



Case No. BVILAT2021/012

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Damian Chance

COMPLAINANT

AND

**Ivan Chinnery, Sharleen Chinnery and Darlene Chinnery
dba White Bay Camp Ground**

FIRST RESPONDENT

AND

Labour Commissioner

SECOND RESPONDENT

BEFORE:

Jamal S. Smith, Chairperson

Zebalon A. McLean, Member on the recommendation of the Complainant

Kamika A. Forbes, Member on the recommendation of the Respondent

- IN ATTENDANCE:**
- (1) Damian Chance, the Complainant
 - (2) Patricia Archibald-Bowers, legal practitioner for the Complainant, instructed by J.S. Archibald & Co.
 - (3) White Bay Camp Ground, represented by Darlene Chinnery and Sharlene Chinnery
 - (4) Nicosie Dummett, Principal Crown Counsel for the Second Respondent, instructed by the Attorney General's Chambers
 - (5) Shonice Warner, Crown Counsel for the Second Respondent, instructed by the Attorney General's Chambers

- ADDITIONALLY:**
- (6) Everetta Days Chance, Witness for the Complainant
 - (7) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

FINAL AWARD

10 February; 10 March 2022; 21 July 2022

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A. INTRODUCTION

1. This is a case about a family business, with the patriarch growing old and passing the business to his children who deal with the business very differently from their father. This results in the current dispute being reminiscent of the tragic dysfunction that characterises Shakespeare’s *King Lear*. As Edgar said about the death of great men in *King Lear* “Men must endure Their going hence, even as their coming hither; Ripeness is all.” We see the tragic nature of this situation in the web of relationships that arise in this case.
2. In this award, reference will be made to an Agreed Trial Bundle filed by the Complainant on 07 December 2021 (the “**Trial Bundle**”)
3. On 7 December 2021 the Tribunal heard evidence in respect of the jurisdiction stage and made a finding of fact that the Complaint in this dispute was first filed with the Labour Commissioner in 2018 and not in February 2019. The Tribunal indicated that it will give its reasons for that decision in this Final Award. On 10 February 2022 the Tribunal issued an Interim Award in respect of an application for a stay of proceedings and a determination on the Tribunal’s jurisdiction to make third-party orders (the “**Interim Award**”). The procedural history of this Complaint has been fully outlined in the Interim Award. This Final Award should be read in conjunction with the Interim Award and all words and phrases used in this Final Award, unless otherwise specifically defined, will have the same meaning as all words and phrases already defined in the Interim Award.
4. The Complainant was employed by the Respondent as a Compound Worker/Maintenance Worker, and the Respondent was a bar, restaurant and guest house located on the island of Jost Van Dyke.
5. On 19 February 2019 the Complainant filed a Complaint with the Labour Commissioner (the “**Complaint**”) which indicated that he worked for the Respondent from 5 January 2013 to 1 August 2018. However, due to non-payment and verbal abuse he “couldn’t accept the situation no more”. He claimed to have worked for almost a year for \$1,800.00 and when he asked for a letter from the Respondent so he could find a part-time job to maintain himself, he “was being neglected”. That situation forced him to resign and seek alternative employment. He said he worked for the Respondent’s business and personal homes while also picking up “moorings”. He wanted them to “submit my finance”.¹

¹ TAB 1 of the Trial Bundle.

6. By a Memorandum dated 25 May 2021 the Deputy Labour Commissioner referred the Complaint to the Minister pursuant to section 26(3) of the Labour Code, 2010 without any explanation as to the reason for the delay which violated both section 7(b) and 26(3) of the Labour Code, 2010. This delay was the subject of the Interim Award.
7. On 16 July 2021 the Minister referred the Complaint to the Tribunal pursuant to section 28(1) of the Labour Code after the parties having failed to reach an agreement.
8. On 07 October 2021 the Respondent filed a Response to the Complaint,² which among other things provided:
 - (a) Mr. Chance was not terminated, but he resigned on his own free will with no grievances. When Mr. Chance tendered his resignation, he could have memorialized any grievances he had in his letter of resignation.
 - (b) A letter seeking a part-time job while under the sponsorship of the Respondent was never requested by the Complainant. Given the circumstances at that time, since there was no full time work, such a letter would have been granted since other employees requested letters to obtain part-time work and were granted.
 - (c) Although the issue of the limitation period was raised, that was already addressed in the Interim Award.
 - (d) From 5 August 2017 the Complainant was on vacation for the remainder of that month and was given a temporary lay off letter until 15 October 2017 since the business is usually closed around that time for the off season. However, on 6 September 2017 Hurricane Irma demolished the entire business. Due to the extensive damage done to the business, the Complainant and all other workers were not on duty for the remainder of 2017.
 - (e) The Complainant got various jobs around the community helping to rebuild after Hurricane Irma, including working with a team from the BVI Electricity Corporation in November and December to restore power to the island of Jost Van Dyke and he was paid directly through the individuals he worked for and the BVI Electricity Corporation.
 - (f) In January 2018, the Complainant along with other employees and a contractor worked on the family house repairing the roof. The Complainant worked for 12 days and was paid \$75 per day. Due to the banking issued at the time, they were all paid in cash.
 - (g) On 7 - 11 March 2018 the Complainant along with two (2) other employees began construction on the Respondent's beach cabin. They worked on the cabin for about 3 to 4 days a week for 5 to 6 hours a day and were paid at a rate of \$6.00 per hour.

² TAB 2 of the Trial Bundle.

- (h) After 11 March 2018 the Complainant never did any more work for the Respondent and worked for others on the island of Jost Van Dyke to assist in the rebuilding of homes for residents of Jost Van Dyke who had been displaced after Hurricanes Irma and Maria in September 2017.
 - (i) On 10 June 2018 the Manager of the Respondent confronted the Complainant about rumours she had heard within the community that he was accusing her of non-payment for work done which was causing him to be unable to pay his bills. At the time, the Complainant denied the accusations.
 - (j) On 15 June 2018 the Complainant left for his hometown of St. Vincent to be married. Upon his return, the Complainant continued to reside on the Respondent's premises with his now wife, Everetta Chance. At that time, he was still not working for the Respondent, but was working with whomever he pleased.
 - (k) There was a confrontation with Mrs. Chance and on 15 July 2018, the Complainant and two (2) others were given an eviction notice. The situation escalated to the point where the Royal Virgin Islands Police Force were called, and the Respondent was instructed that they need to give them 30 days notice.
 - (l) On 1 August 2018 Mr. Chance turned in his resignation letter.
9. On 22 October 2021 the Complainant filed a Reply, in which he maintained that he never said that he was terminated and the Respondents knew very well the grievances which were excessive non-payment and verbal abuse, and maintained that he requested a part-time permit which was refused. He also maintained that he worked for the Respondent until his resignation on 01 August 2018. He claims that the bar was in operation since January 2018 so the Respondent was in a position to pay their employees. He further alleges that construction of the beach cabin was outside his regular pay as a maintenance worker and that he was told by the Respondent that he would be paid "as a job" and not an hourly wage.
10. Additionally, in the Reply the Complainant indicated that he got married to his wife, Everetta Days Chance, in St. Vincent. He continued to work for the Respondent after his return from St. Vincent, and during the time in July that the Complainant lived on the Respondent's premises in Jost Van Dyke his wife resided in St. Thomas and in Queens, New York. However, his wife visited him during the month of July to cook and wash his clothes but she never lived there. He claimed that on one occasion when his wife visited him, the Respondent's Manager, Darlene Chinnery, initiated an argument and then called her child's father, who was the police officer on duty in Jost Van Dyke at the time. It was this type of intimidation which was a pattern by the Respondent and their agents.
11. Finally, the Complainant denied anyone witnessing him being paid any monies and confirmed that he only received \$1,800.00 for the year 2018 up until he resigned.
12. The trial of the liability and remedies stage of this dispute took place over the course of two (2) days on 10 February 2022 and 10 March 2022 during which the full panel of the

Tribunal heard the oral evidence and closing arguments from both parties. The entire trial took place via the WebEx video conferencing platform in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020³ and in accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.

B. THE EVIDENCE

(a) The Evidence of Damian Chance

13. The Complainant filed an Affidavit⁴ in which he alleged that he was hired as a compound worker by the Respondent on 28 December 2017 and is married to Everetta Days Chance. He would also do construction work and other odds and ends around the Respondent's premises, but he was being paid late and never the full amount owed.
14. He resided in a two-bedroom guest house on the premises of the Respondent with Ackime Nash and Denton Brown.
15. He was called "nigger" and other disparaging names by Darlene Chinnery, the Respondent's Manager. He decided to resign and his wife typed up his resignation letter dated 1 August 2018 which he gave to Darlene Chinnery, the Respondent's Manager, the same day.
16. He indicated that his wife typed another letter for him on 24 September 2018 with a list of works completed by him and monies paid and owed by the Respondent, a copy of which was attached as Exhibit "DC-7" although incorrectly referred to in the affidavit as "DC-6". In that letter, the Complainant alleged that Darlene Chinnery, the Respondent's Manager, called him "lady", "scamp" and a "nigger". The list started with August 2017, where he did boat moorings and was owed \$350.00 for that month. He also claimed from 31 July to 4 September 2017 he was due \$1,250 and vacation pay for two (2) weeks at normal pay of \$560.00 and goes through various other tasks up until 2 – 3 July 2018, for a grand total of \$23,190.00 owed.
17. It should be noted that as the initials of the Complainant and the sole witness for the Respondent are both "DC", to avoid confusion between the exhibits, the Tribunal will refer to the Respondent's exhibits by the initials of the business "WBCG".
18. Under cross-examination he confirmed that he was paid \$560.00 every two (2) weeks and when pressed he confirmed that he was paid \$7.00 an hour. When pressed he admitted that Pearlette Chinnery was the one who asked him to pick up guests from yachts moored in the area and she was the one who would pay him. However, he claimed that as she was the mother of Darlene Chinnery, the Respondent's Manager, he was working for all of them. However, it was Darlene Chinnery, the Respondent's Manager, who wrote his check on behalf of the Respondent, and the moorings work was not included in it.

³ S.I. No. 99 of 2020.

⁴ TAB 8 of the Trial Bundle.

19. Also under cross-examination it was revealed that Darlene Chinnery, the Respondent's Manager, went on vacation from August to December 2017 and he was to be paid upon her return. He also agreed that the business closed for September and October and would resume in November.
20. Additionally, under cross-examination it was asked whether he had carried out his duties, and he claimed that he did. However, when pressed that the windows and doors were not boarded up, he responded that he did whatever he was told to do.
21. During re-examination it was revealed that the Complainant is the father of a child for the sister of Darlene Chinnery, the Respondent's Manager, Sharleen Chinnery.
22. On a question from the Tribunal probing the fact that Darlene Chinnery, the Respondent's Manager, had said that he didn't do anything in September 2017 and she said it so confidently, the Complainant admitted that after Irma destroyed everything they were unable to do any work.
23. Having had the opportunity to review the Complainant's pleadings, written evidence and to observe his demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of his account, the consistency between his written and oral evidence under oath, as well as the internal consistency of his written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds him to have been a credible witness.

(b) The Evidence of Ackime Nash

24. On 22 October 2021 Ackime Nash filed an Affidavit.⁵ He claimed that he is a waiter by profession and was brought from St. Vincent by the Complainant to work for the Respondent. He began working for the Respondent on 28 December 2017 (which would have been the same date of employment as the Complainant) as a waiter but ended up doing construction work and other odds and ends around the property. Under cross-examination he indicated that he is the cousin of the Complainant.
25. He claimed that himself, the Complainant, and another person lived in a two bedroom guest house on the Respondent's premises. He was paid \$500.00 every two weeks for a total of \$1,000.00 per month. However, they were always late paying him and the other workers and even when they paid them, it was never the full amount. During cross-examination he claimed that he worked on the Respondent's premises and on the Respondent's Manager's, Darlene Chinnery, mom's house. He also told the Tribunal that he worked from March to April 2018 on the cabin with the Complainant, cleaning and painting. However, the Respondent's Manager, suggested to him that he was being untruthful.
26. He disputed the fact that the Complainant never worked for the Respondent after 11 March 2018 and worked for the Respondent up until he resigned on 1 August 2018. Despite this,

⁵ TAB 8 of the Trial Bundle.

Mr. Nash indicated that he worked for the Respondent until 28 September 2020 and he worked with the Complainant until he left.

27. He claimed that the Respondent not only owed the Complainant money, but all three (3) employees which prevented them from paying their bills, eating and basically surviving. He also claimed that Ms. Darlene Chinnery, the Respondent's Manager, would "cuss" when he asked for his money. He ultimately decided to leave because he was not being paid, and he could not survive so he returned home to St. Vincent. Accordingly, the Respondent still owed him \$4,000.00.
28. Having had the opportunity to review Mr. Nash's written evidence and to observe his demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of his account, the consistency between his written and oral evidence under oath, as well as the internal consistency of his written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal has some difficulty fully accepting him as a credible witness.
29. Additionally, with respect to his evidence about whether the Complainant was paid, or anyone else other than himself was paid by the Respondent, without more, the Tribunal cannot accept that there can be any real nexus between his knowledge, other than hearsay, of whether other persons, in particular, the Complainant, was paid by the Respondent. As that was the gravamen of his evidence, the Tribunal, therefore, finds it difficult to accept the totality of his evidence.

(c) The Evidence of Everetta Day Chance

30. On 05 December 2021 the wife of the Complainant, Everetta Day Chance, filed an Affidavit with the Tribunal, where she indicated her address in New York and that she is an assistant manager by profession.
31. Although she indicates that her husband began working for the Respondent on 28 December 2017 as a compound worker but ended up doing construction work and other odds and ends around the property, she does not disclose how she comes to that information and as it is merely hearsay, it and all other hearsay evidence will be disregarded.
32. She confirmed that her husband lived in a two-bedroom guest house on the Respondent's premises with Ackime Nash and Dexton Brown, and although she lived between St. Thomas and New York, she would visit her husband often, but never lived in Jost Van Dyke up until the time her husband resigned.
33. She confirmed that she typed her husband's resignation letter dated 1 August 2018. She also confirmed that she typed the letter dated 24 September 2018 that was identified as Exhibit DC-7.
34. Having had the opportunity to review Mrs. Chance's written evidence and to observe her demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of her account, the consistency between her

written and oral evidence under oath, as well as the internal consistency of her written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal accepts her as a credible witness.

(d) The Evidence of Darlene Chinnery

35. On 07 October 2022 the Respondent's Manager, Darlene Chinnery, filed an Affidavit in this matter and exhibited the following documents:
- (a) The resignation letter of Mr. Damian Chance (Exhibit "WBCG-1");
 - (b) Photos showing the extensive damages done to the Respondent's premises (Exhibit "WBCG-2");
 - (c) Video showing the clean-up by an excavator (Exhibit "WBCG-3");
 - (d) Photos showing beach cabin construction (Exhibit "WBCG-4");
 - (e) Voice note of conversation between the Complainant and Darlene Chinnery about the accusations made about non-payment for work (Exhibit "WBCG-5");
 - (f) Eviction Notice (Exhibit "WBCG-6"); and
 - (g) Screen shot of photos of the conversation between the Complainant and Darlene Chinnery in reference to the incident between his wife and Darlene Chinnery (Exhibit "WBCG-7").
36. Under cross-examination she revealed that her father, Ivan Chinnery, was originally the owner of the trade license for the Respondent but as he grew older and started to suffer from forms of mental illness the business was transferred to his children.
37. Having had the opportunity to review Ms. Chinnery's written evidence and to observe her demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of her account, the consistency between her written and oral evidence under oath, as well as the internal consistency of her written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal accepts her as a credible witness.

C. THE TRIBUNAL'S ANALYSIS

38. The Complainant effectively alleges constructive dismissal on the basis of non-payment of salaries and verbal abuse. Constructive dismissal is governed by section 83 of the Labour Code, 2010. By virtue of section 85(2) of the Labour Code, 2010 the burden of proof shifts to the employee to prove the reason for the dismissal.
39. The dismissal was due to relationship changes and ultimately the breakdown in the relationship between the Complainant and the Respondent's Manager and her family. The

non-payment did not appear to bother the Complainant until the relationship changed. However, once the relationship changed, the non-payment became an issue and the Complainant decided to end the employment relationship by handing in his resignation that was penned by his wife. In effect, the real reason for the dismissal was the non-payment of salaries due to the Complainant.

40. As it relates to the verbal abuse, the Complainant failed to particularize those incidents of abuse, and so the Tribunal will not consider that the abuse was the real reason for the dismissal.
41. The verbal abuse was the effect of the breakdown of the personal relationships and it is important to separate the personal relationships involved from the employment relationship. It is clear that the Complainant is the father of a child of Sharlene Chinnery, one of the owners of the Respondent. Therefore, it ought not to have escaped the Complainant's notice that he was living "rent free" on the Respondent's premises when he got married to his wife and would have his wife visit him at the Respondent's premises. The obvious friction that this would create could not have escaped the Complainant, which ultimately resulted in the police being called in. However, the personal nature of the arguments and the negative names used by the Respondent appears to be associated with the personal relationship and not the employment relationship. For this reason, the Tribunal will make no findings in relation to the verbal abuse that the Complainant was obviously subjected to when the personal relationship deteriorated, and there is no evidence that shows that the verbal abuse was during working hours or in any way associated with the employment relationship.
42. The Tribunal will, however, echo the wise counsel from the legal practitioner for the Complainant that despite what may have transpired between the parties there is a child involved that connects all the parties involved. There is a need to ensure that the personal relationship does not hinder the psycho-social development of that child.
43. The Tribunal accepts that the Complainant discharged his burden of proof by evidencing the list of non-payment under the letter dated 24 September 2018 identified as Exhibit DC-7, except that the moorings were always paid separately and not part of the employment contract. Additionally, the work on the Respondent's premises after Hurricanes Irma and Maria in September 2017, including the construction work on the cabin, were all reasonably incidental to the role of the Complainant in light of his own admission that there was no other work after the 2017 hurricanes. If they were not reasonably incidental to his role as Compound Worker/Maintenance Worker, this Tribunal would not be able to order compensation for work done, since those works would not be directly related to the employment contract. In this regard, the Complainant is only entitled to be compensated for work done in accordance with his employment contract and his standard wages of \$7.00 per hour or \$560.00 every two (2) weeks. Therefore, he would only be entitled to compensation for August 2017 until his resignation on 1 August 2018.
44. While it is noted that the Respondent claims to have ordinarily been closed for September and October each year, they presented no evidence to support this assertion and there is nothing before the Tribunal that suggests the Complainant did not return to work after he was married in August 2017. Upon his return he was faced with the 2017 hurricanes, and he

was required to help with the rebuilding works. Therefore, the Tribunal does not accept the Respondent's assertion that he did not work in September and October 2017.

45. The claim for compensation between August 2017 – July 2018, which would amount to \$12,320, less \$1,800.00 that was agreed to have been paid, for a balance of \$10,520. The obligation of the employee to mitigate the loss by finding alternative employment, would amount to a discount for two (2) months for a further deduction of \$2,240.00, where it was accepted that the Complainant sought to obtain alternative employment and had written to the Immigration Department to evidence intention to obtain alternative employment. Therefore, the Respondent is only obligated to pay the Complainant a total sum of \$8,280.00.
46. The Tribunal also reiterates its position in *Qasim Yoba v. Peter Island Resort and Spa*,⁶ that where an employee is given residential premises as part of the employment contract, unless the employment contract provides otherwise, it creates a bare license. This entitles the employer to evict the employee at will and may immediately turn out that employee at a moment's notice which would be separate and apart from the employment contract. Therefore, there was nothing wrong with the Respondent terminating the bare license without terminating the employment contract, and contrary to the advise given to the Respondent, they were not required to give the Complainant 30 days' notice.
47. In accordance with section 83(2), the Tribunal having found that the Complainant has discharged his burden of proof to establish that he was constructively dismissed, the Complainant is deemed to have been unfairly dismissed. For this purpose, the Tribunal must apply the remedies outlined in section 86 of the Labour Code, 2010. The Respondent having agreed to compensation, and at no time objected to the payment of compensation, only the quantum, the Tribunal will make a compensation order since there is no request for reinstatement or re-engagement, and there is no need to order the payment of a punitive sum.
48. Additionally, as there is no basis for ordering a punitive sum, there is additionally no basis for making a costs order against the Respondent who was unrepresented in these proceedings and made every effort to comply with the rules, orders and directions of the Tribunal. For this reason, the Tribunal will make no order as to costs.
49. However, in keeping with the Tribunal's decision in *Colleth Ranger-Vassell v. Scrub Island Resort*,⁷ pre-award interest will be awarded to put the parties in the position they would have been in had the compensation been paid when it was due. Therefore, in keeping with the Interim Award, the Second Respondent shall pay the pre-award interest based on 3% per annum at the daily rate of \$0.68 per day for a total of \$992.80.

The Final Award

50. The final award of the Tribunal is as follows:

⁶ BVILAT2017-021 at para. 87.

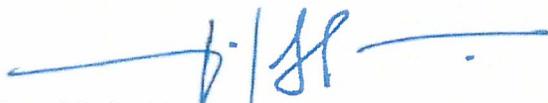
⁷ BVILAT2020-002 at paras. 115 – 120.

- (a) The Complainant was constructively dismissed by the First Respondent.
- (b) The First Respondent shall pay to the Complainant compensation in the amount of \$8,280.00 on or before Thursday, 01 September 2022.
- (c) The Second Respondent shall pay pre-award interest to the Complainant in the amount of \$992.00 on or before Thursday, 01 September 2022.
- (d) If the compensation is not paid on or before Thursday, 01 September 2022, the First Respondent shall pay post-award interest to the Complainant in the amount of \$1.15 for each day thereafter that the compensation remains unpaid.
- (e) No order as to costs.

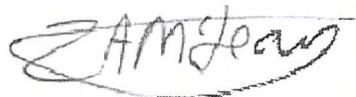
Post-Script: Any person who is dissatisfied with this Interim Award may appeal to the High Court on any question of law on or before Friday, 12 August 2022.

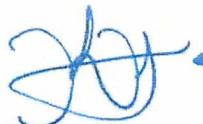
By Order
Labour Arbitration Tribunal

Location:
Ashley Ritter Building
Road Town, Tortola VG1110
British Virgin Islands


Jamal S. Smith, LLB(Hons.), FCI Arb.
Chairperson




Zebalon A. McLean
Member on the recommendation of the
Complainant


Kamika A. Forbes, LLB(Hons.)
Member on the recommendation of the
Respondent