

LI 2021



Labour Tribunal

CAYMAN ISLANDS GOVERNMENT

Department of Labour & Pensions
2nd 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
Labour Tribunal General Email: labourtribunaldlp@gov.ky

Labour Tribunal

07 July 2021

Via Email

c/o Nigel Smith
Carey Olsen
Via Email

The enclosed ruling of the Labour Tribunal, resulting from the proceedings of **MONDAY 24 May 2021**, in the matter of _____ is provided in accordance with section 75 of the Labour Act.

Decision

The Tribunal notes that section 54 of Law appears to be interpreted and/or applied inconsistently within the Department of Labour and Pensions.

In the Summary of Facts document prepared by Senior Labour Officer ("SLO") Jason Ricketts, he states (second to last paragraph):

"I note filed his complaint on the day [redacted] attended the Department, far within ninety-day limit, however [redacted] had not submitted [redacted] complaint form which was later submitted on the 6th September 2019."

However, the Cover Letter to the Complaint signed by the SLO and the Director, addressed to the Respondent and dated 4th October 2019 states as follows:

"On 6th September 2019, a complaint was filed against your organization by your former employee."

Finally, page 5 of the Complaint form bears the signature of someone purporting to be an Officer of the Department of Labour and Pensions, indicating that the Complaint was received on 6th September 2019.

The Tribunal does not suggest or imply any wrongdoing or malicious intent on the part of the Department of Labour and Pensions, but raises this point only to draw the Department's attention to this discrepancy and to recommend that a consistent approach be adopted going forward. If the Department has not already done so, perhaps guidance from the Attorney General and/or the Labour Appeals Tribunal may prove beneficial to all.

In the present matter, whether the claim has any merits does not fall to be decided. The question is whether it is time-barred.

The Tribunal finds that the time started to run on the date of dismissal (i.e 7th June 2019) and applying section 12 of the Interpretations Law, the window of opportunity to file the Complaint expired on 5th September 2019.



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The Tribunal finds that:

*there is nothing remarkable in the fact that the Act contains a time limit for presenting a complaint of unfair dismissal. In most, if not all, legal systems lapse of time after the occasion for grievance may result in the application of a procedural rule denying a remedy for the infringement of a right. There are sound policy and legal reasons for imposing time limits: the promotion of social, economic and political stability the attachment of legal certainty and finality in disputes; the recognition of evidential procedural and other practical difficulties in achieving a fair and just solution of a dispute long after the event. Further, expectations that no legal action will be taken may be legitimately and reasonably formed and acted upon in good faith by potential respondents who change their position. ' (Mr Justice Mummery, **Biggs v Somerset County Council [1995] UKEAT 995_94_2302**)*

The Tribunal also accepts the Respondent's submissions with respect to severance pay as set out in clause #9 and 10 above.

The Tribunal dismisses the Complainant's claim for Unfair Dismissal and Severance Pay on the ground that the Tribunal does not have jurisdiction to hear it.

Orders/Awards

The Complainant's claim for Unfair Dismissal is dismissed.

The Complainant's claim for Severance Pay is similarly 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.

Please direct appeals to:

Secretary to The Labour Appeals Tribunal

Email: Lat@gov.ky Alternative Email: labourtribunal@dlp.ky

Please be guided accordingly.

Faithfully,

Kara Connor
Labour Tribunal Secretary



DEPARTMENT OF LABOUR & PENSIONS

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LABOUR TRIBUNAL <i>Extraordinary Gazette No. 49/2019</i>		
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 <i>(Resigned)</i>	Ian Charlerly
Kathryn Rowe	Noel Webb	Brando Rankin
		Edward Solomon

Proceedings

Matter:

Date of Hearing: 24 May 2021

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: Ian Charlerly

Labour Tribunal Secretary: Kara Connor

Employee/Complainant: (Not Represented by Counsel)

Employer/Respondent: (Not in Attendance)
Mr Nigel Smith (Counsel for the Respondent in Attendance)

Witnesses: N/A

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 24th May 2021, commencing in the afternoon 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 Act (2021 Revision) ("the Law").

BACKGROUND

3. [redacted] was employed with [redacted] from the [redacted]
4. [redacted] was employed in the capacity of an [redacted], earning [redacted]

PRELIMINARY MATTERS

5. The Tribunal allowed the parties to address the Respondent's submission that the Complainant's claim was filed out of time.
6. Mr Smith, Counsel for the Respondent, argued that the Law specifies that a complaint of unfair dismissal as defined in section 2 of the Law must be filed with the Director within ninety days of the date of dismissal, pursuant to section 54 (1) and (2). Further, [redacted] argued that the Law does not provide the Director the power to accept a complaint filed after the ninety days for any reason.
7. Mr Smith on behalf of the Respondent, submitted that:
 - [redacted] Complaint is one of unfair dismissal.
 - [redacted] Complaint states that [redacted] employment was terminated on 7th June 2019 as corroborated by the evidence.
 - The Director's cover letter to [redacted] dated 4th October 2019 states that the Complaint was received by the Department of Labour & Pensions on 6th September 2019 (as corroborated by the evidence).
 - The section of the Complaint form signed by [redacted]; designated for Official Use Only, states that the Complaint form was received on 6th September 2019.
 - Applying the computation of time as provided for in section 8 of the Interpretation Law (1995 Revision), ninety days from the 7th June 2019, is the 5th September 2019.
 - Section 54(1) and (2) of the Law as read with section 8 of the Interpretation Law (1995 Revision) provides that [redacted] Complaint is out of time and the Tribunal does not have jurisdiction to hear the Complaint.

8. The Complainant argued that the 7th June 2019 should not apply as the effective termination date because [redacted] did not receive a written statement of termination as required by Law. However, Counsel for the Respondent countered that, pursuant to section 12 (1) of the Law, a written statement of termination is only required upon request by the Employee and further, the email conversation thread between [redacted] - [redacted] (which forms part of the Complainant's written submissions under the subject 'Classes cancelled?'), is sufficiently explicit as to the Complainant's termination from [redacted]. The email exchange is as follows:

To [redacted]

[redacted], I have received numerous messages from concerned [redacted] asking why all of [redacted] is early as Sundays class (June 9th 2019) which was full plus wait list. Please can you provide me with the reason for this so I can provide such members with the answers they seek.

The reason is that you no longer work for [redacted]. You can explain that how you like [redacted].

[redacted], thank you for confirming this.

I would have expect (sic) to be notified of my termination in person or writing prior to it happening.

9. Further, the Respondent argued that pursuant to Section 40 of the Law as read with section 51 of the Law, the Tribunal does not have jurisdiction to consider the matter of severance pay. Or [redacted] interpretation, the Law provides that an employee who completes in aggregate of one year or more is entitled to severance for any reason, save for instances of a fair termination as set out in section 51.

10. The Respondent's submission was that a Tribunal can only consider the question of unfair dismissal if a Complaint is properly initiated (i.e. in the present matter, duly filed). Therefore, if the Complaint for unfair dismissal is out of time, the Tribunal cannot consider the question of unfair dismissal and hence the Complainant has no claim to severance pay. It is the Respondent's position that the Law does not specify a time limit in section 40 because the Law anticipates that Unfair Dismissal and Severance Pay would be dealt with together.

11. The Complainant had no further comments on this point.

12. The Tribunal briefly entertained the Respondent's following two points before a brief adjournment to consider the preliminary matters:

- That the complaint was primarily a commercial dispute and therefore outside the jurisdiction of the Tribunal; and
- That [redacted] had effectively waived all rights to any legal claims against [redacted] pursuant to the terms of an Agreement of Sale and Purchase dated [redacted] a few days after the Complainant's termination date).

THE LAW

13. The Labour Law (2011 Revision) provides:

2 'complaint' means a formal complaint made to the Director under section 46 or 54.

12 (1) Where an employer has, subsequent to the expiration of an employee's probation period, terminated the employee's employment the employer shall upon a request being made by the employee at any time within fourteen days after the termination of that person's employment, furnish within fourteen days to the said employee a written statement of the reason for the action, and if the employee so requests send a copy thereof to the Director.

40 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.

54 (1) Should any questions arise as to whether an employee has been unfairly dismissed, the employee may seek a resolution of the question by filing a complaint of unfair dismissal with the Director.

(2) A complaint under subsection (1) must be filed within ninety days of the date of dismissal

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 his 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 himself 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 his 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 employment.*

THE TRIBUNAL'S OBSERVATIONS, FINDINGS, RECOMMENDATIONS AND DECISION

14. The Tribunal notes that section 54 of Law appears to be interpreted and/or applied inconsistently within the Department of Labour and Pensions.

- In the Summary of Facts document prepared by Senior Labour Officer ("SLO") states (second to last paragraph):

"I note I filed complaint on the day attended the Department, far within her ninety-day limit, however had not submitted complaint form which was later submitted on the 6th September 2019."

- However, the Cover Letter to the Complaint signed by the SLO and the Director, addressed to the Respondent and dated 4th October 2019 states as follows:

"On 6th September 2019, a complaint was filed against your organization by your former employee,

- Finally, page 5 of the Complaint form bears the signature of someone purporting to be an Officer of the Department of Labour and Pensions, indicating that the Complaint was received on 6th September 2019.

15. The Tribunal does not suggest or imply any wrongdoing or malicious intent on the part of the Department of Labour and Pensions, but raises this point only to draw the Department's attention to this discrepancy and to recommend that a consistent approach be adopted going forward. If the Department has not already done so, perhaps guidance from the Attorney General and/or the Labour Appeals Tribunal may prove beneficial to all.

16. In the present matter, whether the claim has any merits does not fall to be decided. The question is whether it is time-barred.

17. The Tribunal finds that the time started to run on the date of dismissal (i.e. 7th June 2019) and applying section 12 of the Interpretations Law, the window of opportunity to file the Complaint expired on 5th September 2019.

18. The Tribunal finds that:

'there is nothing remarkable in the fact that the Act contains a time limit for presenting a complaint of unfair dismissal. In most, if not all, legal systems lapse of time after the occasion for grievance may result in the application of a procedural rule denying a remedy for the infringement of a right. There are sound policy and legal reasons for imposing time limits: the promotion of social, economic and political stability the attachment of legal certainty and finality in disputes; the recognition of evidential procedural and other practical difficulties in achieving a fair and just solution of a dispute long after the event. Further, expectations that no legal action will be taken may be legitimately and reasonably formed and acted upon in good faith by potential respondents who change their position.'

(Mr Justice Mummery, Biggs v Somerset County Council [1995] UKEAT 995_94_2302)

19. The Tribunal also accepts the Respondent's submissions with respect to severance pay as set out in clause #9 and 10 above.

20. The Tribunal dismisses the Complainant's claim for Unfair Dismissal and Severance Pay on the ground that the Tribunal does not have jurisdiction to hear it

[Handwritten signature]

ORDERS/AWARDS

- 21. The Complainant's claim for Unfair Dismissal is dismissed.
- 22. The Complainant's claim for Severance Pay is similarly dismissed.

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.

[Handwritten signature]
Gregory Barnes, Chairperson
Signed this 4 day of July, 2021

