JOELLE MOLCAN

Complainant

and

Respondent

Tribunal Order

Date of Complaint:	26 April 2024
Date Investigation Completed:	28 June 2024
Date of Referral to Tribunal:	9 August 2024
Date of Direction Meeting:	28 October 2024
Date of Hearing:	3 February 2025
Tribunal Panel	Chen Foley – Chairman Betty Christopher-Deputy Chairman Valerie Young—Tribunal member
Parties Present:	For the Respondent Bradley Houlston – Counsel for the Respondent Joelle Molcan – Complainant, via Webex

1. The Complaint was filed under the Employment Act 2000 ("the Act") pursuant to sections 8, 9, 10, 10A, 11, 12, 16 and 20.

Summary of Disposition by the Tribunal

2. The Tribunal dismisses the Respondent's limitation arguments in relation to the Complainant's claims for: (i) statutory overtime, (ii) underpayment for maternity leave, vacation days and public holidays, and (iii) denial of meal breaks.

3. The Tribunal upholds the Respondent's limitation argument in relation to the Complainant's claim for missed rest days.

4. The Tribunal finds that the Complainant was given a Statement of Employment.

5. There is no basis for the Tribunal to treat her Contract of Employment as void.

6. In relation to the Complainant's claims, the Tribunal finds that the Complainant was:

    a. not entitled to statutory overtime;
    b. paid appropriately for maternity leave, vacation days, and public holidays;
    c. given time for meal breaks and to the extent she worked through her meal breaks she voluntarily agreed to do so; and
    d. not terminated on 15 April 2024 and instead abandoned her post on 23 April 2024 with the consequence that she is not entitled to be paid beyond that date, though the Respondent nonetheless agreed to pay her up to 3 May 2024. She was paid appropriately during her notice period up to that time.

Procedural History

7. A Directions Hearing was held on 28 October 2024 following which an Order was made setting out the steps to be taken by the Parties in preparation for the final hearing. A further scheduling Order was made on 10 January 2025 following an application by the Respondent, pursuant to the liberty to apply provision contained in the 28 October 2024 Order, which simply granted the Parties the ability to file written submission on legal issues in advance of the final hearing.

8. The Tribunal extends its gratitude to the Parties for the way in which they presented their respective cases. The materials submitted in advance of the Hearing allowed the Tribunal to narrow the matters in dispute and paved the way for an efficient Hearing.

9. The Tribunal also extends its gratitude and appreciation to Mr. Dudley Ebbin, the Employment & Labour Relations Tribunal Officer, whose administrative assistance proved invaluable and ensured both sides had the ability to present their cases fully.

10. In reaching its decision that Tribunal considered:

    a. The Complainant's Statement of Claim;
    b. The Respondent's Response to the Statement of Claim;
    c. The Complainant's Response to the Respondent's Response;
    d. The affidavit of and the exhibit to his affidavit;

e. The affidavit Mr.
f. The affidavit of Ms.
g. The Complainant's written Closing Submissions and bundle of supporting documents;
h. The Respondent's written submissions; and
i. An audio recording of a meeting that took place on April 15, 2024, during which the Complainant was told that she was not required to attend the office for the duration of her notice period but was required to remain available to respond to queries via email or telephone.

11. The Tribunal also had the benefit of hearing from Mr. Bradley Houlston (Counsel for the Respondent), on behalf of the Respondent (who attended the final hearing in person), and the Complainant, Ms. Molcan (who participated at the final hearing Webex because she was outside of Bermuda).

12. The Complainant did not engage Counsel for the hearing. To ensure a balanced and fair process, the Tribunal did not insist on adherence to strict rules of evidence. This was reflected in the treatment given by the Tribunal to the Complainant's Statement of Claim, Response to the Respondent's Defense, and Closing Submissions which contained both legal argument and statements of fact, including responses to matters raised in the witness statements submitted by the Respondent. The legal arguments were accepted by the Tribunal as such, and the statements of fact contained in these documents were treated as part of the Complainant's evidence.

The matters in dispute

13. The Complainant initially complained that she was:

a. never given a Statement of Employment;
b. entitled to statutory overtime pay;
c. underpaid for maternity leave, vacation, and public holidays because the sums paid during those periods did not take account of overtime;
d. denied meal breaks and rest days; and
e. underpaid for her notice period.

14. In her Closing Submission the Complainant made a further request for the Tribunal to treat her employment contract (which she signed on 19 January 2022) as void, citing several reasons why she believed the Tribunal ought to do so.

15. The materials seen by the Tribunal also refer to a disagreement between the Parties on the number of weeks the Complainant was entitled to take as maternity leave and the Respondent's obligation to provide medical insurance for the Complainant's dependent spouse. At the final hearing, the Parties both confirmed that these two issues had been resolved. Accordingly, the Tribunal takes no position and expresses no view with respect to them.

Limitation

16. A threshold challenge was raised by the Respondent about the Tribunal's jurisdiction to hear the Complainant's claims on limitation grounds.

17. The right of an employee to complain to an Inspector, which triggers the dispute resolution process created under the Employment Act 2000 ("the Act"), is circumscribed as follows:

> *Right to complain to Inspector*
>
> 36 (1) An employee shall have the right to make a complaint in writing to an inspector that his employer has, within the preceding six months, failed to comply with any provision of this Act (our emphasis added).

18. The Respondent's position on limitation was fully set out in its written submissions and is essentially that *"an employee is statutorily barred from bringing any complaint based on alleged breaches of [the Act] which occurred more than six months before submission of their complaint."* As it relates to the Complainant, the Respondent says the Tribunal has no jurisdiction to consider alleged breaches of the Act occurring more than six months before the date of her complaint to an inspector, even if those breaches form part of a continuing breach of duty by the Respondent that persisted into the prescribed six-month window.

19. The Respondent concedes that there is no authority from any senior court in Bermuda that supports its restrictive reading of Section 36(1). For our part, the Tribunal is also unaware of the existence of any such authority.

20. In construing section 36(1), the Respondent invited us to consider the purpose for which the Tribunal had been established. We agree with the Respondent's observations that the Tribunal was created to provide a forum by which disputes

regarding the Act would be resolved in a more flexible, speedier, and less costly manner. We would add that the procedures and approaches established by the Act create a more simplified process (particularly when compared to the procedure of the Bermuda Supreme Court) and account for the needs of litigants in person, a significant demographic of those utilizing the service. The regime permits a more cost-effective mechanism for resolving employment disputes thereby ensuring an employee has access to justice regardless of financial means at a time when the employee may be income insecure.

21. Having regard to the purpose for which the Tribunal was created, we do not read section 36(1) in the restrictive manner preferred by the Respondent. We agree with the statement that our jurisdiction rests on there being a breach of the Act within six months of the employee's complaint to an inspector, with the effect that if an employee complains of a singular breach that occurred more than six months before their complaint was made, the Tribunal will have no jurisdiction to hear the attendant dispute.

22. However, the position is different where there is a continuing (and uninterrupted) breach of the Act that stretches across a period that is both within and outside the six-month window. It is our view that the continuing nature of the breach is sufficient to establish the Tribunal's jurisdiction for the entire period of the breach, provided at least one instance of the breach falls within the requisite six-month time frame.

23. In reaching its conclusion the Tribunal takes comfort in the fact that it expresses a view that is neither novel nor fanciful. Using a continuing duty to delay expiration of an applicable limitation period is well documented in the common law (see *Shaw v Shaw* [1954] 2 QB 429 and its progeny).

24. We accept that the approach taken in relation to the continuing duty theory has evolved. For example, we are aware that recent English court decisions in the context of duties owed by professional advisers (for example architects and lawyers) have been more cautious in applying the continuing duty theory. We observe, however, that the reticence of judges to allow a continuing duty to extend limitation in these cases can be explained by the absence of evidence supporting an intention to prolong a professional service provider's duty for an extended period after the professional service was provided (see *Tesco v Costain Construction* [2003] EWHC 1487 (TCC)). The position in the employment context is different because there is a clear and

obvious intention that the employer's obligations, whether imposed under contract or by statute, will continue into the future.

25. Contrary to the position advanced in the Respondent's written submissions, we have not been asked to consider an employee with 20 years' service who is complaining about breaches across all 20 of those years. The Complainant was employed from 22 April 2022 to 23 April 2024, a period of 2 years and 1 day. Having regard to an alleged continuing breach of the Act extending throughout that limited period (a period that falls in part within the six- month window required by section 36(1)) would not lead to a perverse or unconscionable outcome.

26. Given the continuing duty theory is known within the context of limitation if Parliament had intended the Tribunal to adopt a more restrictive reading of Section 36(1) it would have said something to that effect. Even the more restrictive language used in the Limitation Act 1984 does not forestall a judge from adopting the continuing duty theory on limitation in appropriate instances, see for example section 7 of the 1984 Act which says:

> An action founded on simple contract ***shall not be brought after the expiration of 6 years*** from the date on which the case of action accrued.

27. If an employee complains of a consistent pattern of misconduct by their employer that amounts to a breach of the Act, justice requires that the Tribunal be able to fully and finally resolve their grievance if section 36(1) can broadly be satisfied. The guardrails established by the Act and common law are sufficient to protect the interests of the employer in that instant.

28. The position advanced by the Respondent would force employees who are faced with an employer's continuing breach of duty over time to choose between obtaining limited relief utilizing the more efficient and streamlined process created by the Act and obtaining more fulsome relief by engaging in costly and time-consuming litigation. Given the purpose for which the Tribunal has been established, we do not believe such a choice is reflective of Parliament's intention in creating the Tribunal.

29. In accepting the Complainant's continuing duty theory on the present facts, we are satisfied that there is no credible risk that the memories of key witnesses will have faded, or that key witnesses are no longer available, or that relevant evidence will

have been lost. As a result, we do not believe the Respondent is placed at a disadvantage by having to respond to allegations dating back to 2022.

30. Accordingly, the Tribunal finds that it has jurisdiction to hear the following claims which involve an alleged continuous (and uninterrupted) breach of the Act and which include an alleged breach that occurred within six months of the Complainant's complaint:

    a. the statutory overtime claim;
    b. the allegations relating to underpayment for maternity, vacation, and public holidays; and
    c. the claim relating to missed meal breaks.

31. The Tribunal does not have jurisdiction to hear the Complainant's claim relating to rest days because the instances complained of occurred on 24 and 31 July 2022, more than six months before her complaint to the Department of Labour. We view these as a singular or one-off occurrence. There is no evidence that they formed part of a continuing pattern whereby the Complainant was required to work without a period of rest as required by section 10.

32. There was no suggestion by the Respondent that the Complainant's allegation relating to underpayment during her notice period was out of time and that claim proceeds in any event.

Our findings of fact

33. Having reviewed the materials submitted by the Parties, and having heard the Complainant and Mr. Bradley Houlston on behalf of the Respondent, we find the relevant facts to be as follows:

    a. The Complainant was employed by the Respondent as an She commenced employment on 22 April 2022 and her employment ended on 23 April 2024 when she emailed the Respondent indicating that she would no longer be performing her duties under her Contract of Employment.

    b. The terms of the Complainant's employment are broadly set out as a Contract of Employment signed by the Complainant on 19 January 2022. It was

countersigned on behalf of the Respondent the following day, 20 January 2022.

c. The Contract set out relevant details of the Complainant's employment, including (and relevant to the dispute) that she would be paid a salary of $100,000 per year, based on a 38.5-hour work week.

d. The contract also made clear that the Complainant would be required to work shifts. Mondays to Saturdays were to be regular workdays but Sundays and evenings might be required from time to time.

e. From the content of the Contract of Employment and based on an email exchange between the Complainant and the Respondent on or about 14 January 2022, it was understood and agreed that the Complainant could not be guaranteed more than 38.5 hours per week, but that she could work more hours if she wished to do so subject to the clinic's requirements.

f. As it turned out, the Respondent has a growing and busy practice and additional working hours were available for the Complainant and she volunteered to work additional hours on a regular basis.

g. Crucially, there is no evidence to suggest the Complainant was forced into working more than 38.5 hours per week. Moreover, she does not assert that she ever refused to work extra hours.

h. It is the policy and practice of the Respondent to pay its technical staff an hourly rate for time worked in excess of their contracted hours. In relation to the Complainant, she was initially paid $50 per hour for hours spent working in excess of 38.5 hours per week. This later increased to $53 per hour in or about February 2023.

i. In about February 2022, prior to the start of the Complainant's employment, she was advised that the Respondent would require her to focus most of her time on . The Complainant expressed a desire to work extra hours so that she could both satisfy the demand for scans and her desire to maintain related competency. In one email that the Tribunal read, the Complainant proposed working 30 hours each week to run the department and then an additional 20 hours per week on for a total of 50 hours per week.

The Complainant even went as far as to suggest that hours be taken from the primary and given to her to allow her to work extra hours performing

j. The Complainant sought to work more than 38.5 hours per week throughout her employment. She did so for both personal and professional reasons.

k. There was time within the Complainant's regularly scheduled hours for meal breaks. However, the Complainant regularly sought to work extra hours. If the extra hours she requested (and was given) reduced the time available for meal breaks, she cannot now complain about the meal breaks that she voluntarily missed.

l. The Complainant's relationship with the Respondent became fraught and on 12 March 2022 she tendered her resignation. Her Contract required her to give 12 weeks' notice, which meant her last day of employment was to be 4 June 2024.

m. A few weeks after the Complainant handed in her notice, the Respondent took the decision to ask the Complainant not to attend the clinic for the duration of her notice period. This decision was precipitated by the Complainant drafting two letters on the Respondent's letterhead, one purporting to be from Ms. and the other from , which contained information that the Respondent believed was inaccurate. did not sign the draft given to him by the Complainant and he took exception to the Complainant presenting the draft letter to Ms. without his prior knowledge.

n. A meeting was held on 15 April 2024 at which the Complainant was told that she would not be required to come into the clinic for the remainder of her notice period, but that she would need to remain available to respond to queries during this period. The Complainant's employment was not terminated at the meeting. Even though the Complainant was not required to work her set schedule during the remainder of her notice period, she was to remain available for urgent inquiries. We find that the request that she remain available to respond to urgent inquiries included being available to attend the clinic to provide cover if needed.

o. The Complainant was given a letter at the 15 April 2024 meeting which summarized the action that was being taken by the Respondent. It is useful to set out the terms of that letter:

> *Dear Joelle,*
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> *We accept your resignation as tendered. We wish to advise you that for the remainder of your notice period, you will not be required to attend work or undertake any of your duties of employment. Should there be any urgent queries during this period related to either your role or employment, please be advised we shall reach out via phone and email.*
>
> *During this time, your salary and contractual benefits will continue while you remain employed by the Company.*
>
> *We thank you for your service to*
> *Imaging and with you all the best in your future endeavors.*

p. Contrary to the Complainant's assertions, she was not terminated on 15 April 2024.

q. The Complainant contacted the Respondent via email several days later (on 18 April 2024) to ask for clarification on the hours during which she was to be available for the remainder of her notice period. The Respondent responded as follows:

> *You should keep yourself available to Mon-Thurs 8am to 12pm and 1pm to 4:30pm. On Fridays, your hours will be 8-12 and 1-5:30. This way you can have weekends off.*

r. The Complainant did not express any objection to this request to remain available at the times requested by the Respondent. Indeed, there was no basis upon which she could reasonably object to the request.

s. Subsequently on 23 April 2024 the Complainant emailed the Respondent indicating that she planned to leave Bermuda before the end of her notice period. The Respondent responded saying that if the Complainant left the island before her employment was over the Respondent would regard her as having ended her employment prematurely, and her final pay would be adjusted; accordingly, the Complainant on that basis still left the jurisdiction.

t. We believe the 23 April 2024 email from the Complainant expressed a definitive intention to abandon her employment; and on the evidence presented, we conclude the Complainant did indeed abandon her employment. The Respondent is permitted to treat her as having done so from that date.

u. In any event, on 2 May 2024 the Respondent requested the Complainant to attend the clinic to provide cover for an for the period 14 May 2024 to 21 May 2024. The Complainant did not and could not do so because she was not in Bermuda.

v. The Respondent paid the Complainant up to 3 May 2024.

w. Based on the Referral, the Complainant initially complained to an inspector about her compensation prior to the end of her employment on 26 April 2024. This is the relevant date for purposes of section 36(1). Her complaint was supplemented to include allegations relating to the termination of her employment and her claim for being underpaid during her notice period.

The Contract of Employment

34. We disagree with the Complainant's assertion that she was not given a Statement of Employment. We are satisfied that she signed a Contract of Employment on 19 January 2022.

35. In hindsight, it would have been preferable for the contract to have been clearer about the Respondent's policy and practice with respect to the Complainant working extra hours; however, these matters were discussed and agreed upon in contemporaneous emails between the Parties. The Tribunal cannot pretend an employment contract did not exist or that we have not seen the email exchange with the Complainant

discussing her salary and the fact that she would be paid (at least initially) at a rate of $50 per hour for extra hours.

36. We will not treat the Complainant's employment contact as void. The Complainant has not satisfied us that we have power to void a valid employment agreement, and the reasons she has cited for our doing so are not compelling.

Is the Complainant entitled to statutory overtime?

37. The Complainant is not entitled to statutory overtime.

38. The Complainant suggests that the Act gave her a right to statutory overtime irrespective of what she discussed and agreed with the Respondent. However, this is not the case.

39. We accept the Respondent's submission that the Complainant is a professional within the meaning of section 9(2)(a) because she is engaged in a paid occupation requiring competence, skill, and specialist training and which is also regulated. It was reasonable to expect that the Complainant's professional duties might require her to work longer than her contracted hours on occasion.

40. Separately, we find that the Complainant also falls within Section 9(2)(b) exception given that in her contract it was clearly stated that she was to be a salaried employee.

41. While ordinarily salaried employees can be expected to work extra hours without additional compensation, there is nothing to prevent an employer compensating a salaried employee for doing so, which was the case here. In doing so, the Respondent went beyond the minimum requirements of the Act as they relate to salaried employees. This does not have the effect of converting the Complainant from a salaried employee to an hourly wage earner.

Was the Complainant Underpaid?

42. The Complainant complains that her pay has been consistently miscalculated because it failed to account for overtime. She cites three examples where she says this was the case: (i) maternity pay, (ii) vacation pay, and (iii) holiday pay.

43. As a salaried employee the Complainant's maternity, vacation pay, and holiday pay were to be calculated by reference to her annual salary. This was done. We do not agree that extra hours worked prior to maternity leave, vacation leave, or public holidays are relevant for purposes of calculating her compensation. The Complainant has no basis for seeking additional money from the Respondent.

44. For purposes of section 11 (public holidays) and section 12 (vacation leave) the interpretation section of the Act defines "wages" in relevant part as follows:

> "wages" means all sums payable to an employee under [her] contract of employment (by way of weekly wage, annual salary or otherwise) or otherwise directly in connection with [her] employment... (our emphasis added).

45. As set out above, we find that the Complainant was compensated by an annual salary. She is not paid on an hourly basis. Reference to "wage" in sections 11 and 12 should be read as reference to her annual salary. While we accept that the Respondent has a policy of compensating professional staff for working extra hours, this does not alter the fact that they are remunerated on a salaried basis. While the Complainant was able to boost her earnings by working extra hours, her contractual salary did not fluctuate from week to week. Accordingly, we do not agree with the Complainant 's characterization of herself as *"an employee whose wages vary from week to week"* under the Act.

Was the Complainant denied meal breaks?

46. We have set out our factual findings in relation to the meal breaks above. There was ample time in the Complainant's regular schedule for meal breaks, which she chose not to take or to take minimally.

47. Section 10A(b) makes clear that an employee can consent to working during a meal break if they so choose. To the extent that the Complainant volunteered to undertake additional work that limited her ability to enjoy meal breaks that was a choice she was permitted to make. She cannot now complain that she was denied meal breaks.

Was the Complainant underpaid during her notice period?

As set out above, the Complainant remained employed after the 15 April 2024 meeting. She was not terminated on that date. Accordingly, there was no requirement for a section 18(5) payment being made to the Complainant.

48. Given the Complainant remained employed by the Respondent for the entirety of her notice period, it was reasonable to expect that the Respondent might request her to attend the clinic after 15 April 2024 if circumstances warranted. Nothing in the letter dated 15 April 2024 or discussed in the meeting held on that date relieved the Complainant of the duty to perform work-related tasks if she was asked to do so.

49. We find that the Complainant *abandoned her post* and that the Respondent was entitled to treat her as having terminated her Contract of Employment when she informed the Respondent that she would be leaving Bermuda before the end of her notice period.

50. We believe the Respondent was entitled to treat the Complainant as having terminated her Contract of Employment 23 April 2024. In the event, the Respondent was more generous, providing her with her salary up to 3 May 2024. The Complainant is not entitled to compensation after this date.

51. As a salaried employee, there is no basis for the Complainant to seek lost overtime for that period of the notice period that was worked prior to her abandoning her post.

Order of the Tribunal

52. The Complainant's claims are dismissed.

53. The Parties are reminded that the Determination and Order of this Tribunal is binding. Any Party aggrieved may, however, Appeal to the Supreme Court on a point of law.

Date: 12th March 2025

Chen Foley – Chairman

Betty Christopher JP Deputy Chairman

Valerie Young Tribunal Member