

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

BETWEEN:

Mr. XXXXXX

Complainant

AND

XXXXXX Limited

Respondent

DECISION

Date of Complaint: 2nd November 2023
Date Investigation Completed: 8th February 2024
Date of Referral: 9th February 2024
Date of the Hearing: 13th September 2024

Tribunal Panel Members: Ms. Kelly Francis, Chairman
Mr. Robert Horton, Member
Ms. Judith Hall-Bean, Member

Present: Mr. XXXXXX (Complainant)
Mr. Arnold XXXXXX (BIU Representative for Complainant)
Mr. XXXXXXX, XXXXXX, XXXXXX (Respondent)
Ms. XXXXXXXX (Respondent)
Mr. XXXXXXX [via WebEx], XXXXXX, XXXXXX Limited (Respondent)

Witnesses:

Mr. XXXXX [via WebEx], XXXXXXXXXXXXXXX and XXXXXXX Supervisor of
Complainant (for Respondent)
Mr. XXXX XXXXXXX, XXXXXXX
Mr. XXXX (for Complainant)
Mr. XXXXX (for Complainant)
Mr. XXXXX (for Complainant)
Mr. XXXXX (for Complainant)

The Complaint was filed pursuant to provisions of sections 67-69 of the Trade Union and Labour Relations (Consolidation) Act 2021 ("the Trade Union Act"), further supported by provisions of section 37 of the Employment Act 2000 ("the Employment Act").

Background

Further to the hearing held on 13th September 2024, ("the Hearing") between Mr. XXXXXXX ("the Complainant") and XXXXXXX Limited ("the Respondent"). The Complainant is claiming unfair dismissal pursuant to sections 66 and 67 of the Trade Union Act and section 28 (d)(e) of the Employment Act and is seeking reinstatement pursuant to section 40 of the Employment Act or a Compensation Award pursuant to relevant provisions of the Trade Union Act.

The Hearing

Prior to the start of the Hearing, the Parties were invited to try to reach an independent agreement, but declined to engage as prior discussions had not been fruitful. Consequently, they wished the Hearing to proceed. As Mr. XXXXXXX, and at XXXXXXX Limited ("the Complainant") was accompanied by four witnesses, Messrs XXXXXXXXXXXXXXX, employees of the Respondent company, the Hearing commenced with these four witnesses being sworn in and confirming that submitted Witness Statements were theirs and truthful. After the requested confirmation, there were no immediate questions for those witnesses. Messrs. XX and XXX were released from the Hearing, with Messrs. XXXXXXX and XXXXXXX remaining for questioning at a later stage of the proceedings

It should be noted that while both the XXXXXXXXXXXXXXX Manager and XXXXXXXXXXXXXXX were no longer employed by the Respondent, both attended the Hearing via WebEx, with the XXXXXXXXXXXXXXX Manager present for the full day due to his key role in both the management of the Respondent and in the dismissal of the Complainant. It is also noted that the XXXXXXX, XXXXXXX was not employed by the Respondent at the time of the Complainant's dismissal.

The Tribunal commenced with the BIU Representative providing opening remarks which focused largely around his view of the toxic nature of the workplace and working conditions faced by the Complainant and others under the management of the XXXXXXXXXXXXXXX Manager. Noting that the BIU had been involved in

five arbitration hearings with XXXXXX during the past four years, he attributed "unfair, bad and irrational decision making" to the XXXXXXXXXXXX Manager and said that employees at the Respondent company received threats of termination on a regular basis and felt that "they were walking on eggshells". He added that the XXXXXXXXXXXX Manager seemed unaware that effective communication was a two-way process.

As the Complainant had not levied any complaints against the XXXXXXXXXXXX Manager nor had he raised issues of unfair treatment, the Tribunal did not base any of its determinations on those opening remarks. The BIU Representative stated that the Respondent's basis for the Complainant's dismissal grossly exaggerated the risk caused by the Complainant's short absence from the workplace on 25th July 2023 and had overstated the level of responsibility held by the Complainant for the safe operation of the . He concluded his opening statement by expressing the view that termination of the Complainant's service at XXXXXX was grossly unfair, as would be demonstrated during the Hearing.

The Complainant then provided detailed testimony with respect to both the reasons for his believing that his absence from the job site on 25th July 2023 was with the full knowledge and approval of the XXXXXX Supervisor and that his absence did not in any way pose a threat to the safety of the plant or surrounding areas, a key tenet of the Respondent's basis for termination.

The Complainant made the following points during his statement:

- In addition to advising the XXXXXX Supervisor directly, there was a standard practice of using the whiteboard to document any absences and he had noted his appointments on the Board in accordance with that practice. Later during the Hearing, this statement was verified by witnesses for the Complainant. A photograph of the whiteboard showing the dates upon which the Complainant would be away from the job site for appointments was provided in evidence. This statement was verified by the witnesses for the Complainant.
- His absence from the workplace on 25th July 2023 was for the second of two appointments he had in a close time period. He had no reason to think that the XXXXXXXXXXXX was not aware of the second appointment which was for a physical mandated by the Respondent.
- In addition to the XXXXXXXXXXXX who he thought was aware of his appointment, he had advised the XXXXXX Foreman that he would be attending a medical appointment on 25th July 2023.
- The Complainant provided a detailed explanation of the process for XXXXXX the XXXXXX, the time it took to heat, the low level of supervision required during the XXXXXX process and the fact that checking the rising XXXXXX was done only approximately every four hours. He made the point that he was away from the workplace for less than three hours
- Other points made about the XXXXXX included its safe construction, including the absence of direct flame which made the chance of fire or explosion unlikely.

- The Complainant addressed the accusation that he had caused serious damage to the Respondent's relationship with the Ministry ("XXXXXX") due to his absence from the job site on 25th July 2023 which led to a delay in XXXXXX the XXXXXX with the result that the asphalt was not ready when the XXXXXX truck arrived to collect it. The Complainant refutes this accusation on two points:
 - o The XXXXXX process takes several hours and although it was started on time, it was never going to be ready at the time of the arrival of the XXXXXX truck.
 - o More significantly, as it was raining when the XXXXXX truck arrived, the driver called the XXXXXX office and was instructed by his Supervisor not to collect any asphalt as it was raining and they would not be able to complete the paving on wet roads.

- The Complainant stated emphatically that upon his return from the doctor's appointment at approximately 10:30 a.m., an absence of just under three hours, no issues with the XXXXXX had arisen during his absence. He reiterated that there was absolutely no cause for concern with respect to the safety of the XXXXXX.

- The Complainant further asserted that due to the length of time required for the XXXXXX to heat up, it was impossible for it to have reached dangerous XXXXXX levels during the short time that he was away from the job site.

- Finally, in response to the Respondent's assertion that employees of the Respondent Company, including the Complainant, had undergone XXXXXX safety training provided by XXXXXX ("XXXXXX"), an outside firm, the Complainant stated this was not a training session; attendees were simply required to watch a video.

Mr. XXXXXX, XXXXXX Truck Operator at the Respondent Company, then took the stand to confirm the contents of his Witness Statement and to answer questions posed by the Tribunal. Responses to these questions follow:

- He has been responsible for XXXXXX the XXXXXX and confirmed that he did not recall the XXXXXXs ever reaching dangerous levels.

- He could not recall any time during his twenty-nine years' service with the Respondent when there had been a risk of explosion.

- From a risk standpoint, he stated that other than a bad smell, there were no other indicators that the XXXXXX contents were getting too hot.

- While the XXXXXX should get XXXXXX checked periodically while XXXXXX, there were times when this was not done on schedule because staff were busy attending to other tasks. However, he said, this has never resulted in any type of risk.

- He confirmed that the whiteboard was used for notifications such as planned absences.
- He also reiterated the Complainant's assertion that no safety programme had been provided by. He said that the session led by XXXXXX involved only a short video that the employees were required to watch.

Mr. XXXXXX XXXXXX, XXXXXX Foreman at the Respondent Company, then advised the Tribunal as follows:

- He was present when the Complainant turned on the XXXXXX on the morning of 25th July 2023 to begin the XXXXXX process and was aware of his planned absence from the workplace.
- He had not found it necessary to check the XXXXXX of the XXXXXX during the Complainant's absence from the workplace as it had not been long enough to reach its standard operating XXXXXX. He said that it would have been impossible for it to surpass safe operating XXXXXXs during the short period when the Complainant was away from the job site. He reiterated that he had not checked the XXXXXX of the XXXXXX as he did not believe it necessary to do so.
 - He confirmed that while the XXXXXX truck did arrive at the Respondent workplace on the morning of 25th July 2023, while the Complainant was at his medical appointment, to collect asphalt, the XXXXXX crew then refused to collect any as it was raining.
 - He also confirmed that the asphalt was not yet ready when the XXXXXX truck arrived at the Respondent workplace

Mr. XXXXXX, the XXXXXXXXXXXXXXX Manager, addressed the Tribunal via WebEx and provided the following information:

- As the Respondent's XXXXXX Manager, he had full responsibility for the health and safety of XXXXXX, his team and the community at large.
- Due to the Respondent's established relationship with XXXXXX, he regarded the firm as experts in the field and engaged them to provide safety training to the Respondent's employees with respect to safe operating processes to be followed by all persons operating the XXXXXXs.
- He stated that areas of concern which had been identified with respect to XXXXXX management included the risk of fire if it overheated and the risk of disaster as a result of not attending to it on a regular schedule.
- He explained that there were two different XXXXXX in question, one that had an indirect heat source and one that was portable and used a direct flame.

- The XXXXXXXXXXXX Manager explained that the training was critically focused on portable XXXXXX management and also noted that Mr. XXXXXX XXXXXX had not attended the training session led by XXXXXX.
- Despite considerable emphasis on the importance of the training and the grave risks associated with failure to operate the XXXXXX in a safety approved fashion, the XXXXXXXXXXXX Manager admitted that following the risk assessment and training, no policy changes had been issued by the Respondent with respect to new processes to be followed.
- The XXXXXXXXXXXX Manager stated that he had spent a great deal of time repeatedly elaborating on the catastrophic risk associated with allowing a XXXXXX to overheat, including fire and explosion which could severely damage not only the plant facility, but the surrounding neighbourhoods also. He stressed that it was for those reasons that the Complainant's actions, through his absence from the job site, could not be condoned and necessitated that he make the decision to terminate his employment.
- The XXXXXXXXXXXX Manager also justified his decision to terminate the Complainant on the basis that his actions had severely damaged the Respondent's relationship and reputation with XXXXXX, the Respondent's largest and most significant client. He said that without XXXXXX as a client, the Respondent would risk severe financial hardship.
- He explained that he had received a call from a manager at XXXXXX voicing displeasure over the lack of available asphalt. When questioned by the Tribunal as to why such a call would have been made when it had been confirmed that XXXXXX had made the decision not to collect the asphalt that day due to the inclement weather, the XXXXXXXXXXXX Manager was not able to defend his claim adequately.

The XXXXXXXXXXXX Manager, the XXX, XXXXXX and the Complainant then engaged in a period of question and answer.

- The XXXXXX, XXXXXX confirmed that Mr. XXXXXX XXXXXX did not have the experience to make asphalt. Mr. XXXXXX agreed but said that he was experienced with XXXXXX and loading the XXXXXX. The XXXXXXXXXXXX Manager confirmed that Mr. XXXXXX was trained in aspects of the XXXXXX, but was not experienced to handle the "XXXXXX
- " process.
- The XXXXXX, XXXXXX asked the Complainant to describe the signs that would indicate that a XXXXXX was at risk of over XXXXXX. The Complainant stated that the first sign would be for the top to blow.
- The Complainant was asked to describe what occurred on 25th July 2023 upon his return to the workplace from his medical appointment. In response, he stated that the XXXXXXXXXXXX had asked him where he had been and that he replied that he had been at the doctor's office. He said that he had

also informed the XXXXXXXXXXXX that notice of his medical appointment was posted on the whiteboard.

- The Complainant said that marked the end of his discussion with the XXXXXXXXXXXX who had made no comments about the XXXXXX being unmanned or any safety/risk concerns that resulted.

The XXXXXXXXXXXX then joined the Hearing via WebEx to verify his Written Statement of 20th August 2024 and to answer any follow up questions from the Complainant or the Tribunal.

- The XXXXXXXXXXXX was asked to confirm that he, himself, had prepared the Witness Statement of 20th August 2024 that had been submitted for the Tribunal's consideration and whether he was prepared to attest to its truthfulness. To the Tribunal's astonishment, he responded by asking how honest the Tribunal wished him to be.
- After being instructed by the Tribunal Chair that complete honesty was expected, the XXXXXXXXXXXX admitted that he had not authored the Witness Statement and could not vouch for all of the contents, as much of it had been written by the XXXXXXXXXXXX Manager. The XXXXXXXXXXXX then indicated that some of the content of his Witness Statement "was true and some was not".
- He confirmed that he had received the Witness Statement for review before it was submitted but could not adequately explain why he had signed it if he did not agree with all of its content.

Given the above cited discrepancies, the Tribunal Chair then addressed individually each of the eighteen paragraphs contained in the Witness Statement of 20th August 2024 and requested that the XXXXXXXXXXXX agree or dispute the contents of his statement. The Tribunal Chair read aloud each of the paragraphs in order to assist the XXXXXXXXXXXX whose responses follow:

- o Paragraph 1 – he estimates 30% of the statement is true.
- o Paragraphs 2 & 3 – confirmed as true.
- o Paragraph 4 – disagrees that there was any insubordination on the part of the Complainant and disagrees that there was a negative impact to the Respondent's reputation. He does not recall if he had been informed of the Complainant's planned absence in advance.
- o Paragraph 5 – he does not believe there were communication issues between the Complainant and himself.
- o Paragraph 6 – confirmed as true.
- o Paragraph 7 – does not recall if he had received advance knowledge of or had given approval for the Complainant's doctor's appointment on 25th July 2023, nor did he recall noticing the appointment on the whiteboard. "Would not say it didn't happen," he told the Tribunal.
- o Paragraph 8 – attributes this statement to the XXXXXXXXXXXX Manager, particularly the references to the severe risk of catastrophic explosion.
- o Paragraphs 9 & 10 – disagrees and confirmed that the training provided was "just a video".

- Paragraph 11 – agrees with first paragraph, disagrees with second and also pointed out that the Complainant was not trained to have the level of responsibility described.
- Paragraph 12 – disagrees and states that the paragraph had been authored by the XXXXXXXXXXXX Manager.
- Paragraph 13 – does not dispute.
- Paragraph 14 – does not feel that the Complainant had been insubordinate.
- Paragraphs 15 & 16 – as stated above, he cannot state for certain either way if he had or had not been informed and does not recall if he did or did not see anything on the whiteboard.
- Paragraph 17 – disagrees with the reference to reputational damage.
- Point 18 – disagrees that this was his summation.

When asked if he believed that the Complainant's service with the Respondent should have been terminated, the XXXXXXXXXXXX expressed the view that the situation could have been dealt with in a different manner. He added that he believed that the decision to terminate the Complainant's resulted from personal issues between the XXXXXXXXXXXX Manager and the Complainant.

Following the XXXXXX XXXXXX XXXXXX testimony, the XXXXXXXXXXXX Manager expressed his shock and disbelief at the XXXXXX XXXXXX XXXXXX revelations, but at no point denied having been the primary author of the Witness Statement of 20th August 2024 signed by the XXXXXX Superintendent. He also said that the XXXXXXXXXXXX had been present at the termination meeting held on 27th July 2024 and was a full participant in the process.

The Human Resources Manager for the Respondent described the process for preparing the Operation XXXXXX Witness Statement. She said that he had been invited to review and edit the document as necessary before signing it and stressed that there had been no indication from him that he disagreed with the contents. She also stated that she did not have a direct discussion with the XXXXXXXXXXXX about the Witness Statement, as all communication had been through the Respondent's Controller via e-mail.

Tribunal's Deliberations

The Tribunal, having heard the representations from both Parties, considered relevant provisions of the Trade Union Act and the Employment Act in determining whether the Complainant had been unfairly dismissed from his employment by the Respondent.

Section 28, Unfair Dismissal of the Employment Act follows:

Unfair dismissal

28 (1) The following do not constitute valid reasons for dismissal or the imposition of disciplinary action—

- (a) an employee's race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability or marital status;
- (b) an employee's age, subject to any other enactment or any relevant collective agreement regarding retirement;
- (c) any reason connected with an employee's pregnancy, unless it involves absence from work which exceeds allocated leave entitlement;
- (d) an employee's trade union activity;
- (e) an employee's temporary absence from work because of sickness or injury, unless it occurs frequently and exceeds allocated leave entitlement;
- (f) an employee's absence from work for any of the reasons mentioned in section 13 (public duties), or due to service as a volunteer fire officer;
- (g) an employee who removes himself from a work situation which he reasonably believes presents an imminent and serious danger to life or health;
- (h) an employee's participation in any industrial action which takes place in conformity with the Trade Union and Labour Relations (Consolidation) Act 2021;
- (i) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of this Act;
- (j) the making of a protected disclosure under section 29A.

(2) The dismissal of an employee is unfair if it is based on any of the grounds listed in subsection (1).

[Section 28 subsection (1)(j) inserted by 2011 : 35 s. 7 effective 21 October 2011; Section 28 subsection (1)(h) amended by 2021 : 7 s. 99 & Sch. 7 effective 1 June 2021]

- The Tribunal was not persuaded by the Respondent that its decision to terminate the Complainant was justified. In his regard, the Tribunal rejected the Respondent's view that the Complainant's absence from the job site for just under three hours during the morning of 25th July 2023 was so egregious that it warranted termination.
- Further, the Tribunal was not persuaded that the XXXXXXXXXXXX Manager was entirely accurate in his use of the extremely dramatic language employed to describe the severity of risk associated by the Complainant's actions and potential for catastrophic damage to the Respondent, nor was the Tribunal persuaded that these same actions could have resulted in the level of reputational and financial damage described as resulting from the Complainant's actions.
- The Tribunal was persuaded by the Complainant that the Respondent's decision to terminate him met the definition of unfair dismissal set out in the Employment Act.

The Tribunal, having determined that the Complainant was unfairly dismissed, then turned its attention to possible remedies for such dismissal.

In accordance with provisions of section 78.2. (c)(d) Of the Trade Union and Labour Relations (Consolidation) Act 2021, the remedies for unfair industrial practices are as follows:

Remedies for unfair industrial practice

78 (1) This section applies without prejudice to any other powers conferred on the Tribunal under the Employment and Labour Code.

(2) If on a complaint mentioned in section 77 (which has been referred by the Manager to the Tribunal pursuant to section 70) the Tribunal finds that the complaint is wholly or partly well-founded, it may grant one or more of the following remedies—

- (a) an award determining the rights of the employer or the worker in the essential industry or service and of the trade union in relation to the matter to which the complaint relates;
- (b) an award directing the employer or worker or the trade union to take such action in fulfilment of the duty in question which in the opinion of the Tribunal it would be within the power of the employer, the worker, or the trade union to take and is action which in the circumstances either the employer, the worker, or the trade union ought to be required to take;
- (c) an award of compensation calculated in accordance with subsections (3) and (4) to be paid to the employer, the worker or the trade union;
- (d) a general award of such sum to be paid to the employer, the worker or the trade union as the Tribunal thinks fit.

(3) The amount of the compensation awarded under this section shall be such amount as the Tribunal considers just and equitable but the award—

- (a) against the employer in the essential industry or service shall not exceed \$5,000 and in respect of each day during which the unfair industrial practice continues, shall not exceed \$500 per day;
- (b) against the worker of the essential industry or service shall not exceed two weeks' wages and in respect of each day during which the unfair industrial practice continues, shall not exceed one day's wage per day; or
- (c) against a trade union shall not exceed \$5,000 and in respect of each day during which the unfair industrial practice continues, shall not exceed \$500 per day.

(4) Where the Tribunal finds that the unfair industrial practice complained of was to any extent caused or contributed to by any action of the aggrieved person or the complainant it may not award any compensation or it may reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding.

- (b) against the worker of the essential industry or service shall not exceed two weeks' wages and in respect of each day during which the unfair industrial practice continues, shall not exceed one day's wage per day; or
- (c) against a trade union shall not exceed \$5,000 and in respect of each day during which the unfair industrial practice continues, shall not exceed \$500 per day.

(4) Where the Tribunal finds that the unfair industrial practice complained of was to any extent caused or contributed to by any action of the aggrieved person or the complainant it may not award any compensation or it may reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding.

The Tribunal notes that the Respondent made clear during the Hearing that it would be untenable for the Complainant to be reinstated at the Respondent company. The Tribunal fully appreciates the complexities associated with requests for reinstatement or re-engagement, particularly when a considerable amount of time has passed since the aggrieved individual's departure from the company. The Tribunal recognizes that during that period, roles may have been subsequently filled and/or there may have been changes in the company operationally or fiscally which could result in hardship to an employer where reinstatement or re-engagement is mandated by the Tribunal. As such, neither reinstatement nor re-engagement will be proposed by the Tribunal.

DETERMINATION AND ORDER OF THE TRIBUNAL

The Tribunal therefore, in accordance with provisions of section 78.2.(c)(d) of the Trade Union and Labour Relations (Consolidation) Act 2021, awards the Complainant a Compensation Award in the **amount of fifty-two (52) weeks gross salary** based on the equivalent of his salary when he left, adjusted for the 2024 rates, payable no later than **30th November 2024**. It is the opinion of the Tribunal that this award is just and equitable under the circumstances and provides the Complainant with a level of compensation which closely approximates the wages lost between the time of termination and the conclusion of this Hearing. **It is further noted that it is not the intention of the Tribunal to award an exact sum equal to lost wages.**

The Parties to this Hearing are reminded that the Determination and Order of this Tribunal is binding and that either Party aggrieved by this Order may appeal to the Supreme Court of Bermuda on a point of law only within 21 days following receipt of notification of the Order.

Signatures of Tribunal members are on the following page.

TRIBUNAL MEMBERS SIGNATURES



Kelly Francis, Chairman



Robert Horton, Deputy Chairman



Judith Hall-Bean, Member

Dated this 23rd day of October 2024