



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/016

BETWEEN

URBANA M. MORILLO CASTILLO

COMPLAINANT

AND

PEGGY STOUTT

RESPONDENT

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands** Chairperson, **Zebalon McLean**, and **Sheila Brathwaite**, Arbitrators

TRIAL ON: The 19th day of April 2024

DECISION ON: The 24th day of May 2024

IN ATTENDANCE: (1) Urbana M. Morillo Castillo, the Complainant
(2) Nelson Samuel of NR Samuel & Co, lawyers for the Complainant
(3) Peggy Stoutt, the Respondent

ADDITIONALLY: (4) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

1. The Complainant was employed by the Stoutt family from about 2000 to 2020. Her duty was the care of Penelope Stoutt who required round-the-clock care. By a letter from the Respondent dated 1 May 2020, the Complainant was informed she would be laid off for 3 months on one-quarter salary and would return to work on 1 August 2020. By a letter dated 30 July 2020 the Complainant was further informed that due to financial instability caused by the Covid-19 pandemic she was being placed on an additional 3-months off to 31 October 2020 but without pay. Her salary was \$1,500 per month. The Complainant was not

re-engaged on or before 31 October 2020. See section 107(2)(b) of the Labour Code 2010 (the Code).

2. The Complainant filed a Dispute Claim Form with the Labour Commissioner in April 2021. She seeks compensation. She calculates she is owed \$9,549.60 for severance pay. She sets out how she calculates this sum in the attachment to her Dispute Claim Form.
3. In her Reply and affidavits, the Respondent stated that Penelope was her sister and that another sister, Persia, employed the Complainant from 2000 until Persia's death in June 2011, then a brother Preston employed the Complainant from Persia's death to 31 December 2011, and the Respondent assumed the role of employer from 1 January 2012 until the termination of the Complainant's employment in 2020.
4. The Respondent admits that she is liable for severance pay but only for the period 1 January 2012 down to the termination date in the amount of \$3,576.33. It is not clear if the termination date is March 2020 or October 2020. The Respondent was willing to cover the period of 6 June 2011 to 31 December 2011 during which her brother Preston was employer.

Procedural history

5. The Dispute Claim Form was filed in April 2021. Due to administrative matters the Tribunal ceased to be properly constituted until May 2023 after which it was able to resume sitting. At a case management hearing held on 25 January 2024, the matter was set for trial on 19 April 2024. Directions were also given at the case management hearing for the disclosure of documents, the exchange of witness statements and the filing of a trial bundle.
6. On 19 April 2024, the morning of the trial, the Complainant filed an application seeking the following relief:
 - a. that the case management order dated 25 January 2024 be varied as follows:
 - i. the date of disclosure of documents be changed to 19 April (the date on which they were filed), being the date of the trial,
 - ii. the date for the filing of witness statements be changed to 19 April,
 - iii. the date for the filing of the trial bundle be changed to 19 April, and
 - iv. a new date be set for the trial, and
 - b. that Preston be added as a respondent.
7. The grounds of the application were that:
 - a. that Preston was also an employer and it was necessary to add him as a respondent and the omission to add him was an oversight,
 - b. the delay in complying with the case management order of 25 January was a result of a breakdown of communication between the Complainant and her lawyer, and
 - c. there were difficulties in locating documents.
8. The application was supported by an affidavit of the Complainant sworn on 17 April. The affidavit also doubled as new evidence. The application was considered at the start of the

trial. The Respondent, being anxious not to delay the trial, did not object to the orders sought except the adjournment of the trial. Having quickly read the papers and having heard Mr Samuel and the Respondent, the Tribunal granted the extensions for disclosure, for filing witness statements and for filing the trial bundle. We refused to adjourn the trial and to add Preston as a respondent. Preston would only have been a necessary party in respect of the period of 6 months between the death of Persia in June 2011 and the period when the Respondent gave as the commencement of employment by her on 1 January 2012. The Respondent stated she was willing to consider accepting liability for that period.

Analysis of the evidence

9. There was no documentary evidence to establish the date of commencement of employment. The period of 12 years from 2000 when the Complainant said it commenced to the Respondent's version of commencement date is a very long time. It would be expected that there would be some written memoranda or tax or Social Security filing supporting commencement before 2012. The vagueness may have been as a result of the Complainant being employed by the family without it being clear which family members were the employers.
10. The new evidence introduced at trial included a complaint dated 27 April 2015 made to the Labour Commissioner by the Complainant against Preston and the Respondent and a Consent Order dated 31 May 2019 partly settling the complaint. The complaint was a claim for arrears of vacation pay and Social Security contributions over the period of 15 years commencing in 2000. The Consent Order required Preston and the Respondent to pay unpaid salary for the period 2012 to 2016.
11. The case of the Complainant is that the Respondent and Preston, having consented to the order, must have been the employers of the Complainant from 2000. Mr Samuel, counsel for the Complainant, referred to the recital in the Consent Order which states:

“AND UPON the respondents [Preston and the Respondent] acknowledging that the complainant's claim, save for those aspects relating to vacation pay, is not being disputed and indicating that it is always their intention to settle the amount so acknowledged, to the complainant.”
12. He argues that this recital is an admission by the Respondent that she was employer from 2000. The Respondent accepts that as a possible interpretation of the recital but she insists she was employer from 2012 only and that is why the Consent Order only requires her to pay from arrears of salary from 2012.
13. We are not able to find as a fact that the Respondent's tenure as employer went back before 2012. The Consent Order is not conclusive of the point. It does not point clearly to employment before 2012 neither does it constitute an admission or record of employment for that period. Despite the recital the Consent Order only imposes liability from 2012 on the Respondent from 2012 to at least 2016. We do not consider that the Complainant has satisfied us on a balance of probabilities that she was employed by the Respondent for the earlier period.

14. The Complainant did state at paragraph 2 of her Reply filed on 1 December 2023 and in her oral evidence that Persia had informed her in 2000 that she would be working for the Respondent. There is no support for this statement in the evidence and as we have held, the recital in the Consent Order we have quoted, is not adequate support.

Compensation

15. Section 104 of the Code provides that an employee whose period of continuous employment is at least 12 months is entitled to a “severance pay” upon termination of the employment on any of the grounds specified in section 89(2)(a), (b) or (c) or in section 93 or 94. The relevant provision in this case is section 89(2)(c), that is to say termination where the employee is redundant because it had become impracticable or impossible to carry on business at the usual rate due to force majeure or an act of God or because a reduced operation of the employer’s business has become necessary by economic conditions – see paragraphs (e) and (f) of the definition of redundancy in section 89. The conditions are spelt out in the Respondent’s letters to the Complainant of 1 May 2020 and 30 July 2020. We are satisfied the Complainant was terminated under section 89(2)(c), i.e. by reason of redundancy and is entitled to a severance pay under section 104.
16. Under section 107(2)(c), because the Respondent in her letter dated 30 July 2020 failed to state a date for re-employment, and three months elapsed without the Complainant being re-employed, severance pay became due on the expiration of three months, i.e. on 30 October 2020 with interest at 10 per cent per annum on the amount of the severance pay due for the period between 30 October and the date of actual payment. By the Labour Code (Amendment) Act 2020, the following new subsection inserted in section 107:

“(4) Notwithstanding subsection (2)(c), where an employee is temporarily laid off on or between 14 March 2020 to 31 March 2020 severance pay shall be payable immediately after 31 October 2020, except where Cabinet having regard [to] all the circumstances has determined that the period for the payment of severance be extended by Order published in the Gazette.”
17. This amendment came into force on 5 June 2020. Orders were published in the Gazette extending the period for payment. By the Labour Code (Extension of Severance Pay Period) Order 2021 (SI No. 11 of 2021) the period for payment was extended to 28 February 2021.
18. By section 105(1) of the Code The rate of severance pay is calculated at the rate three-quarters of one day’s pay for each month of her employment (being 106 months in this case) or 9 days’ pay per year (being 8 10/12 years. It is accepted by both parties that the daily rate is \$69.20 and that three-quarters of the rate is \$51.90.
19. The Respondent has admitted liability for the period of employment from 1 January 2012 to termination on 31 October 2020. She calculates the amount due to be \$3,576.33. She arrives at this figure by applying 74.9 days at \$51.90 per day for a total of \$3,887.31 from which she deducts 8% or \$310.98.

20. By our own calculations the total is \$5,501.40 (\$69.20 x 9 days x 8 10/12 years, or \$51.90 x 106 months). A rough estimate of statutory deductions is 8%. We will apply this rate. The net severance pay is \$5,061.29.
21. We have also considered the requirement for notice of dismissal or payment in lieu of notice under sections 81(1), 89(1) and 90 except in the case of summary dismissal under section 101. The Complainant, being an employee whose length of service exceeded 7 years but did not exceed 15 years, is entitled to one month's notice. We would therefore add an extra one month's pay in the amount of \$1,500.00 to the compensation.

Summary of order

22. The following orders are made:
- the Respondent shall pay the Complainant severance pay \$5,061.29,
 - the Respondent shall pay the Complainant one month's pay in lieu of notice in the sum of \$1,380.00, and
 - the above payments shall carry interest at the rate of 10 per cent per annum from 1 March 2021 until the date of this award.
23. There shall be no order as to costs.

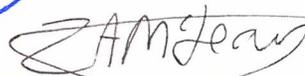
By Order
Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



Sheila Brathwaite
Arbitrator



Zebalon McLean
Arbitrator