

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

**BETWEEN:**

**Ms. Lisa Bernardo**

**Complainant**

**AND**

**Respondent**

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**DECISION**

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**Date of Complaint:** June 22<sup>nd</sup> 2023  
**Date Investigation Completed:** September 24<sup>th</sup> 2023  
**Date of Referral:** November 3<sup>rd</sup> 2023  
**Date of the Hearing:** March 27<sup>th</sup> 2024

**Tribunal Panel Members:** Ms. Kelly Francis, Chairman  
Mr. John Payne, Deputy Chairman  
Mrs. Betty Christopher, Tribunal Member

**Present:** Ms. Lisa Bernado, Complainant  
Mr. ; Representing Ltd. Respondent

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

**Background**

Further to The Hearing held on March 27<sup>th</sup> 2024 (the "Hearing") between Ms. Lisa Bernado (the "Complainant") and (the "Respondent"):

The Complainant is seeking compensation for non-payment of accrued / unused vacation pay accumulated between May 2019 – May 2023, pursuant to Section 12 of the Employment Act 2000.

**The Hearing**

Neither the Complainant nor the Respondent presented any witnesses to support their arguments.

The Complainant stated that she joined the Company in May 2019 and was integral to the start-up and growth of the business. The Complainant received a Contract at the start of employment which stated she had a vacation allowance of 15 days per year after the first full year of employment. Due to the start-up nature of the business, the Complainant stated she was not able to take any vacation during her first two years of employment due to the volume of work required. She further states that at no point, did she ever use her full 15-day per annum entitlement in any subsequent year. The Complainant states that it was accepted that she had not taken vacation in the early years and her commitment to the business was greatly appreciated. The Company owners allowed the unused vacation to accrue from one year to the next without penalty or limit to the number of days that could be accrued. The Complainant understood that she would not lose any of the untaken days and stressed that she had the full consent of the owners.

The Complainant also shared that for the period May 2019 – January 2023, she worked primarily and directly with Owner/ Director [redacted] and [redacted], Field Manager, both of whom worked out of the [redacted] offices. In January 2023, another owner [redacted] who had not previously involved himself in the day-to-day operations, joined the business on a full-time basis in a Managing Director capacity. It was at this point that the Company sought to change her previous employment terms.

Shortly after the arrival of the Managing Director, several actions occurred:

- The Complainant was told despite her understanding, her vacation had not been accruing during her tenure.
- The vacation balance which previously and consistently showed on her pay slip and contributed to her belief that she continued to accrue for the unused vacation, was removed with the reason given that it was an error by their payroll service provider.

- The Complainant was presented with a new contract of employment which amended the vacation policy to include a restricted number of days which can be carried over from one year to the next.
- The Complainant signed the new contract believing the amendments were on a go-forward basis and not meant to be retroactive and encompass her full employment term.

When the Complainant tendered her resignation, she fully expected to receive her bank of accrued / unused vacation pay and was advised that she was not eligible based on the terms outlined in the new contract which ultimately led to the complaint being filed with the Department of Labour.

The Respondents chose to have the current Managing Director as the sole representative for the Company, despite the fact that he had not held an active or operational role in the business for the majority of the Complainants' tenure. Points raised by the Respondent to counter those of the Complainant include:

- The handbook and statement of employment were issued in December 2022, not January 2023 and were a natural part of the business evolution and growth as a company.
- The Respondent states the issue of vacation accumulating was never discussed prior to January 2023 when the Complainant was advised that there was no accrual policy in place. For the Respondent, the absence of a policy stating unused vacation could accrue meant that it could not accrue and defaulted to the terms of the Employment Act, Section 12 which is listed below.
- The Respondent stated the vacation accrual which appeared on the Complainants pay stub was placed erroneously by the outsourced payroll provider and once the error was discovered, was removed.
- The Respondent referenced disciplinary action which had been taken by the Company but did not provide any basis for tying that action to this matter regarding the accrued / unused and unpaid vacation owed to the Complainant. It was therefore not taken into consideration by the Tribunal.

### **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).

(2) An employer shall, where practicable, grant an employee's request to take his vacation leave at a particular time, subject to the reasonable requirements of the business and to requests for vacation by other employees.

(3) An employee shall be entitled to a week's wages for each week of his vacation which shall, where so requested by the employee and where practicable, be paid in advance of the vacation.

*[Section 12 amended by 2019 : 39 s 2 effective 1 January 2020]*

### **Deliberations**

1. The Tribunal have heard the representations from both Parties and considered reasons given by the Complainant to support their claim.
2. The Tribunal was not persuaded by the Respondent that despite the Complainant receiving an updated Statement of Employment in January 2023, this negated the past practice of allowing accrued but unused vacation to accumulate.
3. The Tribunal was persuaded that the Complainant had taken significantly less vacation than either permitted under the Employment Act or, as allowed by her employment contract.
4. The Tribunal was not persuaded that the Complainant had any reason to believe that she would lose the accrued vacation for those years when she either took none or little vacation.
5. Based on evidence provided, the Tribunal was persuaded that the Respondent was incorrect in the action taken when they issued a revised statement of employment which had a retroactive condition embedded which was not disclosed to the Complainant.
6. The Tribunal was persuaded that the Complainant had a reasonable expectation that her accrued / unused vacation days would be paid to her at the conclusion of her employment with the Company.
7. The Tribunal was persuaded that the Respondent is in violation of the Employment Act 2000, Section 18.5 as shown below and has an obligation to pay the Complainant for the vacation days which accrued, but were not taken during her employment tenure of four years.

(5) Where an employee's contract of employment is terminated, his employer shall pay any wages and other remuneration and benefits which accrued at the date of termination and such payment shall be made within seven days of termination or at the next interval at which the employee would have been paid had the contract of employment not been terminated, whichever period is the longer.

**Determination and Order**

The Tribunal awards the Complainant the following:

- 1) Thirty days of vacation pay totaling **\$8,653.84**, less applicable deductions and calculated on the Complainant's annual salary of \$75,000.00 gross per annum.
- 2) Payment must be made in full no later than 30 days following receipt of this order.

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.

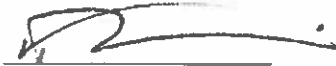
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**DECISION**

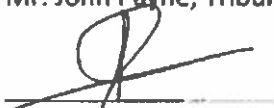
Dated this 17<sup>th</sup> day of April 2024

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Ms. Kelly Francis, Chairman



Mr. John Payne, Tribunal Member



Mrs. Betty Christopher, Tribunal member

