

**VIRGIN ISLANDS
LABOUR ARBITRATION TRIBUNAL
DISPUTE NO. 2015/0009**

IN THE MATTER OF A DISPUTE UNDER THE LABOUR CODE, 2010, CAP. 293

BETWEEN:

TESHAWN CAMERON

Complainant

And

MARINEMAX VACATIONS LIMITED

Respondent

Before:

Mr. Paul B. Dennis, Q.C.
Miss Dawn Smith
Ms. Dionne Boreland

Chairman
Complainant's Nominee
Respondent's Nominee

Appearances:

Ms. Keah A.M. Glasgow for the Complainant
Miss Monique Peters for the Respondent

2021: February 25

DECISION

1. **PAUL B. DENNIS, Q.C., CHAIRMAN:** On the 5th of July, 2019, this Tribunal delivered a written decision ("the initial decision") dismissing the complainant's complaint in this case for unfair dismissal, holding that the complainant had been dismissed by way of payment of salary in lieu of notice, for a valid and fair reason within the meaning of section 81 (1) of the Labour Code, 2010. On appeal to the High Court, the claimant contended that the Tribunal erred in failing to find that he had been summarily dismissed, having regard to the termination letter of 1st December 2014 which reflected that his employment would be terminated with immediate effect. The High Court upheld his appeal, holding that the Tribunal had not properly considered the issue of whether his dismissal was indeed a summary one, and remitted the case to the Tribunal for it to determine that issue in light of all the surrounding circumstances, and as a corollary, the nature of the payment made to the claimant by the respondent upon his dismissal.

2. In light of the High Court decision, the Tribunal directed the parties to submit further written submissions addressing the matters identified for its further consideration as follows:
 - (1) Whether, having regard to all the relevant circumstances of the case, the complainant's termination letter ought properly to be construed as a summary dismissal of him, or as a dismissal by way of payment of salary in lieu of notice, and
 - (2) Whether, in the circumstances, the payment which the complainant received from the Respondent upon termination represented part payment of compensation due to him for unfair dismissal, or payment of salary in lieu of notice.
3. The Tribunal further directed that the matter would then be determined on paper, taking into account the parties' submissions.

Summary Dismissal

4. In its written submissions made through counsel, the respondent concedes that the claimant was summarily dismissed but maintains that it was nonetheless fair because, as found by the Tribunal, he was dismissed for a valid and fair reason connected with his conduct, within the meaning of section 81 of the Labour Code.
5. In light of the respondent's concession, there is no need for the Tribunal to address the first issue identified above. Nor, for that reason, is it necessary to analyse the claimant's copious written submissions, made through counsel, on the point. In light of the concession, the Tribunal will proceed on the premise that it is now common ground that the claimant was summarily dismissed and not by way of payment of salary in lieu of notice.

Whether the Termination was for a valid and fair Reason

6. Regardless of whether a dismissal is summary or not, it must be for a valid and fair reason within the meaning of section 81 (1) of the Labour Code. Otherwise, the dismissal is unfair. In the instant case, the Tribunal in the initial decision, after extensive review and analysis of the evidence adduced by the parties as well as the applicable law, found that that the complainant was dismissed for a valid and fair reason. At paragraph 42 it concluded as follows:

“Given the aforementioned background, it seems to this Tribunal that termination of the complainant’s employment for what was described in the termination letter as “poor attendance record” and “failure to report and communicate...absences” constituted a valid and fair reason, within the meaning of section 81(1) of the Labour Code. Indeed, the totality of the evidence on balance suggests, and we find, that the complainant absented himself from work on the day in question to conduct his own business elsewhere, working on a generator which had nothing to do with his employer’s business. In this regard, we accept counsel for the respondent’s submission, that, quite apart from the background of repeated absenteeism, the complainant’s conduct on that day was, of itself, sufficient grounds for termination and on its own, constituted a valid and fair reason for dismissal within the meaning of section 81(1) of the Labour Code. Accordingly, we find that the complainant was dismissed for valid and fair reasons connected with his conduct, and we reject the complainant’s assertion that he was dismissed merely because of his absence from work as a result of illness, in breach of section 82 (1) (g) of the Labour Code.”

7. The Tribunal’s finding that the complainant was dismissed for a valid and fair reason was not disturbed by the High Court on appeal and there is no basis or reason for us to revisit that issue here. Suffice it to say that in analyzing the evidence relevant to the issue, the Tribunal at paragraph 26 et. seq. of the initial decision dealt with objections raised by counsel for the claimant to certain aspects of the witness statement of the respondent’s sole witness, Mr. Bentley Hodge. In particular, counsel had objected to paragraphs 5 and 14 of Mr. Hodge’s statement in which he sought to give evidence of reports to him by the complainant’s immediate supervisor, Mr. Milton Felix, regarding, among other things, the complainant’s absence from his assigned tasks and also of himself having to speak to the complainant repeatedly about his unauthorized absence from work. It was submitted by counsel at the hearing that the complainant was estopped by virtue of section 101 (3) and (4) of the Labour Code from adducing that evidence because it constituted facts which might have been included in the termination letter, but were not. The Tribunal overruled that objection on two grounds, the first of which was that section 101 (3) and (4) applied to summary dismissal only and had no application to dismissal with notice or by way of salary in lieu of notice. The second ground for overruling the objection was that even if

section 101 (3) and (4) did apply, the impugned evidence did not constitute new facts which ought to have been included in the termination letter but were omitted; rather, that evidence merely served to amplify reasons which had in fact already been stated in the termination letter.

8. In light of the fact that it is now common ground between the parties that the dismissal of the complainant was a summary one and not one by way of payment of salary in lieu of notice, the first ground for overruling the objection no longer holds. However, the second ground still holds. The Tribunal dealt with that ground at paragraph 29 of the initial decision as follows, referring to section 101 (3) which in the context of the point being addressed, was clearly meant to be a reference, more specifically, to section 101 (4):

“The second problem with the objection stems from what appears to be a common misunderstanding as to the effect of section 101(3). That section, it seems to us, does not preclude the introduction of testimony at trial which amplifies a ground for dismissal which was given in the termination letter in the first place. What it precludes is the giving of testimony as to facts which are tantamount to a ground of dismissal not given in the letter of termination at all. In the instant case, we agree with the submission of counsel for the respondent that the disputed testimony of Mr. Hodge that he himself had to speak to the complainant regarding concerns which he had about the complainant’s conduct, serves merely to amplify the reasons which had already been given in the letter of dismissal. Accordingly, even assuming that section 101 (3) did apply, that testimony would still be perfectly admissible.”

9. Applying that same reasoning now in circumstances where it is accepted by both sides that the dismissal was a summary one which attracts the operation of sections 101 (3) and (4), the Tribunal maintains its ruling that the disputed testimony was admissible.

The Impact, If Any, of Sections 81 (2) and 103 (7) on the Fairness of the Dismissal

10. In its decision on the claimant's appeal, the High Court endorsed the Tribunal's finding that the procedures under section 107 (3) requiring a written warning before dismissal were unwarranted in the circumstances of this case. It is therefore unnecessary to revisit that issue for present purposes. However, it was also submitted by counsel for the complainant at the initial hearing of the complaint that even if the dismissal was for a valid and fair reason, it is incumbent upon the Tribunal to determine whether he was given a

fair opportunity to defend himself and that if he was not, then the dismissal would still be unfair. For this proposition, counsel relied on section 81 (2) of the Labour Code which provides as follows:

“81. (2) Subject to section 89, an employer may not terminate the appointment of an employee unless the employer has informed the employee in writing of the nature and particulars of the complaint against the employee and has given the employee or his or her representative a fair opportunity to defend himself or herself including access to his or her employment record.” [Emphasis added]

11. This submission has been repeated by counsel for purposes of the further consideration which the Tribunal is now giving the complaint pursuant to the decision of the High Court. In its initial decision, the Tribunal, having found that the complainant had been dismissed by way of payment of salary in lieu of notice, went on to hold that section 89 was inapplicable since that section only applied to summary dismissals. In light of the respondent's concession that the dismissal was indeed summary, it can no longer be maintained that this section has no application to the circumstances of this case. However, as the Tribunal observed in the earlier decision, the issue of the claimant being denied a fair opportunity to defend himself simply did not arise on the complainant's case. In fact, that issue was raised for the very first time in the complainant's written submissions and had no underpinning in either the points of claim or the evidence adduced in support of the claimant's complaint. To the contrary - it was not raised as a point of contention in the claimant's points of claim at all; nor was any evidence adduced on it in the claimant's witness statement. Since it was not raised as an issue for determination in the claimant's points of claim it was not addressed by the respondent in its points of defence; nor was it addressed either in the defensive evidence adduced by the respondent by way of its witness statement or in its own written submissions. In short, the respondent answered the complainant's complaint as brought – bereft of any challenge to his dismissal on the basis that, contrary to section 81 (2), he had not been given a fair opportunity to defend himself, and it was on that basis that the substantive hearing of the complaint was conducted. The issue of whether the complainant was given a fair opportunity to defend himself was therefore never a live issue in the case.
12. In the circumstances, it does not appear to the Tribunal that it would be right to entertain counsel's submission that this is an issue which should engage it in its determination as

to the fairness of the complainant's dismissal. It seems to us that to do so would be fundamentally unfair to the respondent who, based upon the complaint actually presented, would neither have anticipated this point of contention nor had a fair opportunity to respond to it. Whilst proceedings before the Tribunal are not hidebound by rules of pleadings, a respondent before it must, as a matter of principle and in all fairness be able to reasonably anticipate and respond to the complainant's full case against him and we can see no justification for counsel raising for the first time the issue of whether or not section 81 (2) was complied with, at the stage of submissions. In the circumstances, we must decline counsel's renewed invitation to consider it as a live issue for our determination.

13. That is sufficient to dispose of the complainant's belated attempt, through counsel to invoke section 81 (2). Even if we are wrong on that score, the specific circumstances of this case militate against any finding of unfairness based on that section. There was never any dispute that on the day in question the complainant had abandoned his post from 8:55 a.m. for the entire day without permission and for reasons wholly unconnected with his employment - conduct which we found was, in itself, sufficient grounds for termination on its own, quite apart from the history of repeated absenteeism. The fact of the complainant's unauthorized absence without explanation was not at all open to challenge. Indeed, as observed in the initial decision, the claimant admitted not returning to work for the entire day and not contacting anyone at the office to explain his absence. This admission was hardly surprising, given that he was caught, as it were, *in flagrante delicto*, when Mr. Hodge spotted him at Parts and Power. It would therefore have been pellucidly and palpably clear to him when he was confronted on the following day for an explanation for his unauthorized absence, that this was viewed by his employer as a very serious infraction. In this regard, the undisputed evidence discloses that when so confronted and asked to provide an explanation, his explanation involved an admission that he had abandoned his post for the entire day without authority for reasons wholly unconnected with his duties. It is for this very dereliction that he was dismissed; and given his admission, the issue of him not having been given a fair opportunity to defend himself simply does not arise.
14. In the final analysis therefore, the Tribunal finds not only that the complainant was indeed dismissed for a valid and fair reason, but also that the grounds upon which the fairness of that dismissal have otherwise been challenged are entirely without merit.

The Nature of the Payment Received by the Complainant

15. Section 101 (1) of the Labour Code provides that an employer is entitled to dismiss an employee summarily, without notice, for serious misconduct of a nature that would make it unreasonable to require the employer to continue the employment contract. Sub-section (2) goes on to provide that:
- (2) *The serious misconduct referred to in subsection (1) is restricted to that conduct which is directly related to the employment contract and has a detrimental effect on the business and it includes, but is not limited to, situations in which the employee has*
- (a) *conducted himself or herself in a manner as to clearly demonstrate that the employment contract cannot reasonably be expected to continue;*
- (b) *been convicted of an offence in the course of his or her employment, the penalty for which prevents the employee from meeting his or her obligations under his or her employment contract for twelve working days or more.*
16. Counsel for the claimant relied on the Bahamian case of **Doyle Saunders v. Bimini Sands Marina Ltd.** BS 2018 SC 30 for the threshold test to be met by an employer in defending summary dismissal. Based however, as it does, on a different statutory regime from that which obtains in the BVI, we do not find that case to be particularly helpful for purposes of the instant case. In any event, the question whether the misconduct complained of in any given case is such as to justify summary dismissal is a question of fact and degree: **Henry v. Mount Gay Distilleries Ltd.** [1999] UKPC 39.
17. In the instant case, in analyzing the claimant's conduct, the Tribunal has already found that quite apart from the background of repeated unauthorized and unexplained absences from work, the claimant's conduct on the day in question was, of itself, sufficient grounds for termination on its own. But viewed against that background, his conduct on the day in question was even more egregious. He admitted in his witness statement that he had his own company, Land and Sea Power Services Limited, which at the material time was conducting generator and engine sales, services and repairs and in the earlier decision, the Tribunal found as a fact that despite his protestations that at no time did he ever leave

his job with the respondent to do side jobs, it appeared to us on the totality of the evidence that that was precisely what he did on the day in question and that it was that conduct which provided the catalyst for his termination. Indeed, as we also observed in that decision, the complainant admitted in cross-examination that he would sometimes leave his work base during regular working hours, in circumstances which had nothing to do with his employment. The Tribunal also accepted as a matter of fact that Mr. Hodge, his superior had had to speak to him on multiple occasions (five times in all during the course of his eleven-month employment between January and December 2014) about his repeated unauthorized absence from work during regular working hours.

18. On any rational view, it would be unreasonable to expect any employer to continue to put up with such conduct which, in our view, fell squarely within the description of conduct which, pursuant to section 101 (2) (a), justified summary dismissal, namely, conduct which demonstrated that the contract of employment could not reasonably have been expected to continue. Accordingly, we have no difficulty in holding that summary dismissal of the complainant was indeed warranted and justified in this case.

19. In the course of his submissions, counsel for the claimant correctly observed that section 101 (1) in effect permits summary dismissal without notice and that therefore, the usual notice period or payment in lieu of notice is not necessary when an employee is summarily dismissed. Since the complainant was summarily dismissed in circumstances where, as we have found, such dismissal was justified and therefore lawful, the respondent would have discharged its contractual obligations to him upon termination, simply by paying him such emoluments as had already accrued to him as at the date of his dismissal. However, the payment actually made to the complainant exceeded that and purported to include what the Tribunal originally characterized as salary in lieu of notice. However, since as it now transpires, he was not entitled to notice pay, having been properly dismissed summarily, that payment cannot properly be characterized as payment in lieu of notice. Counsel for the claimant submitted that the payment should be regarded as liquidated damages, representing part payment of compensation due to the complainant for unfair dismissal. However, since, as we have found, his employment was fairly and justifiably terminated summarily, there can have been no breach of contract by the employer attracting damages; nor, for the same reason, can there have been any compensation due to him for unfair dismissal.

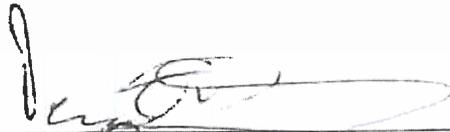
20. The payment, to the extent that it exceeded the emoluments already accrued to the claimant as at the date of his termination, can therefore only be regarded as a windfall, consequent upon his being paid more than the emoluments to which he was entitled as at the date of his termination.

Conclusion

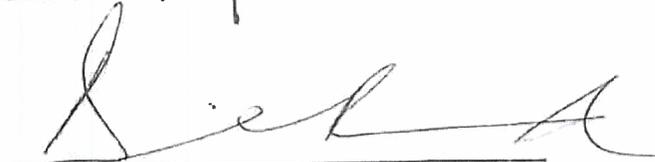
21. Having regard to the totality of the evidence and our findings as discussed above, this Tribunal holds that the summary dismissal of the claimant was not only justifiable but was also fair. In the circumstances, the complaint stands dismissed.

Costs

22. Section 30 (3) of the Labour Code provides that The Tribunal shall not make an order as to costs, except for exceptional reasons which the Tribunal considers appropriate. There being no exceptional circumstances in this case to justify an award of costs, we make no such order.


PAUL B. DENNIS, Q.C., CHAIRMAN


DAWN SMITH, COMPLAINANT'S NOMINEE


DIONNE BORELAND, RESPONDENT'S NOMINEE

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