

EMPLOYMENT & LABOUR RELATIONS TRIBUNAL HEARING

BETWEEN

Jovica Misljen

and

Respondent

Members of Tribunal

Edward Ball, Jr, JP, LLB, FCMI, Chair
McKeisha Smith, MBA Deputy Chair
The Hon. Derrick Burgess, JP

Hearing Dates:

February 22nd, 2022

Place:

Bermuda Industrial Union
Under Covid 19 Regulations

Matter of Dispute

Section 6 - Statement of Employment
Section 8 - Unauthorised Deductions

Preliminary :

This case was heard by
the Employment & Labour Relations Tribunal

Complainant:

Jovica Misljen

Respondent:

Witness:

**Witness called
By the Tribunal:**

Summary of Submissions

Background

The Hearing was conducted "in person" under the Bermuda Government Covid 19 Regulations.

The Parties both agreed that the Employment & Labour Relations Tribunal is being asked to determine whether or not the Employer breached S. 6 and S. 8 of the Employment Act 2000 (the "EA") by not satisfying:

- the Company's obligation to issue a statutory statement of employment;
- to pay the Employee's base pay of \$600 BM dollars per week and a commission rate of 35% per week;
- The Employer substantiating unauthorised deductions for eleven (11) months from the employee from December 4th, 2020 to November 25th, 2021 and as such the employee is entitled to be compensated.

The burden is herewith placed upon the Employer to demonstrate that the complaint is without merit.

On February 15th, 2022, both parties supplied and exchanged document bundles which they relied on at the Hearing in defence of their respective positions.

In addition to the skeletal referral document from the Labour Relations Officer, the Tribunal was further assisted by the Department of Immigration ("Dol"), in providing a copy of the Complainant's Work Permit ("WP") application submitted by the Employer to the Dol on September 25th, 2020.

The Tribunal also exercised its right to call as a witness, xxxxx to assist the Panel in understanding her role in the processing of the Complainant's Dol WP application.

The Tribunal takes as its authority from:

**Part VA of the 2020 Act
Employment And Labour Relations Tribunal.**

Power to obtain information

Section 44D (1) For the purposes of dealing with any matter referred to it under the Employment and Labour Code, the Tribunal may, by writing under the hand of the Chairman-

(a) to require any person to furnish, in writing or otherwise such particulars in relation to

the matter as the Tribunal may specify; and

(b) require a person to attend before the Tribunal and give evidence on oath or otherwise, or produce document, and, subject to this Act, shall not be bound by any rule of evidence in civil or criminal proceedings.

(2) Any person who—

(a) fails without reasonable excuse to furnish particulars in compliance with a requirement under subsection (1);

(b) fails without reasonable excuse to attend before the Tribunal in compliance with such a requirement; or

(c) when in attendance before the Tribunal, refuses to take an oath, or to produce a document or give evidence, in compliance with such a requirement, shall be liable to a civil penalty as may be imposed by the Tribunal.

(3) But a person shall not be liable to a civil penalty for refusing to answer any question or to produce any document which he could not be required to answer or produce in proceedings before a court of law in Bermuda, or for failing or refusing to answer any question or produce any document which is not relevant to the matters in issue.

Schedule 2 Section 20 EA 2000:

PROCEEDINGS

Save as otherwise provided by any provision of this Act or in regulations made by the Minister regulating the procedure to be followed by the Tribunal, that the Tribunal shall regulate its own proceedings as it thinks fit.

In the Case of the Employee.

1. The Complainant referred to his bundle of documents which he relied on at the Hearing and referenced a copy of the Employer's unsigned Intent to Hire letter of July 17th, 2020 and whether the letter met the statutory particulars of a Statement of Employment as contained in **section 6 of the EA 2000** as set out below:

(A) PART II CONDITIONS OF EMPLOYMENT

Statement of employment

6. (1) Not later than **one week after an employee begins employment with an**

employer, the employer shall give to the employee a written statement of employment which shall be signed and dated by the employer and employee.

(a) The statement shall contain particulars of the following—

- (a) the full names of the employer and employee;
- (b) the date when the employment began;
- (c) the job title and brief description of the work for which the employee is employed;
- (d) the place or places of work;
- (e) the gross wage or the method of calculating it, and the intervals at which it is to be paid; the normal days and hours of employment or, where the job involves shift work, the normal pattern of the shifts;
- (f) the entitlement to holidays, including public holidays, and paid vacation leave;
- (g) the entitlement to rest days and meal breaks;
- (h) the entitlement to overtime pay or hours in lieu and the rate of overtime pay or the method of calculating it;
- (i) the terms relating to incapacity for work due to sickness or injury, including provision for sick leave;
- (j) the length of notice which the employee is obliged to give, and entitled to receive;
- (k) to terminate his contract of employment;
- (l) details of any pension provided, whether under the National Pension Scheme (Occupational Pensions) Act 1998 or otherwise;
- (m) any disciplinary and grievance procedures applicable;
- (n) where the employment is not expected to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date on which it is to end;
- (o) any probationary period;
- (p) any dress code;
- (q) the existence of any collective agreement which directly affects the terms and conditions of the employment;
- (r) where the employment is pursuant to a work permit, the date of issue and expiry of that work permit;
- (s) any employment-related conditions (including any requirement to work at more than one location) and any immigration restrictions set out in the work permit;
- (t) the existence of the employer's written policy against bullying and sexual harassment in the workplace and how the policy can be accessed;
- (u) such other matters as may be prescribed and may contain other details relating to the terms and conditions of employment.

(3) Where there are no particulars to be entered under paragraphs (k) to (o) of subsection (2), that fact shall be noted in the statement.

(4) *The statement may refer the employee for particulars of the matters mentioned in (g) to (k), (n) and (q) of subsection (2) to—*

- (a) *the provisions of any collective agreement which directly affects the terms and conditions of his employment; or*
- (b) *to any other relevant document, which is copied to the employee.*

(4A) *Where by virtue of section 9(2) there is no payment of overtime or hours in lieu, that fact shall be noted in the statement.*

(5) *Where-*

- (a) *additional matters to be included in the statement are prescribed under paragraph (r) of subsection (2); or*
- (b) *the employer and employee agree to change any of the terms of employment particularised in the statement;*

the employer shall, as soon as practicable and no later than one month after the matters are prescribed or the change agreed, give to the employee an amendment to the statement containing particulars of the change or a revised statement which shall (in either case) be signed and dated by the employer and employee.

(6) *This section applies, with the necessary modifications, to—*

- (a) *persons falling within section 4(2) (students, casual, part-time and temporary employees, voluntary workers, etc); and*
- (b) *such other persons as may be prescribed by regulations,*

who are not employees for the purposes of this Act; but nothing in this subsection shall be taken to entitle such persons to any of the matters listed in subsection (2) or to any entitlements under this Act which are not applicable to persons who are not employees.

(7) *An employer who contravenes this section shall be liable to a civil penalty as may be imposed by the Manager or the Tribunal;*

and

(B) **Whether the Employer did deduct funds from the Employee's weekly wages, without his knowledge and permission. The statutory requirements for deductions are noted in:**

Section 8 EA Unauthorised deductions EA 2000 are:

8 (1) *An employer shall not make a deduction from an employee's wages unless—*

(a) *the deduction is required or authorised to be made by virtue of this or any other enactment, a collective agreement or a provision of the employee's contract, or by order of any court or tribunal; or*

(b) *the employee has previously signified in writing his agreement or consent to the making of the deduction.*

(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).*

(3) *Subsection (1) does not apply—*

(a) *where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages or an overpayment in respect of expenses incurred by the employee in carrying out his employment;*

(b) *to a deduction made in consequence of any disciplinary proceedings which were held by virtue of this or any other enactment;*

(c) *to a deduction made in consequence of an employee's participation in a strike or irregular industrial action short of a strike that results in a withdrawal of labour.*

2. The Employee argued vehemently that the case of the Employer was flawed generally and in its particulars.
3. xxxxx cited that no Statement of Employment for 2020 was ever provided to him over the eleven (11) month period of his employment tenure with xxxxx that commenced on December 4th, 2020. He confirmed that for the first three (3) months (December 2020 until February 2021) of his employment, xxxxx paid him a fixed rate of \$500 BM dollars per week and also paid his accommodations.
4. More specifically, from March 2021 to November 2021, the Employer paid the Employee only a weekly commission rate of 30%. The Employee acknowledged on questioning by the Panel that xxxxx and him never mutually agreed in writing to an amended weekly base rate and a weekly commission rate, that varied from the remuneration details denoted in paragraph 1 of Section 6 of the DoI WP application, , where xxxxx agreed to provide a range of compensation and benefits. – including, but not limited to accommodation, the base weekly rate of \$600 BM dollars and a weekly commission rate of 35%.
5. The Employee further remarked that he constantly and verbally asked about the status of his Statement of Employment over the life of his eleven (11)

month employment with xxxxx.

6. In cross examination by xxxxx, the Employer disputed xxxxx claim and asserted that the Employee only asked in October 2021, when the Contributory Social Insurance deductions were questioned by xxxxx.
7. xxxxx emphasised that the July 17th, 2020 Intent to Hire letter does not clearly set out, which includes and not limited to, his vacation leave, sick leave and in particular, the benefits and deductions which is referred to at paragraph 8 of Section 6 of Dol WP application form.
8. The Employee conceded and stressed that his "acceptance" in not disputing his pay slips did not mean he agreed to any remuneration amendments to the September 25th, 2020 Dol WP .
9. The combination of the three (3) months of fixed weekly wages, and then a rate of only 30% commmsion over the eleven (11) months, did not dissuade him in pursuing his right to be issued a formal written Statement of Employment that signified the correct remuneration as stated in Section 6 of the Dol WP application, submmited by xxxxx on September 25th, 2020.
10. The Employee strongly denied that he understood how the deductions were made without having a written Statement of Employment and that is one reason why he filed a complaint with the Labour Department.
11. On October 19th, 2021, xxxxx learned that his portion (the Employee's statutory dollar amount) of the Contributory Social Insurance was suspended from December 4th, 2020 to June 30th, 2021 (the "pension holiday" as prescribed under the Contributory Temporary Pension Act 2020) without being told the reason by the Employer.
12. xxxxx referenced lump sums of funds in his Febraury 14th, 2022 letter of his document bundle at page 3, that funds were deducted from his wages from October 8th to October 21st, 2021, totalling \$322.98 BM dollars for three (3) months of unpaid Contributory Social Insurance payments which he did not agree to.
13. xxxxx garnished the Employee's wages as the Company forgot to deduct the Employee's weekly portion of the Contributaory Social Insurance payments for July 31st, 2021, August 31st, 2021, and September 30th, 2021 which he did not approve.
14. Upon questioning by the Panel, the Employer notified xxxxx on October 15th, 2021 that the three (3) months of Contributory Social Insurance arrears must be paid in full in October 2021. The Employer produced four (4) letters given to other xxxxx employees with their signatures appended, acknowledging

the deduction of \$502.88 BM dollars due to xxxx's oversight to deduct the employees' portions of the contributory social insurance. However, there was no copy of a letter sent to or signed by xxxxx, acknowledging his consent to deduct his portion of the Contributory Social Insurance payment.

15. In response to the Panel's question, whether the Employee received payment for any Public Holidays, xxxxx said no.
16. The Employee stressed that he was barely satisfying his living expenses and obligations, resulting in him making inquiries about the Statement of Employment, including the cited base rate, commission, benefits and deductions with the Labour Section of the Department of Labour.
17. The Employee closed his arguments by citing that in the absence of a written Statement of Employment signed by xxxxx and himself, that the DoI WP was his contract.

The Case of the Employer

18. The Employer submitted, as background, the Company's document bundle. In particular, that the signed letter of Intent to Hire by xxxxx dated July 17th, 2020 was xxxxx's employment contract that he refused to sign over the eleven (11) months of his employment.
19. xxxxx, as the Owner/Managing Director of xxxxx reiterated xxxxx's counter claim to xxxxx position in that:
 - The discrepancy in pay as indicated on the work permit was an error.
 - Xxxxx received the intended pay for eleven (11) months with no indication that there was a discrepancy with his pay.
 - As the investigation by xxxxx was launched, it was discovered that there were a few errors in the DoI application, specifically in section 6 of DoI WP application..
 - At this point, xxxxx reviewed all of Xxxx's employees' employment contracts within the xxxxx's HR files and discovered that xxxxx July 17th, 2020 Intent to Hire letter was not signed. There were attempts to have him sign the letter which is evidenced in the attached correspondence between the proprietor xxxxx and xxxxx to no avail.
 - Xxxxx recognised their error in not following up to ensure the July 17th, 2020 Intent to Hire letter was signed.
 - Xxxxx stressed that they submitted documented employees' statements of employment contracts in the Employer's document bundle to the Panel were compliant with Section 6 EA 2000 as amended and that the Company's pay structure was clearly displayed.
20. The Employer stressed that the gross weekly wage of \$600 BM dollars and a

commission rate of 35% of weekly earnings, was incorrectly written by the HR Consultant, xxxxx. It should have stated "or".

21. For emphasis, xxxxx directed the Panel to paragraph 3 of the Employer's July 17th, 2020 Intent to Hire letter :

" Commission rate of 30% for services and a 10% for retail sales sold onto clients a week, minus payroll tax. Social insurance and health insurance deductions. The Compensation will be payable weekly while your agreement is in force. The Employer is entitled to deduct from the Employee's Compensation or from any other compensation in whatever form, any applicable deductions and remittances as required by law".

22. The Panel asked xxxxx who drafted the July 17th, 2020 Intent to Hire letter and why was the letter not signed by xxxxx in the Employee's document bundle.

23. Xxxxx first stated he asked for it to be drafted, then he recanted that statement and named the HR Consultant xxxxx who drafted the July 17th, 2020 letter. Xxxxx then recanted his accusation against xxxxx and asked if xxx's xxxxx Manager, xxxxx could respond to the Panel's questions.

24. After the swearing in of the witness, xxxxx Manager xxxxx remarked that the wording of the July 17th 2020 letter was not written by her.

25. Her role as xxxxx Manager was to have the Employee sign the July 17th, 2020 letter when xxxxx commenced work at xxxxx on December 4th, 2020.

26. The Intent to Hire letter was signed by xxxxx. It was stated by xxxxx, that the Intent to Hire letter was drafted, as well as the xxxxx employees' Statements of Employment contracts by xxxxx.

27. For completeness, the xxxxx employees' statements of employment contracts in noted in paragraph 26 were written for xxxxx and xxxxx.

28. The Manager directed the Panel to a number of whatsapp messages between xxxxx and the Employee from July 2020 up to the time he started work on December 4th, 2020, to signify that xxxxx was actively addressing xxxxx employment queries.

29. The Panel then asked xxxxx and the xxxxx Manager to explain why xxxxx did not offer xxxxx a formal written Statement of Employment as prescribed by Section 6 of the EA 2000 as amended and similar to the written statements of employment contained in the Employer's document bundle.

30. xxxxx insisted that the July 17th, 2020 Intent to Hire letter was xxxxx Statement of Employment and that the Owner/Managing Director did not recall xxxxx verbally asking him to provide a Statement of Employment over the period of the eleven (11) months of his employment.
31. The Panel referred the Employer to xxxxx section 6 DoI WP application that contained xxxxx and xxxxx signatures.
32. xxxxx stated he just signed a blank page and left it to his HR Consultant to fill in the details of the respective sections of the DoI's WP application for xxxxx.
33. The Panel asked xxxxx who sent the DoI WP application to the employee xxxxx who resided in xxxxx prior to coming to Bermuda.
34. After repeated questioning by the Panel, xxxxx and xxxxx and affirmed by xxxxx that a xxxxx sent the blank DoI WP application for him to fill in his personal details. Xxxxx confirmed he indeed signed the blank page of Section 6 of the DoI WP application. The accuracy of naming xxxxx who sent the work permit is set out in a July 24th, 2020 whatsapp message from her to the Employee.
35. Due to the repeated and inconsistent responses, accusations and assertions against HR Consultant xxxxx by xxxxx, in writing the wrong weekly base rate figure of \$600 BM dollars and the wrong weekly commission rate figure of 35%, (as well as xxxxx steadfast position that he was not properly advised by the xxxxx), the Panel recessed the Hearing for a half hour to summons (in writing) the HR Consultant xxxxx.
36. The Chair wrote to the Department of Labour's Administrative Officer xxxxx, asking him to contact xxxxx to see if she could appear before the Panel and be examined on her role in drafting and submitting the September 25, 2020 DoI WP application.
37. The Panel exercised its right under section 44D which reads as follows:

Section 44D(1)(a) to require any person to furnish, in writing or otherwise such particulars in relation to the matter as the Tribunal may specify.

(a) to require any person to furnish, in writing or otherwise such particulars in relation to the matter as the Tribunal may specify; and

(c) require a person to attend before the Tribunal and give evidence on oath or otherwise, or produce documents.....

Panel Witness HR Consultant xxxxx

38. After xxxxx was duly sworn in, the Panel learned she had twenty two (22) years as a HR Professional/Consulstant and was intimately aware of the DoI WP application process.
39. The Panel handed xxxxx the July 17th, 2020 Intent to Hire letter and asked if she wrote it under xxxxx's instruction for xxxxx.
40. Xxxxx responded no and she never saw the letter that xxxxx produced and has not written a Statement of Employment contract for xxxxx.
41. Upon further questioning by the Panel, xxxxx stated that the blank DoI WP application was sent by xxxxx to xxxxx for him to fill in the blank employee sections of the DoI WP application that pertained to his personal details and employment history.
42. Xxxxx stressed that once she was informed by xxxxx that xxxxx had sent the completed DoI WP application, she verbally discussed the terms of section 6 of the DoI WP application with with xxxxx in September 2020.
43. Xxxxx also confirmed that xxxxx verbally provided the terms of the weekly base rate of \$600 BM dollars and the weekly commission rate figure of 35%, in the September 2020 meeting with xxxxx, that was held at xxxxx , where xxxxx also signed xxxxx's DoI WP application.
44. There was no written instructions to xxxxx from xxxxx or likewise from the HR Consultant to the Owner/Managing Director affirming the Employee's remuneration figures.
45. xxxxx then submitted the WP on September 25th, 2020 to DoI.
46. Upon cross examination by xxxxx, xxxxx asked xxxxx why would he ask her to insert a weekly base rate figure of \$600 BM dollars and a weekly commision rate of 35% which was unrealstic and costly for his business profit margin. He also reinforced that there were errors found in other employees' statements of employment.
47. xxxxx replied that as the HR Consultant, the accuracy of information supplied and contained in the DoI WP aplication is soley the responsibility of the Employer and the Employee and that the signatures at the foot of section 6 of the DoI WP states:

Please sign below if you agree with the terms and conditions outlined in the Statement of Employment. A copy of the Statement will be given to you and a copy will be retained on your personal file.

48. xxxxx also stressed that housed in the DoI WP application form was a General Information section for the Employer and the Employee that she shared:

" when she submits a work permit application to DoI, the accuracy of the written details is the sole responsibility of the employer and employee, not the HR Consultant".

49. For avoidance of doubt, the source of the paraphrased statement was stated at paragraph 11 of the General Information on page 2 of the DoI WP for Employers and Employees which reads:

paragraph 11: where an agency submits applications on behalf of an the employer or an employee, the accuracy of the form is the responsibility of the employer and the employee."

50. Xxxxx passionately resented any adverse assertions by xxxxx that she inserted incorrect remuneration figures noted in paragraph 1 of section 6 of the DoI WP application without his permission.

51. Xxxxx also shared with the Panel that it was common practice for her to receive first verbal instructions from xxxxx, then she would present him with a completed written WP application form for him to review and sign before the WP application was submitted to DoI.

52. xxxxx reiterated that she never received any adverse comments from xxxxx concerning three (3) historic WP applications she completed and processed for xxxxx.

53. xxxxx remarked that once he and xxxxx became aware of the errors in xxxxx's DoI WP application, the Owner/Managing Director and xxxxx Manager completed a review of other xxxxx employees' statement of employments and noted the errors. At that time they contacted xxxxx and informed her of this.

54. In response to xxxxx 's claim, xxxxx replied that the xxxxx Statement of Employment took precedence over what was stated in the DoI WP application and they had time to correct the DoI WP information.

55. Xxxxx confirmed that xxxxx was not issued a Statement of Employment letter because he had special terms and was negotiating with xxxxx.

56. In his closing arguments to the Panel, xxxxx reluctantly understood that his signature in section 6 of the DoI WP application for xxxxx was significant. But he still stressed that it made no business sense for him to pay xxxxx the weekly base rate sum of \$600 BM dollars and a weekly commission rate figure of 35%. He reinforced his position that it was xxxxx's responsibility to guide him through xxxxx's DoI WP application process.

57. Xxxxx emphasized that the remuneration stated in the DoI WP application was a mistake and an oversight on his behalf, but still blamed xxxxx. The Owner/Managing Director also stressed that he should not be held to account for the mistake. It was a mistake and no salon on the island would pay a Stylist a fixed rate and commission.

Deliberation of the Tribunal.

The issuance of a Statement of Employment pursuant to Bermuda Labour Law

58. In considering the employment relationship between the Employer and Employee from December 4th, 2020 until November 25th, 2021, the Panel recognised there were a number of inconsistencies, such that the Tribunal could not in all fairness discount the words: "**that ignorance of the law is no excuse**" which applies equally to the Employee and the Employer.

59. The main purpose of the written and statutory Statement of Employment, also referred to as the Contract of Employment, is to clarify the terms and conditions of the employee's employment and avoid uncertainty or misunderstandings, where the employee's expectations might not be the same as the employer's intentions.

60. From a statutory perspective, the principle source of employment law in Bermuda is the **EA 2000** as amended, which states that a written Statement of Employment shall be given to the employee within **one week** of commencing employment. The Statement must contain various particulars of the employment relationship. The Statement must include, but not limited to, the job title, a brief description of the work to be conducted, salary details, hours of work/ holiday pay and paid vacation days.

61. From a contractual perspective, the employer can enter into a more detailed contract with the employee provided the parties agree and preferably in writing.

62. Similarly, a verbal agreement can constitute an agreement contract, assuming it can be proven.

63. The Tribunal is equally mindful that the **EA 2000** as amended clearly stresses

that where the employee requires a work permit, including but not limited to, any employment related conditions, that any Department of Immigration restrictions must be set out in the work permit.

Minimum Terms of the EA 2000 Act

64. The Tribunal was also mindful to note that the **EA 2000** as amended sets out minimum terms and conditions as set down by Bermuda Labour Law that the employer has to observe, including but not limited to, vacation pay, holidays and termination. The parties cannot contract out of the minimum requirements except where otherwise defined in the Act.

65. To be precise, Section 7.2 of the Ministry of Home Affairs Department Work Permit Policy Manual which included the Job Categories with Special Conditions for Beauty Salon, Spa and hairdressing Staff states:

Contracts of employment for beauty salon, spa and hairdressing staff must include information relating to holiday and sick pay entitlements (eg. If remuneration is by way of commission only the contract of employment must specify if the commission payments are inclusive or exclusive of holiday and sick pay entitlements.

66. For avoidance of doubt, the holiday pay entitlement pertains to Public Holiday as set out in Section 11 Public Holidays **EA 2000** as amended and not paid Vacation Leave as set in section 12 respectively in the **EA 2000** as amended.

67. There is no indication of whether the Parties agreed that the weekly Commission rate of 30% was inclusive or exclusive of public holiday compensation and sick leave entitlement.

68. It was the responsibility of xxxxx to amend the September 25th, 2020 section 6 of the DoI WP at paragraph 1 - the remuneration base pay of \$600 BM dollars and Commission rate of 35%, to reflect a weekly wage of only a 30% commission.

69. For avoidance of doubt, both the employer and the employee had to sign to signify the agreement that the wages would be amended to only a 30% weekly commission.

Xxxxx's July 17th, 2020 Intent to Hire letter versus a Statement of Employment and/or section 6 of DoI WP Application.

70. The Tribunal is guided by the Employee's DoI WP at section 6 Statement of Employment at paragraph 1, which denoted Remuneration of a weekly Base Rate \$600 per week and a weekly commission rate (if applicable) of 35%.

71. The overarching instruction for section 6 DoI WP application keynotes (that even if there is a separate Company Statement of Employment submitted by the Employer) the contents must also reflect the written fine print of the Work Permit:

Full time positions (e.g. salon/barber staff) tied to commission must reflect a base wage and percentage commission.

72. The Tribunal was also keen to note, the confusion over the purpose of the Intent to Hire letter because xxxxx was insistent on having a Statement of Employment before he commenced work at xxxxx on December 4th, 2020.

73. xxxxx only provided an Intent to Hire letter to xxxxx and not a formal Statement of Employment. The Intent to Hire letter was received by the Employee during the hiring process on December 4th, 2020 and then negotiations ensued. xxxxx was hired without a formal Statement of Employment other than what was submitted in section 6 of the DoI WP application and to which the Employee never received a copy.

74. xxxxx asked the DoI for a copy of his WP application as part of the Department of Labour consultation/mediation process because xxxxx did not provide it as he requested on numerous occasions for eleven (11) months.

75. Equally, that the Employee had a right to be provided with specific details of all benefits and deductions applicable to him as an employee of xxxxx under Bermuda's Labour laws.

76. The Tribunal then reviewed and sought guidance from the fine print as written at the top of section 6 Statement of Employment of the DoI WP Standard Work permit Application Form states:

Refer to section 6 of the Bermuda Employment Act 2000 for additional details to insert appropriately. Employers may use this form or attach more specific company Statement of Employment ensuring that contents as noted below are reflected.

77. It stands on its own footing, that section 6 - Statement of Employment of the DoI WP application form should marry with xxxxx 's terms and conditions of continued employment for 2020 and 2021.

Statement of Employment Changes between the Parties (Variation Clause)

78. Any unilateral change of the terms and conditions of an employee's employment by the employer such as the weekly commission per week must be in writing and signed and dated by the employee and the employer within one month of the variance. There was no evidence presented by either the

employer and/or the employee of a 2020 or 2021 Variation Statement of Employment agreement.

79. In xxxxx 's closing submission, the Employer took great pains to emphasise that xxxxx 'basically agreed to **only** the revised 30% commission weekly wage payments, as well as the three (3) months of a fixed weekly base rate of \$500 BM dollars" for eleven (11) months of his employment.
80. However, as previous comments by the Tribunal suggest, there was no formal Statement of Employment Agreement. xxxxx's July 17th, 2020 written signed Intent to Hire letter under xxxxx 's hand in the Employer's bundle, lacked detail, proper date stipulations and/or limits to the Agreement.
81. Meaning, that any particular contractual variance was potentially detrimental to the Employee; specifically, financially. This reality was supported in the Employee's testimony and closing submission causing his financial hardship.
82. **The contra proferentem rule:** Where there is doubt about the meaning of a contractual term (in this case - the effects of the July 17th, 2020 Intent to Hire letter with different remuneration figures as compared to the September 25th, 2020 section 6 DoI WP application), the words will be construed against the writer or the person who put them forward.
83. It is more probable than not, that it was also ambiguous to the Employee; and as stated in the Employee's closing statement, he verbally raised the lack of a Statement of Employment between the Parties on numerous times over the life of the employment relationship.
84. As such, the Panel opined that xxxxx cannot rely on his July 17th, 2020 Intent to Hire letter as an employment contract/statement of employment that superseded the completed September 25th, 2020 section 6 of Statement of Employment of the DoI WP application.

Deductions for xxxxx

85. The provisions for Benefits and Deductions are set out at paragraph 8 of section 6 of xxxxx 's DoI WP wherein:
 - *" you will receive an itemised pay statement detailing authorised deductions and benefit compensations that will appear on your pay slip. (Details the benefits packages and amounts that are payable by the employee against each item).*
 - *Positions which attract a bonus or other financial benefits must be reflected."*

86. xxxxx 's accommodation details had to be noted as a written agreement between the parties. However, the Panel was satisfied that xxxxx and xxxxx did verbally agree to the accommodation rate.
87. The Panel was not impressed by xxxxx's financial processes that did not make timely and weekly employee deductions for utility bills such as internet, belco and water usage. Due to xxxxx's oversight, xxxxx had to pay a lump sum payment for three (3) months in March 2021, that caused him financial hardship.
88. Likewise, the Panel was aware - stuck that xxxxx did not ensure that the weekly Contributory Social Insurance payments for xxxxx were deducted starting on July 1st, 2021. Instead 90 days of wages were deducted by xxxxx in October, 2021, to pay the employee's portion of the Contributory Social Insurance. There was no evidence produced by either Party of a written authorisation letter for the statutory deduction.
89. The Employer produced letters in their document bundle that were issued to all employees informing them of the Contributory Social Insurance deductions and explaining the oversight by xxxxx for forgetting to begin deducting the employees' portions from their wages on July 1st, 2021 which they signed and agree to. There was no letter supplied by xxxxx to xxxxx. He also confirmed he never received the letter.
90. Any under or overpayments of xxxxx 's portion of the Contributory Social Insurance scheme attributed to the July 1st, 2020 to June 30th, 2021 "Pension Holiday" should have been discussed with xxxxx when he started work on December 4th, 2020.
91. Paragraph 90 is reinforced by The Department of Social Insurance 2020 Guidelines for Employees at Step 1 pertaining to the Pension Holiday that stated:
- "You must inform your employer that you wish to suspend your contributions for the period between July 1, 2020 and June 30, 2021. **'Important'** Your employer cannot suspend your contributions without your written consent."*
92. The Tribunal also focused on the fine print in paragraph 6 of section 6 DoI WP application form, where the statement on Paid Public Holidays is set out in Section 11 **Employment Act 2000** and Schedule to the **Public Holidays Act 1947**.
93. There was no indication from xxxxx payslips, that xxxxx received Public Holiday pay from March 2021 to November 2021 as the Public Holidays fell.

Xxxxx's 30% Commission Only payment

94. Additionally, even if the Tribunal was persuaded to give the Employer (xxxxx) the benefit of the doubt and consider that in fact xxxxx agreed to no base rate and **only** a commission rate of 30%. There was no written variation Agreement.
95. The Tribunal then turned its attentions to the closing submission by xxxxx on the 30% commission only as a weekly wage.
96. The Tribunal was persuaded that the Employee had the right to claim unpaid wages (Unauthorized Deductions – wage differential as stated in Dol's WP as \$600 BM dollars and the difference in the commission rate xxxxx received at 30%, instead of the section 6 Dol WP commission rate of 35%.
97. xxxxx was within the three months after termination of his employment with xxxxx and with the authority of the Labour Officer, Department of Labour, to lodge his complaint against his former Employer xxxxx.
98. The definition of wages includes statutory pay for Public Holidays and Vacation Pay.
99. While the **EA 2000** as amended allows for contracting out of paid Public Holidays if the parties agree, the Tribunal was not presented with any evidence that the Parties did agree to opt out over the period of the employment relationship from December 4th, 2020 to November 25th, 2021.
100. As it appears on face value that not all statutory deductions were taken from the Employee's wages, for eleven (11) months, this instructs that regardless of any agreement to forego a weekly base salary and work on only a weekly commission, as a bona-fide employee contributing statutory benefits - the employee was entitled to paid public holidays.
101. Further, and denoted with relevant case law indicates the advantage of the employee bringing a claim for unpaid (Holiday pay) as Unlawful Deductions; potentially covering a claim for back dated holiday pay.
102. It is possible to refer to unpaid holidays as being accrued (upon termination) having not been paid over the course of the employment contract.
103. In regards to Section 2 of the **EA 2000** as amended, where xxxxx insisted that the Intent to Hire letter had the same force as a Statement of Employment, the argument did not persuade the Panel.

Unfounded accusations against HR Consultant xxxxx by xxxxx's owner/managing Director.

104. xxxxx continued accusations at his closing arguments, of impugning the professional reputation of the HR Consultant xxxxx was a disingenuous claim.
105. The HR Consultant did not act prematurely and without xxxxx's permission, by inserting a weekly base rate of \$600 BM dollars and a weekly commission rate of 35%. xxxxx's and xxxxx's signatures were clearly appended at section 6 Dol WP and attest that an employment contract agreement was made between the employee and the employer on September 25th, 2020. The Dol would not process the September 20th, 2020 WP application if the signatures where not appended.
106. Therefore, xxxxx's inference of misrepresentation by xxxxx to the Dol in the processing of xxxxx's Work Permit was not validated as he was bond by what he signed.
107. To reinforce the view, xxxxx testified that xxxxx wrote the Intent to Hire letter and the xxxxx employees' Statement of Employment contract letters. xxxxx indicated he received the WP application from xxxxx, not xxxxx.

Employee Pay slips

108. The Tribunal was keen to note that the Employer supplied only selected pay slips for xxxxx from December 4th. 2020 to November 25th, 2021 to rely on.
109. Despite the absence of no copies of pay slips from xxxxx and his repeated request for all pay slips from xxxxx, and no additional copies of pay slips from the Employer for the Employee, the Panel requested the Parties to furnish any and/or all the pay advice slips for xxxxx, so that the Panel can objectively determine what the Employee's net weekly, and monthly wages were. It took a week for xxxxx to comply to the Panel's payslip request.

Determination of Award

110. The Panel awards to the Employee compensation as follows
- Thirty five (35) weeks at dollars per week

- Seven (7) statutory Public Holidays
- The difference between the payment of 30% commission as compared to the 35% commission in the Dol WP for eleven (11) months
- Minus the Difference of the Contributory Social Insurance

Total sum of the award (BM dollars) to xxxxx

- Civil Penalty as noted in section 6(7), and section 44M EA 2000 as amended, payable to Bermuda Government

The Employer is warned that under S.44L of the Act

Non-compliance with award

44L (1) Where any person fails to comply with an award of the Tribunal or any part thereof, a person that is directly concerned in or affected by the noncompliance (hereafter referred to as an "aggrieved person") may, and without prejudice to any remedy or relief to which any person may be entitled apart from this section, make a complaint to the Tribunal.

(2) If on a complaint made under this section the Tribunal finds that the complaint is wholly or partly well-founded, it may grant one or both of the following—

(a) an award of compensation to be paid to the aggrieved person;

(b) a general award of such sum to be paid to the aggrieved person as the Tribunal thinks fit;

(3) The amount of the compensation awarded under this section shall be such amount as the Tribunal considers just and equitable.

(4) Where the Tribunal finds that the non-compliance was to any extent caused or contributed to by any action of the aggrieved person it may not award any compensation or sum or it may reduce the amount of compensation or sum by such proportion as it considers just and equitable having regard to that finding.

(5) An award under this section may within a period of 30 days after the award has been made be recovered as a civil debt in the Supreme Court or in a court of summary jurisdiction by the person or party to whom the compensation or sum is awarded.

(6) Without prejudice to any other provision relating to the Tribunal's power to grant an award under the Employment and Labour Code, no costs shall be payable in respect of

proceedings before the Tribunal under this section.

In subsections (1) to (5) of this section "person" includes a trade union

The parties to this Hearing were reminded and acknowledged that the Determination and Order of this Tribunal are binding. It was also made clear that, in accordance with Section 44J 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.*

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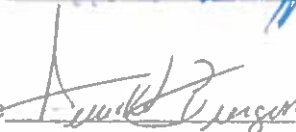
Edward Ball Jr, JP, LLB FCMI Chair

Signature 

McKeisha Smith Deputy Chair

Signature 

The Hon. Derrick Burgess, JP

Signature 

Date: March 24th, 2022