

**DETERMINATION & ORDER**

**THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021  
BEFORE THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL.**

**TRIBUNAL QUANTUM AWARD**

**IN THE MATTER OF:                   CHRIS FURBERT Jr  
  and  
  Bermuda Industrial Union (“BIU”)  
  and  
  XXXXXXXXXXXXXXXX (“Interested Party”)  
  -V-  
  XXXXXXXXXXXXXXXX**

**Members of Tribunal:                   Edward Ball Jr, JP, LLB, FCMI Chairman  
  John W. Payne, Deputy Chair  
  Jocene Wade, JP, FCMI**

**Complainant Representative:           Marc Daniels, Counsel  
  Marc Geoffrey Barristers & Attorneys, Ltd.  
  Carmel Building  
  61 King Street  
  Hamilton HM 19  
  Reverend Nicholas Tweed**

**Respondent and Representative:       Dante Williams Counsel  
  Marshall, Diel & Myers  
  31 Reid Street  
  HM 12**

## **STATUTORY AUTHORITY TO HEAR THE MATTER**

1. The Tribunal made its award on November 27, 2024, but ordered the Parties to supply financial evidence that the Complainant and the Respondent wished to rely on as the Complainant's Quantum Relief for 4.5 years (232 weeks).
2. The Parties were given 21 business days to submit the requested information to the Labour Relations Officer ("LRO").

### **Background**

#### **The Complainant Quantum Submission**

3. Based on the Complainant's testimony at the Hearing on September 24 and 25, 2024, the Statement of Facts and his noted paragraph 231 on page 27 that the gross sum of \$461,915.55 BM dollars represented his losses for 232 weeks. A second, more exhaustive submission denoted the Complainant's losses in the amount of \$768,434.65 BM dollars for 232 weeks.

#### **The Defendant's Quantum Submissions**

4. The Respondent submitted 2 quantum net figures. The first was an award greater than 26 weeks, representing a net quantum of \$355,670.15 BM dollars for 232 weeks, and the second net maximum quantum for only 26 weeks totaling \$43 918.94 BM dollars, which the Respondent maintained is legislated under the **EA 2000** for maximum compensation for an unfair dismissal award.
5. The Tribunal exercised its rights under **section 44B(2), section 44C, the General Powers, and section 44D, the Power to Obtain Information. Under Schedule 2 (20) of the Employment Act 2000 ("the Act"), the Tribunal shall regulate its proceedings as it sees fit.**

#### **General Remarks on Quantum / Relief Sought**

6. Such remedies are within the power of the Tribunal. Before the creation of the Employment and Labour Relations Tribunal in 2021, the Permanent Arbitration

Tribunal, having similar powers under the Labour Relations Act 1975, made orders of compensation in appropriate cases. Since its creation, the Tribunal has done so likewise in cases referred to it under the ***Trade Union and Labour Relations (Consolidation) Act 2021 ("TULRC")***.

### **Notice Period**

7. The Employer did not comply with Section 20(1)(a) Notice Period of the Act by awarding one week's wage in lieu of notice for the unfair dismissal.

### **Section 39 of the Act Remedies**

8. In ***Thomson v Fort Knox Bermuda Ltd [20101 CA (Bda) 5 Civ***, the Court of Appeal considered the remedies available under the Act. After setting out the relevant provisions, Evans JA stated in paragraphs 18-19 as follows:

*"However, sections 39 and 40 do distinguish between claims for unfair dismissal and other claims.*

*Section 39 is headed "Remedies: general". It empowers the Tribunal to order the Employer to do any specified act which in its opinion constitutes full compliance with the Act, and to pay "any unpaid wages or other benefits owing to the employee" (section 39(1)).*

9. This provision was considered in Lynam at paragraph 25 and fortified by the decision in **Gorham's** where Mussenden J considered a situation where there was a finding of unfair dismissal and a maximum award with no consideration of section 40 (4) (b) of the Act and concluded as follows at paragraph 82:

*"...on the basis of an unfair dismissal, the Tribunal was obliged to take into account the 2000 EA section 40(4)(b) factors which would have included the extent to which Mr. Robinson caused or contributed to the dismissal as that was a circumstance to be considered in what was a just and equitable amount of compensation. However, the Tribunal made a maximum award of 26 weeks without providing any reasons for doing so. In my view, the*

*Tribunal failed to consider the extent of any contribution by Mr. Robinson to his dismissal”.*

### **Application of section 40(5)(b) of the EA 2000**

10. Section 40(5)(b) stated that compensation is limited to a sum calculated by reference to the number of weeks of continuous employment, but with a limit of *“up to a maximum of 26 weeks wages”.* (Emphasis added).
11. This Tribunal is aware of the ruling in Colonial Group Ltd v Caesar [2021] Bda LR 24 at paragraph 33.
12. As such, given the findings by the Tribunal that the Complainant was unfairly dismissed, Mr. Williams stressed that section 40(5)(b) should be applicable in determining compensation for the Complainant.
13. The Tribunal is generally obligated under section 40(5)(b) to consider the extent to which the Complainant caused or contributed to his termination.
14. Secondly, the losses sustained by the Complainant in consequence of his dismissal and how he mitigated his losses were attributable to his dismissal.
15. Finally, the Tribunal should make an equal and equitable award in all circumstances, considering these factors.

### **The Tribunal Discussion on the Complainant’s Quantum**

16. The Respondent argued that any Quantum Award was limited to the maximum amount of 26 weeks following Section 40(4) of the **EA 2000**.
17. The Tribunal responds that this is not a matter referred to under the **Employment Act 2000** but the **Trade Union Labour Relations Consolidation Act 2021 (“TULRC Act”)**, so that limitation does not apply. We also restate that the Court of Appeal referred this matter to the Tribunal and in paragraph 58 of their November 17, 2023, judgment:

*“The judge found at [55] that there was a labour dispute within the definition of the legislation, whether under the 1975 or 2021 Act (whose wording is similar), since there was, and remained, a dispute between a worker and a union on his behalf wholly or partially relating to the termination of employment or a worker.”*

18. The Respondent may also state that Section 44H of the **Act** is relevant in that it provides:

*“Where any matter referred to the Tribunal involves questions as to wages, or as to hours of work, or otherwise as to terms or conditions affecting employment which any Act regulates under the Employment and Labour Code or by any other Act, the Tribunal shall not make any award which is inconsistent with that Act.”*

19. However, making an award of a higher amount than 26 weeks is not inconsistent with the **Employment Act 2000** as the Act itself provides in **Section 2(3)**:

*“Where any of the rights of an employee established by any other Act, **agreement**, contract of employment, custom or practice are more favorable than this Act requires, the provisions so established prevail over this Act.”*

20. The Tribunal was keen to also note in the opening paragraph of the **EA 2000** that:

*“WHEREAS it is expedient to promote the fair treatment of employer and employee providing **minimum standards of employment**, by establishing procedures and notice periods for termination of employment....”*

21. Where the **agreement**, *contract of employment, custom, or practice* is silent then the **EA 2000** will prevail.

22. The present Tribunal was also guided by the listed Tribunal award of **XXXXX v XXXX (Oct 17, 2024)**, where XXXX , a sister company to XXX and where the BIU is the bargaining agent, XXXX was awarded:

***A Compensation Award (Section 78. 2. c & d) of the Trade Union and Labour Relations (Consolidation) Act 2021 in the amount of fifty-two (52) weeks gross salary based on the equivalent of his salary when he left, adjusted for the 2024 rates,***

payable no later than **November 30<sup>th</sup>, 2024**. In accordance with Section 78 of the Trade Union and Labour Relations Act, cited below. "It is the opinion of the Tribunal that this award is just and equitable under the circumstances and provides the Complainant with a level of compensation which closely approximates the wages lost between the time of termination and the conclusion of this Tribunal Hearing". **Note, that it is not the intention of the Tribunal to award an exact sum equal to lost wages.**

23. Similarly, the BIU and XX Collective Bargaining Agreement ("**CBA**") provisions establish rights more favorable than the **Act** with its limitation of 26 weeks' pay and any notice pay, then by Section 2(3) the provisions of CBAs so established prevail over the **Employment Act 2000** for the unionized workers.
24. Articles 20, 32, and 33 in the CBA between the XX and the BIU are examples of negotiated terms and benefits:
  - Article 20 is a pension plan for the Employees covered by the Agreement and will keep the employees informed as necessary.
  - Article 32 life insurance: the cost of the policy will be borne solely by the employer.
  - Article 33 insurance: the cost will be borne equally by the employee and employer.
25. The Tribunal noted in the Parties' quantum submissions the commonality on specific benefits to which the Complainant is entitled in this 232-week award. For ease of reference, the Defendant's net calculation for 232 weeks' quantum submission denoted the Complainant's benefit losses for social insurance, the Company's pension, and the employee's health insurance premium contribution paid by XXX.
26. Therefore, the Tribunal can make a quantum award consistent with the level of compensation for unionized workers, given the CBA's insight.

27. Hence, the Complainant is initially awarded \$355,670.15 BM (as noted in the Defendants' 232 weeks net quantum submission) contingent on the Complainant's contribution to his dismissal and, second, taking action to mitigate his loss of earnings.

**Contributory Conduct**

28. It is accepted that the Tribunal can nonetheless consider the extent to which the Complainant caused or contributed to his dismissal, as is the case in any unfair dismissal case, and consider a deduction to the award.
29. The Tribunal revisited the factors in determining the Complainant's contributory behavior. In paragraph 236 of the Tribunal's November 27, 2024, Award:

*"The Tribunal accepted that the threatening evidence was enough for the Respondent to form the basis for a reasonable belief of serious misconduct."*

**The Complainant Mitigated his losses for 232 weeks.**

30. The next step is to consider Section 40(4) to increase or decrease the award amount to a level that the Tribunal considers just and equitable in all circumstances. Section 40(4) requires consideration of the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer, and the extent to which the employee caused or contributed to the dismissal needs to be taken into account.
31. Under oath, the Complainant testified that he mitigated his loss through his company's income. However, the Tribunal did not receive any financial figures from the Complainant to verify his company's income and hence could not offset a dollar amount against his losses.
32. Following the **Polkey** principle in unfair dismissal cases, the Tribunal determines the amount to be deducted; even if a Tribunal decides a dismissal was unfair, the compensation award must be reduced by a percentage based on their estimate of the probability that the dismissal would have occurred anyway, even if a fair process had been followed.

### The Quantum Award

33. Considering the Complainant's lack of financial evidence to mitigate his 232 weeks of losses and the Complainant contributing to his dismissal, the Tribunal awards the Complainant the net quantum of **\$248,969.11 BM dollars**.
34. Also, as prescribed in sections 18 and 20, the **Notice period** for the Complainant is awarded one week's pay in the amount of **\$1375.50 BM dollars**.
35. The Total net award to the Complainant is **\$250,344.61 BM dollars** less the statutory payroll tax. Payment is to be made to the Complainant within **30 calendar days**.

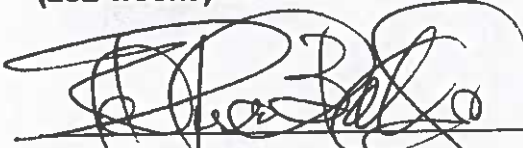
### Post-hearing Procedures.

36. If either party makes any report on or comment on this matter contrary to **section 44E**, such party shall be liable to a civil penalty.
37. Both Parties have the right to apply to conceal any matter of the Hearing/Award as outlined in **section 44F (3)** Notification and Publication of Award of the Act. The Tribunal is aware of the sensitivity of quantum figures submitted by the Parties.
38. According to **section 44 K**, either party aggrieved by this decision has the right to ask a question about interpreting the Tribunal award.
39. Under **section 44O**, either party aggrieved by this decision has the right to appeal to the Supreme Court on a point of law within 21 days after receipt of notification of this award of the Tribunal. The Tribunal consents that the Parties' 21-day appeal window includes the November 27, 2024, Award.
40. The Tribunal does not award legal costs to any party to these proceedings.



**The Award**

42. The Complainant is awarded quantum Relief of **\$250,344.61 BM dollars** for his **4.5 (232 weeks) losses.**



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Edward Ball Jr, JP, LLB, FCMI Chairman



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John W Payne, Deputy Chairman



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Jocene Wade, JP, FCMI Tribunal Member

**Date: January 17<sup>th</sup>, 2025.**

