

**IN THE MATTER OF THE EMPLOYMENT ACT 2000 BEFORE THE EMPLOYMENT  
AND LABOUR RELATIONS TRIBUNAL (the "Tribunal")**

**BETWEEN**

**Complainant**

**AND**

**Employer**

Hearing Date: 27th June 2022

Tribunal Members: The Hon. Derrick V. Burgess, JP, MP, Chairman  
Mr. Eugene Creighton, Deputy Chairman  
Mr. Peter L. Aldridge, Tribunal Member

Present: Complainant  
Counsel for the Complainant  
  
Counsel for the Employer  
witness for the Employer

The Dispute filed under the Employment Act 2000 (the Act), pursuant to Section 37 (4) of the Act.

The Complainant is seeking the following:

1. Sick and vacation pay
2. One month's pay in lieu of notice
3. Twenty weeks' pay for constructive dismissal
4. Commission valued at \$2,270.42

The agreed terms of reference for the Employment and Labour Relations Tribunal is to determine whether the Complainant was unfairly dismissed (constructive dismissal).

## **THE CASE OF THE COMPLAINANT**

As per the Statement of Employment to [redacted] his salary is stated as \$62,000 per annum, and a requirement to work more than 40 hours a week, *'from time to time and overtime will not be paid'*.

Also, he will be paid 65% commission on coaching services [redacted] provides. Plus, he would be entitled to 15 days per year. The benefit will continue per the Professional Schedule, in accordance with the terms of the Employer's Employee Handbook. The Statement of Employment also outlines the Disciplinary and Grievance procedure, plus the Notice to Terminate.

On page 4 of the Job Description, the job category is listed as *'Management'*.

Upon taking a vacation in February 2022, which was granted, on [redacted] return his manager told him that he had exceeded his vacation allowances in previous years and that they were going to deduct two (2) of the days he had taken from his leave. The Complainant, [redacted] disagreed and stated if he had exceeded his vacation allowance, he did not think it was reasonable to go back over previous year's records to try to make deduction from his pay, particularly when those years had been settled.

The Complainant protested with the Human Resource Department to no avail. The Complainant, [redacted] communicated to the Human Resource Department that he was considering his options, when the next communication came from the Employer dated 16<sup>th</sup> March 2020, stating that staff will be on a 3-day work week due to the impact of Covid-19. [redacted] stated that he appreciated the incredible impact of the pandemic, but this does not override his rights under his employment contract or under the Employment Act. Therefore, he refused to sign or acknowledge the layoff notice.

On 29<sup>th</sup> March 2020, he received notice that all staff would be laid off without pay, from 4<sup>th</sup> April 2020 onwards.

On 31<sup>st</sup> March 2020, he submitted his resignation letter based on the events complained of above. [redacted] states that he considered the treatment over deduction of vacation pay to be sufficient to make his decision.

The statement of claim submitted by Counsel for the Complainant states that:

- 1. The terms of employment did not make any provision for short hours or layoff.*
- 2. In breach of S.12 (3), the Respondent did not pay the Complainant vacation pay throughout his period of employment to reflect his commission receipts. Rather, the vacation pay was based merely on his base salary of \$62,000. The sum claimed will be in excess of \$20,000 to reflect the additional sums owed.*

3. *On the 16th March 2020, the Complainant was informed that he would be placed on a short 3-day week with reduced pay, starting 23rd March 2020. The Complainant was asked to signify his agreement to this, but refused to sign. It was unreasonable, and in repudiatory breach of contract to resile from an agreement to pay the Complainant his contractual salary.*
4. *In light of the above matters, any one of which made it unreasonable to expect the Complainant to continue to work for the Respondent, the Complainant resigned, claiming constructive dismissal.*

## **THE CASE OF THE EMPLOYER**

1. confirmed the starting date of employment for was 1<sup>st</sup> August 2014, as per the contract, and that tendered his resignation on 31<sup>st</sup> March 2020, effective the same day.
2. The Employer's witness stated that was entitled to 15 days paid vacation per year, which would increase dependent upon the length of service and in accordance with the Professional Schedule. also stated that was entitled to 18 days' vacation from 2019.
3. Unfortunately, stated vacation entitlement was recorded wrongly in the Employer's system. vacation balance was showing incorrectly. As a result, the Employer thought he had taken vacation in excess of his entitlement; therefore, did not pay for 2 days' vacation.
4. stated the grievance procedure is set out in its Employee Handbook. did not follow this procedure and therefore, did not give the Employer the opportunity to investigate and rectify the mistake.
5. In any event, correct vacation entitlement is 18 days per year since 2019. was paid 65 hours vacation. This was an overpayment of 51 hours, being payment of 65 hours less the 14 hours accrued vacation that he was entitled to.

In early 2020, the virus that became known as Covid-19, was rapidly spreading across the world. At the outset of the pandemic, we had very little knowledge about it. Governments were having to quickly develop strategies to try and curtail the outbreak and protect their citizens. This included the Employer, as they had developed policies to protect the health and wellbeing of its associates. We also had to consider how to minimize the economic impact of the pandemic on the Employer, which in the long run also protects the continued employment of our staff. We were forecasting significant financial losses.

6. On 13<sup>th</sup> March 2020, the Employer held in-person managers meeting, which attended. On 16<sup>th</sup> March, at another managers meeting, written notices were distributed confirming the 2-day layoff.

7. On 19<sup>th</sup> March 2020, Government publicly announced that the L. F. Wade International Airport was to close for incoming passenger flights on 20<sup>th</sup> March 2020.
8. On 19<sup>th</sup> March 2020, the Employer received communications from Bermuda (Travel) Tourism Authority (BTA) regarding the "indefinite hold" of flights, cruises and major events and encouraging tourism business to take action now to survive crippling losses. Many hotels did close. Staff were informed and the Employer explained that the Employer was being guided by the Bermuda Government and Department of Health, and all decisions were subject to change.
9. All staff were informed via written notice dated 16<sup>th</sup> March 2020 and 19<sup>th</sup> March 2020 about layoff and temporary closure.
10. The Airport re-opened July 2020, at a significantly reduced schedule. The Government passed legislation to provide that the 4-month layoff period provided in the Act, would not include the period 1<sup>st</sup> April 2020 to 30<sup>th</sup> June 2020.

#### **EMPLOYER DEFENCE SUBMITTED BY COUNSEL FOR THE EMPLOYER.**

1. The Employer paid vacation pay calculated by reference to his gross salary (of \$62,000 per annum) throughout the period of his employment.
2. It was not a term of the contract that be paid wages as defined in the Employment Act. For each week of vacation, the Employer pays vacation based on salary, not salary plus commission. *This is permitted by the Act.*
3. Further and in any event, cannot claim unpaid wages based on the Act dating back more than 6 months. The Act only permits complaints about breaches which have taken place in the preceding 6 months.
4. It is denied that is entitled to one month's notice pay. resigned without notice.

#### **THE TRIBUNAL'S DECISION**

##### **Vacation Pay and Commission**

##### *The Employers Exhibit E entitled Vacation Leave Administration*

The Employer's witness states that the Complainant, vacation entitlement is in accordance with the professional category as outlined in Exhibit E. Therefore, was entitled to 18 days' vacation (not 20 days) from January 2019.

This statement is contrary to what is or was practice at the Employer based on the following:

1. In the Statement of Employment, the golf professionals' regular duties required him to work more than 40 hours a week from time to time and no overtime will not be paid.
2. The Complainant must create a weekly schedule that will best meet the requirements of the operation.
3. Under his job description, the position of golf professional falls in the job category of 'Management', as per the Employer's document.
4. As per the Employer's document 'Exhibit E' presented to the Tribunal, the Complainant was entitled to 93½ days' vacation and was only paid for 89 days' vacation. Reminder that commenced employment on 1<sup>st</sup> August 2014 and resigned on 31<sup>st</sup> March 2020.

The Tribunal finds in favor of the Complainant golf professional:

1. The Complainant will be paid 4½ days' vacation due. Also, we accept that vacation entitlement is in the 'Management' category.
2. The Complainant's award on vacation shall be paid by the Employer, in full, no later than 30 days from this decision.
3. Section 3 in the Employment Act 2000 reads as follows, "...wages' means all sums payable to an employee under his contract of employment (by way of weekly wage, annual salary or otherwise) or otherwise directly in connection with his employment, including any commission..."
4. The claim for Commission has been formally withdrawn by the Complainant.

### **Constructive Dismissal and Payment in Lieu of Notice**

In the matter on the Complainant's claim for constructive dismissal and Payment in Lieu of Notice the Tribunal in rendering their decision, considered the following:

1. Because of the global pandemic, the Bermuda Government, on 19<sup>th</sup> March 2020, publicly announced the closure of the L. F. Wade International Airport.
2. The recommendation and Government orders from the Department of Health.

3. Notices to all staff from the Employer on 16<sup>th</sup> March and 29<sup>th</sup> March 2020, followed the proper protocol.
4. Communications and directives from the Bermuda Tourism Authority.
5. Government financial assistance to all working residents in Bermuda.
6. During Covid, the Complainant, without being asked, invited, or forced, resigned his position at the Employer, effective 31<sup>st</sup> March 2020.
7. The Employment Act 2000, Section 32 – Lay off.

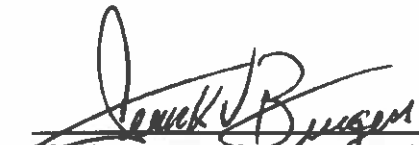
The Tribunal finds in favour of the Employer:

The Tribunal dismisses the claim by the Complainant for Constructive Dismissal and Payment in Lieu of Notice; therefore, request denied.

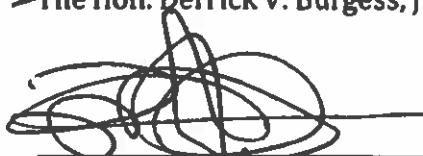
The parties to this hearing are reminded that the determination and order of this Tribunal are binding in accordance with Section 44(I), of the Employment Act 2000.

Any party aggrieved may however appeal to the Supreme Court of Bermuda on a point of law.

Dated this 21<sup>st</sup> day of July 2022

  
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The Hon. Derrick V. Burgess, JP, MP, Chairman

  
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Mr. Eugene Creighton, Deputy Chairman

  
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Mr. Peter Aldrich, Tribunal Member