

**IN THE MATTER OF**  
**THE EMPLOYMENT ACT 2000 (The Act)**  
**BEFORE THE EMPLOYMENT AND**  
**LABOUR RELATIONS TRIBUNAL (THE TRIBUNAL)**

**BETWEEN**

**CHARMAINE ORTEGA AND PAUL ADIQUE – THE COMPLAINANTS**

**AND**

**( ) – THE EMPLOYER**

Hearing Dates: 6<sup>th</sup> June 2023

Written Summation Deadline: 13<sup>th</sup> June 2023

Tribunal Members: The Hon. Derrick V. Burgess, JP, Chair  
Mrs. Judith Hall-Bean, Deputy Chair  
Mr. Eugene Creighton, Tribunal Member

Present via Zoom: Ms.  
Ms. Charmaine Ortega and Mr. Paul Adique  
Mr. Eugene Creighton, Tribunal Member

The dispute is filed under Section 37(4) of the Act.

The Complainants are seeking the following:

1. The remaining five (5) months of wages until the expiration of their work permits on 4<sup>th</sup> August 2023.
2. Five (5) days' vacation pay after the completion of the first six (6) months of employment.
3. Overtime pay and public holiday pay.

At the commencement of the Hearing, the employees and employer were given the opportunity to reach an agreement or settle the dispute – this effort failed.



Home has seven (7) beds and is located at :

**EMPLOYER -**

**TT**

*The Employer, TT, presented her case.*

She stated that the employees were given ample time to learn their duties and that their skill set did not match their résumé. She also stated that they had no knowledge of a balanced meal, and that PA was unable to manage his time.

She stated some residents complained about their meals and that she was very patient with them, in that she hired another person to assist.

She alleged that there were injuries to residents and even suggested that they work elsewhere.

TT presented documentation of complaints dated 12<sup>th</sup> May 2022 and also a 'medical incident report form' in which one (1) particular resident had fallen four (4) times. On one (1) occasion, this same resident was taken to hospital. There were no injuries to this resident.

Also presented was an employee evaluation dated 30<sup>th</sup> October 2022, for PA - under the scoring system 71-90 exceeds standards, 41-70 meets standards and 0-40 needs improvement. PA scored 56. CO scored 71.

During evaluation, TT informed them of areas that needed improvement. She stated to the Tribunal that she had confidence in CO but had issues with PA. CO asked TT if PA be given another chance. This was confirmed by CO. TT stated she even changed PA's shift because the AM shift would be less onerous on him.

TT felt aggrieved when she was told by CO that she was six (6) months pregnant, as this will cause some adjustments.

TT stated that CO did not show up to work on five (5) occasions until hours later – refer to document, dated 31<sup>st</sup> May 2023. In this document, TT lists from 1 to 8 reasons:

1. For not providing a Statement of Employment
2. For not providing itemized pay statements
3. For not providing overtime pay
4. For not providing rest days
5. For not providing public holiday pay
6. For not providing vacation pay
7. Reasons for termination

At this point, the Tribunal panel informed TT that this is a violation of the Act, and in accordance with section 6(7), she will be liable to a civil penalty.



TT stated that PA and CO wanted to work holidays; she stated to them that she cannot afford to pay the holiday rates and that CO stated, "It's ok. We can work the same as a regular day." PA and CO refuted this. TT said she received via WhatsApp at 8pm, on 7<sup>th</sup> February, that neither of them would be coming to work on 8<sup>th</sup> February because they must appear at the Government Immigration Department, on the morning of the 8<sup>th</sup>, and did not know when they will return. TT stated, "I pleaded with them that one of them must show up to relieve me, as I have no other employees. They ignored my pleas. I did not hear from them as to when they will be returning. I was able to get some help for two (2) days, which would be 9<sup>th</sup> and 10<sup>th</sup> February 2023."

On the morning of 9<sup>th</sup> February, CO reported to work, and TT told CO that she hired someone for two (2) days because she did not know what her intentions were as she had not heard from her.

PA showed up for work for the 2pm shift – that's when PA received his termination letter.

#### **EMPLOYEES - CHARMAINE ORTEGA, CO AND PAUL ADIQUE, PA**

Employees, CO and PA were told on 1<sup>st</sup> February 2023, that they were being terminated on 31<sup>st</sup> March 2023. TT indicated that the date is incorrect and was meant to be 30<sup>th</sup> April 2023.

CO and PA stated that TT always complimented them on doing a great job and on/in June 2022, that TT said she was going to renew both for a 1-year standard work permit and TT stated that they both passed their evaluation.

TT gave them courses to do, as it was needed to get registered in Bermuda. Secondly, the residents always complained when TT cooked lunch. They made the point that when residents complained about TT, that she said they were 'playing' and when it's their cooking, it's true. Also, the residents are always complaining because it is almost always chicken. Even families know this as they tell them, and that's why families bring food for the residents.

TT told both CO and PA of the dissatisfaction she has and residents of PA and CO's performance and interaction with them.

The Employees stated that TT only started to verbalize her dissatisfaction after she started to terminate us.

The question from PA and CO is why the residents are always looking for PA and saying that they want PA with them, even when TT is present. Residents saying 'Paul is the best'; we want Paul here, verbally to other staff in the rest home.

When TT was informed of CO's pregnancy, she said she will not send CO back to the Philippines and to continue her pregnancy in Bermuda. CO worked until 20<sup>th</sup> September 2022 and gave birth 22<sup>nd</sup> September 2022.



## **Their Reply – Residents Injured**

The residents were on a field trip to St. George's on 1<sup>st</sup> January 2023. On the way back, they stopped at Bailey's Ice Cream Parlour to buy residents food to eat. PA asked if anyone needed to go to the toilet. Before PA left the bus, he reminded the residents and the bus driver not to leave the bus. As PA assisted the resident that needed to go, PA asked again if anyone needed to use the toilet before he ordered their food. No one needed to go. When PA returned, he noticed one (1) resident is kneeling on the ground. PA asked why he is on the outside and on the ground. The resident said the bus driver helped him off the bus. PA then saw the bus driver walking to the bus – PA notified the administrator of what happened, and TT said the bus driver denied it, and said PA left the resident in the middle of the road. PA suggested to TTT that she see CCTV for the truth.

The resident was checked out at the hospital – no injuries as per the hospital report. PA and CO want to make it clear that “they never hurt the residents even once.”

Another incident – A resident wanted to use the phone and 10pm. TT always said to not let them use the phone, especially during nights as they can disturb others; therefore, PA refused the resident's request. The resident slapped PA in the face. PA kept his composure and reported the incident to TT. TT came and dealt with the resident.

When PA started working at [redacted], he worked unsupervised, no one to show him the routine for two (2) weeks. On one (1) occasion, PA asked his coworker can he leave at 1pm due to back pain. The coworker messaged TT, who did not respond until 1:30pm and PA worked until 1:45pm – he left 15 minutes before his shift ended.

PA asked TT many times for a day off. Just to clarify, we, PA and CO, only had one (1) day off which was Bermuda Day. We were never asked if we wanted to take a day off on holidays and we never stated to TT that we would work for regular pay. This was confirmed by TT – not receiving holiday pay.

When we showed up for work, TT told us that she had hired someone to replace us because she assumed we quit. So she called Immigration and informed them we had quit, which was not true. Also, we called Immigration and the Immigration Agent/Officer said they never received a call from TT.

TT called on 10<sup>th</sup> February and asked if we will continue to work in the [redacted] after receiving an email from the Department of Workforce Development.

PA and CO commenced employment with [redacted] on 12<sup>th</sup> May 2022 until 7<sup>th</sup> February 2023.

When CO reported to work on 9<sup>th</sup> February 2023, she was not allowed to commence work, as was PA. This can be viewed as a lock out.





## DELIBERATIONS

1. The employees, PA and CO, commenced employment with [REDACTED], on 12<sup>th</sup> May 2022.
2. The Employer, TT, has listed several complaints against the complainants, as per the termination letter not dated. PA received his on 1<sup>st</sup> February 2023 and CO on 9<sup>th</sup> February 2023. One such complaint of note was 'inability to keep residents safe'. Evidence presented via reports dated 1<sup>st</sup> and 6<sup>th</sup> August 2022, 7<sup>th</sup> November 2022 and 1<sup>st</sup> January 2023, of falls pertaining to same resident (CZ). The complainant, PA, refuted all and on one occasion requested TT to look at CCTV and the truth will be told. The Tribunal is persuaded to accept the version of the complainant.

Older people are prone to falls – surveys suggest 80% of the falls occur in the bathroom. The number one reason why the elderly fall is age related loss of muscle mass.

There are ways to prevent or cut down the number of falls, such as keeping physically active, wearing sensible shoes, removing home hazards, better lighting and using assistive devices, etc.

It is my opinion that one fall is one fall too much.

TT's complaint against CO states 'inability to complete probation in a timely manner'. The probation period was for six (6) months – expired on 12<sup>th</sup> November 2022. An employee evaluation was held 29<sup>th</sup> October 2022 – the employee score was at the upper level which exceeds the expectation of the evaluation.

TT also states, 'inability to register with the Bermuda Nurses Council in a timely period'. The Tribunal have been informed that in order to be employed as a Certified Nursing Assistant (CNA), one must be registered - we would think that this is also a responsibility of management – to see this is carried out in the time required.

3. In relation to the remedy sought, the employer, TT, has admitted to not providing a statement of employment, itemized pay statements, no overtime pay, no rest days, no public holiday pay and no vacation pay. For a period, there was no health insurance.

The employer, it would appear, thinks the Immigration form, section 6, is the actual statement of employment – not correct. As you will see and read at the top, just below the words Statement of Employment' on the Immigration form, are the words '*refer to section 6 of the Employment Act 2000 for additional details to insert*'.

The work permit is not a contract of employment and the employee can be terminated as per the Act.



In regards to not paying overtime, the Tribunal has not been presented with any documentation by both parties – employer and employees, agreeing to working extra hours at straight pay.

The Tribunal will state that an employer can terminate an employee for unsatisfactory performance, provided the correct process is followed in accordance with the Employment Act.

## **THE TRIBUNAL'S DECISION – DETERMINATION OF AWARD**

The Employment Act 2000 states:

### *Conditions of Employment Part II*

#### *Statement of Employment*

*6(1) Not later than one week after an employee begins employment with an employer, the employer SHALL give to the employee a WRITTEN Statement of Employment, which shall be signed and dated by the employer and employee.*

*6(7) An employer who contravenes this section shall be liable to a civil penalty as may be imposed by the manager of the Tribunal.*

Therefore, the Tribunal has imposed a civil penalty of \$250.

*44M(1) Where a person contravenes a provision of the Employment and Labour Code for which a civil penalty is liable to be imposed, the Tribunal may, subject to this section, impose a civil penalty not exceeding \$10,000 as the Tribunal considers APPROPRIATE for each such contravention.*

*(3) Where the Tribunal proposes to impose a civil penalty on a person, it must give the person notice of:*

- a. The amount of the penalty*
- b. The reasons for imposing the penalty, and*
- c. The right to make representations to the Tribunal within seven (7) days of the date of such notice.*

We also find that such behavior of management to PA and Co amounted to constructive dismissal. Therefore, the award is as follows:

1. In accordance with section 20 (1) (c) four (4) weeks pay in lieu of notice equals:

\$18/hour x 40hours = \$720 per week

Paul Adique: 4 weeks x \$720/week = \$2,880

Charmaine Ortega: 4 weeks x \$720/week = \$2,880



2. Five (5) days' vacation pay:

Paul Adique = \$720

Charmaine Ortega = \$720

In accordance with section 12(1A) of the Act

3. Public holiday pay in accordance with section 11(3)(6) (4A):

During their tenure from 12<sup>th</sup> May 2022 until 7<sup>th</sup> February 2023, there were nine (9) public holidays. As they were paid STRAIGHT TIME for the days worked, they are owed ½ day or four (4) hours for the nine (9) days worked:

Paul Adique: 9 days x 4 hours = 36 hours x \$18 = \$648

Charmaine Ortega: 9 days x 4 hours = 36 hours x \$18 = \$648



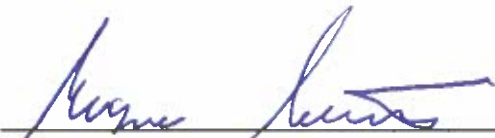
Dated this 20<sup>th</sup> day of June 2023



Chair - The Hon. Derrick V. Burgess, JP, MP



Deputy Chair - Mrs. Judith Hall-Bean



Tribunal Member - Mr. Eugene Creighton

