

**Todd v OM Juicery (2023)**

**DETERMINATION and ORDER**

**The Employment Act 2000 Before The Employment and Labour Relations Tribunal.**

**TRIBUNAL**

Members of the Tribunal: Lorrita J. Tucker, Chairman  
Betty Christopher, Deputy Chair  
Eugene Creighton

Directions Hearing: 16<sup>th</sup> February, 2023

Hearing Date: 23<sup>rd</sup> June, 2023

Adjournment Date: 23<sup>rd</sup>, June, 2023

Hearing Place: Department of Labour  
23 Parliament Street  
Hamilton, HM 12,  
Bermuda

Complainant: Mr. Trevor Todd  
Representative: None

Respondent: Mr. Preston Ephraim  
Doing Business as: OM Juicery  
Representative: None

**STATUTORY AUTHORITY TO HEAR THE MATTER**

The Tribunal Hearing was convened on 23<sup>rd</sup> June, 2023. The Chairman confirmed the points to be considered by the Tribunal. The Chairman stated that the Tribunal's Directions Hearing was convened on 16<sup>th</sup> February, 2023. The Chairman stated that the Employment and Labour Relations Tribunal Hearing was being conducted in accordance with **Section 44B (2), section 44C, General Powers** and **Section 44D, Power to Obtain Information**, and that the Tribunal would regulate its own proceedings as it saw fit pursuant to **Schedule 2 (20) of the Employment Act 2000 ("the Act")**.

**TRIBUNAL DIRECTIONS HEARING**

In the Directions Hearing held on 16<sup>th</sup> February, 2023, the parties were offered the opportunity to meet without the Tribunal's assistance, to engage in meaningful dialogue, to attempt to reach a settlement to their dispute. The Tribunal specified that in the event that the parties were unable to reach a settlement, once the substantive Hearing commenced, the Tribunal's ruling would be final; only being overturned on a point of law. The Complainant did not wish to engage in a settlement discussion with the Respondent. Therefore, both agreed for the matter to be settled at the substantive Hearing.

## **TRIBUNAL HEARING**

The parties were asked if their decision remained the same: to allow the matter to be determined by the Tribunal. Both the Complainant and the Respondent confirmed that their decision as stated in the Directions Hearing held on the 16<sup>th</sup> of February, 2023, remained the same.

## **BACKGROUND**

The Complainant's position is that on 18th August, 2022, OM Juicery's electricity was disconnected, and the Complainant and other employees were told to take the day off. The following day, on the 19th August, 2022, the Complainant was informed via a telephone call from the Respondent's Office Manager, that OM Juicery was shutting down. The Complainant further contends that prior to the business shutting down, as a fulltime employee since September 2018, he had not received vacation pay and that his wages were paid infrequently. That upon the day of the announcement of the business closure, 19th August, 2022, he was entitled to receive outstanding wages and vacation pay, pay in lieu of redundancy notice and severance pay for redundancy.

The position of the Respondent, the owner and operator of OM Juicery, is that the Complainant was not made redundant, nor was he terminated. That the closure of the business was temporary until a new business location could be secured in December 2022.

The Tribunal is charged with determining whether the Complainant's claims of non-payment of outstanding wages, vacation pay, pay in lieu of notice of redundancy and severance pay for redundancy have merit. Consequently, whether the Respondent, the owner and operator of OM Juicery, has offended the following sections of the Act: Section 6, Statement of Employment; Section 12, Vacation Pay; Section 20, Notice Periods; Section 21, Payment in Lieu of Notice; Section 23, Severance Allowance, and Section 30, Termination for Redundancy.

## **CASE OF THE COMPLAINANT**

- 1) The Complainant confirmed that he commenced employment with OM Juicery in September 2018, and that the business was owned and operated by a husband and wife team. He was unable to provide a specific day when he began working, but stated that he started as a dishwasher earning \$15.00 per hour.
- 2) In 2019, the Complainant became a main Juicer, and then began earning \$17.00 per hour.
- 3) The Complainant confirmed that since commencing employment in September 2018, he was not provided with a contract of employment, but it was verbally agreed that he would work from 8:15AM to 5:00PM, seven (7) days per week.
- 4) His approximate weekly hours were between 36 to 56 hours – depending on the needs of the business.
- 5) The Complainant stated that he was a fulltime employee, but at no time during his employment with OM Juicery, was vacation offered. Further, that he did not take vacation or receive vacation pay.
- 6) The Complainant stated that OM Juicery did not offer health insurance. However, he was deducted weekly for social insurance.
- 7) Regarding the Complainant's salary payments: he stated that during his time with OM Juicery, it was not uncommon that the owners deferred salary payments; but, the owners would eventually make good on the salaries, and pay him and the other employees.

8) The Complainant stated that the owners would travel frequently and inform their employees that their salaries were paid. However, he stated that employees would discover that the owners had travelled on vacation without processing staffs' salaries. Because of this, he would be left to manage his personal affairs without his salary.

9) The Complainant stated that on 18th August, 2022, the electricity (at the business) was disconnected; and again, his wages were not paid. On this same day, the Complainant understood that the owners shared via a telephone call that the staff should take the day off. As such, he and other staff closed the shop for the day.

10) The following day, 19<sup>th</sup> August, 2022, the Complainant stated that he received a telephone call from the Office Manager. The Complainant said that the Office Manager stated the following: "The bottom has fallen out and we are shutting it down". The Complainant said he understood the statement to mean that the business had closed.

11) The Complainant said that at no time did he receive notice in writing, via email or otherwise of the organization's plans to close temporarily or long term.

12) The Complainant stated it was approximately 3 or 4 weeks later (after the business closing on the 19<sup>th</sup> of August), that he was aware that the owners of OM Juicery had returned to the island.

13) Approximately six (6) weeks after first hearing that the Respondent had returned to the island, the Complainant stated that he bumped into the Respondent on Reid Street, in Hamilton. It was at this same time that the Respondent approached the Complainant and suggested to him that he recommence his employment with OM Juicery.

14) The Complainant stated that at no time during that meeting on Reid Street, in Hamilton, did the Respondent discuss resolving his outstanding pay.

15) The Complainant stated that he contacted the company's Book-keeper/Administrator, and she confirmed that he was owed wages of \$3,733.18.

16) The Complainant stated that the messages he did receive from the Respondent did not include offers to pay the Complainant what he is owed. And, upon review of the communications from the Respondent, the messages included continued employment with the Respondent (in) rebuilding his organization.

#### **CROSS EXAMINATION OF THE COMPLAINANT**

17) The Respondent commenced his cross-examination of the Complainant with a specific focus on the matter of vacation pay, asking the Complainant if he had ever been offered vacation pay. The Complainant confirmed that he had not ever received an offer of vacation pay.

18) The Respondent disagreed with the Complainant's assertion of not receiving an offer for vacation pay, instead stating, that when vacation pay and a pay raise was offered to the Complainant, the Complainant told him to give the vacation pay and the pay raise to another co-worker. Further stating that the Complainant had said that he did not need a vacation. In response, the Complainant said that he did not remember making the statement.

19) The Complainant clarified that, because at the point of the exchange regarding vacation and a pay raise that he was already making \$17.00 an hour, that he told the Respondent to give the **pay raise** to his co-worker, **not** the vacation time.

20) The Respondent sought clarity from the Complainant regarding who the Complainant believed the owners of OM Juicery to be. However, the Complainant refused to answer the question and the Respondent did not press for an answer.

21) The Respondent switched the focus of the questioning to the issue of the electricity being disconnected on the 18<sup>th</sup> of August, 2022 – asking the Complainant of his recollection as to why the electricity went off. The Complainant answered that the electricity often, went off.

22) The Respondent then asked about the 19<sup>th</sup> of August, 2022 – the day the Complainant stated that he received the call from the Office Manager, stating that the “bottom had fallen out”.

23) The Respondent asked if it had “dawned on the Complainant” (once he heard the news), to call him. The Complainant answered that it was not his job to contact the Respondent; rather, it was the responsibility of the Office Manager to make the call.

24) The focus of the cross-examination switched to the subject of the messages and the nature of the messages – from the Respondent to the Complainant.

25) The Complainant was asked if (since the business closure) he had received messages from the Respondent. The Complainant answered in the affirmative, but replied that he was not interested in the messages as they did not speak to the money he was owed by the Respondent.

26) The Respondent then referred to the Complainant’s statement regarding the chance meeting between the parties on Reid Street, in Hamilton. In particular, the Respondent questioned the Complainant about whether at that chance meeting – he asked the Complainant to come back to work.

27) The Complainant answered: that he told the Respondent that he had arranged for other employment as a painter; further stating to the Respondent that, “there was no work to come back to”.

28) However, the Complainant did state during the line of questioning that he had been seeking clarity on the status of the business, and that he was being contacted (never stating by whom); and confirming that it was approximately six (6) weeks after the business closed that he had the chance meeting on Reid Street with the Respondent.

29) The Tribunal interjected with a question regarding whether the Complainant knew of the business’ challenges, and whether he was told of the challenges by the Office Manager, to which the Complainant replied in the affirmative – to both questions.

#### **CASE OF THE RESPONDENT**

30) The Respondent confirmed that he is the proprietor of OM Juicery. And, he confirmed that sometime in mid to late 2019, OM Juicery moved the Complainant to a Head of Juicing position. However, before a contract could be created, the country headed into the global pandemic and the status of his business was uncertain.

31) The majority of the Respondent’s justification for the business’ financial difficulties, was, as he stated: due to a discovery that OM Juicery had been paying a portion of another company’s electricity bill – approximately 4 to 5 years since moving to their Elliot Street location.

32) The Respondent stated that the business’ electricity consumption had been reduced to between 50 to 70%, due to the shop being closed for months during COVID. Further, that attempts to mitigate the issue of the costs of the monthly bills, were unsuccessful. And, continued financial expenditures to pay the electricity

bill over a 4 to 5-year period, coupled with spoilage of their products when the electricity was disconnected, amounted to tens of thousands of dollars in revenue being lost.

33) The Respondent stated that as a result of the various problems, his business suffered irreparable damage; that he held outstanding debts; and that he lost staff to other jobs and to staff leaving the island. Finally, that throughout the mitigation period regarding the electricity issue, he had to leave the island to manage a personal family matter; and confirmed that the business had closed.

34) The Respondent stated that he had established a new location at Bermuda Aquarium, Museum and Zoo, and OM Juicery was tentatively scheduled to open 1<sup>st</sup> December, 2022. But, he stated that time was needed to establish a concrete plan for repayment. Once a consistent cash flow plan had been reestablished, the Respondent stated that he sent an email to each team member regarding establishing a repayment plan for their salaries.

35) The Respondent stated that he reached out to the Complainant various times through Facebook to provide him with a status update, but that the Complainant did not respond. Facebook was their usual method of communication because the Complainant did not own a cellular phone. The Respondent stated that the Facebook Messenger thread showed that the Complainant was receiving the messages.

36) The Respondent confirmed that he and the Complainant did have a chance meeting on Reid Street, in Hamilton. During the encounter, the Respondent said that he told the Complainant of the new location, and asked him if he would like to come back; and that the Respondent would begin a repayment plan for the Complainant's outstanding wages.

37) The Respondent confirmed for the Tribunal that he had agreed to pay the Complainant's outstanding pay and two-weeks' vacation, but he did not agree to pay the Complainant anything more than that.

38) The Respondent stated, and reiterated, that none of the OM Juicery Team had been fired when the business closed on 19<sup>th</sup> August, 2022, and that he would "gladly have everyone back". Further, that everyone remained employed while OM Juicery was not operational.

39) The Respondent expressed his horror at not being able to keep his business from closing.

40) As the Complainant did not wish to cross-examine the Respondent, the Tribunal in turn asked questions of the Respondent regarding the repayment plan for the Complainant, as well as sought specifics on the timing of the messages to the OM Juicery staff and to the Complainant.

#### **TRIBUNAL QUESTIONING**

41) The Tribunal asked the Respondent how long OM Juicery had been closed during the Pandemic. The Respondent replied that while it was a "very long time", he did operate when he could, in order to pay a worker who was a single parent of two children. But, that the business was closed for approximately four (4) to five (5) months. And, then, fully operational in April 2023.

42) When asked about completing Covid Relief Forms for his employees, the Respondent replied that he had done so for 2 of the 4 employees, but that he did not complete a Covid Relief Form for the Complainant, nor was he asked to do so.

43) The Respondent said that he did mention compensating the Complainant in an email; the same email that he sent to all staff to discuss their repayment plans. During this line of questioning from the Tribunal, the

Respondent established that OM Juicery had begun paying the Complainant \$50.00 a month starting March of 2023 - as a part of the repayment plan.

44) The Tribunal reminded the Respondent that at the Directions Hearing on 16<sup>th</sup> February, 2023, the issue of payment resolution was to be a matter for the Tribunal, as the parties had agreed not to engage without the assistance of the Tribunal - until the substantive Hearing.

45) To determine if the Complainant had knowledge of the repayment plan and the payments to his bank account since March 2023, the Tribunal recalled the Complainant to provide clarity.

46) The Tribunal then asked the Complainant if he had been made aware or was presently aware of the repayment plan that the Respondent had established. The Complainant reiterated that on the day of the chance meeting with the Respondent on Reid Street in Hamilton, that the Respondent did not mention a repayment plan.

47) Further, the Complainant reminded the Tribunal that the Respondent had addressed an email to him *after* the Directions Hearing regarding the commencement of weekly payments of \$50.00 to (Team Members') bank accounts.

48) In reply to the email from the Respondent, the Complaint replied to the Tribunal Administrator, instructing the Tribunal Administrator that: he did not wish to have his money in that way.

49) As a result, and in response to the Respondent, the Tribunal instructed him to immediately cease payments to the Complainant, until the Tribunal had made its determination.

50) For clarity, the Tribunal asked the Complainant if he had been receiving the \$50.00 payments to his bank account, to which the Complainant replied that due to the expense of requesting bank statements, he had not checked to see if the payments existed in his account.

51) The Tribunal sought specific dates from the Respondent regarding the \$50.00 repayments, as well as the dates of the emails the Respondent sent to OM Juicery employees (including the Complainant) regarding their plans to reopen OM Juicery, and their plans for repayment of their payrolls to their staff.

52) Because the Respondent had not submitted the aforementioned documents as supporting evidence of his statements referring to OM Juicery's reopening plans, and agreeing to repayment plans for the Complainant, the Tribunal instructed the Respondent to produce copies of emails and OM Juicery remittance statements to the Complainant, to be submitted to the Tribunal, pursuant to **Section 44D, Power to Obtain Information**.

#### **DELIBERATION OF THE TRIBUNAL**

53) Upon hearing testimony from the Respondent that he agreed to pay the Complainant outstanding wages and two-weeks' vacation pay, the Tribunal is satisfied that the Complainant's claim for these payments are valid.

54) The Complainant testified that prior to OM Juicery shutting down on 19<sup>th</sup> August 2022, as a fulltime employee since September 2018, he had not received vacation pay and that his wages were paid infrequently. Also, that he had not taken vacation, nor was vacation offered.

55) The Complainant further testified that on the 19<sup>th</sup> of August 2022, he received a call from the Respondent's Office Manager, that the bottom had fallen out and that the business would close. It is also clear to the

Tribunal that no notice was provided by the Respondent because, during the cross examination of the Complainant, referenced in clause 23 above, the Respondent asked: if it had "dawned on the Complainant (once he heard the news), to call him". The Complainant replied that it was not his job to do so. Because the reply was not disputed by the Respondent, confirms that he never spoke to the Complainant on the day of 19<sup>th</sup> of August, 2022; the day of the business closure.

56) Further, the Respondent did not dispute the Complainant's statement that he contacted the company's Book-keeper/Administrator, and she confirmed that he was owed wages of \$3,733.18.

57) During the testimony of the Respondent, the business closure date of 19<sup>th</sup> August, 2022 was not disputed. And, in an email dated 21<sup>st</sup> August, 2022 from the owner/operator to the Complainant, while speaking to the forced closure of the business, the owner/operator fully admitted that: "We realize that we have outstanding payrolls to pay most of you". "We are in the process of liquidating so that we can give you your owed amounts".

58) Where the Tribunal took issue with the admittance by the Respondent that he would pay the Complainant's outstanding wages and two weeks' vacation pay, was that the manner in which the payments would be made were not discussed with or agreed to by the Complainant.

59) While the Tribunal is not unmoved by the financial hardships experienced by the Respondent prior to the pandemic, during and post-pandemic, the decision to shut the business belonged to the Respondent. Having made that decision, the Complainant could not be made to suffer by: 1) Not receiving the wages he had worked for up to the date of the closure on the 19<sup>th</sup> of August, 2022, and 2) Could not be expected to survive off of a repayment of \$50.00 per week; payments which did not commence until approximately 7 months later in March 2023.

60) Based on the sudden closure of OM Juicery, the Respondent effectively finalized the company's contract of employment with the Complainant.

61) Therefore, the Tribunal accepts that the Respondent, the owner/operator of OM Juicery offended the following sections of the Act:

a) Section 12 - Vacation Pay: Since commencing employment in September 2018, and having exceeded one year of continuous employment, the Complainant having not received his entitlement of two (2) weeks' vacation leave, was entitled to receive this pay upon the closing of the business.

b) Section 20 - Notice Periods: The Complainant did not receive the statutory notice period of one week.

c) Section 21 - Payment in Lieu of Notice: The Complainant was informed of the business closure with no notice; effectively on his last day of employment on 19<sup>th</sup> August, 2022.

62) To determine under which section of the Act the Complainant was claiming severance pay, the Tribunal had to first consider whether the Complainant had been terminated and if the termination was by way of redundancy.

63) The Respondent has stated that the business ceased operating on the 19<sup>th</sup> of August, 2022, due to circumstances beyond the Respondent's control.

64) The first formal email communication by the Respondent to his staff was 21<sup>st</sup> August, 2022, two days after the closure. Nowhere in the email communication does the Respondent indicate to the staff - specifically to the Complainant - that the closure of the business was temporary, or that the staff remained employed, or that another location was being sought.

65) The email communication as mentioned in clause 56 above, specified that: "We are in the process of liquidating so that we can give you what you are owed". Further, the following statement made by the co-owner/operator of OM Juicery: "We will send out individual paychecks next week to inform you how much is owed and payment expectations", is the true weight of matter which begs the Tribunal to consider that the Complainant's employment was terminated as a direct condition of redundancy.

66) The Respondent's previous statement in clause 38, "that everyone remained employed while OM Juicery was not operational", is contradicted by his statement in clause 33 where the Respondent confirmed that OM Juicery lost employees to other jobs and some having to leave the island. The staff of OM Juicery totaled 4 people.

67) In the case of the Complainant, he confirmed to the Respondent in the chance meeting on Reid Street in Hamilton, some 6 weeks later, that he had engaged employment as a painter.

68) Therefore, the Tribunal does not accept the argument by the Respondent that because of his various attempts to contact the Complainant to "suggest to him" that he return to work is a definition of "remaining employed".

69) In emails to the Complainant (and the OM Team) dated 27<sup>th</sup> October, 2022, and 16<sup>th</sup> December, 2022, by the Respondent, via the co-owner/operator, neither email makes mention of a return to work. The emphasis of both email correspondence' focus solely on the repayment schedule and the delay of payments.

70) To outright reject the Complainant's claim for redundancy, the Tribunal required evidence from either party that a reasonable offer of reemployment or continued employment existed, and that such an offer was unreasonably refused by the Complainant.

71) The Respondent's email dated 16<sup>th</sup> December, 2022 makes clear to the Tribunal that the promised reopening on 1<sup>st</sup> December, 2022, of OM Juicery at its new location – Bermuda Museum, Aquarium and Zoo (BAMZ), did not materialize. Some four (4) months later, neither did the promised completion of repayments to the Complainant, materialize.

72) The evidence submitted by the Respondent to support his claim that employment was still open to the Complainant, spoke only to repayment plans in email communications to all staff. The Tribunal is satisfied that other suggestions by the Respondent to the Complainant of re-employment were based on one face-to-face chance meeting between the parties. This is because, while the Respondent stated in clause 35 that Facebook Message streams showed that the Complainant received his messages, he did not present evidence of the Message Stream or evidence of the Complainant acknowledging the messages or responding in kind to the "suggestion to return to work".

73) It was clear to the Tribunal that the Complainant did not hold a trusting and confident relationship with the Respondent. As such, the Complainant did not consider the suggestion to return to work for the Respondent, as a reasonable offer.

74) Based on the sudden closure of OM Juicery, with no formal or informal consultation with the Complainant established until approximately 6 weeks after the closure of OM Juicery on the 19<sup>th</sup> of August, 2022, and further, with no payments relating to salary until March 2023 – where only one payment of \$50.00 was paid into the Complainant's bank account, the Tribunal asserts that the Respondent effectively finalized the company's contract of employment with the Complainant on 19<sup>th</sup> August, 2022.

75) Therefore, the Tribunal accepts that the Respondent, the owner/operator of OM Juicery offended the following section of the Act:



a) Section 23 - Severance Allowance: Because the Complainant had completed at least one year of continuous employment, he was entitled to severance pay; and 'termination' was by reason of redundancy.

#### **DETERMINATION AND ORDER OF THE TRIBUNAL**

76) Having given the parties full opportunity to present evidence and make submissions, it is the Determination of this Tribunal that:

- i. **Pursuant to Section 8 of the Act, Unauthorised Deductions**, subsection (2) "*Where the total amount of wages paid on any occasion by an employer to an employee is less than the total amount payable on that occasion, the amount of the deficiency shall be treated as a deduction for the purposes of subsection (1)*".

Hence, the Complainant is entitled to unpaid wages.

- ii. **Pursuant to Section 12 of the Act, Vacation Pay (1)**, "*An employee shall be entitled to a period of two weeks annual vacation after he has completed – (a) the first year of continuous employment*".

As of 1<sup>st</sup> September 2019, the Complainant had completed one year of continuous employment and is therefore entitled to two weeks' vacation pay, up to 19<sup>th</sup> August, 2022.

- iii. **Pursuant to Section 20 of the Act, Notice Periods (1)**, "*A contract of employment may be terminated in accordance with this Part by the employer on giving the following minimum periods of notice in writing... (a) One week, where the employee is paid each week*".

The Complainant's claim for compensation of one-weeks' pay in lieu of notice is upheld.

- iv. **Pursuant to Section 23 of the Act, Severance Allowance: (1)** "*On termination of employment, an employee who has completed at least one year of continuous employment shall be entitled to be paid severance allowance by his employer. (a) Two weeks wages, for each completed year of continuous employment up to the first ten years;*

As of the 1<sup>st</sup> of September, 2019, the Complainant had one year of continuous employment and is therefore entitled to two-weeks' wages for each year of continuous employment – up to 19<sup>th</sup> August, 2022.

**It is therefore the Order of this Tribunal that:**

77) The Complainant be compensated as follows:

- a) Unpaid wages in the amount of \$3,733.18 less increments of a total of 12, \$50.00 payments:  
Final unpaid wages = \$3,133.18.
- b) Six-weeks' vacation pay in the amount of \$3,733.14.

c) One-weeks' pay in lieu notice in the amount of \$622.19.

d) Six-weeks' severance allowance in the amount of \$3,733.14

78) The total amount to be paid to the Complainant is: **\$11,221.65**

79) Such amount is to be settled no later than: **6<sup>th</sup> October, 2023**

The parties to this Hearing were reminded, and it was acknowledged, that the Determination and Order of this Tribunal are final.

It was also made clear that, in accordance with **Section 44J** and **Section 44I** of the **Employment Act 2000**, a party aggrieved by a Determination or Order of the Tribunal may appeal to the Supreme Court *on a point of law*.



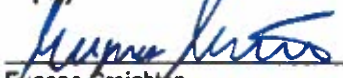
Lorrita J. Tucker

Chairman



Betty Christopher

Deputy Chairman



Eugene Creighton

Member