

DECISION OF THE BOARD

DISPUTE FILED UNDER:

The Employment Act 2000 (The "Act")

BETWEEN

Couver Wilkinson - Complainant

AND

- **Employer**

Date of the Hearing: February 10th, 2022

Tribunal Panel Members: The Honorable Derrick V. Burgess, JP, MP – **Chairman**
Jocene C. Harmon, JP
Paget Wharton

Present: Couver Wilkinson
on behalf of the Employer

The Dispute filed under The Employment Act 2000 (The 'Act') pursuant to Section 37 (4) of the Act.

The Complainant is seeking the following:

- 6 weeks unfair dismissal pay
- 2 weeks' notice pay

The Agreed Terms of Reference for The Employment and Labour Relations Tribunal (the 'Tribunal') is to determine whether the Complainant was 'Unfairly Dismissed'. Therefore the burden is with the Employer to prove that the Complainant was 'fairly dismissed'.

At the beginning of the hearing and at the end of the hearing, both the Employer and the Complainant were given the opportunity to try and settle this matter. The Employer declined and was happy to let the Tribunal decide what would be the best outcome.

Background Facts

1. The Complainant was employed as a Labourer with the Employer for a period of two (2) years and was dismissed on September 28th, 2021 for multiple infractions, including aggressive and disruptive behavior over the duration of the employment period. The Employer has stated these concerns have been ongoing throughout The Complainant's tenure.

2. The Complainant had stated that during the period of Covid, there was sickness and deaths all over the world and Bermuda included, he and his wife had experienced the passing of two (2) friends, one (1) being a best friend who was doubled vaccinated and therefore he invested in a Thermometer to test his co-workers.
3. On September 28th, 2021, one of the co-workers had a cough and it appeared to the Complainant that he was displaying Covid like symptoms and he tested him with the thermometer and his temperature read at 100.4. The Complainant had informed the Foreman who directed the worker to tell the Employer.
4. The Complainant messaged the Employer and the Employer's reply to him stated 'oh you are the cancer on the job, I'm giving you two (2) weeks' notice and then you will no longer have a job'. The Complainant continued to work and the Foreman approached him and told him that the Employer said, 'for you to leave now'. Also, the Employer told him 'if you want Labour laws and rights, then you should get a Government job'.
5. The Complainant stated that he was protecting himself and others from Covid and even more since the Employer told his workers, 'if you have COVID keep it to yourself and stay home. Don't report it because they will shut down the whole job site.'
6. The Complainant's position is that he was terminated for checking the temperature of fellow employees for possible Covid related infections and was terminated without a valid reason.

The Employers letter to the Labour Relations Officer with the Labour Relations Section dated on December 12th. 2021 states the following excerpts:

1. The Complainant commenced employment with the Employer in September 2019.
2. There had been a series of events and behavioral concerns that had existed throughout his tenure which culminated in the Complainant's termination. He was dismissed under Section 25 of the 'Employment Act'.
3. Concerning events commenced shortly after the first Covid 'Shelter in place' period in March 2020.
4. During the period which lasted approximately 1.5 - 2 months, I had employees on a rotational work schedule.
5. The Complainant stopped at the construction site and proceeded to aggressively speak with some of the work permit holders on the job stating he will be reporting them to Immigration for working on that particular day and he was not. These accusations caused disruption and uneasiness and ultimately reflects under the Act of Bullying under Section 10B of the Act.
6. The Complainant's actions continued which included patters of sexual misconduct, making untoward sexual comments to other male workers and on a few occasions physically grabbed

his coworkers in inappropriate places of their body - Sexual Harassment as per Section 10B of the Act.

7. The Complainant had provoked multiple confrontations, some of which involved dangerous weapons such as knives and tools such as hoes. A worker responded verbally to the abuse which led to ongoing arguments.
8. Having observed this for a number of days, the Employer intervened multiple times to demand the workers to cease and desist.
9. The Complainant harassed another employee via text messages following this, the Employer observed an employee with a machete and the Complainant with a hoe. As they approached one another aggressively, I (the Employer) intervened and calmed the situation, needless to say, they were warned of the consequences if anything of this nature transpired again.
10. The Complainant had harassed another worker, who called the Employer to complain of the following:
 - i. choice not to be vaccinated against COVID 19
 - ii. And working illegally in Bermuda and he (the Complainant) threaten to complain to the Department of Immigration.
 - iii. The Complainant was warned by the Employer.
11. After much consideration, I (the Employer) decided that the Complainant was a serious liability to the Employer given the nature of his continued disrespectful manner and dangerous actions.
12. I called the Complainant and told him it would be better for him and everyone, if he left the construction site and that he was terminated.
13. The Employer wrote this is typical for most construction companies on the island, I do not provide 'Statements of Employment' for my workers.

Witness Statements

- a. - stated he was not approached and tested by the Complainant, but he tested three (3) others. has been the Foreman for 15 years as per his work permit. The Employer included that the Complainant was verbally warned about testing employees.
- b. - is a former employee and was not an active employee of the Employer when the Complainant was terminated.
- c. - has been employed for 2.5 years. The Complainant never approached to be tested. It was alleged by the Employer that the Complainant threatened to slap The Complainant denies this allegation.

- d. – was approached by the Complainant to be tested a week before the Complainant's termination. stated that he did not like the Complainant's approach and was offended by the Complainant's statement about reporting him to Immigration. and the Complainant had a verbal confrontation which he and the Complainant both confirmed.
- e. confirmed that she is not employed by the Employer but helps out with administration work and provides advice to . admits there is no documentation or warnings on file about these matters. No 'Statements of Employment' exist.
- f. **The Employer** - stated he has no problem with testing employees.
- g. As the Employer, the verbal warnings/reports have never been put in writing, hence there are no dates or times recorded on such serious allegations.
- h. I have not given the workmen 'Statements of Employment' as required and stated by section 6 of the Act.
- i. **The Complainant** told the Tribunal:
 - a) Employees have to wait three (3) months before getting Health Insurance.
 - b) Employees have to work ten (10) hours a day.
 - c) On weekends, only guest worker are employed, not Bermudians.
 - d) The Employer told him that he is the cancer on the job and he must cut it out and was given two (2) weeks' notice to finish up.
 - e) Later the Foreman came to him and said that the Employer gave instructions for him to leave now (immediately) with no termination of pay in lieu of notice.

DECISION:

- I. **There have been a number of allegations presented by the Employer that are extremely serious. However, there has been no documented evidence reflecting the facts and dates of these allegations, all have been undocumented verbal warnings.**
- II. **As required by law, there are no 'Statements of Employment' for the workers.**
- III. **There was only one (1) witness that confirmed that a serious threat has been made by the Complainant because he did not like his comment referencing to reporting him to Immigration even though he is married to a Bermudian and has two (2) Bermudian children.**
- IV. **There was only one (1) witness currently employed by the Employer that was tested by the Complainant and the others declined.**
- V. **It is the Employer's position that the Complainant was terminated for his ongoing disruptive behavior and hostility towards management**

- VI. If the 'Allegations' made by the Employer followed the 'Progressive Discipline' procedures, i.e. written warning etc. and the requirement for both the Employer and Complainant to sign, the matter of this case would not have been sent to Tribunal.
- VII. We believed had the Employer accepted to participate in the conciliation process with the Labour Relations Section, this matter could have been resolved and had a satisfactory settlement for both parties, however the Employer chose not to do so.

Based on these findings, the dismissal of the Complainant by the Employer cannot be upheld and the settlement award is as following:

- (a) Section 20-(1A) - one (1) weeks full pay in lieu of notice
- (b) Section 40-(1c) - (5A) - 6 weeks full pay
- (c) The Complainant shall be paid by the Employer in full no later than thirty (30) days from this decision.

- VIII. Additionally, we believed that a penalty of \$2500.00 be imposed upon the Employer for failing to provide employees with a Statements of Employment.

'Under the amended Act, if an employer fails to comply with the requirements of Section 6 (e.g. having in place a statement of employment, containing the required particulars) they will be liable for a civil penalty. Such penalty must be appropriate, meaning that it must be "appropriate, proportionate and dissuasive" and may be up to \$5,000 if awarded by the Manager of Labour Relations and up to \$10,000 if awarded by the Employment and Labour Relations Tribunal (the "Tribunal")'.

- a) The imposed penalty is payable to the Accountant General. A copy of the transaction receipt should be forwarded to the Manager of the Labour Relations Section.
- b) The Employer shall pay the penalty in full no later than thirty (30) days from this decision.

Statement of Employment

6 (1) Not later than one week after an employee begins employment with an employer, the employer shall give to the employee a written statement of employment which shall be signed and dated by the employer and employee.

(2) The statement shall contain particulars of the following—

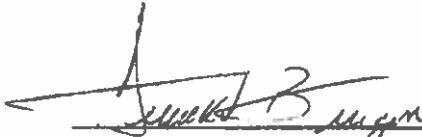
- (a) the full names of the employer and employee;
- (b) the date when the employment began;
- (c) the job title and brief description of the work for which the employee is employed;
- (d) the place or places of work;
- (e) the gross wage or the method of calculating it, and the intervals at which it is to be paid;

- (f) the normal days and hours of employment or, where the job involves shift work, the normal pattern of the shifts;
 - (g) the entitlement to holidays, including public holidays, and paid annual vacation;
 - (h) the terms relating to incapacity for work due to sickness or injury, including provision for sick leave;
 - (i) the length of notice which the employee is obliged to give, and entitled to receive, to terminate his contract of employment;
 - (j) details of any pension provided, whether under the National Pension Scheme (Occupational Pensions) Act 1998 or otherwise;
 - (k) any disciplinary and grievance procedures applicable;
 - (l) where the employment is not expected to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date on which it is to end;
 - (m) any probationary period;
 - (n) any dress code;
 - (o) the existence of any collective agreement which directly affects the terms and conditions of the employment;
 - (p) such other matters as may be prescribed; and may contain other details relating to the terms and conditions of employment.
- (3) Where there are no particulars to be entered under paragraphs (k) to (o) of subsection (2), that fact shall be noted in the statement.
- (4) The statement may refer the employee for particulars of the matters mentioned in paragraphs (g) to (k) and (n) of subsection (2) to—
- (a) the provisions of any collective agreement which directly affects the terms and conditions of his employment; or
 - (b) to any other relevant document, which is copied to the employee.
- (5) Where—
- (a) additional matters to be included in the statement are prescribed under paragraph (p) of subsection (2); or
 - (b) the employer and employee agree to change any of the terms of employment particularised in the statement; the employer shall, as soon as practicable and no later than one month after the matters are prescribed or the change agreed, give to the employee an amendment to the statement containing particulars of the change or a revised statement which shall (in either case) be signed and dated by the employer and employee.


Therefore, the Panel deems the 'dismissal' as unfair and the award is made in accordance with Sections 20 and 40 of the Act,

The parties to this hearing have acknowledged that the Determination and Order of this Tribunal are final and binding. Any party aggrieved may however appeal to the Supreme Court of Bermuda on a point of law.

Dated this day of 7th March, 2022



The Hon Derrick V. Burgess, JP, MP
Chairman



Jocene C. Harmon, JP - Panel Member



Paget Wharton - Panel Member