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

BETWEEN

Complainant

AND

Defendant

DECISION

Date of Hearing: 22nd August 2022

Tribunal Panel: John Payne, Chairman
Robert Horton, Deputy Chairman
Judith Hall-Bean, Tribunal Member

Present: Complainant
Witness for the Complainant
Representative for the Defendant
Representative for the Defendant
Representative for the Defendant

Preamble

The Chairman addressed the Defendant's representatives expressing concern regarding the lack of communication with the Tribunal prior to the Hearing. The Tribunal notes that this behaviour had frustrated the process as it prevented the required exchange of documents, challenged the process whereby Directions were issued and confirmation that the Hearing would take place on the appointed date.

The Labour Inspector in his report also indicated that there had been no communication between the Labour Department and the Defendant, even after several telephone calls and the sending of emails.

For the record, below is a summary of the significant dates in which communication between the Labour Department and the Defendant was attempted:

- 24th June, 2021 -- date complaint filed and referred to Inspector
- 28th January, 2022 -- completion of investigation by Labour Department
- 14th June, 2022 -- request for information sent to Defendant
- 27th June, 2022 – request for information resent to Defendant
- 6th July, 2022 -- initial complaint information by the Labour Officer sent at the Defendant's request
- 8th July 2022 -- response to "request for information" received from the
- 11th July, 2022 -- request received seeking to change the Hearing date to 1st September, 2022
- 14th July 2022 -- Tribunal confirmed 22nd August, 2022 Hearing date.
- 18th August 2022 -- Defendant sends confirmation of witnesses.

maintained that he never received the emails and that when he became aware that a complaint had been submitted to the Labour Department, he became aware that the original emails had the incorrect spelling of his name.

The Complainant eventually responded as requested and provided statements from himself and his witness. Neither documents were sworn or shared with the Defendant in advance, but were presented during oral testimony.

Background

1. The Complainant submitted that the conduct of the Defendant was such that he could no longer work for the Defendant, having been demoted from position 2. This followed a claim that he was not properly advised that he had been demoted. The Complainant stated that he had acted in the position 2 without a Statement of Employment as required by the Act and that he had made several requests to secure a Statement of Employment.

2. The Complainant also alleged that he was constantly bullied and harassed by and another senior staff member.

3. The Complainant argued that that he had been constructively dismissed pursuant to provisions of section 29 the Act. He is seeking:
    - outstanding vacation pay
    - outstanding pay for hours worked
    - compensation for Constructive Dismissal
    - 26 weeks for loss of earnings.

History

4. The Complainant was employed by the Defendant, which provides xxxxx to xxxxx at xxxxx. The Complainant was hired as position 1, but responded to request to work as position 2. The Complainant expressed the view that there were two other staff who had seniority to him and that they could perform the duties required.

5. The Complainant acted in the capacity of position 2 from 21st October, 2019 until 17th June, 2021 when he was demoted. The Complainant informed the Tribunal that during the period that he served as position 2, he had not received a Statement of Employment, although he had repeated asked that this situation be addressed.

6. The Complainant met with and the Defendant's , on 17th March, 2021. It was the Complainant's understanding that the purpose of that meeting was to discuss the outstanding Statement of Employment. Instead, he said, there were a number of other items discussed during the meeting, including his interactions with staff and matters relating to the functioning of the xxxxx. The outcome of the meeting was confirmed in a letter dated 22nd March, 2021, signed by both the and **(Complainant package Item 1G).** That letter concluded with the following statement: *The Defendant is prepared to increase your salary and hours after a period of further assessment through May 31st whilst ensuring that you are aware of all of the required tasks and responsibilities of the xxxxx.*

7. There had been an incident with a known as a The Defendant alleged that the Complainant did not report the incident as required by the Defendant's policies. The Defendant also alleged that this was the second incident not reported by the Complainant while he was in position 2.

8. It was stated that the Defendant wanted to terminate the services of the Complainant. However, mitigated on his behalf, hence a two-week suspension and demotion was considered punishment.

9. By email dated 23rd May, 2021 advised the Complainant that he was being suspended without pay until 6th June, 2021 and that the Complainant was to make contact with on returning to work. **(Complainant package Item 1I)**

10. Following the suspension, the Complainant took personal leave. Upon returning to work following the personal leave, the Complainant did not report to his now appointed post and was considered missing for three days, 28th, 29th and 30th June, 2021. This resulted in a meeting with and the now position 2. The intent of that meeting, held on 1st July 2021

was to discuss the unauthorized absences and for the Complainant to sign a new Statement of Employment as position 1.

11. It is alleged that the Complainant became argumentative during that meeting and refused to sign the new Statement of Employment until he had signed one for the position 2 post, a position he previously held. In addition, the Complainant said he would not take instructions from the new position 2.

12. A second meeting was scheduled for 2nd July, 2021. This was not held as the Complainant terminated his services.

Hearing

Opening Statement of the Complainant

13. The Complainant stated that on 21st July, 2021 he tried to return to work, but was called into a meeting and told to sign a new contract. He was given a deadline of 26th August 2021. He was not happy being asked to sign a new Statement of Employment for the position 1 post when he had tried from October 2020 to August 2021 to get a Statement of Employment for the period he carried out the duties of the position 2. He maintained that he wished to be treated fairly.

Opening Statement of the Defendant

14. stated that he was not aware that there had been an issue with communication between the Defendant and the Labour Department, indicating that the fault resided in the Defendant's not receiving emails.

15. advanced that the Defendant wished to terminate the services of the Complainant for gross misconduct. informed the Tribunal that he argued on behalf of the Complainant with the Defendant's overseas head office, maintaining that the services of the Complainant should not be terminated. Noting that this was the second issue within the xxxxx section not reported by the Complainant while he was in charge, stated that he advised the Complainant that demotion should provide him with an opportunity to regroup.

16. During the Hearing, there was disagreement regarding the need to report events related to . The Complainant stated that there was no policy to report incidents other than when a was damaged. maintained that there was a need to report all situations. The Complainant, in support of his position in this regard, shared with the Tribunal the following excerpt from the Reporting of section in Defendant's document entitled 'xxxxx Workbook': "*the methods used to report damaged vary from xxxxx to xxxxx,* " The Complainant pointed out that no other reference appears in the document to report other than a damaged container.

17. informed the Tribunal that the Complainant was a good worker whom he supported. However, the management style of the Complainant was authoritarian and he would often have to be told about raising his voice to staff.

18. Following a question from a Tribunal Member; advised that the Defendant was a large company with a rather punitive style of management. The Bermuda model was different, less

punitive. He further advised that he often had conflicts with the Defendant and the manager regarding process.

Tribunal Deliberations

19. The Tribunal at times experienced difficulty in ascertaining the facts. had a rather casual approach to the Hearing and provided little documentation to further the Defendant's case. A degree of flexibility was permitted during the Hearing in order to glean as much information as possible.

20. The Tribunal Hearing deemed that five major questions required answers:

    1. Was the Defendant in violation of section 6 of the Act 'Statement of Employment'?

    2. If yes, given the duration of the violation should the Tribunal impose a civil penalty under section 44M of the Act, 'Power of Tribunal to impose civil penalties'?

    3. Did the Complainant suffer harassment from the Defendant or any of its staff?

    4. Was the Defendant's conduct such that it was unreasonable to expect the Complainant to continue the employment relationship, hence constructive dismissal?

    5. Is the Complainant entitled to compensation based on the conduct of the Defendant?

21. A review of relevant legislation and case law was used to determine the response for each question.

Was the Defendant in violation of section 6 of the Act 'Statement of Employment'?

22. **Section 6 (1) of the Act:** "*Not later than one week after an employee begins employment with an employer, the employer shall give the employee a written statement of employment which shall be signed and dated by the employer and employee*".

23. It is agreed that the Complainant had worked as position 2 for the period claimed, that is from 21st October, 2019 to 21st May, 2021. It is also agreed that the Complainant worked in excess of a year without receiving a Statement of Employment for the post of position 2. It was further agreed, as provided in evidence, that the Complainant had raised this matter several times with the and the Defendant's These statements are not in dispute.

24. The email of appointment dated 21st October, 2021 had two clauses: a) the Complainant would be position 2 from 21st October to 21st November, 2019 and b) on successful completion of that month he would be appointed as position 2 for three months. The email concluded that "*once the probationary period is done, and if you have been successful, you will be appointed position 2.* There was no evidence that the Complainant was not successful until the meeting of the 27th March, 2021.

25. There is also no evidence that section 19 of the Act related to probationary period was fulfilled by the Defendant whereby the Complainant should have received a review. Section 19(2) states: "*an employee who is serving a probationary period shall be entitled to receive from his employer*

a review of the employee's performance on or before the completion of one half of the probationary period".

26. Providing evidence, , the Defendant's former xxxxx, did confirm that she was aware of the matter but did not address it until given the authority by in March 2021. A draft Statement of Employment was prepared, but never given to the Complainant.

27. Based on the evidence from both parties, the Tribunal determined that the Defendant was in breach of section 6.

    Section 6(7) of the Act states as follows: *An employer who contravenes this section shall be liable to a civil penalty as may be imposed by the Manager or the Tribunal.*

    If yes, should the Tribunal impose a civil penalty under section 44M, 'Power of Tribunal to impose civil penalties'?

28. Section 44M(1) of the Act states: "*Where a person contravenes a provision of the Employment and Labour Code for which a civil penalty is liable to be imposed, the Tribunal may subject to this section impose a civil penalty not exceeding $10,000 as the Tribunal considers appropriate for each such contravention".*

29. Evidence provided to the Tribunal confirms that the Defendant was aware that the Complainant should have had a Statement of Employment as required under section 6 of the Act. No reasonable explanation was provided for the delay in preparing a Statement of Employment. The Defendant is not a relative new company in Bermuda, so ignorance cannot be used as mitigation. Further, the Defendant is fully aware of the requirements of the Act.

30. attempted to place the blame on and her lack of competence. However, she was not employed by the company at the time the Complainant was appointed.

31. The Tribunal views as gross negligence the Defendant's failure to address this matter within 18 months. It is the Tribunal's further view that this conduct is so egregious that it should not be ignored nor should the Defendant be spared a penalty.

32. It is determined that a civil penalty should be imposed pursuant to provisions of section 44M(1) of the Act.

    Did the Complainant suffer harassment from the Defendant or any of its staff?

33. The Complainant alleged that he was harassed by the Defendant. He contended that the various complaints regarding his work, some of which had been completed, amounted to harassment. The Complainant further believed that emails from the Defendant's xxxxx, written in italics and large font were also harassment.

34. The Complainant in his documents to support that claim provided a set of emails sent to who used italics and large font. The Complainant did acknowledge that he advised that he suffered from He also confirmed that when he advised he requested that other

staff members not be advised. The Defendant did not believe that there was any action required when the Complainant asked the not reveal that he was

35. While not presented as evidence, acknowledged that he had consulted with the Defendant's Head Office regarding the use of italics as regular font in an email and was told it was not a violation of company policy.

36. , in her testimony, stated that she used italics and large font because she wanted to be different. Further, at no time was she advised that the Complainant had a However, she claims to have deduced this because she had a child with It was confirmed that did raise the matter with her. The Tribunal does not accept that deduced the Complainant's on her own as is a and not an However, the Tribunal accepts that was not deliberately targeting or harassing the Complainant by her style of writing.

37. The Human Rights Act 1981 section 6B makes it an offence for an employer to harass an employee. The legislation in 6B (2) states: *"For the purposes of subsection (1) a person harasses another person if he persistently engages in comment or conduct towards another person – a) which is vexatious; and b) which he knows, or ought reasonably to know, is unwelcome".*

38. It is clear that the Defendant, once made aware of the Complainant's did take steps to have the matter addressed.

39. The Tribunal concludes that an asking a staff member, in this case the Complainant, many questions regarding using a font that was not acceptable to the Complainant hardly amounts to harassment.

Was the Defendant's conduct such that it was unreasonable to expect the Complainant to continue the employment relationship?

40. Legal precedents require that in determining if an employee was constructively dismissed, it must be shown that a) the employer violated the employment contract and that b) the employee terminated his employment within a reasonable time after the breach occurred. These provisions are clearly stated in: *Western Excavating (ECC) Ltd v Sharp [1978],* and *Interpetrol Bermuda Ltd and I B Hardy Levin* Bermuda Court of Appeal 1986

41. The Court of Appeal in Western Excavating (ECC) indicated that *"it is not enough for the employee to leave merely because the employer had acted unreasonably; its conduct must amount to a breach of the contract of employment".*

42. In Interpetrol Bermuda Ltd., Mr. Justice da Costa referred to *"an authoritative work has set out the four conditions which must be met in order for the employee to claim constructive dismissal:*

- *There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.*

- *That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.*

- *He must leave in response to the breach and not for some other unconnected reason; and*

- *he must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract"*

43. With respect to the non-issuance of a Statement of Employment, the Defendant was clearly in breach of the Act. However, the Complainant did not terminate his employment based on this fact. The Complainant did work for 18 months without the Statement of Employment, notwithstanding the fact he had made several requests for one.

    "That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving".

44. The Tribunal in considering this condition noted that at no point during the Hearing did either party provide evidence that during the Complainant's acting appointment a formal meeting was held within the probationary period to discuss his performance as require by section 19 of the Act, 'Probationary period'. In fact, the 6 months period as provided for in section 19 of the Act was substantially waived by the conditions set out in the letter of appointment of 21st October, 2019. It could be concluded that the conditions of the email were achieved in the absence of any other statement or the signing of the Statement of Employment.

45. The Complainant is justified in feeling aggrieved for working 18 months without a salary review and increase as agreed.

46. The Tribunal contends that similar to the Defendant advising the Complainant of the acting appointment, the meeting of 22nd March, 2021 regarding his performance and the email of suspension, there should have been formal communication with and regarding his return to work would have been appropriate.

47. The Tribunal does not consider that the requirements as set out by Mr. Justice da Costa have been met.

    Is the Complainant entitled to compensation based on the conduct of the Defendant?

48. The Complainant did not provide evidence regarding the quantum of vacation pay owing or any other outstanding benefits

49. However, the Tribunal is mindful of section 39(1) of the Act, which permits the Tribunal to order the employer who contravenes a provision of the Act to *(b) "pay to the employee not later than such date as may be specified in the notice, the amount which the Tribunal had determined represents any unpaid wages or other benefits owing to the employee".*

50. The Tribunal believes that the Defendant took advantage of the Complainant by not fulfilling the offer made to the Complainant by email dated 21st October, 2019.

51. In the absence of any other information, the email of 21st October, 2019 was deemed a contract.

52. The Defendant committed to having a review at the end of the month period and at that time discuss a salary increase for the Complainant.

53. The absence of a review led to the Complainant not receiving the expected salary increase to which he should have been entitled from 21st November, 2019. It can be assumed that position 2 was earning a higher rate than the $30.00 per hour mentioned in the email.

54. The Complainant was offered a gross salary as position 1 as of 28th June, 2021 of $32.80. This was after the demotion.

55. While there is no guide, the Tribunal believes that a salary increase of $5.00 per hour or $200.00 per week is a fair increase for the responsibilities assumed. It is calculated that from 21st November, 2019 to 6th May, 2021 is 37 weeks.

56. The Defendant is in contravention of provisions of section 6 the Act, whereby it failed to provide the Complainant with a Statement of Employment within a week of the commencement of his employment. This contravention was glaring and negligent in that it lasted for more than 18 months.

57. An appropriate civil penalty of $3000.00 should be imposed pursuant to section 44M(1) of the Act. Failure to provide the Complainant with a Statement of Employment within 18 months is demonstrative of gross negligence by the Defendant. It is the view of the Tribunal that this conduct is so egregious that it should not be ignored and that a civil penalty should be applied.

I. The Act requires that the amount be considered "appropriate" and states in section 44M(2) *"For the purposes of subsection (1) "appropriate" means be effective, proportionate and dissuasive".*

II. According to subsection 3(c), the Defendant has *"the right to make representations to the Tribunal within seven days of the date of such notice".*

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Determination and Order

58. Having given the parties the full opportunity to give evidence on oath and to make submissions, it is the Determination of this Tribunal that:

    I. The Tribunal finds that the termination of employment by the Complainant does not meet the legal standards for Constructive Dismissal.

    II. The Complainant did not prove Harassment.

    III. Pursuant to provisions of sections 6(7) of the Employment Act 2000, a civil penalty of $3,000.00 be imposed on the Defendant for its failure to give a written Statement of Employment to the Complainant within a week of his commencing employment with the Defendant.

    IV. The Defendant pay the sum of $7,400 to the Complainant, as increased salary due to lack of negotiations plus any outstanding benefits such as vacation pay.

    V. The Defendant shall pay the Complainant in full within 30 days of this Determination.

59. The Parties to this Hearing have acknowledged that the Determination and Order of this Tribunal is final and binding.

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

Dated this 30th day of September 2022

Mr. John Payne
Chairman

Mr. Robert Horton
Deputy Chairman

Mrs. Judith Hall-Bean
Tribunal Member