



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2021/026

BETWEEN

ALEXANDRA JOSEPH COGGINS

COMPLAINANT

AND

RIDGEVIEW CONSTRUCTION (BVI) LIMITED

RESPONDENT

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Professor Arthur Richardson**
and **Zebulon McLean**, sitting as arbitrators

HEARING ON: 14 July 2023

DECISION ON: 7 September 2023

IN ATTENDANCE: (1) Alexandra Joseph Coggins, the Complainant
(2) Royd Smurthwaite, a director of the Respondent

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

REASONS FOR DECISION

Summary

1. This decision follows an enforcement hearing which was held on 14 July 2023 via video conference in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020 (S.I. No. 99 of 2020). The hearing was held after the Respondent failed to satisfy the Final Award mentioned below. The procedural history is set out in the Final Award and except for a few salient facts that would permit these Reasons for Decision to stand alone it is unnecessary to repeat it here.

2. The parties are unrepresented by lawyers.
3. The Complainant was employed by the Respondent as office manager from 3 August 2018 to 18 October 2019 when she was made redundant. She was given a termination letter which gave her last day as 30 September 2019. She was asked by Mr Smurthwaite to stay on a bit longer. She issued a Dispute Claim Form to the Labour Commissioner on 27 May 2020. The dispute not being resolved by the Labour Commissioner the Dispute Claim Form was filed with the Tribunal on 22 October 2021.
4. The Respondent did not deny the claim. Boyd Smurthwaite, a director, has appeared in the proceedings for the Respondent. He has offered no defence. In an affidavit filed with the Tribunal on 12 November 2021 he stated he did not dispute the unpaid wages owed to the Complainant. He admitted that the Respondent had cash flow difficulties and it could not trade out of and consequently was unable to pay its creditors. He admitted owing money to the Complainant. He concluded that the company had no liquid assets and was insolvent. He said there were materials in two containers but he could not account for it. He proposed an adjournment to seek the appointment of a liquidator. is liable as claimed by the Complainant.
5. The Complainant filed an affidavit in reply on 25 November 2021. She accused Mr Smurthwaite of a lack of good faith. She referred to the containers of material and to motor vehicles that Mr Smurthwaite owned in the BVI. The Complaint stated further that she found it strange that Mr Smurthwaite is only raising the issue of insolvency after two years and she regarded his actions as a subterfuge.
6. Some evidence was led at the trial but it would appear the matter was largely resolved by agreement and concessions of the parties. A final award was issued by the Tribunal on 17 February 2022. I would summarise the relevant parts of paragraph 11 of the order as follows:
 - a. the Respondent pay certain sums totalling \$9,934.58 to the Complainant plus interest of \$2.20 per day from the date of the award until payment and costs of \$1,500,
 - b. the Department of Motor Vehicles (**the DMV**) furnish to the Secretary of the Tribunal and the Complainant all information in relation to the registration, history of ownership of ownership, insurance and other pertinent details in relation to all vehicles that were previously registered in the Respondent's name and were on or about January 2020 transferred to Oil Nut Bay or any company or associate of Oil Nut Bay (**the Vehicles**),
 - c. the transfer of the Vehicles to Oil Nut Bay be null and void and the DMV immediately unwind the transfers to reflect that the Vehicles were illegally transferred to Oil Nut Bay and to re-enter the Respondent as owner of the Vehicles,
 - d. the DMV immediately cause a lien to be entered on the register place in respect of each of the Vehicles, and
 - e. the Complainant shall forthwith cause all vehicles registered at the DMV in the name of the Respondent and valued at more than \$12,000 to be sold at a price of no less than 15% of the Kelly Blue Book value.

7. The Final Award therefore was a combination of a freezing order and the imposition of a lien in favour of the Complainant except that it was without prejudice of the exercise to the rights of banks claim interest or levy service charges or claim set off or enforce security, or to enforce other contractual rights arising from contracts made before notification of the order.
8. Upon the failure of the Respondent to satisfy the Final Award, the Complainant by application filed on 13 May 2022 sought payment by the Respondent within 30 days. The application was supported by an affidavit of the Complainant originally filed on 25 November 2021. Regrettably the term of the then chairman of the Tribunal expired in or about June 2022. As a result, the Tribunal ceased to be properly constituted. A new chairman was not appointed until 1 May 2023 and the business of the Tribunal resumed in early June. The Tribunal apologises to the parties for the delay in the resumption of its business.
9. In the meantime, the Complainant attempted to enforce the order against the DMV. By memo to the Complainant dated 21 October 2022 the DMV refused, on advice of the Attorney General's Chambers, to comply with paragraphs 11(e) to (g) of the Final Award (summarised at paragraphs 6a, b and c above) on the ground that those paragraphs are inconsistent with the powers of the Tribunal under the law. The DMV refused to take any action required to enforce the order.
10. On the resumption of its hearings, the Tribunal convened a status hearing on 15 June 2023. At that hearing the Tribunal made the following orders:
 - a. the Complainant shall by Friday 30 June 2023 file an updated application for enforcement in the usual form supported by an affidavit on her behalf and, if she considers it necessary or advisable, by affidavits from other persons with knowledge of the facts,
 - b. the Respondent shall by Friday 7 July 2023 file an affidavit setting out:
 - i. what property and assets (including motor vehicles, cash in the bank and work contracts) the Respondent owned or possessed on 1 January 2019,
 - ii. the value of the property and assets at 1 January 2019, and
 - iii. what has become of the property and assets.
 - c. The parties shall file the above documents by emailing them to the secretary of the Tribunal.

Enforcement application

11. The enforcement application finally came on for hearing on 14 July 2023. The Complainant and Mr Smurthwaite on behalf of the Respondent each filed an affidavit on 7 July 2023 for use at the hearing. Mr Smurthwaite re-filed his affidavit on 11 July. Mr Smurthwaite in purported compliance with the order dated 15 June 2023 repeated his claim that the

Respondent does not have liquid assets to settle the Final Award although it did have goods such as roofing materials in two containers in the BVI as of 24 months previously, i.e. about July 2021. He was not in a position to say whether the goods are still there. He provided information in the form of a schedule to his affidavit listing the vehicles that he believes or knew were owned by the Respondent and stating what happened to each. He also provided a listing of the projects the company was involved in and the project outcomes along with outline bank account details in summary format from 1 January 2019 until closure of the account in January 2021.

12. The details of the disclosure by Mr Smurthwaite are as follows:

- a. Construction projects – there is a list of 13 projects in the high-end area in and off North Sound, Virgin Gorda. It does not state the time of these projects but they are each for significant values – in the hundreds of thousands some in excess of a million and two million dollars.
- b. Vehicles – the list comprises 16 motor vehicles, 2 boats and 6 containers. Mr Smurthwaite has not given any explanation as to why a small struggling company should own such a large fleet of motor vehicles and vessels. His note on the status of these items includes the purchase price of each vehicle and what has become of it but does not include the date of disposal.
 - i. Nissan People Carrier valued at \$4,500 was broken down with no funds to repair it yet it was abandoned and not sold
 - ii. One Mitsubishi L200, one Suzuki Grand Vitara, two Nissan Marches, one Great Wall Pickup, one Toyota Tundra purchased for a total of \$46,400 were offset against claims by creditors including staff housing. It is not clear who received the benefit of these vehicles or what were the amounts of the debt or consideration that was set off.
 - iii. One Dodge Pickup, one F150 Double Cab, one Toyota Rav 4 purchased for a total of \$19,000 were taken to Tortola by the other director. Their status is unknown.
 - iv. Two Great Wall Pickups, F450 Truck and two office containers for a total purchase price of \$50,000 were repossessed by Oil Nut Bay.
 - v. One F250 Pickup was sold damaged for \$2,000.
 - vi. One Great Wall Pickup purchased for \$11,000 but its status is unknown.
 - vii. One Jeep Liberty purchased for \$11,000 was sold to pay workers' airfares. Neither the price received nor the names of the workers nor why their airfare was paid by the Respondent is stated.
- c. Boats – Of the two boats, one was purchased for \$8,000 and offset against bills. The other purchased for \$35,000 but was sold for \$12,500 and offset against bills.
- d. Containers – two containers purchased for a total of \$5,000 were repossessed by Oil Nut Bay and four purchased for a total of \$5,000 were abandoned in Virgin Gorda and their status is unknown.
- e. Properties (real estate) – the Respondent did not own any properties.

f. Bank account – There was an “average” opening balance of \$111,013.50 for January to June 2019 and a closing balance of \$30 in January 2021. Mr Smurthwaite did not give the bank name or account number and does not exhibit copies of the bank statements.

13. None of the above information provided by Mr Smurthwaite is sufficiently detailed or supported by documents. It is entirely in his vague words.

Consequences of the insolvency of the Respondent

14. With the vagueness of Mr Smurthwaite’s affidavits and the scarcity of detail and the lack of supporting documents, it is difficult to be certain of the financial state of the Respondent. It is more probable than not that the Respondent is insolvent. It is clear, however, that it has ceased to carry on business in the BVI. It is also clear that in the face of pending insolvency, Mr Smurthwaite and (and possibly the other director too) made a number of decisions which may have preferred some creditors to the prejudice of others.

15. First, the transfers of property to creditors including Oil Nut Bay did not take place within 6 months of the “onset of insolvency” of the Respondent (see section 244 of the Insolvency Act 2003) but it must have been clear to Mr Smurthwaite that the Respondent was in serious financial trouble in 2019 when it experienced “significant cashflow difficulties” although he had hoped he could trade out of the difficulties. With the onset of Covid-19, its trading position became “unviable” – see paragraph 3 of his affidavit filed on 12 November 2021.

16. There is no evidence of what value Oil Nut Bay contributed for the vehicles it received. The vehicles may have been transferred for far less than their market value. The general rule is that the property of an insolvent company must be preserved for distribution to the creditors on a *pari passu* basis. Under section 246 of the Insolvency Act, a transfer at an undervalue may be set aside if at the time of the transfer the company is insolvent or the transfer causes the company to become insolvent within 6 months of the filing of an application for the appointment of a liquidator.

17. The transfers are potentially at an undervalue. They were not, however, within 6 months of the onset of insolvency and therefore cannot be set aside under section 246 of the Insolvency Act. Another relevant provision is section 81 of the Conveyancing and Law of Property Act Cap 220. This section provides that conveyances of property with intent to defraud creditors shall be voidable at the instance of the person prejudiced. It would appear that the predominant purpose of the transfers of the vehicles to Oil Nut Bay was for settlement or reduction of debt although Mr Smurthwaite has not given any evidence of the size of the debt written off or the extent of the reduction.

Terms of the Final Award and the position of the DMV

18. As stated at paragraph 9 above the DMV refused to comply with paragraphs 11(e)-(g) of the Final Award. It refused to do the following:

- a. under paragraph 11(e), to furnish to the Secretary to the Tribunal information in relation to the registration, history of ownership, insurance of the Vehicles that were formerly registered in the name of the Respondent and transferred to Oil Nut Bay,
 - b. under paragraph 11(f), to unwind the transfers, and
 - c. under paragraph 11(g), to cause a lien to be entered on the register of each of the Vehicles,
19. Neither the Code nor the Rules expressly confer power on the Tribunal to require a third party such as the DMV to provide information to aid enforcement. The power to summon the DMV is not necessarily an enforcement power. It is consistent with the general power to summon witness contemplated by section 32 of the Code and 35(1) of the Rules, a power that may be exercised post-trial.
20. The Tribunal has reviewed the Road Traffic Act revised edition 2013 (**the RTA**) and the Road Traffic (Motor Vehicle Registration and Operation, and Driver and Vehicle Licensing) Regulations 2009 (**the Regulations**).
21. The term “Licensing Officer” is defined in section 2 of the RTA. Under section 4 the responsible Minister is given power to issue, inter alia, licences and certificates of registration in respect of motor vehicles and to keep a register of motor vehicles. Under section 3 the Minister may delegate that power. Under section 54 the contents of the register of motor vehicles shall be admissible as prima facie evidence of the facts contained therein in all proceedings under the RTA.
22. Under section 7(1) of the Regulations the owner of motor vehicle imported into the BVI must register it with the Licensing Officer by filling out the details in the vehicle registration form (see Form 1 of Schedule 1) and under section 7(5) of the Regulations the Licensing Officer is required by to enter particulars of a motor vehicle into the register of motor vehicles. Under section 20(1) of the Regulations, the registered owner and the new owner shall jointly complete and submit a joint transfer application to the Licensing Officer giving the name and address of the new owner and the date of change of possession of the vehicle (see Form 2 of Schedule 1). Upon receipt of the transfer application the Licensing Officer will make an entry in the register of vehicles substituting the name of the new owner for that of the former registered owner. Further under section 21 of the Regulations, a motor vehicle shall be licensed and the licence renewed annually. The applicant for a licence shall fill out and submit the licensing form (see Form 3 of Schedule 1). Under section 23 of the Regulations, the Licensing Officer shall on licensing a vehicle, enter in the register of motor vehicles the number and date of the vehicle licence and, under section 26, shall amend the register of motor vehicles and the licence when ownership of the vehicle is being transferred.
23. The Tribunal has considered the DMV’s memo dated 21 October 2022 but does not see a valid reason for the non-compliance with paragraph 11(e). There is no indication that the register of motor vehicles maintained by the Licensing Officer (now the DMV) is private or confidential or otherwise protected from disclosure. Indeed, in the trial of many offences under the RTA, the DMV is required to produce into evidence and disclose the entries of its

registers into evidence. We see no reason why the DMV could not be summoned to produce such evidence in this case, namely:

- a. what vehicles were transferred by the Respondent to Oil Nut Bay,
- b. the make, model and year of manufacture of each vehicle, and
- c. the price or consideration assigned to each transfer.

24. In the circumstances the DMV will be summoned to show cause why it should not produce this information.

25. In respect of transfers of the Vehicles, the case has been made out that these transfers may be in breach of section 81 of the Conveyancing and Law of Property Act. The Tribunal will therefore direct that the enforcement application be served on Oil Nut Bay or its associates requiring it to appear and be heard at the adjourned hearing of the application.

Order

26. The Tribunal makes the following orders:

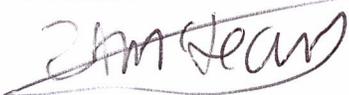
- a. that the DMV be summoned to show cause for its refusal to comply with paragraph 11(e) of the Final Award,
- b. that the enforcement application and a copy of this order be served on Oil Nut Bay or its associates or the responsible individual or entity referred to in its trade licence requiring Oil Nut Bay or its associate or representative to appear at the next hearing,
- c. further hearing be adjourned to **Thursday 28 September 2023 at 10.00am**, and
- d. the hearing shall take place via video conference in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020 (S.I. No. 99 of 2020).

By Order
Labour Arbitration Tribunal

SEP 08 2023

Samuel Jack Husbands
Chairperson


Professor Arthur Richardson
Arbitrator


Zebulon McLean
Arbitrator