

**IN THE MATTER OF A COMPLAINT UNDER THE EMPLOYMENT ACT 2000  
BEFORE THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL (the “Tribunal”)**

**BETWEEN**

**Complainant**

**and**

**THE DEPARTMENT OF HEALTH**

**Respondent**

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**DECISION**

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**Date of Hearing:** 12th September 2022

**Tribunal Panel:** Charlene A. Scott FCI Arb, Chairman  
Michael Bradshaw PhD, Deputy Chairman  
Robert K. Horton, Tribunal Member

**Present:** Complainant  
Michael Taylor, Counsel for the Respondent  
Kimesha Butterfield, Witness for the Respondent

1. , hereinafter referred to as the Complainant, was employed as a service provider for the Department of Health (DoH). By the DoH's standards, this was a contracted position to assist in carrying out necessary functions of the Covid-19 protocol established by them during the height of the Corona virus pandemic. Covid-19/Corona virus is used interchangeably.
2. Over a period of two (2) years, the Complainant signed off on no less than three (3) service provider contracts, including an amendment to one of the contracts. Each contract read in exactly the same way as the others and the language was clear and unambiguous. The title of the contract was headed Service Provider Contract (SP Contract). It set out the terms of what this contract involved and each subsequent page to the contract was headed '*Bermuda Government Service Provider Contract*'. Under the heading 'Services', it talked about a Customer Service Rep./Greeter (Admin Agent) and then went on to define the core responsibilities of such a greeter. Some of these duties were mentioned below. None of the duties involved anything technical or duties and tasks that were difficult to perform.
3. Even the last SP Contract signed off by the Complainant on 1<sup>st</sup> April 2022 where she received a new designation- Port Health Deputy Lead (COVID-19), for all intents and purposes, duplicated each prior contract with the exact same terms and conditions. She was also given a small increase in salary. This position seemed to allow for more movement outside of the airport and a little more responsibility, albeit still carrying out the duties she had performed in the other SP Contracts.
4. At the time of the incident the Complainant was stationed at the L.F. Wade International Airport. Whilst at the airport, her duties were '*... to ensure that the resident/visitor receives the best customer service experience by providing support and information...*' Other duties included but were not limited to, providing a positive first impression of Bermuda to residents and visitors by extending a cordial welcome and assisting with needs; verifying (*Its ordinary dictionary meaning is to prove, authenticate, validate.*) Travel Authorization documentation (TA); providing directions and wayfinding assistance to residents and visitors and answering questions and referring residents and visitors to the appropriate resources. Validating the TA was the major component to allowing any and all persons into the island.
5. Even with the last SP Contract signed off by the Complainant on 1<sup>st</sup> April 2022 where she received a new designation- Port Health Deputy Lead (COVID-19) and three additional duties, for all intents and purposes, each contract set out the exact same terms and conditions. With this new contract, she was also given a small increase in salary.
6. On 18<sup>th</sup> May 2022, the Complainant was summarily dismissed as a service provider with the Government of Bermuda Ministry of Health. In accordance with Section 7.2 of the Contract, formal notice to terminate the contract was afforded her on 24<sup>th</sup> May 2022. Section 7.2 states as follows: '*Either you or us may provide prior written notice of termination of this Contract without cause during the Term in accordance with the termination notice period as set out in Schedule 1. However, failure to adhere to this Contract or our Rules may result in the immediate termination of this Contract and in this event, your right to claim advance notice or payments in lieu of notice will be waived...*'

7. What is alleged to have caused this termination was that the Complainant approved a TA number to a returning resident on or around 22<sup>nd</sup> April 2022 without having had sight any of the required and necessary supporting documentation that should have been uploaded into the system before she approved this request. At the time, the returning resident informed her that she was at the airport and that the approval had not come through. The Complainant looked in the system and did not see a vaccination form nor any updated Covid test results for this returning resident. The Complainant did remember seeing vaccination information pertaining to this returning resident some weeks earlier. The Complainant subsequently approved and authorized an Orange status for the returning resident. This clearly went against the mandated protocol. The core responsibility of a service provider was to verify a TA with proper documentation being uploaded in the system for verification at the time of a request and this was a critical and vital component for anyone, be it a resident or a visitor, seeking admittance to this island. Thus the reason for her termination.
8. We can note that whilst this Covid pandemic was ongoing, Bermuda, like other nations and countries in the world, had set up stringent entry approval guidelines for anyone entering these islands in an effort to reduce the possible Covid virus exposure and contamination of its people residing here on island from and through external sources. In a concerted effort to protect the general population from the harmful Covid virus, all entering travelers to this island had to submit prior proof of their Covid vaccinations or not, which in turn was uploaded into the government website. Failure to provide such vaccination information as well as recent updated Covid test results, persons were then categorized differently upon their arrival on the island. This protocol had to be monitored, checked/authenticated and strictly adhered to by all service providers, the Complainant being one of them who was stationed at the Arrival's Hall.
9. The Tribunal was informed that this returning resident did not enter the island on the day she originally intended to arrive because she failed to receive the TA in time to catch her flight. Instead she arrived a couple of days later and is presumed to have used the prior TA approval issued by the Complainant. This resulted in the Complainant's contract being terminated with the DoH.

**Kimesha Butterfield (Witness for the Respondent)**

10. Ms. Butterfield (sworn) is the Human Resource (HR) Coordinator for the Pandemic Response Unit for the Department of Health. Ms. Butterfield handled recruitment and HR matters within the DoH. It was her department that had to implement a protocol for the Pandemic Response Unit. Ms. Butterfield explained that they had to come up with an incident plan. This was all new due to the contagiousness of the Covid virus. Contract tracing, calling returning travelers, travel surveillance testing, wrist bracelet, monitoring Days 4, 10 and 14 returning persons were all aspects of the incident plan.
11. With respect to the Travel Authorisation (TA) approval, a returning traveler had to follow the steps as outlined on the Government website. One had to upload information of the pre-test and the vaccination card, if one had it, and then upload that information to the website and await a response in the form of a colour. If the response was not immediately forthcoming, one could call the listed government number on the website and seek clarification and approval

of a TA. Visitors could be rejected and be provided an explanation; Bermudians would be emailed a response and still be allowed to return. No deviations were allowed or permitted from that protocol. Ms. Butterfield went on to explain that there were nurses stationed at the airport and they handled the TA's where there were queries.

12. Ms. Butterfield could not answer what happens if a resident cannot get through to the airport and had to board an airplane. Ms. Butterfield said that she did not work in that area and that the Surveillance Team would have the answer.
13. When asked about the duties of the service provider, she directed the Tribunal's attention to 'Services' in the Service Provider (SP) Contract which provided many non-specific duties which included but were not limited to that the service provider '*... ensuring that quality of control is running smooth and passengers receive the best customer service experience; that the SP operates in a professional and respectful manner in all matters in which you are representing the Ministry of Health and Government of Bermuda; provide support and accurate information; use excellent communication skills while interacting with passengers and maintain a professional approach with confidentiality ...*'
14. Ms. Butterfield went on to add that all SP's had to provide a Payroll Tax ID as the SP's had to pay their own payroll tax. SP's had to cover their own medical insurance. They did not get vacation pay nor did they receive sick pay if they were sick and unable to attend work. All of these are benefits usually covered by or provided by an employer for employees. The Health Department had to write to the Head of the Civil Service to get approval to pay these SP's for public holidays as they had to work on such days. Other government workers were paid for the day and did not have to work if that was their normal line of work.
15. Ms. Butterfield said that the Department of Health (DoH) did not provide a uniform, per se. However, all SP's had to wear a DoH polo shirt (which they had to return when no longer working there) as a means of identifying SP's in the restricted areas at the airport. The SP's also had to wear personal protective equipment known as PPE. This included the use of gloves, gowns, medically approved masks or goggles. By the SP wearing the PPE, it assisted in identifying them as the persons hired to carry out this Covid protocol as well as protected them from the risk of exposure to the highly contagious infectious disease from persons they may encounter in the line of work.
16. When questioned by the Complainant as to why she was not hired as an employee, Ms. Butterfield's response was that there was a hiring freeze and the contracts were written as they were. The government was in the midst of a pandemic and could not hire full-time employees. The SP's paid wages were to cover their benefits and it was on them as contract workers to make the requisite payments to the various government departments. See sections 5 and 6 of the SP Contract. The duties were assigned by DoH and even if the duties performed resembled an employee's duties, these were duties specifically established for the contract workers to effectively carry out the Covid protocol.
17. When further cross-examined by the Complainant, our attention was drawn to page 4, clause 1.2, where it states as follows: '*while you are providing the Services, you will not be*

*considered an employee as that term is defined under the Employment Act 2000 (the Act) (my emphasis) and you are not entitled to any employee benefits including, but not limited to, life insurance, medical insurance (where you provide services for less than 45 hours per week), paid vacation days, participation in a retirement plan, overtime pay, payments as a result of termination of this Contract, sick leave pay, or other benefits; rights and obligations of a contract of employment'*

18. Ms. Butterfield only re-emphasised that this was not a regular or a usual employment contract and that all of the SP's were not considered employees but were deemed contract workers. Ms. Butterfield could not answer the question if a SP worked over 45 hours, would they then be eligible for medical insurance.
19. When questioned about the Complainant's termination without cause, Ms. Butterfield informed the Tribunal that the then Acting Permanent Secretary Shivon Washington had heard about the incident of the returning resident who had not presented the correct documentation to receive a TA. Ms. Washington requested that the Complainant be terminated without cause. Ms. Butterfield drew our attention to clause 7.2 of the Contract where it states: '*... either you or us may provide prior written notice of termination of this Contract without cause during the Term in accordance with the termination notice period as set out in Schedule 1. However, failure to adhere to this Contract or our Rules may result in the immediate termination of this Contract and in this event, your right to claim advance notice or payments in lieu of notice will be waived.*'
20. The Complainant was not given the usual '*5 Days' Notice*'; instead she was paid 5 days in lieu. Further, she re-emphasized that the Complainant was hired as a contract worker and thus was not considered an employee.

**(Complainant)**

21. The Complainant was sworn in. The Complainant confirmed that she was employed by the Department of Health. The Complainant confirmed that she assisted in overseeing the A and B Teams. The Complainant confirmed that her Team Leader was Corinda. The Complainant's duties were to get the time sheets, testing tubes, setting up who was working where and generally took care of things at the airport. The Complainant said she worked four (4) days on and four (4) days off. The Complainant said the working hours were long some days.
22. On 18<sup>th</sup> May 2022, the Complainant was called into a meeting by Arnel Thomas. The Complainant had received a chain of emails and wanted to know what was going on. The Complainant said a Mr. Cal Smith and a Mr. Troy Brimmer, who both were a part of the Compliance Unit, were present during the meeting. They informed her that a resident traveler flew into Bermuda using fraudulent vaccination information and that she, the Complainant, was the person who approved a TA on the 22<sup>nd</sup> April 2022. Her initials were on the TA.
23. Mr. Smith, Mr. Brimmer and Ms. Thomas informed the Complainant that the TA was falsified; that there was no uploaded vaccination information at that time. The Complainant testified that she did indeed see the vaccination information, however it was some 2 weeks prior. When

questioned about any information uploaded on the website for this returning resident to verify a TA on the 22<sup>nd</sup> April, the Complainant said she did have name and date of birth information but did not have vaccination status or any testing information. There was no other information in front of her. In essence, when the Complainant approved the TA, what she did was to potentially put all other passengers whom the returning resident was in proximity to and encountered enroute to Bermuda as well as any of the Bermuda population who she came in contact with once she landed, in harm's way.

24. One side issue of no relevance was briefly discussed- one issue being \$80.00 in cash that was placed in a safe place and that cash referred to two TA's processed at the airport where there was nowhere to process the monies.
25. Another issue raised by the Complainant to assist her argument that she should be considered an employee was that she had to wear a uniform of sorts. It consisted of wearing protective clothing (PPE) which she, the Complainant considered a uniform. She also had to use the government's provided laptops and printers. As Ms. Butterfield stated earlier, wearing the PPE was a way for the arriving passengers to identify the hired Covid contract workers. However, nothing hinges on this as the SP Contract clearly stated that none of the SP's were considered employees and wearing PPE did not magically put a SP in the category of becoming an employee. Besides, wearing identifiable clothing such as PPE in a restricted area, as in the Arrivals Hall at the airport, was necessary. Being provided with the laptops and printers to do whatever was necessary at the time is something that the government will do. It will facilitate the ease of inputting and sharing sensitive and confidential data for the Department of Health via a dedicated and protected intranet. So, this issue of what the SP's wears or the equipment they use does not place them in the category of an employee.

### **Tribunal Deliberations**

26. At the heart of this case is the signed service provider contract. The Complainant willingly affixed her signature to the SP Contract each and every time a new contract was presented to her. If at any time she was confused or concerned about any of the terms in the contract, she could have asked questions about it or sought legal advice. That was not proven to have been done. The only question asked was why the contract could not be a full-time government contract which would then give her employee status with included benefits. Her other option was to not remain employed as a service provider and to seek alternative employment.
27. The Bermuda Government had never experienced a pandemic situation of such a magnitude in any of its years. The Bermuda Government via the DoH was devising a plan to keep the Covid virus out of the island as best as it could or at the very least, restricted and contained. No one knew how long the pandemic situation would last. Thus, a short term solution was devised to meet the needs of the country at the time, i.e., hiring the Service Providers on a contract-by-contract basis to protect the immediate needs of the country.
28. We do not believe the Complainant fully appreciated the gravity of the situation in allowing a passenger to land without the proper documentation uploaded onto the government website for approval. It was not a question of approving someone sight unseen at the airport; rather it was

whether the necessary documentation was uploaded into the government website at the time of the request for a TA; whether approval to enter Bermuda could be given based on the documentation on the website and if such approval was given; which arrival category was assigned to the traveler. One cannot use one's memory to say that as it was all right back a few weeks ago and that it would be all right now. Things were changing fast. The Covid virus was still spreading and arriving passengers were found to be infected with it. One connects and interacts with all manner of persons and one's health could change just that fast as well.

29. In June 2022, the Tribunal was appointed to hear this case. Initially, this case looked like it was an employer/employee case. When Ms. Butterfield gave evidence and invited us to review aspects of the contract and in particular, Provisions of Service, it became clear that this was not a case that fell within the meaning of an employee under the Employment Act 2000 as amended (the Act). This aspect was mentioned earlier in paragraph 18 above where the signed contract clearly stated in clause 1.2 that the employee **will not be considered an employee as the term is defined under the Employment Act 2000 (the Act) (my emphasis).**
30. The meaning of '*not*' is its ordinary meaning; not indicates negation; in no manner; no degree; prohibition. In other words, whomever is signing off on the contract will in no way be defined or be considered as an employee under the Act. The remit or scope of the Tribunal falls within the ambit of the Act and anything that is outside of this Act is outside of our remit. We cannot interfere with matters outside of our jurisdiction.
31. The meaning of '*employee*' as per section 4(1)(a) and (b) of the Act means:  
  
*'... (a) a person who is employed wholly or mainly in Bermuda for remuneration under a contract of employment;*  
*(b) any other person who performs services wholly or mainly in Bermuda for another person for remuneration on such terms and conditions that his relationship with that person more closely resembles that of an employee than an independent contractor; ...*
32. The last contract of employment signed off by the Complainant was 1<sup>st</sup> April 2022. As per the Act, section 3, a '*... contract of employment means any contract, whether expressed or implied, whether oral or in writing and whether or not in compliance with the requirements of this Act, which provides for an employee to perform specified services for an employer; ...employee has the meaning given in section 4(1)(a) and (b) (See above paragraph 30).*
33. Yes, the Complainant was employed in Bermuda; and yes she received remuneration for her services rendered. However, all previous contracts signed off by her clearly stated in clause 1.2 under Provisions of Services that she was not considered an employee nor was she entitled to any employee benefits. So, as a matter of fact, we find that the Complainant was not an employee within the meaning of section 4(1)(a) and (b) of the Act.
34. In the future, perhaps a disclaimer can be included at the signing off on these types of contracts by highlighting the nature of them, i.e., they do not fall under the Employment Act and one will need to bring an action before the Bermuda Courts for any alleged breach of contract. Lack of legal knowledge does not exempt the contracting parties from being penalized for

failure to follow what is set out in the conditions of the contract. Before the contract is finalized, a copy of it could be shared with the contracting party and ask them to seek legal advice if unsure of the any of the terms and conditions of the same.

#### **Determination and Order**

35. Under Schedule 2 of the Act, the Tribunal can determine any complaint, labour dispute or other matter referred to it under the Employment and Labour Code. This is what occurred in this situation. Initial review of the complaint looked as if it was an employee/employer situation. However, as the case unfolded, it became clear that this was a contractual relationship that was breached. The Complainant was hired as a contract worker for the Bermuda Government Department of Health and this type of worker clearly fell outside the ambit of the Employment Act 2000, as amended.
36. The Complainants failure to adequately screen an arriving resident returning to the island, as per the required Department of Health Covid protocol lays at the crux of the termination. Although this appears to be a seemingly simple case to handle, this kind of case is outside the scope of adjudication for the Tribunal. The onus is on the contracting party to be satisfied with the entirety of the contract. It may not be enough for the contracting party to say that they '... have read and agree to the terms and conditions of this Agreement ...' because nine times out of ten, the contracting party has not read nor fully appreciated the nature of the contract.
37. The Tribunal will not and cannot interfere with the decision of the Department of Health to terminate the contract with the Complainant. Relief, if still desired, has to be sought elsewhere.

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38. As per section 44O (1), a party aggrieved by a determination, order, declaration or other decision of the Tribunal may appeal to the Supreme Court on a point of law.

Dated this 20<sup>th</sup> day of October 2022



Charlene A Scott, FCI Arb  
Chairman



Michael Bradshaw, PhD  
Deputy Chairman



Robert K. Horton  
Tribunal Member