

**IN THE MATTER OF AN EMPLOYMENT DISPUTE UNDER THE EMPLOYMENT ACT
2000**

**BEFORE THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL (“the
Tribunal”)**

BETWEEN:

Claimant

and

Respondent

AWARD

Background

1. This matter came before the Tribunal pursuant to a referral from Inspector Kenneth Bartram dated July 24, 2023, and raises a question about the right of an employer to terminate an employee’s contract of employment during the probationary period.
2. The Claimant commenced work with the Respondent on October 1, 2022. The Claimant’s contract of employment provided for a 6-month probationary period. Given the Claimant’s start date, the period of probation was set to expire on March 31, 2023.
3. The Respondent terminated the Claimant’s employment on March 24, 2023, just prior to the end of her probation.
4. During the Claimant’s brief period of employment concerns arose in relation to her job performance, in particular in relation to her ability to perform basic housekeeping duties to a satisfactory level. The Tribunal is satisfied that the concerns raised by the Respondent were legitimate.
5. The Tribunal also accepts that senior staff of the Respondent met with the Claimant to discuss what was expected of her and to orient her with the Respondent’s processes. From the evidence of the meeting, the Tribunal is satisfied that:
 - a. An orientation meeting was held with Ms. [redacted] within the first two weeks of her arrival in Bermuda to review standards for cleaning and the products she would be using,

- b. In-office meetings were held with Ms. [REDACTED] at various times to discuss specific incidents that had been reported by clients relating to her work,
 - c. Informal discussions about with Ms. [REDACTED] performance were had, sometimes while Ms. [REDACTED] was being driven between jobs.
6. The concerns about the Claimant's performance were of such significance that she was issued with two written warning letters on February 1, 2023. Ultimately, the Respondent sought to terminate the Claimant without notice on the basis her poor performance, purportedly under section 19 of the Employment Act 2000 ("the 2000 Act").

Summary of the Tribunal's Decision

7. A majority of the Tribunal ("the Majority") finds for the Respondent. In reaching this decision, the Tribunal has taken into consideration:
- a. The Claimant's Statement of Claim submitted dated January 9, 2024;
 - b. The Defendant's Amended Defence dated March 9, 2024;
 - c. The written statement of Ms. [REDACTED] dated March 22, 2024 and supporting materials submitted with that statement;
 - d. The written statement of Ms. [REDACTED] dated March 7, 2024;
 - e. The second written statement of Ms. [REDACTED] dated April 2, 2024;
 - f. The written statement of Ms. [REDACTED] dated March 27, 2024;
 - g. The written statement of Mr. [REDACTED] dated March 8, 2024;
 - h. The in-person evidence of Ms. [REDACTED] Ms. [REDACTED], Ms. [REDACTED], and Mr. [REDACTED];
 - i. The representations made at the April 19, 2024 hearing by Mr. Arnold Smith for Ms. [REDACTED] and Mr. Hindess for the Respondent;
 - j. The closing written submissions of the Respondent received on April 26, 2024; and
 - k. The closing written submissions of the Claimant received on April 29, 2024.
8. The Tribunal wishes to extend its appreciation to Mr. Hindess, counsel for the Respondent, and Mr. Arnold Smith of the Bermuda Industrial Union, as next friend to the Claimant, for their assistance in the resolution of this matter.

The law on Probationary Periods

9. Section 19 of the 2000 Act provides as follows in relation to the imposition of a 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 commencing from the date of his employment or promotion.
- (2) An employee who is 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.

(3) An employer may, before the expiration of the probationary period referred to in subsection (1) and after conducting a review under subsection (2), extend an employee's probationary period for a period not exceeding three months.

(4) 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.

(5) In the application of this section to an employee who during a period of continuous employment is promoted (and without prejudice to section 27), subsection (4) shall not apply.

(6) The six-month and three-month periods referred to in subsection (1) and (3), respectively, shall not apply to-

(a) customs officers;

(b) fire officers;

(c) police officers;

(d) prison officers; and

(e) such other classes of employee as may be prescribed for the purposes of this section.

10. The current version of section 19 has been in force since June 2021. It differs from the original provision in that it contains additional language which mitigates some of the harshness of the law relating to probationary periods. Of note, section 19 now includes the requirement that the employer perform a review of the employee's performance prior to completion of half the probationary period. Also of note, the right of an employer to extend the probationary period (though admittedly this is not an issue here), is contingent upon completion of the performance review during the first half of the probationary period.

The Findings of the Majority

11. While section 19(2) creates an obligation on the employer to provide probationary employees with a review of their performance, it does not prescribe the manner in which the review is to be conducted. There is nothing in the clause to prevent the review being shared in email, or via text message, or during an informal meeting while traveling in a car between work sites. All that is required is that the employer share with the employee feedback on the employee's performance during the first half of the probationary period.

12. The benefit of the probationary period (for both the employer and the employee) is that it creates a trial period during which either party may decide not to continue with the relationship. Either party may terminate the relationship "without notice": whereas the employee may do so for any reason, the employer may only do so for reasons relating to the employee's performance or conduct, or for operational requirements.
13. The progressive disciplinary process does not apply during the probationary period, and the amendments to section 19 do not seek to introduce that process into the period of probation.
14. While we can understand Ms. _____ desire for more hands-on guidance, the fact remains that her resume stated that she had prior experience required by the Respondent. We are sympathetic to her complaint that she incurred significant expense in coming to work in Bermuda. However, her desire for more assistance to become proficient in the role does not translate to a legal duty to keep her in the role if her performance did not reach a satisfactory standard during the probationary period.
15. In view of the foregoing and having considered the evidence presented, we are satisfied that Ms. _____ was told about concerns with her performance throughout the probationary period, including during the first half of the period. We are satisfied that this communication satisfied the requirement to provide her with a review of her performance in accordance with section 19(2).
16. We are also satisfied that the Respondent took the decision to terminate Ms _____ contract of employment because of dissatisfaction with her performance, which it was entitled to do. Accordingly, the Claimant's termination fell within the scope of section 19 and was justifiable in the circumstances.

Chen Foley
Valerie Young


The Dissenting Opinion

1. Having considered the background to the claim and the relevant provisions of the 2000 Act, I am unable to reach the same conclusion as the Majority. The decision of the Majority does not comport with the spirit of the Act.
2. I do not believe a performance review was carried out in accordance with section 19(2). The Majority's approach to that review is that any interaction between the employer and employee where performance is discussed is sufficient to satisfy the section 19(2) requirement. I do not believe that to be the case. In the absence of a formal meeting, set in the employee's and employer's calendar, where there is an awareness that workplace performance is to be discussed within the context of the probationary period, I do not believe section 19(2) is satisfied.
3. Moreover, I believe there is more than a moral duty on the employer to see to it that an employee, particularly an employee who has traveled to Bermuda for work and undertaken the associated costs of doing so, receives guidance during the probationary period sufficient to allow them to improve their performance. From the evidence presented, I am not satisfied that such hands-on guidance was provided.
4. In the circumstances, I would have found that Ms. _____ termination was unfair.

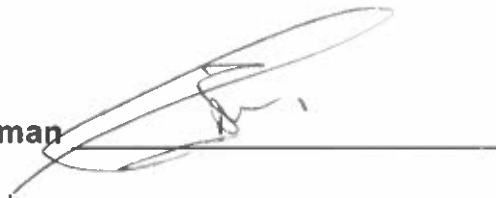
Dr. Michael Bradshaw

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. The Tribunal decision is binding.

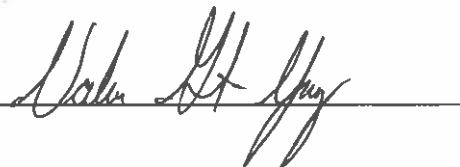
Chen Foley Tribunal Chairman



Dr. Michael Bradshaw Deputy Chairman



Ms. Valerie Young Tribunal Member



Date: 29th July 2024

