



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/013

BETWEEN

ALOMA MITCHELL

COMPLAINANT

AND

BVI HEALTH SERVICES AUTHORITY

RESPONDENT

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Zebalon McLean**, Arbitrator

HEARING AND

SUBMISSIONS ON: 9 May, 19 June, 18 September, 9 October, 31 October and 7 November (and requests by the Tribunal on 11 November and 31 December 2025)

DECISION ON: 23 March 2026

IN ATTENDANCE: (1) Aloma Mitchell, the Complainant
(2) Mundelle Bardouille of Maximea and Co, legal practitioners for Complainant
(3) Daniella Boxill, in-house Legal Counsel for the Respondent
(4) Lesley-Ann Stewart of George Henry Partners LP, legal practitioners for the Respondent

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

The application

1. The Complainant worked for the Respondent as an Environmental Services Technician from September 2012 to 25 May 2023 when she was terminated. She filed a Dispute Claim Form in September 2022 (**the September Claim Form**) complaining of a workplace injury from 18 January 2022, non-payment of wages, injury from cleaning, failure to provide a safe work environment, and failure to provide equipment. In essence, she alleged her injury to health was caused by the Respondent's failure to provide a safe work environment and its failure to provide equipment (to avoid or mitigate injury) during the course of her cleaning duties.

2. After failed negotiations for a settlement of the complaint, the Respondent terminated her by letter dated 26 May 2023 [**page 109**] with immediate effect or with effect from 25 May. The amount of \$17,590.41 was paid to her on 13 June 2023 – see a copy of the receipt at page 111 of the trial bundle and a copy of the cheque at page 112 and our ruling referred to at **paragraph 10 below**.
3. On her termination, the Complainant did not then file a second Dispute Complaint Form seeking compensation for unfair dismissal or an increased amount of severance, neither did she seek to amend the September 2022 Dispute Claim Form. She pursued the September 2022 Dispute Claim Form and it was referred to the Tribunal on 19 September 2023 for resolution.
4. The Respondent filed a Response on 1 December 2023. It denied the Complainant suffered a workplace injury or that it failed to provide a safe system of work or proper equipment. It claimed that in any event the Tribunal has no jurisdiction to order damages for employment injury. The Respondent went further and stated that the Complainant had been dismissed for a valid and fair reason. It later submitted that only the issues of the amount of severance and unpaid wages should be dealt with by the Tribunal.
5. The Complainant filed a Reply on 15 December 2023. She claimed she was unfairly dismissed and that the severance pay was incorrectly calculated – see paragraph 8 of the Reply at page 16 of the trial bundle. She claimed compensation for under-payment of remuneration.
6. The Respondent applied on 21 March 2024 for the summary determination of the complaint and that it be dismissed save for the assessment of severance pay and any unpaid wages. In a decision dated 13 August 2024, the Tribunal ruled that the claim for compensation for employment injury was outside of its jurisdiction. We allowed the application and ordered that claim for employment injury be struck out and directed an assessment of severance pay.
7. The Complainant in her affidavit filed on 28 March 2025 [**page 40 of the trial bundle**] provided details of her claim for unpaid wages for extra hours worked after the passage of Hurricane Irma in 2017. The basis of her claim was that her hours had been increased from 8-hour to 12-hour shifts and that she worked fifteen 12-hour shifts per month but was not compensated the four extra hours. She stated she made requests of the Respondent to provide her work schedules and salary slips to establish what amounts were owed. I will deal with this in the assessment of the evidence at **paragraphs 13 to 27 below**.

Witness statement of Ishma Edwards

8. During the trial on 19 May 2025 Mr Case, then counsel for the Respondent, notified the Tribunal and the Complainant that he no longer intended calling Ishma Edwards, the former acting Human Resources Manager and present Patient Experience Manager of the Respondent, as a witness. Ms Edwards had given an affidavit. It was included in the trial bundle.

9. Ms Stewart, who replaced Mr Case as the Respondent's lead counsel on the second day of the trial on 19 June 2025, repeated this at the start of the Respondent's case. Ms Bardouille, counsel for the Complainant, raised an objection. She contended that the Respondent had never given written notice of its intention not to call Ms Edwards as a witness. She drew an analogy with rule 29.8(2) of Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 (**the CPR**). This rule provides that if a party who has served a witness statement does not intend to call the witness at the trial, the party must give to the other party notice to that effect not less than 28 days before the trial. Ms Stewart responded that the CPR does not apply to this matter but, in any event, notice was given orally in court on 9 May more than 28 days before the resumption of the trial on 19 June. The Tribunal rules are silent on the point.
10. In a ruling dated 4 July 2025 we directed that the Complainant may rely on the witness statement as hearsay evidence, i.e. a statement of a witness not given by the witness in court and that we would allow the Complainant (i) to refer to the termination letter dated 26 May 2023 and its attachments (at pages 109-113 of the Trial Bundle) which she had referred to obliquely in her own witness statement but did not include in her exhibits or (ii) to put the letter into evidence of her own accord if it could not be referred to because it was tied to Ms Edwards's witness statement.

Severance pay

11. The questions of who is entitled to severance pay and the manner of assessment of severance pay are provided for in sections 104 and 105 of the Code. Relevant provisions of the sections are as follows:
 - a. Section 104
 - (1) An employee whose period of continuous employment is at least twelve months is entitled to severance pay upon termination of such employment on any of the grounds specified in paragraphs (a), (b) or (c) of section 89(2) or in section 93 or 94.
 - (2) A periodic employee shall be deemed to satisfy the conditions as to length of service if he or she had worked with the same employer and any predecessor employer for at least a consecutive four year period.
 - (3) An employer who lays off an employee for a temporary period shall inform the employee in writing and indicate the proposed date for his or her re-engagement prior to the lay-off.
 - (4) Where a periodic employee is employed by two or more employers to perform duties that benefit the same person or associated companies, then two or more employers shall be jointly responsible for severance payment of the employee.
 - (5) An employer who fails, without reasonable excuse, to pay severance pay within two months of the date on which payment of severance pay is due commits an offence and is liable on summary conviction to a fine not exceeding seven thousand dollars.
 - (6) Where an employer is convicted of an offence under subsection (5), the Magistrate shall, in addition to any penalty under subsection (5), order him or her to pay the employee an additional ten per cent of the amount of severance pay to which the employee is entitled.

b. Section 105(1)

(1) In the case of an employee who is not a periodic employee and who is not paid on a piece-work basis, severance payment shall consist of three-quarters of one day's pay or nine days' pay per year, at the employee's latest basic rate of pay, for each month or major fraction thereof of his or her period of employment with his or her employer and any predecessor-employer.

12. There is no dispute that the Complainant is not a periodic employee and is not paid on a piece-work basis and there is no dispute over the duration of her period of employment. There is, however, substantial dispute over the amount of her latest basis wage.

The evidence

13. The Complainant's case is that she worked twelve-hour shifts for total hours far in excess of the contracted 40-hours per week. She claimed her hours totalled approximately 86 per two-week period in most cases and that she was not paid for the difference. It was not overtime. Overtime pay is not included in the calculation of severance. It was her standard pay.
14. Prior to the order dated 13 August 2024 striking out part of her case (see **paragraph 6 above**) and limiting the trial to the assessment of severance (and unpaid wages), the Complainant's case included a claim for compensation for employment injury. As stated at **paragraph 7 above**, in her affidavit filed on 28 March 2025 the Complainant made it clear at paragraph 4 [**page 40**] that, in addition to severance, she was seeking unpaid wages for extra hours worked after the passage of Hurricane Irma in 2017 to the date of her termination. I note that even if that were the case, there may have been a reduction in the number of days worked resulting in the same total hours.
15. She sought documents from the Respondent supporting her claim to hours worked. Her lawyers wrote to the Respondent by letter dated 18 September 2024 [**page 123**] and sought a copy of her work schedule and payment slips for 2016 to 18 January 2022. By a reply dated 23 January 2025 [**page 124**] the Human Resources Manager stated the Respondent no longer had access to the system used to generate pay slips for the period prior to January 2020. Regarding the work schedules, she stated that the officer responsible for generating these was no longer employed by the Respondent but the Respondent was trying to determine if the records could be located. This is dealt with in the witness statement of Kishma Williams-Chalwell, the Respondent's Deputy Human Resources Manager.
16. The Complainant stated that without the work schedules or pay slips she had to rely on her memory to reconstruct her hours worked since September 2017. She was sure that her typical work schedule consisted of fifteen 12-hour days per month for a total of 180 hours but she was only paid for 8 hours per day for 96 hours per month. Fifteen 8-hour shifts would have produced 120 hours per month. Twelve 8-hour shifts would have produced 96 hours per month, a balance of 84 hours per month as stated by her at **paragraph 11** of her affidavit. She claimed this balance.
17. I note here that her contract rate was 40 hours per week – see clause 13 of her contract of employment [**page 195**], however. The contract rate works out at 2,080 hours per annum or

173.3 per month. Her rate of pay was \$10.35 per hour – clause 8 of her contract of employment [**page 194**]. The total of 173.3 hours per month produces annual remuneration of \$21,528. The total of 180 hours per month produces annual remuneration of \$22,356.

18. The Complainant relied on the evidence of Levor Lettsome. Mr Lettsome was the former Human Resources Manager. He testified [**para 9 at page 44**] that the Complainant had raised concerns with him about not being properly paid for her 12-hour shifts. He said at the time the electronic payroll system only allowed payment for 8-hour shifts and the remaining hours had to be entered manually and approved by managers which frequently did not occur. He also testified that the Complainant and other staff were not paid for all their hours and had accumulated unpaid hours. There is in fact no evidence of any action having been taken in the almost 6 years from September 2017 to the Complainant’s dismissal in May 2023.
19. The Complainant’s final witness, Ms Ephraim, had a work emergency and could not attend the trial. Her affidavit could not be tested in cross examination. I did not consider it.
20. Ms Williams-Chalwell turned out to be the Respondent’s sole witness. She confirmed the Complainant’s pre-2020 pay slips were not available because the payroll system in place at the time was no longer accessible and the work schedules could not be located because the former manager responsible for their maintenance had retired - see paragraph 6 of her witness statement [**page 46**].
21. She confirmed that the Respondent was continuing to follow up with the current supervisor to determine if the records could still be located. No further detail or outcome of the searches is given. I do not find that the Respondent deliberately suppressed work schedules or pay slips although it does not seem all was done that could have been done to locate the missing data.
22. Ms Bardouille, lawyer for the Complainant, filed a reply to the Respondent’s post-trial submissions on 7 November 2025. The reply was accompanied by a copy of her work schedule for 2022 which, according to paragraph 31 of the submissions, had only become available to her in October 2025, after the close of the case and the filing of her initial submissions. There was no further hearing and the schedule was not put in evidence but I will permit myself a short reference to it. It records “time in” and “time out” only in the month of January. Otherwise, it mainly records the flat amount of 8 hours per shift. It shows total hours of 1,870.45 which included overall adjustments totalling the net amount of 719.44 hours in entries on 15 August, 30 September, 21 October and 31 December. Applying the hourly rate of \$10.35 to 1,870.45 hours produces annual pay of \$19,359.15.
23. The Respondent stated the Complainant’s annual salary was \$21,532.99 and the monthly salary was \$1,794.42 [**page 184**]. I will accept these figures. Against the record of 1,870.45 hours worked in 2022, it is difficult to understand the level of under-payment reported by the Complainant. I am sensitive to the fact that the Complainant was without all the work schedules. She claims to have worked excessive hours for 6 years without documented complaint. Her pay slips for 2020 to 2023 [**pages 126-183**] are quite helpful. They show consistent pattern of hours over most of the two-week pay periods but she will no doubt say they only gave half the story, i.e., the number of recorded hours not the full hours she worked.

Her case would require us to find there were substantial amounts of hours worked that were not recorded on pay slips she received each month and which she would have had ample available opportunity to challenge.

24. I note the pay slips at pages 182 and 183 of the trial bundle for the weeks ending 31 August 2022 and 31 December 2022 show salary arrears of \$3,837.30 and \$3,588.84 respectively. There has been no explanation for these spikes in salary. They could have been adjustments to reflect hours worked but not recorded in the electronic system. The Complainant was paid for that time. Despite these spikes in pay, the basic rate of pay was \$10.35 per hour for roughly 86.67 hours every 2 weeks for a twice-monthly total of \$897. This produces the monthly salary of \$1,794 and the annual salary of \$21,532.99 per annum.
25. By emails dated 11 November and 30 December 2025 we asked the parties to each file a one-page submission (without reference to any new evidence) regarding the entry for Salary Arrears on pages 55 and 56 of Exhibit KWC-1 (pages 182 and 13 of the trial bundle). We also requested the parties to show how the severance pay figure of \$7,981.70 was determined. In respect of salary arrears, we asked them to indicate (i) the period covered by the arrears, (ii) how each figure was arrived at, (iii) whether the arrears were for regular hours of work or extra time, (iv) whether the arrears were in addition to the regular monthly salary of \$1,794.42 and annual salary of \$21,532.99 or included in salary, and (v) what was the total annual salary paid in 2022 and 2023. The parties did not take advantage of this request.
26. I am left with the evidence of payroll from January 2020 to termination in May 2023. The consistent pattern of hours worked is hard to ignore. Faced with a consistent record as demonstrated by the pay slips it would be a strong thing to conclude there was massive underpayment on a monthly basis for 6 years at a large state-owned enterprise with layers of management and with ample opportunities to air grievances. It would be alarming this could occur without intervention and correction by the HR Manager or the Complainant's team leader or department head.
27. Based on the above, I think the claim for unpaid wages must fail.

Summary

28. I find that the Complainant's basic rate of pay was \$21,532.99. The amount of severance was correctly calculated at \$7,981.70 as set out in the payment schedule at page 184 of the trial bundle.
29. I do not find that the Complainant has established arrears due. The claim for unpaid salary is dismissed.
30. Each party may, if so advised, file a costs schedule and costs submissions and by **4.00pm** on **Monday 13 April 2026** and the party opposing may file a response by **4.00pm** on **Monday 27 April 2026**.

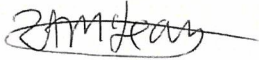
By Order
Labour Arbitration Tribunal





Samuel Jack Husbands
Chairperson

I have reviewed a draft of the above reasons and I agree the order made by the chair.



Zebalon McLean
Arbitrator

