VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/005

BETWEEN

DELROY POMPEY **COMPLAINANT**

AND

NORTH SOUND RESORTS MANAGEMENT LIMITED **RESPONDENT**

REASONS FOR DECISION REISSUED

BEFORE: **Samuel Jack Husbands**, Chairperson, **Sheila Brathwaite** and **Yvonne Crabbe**, arbitrators

HEARD ON: The 9th day of May 2024
MADE ON: The 10th day of December 2024
REISSUED ON: The 23rd day of December 2024

IN ATTENDANCE: (1) Delroy Pompey, the Complainant
(2) Jelisa Potter, Human Resources Manager of the Respondent
(3) Sarah Moore, Executive Assistant, of the Respondent

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

Summary

1. The Complainant was employed by the Respondent as a maintenance technician at the Respondent's Oil Nut Bay report. He commenced work pursuant to a contract of employment dated 16 September 2021. The contract in evidence is not signed on behalf of the Respondent but it is not in dispute that the document was his contract. He was notified of his dismissal on Tuesday 17 January 2023 when he was handed a termination letter dated 16 January 2023.

2. The details of his ceasing to work for the Respondent are set out in his handwritten memorandum attached to the Dispute Claim Form. He stated on Saturday 14 January 2023 he was sitting in the maintenance office when between 2.30pm and 3.00pm Tilden Francois,

a co-worker, administered a breathalyser test. Mr Francois left and returned 10 minutes later and told the Complainant he had to leave because he had alcohol in his system. The Complainant called his Maintenance Manager, Mincainton "Minchie" Laurent, to find out what was going on. Mr Laurent repeated that the Complainant must go home. The Complainant further stated he had not drunk alcohol that day. On his next day back at work on 17 January 2023 he received the termination letter dated 16 January 2023. It stated that he was summarily dismissed. The decision had clearly been taken to dismiss him before he arrived back at work. It is doubtful therefore that at the brief meeting on 17 January the Complainant was given a fair opportunity to defend himself as is required by section 81(2) of the Labour Code 2010 (the Code). He asked to be reinstated but he was told the policy on alcohol was one of zero tolerance and he was not reinstated. The reasons given for his dismissal were:

a. the Complainant was suspected of being "under the influence of alcohol" at work on 14 January,
b. on his being breathalysed, the Respondent's suspicions were confirmed, the test having showed a high reading of alcohol in his system, and
c. being under the influence was in breach of the Respondent's zero tolerance policy.

3. The zero-tolerance policy on alcohol use was signed by the Complainant on 16 January 2021. The policy document stated that the Complainant acknowledged that the Respondent maintained a zero-tolerance policy for employees found to be under the effects of drugs or alcohol while on duty. It contained a further acknowledgement by the Complainant that "possessing or being under the influence of drugs or other intoxicants while at work or operating company-owned watercraft is an act constituting immediate dismissal".

4. The contract of employment provided for a salary of $30,000 per annum paid in instalments twice a month. It provided at clause 18 that the Complainant may be dismissed for disciplinary reasons with 24 hours' notice for and valid and fair reason. It was also provided at clause 19 that the Complainant shall comply with all rules, regulations and policies directed to the Complainant by the Respondent. This was followed by an 'entire agreement' clause which provided that the terms and the appendix embodied the entire agreement that there were no promises, terms, conditions or obligations other than those contained in the agreement. The 'entire agreement' clause is, in our view, to be interpreted subject to the specific clause 19. We are therefore satisfied that the zero-tolerance policy forms part of the contract.

5. The Complainant sought re-instatement. That remedy was not acceptable to the Respondent.

The evidence

6. The Complainant did not file a witness statement. We treated the document headed "Reply" as his witness statement. It was in the form of an affidavit and must have been intended as sworn testimony. In it, he outlined his work during the morning of the 14th. He worked with other co-workers. He then ate lunch in the maintenance office with Eldon "Eddie" Rennie and he remained there after lunch awaiting his next instructions. His next instructions were to drive Eddie to the site where Mr Laurent and a supervisor were worked. He remained

there with them for about 25 minutes before returning to the maintenance office to await his next assignment. After about 30 minutes in the maintenance office with Eddie, he was breathalysed by Tilden Francois.

7. He was not told he was being tested for alcohol. He did not realise the equipment he was asked to blow into was a breathalyser until just before he blew into it. The test results were not shown or told to him. He did drink the night before (on the 13th) but he was sober and his judgment was not impaired nor was his ability to execute his tasks hampered nor was he a danger to his co-workers. He felt he was wrongfully dismissed.

8. In his oral evidence the Complainant stated he understood the zero-tolerance policy.

9. Sheron Thomas gave evidence on behalf of the Complainant. She was his live-in partner. She said he came in late during the night and they got up at 5.45am when their alarm sounded. The had breakfast and looked after the needs of her bed-ridden father. He exhibited no signs of disorientation or usual behaviour. She drove him to the dock at Gun Creek where he would take the boat to work.

10. The evidence on behalf of the Respondent was given by (i) Jelisa Potter, the Human Resources Director, (ii) Mr Lettsome, (iii) Mr Francois, (iv) Mr Rennie, (v) Quinton Maclear and (vi) Deo Rai. They each filed documents headed "Incident Report". It is clear these documents were meant to be witness statements and they were treated as such by the Tribunal. Neither the Villa and Facilities Director nor Mr Laurent, the Maintenance Manager, who attended the termination meeting on 17 January 2023 gave evidence. They may have left the company.

11. Ms Potter stated that:

    a. the Respondent does not agree to re-instatement or to compensation.
    b. she believed the Complainant did drink on the job although this was not the reason for dismissal,
    c. in the afternoon he exhibited behaviour that was consistent with that of a person under the influence and he smelled of alcohol and could not carry on a coherent conversation,
    d. the Complainant was breathalysed and found to be intoxicated, and
    e. on 17 January 2023, during his next day back at work after being breathalysed and sent home on 14 January, he was invited to a meeting with the Villa and Facilities Director, the Maintenance Manager and the Human Resources Manager,
    f. the Complainant gave a statement in which he admitted to drinking heavily the night before the 14th,
    g. his statement was dismissed as a futile excuse especially since it was not suggested that he was intoxicated or exhibited any signs of intoxication on the morning of the 14th,
    h. he was found to be under the influence while on duty, and
    i. consequently, the zero-tolerance policy was applied and he was summarily dismissed.

12. Ms Potter did not herself see the breathalyser test results or reading. She relied on the report of Mr Francois. Unfortunately, Mr Laurent who requested the test and who would have seen the readings and was satisfied at its correctness and what it meant, did not give evidence in

support of Ms Potter's findings or conclusion. She also admitted that the persons who carried out the test, i.e. Mr Francois and Mr Laurent, had no official certification in the use of breathalyser machines. She said the instructions are on the box. Her view is that even without the test results the Complainant could still be dismissed for breach of the zero-tolerance policy once there was alcohol on his breath. When the Complainant put it to Ms Potter that she could not say he was drunk she said she had to reply on the report of her manager. She believed it was the first time Mr Potter had been breathalysed.

13. Mr Lettsome stated that the Complainant was dismissed at the meeting with the Villa and Facilities Director, Ms Potter and Mr Laurent on 17 January 2023 and that the reason for the dismissal was a breach of the zero-tolerance policy. The Respondent's executive team considered giving the Complainant a second chance. The Complainant was remorseful but the executive team determined they could not change their minds as they had to uphold the zero-tolerance policy. The Complainant was offered resignation instead of dismissal but he refused. The Complainant had been previously suspected of drinking on the job and had denied it but this time the breathalyser test confirmed it and it was no longer deniable. They concluded the Complainant must have had alcohol in his system from the night before the 14th. This was true. The Complainant admitted it. But having drunk alcohol the night before does not necessarily mean, however, that it influenced his behaviour.

14. The next witness, Mr Francois, stated he worked with the Complainant on the 14th. The Complainant was talking excessively and did not act like he was in his right senses. While he was at the maintenance office with the Complainant, Mr Laurent called him and showed him how the breathalyser device worked and asked him to give it to the Complainant to blow into. Mr Francois did as requested and administered the test at about 1.45pm to 2.00pm and he returned the device to Mr Laurent. There is no evidence Mr Francois had ever used the breathalyser equipment before or was familiar with it. There is no evidence that it was calibrated. Mr Laurent told Francois the Complainant was over the limit and instructed him to notify the Complainant to go home. Mr Laurent did not give evidence.

15. Mr Rennie said that he worked with the Complainant on the 14 January. He said anyone observing the Complainant would think he was drunk. He saw Mr Francois administer the breathalyser. He excused himself and stood outside the room.

16. On 14 January, after the Complainant was sent home, Mr Maclear and Mr Rao encountered him. He was shouting profanities about management of the company and describing how he had been dismissed. He was also trying to climb on top of a cart and banged on the cart and appeared to be under the influence of alcohol.

Analysis of the evidence

17. The Complainant was dismissed on his next day at work on 17 January 2023 for being found under the influence of alcohol at work on 14 January. It is not in doubt that on 14 January the Complainant was talking excessively at work. We would not go so far to describe his conduct as boisterous. Further, it is not in doubt that the zero-tolerance policy operated by the Respondent meant that an employee in breach of the policy would be subject to

summary dismissal regardless of his or her spotless record or long years of service. What is in dispute is whether the Complainant was in breach of the policy.

18. The Tribunal considers that, as a matter of principle, an employer may select some misconduct as being sufficiently serious to merit summary dismissal bearing in mind the nature of the business in which it was involved. The zero-tolerance policy in respect of alcohol abuse is not necessarily unfair or unreasonable in the hotel resort business and summary dismissal would not be an unreasonable response.

19. The reasons for dismissal, as contained in the dismissal letter dated 16 January 2023, are set out at paragraph 2 above. The Tribunal is not satisfied the Respondent has discharged the burden of proving the reasons. The administration of the breathalyser test was not sufficiently monitored or properly applied and the readings are not in evidence. There is evidence from observers of what can be described as the Complainant's extravagant behaviour but, overall, these personal observations fall short of demonstrating that the Complainant was under the effects or drugs or alcohol while on duty. They do provide a reasonable suspicion he was under the influence. Resort was had to the breathalyser to confirm the suspicions but, on the evidence, the breathalyser test was not capable of doing so.

20. The Respondent states in its Response that even without the evidence of the readings of the breathalyser there was still ample evidence from the visual observations of its witnesses that the Complainant was under the influence. There is something to be said for this. However, the unflinching application of policies from which there is no derogation, such as the zero-tolerance policy, calls for strong and certain evidence of the prohibited conduct. While the employee's conduct, as described by the witnesses, could be attributed to alcohol consumption we could not be satisfied that it was.

21. For the reasons given above, the Respondent has not established that the Complainant was under the influence of alcohol. It has failed to satisfy us that it had good ground for the dismissal. We find, therefore, that the Complainant was unfairly dismissed. The Complainant is entitled to one of the remedies set out in section 86(1) of the Code. He sought reinstatement but this is not acceptable to the Respondent. The Respondent did not accept it was liable to compensate him, meaning that it denied liability. It did not include in its Response, as is required by rule 20(1)(f)(ii) of the Labour Code (Arbitration Tribunal) (Procedure) Rules 2020 (S.I. No. 98 of 2020), a statement that compensation or any of the remedies in section 86(1) of the Code would be acceptable. Despite this, it fought the case on the basis that compensation would be payable if the Complainant were to prevail and the Complainant presented the case as one for compensation not a punitive award. We cannot overlook this reality. We therefore consider that an order for compensation may be made in the circumstances.

22. The parties are not represented by lawyers in these proceedings. At the trial they dealt with the question of liability and not the calculation of the compensation. we will assess compensation on such evidence as there is. the complainant's salary was $30,000 per annum. he secured another job but did not say when. We will award him 5 months pay plus pay for the notice period of two weeks to which he was entitled. Based on the pay slips

attached to the Dispute Claim Form we would allow net pay of $2,300 per month plus service change of $150 for a total of $2,450 per month. This works out to damages of five months' pay of $12,250 plus two weeks' pay of $1,225 for a total of $13,475.

23. If we are wrong to hold that compensation was acceptable to the parties and that a punitive award should be made, we would have awarded punitive damages of about $15,000.

Summary

24. We find that the Complainant's summary dismissal was unfair.

25. We award him compensation of $13,475 with interest at 3% per annum from 17 January 2023 to the date of this decision.

26. We make no order as to costs.

By Order
Labour Arbitration Tribunal

Samuel Jack Husbands
Chairperson

LABOUR ARBITRATION TRIBUNAL
DEC 27 2024
BRITISH VIRGIN ISLANDS

SBrathwaite (electronic)
Sheila Brathwaite
Arbitrator

Y Crabbe (electronic)
Yvonne Crabbe
Arbitrator