

**INDUSTRIAL TRIBUNAL**

**COURT #2 FREEPORT INSURANCE CENTER, 21B WEST MALL & POINCIANA  
DRIVE, FREEPORT, GRAND BAHAMA, COMMONWEALTH OF THE BAHAMAS**

**Before**

**MRS. HELEN J. ALMORALES-JONES (VICE-PRESIDENT)**

**(SITTING ALONE)**

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**CHERYL BAIN**

**APPLICANT**

**BARBARY BEACH DEVELOPMENT LIMITED**

**RESPONDENT**

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**ORDER ON DIRECTIONS**

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**APPEARANCES**

For the Applicant

Mr. Justin Palacios  
Labour Advocate  
Freeport, Grand Bahama  
The Bahamas

For the Respondent

Counsel, Ms. Lavette A. Kemp  
Graham Thompson  
Freeport, Grand Bahama  
The Bahamas

**WHEREAS:**

- 1) On the 12<sup>th</sup> April, 2023, **Cheryl Bain** ("the Applicant") filed a **Report of a Trade Dispute** against **Barbary Beach Development Limited** ("the Respondent") with The Department of Labour in Grand Bahama, The Bahamas;
- 2) It stated, inter alia, that the issues relevant to the dispute were *Wrongful & Unfair Termination, Severance pay, Notice pay, Vacation pay, Salary owed, Commission pay, Holiday pay owed, Overtime pay, Employee reserve owed, Re-imbursment of N.I. Contributions, Breach of Minimum Wage Act and Breach of Employment Act*;
- 3) By a **Certificate of Referral** dated the 18<sup>th</sup> May, 2023 (received on the 5<sup>th</sup> July, 2023), the Honourable Minister of Labour & Immigration ("The Minister") referred the said trade dispute to the Industrial Tribunal, Northern Region, ("the Tribunal");
- 4) In accordance with **Rule 3(1) of The Industrial Relations (Tribunal Procedure) Rules, 2010** ("The Rules"), on the 7<sup>th</sup> July, 2023, the Tribunal served the **Applicant** with notice of the referral;
- 5) The Applicant filed a **Form A** (Originating Application) on the 14<sup>th</sup> July, 2023, which stated, inter alia, that the grounds for the application were:-
 

*The Applicant was employed with the Respondent;*  
*The Respondent did not pay the Applicant in accordance with the law;*  
*The Respondent refused to pay the Applicant her statutory entitlements after they terminated her for alleged breaches of the Employee Handbook;*  
*Breach of contract;*  
*Breach of The Employment Act & Minimum Wages Act;*  
*Wrongful Dismissal;*  
*Unfair Dismissal; and*  
*The Respondent owed the Applicant Vacation pay, Overtime pay, Holiday pay & Commission pay;*
- 6) In accordance with **Rule 4 of The Rules**, on the 18<sup>th</sup> July, 2023, the Tribunal served a copy of the **Form A** (Originating Application), a **Form C** (Notice of Originating Application) and a blank **Form D** (Notice of Appearance) on the Respondent (received by *Beverly Sands*);
- 7) In accordance with **Rule 5(1) of The Rules**, on the 25<sup>th</sup> July, 2023, the **Respondent** filed a **Form D** (Notice of Appearance) which stated, inter alia, that it intended to resist the application and its name is *Barbary Beach Development Limited, T/A Viva Wyndham Fortuna Beach*;

8) In accordance with **Rule 6 of The Rules**, on the 23<sup>rd</sup> August, 2023, the Respondent filed a **Form E** (Defence) which stated, inter alia, that:-

- the Respondent contracted the Applicant under a contract for service starting from the 6<sup>th</sup> April, 2021;
- the Applicant terminated the contract on the 11<sup>th</sup> April, 2023;
- the Respondent denies that the Applicant was its employee and avers that she was an independent contractor; and
- the Respondent denies the allegations of Wrongful and Unfair Dismissal, breach of contract, breach of The Employment Act or Minimum Wages Act as well as the Applicant's claims for Vacation pay, Overtime, Holiday pay and commission;

9) The Tribunal today (Tuesday, 26<sup>th</sup> September, 2023) conducted a **Case Management hearing** in this matter;

10) **Both parties** agreed that:-

- their working relationship was governed by a written contract called a "*Vacation Club Agents Agreement*";
- the Respondent's Human Resources Manager verbally terminated the Applicant on the 3<sup>rd</sup> April, 2023; and
- on 11<sup>th</sup> April, 2023, the Respondent gave the Applicant a termination letter;

11) The Tribunal directed that the **Applicant's Representative** provide Tribunal and the Respondent's Counsel with further written particulars of the Applicant's claim for **Unfair Dismissal** by Tuesday, 17<sup>th</sup> October, 2023;

12) The **Applicant's Representative** advised that the Applicant's claim for:-

- "*Salary owed*" represented back pay for the weeks the Respondent did not pay her the statutory minimum wage;
- "*Commission pay owed*" was because the Respondent did not always pay her the agreed commission under the terms of their written contract;
- "*Overtime pay*" represented Overtime pay for working in excess of 40 hours per week and on public holidays; and
- "*Employee Reserve*" represented the difference between the Respondent's records of the Applicant's reserve and the amount of reserve they paid her upon termination;

13) The Tribunal identified the **issues for trial** as:-

- Whether the Respondent's *Employee Handbook of Policies & Regulations* applied to the Applicant?;

- Whether the Respondent paid the Applicant the correct *Commission* according to the terms of their written contract?;
- Whether the Respondent paid the Applicant the correct *Employee Reserve* according to the terms of their written contract?;
- Whether the Applicant worked for the Respondent as an *Employee* or *Independent Contractor*?; and
- If the Applicant was the Respondent's employee, how to calculate her *rate of pay* for the purpose of assessing her claims for *Vacation pay* and *Overtime pay*?

14) At the request of the Applicant's Representative, the Tribunal directed that the **Respondent** provide the Applicant's Representative with:-

- copies of all the Applicant's bi-weekly pay sheets; and
- a spreadsheet showing its records of the dates the Applicant reported for work as well as the times she entered and left the resort;

15) The Tribunal directed that the **Respondent** permit the Applicant's Representative access to any attendance and wage records pertaining to the Applicant;

16) The Tribunal directed that the **Applicant's Representative** to produce at trial a spreadsheet itemizing how he calculated the sums he alleged the Respondent owed the Applicant for *Back pay*, *Commission*, *Reserve* and *Overtime pay*:-

17) Pursuant to **Section 58(1)(a)** of **The Industrial Relations Act, Cap. 321** ("The I.R.A."), the **Tribunal** remitted the dispute to the parties for further consideration, with a view to settling it out of Court;

18) The **Applicant's Representative** advised that if the matter proceeds to trial, the Applicant will testify and call about 5 witnesses on her behalf and elected to have them give *viva voce* testimony;

19) The **Respondent's Counsel** advised that the Respondent will call about 4 witnesses in its defence and elected to tender written Witness Statements into evidence to serve as their evidence-in-chief;

20) The **Tribunal** estimated that the trial may last 3 days;

21) The **Tribunal** directed that the parties file:-

- an **Agreed List** and **Bundle of Documents**; and
- each party file a separate **List** and **Bundle of Documents** for any other documents they wish to tender into evidence; and

22)The **Tribunal** advised the parties that **Rule 3(5)** of **The Rules** provides that a Counsel/Representative appearing pursuant to **Section 57(3)** of **The I.R.A.** may submit a *Brief/Skeleton Arguments* to the Tribunal and serve a copy on the other party no later than 7 days prior to the commencement of the hearing;

**IT IS HEREBY ORDERED THAT:-**

1. The matter is adjourned to 10:00 a.m. on Monday, 11<sup>th</sup> and Tuesday, 12<sup>th</sup> December, 2023, for trial;
2. By Tuesday, 17<sup>th</sup> October, 2023, the **Respondent** provide the Applicant's Representative with:-
  - copies of all the Applicant's bi-weekly pay sheets; and
  - a spreadsheet showing its records of the dates the Applicant reported for work as well as the times she entered and left the resort;
3. The **Respondent** permit the Applicant's Representative access to any attendance/wage records pertaining to the Applicant, at a mutually agreed date and time;
4. By Monday, 11<sup>th</sup> December, 2023, the **Applicant's Representative** to produce a spreadsheet itemizing how he calculated the sums he alleged the Respondent owed the Applicant for *Back pay, Commission, Reserve and Overtime pay*:-
5. By Friday, 1<sup>st</sup> December, 2023, the parties file with the Tribunal and at the same time serve a copy thereof on the other party's Representative:-
  - An **Agreed List** and **Bundle of Documents**;
  - A separate **List** and **Bundle of Documents** for any other documents they wish to tender into evidence; and
  - A **Brief** or **Skeleton Arguments** (if any); and
6. The Tribunal serve a new **Form J** (Notice of Hearing) on both parties.

**AND THIS IS THE ORDER OF THE TRIBUNAL.**

**DATED: This 26<sup>th</sup> day of September, A.D., 2023.**

**Her Honor, Helen J. Almorales-Jones,  
Vice-President**