

Xxxxx and Xxxxxx Versus Xxxxx

DETERMINATION and ORDER

In the Matter of The Employment Act 2000 Before The Employment and Labour Relations Tribunal

THE TRIBUNAL

Members of the Tribunal:	Lorrita J. Tucker, Chairman Jocene Harmon, Deputy Chair Yolanda Outerbridge
Directions Hearing:	26 th April, 2024
Hearing Date:	28 th June 2024
Adjournment Date:	28 th June, 2024
Hearing Place:	Department of Labour Relations 23 Parliament Street Hamilton, HM 12, Bermuda
Complainant/s: Representative:	Xxxxxx and Xxxxxx None
Respondent: Doing Business as: Representative:	XXXXXX Xxxxxxxx None

STATUTORY AUTHORITY TO HEAR THE MATTER

The Tribunal Hearing was convened on 28th June, 2024. The Chairman confirmed the points to be considered by the Tribunal. The Chairman stated that the Tribunal's Directions Hearing was convened on 26th April, 2024. 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 26th April, 2024, the Tribunal explained that should the matter proceed to the substantive hearing, the parties would have the opportunity 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 Employer stated to the Tribunal that she was of the position that there was no case to answer or indeed to resolve, as the business had closed since both Employees had filed their claims, and that both Employees

had resigned their posts; they were not dismissed. The Employer was reminded that both employees had a right to file a claim under *Part V Enforcement of the EA, 36, Right to Complain to Inspector*, and the Tribunal was obliged to hear the complaint under *38, Hearing of Complaints by Tribunal*. Subsequently, the parties decided to proceed to the substantive hearing.

THE TRIBUNAL'S CHARGE

The Tribunal was charged with determining whether the Employer offended the Employment Act 2000 by constructively dismissing both employees during the process of relocating her business, and in determining the final place of relocation for both Employees.

Each Complainant alleged, that from the initial notice received by the Employer to vacate the premises of the business, proceeded by their consistent pleas and attempts to receive relevant, clear and timely communications from their Employers as to the future plans for their work and workplace, and their statuses (due to being work permit holders), that due to both Employers' contradictions and deflections regarding imminent relocation decisions, and having a disregard for each Employees' emotional, medical and fiscal welfare, financial burdens, and professional reputations – they were forced to resign their posts and make a claim of constructive dismissal.

BACKGROUND

1) The period of dispute commenced December 2022 and continued through to September 2023. In the former date, the Employer was notified by the owner of the building that they were operating from – the Xxxxxx Building, Bermuda, that the building was to be demolished. The Employer was given a notice to vacate the premises by 31st March, 2023.

2) The business, the Xxxxxx, was comprised of eleven (11) employees performing as therapists and hair stylists. Both employees were hired as xxxxxts; Employee A's official title was Spa Coordinator. As such, relocation of the business involved finding permanent or temporary premises where employees could perform their trades. Further, that the relocation would give the owners of Xxxxxx the opportunity to find a new space, upgrade their offerings, especially for the spa, and offer new amenities and premium services in a new and improved space.

3) It is not disputed by either party that no formal notice was provided to the employees of Xxxxxx once the notice to vacate their employment premises was received. However, by 1st April 2023, the business remained operating from the XxxxxxBuilding; and in May of 2023, the first staff meeting was held to assure staff of a relocation plan and continued salary payments.

4) By August 2023, the Employers were given two-weeks to vacate the Xxxxxx Building, and the Employers informed their staffs of this notice. With no permanent location to move to in September 2023, the Employers announced opportunities for secondment to two other xxxxxs, but had found one temporary location at a building on Burnaby Street. By the 1st week of September 2023, one Employee relocated and the other Employee (on a fit to return to work) did not start work at the temporary location. However, the Employer was advised by the landlord of the building that they could not perform their xxxxx on the premises due to a long-standing tenant operating a similar service. Consequently, both Employees were unable to perform their work.

5) Collectively, Employees A and B sought advice from the Labour Relations Office. Once, submitting their letters to the Employer (and) Director S. – with a request to meet for resolution by a particular date, although contacted by the Employer and Director S. to meet, the meeting did not materialize. Subsequent to the (failed) meeting, the Employer had contacted the owner of another xxxxxx – Xxxxxx, on Front Street – as the owner

had left the xxxxxx empty when she left the island. However, by the time Employees A and B received the offers to relocate to the alternative xxxxxx, each had submitted their letters of resignation.

THE EMPLOYMENT BACKGROUND OF THE COMPLAINANTS - EMPLOYEE 'A' AND EMPLOYEE 'B'

EMPLOYEE 'A' – L.xxxxxx

6) Employee 'A' had been employed with Xxxxxx as a Xxxxxxt for approximately 31 years, from 13th March 1992 through to the date of her resignation: 11th September, 2023.

7) At the time of the dispute period of notice, Employee 'A' had returned to work in December 2022 after a period of illness and recuperation starting on 10th October 2022 until the beginning of December 2022.

8) In February 2023 Employee 'A' commenced extended sick leave after numerous surgical procedures and then recuperation until August 2023. In September 2023, Employee 'A' was declared fit to return to work.

9) At the end of August, 2023, Employee 'A' was informed three (3) days prior to her planned return to work of 1st September, 2023, that there were no xxxxx facilities in the temporary Burnaby Street premises.

10) Employee 'A' was not paid sick pay during the time of her 7 months illness and recuperation - February 2023 through August 2023.

11) Two (2) clients had been booked for Employee 'A's return to work on 1st September, 2023.

12) Employee 'A' hand-delivered her resignation to her Employer on 11th September, 2023.

HEALTH INSURANCE CANCELLATION

13) Employee 'A' informed her Employer that after her first surgery in February 2023, while checking her insurance CG HIP, that her coverage ended in January 2023. As such, that upon visiting a consultant prior to her second surgery – she was informed that her coverage had been declined; she then received a bill for approximately \$2000.00.

14) Employee 'A' stated that her Employer seemed indifferent to hearing that her HIP health insurance had been exhausted, especially because prior to her illness, the Employer had been with another health insurer where Employee 'A' had paid premiums for Major Medical for 30 years. Ultimately, she was informed by her medical providers that her health insurance had been cancelled.

EMPLOYEE 'B', A. XXXXXX

15) Employee 'B' had been employed with Xxxxxx as a Xxxxxxt for 2 years and 4 months: 4th May, 2021 through to the date of resignation, 11th September, 2023.

16) Employee 'B' datelined and detailed the dispute period of December 2022 through to September 2023.

17) Employee 'B' was informed on 3rd September, 2023, that she would not be able to work in the Burnaby Street location because there were no xxxxx facilities. The Employer then offered Employee 'B' the opportunity to perform xxxxxxxring duties, at less pay, in the same location - for a xxxxxx who was on vacation.

18) On 4th September, 2023, Employee 'B' arrived at the Burnaby Street location to find no xxxxx equipment or furniture. The Employer later arrived with one chair and one mirror.

19) The Employer and Director S. requested a meeting with Employee A and B on 7th September, 2023. Both Employees attended while the Employer stayed for a brief period, then left and did not return. Director S. – the meeting solicitor, did not show. Ultimately, after a three-hour period had passed, no meeting materialized.

20) Employee 'B' hand-delivered her resignation to her Employer on 11th September, 2023.

HEALTH INSURANCE CANCELLATION CLAIM BY EMPLOYEE B

21) Employee 'B' stated that during March 2022, having been on the island for only 10 months, that after a doctor's appointment she learned that her BFM health insurance had been terminated. That up to that point, her deductions had been approximately \$600.00 monthly.

22) When the Employer was confronted about the terminated health insurance, Employee 'B' was told that monies had been applied to the "wrong account". After which, Employee 'B' was told the insurance company had cancelled the account because reimbursements were too high. Employee 'B' testified that eventually she was forced to move to the Hospital Insurance Plan (HIP) and then another insurer all within a period of six months, and never received an explanation from the Employer about where the previous deductions had gone.

THE POSITION AND TESTIMONY OF EMPLOYEE 'A'

23) With the sick leave statuses of Employee 'A' having been established, she testified that she was aware of the decision made by the landlords for the Employer to vacate the XxxxxxBuilding. Further, that 2 months later, she had to have surgery in February 2023, which her Employer told her "was not convenient". Unfortunately, the surgery was unsuccessful and Employee 'A' had to have two further life-saving surgeries. Because of the nature of the surgeries, she would be unable to perform her xxxxx duties until she received a 'fit for work' notice from her doctor. Specifically, because the work required her to have close proximity ergonomically to a sink, and she would have limited movement. This reality included the possibility of retaining an assistant to help with hair washing.

24) Employee 'A' confirmed that the entirety of her sick leave was unpaid. However, she had been guaranteed that she would have a job to return to once she was given medical clearance.

25) Employee 'A' presented evidence of a text message between herself and the Employer in which she stated to the Employer that she had been informed by one of her clients that the xxxxxx was closing down on the 31st of August; asking "what was happening to us". And, were they being made redundant?

26) The Employer responded that they had to close on the 31st of August. Further, "that they don't have an alternative yet, but still trying to get something". The Employer continue in the text: "No redundancy - as we will have a new place to work at in December (2023)".

27) While Employee 'A' expressed that she needed an income (in the meantime), the Employer stressed that they were doing everything they could but had nothing definite. But, Employee 'A' did not accept the answer and asked if she would be paid until a new venue was available – because she was still on a work permit and had no income since February 2023.

28) The remainder of Employee 'A's text provided clear indication from the Employer that numerous places that had been lined-up had not materialized, and that they were continuing to seek bi-weekly extensions by the landlords up to the time they had to vacate the XxxxxxBuilding of 16th September, 2023.

29) Employee 'A's evidence of multiple texts between herself and the Employer indicated that during the 10 months in dispute and while she continued to be on sick leave, that the following locations had either been communicated to her by the Employer, or that she had heard through rumour and sought confirmation from the Employer whether they were rumour or true:

- The xxxx Building; The xxxxxx; The (former) xxxxxx; Xxxxxx Xxxxxx; Xxxxxx xxxx.

30) In an undated text between Employee 'A' and the Employer, when the Employer was asked for an update, stating that the latest news she had heard was of a move to Xxxxxx, and that they had to be out by 31st August, the Employer replied, "nope."

31) Employee 'A' said it was further on in the trail of the above text message that the Employer stated that while there was only 2, ½ weeks from (early September to the vacate date), that the Employers had lined up clients for Employee 'A', and were working on clients for October 2023.

32) Employee "A' testified that she believed this information to be untrue based on the Employer's statement that a) they had to vacate the premises, and b) confirmation by the Employer that no alternative had been found for Employee 'A' to service her clients after vacating the XxxxxxBuilding. As such, Employee 'A' asked both the Employer and Director S. to hold off on booking clients for her until the new venue was up and running; believing that it was unprofessional for customers to be serviced in a place that was not conducive for such services to be provided.

33) Employee 'A's text message indicated that messages had not been sent out to her clients regarding the relocation, or Xxxxxx clients at large informing them of the changes to business. At the time of requesting that her clients and Xxxxxx's client base be communicated with, the response received by Employee 'A' was a reply from Director S. requesting a 10/10:30 meeting for the following day – with herself and Employee 'B'.

34) Employee 'A' confirmed that she showed for the meeting on 8th September, 2023, in which only one of the Employers showed. Confirming that no concrete answers or directions were provided to her or Employee 'B' about where they were to work, or what would happen to them since being told that they could not work at the Burnaby Street location. Ultimately, the Employer left the meeting, stating that she was leaving to locate the Director S., but – after a three-hour wait, neither she nor Director S. showed.

35) After the non-meeting, Employee 'A' testified that the Employer called her to ask if they could meet, as Employee 'A' had worked for her for approximately 31 years. It was at that time that the Employer mentioned a secondment to work in the vacant xxxxxx on Front Street.

36) Employee 'A' expressed doubt at the offer to move to the Xxxxxx location on secondment because she was still on a work permit until March 2024 – although she had an application being vetted for long term residency.

POSITION AND TESTIMONY OF EMPLOYEE 'B'

37) Employee 'B' clarified for the Tribunal that there were two (2) Employers that employees communicated with – a mother and daughter team (the Employer and Director S.) however, the majority of the management of the relocation and the communication surrounding it was by the Employer – the lone Respondent in this matter.

38) Employee 'B' testified that in December 2022, when the decision was made by the landlords of the Xxxxxx Building, that all tenants were to vacate the premises by 31st March 2023, that she was not informed of this

by the Employer rather, it was in conversation with a client. And, when the Employer was asked about the rumor, she stated that the company had not been given a date to vacate.

39) Employee 'B' stated that employees were then banned from speaking about the building closure and that she was asked to sign a Non-Disclosure Agreement (NDA) by Director S.

40) Because of her concern about the safety of her job, Employee 'B' signed the NDA and was then shown plans for the new business.

41) Employee 'B' confirmed that in February 2023, that Employee 'A' was absent due to major surgery and this left Employee 'B' as the xxxxxx at the business, and with an increased workload – which she carried through the absence up to September 2023.

42) Employee 'B' testified that despite the supposed March 31st vacate date and rumors of a new space being located, employees received few details and were continually told to not discuss changes with clients.

43) Employee 'B' stated that some 5 months later – in May 2023, that the first staff meeting was held because a new Beauty Therapist was being employed. In that meeting, employee 'B' testified that staff were assured that there was a concrete relocation plan; that the Employer made promises that employees' salaries would be maintained due to having an approved bank loan, and receiving an extended deadline of December 2023 to vacate the Xxxxxx Building.

44) Employee 'B'; continued that due to such uncertainty, two (2) employees – both work permit holders - resigned their positions with Xxxxxx and left the island as they were unable to secure alternative employment.

45) By the following month of June, rumors circulated that the Employers had not received an extension to December 2023; rather, an extension to 31st July, 2023.

46) Employee 'B' testified that her concerns continued to grow by early July 2023 because, by then, the relocation premises had changed twice – and time was running out for a vacate date of 31st July, 2023. She confirmed that no xxxxx furniture or equipment had been scheduled for relocation before the 31st July deadline, and the Employer then returned to stating (as she had done in the May Meeting), that Xxxxxx had been given a vacate extension to December 2023.

47) Employee 'B' testified that by August 2023, the dispute reached a critical juncture, because suddenly, the Employer announced on 16th August, 2023 that the company had now been given two-weeks to vacate the premises and would have to be out by 31st August 2023. That upon hearing this announcement, all other past assurances by the Employer had been contradicted yet again. Employee 'B' then stated to the Employer that based on the Employment Act, the Employer should lay off her staff or make them redundant. To this point, Employee 'B' stated that the Employer strongly refused.

48) Employee 'B' stated that the meeting became heated and alleged at one point, the Employer was said to have asked the Employees: "can't you just go home?" Employee 'B' testified at that same time, the Employer then raised the possibility of being seconded to other xxxxxs. Employee 'B' believed that such a possibility raised legal and professional concerns because of her work permit status.

49) Later, on the day of the 16th of August, Employee 'B' testified that she received a text message from the Employer's daughter, Director S, in which she stated that false information had been provided by the Employer (her mother), and that she wished to visit with Employee 'B' at her home, to clear up the information.

50) Employee 'B' stated that she refused the offer; instead agreed to discuss it the next day in the workplace. However, she said, Director S did not show for work.

51) Employee 'B' testified that upon arriving to work (2 days later) on the 18th of August, 2023, the Employer held a meeting with the staff and informed them that a location had been found whereby all staff could move to. Further, after returning to the workplace later that day, the Employer showed employees videos and pictures, stating that a lease had been signed for the location and the plans were confirmed to move as of 31st August, 2023.

52) However, by the 21st of August, Employee 'B' stated that staff were then told that another extension had been granted for them to stay in their current location until 16th September, and that she was pushing for a further extension through October 2023.

53) Employee 'B' stated that despite the continuous revised and extended vacate dates being communicated to staff, on the 29th of August a moving truck arrived to remove equipment to the temporary location – The (former) Xxxxx premises on Burnaby Street.

54) Employee 'B' stated that no xxxxxx (xxxxx furniture and equipment) was moved – despite Employee 'B' working until 9:00PM that same day packing items to be removed by the movers.

55) On 3rd September, Employee 'B' testified that she returned to the Xxxxx from the Xxxxx premises on Burnaby Street to retrieve some equipment. She stated at that time she was informed by the Employer (who was in her office at the time), that there was nowhere for her to work the next day (the 4th of September) because the business owner/landlord would not allow xxxxx to be performed on those premises, because another of his lessors, also providing xxxxx services, did not wish to have competing services near them. And, as Employee 'B' was a xxxxxx, she would not be allowed to work there.

56) Employee 'B' testified that after she was told that she could not work (in the premises), the Employer suggested to her that she could go to people's homes and cut their hair.

57) Employee 'B' stated that it was at that time she reiterated to the Employer that she had sought advice from the Labor Department; stating again that she should either have been laid off or her position made redundant.

58) She stated that the Employer again refused either suggestion.

59) As such, Employee 'B' asked the Employer how she would be paid – since she could not work; further, that she had 11 clients booked for xxxxx services. In response to this statement, Employee 'B' stated that she was then offered the opportunity to work as a XXxx for less pay, but filling in for one of Xxxxx's xxxxxx who was on vacation at the time.

60) Employee 'B' agreed to the arrangement (fearing she might have financial troubles), but testified that the Employer then stated to her that, "she did not know when all (of this) would happen".

61) Employee 'B' testified that when she did arrive (to work) at the Burnaby Street temporary location, that it was subpar; that no xxxxx equipment or furniture had been put in place to service her clients or the xxxxxx's clients. However, during the same day, the Employer brought her one chair and one mirror.

62) Employee 'B' testified that in order to protect her interest, and after consulting with the Labour Relations Officer, on the 6th of September she hand-delivered a letter to her Employer in which she requested a resolution to the issue within 48 hours, or further action would be taken. She testified that she told the Employer that the letter was not a resignation; that she only wanted a resolution.

63) Employee 'B' returned to work at the Burnaby Street location the following day. Working as a xxxxxx, she xxx three (3) clients.

64) Employee 'B' testified that on 7th September, both she and Employee 'A' received text messages from Director S requesting a meeting for the 8th September. Both Employees agreed to the meeting. With some discussions ensuing between Employee 'B' and the Employer, Employee 'B' testified that the Employer reminded her that she had "only missed a week off work, so far". Employee 'B' asked the Employer if she would be paid (for that week) but was told no, because there was no money coming in and that her clients were being redirected to another xxxxxx called Xxxxxx.

65) Employee 'B' testified that no progress was made in the meeting and that after a period of time had passed, and they were still waiting for Director S to arrive, she requested of the Employer to hold a meeting by the deadline date presented in her resolution letter of the 6th September. Employee 'B' stated that the Employer (having given numerous excuses for Director S' absence) then left the building stating that she would be right back but, after 3 hours had passed – with neither the Employer returning or Director S showing for the meeting, Employee 'B' decided that she had no choice but to resign.

66) Employee 'B' stated that she hand-delivered her letter of resignation to the Employer on 11th September, 2023 and filed her initial complaint with the Labour Relations Officer. She testified that on the 12th of September, the Employer reached out to her with offers of possible work options – which Employee 'B' said were not concrete options – therefore she did not respond to the Employer.

POSITION AND TESTIMONY OF THE EMPLOYER

67) The Employer confirmed that the period in dispute was December 2022 through September 2023. That during that period, Employee 'B' was operating out of the Xxxxxx Building, and Employee 'A' was on sick leave the majority of the time.

68) In the Statement of Defense (SOD) provided by the Employer, the company had been occupying two floors in the Xxxxxx Building for 25 years. The employer confirmed that in early December 2022, the owner of the building informed her that it would be demolished and she was given notice to vacate by 31st March 2023. However, expressing that such a period of notice was not very long to relocate a business that needed specialized fixtures and fittings, she expressed relief at the opportunity to find a new space to upgrade their services – especially their spa services.

69) The Employer confirmed that at the time of notice to vacate (December 2022), that their lease had expired. In the SoD, the Employer confirmed that her staff were informed by one of her clients (who worked in the building) a couple of hours after the tenants had been informed. However, that she had not informed her staff because they were all fully booked and she wished not to disrupt their day until she had something concrete to communicate – needing the weekend to make a plan.

70) The SoD emphasized that at no point in the company's 50-year history had staff ever been told they would have no place to work. In this matter, the Employer made clear their intention was to upgrade their facilities and offer new amenities and premium services in a new and improved space. That under no circumstances were they considering closing their business.

71) Under normal course of business, it would not be the Employer's position to notify staff of the day-to-day dynamics and changes in plans until plans (for the move) were finalized and contracts were in place. That their position with their staff was that they would always be employed. The Employer's position as stated in the SoD was that evidence would show that there were constant reassurances made to employees that they would be moving and remain employed. And, should their staff choose to leave, it would be their choice.

72) The Employer stated that both Employee 'A' and 'B' made the choice to leave her employ despite constant reassurances through the 9-months period in dispute – that they would remain employed, and that they chose to resign without giving one-months' notice, despite attempts to keep them employed.

73) The Employer's SoD indicated that she looked at several commercial properties for rent; the properties found were suitable but needed complete refits including plumbing, electrics and air-conditioning. They found opportunities for secondments with two (2) local companies and found one temporary and one permanent location. A temporary location lease (at the Xxxxxx old premises) was signed on 28th August, 2023 and the move was made on 1st September, 2023.

74) The Employer's SoD indicated that Director S entered into talks for the permanent location in August 2023; but because of the involvement needed by that company's board of directors, it would take weeks for approval to be provided for the lease. Ultimately, the lease for the new location was signed November 2023 and, submission of plans for the permanent location (XxxxxxBuilding) – were approved in February 2024.

75) The Employer alleged that during plans for relocation, Employee 'A' and Employee 'B' spread gossip and rumours and posted malicious comments on social media to cause disruption. That because of their actions, the company's reputation was damaged and caused the business to be financially impacted.

76) However, the Employer confirmed in her testimony that a temporary location: the former Xxxxxx premises was leased; the first month rent paid - commencing the move-in. However, as the Employer testified, the landlord advised them after a few days that no xxxxx could be done on the premises because of a complaint by current tenants not wanting a competing business so close. The Employer stated that: "unfortunately, (this) was not going to work for Employee 'A' and Employee 'B'".

77) The Employer testified that - with short notice to find suitable premises for both Employees, the owner of another xxxxxx: Xxxxxx, who had left the island, was called by Director S and agreed to the xxxxxx being used. The Employer stated that Director S contacted both Employees for them to view the space – but neither Employee responded.

78) In the Employer's SoD, she stated that neither Employee looked at (the Xxxxxx) premises - a place that was in a good location and ready to go – where both could have kept their clientele until the permanent place was outfitted, or alternatively, (they) could have applied for other jobs to work elsewhere and continued working up until they received new work permits, with no gap in employment.

79) The Employer stated that both Employees were advised that any business going through such upheaval was subject to day-to-day changes until things settled. That the situation was an unfortunate sequence of events – to which she – the Employer – had no control over. The Employer insisted that all stops were pulled out for the Employees to have continuous employment.

CROSS EXAMINATIONS

80) The Tribunal noted that the Employer was unprepared to engage either Employee and was resistant to any form of examination of her position in the dispute. Because of this, the Tribunal questioned the Employer to seek clarity on what it determined were the most contentious issues of the dispute: 1) the Employers' communication to Employees 'A' and 'B' during the period of dispute, and 2) the details surrounding the various locations that were being considered for relocation and when.

81) The Tribunal sought clarification of the "secondments" that were offered. The Employer confirmed that the secondments were for the use of other locations, not to work for another Employer.

82) The Temporary Location

- The former Xxxxx premises on Burnaby Street;
- The lease was for a minimum of three (3) months, with a maximum lease period of 6 to 8 months;
- The lease was signed on 28th August, 2023;
- The move in date was 1st September, 2023;
- Three (3) days later, the Employees were told that they could not perform xxxxx on the premises.

83) The Permanent Location

- The Permanent location was confirmed as the XxxxxBuilding;
- The Employer confirmed that talks with the building owners commenced in August 2023;
- The lease was signed in November, 2023 (one month after both employees resigned);
- Plans of the redesign were approved in February 2024 (four months after both employees resigned).

84) The Employer was asked when did the Xxxxx business close? The Employer's answer was that it had not closed at the time of the dispute. Evasively she answered that it had only recently closed. Further stating in her testimony that the Xxxxx business remained closed (to-date), and that she was now a pensioner.

85) Employee 'B' confirmed that Xxxxx had operated from the temporary location, until closing in April 2024.

COMMUNICATION TO EMPLOYEE 'B'

86) The Employer did not dispute that she had not informed Employee 'B' that Xxxxx had been asked to vacate the Xxxxx Building. She stated that upon being told the news, that she wanted to think about what she wanted to do and wished to speak to her daughter, Director S. That throughout the period of dispute, that she believed that she was being harassed by Employee 'B'.

87) The Employer did not dispute the testimony of the Employee 'B' 'regarding the date periods of each meeting with employees – nor the numerous relocations options and the numerous vacate dates and deadlines that were communicated in each meeting. Neither did the Employer dispute or challenge Employee 'B' on the comments she was alleged to have made, regarding "suggesting that the employees "just go home"; "work from other people's houses", or that she had been made aware of options to discuss layoffs or redundancy.

88) She stated that during her meetings with Employees, that the meetings were "fraught" and she did feel harassed. However, that she believed that she was communicating with her Employees and that they were "happy with what they were being told."

89) The Employer confirmed that after being informed that both Employees would not be able to perform xxxxx duties at the Burnaby Street location, it was then that she asked them both to consider going to the Xxxxx location. She testified that she made the suggestion via email to both Employees. However, that the emails were sent after both Employees submitted their resignations – claiming constructive dismissal.

90) Regarding the Employer's claim that the social media posts by Employees 'A' and 'B' had impacted on the business' ability to retain their clients (thereby) unable to make money – and if she had evidence to prove her allegation, the Employer stated that she did not have any evidence.

91) Finally, the Tribunal asked the Employer, that, when given notice to vacate the building, why had she never informed clients of Employee 'A' and 'B' that the new location was coming. The Tribunal received no answer.

CLOSING STATEMENT BY EMPLOYEE 'A' – L.xxxxxx

92) Employee 'A' said that she was dismayed that after she worked for someone half of her life - to be dismissed with only 2-days' notice was unbelievable. That since being told two days before she was to recommence work (at the Burnaby Street Location) that she could not work there, she had not received an apology from her Employer.

93) Having been through life-saving surgeries, no compassion was shown nor had she been offered any financial assistance while being on unpaid sick leave for seven (7) months. As a result, she had used all of her savings over the past 15 months.

CLOSING STATEMENT BY EMPLOYEE 'B' – A. XXXXXX

94) Employee 'B' stated that she felt dismissed. That she was the only employee left at the xxxxxx – "holding up the xxxxxx" while the vacate/relocation matter was going on. She worked alone (while Employee 'B' remained on sick leave) and was never thanked for her work. Further, that it was only after the Employer learned of her consultation with the Labour Relations Officer that she received an option to relocate to Xxxxxx (vacant) xxxxxx.

95) Employee 'B' said that throughout the ordeal, she was only asking of the Employer for the right thing to be done. Which, to her knowledge was for redundancy to be paid.

CLOSING STATEMENT BY THE EMPLOYER – S. TERNANT

96) The Employer stated that she did not agree with what either Employee had said (in their testimonies) and in their Statements of Claim. And, that she felt attacked. She stated that she could not control the past events but, that both Employees wanted to know daily – and it was "unreasonable" to expect that.

THE TRIBUNAL'S DELIBERATION

97) Notwithstanding each Complainants' claim that they each were constructively dismissed, the Tribunal focused its deliberations on how the Employer (and by association, Director S) communicated and managed the notice to vacate their place of operations; how the notice was communicated to both Employees; and when and how it was confirmed that each Employee would continue their duties as xxxxxx.

EMPLOYEE A - DELIBERATION

98) As Employee 'A' demonstrated in her evidence of text messages between herself and the Employer, that while on extended sick leave, all communication with her Employer and Director S was initiated by Employee 'A' and prompted in large part – over the period of (her) 7 months' sick leave – of Employee 'A' hearing rumours about intended relocation options; also, with text replies from the Employer confirming that each opportunity had not materialized.

99) The Tribunal considered that Employee 'A' was in the most vulnerable of positions by not being paid sick leave while out for 7 months, nor at any time within that 7 months receiving confirmation of when and where she would be relocated upon returning to work – despite receiving replies from the Employer (each time) that a location was being secured and clients were being reserved.

100) Employee 'A', having received communication from her Employer in December 2022 that Xxxxxx was notified to vacate the premises by 31st March, 2023; then anecdotally hearing of numerous extensions (without confirmed deadlines); then hearing of a vacate deadline of 31st August, 2023 – but with her expected date of return to work being 1st September, 2023 – at no time was individually consulted by either the Employer or Director S about the terms of her return to work; the logistics of that return; what her working conditions or duties would pertain (due to her statements that she would require an assistant for sink work), nor was she presented a revised statement of employment/addendum to be guided by during relocation and post-relocation.

101) As evidenced in Employee A's text messages – once informed on or around 1st August, 2023, the Employer **had not** communicated to her that they had been given 2-weeks to vacate the premises. Rather, Employee 'A' heard a rumour that this was the case; and anxiously expressed where they would go if indeed the rumour was true that the final vacate date was 31st, August, 2023. Within the same text reply, the Employer did not confirm the rumour rather, spoke in the affirmative that two (2) clients had been booked for Employee 'A' with no mention or confirmation of where Employee 'A' would service those clients.

102) The Tribunal considered above all, that when Employee 'A' asked – months before the vacate date of 31st August if (they) would be made redundant, the Employer replied: "nope"; and when Employee 'A' indicated that she would require an assistant upon return to work, there was no acknowledgement of this request from the Employer; finally, the Employer did not dispute that Employee 'A' was told 3 days before her intended start date of 1st September, 2023, that she would not be able to work in her job.

103) While the Employer stated in her SoD and in her testimony that at no time was Employee 'A' ever told that she would not have a job; was being terminated, or being made redundant – the Tribunal reasoned that the Employer's "intentions" while admirable, could **not** be considered as a part of the criteria in determining whether Employee 'A' was (as per her claim) moved to the point of claiming constructive dismissal. Rather, the Tribunal had to consider whether the Employee's position had been made redundant based on the following:

- i. Absent of proper consultation within two (2) weeks of the relocation date to the temporary premises;
- ii. Timely communications to Employee 'A' of a viable alternative work location;
- iii. A revised contract of employment by 1st September, 2023; and,
- iv. All by the relocation and resumed employment date of 1st September, 2023.

104) Moreover, Employee 'A' had **not** received a salary while on sick leave for seven (7) months. This was compounded by the fact that her minimum health insurance package of HIP had been exhausted by Employee 'A's second major operation, forcing her to pay out-of-pocket in the amount of approximately \$2000,00; and that the Employer had been made aware of this outcome.

105) The Tribunal considered that this fact more than any other circumstance surrounding the Employer's intentions to keep Employee 'A' employed, was the paramount factor in the Employer's obligation to formerly consult with and consider and share options with Employee 'A'. Ultimately to allow Employee 'A' an opportunity to direct her own fate.

106) The Tribunal reasoned that the Employer had a legal responsibility to, at a minimum, consult with Employee 'A' – a 30-year veteran of Xxxxxx - to consider alternatives for her employment based on the indisputable fact that by 31st July, 2023 – four (4) months after the first official vacate date of 31st March, 2023 that a confirmed, alternative location where Employee 'A' could perform her duties as a Coordinator and/or Xxxxxxt had not been **viably secured**, nor had this information been communicated to Employee 'A' in any

meaningful or official capacity by the 16th of August, 2023 – two weeks before her return to work date or her start date in the temporary location. Therefore, Employee 'A's position was made redundant.

EMPLOYEE 'B' – DELIBERATION

107) The Tribunal was not unsympathetic to the Employer's intentions to keep both Employees employed during the relocation efforts. However, the Employer, and by extension Director S' actions and lack of good faith communications maintained throughout the duration of the dispute, belied key statements made by the Employer in her SoD and solidified in her testimony, that she believed that she was communicating with her employees and that she believed her employees were happy with what was being communicated to them, versus, stating that it was not (her) intention to acquiesce to employees' expectations to be communicated with on a day-to-day basis during such matters.

108) The Tribunal reasoned that the first Employee meeting held in May 2023 – since the notice to vacate was received in December 2022 should have been initiated by the Employer and Director S – not by the Employees who initiated the meeting request. And, communicating 5 months after the first notice to vacate indicated to the Tribunal that official updates were extensively overdue. Further, that once Employee 'B' had signed an NDA, as noted in clause #39 - to not disclose plans for a permanent location, that action permitted the Employer and Director S to provide updates to Employee 'B' on any interim plans for her eventual relocation.

109) However, despite the Employer's promise of having a concrete plan – communicated to Employees in the May 2023 meeting; including a promise of continued payment of their wages, through undisputed testimonies, no less than four (4) possible locations for relocation over the period of April 2023 through August 2023 had been communicated to Employee 'B', and the following vacate dates had been communicated during the same period of time:

1. 31st March 2023
2. 31st August 2023
3. 1st September, 2023
4. 16th September, 2023
5. October 2023
6. December 2023

110) The Tribunal reasoned that by 16th of August, 2023, when the Employer had been given a final vacate notice of 31st August, 2023, the Employer had the responsibility - within two weeks of having no confirmed relocation alternative – to comply with the Employment Act 2000 in the absence of a representative, to consult with Employee 'B' on the options for her relocation; alternative employment or other options; this despite the Employer's intentions to not terminate or make redundant Employee 'B' or her other employees.

111) By the Employer's own SoD, it was stated that moving the business would include finding suitable premises that might still require a complete refit including plumbing, electrics and air-conditioning. This statement indicated to the Tribunal that the Employer – having experienced moving business numerous times over a 50-year period of operation was highly cognizant of the reality of possibly not being able to keep Employee 'B' employed the longer it took to secure an alternative location – whether temporary or permanent.

112) The Tribunal determined that the Employer had resigned herself to the reality that the situation of relocating both Xxxxxx, suggesting secondments, offering work as a xxxxxx, and suggesting to Employee 'B' that she could "go to people's houses" – was confirmation that a viable and secure working arrangement had not been determined for Employee 'B' by the 16th of August, 2023. And, despite the announcement that a

lease had been signed for a temporary location to move into on 1st September, 2023, the Employer did not confirm with the landlord – at the signing of the lease that the premises was suitable for the spa staff and the xxxxx staff.

113) The Employer's attempt to secure a secondment – to rent a chair at Xxxxxx xxxxxx, and notifying Employee 'B' after she had submitted her resignation was of no consequence. Specifically, because, the Employer confirmed that although the owner of the second option for secondment (Xxxxxx) had agreed to the use of her shuttered xxxxxx, the lease took another three (3) days to receive.

114) The Tribunal concluded that, despite the employer's conflicting actions during the disputes and her intention to retain Employee B until a permanent location was secured and operational, she nonetheless had a legal and ethical obligation to consult with both Employee B and Employee A to determine what would be in their best interest.

115) Neither Employee was represented during the period of dispute and both Employees were work permit holders, thereby not having the inherent freedom of Bermudian/Status Bermudian workers to affect their own employment decisions once provided with options.

116) Admittedly, within the Employer's SoD, she stated: 'that the situation was an unfortunate sequence of events to which she had no control over'.

THE LAW

117) Pursuant to the Employment Act 2000, redundancy occurs when the employer has reduced the workforce due to: the modernisation or mechanisation of the business, the discontinuance, sale, disposal or reorganisation of the business, a reduction in business necessitated by economic conditions, a contraction in the volume of work or sales, reduced demand or surplus inventory or the inability to carry on the business at the usual rate or at all due to shortage of materials, mechanical breakdown, act of God or other circumstances beyond the control of the employer.

118) In the matter of Xxxxxx's business operations, after receiving notice to vacate their premises, a reorganization was required to relocate both the spa staff and the xxxxxx. The temporary location selected at the former Xxxxxx premises on Burnaby Street Hamilton, accommodated only the continued operations of the Xxxxxx staff. Xxxxxx were unable to perform their duties at this location. As of Xxxxxx vacating the Xxxxxx building on August 31st/September 1st, 2023, neither Employee A nor Employee B had a confirmed workplace where they could serve their clients and carry out their roles, with Employee A as a Spa Coordinator and both as xxxxxx. The Employer did not attempt to offer a formal secondment until three (3) days after being informed that neither employee would be allowed to perform their hairstyling duties, and this offer came only after both employees had submitted their resignations. These resignations were a direct result of the Employer's failure to respond to documented requests from the Employees for a resolution concerning the Burnaby Street location, potential secondment options, and the overall status of their employment.

119) Where a potential redundancy situation arises, as soon as is practically possible – as is key in English law - the Employer should (as encouraged by Employee 'B') hold discussions with the potentially affected employees. However, in the case of Xxxxxx, by the Employer's own admission, she did not agree or believe that employees should be communicated with until plans were concrete and contracts signed. The Employer's further admission in her SoD that she signed a lease for the Burnaby Street location on 28th August, 2023 – confirms that she understood that Employees 'A'; and 'B' would be relocated to a place that was unfavorable to them as xxxxxx. Conversely, favourable conditions existed for the Xxxxxx spa staff.

120) In actuality, such knowledge would also lend itself to knowing that both Employees would also have an inability to earn reasonable wages, if at all. The latter speaks to undisputed evidence presented by both Employees, and not contradicted by the Employer, that their clients had not been informed of the relocation efforts, or to where they both were being relocated temporarily or permanently; and an admission by the Employer that (in Employee 'B's case), her clients were being sent to another xxxxxx called Xxxxxx.

121) Ultimately, the Employer had no concrete plan to communicate to either Employee about their future state of work. Neither did she allow either Employee the opportunity to affect their own decisions regarding relocating to await a permanent place to work; the conditions of a secondment; the opportunity to have a reasonable consultation period with the Employer to make an informed decision; or affect their ability to make a wage – as neither Employee received wages while not working and were told that while awaiting a place to work, that they would remain unpaid.

122) Therefore, it is the determination of the Tribunal that pursuant to The Employment Act Section 30 – Termination for Redundancy, that the positions of: Employee A (L.xxxxxx), Xxxxxx Coordinator and Xxxxxx, and Employee 'B' (A Xxxxxx), Xxxxxx, were redundant effective: 1st September, 2023, and supported by the following criteria in subsection (3):

(b) the discontinuance of all or part of the business;

(e) the reduction in business which has been necessitated by economic conditions, contraction in the volume of work or sales, reduced demand or surplus inventory;

(f) the impossibility or impracticality of carrying on the business at the usual rate or at all due to – (iv) other circumstances beyond the control of the employer.

REMEDY SOUGHT AND AWARD FOR EMPLOYEE A – L.xxxxxx

123) Employee 'A' sought:

- i. 26 weeks' pay for constructive dismissal
- ii. 1 months' notice pay
- iii. Vacation pay (during) 30 years of service

124) Pursuant to Section 23 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. Subsection (3) supports subsection (1) termination of employment as meaning termination by reason of – (a) redundancy. Subsection (2) provides for the amount of severance payable to an employee shall be no less than the equivalent of –

(a) Two weeks wages for each completed year of continuous employment up to the first ten years'

(b) Three weeks wages for each completed year of continuous employment thereafter – up to a maximum of 26 weeks wages.

125) Employee 'A' was employed with Xxxxxx from 13th March 1992 to 11th September, 2023, and had thirty-one (31) years and six (6) months of service.

126) The Tribunal awards the maximum of 26 weeks wages.

127) L. Edward's hourly rate of pay up to final separation was submitted as:

- i. \$16.40 per hour, 40.0 hours per week, by 26 weeks, totaling \$17,056.00

- ii. Notice Pay of one (1) month: \$2,624.00

128) Regarding the Complainant's claim for vacation pay over the period of 31 years of service, the Tribunal determined that in the absence of Employee 'A's initial contract of employment 13th March, 1992, to substantiate her weekly/monthly pay and benefits, the Employer's argument against such redress was accepted. The Employer's SoD highlighted Employee 'A's initial remuneration arrangement was based on a basic wage and up to 30% commissions – covering vacation pay. In approximately 2010, Employee 'A' requested a change in remuneration to straight commission – minimum 40% to maximum 50%; which was granted.

129) Employee 'A' provided no evidence to support her claim for 31 years of vacation pay, or to counter the Employer's evidence that at no time since approximately 2010 to-date did Employee 'A' request, seek, or clarify how or if vacation pay was being applied. The Employer contends that this was because Employee 'A' was receiving her request for straight commission.

130) Notwithstanding section 12 Vacation of the EA which entitles employees to vacation leave accordingly and is not an opt out benefit, without substantive evidential documentation (which should have been provided to the Tribunal by Employee 'A'), calculus for redress prior to September 2022 (the earliest pay slip submitted) is not possible. However, evidential pay slips from September 2022 through January 2023 indicate that no vacation pay 'line item' is listed, but should have been - as a standard benefit. As such, pursuant to section 12 Vacation of the EA, Employee 'A' was entitled to 10 days' vacation:

- i. Accrued 0.83 days per month: September and December 2022 and January 2023;
- ii. Total of 19.99 hours at \$16.40 per hour
- iii. Vacation pay owed: \$327.83

Total Award for Employee 'A' L.xxxxxx

- i. \$20,007.83

REMEDY SOUGHT AND AWARD FOR EMPLOYEE 'B' – A. XXXXXX

Employee B sought:

- ii. Six (6) weeks' pay for constructive dismissal
- iii. One (1) months' notice pay
- iv. Nine (9) days of unpaid wages

131) Employee 'B', A. Xxxxxx was employed with Xxxxxx from 4th May 2021 through 11th September, 2023. Severance allowance for two (2) years and six (6) months of service is awarded as follows:

132) Section 23 Severance Allowance having been established; Subsection (2) provides for the amount of severance payable to an employee shall be no less than the equivalent of –

- (c) Two (2) weeks wages for each completed year of continuous employment up to the first ten years;

133) A. Xxxxxx' hourly rate of pay up to final separation was submitted as:

- i. \$16.40 per hour
- ii. Severance Pay: \$16.40 per hour x 40.0 hours per week x 4 weeks = \$2,624.00
- iii. Notice Pay of one (1) month = \$2,624.00
- iv. Nine (9) days of unpaid wages = \$5,904.00

134) Section 23 Severance Allowance having been established; Subsection (2) provides for the amount of severance payable to an employee shall be no less than the equivalent of –

(c) Two (2) weeks wages for each completed year of continuous employment up to the first ten years;

135) A. Gyles' hourly rate of pay up to final separation was submitted as:

- i. \$16.40 per hour
- ii. Severance Pay: \$16.40 per hour x 40.0 hours per week x 4 weeks = \$2,624.00
- iii. Notice Pay of one (1) month = \$2,624.00
- iv. Nine (9) days of unpaid wages = \$5,904.00

Total Award for Employee 'B' A.

- i. \$11,152.00

It is therefore the Order of this Tribunal that:

136) The Respondent, having offended Sections, 12 Vacation; 21 Payment in Lieu of Notice, and 30 Termination for Redundancy is ordered to pay: L. **\$20,999.20** and A. **\$11,152.00.**

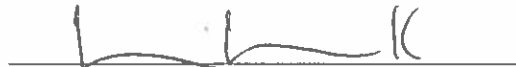
PAYMENTS DEADLINE

137) Payment of the Award should be made within (30) days from receiving the Tribunal Decision.

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



Date:


12th September 2024

Signatories

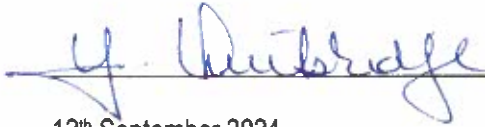
Lorrita J. Tucker
Chairman



Jocene Harmon
Deputy Chairman



Yolanda Outerbridge



Date:

12th September 2024