



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/020

BETWEEN

NATASHA DORSET

COMPLAINANT

AND

KID'S CONNECTION / PELICAN GATE

RESPONDENT

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands** Chairperson, **Kisha Frett**, and **Kamika Forbes**, Arbitrators

TRIAL ON: The 17th day of May and the 5th day of July 2024

DECISION ON: The 31st day of July 2024

IN ATTENDANCE: (1) Natasha Dorset, the Complainant
(2) Lois Freeman-Augustine, the Respondent

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

Summary

1. The Complainant filed a Dispute Claim Form with the Labour Commissioner on 10 November 2021. She complained that she was not paid vacation pay for three and a half years. She also attached a letter to the Dispute Claim Form containing particulars of a claim for unfair dismissal on 22 September 2021 (erroneously stated as 22 August in the dismissal letter).

2. The Tribunal was not properly constituted from July 2022 until the appointment of a new chairperson in May 2023. Upon reconstitution of the Tribunal the Minister referred the complaint to it on 19 September 2023 pursuant to section 28(1) of the Labour Code 2010 (**the Code**). The Tribunal made case management orders on 17 November 2023, 25 January 2024 and 23 February 2024 and the claim was set for trial on 17 May 2024.

The facts

3. The Respondent owns and operates two schools in Tortola. Kids Connection Daycare and Preschool (**Kids Connection**) is situated at Johnson Ghut and Pelican Gates Primary School (**Pelican Gates**) is situated at West End. The Complainant was employed by the Respondent as a teacher at Kids Connection. Due to a fall in enrolment Connection and the restriction of movement of individuals during the period of the Covid-19 shutdown and curfews from March to October 2020, Kids Connection was on a reduced level of operation. Staff were placed on half pay. On the full reopening of Kids Connection in October 2020 the Complainant was not retained. She was not paid for October. She was transferred to Pelican Gate, but as a cleaner, from about 16 November 2020. She remained there until 22 September 2021 when she was summarily dismissed. She was not happy about her transfer but she accepted it in order to remain employed. Her original contract description in her work permit was “childcare worker”. It is accepted that no amendment was sought to the work permit to recognise the Complainant’s new position as cleaner.
4. Regarding July and August 2021, the Respondent admits she did not pay the Complainant for these months but states it was because the Complainant had not worked. She states at paragraph 13 of her affidavit that prior to the closure of school on 30 June 2021 she and the Complainant discussed arrangements for work during the long vacation. She did not provide any details of those arrangements. She did not hear from the Complainant until she received a WhatsApp message from her on 26 August – see paras 9-11 of her affidavit at pages 9 & 10 of the trial bundle. The Respondent’s position is that the Complainant had not shown up for work and was not entitled to salary. The end of August was nearly two months after school had closed in June. The Respondent felt that it would have been expected that any person interested in their job would have made contact with her workplace to find out about the schedule. In her oral evidence she said she informed the Complainant that though school would be closed she would have to come to work to ensure the school was kept clean and tidy and she left it to the Complainant to determine in her discretion the days she would come in. The Respondent described it as an in-depth discussion.
5. The Complainant said there was no such discussion. In paragraph 2iii of her affidavit, at page 14 of the bundle, she stated she made several attempts to contact the Respondent during the holidays but her calls and text messages were not returned. There is evidence of a missed call from the Complainant and an unanswered text message on 26 August and a further missed call on 27 August at page 22 of the bundle. There is no evidence of communication between the parties between the end of term on 30 June and 26 August. The Complainant stated in her first WhatsApp message on 26 August that she needed clarification about the two months she was at home. In her oral evidence she said she was not scheduled to work. She was not given a schedule and so she did not show up.

Arrears of salary

6. It is expected that the matter of work and salary during the vacation would be agreed upon by the parties the commencement of the vacation. It is unfortunately that the arrangements were not documented. Normally teachers are paid during the school vacations. Even if teachers are not required to attend school one might expect the cleaner to come to work in the vacation. And it might be further expected that even if the Complainant did not show up the employer would call her in for an explanation and document it.
7. We find that there was an onus on the Respondent to provide the Complainant with a work schedule and to inform her of her arrangements. We are not satisfied, in the absence of a written work schedule or even a documented oral agreement, that it was made known to the Complainant what her duties and times of work were during the vacation. We conclude therefore that the Respondent is liable for salary for July and August 2021.
8. Salary for October 2020 is another matter. The Complainant was effectively laid off and accepted the lay off until her reassignment to Pelican Gates in November. Having accepted these arrangements, she cannot now seek to go back on the terms of her lay off and reassignment. We find that the Complainant is not owed salary for October 2020.
9. We would allow the Complainant salary for July and August 2021.

Arrears of vacation pay

10. The Complainant was under the impression that she was entitled during the school vacation to an extra two weeks' vacation pay in addition to her salary. Of course, what she is entitled to is her full salary and also a certain number of vacation days when she is not required to come to work but for which she must still be paid. She admitted that she was paid in full for all the months she worked or was required to work except July and August 2021. Her vacation days were not less than the statutory minimum of 12 days per annum and there is no evidence that she received less than the full number of days every year. Accordingly, we do not make an award for short-payment of vacation pay or unpaid vacation days.

Unfair dismissal

11. After the trial on 17 May 2024, we asked the parties for their views on whether a claim for unfair dismissal was properly before the Tribunal. Fairness of the dismissal arose in the evidence. Mrs Freeman-Augustine submitted she had not conducted her case on the basis that unfair dismissal was a claim being made because it had not been raised or referred to in the Dispute Claim Form or in the Complainant's letter dated 30 September 2021 attached to the Dispute Claim Form. Mrs Freeman-Augustine referred further to paragraphs 16-18 of the her Affidavit in Opposition at pages 10-11 of the bundle which dealt with a dispute between the Complainant and herself on 22 September 2021. She submitted these paragraphs raised issues of termination but not unfair termination. This may be to split hairs but Mrs Freeman Augustine considered her position is reinforced by the summary at paragraph 6 of the Complainant's own affidavit of the orders she was seeking. In that

paragraph the Complainant stated she was seeking orders for the Respondent to pay her past salary, accrued vacation pay and costs. The Complainant did not see compensation for unfair dismissal.

12. The Complainant, for her part, relied on paragraph 4 of the letter of 30 September 2021 which accompanied the Dispute Claim Form. There the Complainant stated that the Respondent had treated her very unfairly. But the Complainant did not go on to state or infer that the termination itself was unfair. She may have meant that the refusal to pay vacation pay was unfair. The Tribunal noted that the Complainant took issue in the letter of 30 September 2021 with the allegations of misconduct. She stated she was never given any reprimand or warning for displaying hostile behaviour. She gave an explanation for the allegations she had become enraged and that she “looked” to launch a physical attack. She denied she made any attempt to launch a physical attack on Mrs Freeman-Augustine although she did raise her voice at allegations of sabotage of the water system. She further stated it was Mrs Freeman-Augustine who threatened her with physical violence.
13. The Tribunal takes the view that, despite these challenges to the termination letter, the Complainant did not seek compensation for unfair dismissal or amend her case. The Labour Commissioner therefore did not get a chance to deal with unfair dismissal. It is now too late, after the close of the case, to add a claim for compensation. Perhaps the Tribunal could have raised the issue of its own motion and remitted the case back to the Commissioner. But that would be an extraordinary step even if the Tribunal has the authority to remit a case back for reconsideration.
14. For the reasons at paragraphs 11 to 13 above we rule that a claim for compensation for unfair dismissal is not before the Tribunal.

Summary of order

15. The following orders are made:
 - a. the Respondent shall pay the Complainant unpaid salary for July and August 2021, to be agreed by the parties within 21 days but to be set by the Tribunal in default of agreement,
 - b. the arrears of salary shall carry interest at the rate of 3% per annum from 1 August 2021 to 31 July 2024,
 - c. the claims for vacation pay and salary for October 2020 are dismissed, and
 - d. the Respondent shall pay the Complainant costs of \$500.00.

By Order
Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



Kisha Frett
Arbitrator



Kamika Forbes
Arbitrator