VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/039

BETWEEN

JENNIFER CAINES **COMPLAINANT**

AND

SCRUB ISLAND RESORT, SPA AND MARINA **RESPONDENT**

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, Chairperson, **Dancia Penn OBE, KC**, and **Zebalon McLean**, Arbitrators

HEARD ON: The 30th day of May 2024
MADE ON: The 25th day of March 2025

IN ATTENDANCE: (1) Jennifer Caines, the Complainant
(2) Lena Stoutt-Frett, Director of Human Resources of the Respondent
(3) Sandra Lee Grisham, General Manager of the Respondent

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

1. The Complainant filed a Dispute Claim Form with the Labour Commissioner on 8 August 2022 containing a claim for compensation from the Respondent. The particulars of the claim were filled out in the Complainant's own handwriting. She did not mention the term "unfair dismissal" but it was clear it was a claim for such. The claim was referred to the Tribunal for resolution pursuant to section 28(1) of the Labour Code 2020 **(the Code)** on 20 November 2023.

2. At the case management hearing on 26 January 2024 the Respondent was ordered to file a Response by 9 February 2024 and the Complainant to file a Reply by 23 February. Both

parties complied. At the case management hearing on 14 March the Respondent was permitted to file an Amended Response by 22 March setting out details of the misconduct alleged in the letter of 3 August 2022 and the Complainant was permitted to file an Amended Reply by 28 March responding to the allegations. The Respondent filed its Amended Response on 27 March and the Complainant field a Response on 2 April and an Amended Reply on 9 April. The parties were ordered to file affidavits or witness statements by 25 April. The trial was set for 31 May 2024. The Respondent filed witness statements on Dornelle Hazell and Hailee Concepcion on 27 March. The Complainant filed witness statements of Kechia Leonard on 13 April, Marilyn Glasgow on 15 April and Sean S.V. Leonard. She did not file a document of her own headed Witness Statement. We agreed to treat her Response and Reply filed on 2 and 9 April as her witness statements.

3. The Respondent carries on business as a resort which encompasses a hotel, restaurants, a spa and a marina. The Claimant was employed by the Respondent from 5 June 2017. She was employed first as assistant restaurant manager. She was promoted to restaurant manager on 18 February 2020. Her employment was terminated when she was summarily dismissed on 3 August 2022 for what the Respondent described in the termination letter from the General Manager dated 3 August 2022 as "gross misconduct".

4. The reasons for dismissal given by the Respondent in the dismissal letter are as follows:

   a. At a staff meeting on 26 June 2022, fifteen members of staff stated they could not work with the Complainant due to her disrespect, menacing ways, abuse and unprofessionalism, examples of which were:
      i. She did not greet staff upon arrival with even a "good morning",
      ii. She was rude to the employees known as Spice and Sean, and to other staff.
      iii. She threatened foreign staff by reminding them that she is from the BVI,
      iv. she overrules and undermines bar supervisors, and
      v. she never acknowledges good reviews.
   b. The Complainant was invited to a meeting on 1 July 2022 to discuss the allegations. At the meeting she was given a written warning in accordance with the Labour Code and the employee handbook and was invited to make a defence or respond during the meeting or during her vacation.
   c. She stated that nothing in the summary of misconduct was true and she refused to read or receive the letter. But far from offering a defence, she used indecent and abusive language to the General Manager and behaved in a disrespectful, abusive and unacceptable manner and made false, unfounded, disparaging, disrespectful, abusive and inappropriate statements about him. The General Manager described her conduct as violent and intimidatory, finger-pointing, verbally very aggressive, and menacing. As a result, he became scared.
   d. The Respondent conducted a thorough investigation of all relevant staff concerning the Complainant's abusive authority, verbal offences and serious misconduct. The Respondent had lost all trust and confidence in her and concluded she was guilty of misconduct so serious that it demonstrated that the employment relationship could not be expected to continue as the employer could reasonably take no course of action other than termination.

5. The Complainant was paid $7,710.86 despite being summarily dismissed.

6. Evidence on behalf of the Respondent was given by former Assistant General Manager Dornelle Hazell and former Assistant Controller Hailee Concepion. Mr Hazell stated he witnessed the Complainant's conduct towards the General Manager at the meeting on 1 July. In his witness statement he gave evidence that he saw the Complainant's display of behaviour that was disrespectful and unprofessional towards the General Manager at the meeting. In his oral evidence he could not recall what the Complainant said that was so unprofessional or disrespectful. He did say she had never disrespected him and he had never witnessed her being disrespectful to other staff members. Regarding her response about the staff allegations, all he could recall is that she decided not to sign (presumably the dismissal letter). He was able to state, however, that everything in the dismissal letter was true. This seems unlikely for a witness who could not recall what had happened at the meeting. What he did remember was that she became so upset at the meeting that she asked to leave but before doing so she was given a letter to which she was asked to respond but to the best of his knowledge she never did respond.

7. The state of the Respondent's evidence is that none of the fifteen employees who had complained about the Complainant's conduct gave evidence. The General Manager did not give evidence. It was stated in the Amended Response filed by the Respondent on 27 March 2024 that the General Manager was unavailable to attest to the misconduct of the Complainant. Mr Hazell's evidence was not helpful because he could not recall the particulars of misconduct and he had never seen the Complainant being disrespectful towards staff members. We note that the warning letter handed to the Complainant during the meeting on 1 July 2022 was not in evidence before the Tribunal.

8. In her Response filed on 20 February 2024 the Complainant denied the allegations of misconduct. As stated above, she did not file a document headed "Witness Statement" and the Tribunal treated the documents headed "Response" and "Amended Reply" and filed on 2 and 9 April 2024 as her witness statements. In her document filed on 9 April 2024, the Complainant denied she was disrespectful at the meeting. She was asked about allegations of bad or disrespectful treatment of staff members and she said no such allegations were true. She said she asked if she could leave the meeting and the General Manager told her when she returned from vacation they would handle the situation with the staff members. She also denied she was given an opportunity at the meeting to defend herself or that she spoke aggressively. She further denied telling staff members that she is from the BVI. She says her mother is from St Kitts and she was raised there. She challenged the Respondent to confront her with the fifteen staff members who are alleged to have described her as rude or disrespectful. Cross-examination was concentrated on the payments she received. She stated in response to a question from the Tribunal that she did not get a chance to express her herself at the meeting on 1 July. She said she was advised by the General Manager to go on vacation. On her return to work in August she was called to a meeting by the General Manager and was handed a cheque and a letter of termination. Her witnesses, Ms Glasgow and Ms Leonard, gave evidence but provided what were mere testimonials about her general good conduct. They did not deal with the specific allegations of misconduct. Her witness Sean Leonard was not present to confirm his witness statement and to give oral evidence.

Statutory requirements

9. The Tribunal is guided by sections 81, 85, 101, 102 and 103 of the Code. These sections together provide that:

   a. the employment contract shall not be terminated by an employer without a valid and fair reason and unless the notice requirements section 90 are complied with and the employer acts reasonably,
   b. subject to section 89, the employer may not terminate the contract unless it has informed the employee in writing of the nature and particulars of the complainant against her and has given her a fair opportunity to defend herself,
   c. the employer bears the burden of proving the reason for dismissal,
   d. where an employee who served less than 7 years is terminated on notice for a valid and fair reason, the notice periods shall be at least equivalent to the interval of time between the employee's pay days,
   e. the employer may summarily dismiss an employee who is guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment,
   f. when terminating an employee for serious misconduct the employer must provide the employee with a written statement of the precise reason for the dismissal and shall be conclusively bound by the contents of the statement,
   g. an employer who fails to provide a statement may not introduce into evidence facts which might have been included in the statement but were not, and
   h. an employer may take disciplinary action short of dismissal when it is reasonable to do so, e.g. issue a written warning, or suspension from duty for up to a week without pay.

Findings of fact

10. There is no dispute the Complainant was employed by the Respondent, first as assistant restaurant manager then as restaurant manager. There is no dispute that her salary was as set out in the Amended Response filed on 27 March 2024. There is now no dispute that her employment commenced on 5 June 2017. What is disputed are the circumstances of her dismissal.

11. The Respondent issued to the Complainant a letter outlining the allegations of misconduct against her. The Complainant admitted a letter was tendered but she did not take it. It is clear from the circumstances of the meeting that the Complainant was very upset and walked out. This may not be an unusual reaction to termination meetings or to meetings that might lead to termination.

12. But a greater concern is that there is no clear evidence of the contents of the letter or the time within which a response was expected from the employee and there is not sufficient proof of the allegations of misconduct (which are denied by the Complainant).

13. The burden of proving the incidents of misconduct falls on the employer. The assessment of why it was valid and fair and reasonable to terminate the employment and not resort to

some other form of disciplinary action must be provided by the employer. It remains for the employer to place before the Tribunal the circumstances that demonstrate why it would be unreasonable to continue the employment. The reason for these lapses may be due to the unavailability of the General Manager or perhaps the staff who made complaints. This may be understandable but it is not an answer to the gap in the evidence.

14. I am not satisfied that the Respondent has discharged the burden of proof imposed on it. Many subjective terms such as "disrespect" were used. In his witness statement Mr Hazell described the Complainant's behaviour at the meeting with the General Manager on 1 July as disrespectful, aggressive, and that her body language could be considered ill-mannered or that she stood up to make her points more forcefully. The Complainant would perhaps state she was demonstrative or firm or even forceful. I believe the Complainant could have been more approachable and she was certainly not happy to face the accusations against her and displayed an undesirable attitude. But it is not possible for me to reach a conclusion more favourable to the Respondent when the General Manager did not give evidence and Mr Hazell was not more clear in his oral evidence in his recollection of events and the Complainant was firm that she was not disrespectful.

15. It is stated at page 3 of the dismissal letter (page 9 of the bundle) that the Complainant refused to defend herself or give any written or oral response to the matters of concern in the letter. Section 81(2) provides that an employer may not terminate the appointment of an employee without having given her a fair opportunity to defend herself. The Complainant denied she was given an opportunity to defend herself in the meeting. She said in her oral evidence that she did not get a chance to express herself. The only other witness who was capable of speaking to this was Mr Hazell. He said she was given an opportunity to defend herself and the opportunity to provide a rebuttal. Without the letter of 1 July 2022, I cannot be sure about what was said to the Complainant. Even if it were established that the Complainant passed up the opportunity to defend herself, that would be no indication that the employer is relieved of the burden of justifying the dismissal.

16. This is a borderline case. Aspects of the Complainant's conduct were unsatisfactory. On the other hand, the burden of proving serious misconduct in breach of the contract of employment was on the Respondent. The Respondent did not establish some essential elements of its case as I have outlined above and, accordingly, I am of the view it did not fully discharge the burden of proof. This decision is not to be seen to establish the Tribunal's implicit support for misbehaviour by employees or that a light touch will be applied to employee misconduct. I must remind employers that the provisions of the Code must be adhered to before termination, especially summary dismissal, takes place and that the relevant witnesses must give evidence. I conclude that the Respondent has failed to establish valid and fair reasons for termination or that it has been established she was guilty of serious misconduct. Accordingly, I find the Complainant was unfairly dismissed.

17. It is noted that the Complainant was paid not just arrears of salary and unpaid vacation that were due at the time of dismissal. She was paid severance of $7,70.86 as if the dismissal were effected under sections 89(2), 93 or 94 of the Code. I will take this sum into account in assessing compensation for unfair dismissal.

Remedies

18. Section 86(1) of the Code provides that where the Tribunal determines that a dismissal is unfair or illegal the Tribunal may order reinstatement, re-engagement or compensation but if these remedies are not acceptable to both parties, it may order the payment of a punitive sum. In the Dispute Claim Form, the Complainant claimed compensation. The Respondent has not stated outright that it accepts the remedy of compensation. I am satisfied that it has defended the case on the basis that compensation is the only remedy that could be awarded. I will not therefore consider punitive damages. In any event, the section is not clearly worded. There is the view that the proviso of the remedy being acceptable to both parties should have been inserted between paragraphs (ii) and (iii) of subsection (1) so that compensation, not punitive damages, would be the default remedy where reinstatement and re-engagement are claimed by the Complainant but not accepted by the Respondent.

19. The claim for unfair dismissal is not a claim for breach of contract. Compensation for breach of contract is normally the loss that is reasonably foreseeable or that is considered to arise fairly and reasonably from the breach of contract. The aim of contract damages is to put the party not in breach in the position he or she would have been in had the contract been performed as agreed. Regarding compensation for unfair dismissal, the Code helpfully contains a non-exhaustive list of factors which must be taken into account in assessing compensation. The factors include the duty of the employee to mitigate his or her losses – see section 86(2)(e).

20. The Complainant was aged 53 at the date of termination. She would have been expected to work for another 12 years before retirement. Her employment contract is not in evidence. I will treat her as a permanent member of staff who would have worked until age 65. She has obtained employment since her dismissal. I do not know precisely when her new employment commenced or what her terms of employment. She stated in oral evidence that she was at home for a year after dismissal. I do not know what efforts she made to find employment in that time. The burden of establishing the unreasonableness of the steps to obtain new employment was on the Respondent There is no evidence on this point.

21. I determine the Complainant is entitled to loss of salary for one year, that is her average net salary of $2,400 per month after statutory deductions times 12. I assess her compensation at one year's salary of $28,800. I will take account of the amount already paid to her.

22. I make no order as to costs.

Summary

23. I find that the Complainant was unfairly dismissed and is entitled to compensation.

24. I award her compensation of $21,629.14 being one year's pay of $28,800 less the amount of $7,170.86 paid to her on dismissal. This sum shall bear interest at the rate of 3% per annum from 17 August 2022 until the date of this judgment.

Postscript

25. I apologise for the delay in issuing this decision. The Tribunal spent much time in an effort to render a decision on which the panel was agreed. In the end, despite our efforts, a unanimous decision was not possible.

Samuel Jack Husbands
Chairperson

LABOUR ARBITRATION TRIBUNAL
MAR 25 2025
BRITISH VIRGIN ISLANDS

26. I have read the draft decision of the Tribunal in this Arbitration, issued following deliberations.

27. I have dissented from the Award rendered by the majority of the arbitrators, because I do not agree with both the result of the Award as well as with certain key elements of the reasoning.

28. I remain neutral, independent and impartial in this Arbitration and I consider it important to append this opinion of my dissenting views.

29. This my dissenting opinion is issued in good faith and is not intended to in any way denigrate or undermine the majority. Indeed, I am in agreement with much of the findings and statements of the majority, but I do not agree with some of the reasoning and conclusions.

30. This is indeed a difficult and borderline case. It is a case in which neither the Claimant nor the Respondent was represented by counsel at the hearing. The Claimant represented herself and the Respondent was represented by its Human Resources Manager supported by its then new General Manager.

31. This fact clearly meant that neither of the parties was fully aware of technical evidential requirements such as burden of proof and standard of proof. Nor was there a full appreciation of the nuances of labour law and the Labour Code such as for example the technicalities of severance pay, and when and in what circumstances it is due and payable, the difference between severance pay and payment in lieu of notice and so on.

32. While ideally the Respondent would have been able to present more evidence than it did, it is my considered view that the evidence which was presented by the Respondent was sufficient to meet the required burden of proof to the extent that that lay on the Respondent, and that it did so to the requisite standard.

33. In my view, any deficiencies that there may have been in the evidence of the Respondent were not such as to negative the obvious serious misconduct of the Claimant. It is my view

that the conduct of the Claimant constituted serious misconduct within the meaning of the law, and that she was not unfairly dismissed.

Dancia Penn OBE, KC
Arbitrator

34. I have read the reasons of the Chairperson and I agree the order he gives.

Zebalon McLean
Arbitrator

LABOUR ARBITRATION TRIBUNAL
MAR 25 2025
BRITISH VIRGIN ISLANDS