

DECISION OF THE BOARD
DISPUTE FILED UNDER:
The Employment Act 2000 (The "Act")
BETWEEN

Complainant

AND

Employer

Tribunal Members: The Honorable Derrick V. Burgess, JP, MP – Chair
Jocene C. Harmon, JP – Deputy Chair
Eugene Creighton

Present:

on behalf of the Complainant
on behalf of the Employer
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:

2 weeks' vacation Pay	\$2120.00
16 weeks' Severance Compensation	\$16,960.00
Legal Fees	\$2,000.00
Total	\$21,080.00

The Agreed Terms of Reference for the Employment and Labour Relations Tribunal ('Tribunal') is to determine whether the Complainant was 'unfairly dismissed'. Therefore, the burden is with the Employer to prove that the Complainant was not 'unfairly dismissed'. The Complainant is also seeking vacation pay and legal fees, as noted above.

Background Facts

1. The Complainant contends that he was unfairly dismissed and the Employer contends that the Complainant was not but instead laid off.
2. At the beginning of the hearing, both the Employer and the Complainant were given the opportunity to try and settle the matter, both declined.
3. The Complainant was employed as a Mason with the Employer for a period of 8 years and 7 months, as at 29th September 2021.
4. The Complainant was not in possession of a ticket, but agreed to let know when a ticket was booked. The Complainant gave two (2) days' notice of his planned departure from Bermuda on May 5th, 2021.
5. The Complainant travelled on June 5th, 2021 and was gone for 4 weeks.
6. On June 18th, 2021, the Complainant was cleared from 14 day quarantine, and could've returned back to work.
7. After several weeks of checking in on returning to work, the Complainant made a phone call (that he recorded) on the 29th of June 2021 and was then told he was 'laid off'.
8. During the mediation session it was suggested that he had walked off the job which he rejected because he had finished his part/piece of work before leaving the job site. The Complainant stated that he kept the bosses informed of what was happening and at no time did he abandon his employment.
9. The Complainant went to a dental appointment and was told his Health Insurance was cancelled, and it was cancelled on May 7th, 2021 while he was in Jamaica.
10. The Complainant received no paperwork from the Employer to say that he had been 'laid off'.
11. The Complainant attended mediation with the bosses and this did not result in a resolution.
12. The Complainant sincerely felt that he had been 'dismissed unfairly.'
13. Since the mediation session on September 23rd, 2021, the Employer offered him his job back on September 28th, 2021, which he believes was an effort to avoid lay off period.
14. The Complaint believes that if the bosses had laid him off since June 18th, 2021, he would have been laid off for 16 weeks. Also, the Complainant is seeking legal costs for legal counsel.

15. The Employer did not present any written statements or pay slips for weeks ending 22nd December – 29th December, 2020 and January 5th, 2021 for owed vacation pay totaling \$3150.00.

for the Employer indicated to the Tribunal:

16. stated that the Complainant showed up for work on May 3rd, 2021 and mentioned that he is traveling on May 5th, 2021. In this conversation, there was no mention of his mother being sick. The first time I heard of it was the meeting with the Labour Relations Section. The Complainant worked on May 3rd, 2021, left for lunch and did not return thereafter. The Complainant walked off the job leaving unfinished work and did not inform him or that he was not coming back after lunch. contends that to walk off the job, you pretty much terminate yourself, and yes he canceled his the Complainants health Insurance on May 7th, 2021. The next time heard anything from the Complainant was via on June 18th, 2021. The Complainant had called DB enquiring as to when he can return to work. The Complainant was never told he could not travel, his request was verbally approved. However, he was required to complete a full day's work. The Complainant was never told by that he could not travel.
17. When the Complainant returned to the island, he made contact with and told him there is no work and things were slow. confirmed that the Complainant was never informed that he was dismissed.
18. In fact, all staff were laid-off from Aug 2nd, 2021 to September 3rd, 2021 because things were so slow and the insurance was cancelled.
19. confirmed they are a small company, and they had never built a house and relied on small projects to make ends meet.
20. When asked by the Tribunal, would he take the Complainant back, said yes, he is a 'good worker'.
21. During the lay-off period, the Complainant was working with another company and he had no issue with that, as it happens from time to time and we all have to work. The Complainant was second longest serving employee.
22. When the Tribunal questioned about the termination of the Complainant's health insurance, explained from time to time when there is no work, for shorter periods of two weeks or so, he pays 100% of the health insurance. confirmed he pays all of the employer and employee portions with no back pay from the employees and during longer periods, he cancel's as he cannot afford to maintain and pay employee health insurance with limited financial activity.

23. When asked about not paying vacation as stated by the Complainant, the Employer pointed out and show copies of three (3) pay slips dated Dec 22nd, 29th2020 and January 5th, 2021, reflecting two (2) weeks; vacation and one (1) weeks regular pay totaling \$3150.00. stated to the Tribunal that he would provide the cashed cheque as proof.
24. When asked about the 'Statement of Employment', he stated that he had not issued a 'Statement of Employment' and had only been made aware of this process during the mediation, when Labour Relations pointed it out to him. The Employer is now compliant. apologized for not doing so and confirmed as a result of this matter, he has learned a lot.
25. was notified that a violation of the Act may carry a penalty of up to \$10,000.00 and he will be fined for the violation.

for the Employer indicated to the Tribunal:

26. On May 3rd, 2021, called a meeting with all staff to discuss the high usage of cellphones while working on the job sites. After the meeting, the Complainant informed that he would be traveling. said the Employer does not stop people from traveling and the Complainant never told him the date he would be returning.
27. On the same day, stated the he left the job site to get some supplies and when he returned, he asked another staff member for the Complainant and was told he had left for the day.
28. The next time heard from the Complainant was in June when he called to say he would be ready to return to work after his 14 day quarantine period.
29. Since which he called about three (3) times and on each occasion, told the Complainant work is slow. The Tribunal asked if he knew that the Complainant was recording the conversation, which he replied 'No, had no idea'.

The Complainant indicated to the Tribunal:

30. The Complainant stated he told he was traveling but did not tell him when he was coming back.
31. The Complainant stated that he had completed his section of plastering and left the job (worked half day).
32. The Tribunal asked the Complainant whether he asked either for permission to leave, and the Complainant stated 'No', I did not have to tell them because I had finished my work'.
33. The Complainant later admitted to the Tribunal that he was wrong for walking off the job.

34. From June 18th, the Complainant called twice (2) and about three (3) times and complained about other staff members working and he was not and this is why I went to Labour Relations to make a complaint.
35. The Tribunal asked the Complainant whether he was employed anywhere else during this period of lay off, and the Complainant confirmed 'Yes, for about 7 weeks'.
36. The Tribunal asked the Complainant why didn't he accept the offer made by the Employer to return to work plus \$5000.00, which the Complainant replied 'That he felt he would be treated unfairly'
37. The Tribunal asked the Complainant whether he thought leaving the job without permission was fair, which the Complainant replied 'No'. ?
38. The Complainant stated that he did not receive vacation pay or a week of wages totaling **BD\$3150.00 (dated December 22nd, 2020).**
39. The Tribunal questioned about the non-payment, he replied that this was paid, however he will go back and double check and if this has not been paid, I will pay this to the Complainant.

DECISION:

- i. **There was no written instructions on applying for vacation pay or a procedure for lay-off notice, there was no contract.**
- ii. **As required by law, there is no 'Statement of Employments' for the workers.**
- iii. **Evidence to the Tribunal has now been verified that the amount of BD\$3150.00 that the Complainant claimed was owing to him was paid by Cheque and cashed by the Complainant.**
- iv. **The Tribunal believes that and were forthright and consistent in their comments at the hearing.**
- v. **The Tribunal felt that the Complainant terminated himself by walking off the job.**
- vi. **Based on these findings, we dismissed the Complainants claim for 'unfair dismissal**
- vii. **On the Complainants claims for 'Legal Fees' – there is no provision in the Employment Act for such a claim. Denied**
- viii. **The Tribunal finds that vacation for January to May 3rd, 2021 is payable, see below:**
Vacation Pay due – Jan – May 3rd 2021
Vacation entitlement per year – 10 days
10 days ÷ 12 = .8333 x 4 months = 3.333 days owed or (26.7 hours).

The Complainant shall be paid by the Employer in full no later than thirty (30) days from this Decision.

All Government taxes shall be deducted from this payment and payable to the appropriate Government departments.

- ix. Additionally, we believe that a penalty of BD\$1500.00 be imposed upon the Employer for failing to provide the Complainant with a Statement 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")'.

- x. 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.
- xi. 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 vacation leave;
- (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—

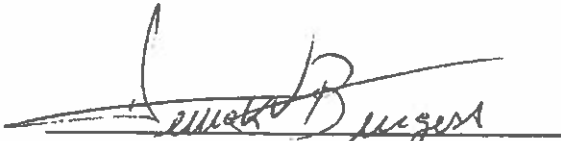
- (a) additional matters to be included in the statement are prescribed under paragraph (p) of subsection (2); or
- (b) the employer and employee agree to change any of the terms of employment particularized in the statement;

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.

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

Dated this 16th day of May 2022


Chair – The Hon Derrick V. Burgess, JP, MP


Deputy Chair – Jocene C. Harmon, JP


Tribunal Member – Eugene Creighton