



## Labour Tribunal

18<sup>th</sup> January, 2022

Via Email

**Walkers**  
Via Email

The enclosed ruling of the Labour Tribunal, resulting from the proceedings of 5 March, 2021  
**14 July 2021**, in the matter of \_\_\_\_\_ is  
provided in accordance with section 75 of the Labour Act.

### Decision

The Tribunal finds that the Complainant was not constructively dismissed. Rather, instead of dismissing the Complainant for cause, the Company offered to conclude the employer/employee relationship on terms, which the Complainant did not accept. According to her Complaint the Complainant's date of termination was 21<sup>st</sup> August 2020, so it appears that the contract of employment was terminated by her resignation on that date.

### Orders/Awards

Claims dismissed.

### 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.**



**Labour  
Tribunal**  
CAYMAN ISLANDS GOVERNMENT

**Department of Labour & Pensions**  
2<sup>nd</sup> Floor, Mid Town Plaza, Elgin Avenue  
P.O. Box 2182 George Town  
George Town, Grand Cayman KY1-1105  
Direct Ext: (345) 244-4015 Direct Email: [kara.connor@gov.ky](mailto:kara.connor@gov.ky)  
Labour Tribunal General Email: [labourtribunaldlp@gov.ky](mailto:labourtribunaldlp@gov.ky)

Please direct appeals to:

**Secretary to The Labour Appeals Tribunal**

2<sup>nd</sup> Floor Mid Town Plaza  
Elgin Avenue, George Town  
Grand Cayman KY1-9000  
Cayman Islands  
Tel: (345) 945-8960

Email: [Lat@gov.ky](mailto:Lat@gov.ky) Alternative Email: [labourtribunal@dlp.ky](mailto:labourtribunal@dlp.ky)

Please be guided accordingly.

Faithfully,

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Kara Connor  
Labour Tribunal Secretary



**Labour  
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CAYMAN ISLANDS GOVERNMENT

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

V

**Case Title:**

**Date of Hearing:** Tuesday 6<sup>th</sup> July 2021

**In attendance:** **Labour Tribunal Panel:**

Robert Jones, Chairperson  
Felicia Deslandes, Tribunal Member  
Jack Ebanks, Tribunal Member

**Secretary:**  
Kara O'Conner

**For Employee:**  
was in attendance (by Zoom)  
but was not otherwise represented.

**For the Employer:**  
Legal Counsel, Nicolas Dunne, Walkers Attorneys

**The hearing was closed to the press and the public.**

2.1 The Employee is employed as \_\_\_\_\_ the general responsibilities and duties are as stated in the attached job description.

2.2 The Employee will report to and take instruction from the Employer's President and will faithfully and diligently perform such duties and tasks as may from time to time be assigned to him (sic) and obey all reasonable and lawful instructions issued for or on behalf of the Employer.

2.3 The Employer may not change the Employee's responsibilities and duties without first giving reasonable notice of any such change to the Employee...

#### **4. HOURS OF WORK**

4.1 The Employees regular hours of work will be an 8-hour period from 7:00 am - 6:00 pm Monday to Friday, with a break to be taken. The Employee's standard work week will be 37 hours.

4.2 The Employee may be required to work such hours in excess of the standard work week as are necessary in order to fulfil their duties and/or as may be required by the Employer from time to time.

#### **5. REMUNERATION AND BENEFITS**

5.1 The Employee will be paid a base salary of \_\_\_\_\_ in arrears bi-monthly on or about the 15<sup>th</sup> and the last day of each month to a bank account nominated by the Employee.

5.2 The Employee may be eligible for a discretionary bonus in the amount of \$ \_\_\_\_\_ per annum, payable (if at all) by the Employer in its sole discretion in accordance with the Bonus Structure Plan. The Employer retains the right to change or terminate the bonus plan at any time for any reason.

5.3 The Employee may be eligible for a discretionary bonus in an amount not to exceed \_\_\_\_\_ in aggregate, payable (if at all) by the Employer in its sole discretion in accordance with the Anniversary Bonus Structure Plan. The Employer retains the right to change or terminate the bonus plan at any time for any reason...

#### **7. TERMINATION**

7.1 The employment may be terminated by either party on not less than two weeks written notice, such notice to be addressed to the parties at the addresses shown above and either delivered by hand or posted.

7.2 While the Employee is serving out any period of notice, the Company reserves the right to give the Employee no duties and/or to exclude the Employee from the Company's premises for all or part of that period. The Employee will be paid as normal during any time that \_\_\_\_\_ has no duties and/or is excluded from the firm premises. However, the Company reserves the right to set some or all any accrued holiday entitlement against the period of notice, in which case the accrued entitlement would not be paid on the termination date.

7.3 The Company reserves the right in its discretion to pay the Employee their basic salary under in lieu of termination. The Company reserves the right to dismiss the Employee

have with respect to the repayment of the ;  
previously paid to you.

relocation allowance

3. *In accordance with the company's normal business practice, you will be paid (a) all of your earned but unpaid salary as of the Separation Date and through August 31, 2020, less all applicable withholdings, and (b) all of your accrued but unpaid vacation as of the Separation Date, less all applicable withholdings.*
4. *Contingent upon our execution of this Agreement and your return of all Company materials, including but not limited to company-provided electronics, you will be paid an less all applicable withholdings (the "Payment"). You acknowledge and agree that the payment shall be inclusive of any statutory payment obligations applicable to your employment with the Company as of the Separation Date and shall be in addition to any salary accrued prior to the Separation Date. Payment of the 1 shall be contingent on your execution of this Agreement, and if you do not execute such agreement, then you will not be paid the 1*
5. *You agree that, within seven (7) days after the Separation Date, you will submit your final documented expense reimbursement statement reflecting all business expenses you incurred through the Separation Date, if any, for which you seek reimbursement. The Company will reimburse you for these expenses pursuant to its regular business practice.*
6. *To the extent provided by applicable law or, if applicable, by the Company's current group health insurance policies, you will be eligible to continue your group health insurance benefits at your own expense. You will receive information regarding continuation coverage from the Company's health insurance provider.*
7. *Upon your Severance Date, the Company will comply with all applicable laws, rules, and regulations with respect to immigration reporting obligations, including reporting the change in your employment status with the Company.*
8. *Except as provided in this Agreement, you acknowledge and agree that you have been timely paid all wages or other forms of compensation, including, but not limited to accrued unused vacation, overtime and regular wages, bonuses, awards, commissions, business expenses reimbursements, statutory penalties, and or interest on unpaid wages that you may have earned or to which you may have become entitled as a result of your employment with the Company through the date of this Agreement.*
9. *You agree that prior to the execution of this Agreement you were not entitled to receive any payments or benefits from the Company other than as described in this Agreement and that the only payments, equity and benefits that you are entitled to receive from the Company after the separation Date are those specified in this agreement.*
10. *You agree to use your best effort to work with the Company to ensure an orderly transition of active discussions, projects, and other Company relationships. You agree and acknowledge that, on the Separation Date, you will return to the Company all electronic and paper files, messages, records, documents, workpapers, memorandums, client lists, equipment and property, any and all inventory, computer hardware and software, keys, all work product, and other Company property relating to the Company's business, along with any and all copies of the foregoing in any format.*
11. *In consideration for receiving the benefits described above (including but not limited to the payment) to which you acknowledge you are not otherwise entitled, you (a) waive and*

agreements between you and the Company. You and the Company agree that this Agreement constitutes the entire agreement between you and the Company regarding the subject matter of this Agreement and that this Agreement may be modified only in a written document signed by you and a duly authorized officer of the Company.

18. You understand and agree that you may be waiving significant legal rights by signing this agreement and you represent that you have entered into this Agreement voluntarily, having had the opportunity to consult with an attorney, with a full understanding of and in agreement with all of its terms.

19. You have until 5pm EST August 26, 2020 (the "Expiration Time") to review this Agreement and to discuss with an attorney of your own choosing, at your own expense, whether or not you wish to sign it. At the Expiration Time, this offer will expire." (Emphasis in the original)

9. On 20<sup>th</sup> November 2020 the Complainant filed the aforementioned Complaint at the Department, claiming that [redacted] had been unfairly dismissed on 21<sup>st</sup> August 2020 and that [redacted] was due severance pay and "Please find attached letter from my lawyer for a detailed explanation."
10. The letter in question, from Cayman attorneys at law BB Attorneys, to the Department, was dated 19<sup>th</sup> November 2020 and stated, in part, that-

"We are instructed by ["the Complainant"] hereinafter referred to as "our Client", to file the complaint against [redacted] previous employer, [redacted]

Firstly, it is to be noted that [redacted] provided our Client with a purported "Separation Agreement" (attached for ease of reference) which does not comply with the Labour Law of the Cayman Islands.

Our Client was unfairly dismissed, having been given tasks outside of the remit of [redacted] job description on purpose with a view to having [redacted] terminated. [redacted] has been on a purposeful mission to constructively dismiss our Client ever since [redacted] which occurred in [redacted]

Since reporting the rape, our Client has been discriminated against, targeted for dismissal and been shunned within the workplace. Furthermore, our Client has been purposely assigned work and forced to perform tasks outside of the remit of [redacted] employment contract. We are instructed that our Client was given false warnings, alleging failures of work completion. When those were challenged, [redacted] requests to meet to discuss were ignored and [redacted] was then terminated without valid reason or cause.

Around January 2020, our Client shared with [redacted] last former manager, that [redacted] has been actively looking for a new job as per [redacted] previous lawyer's recommendation... [redacted] told our Client that [redacted] was promoted to replace our Client's previous manager, [redacted] hence, [redacted] will become our Client's direct manager. [redacted] asked our Client to stay and help [redacted] with [redacted] new role. Our Client was worried about getting fired and [redacted] assured that s/he would stand up to fight for our Client's right if that ever happened. Our Client decided to stay to help [redacted]

Ever since [redacted] became our Client's direct manager, there were no goals or objectives set with a delivery date by [redacted] in addition, [redacted] has no technical or managing skills. Hence, [redacted] is not able to measure underperformance, especially if no objectives have been set. With zero knowledge of technical skills, [redacted] often skipped the weekly sync up, and has only been actively engaged two (2) months prior to our Client's termination date. Therefore, it is reasonable to conclude that our

deadlines which had been identified in written warning. As such, summary termination was lawful and justified.

6 Eight Point also wishes to make clear from the outset that certain of the allegations made by [the Complainant] are deeply offensive, and it is little short of outrageous that this claim should now be made at all, let alone in the ridiculous sums that are contended for which have no connection with either reality or the provisions of the Labour Act. The complaint made appears to be little more than a "shakedown", apparently planned by [the Complainant] and attorneys over the course of a number of months, having been advised long before termination to simply continue to receive a paycheck in the meantime until dismissal...

31 The reality is that there have been issues with [the Complainant]'s performance from very early in employment, scheduled for 3 months after its commencement. [The Complainant]'s review took place on 25<sup>th</sup> July 2019 and was conducted by (pages 31-33).

32 In that review, [the Complainant] consistently rated performance at a higher level than did. Of the 18 areas that formed part of the review, assigned a value of 2 on a 5-point scale ("Occasionally Meets Expectations") in 9 of them. As such, initial performance was comparatively weak.

33 In the months after that review there continued to be significant issues with [the Complainant]'s performance, including failures to attend at mandatory meetings and periods when was uncontactable during working hours (pages 34-37)...

37 As a result, on 21<sup>st</sup> July 2020 [the Complainant] was issued with a final warning in respect of performance. [The Complainant] effectively admitted at this stage that was not making much effort, telling on 21<sup>st</sup> July 2020 to the effect that didn't plan on staying with and did not want to "continue putting further funds in [name]'s hands". As such stated that lawyer had advised to just "continue receiving a paycheck" (page 56).

38 However, initially received an upbeat interim assessment from 10<sup>th</sup> August (page 57). If, as is alleged, was on a mission to dismiss [the Complainant] no matter what, clearly no such positive feedback would have been given.

39 By 18<sup>th</sup> August that earlier promise had evaporated, and reported a reversion to previous bad habits and noted that unless was regularly reminded and supervised on a daily basis, tasks were not completed (page 58). It was noted that was "not actively completing" tasks.

40 [The Complainant] was, it seems, simply marking time until left. Ultimately took the view, as it was entitled to, that the issues could not be tolerated any longer, and given that the written warning which produced no consistent improvement in performance reached a stage at which termination was both proper and inevitable..."

13. The 21<sup>st</sup> July 2020 final written warning from the Employer to the Complainant referred to was in the following terms -

"As has been set out to you during the course of a number of previous meetings with your manager, your performance over recent months has fallen below the standard that is expected by the Company in a number of regards. In particular, the following issues have arisen

a). You are frequently unavailable and uncontactable during normal working hours; and

15. Once the fact that a dismissal has taken place has been established, it is then for the employer to show what the reasons were (or if there was more than one, then the principal reason) for the dismissal and show that it was a reason of a kind such as to justify the dismissal of an employee holding the position which the subject employee held (see Smith v Glasgow City Council [1987] ICR 796, [1987] IRLR 326 HL).
16. However, if the employee considers that the reason put forward by the employer was not the true reason, the evidential burden then shifts to the employee to produce evidence to cast doubt on that reason (see Maund v Penwith District Council [1984] ICR 143, [1984] IRLR 24, CA)

#### The Tribunal's Observations

17. In the usual course of events, by this stage of its decision the Tribunal would have already referred to the particular document, or particular exchange, that contained the decision to dismiss and identified the reason given for the dismissal but in this case, all the Tribunal has is the "Agreement" letter given to the Complainant on 21<sup>st</sup> August 2020 which does not appear to effect a dismissal but only sets out the terms on which the Employer was prepared to end the Complainant's contract (although in their 18<sup>th</sup> January 2020 [2021] response document the Employer's attorneys do refer to the dismissal taking place on 21<sup>st</sup> August 2020).
18. The Tribunal has no difficulty identifying the reason relied on by the Employer for the dismissal. As has been mentioned, "*the sole reason for [the Complainant's] termination was underperformance in [his] role by way of failure to address issues of lack of availability and failure to meet deadlines which had been identified in [his] written warning. As such, summary termination was lawful and justified*". (see again the Employer's response document dated 18<sup>th</sup> January 2020 [2021]).
19. The Tribunal will return to when exactly termination took place, but the underperformance reason was confirmed in [redacted] evidence by [redacted]. In [redacted] testimony [redacted] referred the Tribunal to various documents supporting the Employer's "underperformance" reason.
20. The first document was the Complainant's '90 Day Performance Review Self-Assessment' dated 25<sup>th</sup> July 2019 which tended to show, according to [redacted] that the Complainant over estimated [redacted] own abilities, assessing [redacted] as attaining 'Exceptional Performance' or as 'Consistently Meet[ing] Expectations' rather than as 'Occasionally Meet[ing] Expectations' as assessed by [redacted] then manager,
21. It appears that [redacted] also had to write to the Complainant about issues concerning [redacted] non-attendance at staff meetings and the Tribunal was referred to the email from [redacted] to the Complainant dated 20<sup>th</sup> August 2019 (timed at 4:14pm) and the email from [redacted] to the Complainant dated 19<sup>th</sup> September 2019 (timed at 4:34pm). The 19<sup>th</sup> September 2019 email saying-
 

*"As discussed, communication is key for our teams to function. You did not ping anyone on slack, email, or respond to messaging. If you need personal time to compose yourself or do something outside of work, that is fine, but don't go completely dark on the team in the middle of the workday. All I have asked and will continue to ask is that you tell someone what you are doing."*
22. The Tribunal does not have any documentation evidencing any other difficulties that the Company may have had with the Complainant between November 2019 and February 2020 but in March 2020 and April 2020 there were exchanges between the Complainant and [redacted] then manager, [redacted], about time keeping and communication. In one exchange in answer to [redacted]

- but there does not appear to exist any evidence to support the Complainant's claim that [redacted] was dismissed because of anything to do with matters arising in October 2019. The Complainant says that [redacted] was discriminated against, targeted for dismissal and was shunned within the workplace but [redacted] was not able to produce any contemporaneous documentation to support this, nor was [redacted] able to give any evidence at the Tribunal hearing in support of this, save to say that it was [redacted] belief that it was so.
28. Nor does the allegation that the Complainant was constructively dismissed (for whatever other reason) appear to bear scrutiny. Nowhere in the documentation that came into existence at the material time is there any mention by the Complainant of [redacted] being given tasks that were outside the remit of [redacted] job description.
  29. Rather, amongst the documentation filed by the Complainant was evidence that the Complainant was obtaining assistance from [redacted]; employees to do the work [redacted] was given by [redacted]. The documentation in question included invoices and the Complainant accepted paying for this assistance. The Complainant said [redacted] did so, so that [redacted] could "educate myself" and that "I have coaches so I can do a better job".
  30. Quite apart from the issues that could potentially arise because the Complainant may have provided information about the Company to individuals who were not bound by the same duties of confidence to the Company as the Complainant was, the Complainant's case appears to be that [redacted] was given work that [redacted] had difficulty completing and so [redacted] paid outside contractors to assist [redacted], all without mentioning to the Employer the difficulties [redacted] was experiencing.
  31. When [redacted] received the written warning on 21<sup>st</sup> July 2020 about being "unavailable and uncontactable during normal working hours" and "failing to adhere to the deadlines specified for the completion of work" the Complainant only mentioned the fact that [redacted] missed a meeting the previous day because [redacted] had to attend to a personal matter concerning a utility company. No objection or comment was made by the Complainant about the concern that [redacted] was failing to complete work in a timely manner.
  32. In Maud Griffiths LJ said "*the employee cannot do this [show that the real reason for the dismissal is in issue] by merely asserting in argument that it [the reason relied on by the employer] was not the true reason; an evidential burden rests on him [or her] to produce some evidence that casts doubt on the employer's reason. The graver the allegation, the heavier will be the burden. Allegations of ...malice should not be lightly cast about without evidence to support it*" (at 149 and 150)
  33. In the circumstances, the Tribunal is satisfied that the reason for the Complainant's dismissal was the potentially fair s51(1) *failure to perform* reason (s51(1)(c)) and the Tribunal is satisfied that that reason was relied on based on the "*set of facts known to the employer or ... of belief held by [redacted] which cause[d] him to dismiss the employee*" (see Abernathy v Mott Hay and Anderson [1974] ICR 323 [1974] IRLR 213 CA). It is enough for an employer to show subjectively that it believed in the existence of the reason and in this case, if the Complainant was being given work that [redacted] had difficulty executing or completing, [redacted] did not inform the Company of this. All the Company knew at the time was that the Complainant was not doing the work [redacted] was being asked to do, in the way [redacted] was asked to do it, and in a timely fashion.
  34. Deciding what the reason was for a termination and whether it was one that could justify dismissing an employee holding the position the subject employee held is but the first stage to be addressed by a labour tribunal in what is a two-stage process. The second stage is to answer the question of whether on the facts of the particular case in question, it was fair to dismiss the

*which [s]he is employed (with or without notice) in circumstances in which [s]he is entitled to terminate it without notice by reason of the employer's conduct"* (definition - see the UK Employment Rights Act 1996 s95(1)(c)).

40. But whilst an employee who terminates his or her contract of employment, with or without notice, may still claim to have been dismissed, if the circumstances are such that he or she is entitled to terminate it without notice by reason of the employer's conduct, such a constructive dismissal, if established, is not automatically unfair. A tribunal must still proceed to apply the normal tests of fairness. Often the factors applying to whether an employee was constructively dismissed will be the same as those applying to whether the dismissal was fair and so in practice the tribunal must consider both matters (see Stephenson & Co (Oxford) Ltd v Austin [1990] ICR 609 EAT).

41. Having done so, the Tribunal finds that the Complainant was not constructively dismissed. Rather, instead of dismissing the Complainant for cause, the Company offered to conclude the employer/employee relationship on terms, which the Complainant did not accept. According to Complaint the Complainant's date of termination was 21<sup>st</sup> August 2020, so it appears that the contract of employment was terminated by her resignation on that date.

#### Appeals

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

Signed this 9<sup>th</sup> day of January, 2022

Chairperson

