

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

BETWEEN

Complainant

AND

Respondent

DECISION

Dates of Hearings: 19th August, 2022
26th July 2022

Tribunal Panel: Dr. Michael Bradshaw, Chairman
Ms. Yolanda Outerbridge, Deputy Chairman
Mr. Eugene Creighton, Tribunal Member

Present: Complainant
Representative for the Respondent
Witness for both Parties

Introduction and Overview

The Complainant was employed for just over a year for the Respondent. A meeting called by the owner the Respondent, was initially only intended to issue a final written warning to the Complainant in relation to absenteeism and tardiness. Through the course of the meeting tensions grew, in part due to a previous meeting held in December where the Complainant did not believe that the Respondent had sufficiently addressed the concerns raised in that meeting by the Complainant. This tension led the Complainant to advise that she had recorded the meeting in December (as a way of proving that the Respondent had not followed through to address complaints raised). The Respondent felt that recording a meeting without her knowledge or permission was a breach of trust and deemed it to be a serious matter and summarily terminated the Complainant for Serious Misconduct (under Section 25 of the Employment Act 2000). The Complainant contends that she was unfairly dismissed and was not provided with an exit interview or opportunity to defend her position. The Complainant contacted a Labour Relations Inspector who attempted to conciliate the matter, however, a settlement could not be reached. The matter was therefore referred to the Tribunal.

Terms of Reference

The Respondent served a notice of Summary Dismissal to the Complainant under terms of Section 25 of the Employment Act 2000. The Complainant countered with a claim of Unfair Dismissal as per section 28 of the same named Act above.

Evidence Submitted and Heard

The Respondent submitted a witness statement of her account of the events that led to the Complainant's termination. A second witness statement was submitted by the Respondent from another employee who was asked to be a witness in the meeting held with the Complainant on the day of the termination. also attended the hearing in person to participate. In addition, various supplementary documents were supplied which included a copy of the full and final warning (signed by the Respondent but not the Complainant), the termination letter as well as the certificate of employment letter.

The Complainant submitted a packet which contained several pieces of evidence (previously provided by the Respondent during conciliation proceedings). In addition, the Complainant put forward her written detailed account of the events leading to her termination, as well as a witness statement from .

Deliberations and Findings of the Tribunal

The matter before the Tribunal is to determine whether or not the Respondent acted in accordance with the provisions of their disciplinary procedure and the requirements under the Employment Act 2000 when terminating the employment relationship. The burden was on the Respondent to demonstrate that the Complainants' conduct could be considered

serious misconduct, such that it would be unreasonable to expect the Respondent to continue the employment relationship.

The matter that led to the Respondent's decision to terminate centered around a statement made by the Complainant during a meeting held on January 26, 2022 at 10:45am. The Complainant contends that during the meeting with the Respondent there was a heated exchange surrounding concerns raised by the Complainant in a previous meeting held in December that were not addressed by the Respondent. The Complainant stated that she recorded a meeting held in December of the previous year. The meeting on January 26th was initiated for a separate reason. The Respondent believed that recording a meeting without her knowledge breached trust. The Respondent believed that terminating the Complainant would protect her business. The Respondent believed that there could be a possibility that the Complainant could repeat this behavior with the children or parents of the business. The Respondent noted that she had no reason prior to this matter not to trust the Complainant. confirmed that the Complainant did state that the December meeting was recorded.

The Complainant confirmed to the Tribunal that she actually did not record the meeting but only said so out of frustration and as a way of evidencing what was previously discussed in the December meeting. The Complainant contends that the reason for the termination was actually due to the December meeting not going the way the Respondent wanted and not because of her saying that the December meeting was recorded. The Complainant contends that the Respondent was looking for a reason to terminate her.

Neither party disputed that a conversation occurred that would have led the Respondent to believe that the Complainant recorded a previous meeting that took place in December. The Respondent however confirmed to the Tribunal that she never sought to confirm that there was actually a recording prior to terminating the Complainant. There was no attempt to request to hear the recording or obtain any evidence that the meeting was recorded. confirmed that there was no attempt to seek proof that the meeting was recorded (during the January 26th meeting).

The Respondent was made aware of the supposed recording during the meeting held on January 26th. This meeting was held in the morning (10:45a.m.) but the Complainant was not advised of her termination until 3:15p.m when she was called into a second meeting with the Respondent on the same day. The Complainant was allowed to return to work following the meeting that occurred at 10:45a.m. Additionally, after the notification of termination was given at 3:15pm, the Respondent gave the Complainant the option to work out the rest of the day or leave immediately. The Respondent used the time following the 10:45a.m meeting to engage with the Labour Relations Section prior to making a decision to terminate. The Tribunal assessed the extent to which trust was broken between the Respondent and Complainant. The Tribunal assessed whether the sole act of recording a meeting without the Respondent's knowledge (a) is directly related to the employment relationship or (b) had a detrimental effect on the Respondent's business such that it would be unreasonable to expect the Respondent to continue the employment relationship (test for summary dismissal under section 25 of the Employment Act 2000). The Tribunal

believes there to be a misalignment between the Respondent's determination of serious misconduct and the action of the Respondent to allow the Complainant to continue to work for the remainder of the day and also after the termination notice was given. If the act leading to serious misconduct had a detrimental effect on the Respondent's business such that it would have been unreasonable to expect the Respondent to continue the employment relationship, it is the view of the Tribunal that the Respondent should not have allowed the Complainant to continue working after terminating her. The Tribunal would have expected that the Complainant should have been removed immediately from the work place either by way of a paid suspension pending further investigation or asked to leave immediately following notice of termination. Therefore, the tribunal does not believe that the Respondent has sufficiently evidenced that the act of saying that a meeting was recorded was severe enough to warrant termination.

Subsequent to the termination the Respondent discovered that there was no recording. The Respondent acknowledged before the Tribunal that in her attempt to protect the she made a rash decision to terminate. The Respondent said that had she known that there was no recording she would have likely given a written warning instead of termination. The Respondent confirmed that the Complainant was a good employee.

The Tribunal also assessed the extent to which the Respondent followed its own employee handbook in relation to disciplinary procedures. Although the Complainant played a part in the sequence of events that led to her termination, namely falsely stating that she had recorded a meeting when she actually did not, and then not correcting this false information, it is the view of the Tribunal that the Respondent did not follow its own disciplinary policy which requires a first written warning for serious misconduct before initiating termination.

It is the view of the Tribunal that the Respondent has not sufficiently proven that the Act alone of recording the meeting was sufficient enough to terminate.

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Determination and Order

Based upon the written and oral submissions, the Tribunal has determined that:

- i) The Complainant was unfairly dismissed.
- ii) The Tribunal finds that, as a result of the Complainants conduct and culpability being contributors to the Respondents decision to terminate and considering the size of the Respondents business it is unreasonable to award reinstatement.
- iii) The Complainant is awarded four (4) weeks' notice pay.
- iv) The Complainant is entitled to thirteen (13) weeks of maternity leave pay on the grounds that had the Complainant not been terminated she would have been entitled to maternity leave pay as set out in section 16 of the Employment Act 2000.
- v) The Tribunal finds that due to the Complainants culpability and the extent to which this caused or contributed to the dismissal it is unreasonable to award a compensation order in accordance with Section 40 of the Employment Act 2000.
- vi) The Respondent shall pay the Complainant in full no later than sixty (60) days from this Determination and Order.

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

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

Dated this 28th Day of September 2022


Dr. Michael Bradshaw
Chairman


Ms. Yolanda Outerbridge
Deputy Chairman


Mr Eugene Creighton
Tribunal Member