

**IN THE MATTER OF A DISPUTE UNDER THE EMPLOYMENT ACT 2000
BEFORE THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL**

BETWEEN

WHITNEY AUSTIN

Complainant

AND

XXXXXXX

Respondent

DECISION

Date of Hearing: 20th September, 2024

IN ATTENDANCE

Members of Tribunal

Keren Lomas, Chairman
Robert Horton, Deputy Chairman
Judith Hall-Bean, Member

Complainant

Whitney Austin

For Complainant

Terry-Lynn Griffiths, Wakefield Quin Ltd.
Stacey-Lee Williams, Executive Director, Citizens Uprooting Racism in Bermuda

Irene Francis, Aunt of Complainant [Observer]

Respondent

XXXXXXX, Owner/Dentist [XXXXXXX]

For Respondent

Marcia Pringle, Human Resource Specialist, Performance Solutions Limited

TERMS OF REFERENCE

To determine whether the Complainant was made redundant or was unfairly dismissed.

BACKGROUND FACTS: UNDISPUTED

1. The Complainant was hired as a Dental Receptionist/Relief Dental Assistant by the Respondent on 22nd March, 2021. On 22nd March, 2022, the Complainant was offered and accepted the role of XXXXXXXX and Coordinator at XXXXXXXX.
2. As a result of unhappiness in the workplace relating to alleged racial inequality, XXXXXXXX Office Manager, Ms. XXXXXXXX "the Officer Manager", with the approval of the Respondent, arranged for Citizens Uprooting Racism in Bermuda [CURB] to host two training sessions at XXXXXXXX to address staff members' concerns in this regard. The Respondent and all current XXXXXXXX staff members attended two training sessions that were held on 11th and 25th April, 2023. Ms. Stacey-Lee William's, CURB's Executive Director, served as facilitator at the training sessions.
3. The Respondent states that he "experienced a hostile encounter where I felt personally attacked" and we accept that this was following the statement made by the Complainant at the first meeting on 11th April, 2023 when she addressed the Respondent directly with her concerns of racism and unfavourable treatment compared with the treatment afforded his lighter skinned employees. One other employee, the Office Manager, expressed her disquietude at this same meeting.
4. A meeting, attended by the Respondent, CURB's Executive Director and Mr. Cory Butterfield, CURB's Strategic Director, took place at CURB's office on 21st April, 2023. The purpose of that meeting was to discuss the Office Manager's report that concerns raised by employees during the training session of 11th April, 2023 had not been addressed.
5. The second training session, attended by the Respondent and XXXXXXXX staff and again facilitated by CURB's Executive Director, took place at XXXXXXXX on 25th April, 2023 to define specific words relating to the topic of racial equality. The Respondent left that session before its conclusion.
6. On 7th August, 2023, the Complainant attended a meeting called by Marcia Pringle, Human Resource Specialist, Performance Solutions Limited ["the Human Resource Specialist"]. The Respondent, the Human Resource Specialist and the Complainant were in attendance, at that meeting, the Complainant was served with a letter headed 'Advance Notice of Redundancy'. Later that evening, the then Office Manager informed the Complainant that she too had been made redundant.
7. On 10th August, 2023 the Complainant was handed a Disciplinary Warning letter, signed by the Respondent, advising that her "actions on August 9th, 2023 were unacceptable and you are being issued with a formal warning of misconduct." In that letter, the Respondent also wrote: "*Whitney, I am concerned with your unprofessional behaviour towards me, the practice, our patients and your job responsibilities. This level of insubordination is unacceptable.*"

8. On 23rd August, 2023, the Complainant, accompanied by her counsel, Ms. Terry-Lynn Griffiths, attended a meeting with the Human Resource Specialist and the Respondent. At that meeting, the Complainant received the document headed 'Formal Notice of Redundancy', dated 23rd August, 2023, in which she was advised that her position as Dental Receptionist/Relief Dental Assistant at XXXXXXXX had been made redundant with immediate effect. The Formal Notice of Redundancy repeated the reasons for the redundancy and exhibited the statement of the amount to be paid to the Complainant upon termination of her employment, such amount calculated in accordance with the Complainant's length of service.
9. The Complainant, by her counsel, agreed that if the Tribunal found that the redundancy was warranted on the evidence, the sum to be received upon redundancy was correctly calculated. Also attached to that letter was a document headed "Acceptance" to be signed by the Complainant who declined to sign it at that time. The Complainant later received the severance pay, but by her counsel advised the Respondent that she had been unfairly dismissed on account of the "protected disclosure" made to CURB. Counsel for the Complainant also claimed a just and equitable award under section 40 of the Employment Act 2000 ["the Act"] on account of all the factors described in the Complainant's pleadings, not limited to an award calculated by reference to her years of service with the Respondent.
10. On _____, the Respondent published a job advertisement in *The Royal Gazette* indicating that XXXXXXXX was looking to recruit for the position of "Certified Dental Assistant" with "5 years' directly relevant experience including XXXXXXXX and Itero scanning", two Registered Dental Hygienists [one full-time, one part-time] and an Associate Dentist.

COMPLAINANT'S EVIDENCE

11. The Complainant's evidence of alleged discrimination by the Respondent, set out in her evidence before the Tribunal and in her written submissions, was largely accepted by the Tribunal. Her evidence of the timing of the XXXXXXXX job advertisements led her to conclude that the Advance Notice of Redundancy that she received was a sham and would lead her or any reasonable person to conclude that she was unfairly dismissed.
12. Similarly, the CURB Executive Director's evidence before the Tribunal and her written submission were largely accepted by the Tribunal.

MATTERS IN DISPUTE AND FINDINGS TO BE MADE BY THE TRIBUNAL

13.
 - A. Was the Complainant treated by the Respondent differently and less favourably than her co-workers as a consequence of her skin colour?

- B. Was the redundancy necessary for business efficacy or was it a method to release the Complainant from her employment in retaliation for statements made directly to the Respondent during the first training session of 11th April, 2023?
- C. Were the advertisements placed in *The Royal Gazette* only for work permit renewals for existing staff members and dental hygienists (for which last position the Complainant acknowledged she was unqualified) or was the Respondent seeking to replace the Complainant by this advertisement which ran a mere month following the Complainant being made redundant?
14. Since the Complainant was alleging that the redundancy was a sham and that she had been unfairly dismissed, the burden of proof fell on the Respondent to negate the allegation of unfair dismissal: Section 38(2) of the Act provides: *"In any claim arising out of the dismissal of an employee, it shall be for the employer to prove the reason for the dismissal, and if he fails to do so, there shall be a conclusive presumption that the dismissal was unfair"*.
15. Consequently, it was for the Respondent to open the Hearing with his testimony and that of his witness.

RESPONDENT'S EVIDENCE

16. The Respondent confirmed that the matters set out in his witness statement dated 19th September, 2024 were true. He said that the Human Resource Specialist had attended his office and interviewed all ten employees. He opined that the Human Resource Specialist was objective in her functions as she was not familiar with any of his employees. During the Hearing, the Respondent stressed that the Complainant's redundancy was a business decision taking into consideration XXXXXXXX needs and the viability of the XXXXXXXX practice; it was a business decision aimed at ensuring XXXXXXXX sustainability and efficiency.
17. Upon cross-examination regarding the internal audit conducted by the Human Resource Specialist, the Respondent explained that the performance of the Complainant was scrutinized as part of the internal audit she was conducting, but that the words "in particular" were not intended to be any reflection on the Complainant's job performance. He said that he and the Human Resource Specialist had conducted a thorough audit of XXXXXXXX operations and that the audit included evaluating the performance of all staff members.
18. The Respondent informed the Tribunal that, in his view, the Human Resource Specialist had handled the redundancy process professionally. He said that she had noticed during her audit of the Complainant's position that there were days when she saw no patients and other days when she saw very few. The Respondent informed the Tribunal that the Complainant had total control of patient scheduling; she had her own room, the equipment that she needed and received commissions for servicing XXXXXXXX patients. He added that Dr. XXXXXXXX, then Assistant Dentist, assisted with the Complainant's job duties.

19. Upon being asked why the Complainant would refer XXXXXXX patients when she received commissions for them, it was clear that the Respondent was not familiar with how the commission was being paid, only that it was coming out of the dental practice revenue; if the Complainant did part of the XXXXXXX work on a patient and then referred the balance of that service to a dentist, she would still receive the commission plus her salary. Following the redundancy, he said the role of XXXXXXX was not replaced and that the job function was done by others at XXXXXXX qualified to carry it out.
20. On the question as to whether the job advertisement placed in *The Royal Gazette* [an advertisement for four positions: two Registered Dental Hygienists (for which the Complainant acknowledged she was not qualified), one Certified Dental Assistant and one Associate Dentist was intended to find a replacement for the Complainant's role and whether the job functions of the Certified Dental Assistant mirrored the job functions of the Complainant, even including a demonstrated ability to perform the bonding of XXXXXXX attachments, the Respondent explained that there were two certified Dental Assistants in the practice for whom work permit renewals were required by job advertisement although, as it turned out, neither of these employees, XXXXXXX nor XXXXXXX, remained at XXXXXXX; one went with Associate Dentist Dr. XXXXXXX when he left XXXXXXX and the Respondent had decided not to replace the Associate Dentist and the Certified Dental Assistants. However, he needed dental hygienists and in February 2024 he made application for and subsequently hired a XXXXXXX dentist whose qualifications were not acceptable in Bermuda, but whose qualifications were sufficient for her to be a Dental Hygienist.
21. The Respondent informed the Tribunal that sometime July 2023, the Complainant had informed him that she planned to leave XXXXXXX "in July". He said that upon asking the Complainant to clarify which July, he was told that he would receive any further details from her in writing. She had informed him that she had been accepted for a course in Dental Hygiene at a college abroad.

HUMAN RESOURCE SPECIALIST'S EVIDENCE

22. The Human Resource Specialist, having commenced her employment with the Respondent in May 2023, informed the Tribunal that she had some twenty years' experience in human resources. She said that she had received a number of certifications related to human resources, although she had no academic qualifications in the field. She said that the Complainant had advised her she would be leaving XXXXXXX to pursue studies abroad and that if she had taken steps to leave as she had indicated, he, the Respondent, would have awaited her resignation rather than pursuing her redundancy. However, the Human Resource Specialist said, when the Complainant had not resigned by July, the decision was made to proceed with redundancy. She stated that the Respondent had considered ideas for part-time employment for the Complainant, but after the Advance Notice of Redundancy had been given, there was a deterioration in the working relationship between the Complainant and her employer. Consequently, this option was not pursued. The Human Resource

Specialist agreed that there had been no consultation with the Complainant prior to issuance of the Advance Notice of Redundancy dated 7th August, 2023.

23. Regarding the job advertisement in *The Royal Gazette*, the Human Resource Consultant said that XXXXXXXX, a full-time Dental Hygienist at XXXXXXXX, did not wish to remain at XXXXXXXX and that the XXXXXXXX dentist was hired to take her place. The only new role created was the part-time Dental Hygienist working 15 hours per week. She said that following XXXXXXXX's departure, there were two Dental Assistants, XXXXXXXX and XXXXXXXX, who could service the XXXXXXXX patients. Therefore, the advertisement for Dental Hygienists was to renew XXXXXXXX's work permit and to secure the services of a part-time Dental Hygienist.
24. The Human Resource Specialist stated that she had one meeting with the Complainant soon after she had been recruited by the Respondent as a consultant. She stated also that she was at XXXXXXXX once a week on a Monday and then only for an hour or so. She confirmed that on 7th August, 2023, the Complainant was given an Advance Notice of Redundancy and that on 10th August, 2023 she was given a Formal Disciplinary Notice for failing to carry out her job functions. She said that in the presence of the Respondent, the Complainant had been given an opportunity to respond to the allegations of unsatisfactory job performance, but the Complainant had chosen not to respond. She explained that although the Advance Notice of Redundancy bore the signature of the Respondent, it was her advice to the Respondent that this action be taken.
25. Very compellingly, the Human Resource Specialist informed the Tribunal that she knew nothing about the intervention of CURB until after the redundancy had occurred. Reverting to the aspect of redundancy, she accepted that the number of XXXXXXXX patients had increased from 23 in 2022 to 31 in 2023, but said that this number was still not enough to justify retention of the Complainant's position, hence the redundancy. She explained to the Tribunal that 31 XXXXXXXX patients a month amounted to just one patient a day, an appointment lasting just 15 to 30 minutes. Such number was not enough to keep the role of XXXXXXXX working a 4-day week receiving a salary and commission. XXXXXXXX had become her main function as there was a full-time Dental Assistant and full-time Receptionist. The Human Resource Specialist stated that she had looked at XXXXXXXXaccounts; she had also assessed the Complainant's role at the practice, her pay and the commission.
26. She explained that reorganization needed consideration of many aspects: new job descriptions were drawn up for the Dental Assistants and new employment contracts were drawn up. She noted that although she spent only a short time at XXXXXXXX on Mondays, much of her XXXXXXXX-related work was carried out at Performance Solutions Limited's office.
27. The Tribunal noted that in performing the audits, the Human Resource Specialist had sought job descriptions and responsibilities of XXXXXXXXemployees and that she had not received such information from the Complainant.

TRIBUNAL'S DELIBERATION

28. From evidence contained in sworn statements from the parties and elicited in examination in chief, in cross-examination and in re-examination, the Tribunal concludes:

- (1) There was a need for reorganization of the dental practice and although the reorganization appears to have started with the redundancy of the Office Manager and subsequently of the Complainant's role, this reorganization continued with staff leaving and with a full-time Dental Hygienist and part-time Dental Hygienist being employed. New job descriptions and contracts were being drawn up for the new employees.
- (2) Before being made redundant, the Complainant was served with an Advance Notice of Redundancy which stated that the conditions of redundancy were (a) the reorganization of the business (referencing section 30(3)(d) of the Act and (b) the reduction in business necessitated by economic conditions, contraction of the volume of work or sales, reduced demand or surplus inventory (referencing section 30(3)(e) of the Act). The letter complied with the redundancy provisions set out in the said section of the Act.
- (3) Termination by reason of redundancy then followed by letter dated 23rd August, 2023 given to the Complainant at a meeting that same day for the purpose of confirming the last day of employment, determining a hand-over transition plan, the redundancy plan and pay-out details. The letter exhibited a calculation of the severance pay, the calculation of which was accepted in evidence as correct and as having been received by the Complainant.

COMPLAINT OF UNFAIR DISMISSAL

29. The Tribunal rejects the claim of unfair dismissal, but deems it appropriate to make the following observations with respect to that decision.
30. The Tribunal notes that the timing of the protected disclosure at the CURB training session of 11th April, 2023 occurred within four months of the service of the Redundancy Notice to the Complainant. CURB's Executive Director had received information from the Office Manager and the Complainant which warranted examination of the conduct of the Respondent toward his employees.
31. The Tribunal was apprised of several incidents to support the complaint that the Respondent treated dark-skinned employees unfavourably, including celebrating birthdays of lighter-skinned employees with cards, balloons and treats, but omitting to do so on the occasion of the Complainant's birthday or on the birthdays of other darker skinned and/or Bermudian staff; providing a lighter-skinned employee with lunch treats which were never received by the Complainant and publicly reprimanding the Complainant for arriving at work late when lighter-skinned and non-Bermudian staff who arrived late were not similarly reprimanded. The CURB Executive Director described such incidents as "microaggressions" and acknowledged that acts of such stereotyping or bias accumulate and lead to frustration and discontent in some employees.

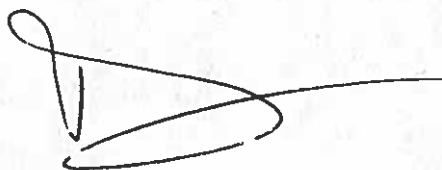
32. During his testimony, the Respondent strongly denied that he treated any of XXXXXXXX employees unfavourably; instead, he asserted, he went out of his way to ensure that all staff were treated fairly. However, the Tribunal finds that the details of unfavourable treatment provided were compelling and accepts that the Respondent on occasion not only treated the darker-skinned employees at XXXXXXXX less favourably than he did lighter-skinned and non-Bermudian employees, but worse, he refused or was incapable of accepting that he was exhibiting racial bias, although he may have been doing so unwittingly.
33. The Complainant, during her testimony before the Tribunal and via submissions from her counsel, argued that she had been unfairly dismissed by the Respondent, pointing out that she had been terminated as a result of protected disclosures made during the CURB training sessions and not because her position had been made redundant. In a written submission, the Complainant's counsel pointed out that pursuant to section 28 of the Act, an employee who is terminated following the making of protected disclosures will be deemed to have been unfairly dismissed.
34. The Respondent, rejecting the assertion that the Complainant had been dismissed due to protected disclosures made during the CURB training sessions, maintained that the Complainant had been made redundant solely as a result of a business decision to reorganize the dental practice pursuant to a recommendation from the Human Resource Specialist who had conducted an audit of XXXXXXXX staffing needs. He said that an audit of patient statistics and the number of XXXXXXXX patients who were treated monthly had led to the decision to make the role of XXXXXXXX Leader, the post held by the Complainant, redundant.
35. The Tribunal accepts that the Human Resource Specialist, while conducting her audits of XXXXXXXX staffing needs and advising on the course of redundancy, could not have been influenced by what occurred at the CURB training sessions, as she knew nothing of the CURB's intervention at XXXXXXXX until after the Complainant's redundancy had been executed.
36. The Tribunal understands fully how the Complainant, who openly spoke at the CURB meeting against the unfair treatment of employees, believed that the redundancy was in retaliation for protected disclosures at the CURB training session. In the Tribunal's view, the Complainant's reaction to the redundancy decision was perhaps a natural one.
37. However, the Tribunal is persuaded that the Respondent's decision to make the Complainant redundant was a business decision resulting from an audit of XXXXXXXX staffing needs that had been carried out by the Human Resource Specialist and not as a result of protected disclosures made by the Complainant at the CURB training sessions of 11th and 23rd April, 2023.
38. In the circumstances, the Tribunal accepts that the Complainant's redundancy was a legitimate business decision and does not agree that the Complainant was unfairly dismissed from her employment at XXXXXXXX.
39. There are no orders that the Tribunal can make in these circumstances.

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


Dated this ^{14th} day of October, 2024



Keren Lomas
Chairman



Robert Horton
Deputy Chairman



Judith Hall-Bean
Member

Q. 1. A particle is moving with a constant velocity of 10 m/s. Calculate the distance covered by it in 5 seconds.

Sol. Given: $v = 10 \text{ m/s}$
 $t = 5 \text{ s}$

$$s = vt$$

$$= 10 \times 5 = 50 \text{ m}$$

$$s = \frac{v^2 - u^2}{2a}$$

$$100 = \frac{v^2 - 0}{2 \times 10}$$

$$100 = \frac{v^2}{20}$$



$$2000 = v^2$$

$$v = \sqrt{2000}$$

$$v = 44.72 \text{ m/s}$$

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