VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/011

BETWEEN

DIAN FAHIE **COMPLAINANT**

AND

BVI HEALTH SERVICES AUTHORITY **RESPONDENT**

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, Chairperson, **Professor Arthur Richardson** and **Zebalon McLean**, arbitrators

TRIAL AND SUBMISSIONS ON: 12 July, 30 September, 12 November and 9 December 2024 and 24 January 2025

DECISION ON: 24 October 2025

IN ATTENDANCE:
(1) Dian Fahie, the Complainant
(2) Marie-Lou Creque of Creque Global Group, legal practitioners for the Complainant
(3) Nia Belgrave of Creque Global Group, legal practitioners for the Complainant
(4) Daniella Boxill, in-house counsel of the Respondent
(5) Jermaine Case of George Henry Partners LP, legal practitioners for the Respondent

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

Introduction

1. The Complainant was formerly employed as a public officer. She entered into an agreement dated 4 August 2011 [**page 57 of Trial Bundle**] to be employed by the Respondent, a government statutory corporation. The terms were subsequently varied and she was eventually seconded from the public service to the service of the Respondent as internal auditor [**page 68**]. She was first employed by the Respondent on secondment by a contract dated 10 February 2012 [**page 73**] for a period of two years. This contract was renewed with effect from 23 January 2014 for a further term of three years to 22 January 2017 as confirmed by further agreements dated 29 April 2014 [**page 75**] and dated 28 May 2014 [**page 77**]. It was provided by clause 6 of the Schedule to the 2014 agreements, her employment could be terminated on three months' notice in writing or on the payment of one month's salary [**page 78**]. The extension of her contract beyond January 2017 is not in evidence but the case proceeded on the basis that the terms were similar to those contained in the 2014 contract.

2. She was terminated with effect from 31 July 2022 [**page 312**]. Her termination letter was dated 14 July [**page 310**]. She filed a Dispute Claim Form with the Labour Commissioner dated 7 September 2022 [**page 1**] in which she claimed compensation for unfair dismissal. The claim was referred by the Labour Commissioner to the relevant Minister pursuant to section 26(3) of the Labour Code 2010 (**the Code**) by memorandum dated 5 June 2023 [**page 3**] and it was further referred by the Minister to the Tribunal for resolution pursuant to section 28(1) of the Code on 28 August 2023 [**page 5**].

3. The Complainant gave an Oath of Secrecy and Security on 24 January 2012 [**page 67**] as part of her contract obligations. She swore to observe strict secrecy in all matters connected with her employment and she undertook not to reveal matters which came to her in the discharge of her duties except to her official supervisors or otherwise required by them to do so.

The evidence

Complainant's and Moleto Smith's evidence

4. I will summarise the evidence of these two witnesses together as the case is well-documented and there is a great deal of consistency between the Complainant's and the Respondent's cases.

5. The Complainant was informed in early May 2021 by Angelina John, the Respondent's Financial Controller, that Ms John had discovered several anomalies in the payroll and invited her to review the payroll information. She reviewed the information and identified certain anomalies herself. They raised what she termed a "red flag". She was instructed by the then chairman by email dated 13 May 2021 to proceed with the audit [**para 8 page 22 to para 14 page 23**]. The Complainant believed the Respondent had not set up proper structure including the formation of an Audit Committee to oversee its "independence, objectivity, performance and professionalism" [**paras 5 and 6 page 12 and 13**] and support of the audit process and to provide effective use of its internal audit department, among other things. The Board changed at the end of July 2021 [**para 15 page 23**] and the new chairman instructed her by email dated 8 September 2021 [**page 82**] to conduct an internal audit of salary increases implemented from 1 December 2020 to the date of the letter.

6. In a memo to the chairman and deputy chairman dated 26 September 2021 [**page 83**] the Minister of Health, under whose portfolio the Respondent fell, stated it was the desire of the government to conduct a comprehensive review of the human resources capacity and the financial and operations and sustainability of the Respondent and noted that the chairman had advised of reports of Board meetings indicating that the Respondent had been experiencing internal and administrative issues that had been effecting the Respondent's daily function or which may require Board ratification. He suggested that an independent audit be conducted of employee records and roles of certain officeholders with the option of the preparation of an audit by the central government's Internal Audit Department (**Central Audit**). He then suggested that a formal request be submitted to his office for assistance in engaging the services of Central Audit.

7. The Board met and accepted the Minister's suggestion and by a letter dated 8 October 2021 requested his assistance in engaging the services of Central Audit [**page 84**]. By WhatsApp message dated 10 October 2021 [**page 86**] the chairman referred to a recent breakfast meeting (on 28 September) and notified the Complainant of the Board's approval of the Miniter's request for a review and assessment of "many key personnel and components" of the Respondent. He asked her to put on hold any additional work. The Complainant replied on 11 October stating she was awaiting instructions on the way forward with the audit [**page 86**].

8. In a letter to the Complainant the same day [**page 87**] the chairman formally confirmed his instructions that her audit had been placed on hold and the Board had approved the request to approve the services of Central Audit. He then asked her, in effect, to submit her work product as a preliminary report to Central Audit. The instructions to discontinue her audit were, in our view, clear.

9. The Complainant must have thought there was a cover up or complicity in fraud and corruption at the top of the Respondent's management. She did not feel that misconduct would be addressed. She was suspicious of the former and present chairman and she did not want to be accused later of breach of fidelity [**paras 35-37 page 26**]. She related her experiences regarding a report she submitted about the Respondent's Emergency Department about which nothing was done [**paras 37-38 pages 26**].

10. Notwithstanding the clear instructions of her Chairman, the Complainant felt sure that there was criminality or attempted criminal conduct and a waste, misappropriation and mismanagement of public resources [**paras 39 page 27**]. She may have had laudable motives. She believed she was acting as a whistleblower under the protection of the Whistle Blower Act 2021 and felt compelled to disseminate her report.

11. She completed and circulated as an attachment to an email on 15 November 2021 [**page 301**] a lengthy and detailed Preliminary Audit Report of her own [**page 90**]. It is worth noting here that the Whistle Blower Act had been recently enacted and had been assented to on 5 August 2021 but had not been brought into force. The Complainant emailed her report to the chairman and deputy chairman and other board members and copied the Premier and his Permanent Secretary, Minister Malone and his Permanent Secretary, the Financial Secretary

and another government official. In her email, the Complainant referred to irregularities that had been detected by the Financial Controller. She acknowledged that she had been instructed to discontinue her audit. She said the audit, though incomplete, revealed fraud and corruption which it was her fiduciary duty to report. There is no evidence she leaked the report to persons not disclosed in her email. She alleged in the Reply that she went ahead and disclosed the report at the request of the then Premier and pursuant to the Whistle Blower Act [**paras 7 and 9 at pages 13 and 14**].

12. The chairman replied by email the next day, 16 November, [**page 302**] and informed the Complainant that her unauthorised dissemination of the report after requests to discontinue it was profoundly unacceptable and may be seen as a breach of fidelity and that the Board would determine what actions it should take to ensure the type of behaviour did not occur in future.

13. He next sent the Complainant a letter dated 1 December 2021 [**page 303**] in which he referred to the relevant correspondence and instructions, in particular her email of 15 November, and notified her the Board considered that her conduct warranted disciplinary action up to discharge from her position. She was placed on leave.

14. By letter dated 8 February 2022 [**page 305**] the Complainant was invited by Angelina John, the Interim Chief Executive Officer, to respond by 11 February 2022 to the concerns raised in the chairman's email of 16 November and to attend a meeting during the week of 14 February to make oral representation. The Complainant replied by letter dated 11 February 2022 [**page 306**].

15. The Complainant attended the meeting with the Board on 17 February 2022 [**para 51 page 28**]. The meeting was by audio visual link. It was recorded but the recording is not available. She subsequently received what she termed "deficient" draft minutes. She stated she felt harassed and intimidated. She did not state in any detailed way that she was not allowed to put her case. On 31 July 2022 she received the termination letter dated 14 July 2022 [**page 310**]. It is common knowledge that the Premier had been out of office effectively from the end of April 2022. No corroboration of his request for the disclosure of the report has been provided.

16. The reasons for termination stated in the dismissal letter were improper release of confidential or privileged information contrary to clause 9.5(3)(d) of the Employee Handbook and other serious misconduct not specifically outlined in the Handbook, being the failure to comply with instructions contained in the Board's letter dated 11 October 2021 and associated communications amounting to insubordination and serious misconduct contrary to clause 9.5(3)(u). We also note the infractions at clause 9.5(4)(i) of the Handbook of failure to comply with verbal or written instructions, published policies, or procedures and standards [**page 435].**

17. By the time of the Complainant's dismissal in July 2022, the Premier had been effectively out of office for nearly three months.

Evidence of Angelina John

18. Ms John, the Financial Controller and Interim CEO, gave a witness statement on behalf of the Complainant [**page 56a**]. She is a Fellow of the Chartered Institute of Accountants. She agreed with the Complainant that there were administrative and systemic deficiencies in the management of payroll of Human Resources officers and she supported an internal audit. She knew that the Complainant was required to discontinue her internal audit and defer to Central Audit. She considered that that the report by Central Audit supported or aligned with the Complainant's findings. We note here that far from supporting the Complainant's persistence with an audit, the report by Central Audit might have supported the view that the Board made a good call and did not suppress information and that the Complainant could have used her time more usefully, especially since she claimed to be overworked. She concluded that the Complainant's disclosure of the report was not an improper release of information having regard to the provisions of the Whistle Blower Act. The witness too was unaware that the Act had not been brought into force.

Evidence of Dr Dierdra Wheatley

19. Dr Wheatley produced the employment contracts and related correspondence. She also made reference, at paragraph 20 of her witness statement [**page 55**], to clause 12 of the Secondment Agreement [**page 70**] which provided that reports and other work products produced during the period of secondment should not be shared with anyone other than the Respondent. She noted that the Secondment Agreement (dated February 2012) was for a period of two years and it was not clear if it was extended but it must have been.

The statutory and contractual framework

20. We set out below relevant provisions of the Code.

Section 81 –

(1) The employment contract of an employee shall not be terminated by an employer without a valid and fair reason for such termination connected with the capacity or conduct of the employee, or with the operational requirements of the undertaking, establishment or service, pursuant to section 88, 89, 101 or 103, and unless the notice requirements in section 90 are complied with.
(2) Subject to section 89, an employer may not terminate the appointment of an employee unless the employer has informed the employee in writing of the nature and particulars of the complaint against the employee and has given the employee or his or her representative a fair opportunity to defend himself or herself including access to his or her employment record.

Section 85 –

(1) In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to prove the reason for the dismissal.
(2) In the circumstances referred to in section 83, it shall be for the employee to prove the reason which made the continuation of the employment contract unreasonable.
(3) The test as to whether or not a dismissal was unfair under section 82 or 83 is whether or not, under the circumstances the employer acted unreasonably.

Section 101 –

(1) An employer is entitled to dismiss summarily, without notice, an employee who is guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract.
(2) The serious misconduct referred to in subsection (1) is restricted to that conduct which is directly related to the employment contract and has a detrimental effect on the business and it includes, but is not limited to, situations in which the employee has
    a. conducted himself or herself in a manner as to clearly demonstrate that the contract cannot reasonably be expected to continue;
    b. of an offence in the course of his or her employment, the penalty for which prevents the employee from meeting his or her obligations under his or her employment contract for twelve working days or more.
(3) The employer shall, when terminating an employment contract under the provisions of this section, provide the employee with a written statement of the precise reason for the action and the employer shall be conclusively bound by the contents of the statement in any proceeding contesting the fairness of the dismissal.
(4) An employer who fails to provide the statement referred to in subsection (3) shall be stopped from introducing testimony as to facts which might have been included in the statement, in any proceeding contesting the fairness of the dismissal.

Section 102 –

(1) An employer is entitled to take disciplinary action other than dismissal when it is reasonable to do so under the circumstances.
(2) For purposes of this section, "disciplinary action" includes in order of severity - (a) a written warning; (b) suspension from duty for a period not exceeding one week without pay.
(3) In deciding what is reasonable under the circumstances pursuant to subsection (1), the employer shall have regard to the nature of the violation, the terms of the employment contract, the employee's duties, the pattern and practice of the employer in similar situations, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee.
(4) Where action is taken by an employer in accordance with this section, he or she shall advise the employee concerned in writing of the misconduct or action in breach of the employment contract and of what steps the employer is likely to take in the event of any repetition of the behaviour in respect of which the disciplinary action is taken.
(5) A complaint that any disciplinary action taken against an employee was unfair or unreasonable may be made by the employee to the Commissioner pursuant to section 26

21. The relevant provisions of the Handbook are contained in clauses 9.5(3) and 10.2 [**pages 432 and 436**].

Compliance with termination procedure – procedural fairness

22. An employer in any type of dismissal is required by sections 81 and 85 of the Code (i) to have a valid and fair reason for termination connected with the capacity or conduct of the employee or with the operational requirements of the undertaking, establishment or service, (ii) to give notice to the employee except in the case of summary dismissal or other circumstance allowed by the Code, (iii) to provide a statement in writing of the nature and particulars of the complaint against the employee, (iv) to give the employee a fair opportunity to defend herself, and overall (v) to act reasonably.

23. The procedural steps taken by the Respondent were as follows:

a. on 16 November 2021 Mr Smith notified the Complainant her disclosure of the report was unauthorised and profoundly unacceptable and a breach of fidelity,
b. on 1 December he notified her that her conduct warranted termination and she was placed on leave,
c. on 8 February 2022 Ms John asked her to respond in writing to the charges against her by 11 February and proposed a meeting during the week of 14 February,
d. on 11 February 2022 the Complainant replied to Ms John addressing the charges against her, and
e. on 17 February 2022 the termination hearing took place (it is described by the Complainant [**para 51 page 28]** and by the Mr Smith [**para 45 page 49**] and we have referred to the circumstances at paragraph 15 above**)**.

24. There is regrettably no transcript or recording of the hearing. Mr Smith stated that the Complainant made an admission of conduct that amounts to misconduct, i.e. that she disclosed the report knowing she had been instructed not to do so. The Complainant herself denied disclosure in her reply to the charman's letter dated 8 February 2022. She asserted a right to disclose under the Whistle Blower Act. She also tried to argue that the disclosure she made was not unauthorised because Mr Smith's instructions were equivocal, they did not specify a time limit, and they failed to protect the integrity of confidential and privileged records. We find no basis in her objections. As we have stated above, we think the instructions were clear and free from doubt. Any doubt caused by the unavailability of a transcript or recording is overcome by Mr Smith's clear statement and the Complainant's own letter and the strength of the case against the Complainant. The time to respond to the charges was only 3 days but the Complainant had had the charges since 16 November 2021. We do not think she was at a disadvantage. We accept Mr Smith's version of what transpired at the meeting. We think it was a valid hearing. We resolve these issues of procedural fairness in favour of the Respondent. She had been given a fair opportunity to state a case.

25. There is a further requirement that is contained in rule 10.2 of the Handbook. This clause requires that a terminated employee be given notice and an opportunity to appeal. The Complainant argues that she ought to have been given a post-dismissal notice and informed of her right to appeal, i.e. apply to the Labour Commissioner under the Code. We do not agree. We think this provision refers to notice before termination and to an appeal to the Board or any authority set up under the contract with power to hear complaints. In any event the Complainant has applied to the Labour Commissioner within the time prescribed by the Code.

Validity, fairness and reasonableness of the reasons for termination – substantive fairness

26. We will also resolve the substantive fairness in favour of the Respondent. The Complainant made admissions which entitled the Board to uphold the charges and terminate her for the reasons set out in the termination letter. Based on the evidence as we have outlined above, a reasonable employer was entitled to find the Complainant was guilty of serious misconduct as contemplated by the Code and clause 9.5(3)(d) of the Handbook [**page 432]** and therefore liable to immediate termination under the Code or clause 9.5(3)**.** We do not think the restriction of the improper release of information is limited to patient information.

27. In the circumstances we are satisfied that the Complainant was guilty of serious misconduct.

Does the Complainant's conduct justify summary termination?

28. We now consider whether the misconduct was of a nature that it would be unreasonable to require the Respondent to continue the employment contract and whether it was conduct which was directly related to the employment contract and had a detrimental effect on the business– see section 101 subsections (1) and (2). We have also considered whether disciplinary action short of termination was more reasonable in the circumstances and we reviewed the provisions on "progressive discipline" at clause 9.5(4) of the Handbook [**page 433]**.

29. Disobedience of an order of the Board in a matter such as this is the type of conduct that is contemplated by clause 9.5(3) and 10.2 of the Handbook. An employee at the level of Internal Auditor ought to be aware of her obligations when handling her employer's financial information, especially information that contains salary information of other staff members even if that information on employees of public statutory boards is not entirely private and may be obtained upon inquiry.

30. The Complainant set out at paragraph 61 of her witness statement [**page 39]** the circumstances of the preparation and disclosure of her report. It is a fact, however, that she was asked to stand down on her report and that she disobeyed the instructions of the Board in a serious matter. The Board's decision to terminate her on the grounds given by the Board was in our view within a band of reasonable responses open to the Board.

31. The Tribunal must remind itself that it does not substitute its own views for that of the employer. It attempts to assess the employer's conduct with a view to determining what a reasonable employer would have dome, the so-called band of reasonable expectations test – see **Iceland Frozen Foods Ltd. v. Jones** [1983] 1CR 17 and previous decisions of this Tribunal. This an objective test in determining what a reasonable employer would have done. It is a difficult test to apply. A strenuous effort must be made not to impose any of its own subjective element. Commentators have criticised the test on the ground that it leans too heavily on the side of the employer. This Tribunal has adopted the test as a workable guide.

32. We have no doubt that the conduct of the Complainant in flouting the instructions of the Board and disclosing the report is a serious breach of the terms of her contract for an employee of her standing and responsibility.

Should other disciplinary action have been taken – progressive discipline

33. That leaves the questions of whether the employer could have taken disciplinary action other than termination as permitted by section 102(3) of the Code for this one act of misconduct. We also note clause 9.5(4)(i) of the Handbook [**page 435]** (referred to at **paragraph 16 above)** falls within the area of progressive discipline**.** The Complainant's main reasons are that the report would have come to the attention of those to whom it was disclosed in any event. The persons were very senior government officials. She felt that the report reaching only those persons should not have set off alarms and, even so, her conduct would have merited a sanction short of dismissal. She argues further that the findings in the Central Audit report aligns with her report thereby supporting her contention that there were structural anomalies regarding payroll and, if not justifying the disclosure the report, making it more understandable and forgiving.

34. To demonstrate the alignment of her report and the official Internal Audit Department report, the Complainant set out excerpts of both reports at paragraph 60 of her witness statement for comparison. The central government Internal Audit Department report identified excess of authority and conflicts of interest that required correction and improved systems but did not report any fraud or corruption. But that is beside the point. The question is not whether there were actual reportable instances of fraud or misconduct, it was the Complainant not disclosing sensitive internal information outside the organisation but her failure to adhere to Board's instructions. And as stated above, the alignment of the two reports might only serve to contradict the Complainant's fears of a cover up.

35. The Complainant made a point that may be termed "no harm, no foul', based on the premise that senior government officers including the Premier, permanent secretaries and the Financial Secretary to whom the report was distributed would be likely to see it eventually. Again, we think that the flouting of the instructions of the Board was so serious a reasonable Borad could cease to have confidence in the Complainant and terminate her.

36. We are satisfied that the conduct of the Complainant for which she was terminated constituted serious misconduct of the type that justified termination and that her termination was a reasonable sanction.

Disposition and order

37. For the reasons stated above we dismiss the complaint.

38. We will hear the parties on costs.

39. We apologise to the parties for the delay in giving this decision.

By Order
Labour Arbitration Tribunal

Samuel Jack Husbands
Chairperson

Professor Arthur Richardson
Arbitrator

Zebalon McLean
Arbitrator

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