IN THE MATTER OF EMPLOYMENT & LABOUR RELATIONS TRIBUNAL

BETWEEN

XXX **Claimant**

AND

BERMUDA XXXX

Defendant

DECISION

Hearing Date: 6th June 2025

1. The Claimant, Ms., complained that her former employer, the Defendant, had made an unauthorized deduction of her wages contrary to Section 8 of the Employment Act 2000 due to non-payment of salary, time in lieu and repatriation cost.

2. The Claimant appeared remotely at the hearing via Webex and the Defendant was represented at the hearing by two members of its board, and .

3. Both parties provided a comprehensive bundle of documentation setting out the complaint and response prior to the hearing. These identified that there were 3 issues of dispute.

4. The first issue was that the Claimant alleged that her wages for the last month of her employment in April 2024 were incorrectly processed and that she was owed the sum of $1,048.71.

5. The Defendant's written response provided evidence of the payments made to the Claimant (albeit well after the end of her employment) and explained how the deductions of health insurance and social insurance were applied.

6. Upon reviewing the detailed written explanation by the Defendant, it was clear to the Tribunal that the correct amount had been calculated. The Claimant had made a mistake in referring to a payment received by her as $2,063.08 instead of the actual amount received of $2,869.01 and had not appreciated that certain items could not be pro-rated to the 26 days that she worked in April 2024 i.e. the deductions of the health insurance premium and payroll tax and the benefit of the $150 phone allowance.

7. At the hearing, the Claimant did not provide any reason to challenge the Defendant's calculation. The Tribunal therefore finds in the Defendant's favour that there was no shortfall in wages for April 2024.

8. The second issue was also able to be addressed promptly. Although only raised by the Claimant after having made her initial complaint to the Labour Relations Department, the Claimant sought reimbursement of her repatriation costs of $575.63. Whilst no receipt had been presented at the time of her repatriation (or for some time after), the Defendant accepted that the Claimant was entitled to this reimbursement in accordance with her contract of employment and confirmed that had any receipts been presented in a timely fashion, they would have been paid.

9. As the receipt for this has now been presented and, as accepted by the Defendant, the Tribunal finds that this amount of $575.63 should be paid by the Defendant to the Claimant.

10. The third issue was not so easily resolved. The Claimant was seeking the payment of 11 days accrued time in lieu that the Defendant denied was owed to

her. This issue requires a review of the history of the employment of the Claimant.

11. In June 2022, the Claimant was promoted to the position of ManagerXXX and a new contract was issued in the form of a letter dated 22nd June 2022 with an improved monthly salary. This contract confirmed the agreement reached between the parties at the time in respect of time in lieu. It was agreed that the Claimant was owed time in lieu of 11 weeks. Half of the outstanding time in lieu was to be paid at a rate of $500 per month commencing 30th June 2022 and, as the contract stated, the "*remaining half of [the Claimant's] current outstanding time in lieu will be taken as vacation*".

12. This agreement was an exception made by the Defendant in recognition of the work the Claimant carried out during the covid period. The contractual position stated in the Employment Handbook provided that "*the compensation of salaried employees has been calculated taking into consideration the fact you will, at times, be required to work outside normal working hours without receiving overtime or time in lieu. It is a condition of your employment that, when required by the [Defendant], you will work outside your normal working hours. This includes Saturdays, Sundays and public holidays. As much notice as possible will be provided.*"

13. The Defendant had therefore agreed to grant the Claimant 33 days of time in lieu (half the 55 days/11 weeks). However, there was a difference in recollection between the Claimant and the Defendant on what was said about how and when this time in lieu was to be taken.

14. Ms.'s recollection was that the Board informed the Claimant that she needed to use the time in lieu up soon and that any day off would be considered as using up the time in lieu before the vacation days. To assist with enabling the Claimant to take time off, the Defendant's evidence was that arrangements

could be made to bring in substitute coaches for periods as necessary to allow these days off to be taken.

15. The Claimant's recollection was that no such requirement was imposed on her to use up the days, nor was she informed that time in lieu would be considered as taken before (or treated as) vacation days and that, in any event, the demanding circumstances of her full-time role meant that she could not take such a significant period of time off.

16. Having heard the Claimant's description of her responsibilities, reasons why it was difficult for her to take time off and the general impression given that she was a dedicated employee running a successful organization at the time, the Tribunal accepted the Claimant's position that, from her own perspective at least, it seemed difficult to take this time off.

17. The Defendant's evidence was that the Claimant was never refused a vacation request and never expressed to them that she was unable to take vacation. On the contrary, when the Claimant did raise issues relating to her employment, on one occasion in tears, it was in relation to personality conflicts with other members of staff, not overwork or inability to take a vacation.

18. The only other reference in the contract to the time in lieu was: "*Once outstanding time in lieu has been used [the Defendant] will consider adjusting the current amount of entitled vacation days*". This will be discussed further below.

19. There was then no further communication in writing from either party to the other on this issue until the Claimant handed in her resignation. It was only after this that the issue arose of how much vacation or time in lieu was still owed.

20. This was unfortunate as it was this lack of clarity and communication on this issue which has led to this matter having to come before the Employment Tribunal over a year later.

21. The Defendant rightly pointed out that the Employment Handbook placed the onus on the Claimant to communicate on this issue. The Handbook provided that it was the Claimant as whose obligation it was to "*track all approved vacation time and will provide written quarterly updates to the Board on remaining time to be granted*". This was in respect of other employees as well as the Claimant herself as the and .

22. The Tribunal has sympathy for the fact that the Defendant is a XXX with a Board consisting of XXXX and that they were relying upon the Claimant in her role as to be the party primarily responsible for arranging and monitoring her own vacation leave. The Defendant was also hampered from the beginning of 2022 in not having the position of Treasurer adequately fulfilled. However, this was their responsibility to correct. If they had done so, there might have been the necessary communication between the Claimant and Defendant to monitor the taking of the time in lieu and vacation during the remainder of 2022 and 2023 to ensure that both parties were in agreement on how this was to be calculated.

23. Without this communication though, when it came time to calculate the Claimant's final pay, there was a difference in approach. The Claimant took the view that she had used vacation first each year and that any time in lieu not used was carried over in its entirety.

24. In contrast, the Defendant took the view that, as stated in the contract, the time in lieu was to be treated as vacation and that it remained subject to the rule contained in the Employment Handbook that stated: "*It is intended that annual vacation leave be used within the year it is granted. Employees may not,*

without the consent of the XX and the Board, carry forward unused holiday entitlement to a subsequent calendar year".

25. The Defendant was, to their credit, ready to disapply the strict Employment Handbook rule on carrying over vacation days when it came to working out the Claimant's outstanding entitlement upon her termination.

26. As the Claimant had been unable to take the 33 days' time in lieu and her vacation of 15 days during 2022 (instead taking 23 days in total), the Defendant retrospectively agreed in April 2024 to carry over 8 of the unused 15 vacation days and 10 of the unused time in lieu from 2022 into 2023.

27. Similarly, for the end of 2023 after the Defendant had only taken 18 vacation days during that year, the Defendant was willing to carry over 10.5 of the 15 unused vacation days, the time in lieu days having been used up during that year. This meant that the pro-rated 5.5 vacation days for 2024 plus the 10.5 carried over days were allowed as vacation, and these were used during the notice period. In total, the Claimant took all 16 vacation days for 2024, and she was as a result paid through until 26th April 2024, despite her last working day being in early April.

28. The Claimant's calculation which resulted in her being owed 11 days time in lieu upon termination of her employment was as a result of her using the majority of her vacation days each year by her calculation (so not losing these days from any inability to carry these over) and then carrying over in full the unused time in lieu days. So, for example, the Claimant carried over a full 25 time in lieu days from 2022 to 2023 and then 21 time in lieu days from 2023 to 2024.

29. In deciding, which is the approach that the Tribunal should favour, there has to be a finding of what was the agreement reached between the parties in respect of the treatment of the vacation and time in lieu days.

30. The only written document setting out the agreement is helpful to an extent for the Defendant as it states clearly that the outstanding time in lieu "*will be taken as vacation*". If it is to be taken as vacation, then the Defendant would reasonably argue, it should have been reasonably clear to the Claimant that these days would be subject to the rule of limited carry-over for vacation.

31. However, the other reference to the outstanding time in lieu in the contract which refers to once it being used, the Defendant "*will consider adjusting the current amount of vacation days*", suggests that (a) the time in lieu days were still being considered as something separate from vacation days rather than becoming vacation days and (b) by not mentioning any time limit, that there was no time imposition on when these days ought to be used up. In fact, as there was no adjustment to the vacation days during 2023 and it was clear that the Claimant had not taken any significant time off during the second half of 2022, the mutual assumption must have been that these days were still available to be taken by the Claimant.

32. Whilst the Tribunal accepts the Defendant's evidence that in 2022 mention had been made to the Claimant of the need to take the days sooner rather than later, there was no follow-up thereafter on this issue for the next 1 ½ years. This was even when it was clear that the Claimant had not handed in the necessary request for a long period of time off to clear the backlog.

33. The Tribunal therefore finds that there was no agreement reached whereby the time in lieu days were to be treated as vacation and subject to the carry-over rule. This was neither clearly expressed in writing nor, by the actions of both parties over the following 1 ½ years, is there any evidence by their conduct that

this was the agreement in place. Instead, there was a willingness on the Defendant's part to allow the Claimant to continue working without taking the leave necessary to reduce the vacation or time in lieu days. There was also no clear directive that this should not occur, or she risked losing the time in lieu days that had been agreed.

34. As the Defendant frankly admitted, due to their issues with oversight without a Treasurer, this issue only surfaced after the Claimant had resigned her employment on 26th January 2024 and the issue of how to calculate the days owing needed to be addressed.

35. The Tribunal has significant sympathy for the Board as it recognizes that the initial decision to grant the significant time in lieu of 11 weeks was generous. However, having made this generous decision and not having clearly specified in writing or by its conduct over the following 1 ½ years that it was to be treated as vacation subject to the usual rules on carry-over, it should pay to the Claimant the 11 days' pay owed to her.

36. The calculation of the 11 days' pay will be subject to any payroll tax due but otherwise not subject to any deductions. By our calculation using the gross monthly pay of $7,083, this results in a gross daily amount of $236.11. Gross pay of 11 days is $2,597.22, less payroll tax of 0.5% for the employee portion of $129.86, resulting in an amount of $2,467.36.

37. Together with the flight reimbursement of $575.63 this amounts to an overall total of $3,042.99. The Defendant should therefore pay the amount of $3,042.99 to the Claimant within 30 days of this Decision.

38. The parties to this Hearing are reminded that the Determination and Award of this Tribunal is binding.

39. Any party aggrieved may appeal to the Supreme Court of Bermuda on a point of law within 21 days of receiving the decision.

Dated this 11th day of June 2025

C J Rothwell

Craig Rothwell
Chair

Judith Hall-Bean
Tribunal Member

Peter Aldrich
Tribunal Member