



Labour Tribunal

Thursday, 8 April, 2021

Via Email: |

c/o Mr. Michael Wingrave

Dentons

Via Email: Michael.wingrave@dentons.com

Ref: 205493

The enclosed ruling of the Labour Tribunal, resulting from the proceedings of **Tuesday, 9 March 2021**, in the matter of ' ' provided in accordance with SECTION 15 OF THE LABOUR ACT.

Decision

34. Quoting from the decision of

"In this respect, the present law of the Cayman Islands differs materially from English law, because the requirement to conduct a "reasonable investigation" is at odds with the provision of section 40 of the Law and the exemptions contained within it if the employer delays in making its decision. In the Cayman Islands, the burden is on the employer to show that it acted "forthwith"

35. Here, the Tribunal does not consider that the burden has been discharged in the present case given that the dismissal took place almost one month after the incident in respect of which dismissal is sought to be justified.

Again quoting from '

The fact that the Employer quite rightly had to conduct a comprehensive investigation into the circumstancesdid not absolve the Employer from taking action to dismiss the employee at an early point in time if the Employer reasonable believed there to have been serious misconduct. "Forthwith" in the context of s.52 (1) refers to the point of discovery of the misconduct that is relied upon as the basis for dismissal. The power to dismiss is permissive. The Employer is not obliged to dismiss but if they do decide to dismiss they must do so "forthwith"

36. We do not find that acted forthwith and thus this provides another further reason for the decision arrived at by the Tribunal that the employee was unfairly dismissed.



Orders/Awards

The unanimous decision of the Tribunal is that the Complainant was unfairly dismissed and is due compensation as follows;

- Severance of
- Unfair dismissal compensation

Total award is \$

Right to Appeal

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

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

Please direct appeals to:

Secretary to The Labour Appeals Tribunal
Ministry of Education, Employment, and Gender Affairs
2nd Floor Mid Town Plaza
Elgin Avenue, George Town
Grand Cayman KY1-9000
Cayman Islands
Tel: (345) 945-8960
Email: Lat@gov.ky Alternative Email: labourtribunal@dlp.ky

Please be guided accordingly.

Faithfully,

Kara Connor
Labour Tribunal Secretary



Department of Labour & Pensions
Cayman Islands Government
2nd Floor, Mid Town Plaza
Elgin Avenue, George Town
P.O. Box 2182
Grand Cayman KY1-1105

Direct Ext: (345) 244-4015 Direct Email: kara.connor@gov.ky
Labour Tribunal General Email: labourtribunaldlp@gov.ky
Main Phone Contact #: (345) 945-8960
Confidential Hotline Contact #: (345) 945-3073
Department's General Email: dlp@gov.ky
Freedom of Information Email: FOI.DLP@gov.ky
Website: www.dlp.gov.ky
Facebook: www.facebook.com/cidepartmentlabourpensions

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

Decision

Matter: _____
Date of Hearing: 9 March 2021
Location: Main Conference Room, Department of Labour & Pensions

Attendees

The Tribunal
James Kennedy, Chairperson
Noel Webb, Deputy
Angelita Edwards, Deputy

For the Complainant

For the Respondent
Michael Wingrave – Dentons – Attorneys

Observers
Brent Fuller & Emma Hutchinson – Ombudsman's Office
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 _____ the Complainant" or " _____) against former employer, _____ the Employer" or _____ .
2. The Complaint was heard in person at Midtown Plaza, on 9 March 2021, commencing at 10 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. The Tribunal has also reviewed the relevant sections of the Cayman Island Labour Act (2011 Revision) ("the Labour Act") and in reaching this Decision, the Tribunal has also carefully considered the evidence, and oral testimony of the witnesses.

Background

1. _____ was employed by _____ and was terminated by _____ letter on _____ . _____ was paid _____ and was _____ . This gives a weekly wage _____ and full completed _____ .
2. _____ worked in what was known as " _____ The _____ was a _____ . within which _____ and acted as a _____ , who dealt with customers. _____ and returned their _____ .
3. _____ was the main person in charge of the _____ .
4. There were a number of rules with respect _____ Given the presence of the _____ this was a _____ and the staff who worked _____ were not entitled to bring _____ including their _____ to avoid possible issues. _____ for their own purposes with a view to _____ .
5. Whilst these rules seems clear and obviously sensible there were some permitted exceptions that could be utilised for the _____ . One example given by _____ who was the _____

was that on occasion lunch would be ordered
would pay by asking and produce a receipt, upon this being
vouched and would be given to the
asserted that the rules were somewhat looser and indeed that

6. who was a working in the cage on the day in question recounted
that come to all the time and ask someone

7. Both denied that there would ever be an instance of a
ie. a member of staff getting cash from the cage and then replacing it directly with cash some time later.

8. was clearly well versed in the business practices and
procedures of and had an entirely unblemished record of good employment

9. The incident that led to dismissal occurred on the 15th of January 2020. At around 5.30 p.m.
observed
Before could make enquiries
that and was now putting it back.

10. On being questioned by that someone who
to, visited earlier than expected to further explained
that the person as

11. As were in breach of reported the
incident to next day.
and an internal investigation carried out.

12. was questioned and version of events was that owed and
unexpectedly asked for had money in car but not on person (for reasons
explained above), told that was and would showed it to and
gave it to the Upon returning from a break, during which time had
retrieved from car, returned to the what was doing and

placed [redacted]. The alerting of [redacted] actions triggered [redacted] to report the incident and thus resulted in the investigation.

13. [redacted] gave a statement dated 28 January 2020 and included that the volume of work was so high that day that neither of them could [redacted] and that [redacted] did alert [redacted] in advance to [redacted] actions and intentions.

14. Whilst no direct evidence was led with respect to the investigation, a letter from [redacted] to the Department of Labour and Pensions dated 30 March 2020 outlined the investigation undertaken. It appears from that letter that [redacted] was spoken to as was [redacted] relevance is that [redacted] denied [redacted] passed the [redacted] (alleged) and instead it was a [redacted] who identified [redacted] as [redacted]

15. The letter from [redacted] concludes:

"Having reviewed the content of the complaint under reference, we wish to advise that [redacted] maintains that [redacted] was dismissed for good cause as [redacted] unauthorized [redacted] constituted a serious breach of [redacted] Code of Conduct.

Further, as management's trust and confidence in [redacted] was eroded because of the conflicting evidence of [redacted] who claimed that the said [redacted] as against the evidence of [redacted] who stated that [redacted] individual that was not [redacted] and who claimed to [redacted] has determined that the employment relationship could not reasonably be expected to continue."

16. The termination letter itself was dated [redacted] and was titled [redacted] and stated:

"After reasonable investigation by the [redacted] into your conduct on [redacted], the [redacted] has decided to terminate your employment with cause with immediate effect.

The [redacted] investigation revealed that on January 15th while functioning in your role as [redacted] you [redacted] to complete a [redacted] who visited [redacted] to collect the [redacted]. More specifically, your written statement dated January 17, 2020, acknowledges and confirms your removal of [redacted] to make the [redacted]. Your written statement further confirms that you notified a colleague of your plans to remove [redacted] and [redacted] later in the day. You also advised your immediate manager at the end [redacted]

of the day that, you _____ and that you were
in the process of _____

Notwithstanding the _____ on the same day, you acknowledged that your
unauthorized _____, was wrong and a breach of _____ 'code of conduct'.

By your conduct you failed to comply with the expressed and established rules and policies of the
including _____, Code of Conduct:

- Principle 1.2: Our Culture of Integrity-Doing What's Right and
- Principle 6: Integrity in Safeguarding Entrusted Assets.

Furthermore, your conduct amounts to gross misconduct, and constitutes a fundamental breach of
your contract of employment.

In all the circumstances, _____ has lost trust and confidence in you.

17. _____ version of events and _____ are not materially different apart from the identity of the
_____ saying it was _____ and the _____ saying a _____

18. _____ readily accepted at the time and at Tribunal that what _____ did wasn't standard procedure but
where _____ was at odds with _____ employer is that _____ said that what _____ did was often done by other members
of staff. _____ believed that in fact _____ transparency over _____ actions in bringing it to the direct
attention of _____ supervisor and also some issue the supervisor had with _____, led to action being commenced
against _____ whilst others were not sanctioned.

19. _____ had a phone interview with _____ s on the _____ and was not contacted for a
significant period of time and regularly contacted _____ or employees directly seeking an update and asking to
be allowed to return to work. On _____ wrote to _____ again explaining _____ version of
events and asserting that "last month _____ ask me to _____ because the car guy had washed
vehicle and _____ was at the front and _____ until _____ came back that same day and I didn't go as far as _____ : did
all I did was put the _____

20. On 4th February _____ again wrote complaining about the delay and that _____ was being treated as a criminal
and asserting issues between _____ and that _____ may be behind this.

21. _____ was not contacted again until being handed _____ termination letter on _____

The Tribunal Observations

22. This is a sorry ending to a long-term employment relationship. Other than some recent friction between [redacted] and [redacted] had worked [redacted] way up from a very junior role to a role that entailed significant responsibility and trust and [redacted] employment at [redacted] represented almost all of [redacted] working life.
23. The Cayman Islands is a small business community and the [redacted]. Dismissal for a loss of trust and confidence for matters touching on breaches of the [redacted] Code of Conduct and the whiff of theft or financial impropriety in any form can easily have lifelong consequences for the employee.
24. 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] has committed a fundamental breach of [redacted] 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.
25. In this case the facts are that [redacted] made plain [redacted] intent to [redacted] and [redacted] did so by alerting a junior member of staff and then proceeded to actually [redacted] pass onto [redacted] later the same day and informed supervisor of what [redacted] was doing as [redacted].
26. We accept that [redacted] actions were not in accordance with accepted practice and that [redacted] was aware of this at the time [redacted] did it, but the question remains as to whether the conduct admitted and accepted was of the most serious nature entitling [redacted] to dismiss a [redacted] summarily?
27. In arriving at the answer, we remind ourselves that it is not for the employment 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 the 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.
28. Even whilst restricting ourselves to that role, we do not believe that the employer acted reasonably in [redacted]

terminating [redacted] in the circumstances.

29. Even [redacted] conceded that this was not a [redacted] it was a case of [redacted] amounting to a breach of protocol over [redacted] that was sorted out in a matter of hours. Not only that but the employee was undeniably upfront in having declared [redacted] to other members of staff at the time and not upon being caught which would be a much more serious matter.

30. We also find significant failings with [redacted] investigations. It is not acceptable to interview [redacted] on the [redacted] by phone only and then not allow [redacted] a chance to see the statements generated by staff. Critically the letter from [redacted] dated 30 March 2020 to the DLP makes the issue of the identity of the [redacted] of the [redacted], a factor in the decision to dismiss. The failure to allow [redacted] to see the statement of [redacted] and to address their concerns on this issue makes [redacted] fall foul of their duty to carry out an investigation that was fair in the circumstances. [redacted] should have been presented with all statements generated and been invited to respond to them and invited to a disciplinary hearing on notice of the seriousness of the situation. [redacted] did none of that and given the size of the organisation and resources available to it, the failed to do so at their peril. Their lack of investigation also meant they did not investigate the allegations of [redacted] that what [redacted] did was commonplace and done by others including [redacted]. It is not for us to determine the truth of the allegations, but it is incumbent on the employer to investigate these potentially relevant matters at the time before dismissal.

31. Finally, we note that the decision to terminate was communicated on the 12th February 2020 after suspension on known facts on the 17th January. Section 52(1) of the Act states:

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) [redacted] conducted [redacted] in such a manner as clearly to demonstrate that the employment relationship cannot reasonably be expected to continue.

32. Section 52(1) sets out the test which is to be applied to a summary dismissal for misconduct under section 51(1)(a) of the Act. Accordingly, if an employer can in fact demonstrate that [redacted] reasonably believed the employee to be guilty of serious misconduct, and in fact dismisses the employee as soon as [redacted] could objectively have formed that "reasonable belief" then the employee is fairly dismissed.

33. Therefore, even if the conduct complained of which formed the basis for the dismissal was "misconduct in or in relation to employment so serious that the employer cannot reasonably be expected to take any course other than termination misconduct", the Tribunal considers that [redacted] failed to dismiss the Employee "forthwith" on discovering the Employee's breaches of the Code of Conduct which were apparent at latest the 17th January 2020.

34. Quoting from the decision of [redacted] of the LAT in [redacted] LAT 7/16

"In this respect, the present law of the Cayman Islands differs materially from English law, because the requirement to conduct a "reasonable investigation" is at odds with the provision of section 40 of the Law and the exemptions contained within it if the employer delays in making its decision. In the Cayman Islands, the burden is on the employer to show that it acted "forthwith"

35. Here, the Tribunal does not consider that the burden has been discharged in the present case given that the dismissal took place almost one month after the incident in respect of which dismissal is sought to be justified.

Again quoting from [redacted] *"The fact that the Employer quite rightly had to conduct a comprehensive investigation into the circumstancesdid not absolve the Employer from taking action to dismiss the employee at an early point in time if the Employer reasonable believed there to have been serious misconduct. "Forthwith" in the context of s.52 (1) refers to the point of discovery of the misconduct that is relied upon as the basis for dismissal. The power to dismiss is permissive. The Employer is not obliged to dismiss but if they do decide to dismiss they must do so "forthwith"*

36. We do not find that [redacted] acted forthwith and thus this provides another further reason for the decision arrived at by the Tribunal that the employee was unfairly dismissed.

Decision

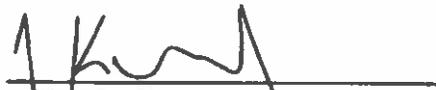
1. The unanimous decision of the Tribunal is that the Complainant was unfairly dismissed and is due compensation as follows;

- Severance of [redacted]
- Unfair dismissal compensation [redacted]

2. Total award is \$ [redacted]

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 7th day of April 2021

