

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

BETWEEN:

Ms. ;

Complainant

AND

Island Ophthalmology Ltd. (Jennifer Faries)

Respondent

DECISION

Date of Complaint: September 8th 2022
Date Investigation Completed: November 18th 2022
Date of Referral: January 18th 2023
Date of the Hearing: 28th March 2023

Tribunal Panel Members: Ms. Kelly Francis, Chairman
Mr. Peter Aldrich, Tribunal Member
Mr. Gary Phillips, Tribunal Member

Present: Ms. Complainant
Ms. Jennifer Faries, Respondent

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

To Be Noted

The initial complaint lodged with the Labour Relations Section included three complainants, all former employees of Island Ophthalmology. The Tribunal elected to treat each complainant

separately as their circumstances were unique from each other. Similarly, individual judgements have been rendered.

Background

Further to the hearing held on March 28th 2023 (the "Hearing") between Ms. [REDACTED] (the "Complainant") and Island Ophthalmology Ltd / Jennifer Faries (the "Respondent"). The Complainant is seeking compensation for unpaid wages and for constructive dismissal pursuant to Sections 29 and 40 of the Employment Act 2000, of 26 weeks wages.

The Hearing

The Tribunal was presented with a considerable body of evidence to review in advance of and during the Hearing and was tasked with discerning what was and was not germane to the complaint filed on September 8th 2022 by Ms. [REDACTED]. The Tribunal was also presented with video footage by the Respondent which was reviewed and determined that none of the footage was relevant to this case.

[REDACTED] (Complainant) was invited to present her case. The Complainant advised the Tribunal that she suffers from anxiety and asked to read her prepared statement of events which was permitted by the Tribunal. In describing the account of her time employed by Island Ophthalmology, it became apparent that the Complainant was inadvertently placed in the middle of the growing conflict between the two business partners. As their relationship deteriorated, she became increasingly distressed and began to physically suffer. She provided instances where she was asked to choose sides and felt punished if she did not show favour to the Respondent. While ill equipped and subordinate to both business partners, she found herself unsuccessfully trying to mediate and / or run interference with patients so they were shielded from the growing animosity. As a result of the escalating situation, the Complainant tendered her resignation on June 4th 2022 with effect on August 19th 2022. During her notice period, she contends she was forced to stay out of work due to stress related illness. On August 9th, the Complainant claims there was a further confrontation with the Respondent regarding patient scheduling. The Complainant felt threatened by the Respondent. At the conclusion of this exchange the Complainant left the practice and did not return. The Complainant also contends that following her departure, the Respondent sent hostile communications from her lawyers advising that she was bound by the non-compete clause in her contract and has sought to prevent her from using her specialist skills thereby reducing her earning potential. As a result of these deliberate actions, the Complainant continues to struggle to fully practice her trade and has suffered from a loss of income.

Ms. Faries (Respondent) was then invited to respond to Ms. however she was not able to sufficiently refute the allegations put forward by the Complainant regarding the office environment or escalating conflict and resulting stress suffered by the Complainant.

Deliberations

1. The Tribunal have heard the representations from both Parties and considered reasons given by the Complainant to support the conditions of Section 29 (1) of the Employment Act 2000: Constructive Dismissal.
2. Constructive Dismissal states: "An employee is entitled to terminate his contract of employment without notice where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship having regard to the employee's duties, length of service and circumstances.
3. The Tribunal was not persuaded by the Respondent that the Complainant was spared the effects of the conflict evident between the two partners.
4. The Tribunal was persuaded that the Complainant was unfairly placed in a situation outside of her control or ability to mitigate
5. The Tribunal was persuaded that the Complainant had no alternative left to her but to vacate her post.

Determination and Order

The Tribunal reviewed section 40 (4)(a) which states "A compensation order shall, subject to subsection (5), be of such amount as the Tribunal considers just and equitable in all the circumstances, having regard -

- (a) To the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer."

In this instance, the Tribunal is persuaded that the Employee was placed in an untenable situation in the first instance which created significant physical and emotional stress and, by engaging in highhanded tactics to enforce a non-compete order, the Employer prevented the Employee from being hired in the area of her specialty which has forced her into a lesser financial / economic situation. The Tribunal is not persuaded that this action was necessary under the circumstances.

The Tribunal awards the complainant the following:

- 1) Twelve weeks salary totaling **\$22,153.85**, less applicable deductions to compensate the complainant for the resulting loss of income since her forced departure from Island Ophthalmology, payable no later than **June 30th 2023**.

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.

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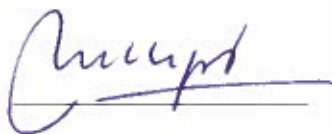
Dated this 10th day of May 2023



Ms. Kelly Francis,
Chairman



Mr. Peter Aldrich,
Tribunal Member



Mr. Gary Phillips
Tribunal member