

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

BETWEEN

Complainant

AND

Respondent

DECISION

Date of Complaint: 3rd May 2023
Investigation Completed: 30th May 2023

Date of First Directions Hearing: 18th December 2023
Date of Second Directions Hearing: 19th February 2024
7th June 2024
Date of Substantive Hearing: 9th September 2024

IN ATTENDANCE

Members of Tribunal: Ms. Keren Lomas required leave and

- Ms. Jocene Wade continued the role of **Tribunal Chairman**.
- Mr. Robert K. Horton, **Deputy Chairman**
- Mrs. Judith Hall-Bean, **Tribunal Member**

For Complainant:

Mr. (via telephone and WebEx)

For Respondent:

Ms. Barbara Tannock, Director/Recruitment & Immigration, The Catalyst Group Limited

Terms of Reference

To determine if the Complainant was unfairly dismissed by the Respondent, if the Complainant is entitled to three months' salary in lieu of proper notice of termination of service by the Respondent and if the Complainant is entitled to reimbursement for deductions from his salary towards a motorbike loan made by the Respondent.

BACKGROUND

1. A Directions Hearing concerning the complaint took place on 18th September 2023 and a Further Directions Hearing took place on 18th December 2023 and 19th February 2024. The Tribunal convened for the Substantive Hearing on 7th June 2024, and 9th September 2024.
2. At the Substantive Hearing ("the Hearing"), the Chairman confirmed the issue to be considered by the Tribunal and stated that the Hearing was to be conducted in accordance with sections 44B (2) and 44C, General Powers, of the Employment Act 2000 ("the Employment Act") and that the Tribunal shall regulate its own proceedings as it sees fit pursuant to provisions of Schedule 2 (20) of the Employment Act 2000.
3. The Chairman afforded the Parties the opportunity to meet without the Tribunal's assistance to engage in meaningful dialogue to attempt to reach a settlement to the dispute. Ms. Barbara Tannock (Ms. Tannock) stated that the Respondent had no intention of speaking with the Complainant further concerning the matter. The Hearing then proceeded.
4. The Complainant's and the Respondent's written submissions formed the basis of the Tribunal's deliberations and Award.

5. The Chairman drew the Parties' attention to the following provision of section 44E(1), Power to Exclude the Public, of the Employment Act: *Proceedings of the Tribunal shall be open to the public but the Tribunal may with the consent of both parties 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.* The Parties consented to exclude the press and the public
6. The Complainant commenced employment as a mason with the Respondent on 11th January 2023.
7. The Tribunal learned that, according to Portugal's National Qualifications Catalogue, the Complainant had completed a three (3) year course in Portugal, his home country, qualifying as a certified Bricklayer/Mason on [redacted] at the "Fundação Escola Profissional de Vila Franca do Campo".
8. Upon beginning work with the Respondent, the Complainant was expecting to perform duties typical of a mason, such as laying blocks, concrete forms and other construction tasks associated with the trade. However, he alleges that he was not assigned the kind of work expected. Instead of being asked to utilize his skills as a trained and certified mason, he was tasked with working on a sifter, a job that required him to work alone for some three weeks. He asserted that the sifter work was really a two-man job.
9. The Complainant alleges bullying from the Foreman ([redacted]) who frequently assigned him tasks that did not align with a mason's role and only assigned these duties. He told the Tribunal, "*The more I did, the more they wanted.*" The Tribunal learned the situation escalated when the Foreman began to challenge the Complainant's qualifications, asserting that he was not a mason despite his certification.
10. The dispute over qualifications created a hostile work environment, with the Foreman constantly questioning the Complainant's skills and undermining his professional standing. The Respondent contends that the Complainant was not an

experienced mason, despite the approval of his employment as a qualified mason by the Department of Immigration, asserting that he did not meet the skill level required for the position.

11. The Respondent also alleges that the Complainant provided employment references from persons who were unknown and that the same references were submitted to the Department of Immigration as part of the work permit application process. The Respondent maintains that its inability to locate the Complainant's referees heightened concerns about the validity of the Complainant's professional references.

12. The Respondent maintains that its Foreman, _____ who has been in the Respondent's employment for several years, was highly experienced and capable of assessing whether an individual possessed the necessary skills to work as a mason.

13. According to the Respondent, an onsite meeting was held with the Complainant on 28th March 2023 to address dissatisfaction with his work. During the meeting, the Respondent communicated that the Complainant's workmanship did not meet the company's standards and that the Respondent was considering terminating his contract due to poor performance. However, the Respondent maintained, the Complainant walked off the job. *It is noted that no documentation was presented to the Tribunal as confirmation of these facts.*

14. The Respondent, believing that the Complainant was not a qualified mason, therefore extended the Complainant's probationary period. Instead of working as a mason, the Complainant was assigned to sift sand. No documented evidence was provided by the Respondent to substantiate either the Complainant's alleged lack of qualifications or specific terms and reasoning for the reassignment to sifting sand.

15. The Respondent further alleges that during the referenced onsite meeting, there was discussion on the negative impact the Complainant was having on team morale. It was claimed that he made disparaging comments about the leadership

and management practices and that he was having a "cancerous" effect on the team.

16. The Tribunal learned that the Complainant was initially placed on a 90-day probationary period with no written confirmation of a mid-term review and no ending date of the first 90 days of probationary period.
17. The Tribunal heard that the Respondent felt that the Complainant was not meeting the expected standards for a mason during the 90 day probationary period , but was willing to extend the probationary period for a further 90 days as an opportunity to reassess the Complainant's performance. However, this arrangement was not done in a transparent and constructive manner and there was no written evidence of this arrangement.
18. The Tribunal notes that despite alleging that the Complainant did not possess the necessary qualifications, the Respondent extended the probationary period without clarifying or documenting the terms of the extension or how it related to the Complainant's original role as a mason.
19. The Respondent failed to provide any witness statements or independent verification of the claims regarding the Complainant's qualifications or unsatisfactory performance. This lack of evidence calls into question the basis of the Respondent's position and the actions taken against the Complainant during his probationary period.
20. The Respondent's decision to retain the Complainant after the initial 90 days raises questions under the 'principle of fairness' in the Employment Act. If the Respondent believed that the Complainant was not qualified as a mason and was not meeting the company's standards, it would have been reasonable to end the employment relationship at that point. Retaining the Complainant as an employee, even in a reduced capacity, implies that the Employer either saw potential for improvement or failed to take appropriate steps to address the performance issue.

21. The Tribunal was made aware that the Complainant was so frustrated by the Foreman's apparent hostility towards him that he reached a point where he could no longer continue working in such an environment.
22. The Complainant has presented these allegations as part of his claim of unfair treatment, which ultimately led to his resignation from the Respondent's employ.
23. The Complainant referred to the contract of employment (Portuguese contract) and he indicated that amounts of \$108 per week for health insurance, \$38.40 for the Pension scheme and \$35.02 for social insurance were to be deducted and paid to the relevant entity and authority.
24. The Complainant informed the Tribunal that during a visit to the dentist, he learned that he was not covered for dental visits. He had no knowledge of the type of health insurance that the Respondent was to provide and stated that as a result of the fact that he was required to pay the dental office \$600 for the visit, he then became suspicious about the deductions made from his pay. He said that he decided to visit the Department of Social Insurance where he learned that some contributions had been submitted by the Respondent, but not the full quota.
25. The Respondent alleges that the Complainant appeared surprised upon learning that he was employed by a Black-owned company. The Respondent made this observation as part of the broader discussion regarding the Complainant's attitude and conduct during his employment.
26. The Complainant informed the Tribunal that he had resigned from the Respondent's employment because of continued bullying and harassment by the Foreman and concern about the deductions from his wages. Feeling "frustrated and aggravated", he had then gone to the Department of Labour to make a complaint.

ISSUE OF THE MOTORBIKE

27. The Respondent maintained that upon leaving the company, the Complainant had not returned a motorbike that was purchased for his use during his employment with the company. The Respondent said that it had been agreed that the company would purchase the motorbike outright, with arrangements in place for the Complainant to pay for it eventually by means of regular deductions from his salary.
28. The Complainant acknowledged that he did not return the motorbike because he was seeking a refund of the money that had been deducted from his wages to cover the cost of the bike. He argued that since deductions had been made from his salary, he felt entitled to retain the vehicle until the deductions had been returned in full by the Respondent
29. After a brief discussion, the Chairman asked the Complainant who legally owned the motorbike. In response, the Complainant confirmed that the vehicle was registered under the name _____, the Respondent and owner. The Chairman then made clear that as he was not registered as owner of the vehicle, it must be returned to its rightful owner, that is, the Respondent.
30. The Complainant agreed to the Chairman's directive and indicated that he would arrange for his brother to return the motorbike to the Respondent. The Tribunal acknowledged this arrangement and noted that it was the Complainant's responsibility to ensure the vehicle's prompt return.

KEY ISSUES

31. The primary issues include the mismatch between the Complainant's qualifications and the duties to which he was assigned, the Foreman's challenge to the Complainant's professional status and the informal termination process. These events suggest potential mistreatment and lack of recognition of the Complainant's skills and credentials.

32. The Complainant was employed on the basis of his recognized qualifications and references that were initially verified and accepted by the Respondent during the work permit application process. These documents, submitted to the Bermuda Department of Immigration without objection, led to the issuance of a work permit.
33. The Respondent maintains that the Complainant was not qualified for the role of mason. Despite this assertion, the Respondent failed to produce evidence to support these claims, such as a documented performance assessment, warnings or records of any meetings held with the Complainant regarding his performance.
34. The Respondent admitted to the Tribunal that there were no written warnings, no documented performance reviews nor evidence of poor performance presented to the Complainant during the probationary period. This lack of documentation highlights a failure in procedural fairness and transparency in assessing the Complainant's suitability for the role.
35. Ms. Tannock suggested that the Complainant's qualifications were not credible and alleged that references could not be verified as the authors were unknown. However, the Respondent did not take reasonable steps to verify these credentials during the recruitment vetting process and prior to the submission of the work permit application to the Department of Immigration.

FINDINGS

36. The Tribunal finds that the Respondent failed to conduct a fair and transparent assessment of the Complainant's performance during his probationary period. There was no documented evidence of specific performance issues, formal assessment or corrective actions taken, evidence required under the Employment Act 2000 to substantiate claims of unsuitability.
37. The Tribunal notes that the credentials provided by the Complainant were initially accepted by the Respondent and submitted to the Department of Immigration for a work permit. The Respondent's sudden reversal in its stance during probation,

without due verification or evidence, undermines their claim that the Complainant was unqualified.

38. The Respondent's actions suggest procedural lapses, including the failure to document performance issues and the improper handling of the Complainant's probationary period. The Tribunal finds that these lapses contributed to an unfair assessment process.

EMPLOYMENT LAW

39. The Complainant did not have an Employment Contract to which the terms of the 'probationary period' were documented. The Employment Contract presented was a copy of page 13 of the Immigration Questionnaire and The Portuguese Accord (also known as the Bilateral Labour Agreement) between the Bermuda Government and the Government of the Azores which primarily facilitates the recruitment and employment of Portuguese nationals from the Azores to work in Bermuda.

40. Section 6 of the Employment Act 2000 - Statement of Employment -

"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."

41. Constructive Dismissal: Section 29(1) of the Employment Act follows: *"An employee is entitled to terminate his contract of employment without notice where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship, having regard to the employee's duties, length of service and circumstances."* The repeated questioning of the Complainant's qualifications, coupled with his assignment to tasks that did not align with his job description as a mason, may be seen as forms of constructive dismissal. The Respondent's failure to allow the Complainant to perform the trade

in which he was skilled and the bullying he faced from the Foreman are contributors to what was for the Complainant an intolerable work environment.

42. The Tribunal accepts that the Complainant was hired specifically as a mason, but was not allowed to perform the duties associated with that role. In the Tribunal's view, this constituted a breach of contract. Employment contracts implicitly include the expectation that an employee will be able to perform the work for which they were hired and that the employer will provide a suitable working environment.

43. The Respondent provided a copy of the Portuguese Accord (also known as the Bilateral Labour Agreement) between the Bermuda Government and the Government of the Azores which primarily facilitates the recruitment and employment of Portuguese nationals from the Azores to work in Bermuda. However, the Portuguese Accord does not serve as a 'Statement of Employment' as required by the Employment Act 2000.

44. While the Portuguese Accord facilitates the employment of Portuguese workers in Bermuda, it does not replace the employer's responsibility to provide a proper Statement of Employment. Employers must ensure that all workers receive a written statement detailing the specific terms and conditions of their employment in accordance with Bermuda's legal requirements.

CONCLUSION AND RECOMMENDATIONS

45. Having assessed written submissions by both Parties, having heard the evidence of both Parties during the Hearing and having considered applicable law, the Tribunal makes the following findings.

46. The Complainant provided adequate evidence of his qualifications as a mason, including certification and prior work experience. The Tribunal finds no basis for the Foreman's continued rejection of the Complainant's credentials, as there was no credible evidence presented to suggest that the Complainant was not qualified to perform masonry work.

47. The Tribunal finds that the Complainant was not treated fairly in relation to his employment as a mason. Despite being hired to perform skilled work, the Complainant was assigned to non-skilled labour for an unreasonable period. In the Tribunal's view, this arrangement was unjust, especially since the Complainant had been employed under the pretext of working as a mason.
48. While there was no conclusive evidence to support the Complainant's belief that the Foreman disliked him personally, the Tribunal notes that the Respondent's treatment of the Complainant was inconsistent with the normal progression for employees with certified skills. Whether the Foreman was motivated by personal bias or not, the Tribunal concludes that his actions were inappropriate and contributed to an unfair work environment.
49. The Tribunal concludes that the Foreman, and the Respondent, without justifiable cause denied the Complainant the opportunity to perform the duties for which he was qualified and employed and, further, that the Respondent's denial in this regard resulted in the Complainant being treated unfairly when compared to other employees in similar roles.
50. There is no written evidence to support the Respondent's claims about the Complainant's unsatisfactory performance or any formal assessment of his probationary period, nor did the Respondent provide evidence of same during the Hearing. Without proper documentation, it is impossible for the Respondent to justify any actions taken against the Complainant based on alleged poor performance.
51. According to the Respondent, the Foreman had legitimate concerns about the Complainant's ability to perform the work of a mason and was acting within his authority to assign tasks accordingly. The Respondent argued that there was no personal animosity involved in the decisions made by the Foreman and that the work assigned to the Complainant was based on the needs of the site and his observed performance. Again, the Tribunal heard no evidence to support the Foreman's conduct towards the Complainant.

52. The Respondent did not dispute that the Complainant had been assigned non-mason tasks but stated that this was a standard practice for employees whose skills needed further evaluation.

53. In the Tribunal's view, assigning the Complainant to tasks unrelated to the job for which he was hired without addressing his concerns, coupled with the absence of any documented feedback or support, reflected the Respondent's mismanagement of the probationary process.

54. The Respondent's failure to address the Complainant's concerns fairly and its reliance solely on unverified claims of his qualification further demonstrate procedural lapses.

DETERMINATION AND AWARD

55. Having accepted that the Complainant was bullied by the Foreman and not allowed to perform his contracted role, the Tribunal concludes that the Complainant was Constructively Dismissed (Section 29) and considers an award in accordance with provisions of sections of the Employment Act

- i. Changes to the employee's job role without consent.
- ii. Bullying, harassment, or intimidation in the workplace.
- iii. A lack of support or unreasonable demands that render the role untenable

56. The Tribunal considers the following factors in determining a financial award in favour of the Complainant: the presence of procedural fairness, the degree of constructive dismissal determined and any exacerbating factors related to workplace treatment.

57. The Tribunal accepts that the Foreman's actions, coupled with the Respondent's inaction, amounted to the creation of a hostile work environment, making the

Complainant's position untenable. Additionally, the Tribunal accepts that the Complainant's decision to leave the job site in order to seek help was a reasonable one.

58. The Tribunal rules that the Complainant was constructively dismissed. The circumstances of the case support the conclusion that the Complainant was forced to leave the job due to sustained and mistreatment by the Foreman. Given the Respondent's failure to intervene, the Tribunal recognizes the Complainant's departure reasonable and justifies his response to the hostile environment.

59. The Tribunal rules that the Complainant has no entitlement to overtime pay for his period of service with the Respondent.

60. The Tribunal rejects the Respondent's counterclaim of \$5,265.00 for the following reasons:

- a. \$1,300.00 for Airline Fees - Under Bermuda Department of Immigration policy, the Employer, in this case, the Respondent, is responsible for the repatriation of the worker to his country of origin. The Tribunal notes Ms. Tannock's testimony that the Respondent was in compliance with Department of Immigration policy in purchasing a return airline ticket for the Respondent. The Tribunal notes also Ms. Tannock's testimony that the Respondent paid more than the normally required amount for the airline ticket owing to the Complainant's changes in his departure date from Bermuda.
- b. \$850.00 – The motorbike has been returned by the Complainant.
- c. \$1,015.00 - Cost of Work Permit – No proof of documentation confirming this arrangement between the Respondent and the Complainant was presented.
- d. \$2,100.00 - Consultant Fees – The general principle is that each Party bears its own consultant/ legal costs regardless of the case outcome.

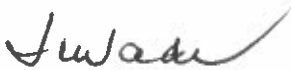
THE TRIBUNAL ORDER

The Tribunal therefore orders that:

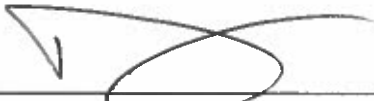
- (i) The Complainant be compensated 3 weeks wages @ \$960.00 per week = \$2,880.00;
- (ii) One weeks' notice pay at \$ 960.00 + \$2,880.00 wages = **Total Award of \$ 3,840.00**
- (iii) Any outstanding Government obligations with respect to the Complainant be satisfied and
- (iv) Pursuant to **Section 44M** a Civil Penalty of **\$1500.00** has been imposed upon the Respondent for not providing the Complainant with a Statement of Employment.

Either Party that is aggrieved by this Determination and Order has the right to appeal to the Supreme Court on a point of law only within 21 days after receipt of notification of the Order.

Dated this 29th day of November 2024



Jocene C. Wade
Chairman



Robert K. Horton
Deputy Chairman



Judith E. Hall-Bean
Member