



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/032

BETWEEN

FRANCISCO CALDERON

COMPLAINANT

AND

**BARGAIN CENTER & WILD ROSE FURNITURE
STORE**

RESPONDENT

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Professor Arthur Richardson**
and **Yvonne Crabbe**, Arbitrators

TRIAL ON: The 6th day of September 2024

REASONS ON: The 20th day of December 2024

ORDER ON: The 7th day of January 2025 (with correction of typos)

IN ATTENDANCE: (1) Francisco Calderon, the Complainant
(2) Brenda Herbert, supervisor and part-owner of the Respondent
(3) Kurtney Herbert, store manager and part-owner of the Respondent
(4) Harvey Herbert, a part-owner of the Respondent

ADDITIONALLY: (5) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

1. At the third case management hearing on 26 April 2024 orders were made for, inter alia, disclosure of documents, the exchange of witness statements and this matter was set for trial on 6 September 2024. The parties are self-represented. The witness statements were not compiled in the usual form but they present the evidence the parties wished to place before the Tribunal.

2. The Complainant filed a Dispute Claim with the Labour Commissioner on 22 September 2021. The Respondents filed a Response in the form of a letter to the Tribunal dated 26 January 2024. The Complainant filed a Reply on 1 February. The Tribunal suggested to the Respondents that they may wish to amplify the letter/Response to provide a more detailed rebuttal to the Dispute Claim Form and to support the suspension letter and the Complainant ceasing to work for them. An Amended Response was filed on 11 March 2024 and the Complainant an Amended Reply on 19 March 2024.

Summary of the facts

3. The facts and circumstances are as follows:
 - a. The Herbert family, of which the patriarch was Merit Herbert now deceased, own and operate the Bargain Center and Wild Rose Furniture Store. We will refer to Mr Herbert and the present owners by their Christian names for ease of reference. They employed the Complainant since 1986; first as a gardener/farm hand at Merit's farm in the mornings and in the evenings he would help out at the furniture store, and, according to the Complainant's evidence, in 1988 he was employed exclusively at the store.
 - b. By 2017 after Merit's passing, the relationship between the Complainant and the rest of the Herbert children who now own and operate the store, namely Kurtley Herbert, Harvey Herbert and Brenda Herbert-Stewart (the Respondents) had deteriorated.
 - c. The Complainant did not set out in his witness statement the facts relating to his termination or his ceasing to work for the Respondents. He did respond to the Respondent's allegations in his Dispute Claim Form, Reply and Amended Reply and he was allowed to supplement his witness statement by oral evidence at the trial.
 - d. By letter from Kurtney as managing director dated 31 May 2021, the Complainant was suspended for one week to return to work on Wednesday 9 June 2021. The reason for the suspension was "personal misconduct towards Management as well as a paying customer". The letter went on to describe the Complainant's conduct as showing a lack of respect for his supervisor and his continuous absences from work without informing management or co-workers, and his reluctance to assist co-workers with duties. No further details of the Complainant's misconduct were contained in the letter. An attempt was made to hand the letter to the Complainant but he refused to accept it.
 - e. In any event, the Complainant did not contest the suspension. He did not, however, return to work until Monday 14 June. In his oral evidence his explanation for his late return was that he was not feeling well. Neither the notice nor the illness is documented. They have not been expressly admitted by the Respondents. There appeared to be no or very little communication between the Complainant and the Respondents on the day of his return until at about 3.30pm when he was called upstairs to a meeting. He was told presumably by Kurtney that he could return to where he was and the meeting closed. Kurtney's version was that the Complainant refused to enter the room and take a seat and he told him to go back where he was before the meeting. The Complainant then left.
 - f. Nothing further was heard of him until 11 August. He did not come to work and neither did he receive salary. Mrs Herbert, Merit's widow and the mother of the Respondents and the human resources manager of the store, passed away just before 11 August. According to the Complainant, he contacted Brenda on 11 August to express regrets over Mrs Herbert's passing. He attached to his Amended Response a print-out of

WhatsApp text messages between himself and Brenda. In the first message on 10 August 2021, he informed Brenda he would be travelling to St Lucia the next day (to attend a funeral?) and he planned to be back on 10 September. Brenda replied on 11 August stating “Morning. Ok. Travel safe. Hope everything goes ok”. The final message was a text from the Complainant dated 14 September stating he had returned the day before but he was in quarantine for 7 days. There was no further contact between the parties until the Complainant filed a Dispute Claim Form on 22 September 2021. He did not resume work and neither did the Respondents contact him or send him a termination notice.

- g. The Respondents made allegations about the Complainant’s poor work ethic, his unauthorised absences for work, his reluctance to assist. This conduct by the Respondent has not been documented or met with written warnings. The suspension letter dated 31 May 2021 did not comply with section 102 of the Code. It did not sufficiently describe the Complainant’s wrongful conduct or what steps would be taken in the event of a repetition of the behaviour nor did it set out the steps the Complainant could take to rectify the unsatisfactory performance – see sections 102(4) and 103(5) of the Code.

Analysis of the evidence

4. There is no written contract of employment in evidence. The Complainant started working for Merit in 1986 and gradually assumed a role within the Bargain Center. The evidence is not clear about two crucial periods during the Complainant’s recent employment, first, what occurred on his return to work from suspension on 14 June 2021, and second what was his status on 11 August 2021 when he notified Brenda he was going to St Licia.

The suspension and dismissal up to 14 June 2021

5. The Complainant returned to work three days late after his suspension. He gave no adequate excuse. He said he was not feeling well. He produced no medical certificate and provided no specifics of his illness. What occurred later that day is even more unusual. Near the end of the workday the Complainant was called into a meeting with Kurtney. He displayed reluctance to participate in the meeting. Kurtney told him he could return where he was.
6. In his oral evidence, Kurtney stated that the Complainant walked off the job by not reporting back to work at the end of the period of suspension on 9 June 2021. The relationship that was once cordial had deteriorated to the point where Kurtney could not tolerate the Complainant. He admitted that after the Complainant failed to enter the meeting room and take a seat on 14 June he told him to go back to where he was before the meeting.
7. None of this was in writing. No written notice of termination was given. No reference was made to the suspension. The Complainant interpreted Kurtney’s statement as a direction to return home.

Notice of overseas travel on 11 August 2021

8. After being at home from the close of business on 14 June 2021, the Complainant messaged Brenda by WhatsApp on 11 August 2021 to notify her he was travelling to St Lucia the

next day and was planning to be back on 10 September. He had not been back to work since 14 June and had not been paid. It seems he still considered himself employed by the Respondent. He was still expecting a call. Brenda replied on 12 August 2021 and wished him safe travels. The day after his return, on 14 September, he messaged her to say he was back but was in quarantine for seven days. He never received a call back. There was no further correspondence between the parties. The Complainant filed the Dispute Claim Form on 22 September 2021.

9. It seems a reasonable inference from the events of 11 August 2021 that the Complainant considered himself under suspension in the period 14 June to at least 14 September on his return from St Lucia.

The legal position

10. The responsibilities of an employer in suspending employees are set out on section 102 of the Labour Code.

“(1) An employer is entitled to take disciplinary action other than dismissal when it is reasonable to do so under the circumstances.
(2) For purposes of this section, “disciplinary action” includes in order of severity -
(a) a written warning;
(b) suspension from duty for a period not exceeding one week without pay.
(3) In deciding what is reasonable under the circumstances pursuant to subsection (1), the employer shall have regard to the nature of the violation, the terms of the employment contract, the employee’s duties, the pattern and practice of the employer in similar situations, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee.
(4) Where action is taken by an employer in accordance with this section, he or she shall advise the employee concerned in writing of the misconduct or action in breach of the employment contract and of what steps the employer is likely to take in the event of any repetition of the behaviour in respect of which the disciplinary action is taken.
(5) A complaint that any disciplinary action taken against an employee was unfair or unreasonable may be made by the employee to the Commissioner pursuant to section 26.”

11. The procedural safeguards in the section require the employer to advise the employee in writing of the misconduct or breach of contract and what steps the employer is likely to take in the event of a repetition of the behaviour complained of. The warning letter was a “bald” letter. It failed to specify the misconduct or unsatisfactory performance. It was defective in that it did not specify any action that the Respondent would take in the event of a repetition.
12. In order to dismiss an employee who was previously warned the employer must have resort to section 103. Subsection (2) provides that if the employee is guilty of a similar offence

within 6 months of the warning the employer may dismiss him without further notice but is required by subsection (3) to provide the employee with a written statement of the reasons for the action. In that case, sections 101(3) and (4) apply. This means the employer shall be conclusively bound by the statement of reasons for dismissal and if the employer fails to provide a statement he shall not be permitted to introduce testimony as to the facts which might have been included in the statement in any proceeding contesting the fairness of the dismissal.

13. The question may then be asked whether there was conduct of the employee that was so egregious or so demonstrative of the repudiation of the employment contract that the procedural safeguards of a written notice of suspension or a written statement of the reasons for dismissal may be dispensed with. The safeguards provide a record against which the validity, fairness and reasonableness of the dismissal may be tested.
14. Kurtney's instructions to the Complainant were to "return where you came from", what did this mean? It was neither notice in writing nor a statement of reasons. It might be argued that the Complainant's conduct so clearly demonstrated his repudiation of the contract of employment that no words or no written words were necessary. The Complainant did show what might be described as petulance in not entering the office to meet with Kurtney but the refusal by the Respondent to adhere to the safeguards designed for the protection of the employee prevents the Tribunal from assessing the quality of the misconduct and the fairness or reasonableness of the dismissal. We are left with unsatisfactory conduct on the part of the employee and what appears to be a dismissal by the employer but no definite idea of exactly what considerations the employer acted upon. It would be unwise in most instances to allow a departure from compliance with the mandatory requirements of sections 101, 102 and 103 even if departure may be allowed. In the circumstances we find that the Complainant was unfairly dismissed.
15. We are influenced by the fact that the Complainant had up to 2021 been in the employ of the Herbert family for 35 years continuously. There was no serious misconduct in his record. His breaches of contract or unsatisfactory performance had not been documented or resulted in disciplinary action. It is true he returned late from suspension and offered an unsupported excuse for his lateness. Even if the Respondent took the view that he had walked off the job and thereby repudiated the contract of employment, i.e. his conduct amounted to a significant breach of the contract or led to the conclusion he no longer intended to be bound by the essential terms of the contract, we do not know that this was the reason for the dismissal.

Remedies

16. We now turn to the remedies available to the Complainant. Section 86(1) provides as follows:
 - (1) Where the Tribunal determines upon a dispute referred to it under section 27 that the dismissal was unfair or illegal, the Tribunal.
 - (a) may order either that
 - (i) the employee be reinstated;

- (ii) the employee be re-engaged in a position that is substantially equivalent if the post held by the employee is not immediately available; or
- (iii) compensation be paid in lieu of reinstatement or re-engagement,

if this remedy is acceptable to both parties; or

(b) may order the employer to pay the employee such punitive sum as it thinks fit.

17. The Complainant originally sought reinstatement. At the trial he recognised this was no longer an attractive option for him. In any event, it was not acceptable to the Respondent. He is seeking compensation. The Respondent has fought the case on the basis that, if it is found liable, the available remedy is compensation. The Tribunal is therefore not required to consider punitive damages. Even so, the Tribunal would have to be very careful in treating punitive damages as the primary basis for compensating dismissed employees.

Compensation

18. The evidence in support of loss is weak. The Complainant produced his last paycheck on 31 May 2021, the date of his suspension. He was paid \$1,500 monthly in two equal instalments in the middle and at the end of the month. In his oral evidence he said he wanted compensation for unpaid vacation for 35 years and his vacation pay for 2021. The records produced are scanty. There is no evidence of unpaid vacation pay. There is no evidence of steps taken to mitigate loss, i.e. whether the Complainant has sought or has been able to secure employment. Under section 86(2)(e) of the Code, the Tribunal shall in assessing compensation take into account the duty of the employee to mitigate his or her losses. The burden of proof of mitigation, however, is on the employer. The parties are self-represented. The Tribunal could set the matter for further hearing for the assessment of compensation. But this matter is already aged. The Dispute Claim Form was filed with the Labour Commissioner in September 2021. We must do our best to arrive at a fair assessment of compensation.

19. This is not a case to which severance payment under section 104(1) of the Code is applicable. The Complainant is entitled to compensation under section 86(1). Without in any way disparaging the Complainant we have considered that his skill set is limited. He worked at the same job for nearly 35 years. His job prospects may have been very limited when he was dismissed. In these circumstances we would award him one year's wages being \$18,000.

Contributory fault of the employee

20. We are not called upon to address contributory fault of the Complainant and we do not make a finding that reduction of compensation due to the employee's conduct may be made in the BVI where, but for the failure to follow the procedural steps, the employer could have fairly dismissed the employee on the facts available to it – the so-called Polkey deduction (see **Polkey v A.E. Dayton Services Ltd** [1988] AC 344). There is also specific statutory authority in the UK in section 123(6) of the Employment Rights Act 1996 which expressly provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to

that finding. Even if such a rule has been adopted in the BVI we would not hold that the Complainant's conduct was such as to contribute to a reduction in compensation to which he is entitled.

Costs

21. The Complainant had long years of service with the Herbert family. His income was very limited. He has pursued this matter without legal representation. He has to bear the fees of the arbitrator he recommended. That, as far as we are aware is his only expense. In order to make an order for costs we must find there are exceptional reasons for doing do – see section 30(3) of the Code. We do not find such reasons. Accordingly, we make no order for costs.

Summary

22. It is ordered as follows:

- a. the Respondent pay the Complainant the sum of \$18,000 as compensation for unfair dismissal, and
- b. there be no order as to costs.

By Order
Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



Professor Arthur Richardson
Arbitrator



Yvonne Crabbe
Arbitrator