



Labour Tribunal

CAYMAN ISLANDS GOVERNMENT

Department of Labour & Pensions ¹⁴

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: labourtribunaldip@gov.ky

Labour Tribunal

Tuesday, 10 August, 2021

Via Email

Via Email

Ref: 180307 –

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

Decision

Although the Tribunal does not consider the Complainant's actions in this instance to be misconduct for the reasons aforementioned, the Tribunal notes that the Respondent admitted to tolerating similar behaviour for a good portion of the Complainant's tenure and that this incident was essentially, the 'last straw'. It is also noted however, that the Complainant did not have any previous written warnings. In the absence of any disciplinary action for previous episodes, the Complainant could not have known that her actions would have resulted in dismissal.

The Tribunal notes that the Employer did not withhold the Complainant's notice pay.

Orders/Awards

The Complainant's claim for Unfair Dismissal succeeds. Taking into consideration the factors set out in section 55 (2) of the Law, and in particular, the manner of dismissal pursuant to 55(2)(e), the Tribunal awards the maximum compensation under this head _____

The Complainant's claim for Severance Pay similarly succeeds. The Tribunal orders the Respondent to pay a sum of _____

Total Order: _____

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



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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

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: labourtibunal@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. 45/2019</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 March 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 Represented by Counsel)

McKenzie Friend: N/A

Witnesses:

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, Caregivers Agency, [redacted], "the Employer" or "the Respondent"). The Complaint was heard by the Tribunal on the 24th March 2021, 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 Act (2021 Revision) ("the Law").

BACKGROUND

3. [redacted] was employed by the Respondent commencing [redacted] years (completed service).
4. At the time [redacted] employment ended, [redacted] was working in the capacity of a [redacted]; earning CI\$ [redacted] and working a standard [redacted] hour work week.
5. The Respondent, [redacted] operating at [redacted], has been in operations for [redacted] came under new management on or about 2015.
6. [redacted] provides [redacted]. Its clients are mostly expatriate professionals. As set out in the Respondent's letter addressed to Mr Dwayne Forde of the Department of Labour & Pensions under the caption: Reference: 180307 – Complaint by Former Employee (the "Response Letter"):

"As you must understand and appreciate that we work with [redacted] of [redacted] (sic), so having a suitable staff member assigned to [redacted] is very important."
7. Notwithstanding the foregoing, a significant portion of the revenues came from CINICO who are the Payees for services provided to some of [redacted] elderly care clients.
8. During the time that [redacted] was employed with [redacted] the Company had approximately 15-22 employees.
9. [redacted] served as the [redacted] served as the [redacted]

EVIDENCE

10. At the Hearing, the Respondent put the case that [redacted] was terminated for gross misconduct on 5th August 2018, pursuant to section 52(1)(a) of the Law, insofar as the Complainant conducted [redacted] in such a manner as to clearly demonstrate that the relationship could not continue.

The Offending Conduct

11. The Respondent avers that on or about the 5th July 2018, the Complainant was engaged in private WhatsApp message exchanges which [redacted] later posted in the Company's Group Chat. The private WhatsApp messages had taken place between:

- a) The Complainant and the Administrative Assistant; and
- b) The Complainant and the Manager

(together, the "Private Chat Messages").

12. Whereas the Private Chat Messages were accessible by the parties only, messages in the Group Chat were accessible by all of [redacted] employees.

13. The Respondent maintains that the Group chat was established by the Manager for the primary purpose of maintaining communication with staff members who worked throughout the day at various [redacted]. According to the Respondent, it was the official means used by the Manager to broadcast general information to [redacted] Employees.

14. The Respondent said that the WhatsApp group chat would also occasionally be used by staff members to share work experiences with each other and to provide support for one another. The Respondent also accepted that occasionally staff would share spiritual inspirational messages, jokes and other general information, but insisted that these sorts of messages were the exception rather than the rule.

15. In broad terms, the Private Chat Messages include an initial inquiry by the Complainant into the status of June's pay and an initial response by the Respondent explaining a reason for its delay. The exchange then deteriorates into both parties accusing each other of rude and/or unprofessional behaviour.

16. The Respondent's complaint is that the Complainant posted what [redacted] knew were intended to be private chats in the Group chat in bad faith and with the intent to sow discord amongst [redacted] employees.

17. The Respondent's Letter to the DLP states as follows:

"I took the decision to terminate [redacted] employment on the 5th of July 2018, with one month's notice, more so on the basis of [redacted] actions in which [redacted] proceeded to send copies of my discussions with [redacted] and that of the admin assistant to the entire group of employees on our group chat. I saw this as malicious, and an attempt to cause intentional dissension with the rest of the group. Therefore guided under section 52(a) of the Labour Law (2011 Revision). A letter was sent to [redacted] advising her of our course of action. Tensions had risen beyond repair at this point and we could not expect to continue employer/employee relationship."

18. The Complainant neither accepted or disputed the purported confidential nature of the Private Chat Messages exchanges, but [redacted] did not deny posting the messages in the Group Chat.

Events Leading to the Complainant's Termination

19. The Complainant's case is that [redacted] contacted the Respondent on or about 4th July 2018 inquiring about [redacted] pay as was due to receive it on the 1st July 2018.

20. [redacted] says that [redacted] was advised by the Manager that there were accounts receivable issues in relation to the Client [redacted] was assigned to work with, but that it was expected to be sorted out soon.

21. said that told Manager that if pay was not transferred to account that day, that would not be going into work the following morning. says that was told "to feel ad do as sees fit."

22. According to , notwithstanding the foregoing, indeed went to work on the 5th July 2018. Per the evidentiary documents submitted by the Respondent, the client to whom the Complainant was assigned confirmed that reported to work on 5th July 2018.

23. An extract of the events leading to termination taken from the Complainant's Official Complaint Form (DLP/Form 1B) reads as follows:

a) "When contacted again on the 5th of July, states that payment will be made when can collect payments from the client. I informed that this was not good enough, as this was not what I signed up for, furthermore, I work and carry out my duties to the best of my ability. Hence, if I work I do expect to get my salary on time. Again: told me "to feel and do as I see fit". I asked what meant by that however did not respond.

A group WhatsApp message was sent out by on the 5th July stating that they understood that everyone is stressed about their pay however, they have used up all their reserves due to clients not paying, furthermore they had a family crisis. then responded to ; WhatsApp Group Chat to say, Yes, ladies it is bad, and you are all free to do what you see fit to do...

then contacted me personally via WhatsApp message and voice notes to state view of me in unprofessional manner. I contacted to let know that I did not appreciate the manner in which Ms Jackson had addressed me, and the least I expected is to be respected. told me that I am rude as always, and I am free to feel and do as I see fit. I post both and response in the group chat to which I was removed, and a notice sent out by I stated, I'm a strong believer in do onto others as you would have them do onto you. However, you should always treat others the way you want to be treated. : never showed any respect to me therefore the feeling is mutual. I just wanted to get that across and that the end of the matter."

Again contacted me personally via WhatsApp to come in the next date that was the 6th of July to collect my one month's notice. also informed to collect my termination letter the next day...

My termination letter was sent via email..."

24. At the Hearing the Respondent did not deny that there was a delay in processing payroll. However, the Manager did deny that payroll was consistently late. provided the Tribunal with the dates that funds were transferred to the Employees for various months over the course of the preceding year. Most of the dates mentioned in that respect were within the first 7 days of each month.

25. The Manager explained to the Tribunal that in recent times the Company had come into some difficulties meeting its payroll obligations as a result of late client payments. Further advised the Tribunal that she was strongly opposed to the idea of securing a loan or overdraft facility in order to assist in meeting payroll. Response Letter states:

"Please note that for the entire existence of the Agency we have operated, and continue to do so, without the need of overdrafts or loans."

26. The Respondent explained that in addition to the payroll challenges, on or about the time that [redacted] was pursuing them for [redacted] pay, the Respondent's family was also dealing with a [redacted]

27. At the Hearing, the Respondent admitted that the Complainant's alleged rude and unprofessional behaviour which described as intolerable, and upon which it relies as the primary reason for the Complainant's termination, had indeed been tolerated for some time. The Complainant's letter of termination dated 5th July 2018 (the "Termination Letter") reads as follows:

a) *"We have been observing your behaviour since the commencement of the year [Our emphasis] and it is with regret that the relationship between yourself and the agency has deteriorated beyond repair...*

You have acted very rudely and in a condescending manner, always, [our emphasis] to the staff and to management. The [redacted] has always tried [our emphasis] to accommodate any questions or concerns raised by you...

You rarely attended staff meetings [our emphasis] held...which in the opinion of Management reflects a disinterest in [redacted] / and its well-being .

These actions demonstrate serious deterioration of the Employer/Employee relationship and warrant the termination of the relationship giving one (1) month's notice effective 5th July 2018.

[redacted] is proud of its reputation in the homecare industry and has a solid base of good clientele that we cannot compromise on. Keeping this in mind, we have no choice but to terminate your contract with the company lest your behaviour reflects negatively on our clients which has already occurred [our emphasis]..."

28. The Complainant maintains that:

- a) [redacted] advised [redacted] to collect [redacted] check via WhatsApp on 5th July 2018.
- b) [redacted] similarly told [redacted] to collect [redacted] check via WhatsApp on 5th July 2018.
- c) [redacted] originally told [redacted] that they could speak face-to-face when [redacted] came to collect [redacted] check.
- d) [redacted] later advised that [redacted] would not be able to see [redacted] that day.
- e) [redacted] received [redacted] termination letter via email.

29. The Labour Act (2021' 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 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 his employment.

* For a conduct dismissal to be fair, a tribunal must be satisfied that, at the time of dismissal:

- The employer believed the employee to be guilty of misconduct.
- It had reasonable grounds for believing that the employee was guilty of that misconduct.
- At the time it held that belief, it had carried out as much investigation as was reasonable.

(British Home Stores Limited v Burchell [1978] IRLR 379.)

The Burchell guidelines mean that a tribunal should not, itself, determine whether the employee is guilty, but rather whether the employer believed, and had reasonable grounds for believing, that the employee was guilty of the misconduct. In considering this issue, a tribunal must review the level of investigation undertaken by the employer and consider whether it was within the "band of reasonable responses"

THE TRIBUNAL'S OBSERVATIONS, FINDINGS, RECOMMENDATIONS AND DECISION

30. The Tribunal sought to be as empathetic with the Respondent as possible insofar as it relates to the challenges meeting payroll. However, inasmuch as small business ownership should be encouraged, it cannot be at the detriment of the employees and in particular, low wage earning employees who depend on their timely pay at regular intervals to attend to the most basic of needs (e.g. food, water, shelter, electricity). On multiple occasions, / chose to let their employees go without pay (which the employees had already earned – i.e. paid in arrears), for up to as many as 6 days). Meanwhile, the possibility of a line of credit or an overdraft facility might have been available to to assist it in meeting its payroll obligations. Instead, chose not to even pursue that option. The Tribunal noted that the Employer seemed resolute in position on this and quite proud of the stance she had taken.
31. Notwithstanding the Tribunal's observations in clause 30 above, the Complainant's contract of employment provides that : is paid monthly and no date is specified. Further, the Law provides the Respondent 30 days to reconcile their payroll accounts.
32. The Tribunal notes that the Respondent does not dispute, and indeed the evidence confirms that, in relation to the delay with June's payroll, the Manager told the Complainant (and all the employees in the Group Chat) to '*do as they see fit*'. Further, according to the Complainant, via WhatsApp she had given the Respondent an opportunity to expand upon what she meant by that statement, but the Respondent declined to do so. The Tribunal finds that it is therefore reprehensible for the Respondent to then turnaround and not only take offense, but to actually terminate the Complainant on the grounds of misconduct pursuant to section 52(1)(a) (i.e. gross misconduct), for essentially doing what the Complainant thought was fit to do (i.e. which was to post in the Group Chat, the private chat exchanges between:
- a) The Complainant and the Administrative Assistant; and
 - b) The Complainant and the Manager).
33. The Tribunal finds that the Complainant is entitled to rely on the Respondent's instructions. "*to do as sees fit*" as license/permission to post the Private Chat Messages in the Group Chat and therefore the Complainant's actions cannot be construed as misconduct.
34. In the absence of any misconduct the Complainant's actions are outside the scope of section 52(1)(a) and therefore the termination is unfair.
35. Further, the Tribunal is satisfied that the United Kingdom Court of Appeal has made it clear that even where misconduct is admitted an employer is still under a duty to follow a fair procedure, such as hearing explanations and considering other penalties besides dismissal. In the present case, the Tribunal accepts that the Manager did not afford the Complainant the opportunity to give account of the story or to hear explanations and in-fact rescinded her decision to have a face-to-face meeting with the Complainant altogether. Based on the size and the administrative resources of the Company, the Tribunal finds it is reasonable to have expected the Respondent to do more.
36. Finally, although the Tribunal does not consider the Complainant's actions in this instance to be misconduct for the reasons aforementioned, the Tribunal notes that the Respondent admitted to tolerating similar behaviour for a good portion of the Complainant's tenure and that this incident was essentially, the 'last straw'. It is also noted however, that the Complainant did not have any previous written warnings. In the absence of any disciplinary action for previous episodes, the Complainant could not have known that her actions would have resulted in dismissal.
37. The Tribunal notes that the Employer did not withhold the Complainant's notice pay.

ORDERS/AWARDS

38. The Complainant's claim for Unfair Dismissal succeeds. Taking into consideration the factors set out in section 55 (2) of the Law, and in particular, the manner of dismissal pursuant to 55(2)(e), the Tribunal awards the maximum compensation under this head (i.e.
39. The Complainant's claim for Severance Pay similarly succeeds. The Tribunal orders the Respondent to pay a sum of C\$

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 29th day of July, 2021

