



EMPLOYMENT RIGHTS TRIBUNAL

ERT/2019/39

Jason Bent

CLAIMANT

V

Jada Builders Inc.

RESPONDENT

DATE: July 30, 2021, August 6, 2021 and November 16, 2021

BEFORE:	The Hon. Mr. Justice (ret'd) Christopher Blackman GCM; Q.C	Chairman
	Edward Bushell, Esq	Member
	Mrs. Beverley Beckles	Member

APPEARANCES: Jason Bent, Claimant in person.

The Respondent was not present.

DECISION

1. The Respondent in this matter has ignored the many steps taken, including the publication in the Daily Nation of Monday July 19, 2021 of the hearing date of Friday, July 30, 2021 at 10.00 am of a **TAKE NOTICE dated the 30th day of June, 2021** that required the Respondent to appear before the Tribunal to defend a claim for unfair dismissal brought by the Claimant. The Respondent was advised in the said **TAKE NOTICE** that if it failed to appear at the hearing, the Tribunal may proceed to hear and determine the matter in its absence.
2. The Tribunal acknowledges that at the time of issuing the foregoing **TAKE NOTICE the Employment Rights Act** (the Act) had no Rules in place to provide for the said **TAKE NOTICE**. However, section 6 (3) of the Act provided that subject to the Act, the Tribunal shall regulate its own procedure. Accordingly, in the spirit of ensuring justice between the parties, the Tribunal determined that Notice be given to the Respondent of any Hearing in advance of that hearing to afford the Respondent an opportunity to appear and make any application that it sought fit to make.
3. On July 30, 2021, at 10.00 am, the hearing of the matter was called on in the Large Conference Room, 2nd Floor, Warrens Office Complex, Warrens, St. Michael. The Registrar of the Tribunal, Mr. Winston Chase in the environs of the hearing area called the name of the Respondent 3 times and there was no appearance by anyone, for or on behalf of the Respondent, **JADA BUILDERS INC.** The Tribunal thereafter heard the matter.

4. The Claimant, Jason Bent was sworn and gave evidence in furtherance of the Witness statement which had been filed on October 24, 2019 and which statement has been relied upon by the Tribunal. The critical issues identified in that statement relate to the start of his employment with the Respondent on January 19, 2015 as an Assistant Quantity Surveyor and the circumstances leading to his termination on March 5, 2019 when he held the position of Quantity Surveyor.
5. In light of the significance of the details given by the Claimant at paragraph 5 of his Witness Statement under the captioned "**Circumstances Leading to my Termination.**" the paragraph is reproduced in its entirety, as follows:

"On February 08, 2019, I was invited to a meeting with Mr. Paul Lewis (PL) (Chief Personnel Officer), Mr. Geoff Gray (GG) (Commercial Manager) and Ms. Shantelle Hayes (HR Manager). At that meeting I was told that "business was slow" and therefore, they were asking that I take a sabbatical (Time off without pay). I told them that I could not take a sabbatical at the time because my wife just had a baby and we needed an income to sustain my family. In addition, I stated that I was currently working on a number of projects that required my attention at that time and thus, would not be able to complete said projects if I took a sabbatical.

Geoff Gray then suggested that instead of taking a sabbatical that I be laid off for thirteen (13) weeks, during which time they would call me back when needed and pay me for my time during that layoff period. I rejected Geoff Gray's proposal. Paul Lewis then noted that things were really slow with the company and that he had been instructed by Mr. Philip Temprow to cut down on the number of staff in order to reduce the company's overheads. I then suggested that since things were slow with the company that everyone in the Commercial Department should work on a part-time basis. PL and GG confirmed that was a good

suggestion and that they were going to speak to the other employees within the department about that part time work schedule. Later that afternoon, Geoff Gray told me that the part-time arrangement (2 ½ days per week) will take effect starting Monday February 11, 2019.

Later that same evening I spoke to the other employees within the Commercial Department and found out that only the local employees (two black men) in the department, that being Tony Latchman and myself, were asked to work part-time. The others, Malcolm McDonald, Stuart Hope and Geoff Gray all expat workers from the UK (all Caucasians) continued to work fulltime. I then went back to Paul Lewis and asked why only Tony Latchman and myself were asked to work part-time, to which he told me that the others will be placed on part-time basis soon.

In the weeks that followed, I observed that only Tony Latchman and I were working part-time. I spoke to Shantelle Haynes (HR Manager) and Joyce Hoyte (Office Manager) and informed them that the company acted prejudicially and that secondly, my employment rights were violated namely they had placed me on part-time work without proper consultation."

6. Mr. Bent further stated that on February 27, 2019, he was summoned to a meeting with the Chief Personnel Officer, Paul Lewis. During that meeting he learned that an error had been made in pricing a Tender on which he had worked. He was suspended at the conclusion of the meeting and advised that he would be made aware of the Company's decision on March 4, 2019.
7. At the meeting on March 4, 2019, Mr. Bent was informed by Mr. Lewis that it had been decided to terminate his employment. Mr. Bent stated that he pleaded with Mr. Lewis not to be terminated. Mr. Lewis said he would prefer not to fire him and instead invited him to resign in

consideration of which a debt of approximately five thousand dollars would be written off, and a letter of recommendation provided. Mr. Bent further stated that he said he would think about it and that he would advise Mr. Lewis of his decision.

8. On the following day March 5, 2019, the Claimant sent Mr. Lewis an email at 10.53 am advising that he would not be resigning and later that day he received an email with a letter of dismissal attached, dated March 4, 2019. The Claimant said that he exercised his right to appeal on March 12, 2019 but there was no response to that filing.
9. In accordance with section 42 of the Act, on March 18, 2019 Mr. Bent informed the Chief Labour Officer of the circumstances relating to the termination of his employment with the Respondent.
10. The Chief Labour Officer's attempts to conciliate the matter were unsuccessful, and on the 7th day of August 2019 the matter was referred to the Tribunal for determination.
11. In the Claim Form filed by the Claimant on August 15, 2019, the Claimant contended (1)) that the Respondent contravened Section 38 (1) of the Act and violated the rights afforded to him under the said Act, and (2) that the Respondent had failed to follow the process set forth in the Fourth Schedule to the Act in relation to his dismissal.
12. The two issues for determination by the Tribunal are therefore (a) was Section 38 (1) of the Act contravened and (b) was there compliance by the Respondent of the provisions of the Fourth Schedule to the Act in relation to the dismissal of the Claimant.

Was Section 38 (1) of the Act Contravened?

13. The material provisions of Section 38 are set out hereunder. The subsections are **(1) and (4) to (7)**

38. (1) Except where there is an agreement to the contrary in a contract of employment, an employer shall not lay off an employee, or place an employee on short-time,

(a) except for one or other of the reasons specified in subsection (4);
and

(b) unless the requirements of subsections (5), (6) and (7) are complied with in relation to the laying off of the employee or the placement of the employee on short-time, as the case may be.

(4) The reasons referred to in subsection (1) (a) are that:

(a) the employer has temporarily ceased, or intends temporarily to cease, to carry on the business for the purposes of which the employee was employed by him, or has temporarily ceased, or intends temporarily to cease, to carry on that business in the place where the employee was so employed;

(b) the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have temporarily ceased or diminished, or are expected temporarily to cease or diminish.

(5) Before laying off the employee or placing him on short-time, the employer shall

(a) carry out the consultations required under subsection (7) (b);
and

(b) supply the employee, the trade union recognised for the purposes of bargaining on behalf of the employee (if there is one) and the Chief Labour Officer with a written statement of

the facts that require the employer to lay off the employee or place him on short-time.

(6) The statement referred to in subsection (5) (b) shall contain particulars of

(a) the facts referred to in subsection (4) relevant to the lay-off or short-time action; and

(b) the number and categories of affected employees and the period during which the lay-off or short-time action is to be carried out, where any employees, in addition to the employee in question, are affected by those facts.

(7) The consultations referred to in subsection (5) (a) are consultations with the affected employees or their representatives, being consultations conducted in accordance with the following requirements:

(a) the consultations shall commence not later than 6 weeks before any of the affected employees is laid off or placed on short-time and shall be completed within a reasonable time;

(b) the consultation shall be in respect of

(i) the proposed method of selecting the employees who are to be laid off or placed on short-time;

(ii) The proposed method of carrying out the lay-off or short-time action, with due regard to any agreed procedure, including the period over which the lay-off or short-time action is to take place, and

(iii) any measures that the employer might be able to take to find alternative employment for those who are to be laid off or placed on short-time and to mitigate for them the adverse effects of being laid off or placed on short-time;

(c) where, in any case, there are special circumstances which render it not reasonably practicable for the employer to comply with any of the requirements or paragraphs (a) and (b), the employer

shall immediately consult with the Chief Labour Officer and take all such steps towards compliance with that requirement as are reasonably practicable in all the circumstances.”

DISCUSSION

14. Sections 31 and 38 of the Act have in common the requirement for consultation by the employer with the employee or his representative, when significant action by the employer with regard to the workforce of the business is contemplated. So, in the case of redundancies by 10 percent or any other critical number the employer is required to carry out the consultations mandated in Section 31. Similarly, Section 38 provides that an employer shall not lay off an employee or place that employee on short-time except for the reasons **specified** in the section and compliance with the requirements of the Section. Interestingly, both sections have provided that in special circumstances the detailed requirements for consultation may be foregone.
15. The significance of consultation pursuant to the provisions of the Act have been considered on several occasions by the Tribunal, and most recently in the decisions given in **ERT/2017/032/033/034 Michelle Cox-Jordan et al v. World Gift Imports (Barbados) Limited trading as Little Switzerland** dated 27 August, 2020 and **ERT/2020/020 Dr. Orville Wickham v. Barbados Agricultural Management Co. Ltd** dated 1 September, 2021. In the **Cox-Jordan** matter, the Tribunal adopted the tests for fair consultation enunciated by Judge Levy Q.C sitting as the Employment Appeal Tribunal Chairman in **Rowell v. Hubbard Group Services Ltd. [1995] IRLR 195** at para 15, and we consider it appropriate to reproduce them in this matter. Judge Levy cited with approval and adopted the tests for fair consultation proposed by

Hodgson J in *R v. Gwent County Council ex parte Bryant* [1988] Crown Office Digest p.19, when he said: "*Fair consultation means :*

- a) *Consultation when the proposals are still at a formative stage;*
- b) *Adequate information on which to respond;*
- c) *Adequate time in which to respond;*
- d) *Conscientious consideration by an authority of the response to consultation.*

"Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matter about which it is being consulted, and to express its view on the subject, with the consultor thereafter considering those views properly and genuinely."

16. It is against the foregoing legal authority that the Tribunal has considered the Claimant's contention that the Respondent contravened Section 38 (1) of the Act and that his employment rights were violated in that he was placed on part time work without proper consultation.

17. As noted at paragraph 5 hereof, Mr. Bent stated that on February 8, 2019 he was requested to take a sabbatical (time off without pay) as "business was slow". He said that he rejected that suggestion as he was then working on a number of projects which he would have been unable to complete if he had gone on the sabbatical. He said that there was a further suggestion that he be laid off for 13 weeks during which time the Company would call him back on a needs basis for which he would be paid for any work done. The Claimant said that he also rejected that suggestion.

18. Mr. Bent further said that there was then an intervention by Paul Lewis the Chief Personnel Officer who noted that things were really slow with the

company and that he had been instructed by Mr. Philip Temprow, the CEO to cut down on the number of staff in order to reduce the company's overheads. As noted in the extract reproduced above, Mr. Bent "**...then suggested that since things were slow with the company that everyone in the Commercial Department should work on a part-time basis. PL and GG confirmed that was [a] good suggestion and that they were going to speak to the other employees within the department about that part time work schedule.**"

19. As the Witness Statement detailed, late on February 8, 2019 the Commercial Manager, **Geoffrey Gray** advised the Claimant that effective Monday February 11, 2019 he would be required to work part-time, being two and one-half days per week. Mr. Bent said that he later learned that only the 'local employees' were on the part-time arrangement, and consequently, he informed the Human Resources personnel that he was of the view that the company had acted prejudicially and had violated his employment rights.
20. The Tribunal has carefully considered the several conversations noted in the preceding paragraphs and the solution for part-time work was that offered by the Claimant, and came **after (emphasis added)** two previous suggestions by the Company officials had been rejected. However, as the requirements for consultation with the Chief Labour Officer mentioned in section 37 (7) (a) or section 38 (7) (c) were not complied with, the Tribunal is obliged to reassert its determination in **ERT 2018/316 Shikeila Johnson v. Ian Griffith Mortuary Service**, dated 23 August, 2019 and applied in **ERT 2019/ 061 Edwin O'Neal and others v. Barbados Agricultural Management Company Limited**, dated September 15, 2021 where there has been a failure by the Respondent to

carry out the consultations required by the section. In the context of this matter the Tribunal is therefore obliged to find that the allegation made under section 38 (1) of the Act was well founded.

21. Consequentially, pursuant to Section 39 (2)(a) of the Act the Tribunal **DECLARES** that the Claimant's rights by being placed on short-time were contravened. The Claimant's declared salary is \$10,200.00 per month and according to the evidence and witness statement, he essentially worked half of each week for the month of February. Section 39 (2)(b) of the Act provides that the Tribunal shall order the employer to pay the employee a sum that it is fair and just in the circumstances. The Tribunal awards the Claimant the sum of \$5,100.00 as compensation under this section.

Was There a Breach of The Process Set Forth in The Fourth Schedule to the Act.

22. Section 27 of the Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 29(1) of the Act further provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reason ...for the dismissal. Section 29(2) states that an employer shall have the right to dismiss an employee for a reason....if it (b) relates to the conduct of the employee.
23. However, section 29 (5) (b) stipulates that an employer is not entitled to dismiss an employee for any reason related to the conduct of the employee without informing the employee of the accusation against him **and** (emphasis added) giving him an opportunity to state his case subject to the disciplinary procedures specified in the Fourth Schedule of the Act.

24. The chronology of the events relating to the dismissal of the Claimant is as follows:
- (a) On February 27, 2019 the Claimant was summoned to meeting with Paul Lewis where he was advised that the purpose of the meeting was to discuss the Sol Airport Tender which had been submitted on February 1, 2019. A number of other persons were present. The Claimant was advised that the Tender was the highest because of the error, and that consequently the Respondent had not been awarded the Tender.
 - (b) The Claimant in his Witness Statement said that other matters were brought up for which he had had no foreknowledge to properly respond to the allegations, and at the conclusion of the meeting, he was suspended with immediate effect for "gross negligence in the execution of (his) duties" and required to handover the motor vehicle and laptop assigned to him and that a decision on his future with the Respondent, would be given on February 28, 2019.
 - (c) On February 28, 2019 the Claimant was advised that he should meet with Paul Lewis on March 4, 2019
 - (d) At the meeting on March 4, 2019, Mr. Bent was informed by Mr. Lewis that it had been decided to terminate his employment. Mr. Bent stated that he pleaded with Mr. Lewis not to be terminated. Mr. Lewis said he would prefer not to fire him and instead invited him to resign in consideration of which a debt of approximately five thousand dollars would be written off, and a letter of recommendation provided. Mr.

Bent further stated that he said he would think about it and that he would advise Mr. Lewis of his decision.

- (e) On March 5, 2019 the Claimant sent Mr. Lewis an email at 10.53 am advising that he would not be resigning and later that day he received an email with a letter of dismissal attached, dated March 4, 2019. The Claimant said that he exercised his right to appeal on March 12, 2019 but there was no response to that filing.
- (f) The Claimant noted in his Witness Statement that the assertion on February 27, 2019 that the Respondent had not been awarded the Tender was false as the Bid had not then been awarded. Moreover, it was within his knowledge that the Respondent was in fact awarded the Tender.

25. As noted earlier, section 29 (5) of the Act provides that before there is a dismissal by reason of conduct, the employee **must** be given the opportunity to state his or her case, and the employer should then initiate the procedures required under Part B of the Fourth Schedule.

26. In a decision dated February 18, 2020 in **ERT/2014/060 Theresa Foster v. Sinclair Gittens** the Tribunal detailed the three (3) steps required by Part B of the Fourth Schedule to be observed by the employer. These steps are:

Step 1: (a) That the employer set out **in writing** the alleged conduct of the employee the cause of concern and for which disciplinary action is being considered, and (b) send the statement to the employee and invite the employee and a friend to a meeting to discuss the matter.

Step 2: The meeting must take place before any disciplinary action is taken, and should be held within 7 working days of the statement being sent to the employee, with the employee having the right to have a friend or shop steward, if a member of a trade union, present during the proceedings. The employer must inform the employee in writing of the decision and must advise that the decision may be appealed, if the employee is not satisfied with it.

Step 3: Provides for the process where the employee wishes to appeal.

27. In this matter, according to the Claimant's Witness Statement and a consideration of the chronology in paragraph 23, none of the above steps were taken by the Respondent Company. In particular the Tribunal has taken note the charges against the Claimant were never put in writing, and further, other issues were raised for which there had been no prior warning. As a consequence, the Tribunal has had little difficulty in holding that Mr. Bent was unfairly dismissed by the Respondent.
28. The observation by the Claimant that the Respondent was in fact awarded the Sol Tender after his dismissal, bears an eerie similarity to the events in ***Theresa Foster v. Sinclair Gittens*** when an one hundred dollar note which had been missing, and for which Miss Foster was blamed, was found in the bar area **after** Miss Foster had been suspended, and away from the premises.

THE REMEDY

29. Section 33 (2) of the Act provides that the Tribunal may, subject to certain conditions, make an order for reinstatement of the employee if that is the

wish of the employee. Section 33 (4) (b) however requires the Tribunal to take into account whether it is practicable for the employer to comply with an order for reinstatement.

30. Both in his evidence before the Tribunal and in his Written Submissions, the Claimant stated that (1) he had an '*amiable relationship*' with members of the Commercial Department of the Respondent Company; (2) that there was a job vacancy on the company's website for a Quantity Surveyor; (3) that at the time of giving evidence on July 30, 2021 he had been in negotiations with the Respondent for the position of Quantity Surveyor; and (4) that by the time of the November hearing he had been working with the Respondent on contracts and that it was his expectation that that work would continue to the end of the year.
31. The Claimant in his Written Submissions has cited the Jamaican Industrial Dispute Tribunal case of *Caribbean Airlines Ltd v. Small*, IDT 4 of 2012 in support of the proposition that reinstatement into a department with a small number of persons was possible and that an order for reinstatement was made by the Industrial Dispute Tribunal on July 31, 2012 to that effect. It should be noted however that CAL did not comply with the order and consequently, the airline was fined \$350,000.00 on November 29, 2015 in the Kingston Corporate Area Resident Magistrate's Court for breach of the order.
32. The Tribunal has taken note of the following passage from the United Kingdom Supreme Court case of *McBride v. Scottish Police Authority (Scotland)*[2016] UKSC 27 where Lord Hodge in giving the unanimous judgment of the Court said at paragraph 37:

*“At the stage when it is considering whether to make a reinstatement order, the tribunal’s judgment on the practicability of the employer’s compliance with the order is only a provisional determination. It is a prospective assessment of the practicability of compliance, and not a conclusive determination of practicability. This follows from the structure of the statutory scheme, which recognises that the employer may not comply with the order. In that event, section 117 provides for an award of compensation, and also the making of an additional award of compensation, unless the employer satisfies the tribunal that it was not practicable to comply with the order. Practicability of compliance is thus assessed at two separate stage- a provisional determination at the first stage and a conclusive determination, with the burden on the employer, at the second: *Timex Corporation v. Thomson* [1981] IRLR 522, 523-524 per *Browne-Wilkinson J* and *Port of London Authority v. Payne* [1994] ICR 555, 569 per *Neill LJ*.”*


33. The Tribunal notes that section 37 of the Act is the comparable section to section 117 of the UK Employment Rights Act 1996.
34. Notwithstanding the valuable guidance provided by *McBride* cited above, Section 34 (2) of the Act provides that on making an order for the reinstatement of an employee the Tribunal shall specify
 - (a) An amount payable by the employer in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal (including arrears of wages) for the period from the date of termination of employment to the date of reinstatement;

- (b) Any rights and privileges, including seniority and pension rights, which must be restored to the employee; and
 - (c) The date by which there must be compliance with the order.
35. In cases where reinstatement has been opposed by the employer, it was often contended by the management or other significant persons in the employer company that they had lost the trust and confidence of the employee. However, as noted at paragraph 30 above, the Claimant has maintained a working relationship with the Respondent and such a contention would not appear to have any substance in this matter. Accordingly, the Tribunal makes the following orders:
- (a) An order of reinstatement of the Claimant as Quantity Surveyor with the Respondent, pursuant to section 34 of the Act with effect from April 1, 2022;
 - (b) An order for compensation in accordance with section 34 (2) (a) of the Act that the Respondent shall pay to the Claimant all arrears of wages and benefits from the date of his dismissal on March 5, 2019, until the date of the said reinstatement which is computed to be the sum of \$370,536.15.
 - (c) The restoration of all rights and privileges, including transportation, seniority and pension rights.
36. Section 36 of the Act requires the Tribunal to take into account any sums received by the Claimant from the date of termination to the date of reinstatement, by way of wages, money in lieu of notice or ex gratia payments, or any moneys received in respect of any employment with another employer.

37. The Tribunal accordingly orders that the parties hereto appear before the Secretary of the Tribunal to settle the issues arising from the provisions of paragraphs 35 and 36 hereof, with due recognition of the award of \$5,100.00 mentioned at paragraph 21 above
38. If the Respondent fails to reinstate the Claimant as ordered at paragraph 35 (a) above, the Claimant shall within 21 days of that date, apply to the Tribunal for the remedies provided for in Section 37 of the Act, and the accounting reconciliation referred to above, shall consequentially be modified to reflect the orders made for non-compliance with the Order stipulated at paragraph 35 (a) above.
39. The parties to this matter to bear their own costs

Dated this 8th day of March 2022


Christopher Blackman
Chairman


Edward Bushell
Member


Beverley Beckles
Member