

**IN THE MATTER OF THE EMPLOYMENT ACT 2000 BEFORE THE
EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL
(the “Tribunal”)**

BETWEEN

Plaintiff

AND

Respondent

DECISION

Hearing dates: March 24th 2022
June 1st 2022

Tribunal Members: Dr. Michael Bradshaw, Chairman
Ms. Jocene C. Harmon, JP, Deputy Chairman
Mr. John Payne, Tribunal Member

Present:

Representative of the Respondent
of the Respondent
Witness for the Respondent
Witness for the Respondent

Preliminary: Matter to be heard before the Employment Tribunal for
determination pursuant to the Employment Act 2000.

Dispute concerning: Unfair Dismissal; Summary Dismissal; Unauthorized Deductions;
Vacation Pay.

Terms of Reference

The Plaintiff contends he was subject to Unfair Dismissal (section 28 of EA 2000). The Respondent states that the relationship was terminated for cause and the maximum liability was one month's notice and no entitlement to severance pay.

Introduction and Overview

The Plaintiff is an American expatriate hired as a very senior manager for a substantial enterprise that is owned and operated by [redacted] and [redacted]. The Plaintiff was newly arrived to Bermuda and served a probationary period of 90 days, prior to confirmation as the Chief Operating Officer of the enterprise.

The Respondent terminated the employment relationship in late 2021 without being able to agree terms of separation in full with the Plaintiff. The Labour Relations Office's efforts in late 2021 / early 2022 were unsuccessful in conciliating the matter.

The matter was placed in the Employment and Labour Relations Tribunal process in February 2022. The Tribunal noted above was duly seized of the matter and held a Preliminary Hearing by WebEx on March 24th 2022, wherein all parties were consulted and collaborated, as regards the particulars of the preparation process for the Final Hearing. This was used as a Directions Hearing. The Final Hearing took place on June 1st, 2022, without any known difficulties or unresolved problems in the preparation phase.

Evidence submitted and Hearing presentations

Prior to the Final Hearing the Plaintiff and Respondent each submitted a labelled package of all the evidence on which they would rely to the Tribunal and also exchanged the same with each other. The parties agreed to attempt a last-ditch conciliation on their own accord but were unsuccessful. [redacted] led her witnesses [redacted], [redacted] and [redacted] through their presentations and any re-direction after cross examination as needed. Unfortunately, written witness statements had not been submitted in advance. [redacted] I was unable to appear as scheduled and the Respondent was allowed to submit a sworn affidavit from him that spoke solely to the details of submitted attorney's fees that were alleged to be a responsibility of the Plaintiff.

Deliberations

In accordance with amendments to the Act and effective June 1st, 2021, probationary periods for all new employees is capped at six (6) months with a trial period for both the employer and employee. The employee will be entitled to a review of their performance no later than the halfway point of the probationary period. Therefore, on or before the completion of one half of the probationary period, employees are entitled to receive from the employer a review of their performance. Following the review, the employer may extend the probation period for a maximum of three (3) months.

In the matter of the Plaintiff, this was not the case. According to the 'Statement of Employment' provided by the Respondent, the Plaintiff was placed on a ninety (90) day probationary period with no review period identified. In particular, the Respondent was non-compliant to Section 19 of the Act as it relates to the 'probationary period'.

It is clear that the Respondent failed to invite the Plaintiff to a probationary review meeting; or to set out in writing the alleged performance concerns; or tell formally or demonstrably to the Plaintiff those issues of performance that might lead to considerations of terminating his contract.

No substantive written evidence was presented of the above by the Respondent.

It was clearly established by the evidence from both parties that any termination by the Respondent occurred after the probationary period had been completed.

Employers may only dismiss an employee without notice during their probationary period for a reason relating to the employee's performance review, performance conduct, or the operational requirements of the employer's business (as well as serious misconduct).

Findings

In this matter, the Plaintiff's employment was unfairly terminated by the Respondent without a valid reason, which is in breach of Section 18 of the Act.

An employee's contract of employment shall not be terminated by an employer under Section 18 subsection (1), unless the notice requirements under Section 20 and the provisions under Section 26 or 27 have been met.

In light of the seniority of the post and the customary procedure in such terminations the notice conditions as at Section 20 (2d)., for senior posts a typical notice period could be at least 3 months to 6 months.

It was not found that the Plaintiff contributed in any substantial extent to the circumstances of his abrupt dismissal. The Plaintiff began employment in Bermuda, as of August 19, 2021, according to the applicable Work Permit.

A probationary period of ninety (90) days would therefore have ended on November 16, 2021. The earliest acceptable date to the panel for the termination instruction given by the employer is found to be November 27, 2021.

Therefore, the Plaintiff was employed post-probation in full for a period of eleven (11) days.

Determination and Order

After examining all of the submitted evidence as well as hearing the presentations at the Final Hearing, the Tribunal has deliberated and now makes the following Determination:

- I. The Plaintiff was Unfairly Terminated (as per Section 18 EA 2000);
- II. Remedies for Unfair Dismissal are as per Section 40(4) and Section 40(5) of the Act. As the Plaintiff is not found to have contributed in any substantive degree to the dismissal, the Plaintiff is awarded 16 weeks of wages as compensation. This is considered just and equitable as the Plaintiff was employed at a very senior level such as would usually attract substantial monetary compensation on any termination not caused by the Plaintiff;
- III. The Plaintiff is entitled to 'notice pay' of one (1) month as outlined in the Statement of Employment in lieu of notice. This is considered inappropriate for the nature and status of the post of the Plaintiff;
- IV. Other entitlements and benefits such as vacation pay etc. are to be paid on a pro-rated basis, where it is given that the 'probationary period' commenced on August 19th, 2022, as per the Statement of Employment. 18 days' vacation per year is equivalent to 1.5 days per month. The Plaintiff should receive 4.5 days;
- V. As per the Statement of Employment, the Plaintiff should receive the 'hold back pay' in the amount of \$2,813.00;
- VI. The Respondent shall pay the Plaintiff in full no later than thirty (30) days from this Determination;
- VII. The matter of the Plaintiff's repatriation costs should be addressed by the work permit provisions;
- VIII. No award is made as regards the claim for attorney's fees, as submitted by the Respondent. Each party is left as responsible for its unilateral actions by way of costs for legal assistance.

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

The Tribunal makes no further Determination in this matter.

Dated this 21st day of July 2022



Dr. Michael Bradshaw
Chairman



Mr. John Payne
Tribunal Member



Ms. Jocene C. Harmon, JP
Deputy Chairman