

***THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL HEARING
BETWEEN
MICHAEL HAYWARD
AND***

Members of Tribunal: Mr. John Hindess, Chairman
Mrs. Judith Hall-Bean, Deputy Chairman
Ms. McKeisha Smith, Tribunal Member

Hearing Dates: 26th April 2022

Matters in Dispute: Severance Pay, Redundancy Pay

Preliminary: This case was heard by the Employment & Labour Relations Tribunal.

Claimant: Mr. Michael Hayward (MH)

Representative for Claimant: Mr. George Scott (GS)

Respondent:

Representatives for the Respondent:

**IN THE MATTER OF A COMPLAINT UNDER THE EMPLOYMENT ACT 2000 BEFORE THE
EMPLOYMENT & LABOUR RELATIONS TRIBUNAL (the 'Tribunal')**

BETWEEN:

MICHAEL HAYWARD

Claimant

AND

Respondent

DECISION

A. THE PARTIES

1. The Claimant is MH and is the employee in these proceedings (the **Claimant** or the **Employee**). The Claimant was represented by GS.
2. The Respondent is the employer in these proceedings (the **Respondent** or the **Employer**). The Respondent was represented by [redacted] and [redacted].

B. PROCEDURAL BACKGROUND

3. This matter was referred to the Employment & Labour Relations Tribunal on 2 July 2021 (the "**Referral**"). The Claimant's Statement of Claim was provided on 2 November 2021 (the "**Statement of Claim**") and the Respondent's Defence was provided on 1 December 2021 (the "**Defence**"). The Claimant did not file any Reply to the Defence although he had the right to do so pursuant to the Directions Order in this matter dated 17 September 2021.
4. The hearing of this matter took place at the offices of [redacted] on Tuesday, April 26th 2022.

C. BACKGROUND

5. The agreed facts are as follows.
6. The Claimant has been employed by the Respondent since 1994. At all relevant times, the Claimant was employed as a cycle or bike mechanic at the _____ location of the Respondent.
7. During the course of his employment, the Claimant did not execute a statement of employment and so there is no written terms of his employment. The Respondent provided the company handbook under which the parties agreed he operated but receipt of which was never signed by the Claimant.
8. In late March 2020, the Bermuda Government issued a closure notice under the Public Health Act 1949 due to the communicable disease known as Covid-19 and the Respondent was forced to close its business. All employees of the Respondent, including the Claimant, were laid off pursuant to the Employment Act 2000.
9. The Respondent's business was closed from March 25th until May 3rd when it reopened only _____.
10. During this period, the Respondent provided a document to the Claimant titled "*BFM Health Insurance Premium Repayment Agreement*" which stated as follows:

"As we proceed day by day through this Health Crisis and new challenges arise the company is looking at all operational issues. With no current firm time line for reopening and being unsure of what business will look like when we do open I want to ensure NO ONE goes without Health Insurance.

The company is prepared to cover these shortfalls on condition the employee agrees to a repayment of their Health Insurance Premium within 90 days on a weekly basis or monthly bases depending on how you are compensated."
11. The document then had a signature section where the Claimant was asked to "agree to repay the Employer any Health Insurance premium owed within 90 days of commencing work."

12. The Claimant never signed this document.

13. On May 1st, 2020, [redacted] telephoned MH to invite him back to work at the [redacted] location. The parties agree that in that conversation, MH stated that he needed confirmation that he would work 40 hours per week and [redacted] stated that he could not guarantee that. MH stated that he would not return to work unless he was given that guarantee. The parties scheduled a meeting for May 4th to discuss. This is corroborated by the evidence of MH and GS and a letter written by [redacted] to MH dated May 1st 2020.

14. On May 5th 2020, the Respondent notified staff that it would not continue to pay for their health insurance premiums effective May 1st.

15. The Respondent wrote to the Claimant on May 5th and stated,

"Dear MH.

Due to the current Covid 19 pandemic and the swift negative impact it has caused on all business especially ours we are forced to make operational changes in order for the Company to survive. We do not see a return to business as normal within months and any type of business shall be at a drastically reduced volume and driven by local consumers. We will update you as changes take place

With the island entering Phase 1 of a 4 phase Government plan any visitor and tourism arrivals are doubtful for months to come and our hotel concessions do not yet have an opening date for 2020. The airport is closed until we enter Government's Phase 4 and without air travel we have lost our customer base. Cruise ships have cancelled their scheduled visits up to August 2020.

After looking at every area and reducing expenses, we regretfully, effective May 1, 2020 the Company has to cancel health insurance premiums. This is based on the Company's need to survive since our expenses are vastly greater than our income, and nothing personally against you. We recommend you reach out to either MR at BF&M by email or by phone at 295-5566 extension 2236 or the Government portal for enrolling in HIP. The portal address is <https://www.gov.bm/hip-and-futurecare-benefits>

The company has begun discussions with all employees regarding wage reductions and this includes you.

In addition, the Unemployment Benefit Administrator has clarified Government's position on when the unemployment benefit ends.

Staff are only eligible if they are working less than 15 hours per week."

16. On May 12th 2020, the Respondent again wrote to the Claimant and stated,

"Dear MH,

As of today you have not signed and returned the Health Insurance Repayment letter the company provided you.

All other employees have agreed to repay the company.

Please return the signed letter."

17. MH never signed the letter and did not return to work.

18. On June 16th, I wrote another letter to MH and stated,

"Due to the Covid 19 Pandemic and the closure of all shops except for our and Hamilton shops, we are forced to change the way we do business. As of July 1, 2020 we would like to open Hamilton 6 days a week and 7 days a week.

We have significantly reduced rental volume and sales and service however we would like you to return to work July 1 2020. Currently hourly staff have agreed to a 20% wage reduction as we operate in a much reduced capacity. Please see attached spreadsheet. In addition, staff have agreed to work up to 48 hours per week at the straight hourly rate.

The company has also reduced its medical insurance coverage effective May 1 2020 to offer employed staff the SHB standard hospital benefit. The monthly cost is currently \$355.41 and this will be shared equally between the company and the employee.

Please call me to discuss this offer with me so I can determine if you will be returning to work.

Please sign and return a copy of this letter to confirm receipt."

19. MH never signed the letter but he did acknowledge receiving it.

20. MH attended the _____ location on July 1st but no meeting was held and a meeting was set for July 15th.

21. On July 15th, MH attended the meeting with GS. _____ cancelled the meeting as he was not expecting GS to attend with MH.

22. On July 22nd, _____ wrote to MH as follows:

"Further to our conversation on Wednesday July 15, 2020 you have not signed the letter dated June 16, 2020 when we informed you of being recalled to work on July 1, 2020. You were to notify me of your intention to return to work. Furthermore, you have not signed and returned my letter dated March 25, 2020 titled BFM Health Insurance Premium Repayment Agreement.

We have made our position clear with the offer that was enclosed. You were one of the first employees asked to return and yet here we are in mid-July and you have not responded in writing as requested in June.

We recall you from layoff to report to work on August 7, 2020 at 830am. If you do not respond to me in writing via email or letter as requested here by July 29th, 2020 we will take it you mean that you will not be returning to work.

Therefore your employment with the company will be terminated without further notice."

23. MH responded to this letter with his own letter dated July 23rd and stated that he would return to work on August 7th but also notifying the Respondent that his health insurance needed to be discussed.

24. On August 4th, _____ wrote to MH and asked him to initial and sign a letter where he would agree:

(i) A 20% wage reduction;

(ii) Hourly rate of \$15.80;

(iii) Work up to 48 hours per week;

(iv) The monthly cost of \$355.41 for the reduced medical insurance coverage to be shared equally between the Employee and the Employer.

25. The August 4th letter also informed MH of his option to suspend Social Insurance and pension contributions.
26. MH received the August 4th letter on his return to work on August 7th. He informed [redacted] that he needed time to read the letter and [redacted] said he could go home and read it. MH left work and on August 10th, returned the letter indicating that he did not agree to any of the above changes except for the social insurance and pension payments suspension.
27. Another meeting was held between the parties on August 18th but they could not agree and MH left work and did not return.
28. On June 16th, 2020 the Bermuda Government released a statement as follows:

"To assist employees which were laid off, terminated, or made redundant as a result of COVID-19, the unemployment benefit was introduced. The unemployment benefit came into effect on the 24th of March 2020 and the application period will end on the 30th of June 2020.

The unemployment benefit provides a weekly benefit of up to \$500 to eligible persons, including work permit holders, for up to 12 weeks.

The Government will extend these benefits, but not the application deadline, to allow persons to receive further support while the country moves towards the new normal with the gradual re-opening of the economy during phase 4.

Additionally, following engagement with industry associations, the Government will also table legislation this week to amend the Employment Act 2000. The legislation will amend the portion of the Act with respect to lay off, due to the impact of the COVID-19 pandemic resulting in the state of emergency.

The change will exclude the period from 1 April to 30 June 2020 from the calculation of the period of four months, after which a lay off is deemed to be a termination for redundancy.

The existing provisions of the Employment Act would then apply for severance pay for those employees not recalled at the end of the four-month period starting from 30th of June 2020.

The purpose of this amendment is to protect both employees and employers in these unprecedented times. In the face of the global pandemic, employees should not lose their benefit entitlement of redundancy pay under the Act. This must be protected.

On the other hand, employers with little or no cash, and significantly lower revenues due to the pandemic, should not be forced into bankruptcy by paying these benefits. A compromise must be reached.

This move represents a balanced approach to provide both groups an opportunity to adapt to the new normal as we go through phase 3 and work toward entering phase 4.”

29. The company handbook states that “a normal workweek consists of 40 hours but may include working public holidays and weekends.” It does not state that employees are guaranteed any length of hours to work per week or month.
30. The Respondent took no issue with the Claimant’s ability or competence; this dispute arises over the terms of his employment and its alleged termination.

D. THE PARTIES’ CLAIMS AND THE RELIEF SOUGHT

31. The Referral summarizes the Claimant’s position as follows:

“The Complainant contends that he did not agree to the varied terms of employment offered to him to return to work. He further contends that when he did return to work on two occasions, he was sent home for not agreeing to the terms offered to him.

The Complainant further contends that he was laid off for more than 4 months and is therefore entitled to severance pay.”

32. In the Claimant’s Statement of Claim or submissions, he stated that the Employer must either “retire” him or “sever” him and seeks redundancy/severance pay.
33. The Respondent counters that MH was never “sent home” or terminated but rather chose not to return to work. They also claim that he never “resigned” however and consider him to simply be absent from work and he could return.
34. The Employer contends that due to the unprecedented circumstances of the Covid-19 pandemic, the Employer was forced to make reasonable variations to their employment relationships in order to survive and continue to provide employment to its staff.

35. The Employer therefore believes that MH is not entitled to any redundancy or severance pay as his job is still open to him.

Determination and Order

36. MH accepts that he did return to work within four months of having been laid off due to the Covid-19 pandemic and so he was not laid off nor dismissed but rather, he did not agree to the change in his contractual terms of employment upon return.

37. MH's main points of contention were that he would not be guaranteed four (40) hours of work and that his health insurance was changed.

38. However, it is clear that the contract under which the parties operated did not guarantee MH a certain amount of work and so that part of his claim must fail.

39. In relation to the health insurance, it was also accepted by MH and his representation that the Employer had provided more comprehensive health insurance than is required under the relevant legislation.

40. The Employer argued that it could no longer afford to provide beyond the statutory minimum and gave evidence that all other employees had returned and were operating under the new health insurance.

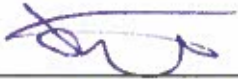
41. It is therefore the determination of the Tribunal that the Employer has acted reasonably in all the circumstances and that MH was not unduly laid off or unfairly dismissed and in effect chose not to return to work. It should be noted that the Employer gave evidence before and at the hearing of this matter that MH still had his position if he chose to return.

42. Therefore, having examined all the evidence presented through written and oral delivery by all parties, the Tribunal finds that the Complainant is not entitled to severance or redundancy pay.

43. The parties to this hearing are reminded that the determination and order of this Tribunal are binding.

44. Any party aggrieved may however appeal to the Supreme Court of Bermuda on a point of law.

Dated this 12th day of August 2022



Mr. John S. Hindess, Chairman



Mrs. Judith Hall-Bean, Deputy Chairman



Ms. McKeisha Smith, Tribunal Member