



DEPARTMENT OF LABOUR & PENSIONS

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LABOUR TRIBUNAL		
Extraordinary Gazette No. 45/2019		
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 (Resigned)	Ian Charlerly
Kathryn Rowe	Noel Webb	Brando Rankin
		Edward Solomon

Proceedings

Matter: [REDACTED]

Date of Hearing: 2 November 2020

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: [REDACTED]

Employer/Respondent: [REDACTED]
On behalf of [REDACTED]
Represented by Mr Alasdair David of HSM Chambers

Observers: [REDACTED]

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 "the Respondent"). The Complaint was heard by the Tribunal on the 2nd November 2020, 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 17th January 2003 through to 19th May 2020. At the time [REDACTED] employment came to an end, [REDACTED] was working in the capacity of [REDACTED] and earning CI \$[REDACTED] per month.
4. According to [REDACTED] most recent quarterly performance evaluation, on or about 11th March 2020, it was determined that, based on [REDACTED] performance over that period, the Complainant was "meeting expectations."
5. The Respondent alleges that the Complainant was issued a Performance Improvement Plan on or about 30th March 2020 in relation to, at least in part, [REDACTED] attitude. However, this Performance Improvement Plan was not provided to the Tribunal and the Complainant adamantly refutes this allegation.
6. The parties agree that there was an altercation on 4th May 2020 between the Complainant and a co-worker [REDACTED] that took place in the afternoon at or about 6pm in relation to a company vehicle.
7. In a letter signed by [REDACTED] the [REDACTED] – Cayman Islands, dated 19th May 2020, the Respondent alleges that the Complainant was the aggressor:

"On March 30, 2020 you were placed on a Performance Improvement Plan to correct issues surrounding your performance. The Performance Improvement Plan set forth multiple areas in which you were failing to meet performance expectations, including, but not limited to "Create and adjust attitude". On May 4, you ignored this warning about improving your attitude and engaged in serious misconduct during an altercation with your co-worker [REDACTED]"

On May 4, [REDACTED] filed a complaint with [REDACTED] claiming that you shouted at [REDACTED] about the van [REDACTED] had been driving, yelling expletives at [REDACTED] and threatening [REDACTED] with violence. [REDACTED] conducted an investigation of the incident, which included receiving written statements from you, [REDACTED] and, one of the witnesses to the incident [our emphasis added]. After reviewing all the statements, it was determined that you were the aggressor in the altercation and that you threatened [REDACTED] [our emphasis added]. This behaviour is considered gross misconduct, and pursuant to the Termination provision of your employment agreement, specifically Clause 3.2(a), [REDACTED] has the right to

terminate your employment with immediate effect. Therefore, your employment will be terminated effective May 19, 2020.

You have the right to appeal this decision in writing to [REDACTED] within 7 days of the date of this letter.

Any outstanding salary, notice, and vacation days will be paid to you via cheque. You are required to submit all Company property that may be in your possession.

Kindly acknowledge receipt of this letter by signing the attached copy. "

1. An unsigned piece of correspondence, represented as and presumed to be a statement from [REDACTED] states:

"After I came back in the office [REDACTED] (i.e. [REDACTED]) approach me in an very angry way, this was [REDACTED] words don't drive back my [REDACTED] n again or else me an you going to have things. I said what you talking about [REDACTED] said again me and you foing to have things and I am going to show you something to bombocloth.

So I said [REDACTED] you going on like your horn longer than anybody else that's why you want people to be agra of you, you going like its your can why you a go on like that.

[REDACTED] said am going to show you something. So I said what is this for why you a go on like that [REDACTED] said you going to know, I going to show you something I said me and you don't have anything I don't even talk to you from morning I make sure I avoid you. [REDACTED] said again you see you [REDACTED] I going to show you something.

Then I say to [REDACTED] if you have problem at your yard let it stay at your yard don't bring it to me. Then [REDACTED] said you is my problem.

So when I realize its getting out of hand I said you can't do me nothing, so [REDACTED] said I can't do you nothing watch and see so I said talk you a talk you can't do me nothing. [REDACTED] said ask Cayman people about me, ask them and they can tell you who [REDACTED] is.

I said I don't need to ask people nothing because you can't me nothing. [REDACTED] said okay, okay I can't do you nothing I don't have to do you anything, I ago make me friend dem do it. Now I said you can't make nobody do me nothing [REDACTED] said watch and see no, watch and see. Then I said if you let anyone do me anything am coming for you."

2. An email dated 6th May 2020 from [REDACTED] to [REDACTED] and copied to [REDACTED] under the subject heading of 'Incident Report on May 4, 2020' states:

"...I just want to state what I have witness in the incident between [REDACTED] and [REDACTED] on May 4 2020. Myself and [REDACTED] had just exit the company van while going tru the warehouse [REDACTED] was verbally attack be [REDACTED] words was "why the expletive you drive my van for" [REDACTED] in relation says to [REDACTED] "is it your expletive van" so they keep on arguing with each other, [REDACTED] say "do you think you're a bad [REDACTED] you need to go and ask around Cayman who I am" [REDACTED] says "am not afraid of you because the most u can do is kill me! So [REDACTED] Reply was " I don't have to touch you I have my cousin and nephew who can do that for me" [REDACTED] reply was "if anything happen to me you will be held accountable for it" then [REDACTED] come and [REDACTED] and [REDACTED] went in the office, I tried to calm things down but it wasn't working, this was told to me supervisor."

3. The Complainant admits to being involved in the verbal altercation but in the [REDACTED] Incident Report' he prepared dated 8th May 2020, [REDACTED] suggests that [REDACTED] was the first to use expletives and become aggressive:

On Monday the 4th of May 2020 at approximately 6:12pm an incident arose between [REDACTED] a colleague and myself [REDACTED]. This occurred at the [REDACTED] facility in the Operations area, as the [REDACTED] van that I would normally drive home due to Covid19 road blocks. This van was driven out by [REDACTED] just prior to my departure from the office for the day. Upon his return I asked "why would you drive out the van that I would usually drive home", [REDACTED] in turn responded by using profanity and saying "I didn't drive out the van it was our other colleague [REDACTED] whom both return to the office together.

I replied to [REDACTED] indicating "that I saw [REDACTED] driving the van" we both exchange words however during this exchange [REDACTED] seemed to be getting more aggressive in [REDACTED] body language. The argument cease as another colleague [REDACTED] escorted [REDACTED] into the Imports office. "

4. During [REDACTED] testimony, [REDACTED] also said that both [REDACTED] and [REDACTED] exchanged threats but that [REDACTED] did not take it seriously because people say things they do not mean when they are angry.
5. [REDACTED] said that on the evening of the 4th May 2020 [REDACTED] got a call from [REDACTED] who told [REDACTED] that [REDACTED] was in a verbal altercation with the Complainant wherein [REDACTED] had been threatened and that [REDACTED] was going to file a police report. [REDACTED] testified that [REDACTED] told [REDACTED] that [REDACTED] would have to make the decision on [REDACTED] own as to whether or not to make a police report but that [REDACTED] assured [REDACTED] that [REDACTED] would look into the matter right away.
6. On 5th May 2020, [REDACTED] called [REDACTED] ([REDACTED] and [REDACTED] immediate supervisor) and [REDACTED] (whom [REDACTED] said was at least within hearing range of the verbal altercation along with [REDACTED]) into the office. [REDACTED] asked [REDACTED] whether [REDACTED] had spoken to all of the witnesses including [REDACTED] to which [REDACTED] responded yes.
7. [REDACTED] said that [REDACTED] told [REDACTED] that although [REDACTED] heard the arguing [REDACTED] was not paying attention. [REDACTED] confirmed that there was a lot of shouting but that [REDACTED] did not know if any threats had been made.
8. [REDACTED] said that [REDACTED] first told [REDACTED] that [REDACTED] had confirmed to [REDACTED] that [REDACTED] had made threats toward [REDACTED]. As a result, [REDACTED] instructed [REDACTED] to send the Complainant back home when [REDACTED] arrived for the start of [REDACTED] shift, so that they could look into the matter.
9. According to [REDACTED], approximately 2 hours later, when the Complainant arrived, [REDACTED] asked to speak with both [REDACTED] and [REDACTED] because [REDACTED] did not agree with the decision. When recapping with [REDACTED] the evidence that was obtained from the inquiries [REDACTED] had made, [REDACTED] now denied that any witnesses confirmed that threats were made.
10. [REDACTED] testified that [REDACTED] was very upset to learn that [REDACTED] was now relaying a different version of the outcome of [REDACTED] investigations. [REDACTED] said that [REDACTED] told [REDACTED] [REDACTED] was now very confused and that [REDACTED] had to go home until they could properly look into the matter.
11. [REDACTED] said that [REDACTED] was visibly upset but not saying very much other than suggesting that [REDACTED] should be sent home also, if [REDACTED] was going to be sent home.

12. [REDACTED] said that when the Complainant was providing a verbal recollection of the 4th May incident to [REDACTED] admitted to saying that [REDACTED] should ask around Cayman about [REDACTED] because [REDACTED] would learn that [REDACTED] was a very peaceful person. [REDACTED] claims that [REDACTED] told [REDACTED] that [REDACTED] doubted [REDACTED] would have interpreted such a statement in that manner and that it was more likely that [REDACTED] would interpret that as a threat. The end result of the meeting was that [REDACTED] was sent home for the day.
13. The Complainant testified that [REDACTED] reported to work on 6th-8th May as usual. That on the 6th May 2020 [REDACTED] attended a meeting with [REDACTED] supervisor and [REDACTED] wherein they apologized to each other and to [REDACTED]. There were no further incidents reported between [REDACTED] and [REDACTED] during that time and neither have there been any reports of harassment or violence since [REDACTED] was terminated for the 4th May incident.
14. [REDACTED] said that [REDACTED] received a call from [REDACTED] on 6th May stating that [REDACTED] had learned that [REDACTED] was now denying that threats were made but that [REDACTED] had in fact told [REDACTED] that threats were made towards [REDACTED]. [REDACTED] advised [REDACTED] to write a letter to the Interim HR Manager setting out the events in [REDACTED] own words.
15. [REDACTED] said that [REDACTED] became convinced that the Complainant was guilty of serious misconduct on the basis of [REDACTED] evidence and upon learning of a previous matter from earlier in the year in relation to [REDACTED] performance and behaviour towards [REDACTED] co-workers (attitude). No evidence was provided to the Tribunal in relation to these previous matters. The Complainant denied that [REDACTED] had received any previous written warning and this was not challenged by the Respondent.
16. [REDACTED] confirmed that [REDACTED] did not disclose to the Complainant who the witnesses were that provided evidence in this case that was relied upon in making the decision. The Complainant testified that the first time [REDACTED] learned that the witness was [REDACTED] was in the second termination letter that [REDACTED] received. [REDACTED] then provided the Tribunal with the first termination letter that [REDACTED] received (referenced above) which does not identify the witness.
17. The Complainant said that [REDACTED] too had a phone call with [REDACTED] on the night of the 4th May 2020 wherein [REDACTED] claimed to be surprised to hear that [REDACTED] was alleging that threats were made and denied having heard any threats.
18. Notwithstanding the first termination letter, Counsel for the Respondent now says that the Complainant was terminated for serious misconduct pursuant to section 52(1)(a) of the Labour Law.

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 [redacted] 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 [redacted] 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 [redacted] 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 [redacted] 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 [redacted] 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 [redacted] 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 fell 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. The Tribunal notes that the Respondent is relying upon section 52(1)(a) as the basis for the termination of [redacted]. As above, section 52(1)(a) says that the employee conducted [redacted] in such a manner as clearly to demonstrate that the employment relationship cannot reasonably be expected to continue". However, the incident took place on 4th May 2020, the employee was sent home for one day on 5th May 2020 and then reported to work as usual on 6th- 8th May 2020. Thus the employment relationship had in fact continued.
- 21. The Tribunal notes that both [redacted] and [redacted] attended a meeting with their immediate supervisor present on 6th May 2020 wherein they apologized to each other and to their supervisor. The Tribunal also notes that no further incidents were reported between the Complainant and [redacted] during that time or even since [redacted] was terminated.

22. The Tribunal finds that [REDACTED] by [REDACTED] own admission, took into consideration matters which [REDACTED] ought not to have taken into consideration when deciding to terminate [REDACTED]. [REDACTED] took into consideration previous incidents which did not even materialize into written warnings.

23. The Tribunal also notes that the supervisor tasked with responsibility for investigating the matter was not present at the hearing, neither did [REDACTED] provide a witness statement. This is the same supervisor who allegedly told [REDACTED] that [REDACTED] had made threats and then two hours later denied that any witnesses heard threats.

24. The Tribunal also notes that the witness [REDACTED] was not present at the hearing and that the Complainant never had an opportunity to examine [REDACTED] evidence.

25. The Tribunal also notes that no witness statements were forthcoming from [REDACTED] or [REDACTED], both of whom were allegedly within hearing range of the loud verbal altercation.

26. The Tribunal does not accept that termination of an employee with [REDACTED] tenure who had just recently been informed that their performance met the company's expectations was within the band of reasonableness on the basis that:

- a. the investigation was poorly handled with the lead investigator allegedly changing his version of the outcome of the investigation;
- b. the Complainant was denied natural justice due to the identity of the Respondent's main witness being withheld therefore denying [REDACTED] the opportunity to cross examine the witness; and
- c. the person responsible for deciding to terminate [REDACTED] admittedly took into consideration matters which [REDACTED] ought not to have relied upon when making the decision to terminate and
- d. the employment relationship had continued beyond the 4th May 2020 incident without any further incidents

27. The Tribunal does not accept that the Respondent genuinely believed that serious threats were made against [REDACTED] as they failed to take any actions which a reasonable employer would have done such as:

- a. suspending the offending employee with specific instructions to stay away from the premises and co-workers,
- b. file a police report
- c. taken steps to ensure that when on premises the two individuals did not come into contact with each other

28. The Tribunal is inclined to believe that the Respondent looked at this incident as an opportunity to part ways with [REDACTED] without having to pay [REDACTED] severance to which [REDACTED] would otherwise have been entitled.

Orders/Awards

29. [REDACTED] claim for severance pay succeeds. [REDACTED] is entitled to
x 12 months /

30. [REDACTED] claim for unfair dismissal similarly succeeds. The Tribunal awards
per month x 12 months /

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 1 day of February, 2021

