IN THE MATTER OF AN ARBITRATION UNDER TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021 BEFORE THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL

BETWEEN

UNION
(on behalf of Employee)

Claimant

AND

EMPLOYER

Defendant

DECISION

Date of Hearing: 10th March 2022

Appearing for the xxxxx Union: xxxxx
Appearing for xxxxx: xxxxx

Background

1. xxxxx was employed at xxxxx for 37 years for xxxxx, xxxxx, xxxxx and then xxxxx. He was initially hired by xxxxx as xxxxx in 1984 and remained in this position until his suspension from work on 28th September 2020 and subsequent termination.

2. Evidence was provided that during the later course of his employment, xxxxx was regularly written-up for poor performance. xxxxx provided numerous examples of "Employee Performance Development" (EPD) forms that recorded disciplinary action against xxxxx.

3. For example, xxxxx was "coached" on 11th July 2019 because he left trash on 2 different occasions after his shift. On 3rd December 2019, he was given a Level 1 warning for again not removing the trash xxxxx. On 23rd January 2020, he was given a Level 2 warning for yet again leaving trash xxxxx. On 24th January 2020, he was given a Final Warning for leaving 2 days' worth of trash xxxxx. As explained by xxxxx, the xxxxx, the leaving of trash was a potentially serious security concern as the xxxxx regulations required that all trash be removed to a secured dumpster. Any failure to do so was a cause of concern to the Bermuda Police and an embarrassment to xxxxx.

4. Within a month of the Final Warning, on 19th February 2020, there was an act of insubordination by xxxxx and a further EPD form was issued to him upon which is

written "termination". However, at a meeting held on 19th February 2020 between xxxxx and the Union, it was agreed that xxxxx' employment would not be terminated. The Union successfully pleaded on xxxxx' behalf that he be given one last chance.

5. In attendance at this meeting were xxxxx, xxxxx, the Resource and Planning Manager, and xxxxx of xxxxx as well as xxxxx, xxxxx and xxxxx, the then President of the xxxxx on behalf of the Union. Although xxxxx and xxxxx were slightly uncertain as to the length of time stating that it was between 3 to 6 months, xxxxx confidently asserted on the basis of his notes that it was agreed that xxxxx was to be placed on a probationary period of 3 months and that if he failed to improve, then his employment was to be terminated. This was not disputed by xxxxx and xxxxx who accepted that the probationary period could have been agreed for 3 months. All parties were therefore agreed that xxxxx was being given one last chance but that if he did not adhere to the requirements of his position, his employment would be terminated following any further transgression by him.

6. By email dated 9th March 2020 from xxxxx, HR Manager to xxxxx, a list of recurring offences was detailed in relation to xxxxx' performance as well as issues relating to the whole xxxxx. This was in preparation for a JCC Meeting on 10th March 2020 which discussed future operations and safety measures for the workplace. The list of recurring offences by xxxxx ran to an extraordinary 15 points. It was unclear from the evidence whether xxxxx was working during this time, with xxxxx himself giving evidence that he was unsure whether he returned to work in the month-long period between 19th February 2020 and late March 2020 when the pandemic struck Bermuda.

7. In late March, all xxxxx cancelled and the first lockdown was in place. As explained by xxxxx, this meant that lay-offs and redundancies had to be made. xxxxx was not one of those affected by redundancy, but he was laid off during this time and was not required to attend work for the period from late March 2020 until the end of June 2020.

8. With xxxxx not working until his return in early July 2020, this raised the question whether the probationary period of 3 months continued to run during this period of lay-off. Whilst the usual approach would be that it would continue and so would have expired during the lay-off, this issue is complicated by the fact that the agreement on this 'last chance' probationary period was not confirmed in writing by either xxxxx or the Union.

9. Instead, as indicated above, xxxxx and xxxxx had an uncertain recollection of the length of the probationary period and, understandably given the tumult caused by the pandemic, the issue of whether the probationary period continued or not was not at the forefront of anyone's mind. xxxxx asserted that there was no indication that the probationary period was to be paused. However, when xxxxx was asked the question of when he believed his probationary period of 3 months commenced, he was clear that it only began when he returned to work in July, seeming to take the commonsense view that he could not have been assessed on a probationary basis during the time that he was at home and laid off from all work.

10. xxxxx reopened xxxxx in July 2020. xxxxx, the xxxxx Manager since March 2021 but then in a supervisory role, gave evidence that his

predecessor as xxxxx Manager, xxxxx, explained to xxxxx when he returned in July that WhatsApp group messages would be the main form of communication to all staff. This had been agreed with the Union and xxxxx stated that both xxxxx and xxxxx had spoken to the staff to inform them of this.

11. As with all other staff, xxxxx stated that it was made clear to xxxxx at that time that if WhatsApp was an issue, then alternative forms of communication could be made, for example, direct text messages or phone calls. Contrary to this, xxxxx in his evidence contended that no such conversation or arrangement was made and stated that he never used WhatsApp during his employment at xxxxx and never received any texts. However, he also, rather confusingly, acknowledged receiving a WhatsApp message eventually on the key date of 23rd September 2020 as described below.

12. xxxxx also explained that from the opening of xxxxx in July, the minimal work available and the limited xxxxx resulted in the staff being split into two crews on a rotation with one week on and one week off. It was expected that the group on shift would arrive 30 minutes prior to xxxxx, and 90 minutes prior to xxxxx for xxxxx that xxxxx and xxxxx.

13. After returning to work in early July, xxxxx was issued with another EPD on 30th August 2020 for leaving trash xxxxx and office signed by both xxxxx and xxxxx. However, no formal disciplinary action was taken. This warning potentially could have fallen within his probationary period if it was deemed to commence at the start of July 2020.

14. Another 3 weeks passed and on 22nd September 2020, xxxxx was on the rota for that week and on shift that day. During that time, according to both xxxxx and xxxxx, the xxxxx xxxxx at its usual time in the evening, but that in order to abide by the Covid-19 regulations in place, the same crew needed to be used xxxxx. This meant that xxxxx and then returned to xxxxx. xxxxx and xxxxx explained that this schedule would have been known to all those on shift. So if the xxxxx was arriving in the evening, the staff would know that they would be required to attend xxxxx the next morning to assist with the xxxxx. xxxxx stated that as xxxxx was on shift on 22nd September 2020, he would have been aware xxxxx day and he would have known that he had to return to work the next day for xxxxx.

15. Nonetheless, xxxxx stated that at 1.30pm on 22nd September 2020, a WhatsApp group message was sent to all staff required to work the next day, reminding them of the early 8.30am departure.

16. In his evidence, xxxxx stated that he did not receive the WhatsApp message that day because he did not have a data package for his phone and was having problems with his phone. Without a data package, he relied on access to xxxxx Wi-Fi or his home Wi-Fi to receive messages. He also complained that xxxxx never mentioned to him whilst they were working together until xxxxx that day, that he would need to come in the next day at 8:30am.

17. As a result of this, xxxxx did not attend work until 10.30am on 23rd September 2020. He explained that he had not checked his phone when he returned home the previous

evening. Instead, he looked at the message the following morning when he was getting ready to come to work for 10.30am. By that time, it was too late for him to make it to work on time for the xxxxx at 8.30am.

18. When he did arrive at work, xxxxx questioned xxxxx why he did not arrive on time. Although there was a different recollection of this conversation by xxxxx and xxxxx, it seems that xxxxx replied that he did not know about xxxxx as he had not received xxxxx's message until the following morning when it was too late. As xxxxx was of the view that xxxxx should have known as xxxxx was present the previous day when xxxxx and would have been aware of the schedule, he did not accept that as a justifiable reason. Nor did xxxxx whom xxxxx was liaising with by phone that morning as xxxxx was not on shift that day. As xxxxx explained, due to the reduced xxxxx and reduced numbers at work, it was no longer the case that the managers would necessarily be at xxxxx each and every day. xxxxx's evidence was that he explained to xxxxx that he would have to write him up for this. He stated that the decision to do so was also supported by the shop steward, xxxxx, who was present and had taken over since xxxxx's retirement. xxxxx explained that he then had nothing further to do with the matter as it was for xxxxx as the manager to complete the due process.

19. In contrast to xxxxx's account of events, xxxxx asserts that xxxxx agreed to retract the write up after hearing his explanation of events.

20. A copy of the EPD dated 23rd & 24th September 2020 was provided. This stated that xxxxx was being dismissed because of "No show for morning xxxxx". The EPD refers to xxxxx being on a "Final warning as agreed by all parties". This document was signed by xxxxx and xxxxx on 23rd September 2020 and then signed by xxxxx on 24th September 2020 on his return to the office. There is no sign that the EPD was retracted at any time by xxxxx. Instead it could be possible that the difference in recollection by xxxxx and xxxxx was due to xxxxx giving xxxxx the impression that xxxxx would be completing the process and then xxxxx not hearing anything further that day.

21. xxxxx was then on his rest days from 24th to 27th September 2020 and returned to work on 28th September 2020. xxxxx' evidence was that after completing his tasks, he was informed by xxxxx that he was being suspended from work until further notice. From xxxxx' perspective, he was clearly unsure of what had happened on 23rd September 2020 and so returned to work on 28th September 2020. This is unsurprising as xxxxx never received any formal letter of termination from xxxxx during that time. No such letter was provided by xxxxx at the hearing either.

22. With xxxxx being no longer employed by xxxxx and so not present to give evidence, xxxxx's recollection was that he reviewed the decision to dismiss by speaking with xxxxx to find out what had occurred. xxxxx took him through what had happened and explained to xxxxx's satisfaction that there was no legitimate reason why xxxxx failed to arrive at work on time on 23rd September 2020. He also informed xxxxx that the matter had been discussed with xxxxx as the Union representative and it was agreed that there had to be a "parting of ways" given that xxxxx was on his last chance.

xxxxx' position

23. On behalf of xxxxx, in their written Statement of Case which was helpfully provided by the Union to us in accordance with our directions prior to the hearing, the Union argued that the final written warning of 19th February 2020 had lapsed by the time of the dismissal. According to Article 38 of the Collective Bargaining Agreement, the final written warning will be entered on the employee's personnel file for a maximum period of six (6) months. As the termination of employment took place on or around 23rd September 2020, this was outside the 6 month period. The Union also argued that termination should not have been the ultimate penalty as xxxxx had worked for the company for 37 years. He also did not have in his possession a company phone, nor was he obligated to answer his phone after hours. He was also not duty bound to do overtime as overtime is voluntarily done by the employee.

24. At the hearing, the Union also argued that xxxxx could not be dismissed because the probationary period of 3 months had expired in May 2020 and the period of lay-off had not paused this period. They also claimed that xxxxx did not have authority to dismiss xxxxx on 23rd September 2020, only xxxxx, and he was not present on that day. Moreover, xxxxx could not sign the EPD and terminate the employment of xxxxx on 24th September 2020 as xxxxx was on his rest day. Article 38 required that the disciplinary action "will be communicated to the individual concerned in the presence of the Supervisor/Manager and the individual's representative."

xxxxx's position

25. As xxxxx failed to provide their Defence or any of their own supporting documents prior to the hearing as required by the directions agreed with the parties, it was unclear what their position was until the hearing commenced and they produced a brief summary and collection of the past EPDs of xxxxx. In summary, xxxxx argued that xxxxx had been given numerous opportunities and had a long track record of misconduct and poor performance. xxxxx gave evidence that during his 6 years working alongside xxxxx, his consistent experience was that xxxxx would be given an instruction and not complete it or not carry it out at all. He would receive an EPD and then wait for the 6 month period to expire before "messing up again". He was consistently spoken to about the need for the trash to be properly removed to the secure dumpster but it remained a problem.

26. xxxxx relied upon xxxxx' late arrival on the 23rd September 2020 as being the time when the last chance given to him on 19th February 2020 was ended by his own actions. Furthermore, the decision to dismiss was agreed by xxxxx.

Analysis

27. As with many issues in this case, the failure of a proper recording of the actions taken has not been helpful in reaching a decision. The main fault for this lies with xxxxx. Whilst there is sympathy for the impact that the pandemic has had on the usual running of the company by HR and management, the disregard of the need for formal written confirmation of the probationary period or the dismissal of xxxxx was matched (and surpassed) by the cavalier disregard to the Tribunal's request to provide a Defence and documentation prior to the hearing.

28. Nonetheless, as discussed above, it was clear from the evidence that a probationary period of 3 months was agreed and, although it was unclear from the evidence when this was intended to commence and end, xxxxx at least was clear that he was of the belief that when he returned to work after lay-off at the start of July 2020, this was the moment when the 3 month probationary period commenced. As this was his view, xxxxx was under no misapprehension of the need to ensure that he did not commit a further act of misconduct or poor performance during July, August and September 2020.

29. This understanding of the situation also seems to have been shared by xxxxx, who although she was not present to give evidence, agreed with and was ready to sign off on the termination of xxxxx on 23rd September 2020 as indicated by her signature on the EPD. Likewise, although their recollection of the length of time of the probationary period was hazy, the right to dismiss xxxxx on 23rd September 2020 was also shared by xxxxx who believed him to still be on his last chance. This was certainly the view of xxxxx and xxxxx.

30. However, if the parties had agreed to treat this 'last chance' as a probationary period, then by Article 37, the termination of employment by xxxxx would have required one week's notice to be given. It is not clear whether the parties considered Article 37, but on this point, if a probationary period was agreed, then it is appropriate for this notice to be given by xxxxx.

31. The Union's argument that the final written warning of 6 months lapsed had lapsed by the time of his dismissal is correct. However, the agreement between the Union and xxxxx was for a 3 month probationary period.

32. The significant length of service of xxxxx was likely the main factor which enabled the Union to argue successfully in February 2020 that, rather than being dismissed for another infraction at that time whilst being on a final written warning, xxxxx should be given one last chance. For that reason, we do not accept that this factor ought to weigh so heavily again when considering the fairness of the dismissal in September 2020. The Union had already played that trump card on xxxxx' behalf to give him that last chance.

33. The fact that xxxxx did not have a company phone or he was not obligated to answer his phone after hours or he was not obliged to do overtime are also not reasons that can make the dismissal unfair. The use of WhatsApp was agreed between xxxxx and the Union as a reasonable way to disseminate messages, and was advocated by xxxxx to his members. If there was an issue with this means of communication, then it was open for xxxxx to inform xxxxx of this and alternative arrangements would have been made, such as text messages or simple phone calls. Had such an alternative arrangement been made for a phone call, there is no basis for arguing that a company phone needs to be provided in order for an employee to receive calls from his employer. Likewise we do not accept that this needs to be the case in today's world in order for an employee to receive a text or WhatsApp message from his employer.

34. Furthermore, we accept xxxxx' explanation that xxxxx ought to have been aware of the need to attend work for the 8.30am departure the next day as he was present the day before. He would have seen the xxxxx (and handled it) and been aware from the regular schedule at that time that it would xxxxx out early the following morning and his attendance was required. The whole issue of receiving or not receiving the WhatsApp

messages is therefore immaterial. Even if there was some merit to this argument, xxxxx plainly could also have checked for messages when he returned home to use his Wi-Fi that evening, rather than only checking the following morning.

35. Finally, although this issue was not pursued by the Union actively at the hearing, we do not understand that the hours to be worked by xxxxx the following day were overtime. Instead, from xxxxx's explanation, the schedule of having two crews on rotation was agreed and the requirement to arrive in good time before and work after the end of each xxxxx was arranged in an effort to try to maximise the number of working hours for its remaining employees on a much reduced schedule. There was no evidence of any complaint about the schedule and the attempt to maximise hours for their members from the Union.

36. By Article 38, it is agreed that an action for dismissal must be communicated to the individual in the presence of the Supervisor/Manager and the shop steward. We acknowledge the Union's concern that xxxxx may not have had sufficient authority and that notification of the termination ought to have been carried out by xxxxx personally when he, xxxxx and xxxxx could be present. As xxxxx was on rest days until his return on 28th September 2020, this would have meant that any termination ought not to have occurred until that day. Combined with the fact that a week's notice ought to have been given for termination in a probationary period, xxxxx therefore ought to have been terminated no earlier than 28th September 2020 and be paid an additional week's pay in lieu of notice.

Conclusion

37. Therefore, our conclusion is that xxxxx was fairly dismissed within the agreed 3-month probationary period commencing at the start of July 2020. However, if he did not receive full pay and benefits until 28th September 2020 and a further week's pay in lieu of notice, then this should be remedied by paying the difference due to him. We are unable to determine a precise outstanding amount owed to xxxxx as we were not provided with any termination letter or final pay slip of xxxxx. We therefore leave the parties to review the final pay received by xxxxx and trust that it will be easy to agree if any further amount is payable to xxxxx based on our conclusion.

Dated this 28th day of March 2022

C J Rothwell

Craig Rothwell
Chairman

Robert Horton

Eugene Creighton