

**IN THE MATTER OF A COMPLAINT UNDER THE EMPLOYMENT ACT 2000  
BEFORE THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL  
PURSUANT TO PART VA SECTION 44B**

**BETWEEN:**

**EMPLOYEE : XXXXXXXXX**

**AND**

**RESPONDENT: XXXXXXXXX**

**DETERMINATION & ORDER**

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<b>Members of Tribunal:</b>	<b>Jocene Wade, Chair, JP, FCPID, FCMI Peter Alrich, Deputy Chair Betty Christopher, Tribunal Member</b>
<b>Hearing Date:</b>	<b>July 26<sup>th</sup>, 2024</b>
<b>Place:</b>	<b>Ministry of Economy and Labour Department of Workforce Development Physical Address 23 Parliament Street Hamilton HM 12</b>
<b>Matter of Dispute:</b>	<b>Section- 19(2),19 (4) Probation Section- 28 (1) (a) Unfair Dismissal</b>

**EMPLOYEE AND 'EMPLOYEE' Representative:**

**Bruce Swan  
Bruce Swan and Associates**

**Respondent Representative:**

**Fozeia Rana-Fahy  
MJM Limited, Thistle House  
4 Burnaby Street  
Hamilton, HM11**

**AUTHORITY TO HEAR MATTER**

The Tribunal Hearing was conducted in accordance with section 44B (2), the General Powers of section 44C and that the Tribunal shall regulate its own proceedings as it sees fit pursuant to Schedule 2 (20) of the Employment Act 2000 ("the Act 2000").

**SUMMARY OF THE EMPLOYEE CASE**

The EMPLOYEE alleges that:-

- I. Her employment was terminated unfairly while on probation
- II. The EMPLOYEE relies on Section 28 of the Employment Act 2000, asserting that the dismissal was unfair because she did not receive any written warnings prior to her termination

**PRELIMINARY ADDRESS BY THE TRIBUNAL**

1. The Tribunal referred the Parties to section 44E of the Employment Act 2000 that provides, unless both parties consent, to exclude the public or any representative of the press where it considers it necessary or desirable to protect the privacy of parties to a Hearing.
2. The EMPLOYEE did not consent to exclude the press or the public.
3. The parties were also afforded an opportunity to settle which was unsuccessful.

## PRELIMINARY ARGUMENTS HEARD BY THE TRIBUNAL

4. The EMPLOYEE employment commenced with Xxxxx on November 1st, 2023 to November 23rd, 2023
5. Ms. Xxxxx' employment was terminated by Dr. Xxxxx on November 23rd 2023 once it was clear to Dr. Xxxxx that Ms. Xxxxx was not suitable for the position. Her assessment was based on personal observations of Ms. Xxxxx' performance and her unwillingness to accept feedback on her performance. Dr. Xxxxx was also concerned by the fact that Ms. Xxxxx was also working another job at night. Dr. Xxxxx felt that this created a potential health and safety risk for her patients due to the possible lack of sleep that could negatively affect Ms. Xxxxx' performance and clinical judgment. Her general observations and opinions were echoed by Dr.xxxxx who was called as a witness by Dr. Xxxxx.
6. Dr.Xxxxx stated that Xxxxx has produced numerous Bermudian professionals who were given similar employment and training opportunities.
7. The Employment Act 2000 section 19 (2) states that "an employee who is serving a probationary period shall be entitled to receive from their employer a review of the employee's performance on or before the completion of one half of the probationary period." Although Dr. Xxxxx did not provide a formal written review for Ms. Xxxxx, in her evidence and testimony she did provide information that states that she gave Ms. Xxxxx verbal feedback on her performance on numerous occasions during her 15 days of her employment.
8. The Employment Act 2000 section 19(4) states "During the probationary period (including any period of extension under subsection (3), a contract of employment may be terminated without notice (a) by the employer for any reason relating the employee's performance review, performance, conduct, or operational requirements of the employer's business". With this in mind, Dr. Xxxxx was operating within the confines of the Employment Act 2000 when she terminated Ms. Xxxxx without notice given; her belief that Ms. Xxxxx was not a good fit for her business given her unsatisfactory performance.
9. As Ms. Xxxxx was terminated within her probationary period she is therefore not entitled to any Payment in Lieu of Notice (section 21 (1) of the Employment Act 2000).

## EMPLOYEE'S ARGUMENT:

## **COUNSEL BRUCE SWAN**

The EMPLOYEE arguments were set out in her Statement of Facts ("SOF") dated **May 13th, 2024**.

10. Ms. Xxxxx was hired on November 1st 2023 and serving a six (6) month probationary period per the signed Employment Offer dated October 24th, 2023.
11. Ms. Xxxxx asserts that she was dismissed without a valid reason and complained that she had been unfairly dismissed and the employer is in breach of Section 28 (1) (a) of the Employment Act 2000.
12. Ms. Xxxxx submitted her complaint to the Department of Labour to earn her just due for which she was treated and terminated and the manner behavior and misconduct she experienced by Dr Xxxxx.
13. Ms Xxxxx alleged comments were verbally discussed and not documented by Dr Xxxxx.
14. The reasons for her dismissal were vague and not substantiated by any formal warnings or documentation issued to Ms Xxxxx and there is no lawful reason why Ms Xxxxx should be terminated.
15. It is unclear if Ms. Xxxxx asked for a Certificate of Termination (section 22 of the Employment Act 2000) but if requested it should be provided by Dr. Xxxxx and/or Xxxxx Limited.

## **SUMMARY OF SUBMISSIONS**

### **EMPLOYER ARGUMENTS**

Mrs. Fozeia Rana-Fahy confirmed for the Tribunal in these Proceedings that Xxxxxxxx, was hired as a trainee Orthodontic Assistant and her place of Employment was Xxxxxxxx Ltd.

16. The Respondent relied on the facts and matters set out in the EMPLOYEE 'Statement of Facts 'SOF' dated **13 May, 2024**, where those arguments would be repeated in the Response document. All references to paragraph numbers below were to the 'SOF'.
17. As per the 'SOF' - the Respondent argued that on a legal basis:

- a. The EMPLOYEE was not entitled to bring an unfair dismissal complaint during her probationary period.
- b. The EMPLOYEE was not entitled to any remedy for unfair dismissal as she was employed for only one (1) month of continuous employment with the Respondent, and will **not** be entitled to any payments.
- c. The reference to section 28 (1) (h) of the Employment Act 2000 is in fact a reference to sections below:
- d. The following do not constitute valid reasons for dismissal or the imposition of disciplinary action:
  - i* an employee's race, sex, religion, color, ethnic origin, national extraction, social origin, political opinion, disability or marital status;
  - ii* an employee's age, subject to any other enactment or any relevant collective agreement regarding retirement;
  - iii* any reason connected with an employee's pregnancy, unless it involves absence from work which exceeds allocated leave entitlement;
  - iv* an employee's trade union activity;
  - v* an employee's temporary absence from work because of sickness or injury, unless it occurs frequently and exceeds allocated leave entitlement;
  - vi* an employee's absence from work for any of the reasons mentioned in section 13 (public duties), or due to service as a volunteer fire officer;
  - vii* an employee who removes himself from a work situation which he reasonably believes presents an imminent and serious danger to life or health;
  - viii* an employee's participation in any industrial action which takes place in conformity with the Labour Relations Act 1975;
  - ix* the filing of a complaint or the participation in proceedings against an employer involving alleged violations of this Act.
- e. The dismissal of an employee is unfair if it is based on any of the grounds listed in subsection (1) above.

Ms. Rana-Fahy also stated that it was difficult to reconcile the allegation made in the SOF with Ms. Xxxxx' unfair dismissal claim. In any event, the EMPLOYEE strongly objected to the assertion that she contributed to the unsuccessful completion of her probationary period.

#### **COUNSEL FOZEIA RANA-FAHY RESPONSE TO 'SOF'**

## **SUBMISSIONS ON THE DISMISSAL ISSUE AND THE LAW**

18. Section 19 (4) (a) of the Employment Act 2000 provides a mechanism for employers to summarily dismiss an employee during probation because of the employee's performance and conduct. The standard for section 19 (4) of the Employment Act 2000 is not reasonableness or band of reasonable responses; the burden was on the Respondent to prove on the balance of probabilities that the reason for dismissal was conduct.
19. Likewise, under section 38 (2) of the Employment Act 2000, the burden was on the Respondent to prove the reason for dismissal on the balance of probabilities. If the Tribunal found that on the balance of probabilities the reason was the employee's conduct, then the dismissal cannot be unfair under section 28 of the Employment Act 2000.

## **RESPONDENT'S CLOSING REMARKS**

20. In conclusion, Ms. Rana-Fahy argued that the EMPLOYEE complaint was wholly misconceived.
21. The Respondent defends the dismissal on the following grounds: - The EMPLOYEE lacked initiative in her role despite being provided with the required tools. She frequently complained about her work. -The EMPLOYEE often appeared tired and snappy affecting her performance. She displayed a bad attitude, which negatively impacted the working environment. - The Respondent contends that the employment was simply not working out, particularly considering the role's demands.
22. The probationary period is intended to assess the employee's suitability for the role, which lasted one month. During this time, the employee's performance was closely monitored and evaluated against the expectations for the position. This lower threshold test allowed for broader assessment of the employee's basic suitability for the position. Unfortunately, the employee's performance did not meet the required standards, leading to conclusion that she was not suitable for the role moving forward.

## STATEMENT OF WITNESS

23. Dr.xxxxx stated she was fully prepared to provide training to Ms. Xxxxx on any day at any time that suited Ms. Xxxxx. Despite her readiness, Ms. Xxxxx did not make herself available for training sessions.

## ISSUES BEFORE THE TRIBUNAL

24. The complaint by the EMPLOYEE was set out in the 'SOF'. The complaints are as follows:

- (a) The EMPLOYEE dismissal was unfair contrary to section 28 of the Employment Act 2000 (the "Act") and/or in breach of section 19 of the Employment Act 2000 (the '**Probationary Period**')
- (b) The EMPLOYEE never received a written performance review (all verbal) during the first month of her probation contrary to section 19 (2) of the Employment Act 2000 (the '**Probationary Period**')
- (c) The EMPLOYEE employment was terminated within one (1) month of the commencement of the probationary period in accordance with Section 19 of the 'Employment Act 2000'.

## LEGAL PRINCIPLES

25. The statutory framework is set out in the Employment Act 2000, which provide relevantly as follows:

### ***'Probationary period'***

- (1) *Subject to this section, a new or promoted employee may be required to serve a probationary period of not more than six months commencing from the date of his employment or promotion.*

*(2) An employee who is serving a probationary period shall be entitled to receive from his employer a review of the employee's performance on or before the completion of one half of the probationary period.*

*(3) Any employer may, before the expiration of the probationary period referred to in subsection (i) and after conducting a review under subsection (ii), extend the employee's probationary period for a period not exceeding three months.*

*(4) During the probationary period (including any period of extension under subsection (3)), a contract of employment may be terminated without notice –*

- (a) by the employer for any reason relating to the employee's performance review, performance, conduct, or operational requirements of the employer's business; or*
- (b) by the employee for any reason...*

**'Unfair Dismissal'**

25 *(1) The following do not constitute valid reasons for dismissal or the imposition of disciplinary action -*

- i. an employee's race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability or marital status...*
- ii. (b) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of this Act;*
- iii. (c) the making of a protected disclosure under section 29A.*

*(2) The dismissal of an employee is unfair if it is based on any of the grounds listed in subsection (1).*

*'In any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair.*

The probationary provisions in section 19 of the Employment Act 2000 were self-contained and were to be applied independently of other provisions in the



The probationary provisions in section 19 of the Employment Act 2000 were self-contained and were to be applied independently of other provisions in the Employment Act 2000. In Robson v Burchall [2019] SC (Bda) 42 App (22 July 2019), Pettingill AJ stated as follows:

26. *The Tribunal wrongly applied s.27 which deals with termination for “unsatisfactory performance” and seemingly reached the conclusion that the Respondent should have received some form of warning and “instructions” as related to her performance, such application being whilst she was on probation. This may be the Tribunal’s well-meaning view but it is not a statutory requirement.*
27. *The foregoing approach would effectively be trying to put the “square legal peg” in the ‘round statutory hole’, the latter being s.19 ‘probationary period’ which the Court finds is a ‘stand-alone’ section to which s.27 or any other section of the Employment Act 2000 for that matter, dealing with ‘warnings’, notice or termination’ has no application.*
28. *If it is concluded, and it was accepted by the employee in this instance in regard to the initial ‘probation’, that there is an operational probationary period then the Employer is legally entitled to terminate the contract of employment for any reason without notice in accordance with s.19.*
29. *The Tribunal clearly conflates the provisions of s.19 which effectively allows for ‘summary dismissal’ with the sections of the Employment Act 2000 that are addressing a ‘contractual employment’ not subject to a probationary period.’*

## **THE ORDER**

The Tribunal finds that the Employee dismissal was directly related to her failure to successfully complete the designated six (6) month probationary period. During this probationary period, it is the employer’s prerogative to assess the employee’s performance, suitability, and overall fit for the position.


Based on the evidence presented, it is clear that the employer conducted a fair and thorough evaluation of the employee's performance during this time. The employer's decision to terminate the employment was not arbitrary but was based on specific performance concerns that were identified and communicated to the employee. As such, the dismissal was a result of the employee's inability to meet the performance standards required for continued employment, and the Tribunal finds this to be a lawful and justifiable reason for termination under the terms of the employment contract.

The Tribunal's decision is binding and under Section 44 of the Employment Act 2000, either party may appeal to the Supreme Court on a point of law



Jocene C. Wade, JP, FCIPD, FCFI

Chairman



Peter Aldrich

Deputy Chair



Betty Christopher

Tribunal Member

Date: September 12, 2024