

EMPLOYMENT & LABOUR RELATIONS TRIBUNAL

DISPUTE FILED UNDER

EMPLOYMENT ACT 2000 (THE "ACT")

PURSUANT TO PART VA SECTION 44B

JAMES PETTY COMPLAINANT

and

DEFENDANT

DATE : January 22nd, 2024

**PANEL : Edward Ball Jr, JP, LLB, FCMI Chairman
Lorrita Tucker Deputy Chair
Jocene Wade JP, FCIPD, FCMI**

DETERMINATION & ORDER

EMPLOYMENT & LABOUR RELATIONS TRIBUNAL HEARING

BETWEEN

JAMES PETTY ("The EMPLOYEE")

And

..... ("The EMPLOYER")

Members of Tribunal: **Edward Ball Jr.**
 Lorrita Tucker
 Jocene Wade

Tribunal Hearings **January 12th, 2024 (suspended due to IT technical difficulties)**
 January 22nd, 2024
 in pesron and via WebEx
 February 12th, 2024 via WebEx

Places: **Department Labour**
 23 Parliament Street
 Hamilton HM 12.

WEBEX **Bermuda Public Services Union**
 2 Angle Street
 Hamilton HM CX

Matters of Dispute:

1. **Section 18 – Termination of Employment**
2. **Section - 20(2), 20(3) Notice period**
3. **Section - 38(2) Hearing of Complaints by the Tribunal**
4. **Section 39 Remedies: General**
5. **Sections 40: Unfair dismissal**

Directions Hearing:

October 29th, 2023

Complainant

James Petty ("Mr. Petty")

Defendant:

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PROCEDURAL AUTHORITY TO HEAR AND EVIDENTIAL MATTERS

1. The Chairman confirmed the points to be considered by the the Employment and Labour Relations Tribunal (*' the Tribunal'*). The Chairman stated that the Hearing was to be conducted in accordance with **section 44B(2), section 44C the General Powers, section 44D Power to Obtain Information** and that the Tribunal shall regulate its own proceedings as it sees fit, pursuant to **Schedule 2 (20) of the Employment Act 2000 ("the Act")**. As stated at the Directions Hearing, there was to be no secret taping or cellular phone recordings of these proceedings without the permission of the Tribunal.
2. In the Directions Hearing held on October 29th, 2023, the Parties were offered the opportunity to meet without the Tribunal's assistance, to engage in meaningful dialogue and attempt to reach a Settlement Agreement to their dispute. The Employer did not wish to engage in a Settlement discussion with the Claimant. Therefore, both agreed for the matter to be settled at the scheduled substantive Tribunal.

3. At the substantive Tribunal of January 22nd, 2024, the Chairman afforded the parties with an opportunity to make remarks, and then gave the parties a further opportunity to discuss and to engage in meaningful dialogue without the Tribunal's assistance in an attempt to reach a Settlement to their dispute. Both Parties agreed to proceed with the Hearing.

Section 44E Power to Exclude the Public

4. The Tribunal referred the Parties to **section 44E** that provides unless both parties consent, to exclude the public or any representative of the press where it considers it necessary or desirable to protect the privacy of parties to a Hearing.
5. The Employee and the Employer verbally stated that they had no objection to a public hearing.

6. Section 44F Notification and Publication of the Award

7. The Chairman reminded the parties of the legal requirement of **section 44F** and that the Parties should return their completed documentment to the Labour Relations Officer.

Employer's concern concerning examination, cross-examination and rebuttal procedure

8. the [redacted] CEO ("CEO"), Mr. [redacted] expressed that he wished more clarity was provided by the Tribunal at the Directions Hearing on the formalities of examination, cross examination and rebuttal format, such that he would have prepared.
9. The Tribunal reassured CEO and Mr. Petty, that the Tribunal will ensure that the proceedings were fair and just by assisting the Parties to adhere to the procedural format during the Hearing. The Chair also emphasised that the Directions Hearing Consent Order was clear on the format.

EVIDENCE DISCLOSED BY THE PARTIES

10. Mr. Petty's and the [redacted]'s Written Submissions, Statement of Facts ("SoF") from Resolution Chambers on behalf of Mr. Petty, [redacted]'s Response, the [redacted]; Witnesses Statements of Ms. [redacted] and Mr. [redacted]; as well as written Rebuttal and Exhibits, as ordered in the Directions Hearing Consent Orders formed the bases of evidence before the Tribunal. Oral Closing Submissions by the Parties assisted in forming the basis of the Tribunal's deliberations for the Award.
11. The [redacted]'s Witness [redacted]'s sworn testimony was conducted via WebEX with all parties present on February 12th, 2024 at 10:00 a.m.
12. The Tribunal asked Mr. Petty was the Resolution Chamber's letter dated November 8th, 2022 considered as his SoF that he was relying on as the evidence of the September 29^m, 2022 incident.
13. Mr. Petty replied yes.
14. The Chairman further sought clarification from Mr. Petty, if he submit a rebuttal to the Employer's Defence's Statement of November 17th, 2023.
15. Mr. Petty response was no and that Resolution Chambers did not submit a Rebuttal to the Defendant's statement.

Mr. Petty's Case

16. On June 15th, 2017, Mr. Petty commenced full - time employment as the Facilities and Plant Operations Manager with the [redacted].
17. On September 29th, 2022, Mr. Petty received a telephone call from the Mechanical Services Tradesman ("the Plumber"), Mr. [redacted] who informed Mr. Petty that he had not been paid the overtime ("OT") for the previous month that was submitted for payment.
18. [redacted] advised Mr. Petty that as delayed nonpayment for previously worked OT by the Employer had been an issue, he was very angry and said "he was done".

19. Mr. Petty informed Mr. [redacted] that he would speak to the [redacted] CEO, the Employer's Human Resources and Office Manager ("HROM"), Ms [redacted] to resolve the nonpayment of the September 2022 OT.
20. After speaking to the CEO, he sked Mr. Petty to a meeting with the HROM in her office. The CEO discussed the conversation that Mr. Petty had with Mr. [redacted] concerning the nonpayment of Mr. [redacted] September 2022 OT and that Mr. [redacted] had verbally resigned.
21. On initially hearing that the Plumber had verbally resigned, Mr. Petty recalled that the HROM said: **"he is not a good employee, let's just let him go"** (referring to [redacted]).
22. Mr. Petty was dismayed by the HROM's comments because Mr. [redacted] was a reliable and good worker who serviced many of the Employer's customers.
23. After voicing his frustration with HROM's initial position of accepting Mr. [redacted] verbal resignation, Mr. Petty stated that if the Employer took that view, **"then they would be receiving his resignation too."**
24. As the CEO and HROM expressed no immediate position on Mr. Petty's verbal comments of his "verbal resignation", Mr. Petty angrily walked out of the meeting and slammed the door.
25. After entering his office, then to his desk, Mr. Petty noticed that his computer files were being deleted. Shortly thereafter, [redacted] CEO entered Mr. Petty's office to share that the Employer had accepted Mr. Petty's verbal resignation. The CEO also stated that the Company would pay Mr. Petty three (3) months' pay in lieu of notice as stipulated in his Statement of Employment ("**SoE**").
26. Mr. Petty also shared that the CEO remarked that he had thought about calling the Police to escort him off the [redacted] premises. Instead, the CEO escorted Mr. Petty off the [redacted] property. Mr. Petty remarked that he was ordered to leave his office immediately, he had not finished packing and removing his personal belongings from his office.
27. Mr. Petty emphasised that he had informed the CEO that he had not resigned in writing as stipulated in the [redacted] Employee Policy Manual.

28. Mr. Petty also explained that he did not receive any correspondence from the Employer since the September 29th, 2022, concerning the “ OT incident” and the Employer accepting his verbal resignation.
29. Mr. Petty lodged an unfair dismissal claim with the Department of Labour (“the Department”) where Mr. Petty submitted a claim for five (5) years of health insurance coverage, his entitlement to a bonus, reinstatement to his former position and to be reimbursed for any and all loss earnings incurred from the date of his September 29th, 2022 unfair dismissal.

Examination, Cross Examination and Rebuttal of Witness

30. Mr. [redacted] Witness Statement dated November 8th, 2022 was entered into evidence then the CEO commenced examination questions..
31. The CEO: Mr. [redacted] what were the details of the September 29th, 2022 cellular telephone call to Mr. Petty?
32. Mr. [redacted] replied that upon examining his September 29th, 2022 pay advice slip, he noted that his OT worked in the previous pay period was not paid. Mr. [redacted] further explained that there were several previous pay periods where OT was not paid.
33. The CEO: Mr. [redacted] did you quit your employment with [redacted] on September 29th, 2022?
34. Mr. [redacted] responded no. He was extremely angry that he was not paid his September 2022 OT. As a result of the nonpayment of the OT, Mr. [redacted] told Mr. Petty via the September 29th, 2022 telephone call that **he was done?**
35. The CEO: What did you mean by the words, “**You are done?**”
36. Mr. [redacted] responded that he would not work any more OT, but did not indicate he was resigning.
37. The CEO: Mr. [redacted] has Mr. Petty ever shared the [redacted] s policy on the payment of worked Overtime with you?
38. Mr. [redacted] replied he was unaware of the Employer’s monthly cut off period for the submission of OT to HROM and the [redacted] s Accounts Section.

39. The Tribunal asked Mr. [redacted] if he was aware of the [redacted] OT cut off date Policy.
40. Mr. [redacted] stated he was only aware of the OT cut off date policy after he had a conversation with the CEO on September 29th, 2022.

Cross examination by Mr. Petty

41. Petty: Mr. [redacted] when you said I am done did you mean you were resigning?
42. [redacted]: no, you did not ask if I meant I was resigning.
43. The Tribunal: Mr. [redacted], what is your understanding of the word "Done" in the Bermuda context.
44. [redacted] It meant several things such as not working anymore, fed up or I am leaving.
45. The Tribunal retorted: Mr. [redacted] did you think Mr. Petty understood that I am done was only pertaining to you not working any more OT?
46. [redacted]: Mr Petty said he would take the matter up with Mr. [redacted] and Ms. [redacted].

Tribunal Discussion and Analysis of Mr. [redacted], testimony

47. The Tribunal was amazed at the level of confusion surrounding how a straight forward matter such as unpaid OT due to Mr. [redacted] resulted in Mr. Petty filing an unfair dismissal claim against the [redacted]; because he did not resign from the Company on September 29^m, 2022.
48. The Tribunal discussed that the Employer could have paid the outstanding balance of the September 2022 OT to Mr. [redacted] as a special check, or a special bank deposit, especially as there had been repeated occasions of nonpayment of OT to Mr. [redacted].
49. Then, the [redacted]; HRM could have scheduled a meeting with Mr. Petty, Mr. [redacted] and the CEO to discuss and reinforce the [redacted]; OT cut off payroll policy and that the Company will ensure Mr. [redacted]; owed OT was submitted on time for payment.

Examination of Mr. Petty by the Employer

50. The CEO: Mr. Petty, what was the purpose of you coming to my office on September 29th, 2022?
51. Petty: Mr. called me to share that he had not been paid his OT on September 29th 2022 and this pattern of nonpayment for OT had happened before and that **he was done**.
52. The CEO: Mr. Petty did Mr. say he was resigning?
53. Petty: That is what I understood as he said **he was done**.
54. The CEO: Mr. Petty, as a senior manager, did you explain the I OT cut off monthly date to Mr. ?
55. Petty: no, as I only signed off on the timesheets for Mr. s September 2022 wages which were also emailed to HROM and sometimes to of Employer Accounts section.
56. The CEO: Mr. Petty, as a senior Employer manager, what authority did you have to manage your Facilities Management Department?
57. Petty: I did not have authority over money, wages, etc.
58. Tribunal: did you have access to Employer's Policy Manual?
59. Petty: No, as the Employee Policy Manual was kept in the HROM's office.
60. Tribunal: Did you have to physically obtain the Employee Policy Manual from Ms. : first?
61. Petty: Tried, but she would only release them if the CEO agreed.
62. The CEO: Mr. Petty, what is your role as a senior manager in disciplining your staff?
63. Petty: I would initiate the first step, then forward the matter to Management.
64. The CEO: Were you told by the CEO to manage your sections several times?
65. Petty: Yes
66. The CEO: Did the CEO inform you that HRMO their doors were open to assist you on employee matters?
67. Petty: Yes
68. The CEO: What prompted you to "verbally resign"?

69. Petty: I did not resign and had not submitted a written resignation letter.
70. The CEO: Have you verbally threatened to resign from the _____ on numerous occasions in the past and stated you had interests overseas?
71. The Tribunal had recessed and upon resuming the Hearing, asked Mr. _____ to confine his questions to matters that are not contested as the Defence Statement outlined the Employee's position.
72. Mr. Petty : I do not recall all the events of those discussions.
73. The CEO: Mr. Petty did you regularly send the timesheets to _____ or Ms. I _____ on time?
74. Petty: I emailed the timesheets to _____ and sometimes to Ms. I _____.
75. The Tribunal asked the Employer to confirm if the I _____ accounts employee (_____ if she received timesheets on a timely bases from Mr. Petty?
76. Mr. I _____ confirmed that (_____ had to send numerous email reminders to Mr. Petty for timesheets, as opposed to Mr. Petty's statement.
77. The CEO: Did Ms. _____ instruction you what happens if OT was not submitted by a specific date?
78. Petty: No. Not even when the timesheets were emailed to Ms. _____.
79. The CEO: when you left Ms. _____ office, were you "frustrated", then stormed out and slammed the door as you left?
80. Petty: yes only because Ms. _____ said he is not a good employee and just let him go (reference to Mr. I _____).
81. The CEO: when I came to your office, did I state that the _____ accepted your verbal resignation and that in lieu of notice, the Employer will pay you three (3) month's salary per your SoE?
82. Petty: yes, but I did not verbally resign or submit a written resignation letter per the _____ Employment Policy manual.
83. The CEO: Why did you leave the _____ premises?
84. Petty: Because, you asked for my pass swipe key, keys, and all the _____ property in my possession. Then you walked me off the premises. You also told me that you were thinking of calling the Police, but decided against it. What other choice did I have but to comply with your order and leave.

85. Tribunal: Mr. [redacted], at what point in the series of events of the September 29th, 2022, would you say Mr. Petty understood the [redacted] accepted Mr. Petty's verbal resignation?
86. The CEO: when I found Mr. Petty packing his personal belongings.
87. The CEO: Mr. Petty, did you not have the opportunity to write a letter stating you did not resign?
88. Petty: If the Company felt I resigned, the Employer should have sent me a letter that day stating that the [redacted] accepted my verbal resignation with immediate effect.
89. The CEO: why did you wait some six (6) weeks to communicate with the [redacted] about reinstatement?
90. Petty: My lawyer, Resolution Chambers letter dated November 8th, 2022 recommended that the [redacted] reinstate me to my former Facility Management post as I had not resigned.
91. The CEO: Did I meet you within two (2) weeks (after September 29th, 2022 resignation) at a St. David's community event?
92. Petty: yes.
93. The CEO: Why did you not bring up reinstatement then? Did I not extend my hand to shake yours?
94. Petty: Why should I shake your hand after you escorted me off the [redacted] premises and mentioned as an after thought that you decided not to call for a Police escort. Also that community event and venue was not conducive for that type of discussion.
95. Tribunal: Mr. Petty, the Employer sent letters to your last known Bermuda address which was **49 South Road Devonshire DP 08** which you testified is still current. The Employer also sent an email to your email address of jhpetty@aol.com on Friday October 7th, 2022 at 11:54 am where the subject line read – **Collection (in the Employer's document bundle)**. Ms. [redacted] asked for your telephone number to pass to the courier, so that the courier could facilitate the delivery of the Employer's letters. Are you still residing at that address? And is your email address still the same.

96. Petty: yes, but I was not in Bermuda because I was in Turks and Caicos.
97. Tribunal: Mr. Petty, can you acknowledge the date that you noted the funds were deposited into your bank account on October 7th, 2022, totally \$35,067.86 BM dollars.
98. Petty: I did not pay attention of the date when the funds were transferred into my bank account.
99. Tribunal: If you were hoping to be reinstated, was it not your responsibility or your lawyer's to commence talks with the Employer as soon as practicable after the September 29th, 2022 verbal resignation incident. In other words, the time delay was five (5) to six (6) weeks.
100. Petty: I sought legal advice as soon as I could. Also remember that Mr. [redacted] was thinking of having the Police escort me off the [redacted] premises.

Tribunal Discussion and Analysis of Mr. Petty's testimony

101. The case revolves around the three words uttered in the heat of the moment by Mr. [redacted] "I am done" meaning verbally resigning. Bermudian colloquialism on the word "I am done" takes on a color of its own, depending on the event at the time, as distinct to the usage as slang words.
102. Webster dictionary defines "colloquialism" as a local or regional dialect expression. The dictionary also defines "slang" as a type of language that consists of words and phrases that are regarded as very informal, are more common in speech than writing, and are typically restricted to a particular context or group of people.
103. The Tribunal was guided by the actions of the [redacted] senior management team - Mr. [redacted] and Ms. [redacted] - having the presence of mind to call Mr. [redacted] to check if he had verbally resigned after their conversation with Mr. Petty.
104. Mr. [redacted] stated that he did not verbally resign after his emotional temperature had cooled down.
105. However, the same [redacted] senior team acted quickly on Mr. Petty's angry words if you feel that way you can have my resignation as well".

106. The Tribunal was not presented with any specific dates of past incidents when Mr. Petty threatened to verbally resign.
107. The Tribunal was also confirmed that the [redacted]'s HROM was required to apply its Company's Employment Policies consistently and fairly, irrespective of Mr. Petty's rank and status. In other words, there was no exit interview with Mr. Petty.
108. The Tribunal also recognised that Mr. Petty could have written a letter to the Employer within a reasonable time of three (3) to five (5) days to state he had not resigned and asked for reinstatement.

Examination, of the CEO, [redacted], / TThe CEO by Mr. Petty

109. Petty: Mr. [redacted] what is the [redacted]; Employee Manual Policy on resignation?
110. The CEO: as a quick overview, I expect that the employee would provide [redacted]; Management with a verbal or written resignation letter. The HR Department will contact the employee, arrange an exit interview, establish a leaving date, determine the vacation entitlement, outstanding salary owed and discuss other matters pertaining to Employee the leaving
111. Petty: Why was I not treated with the same retirement process as outlined in the [redacted]; Employee Resignation policy, if [redacted] - accepted my verbal resignation on the spot?
112. The CEO: because you were a senior manager. It was not the Company's position to treat you like the lower rank and file employees. I would have expected you to send us a letter asking the Company to withdraw your resignation. The Company provided you with an opportunity to reply to the the Company's October 8th, 2022 letter. Also it was not the first time you said you were resigning.
113. Petty: what was different this time?
114. The CEO referenced:
- (1) you lied about Mr. [redacted] resigning;
 - (2) the reason why Mr. [redacted] was not at work on September 29th, 2022;
 - (3) your angry outburst and behaviour in Ms. [redacted]'s office that day;

(4) your repeated words that you did not need to work at E as you had better opportunities elsewhere in the islands and the USA where your daughter was living.

115. Those factors helped Ms. and I to decide to accept your verbal resignation with immediate effect, and to waive the three months notice period. We decided to inform you immediately that we accepted your resignation by me coming to your office. I also agreed with Ms. to call the 's IT vendor to disable your computer access to the Company's IT network.

116. Tribunal: Mr. , Resolution Chambers on behalf of Mr. Petty wrote at the bottom of page 2:

To my client's utter shock, by the time he had returned to his desk, his files had started to be deleted off his computer.

117. Tribunal: Was an order given by HROM or yourself to have any of Mr. Petty 's computer files deleted?

118. The CEO: No, the ; IT was only ordered to immediately deny computer access to Mr. Petty.

119. Petty: So I was terminated without having a further discussion with the CEO and HROM?

120. The CEO: As I explained our decision was based on the events that I described on September 29th, 2022.

121. Tribunal: Mr. did you or Ms. think to allow a day to pass to allow Mr. Petty to be less emotive. Then to convene a meeting with Mr. Petty to ensure his verbal resignation words were clear and unambiguous on resigning?

122. The CEO: No because as a senior manager, I would have expected Mr. Petty to come to me and we could have discussed the incident. Also his verbal outburst and behaviour in Ms. office was really shocking for a Company's senior manager.

123. Tribunal: so would it be correct to say Mr. that the incident and the events that followed on September 29th, 2022, including the verbal resignation were the last straw that broke the camel's back?

124. The CEO: yes but mainly that he verbally resigned.

Tribunal Discussion and Analysis of the CEO's testimony

125. Tribunal discussed at paragraph 2, on page 2, at the beginning of the third line of the BLDC's letter to the Tribunal dated November 17th, 2023:

"Due to his unprofessional outburst and dishonest statement regarding Mr. resignation, it was unreasonable for the company to expect him to carry out his duties as a Senior manager and it was in the best interest of both parties for him to leave immediately".

126. It was quite apparent to the Tribunal that the Employer ceased the opportunity to "heavy handedly" and promptly terminate Mr. Petty's employment. Once the Company denied Mr. Petty access to the Employer's IT network, asked for all the Employer's possessions and ensured Mr. Petty was escorted off the premises, no amount of post meaningful dialogue could have occurred.

127. The Tribunal also based its opinion on the quick payment of the three (3) months pay in lieu of notice on October 3rd, 2022 to Mr. Petty.

128. The Tribunal was also weary that the Employer took pains to investigate only Mr. Petty's verbal resignation, but did not apply its Human Resources' Policy fairly and even handedly to Mr. Petty, irrespective of Mr. Petty's senior manager's rank and his repeated past threats to verbally resign.

129. Clearly, mutual trust and confidence was extinguished between the Parties as the employment relationship was irreparable once Mr. Petty was escorted off the premises.

130. The CEO also confirmed that the Employer had hired a new Facilities and Plant Operations Manager and that reinstatement of Mr. Petty to his previous position was not an option.

Witness Statement the _____ Human Resources and Office Manager

131. The Tribunal issued the former HROM Ms. _____ with a section 44D(1)(b) order to appear before the Tribunal on February 12th, 2024 at 10 am via WebEx. The _____'s witness was duly sworn and confirmed that she wrote her Witness statement on September 29th, 2022, in her former capacity as the HROM.
132. The CEO: Ms. _____ how many years were you employed by the _____ ?
133. _____ twenty six (26) years and ten (10) months in the role as Human Resources Office Manager. I retired in January 2024.
134. The CEO: did I and Mr. Petty come to your office on September 29th, 2022?
135. _____ Yes
136. The CEO: Do you recall the purpose of the visit?
137. _____ : Yes. Mr. _____ had not been paid his overtime in the last pay period and that Mr. Petty said Mr. _____ had resigned. You also stated that Mr. Petty was very upset at Mr. _____ resigning.
138. The CEO: what steps did you conduct on the matter of Mr. _____'s OT claim?
139. _____ : I immediately searched the _____'s payroll data files for September 2022 and stated to you and Mr. Petty that OT had been paid up to a certain period. However, there was one (1) time sheet that included a claim for OT for Mr. _____. I further explained to you both that the _____'s standard practice for OT payment was not processed after the payroll cutoff date. It would be paid at the next pay period which was the following month.
140. The CEO: did you comment on the news that Mr. _____ had resigned?
141. _____ : I said if Mr. _____ had resigned that we should accept it.

142. The CEO: has there been any issues in the past with Mr. Petty submitting his section's timesheets on time?
143. : Yes. Emails were sent by Ms. of Payroll, reminding Mr. Petty of the Company's payroll's cutoff date which included OT.
144. The CEO: how long had the cut off on OT and timesheet policy been in place?
145. : for over 20 plus years.
146. The CEO: do you recall me stepping out to call Mr. ?
147. : yes, and that Mr. said he had not resigned.
148. The CEO: do you recall Mr. Petty's reactions to your words, we accept his resignation?
149. : Mr. Petty said in a very agitated voice that he was resigning and stormed out of the office and slammed the office door.
150. The CEO: can you recall what we discussed after Mr. Petty slammed the office door?
151. : yes, we discussed Mr. Petty's employment record and performance over the last few years, that he had on other occasions said he had other opportunities elsewhere outside of the
152. The CEO: were you surprised by Mr. Petty's outburst?
153. : yes, as I have never seen such angry outburst behaviour by a senior manager in all my years as the HROM.
154. The CEO: did we accept Mr. Petty's resignation?
155. : yes, and we both agreed to waive the notice period and pay him three (3) month's in lieu of notice.
156. The CEO: who ordered the 's IT contractor to deny Mr. Petty's access to the company's computer network?
157. : I did. Based on how Mr. Petty exited the office and that he was headed to his office in another building. I called IT to order

the vendor to deny Mr. Petty computer access. I then carried out the normal termination process.

158. The CEO: did you attempt to send correspondence to Mr. Petty?

159. yes, but Mr. Petty had moved residence over the past year without I being informed. So emails sent to him (the email address on file) and courier letters were sent to him but undeliverable and returned to as Mr. Petty had moved.

160. The CEO: was Mr. I on vacation on September 29th, 2022?

161. L yes, it was shared at a mediation hearing with Mr. Petty.

Cross examination of Ms. by Mr. Petty.

162. Petty: Did (CEO) explain what Mr. said about other times when he was not paid OT?

163. I if you as the senior manager submitted the timesheets after the cut off payroll period, then Mr. was paid OT in the next month pay period.

164. Petty: did you not say on hearing that Mr. had resigned say: *'he is not a good employee, let's just let him go?'*

165. no, I said if he said he was resigning that we should go ahead and accept it.

166. Petty: did you order IT to delete my computer files?

167. no the ;'s IT vendor was only ordered to deny you log on access to your computer.

168. Petty: did anyone ask Ms. if I came to her office to discuss purchase orders such that I needed access to my computer?

169. Tribunal: Mr. Petty, unless Ms. had first-hand information from Ms. on you being in her office before Mr. arrived, the question was unfair to ask Ms. . The Tribunal had sworn testimony from Mr. that he found you in your office which was housed in another building.

Tribunal questions to Witness

170. Tribunal: can you describe the circumstances leading up Mr. Petty's alleged resignation?
171. : Mr. confirmed that Mr. Petty was concerned that Mr. had not received his OT pay and that the plumber had resigned.
172. Tribunal: what were the exact words used by Mr. Petty that led you to believe Mr. had resigned?
173. : Mr. Petty stated that Mr. t said "he was done" and I responded that *we should accept Mr. s resignation*. Mr countered that the Plumber did not resign and that was when Mr. Petty became very upset and stated he was *finished* and walked out the door.
174. Tribunal: did you seek clarification from Mr. Petty about his intention to resign following the September 29th, 2022 meeting?
175. . yes, as I stated the situation, I accepted his decision and he had every opportunity to state his case.
176. Tribunal: what is the Company's formal resignation process, and does it require written notice?
177. The CEO answered: we follow the Act, however, the Act does not require anything in writing for a resignation.
178. Tribunal: are there any previous instances where an employee's verbal comment was treated as a resignation? If so, how was it handled.
179. .e: I cannot recall.
180. Tribunal: how does the company typically resolve disputes over employment status or misunderstandings in communication?
181. . : we meet with the staff.
182. Tribunal: does the Company have any written warnings or disciplinary charges on file against Mr. Petty?
183. nothing documented but there were verbal discussions with Mr. Petty on how he should improve managing his section.

184. Tribunal: What in your opinion was the cause of Mr. Petty raising his voice and storming out of your office?

185. I guess because I said we would accept Mr. F resignation.

186. Tribunal: Ms. I during Mr. Petty's employment tenure with the Employer, did the Company ever issue any disciplinary warnings to Mr. Petty?

187. no.

Tribunal questions for Mr. Petty

188. Tribunal: Did you intend for your comment to be interpreted as a resignation?

189. Petty: No.

190. Tribunal: Have you expressed dissatisfaction or intent to leave your job in any form prior to this incident?

191. Petty: No

192. Tribunal: Following the meeting, did you clarify your position regarding employment status with anyone at the Company?

193. Petty: No.

194. Tribunal: Did you seek clarification from the Employer about your intention to resign following the September 29th, 2022 meeting?

195. Petty: Yes, as I stated the situation, I did not accept the CEO's decision.

196. Tribunal: What is the Company's formal resignation process, and does it require written notice?.

197. Petty: I cannot say off hand.

198. Tribunal: did you attempt before Resolution Chamber's letter of November 8th, 2022 was sent, to communicate sooner with the especially M on discussing reinstatement?.

199. Petty: No.

Tribunal Analysis and discussions

200. The Tribunal noted the conflicting reply from Mr. Petty that he historically never verbally threatened to resign on several

occasions. The Tribunal was confused at the discrepancy between the Parties over the Employee's verbal resignation threats.

201. Clearly, by Mr. Petty walking out following a heated argument with the CEO and the Human Resources and Office Manager was a stressful situation for all the Parties. Mr. Petty said he was angered by Ms. [redacted] stating let's accept Mr. [redacted] resignation.
202. Similarly, in the Tribunal's opinion, the above words were unclear as to Mr. Petty's resignation intentions. Even if there was a hint of Mr. Petty leaving for good on September 29th, 2022, we repeat, it was the HR and Office Manager's responsibility to meet with Mr. Petty at a later date after he had cooled down, to discuss the [redacted] matter.
203. It was also appropriate to discuss with Mr. Petty's his conduct under the Employer's disciplinary procedure, for example, for insubordination or aggressive behaviour.
204. The Tribunal opined that it would be unreasonable for the Employer to treat the whole September 29th, 2022 incident as a verbal resignation. There was no conclusive evidence that Mr. Petty's verbal resignation was to be treated as an unequivocal resignation.
205. Although the Employer was not legally obligated to provide a cooling off period to Mr. Petty or to afford him with the opportunity to change his mind on resigning in the heat of the moment, the Tribunal found that the Employer acted unreasonably in treating Mr. Petty's conduct of angrily walking out and slamming the door of the HR and Office Manager as a verbal resignation.
206. In paragraph three (3) starting at line 10 of the Defendant's document titled: Summary of the Facilities & Plant Operations of September 29th, 2022:

"At this point Mr. Petty again when (went) into a rage this time much louder and more aggressive. There was a short back and forth between Mrs. [redacted]"

and Mr. Petty and I interjected and asked them to stop, and it was at this stage that Mr. Petty looked at me and said he had had enough and that he resigned, opened the door, slammed the door, and left the building. In all my years of management have never seen a senior manager conduct himself in this manner, I was in total shock of Mr. Petty's behavior".

207. The Tribunal was unable to determine the value of the slamming of the door as a red flag to have Mr. Petty escorted off the property.
208. No evidence was presented to the Tribunal that the CEO and the HROM were in imminent danger of physical harm or that the Employee would have a detrimental effect to the Employer's property and staff after Mr. Petty's heated confrontation.

Escorting Mr. Petty off the Property

209. In regards to the circumstances that prompted the CEO to escort Mr. Petty from his office and off the premises, the Tribunal examined the intent of Mr. [redacted]'s visit to Mr. Petty's to see how Mr. Petty was feeling. From Mr. Petty's testimony, he was insistent that the CEO decided against calling the Police but instead escorted him off the premises. The CEO denied that he ever implied calling the Police to escort Mr. Petty off the Employer's premises.
210. Mr. Petty also expressed that being escorted off the Company's property was punitive and made him feel like a criminal.
211. The Tribunal turned its attention to examine the Employer's November 17th, 2023, the Employer's Statement at paragraph 3 entitled "**Rebuttal Points**" at paragraph five (5) page 2:

(1) As a Senior manager of [redacted] would expect Mr. Petty to act in a matter of Authority and serve as a [redacted] representative to both employees and

contractors/ vendors during the three-month required notice period as per his employment contract. Due to his unprofessional outburst and dishonest statement regarding Mr. ; resignation, it was unreasonable for the company to expect him to carry out his duties as a senior manager and it was in the best interest of both parties for him to leave immediately.”

212. The Tribunal accepted the practice by some employers to immediately escort a resigning employee off the company's property for IT security reasons and to minimise staff morale. While the practice would allow the company to maintain a sense of control and order, there are equally a number of cons associated with immediately escorting the resigning Employee off the premises such as effectively terminating Mr. Petty.
213. The Tribunal agreed that Mr. Petty was treated harshly, as there was no evidence presented to the Tribunal of Mr. Petty's potential disruption to the workplace or the servicing of the 's clients.
214. The Tribunal was also not presented with any of the Employer's policies concerning "escorting an employee off the Company's premise", after a verbal or written resignation or policies when an employee was terminated.
215. However, the Tribunal also affirmed that once the Human Resources and Office Manager ordered the IT vendor to deny Mr. Petty access to his computer, Mr. Petty was effectively terminated.
216. Also noted under cross examination of Mr. Petty by the CEO, Mr. Petty indicated he did not know what had become of his personal belongings which he was unable to pack and remove from his office.

217. Upon further questioning by the Tribunal, the Employer remarked that Mr. Petty's personal belongings were delivered to him which Mr. Petty denied.
218. The Tribunal asked the Employer to inquire further on where was Mr. Petty's personal belongings. The Employer confirmed that no one seems to know how his personal belongings left the office or the whereabouts of Mr. Petty's personal belongings.

Legal Case law in the Bermuda and the United Kingdom ("UK") concerning "Verbal Resignation in the heat of the moment"

219. The Tribunal took guidance from the Bermuda case law decision as well as recent persuasive UK Employment Tribunal decisions on **"verbal resignation in the heat of the moment"**.
220. The Tribunal has taken extraordinary pains to quote the pertinent sections of the Bermuda and United Kingdom law Employment Tribunal cases judgments, so that the Employer and Mr. Petty fully understood the impact of their actions in this matter.
221. **Firstly**, the case of *VIP Auto Service Ltd and Sonja Warner Civil Jurisdiction 2017: No ; 71* was filed as a Notice of Appeal pursuant to **section 41** of the Employment Act (**"the Act"**), in the Supreme Court of Bermuda against the findings and decision of the Employment Tribunal (**"the Tribunal"**) in favour of the Respondent (Employee). VIP's Appeal was dismissed. Of interest were the facts at paragraph 5:

"It was uncontroversial evidence that a heated exchange occurred between the two women on 2 March 2017. Evidence admitted before the Tribunal suggested that the confrontation was even physical at a common-assault threshold. The dispute ended with Ms. Warner uttering words to the effect; "I'm leaving" which was contentiously taken and treated by the Employers as a

resignation. On the following two work days, a Friday and Monday, Ms. Warner did not attend work, having advised her Employers that she was taking a mental health day and attending a funeral. When she returned to work on the 3 Tuesday, she encountered the ensuing conflict over whether she had effectively resigned. Ms. Warner's Employers, by letter dated 2 March 2017, purported to accept a resignation from her and terminated her employment.

222. The situation of Mr. Petty before this Tribunal is similar to the **VIP** case, albeit with the important distinction that the Employer accepted Mr. Petty's verbal resignation with immediate effect, despite Mr. Petty's verbal resignation being uttered in the heat of the moment. Simply put, Mr. Petty's resignation was equivocal and ambiguous.

223. **Secondly**, the Tribunal reviewed the persuasive decision of the UK Employment Appeal Tribunal ("EAT") where the President, Mr. Justice Wood MC delivered a judgment in ***Southern v Frank Charlesly [1981] IRLR:***

*"Now we look to the law. The leading case is that of **Southern v Frank Charlesly [1981] IRLR 278**. The law seems to be this. Where an employee gives an unequivocal and unambiguous notice of his resignation, then that can be accepted by an employer and there is no dismissal.*

Where the ambiguous words are said in a moment of anger or in the heat of the moment or where there is mental incapacity on the part of employee or a disability of some kind, there is a duty on the employer not to accept such a resignation readily, but to check clearly that it is the true intention of the employee and to inquire when matters are clearer and calmer.

Put another way, it is important for an employer to know whether an employee has resigned, since if he treats the employee as having resigned and that is not the case, he may be taken to have dismissed the employee.

So in any case where a resignation has taken place or indeed a dismissal has taken place in an angry moment, or in other circumstances to which we have referred, there is an onus on the employer to check that it is the continuing and true intention of the employee.

In other words, the employee should seek to recoup the situation and see if the resignation has occurred in these circumstances. We find unanimously that the employers have not done that, that they rather seized the opportunity of this resignation when it arose to make sure that the applicant should not return, indeed that was a fact endorsed on the Reason for leaving form which they filled in. So we find that there was a dismissal because the Employer did insufficient to recoup the 6 situation and write or speak to the applicant to find out what his true intentions really were..."

2023 UK EAT Ruling

224. **Thirdly**, in the recent 2023 persuasive case of ***Omar v Epping Forest District Citizens Advice [2023] EAT 132***, the parties had a disagreement, during which the employee said ***"that's it, from today, a month's notice"***, words which his Employer interpreted as his notice to resign.
225. **Mr. Omar** had a history of verbally resigning, usually during disagreements with his line manager. The line manager had responded on these previous occasions by refusing to accept the verbal resignation.
226. **Mr. Omar** verbally resigned again during another altercation with his line manager. At a subsequent meeting later that day with the same line manager and the organisation's CEO, various things were discussed, but **Mr. Omar** was not asked to retract his resignation or indicated that was a mistake. There was some discussion between the parties about an alternative role, but no formal offer was discussed or made by the employer.
227. At a meeting two days later, the CEO informed the **Mr. Omar** that his manager had decided they no longer wanted to work with him and that his resignation

would still stand. Mr. Omar was asked to confirm his resignation in writing, and he said that he would. However, the following day the employee wrote to his Employer asking that his resignation be retracted as it was given in the heat of the moment.

228. However, his employer refused, was firm that the employee's resignation stood, and treated the employee's employment as terminating on a month's notice he didn't do this and instead submitted a request to retract his resignation.
229. The employer requested that his notice be put in writing, but the following day the employee wrote to his employer asking that his resignation be retracted as it was given in the heat of the moment. His employer refused, took his resignation to still stand, and treated his employment as terminating on a month's notice."
230. Mr. Omar's case was that he had not resigned, and that he had been unfairly dismissed. In the first instance, the Employment Tribunal found in favour of the Employer and decided that the employee had in fact resigned.
231. The employee appealed and whilst the case will be referred to a fresh tribunal for a new hearing and the outcome of that case is awaited, the Employment Appeal Tribunal set out the following helpful principles for Employers.
232. The EAT decided that the tribunal had NOT examined sufficient findings of fact around the words, actions and intentions of the employee at the time and had been distracted by irrelevant red herrings (the discussion about another job). It allowed the appeal and sent the case back to be heard again by a different judge.

Tribunal further discussions

233. For the specific nuisances of Mr. Petty's case and clarifications of existing Bermuda and UK case law around "**heat of the moment**" **resignations**, the Tribunal has taken the liberty to provide the two principle guidelines for employers and employees to be guided by.

234. The Tribunal also noted the UK EAT guidelines which are summarised as follows:

"Despite the way it was argued in this case, there isn't a "special circumstances exception" that means that any resignation delivered in the heat of the moment isn't valid.

The key is to assess whether the resignation was seriously meant or really intended. If it was, then it will be effective and could only be retracted by agreement with the Employer. What this means is that each case will be specific to its own facts, and context will be crucial.

What the Employer took the words to mean will be important but won't decide the case. The test is what a reasonable bystander, in possession of all the relevant facts and circumstances, would understand the words spoken to mean when looking at it from the perspective of the Employer (the recipient of the words) It has to be apparent to the reasonable bystander that the employee used words that amount to words of resignation (whether immediate or on notice). An intention to resign in the future is not.

It has to be apparent that the resignation was "seriously meant" or "really intended" or "conscious and rational". This means that the employee genuinely intended to resign and also to be "in their right mind" when doing so. Confusingly, however, it does not mean that it needs to be a rationally thought through or sensible decision

To succeed, the employee will have to show that objectively any reasonable bystander would understand that the words of resignation weren't clear and unequivocal or that resignation wasn't seriously meant or intended.

If it's found that the resignation was meant or intended but that the employee simply changed their mind, the resignation will stand.

The same principles apply to written notice as well as verbal in the heat of the moment, but realistically, sitting down and writing a letter of resignation and then delivering it is likely to be taken as evidence of meaning and intention".

Tribunal Analysis of the Act and Relevant Case law

235. In summary, the legal key takeaway for this Tribunal was that Mr. Petty's vocal behavioral utterance of **if you feel that way you can have my resignation** was a direct response to the HROM stating: **we should accept Mr. Petty's resignation**. In other words, there does not exist an automatic "exception" for resignations made in the heat of the moment. Hence, in the opinion of the Tribunal the average bystander would determine that Mr. Petty was dismissed.

Bermuda's Statutory Framework on the Termination of an Employee.

Section 18 of the Act Termination of employment

1. An employee's contract of employment shall not be terminated by an Employer unless there is a valid reason for termination connected with

1(a) the ability, performance or conduct of Mr. Petty;

1A (4) Notwithstanding subsections (1) and (1A), an employee's contract of employment may be terminated by the Employer without notice, for serious misconduct, under section 25.

Tribunal Analysis and Discussion

236. Noting the HROM's witness statement at paragraph 3:

...considered the Manager's employment record and performance over the past few years ... (Emphasis)
and the remarks of the CEO, and the HROM, confirmed to the Tribunal that there were no formal written warnings or formal disciplinary penalties on file against Mr. Petty for misconduct or serious conduct.

237. Likewise, no facts were admitted to the Tribunal concerning Mr. Petty's diminished abilities or documented evidence of performance shortcomings, over the length of Mr. Petty's five (5) years of employment with the Employer.

Section 25 of the Act Summary dismissal for serious Misconduct.

238. The Tribunal then had regard to **Section 25 of the Act** which sets out the statutory framework for summary dismissals:

An Employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct-

- (1) which is directly related to the employment relationship; or*
- (2) which has a detrimental effect on the employer's business, such that it would be unreasonable to expect the employer to continue the employment relationship.*

Tribunal Analysis and Discussion

239. The Tribunal's decision to pay the three (3) month's in lieu of notice centered on Mr. Petty's loud and aggressive outburst in the HROM's office to reinforce the decision of accepting Mr. Petty's resignation was with immediate effect.

Section 26 of the Act Termination for repeated misconduct sets out the requisite procedural steps for establishing repeated misconduct:

"Termination for repeated misconduct 26 (1) Where an employee is guilty of misconduct which is directly related to the employment relationship but which does not fall within section 25, the Employer may give him a written warning. Employee's contract of employment without notice or the payment of the severance allowance.

Tribunal Discussion and Analysis

240. There was no evidence before the Tribunal from which it could reasonably determine that the **Section 26** warning procedure had been followed against Mr. Petty.
241. The only remaining alternative was **Section 25 Summary Dismissal** by way of the Tribunal's finding of unfair dismissal.
242. In the Tribunal's judgment, the evidence sadly failed to establish serious misconduct. On the evidence led, there was a verbal confrontation between Mr. Petty and HROM and over the Overtime matter.
243. The Tribunal did not hear conclusive evidence detailing the entire Parties confrontation in the HROM's office.
244. However, it would be grossly speculative by the Tribunal to rely on the facts of the confrontation to conclude that Mr. Petty had committed serious misconduct by angrily slamming the HROM's door as Mr. Petty returned to his office over the nonpayment of Mr. ; Overtime.
245. The fact that Mr. Petty stated under oath that "I did not resign" and he never wrote a resignation letter following the confrontation, establishes that his behaviour was reactionary to Mr. 's alleged verbal resignation. Indeed, the Employee expressly complained that the CEO had come to Mr. Petty's office to ensure he was leaving, informed Mr. Petty that access to his computer was disabled, asked Mr. Petty to hand in his keys and access card.
246. Whilst it was inconclusive for the Tribunal to determine if the CEO's words that he could have called the police to escort Mr. Petty off the - - - - property had legs, the intent was to sever the employment relationship as quickly as possible.

247. The Tribunal turned its attention to Mr [redacted] Defence statement of November 17th, 2022:

“If Mr. Petty regretted his decision to resign, it would be reasonable to expect a request for re-instatement within days of the incident, not after more than a month of no contact.”

248. The Tribunal was concerned that the delayed response from Mr. Petty concerning that he did not resign in the heat of the moment paints a picture of no urgency by him to be reinstated to his [redacted] Facilities and Plant Operations Manager’s post.

249. The Tribunal did not accept that the onus was singularly on Mr. Petty to tender a written resignation letter and that the Company should have sent a letter to specifically ask Mr. Petty if his intentions of September 29th, 2022 was to formally resign.

**Deliberation by the Tribunal of the Unfair Dismissal claim by Mr. Petty
Application of the Statutory, legal authorities and case law.**

Section 20 Notice Periods

A contract of employment may be terminated in accordance with this Part by the Employer on giving the following minimum periods of notice in writing (“the statutory notice periods”) one (1) month, any other case.

250. The Tribunal did not find an amended SoE that reflected the statutory “**Notice Period**” as stipulated under **Section 6 SoE** of the Act at paragraph 2(i) which reads:

“The length of notice which Mr. Petty is obligated to give, and is entitled to receive to terminate his contract of employment.”

251. However, Mr. Petty’s SOE stated the Employer may terminate Mr. Petty employment by giving three (3) months in lieu of notice if there is a valid

reason pursuant to the Act. The Tribunal was satisfied the Employer conformed to the statutory notice period.

Section 25 of The Act, with respect to dismissal

252. In the matter of the Supreme Court case of **Gorham's Limited - v - David Robinson 2021: No. 38**, Mussenden J held that:

The standard in relation to dismissals under section 25 of the Act as follows: first, the Employer has the burden of proving serious misconduct on an objective standard; secondly, the Tribunal has to assess whether the dismissal was within the range of permissible responses of what a reasonable Employer would have decided.

253. The only reference in the Employer's SoE for serious misconduct was reference to Employee Handbook. As no evidence was admitted to the Tribunal that Mr. Petty's September 29th, 2022 behaviour constituted serious misconduct, then Mr. Petty's had an unblemished employment record.

Was Mr. Petty's dismissal unfair?

254. The Bermuda Court of Appeal decision considered the correct approach to be taken when assessing a decision to terminate a worker, where Kawaley CJ's ruling in **Lynam** referred to the English guidance from their Court of Appeal in **Foley v Post Office [2001] 1 All ER 5550** in which it held that:

"...the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the Employer. Their proper function is to determine whether the decision to dismiss Mr. Petty fell within the band of reasonable responses 'which a reasonable Employer might have adopted'.

255. The Tribunal affirmed that Mr. Petty was dismissed and based its decision on the following points:

- (a) The Employer did not conduct a meeting with all the Parties (Mr. _____, Mr. Petty, the CEO and HROM _____) after the September 29th, 2022, when cooler heads prevailed.
- (b) The meeting provided the opportunity for all parties to discuss Mr. _____'s and Mr. Petty's intent concerning their verbal resignation words of I'm done by Mr. _____ and Mr. Petty's reaction and his assertion to hearing the HROM's words: "that if they felt that way they would be receiving his resignation too." Both _____; Employees' words were ambiguous and equivocal.
- (c) That Mr. Petty's verbal resignation words was not confirmed in writing after he "cooled off".
- (d) That the Employer produced no evidence of Mr. Petty's documented performance shortcomings and no disciplinary penalties over the length of Mr. Petty's five (5) years of employment to justify accepting Mr. Petty's verbal resignation with immediate effect.
- (e) The Tribunal applied no weight to the CEO's asserting that there were also verbal conversations with Mr. Petty on his performance shortfalls.
- (f) The Employer did not apply its Employee Policy on resignation fairly to Mr. Petty. The Company immediately accepted his verbal resignation, denied access to his computer, asked for his security pass wipe key, keys and all the Employer's property. Lastly, that the CEO escorted Mr. Petty from his office and off the _____'s property.
- (g) The Tribunal keenly noted that the CEO's words that the Act makes no reference to a Company's policy on resignation.

- (h) The Tribunal was surprised that no senior manager of the ; could confirm the whereabouts of Mr. Petty's missing personal property.

Application of Section 38, 39 and Section 40 of the Act.

256. Pursuant to **Section 38 (2)** of the Act, the burden was on the Employer to prove the reason for the dismissal on the balance of probabilities. That based on the papers and Exhibits submitted by both Parties, that there was no contradicting evidence pertaining to the dismissal of Mr. Petty for his verbal resignation in the heat of the moment.

(1) In **Thomson v Fort Knox Bermuda Ltd [2010] CA (Bda) 5 Civ**, the Court of Appeal considered the remedies available under the Act. After setting out the relevant provisions, Evans JA stated at paragraphs 18-19 as follows:

"However, sections 39 and 40 do distinguish between claims for unfair dismissal and other claims.

Section 39 is headed "Remedies: general". It empowers the Tribunal to order the Employer to do any specified act which in its opinion constitutes full compliance with the Act, and to pay "any unpaid wages or other benefits owing to the employee" (section 39(1)).

257. **Section 40** deals only with *"Remedies: unfair dismissal"*.

(1) *These remedies include an order for reinstatement or reengagement, and a compensation order which takes account, not only of the unfair dismissal, but also of "the extent to which the employee caused or contributed to the dismissal" (section 40(4) (b)).*

Tribunal analysis and discussion.

258. The Tribunal determined that the implied term of mutual trust and confidence had been exhausted between the Parties and that due to:

(a) the hiring of a new Facilities and Plant Operations Manager by the Company between the period of 2022 - 2023; and

(b) the amount of time of the dismissal of Mr. Petty from September 29th, 2022 and February 2024, that the imposition of such an order of reinstatement or reengagement by the Tribunal on would be impracticable.

Application of section 40(5)(b).

259. Finally, the compensation is limited to a sum calculated by reference to the number of weeks of continuous employment, but with a limit "up to a maximum of 26 weeks wages". (Emphasis added).

Tribunal analysis and discussion.

260. As such, given the findings by the Tribunal that there was no serious misconduct that the summary dismissal was unfair and therefore, **section 40(5)(b)** will be applicable in determining compensation to the Claimant.

The Tribunal considered whether Mr. Petty had contributed to his termination of the employment.

261. This provision was considered in Lynam at paragraph 25 and fortified by the decision in Gorham's where Mussenden J considered a situation where there was a finding of unfair dismissal and a maximum award with no consideration of **section 40 (4) (b)** of the Act and concluded as follows at paragraph 82:

"... on the basis of an unfair dismissal, the Tribunal was obliged to take into account the 2000 EA section 40(4)(b) factors which would have included the extent to which Mr. Robinson caused or contributed to the dismissal as that was a circumstance to be considered in what was a just and equitable amount of compensation. However, the Tribunal made a

maximum award of 26 weeks without providing any reasons for doing so. In my view the Tribunal failed to consider the extent of any contribution by Mr. Robinson to his dismissal.

FINDINGS OF THE TRIBUNAL

262. The Employer complied with **Section 20(1)(c)** and **section (2)(C) Notice Period of the Act** by awarding three (3) months' salary in lieu of notice.
263. Pursuant to **Section 39 of the Act Remedies**, the Tribunal made the following awards:
264. **Firstly**, there is a reference to the length of service at **Section 40(5)(b)**. This is four (4) weeks wages for each completed year of continuous employment for employees with more than five (5) years of completed of continuous employment. Mr. Petty's total years of employment was 5.25 years.
265. **Secondly**, the loss sustained by Mr. Petty in consequence of his dismissal in so far as that loss is attributable to action taken into account.
266. **Thirdly**, the extent to which Mr. Petty caused or contributed to the dismissal.
267. **Finally**, the Tribunal, having regard to these factors should make an award that is just and equitable in all circumstances.
268. Based on the findings above, the Tribunal did not consider that Mr. Petty's one off verbal outburst on September 29th, 2022 in the HROM's did not justify and give rise to his dismissal.
269. Therefore, the Tribunal awards Mr. Petty twenty one (21) weeks which is consistent with the level of compensation contained within **Section 40(5)(a)** and **Section 40(5)(b)**.
270. Hence, Mr. Petty is initially awarded **\$57,718.61 BM dollars** contingent if Mr. Petty mitigated his loss of earnings.

Mr. Petty Mitigating Loss of Earnings

271. However, Mr. Petty failed to mitigate his loss (or to use the words of the **Section 40 – treating the loss as not being attributable to action taken by the Employer was considered.**
272. Mr. Petty did not remain in Bermuda and did not seek employment of any kind, when his employment was terminated from on September 29th 2022 to January 29th, 2024.
273. The Tribunal was presented with no evidence that Mr. Petty was employed in Florida or Turks and Caicos.
274. The Tribunal noted Mr. Petty's decision to leave Bermuda for personal reasons, within a few weeks of the Employer terminating his employment. However, Mr. Petty's personal decision lends no weight to mitigating his loss of employment.
275. Therefore, an option for Mr. Petty to mitigate his loss would have been to return to Bermuda to seek alternative employment.
276. Hence, Mr. Petty's loss amounted of **\$6,184.15 BM dollars** for the 2.25 years or 9 weeks for not mitigating his loss of earnings.
277. The Employer is to pay Mr. Petty the award totaling **\$51,534.46 BM Dollars less Government statutory deductions.**

Sign on Bonus

278. The Employer paid Mr. Petty the **\$100.00 BM dollars** as his commencement bonus.

Claim of five (5) years Health insurance.

279. The Tribunal denied the award to Mr. Petty for his claim of five (5) years of health insurance coverage.

Claim for Reinstatement or Reengagement

280. The Tribunal does not recommend reinstatement or reengagement of the Claimant to his former ; post as the Facilities and Plant Operations Manager.

Certificate of Termination

281. The is to issue Mr. Petty with the statutory **section 22 Certificate of Termination** with the reason of the separation from the Employer.

Power to exclude the Public

282. That pursuant to **Section 44E(3) and (4)** of the Act, no report on, or comment in respect of this Tribunal may be made by either party that is not a fair and accurate report or summary of the proceedings.
283. If either party makes any report on or comment in respect of this Tribunal contrary to **section 44E**, such party shall be liable to a civil penalty.

Notification and Publication of the award

284. That Mr. Petty and the Employer had not applied as a matter of right to conceal any matter of the Hearing/Award as outlined in **Section 44F (3) Notification**.

Publication of Award of the Act.

285. The Tribunal did agree that the Witness s name will be redacted and only initials used.

Appeals

286. Pursuant to **Section 44O** of the Act, the Employer may appeal on a point of law.



The Award

287. In conclusion, for the reasons the Tribunal set out above, the Tribunal finds that the Complainant was "unfairly dismissed" and is entitled in the circumstances to the award for compensation ordered by the Tribunal of \$51,534.46 BM Dollars less Government statutory deduction as set out in the Tribunal's findings and payable forthwith to Mr. Petty.

Edward Ball Jr, JP, LLB, FCMI
Chair



Lorrita Tucker
Deputy Chair



Jocene Wade, JP, FCIPD, FCMI
Tribunal Member



Date: 12th, March, 2024

