoom hearing and was aware that the matter was listed. There was a delay in the commencement of the hearing and [redacted] had left the meeting room prior to commencement and was unresponsive to all efforts to contact [redacted].
5. Mindful of the long delay in listing this matter and having reviewed the papers, it appeared that little would be added by the presence of [redacted], particularly as video evidence existed of the incident and thus cross examination would be of limited value. As such the decision was taken to proceed with the matter in [redacted] absence.
6. The Tribunal notes its obligations with respect to procedure under s75(6) of the Labour Act being that, if a party fails to attend, it is to proceed to consider the case on the basis of the complaint, the hearing and any written representations made by the party failing to attend and we proceeded to do so.

Background

1. [redacted] was employed by [redacted] as a Supervisor and was employed on [redacted] through to [redacted], being 11 full years. [redacted] rate of pay was: [redacted] per hour and: [redacted] stated [redacted] average work hours were 45, giving a weekly wage of \$ [redacted].
2. [redacted] complaint explains that [redacted] attended work on 18 April 2021 and as [redacted] entered the [redacted] [redacted] passed a co-worker [redacted] noted the floor was dirty and stated that, in a jovial manner, [redacted] said to [redacted] that the floor was messy and asked another worker to sweep the floor. There was a discussion as a result of confusion arising over who should sweep the floor due to conflicting instructions from [redacted] and [redacted] [redacted] indicated that as [redacted] spoke to [redacted] over this confusion, [redacted] tapped [redacted] supervisor with [redacted] hand. [redacted] relates that despite having a good relationship with [redacted] which involved some joking, that [redacted] was not pleased with the interaction and [redacted] arranged for [redacted] and the manager to go to the office and explain what happened. In the presence of two supervisors [redacted] apologised to [redacted] for [redacted] conduct.
3. [redacted] indicated that the next day, [redacted] became aware of an employee incident between [redacted] and [redacted]. Video evidence of the incident was reviewed and witness statements collected. They state that the video appeared to show [redacted] making a slapping motion that hit the hat of [redacted] at the 3 second mark. At the 17 second mark, [redacted] appeared to grab [redacted] apron and pull causing [redacted] to stumble forward. The interaction continues and at the 26 second mark [redacted] appears to brush [redacted] hat with [redacted] hand as the conversation ends.

4. They explained that the witness statements were reviewed and whilst [redacted] maintained that [redacted] actions were done in a joking and "jovial" way the statements of [redacted] and other witnesses seemed to indicate that the actions were performed in anger. They also indicated that they received verbal comments that similar behaviour by [redacted] had occurred in the past, but these were not confirmed by available video evidence due to uncertain dates and times.
5. [redacted] then explained their decision by saying that the employer does not tolerate unwanted physical contact between employees especially of sexual, threatening, or violent manner. Therefore, once all the evidence had been gathered and evaluated the decision was made to terminate [redacted] employment for gross misconduct under Section 52(1)(a) of the Cayman Islands Labour Act.
6. The Tribunal was shown witness statements as referenced. There was a statement of [redacted] signed 23 April 2021, a statement of [redacted], undated, a statement of [redacted] dated 22 April 2021 and a statement of [redacted] undated.
7. The Tribunal also had available the video footage of the incident. The footage was clear and captured the entire incident but there was no audio.
8. The termination was communicated by a Memo dated 20th April 2021 and stated as follows:

In accordance with paragraph 22 section (IV) of the Terms & Condition, you are hereby notified that [redacted] will terminate your employment with [redacted] on the grounds of gross misconduct during the course of duty.

This is in reference to your conduct on the afternoon of Sunday April 18, 2021. You hit your subordinate [redacted] on [redacted] twice and pulled [redacted] by [redacted] apron as viewed in the video downloaded from the store camera. Your explanation of the incident is similar to those of other coworkers however, this behavior is deemed inappropriate and the decision to terminate your employment was made with immediate effect.

The Tribunal Observations

9. The termination was under s52(1)(a) of the Labour Act. This is a misconduct termination requiring a situation whereby the employee is guilty of misconduct so serious that the employer cannot reasonably be expected to take any course other than termination and requiring the employer to act reasonably in the circumstances.
10. In arriving at the answer to the question of whether the employer has acted reasonably in finding that the conduct was so serious as to result in it being unreasonable to expect them to take any other action than termination, we remind ourselves that it is not for the Tribunal to substitute its own view for that of the employer when considering the fairness of a dismissal. Instead, it should determine whether the employer's actions fell within a range of reasonable responses of a reasonable employer. In other words, even if the Tribunal would not themselves have decided to dismiss in the circumstances facing the employer, the question is whether no reasonable employer could have decided to dismiss in those circumstances?
11. In answering this question, we find that dismissing an employee is a remedy of last resort, summary dismissal will only be warranted where an employee has committed gross misconduct, i.e., [redacted] or [redacted] has

committed a fundamental breach of their contract of employment. Most acts of misconduct by employees at work may merit a warning or other sanction short of dismissal but will not merit summary dismissal and only the most serious behaviour by an employee entitles an employer to dismiss summarily. The Tribunal is also entitled to consider the length of service of the employee and their disciplinary history as part of the factual matrix and does so when arriving at their decision.

12. We find that, even whilst restricting ourselves to considering if the employers actions fell within a band of reasonable responses, we do not believe that the employer acted reasonably in terminating
13. Upon review of the video footage it is clear that the incident is of a very minor nature. There are 3 incidents of physical touching, two of which amount to completely trivial flicking of a cap. The other incident is a very brief tug at an apron. The reaction of the other staff in the picture demonstrates that the incident is not a significant one. For at most 4-5 seconds a supervisor's attention is drawn to the interaction between and then returns to work, the other staff in picture either don't even look up or return to duties in even less time.
14. At the hearing the employer sought to say that the altercation could have been a health and safety issue, that simply isn't plausible based on the footage.
15. Furthermore, the statements which supplement the footage don't reveal anything that would indicate the incident was more serious than the footage showed, in fact the opposite is true. statement shows was not present at the incident and speaks only to the apology in the office. makes no mention of the physical issue and focus appears on the conflicting instructions to clean up the floor. indicates that *then used hand to touch the peek (sp) of l hat which was wearing. Also pull towards by holding apron. When I noticed what was going on I said Jasmine that behavior is inappropriate, I told to go and apologize to l I asked to go to the office then went to the office called me, was also present: apologized to for behavior."*
16. indicated that after discussion over who should clean the floor "*hit my hat and when I told why you hit me what do you want then again: pulled my apron."* None of these statements suggest a major issue or that the situation between the employees was irretrievable.
17. It is beyond dispute that an incident occurred, that overstepped the mark and should not have touched but: was an employee of 11 years standing, apologised immediately and the incident was very minor in nature and we do not accept that it was reasonable for with the benefit of all this information to have summarily dismissed
18. allude to other previous issues to justify the decision, but these cannot form part of the decision-making process as no records or information was provided to substantiate the allegations. If the employer had concerns that this incident formed a pattern of behaviour, the appropriate response was to record those incidents, issues warnings and then terminate fairly in due course after giving an opportunity to improve behaviour.

Decision

19. The tribunal unanimously finds that was unfairly dismissed for the reasons set out above.
20. There was some contributory fault of who's conduct brought about this situation in the first place

but apologised immediately and we award 10 weeks salary by way of compensatory award for unfair dismissal to a total award of:


Severance: 11 weeks

Unfair dismissal compensation: 10 weeks

Total award \$:

Appeals

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



James Kennedy, Chairperson

Signed this 23 day of October 2023