

**THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL**

**DISPUTE FILED UNDER**

**EMPLOYMENT ACT 2000 (the "Act")**

**PURSUANT TO PART VA SECTION 44B**

**CLAIMANT:**

**RESPONDENT:**

**HEARING DATE:            June 28, 2024**

**DETERMINATION & ORDER**



**Members of Tribunal:** Edward Ball Jr., Chairman  
Derrick Burgess, Deputy Chairman  
McKeisha Smith Tribunal Member

**Tribunal Hearing** June 28, 2024

**Places:** Department of Labour  
23 Parliament Street  
Hamilton HM 12.

**CLAIMANT'S Matters of the Dispute:**  
Section 6 Statement of Employment  
Section 7 Itemised Pay Statement  
Section 8 Unauthorised deductions  
Section 9 Overtime  
Section 19 Probationary Period

#### **AUTHORITY TO HEAR THE MATTER**

1. The Chairman reaffirmed the Tribunal's commitment to a fair and just hearing. He outlined the points to be considered by the Employment and Labour Relations Tribunal (" the Tribunal"), emphasising that the Tribunal shall regulate its proceedings as it sees fit under **Schedule 2 (20) of the Employment Act 2000 ("the Act")**. As stated at the Directions Hearing of January 30, 2024, there was to be no secret taping or cellular phone recordings of these proceedings without the permission of the Tribunal, ensuring the integrity of the process.



2. In the Directions Hearing, the Parties were offered the opportunity to meet without the Tribunal's assistance, engage in meaningful dialogue, and attempt to reach a Settlement Agreement to their dispute. In its commitment to facilitating a resolution, the Tribunal encouraged both parties to engage in a Settlement discussion. However, the Employer did not wish to participate in this process. Therefore, both Parties agreed the matter should be settled at the scheduled substantive Tribunal.
3. At the substantive Tribunal of June 28, 2024, the Chairman allowed the parties to discuss and engage in meaningful dialogue without the Tribunal's assistance to reach a Settlement to their dispute. The Employer declined.
4. The Tribunal emphasized its right under **Section 44D Sections (1)(a)** to obtain added documentation and electronic and video footage, and **Section 44D1(b)** to require anyone to appear before the Tribunal to give evidence.

#### **Section 44E Power to Exclude the Public**

5. The Tribunal referred the Parties to **section 44E**, which provides that, unless both parties consent, the public or any press representative may be excluded where the Tribunal considers it necessary or desirable to protect the parties' privacy to a Hearing.
6. The Parties said they had no objection to a public hearing.

#### **Section 44F Notification and Publication of the Award**

7. The Chairman reminded the parties of the legal requirement of **section 44F(3)** and that the Parties should return their completed documents to the Labour Relations Officer.
8. Where the Statement of Employment is silent, then the **Employment Act 2000** prevails, as noted in **Part 1 Introduction Section 2(3) of the Act**.



## **SUMMARY OF SUBMISSIONS**

### **Employee's Employment History**

9. The Claimant was granted a Bermuda Worker and Entry Permit as a Nail Technician with the Respondent on May 31, 2023 and commenced employment on August 18, 2023.
10. The Claimant's Statement of Employment ("SoE") outlined the Nail Technician's duties and functions and was signed on August 23, 2023, until her termination on October 11, 2023.
11. The Claimant, at all material times, was on probation from August to October 2023.

### **The Claimant's Arguments of the Dispute Presented to the Tribunal**

12. The Claimant avers that the Respondent wrongfully/unfairly dismissed her before the completion of her probation and further that:
  - (a) The Claimant initially reported to the Department of Labour ("DoL") that there was no midpoint review watermark probationary performance report within 45 days of her 90-day probationary period.
  - (b) that the Claimant was not paid the statutory Minimum Wage upon the commencement of her employment on August 18, 2023, as stipulated by the **Minimum Hourly Wage Order 2023** that came into force on June 1, 2023.
  - (c) The Claimant argued that the Respondent owed her unpaid Overtime ('OT') at the applicable overtime rate instead of straight time.
  - (d) The Claimant professed that if she was underperforming, being disrespectful as a Nail Technician to the Company's manager and being late for her customers'





appointments, the Claimant affirmed that there were no formal written warnings of any bona fide Customer complaints.

(e) The Claimant avowed that the incidents of Bullying and Harassment by the Manager, \_\_\_\_\_, and the Proprietor, \_\_\_\_\_, occurred up to the time of her termination on October 11, 2023.

#### **The Respondent's Position to the Claimant's Dispute**

13. The Respondent's position was that the dismissal of the Claimant was fair. The Respondent exercised his rights of dismissal contained in the Claimant's SoE and explained in the Respondent's letter of October 11, 2023, where:
  - (i) The Claimant's actions of making unprofessional comments/remarks to staff displayed ill behaviour towards the \_\_\_\_\_ Manager and Proprietor;
  - (ii) the Claimant refused to sign her mid-term probationary performance review dated October 8, 2023;
  - (iii) the accusation that the Proprietor stole money from the Claimant's lodging was untrue;
  - (iv) There was unauthorised videotaping by the Claimant of the \_\_\_\_\_ Proprietor and another member of \_\_\_\_\_ staff entering the Claimant's apartment to remove items from her apartment.
  - (v) The Respondent declared that \_\_\_\_\_ had justifiable reasons for entering the Claimant's apartment and gave prior notice to the Claimant.
14. \_\_\_\_\_ affirmed that the Claimant was paid according to the **Minimal Hourly Wage Order 2023**, all monies for OT were paid to the Claimant, and there were no unauthorised deductions from the Claimant's wages.
15. The Respondent denied that the Claimant was bullied and harassed by himself and the \_\_\_\_\_ Manager.
16. The Respondent stated that the Claimant was not entitled to any compensation award or notice pay for this fair dismissal.



**Claimant's Oral argument of no forty-five (45) Mid-term Performance Review**

17. The Claimant and the Respondent acknowledged the statutory requirement of a forty-five (45) days midpoint (*one-half*) Probationary Performance Review per the Act. This review is crucial to the probationary period, allowing both parties to assess the Claimant's performance and make any necessary adjustments. The Respondent had characterised the mid-point Probationary performance review as a 7-week review.
18. The Respondent stated that on September 28, 2023, the Manager verbally requested the Claimant to attend a 45-day probationary performance Review and said she would not participate in any probationary performance review unless it were held in the presence of a Labour Relations Officer from the Department of Labour ("DoL").
19. The Tribunal asked the Claimant to explain why she disobeyed the Manager's directive to attend the midpoint Probationary Performance Review exercise. If the Claimant disagreed with any of the 45 days probationary performance scores assigned by the Manager, the Claimant had the right to provide a written documented response to each performance indicator with any proof to counter the low-performance review score (or any score) suggested by the Manager.
20. The Claimant directed the Tribunal to several 5-star review rating reports from a few of her clients. From August to October 2023, the Claimant was never told her nail technician skills were below standard.
21. The Claimant disagreed that her performance was too poor to warrant her dismissal on October 11, 2024, or that she should be dismissed for exercising her rights to privacy in her accommodation.
22. However, under oath, the Claimant acknowledged a midterm review, which she refused to sign. The midterm review came after the Claimant met with DoL. The Claimant did not attend the Oct. 1, 2023 meeting; the meeting was held on Oct. 8, 2023.



**Dispute on whether Overtime was owed to the Claimant**

23. The Claimant stated the Respondent owed her unpaid Overtime ("OT") at the applicable overtime rate instead of straight time.
24. However, under examination, the Claimant was paid the statutory Minimum Wage monies owed to her and all at the applicable Overtime rate based on financial accounting summary. The Claimant also signed the written summary of weekly pay slips, which formed confirmation and agreement with Inlet's accounts documents.

**On the Matter of the Respondent moving the Claimant's personal belongings**

25. The Claimant stated that she had to work on Saturday, October 7, 2023, when she was told to move her "stuff" from her Inlet apartment's kitchen. The Claimant also averred that the Proprietor entered her apartment, moved the stuff from the kitchen and placed the goods outside the apartment. The Proprietor entered the Claimant's apartment a second time and was seen carrying a black bag as he exited her apartment.
26. The Claimant was prepared to move her personal belongings at the end of her shift or on her day off on Saturday, October 7, 2023.
27. The Claimant also stated that her "money" was missing, and when she attempted to search for the money, she was prevented from entering the kitchen she was using as the door was screwed tight, preventing entry. She called the Police again and submitted a written police report.
28. The Claimant videotaped the Proprietor and another worker on Monday, October 9, 2023, entering her apartment to move her belongings. The Claimant called the Police and the Landlord and Tenant Office to lodge formal complaints against the Proprietor.

**Respondent's Response to Moving the Claimant's personal belongings**

29. The Respondent agreed that he and another member of staff entered the Claimant's apartment, but only the kitchen area, which was in another room separated by a door that could be locked.



30. Regarding the Claimant's Police complaint, the Respondent stated that no charges were forthcoming against [redacted] as the Police dismissed the matter.
31. The Respondent shared no further details on the Claimant's complaint to the Landlord and Tenant Office.

#### **Tribunal Discussions on the Statutory Probationary Requirements**

32. The Tribunal noted that the Respondent's depiction of 7 weeks, week 10, and 3 months written on the Inlet 3-month Probationary Review form was incorrect.
33. The period for the statutory probationary reviews for [redacted] workers was **45 or 90 days**.
34. The Tribunal noted that [redacted] Department of Immigration Work Permit and Entry Permit application in *section 6 paragraph 9* stated the probationary period was **six (6) months and not three (3) months** noted in the Claimant's SoE dated August 23, 2023.
35. The Respondent did not explain the discrepancies between the two different probationary periods for the Claimant's performance review noted in paragraph 34.
36. Contrary to the new provision of **Section 19(2) of the Act 2000** required after the legislation's amendment on June 1, 2021, the Employer shall conduct a mid-point probationary performance review (within 45 days). The Respondent carried out a midpoint review of the Claimant's performance per **the Act**.
37. Because there was no rebuttal documentation from the Claimant and no signature of the Claimant affixed to the [redacted] on October 8, 2023, the 45-day probationary review, the Employer's 45-day probationary performance review record was legitimate. It formed the basis for the Claimant's dismissal for performance and conduct.
38. The DoL's Labour Relations Officers were ineligible to be present during the Claimant's midpoint probationary performance review.





**The Tribunal discussed the Proprietor entering the Claimant's Lodging without her presence.**

39. The Tribunal was disappointed that the Respondent Proprietor (the property owner) entered the Claimant's lodgings without her presence. The Claimant's tenant rights require any landlord to abide by giving prior notice to enter the tenant's rented accommodations with the agreement of the Tenant unless it was an emergency such as but not limited to a fire or robbery. The Respondent stated he required the apartment with the kitchen being set by the Claimant for as a rental unit.
40. The Claimant's adverse reaction to the Proprietor entering her apartment, submitting the Police reports, submitting the Landlord and Tenant complaint, and videotaping the Proprietor formed the central reasons for the Respondent's dismissal of the Claimant during the midpoint probationary performance review for serious conduct and performance. This was evidenced in October 11, 2023 dismissal letter.

**Tribunal's Further discussions on the Claimant's and Respondent's Employment Relationship**

41. The Implied term of Mutual Trust and Confidence obligates the employer and the employee to interact appropriately and not undermine the employment relationship.
42. The Implied term of Duty of Good Faith obligates the employer and employee to act honestly and fairly with each other and avoid taking unfair advantage of the other party to the employment contract.
43. The employment relationship between the Parties was irreparable after the Proprietor entered the Claimant's apartment on October 7 and October 9, 2023, respectively. The Claimant videotaped and reported the Proprietor to the Police, Landlord, and Tenant Officer. These actions by the Claimant were not entertained favorably by the Respondent.

**The Tribunal has no authority to determine Human Rights violations by**

44. The Claimant had a Universal and fundamental right to her privacy and accommodations, enshrined in the Bermuda Constitution Order 1968. Because of



the Claimant's strong opposition to the Proprietor invading her privacy, the Claimant became very passionate towards the Respondent.

45. It was in the Claimant's best interest to refute in writing any claims by the Employer of her unruly conduct during the Sunday, October 8, 2023 event in **paragraphs 25 - 28**, which was documented in the October 11, 2023, and indicators noted in the midpoint 45 days performance review period.
46. But for the Proprietor's actions on October 8 and October 9, 2023, the Claimant would not have sought the advice of the Landlord and Tenant Office or called the Police.
47. To repeat, because the Claimant failed to participate in the 45-day mid-point probationary performance review exercise generally, the Employer's probationary performance review record had legitimate standing.
48. The Claimant can complain to the Human Rights Commission (the Commission), which can investigate universal rights breaches.

#### **Tribunal Discussions and Findings of the Dispute**

49. The Tribunal declared that the claim by the Claimant of no 45-day mid-term performance review has no merit.

#### **Respondent's Response on not complying with and including a policy on Bullying and Sexual Harassment section 6(2) (q)**

50. The Tribunal noted that the Respondent admitted that was attending to including a Bullying and Harassment Policy for the employees as stipulated per **section 6(2)(q) of the Act**.

**The claimant argued that she was not paid the minimum wage upon commencing her employment on August 18, 2023, and up to the time of her dismissal on October 11, 2023.**



51. From the weekly pay slips for the period of the Claimant's employment from August 18, 2023, to October 11, 2023, both the Claimant and the Respondent signed that the wages for each weekly pay period were correct.
52. What was not clear from the three-month weekly pay slips was whether the Claimant was paid for the **Labour Day holiday** on September 4, 2023, which the Claimant also scheduled to be off as a work-scheduled rest day and was evidenced in both submissions by the Parties as hours off.
53. The Respondent stated the Claimant was paid her regular week's wage as she was off (like the rest of Bermuda) for the **Labour Day Public Holiday**
54. However, the Tribunal not presented of any proof of any Public Holiday payment for the **Labour Day Public Holiday** to the Claimant on her September 4 to September 10, 2023 pays lip. Employees are entitled to receive a holiday with pay on public holidays
55. In cases where a public holiday falls on an employee's shift rest day off, the employer is generally required to grant employees time off on the next working day immediately following the public holiday.
56. Only if the Claimant was required to work on the **Labour Day** public holiday was generally required to pay the Claimant at the overtime rate of double time (2.0) for all hours worked on the **Labour Day** holiday.
57. Alternatively, the Respondent could compensate employees who work on a public holiday at the regular pay rate and grant the employees a holiday with pay on an alternative day the employer and employee agreed upon. The Respondent is encouraged to read **Sections 11 Public Holiday paragraphs 3 & 4.**
58. There was no reference in the Claimant's SoE to **Public Holidays** as stipulated in **Section 6(g) of the Act.**

#### **Minimum Wage Claim**

59. The Claimant was bound by her signature for receipt of all her weekly wages and that the minimum wage rate of \$16.40 per hour was paid to her for all hours worked during the 2.5 months of work by the Respondent.



#### **Clarity on the Claimant's fixed-wage of \$500 per week**

60. The Tribunal obtained clarity from the Respondent that the salary of \$500.00 BM dollars was a fixed dollar amount for a forty (40) hours work week consisting of five (5) days and that the Claimant had two (2) shift rest days off during the work week.
61. The Tribunal asked the Respondent to ensure that all existing and future SoEs and pay slips for . . . staff reflect the work days, that the total work week was 40 hours, and that each employee had two rest days off. **The Act** mandated that the Employer ensure the workers were clear on the wages they were being paid.

#### **The Claimant's OT Pay Claim**

62. The Tribunal noted that the Claimant was paid two (2) hours for OT work during the pay period of August 21 to August 27, 2023.
63. The Respondent could not verify to the Tribunal if the 2 hours of OT were paid at the straight time or the OT multiplier rate of 1.5 hours for each hour worked. In other words, was the Claimant paid 3 hours extra for OT for the work period **noted in paragraph 24**.
64. The Respondent owes the Claimant additional wages for the OT **Only If** the correct OT rate of 1.5 hours for each hour was **not** paid to the Claimant.

#### **Unauthorized deductions from the Claimant's earnings**

65. The Tribunal was presented with unauthorized deduction claims by the Claimant.

#### **Tribunal discussions - Is the Claimant entitled to the Notice Period pay**

66. Based on the evidence before the Tribunal, the Respondent followed the **Act** in dismissing the Claimant, who was not entitled to a week's wage for the notice period because the dismissal was for performance and conduct during the probationary period.





### **Tribunal Statutory Deliberations**

67. **Section 20 of the Act** dealt with "*notice periods*". It was clear from **section 20 (2)** – and the law generally – that notice provisions did not apply when dealing with summary dismissal, such as summary dismissal for serious conduct.
68. The Claimant was terminated summarily on October 11, 2023, by letter (*the "Termination Letter"*). It was clear from the Termination Letter that:
- (a) relied on the summary dismissal provision in **section 19 (4) of the Act**;
  - (b) the effective date of termination was October 11, 2023. So, no notice was required.

### **Legal Principles**

69. The statutory framework was set out in the **Employment Act 2000** (the "**Act**"), which provides as follows:

#### ***"Probationary period***

*19 (1) Subject to this section, a new or promoted employee may be required to serve a probationary period of not more than six months from his employment or promotion date.*

*(2) An employee serving a probationary period shall be entitled to receive from his employer a review of the employee's performance on or before the completion of one-half of the probationary period.*

70. **Section 19 (4) (a)** of the **Act** provided a mechanism for employers to summarily dismiss an employee during probation because of the employee's conduct and performance.
71. The standard for **section 19 (4)** of the **Act** is not reasonableness or band of reasonable responses; the burden was on the Respondent to prove on the balance of probabilities that the reason for dismissal was conduct and performance.
72. Likewise, under **section 38 (2)** of the **Act**, the burden was also on the Respondent to prove the reason for dismissal was on the balance of probabilities.



73. **“Conduct”** is not defined in the **Act**. However, it is essential to note that provisions in the **Act** refer to **“misconduct”** and **“serious misconduct”**. Accordingly, **“conduct”** must mean something other than **“misconduct”** or **“serious misconduct”**.
74. The Tribunal acknowledged that the probationary period under **Section 19** represented a careful balance between employer and employee interests. It was a time when an employee’s position was very vulnerable, and there needed to be certainty about when the employment contract was ended.
75. The Claimant’s 45 days probationary period did not provide a period during which the employer had plenty of time (particularly with the option of extending the period being available under **Section 19**) to terminate an employee’s employment without leaving this until after the last day of the probationary period.
76. Based on the papers and Exhibits submitted by both Parties, there was no contradicting evidence about the dismissal of the Complainant for her performance and conduct during probation under **section 19 (4) (a)** of the **Act**.
77. The issue of the **Section 20(2)** Notice Period does not apply to the Claimant as she was dismissed for performance and conduct within her probation period following **section 19(4)** of the **Act**.
78. The Claimant’s assertion that her dismissal was unfair related to bullying and harassment under **section 28** and **section 29A** of the **Act** is not vested in the powers of the Tribunal, as that authority on such complaints is vested in the Human Rights Commission.
79. The Tribunal gleaned that \_\_\_\_\_ could have been more empathetic to the plight of the Claimant, who was in Bermuda dependent on earning a wage, and that it was not the intent of the Claimant to be dismissed on matters, not germane to her performance and conduct as a nail technician. Instead, in the Tribunal’s opinion, the Claimant was principally dismissed for exercising her human rights as a person



working in Bermuda, as issues noted in the Respondent's Letter of October 11, 2023.

**Tribunal's discussions and Deliberations of the missing statutory details from the Claimant's SoE.**

80. The Claimant's (by extension, all employees) SoE must contain the statutory requirements per **section 6 of Act Subsections 2(a) – 2(r)**. They should not be limited to the job title, brief description of the work, salary details, work hours, vacation leave, sick leave meal and refreshment breaks.
81. The Claimant's SoE also failed to include the entitlement to rest days off, overtime, a notice of the mid-point probationary period in days, the employer's written policy against bullying and sexual harassment, and how the policy can be accessed by staff and training. The employer can also enter into a more detailed contract with the employee as long as it is in writing. Verbal agreements are enforceable only if proof supports the contract variation.
82. The Act is clear that any breaches of **section 6(7)** by the Employer:  
*Any Employer who contravenes this section shall be liable to a civil penalty as may be imposed by the manager or the Tribunal.*
83. The Tribunal noted that the probation period written in the Claimant's Work Permit and Entry Permit on May 31, 2023, was six months.
84. The probationary period stated in the Claimant's SoE on August 28, 2023, was three (3) months compared to six (6) months noted. That factoid will be shared with the Chief Immigration Officer.
85. The Respondent neglected to include **section 6(2) (g) – Public Holidays** in the Claimant's SoE, and *a civil penalty of \$500.00 BM dollars is imposed.*



86. That the Respondent neglected to include **section 6(2) (a) Overtime in the Claimant's SoE**, and **a civil penalty of \$500.00 BM dollars is imposed.**
87. The Respondent neglected to include **section 6(2) (k) disciplinary and grievance procedures applicable in the Claimant's SoE**, and **a civil penalty of \$500.00 BM dollars is imposed.**
88. The Respondent is to pay the Claimant any additional wages for Overtime pay for the period commencing the week of August 28, 2023, **Only If**, the Respondent calculated the OT wage at a straight time instead at the OT multiplier rate of 1.5 hours for each hour worked.
89. The Respondent neglected to include **section 6(2) (q) written policy and bullying and sexual harassment** in the Claimant's SoE and **imposed a civil penalty of \$500.00 BM dollars.**
90. The Respondent is to pay the total civil penalty charges (listed in paragraphs 78 – 79, 80 and 82) of **\$2000.00 BM dollars** to the Accountant General.
91. The Respondent will pay the Claimant any wages owed for the **Labour Day** Holiday **Only If**, the Respondent's accounting records prove that the Claimant was not paid as her regular scheduled shift day off was the Labour Day Public Holiday.
92. According to section 44E, no report on or comment on this matter may be made by either party that is not a fair and accurate report or summary of the proceedings.
93. If either party makes any report on or comment in respect of this matter contrary to **section 44E**, such party shall be liable to a civil penalty.





94. Both Parties have the right to apply to conceal any matter of the Hearing/Award as outlined in **section 44F (3) Notification and Publication of Award of the Act**.
95. Pursuant to **section 44 K**, either party aggrieved by this decision has the right to ask a question about interpreting the Tribunal award.
96. Pursuant to **section 44O**, either party aggrieved by this decision has the right to appeal to the Supreme Court on a point of law within 21 days after receipt of notification of this award of the Tribunal.

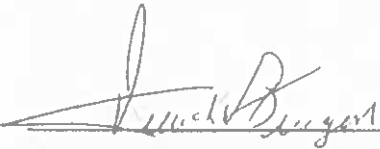
**The Award**

97. The Complainant's complaint of unfair dismissal is dismissed.

**All civil penalties** made by the Tribunal are to be paid within 30 days of the Decision.



Edward Ball Jr, JP, LLB, FCMI Chairman



Derrick Burgess, JP, Deputy Chairman



McKeisha Smith Tribunal Member

**Date: July 26, 2024**

