

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

BETWEEN

Deanna Fox

Complainant

AND

Defendant

DECISION

Date of Hearing: 6th December, 2022

Present:

John Payne, Tribunal Chairman,
Jocene Steed, Tribunal Member
Orin Simmons, Tribunal Member

, Employer
witness
Witness

Deanna Fox, Complainant
Bruce Swan, Counsel for the Complainant

1. This matter was referred to the Employment & Labour Relations Department on 16th March 2022 and to the Tribunal on 10th August 2022. The Parties submitted statements from witnesses however these were not sworn.

Issue

2. The Complainant is seeking redress for unfair dismissal under section 40 of the Employment Act 2000.

Background

3. The Complainant was employed by the Employer from 23rd November 2020 until 25 January 2022 as a working supervisor. During this period she was responsible for opening the business in the morning. The Complainant previously work for a now defunct business operated by the Employer and others.
4. One the day in question it is alleged that the Complainant behaviour was erratic. She was banging utensils and talking in a loud sometime incoherent manner. It is claimed that on more than on occasion that morning. She threw or unprofessionally gave food to customers. The Complainant was approached by the Employer after he received complaints from both staff and next door vendors about her behaviour. When she refuse to leave the premises, the Employer summoned the police.
5. The Complainant left the premises after a conversation with the police officer. The Employer then closed the business for the day.

The Case

6. The Tribunal took note of section 38 **Hearing of complaints by Tribunal** in particular subsection (2) which states: *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.*
7. The Employer was directed to present their case first.

Case of the Employer

8. The case of the Employer was presented by one of the owners. He indicated that he had known the Complainant for many years when she was employed in a now defunct company that he had been a part owner. That Company stopped trading in March 2020 due to the negative impact of the COVID-19 pandemic. In July 2020 he formed another company and invited several of the staff from the former company to join him. The Complainant being one of those persons.
9. He indicated that the new company opened on 23rd November 2020 and that the Complainant had been engaged for 14 months. During the early period of operating business was slow and he had to reduce the hourly rate and work hours of staff.
10. The Complainant was a good worker but could at times display unacceptable traits. The Employer indicated that in recent weeks the Complainant's behaviour had changed "she began acting in a way that I certainly had never experienced before which included making random loud noises, being extremely aggressive to the vendors when they were making deliveries".
11. He further stated "The behaviour was such that he had no choice but to give her a formal warning letter which I had every intention of giving her on the day".
12. The Employer further evidenced that on the day in question on arriving to work staff warned him about the complainant's behaviour being out of control. He then approached the

23. He claimed evidence show that the behaviour by the Complainant was outside the box and whenever in the past her behaviour was in appropriate it would eventually return to normal. Indeed when the police arrive the Complainant's behaviour was normal. Hence further disruption to the business was averted.
24. Counsel for the Complainant indicated that they were seeking proper compensation for unfair dismissal.

The Complainant Testimony

25. The Complainant took the witness stand stated that she had worked for the Employer since she was 16 years old. That she and the Employer had an off on relationship. He knew that bother her brother and mother had mental health conditions and would often mention it
26. She indicated that in recent months she felt as if she was not wanted. The Employer would often make remarks about her having a mental health issue or being summoned to the office for things that did not make sense. She was tired of being accused of things she did not do or could not be proven. She believed she was being punished for a situation that occurred two weeks prior.
27. That morning she thought she had lost her keys and had been emotional. However having found them her mood changed, she was happy and started singing loudly and did not believe her behaviour was abnormal.
28. The Complainant advised that after the early morning "rush" things slow down greatly and on this occasion she went outside to check the traffic flow. The Employer approached her and she was told that someone had complained about her being rude. She was told to go home.
29. She indicated that when the police officer suggest she leave she did but with the understanding that she would return to work the next morning.
30. The Complainant stated that she had worked from 7am to 11 am that day. Later that day a termination letter on her phone.
31. She advised that a progressive disciplinary process was not followed. It was not in her interest to be rude and she did not believe that she had been.
32. The Complainant advised that no severance pay was given when terminated from the previous company.
33. During cross examination the exchange between the parties got a little hostile and the Chairman stopped the exchanged and summarized for the Employer

Issue of the continued operation

34. The Chairman then asked both parties to make comment on whether the employment of the Complainant was considered continuous with her employment of

35. Counsel for the Complainant stated that his client believed that the employment was continuous as some of the Partners for were the same as those for .
36. The Employer responded that had been a limited company and when dissolved had no assets. Further, it had three partners at the time of closure with a debt of \$68,000.
37. He was trying to should good faith and convinced the creditors that the new company would try to eliminate some or all of the debt owing by .

Deliberations

38. The Tribunal having heard the representations from both parties determined that it had three issues to consider. These based on relevant laws and court precedents were:
- Was the complainant guilty of serious misconduct?
 - If so, was the Employer justified in summarily severing the employment relations?
 - Should it be determined that the Complainant was unfairly dismissed was the relationship of employment be from the date of employment with Ltd or was the employment continuous and her years of engagement with to be considered.
39. The Tribunal took into account the ruling by Kawaley CJ in the case of Matthews v Bank of Bermuda ltd. In that matter the Learned Justice determined that the Tribunal must consider and make findings on the objective reasonableness of the decision by applying section 25 and 24(3) of the Employment Act 2000.
40. The Employment Act 2000 section 25 states *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.*
41. Section 24 (3) reads: *In deciding what is reasonable for the purposes of subsection (1), regard shall be had to-*
- the nature of the conduct in question;*
 - the employee's duties;*
 - the terms of the contract of employment;*
 - any damage caused by the employee's conduct;*
 - the employee's length of service and his previous conduct;*
 - the employee's circumstances;*
 - the penalty imposed by the employer;*
 - the procedure followed by the employer; and*
 - the practice of the employer in similar situations.*
42. The conduct of the Complainant clearly was unprofessional as verified by the two witnesses. They did however agree that they had never experienced the Complainant acting in such a manner before. Even the Employer stated that her behaviour at that time was out of the ordinary.

43. The Employer in his testimony indicated that the behaviour of the Complainant had deteriorated over the recent weeks and that he had intended to give the Complainant a written warning at the conclusion of her shift that day. It is questionable whether a summary dismissal would have occurred had the Employer not have the written warning in hand. Even though under cross examination the Employer stated that the termination was based on the conduct of 25th January 2022.
44. The Employer's conduct for other offences by the Complainant was rather *laissez-faire*. Both parties agreed that the working relations was very cordial and it appeared to the Tribunal less than professional at times. During his evidence and in his written statement the Employer indicated that the parties had a 15 year working relationship, and that he had never given the Complainant a formal warning even on those occasions that he believed she may have deserved one.
45. When giving consideration to section 24(3) (h) The Tribunal is not persuaded that there was a need to close the business on the day in question especially after the Police arrived and convinced the Complainant to leave. While the conduct of the Complainant was inappropriate, the Tribunal do not believe that it warranted *summary dismissal* for serious misconduct applying the conditions as stated in section 24(3). But believes that some form of discipline would have been appropriate in the circumstances.
46. Further the Tribunal took note that during the time of the event the Government had put certain procedures in place for workers who had been terminated or laid off due to the pandemic to be compensated. This topic was never raised by either party. It is therefore reasonable to surmise that the employee did receive compensation from the government

DECISION

47. Considering the above, the Tribunal then considered how much did the Employee's conduct contribute to her summary dismissal? It is agreed that the conduct of the Complainant was inappropriate.
48. However, Section 40(4) of the Act states:
40 (4) A compensation order shall, subject to subsection (5), be of such amount as the Tribunal considers just and equitable in all the circumstances, having regard—
 - (a) *to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer; and*
 - (b) *the extent to which the employee caused or contributed to the dismissal.*
(5) The amount of compensation ordered to be paid shall be not less than—
 - (a) *three weeks wages for each completed year of continuous employment, for employees with no more than two complete years of continuous employment;*
 - (b) *four weeks wages for each completed year of continuous employment, in other cases,**up to a maximum of 26 weeks wages."*

49. The Complainant is not seeking reinstatement. The Tribunal in making its determination of a compensation order in accordance with subsection 40(4) took into account the wording of the legislation “*be of such amount as the Tribunal considers just and equitable in all circumstances”.* (Emphasis the Tribunal)_ This included giving consideration as set out in section 40 (4) (b) *the extent to which the employee caused or contributed to the dismissal.*

50. Having determined that the Employer was not entitled to summarily dismiss for serious misconduct the Complainant, but taking into account the conduct of the Complainant, the Tribunal hereby orders:


(i) the Employer to pay the minimum amount of compensation allowable in the form of three weeks’ wages for each completed year of continuous employment as the Complainant had been working there since 23rd November 2020.

51, Payment of the compensation is to be made before the 28 February 2023.

Dated this 20th day of January 2023



Chairman-Mr. John Payne



Tribunal Member- Ms. Jocene Wade



Tribunal Member-Mr. Orin Simmons

