



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

KAREN VANTERPOOL

COMPLAINANT

AND

BVI RECREATION TRUST

RESPONDENT

BEFORE:

Jamal S. Smith, Chairperson

Kamika A. Forbes, Member on the recommendation of the Complainant

Zebalon A. McLean, Member on the recommendation of the Respondent

IN ATTENDANCE:

- (1) Karen Vanterpool, Complainant
- (2) Stacy Abel holding for Marie Lou Creque, legal practitioner for the Complainant instructed by Creque Global Group
- (3) BVI Recreation Trust represented by Eustace Freeman
- (4) Nicosie R. Dummett, Principal Crown Counsel for the Respondent on behalf of the Attorney General
- (5) Shonice Warner, Crown Counsel for the Respondent on behalf of the Attorney General

ADDITIONALLY:

- (6) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

FINAL AWARD

12 May 2022; 30 June 2022; 28 July 2022

1. This is a case arising out of a complaint filed with the Labour Commissioner on 04 October 2021 (the “**Complaint**”)¹ by Karen Vanterpool (the “**Complainant**”) against the BVI Recreation Trust (the “**Respondent**”) which is a statutory body created by the Recreation

¹ This was not included in the Trial Bundle, but reference to it was made in the First CMO.

Trust Ordinance.²

2. The Complainant's case is that she originally applied for the position of Executive Director, but although she was not successful she was offered the position of Administrative Manager which was a position specifically created for her as it was not on the Respondent's Organizational Chart. She commenced employment on 01 July 2021 the same day that Eustace Freeman was hired as Executive Director, who was at the time of her interview for the Administrative Manager job was the Programme Officer of the Department of Youth Affairs and Sports. There was a meeting on 06 August 2021 between the Chairperson, Mr. Freeman and herself where concerns were raised about her performance. She claimed that the Chairperson promised to give her QuickBooks training but never returned. She claims that nowhere on the Job Description did she see payroll being part of her duties. She got QuickBooks training from a YouTube video by Mr. Freeman and pursued other QuickBooks training as well. She maintained that the reason she didn't get more done was the lack of training. She received a performance evaluation on 14 September 2021 and she scored very low. She admitted that there were things in her contract that she was unable to tackle because of the Respondent's inability to provide the necessary things. She claims there was breach of contract from the beginning and so she is entitled to compensatory damages. She also admitted that the termination took place during her probation period, but she was not given adequate training or given monthly progress reports.
3. In this award, reference will be made to an Agreed Trial Bundle filed by the Respondent on 04 April 2022 (the "**Trial Bundle**").
4. By a Memorandum dated 19 November 2021 the Labour Commissioner referred the Complaint to the Minister pursuant to section 26(3) of the Labour Code, 2010 (the "**Code**").³ The Tribunal must take note of the fact that this is the first case before the Tribunal where the Labour Commissioner complied with section 26(3) of the Code.
5. On 16 December 2021 the Minister referred the Complaint to the Tribunal pursuant to section 28(1) of the Code after the parties having failed to reach an agreement.⁴
6. On 07 January 2022 the Secretary to the Tribunal issued the Notice of Case Management Hearing fixing the date for the case management hearing on 22 February 2022 and outlining the deadlines for filing pleadings and evidence in accordance with the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (the "**LPR**").⁵
7. On 14 February 2022 the Respondent filed a Response to the Complaint,⁶ which was filed outside the deadline set by the Notice of Case Management Hearing, which caused the Complainant to file a Reply on 21 February 2022, the day before the case management hearing.

² Cap. 278, as amended by the Recreation Trust (Amendment) Act, 2012 (No. 4 of 2012), found at TAB 1 of the Trial Bundle.

³ No. 4 of 2010.

⁴ TAB 3 of the Trial Bundle.

⁵ S.I. No. 98 of 2020.

⁶ TAB 6 of the Trial Bundle.

8. The Respondent's Response was accompanied by the First Affidavit of Eustace Freeman on 14 February 2022 along with a Certificate of Exhibits "**EF-1**"⁷ which included:
- (a) Application and Resume of the Complainant for the position of Executive Director dated 05 April 2021 (the "**First Application for Employment**");
 - (b) Letter to the Complainant from the Respondent referenced "Job Offer Administrative Manager" dated 03 June 2021 (the "**Offer for Employment**");
 - (c) Orientation Workshop Schedule for 01 to 02 July 2021 (the "**Orientation Workshop Schedule**");
 - (d) Letter to the Complainant from the Respondent referenced "Performance Evaluation" dated 06 September 2021 (the "**Performance Evaluation Letter**"); and
 - (e) Response letter from the Complainant to the Respondent referenced "Performance Evaluation" dated 08 September 2021 (the "**Performance Evaluation Response**").
9. The Respondent's case, as far as it differs from the Complainant's case, is that during the Complainant's interview for the Administrative Manager job she was asked about her proficiency and experience with financial accounting systems including QuickBooks and with preparing financial reports. The Complainant indicated that she was experienced with financial accounting and proficient with QuickBooks accounting software and also that she was adept at producing financial reports. In fact, if the Complainant had indicated that she did not have the required proficiency she would not have been offered the position. She commenced work on 2 July 2021 and attended a two-day orientation workshop. Within the first month of employment it became obvious that the Complainant had no experience in preparing financial reports neither was she proficient with financial account systems in general or with QuickBooks in particular. She was unable to properly reconcile bank accounts on a monthly basis even when asked to use an accounting software other than QuickBooks. It would take her up to four (4) days to process payroll for a staff of merely fifteen (15) people, which should take no more than a day. As a result of the meeting with the Complainant in August, training with the Visual Payroll Administrator was conducted that month and other training was organized for one hour a week. During a meeting with the Chairperson, the Complainant and the Executive Director, the Chairperson expressed disappointment with the Complainant's lack of basic understanding of the QuickBooks software. The Respondent employed a certified accountant to provide additional training to the Complainant.
10. On 22 February 2022 the Chairperson of the Tribunal issued a Case Management Order (the "**First CMO**") where neither party had any legal practitioner present, although the Respondent's Executive Director indicated that the Attorney General would be representing the Respondent and the Complainant indicated that she would consider obtaining legal representation. The Tribunal ordered costs against the Respondent for the late filing of the

⁷ TAB 7 of the Trial Bundle.

Response and deemed its Response to be duly filed. In accordance with LPR 24(2), the Complainant was given an opportunity to file another Reply since the late filed Reply did not comply with LPR 23. In addition to giving case management directions the Chairperson also required the parties to file skeleton arguments and a bundle of authorities that address:

- (a) Was the termination within the four months probationary period which is permitted by section 46(1) of the Labour Code, 2010?
 - (b) During the probationary period was the Complainant given reasonable training and general orientation in the duties and responsibilities of the position for which she was hired?
 - (c) Was the Complainant informed on a monthly basis of her progress?
 - (d) Was the Complainant informed in writing, within fourteen days of the expiry of the probationary period, whether she satisfactorily completed the probationary period?
 - (e) Did the Respondent at any time during the probationary period inform the Complainant that she had satisfactorily completed the probationary period?
 - (f) Was the Complainant terminated for a valid and fair reason with at least twenty-four hours' notice to comply with section 88(1) of the Labour Code, 2010?
 - (g) If any of the above questions (a) – (d) is answered in the negative, or question (e) above is answered in the affirmative, what are the consequences of the illegality?
 - (h) If question (f) if answered in the negative, what are the consequences of the unfair dismissal?
11. In accordance with the First CMO the Complainant filed a Reply on 02 March 2022⁸ along with a list of documents with the documents exhibited, but that list and documents were superseded by later documents. However, the Reply's first page had paragraphs numbered 1, 2 and 3 and the second page had paragraphs numbered 9, 10, 11, 12 and 13, so that the Reply was missing paragraphs 4 – 8, which suggests that at least an entire page of the Reply was missing. Neither party drew this fact to the attention of the Tribunal, either when it was originally filed or when it was included in the Trial Bundle.
12. The pre-trial hearing was held on 29 March 2022 before the full panel of the Tribunal which issued a Case Management Order (the "**Second CMO**").⁹
13. In accordance with the Second CMO the Complainant filed an Affidavit on 30 March 2022 which was supported by a Certificate of Exhibit with the following exhibits:
- (1) Certificates and Diplomas (7 pages) ("**KV-1**");

⁸ TAB 10 of the Trial Bundle.

⁹ TAB 13 of the Trial Bundle.

- (2) Testimonials and References (7 pages) (“**KV-2**”);
 - (3) Receipt No. 738001 dated 26 September 2021 from Amazon for QuickBooks along with cover page of QuickBooks textbook, QuickBooks video training and QuickBooksPro 2019 reference guide (“**KV-3**”);
 - (4) BVI Recreation Trust – Job Description (Administrative Manager) (“**KV-4**”);
 - (5) Complainant’s Letter to Respondent dated 05 November 2020 (“**KV-5**”);
 - (6) Respondent’s Organizational Chart (“**KV-6**”);
 - (7) Two letters from Complainant to Labour Department dated 4 October 2021 and 14 October 2021 (“**KV-7**”);
 - (8) Work samples (41 pages) (“**KV-8**”);
 - (9) Various Job Description samples (8 pages) (“**KV-9**”); and
 - (10) Undated Respondent’s Termination letter to Complainant effective 1 October 2021 with photo (“**KV-10**”).
14. The trial was to take place on 28 April 2022 in accordance with the First CMO but was adjourned to 12 May 2022.
 15. The trial of this dispute took place over the course of two (2) days on 12 May 2022 and 30 June 2022 during which the full panel of the Tribunal heard the oral evidence and closing arguments from both parties. The entire trial took place via the WebEx video conferencing platform in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020¹⁰ and in accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.
 16. There were only two (2) witnesses, the Complainant, and the Executive Director of the Respondent. Having had the opportunity to review the pleadings, written evidence and to observe both their demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of their accounts, the consistency between their written and oral evidence under oath, as well as the internal consistency of their written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds both witnesses to have been credible witnesses and must now decide the specific issues identified in the First CMO.
 17. There is no dispute between the parties that the termination of the Complainant was during her probationary period. Therefore, both parties concede that the termination was within the four months probationary period which is permitted by section 46(1) of the Code.

¹⁰ S.I. No. 99 of 2020.

18. The Complainant disputes that the training provided was “adequate”. However, the Code only requires that the training be “reasonable”. Having considered all the evidence where not only the Respondent provided an orientation in which her duties and responsibilities were outlined, the Respondent went above and beyond with the amount of training provided to the Complainant for a function that was part of her Job Description. The training that an employer is required to provide during the probationary period is only with tasks specific to the job and peculiar to the employer, so that the employee understands how the specific duties and responsibilities are to be carried out to the employer’s satisfaction and against which training the employer can assess the employee. The Tribunal finds that the Respondent adequately discharged this burden.
19. In light of the fact that the Complainant commenced work in July 2021, the Complainant had a meeting in August 2021 with the Chairperson and the Executive Director where they addressed her performance issues and in September 2021 there was a Performance Evaluation Letter to which she responded with the Performance Evaluation Response. As she was terminated in October 2021, the Tribunal finds that the Complainant was informed on a monthly basis of her progress as required by section 46 of the Code.
20. It was not disputed by the Complainant that she was never told that she satisfactorily completed the probation period, and she was told within fourteen (14) days of the expiry of the probationary period that she did not satisfactorily complete the probationary period since the probationary period would have expired in November 2021 and she was terminated in October 2021.
21. The reason for the termination was performance related. The Offer for Employment which was signed by the Complainant clearly referred to a Job Description, and on the second page of the Job Description, the fifth and sixth bullet points of the responsibilities for the Administrative Manager read:
- “- Providing financial reports and interpreting financial information to managerial staff while recommending further courses of action.
 - Maintain the financial health of the organization.”
22. The Complainant admitted that she did not produce the financial reports. In the Performance Evaluation Letter it refers to the performance issues as follows:
- “I refer to your July evaluation conducted in August concerning your accounting knowledge which was questioned based on your performance and understanding on the basic accounting practices.”
23. According to the Termination Letter exhibited as KV-10 it provides:
- “It is with regret that we inform you that your employment with the Recreation Trust has been terminated effective 1st OCT 2021. We have come to the conclusion for termination due to the lack of efficient performance in relation to your Job

Description. . . The failure to produce financial reports needed was the driving force behind this decision.”

24. Considering this, the Tribunal concludes that the termination was for a valid reason. However, the Complainant disputes that she was given twenty-four hours’ notice in accordance with section 88(1) of the Code merely because the letter was undated. The Tribunal does not accept this, by itself, would be sufficient evidence to support an adverse finding that the termination was not made with at least twenty-four hours’ notice, especially because the letter itself quotes directly from section 88(1) of the Code. In the Tribunal’s view it must have been operating on the mind of the Respondent that twenty-four hours’ notice was required. For that reason, the Tribunal finds that the termination complied with section 88(1) of the Code.
25. In order for it to be fair the Respondent must have given the Complainant a reasonable opportunity to be heard. The Tribunal accepts that the meeting in August 2021 made clear the Respondent’s unhappiness with her performance, and if that were not enough, the Performance Evaluation Letter not only made the position clearer but indicated that if improvements were not made she would be terminated. The Complainant responded in the Performance Evaluation Response, so that she clearly had an opportunity to respond, at least on two (2) occasions. Therefore, the Tribunal finds that the termination was not only valid but also fair.
26. In light of this the Complainant’s claim of unfair dismissal is dismissed and there is no exceptional reason to order costs in favour of the Respondent.

The Final Award

27. The final award of the Tribunal is as follows:
 - (a) The Complainant was validly and fairly dismissed by the Respondent.
 - (b) No order as to costs.

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, 26 August 2022.**

By Order
Labour Arbitration Tribunal

Location:
Ashley Ritter Building
Road Town, Tortola VG1110
British Virgin Islands


Jamal S. Smith, LLB(Hons.), FCI Arb.
Chairperson

Kamika A. Forbes, LL.B.(Hons.)
Member on the recommendation of the
Complainant

Zebalon A. McLean
Member on the recommendation of the
Respondent

