



EMPLOYMENT RIGHTS TRIBUNAL

Case: ERT/2014/031

WENDELL STOREY

CLAIMANT

AND

PAYNES BAY RESORT INC. T/A WAVES HOTEL & SPA

RESPONDENT

**DATES: 14th March, 2016; 28th June 2016; 11th July 2016; 7th February 2017;
14th February 2017; 6th April 2017; 23rd January 2018.**

BEFORE: Mr. Omari Drakes, Mr. John Williams, Ms. Beverley Beckles

APPEARANCES: Messrs DeCoursey Eversley and Glenroy Goddard and
Caswell Franklyn for the Claimant

[1] This is a claim of unfair dismissal made pursuant to Section 32 (1) of the **Employment Rights Act - 2012 (the “Employment Rights Act”)** by Wendell Storey (the “Claimant”) against his former employers Paynes Bay Resort Inc. t/a Waves Hotel & Spa (the “Respondent”) following the Claimant’s dismissal on October 15, 2013.

The Issues

[2] The issues to be determined in this case are:

(i) Was the Claimant unfairly dismissed by the Respondent; and if so

- (ii) What is the appropriate compensation to award the Claimant in the circumstances?

The Claimant's Evidence

- [3] The Claimant testified that the Respondent employed him on June 2, 2002 as a night auditor.
- [4] The Claimant stated that on October 14, 2013 the Claimant reported for work at approximately 10:45 p.m. At that time and before he could commence his duties Ms Sandra Blenman handed him an envelope addressed to him. The envelope contained a letter suspending the Claimant with pay pending an investigation (the "Suspension Letter"). The Suspension Letter also indicated that the Claimant was to report for a meeting with Kathleen Gaskin, the General Manager of the Respondent (the "General Manager") and Brenda Taylor, the Human Resources Officer of the Respondent (the "Human Resources Officer") on October 15, 2013 at 12:30 p.m. The Claimant tendered a copy of the Suspension Letter into evidence as **Exhibit WS 1**.
- [5] On October 15, 2013 the Claimant attended at the General Manager's office for the scheduled meeting. The General Manager informed the Claimant that a guest had complained that he was asleep on duty when the said guest came to make a complaint about mosquito bites. The Claimant denied that he dealt with such a guest. The General Manager thereafter asked the Human Resources Officer to read a letter to the Claimant. The letter dated October 15, 2013 was in fact a termination letter (the "Termination Letter"). The Termination Letter begins by setting out a complaint made by a guest that was received on October 10, 2013. The complaint being that during their stay they had what they deemed to be an emergency during the Claimant's shift as Night Manager/Night Auditor and sought the Claimant's assistance. The

Termination letter then states that the Claimant was found asleep in the reception lounge area. The Termination Letter then indicated that:

After investigating, it was confirmed by members of the night team, who are under your management, that it was common practice for you to position yourself in the lounge chairs between the hours of 2am – 5am.

This action displayed by you in your position as the Night Manager is totally unacceptable. It placed the property, our staff and our resident guest at significant risk.

As a result of the above, your employment is hereby terminated effective October 15th 2013.

[6] The Claimant was also presented with a Termination of Services/Lay-Off Certificate dated October 15, 2013 that stated as the reason for termination “Contract Terminated due to Negligence”.

[7] In these circumstances the Claimant alleges that he was unfairly dismissed on October 15, 2013.

The Respondent’s Evidence

[8] In response to the Claimant’s claim the Respondent submitted a number of documents. The documents included:

- (i) An email chain and attachment dated October 10, 2013;
- (ii) Three (3) internal statements given by staff of the Respondent;
- (iii) A copy of the Termination Letter;
- (iv) A copy of the Suspension Letter;
- (v) Various disciplinary documents issued to the Claimant between September 2004 and July 2010.

- (vi) The Claimant's contract of employment dated June 14, 2002 together with the Claimant's Job Description signed as received on June 15, 2002 (the "Contract"); and
- (vii) The Respondent's Handbook signed as received on June 15, 2002.

[9] It appears that the Respondent reproduced the Claimant's personnel file.

[10] The Respondent formally tendered no written or oral evidence, though the Claimant's Attorneys-at-Law provided the Tribunal with draft Witness Statements of Kathleen Gaskin and Brenda Quintyne. To the extent that the Claimant submitted these Witness Statements to the Tribunal, the Tribunal could not properly consider them as evidence submitted by the Respondent. Accordingly, the Tribunal has placed no reliance on these documents.

[11] Based on the evidence submitted, the unanimous finding of the Tribunal is that the Claimant was unfairly dismissed.

[12] We must state here that at the start of this hearing Ms Verla Depeiza Attorney-at-Law acted on behalf of the Respondent. However, during the course of the hearing Ms Depeiza indicated to the Tribunal that she was unable to take instructions from the Respondent. As a result, Ms Depeiza asked to be removed from the record as Attorney-at-Law for the Respondent. Ms Depeiza was thereafter removed from the record.

Reasons

[13] As espoused by the Court of Appeal in **Chefette Restaurants Limited v Harris Civil Appeal No. 11 of 2016**, in determining whether or not the Claimant was unfairly dismissed, the Tribunal:

*...must have regard to four conditions. These are (i) whether the employee has met the criteria in **section 27 (3)** necessary to qualify for the right in **section 27 (1)** not to be unfairly dismissed; if so, (ii) whether, pursuant to **section 29 (1)** and **(2)**, the reason, or principal reason, for the dismissal of the employee, related to the employee's capability or conduct or to some other statutory reason that justifies dismissal; if the reason relates to capability or conduct, (iii) whether the appropriate statutory disciplinary procedures were complied with pursuant to **section 29 (5)**; and if the reason for dismissal relates to reasons other than to the capability or conduct of the employee, or if the reason relates to the capability or conduct of the employee and the employer has complied with the procedural requirements in **section 29 (5)**, (iv) whether the dismissal was fair under **section 29 (4)**.*

Has the Claimant satisfied section 27 of the Employment Rights Act?

[14] Section 27 of the **Employment Rights Act** states that:

- (1) An employee has the right not to be unfairly dismissed by his employer.*
- (2) Subsection (1) has effect subject to the following provisions of this Part.*
- (3) Subsection (1) does not apply to the dismissal of the employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.*

[15] As it relates to the Claimant's length of employment, there appears to be a discrepancy as to the date of the Claimant's employment by the

Respondent. The Claimant's evidence is that he was employed on June 2, 2002 though the Contract sets the date at June 15, 2002. To the extent that the Contract was signed as having been received by the Claimant, and there is no conclusive evidence to show otherwise, the Tribunal finds that the Claimant was employed from June 15, 2002.

[16] The date of the Claimant's dismissal is clearer. The Claimant's evidence and the Termination Letter both show his employment came to an end on October 15, 2013. This is also supported by the documents provided by the Respondent.

[17] The Tribunal therefore finds that the Claimant has met the necessary requirements not to be unfairly dismissed pursuant to Section 27 of the **Employment Rights Act**.

Did the Respondent satisfy its obligation under Section 29?

[18] Section 29 of the **Employment Rights Act** states that:

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show*

(a) *the reason, or, if more than one, the principal reason, for the dismissal; and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) 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;

(b) relates to the conduct of the employee;

(c) is that the employee was redundant, but subject to section 31; or

(d) is that the employee could not continue to work in the position which he held without contravention, either on his part or on that of his employer, of a duty or restriction imposed by law.

[19] Based on the evidence submitted by the Claimant and the information provided on behalf of the Respondent, it is clear that the principal reason for the Claimant's dismissal was negligence. However, the Termination Letter does not make clear what the alleged negligent act was.

[20] In the first paragraph of the Termination Letter it speaks of a complaint made by a guest, who while seeking assistance in a perceived emergency on October 10, 2013 and allegedly found the Claimant asleep in the reception lounge area. However the very next paragraph of the Termination Letter states that the investigations confirmed that it was common for the Claimant to be positioned in the lounge chairs between 2am and 5am. The third paragraph of the Termination Letter states that the action displayed was totally unacceptable and placed the property, staff and guest at risk. The fourth paragraph of the Termination Letter states that the Claimant was terminated effective immediately. It is therefore unclear as to whether the terminable offense was the Claimant being asleep during the October 10, 2013 "emergency" or generally

positioning himself in the lounge chairs between the hours of 2am and 5am. Nevertheless it appears that both scenarios seem to be concerned with the Claimant's conduct. It is therefore a finding of the Tribunal that the Claimant was dismissed for his conduct; conduct being a potentially fair reason pursuant to Section 29 (2) (b) of the **Employment Rights Act**.

[21] When terminating the Claimant for conduct, it was for the Respondent to show the Tribunal that it complied with the requirements of Section 29 (4) of the **Employment Rights Act**. There it states that:

(4) Where the employer has fulfilled the requirements of subsection (1), the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether

(a) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) the employer complied with the rules set out in Part A of the Fourth Schedule.

[22] It is here that the Respondent fell woefully short of the requirements of the **Employment Rights Act**.

[23] Firstly, the Tribunal finds that on the evidence provided, the Respondent did not act reasonably in treating the allegation against the Claimant as a sufficient reason for dismissing him as required by Section 29 (4) (a) of the **Employment Rights Act**. The complaint made by the guest does not identify any employee, far less the Claimant. This is of course grounded on the assumption that the incident complained of did in fact occur or occurred as described by the guests. The evidence against the Claimant was inconclusive and speculative at best.

[24] Further, there is no evidence that the Respondent complied with the requirements of Section 29 (5) of the **Employment Rights Act**. There it states that:

(5) Notwithstanding subsection (1), an employer is not entitled to dismiss an employee for any reason related to

(a) the capability of the employee to perform any work; or

(b) the conduct of the employee,

without informing the employee of the accusation 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.”

[25] The Tribunal takes particular note of the Suspension Letter where the subject reads “Justifiable complaint from a Resident Guests [sic]”. To the extent that the Respondent considered the complaint to be “justifiable” at the time of issuing the Suspension Letter, suggests that guilt was determined before the Claimant knew of the accusation against him and giving him an opportunity to state his case, pursuant to either the Standard Disciplinary Procedures or the Modified Disciplinary Procedures set out in Parts B and C, respectively of the Fourth Schedule of the **Employment Rights Act**. The Tribunal considers this to not only be contrary to Section 29 (5) of the **Employment Rights Act** but also unreasonable pursuant to Section 29 (4) of the **Employment Rights Act**.

[26] For these reason, the Tribunal finds unanimously that the Respondent unfairly dismissed the Claimant. Having found that the Claimant was

unfairly dismissed the Tribunal had to consider the appropriate remedy to be given to the Claimant.

Remedies

[27] Section 33 (1) of the **Employment Rights Act** states that:

(1) Where the Tribunal finds that a complaint under section 32 is well founded, the Tribunal shall

Explain to the employee the orders that the Tribunal may make under subsection (2) and the circumstances in which the orders may be made; and

(a) Inquire of the employee whether he wishes the Tribunal to make such an order.

[28] Pursuant to Section 33 (1) of the **Employment Rights Act**, the Tribunal explained the orders available to the Claimant. Following the said explanation the Claimant indicated that he wished the Tribunal to make an order in his favour. The Claimant also indicated that he was not interested in returning to the employment of the Respondent but preferred financial compensation. Indeed, the Tribunal was made aware that there was a change of ownership in hotel.

[29] It was therefore left to the Tribunal to determine an appropriate remedy for the Claimant. The Tribunal first considered reinstatement and reengagement. However, in light of the circumstances of this case, in particular the Claimant's preference not to return to employment with the Respondent, the Tribunal is of the view that neither reinstatement nor reengagement is appropriate, instead the Tribunal believes that an award for compensation pursuant to Section 37 (1) (a) and the Fifth Schedule of the **Employment Rights Act** would be appropriate.

[30] The Fifth Schedule of the **Employment Rights Act** states that:

(1) In a case to which section 37(1)(a) or (c) applies, the Tribunal shall make an award of compensation, to be paid by the employer to the employee, consisting of the aggregate of the following amounts

(a) a basic award determined in accordance with the rules set forth in paragraph 2;

(b) an amount such as the Tribunal thinks fit in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal;

(c) an amount, not exceeding 52 weeks' wages, where the dismissal was for a reason specified in section 30(1)(c) or, where there was more than one reason for dismissal, one of those reasons was a reason so specified.

Basic Award

[31] The Claimant submitted evidence to show that his gross salary was the sum of **\$33,657.55** for the year 2011. Pursuant to the formula set out at Section 2 (2) of the Fifth Schedule of the **Employment Rights Act**, the Claimant is entitled to the sum of **\$21,351.00** being his weekly wage of **\$647.00** by 3 weeks by 11 being the number of years he was employed (i.e. $\$647.00 \times 3 \times 11 = \$21,351.00$).

[32] Therefore the Tribunal awards the Claimant the sum of **\$21,351.00** as a basic award.

Compensatory award

[33] Having addressed the basic award, the Tribunal must now consider whether it is appropriate to make a compensatory award. This award represents a sum that the Tribunal believes reasonably reflects any benefit which the employee might have had but for the dismissal. Save for these parameters, quantifying this award is discretionary.

[34] A review of common law authorities from other jurisdictions shows that in determining the discretionary compensatory award, a Tribunal should exercise its discretion “judiciously and upon the basis of principle”¹. In exercising its discretion Courts have considered heads of loss including:

- (i) Immediate loss of wages.
- (ii) Manner of dismissal
- (iii) Future loss of wages.
- (iv) Loss of pension rights.

[35] This Tribunal believes that in exercising its discretion in should consider these heads and now does so below.

Immediate Loss of Wages

[36] Pursuant to Section 22 (1)(d) of the **Employment Rights Act**, an employee with 11 years service who is paid weekly is entitled to 6 weeks’ notice of dismissal. The Tribunal is of the view that a true representation of immediately loss wages must be reflective of the Claimant’s net wages (after deductions for National Insurance and PAYE). In the instant case the Claimant’s net weekly wage was **\$647.00**. Had the Defendant followed the correct procedures and dismissal of the Claimant was thereafter determined to be the appropriate outcome, the Claimant would have been entitled to no less than 6 weeks’ notice of dismissal. It is in this context that the Tribunal awards the Claimant the sum of **\$3,882.00** under this head.

¹ Norton Tool Co Ltd v Tewson [1972] EW Misc 1

Manner of Dismissal

[37] Under this head the Tribunal believes that it must consider if the manner by which the Claimant was dismissed could give rise to any risk of financial loss at a later stage by, for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal. The Claimant has not provided evidence that would allow the Tribunal to make an award under this head and as such no consideration has been given to the manner by which the Claimant was dismissed in calculating the appropriate award.

Future Loss of Wages

[38] The Claimant has testified that he has been looking for a new job since he was dismissed. To this end he indicated that he attended interviews but as at the time of giving evidence had not been successful in his efforts. The Claimant also testified at a hearing on June 28, 2016 that it was his 65th birthday. Therefore at the time of his dismissal the Claimant was 63 years old. The Tribunal is of the view that it is more likely than not that the Claimant's age has affected his ability to find comparable employment.

[39] The Tribunal therefore believes that the Claimant has lost future wages as a result of his unfair dismissal. In the circumstances the Tribunal awards him six (6) months' wages under this head; six (6) months' wages being the sum of **\$14,916.79**.

Loss of Pension Rights

[40] The Claimant has not provided evidence that he was entitled to receive a pension from the Respondent and in the circumstances there has been no award made under this head.

Summary

[41] The sum of the award under these heads amounts to **\$18,798.79** and this Tribunal therefore awards the Claimant the sum of as a compensatory award.

Conclusion

[42] In conclusion, the Tribunal finds that the Claimant was unfairly dismissed and as a result of said unfair dismissal is entitled to the sum of **\$40,149.79** comprising of a basic award in the sum of **\$21,351.00**, immediate loss of wages in the sum of **\$3,882.00** and future loss of wages in the sum of **\$14,916.79** as financial compensation.

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R. Omari Drakes
Deputy Chairman

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John Williams
Employer's Representative

.....
Beverley Beckles
Employee's Representative

Date: