

**IN THE MATTER OF A COMPLAINT UNDER THE TRADE UNION & LABOUR RELATIONS
(CONSOLIDATION) ACT 2021 BEFORE THE EMPLOYMENT & LABOUR RELATIONS
TRIBUNAL**

BETWEEN:

Claimant

AND

Respondent

DECISION

A. THE PARTIES

1. The Claimant is Mr. _____ and is the employee in these proceedings (the “**Employee**”). The Employee was represented by Mrs. Ronaldine Burgess of the Bermuda Industrial Union (BIU).
2. The Respondent is _____, doing business as _____ is the employer in these proceedings (the “**Employer**”). The Employer was represented by Ms. Sarah Blair of Conyers Dill & Pearman Limited.
3. The hearing took place on 16 February 2024.

B. BACKGROUND

4. The dispute between the parties centered around a physical altercation which took place between two employees during their work shifts on 6 October 2022 at the _____
5. The altercation involved Mr. _____ who was at all material times employed as a kitchen porter and Mr. _____ ; who was employed as a bartender.

6. It was agreed between the parties that on 6 October 2022, Mr. [redacted] was working in the bar area when he observed Mr. [redacted] give a bag of ice to a hotel guest.
7. Mr. [redacted] then went to the kitchen and gave the guest some more ice which led to an altercation between [redacted] and [redacted].
8. The interaction led to physical blows and was witnessed by at least two other employees and part of which was captured on videotape.
9. Both Mr. [redacted] and Mr. [redacted] were suspended while the Employer conducted an investigation, following which Mr. [redacted]'s employment was terminated for serious misconduct. Mr. [redacted] resigned before the investigation was completed.

C. THE ISSUES

10. In the Statement of Claim filed by the BIU on behalf of Mr. [redacted] they state that while they do not condone fighting in the workplace, Mr. [redacted] was the aggressor, having instigated and provoked the fight and as such, Mr. [redacted] should only have been suspended and not terminated.
11. The Employer took the position that Mr. [redacted] was at least an equal aggressor and it is clearly serious misconduct warranting immediate termination to engage in a physical altercation at the workplace.
12. Pursuant to the referral letter from the Labour Relations Officer, the Employee sought the following relief in this matter:
 - (i) *Termination to be rescinded and replaced with resignation; and,*
 - (ii) *Compensation.*

D. THE EVIDENCE – the Employer

13. The evidence of Mr [redacted] was given first and was brief. Mr [redacted] is the Finance Manager for the Employer and witnessed the fight between Mr [redacted] and the Employee.
14. Mr [redacted] gave evidence that he saw them fighting in what he describes as “an aggressive fight.” He also said that even after the two were separated, the Employee remained aggressive and that the Employee was yelling, “I want to fight, I want to fight... I am going to kill him, I am going to kill him!” until he left the hotel.
15. Mr [redacted] gave evidence next as he also witnessed the fight. Mr [redacted] a cleaner at the [redacted] Hotel and was working at the time. He gave evidence that in contrast to the Employee’s version of events, neither party could be singled out as the aggressor and that “they were both aggressive to each other and neither of them tried to walk away”.
16. Under cross-examination, the Employee’s counsel highlighted the fact that Mr [redacted] statement was drafted by Mr [redacted] a director of the Employer and the person who investigated this matter on their behalf.
17. Mr [redacted] gave evidence next and provided his recollection of the investigation and the decision to dismiss the Employer in which he was involved.
18. Mr [redacted] showed that he interviewed all the witnesses and determined the following series of events took place as set out in his witness statement:

Having considered all of the evidence, the summary below is what I understood to have taken place. I've marked these events on the Floorplan, using the letters below.

a. A guest went to the bar and asked [redacted] for ice.

b. As described in [redacted]’s statement, and which I confirmed was true, the Resort only had one functioning ice machine at the time and was suffering an ice shortage. [redacted] went to the kitchen, collected half a bag of ice and provided it to the guest who was in the waiting area for the dining room.

c. The Complainant was speaking with [redacted] while [redacted] was cleaning.

d. The Complainant saw the exchange between [redacted] and the guest, and offered to provide, and did provide, the guest with more ice.

e. The Complainant then went to check his vacation in the staff office.

f. On his way back to the kitchen, [redacted] got into an argument over the ice incident. It's not clear who started the conversation (each say the other made the first comment and no one witnessed this part of their exchange), but the Complainant twice went over to [redacted] at the bar (see [redacted]'s second statement). There was provocation on both sides. [redacted] describes it as a "heated verbal exchange" (second statement, page 10), with their shouting at one another and "getting into one another's personal space arguing" (first statement, page 9).

g. The Complainant and [redacted] made their way to the corridor between the dining area and the kitchen. This is what was caught on camera. The CCTV Footage shows:

i. The Complainant had walked into the corridor first and is seen standing close to the door, facing it, as [redacted] walks through. They are both arguing and are in one another's personal space.

ii. The argument becomes physical when the Complainant aggressively shoves [redacted] against the door.

iii. [redacted] then hits the Complainant. As this happens, [redacted] is seen rushing through the double doors, who immediately tries to separate them.

iv. The three of them move back and forth across the room before [redacted] manages to grab the Complainant and pushes him through the door back into the dining room.

v. [redacted] does not immediately follow. Ms [redacted] comes into shot and is seen speaking to [redacted].

vi. [redacted] shortly after exits the small area, following the Complainant and [redacted] into the dining area. Ms [redacted] follows.

Nothing more of the fight can be seen on the CCTV Footage as the doors to the dining room have swung shut.

h. The parties were now in the waiting area for the dining room and towards the bar area. The separation didn't last long and another verbal argument between the two started up again (see [redacted]'s statements, consistent with Ms [redacted]).

evidence), including the Complainant saying to [redacted] that he would "kill him" ([redacted] told me this, although it isn't in his written statements). A second physical fight broke out in the bar area. More staff had arrived, including Mr [redacted], [redacted] (Finance Manager), and together they separated the Complainant and [redacted].

i. The Complainant went to the kitchen and spoke with [redacted] and Mr [redacted] about what had happened. [redacted] and the Complainant were suspended and separately left the Resort."

19. A key piece of evidence in this matter was a video clip of part of the altercation – specifically, the beginning of the physical aspect of the altercation.

20. In cross-examination of Mr. [redacted] counsel for the Employee highlighted that Mr. [redacted] and the Employer acknowledged there was cctv footage of the front desk area that may have been relevant but that was not provided. Mr [redacted] stated this was because it only showed guests leaving the lobby and those guests did not want their images shown.

21. The footage that was shown and entered into evidence was watched during the hearing and its relevance and impact on this matter are discussed below.

22. Continuing her cross-examination of Mr. [redacted] the Employee's counsel also pointed to the Employer's handbook and code of conduct and highlighted the part that stated that a person *may* be terminated for serious misconduct but that this was not mandatory. Mr. [redacted] stated that violence and threatening behaviour is never acceptable and it appeared from the video that the Employer in fact instigated the physical aspect of the altercation and did utter the words, "I am going to kill him."

E. THE EVIDENCE – the Employee

23. The Employee's evidence began with Mrs. [redacted] who stated that she was in the kitchen area when she saw the fight.

24. She stated that she attempted to break up the fight with the help of Mr [redacted] and Mr. [redacted] and that Mr. [redacted] had "jumped [redacted] and they were wrestling in the bar; [redacted] had his arms around [redacted] s neck and his legs around his waist."

25. In cross-examination, Mrs. [redacted] gave evidence that both of them were fighting and that she had not seen the beginning of the fight but that the Employee was more "riled up".
26. The Employee gave evidence next and gave a slightly different version of events; he stated that Mr. [redacted] was the one who followed him and was the aggressor.
27. Regarding the beginning of the physical altercation, in his witness statement, Mr. [redacted] stated that "As we were walking through the door, I tried to explain the situation with guest again, in addition to asking him three times to get out of my face. When he refused, I
28. proceeded to remove him from my personal space. After which he punched me in my face twice while we were arguing and again, he swung and missed."
29. In cross-examination at the hearing, when the Employer's counsel asked Mr. [redacted] about the argument, Mr. [redacted] stated, "I kept asking him to get out of my face, it was like 10 times, I am not gonna keep on sitting there and I pushed him...I stopped and put my hands behind my back....he then he hit me again....i never threw a punch."
30. However, later in cross-examination, when Mr. [redacted] was asked if he put his hands on Mr. [redacted] first, he answered "yes". When Mr. Horton asked later whether Mr. [redacted] accepted any responsibility, Mr. [redacted] conceded again that he did push Mr. [redacted]. He did, however, continue to deny that he had thrown a punch.
31. The aforementioned video evidence was then shown and it clearly shows that Mr. [redacted] was indeed the first one to initiate physical violence by forcibly shoving Mr. [redacted]. Also, no matter how Mr. [redacted] attempted to interpret it, the video evidence also clearly shows that Mr. [redacted] threw punches and was at least an equal aggressor.

F. THE LAW and CLOSING ARGUMENTS

32. Section 25 of the Employment Act 2000 ("the Act"), headed: "Summary dismissal for serious misconduct", provides:

"An employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct –

(a) which is directly related to the employment relationship; or

(b) 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.”

33. The leading case in Bermuda in relation to how section 25 of the Act is to be interpreted is *Raynor's Service Station v Earlston Bradshaw* [2017] Bda LR 72. Paragraph 4 of the Court of Appeal's decision held that in order for an employer to dismiss an employee without notice, two conditions must be satisfied. First, the employee must be guilty of serious misconduct and second, it must be such that it would be unreasonable to expect the employer to continue to employ him or her.

34. Section 38 of the Act, headed "Hearing of complaints by Tribunal", subsection (2) provides:

"In any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair."

35. Therefore, the Employer had to establish the two factors set out in section 25 to demonstrate that the Employee was guilty of serious misconduct, otherwise, the dismissal is presumed unfair. In short, the issue was whether the conduct of the Employee was serious enough such that it was unreasonable for the Employer to continue to employ him.

36. This calls for an objective assessment of whether a reasonable employer would or would not have made the summary dismissal decision assuming, of course, that summary dismissal was justified as section 25 requires the employer to establish first and foremost that the employee 'is guilty of serious misconduct'. (*Elbow Beach v Lynam* 2016 Bda LR 112)

37. Put another way, the burden in this alleged breach of section 25 of the Act is upon the Employer to demonstrate that the conduct or action of the Employee was so egregious that no form of discipline other than summary dismissal for serious misconduct was appropriate.

The first step, therefore, is to determine whether the Employee was guilty of serious misconduct.

Was the Employee Guilty of Serious Misconduct?

38. In the case of *Matthews v Bank of Bermuda Limited* BDLR [2010] Bda LR 56, Kawaley CJ (as he then was) determined that the Tribunal must consider and make findings on the objective reasonableness of the dismissal decision by applying the statutory criteria in section 25 of the Act as read with section 24, headed "Disciplinary action", subsection (3).

39. Therefore, having regard to section 24(3) of the Act, the essential legal elements of unfair dismissal raised by the facts of this case require the Tribunal to determine or consider the following factors, *inter alia*:

- (i) whether the conduct was an act of simple negligence or deliberate misconduct;
- (ii) the nature of the Employee's duties;
- (iii) the damage caused by the Employee's conduct;
- (iv) how similar conduct has been punished in respect of other employees in the past;
- (v) the Employee's length of service, previous conduct as well as his circumstances;
and,
- (vi) the procedure followed by the Employer as well as the penalty.

40. It was not disputed between the parties that the Employee actively participated in the violent altercation and the evidence clearly shows that he did in fact initiate the physical aspect of the altercation and did throw at least one punch. The procedure followed by the Employer was thorough and the Tribunal finds no fault with how it was carried out. The Tribunal also recognizes that violence in the workplace is one of the most serious forms of misconduct and can very rarely be tolerated, if at all. There were no mitigating circumstances which may have excused the behavior.

41. Further, Mr. [redacted] was a credible witness who stated that he heard the Employee threaten to kill Mr. [redacted].

Was Summary Dismissal Justified?

42. No matter how much the Employee attempted to paint himself as a victim or Mr. [redacted] is as the primary aggressor and instigator, it was clear from the evidence that at the very least, both parties were equally responsible and equally involved in the physical altercation.

43. Taking into account the evidence and applying the tests above, the Tribunal finds that dismissal was a sanction that was reasonably open to the Employer and that the Employer was justified in summarily dismissing Mr. [redacted].

44. The Employee's claims are therefore dismissed.

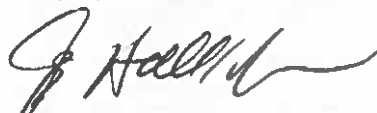
DATED this 24 day of April 2024



John Hindess
Chairman



Robert K. Horton
Deputy Chairman



Judith Hall-Bean
Tribunal Member

