



VIRGIN ISLANDS

LABOUR CODE, 2010

(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/002

BETWEEN

NADA MARRUGO

COMPLAINANT

AND

NATIONAL BANK OF THE VIRGIN ISLANDS

RESPONDENT

REASONS FOR DECISION ON STRIKE OUT APPLICATION

BEFORE: **Samuel Jack Husbands** chairperson, **Kisha Frett** and **Kamika Forbes**, arbitrators

HEARD ON: The 10th day of July and 5th day of September 2024

DECISION ON: The 20th day of December 2024

IN ATTENDANCE: (1) Nada Marrugo, the Complainant
(2) Dancia Penn KC of Dancia Penn and Co, legal practitioners for Complainant
(3) Joy Penn, Chief Executive Officer of the Respondent
(4) Annette Braithwaite, Chief Compliance and Risk Officer of the Respondent
(5) Paul Edwards of O'Neal Webster, legal practitioners for the Respondent

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

Summary of the facts

1. The Complainant was employed by the Respondent from 11 February 2013 to 26 May 2020 when she was dismissed by the Respondent. She instructed lawyers shortly after her dismissal. She alleges that she was unfairly dismissed. She filed a Dispute Claim Form with the Labour Department on 14 July 2020. The Dispute Claim Form was accompanied by a letter dated 14 July 2020 addressed to Devern Davies, a senior officer of the Labour Department. It was not addressed to or handed directly to the Commissioner. She did not

receive a date-stamped copy of the letter or the Dispute Claim Form from the Labour Department as is the usual practice neither did she receive an acknowledgement of receipt. She sent reminders to Mr Davies on 16 July 2020 and 27 July 2020. The email of 27 July is timed at 7.57am and contains at the bottom the usual notation of an attachment of a letter dated 14 July.

2. The matter did not progress rapidly, though not for want of effort on the part of the Complainant's lawyers, Dancia Penn & Co. Dancia Penn & Co wrote a number of letters to the Commissioner between 17 January 2022 and 16 May 2023. There was no response. On 30 October 2023 the Commissioner referred the matter to the responsible Minister and by notice dated 22 November 2023 the Minister referred it to the Tribunal.
3. The Respondent filed a Response supported by two affidavits on 5 February 2024 and the Complainant filed a Reply in the form of an affidavit on 23 February 2024. The first case management hearing was held on 14 March 2024 and the second on 25 April 2024. At the second case management hearing, permission was given for further disclosure and the filing of additional affidavits or witness statements.

The Strike Out Application

4. At the second case management hearing the Respondent gave oral notice that it proposed filing an application to strike out the Dispute Claim Form on jurisdictional grounds directions. Notwithstanding rules 13(1) and (4) of Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (S.I. No. 98 of 2020) permission was also given to the Respondent to file the strike out application.
5. The strike out application was filed on 21 March 2024. The following orders are sought:
 - a. that the Dispute Claim Form be struck out with costs to the Respondent as it was filed outside the time, i.e. 6 months, permitted by section 181 of the Labour Code,
 - b. alternatively, that the Attorney General be added as the second respondent and that the Respondent be given 14 days to amend its Response and that the Attorney General have 14 days to reply to the Amended Response
6. The application came on for hearing on 10 July and 5 September 2024.

Submissions of the parties

When was the Dispute Claim Form submitted to the Labour Department?

7. The Respondent submits that the onus is on the Complainant, if challenged, to establish that the Dispute Claim Form was filed in time. While the Respondent is not able to point to a filing date, the Respondent says the burden rests on the Complainant to establish on a balance of probabilities that it was filed in time. There is circumstantial evidence that the Dispute Claim Form was submitted to Mr Davies at the Labour Department on 14 July. The Complainant says on oath that she took the Dispute Claim Form to Mr Davies on 14 July

2020. She produced into evidence two emails chasing Mr Davies for a confirmation of receipt on 16 and 27 July 2020. Her evidence is credible. She was not cross-examined.

8. The Tribunal does not think the Complainant manufactured either her letter dated 14 July or her chasing emails of 16 and 27 July. It is clear, if the Complainant is to be believed, that the Dispute Claim Form was delivered to the Labour Department on 14 July 2020. We do believe that she did date her Dispute Claim Form 14 July 2020 and that she did take it to the Labour Department on that date or at the latest by 16 July 2020 when she sent her first chaser email to Mr Davies. That she did not receive a date-stamped copy of the Dispute Claim Form or replies to her emails would be to punish her for the default of the Labour Department.

Was the dispute submitted to the Commissioner

9. It is not only the filing date that is in question. Mr Edwards, counsel for the Respondent, submitted that the Dispute Claim Form was not filed with the proper authority. It must be accepted that it was submitted to Mr Davies and not to the Commissioner. The Tribunal takes notice that Mr Davies is a senior officer in the Labour Department.
10. Mr Edwards for the Respondent also argues that it is the Commissioner, not Mr Davies, who is the statutory authority to whom claims must be referred and that, even if the Dispute Claim Form were delivered to Mr Davies in time, that would not satisfy the statutory obligation to deliver it to the Commissioner. Section 26(1) of the Code provides as follows:

“(1) Any dispute or complaint arising out of any matter covered by the Code or any law relating to labour or generally out of the relationship between the employer and the employee may be referred by either party concerned or his or her representative to the Commissioner for settlement.”

11. This provision goes hand in hand with section 181(1) – set out at paragraph 19 below – which uses the language of a referral of a dispute “to the Commissioner”. Neither the Code nor the Rules contain any specific guidance as to how documents are to be filed or to whom they are to be delivered. It is not expected that the Commissioner herself would personally receive claims. Indeed, this bears comparison with the filing of documents at the Tribunal. The chairperson of the Tribunal does not personally receive documents. She or he depends on competent and qualified staff. Rule 4(1)(a) provides that:

“(1) Any reference in these Rules to the filing of any document with the Tribunal shall include the following procedure

(a) a document to be filed with the Tribunal must be delivered by hand to the Office of the Tribunal during business hours with the appropriate copies, including three (3) copies for the Tribunal, one (1) additional copy for the filing party and one (1) additional copy for any other person who may be entitled to a copy in accordance with these Rules;”

12. This seems to have been the type of procedure adopted by the Complainant except that the cover letter to which the Dispute Claim Form was attached was addressed to Mr Davies. This ought to be of no importance because a properly completed Dispute Claim Form complying with the template for forms currently in use was also filed. The form is not a statutory form but it is given by the Labour Department to applicants and is in general use.
13. The Respondent relies on the authority of **Matheson v Mazar Solutions Ltd** [2005] CSIH 35, a decision of the Inner House of the Court of Session of Scotland for the proposition that delivery to a person other than the Commissioner is not a proper filing. In **Matheson** the evidence disclosed that the originating document was delivered to an office other than the one to which it should have been delivered. Section 11(2)(a) of the UK Employment Rights Act 1996 provided that an Employment Tribunal cannot consider an originating application unless the application is “presented to the tribunal before the end of the period of three months beginning with the effective date of termination”.
14. The application was sent by fax to the Edinburgh office of the Employment Tribunals on 31 August 2002. From there it was sent to the Central Office of the Employment Tribunals in Glasgow where it was date-stamped as received on 2 September. The question on the appeal was where an originating application is to be regarded as having been presented to the tribunal, in that case in Edinburgh or at the Central Office in Glasgow. The point of law was whether the tribunal had erred in law in concluding that the Edinburgh office was not the Regional Office of the Employment Tribunals within the rules. The court ruled that in the scheme of the legislation, the Edinburgh office was not an office to which applications could be sent.
15. That is a far point from disallowing applications that went to the correct office. There are two offices of the Labour Department in the BVI. Both are small offices. The Commissioner works out of the office in Tortola where the Dispute Claim Form was delivered. The discussion in **Matheson** was not over whether an applicant could submit the application by fax or accompanied by a cover letter addressed to a senior officer. It was about the place where the application must be received.
16. The Respondent may also be contending that the Dispute Claim Form was delivered to the incorrect person. This is a refinement of the point decided in **Matheson**. In our view it would be unworkable and place too high a burden on complainants if claims must be delivered directly to the Commissioner herself. The Commissioner has staff under her who must be trusted to handle administrative matters. She is not a one-woman band. The Complainant took what was in our view a reasonable step to get the Dispute Claim Form to the Commissioner. She is not to be penalised for what may have been a breakdown of communication or a misstep in the Labour Department. We must add that we have not had testimony from Mr Davies, a very senior and capable officer, and we make no finding that he was in any way neglectful.
17. We note the helpful authorities on statutory interpretation cited by the Respondent including **Bebo Investments Ltd v Financial Secretary** (ECHC, January 2008), **Grant v**

Maduro (ECCA, November 2019), and **Financial Services Commission v Harneys Insurance Management** (EHC, January 2019).

18. For the reasons given above, the Tribunal is satisfied that that Complainant delivered a completed Despite Claim Form to the Labour Department on 14 or 16 July 2020, within 6 months of her termination.

Consequence of failure to submit a Dispute Claim Form in time

19. Section 181 of the Code provides as follows:

“(1) A person shall refer a dispute or complaint to the Commissioner within six months of the ground for the dispute or complaint coming to the knowledge of that person.
(2) The Commissioner shall not investigate or resolve a dispute or complaint referred to him or her after the six-month period mentioned in subsection (1).”

20. The Tribunal having decided that the Dispute Claim Form was delivered to Mr Davies in the period 14 to 16 July 2020 and that such delivery was a reference of the dispute to the Commissioner, it follows that the dispute was referred to the Commissioner within 6 months of the ground for the dispute becoming coming to the knowledge of the Complainant. It has not, therefore, become necessary to decide whether the 6-month period is an absolute bar to proceedings.
21. We note that subsection (1) of section 181 does not provide a sanction for failure to refer the dispute in time but we also note the clear terms of subsection (2) which prohibit the Commissioner from investigating or resolving any dispute referred to her after the expiration of the 6-months period.
22. We note that in **Matheson** the Complainant had available to him section 11(2)(b) of the UK Employment Rights Act 1996 which provided that the UK tribunal may extend the time for presentation of an application when it appears satisfied the compliance with the primary time limit was not reasonably practicable. No similar provision exists in the Code. Similarly, the limitation provision the subject of the decision of **Graceway Trading Ltd v Parker** (CL-AP-24/2022, May 2023), a decision from the Court of Appeal of the Turks and Caicos Islands, relied on by Ms Penn KC, counsel for the Complainant, did not contain a hard time bar. It authorised an extension of the time for filing as the tribunal considered reasonable.

Adding the Attorney General as a respondent and consequential amendments to the Dispute Claim Form to seek relief against the Commissioner

23. The Dispute Claim Form was submitted to the Commissioner within the period 14 -16 July 2020 but it was not until 30 October 2023 that it was referred by the Commissioner to the Minister. It is provided by section 26(3) of the Code that where the Commissioner fails to achieve a settlement within 30 days from the date of reference or such longer time as the

parties agree, she shall refer the matter to the relevant Minister. No sanction is provided in the Code for breach of the 30-day period. Mr Edwards does not argue that the breach of the 30-day rule creates a jurisdictional bar. That argument has been put to rest by the judgment of Ellis J in **BVI Ports Authority v Lendor** (ECHC, May 2022), an appeal from a decision of the Tribunal.


24. Instead, the Respondent intends to seek relief, not fully particularised, against the Commissioner. The relief includes third party costs orders, compensation for the inordinate delay and general failure to comply with section 26(2) of the Code resulting in loss or damage to the parties. Mr Edwards relies on **Chance v Chinnery & Others** (ECHC, February 2022). In the **Chance** case the Commissioner was joined as a respondent and an interim costs order of was made against her. The decision in **Chance** was a decision on its own facts. Normally orders against the Commissioner would be unnecessary because it is always open to the parties who suffer from delay to seek prerogative orders to compel the Commissioner to perform her duties although, in this case, that remedy may not have been open to the Respondent, who (it would appear from the evidence of Joy Penn) may only have received the Dispute Claim Form on 12 January 2024, that is three and a half years after it was filed at the Labour Department. We note there was a fair amount of correspondence passing between the Complainant and the Labour Department but the Respondent was not copied.
25. Even if the Tribunal may join the Attorney General as respondent, the Tribunal has decided as a matter of case management to decline to make such order. A Response and a Reply have been filed by the parties. There has been disclosure, and affidavits have been filed which constitute the evidence of the parties. A trial date had been set. The proceedings were stayed for the Strike out Application to proceed. It would be unwise, in our view, to take the case backwards or delay or over-complicate it at this stage. These proceedings still represent a contest between an employer and a dismissed employee. Four and a half years have passed since the dismissal. We also note there may a bar against liability available to the Commissioner under section 25 of the Code. We must get on with the proceedings as promptly as possible. The Respondent may seek what relief it considers it is entitled to in separate proceedings against the Commissioner.

Summary of the order

26. The Strike Out Application is dismissed. There will be no order as to costs.
27. We issue the following directions:
 - a. The parties shall disclose any additional documents not previously disclosed in the proceedings by **4.00pm on Friday 10 January 2025**.
 - b. The parties shall exchange additional affidavits or witness statements electronically by email and file paper copies with the Tribunal by **4.00pm on Friday 7 February 2025**.
 - c. Each affidavit or witness statement shall stand as the evidence-in-chief of the witness making it.


- d. Each witness shall attend the trial to formally admit his or her witness statement, to supplement the witness statement if necessary and to be cross-examined.
- e. The parties shall attempt to agree the trial bundle and the Complainant shall prepare the paginated trial bundle (not including Consents of arbitrators, appointments of arbitrators by the Minister, notices of acting, practising certificates and trade licences) and shall deliver it in electronic format to the Respondent and to the Tribunal and shall also deliver two paper copies to the Tribunal not later than **4.00pm on Friday 28 February 2025**.
- f. The trial of this matter shall take place by video conference in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020 (S.I. No. 99 of 2020) on **dates to be fixed in March 2025** with the sitting commencing at **10.00am** and ending no later than **4.00pm** with a 45-minute break for lunch.
- g. The witnesses shall, where possible, give their evidence from the office of the lawyer for the party calling them.
- h. The estimated length of the trial is two days.

By Order
Labour Arbitration Tribunal


Samuel Jack Husbands
Chairperson


Kisha Frett
Arbitrator




Kamika Forbes
Arbitrator