

**IN THE MATTER OF A COMPLAINT UNDER THE EMPLOYMENT ACT 2000 BEFORE THE
EMPLOYMENT & LABOUR RELATIONS TRIBUNAL (the 'Tribunal')**

BETWEEN:

Miss Xxxxx

Complainant

AND

Mrs. Xxxxx

Respondent

DECISION

Date of Complaint: November 20th 2023
Date Investigation Completed: December 21st 2023
Date of Referral: February 2nd 2024
Date of the Hearing: July 19th 2024

Tribunal Panel Members: Ms. Kelly Francis, Chairman
Mrs. Yolanda Outerbridge, Tribunal Member
Mrs. Judith Hall Bean, Tribunal Member

Present: Ms. Xxxxx (via WebEx), Complainant
Ms. Xxxxx, Translator for Complainant, via Webex
Mrs. Xxxxx, Respondent
Ms. Xxxxx, Representative for Respondent
Mr. Bruce Swan, Representative for Respondent
Summer Student accompanying Bruce Swan

The Complaint filed under The Employment Act 2000 (The 'Act') pursuant to Section 37 (4) of the Act.

Background

Further to the hearing held on July 19th 2024, (the "Hearing") between Ms. Xxxxx (the "Complainant") and Mrs. Xxxxx(the "Respondent"). The Complainant is seeking compensation for unauthorized deductions; pay in lieu of notice, payment for time worked without pay, payment for contracted hours short fall and payment for lost wages pursuant to Sections 8.1 a & b, 8.2 and 19.4 of the Employment Act 2000. Additionally she is claiming she was the victim of bullying and harassment which violates section 10.b.

The Hearing

Prior to the start of the hearing, the parties were invited to try to reach an independent agreement but were unsuccessful. Neither the Complainant nor the Respondent presented witnesses in support of their claim or defense. The Complainant through her translator, outlined her history of events leading to the dismissal by the Respondent within the probation period. The Complainant contends that she was employed at a rate of \$18.50 hour for 61 hours per week and that was the basis upon which she accepted the role. The Complainant then confirms that during a May 2023 phone call with the Respondent in advance of her arrival, she was told the salary would need to be amended to ensure she met the new minimum wage of \$16.40 and she would now receive \$2,300.00 net per month. The Complainant states that she commenced employment on August 28th 2023 under the original contract terms and was not presented with a new contract with the amended rate until September 25th 2023. This new contract had less favourable terms than her original Statement of Employment. The new contract had a rate of \$16.40/ hour for working 46 hours / week. The Complainant states she did not appreciate that her number of hours were being reduced from 61/week to 46/week and there was pressure to sign the contract without having time to review the contents with a translator. She further states, she was advised repeatedly that there would be no deductions from her salary and she believed the Respondent was covering the costs of social insurance and health insurance in full as that is what had been told to her.

The deterioration of the relationship did not appear to be disputed by either party. The Complainant however felt strongly that the husband of the Respondent was a key factor and exhibited a level of anger and hostility towards her and her partner which she believed classified as bullying. Although the Complainant was hired to be a live in care giver, after discussions with the Respondent, she made the decision to live out (September 30th 2023) but continued to work her hours as scheduled.

On October 22nd, 2023 the Respondent and her husband left for vacation and the Complainant returned to the house and was the sole caregiver, providing 24/7 care for the entirety of their absence. Following their return on October 30th, 2023 the Complainant states the relationship worsened and she was ultimately terminated on November 11th 2023. The Complainant further stated that a) she did not receive additional compensation for the vacation coverage, b) she did not receive a probation midpoint assessment and c) she did not receive any documentation to support the termination.

The Respondent explained that as the Complainant had sums owing to her for the balance of her plane ticket, she waived that debt rather than paying her directly. She also states that the Complainant became increasingly aggressive and made direct threats towards her husband which for her was what led to the decision to terminate her employment. The Respondent did stress however that based on a final discussion with the Complainant, the two were in complete agreement regarding the need for the employment relationship to end and the termination should not have been a surprise. The Complainant denies that the termination decision was reached by mutual agreement.

With regards to the change in contracted terms, the Respondent states that the Complainant was made aware that they could not afford to employ her for the 61 hours/week and reduced the hours to 46 hours/week shortly after she started. The Tribunal notes that with the assistance of the Labour Relations Officer, the short fall between the hours worked and hours paid during her first two weeks of employment has been paid. The Respondent explained that at no time during the Complainants employment was she paid more than \$16.40/hour and does not agree that the Complainant had any reason to expect to be paid \$18.50/hour.

When the Respondent issued the new contract on September 25th 2023, it clearly stated that the hourly rate was \$16.40 and that the Complainant would pay 50% of the costs for both social insurance and health insurance. The Complainant states that the Respondent did not allow her to properly review the contract with the help of a translator and pushed her to sign which she did on September 26th 2023.

Of considerable concern to the Tribunal is the evidence presented in the form of a copy of the Statement of Employment page extracted from the application submitted to the Department of Immigration. The page is signed by both the Respondent and the Complainant as of May 1st 2023 with an amended signature on August 17th 2023 and, the salary has been amended from \$1150/ biweekly to \$18.50 per hour. Despite this change being initialed seemingly by the Respondent, she strongly denies that this is her signature. The translator for the Complainant who at the time was preparing the application for submission also denies making the change or signing the form

on behalf of the Respondent. It is noted that both the Respondent and the Complainant met with the Translator for the Complainant in person to finalise the immigration application and sign off where signatures were required.

While the Complainant and the Respondent appear to be in agreement that while the relationship began well and all parties enjoyed a close relationship, the situation soured and the termination occurred. The two accounts differ greatly however with respect to the understanding around what compensation was promised and the reasons behind the decision to terminate.

The Respondent does admit to failing to hold a mid-point probation meeting and not immediately providing a statement of termination, explaining that this was her first time employing anyone and she was not aware of the requirements and did not have anyone to advise her of what actions to take.

Deliberations

The Tribunal have heard the representations from both Parties and considered reasons given by the Complainant to support the conditions of the Employment Act 2000 as outlined below.

1. Section 19.4 - Probation Period states:

During the probationary period (including any period of extension under subsection (3)), a contract of employment may be terminated without notice—

- a) by the employer for any reason relating to the employee's performance review, performance, conduct, or operational requirements of the employer's business; or*
- b) by the employee for any reason.*

- The Tribunal was not persuaded by the Complainant that she is due any payment in lieu of notice as she was within her probation period at the time of termination.

2. Section 8.1 a & b - Unauthorised deductions:

An employer shall not make a deduction from an employee's wages unless—

- a) the deduction is required or authorised to be made by virtue of this or any other enactment, a collective agreement or a provision of the employee's contract, or by order of any court or tribunal; or*
- b) the employee has previously signified in writing his agreement or consent to the making of the deduction.*

- The Tribunal was persuaded that the Complainant commenced employment believing her rate of pay was \$18.50/hour and she would not be required to contribute towards the costs of health insurance or social insurance.
- The Tribunal was persuaded that the Respondent violated Section 6 of the Employment Act by presenting two Statements of Employment to the Complainant with differing terms and conditions.
- The Tribunal was not persuaded that the Complainant did not understand the terms outlined in the new employment contract which she signed on September 26th 2023 which clearly showed a wage of \$16.50/ hour for 46 hours work per week and shared deductions.
- The Tribunal was further persuaded that the Complainant understood the terms of employment as she does not deny having discussions with the Respondent with respect to the reduction in hours as a means for them to manage the costs associated with her employment and, adhered to the work schedule as outlined in the September contract.
- The Tribunal also notes that based on hours recorded on the Complainant's payslips, at no time during her employment did she work or receive pay for 61 hours/week.
- The Tribunal was persuaded that the Complainant should not have been deducted for the costs associated with Belco (September 23 payslip), Health Insurance or Social Insurance (all payslips).

3. Section 8.2 - Unauthorised deductions:

Where the total amount of wages paid on any occasion by an employer to an employee is less than the total amount payable on that occasion, the amount of the deficiency shall be treated as a deduction for the purposes of subsection (1).

- The Tribunal was persuaded that for the period between August 28th – September 25th 2023, the Complainant should have been paid \$18.50/hour.
- The Tribunal was also persuaded that between September 11th - September 25th 2023, prior to the new contract coming into effect, that the Complainant should have received a rate of \$18.50 / hour rather than \$16.40/hour.
- The Tribunal was satisfied that the arrangement between the Complainant and Respondent with respect to the voiding of sums owing to the Respondent for the plane ticket cost was a mutually agreed arrangement.

4. Section 10.b - Employer to provide policy statement against bullying and sexual harassment

a) In this section— “bullying” means the habitual display of offensive behaviour intended to harm, intimidate, humiliate, undermine or coerce a person or group of employees and includes, but is not limited to, ostracising, ridiculing, shouting at, threatening, and verbally abusing a person or group of employees; and “sexual harassment” includes any one or more incidences of any of the following— the use of sexually suggestive words, comments,

jokes, gestures or actions that annoy, alarm or abuse a person; the initiation of uninvited physical contact with a person; the initiation of unwelcome sexual advances or the requests of sexual favours from a person;

- The Tribunal was not persuaded the Complainant experienced any form of bullying while employed by the Respondent. The Tribunal does note however that the Respondent failed to include the above statement in her employment contract.

Determination and Order

The Tribunal awards the Complainant the following:

- (a) **\$497.00** for 22 hours pay for the period between September 11th – 25th 2023 representing 2 hours per day at \$18.50/hour which the Complainant did not receive prior to commencing the new contract at 46 hours/ week on September 26th.
- (b) Reimbursement in the amount of **\$143.68** for the social insurance deductions (paystubs PY00001 and PY00002) prior to the new contract coming into effect on September 26th
- (c) Reimbursement in the amount of **\$119.00** for the Belco deduction shown on paystub PY00002.
- (d) **\$90.39** which represents the difference between the straight time pay received for the September 2nd holiday (Paystub PY00001) and the time and a half which the Complainant should have received based on a wage of \$18.50/hour.

Total Award: \$850.07

The Tribunal also notes that while seemingly unintentional, the Respondent violated several immigration policies as they relate to the employment of live in carers and cautions her to seek appropriate and reputable advice in the future to avoid making similar errors in the future.

The Parties to this hearing are reminded that the Determination and Order of this Tribunal is binding. Any party aggrieved may however appeal to the Supreme Court of Bermuda on a point of law.

DECISION

Dated this 14th day of August 2024

Ms. Kelly Francis, Chairman

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Mrs. Judith Hall Bean, Tribunal Member

Handwritten signature of Judith Hall Bean in black ink, written over a horizontal line.

Mrs. Yolanda Outerbridge, Tribunal member

Handwritten signature of Yolanda Outerbridge in black ink, written over a horizontal line.

