BARBADOS

IN THE EMPLOYMENT RIGHTS TRIBUNAL

CLAIM NO. ERT NO. 2014/086

BETWEEN

PETER BOWEN **CLAIMANT**

AND

JOHAN INVESTMENTS LIMITED

(T/A ZACCIOS RESTAURANT) **RESPONDENT**

TRIBUNAL:

Kathy-A. Hamblin, Deputy Chairman

Beverley Beckles: Employees' Representative

John Williams-Employers' Representative

PRE-HEARING REVIEW: **May 14, 2018**
DATE OF HEARING: **May 22, 2018**
DATE OF DECISION: **November 15, 2018**

APPEARANCES:

The Claimant, Peter Bowen, in person

The Respondent, Johan Investments Limited (trading as Zaccios Restaurant) represented by Hannelore O'Brien, Director and Vernal Henry, General Manager.

DECISION

For the reasons set out below, the unanimous decision of the Tribunal is that the Claimant, Peter Bowen, was unfairly dismissed by the Respondent Johan Investments Limited (trading as Zaccios Restaurant) on August 22, 2014.

REASONS

SUMMARY OF THE FACTS

Peter Anderson Bowen ("the Claimant"), a chef, complains that on August 22, 2014 he was handed a letter by Andrea Sealy, Assistant Manager of Zaccio's Restaurant, informing him of his dismissal. The Claimant contends that his dismissal from the position which he had held since November 21, 2010, was unfair.

The Respondent justifies its dismissal of the Claimant on the ground that the Claimant was repeatedly warned, both orally and in writing, in the three-month period immediately preceding his dismissal, about his lack of focus, failure to prepare meals in accordance with the menu and improper food preparation. The Respondent based its decision to dismiss the Claimant on three specific incidents relating to poor food quality and preparation which allegedly occurred on August 20, 2014.

STATEMENT OF THE CASE

The Claimant filed his complaint with the Labour Department on September 5, 2014 and, after an unsuccessful attempt to conciliate the matter, the Chief Labour Officer referred the complaint to the Tribunal by letter dated November 11, 2014.

The Claim Form and Witness Statement were filed on August 27, 2015 and August 31, 2015, respectively. With these, the Claimant also filed a copy of the termination letter and Termination/Lay-off Certificate, both dated August 22, 2014, and a letter from the

Respondent dated February 9, 2011 confirming the Claimant's employment status and weekly wages.

The Claimant was the sole witness to testify on his behalf.

The Respondent filed its Response dated December 12, 2014 on December 15, 2014, that is, *before* the Claimant filed the Claim Form. The Respondent also filed Witness Statements of Andrea Sealy and Oneal Benskin dated December 9, 2014 and December 11, 2014, respectively, together with copies of the termination letter, and warning letters dated October 15, 2013, May 26, 2014, June 4, 2014, August 13, 2014 and August 20, 2014. In addition, the Respondent provided two copies of "Zaccios Rules and Regulations", one of which was intended to replace the incomplete copy of the said Rules and Regulations initially filed by the Respondent.

Mr. Benskin was the sole witness called by the Respondent, the Respondent having previously informed the Tribunal that Ms. Sealy is no longer in its employ.

Hannelore O'Brien, a director of the Respondent company was called as a witness by the Tribunal to explain certain matters which were not made clear in the bundle of documents filed by the Respondent or which could not be ascertained from Mr. Benskin's evidence.

Amendment of the Claim Form

In the Claim Form, the name of the Respondent is given at paragraph 7 as "Zaccios Restaurant". The Respondent confirms, as stated in its Response, that "Zaccios Restaurant" is the trade name of Johan Investments Limited. In these circumstances, the Tribunal

amended the Claim Form, with the consent of the Respondent, to reflect the correct name of the Respondent. The matter will therefore be continued as *Peter Bowen v. Johan Investments Limited (trading as Zaccios Restaurant).*

ISSUE

The sole issue for determination by the Tribunal is whether the Respondent's decision to dismiss the Claimant was fair in all the circumstances.

DISCUSSION

Under Section 29 (1) of the Act, the employer must show:

1. *The reason, or, if more than one the principal reason, for the dismissal; and*
2. *That the reason either falls within subsection (2) or must be some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.*

Section 29 (2) provides that:

"*An employer shall have the right to dismiss an employee for a reason which falls within this subsection if it*

a) *relates to the capability of the employee to perform work of the kind which he was employed by the employer to do".*

In Section 29(3) "'capability', *in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality."*

Reason for dismissal

The termination letter, issued to the Claimant on August 22, 2014, referred to poor food preparation resulting in a customer complaint, as well as the Claimant's lack of interest in

preparing food according to the menu, as the reasons for the termination of the Claimant's employment. The Respondent also sought to rely on a series of letters which were purportedly issued to the Claimant, in which were outlined multiple infractions including:

- preparing excessive amounts of vegetables and starches;
- mixing sweet potatoes with vegetables resulting in spoiling and wastage;
- assisting the porter after closing;
- demanding vacation within two days after seeking a cash advance on vacation pay and being offered a smaller sum than requested;
- preparing meals of poor quality;
- preparing orders incorrectly;
- preparing food other than as specified on the menu;
- failure to use a scoop provided for portioning sweet potato fries; and
- frying fish and sweet potato fries in the same deep-fat fryer.

The Respondent has shown that the principal reason for the Claimant's dismissal was his capability to perform the work for which he was engaged. Lack of capacity is a potentially fair reason for dismissal of an employee.

Once the employer meets its burden under Sections 29 (1) and 29 (2), it is for the Tribunal to determine pursuant to Section 29 (4)

> *i) whether the employer acted reasonably in treating the reason given for dismissal as a sufficient reason for dismissing the employee; and*

ii) whether the employer complied with the procedures set out in the Fourth Schedule, Part A.

An employer may not dismiss an employee for any reason related to the capability of the employee to perform any work without informing the employee of the accusations against him and giving him an opportunity to state his case, subject to the Standard Disciplinary Procedures and the Modified Disciplinary Procedures set out in Parts B and C, respectively, of the Fourth Schedule. **(See Section 29 (5)).**

Reasonableness of the decision to dismiss

The role of this Tribunal is "*not [to] simply consider whether [we] think that the dismissal was fair and thereby substitute [our] decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which a 'reasonable' employer might have adopted...An Employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice*." *Per* Aikens, LJ in ***Orr v. Milton Keynes [2011] ICR 704***.

Any opinion which this Tribunal has with respect to the Claimant's competence is immaterial. The Respondent's belief is what is relevant, provided always that the Respondent's belief is genuine and honest and is based on reasonable grounds. The test which must be applied in determining whether a dismissal based on incapacity is fair, was laid down by Lord Denning MR in ***Alidair Ltd. v. Taylor [1978] IRLR 82:***

> "*Wherever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."*

In his testimony, Mr. Benskin described the Claimant with whom he worked for three years and whom he supervised, as "*a competent chef*", "*a very good employee", "dependable*" and one who "*worked hard*". The Tribunal is still bound to consider, notwithstanding these accolades (which might be the personal views of the witness and not necessarily those of the Respondent), whether the Respondent genuinely believed that the Claimant lacked capacity to discharge his duties. That necessitates an assessment of the reasonableness of the grounds on which the Respondent based its belief in the Claimant's lack of capacity.

According to Mrs. O'Brien, she made the decision to dismiss the Claimant after consultation with Ms. Sealy and Mr. Benskin. Ms. Sealy, who purportedly signed and issued the Claimant's dismissal letter just two days after the alleged events of August 20, 2014, excluded from her witness statement any reference to those events which ultimately led to the Claimant's dismissal.

Ms. Sealy's witness statement focuses on the events of October, 2014 (the Tribunal believes that this is a typographical error and the reference is to October, 2013), relating to the Claimant preparing too many vegetables and mixing sweet potato with the vegetables. She

also refers to a May 2014 incident involving a request for an advance on his vacation pay, neither of which was specifically referred to in the Claimant's termination letter.

In Mr. Benskin's witness statement, he states that the Respondent received complaints about the Claimant "*on numerous occasions*" about preparing "*too much vegetable (sic) or mixing vegetables with Yams or Sweet Potatoes-which spoiled and had to go into the garbage or complaints from customers about food not cooked according to the menu*".

Mr. Benskin also stated that he complained to management about the Claimant, as a consequence of which, warning letters were issued to the Claimant. In his oral testimony, Mr. Benskin states that other members of staff complained to him about the Claimant. However, he made no specific reference either in his oral or written testimony to any complaints made about the meals prepared on August 20, 2014.

An August 20, 2014 "*final warning*" letter referred exclusively to the Claimant's preparation of excessive amounts of vegetables, mixing of sweet potatoes with the vegetables and consequent wastage. However, Mr. Benskin's oral testimony would tend to contradict the contents of that letter. Mr. Benskin informed the Tribunal that the Respondent "*received customer complaints daily [about the Claimant] until we stopped him from doing vegetables*". In response to a question from the panel, Mr. Benskin stated, unequivocally, that the Claimant had ceased "*doing vegetables*" approximately two weeks prior to his dismissal.

The Tribunal is inclined to accept the oral evidence of Mr. Benskin over the August 24, 2014 letter which was unsigned by the Respondent and unendorsed by the Claimant. The

Tribunal is of the view that the August 20, 2014 letter, which for reasons set out later in this decision the Tribunal has in any event disregarded, was contrived for the express purpose of grounding the Claimant's dismissal. Accordingly, the Tribunal finds that the Respondent's belief in the Claimant's incompetence was not honestly held.

Next, the panel sought to ascertain what, if any, inquiries were made by the Respondent into the circumstances surrounding the poor preparation of the August 20, 2014 meals, prior to the Claimant's dismissal.

A reasonable investigation, for the purpose of section 29(4)(i) would be one which a reasonable employer would have carried out in similar circumstances. The Tribunal considered whether that hypothetical reasonable employer would have been able to form a genuine belief, having regard to the findings of the Respondent's investigation, that the Claimant was guilty of poorly presenting food for consumption by guests of the restaurant and of generally displaying a lack of interest in his work.

In the termination letter, the Respondent identified three meals out of an unspecified number prepared on August 20, 2014 that were below the Respondent's accepted standards. These were a "*tasteless*" Asian stir-fry, pecan crusted chicken with which no whole grain mustard sauce was served, pasta which was "*overloaded with vegetables (like a Stir-Fry)*" and chicken curry "*which had to be fixed to have some taste*."

The Claimant stated unequivocally during the course of his oral evidence that he prepared none of the three meals in issue. His evidence was not challenged. The Respondent did not adduce any evidence that the Claimant was informed, on August 20, 2014 or at any time prior to his termination, that he was believed to be responsible for the preparation of the chicken curry, or the other sub-par dishes. The Claimant stated, and his evidence was later corroborated by Mr. Benskin, that he was one of at least three chefs or cooks on duty on every shift, all of whom, according to Mr. Benskin, "*chipped in*", and "*worked as a team*" to prepare meals.

A reasonable employer would have made enquiries to ascertain who was primarily responsible for preparation of the meals in issue. There is no evidence, either in the form of oral testimony or witness statements, that the Respondent, on whom the burden of proof rests, held discussions with any member of the kitchen staff, including Mr. Benskin (the head chef and the person with responsibility for running the kitchen), or the Claimant, to ascertain who was ultimately responsible for preparing the meals. The Respondent did not show that the Claimant was wholly or even partly responsible for the preparation of any of those meals.

The Respondent's evidence is tenuous and unsafe. The Tribunal is not persuaded by that evidence that the Respondent carried out any or any reasonable investigation prior to its dismissal of the Claimant to determine who prepared the meals in issue. For these reasons, the Respondent has not established that its belief that the Claimant lacked capacity to do the job for which he was engaged was based on any reasonable grounds.

PROCEDURAL FAIRNESS

The Tribunal must also consider whether the Respondent acted within the band of reasonable responses in determining that dismissal was a fair sanction in all the circumstances. This entails consideration of the disciplinary procedures adopted by the Respondent to ascertain whether those procedures were in conformity with the statutory requirements.

Pursuant to Part A of the Fourth Schedule, an employer must apply progressive disciplinary action. An employer must warn an employee and give him a reasonable opportunity to make correction. Oral or written warnings or both should be utilised before stronger forms of disciplinary action are implemented. **(See Part A, Fourth Schedule c(i) and (ii).**)

The action which the Act contemplates that an employer should take prior to dismissal was explained more fully by Sir John Donaldson in **James v. Waltham Holy Cross UDC [1973] ICR 398; [1973] IRLR 202.**

> "*An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance*."

The Respondent's Rules and Regulations contemplate the application of progressive discipline. Under the rubric "*Disciplinary Procedures*", the Respondent sets out the procedure applicable to all employees:

> **"First offence: Verbal warning which will be recorded on a Verbal Warning form and placed in the employees Personal File.**
>
> **Second offence: Written warning**
>
> **Third offence: Dismissal."**

The Respondent identified at least nine offences committed by the Claimant in a nine-month period beginning in October, 2013, and sought to demonstrate that the Claimant was given several chances to improve his performance prior to his dismissal.

According to Mr. Benskin, he "s*poke to [the Claimant] several times* [about complaints against the Claimant] *but there was no change in his behavior*." In the dismissal letter, the Respondent alludes to the "*several occasions*" in the preceding three months on which the Respondent "*had to speak and write*" to the Claimant.

The Respondent produced five warning letters addressed to the Claimant, and purportedly issued between October 15, 2013 and August 20, 2014. Of those five letters, three were unsigned by the Respondent. None of the five letters was endorsed by the Claimant. The Claimant categorically denied having received any oral or written warnings, including the

three referred to in the dismissal letter. In answer to specific questions from the Tribunal, the Claimant stated as follows:

> "*I had never seen the letters referred to in the termination letter. I was never given any warning letters. I cannot account for the three letters mentioned in the termination letter; I have never seen these letters.*"

The Respondent argued that the verbal warnings were recorded on the Claimant's personal (sic) file. However, the Respondent was unable to produce the Claimant's "personal" file, Mrs. O'Brien having cited a 2015 fire which destroyed some files, thereby accounting for the unsigned letters and absence of proof that the Claimant received these letters. The onus was on the Respondent, who sought to rely on these letters, to show that the letters were issued to the Claimant. The Respondent failed to do so. Any doubt must be resolved in favour of the Claimant.

The Tribunal has taken note of the fact that the Respondent filed its documents ***prior*** to 2015 when the Respondent states that the fire occurred, attaching to the Respondent's Form 2 dated December 12, 2014 and filed on December 15, 2014, the several letters on which it sought to rely. Consequently, the panel accepts the evidence of the Claimant over that of the Respondent.

In the absence of the Claimant's endorsement on the warning letters and of any other evidence that the Respondent did in fact issue these letters to the Claimant, the Tribunal is

constrained to disregard them in determining whether the Respondent warned the Claimant and/or afforded him a reasonable opportunity to improve his performance.

Even if the validity of the warning letters was not in question, the Tribunal would still have concluded that the Respondent failed to give the Claimant a reasonable opportunity to improve his performance.

The last two warning letters purportedly issued to the Claimant were dated eight days apart-the first eight days before the Claimant's dismissal and the second two days before the Claimant's dismissal. No reasonable employer was likely to consider either period to be sufficient, in the circumstances, to enable the Claimant to correct the matters of which the Respondent complained. A reasonable employer might have concluded that this was not a proper case for dismissal of a competent, hard-working, dependable chef, who was considered to be "*a very good employee*", without first affording him a reasonable opportunity to improve his performance.

Compliance with the procedural rules under Part B

The standard disciplinary procedure is more particularly set out in Part B of the Fourth Schedule. Pursuant to Part B, an employer must follow certain steps prior to taking disciplinary action against an employee. The employer must:

i) Set out in writing the alleged conduct of the employee which leads him to consider taking disciplinary action against the employee;

ii) Send the statement or a copy of it to the employee and invite him to attend a meeting to discuss the matter along with his representative, if any;

iii) Meet the employee before disciplinary action is taken;

iv) Meet the employee within seven working days of the transmission of the statement to the employee;

v) Not meet with the employee unless he has informed the employee of his right to have a friend, or shop steward present;

vi) Not meet with the employee unless he has informed the employee of the basis for including in the statement the grounds set out therein;

vii) Not meet with the employee unless the employee has had a reasonable opportunity to consider his response to the complaint; and

viii) After the meeting inform the employee in writing of the decision and notify him of his right to appeal if he is dissatisfied with that decision.

The employee's only obligation is to take all reasonable steps to attend the meeting.

In response to questions from the panel, the Claimant stated that he was greeted at the door of the restaurant at the start of his shift by Ms. Sealy, who directed him to the office, where he was handed his termination letter. He denied having received any statement from the Respondent stating that the Respondent intended to take disciplinary action against him. He was not invited to a meeting to discuss any disciplinary matters against him at any time prior to his dismissal, nor was he invited to bring a friend or trade union

representative to a meeting with the Respondent prior to his dismissal. He also denied having been advised that he had a right to appeal the decision to dismiss him.

Mrs. O'Brien, on behalf of the Respondent, while admitting being aware of the existence of the Act, contended that it was Ms. Sealy's duty "*to deal with employees, so I was not aware of the guidelines*." She denied being aware that an employer is required to take progressive disciplinary action "*because I was not really dealing with those things*."

The Respondent adduced no evidence to show that the procedural requirements which are plainly set out in Part B were observed.

Compliance with the procedural rules under Part C

The Act preserves the right of an employer to summarily dismiss an employee if circumstances warrant that course of action. The only restriction on that right is the requirement that the employer follow Part C of the Act, which sets out modified disciplinary procedures, which are applicable in the case of a summary dismissal.

"1. The employer must

(a) set out in writing

(i) the alleged misconduct of the employee which led to the dismissal;

(ii) the basis for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct; and

(iii) the right of the employee to appeal against dismissal; and

(b) send the statement or a copy of the statement referred to in paragraph (a) to the employee.

Even though the Claimant received a letter advising him of the reasons for his dismissal, that letter contained no indication of the basis for the Respondent's belief that the Claimant was responsible for the preparation of the sub-par meals. There is no reference in that letter to even a cursory inquiry that may have been conducted by the Respondent. In fact, there is no evidence that the Claimant was aware, prior to receipt of the termination letter, that he was being held responsible for the defects in those meals. Further, as stated earlier in these reasons for the Tribunal's decision, the Claimant denied that he was advised in writing of his right to appeal and the Respondent failed to show that he was in fact so advised.

The Tribunal finds that the Respondent failed to comply with Parts A, B or C of the Act and accordingly, the Respondent's decision to dismiss the Claimant was unfair in all the circumstances.

DISPOSITION

Many of the disputes which are referred to the Tribunal for settlement ought not to reach the Tribunal. In every claim filed against him, an employer should carefully review the procedure he followed prior to dismissal to determine whether he complied with the statutory requirements before allowing the matter to proceed to a hearing.

The Act is written in plain English. The disciplinary procedure is clear. So too are the provisions relating to notice. Therefore, employers should have no difficulty fully acquainting themselves with its provisions. No employer should still be pleading ignorance of the Act. Ignorance is not an excuse.

In this case, the Respondent's Director Mrs. O'Brien admitted only vague knowledge of the Act. Even though Ms. Sealy was familiar with the Act, according to Mrs. O'Brien, the Tribunal heard or saw nothing in the Respondent's evidence to suggest that the Respondent observed any of the statutory requirements prior to dismissing the Claimant.

The Respondent's disregard for the Act was also evident in Mrs. O'Brien's communication with the Chief Labour Officer prior to the referral of the matter to the Tribunal for hearing. The Chief Labour Officer reported, and Mrs. O'Brien admitted at the pre-hearing review, that she declined to meet with the Chief Labour Officer with a view to conciliation, preferring instead to refer the matter to the Tribunal for resolution.

Conciliation is made mandatory by section 43(2) of the Act (as amended). If the Chief Labour Officer fails or neglects to discharge his duties as set out in that section, jurisdiction might be a live issue if the matter is thereafter referred to the Tribunal. The Chief Labour Officer must therefore make a good faith effort to settle disputes. The Chief Labour Officer will have discharged his duties, if he sought, and the employer refused, as in this case, to meet for the purpose of attempting to settle the matter.

The Chief Labour Officer is empowered by Section 45 (2) to report to the Tribunal if in any case he "*is unable to effect compliance with any provision of his Act*".

Where an employer refuses to meet with a view to resolving the dispute, the Chief Labour Officer should exercise his power under section 45, and immediately refer the matter to the Tribunal for consideration.

COMPENSATION

It is the opinion of this panel that the Claimant is entitled to compensation in the following sums, whether or not he seeks or is offered reinstatement or reengagement:

In accordance with the Fifth Schedule of the Act, the Claimant, having been employed for more than two, but less than 10 years, is entitled to receive a basic award of 2 ½ weeks wages for each complete year of employment. He is therefore entitled to a basic award of $6,540.00, being $872.00 per week for 2 ½ weeks for three years.

Secondly, he was entitled, in accordance with Section 22 (1) (b) of the Act, as an hourly paid employee, to receive two weeks' notice of termination of his employment, having been continuously employed by the Respondent for more than two but less than five years. The Respondent admitted that the Claimant was given one week's pay in lieu of notice.

Where the notice given in purported compliance with section 22 is inadequate, the Tribunal may, in accordance with section 24(2) order the employer to pay the employee in addition to the outstanding notice, a sum equal to two weeks' wages. The Claimant is

entitled to an additional week's notice and compensation for that period in the sum of $872.00. The orders the Respondent to pay the Claimant compensation for the outstanding notice period in the sum of $872.00 together with the sum of $1,744.00 for its failure to give the Claimant adequate notice.

If the Respondent fails to comply with the order for the payment of the sums of $872.00 and $1,744.00, the Respondent shall also pay the Claimant in accordance with section 24(2)(b) of the Act, four weeks' pay or the sum of $3,488.00 for each month or part thereof that the said sums or any part of the said sums remain unpaid.

The Tribunal may award an additional amount for any benefit which in its discretion the Tribunal believes the Claimant might reasonably be expected to have been entitled to but for his dismissal. On November 20, 2014 the Employment Rights Tribunal requested that the Claimant file his Claim Form. He failed to comply with that request until August 24, 2015, more than one year after his dismissal and nine months after the matter was referred to the Tribunal for determination. The Tribunal declines to exercise its discretion in favour of this Claimant, having regard to his tardiness in pursuing his complaint.

SUMMARY

• Basic award of 2 ½ weeks' pay for 3 years at the rate of $872.00 per week	$ 6,540.00
• Award for inadequate notice	$ 872.00
• Failure to give statutory notice	$ 1,744.00
Total	$ 9,156.00

Compensation is accordingly awarded in the sum of **$9,156.00** to be paid by the Respondent to the Claimant within 28 days of the date of this decision.

_____ _____

Beverley Beckles John Williams

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Kathy-A. Hamblin