



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Vashti James-Cockburn

COMPLAINANT

AND

Felix Harry dba West Side Bakery

RESPONDENT

BEFORE: **Jamal S. Smith**, Chairperson
Professor Arthur G. Richardson, Member on the Recommendation of the Complainant
Zebalon A. McLean, Member on the Recommendation of the Respondent

IN ATTENDANCE: (1) Vashti James-Cockburn, the Complainant in person
(2) West Side Bakery, represented by Felix Harry

ADDITIONALLY: (3) Malisa Ragnath-Mangal, as Secretary to the Tribunal

FINAL AWARD

03 February 2022; 17 February 2022

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A. INTRODUCTION

1. This labour dispute arises out of a complaint against Mr. Felix Harry doing business as West Side Bakery (the “**Respondent**”) filed by Vashti James-Cockburn (the “**Complainant**”), with the Labour Commissioner on 02 October 2020 (the “**Complaint**”). Both the Complainant and the Respondent were unrepresented.
2. This is a tragic case of a family business where the family aspect is all but lost. Like the title character in Shakespeare’s *The Tragedy of Julius Caesar*, Mr. Harry’s business was assassinated by the global pandemic caused by COVID-19 that sent the Territory into lockdown in March 2020. However, unlike Julius Caesar no one gave Mr. Harry the ominous warning “Beware the ides of March” and as the final blow is struck in Mr. Harry’s business by this Complaint, he too must ask “Et tu, Brute?”.
3. The Complainant alleges that she was hired by the Respondent as a Kitchen Helper since 13 October 2013. She was told to stay away from work due to the COVID-19 pandemic at the end of March 2020 and she had not been able to return to work since then nor would the Respondent renew her work permit. She is seeking her vacation pay and severance pay.
4. In this award, reference will be made to a Trial Bundle prepared by the Secretary to the Tribunal to assist the Tribunal on 07 January 2022 (the “**Trial Bundle**”). During the trial the Secretary to the Tribunal displayed a copy of the Letter dated 21 January 2021 from the then Deputy Labour Commissioner to the Respondent outlining the amount of severance pay owed to the Complainant (the “**Severance Pay Letter**”). This was referred to in paragraph 6 of the Respondent’s sworn response, which the Complainant also accepted. The Trial Bundle and the Severance Pay Letter, contain all the documents considered by the Tribunal, unless otherwise expressly stated in this Final Award.

B. THE CASE HISTORY

5. After there was no settlement achieved by the Labour Commissioner, the Complaint was transferred to the Minister under a Memorandum by the Labour Commissioner dated 26 May 2021, over seven (7) months later and the parties had not agreed to any extension of time, where section 26(3) of the Labour Code, 2010 (the “**Code**”) establishes a duty to transfer the Complaint to the Minister if no settlement is achieved within thirty (30) days. The Labour Commissioner’s Memorandum can be found at TAB 2 of the Trial Bundle.
6. A seven (7) months delay to transfer the Complaint to the Minister was contrary to the clear intent of the Code to ensure the prompt settlement of labour disputes. This Tribunal continues to express its concern raised in *Devonni Christopher v. BVI Health Services Authority*¹ where the inordinate delays by the Labour Commissioner in transmitting complaints to the Minister is a statutory breach and falls far below international standards. There is a clear need for this situation to be reformed to minimize the exposure of the public purse to this contingent liability.

¹ BVILAT2021/008, delivered on 18 January 2022.

7. On 16 July 2021 the Minister referred the Complaint to the Tribunal pursuant to section 28(1) of the Code, and the Minister's reference is found at TAB 1 of the Trial Bundle.
8. On 22 July 2021 the Secretary to the Tribunal issued the Notice of Case Management Hearing, found at TAB 4 of the Trial Bundle, scheduling the first Case Management Hearing for Thursday, 30 September 2021 and giving guidance for the timeline for filing the Form of Consent for the member recommended by the Respondent and the Complainant (found at TAB 5 and TAB 6, respectively), the Response (found at TAB 10) and the Reply (which is also headed "RESPONSE") (found at TAB 11).
9. On Thursday, 30 September 2021 the Chairperson of the Tribunal issued a Case Management Order (the "**First CMO**") found at TAB 12 of the Trial Bundle which, among other things, adjourned the first Case Management Hearing to Thursday, 11 November 2021 to allow the Respondent to file his Form of Consent out of time which prevented the Minister from appointing the party recommended members of the Tribunal for the purposes of this dispute so that no trial directions could have been given.
10. On Thursday, 11 November 2021 the Chairperson of the Tribunal issued a Case Management Order (the "**Second CMO**") found at TAB 13 of the Trial Bundle, which, among other things, fixed the date for the Pre-Trial Hearing to Tuesday, 18 January 2022 and gave trial directions while fixing the date for the trial to Thursday, 03 February 2022.
11. In accordance with the Second CMO, the Complainant filed the Affidavit of Calvin Cockburn on 24 November 2021 found at TAB 16 of the Trial Bundle.
12. On Tuesday, 18 January 2022 the full panel of the Tribunal reviewed the state of the case in preparation for the trial then issued a Case Management Order (the "**Third CMO**") which was made after the issuing of the Trial Bundle, which confirmed the correct name of the Respondent for the purposes of these proceedings.
13. In accordance with the Second CMO, the Chairperson of the Tribunal issued Witness Summons for the additional witness for the Complainant, namely, Calvin Cockburn, the husband of the Complainant and the nephew of the Respondent's wife.
14. The trial of this dispute took place on 03 February 2022 during which the full panel of the Tribunal heard the oral evidence from both parties and Calvin Cockburn. The entire trial took place via the WebEx video conferencing platform in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020² and in accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.
15. The Secretary to the Tribunal issued a Notice of Decision Hearing on Thursday, 10 February 2022 fixing a date for the delivery of the decision to Thursday, 17 February 2022 at 9:00 a.m. The Tribunal now gives the decision for its final award.

² S.I. No. 99 of 2020.

C. THE TRIBUNAL'S ANALYSIS

(a) The Findings of Fact

16. The Complainant was hired by the Respondent on 13 October 2013 as a Kitchen Helper and was temporarily laid-off on or about 27 March 2020 when the Territory entered lockdown as a result of various public health measures due to COVID-19 and the Imposition of a Curfew Order, 2020.³ The total period of employment was 6 years and 5 months, and at the end of that period she was being paid a gross sum of \$489.00 on a bi-monthly basis. The Complainant was unable to provide the Tribunal with any evidence about how much vacation pay she was owed, however, the Respondent confirmed that she was paid for her vacation days for 2019 and she had only worked for two (2) months in 2020 before the COVID-19 lockdown in March 2020. The Complainant was temporarily laid-off by the Respondent due to the COVID-19 lockdown with effect from 27 March 2020. The Respondent never disputed that he owed the Complainant for vacation days, but during his oral evidence he claimed it may only be one (1) day of vacation pay owed. Apart from that, the Tribunal accepts the evidence of the Respondent and deems that the Complainant was owed two (2) days of vacation pay.
17. The reason for the temporary lay-off by the Respondent was the indication to the Complainant that “things slow”. The Tribunal accepts that the economic condition suffered by the Respondent was also created by a *force majeure* situation namely the public health measures adopted due to the COVID-19 pandemic. Therefore, there was a valid reason for the termination pursuant to section 89 so that the Complainant was temporarily laid off, which is a form of termination, pursuant to section 89(3)(e) and (f). This would satisfy the requirement of section 104(1) of the Code.
18. While the Complainant waited in the car, her husband, a police officer, proceeded to get the Respondent to sign an application form to obtain unemployment relief from the Social Security Board due to the COVID-19 pandemic. The basis of the application was that she was still employed by the Respondent and would be re-employed in October 2020.

(b) The Law

(i) *Jurisdiction*

19. The Respondent raised no challenge to the jurisdiction of the Tribunal in these proceedings. Therefore, the Respondent is deemed to have accepted the jurisdiction of the Tribunal and the Tribunal so finds that it has jurisdiction to hear this dispute upon the referral to it by the Minister.

(ii) *The Termination*

20. The termination was irregular for several reasons, including that the required notice, or

³ S.I. No. 22 of 2020.

payment in lieu of notice, was not given to the Complainant. The failure of notice requires that payment in lieu of notice was to be given in accordance with section 91(1) of the Code. As section 106 of the Code makes it clear that the payment of severance pay shall not affect entitlement to payment in lieu of notice. For this reason, the Respondent owes the Complainant the sum of \$489.00 as payment in lieu of notice in addition to the severance pay.

21. Additionally, the temporary lay-off was not in writing and the Complainant was not told the proposed date for her re-engagement prior to the lay-off as required by section 104(3) of the Code. Section 107(2)(c) makes it clear that where no date of re-employment is given and three months has elapsed without re-engagement, as occurred in this case, severance was payable from the end of that three-month period. Therefore, when 27 June 2020 arrived and the Complainant was not re-engaged by the Respondent, the obligation to pay severance to the Complainant arose.
22. The effect of section 107(2)(c) was merely delayed by the insertion of section 107(4) due to the Labour Code (Amendment) Act, 2020⁴ which provides:

“Notwithstanding subsection (2)(c), where an employee is temporarily laid off on or between the period of 14 March 2020 to 31 October 2020 severance pay shall be payable immediately after 31 October 2020, except where Cabinet having regard all the circumstances has determined that the period for the payment of severance be extended by Order published in the *Gazette*.”
23. That section did not change the fact that 27 June 2020 was the last day that the Complainant should have been re-engaged. It only delayed the payment of the severance pay which would have been payable on 27 June 2020 to 31 October 2020. This was further extended to 31 January 2021 by the Labour Code (Extension of Severance Pay Period) Order, 2020.⁵ This was again extended to 28 February 2021 by the Labour Code (Extension of Severance Pay Period) Order, 2021.⁶ Therefore, 28 February 2021 was the last day on which the Respondent was to pay the Complainant the severance pay that was due to her. As both parties accepted the calculation of the severance pay by the Labour Commissioner, and the Tribunal deems the calculation up to March 2020 was correct, the Tribunal will order severance pay in the amount of \$2,808.00 based on the Severance Pay Letter.
24. The Labour Commissioner informed the Respondent how much severance pay was due by virtue of the Severance Pay Letter. The Respondent made it clear that he was not paying it because he cannot afford it. This is unacceptable and the failure by the Labour Commissioner to exercise her powers under the Code to ensure compliance with the Code is a grave concern. Section 104(5) and (6) creates an offence for failure to make severance payment in accordance with the Code and it would have been appropriate for the Labour Commissioner to take the appropriate steps to have the matter prosecuted after she wrote the Severance Pay Letter and the Respondent refused to take any steps to pay it.

⁴ No. 11 of 2020.

⁵ S.I. No. 128 of 2020.

⁶ S.I. No. 11 of 2021.

25. The application for employment relief on the basis that the Complainant would be re-employed with the Respondent in or about October 2020 was a legal impossibility since the last date for re-employment with the Respondent was in or about June 2020. Therefore, any monies paid to the Complainant by the Social Security Board on the basis of her continued employment with the Respondent after June 2020 must be set off against any monies to be paid by the Respondent, since she cannot with the one-hand obtain severance pay from March 2020, be finally terminated in June 2020 and still with the other hand benefit from unemployment relief on the basis of re-employment in October 2020. The Secretary to the Tribunal shall cause a copy of this Final Award to be served on the Social Security Board to give effect to this repayment.

(iii) *Vacation Pay*

26. The Respondent owed the Complainant two (2) vacation days and the vacation pay would be calculated based on \$6.00 an hour for two (2) days. For this reason, the Tribunal determines that the Respondent owes the Complainant \$96.00 in vacation pay.

(iv) *Interest*

27. As a result of the proviso to section 107(2) there is a 10% interest that attaches to the severance pay that accrues annually from the date of termination, that is, from 27 March 2020. Therefore, \$541.26 is due in interest on the date of this Final Award and \$0.77 for each day, thereafter, that the severance payment remains unpaid.

(v) *Costs*

28. In accordance with section 30(3) of the Code, the Tribunal is only entitled to award costs for exceptional reasons, and the Tribunal finds, in accordance with LPR 47(3)(e), that the Respondent has failed to act in accordance with good industrial relations by informing the Labour Commissioner that he does not intend to pay the severance payment after being told that it was owed to the Complainant. For this reason, the Tribunal will summarily assess the costs due to the Complainant for these proceedings from the date of the filing of the Complainant in the amount of \$500.00.

The Award

29. The award of the Tribunal is as follows:

- (a) Subject to paragraphs (b) and (c) below, the Respondent shall pay severance pay to the Complainant calculated in the amount of \$2,808.00.
- (b) The Social Security Board shall confirm in writing to the Secretary to the Tribunal the amount of money paid to the Complainant in connection with her application for unemployment relief on or before **Tuesday, 15 March 2022**.
- (c) The severance pay ordered in paragraph (a) shall be set off against any monies

confirmed to have been paid to the Complainant by the Social Security Board in accordance with paragraph (b) hereof.

- (d) If the severance pay, or any balance thereof, is not paid immediately after receiving the confirmation from the Social Security Board in accordance with paragraph (b) hereof, the Respondent shall pay interest to the Complainant in the amount of \$0.40 for each day after the date of this Final Award that the severance pay remains unpaid.
- (e) The Respondent shall pay to the Complainant pre-award interest in the amount of \$540.00 on or before **Tuesday, 15 March 2022**.
- (f) The Respondent shall make payment in lieu of notice to the Complainant in the amount of \$489.00 on or before **Tuesday, 15 March 2022**.
- (g) If the payment in lieu of notice is not paid on or before Tuesday, 15 March 2022 the Respondent shall pay interest to the Complainant in the amount of \$0.05 for each day thereafter that the payment in lieu of notice remains unpaid.
- (h) The Respondent shall pay vacation pay to the Complainant in the amount of \$96.00 on or before **Tuesday, 15 March 2022**.
- (i) If the vacation pay is not paid on or before Tuesday, 15 March 2022 the Respondent shall pay interest to the Complainant in the amount of \$0.01 for each day thereafter that the vacation pay remains unpaid.
- (j) The Respondent shall pay costs to the Complainant on or before **Tuesday, 15 March 2022** summarily assessed in the amount of \$500.00.
- (k) If the costs are not paid on or before Tuesday, 15 March 2022 the Respondent shall pay interest to the Complainant in the amount of \$0.05 for each day thereafter that the costs remain unpaid.
- (l) The Secretary to the Tribunal shall cause a copy of this Final Award to be served on the Social Security Board.
- (m) The parties are at liberty to apply in accordance with LPR 42 on or before **Friday, 29 April 2022**.
- (n) If any party applies in accordance with paragraph (m) hereof, the Secretary to the Tribunal shall issue a Notice of Enforcement Hearing with accompanying guidance on the dates to file any evidence and the Enforcement Hearing shall be heard before the Chairperson of the Tribunal.

- (o) If neither party applies in accordance with paragraph (m) hereof, no further action may be taken in respect of this dispute.

- PENAL NOTICE -

If you, Felix Harry, fail to comply with the terms of this order proceedings may be commenced for contempt of court and you, Felix Harry, may be liable to be imprisoned or to have an order of sequestration made in respect of your property.

Post-Script: Any person who is dissatisfied with this Final Award may appeal to the High Court on any question of law on or before **Friday, 04 March 2022.**

By Order
Labour Arbitration Tribunal



Mr. Jamal S. Smith, LLB(Hons.), MCI Arb.
Chairperson

Location:

Ashley Ritter Building
Road Town, Tortola VG1110
British Virgin Islands


Professor Arthur G. Richardson
Member on the recommendation of the
Complainant


Zebalon A. McLean
Member on the recommendation of the
Respondent