



Labour Tribunal

Friday, 03 September 2021

Via email

Via Email

Ref: 207148 -

The enclosed ruling of the Labour Tribunal, resulting from the proceedings of **27 April 2021**, in the matter is provided in accordance with section 75 of the Labour Act.

Decision

66. The Tribunal considered the following factors:

- a. The Respondent is an unsophisticated employer, a small , who at the time of the Complainant's termination had only one contract (i.e the Contract for Services with the and one employee (namely,
- b. The Complainant had been with the Respondent for just shy
- c. There is sufficient evidence in the Respondent's written evidence which illustrates the Respondent's concerns with the Complainant's conduct and performance throughout tenure.
- d. the Complainant knew or ought to have known that the Respondent's Contract for Services was already under scrutiny by the and that for no security personnel to show up to provide services on the first day of school would reflect negatively on the Respondent.

67. The Tribunal finds that on the balance, despite the investigatory failings of the Respondent, the dismissal is fair pursuant to section 51(1)(a) of the Law.

68. Given that the termination is deemed to be fair pursuant to s51(1)(a), the Respondent's claim for severance pay must fail in accordance with the provisions of section 40.

Orders/Awards

69. The Complainant's claim for severance pay is dismissed in entirety.

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



**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: labourtribunal@dlp.gov.ky

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: 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 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:

Dates of Hearing: 27 April 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 Chairperson: Angelita Edwards
Deputy Chairperson: Jennodell Myles

Labour Tribunal Secretary: Kara Connor

Employee/Complainant:

Employer/Respondent: represented)

McKenzie Friend: N/A

Witnesses: N/A

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, the [redacted], "the Employer" or "the Respondent". The Complaint was heard by the Tribunal on the 27th April 2021, commencing at 9:30am via the virtual meeting 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 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. The Complainant, [redacted], was employed by the Respondent during the period [redacted].
4. At the time [redacted] employment ended, [redacted] was working in the capacity of a [redacted] Officer, earning [redacted] and working a standard [redacted] hour work week.
5. The Respondent, [redacted], operating at [redacted] [redacted] operating under the [redacted]. The business offered [redacted].
6. [redacted] had a contract for services with the [redacted] (the "Contract for Services") which called for [redacted] at one of [redacted].
7. This was the Company's sole contract during the Complainant's tenure.
8. The Complainant, the Company's sole employee at the time, was assigned to the [redacted] school in the performance of the Contract for Services.
9. The Contract for Services expired in [redacted]. Further, the Contract for Services:
 - a) Had come into jeopardy, at least in part due the Complainant's conduct and/or performance;
 - b) Was subject to a bidding process which took place on [redacted].
10. Over the course of [redacted] employment, the Complainant had exclusive access to a company vehicle to be used in the performance of [redacted] duties (the "Company Vehicle").
11. At some point between [redacted] the Respondent gave [redacted] consent (expressly or impliedly), for the Complainant to drive the Company Vehicle home in the evenings and weekends for personal use.

12. On or about _____, the privileges of using the Company Vehicle for personal use on evenings and weekends were revoked by the Respondent but the Complainant was still expected and permitted to use the Company Vehicle for work purposes.

13. When the _____ closed for _____; on or about _____ the Complainant parked the Company Vehicle at the Respondent's home.

14. Between _____, the Complainant was not scheduled for work and received no income from _____.

Claims

15. It is not disputed that the Complainant was terminated on the 4th March 2020.

16. The Complainant filed the Complaint with the Department of Labour and Pensions on 14th September 2020, seeking severance pay.

EVIDENCE

Basis for Termination

17. According to the Respondent's 4th January email (the "Termination Letter"), the Respondent's case is that the Complainant's employment was terminated on 4th March 2020 because "*failed to report to work as scheduled*", and in so doing, the Complainant failed to carry out a duly issued instruction.

Failure to Carry Out Instructions

18. The Respondent's avers that on 1st March 2020, _____ told the Complainant that work was to resume on the morning of 3rd March 2020.

19. The Respondent claims to have communicated with the Complainant at two different time intervals on the 1st March 2020:

- a) prior to the Complainant's arriving at _____ home on the day ("Interval 1") and,
- b) further communications between the parties some time after the Complainant left property ("Interval 2").

20. Below is a summary of the events of 1st March 2020, according to the Respondent's written evidence.

a) Interval 1

I. The Respondent advised the Complainant that employment would resume on

- ii. The Respondent instructed Complainant to collect uniforms from home later that day;

b) At the Respondent's Home

- i. The Complainant is seen on CCTV entering the Company Vehicle;
- ii. The Complainant did not come to the house as instructed, at any time while was on property;

c) Interval 2

- i. The Respondent instructed the Complainant to report to work on 3rd March 2020.
- ii. The Respondent provided the Complainant with an update on the status of the Company vehicle used for work.

21. The Complainant does not dispute 20(a)(i) and (ii).

22. The Complainant denies clause 20(b)(i) and (ii). Instead, the Complainant countered that:

- a) that did not enter the vehicle, but that checked it and noticed it had not been moved;
- b) that did not have any personal belongings in the car. personal belongings had been removed by from mid-December 2018 when last parked the Company Vehicle; and
- c) assumed no one was at home because the helper's car was not at the property.

23. The Complainant does not dispute 20(c)(i) - (iii) above but informed the Tribunal that had also put to the Respondent, the inconsistencies in positions with regards to authorization to drive the Company Vehicle. The Complainant says that whereas the Respondent told that was no longer permitted to drive the Company Vehicle afterhours and on weekends because it was in need of repair, was expected to continue to use the (presumably) unfit vehicle for work purposes.

24. At the Hearing, in relation to the Respondent's instructions to report to work on 3rd March 2020, the Complainant made the following admissions to the Tribunal:

- a) That understood that the Respondent was expecting to show up at work on 3rd March 2020;
- b) That had not in fact reported to work on 3rd March 2020;
- c) That did not notify the Respondent, by any mode, either on or before the 3rd March 2020, that would not be reporting to work as instructed; and
- d) That actually had no intention of going to work on that day.

25. The Complainant told the Tribunal that [redacted] had made the decision not to go to work on 3rd March 2020 after [redacted] learned via a WhatsApp Message exchange with the Respondent on the evening of 1st March 2020, that the Company Vehicle had not yet been repaired.

26. The Complainant told the panel that [redacted] understood that to mean that [redacted] was still not going to be able to use the vehicle for personal use but that [redacted] was still expected to use it for work purposes.

Advance Notice of Resumption of Work

27. The Respondent avers that the Complainant was forewarned at the end of December that the Company was awaiting the renewal of the Contract for Services and that [redacted] would update when [redacted] had more information.

28. Further on 13th January 2020, the Respondent was advised that the deadline for the [redacted] contract bidding process was i.e. 28th February 2020, and that [redacted] expected to learn the outcome of [redacted] bid soon thereafter.

29. The Respondent also claims to have put the Complainant on notice that [redacted] would be required to start work within the same week that [redacted] contacted [redacted] with an update in regards to the same.

Decision to Terminate the Complainant

30. Notwithstanding the advance notifications provided to the Complainant and the instructions to report to work on 3rd March 2020, the Respondent avers that the Complainant did not show up for work on the day in question.

31. In making the decision to terminate the Complainant, the Respondent took into consideration:

a) the *"history of infractions... as this was not the first occasion that [redacted] did not attend to work on the first day of scheduled work"*; and

b) The complaints about the manner in which [redacted] was performing [redacted] duties by the

History of Infractions / Unsatisfactory Performance

32. The Respondent included in [redacted] written evidence some examples which [redacted] believes supports the proposition that the Complainant had a history of conduct and/or performance issues and most notably, insubordination:

A. End of Year Report

i. In an email to the Complainant on 5th January 2020, the Respondent instructed the Complainant to provide [redacted] end of year report with all findings by the end of the week as the report was due to the [redacted]

ii. In an email to the Complainant on 12th January 2020, under the caption "2nd Request", the Respondent requests that the Complainant urgently provide [redacted]

the end of year report as per 5th January 2020 email, no later than Wednesday, 15th January 2020.

B. Final Written Warning

- i. On 9th January 2019, ... sent the Complainant an email purporting to be a Final Written Warning for, inter alia, insubordination (the ^)¹. concerns in relation to this behaviour are expressed in the following terms:

Good Day

I have been made aware from that you only submitted your renewal security application yesterday January 9th \ 2019. Instructed you from mid July 2018 to ensure you submitted your soon as the , to avoid any late fees or penalty from being applied. Your which was prior to the expiry date of your . I also spoke to you on 3 separate occasions following up on the issuance of your and you provided excuses that "you will call them and let know but did not provide any update only when asked you about "

sent you an email yesterday and you did not respond, but instead left a voice message on ... phone indicating the issue was sorted. Again, specifically asked you to give hi call after you met with I , again you did not adhere to instructions to call after you finish your meeting, nor did you respond to the email sent you. also tried calling you and you did not answer call. It is noted that your meeting was finish with prior to noon and you told you were "just reaching back "at time of your message 3:43pm which was not true.

I have attached a photo that was taken today of the poop again, my sent you an email warning about this previously and a reminder of housekeeping items just sent to you last week prior to esuming in

You are not only be being disrespectful and dishonest which is creating a reputational risk to the company, furthermore you are not adhering to

¹ The Tribunal notes that this Final Written Warning was valid for 12 months only, ending on 18th January 2020 and therefore the Respondent cannot rely on the Final Written Warning as a basis for termination pursuant to S.52(3) of the Law. However, the Tribunal does accept the evidentiary value of the Final Written Warning to the extent that it assists to convey a history of the Respondent's concerns about the Complainant's performance, conduct, dishonesty and insubordination.

the oral and written instructions giving to you from r whom is also owner of C.

Please note effectively that any leave off is required to be approved by prior to you taking.

Please provide an email response to this email by end of day January 10th explaining why you just submitted your application yesterday January 8th, 2019 when you were instructed to do so prior and when follow ups were made to you regarding the same, you told that you submitted the application and had to call to check on it.

This is a final warning to you regarding your daily duties, conduct and your dishonestly.

C. Verbal Warning

- i. On 25th August 2018, while the Complainant was on leave, the Respondent says that discovered that, inter alia, the Company Vehicle was in poor condition.
- ii. On or about 1st September 2019, in a telephone call with the Complainant, the Respondent requested a meeting with which was to be held on 2nd September 2019. In that same call, the Respondent maintains that also told the Complainant that could no longer use the vehicle for personal use in the evenings and/or weekends.
- iii. At the meeting on 2nd September 2019, between the Respondent and the Complainant, the Respondent addressed the following matters:

Performance Issues

- unsatisfactory performance
- various complaints received from about the Complainant including:
 - That was observed sitting and chatting while should have been carrying out duties;
 - That was leaving the without notifying anyone;
 - failure to provide the Ministry with reports of any findings, even though they received notice of findings from other sources.
- The generally poor condition of the Company Vehicle
- Unsatisfactory care/upkeep
- Dishonesty

- Representing to the Respondent that ... required emergency leave which claims to have later discovered were false.

iv. The Respondent claims that noted that the Complainant was particularly aggrieved by the revocation of the privilege of using the Company vehicle

The Respondent's Belief

33. According to the Response to Complaint Letter, at the time of making the decision to terminate, the Respondent believed that the Complainant had already secured alternative employment elsewhere and therefore had no intention of reporting to work on 3rd March 2020.

34. In support of belief, the Respondent points to his behaviour on the day of the 3rd March 2020 and in particular:

- a) nonchalant attitude towards retrieving uniforms for work the following day; and
- b) the excuses (from the Respondent's perspective) the Complainant made about driving an unfit vehicle.

The Termination

35. There is no dispute that between the period of 2nd March 2020 and 4th March 2020, there were no communications between the parties.

36. On 4th May 2020, the Respondent sent an email to the Complainant in the following terms:

I hereby advise you that your employment has been terminated effective immediately, due to failure to report to work as scheduled. Your will be cancelled in accordance with the immigration law.

Please ensure that all uniforms are to be returned to me by close of day Thursday March 5th 2020. Vacation pay that is due to you will be calculated and paid to your bank account accordingly."

The Complainant's Position

37. The Complainant explained that contacted the Immigration on own volition on the morning of 5th March 2020 where learned that ; cancelled. It was evidence that this was ; first indication that employment with had been terminated.

38. The Complainant did not provide the Tribunal with a convincing explanation as to what prompted to contact the Immigration Department on 5th March 2020.

39. The Complainant made no attempts to contact the Respondent to question or dispute the reason or decision to terminate.
40. The Complainant maintains that it is his belief that his employment with S was terminated because he contacted the Department of Labour and Pensions in relation to vacation pay which he believed was owed to him.
41. The Complainant explained that the reason he was pursuing his vacation pay is because he had not been paid since December when the company was closed for Christmas holidays. Given that he was paid salaries monthly, he had no expectation of being paid until the end of March at the earliest. Thus, he would have gone from mid-December through to end of March with no income from his Employer.
42. The Complainant stated that he found another job as a [redacted] within 2 – 3 weeks of being terminated from [redacted] and was able to secure a job as a [redacted] approximately 5 – 6 months thereafter.

THE LAW AND THE ISSUES

43. The Law States as follows:

Section 40:

- (1) 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.

Section 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 within section 52(1);
 - (b) misconduct following the receipt of a written warning under 52(3);
 - (c) unsatisfactory performance following the receipt of a written warning under section 53(2);...

Section 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 that person's 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 themselves 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 that person's duties; or

Section 52:

- (3) Where an employee has been given a written warning under subsection (2), if that person, within twelve months following the receipt of the written warning, commits misconduct of any kind in relation to that person's work, the employer may terminate the employment of the employee, or take such other action as may have been specified in the written warning, without further notice.

Section 53:

- (2) Where an employee has been given a written warning under subsection (1), if that person does not, during the period of one month following the receipt of the written warning, commence performing that person's duties in a satisfactory manner, the employer may terminate that person's employment at the end of that one month period, or after the end of that period take such other action as may have been specified in the written warning without further notice.
- (44) To summarize the Law as it relates to misconduct as is relevant to this matter:
 - (45) The right not to be unfairly dismissed is enshrined in the Law. It is well established that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at s51(a)-(f). One of the potentially fair reasons for dismissal, listed at s51(1), relates to the conduct of the employee. If the tribunal finds that the employer has dismissed for a potentially fair reason, the tribunal must then go on to consider whether the dismissal was fair or unfair.
 - (46) The employer does not have to prove beyond reasonable doubt that the employee was guilty of the misconduct, but merely that it acted reasonably in treating the misconduct as sufficient for dismissing the employee in the circumstances known to it at the time. The reasonableness of the employer's decision is looked at at the time of the final decision to dismiss.
 - (47) The tribunal's task, in essence, is not to conduct its own investigation and come to its own view of the offence but rather, to assess whether the employer's actions in relation to procedure and penalty fell within the range of reasonable responses which a reasonable employer might have adopted in the circumstances.

THE LAW APPLIED

- 46. The tribunal considered all the evidence both oral and documentary and found the following findings of fact on a balance of probabilities and reached the following conclusions having applied the law to the facts found.
- 47. The Complainant is seeking severance pay.

48. Section 40 of the Law provides that the Complainant is entitled to receive severance pay upon termination of his employment initiated by his employer, for any reason, save for a dismissal for (i) serious misconduct pursuant to (S51(1)(a) as read with S52(1); misconduct following a written warning pursuant to (S51(1) as read with S52(3); or unsatisfactory performance pursuant to (S51(1)(c) as read with S53(2).
49. The Respondent case is that the Complainant was terminated for serious misconduct and more specifically, failure to follow a reasonable instruction. The instruction relevant to this matter was, to report to work on 3rd March 2020.
50. The Tribunal accepts that the primary reason operating in the mind of the Respondent at the time of termination was that the Complainant failed to follow a reasonable instruction to report to work on 3rd March 2020.
51. The Tribunal also accepts that the Respondent believed that the Complainant had no intention of returning to work because he had already found another job.
52. The Respondent's submissions to the effect that the Complainant's lassie faire attitude towards retrieving uniforms and "excuses" with regards to the Company Vehicle are accepted as supporting evidence in this regard.
53. The Respondent is not required to prove that he found another job. It is sufficient at this stage of the inquiry that that was the Respondent's belief.
54. Further, the Tribunal accepts that insubordination is misconduct that is capable of destroying the trust and confidence which is at the center of the employment relationship. Therefore, the Respondent's reason for terminating the Complainant is a potentially fair reason pursuant to S51(1) of the Law.
55. The Tribunal is mindful that an employee working under an approved Cayman Islands work permit is licensed to work with one employer, and is prohibited by law from working for any other employer, without first obtaining authorization from the Workforce Opportunities & Residency Cayman ("WORC"). Any work permit holder found to be working for another employer is guilty of an offense under the Immigration Law and liable to a penalty of fines and / or imprisonment. The same liability extends to the Employer, who is in this instance, the Respondent.
56. Therefore, the Tribunal finds that the actions taken by the Respondent to terminate the Complainant's employment and cancel his work permit with immediate effect is consistent with an employer who believed that an employee had no intention of returning to work and who was working with another employer without proper authorization. It follows that the Tribunal finds that a reasonable employer in the same circumstances could have made the same decision the Respondent in this case had made.
57. The Tribunal is satisfied that the Respondent had reasonable grounds for his belief.
58. The Tribunal noted that exchanging messages via WhatsApp was an acceptable mode of communication between the Respondent and the Complainant. Further, when the Complainant was at the property on the 1st of March 2020, he made no attempt to either call or send a WhatsApp message to the Respondent to inquire whether anyone was home so that he could access the uniforms.

which [redacted] would have needed for the next day, if had intentions of going to work. Neither did the take any other action that a reasonable person genuinely concerned about being ready and willing to work the following day might have done.

59. The Tribunal also noted that even after leaving the Respondent's property on 1st March 2020, the Complainant did not try to contact the Respondent to inquire further about [redacted] uniforms. It was the Respondent who had to follow up with [redacted] via WhatsApp.
60. The Tribunal, minded also of the Complainant's admission set out at clause 24 (a) – (d), finds that the Complainant did not appear to be concerned about whether or not [redacted] received his uniforms at all because [redacted] had no real intentions to work for the Respondent any longer. The Tribunal finds that the Complainant's actions in this regard were in bad faith and that [redacted] acted with malicious intent by not informing the Respondent that [redacted] was not going to report to work on 3rd March 2020, at any time before the start of [redacted] scheduled shift. This reckless disregard could have further jeopardized the Respondent's contract with [redacted] and the Tribunal is inclined to believe that this is exactly what the Complainant intended since [redacted] was well aware of [redacted] concerns with [redacted] performance, which included [redacted] own conduct and performance while on the job.
61. However, case authority requires that the grounds the Respondent relies upon to terminate the Complainant to be based on a reasonable investigation. The Tribunal is guided by the UK courts to insist upon an investigation, even in instances where an employee admits to their guilt.
62. The Tribunal is of the view that, at minimum, a reasonable employer would have reached out to the Complainant to ascertain whether the Complainant's failure to attend or notify was due to some misfortune or misadventure, before making a decision to terminate [redacted] employment.
63. There is no evidence that the Respondent undertook any investigation at all.
64. Nevertheless, the Tribunal is minded that an investigation is only one factor for the tribunal to consider.
65. The determination of the question whether the dismissal is fair or unfair depends on whether or not an employer has acted reasonably in accordance with equity and the substantial merits of the case having regard to all the circumstances.
66. The Tribunal considered the following factors:
 - a. The Respondent is an unsophisticated employer, [redacted] who at the time of the Complainant's termination had only one contract (i.e the Contract for Services with [redacted] and [redacted] employee
 - b. The Complainant had been with the Respondent for just shy of [redacted]
 - c. There is sufficient evidence in the Respondent's written evidence which illustrates the Respondent's concerns with the Complainant's conduct and performance throughout [redacted] tenure.
 - d. the Complainant knew or ought to have known that the Respondent's Contract for Services was already under scrutiny by [redacted] and that for no security personnel to show up to provide services on [redacted] would reflect negatively on the Respondent.

67. The Tribunal finds that on the balance, despite the investigatory failings of the Respondent, the dismissal is fair pursuant to section 51(1)(a) of the Law.

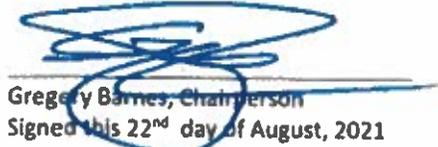
68. Given that the termination is deemed to be fair pursuant to s51(1)(a), the Respondent's claim for severance pay must fall in accordance with the provisions of section 40.

ORDERS/AWARDS

69. The Complainant's claim for severance pay is dismissed in entirety.

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 22nd day of August, 2021

