

**IN THE MATTER OF A DISPUTE UNDER TRADE UNION AND  
LABOUR RELATIONS (CONSOLIDATION) XXXXX 2021 BEFORE  
THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL**

**Pursuant to sections 67 and 80 of the Trade Union and  
Labour Relations (Consolidation) XXXXX 2021**

**BETWEEN**

**Complainant**

**XXXXXXXXXXXX**

**Interested Party**

**AND**

**XXXXX**

**Respondent**

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**DECISION**

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**Date of Hearing: 16<sup>th</sup> August, 2024**

## **IN ATTENDANCE**

### **Members of Tribunal**

- John Payne, Chairman
- Robert Horton, XXXXX Chairman
- Lorrita Tucker, Panel Member

### **Complainant**

- XXXXX
- XXXXX
- XXXXX
- XXXXX
- XXXXX

### **Respondent**

- XXXXX, XXXXX,
- Counsel for the Defendant

## **ISSUE**

The Complainant contends that the Respondent should have credited XXXXXXXX years' service at XXXXX when determining the Complainant's September 2023 starting salary in the XXXXX. The Respondent does not agree.

## **DIRECTIONS HEARING**

At the Directions Hearing held on 8<sup>th</sup> July, 2024, the Parties agreed that the dispute would possibly be resolved before the beginning of the next XXXXX year in September 2024. To that end, it was agreed that the presentation of documents would be expedited, with the Substantive Hearing set for 16<sup>th</sup> August, 2024.

## **SUBSTANTIVE HEARING**

The Substantive Hearing commenced with only the Tribunal Chairman and one Tribunal Member, apart from the Parties, present. In this regard, provisions of Schedule 2, Section 13, of the Employment XXXXX 2000 were invoked following no objection from XXXXX Party. The third Tribunal Member joined the Hearing forty-five minutes after its commencement.

The Complainant raised the issue of the late presentation of documents by the Respondent. These documents included witness statements. Counsel for the Respondent apologized for the late submission of some documents, indicating that due to the cancellation of his flight from overseas he was unable to meet the required timeline. This matter was addressed XXXXX in the Respondent's written submission after the Hearing.

The Tribunal noted that the witness statements submitted by the Respondent had not been notarized and, therefore, could not be presented as evidence without the persons being sworn in during the Hearing. However, whilst it recognized the legitimacy of the concerns raised by the Complainant, the Tribunal opined that, given the small size of the documents and their content, the Complainant would not be disadvantaged by the Respondent's late submissions, provided that the witnesses took the stand during the Hearing. It was therefore decided to proceed with the Hearing.

## **BACKGROUND**

The Complainant applied for, was offered and accepted a position of XXXXX within the XXXXX. The Complainant was remunerated at Category F: Step 3 in the Collective Bargaining Agreement [CBA] between the XXXXXXXXXXXX and the XXXXX XXXXX when XXXXX commenced service as a XXXXX at XXXX XXXXX XXXXX. However, the Complainant is aggrieved that the Respondent has not credited XXXXXXXX years of post-qualification service at XXXXX and that were such service appropriately credited, XXXXX would have been placed at a XXXXX Step upon commencing service within the XXXXX.

The Complainant possesses a bachelor's degree in early XXXXX XXXXX and completed four XXXXX XXXXX while in university as a requirement for full certification as a XXXXX. Following XXXXX graduation from university, XXXXX XXXXX at XXXXX in Devonshire for XXX years. Notably, the Complainant also possesses a master's degree in XXXXX and a special XXXXX XXXXX. At XXXXX, the Complainant supervised and evaluated XXXXX XXXXX in XXXXX capacity as XXXXX XXXXX. XXXXX also was involved in curriculum development, writing and lesson planning for the XXXXX.

XXXXX is registered by the Department of Health under the XXXXXXXXXXXX XXXXX ["XXXXX XXXXX"]. There was no requirement during the Complainant's years of service at XXXXX for XXXXX to be registered with the XXXXX XXXXX XXXXX, XXXXX via the XXXXXXXXXXXX XXXXX XXXXX 2002, so XXXXX was not registered with that body.

The Complainant maintains that upon joining the XXXXX, XXXXX should have been placed on a XXXXX salary scale because of XXXXX qualifications and experience. The Complainant's position is set out in the following excerpt from the XXXXX XXXXXX letter of 10<sup>th</sup> July, 2024 to the XXXXX: "Specifically, we request that XXXXX be granted credit for XXXXX experience, as outlined in the CBA, for two years, thereby placing XXXXX at Category F: Step 7 for the upcoming XXXXX year."

The Respondent, as Department Head and having delegated responsibilities under the Public Service Commission XXXXX 2001, does not agree. The Respondent contends that the XXXXX, the Complainant's former employer, was not a XXXXX as defined by the XXXXX ["the XXXXXXXXXXXX"], with the result that the Complainant's years of service were not eligible for consideration upon XXXXX beginning service in the XXXXX. The Respondent contended XXXXX that the CBA did not afford XXXXX discretion to change the Complainant's starting grade.

## HEARING

The Tribunal addressed two major points, among others:

**I Did the Complainant's previous employment meet the requirements of the XXXXXXXXXXXX and, with XXXXXXXXXXXX experience, XXXXX and professional qualifications, was XXXXX qualified to be paid at a XXXXX salary scale upon beginning service in the XXXXX.**

The qualifications and experience of the Complainant have not been challenged by the Respondent. In XXXXX, the Respondent stated directly to the Complainant that XXXXX qualifications were not in question. Throughout the proceedings there was restatement of that XXXXX. However, the Respondent steadfastly maintained that XXXXX was not a XXXXX in accordance with provisions of the XXXXXXXXXXXX and that XXXXX service there did not qualify the Complainant for placement at XXXXX beginning step in the XXXXX's salary scale.

The Respondent wrote: "*Refusal of the Claimant and XXXXX to accept the XXXXXXXXXXXX as the legislation to determine what is a XXXXX and therefore what can be regarded as previous service at a XXXXX is the reason why this matter is before the Tribunal.*"

The Respondent emphasized that XXXXX was a XXXXX by the Health Department and not a XXXXX which required XXXXX in accordance with

provisions of the XXXXXXXXXXXX. In support of that position, in its letter of 22<sup>nd</sup> February, 2024 to the Labour Relations Officer, the Respondent provides the following information:

- XXXXX possesses a XXXXX as a XXXXX XXXXX;
- XXXXX was listed on the XXXXXXXXXXXX website of XXXXX XXXXXXXXXXXX;
- Tabulated comparison of the functions of a XXXXX versus a XXXXX is provided.
  - XXXXX are not XXXXXs under the XXXXX while a XXXXX is classified as a XXXXX under the XXXXXXXXXXXX XXXXX.
  - XXXXX are governed by the XXXXX XXXXX XXXXX, made under the XXXXXXXXXXXX XXXXX, while XXXXX are governed by the XXXXXXXXXXXX.
  - XXXXX of XXXXX do not require a XXXXXXXXXXXX XXXXX XXXXX while XXXXXXXXXXXX require that .
  - XXXXX can determine their own XXXXX evaluation procedures while XXXXXXXXXXXX are evaluated using a formal XXXXX Evaluation Programmed XXXXX by the XXXXX.
  - XXXXX are inspected by the Ministry of Health while Pre XXXXX XXXXX are supervised by the XXXXX.

Further, to justify its position, the Respondent called as a witness the Department of Health Programmed Manager who advised in XXXXX written statement to the XXXXX that:

- XXXXX are supervised and evaluated by the Department of Health.
- The relevant legislation is the XXXXXXXXXXXX XXXXX, XXXXX and XXXXX's Standards.
- XXXXX operate with XXXXX from and are headed by a XXXXX and a XXXXX.
- XXXXX cater to XXXXX years old. However, some have expanded to include year olds. They are xxxxx by a XXXXX.
- XXXXX can determine their own XXXX while an international XXXX, determined by the XXXXX of, is mandated for XXXXX .
- XXXXX can determine their own XXXXX evaluation procedures while XXXXX in XXXXXXXXXXXX are evaluated by means of a formal XXXXX Performance Evaluation Programme with XXXXX standards, the same standards used in XXXXX XXXXX, XXXXX and XXXXX.

The Senior Policy Analyst within the Ministry of XXXXX appeared as a witness for the Respondent. XXXXX post requires XXXXX to rely heavily on the XXXXX and to advise Ministry XXXXX regarding compliance with the XXXXX and the XXXXXXXXXXXX XXXXX XXXXX 2002. XXXXX provided the following information, inter alia, that complemented information provided in the Respondent's letter of 22<sup>nd</sup> February, 2024.

- In 2019, when questions arose regarding responsibility for the registration of XXXXXXXXXXXX and reception, foundation and XXXXX years that are attached to private XXXXXs, XXXXX looked at the legislative regime for the licensing of XXXXX, XXXXX XXXXX and XXXXX that provided XXXXX XXXXX only.
- While XXXXX who work in a XXXXX may be registered by the XXXXXXXXXXXX XXXXX, registration is not a requirement to work there, unlike the case of XXXXX in XXXXXXXXXXXX who are required to hold a XXXXXXXXXXXX XXXXX XXXXX.

The Respondent proffered that XXXXX was not a XXXXX as defined in the section 2 (1) of the XXXXXXXXXXXX: *”XXXXX” means an institution, XXXXX than a XXXXX site, that provides pre XXXXX, XXXXX XXXXX, XXXXX XXXXX or senior XXXXX XXXXX for not fewer than five persons.*” The Respondent emphasized that this definition of “XXXXX” in the XXXXXXXXXXXX did not include XXXXX such as XXXXX.

The Complainant countered by arguing that XXXXX was supervised, evaluated and held to national standards by the Department of Health, a XXXXX body, and shared XXXXX with XXXXX maintained XXXXX. In this regard, the Complainant relied on the Explanatory Notes, Salary Adjustments (3) (b) (iv) of the CBA:

*“Recognized XXXXX service refers to service as a qualified XXXXX in XXXXXs XXXXX by XXXXX, State, or Provincial XXXXX Authorities. Service in XXXXXXXXXXXXs as a qualified XXXXX is recognized upon submission of written evidence from the Authority in question that it recognizes the service for incremental purposes, or if it is listed in an official publication”.*

In its letter dated 14th March, 2024 to the Labour Relations Officer, the XXXXX for the Complainant asserts as follows: *“We firmly believe that XXXXX should be recognized as a XXXXX XXXXX than a XXXXXXXXXXXX due to shared XXXXX between XXXXX and XXXXX-maintained XXXXX, as well as global standards and globally accepted definitions. Although the XXXXX states that XXXXX is not*

recognized or XXXXX under the XXXXXXXXXXXX XXXXX, it still satisfies the definition outlined in the XXXXX.”

*In its letter of 14<sup>th</sup> March, 2024, the XXXXX also asserts as follows: “...the denial of increments for previous service, as delineated in Explanatory Notes 3b iv, is an injustice that demands rectification. Ms. XXXXX-XXXXX has unequivocally met the stipulated requirements, as evidenced by XXXXX XXXXX qualifications and the nature of XXXXX service. The classification of XXXXX (XXXXX) as a XXXXX XXXXX XXXXX than a XXXXX is a misinterpretation that overlooks its XXXXX al mission, shared XXXXX with XXXXX-maintained XXXXX, and adherence to national standards. By acknowledging these XXXXXs, the XXXXX can uphold fairness and integrity in its policies.*

The Tribunal took note of the Complainant’s view that this restrictive definition of “XXXXX” undermined the value of XXXXX provided by institutions like XXXXX and unjustly penalizes Bermudian XXXXX who have worked in such facilities.

## **II Are there any limitations which prevent the XXXXX from placing the Complainant on a XXXXX grade.**

The Respondent maintained that it was obliged to adhere to provisions of the XXXXXXXXXXXX and the CBA when considering the qualifications and experience of a new XXXXX and making a determination with respect to the salary Step upon which that XXXXX should be placed upon beginning service in the XXXXX.

The Respondent maintains that XXXXX, the Complainant’s previous employer, does not qualify as a XXXXX under the and that Explanatory Notes, Salary Adjustments (3) (b) (iv) of the CBA is not relevant as the Complainant’s work experience at XXXXX is not equivalent to XXXXX experience in a XXXXX as defined in the XXXXX .

The Respondent avers that the Complainant provided no legal or XXXXX basis to warrant being placed at Category F: Step 9 for September 2024. The Respondent argues that in accordance with provisions of the CBA, the Complainant, having a bachelor’s and a master’s degree, should have been placed at Category F: Step 2. The Respondent notes that the Complainant’s placement at Category F: Step 3 XXXXX than at Category F: Step 2 was an administrative oversight, XXXXX that this salary Step, albeit inadvertent, would be honored by the XXXXX

The Complainant rejects the Respondent's position that it has no discretion that would enable it to recognize the Complainant's previous experience under that CBA's Explanatory Notes, Salary Adjustments (3) (b) (iv). Additionally, the Complainant cites the following Explanatory Notes, Salary Adjustments (2) (b) as an avenue whereby the Respondent might approve the requested adjustment in the Complainant's Salary Step:

*(b) Industrial or Commercial Experience: Individuals entering the system with Industrial, commercial or technological experience will be given for up to two (2) years' experience in the related field, provided that the experience was gained within five (5) years immediately preceding application. That is, they will be placed two steps above the beginning step of their particular category.*

In a letter to the XXXXX General Secretary dated 15<sup>th</sup> August, 2024, the Respondent wrote as follows: *"We view Industrial Experience as relating to research, design, development, testing, XXXXX, fabrication or construction related work, working with electrical, civil or mechanical processes etc. etc. We also view Commercial Experience as XXXXX of commerce, business operations to earn profits, working in a business environment, viewing situations based on a business perspective, etc. etc. We do not see how work at XXXXX could fall into the Category of Industrial or Commercial Experience and believe that to do so would be seeking to stretch the meaning to something that was not intended unless it can be shown to be supported in law."*

Throughout the Hearing, the Respondent maintained that it adhered to the law and the CBA by not taking into consideration the Complainant's work experience at XXXXX when assigning XXXXX starting salary.

## **DELIBERATION**

The Tribunal took note of the Complainant's XXX years of post-qualification service at XXXXX and the Respondent's argument that the Complainant was ineligible for placement at a XXXXX salary Step upon commencement of service in the XXXXX as XXXXX by law was not a XXXXX in terms of XXXXX criteria, such criteria set out in the XXXXX XXXXX.

The Tribunal then turned its attention to the Complainant's assertion that the Respondent had the discretion to place the Complainant at a XXXXX salary Step in the CBA, taking into consideration XXXXX many years of service at XXXXX. Here, the Tribunal noted the Respondent's view, set out in the Submission After Hearing from Counsel for the Respondent, that there was no legal basis on which



the XXXXX could regard the Complainant's service at XXXXX as "previous experience".

The Tribunal noted that the XXXXX had delegated responsibilities under the Public Services Commission XXXXX 2001 and as such must XXXXX as if XXXXX were the PSC when making appointments within the XXXXX. Counsel for the Respondent contended that section 18 of the Public Services Commission XXXXX reinforced the XXXXX's decision not to place the Complainant at the requested XXXXX salary Step as it was that postholder who appointed XXXXX to posts in the Public Service, not the Public Service Commission. The Tribunal accepted that this information was technically correct. However, the Tribunal noted that the XXXXX XXXXX on behalf of the Public Service Commission whose authority was delegated, not abrogated.

Section 18 of the Public Service Commission XXXXX follows: "(2) *The emoluments attaching to any office shall be such as may be approved by the Cabinet, and no person shall be recommended by the Commission [Public Service Commission] for appointment to an office except at the salary so approved for that office or at a salary so approved in a scale so approved for the class or grade to which that office belongs.*" That section sets out the authority given to the Respondent to consider placing any XXXXX on a XXXXX grade. The process is usually set out in Collective Bargaining Agreements.

The Tribunal noted that there was a facility or discretion to take previous experience into consideration when a new officer starts. Both the Collective Bargaining Agreements between the XXXXXXXXXXXX and the XXXXX and the XXXXX Public Services Union provide articles addressing this topic, clearly a common feature in Collective Bargaining Agreements.

The Tribunal noted that Collective Bargaining Agreements normally set the minimum standards applicable and that there is always room for change during Joint Consultative Meetings. These meetings also provide an opportunity for clarification of articles if necessary.

The Tribunal reviewed the relevant section in the CBA between the XXXXXXXXXXXX and the XXXXX. Explanatory Notes, page 17, sets out Statement of Pay and Qualifications. Subsection (2) (a) (ii) states: "*New and returning XXXXX to the system are required to produce a performance appraisal from their most recent employer which speaks to their XXXXX experience.*"

Subsection 2 (b) addresses how persons with industrial, or commercial or technological experience should be treated. The Tribunal does not accept the Complainant's view that this section is applicable in its case. One cannot construe

that experience in a XXXXX facility can be deemed industrial, commercial or technological experience. In the Tribunal's view, that conclusion would be a stretch indeed.

During its presentation, the Respondent drew the Tribunal's attention to Part VII, section 15 of the XXXXX that reads **Medical examinations, communicable disease precautions, etc.**

*15 ((1) A XXXXX medical officer may carry out in any XXXXX XXXXX a medical examination of XXXXX attending such a XXXXX.*

*(2) the examination shall be carried out as nearly as possible in the manner set in section 166 of the Public Health XXXXX 1949 and for the purposes of that section, the XXXXX shall be deemed a XXXXX, and the operator shall be deemed to be the principal thereof.*

The Respondent provided the legal definition of the word "deem", making the point that if a XXXXX was a XXXXX, there would be no need to include sections 15 (1) and (2) in the XXXXX XXXXX. However, the Tribunal does not understand the relevance of this point and is of the view that it fails to add any clarity to the points being made.

In the last paragraph of XXXXX sworn statement, the Programme Manager expressed an opinion regarding the XXXXX XXXXX and curricula of XXXXXXXXXXXX. XXXXX states: "*We do not believe the XXXXX XXXXX and curriculum are consistently comparable to those used in XXXXX XXXXX.*" The Tribunal noted that there was nothing provided XXXXX in direct or cross-examination in support of that opinion.

The Tribunal turned to the XXXXX XXXXX, Part III, Non-application to private XXXXX, 9: "*This Part does not apply to a private XXXXX which provides XXXXXXXXXXXX only.*" The Tribunal noted, however, that there was some ambiguity under Part III, Construction of "fit for registration", 10, which follows:

*10. Where in this Part "fit for registration" is used in relation to a XXXXX, it means—*

*(a) that the conditions obtaining at the XXXXX are not such as to endanger the health, morals or safety of the XXXXX attending at the XXXXX; and*

*(b) that, having regard to the circumstances for the time being prevailing with respect to the provision of XXXXXs and XXXXX facilities in Bermuda, there is in the case of that XXXXX a reasonable degree of compliance with the following requirements, that is to say—*

*(i) that the premises of the XXXXX are suitable and safe for a XXXXX;*

*(ii) that the accommodation provided on the premises of the XXXXX is adequate and suitable having regard to the number, ages and sex of the XXXXX attending at the XXXXX; and*

*(iii) that efficient and suitable instruction is being provided at the XXXXX having regard to the ages, sex and abilities of the XXXXX attending at the XXXXX.*

One may argue that XXXXXXXXXXXX, even though registered under the XXXXX XXXXX and the XXXXXXXXXXXX, may qualify to be registered under this XXXXX XXXXX. However, this argument is negated by the application of section 12 (1) which states:

12. (1) *For the purposes of this Part the XXXXX shall keep a register of XXXXXs in which, subject to this section, shall be registered every XXXXX in Bermuda, XXXXXxxxx before or after the appointed day, being a XXXXX—*

*(a) the manager of which makes application to the XXXXX for the purpose in the prescribed manner and XXXXXs the prescribed particulars; and*

*(b) which appears to the XXXXX to be fit for registration as a XXXXX.*

No evidence was provided that the manager or the former employer of the Complainant ever applied under section 12 (1) of the XXXXX XXXXX. The Tribunal therefore determined that XXXXX was not registered as a XXXXX in accordance with provisions of the XXXXX XXXXX.

Finally, the Tribunal noted that the XXXXX and the XXXXX did not support the registration of XXXXX as a XXXXX.

## **CONCLUSION AND DECISION**

The Tribunal, having heard the representations from the Parties, has determined that:

- (i) The Tribunal's principle consideration centered around the question as to XXXXX the Respondent should have taken into account the sixteen years of the Complainant's work experience as relevant when assigning XXXXX a starting salary in the XXXXXXXXXXXXs System in September 2024 and should be considered. Page 18 of the CBA sets out the guidelines for Increment for Previous Service;
- (ii) The Complainant's previous employer, XXXXX and XXXXX, is not a XXXXX as set out in the XXXXX and is not registered under Part III, Registration of XXXXXs, section 12 (1) of the XXXXX XXXXX;
- (iii) There is no provision to apply the CBA's Explanatory Notes (2) (b) industrial, or commercial experience when determining the Complainant's beginning salary Step as the Complainant's work experience at XXXXX and XXXXX did not meet any of the stated criteria;
- (iv) The Respondent had discretion to take the work experience of the Claimant into consideration when determining the starting salary grade. However, this function is discretionary and, as such, it was the Respondent's decision and only hers XXXXX that discretion should have been applied in the Complainant's case;
- (v) Whilst not unsympathetic to the Complainant's plight, the Tribunal recognizes that it had no legal authority to direct the Respondent to place the Complainant at a XXXXX Step as requested by the Complainant and the XXXXXXXXXXXX;
- (vi) The Respondent chose not to exercise that discretion and there was no legal requirement to cause XXXXX to do so.; and
- (vii) The Tribunal does not rule in favour of the Complainant.

**XXXXX party that is aggrieved by this decision has the right to appeal to the Supreme Court on a point of law only within 21 days after receipt of notification of this award.**

(vi) The Respondent chose not to exercise that discretion and there was no legal requirement to cause her to do so.; and

(vii) The Tribunal does not rule in favour of the Complainant.

**Either party that is aggrieved by this decision has the right to appeal to the Supreme Court on a point of law only within 21 days after receipt of notification of this award.**

Dated this 18<sup>th</sup> day of September, 2024

  
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John Payne

Chairman

  
\_\_\_\_\_

Robert Horton

Member

  
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Lorrita Tucker

Member

