

**VIRGIN ISLANDS**

LABOUR CODE, 2010  
(No. 4 of 2010)

**IN THE LABOUR ARBITRATION TRIBUNAL**

**Case No. BVILAT2022/007**

**BETWEEN**

**WYCLIFF GUMBS**

**COMPLAINANT**

**AND**

**MORRELL & COMPANY LIMITED dba TICO**

**RESPONDENT**

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**REASONS FOR DECISION**

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**BEFORE:** **Samuel Jack Husbands**, chairperson, **Yvonne Crabbe** and **Zebalon McLean**, arbitrators

**TRIAL AND SUBMISSIONS:** 17 August, 13 September and 20 September 2023

**DECISION ON:** 25 April 2024

**IN ATTENDANCE:** (1) Wycliff Gumbs, Complainant  
(2) Daniel Fligelstone Davies, legal practitioner for the Complainant instructed by Silk Legal (BVI) Inc.  
(3) Morrell & Company Limited, the Respondent, represented by Adam Morrell, Managing Director  
(4) Marie-Lou Creque, legal practitioner for the Respondent instructed by Creque Global Group

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

## **Summary**

1. This is not a case of dismissal. The Complainant is still in the employ of the Respondent. He complains that the Respondent has failed to pay him the correct amounts of auto allowance, i.e. amounts due as reimbursement for the use of his automobile on the Respondent's business. A subsidiary issue is whether the terms as to the reimbursement of auto expenses may be varied unilaterally by the Response in response to cutbacks during the Covid-19 pandemic.
2. The Respondent carries on business as a distributor of beverages in the BVI. The Complainant was employed by the Respondent since 1994 as a sales representative. The terms of his employment were confirmed in a written contract dated 29 September 2008. The contract contained a term to the effect that it could be "revised by TICO management on a yearly basis".

## **Procedural history**

3. The Complainant submitted a Dispute Claim Form to the Labour Commissioner on 11 December 2020. By a memo dated 18 January 2022, the Labour Commissioner forwarded the dispute to the Minister responsible for Labour under section 26(3) of the Code on the basis that the parties had been unable to reach a settlement. The Minister, acting under section 28(1) of the Code by notice dated 23 March 2022, referred the matter to the Tribunal. He certified that the nature of the dispute was a breach of contract between the parties and compensation for all benefits to which the Complainant is entitled. The Tribunal notes that the Complainant only disputes the mileage allowance, not the food and beverage allowance.
4. The Dispute Claim Form was filed with the Tribunal on 24 March 2022. Shortly thereafter, the term of the chair of the Tribunal expired and Tribunal ceased to be properly constituted until the appointment of the correct chairperson in May 2023. There has been further delay in the issue of this award after the completion of the trial. The Tribunal apologises to the parties for the length of time it has taken to complete this matter.

## **The evidence**

5. The Complainant uses his personal vehicle to visit existing and prospective clients of the Respondent in the British Virgin Islands. For the use of his personal car, he was compensated at the rate of \$1.37 per mile travelled up to a maximum of \$1,350 per quarter. It is common ground that this cap was raised to \$1,750 per quarter in the period of this claim (see paragraph 13 of the Respondent's written submissions filed on 13 September 2023). In order to establish the quantum of reimbursement, the Complainant is required to submit what are called "Auto and Sales Related" forms. An Auto and Sales Related form, partly completed, is exhibited at page 93 of the hearing bundle.
6. By May 2020 the BVI was in the grip of the Covid-19 pandemic. The ports had been closed and curfews were imposed by the government. These measures resulted in the

curtailment of business activity and employment. By a memo dated 8 May 2020 from Adam Morrell, the Respondent's managing director, the staff (including the Complainant) were notified that from after the 4<sup>th</sup> week of April 2020 "payroll would be reduced on a pro-rata basis as to hours worked". The memo did not specify the extent of the reduction in hours. Mr Morrell's assessment is that one-half of the Respondent's business is in tourism. There were two or three "massive lockdowns" according to him. He said all staff were asked to share the burden, including him.

7. By a subsequent email dated 3 February 2021, John Sopsic, a senior employee, reminded staff that in order to claim mileage the log must show where the salesman went during the period between clock-in and clock-out and that it was not satisfactory to simply claim, for example 2,000 miles, without supporting information.
8. In its Response to the Dispute Claim Form, the Respondent stated that the Complainant's 4<sup>th</sup> quarter 2020 and 4<sup>th</sup> quarter 2021 mileage statements contradict the Complainant's case that he provided an accurate account of miles driven. In order to claim the cap of \$1,750 the Complainant must have driven 1,277 miles per quarter. The Respondent had reason to doubt the miles being claimed by the Complainant so it tracked the trips on Google Maps. It then concluded that the Complainant was in fact inaccurately recording his miles. In his affidavit in support of the Response, Mr Morrell again disputed the accuracy of the Complainant's account of miles driven. He said, based on the visit logs and Google Maps, there was a difference of 953.51 miles between the amount claimed of 1,564.29 and the amount the Respondent considered actually driven of 610.59 miles. At paragraph 4 of the affidavit, Mr Morrell offered an explanation of the reason for his assessment of miles actually driven. Mr Morrell also gave oral evidence. The explanation was that, along with Google Maps, new road traffic patterns were taken into account and such things as using the coast road for travel to East End versus the Ridge Road for business miles calculations as the coast road is higher mileage.
9. The Complainant filed an Affidavit in Support of Reply on 11 May 2022 and also gave oral evidence. In his affidavit, he stated that the maximum disbursements for use of his own vehicle rose from \$1,350 to \$1,750 per quarter. As stated above, this was not disputed by the Respondent. The Complainant also stated the mode of recording and submitting vehicle expenses had changed after Adam Morrell took over the business following the death of the previous managing director in 2019. He stated he complied with the new system.
10. When Adam Morrell took over the business in 2019, he seemed to have tightened the ship. He changed the policies for bar and restaurant expenses and for mileage claims. The entire bar or restaurant bill now needed to be submitted and not just the stub at the bottom of the bill. The Complainant conceded that mileage now needed to be logged according to a meter (see paragraphs 8 and 9 of his Reply and 9 and 10 of his affidavit). Mr Morrell issued the memo dated 8 May 2020. He introduced into evidence the print-out from Google Maps to show what he considered a more accurate recording of the miles travelled from bar to bar across Tortola. The Complainant does not accept the accuracy of the Google Maps extract. He said it does not accurately reflect "real world" driving. For example, he may have to

detour to use a bathroom or because vehicles in a road traffic accident blocked the road. We would think these would be exceptional and not everyday events.

11. Mr Morrell also noted in his evidence that miles claimed must be miles driven between the Respondent's business accounts. He referred at paragraph 6 of his affidavit to Mr Sopsic's email dated 3 February 2021 which reminded staff that in order to claim mileage they must submit a log of where they went and show the distance travelled between accounts.
12. Mr Morrell was of the view that his memo of 8 May 2020 did not effect a change in the Complainant's contract. He stated that in any event the Complainant received the memo and did not express disagreement.
13. Regarding the Google Maps data, we are not entirely happy with this evidence, There is no explanation to determine the accuracy of the data. The Tribunal cannot simply assume that the reports are accurate.
14. Two examples of what Mr Morrell seems to have considered the best routes that should be taken were given in Exhibit AM11 to Mr Morrell's affidavit. The exhibit is a statement showing miles plotted from Tico's premises at Pasea Estate using information he derived from an analysis of the Complainant's Sales Team Visit Logs. An example of a route was from Pasea Estate (a) to Trellis Market at Beef Island along the coast road going east (Drake's Highway) as against the Ridge Road and (b) to Rincon Latino Bar & Restaurant along the coast road going west (Blackburn Highway) – see also paragraph 8 above.
15. The Complainant accepted that during Covid-19 there was a reduction in miles driven but not in the rate of reimbursements. He did not agree to a one-third reduction. At paragraph 12 of his affidavit, he stated he wrote to Adam Morrell several times. He did not exhibit copies of the correspondence.
16. Mr Morrell further stated that from May 2020 all reimbursements would be pro-rated by hours worked. It seems to the Tribunal he was matching apples and pears. An employee should be entitled to the full mileage reimbursement for miles actually driven even if his salary was cut. The two were not connected. He said he received letters from the Complainant's lawyers informing him that the Complainant's salary and allowances had been cut but he received no documentation to support this claim. He had provided the report on the discrepancy in miles (Exhibit AM-13) to the Complainant. He explained that where the Complainant exceeded 1,277 miles (i.e., the cap of \$1,750 divided by the rate of \$1.37 per mile) he would be entitled to the full allowance of \$1,750. He also noted that in Exhibit WG-1 that the maximum quarterly rate of \$1,750 was divided by 4 and not by 3, the number of months in the quarter. He could not explain this discrepancy. The Complainant was paid only \$145.83 for that quarter.
17. In her cross-examination of the Complainant, Mrs Creque drew the Complainant's attention to his mileage report for April to June 2020 at Exhibit WG1. The Complainant conceded that he did not complete the form in its entirety. The form did not include information on

mileage. A summary of the mileage information was inserted on the back of the form (see e.g. Exhibit AM-10

18. There is some vagueness in the Complainant's case. He refers both at paragraph 10 of his Reply and at para 11 of his Affidavit to "reduced reimbursements" but does not set out the details. He claimed \$20,000 minus any amounts paid. He stated he submitted 8 reports (presumably mileage reports) but exhibited only 3 – for the following periods:
  - a. April to June 2020,
  - b. July to September 2020, and
  - c. January to March 2021.
19. The Respondent submitted reports for:
  - a. October to December 2020, and
  - b. October to December 2021.

#### **Summary of the parties' submissions**

20. The Respondent did not take advantage of certain deficiencies in the Complainant's evidence. It submitted into evidence the back of the mileage report for the period October-December 2020 containing an endorsement of miles claimed and it also submitted mileage reports for quarters for which the Complainant did not submit any. The onus is however, on the Complainant to prove what disbursements he is claiming by producing the forms with the correct data inserted.
21. The Respondent made the following submissions:
  - a. the claim was filed in December 2020 and was never amended and it could therefore be reasonably implied it was for loss limited to the period from April to December 2020,
  - b. the Complainant failed to provide an accurate account of miles driven and, in any event, there was a reduction in business that necessitated a reduction in mileage compensation,
  - c. the rate of mileage reimbursement was \$1.37 per mile,
  - d. the Complainant failed to produce evidence to show miles driven (counsel stated that the Complainant produced only two mileage reports and, along with three produced by the Respondent, they were the only reports before the Tribunal and this fell short of proving mileage for the entire period claimed in evidence),
  - e. an accurate account of miles should have included the odometer readings prior to setting out from the office on the day's run, for private trips, and on return to the office,
  - f. while the country was on lock-down under Covid-19 restrictions, it was even more desirable, and the Complainant was under a greater duty, to submit an accurate account of miles driven,
  - g. generally the Complainant could not have travelled and did not travel the miles he claimed and he has failed to prove (i) actual miles travelled, (ii) the amount of

- mileage remuneration to which he was entitled, (iii) the amounts he was paid and therefore (iv) the amounts owed to him,
- h. a company may by virtue of section 120(1) of the BVI Business Companies Act unilaterally reduce the level of reimbursement expenses paid to employees under their contracts of employment if it is acting in its best interests,
  - i. there was no bad faith on the part of the Complainant in the reduction of salary and benefits as a response to the economic consequences brought on by the Covid-19 pandemic,
  - j. under section 181 of the Labour Code (**the Code**) the Complainant is barred from making any claims for loss occurring prior to 6 months before the filing of the Dispute Claim Form with the Labour Commissioner,
  - k. the Complainant failed to produce in evidence the form of mileage form approved by his contract of employment and the Respondent had to resort to his visit logs in order to plot his miles driven on Google Miles Maps, and
  - l. the Complainant accepted the reduction in the allowance for restaurant expenses and is bound to accept the reduction for visits for auto expenses.
22. The Complainant submitted that:
- a. there could be no unilateral variation of the contract to reduce the proportion of mileage allowance that could be recovered,
  - b. he did travel the miles claimed,
  - c. he had completed valid and accurate mileage forms for at least two quarters,
  - d. he was not required present an odometer reading showing miles travelled, and
  - e. the Google Maps data is not a reliable calculation of the miles driven.
23. The state of the evidence must have influenced the Complainant to reduce his claim to \$1,300.84 comprising (i) \$863.34 being the balance due to him for the quarter October to December 2020 and (ii) \$437.50 being the balance for the quarter April to June 2020. The Respondent's tally had been \$866.66 for October to December 2020 on the basis that the miles travelled were 1,564.2 miles. But these miles at the agreed rate of \$1.37 would produce a sum of \$2,142.95 which would allow the Complainant to claim the cap of \$1,750. The result therefore would be an underpayment of \$863.34. Second, regarding the quarter April to June 2020, there is no indication on the mileage form of the number of miles but the endorsement gives a figure of \$588.33 which translates into 429 miles for the quarter. The Respondent must have been satisfied at the time that the miles driven was 429. It, however, allowed only 25% of the amount claimed and paid the Complainant \$145.53. Since, as we conclude below, the unilateral reduction in the allowance was not valid, we would restore the amount of \$583.83 by awarding the Complainant the difference of \$437.50 for that quarter.

#### **Unilateral variation of the employment contract**

24. As we have stated at paragraph 6 above, Mr Morrell sent a memo to his staff dated 8 May 2020 purporting to vary the terms of staff contracts. We have noted the authorities relied on by Mrs Creque, especially **Blackburn v LIAT (1974) Limited** (ECCA 2008), in which a reduction on salary on demotion was said to be permissible – see Edwards JA at

paragraph 36 of the judgment. We do not think that even the Covid-19 slowdown was sufficient to permit departure from the principle of mutuality so as to alter a term that required reimbursement for the use of the employee's own property in the business of the employer. Some negotiation is necessary even where the employee is not represented by a workers union. We note further that this point only arose while the evidence unfolded and was not signalled by the Respondent in its Response or in Mr Morrell's affidavit. Changes adverse to an employee such as a change in a major term like remuneration must, if alterable unilaterally at all, be reserved for the most exceptional circumstances. Covid-19 pandemic created exceptional circumstances. We accept that the employer may vary certain aspects of the procedure such as the form to be used for submission of auto-related claims or a change in the information to be captured by the form but it would be totally disproportionate and unfair to permit a unilateral change to the rate of remuneration for use of an employee's own property.

25. The Tribunal does not therefore agree with the Respondent that there was a unilateral variation of the employment contract. Vehicle expenses should be allowed at the contract rate without any deduction. We find, however, that the Complainant has only established a reduced allowance for two quarters, namely April to June and October to December 2020. Though the Complainant's record-keeping was inadequate, we are satisfied he has established loss for those two quarters.

### Order

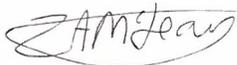
26. We would accordingly award the Complainant \$1,300.84. This sum shall carry interest at 3 per cent per annum from 14 January 2021 until 13 December 2023.
27. There will be no order as to costs.
28. Mr Davies is unable to attend the hearing for the delivery of this decision. In the circumstances, the decision and the order being made will not take effect until his return to the Territory on 2 May 2024.

By Order

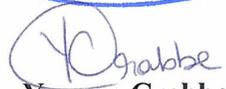
**Labour Arbitration Tribunal**



**Samuel J Husbands**  
Chairperson



**Zebalon McLean**  
Arbitrator



**Yvonne Crabbe**  
Arbitrator