

**IN THE MATTER OF THE EMPLOYMENT ACT 2000 BEFORE THE
EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL (the “Tribunal”)**

BETWEEN

Kimberley Junko

Complainant

And

Defendant

Date of Hearing: 6th May 2022

Present:

John Payne, Chairman
Valerie Young, Deputy Chairman
Eugene Creighton, Tribunal Member

Complainant: Kimberley Junko

Defendant:

Witnesses for the Defendant:

Background

1. The Complainant has filed that her employment was unfairly terminated, which is an offence under section 28 of the Employment Act 2000 (the “Act”), and that she is therefore entitled to be compensated in accordance with the provision of Section 40 of the Act and subsequently entitled to the remaining 5 months’ salary based on her statement of employment.

2. As the Complainant was claiming unfair dismissal under section 28 of the Act, the Defendant was directed to present their case first.

History

3. The Complainant was employed as a [redacted] with the Defendant. The Complainant started her employment on 18th February 2018. The Complainant gave notice by letter dated 1st March 2021 that it was not her intention to renew her contract with the Defendant.
4. In her position, the Complainant was considered a part of the leadership and management team thus privy to significant amounts of confidential internal company and financial information.
5. The Defendant alleges that the Complainant around the 12th August 2021 disclosed information regarding a work permit application to another worker.
6. The Defendant considered this information confidential, and that the Complainant did not have the authority to share such information.
7. When addressing this matter through the disciplinary process the Complainant admitted to the action. However, the behavior displayed did not demonstrate that the Complainant understood or appreciated the seriousness of her actions.
8. Further, the Complainant became rude and threatening which caused the meeting to be concluded.
9. The Defendant believes that the actions of the Complainant amounted to gross misconduct, as she breached the rules of confidentiality expected of her position and was rude and insubordinate.
10. The Defendant believes they were entitled to terminate the Complainant for gross misconduct as permitted under Section 25 of the Act.

The Hearing:

11. The Complainant attended virtually via Cisco WebEx.
12. The Defendant's representatives were advised that there had to be a lead presenter and that the other witnesses would have to leave the room until they were called. They were

of the opinion that they all could remain and share the presentation. It was agreed that the; would lead.

The Case of the Defendant

13. The Defendant's case was presented in the form as a written response (Defendant's bundle pages 103-110). The Defendant addressed disclosure of confidential information, ongoing behavioral issues and the disciplinary process used.
14. Three witnesses whose statements were accepted as evidence in chief were used by the Defendant. There was little variation with the statements as presented.
15. in his statement indicated:
 - a. He was the of the Complainant.
 - b. He
 - c. He understands the obligations placed on surrounding the duty of confidentiality.
 - d. He referred to both the Bermuda Rules on Confidentiality as well as the fiduciary duty of registered chartered accountants.
 - e. The letter addressed to the Department of Immigration dated 12th August 2011 (defendant bundle page 84) was confidential. However, it was normal practice to send such letters when requesting payment.
 - f. During the recruitment process the Defendant had the assistance of an outside company and that the interviews were also conducted away from the Defendant's place of business to ensure that confidentiality was maintained.
 - g. The Complainant was never a part of the recruitment process.
 - h. believes that harm was caused to both the and the third parties mentioned in the letter.
 - i. Reference was made to the need for confidentiality contained in:
 - a. The Defendant's company Handbook: *All staff is hired with the understanding that honesty and integrity are as much a condition of employment as is a good attitude and general proficiency.* (Defendant's bundle page 4).
 - b. The Rules of Professional Conduct Objectivity: *Members do not allow their professional or business judgment to compromise by bias, conflict of interest or the undue influence of others.* (Defendant's bundle page 64)
 - c. Confidentiality of information: *A member, student, or firm shall not use confidential information of any client (b) for the advantage of a third party,...* (Defendant's bundle page 65)

- j. He did attend the meeting of 20th August 2021 with senior managers to discuss the alleged disclosure of information by the Complainant.
- k. He believed that the Complainant's behavior was insubordinate. This was a pattern however, while she was spoken to regarding this a number of times it was only formally documented in her annual review.
- l. That the Defendant had no choice but to dismiss the Complainant, as she saw no harm in her conduct or recognized the seriousness of it.

16. In her statement indicated:

- a. She was employed by the Defendant for 28 years.
- b. That in the preparation of sending an application to the Department of Immigration the Complainant was one of the persons who received a copy of the letter in order to prepare the payment.
- c. The letter (Defendant's bundle pages 84/85) sent by the Defendant to the Complainant had information regarding the Bermudian applicants who were not successful including their names and the reasons.
- d. During the meeting of 20th August 2021 with the Complainant:
 - a. The Complainant admitted that she had informed her colleague;
 - b. The Complainant responded that *the worker was her friend and that she was looking out for him;*
 - c. The meeting got heated and voices were raised;
- e. The meeting was scheduled to resume the next day, but the Complainant called in sick and was off for two weeks. The subsequent meeting was held on the 7th September 2021.
- f. This meeting was brief as the Complainant did not apologize for her conduct.
- g. The Complainant was handed her letter of termination after a short caucus by management.

17. In his statement advised:

- a. He has over 30 years in the retail industry.
- b. The Complainant's position was at the director level.
- c. He was approached by another worker regarding the work permit application. The worker was upset that it was only for one year and not three years as he had requested.
- d. He was shocked that the worker was aware of the application and questioned how such information was accessed.

- e. During the meeting with the Complainant, she displayed no remorse and did not believe that she did anything wrong.
- f. The Complainant had many positives and had been good at her job.
- g. The Complainant's attitude was not healthy for a productive team environment, and she could no longer be trusted with very sensitive information.

The Case of the Complainant

18. In her witness statement the Complainant:

- a. *"acknowledged and have taken responsibility of allowing another worker to read the work permit application..."*
- b. Knew that the other worker wished a three year permit,
- c. Did not think she had violated her fiduciary responsibility when questioned, as she did not reveal any financial information.
- d. Agreed that *"she was upset, angry and disappointed in their decision"*. (Complainant letter page 2)
- e. Advised that her relationship with was stressed.
- f. Her relationship with and was also stressed because of prior incidents.
- g. Was *"prepared to accept a severe written warning with suspension"*. (Complainant letter page 3)
- h. Believes that was making an example of her because she did not apologize.

Deliberation

- 19. The Tribunal closely examined the written bundle of submissions including the supporting annexes that formed the basis of the case for both the Defendant and the Complainant.
- 20. The Tribunal believes that there are two separate and distinct issues for the Tribunal to consider. The first is the action of the Complainant in sharing information that she was not authorized to do. The other is the behavior of the Complainant during the resultant meetings to address her actions.
- 21. The Tribunal took guidance from sections 24, **Disciplinary action**, and 25, **Summary dismissal for serious misconduct**, of the Act with respect to the conduct of the Complainant. As well as section 26, **Termination for Repeated Misconduct** in regards the actions of the Defendant.
- 22. In deliberating the behavior of the Complainant, she conceded that she did share the information without permission. As such the assessment became whether this action

amounted to gross misconduct, as claimed by the Defendant and therefore was entitled to be dismissed without notice or payment of any severance allowance.

23. It is accepted that every employee should be aware that there is a duty to keep in confidence certain types of information that they become aware of due to their employment. A member of a senior management team would be more aware of this requirement.
24. The Tribunal agreed that the Complainant being a _____ and a senior manager was aware of this condition of employment even if it was not stated in the human resources manual.
25. The Complainant should have known that the sharing of the letter had the potential to damage the working relationship between her colleague and senior management. Further, it could also have damaged any professional relationship her colleague may have had with any of the persons named in the letter.
26. Sharing the basic information may have been viewed a misconduct but giving her colleague the full letter went beyond misconduct. It was a significant breach of trust and directly impacted the employment relationship.
27. The Defendant in their evidence cited the behavior of the Complainant to be unprofessional and rude. There was no indication that this was addressed in a disciplinary setting other than during the Annual Review in April 2021 (Defendants Bundle page 79). No action or consequence appears to have been assigned for this behavior.
28. There was an admission by the Defendant in that they did not follow Section 24 of the Act *"entitles the Employer to take disciplinary action, including giving an employee a written warning or suspending an employee, when it is reasonable to do so in all the circumstances"*.
29. The raising of the Complainant's behavior during the Annual Review was noted and the Tribunal accepts that it met the requirements of Section 27, (2) *"if the employee does not, during the period six months beginning with the date of the written warning, demonstrate that he is able to perform his duties in a satisfactory manner and is in fact doing so, the employer may terminate his contract of employment without notice or payment of any severance allowance"*.
30. It is clear that the Complainant having been warned during the Annual Review in April 2021, continued that behavior during the meeting of the 12th of August failing to improve her conduct.

Conclusion

31. The Tribunal have concluded that:

- a. The Complainant does not recognize or accept the impact her behavior regarding the disclosure of confidential information could have in damaging the reputation of the Defendant and,
- b. The relationship between the parties is irreparable as the level of trust that is required for an effective working environment has been severed.

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Determination

32. The Tribunal having given the parties full opportunity to give evidence on oath and to make submissions, it is the conclusive Determination that:
- a. The Defendant did not offend section 28 of the Act, Unfair Dismissal.
 - b. The Complainant is not entitled to compensation.
33. The parties to this Hearing have acknowledged that the Determination of this Tribunal is final and binding. Any party aggrieved may however appeal to the Supreme Court of Bermuda on a point of law.
34. The Tribunal makes no further Determination in this matter.

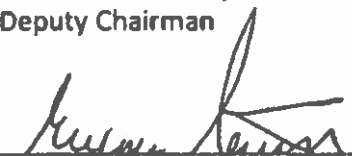
Dated this 3rd day of June 2022



John Payne
Chairman



Valerie Young
Deputy Chairman



Eugene Creighton
Tribunal Member