

**IN THE MATTER OF THE EMPLOYMENT ACT 2000 BEFORE
THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL
(the “Tribunal”)**

BETWEEN

Employee

and

Employer

Date of Hearing: 11th May 2022

Tribunal Members: Mrs. Betty Christopher JP, Chairman
Mr. Clevelyn Crichlow, Deputy Chairman
Ms. McKeisha Smith, Tribunal Member

Present: Employee
on behalf of the Employer
on behalf of the Employer

Background

1. The Chairman of the Tribunal convened the Hearing and confirmed that the dispute to be resolved was whether the Employee had received Vacation and Holiday pay while employed by the Employer in contravention of sections 11 and 12 of the Employment Act 2000 (the "Act").
2. The Parties were offered an opportunity to resolve the matter without the assistance of the Tribunal, an offer which the Parties accepted. However, the Parties failed to reach an accord and the Chairman resumed the Hearing.
3. The Employee started employment with the Employer in October 2020 and received the statutory three (3) months' probation. The probation was extended by agreement for a further three (3) months due to COVID restrictions and the fact that the Employee had not met weekly company targets. The Employee's probation ended in May 2021.
4. The Employee was paid a basic salary of \$500.00 per week or a commission of 35% of sales less standard back-bar deductions, whichever is greater.
5. In a letter dated September 8, 2021, the Employer dispensed with the services of the Employee citing performance issues; the Employee's uncertainty in wishing to continue with the Employer; and the existence of a significant conflict of interest on the part of the Employee.
6. The Employee denies the allegations and is seeking compensation for five (5) days' Vacation and ten (10) days Holiday pay for which she states she has not been paid.
7. Neither the Employer nor the Employee was represented by Counsel and the evidence was presented via WebEx as both Parties were abroad.
8. It is to be noted that both Parties were informed by the Labour Department that they were to provide the Tribunal with all relevant documents to support their positions. This was not strictly adhered to

as the documents provided by both Parties were woefully inadequate and hardly supportive of the cases presented.

9. Additionally, the Chairman was quite clear in establishing that the two items under review were payment for vacation and public holidays, to which both Parties agreed.

The Case of the Employee

10. Listed below is a summary of the Employee's case based on her WebEx testimony and supporting documents:

- i. The Employee agreed that she had signed a Contract, but had not signed the one presented in evidence by the Employer. The Employee confirmed she signed the Contract that she presented to the Tribunal;
- ii. The Employee indicated that she had not been paid for vacations and public holidays. She had not been informed that such payments were included in her wages, although it was covered in a clause in the Contract that she had signed;
- iii. The Employee was unclear as to how the method of payment was calculated and communicating via WebEx added to the difficulty;
- iv. The Employee emphasized that she had no knowledge that employees were given the choice of having management deduct a percentage from their commissions to be set aside in an escrow account to compensate employees for vacation and holidays;
- v. The Employee is seeking five (5) days' Vacation pay and ten (10) days Holiday pay but gave the Tribunal no idea of the amount this might be.

The Case of the Employer

11. The Employer in presenting their case emphasized the following:

- i. The Employer paid its employees above the industry rate, and this was specifically to support its policy of not paying vacation and holiday pay separately.
- ii. The nature of the beauty business required special conditions, and this is recognized by the flexibility of employees' Contracts and working conditions.
- iii. Citing the clause in the Contract, the Employer pointed out that the Employee is entitled to ten (10) days' Vacation, and this was covered by the commission which she is paid.
- iv. The Employer emphasized that the Employee, like all other employees, was aware of the contractual conditions. The Employee's signature on the Contract signified that she had accepted the conditions and was therefore bound by them.
- v. Employees were further aware that approximately 5% of the commission they received should be set aside by them to be utilized for public holidays and vacations.
- vi. In fact, the Employer had offered to deduct this amount and save it for the employees, but their preference was to save it themselves.
- vii. The Employer claims that the Employee is not entitled to Vacation or Holiday pay since this pay was included in her wages/commission.

Deliberation of the Tribunal

12. The Tribunal accepts that this case has presented some difficulties. The use of WebEx to conduct the presentations and to question the representatives presented some challenges. Both the Employee and

Employer were unrepresented by Counsel, and both demonstrated some difficulty with the process.

13. The Tribunal had to examine sparse documentation, assess unclear testimony, and decipher confused explanations.
14. The primary objective of the Act is always in the forefront of the Tribunal's deliberations, which it states:

"...to promote the fair treatment of employers and employees by providing minimum standards of employment, by establishing procedures and notice periods for the termination of employment, by providing employees with protection against unfair dismissal....";

15. This objective is reinforced by the overarching Section 2(3) in the Interpretation, which states:

"Where any of the rights of an employee established by any other Act, agreement, contract of employment custom or practice are more favourable than this Act requires, the provisions so established prevail over this Act"

16. It is to be noted that this dispute specifically involves the sections above and the following sections of the Act, which are reproduced and highlighted below for ease of reference:

Public Holidays

11 (1) In this section-

'public holiday' has the meaning given in the Public Holidays Act 1947, but does not include any Sunday which would not otherwise be a public holiday by virtue of that Act; and

"with pay" means pay at the employee's regular rate of wages.

(2) Subject to this section, an employer shall grant every employee a holiday with pay on each public holiday falling within any period of employment.

(3) Where a public holiday falls on an employee's rest day, the employer shall grant him a holiday with pay on—

- (a) the working day immediately following the public holiday; or*
- (b) such other day as may be agreed by the employer and employee.*

(4) Where an employee is required to work on a public holiday, the employer shall—

- (a) pay that employee at a rate at least equal to the overtime rate;*
or
- (b) pay that employee at his regular rate of wages and grant him a holiday with pay on such other day as may be agreed by the employer and employee.*

(5) An employer shall not be obliged to pay an employee in respect of a public holiday if the employee does not work on his working day immediately preceding and his working day immediately following the public holiday, unless he was on annual leave or sick leave on such a day.

(6) This section shall not apply where the employer and employee agree in writing otherwise.

Vacation leave

12 *(1) An employee shall be entitled to a period of two weeks annual vacation leave after he has completed—*

- (a) the first year of continuous employment; and*
- (b) each subsequent year of continuous employment,*
but such periods of vacation are not cumulative.

(1A) Without prejudice to subsection (1), an employee who has completed the first six months of continuous employment shall be entitled to a period of one week's vacation leave, but where such leave (or any part thereof) is taken prior to the completion of the first year of

continuous employment, the leave so taken shall be deducted from the period of annual vacation leave to which the employee is entitled pursuant to subsection (1)(a).

17. This Tribunal accepts the Employer's argument that it is incumbent upon the Employee to read and understand what they are signing, and it is established that the Contract, which was signed by the Employee, has in it a clause which states that payments for Holidays and Vacations are part of the weekly wage package.

18. Further, since the Employee was once employed in Bermuda in a similar profession, one could conclude that the Employee should be aware of the industry standards and therefore quite able to agree or reject what she may consider to be unfair employment practices.

19. The Tribunal examined both the old Contract signed by the Employee and newly formatted Contract and agrees that the relevant clauses were similar with respect to vacations and holidays.

20. Under the old, signed contract this is covered under V. Salary, and states:

- *The commission level also covers 8 sick days, 10 vacation days and public holidays*

21. Under the new unsigned contract, it is also covered under V. Salary and also states:

- *The commission paid is inclusive of 8 sick days, 10 vacation days and all public holidays.*

22. Under the Act, the following is allowed with respect to holiday pay:

Part 3, S. 11(6) This section shall not apply where the employer and the employee agree in writing otherwise.

23. The Employer would argue that the signing of the agreement is tantamount to an agreement in writing and the Tribunal concurs.

24. With respect to vacations, there is no such proviso to agree or disagree and therefore vacations must follow the strict terms of the Act.

25. The Tribunal would point out further that the Employee's old, signed contract simply states:

vii. Vacation/Holidays Two weeks per year (10) days after the twelve-week probation period.

26. The Contract terms are in fact better than those given in the Act even though it goes on to further clarify the clause by stating:

*S. 12 (1A) Without prejudice to subsection (1), an employee who has completed the **first six months of continuous** employment shall be entitled to a period of one week's vacation leave...*

27. The Tribunal cites Section 7(d) of the Act reproduced below for reference.

Itemised pay statement

7 (1) An employer shall give to each of his employees a written itemised pay statement, at or before the payment of any wages.

(2) The statement shall contain particulars of—

(a) the period of time or the work for which the wages are being paid.

(b) the rate of wages to which the employee is entitled, and the number of hours worked, where the number of hours worked varies from week to week.

(c) the gross amount of wages to which the employee is entitled.

(d) the amount and purpose of any deduction made from that amount.

(e) any bonus, gratuity, living allowance or other payment to which the employee is entitled.

(f) and the net amount of money being paid to the employee.

28. The importance of this Section is that it seeks to protect the Employee by ensuring that all remunerations received by the Employee are clearly listed without confusion. The Employee understands exactly how he is paid; what deductions are taken out; and what bonuses are given.
29. The Employee is consequently entitled to pay statements which leave no doubt about her remuneration.
30. The Tribunal firmly believes that management has been unsuccessful in delineating how the Employee's wages are broken down and this must leave the Employee in some confusion.
31. The Employer's attempts to explain to the Tribunal how management determined the breakdown of the "commission" allocated to holiday, vacation and sick leave were inadequate.
32. The Employer did not effectively quantify the vacation leave, sick leave, and holidays in order to include it in the weekly wage/commission. Therefore, this was not easily understood by the Employee.
33. It is not enough to say that "the commission level also covers 8 sick days, 10 vacation days and public holidays," it must be clearly demonstrated in order to fulfill the conditions outlined in the Act.
34. The Act is quite clear that each employee is entitled to a paid vacation and paid public holidays.
35. Based on the foregoing, the Employer is not in compliance with the terms of the Act and is, therefore, in contravention of it.

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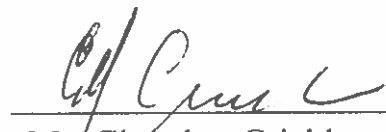
Determination and Order

36. Having examined all the evidence presented through written and oral delivery by all Parties; and being guided by the provisions of Section 39 (1) Remedies: General we find the Employer has contravened the Act.
37. The Employee is granted 9 days' prorated Vacation pay and 10 days Holiday pay.
38. The amount is to be based on the weekly base salary of \$500 which the Employee was paid.
39. The Employee shall be paid by the Employer in full no later than thirty (30) days from this Determination.
40. The Parties to this hearing have acknowledged that the Determination and Order of this Tribunal are final and binding. Any Party aggrieved may appeal to the Supreme Court on a point of law.
41. The Tribunal makes no further Determination in this matter.

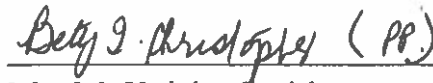
Dated this 13th day of June 2022



Mrs. Betty Christopher, JP
Chairman



Mr. Clevelyn Crichlow
Deputy Chairman



Ms. McKeisha Smith
Tribunal Member