



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/018

BETWEEN

RHODNI SKELTON

COMPLAINANT

AND

BVI TOURIST BOARD

RESPONDENT

REASONS FOR DISMISSAL

BEFORE: **Samuel Jack Husbands**, chairperson, and **Dr Benedicta Samuels**, and **Kamika Forbes**, arbitrators

TRIAL ON: The 23rd and 24th days of January 2025

SUBMISSIONS ON: The 3rd day of March 2025

DECISION ON: the 29th day of May 2025

IN ATTENDANCE:

- (1) Rhodni Skelton, the Complainant
- (2) Clive McCoy, a Director of the Respondent
- (3) Sydney Bennett of Sabals Law, legal practitioners for the Respondent
- (4) Anthea Smith of Sabals Law, legal practitioners for the Respondent

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

1. The Respondent is a corporation established by the Tourist Board Ordinance, Cap 280. It is a body corporate and may be sued in its corporate name. Subject to the approval of the relevant Minister, it may appoint a director of Tourism and such other persons as may be necessary for the efficient performance of its functions.

2. The Complainant was employed by the Respondent as Deputy Director until 6 February 2023. His employment history with the Respondent began on 1 December 2004 when he was hired as Film Manager. He was promoted through the ranks over the years until he was appointed Deputy Director in 2017. On being appointed Deputy Director he was placed on a two-year contract. He said that is standard with the Respondent. The contract was renewed for a period of two years each time until 7 August 2021 when the contract period was reduced to a one-year. The contract dated 7 August 2021 is in evidence. No provision is contained in the contract for the Complainant's return to the substantive post on its expiration.
3. When his contract came to an end the Complainant considered he had been constructively dismissed. He filed a Dispute Claim Form on or about 15 February 2023. In the particulars of his claim he summarised the details of his leaving. He described the dilemma he faced between staying on permanently as Deputy Director and leaving. If he remained on he would lose the 10% gratuity to which he was entitled and he would be heavily monitored and come under greater scrutiny. If he were terminated, he would receive the bare statutory minimum severance under the Labour Code. These were the only options presented by the Respondent. He was summoned to a meeting on his last day of work. He was given a short ultimatum to accept or else and he accepted under duress. He claimed compensation for his loss and the damage to his professional reputation.
4. The Respondent filed a Response on 3 March 2024. It denied he was entitled to compensation, that he was forcibly terminated, that his separation payment was incorrectly calculated and that he accepted under duress. The Respondent also denied damage to his reputation. The Respondent stated further that in or around December 2022 it was going through restructuring and offered him a permanent position. He refused to accept the offer and instead made counteroffers. The Respondent ultimately presented him with a separation package "as requested" by him, even including severance pay to which he was not entitled and on 9 February he signed a release of all claims against the Respondent.
5. The Respondent took two points of jurisdiction. First it stated that the employment contract was not terminated, that it was not further extended and it automatically expired and, as there was no termination, the Tribunal has no jurisdiction. Second as he was not terminated the only issue is whether he became entitled to severance and whether the separation package is a severance package. In any event, he did not claim unfair dismissal.
6. At the opening of the trial the Complainant referred to a request for information dated 8 May 2024 that he said had not been complied with. He had issued a reminder on 20 January 2025. The request was for all relevant emails from April 2022. After argument and before the Tribunal ruled the Complainant waived the request and decided to proceed with the trial.

The evidence

7. It is not disputed that the Complainant worked on contract up to the date of termination, initially on 2-year contracts and in the final 18 months on a one-year then one-month

contracts. The one-year contract dated 7 August 2021 is in evidence as well as the one-month letter agreements.

8. The starting point is section 44(2) of the Code which provides as follows:

Subject to any applicable work permit, where an employment contract for a fixed term is renewed on one or more occasions so that the total period involved is twelve months or more, such contract shall, for the purposes of the Code, be deemed to be for an indefinite period.”

9. The arrangements between the parties were contained in a set of emails passing between them.

- a. Email dated 13 October 2022 at 9.38am from the Complainant to Arlene Thomas, Human Resources Director – The Complainant was seeking to know where matters stood with his job security and expressing frustration with month-to-month contracts. He had received a contract extension. He was disappointed with it. He set out some matters of major concern including the non-inclusion of the contract gratuity.
- b. Email dated 9 December 2022 from Delma Maduro, chair of the Respondent, to the Complainant – This email noted their discussions and referred the Complainant to section 44(2) with respect to his transitioning from contract to Indefinite employment
- c. Reply dated 12 December 2022 from the Complainant to Mrs Maduro – The Complainant stated he never expressed any interest in being taken off contract, that he would suffer a 10% cut in his remuneration, namely the loss of his 10% gratuity received every year (especially as he had not received a salary increase for 6 years). He did not think section 44(2) applied to classes of employees such as himself. He then preferred to remain on contract and he set out some other conditions.
- d. Email dated 10 January 2023 from the Complainant to Mrs Maduro – The Complainant sent Mrs Maduro a huge “thank you” for their meeting the day before. He noted that the Respondent had decided to continue with Mr McCoy as Director and felt that he, the Complainant, was too hard to manage. He stated forthrightly that he distrusted Mr McCoy and did not respect him. He even recommended his own replacement. He concluded that with Mr McCoy as Director there was no other option but to negotiate a separation package. His exact words were: "Lastly, with the Board's feeling of me being "hard to manage", coupled with the Board already making the decision to stick with Mr McCoy as Director, then there is no other option available to me but for us to collectively negotiate an *amicable separation package* for me." [emphasis in original] He then proposed terms and stated he was in for further discussions.
- e. Letter dated 31 January 2023 from Mr McCoy to the Complainant – In this letter Mr McCoy set out the Respondent’s terms of full and final settlement. The letter made it clear that the Complainant would be relieved of his duties as of 6 February 2023. By this letter the Respondent got the jump on the Complainant and terminated him before the negotiations had run their course.
- f. Email dated 1 February 2023 at 1.06pm from Mr McCoy to the Complainant – In this email Mr McCoy stated that documents had been given to the Complainant at a meeting with two members of the Board but the Complainant left them behind and said the

- amount offered was unsatisfactory. This must be a reference to his own letter dated 31 January 2023 at pages 38-39 of the trial bundle
- g. Email dated 1 February 2023 at 1.34pm from the Complainant to Mr McCoy – The Complainant noted that the separation package was not reflective of a package that would be offered to someone of his seniority. The Complainant made it clear he was not happy with the package. At paragraph 8 of his witness statement (not in the bundle) he stated that on 1 February 2023 he was summoned to a meeting and presented with an unsatisfactory “take it or leave it” offer. He also said that on 6 February, one day before the expiration of his contract, he was presented with the same “take it or leave it” offer, leaving him with 75 minutes to sign it.
 - h. Letter dated 8 February 2023 from Mrs Maduro to the Complainant – Mrs Maduro referred to an email from the Complainant dated 6 February 2023 which is not in evidence. She also referred to a letter of presented to the Complainant on 7 December 2022 containing an offer of indefinite employment for his consideration and that he declined and responded with a counter-offer including the option of a separation package. Mrs Maduro also referred to an offer of separation package from the Respondent dated 31 January 2023. This must be a reference to Mr McCoy’s letter dated 31 January 2023 found at pages 38-39 of the trial bundle. She further stated that the Complainant was aware his contract was expiring on 6 February and that both the separation package and the indefinite employment remained options.
10. The Respondent issued a letter dated 7 February 2023 to the pension provider requesting a cheque for 100% of the Complainant contributions as well as its own contributions. On 9 February 2023 the Complainant signed the Release.
 11. The Complainant said in his evidence he felt he had no choice but to sign and that he was constructively dismissed. He denied the Respondent was going through a restructuring. His version of the facts is that with effect from 7 August 2022 the contract was renewed but on what he referred to as consecutive one-month periods. The short renewal periods caused him some anxiety and to feel insecure. He must have clearly begun to feel the end was in sight. He prodded the Board but it was not until the fourth or fifth month that he received a response from the Board. After another two months or so, the Board offered what he considered a significantly reduced remuneration package. He did not accept it initially. The Respondent only fully engaged him on or about 1 February 2023 when he was presented with a “take it or leave it” offer at a meeting with Board members which he considered unsatisfactory. On 6 February 2023, the penultimate or last day of his fifth one-month contract extension he was summoned to a meeting thinking that earnest discussions would be had pertaining to his future with the Respondent but was met instead by options that amounted to his constructive dismissal.
 12. The Complainant believed that precedent had been set whereby permanent employees such as himself who had been placed on contract are allowed to return to their substantive posts on the termination or expiration of the contract without penalty, meaning at the same remuneration as under the contract. He cites the case of another former director as an example of this policy. He stated that ultimately despite his initial refusal to accept the terms offered, he did accept and signed a release on 9 February 2023, releasing the Respondent from all claims.

13. Mr McCoy, the Director, gave evidence for the Respondent. He stated that in December 2022 the Respondent was undergoing restructuring and on it made an offer to the Complainant of permanent employment by letter dated 7 December 2022. As stated above, that letter is not in evidence. Mr McCoy recited the various items of correspondence. He stated that the Respondent presented an offer that was rejected by the Complainant on 10 January 2023 and a decision was then made not to renew his contract and that an amicable separation package be granted.

Additional provisions of the Labour Code

14. Sections 81 and 83 provide as follows:

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.

83(1) An employee is entitled to terminate his or her employment contract without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term, where the employer's conduct has made it unreasonable to expect the employee to continue the employment contract.

(2) Where the employment contract is terminated by the employee pursuant to subsection (1), the employee shall be deemed to have been unfairly dismissed by the employer for purposes of the Code

Analysis of the submissions and the evidence

15. The Respondent presents its case on the basis that it did not dismiss the Complainant but rather the Complainant terminated the contract.
16. We recognise there are occasions in which an employee resigns by mutual consent but in circumstances which amount to a dismissal. The Tribunal may look at what was agreed and what the employee was entitled to on termination and determine if there has been a voluntary acceptance of retirement or termination by mutual consent instead of a dismissal. Even if the parties have executed a release or settlement agreement and there are no acts of overt hostility or duress, the arrangement may still be open to question. It is important to look at whether the terms of the agreement are more or less favourable than the statutory rights or benefits to which the Complainant would be entitled.

17. Counsel for the Respondent submitted ~~first~~ that the option to continue on a fixed-term contract was available only with the consent of the Respondent. The Tribunal accepts that as self-evident.
18. It must be borne in mind that reaching an “acceptable package” was a condition of the termination. The Complainant did not say he would resign at all costs. The Respondent must have misinterpreted his condition because as was stated by Mr McCoy in his email dated 31 January 2023 the Respondent had already decided to terminate the Respondent. In her letter dated 8 February, Mrs Maduro stated that the Respondent would not be entering into further negotiations but the Complainant knew both a separation package and indefinite employment remained an option. It did not therefore follow that the result would be termination if negotiations failed. The necessary outcome on the failure of negotiations would be confirmation in permanent employment. He put his finger on it in cross-examination. He states that up to 1 February 2023 they were still negotiating. He agreed he was never asked to resign and was never threatened with termination. He said that the 6 February meeting that it was made clear to him that if he did not accept their separation package he should consider himself terminated. He stated further that at no point did he expect to be terminated. He did not consider his email of 10 January his final position, but he had no choice. His remuneration package was being diminished, and he faced working in a hostile environment if he continued. This seems to imply that he would not work for the Respondent unless it altered arrangements already in place and do something about Mr McCoy.
19. Relying on **L Lipton Ltd v. Marlborough** [1979] IRLR 179, that with regard to constructive dismissal as provided in section 83(1) of the Code, the employer’s conduct complained of must be the actual reason that the employee resigned or terminated the employment. Counsel submits that no claim for constructive dismissal will arise where the initiative to terminate the employment in such circumstances comes from the employee not least because the employee will not generally be able to prove that the employer's conduct was such that it entitled him to terminate the contract without notice where he has made the first move.
20. The approach to differentiating between termination by mutual agreement in the context such as that arising in the present case and constructive dismissal is summarised in paragraph 13 of **Lipton v. Marlborough** quoted by counsel at para 2.17 of their submissions

“...On the appeal, the first question that has to be decided, just as it was the first question that had to be decided by the Industrial Tribunal, was: given the facts in this case, has there been a dismissal at all? If so, did the company dismiss Mr. Marlborough? It seems to us that the Industrial Tribunal went wrong in law in holding that the conduct of the company was such as to entitle Mr. Marlborough to terminate his employment without notice, and that he did so terminate it, because, when you read the letters, it is perfectly clear what in fact happened. It may well be that if Mr. Marlborough had chosen to treat the conduct of the company as conduct which entitled him to terminate his contract without notice, and had done so, that would have amounted to a dismissal within para. 5. But the plain fact is that he did not. One can well understand

that there were perfectly sensible reasons why he should not — because, if his contract with Lipton came to an end by mutual agreement, there was no possible question of his being inhibited by anything in the contract from taking up immediately alternative employment which he had been offered, and which, no doubt, very wisely he thought was a better bet for him than staying on with Lipton in the hope that they would give him a satisfactory change of job. What he did was to say not, 'I am going, and going forthwith', but 'Please may I go as from 5 pm tonight?' And in the first letter he went on to say, 'Of course I realize that this will make problems for you. So do my future employers. But we will both co-operate in resolving them'. In the second letter he does not even say that. He says: 'I wish to terminate my employment and would request that in view of my future employment I be released at your earliest convenience'. The whole difference between termination by mutual agreement in this context and constructive dismissal, is that in the first case the employee says 'Please may I go?' and the employer says 'Yes'. In the second case the employee says 'You have treated me in such a way as I'm going without a "by your leave"'

21. The difference is not always that neat. The difference between the Complainant and the Respondent was whether the Respondent would accept his proposed termination offer or whether he would remain in employment on their terms. We agree that in seeking to retain the 10% gratuity, obtain a salary increase and increased vacation days and, if these were not available, severance, the Respondent may have made the first move. We note that the Respondent took a bold second move by declaring that its Board had agreed to terminate the Complainant's employment before the negotiations were complete. They must have treated his email of 10 January as notice of resignation. But the Complainant had confidently expected the negotiations would continue. There was an asymmetry of expectations. The Board position was simply that he could continue as a permanent employee as ~~Deputy Director~~ but that Mr McCoy would be Director. We also note that the Complainant was insisting upon terms of separation to which he was not entitled but which he seemed to consider he was entitled. The Respondent could reasonably resist those terms and it did. What it did not do was to notify the Complainant that his terms were rejected and he had to make a decision whether he would stay or a permanent employee under their direction.
22. In the decision in **Ali v Petroleum Company of Trinidad and Tobago** [2017] UKPC 2 the situation is discussed at paragraphs 15 to 19 in which the presentation to an employee of a fait accompli of termination which he could do nothing to resist. Did the reverse happen here, that is to say did the Complainant present the Respondent with a fait accompli of acceptance of his terms or termination. The answer is whether he said and did enough so that a reasonable employer would infer that he had imposed the fait accompli of acceptance of his terms or termination. We do not interpret his emails to state this.
23. We accept that the Complainant's forthright indication of his distrust of and lack of respect for the Director ~~was a clear~~ seemed to be an indication it was not possible for him to work with the Director. Under normal circumstances the Respondent would be required to continue to negotiate or simply require the Respondent to revert to permanent employment. As the Respondent had no intention of promoting the Complainant to the post of Director, and causing Mr McCoy to step aside, the Complainant's position may have become

- untenable. The Respondent may well have thought that the Complainant's disparaging remarks about the Director and forthright opinion that he could not work with the Director left them no choice but to terminate him.
24. We do not find that the Complainant's email of 10 January 2023 constituted a resignation notice. By bringing a halt to the negotiations the Respondent must have taken account of the fact that the Respondent had not recanted his views about the Director. Indeed, it would have been difficult to retreat from such views. We accept the submission by the Respondent's counsel that if the second most senior person in the organisation had indicated in no uncertain terms of his personal distrust and lack of professional respect for the person heading the organisation and had referred to him as lacking experience, education and leadership capabilities and sought to replace him, this presented the Respondent with a serious problem of administration. But the Complainant ended his email by stating he remained open to further discussions/negotiations on the separation package and he was certain that the Respondent would agree that a speedy and clean cut would be best for the organisation.
 25. In these circumstances, was the Respondent still required to follow sections 81 or 101 of the Labour Code before terminating the Complainant? Should the Respondent have at least requested the Complainant to elect to continue as a permanent employee on the usual terms or to resign. I understand counsel for the Respondent to answer this question in the negative.
 26. The Respondent had not treated the strong words of the Complainant as a repudiation and took no steps to accept the repudiation. As stated above, we note that the Complainant had not resigned and, as Mrs Maduro stated in her 8 February letter, continuing and severance remained options until the Respondent called off the negotiations. Once the negotiation were called of that left continuation as the only option. In order to terminate the contract the Respondent should then have followed the termination procedure in the Labour Code. It did not do so. We are entitled to determine that upon the breach of the procedural safeguards in the Code, the Complainant was unfairly dismissed.
 27. The insistence upon adherence to the procedural safeguards in favour of employees is not just fanciful. Faced with the rejection of his proposals the Complainant may have recanted his opinions concerning Mr McCoy or made some other representation to counter the termination notice. In the circumstances, we find that the Complainant was unfairly dismissed. We do not find, despite the contentions of the Respondent, that the Complainant rejected the offer of permanent employment. It would have been pointless as a matter of negotiating tactics for the Complainant to have abandoned his fall-back position while in the middle of negotiations.

Compensation

28. The Complainant seeks compensation. The Respondent has not stated in its Response or elsewhere that this remedy would be acceptable to it if the Complainant were to succeed in his claim. Despite that the case was conducted on the basis that the applicable remedy would be compensation

29. The remedy of compensation is governed by section 86 of the Code. Section 86 so far as relevant provides as follows:
- (1) Where the Tribunal determines upon a dispute referred to it under section 27 that the dismissal was unfair or illegal, the Tribunal.
 - (a) may order either that
 - (i) the employee be reinstated;
 - (ii) the employee be re-engaged in a position that is substantially equivalent if the post held by the employee is not immediately available; or
 - (iii) compensation be paid in lieu of reinstatement or re-engagement, if this remedy is acceptable to both parties; or
 - (b) may order the employer to pay the employee such punitive sum as it thinks fit.
 - (2) Where the Tribunal orders that compensation be paid, it shall take into account, among other things,
 - (a) any vacation pay earned, but not taken,
 - (b) any wages lost by the employee, on account of the dispute, up to the date determination of the issue by the Tribunal;
 - (c) the termination notice to which the employee would have been entitled;
 - (d) the employment category of the employee, his or her seniority and the ease or difficulty with which he or she can secure alternative employment; and
 - (e) the duty of the employee to seek to mitigate his or her losses.
30. The Complainant set out his claim to compensation in his witness filed on 14 November 2024 (not included in the Revised Trial Bundle). He claims the equivalent of salary of \$100,000 for each of the 19 years he would have continued to work down to retirement age.
31. On termination he received the following:
- a. the full amount of his and the Respondent's pension contributions
 - b. \$27,675 for three months' salary to 30 April 2023.
 - c. \$1,677.27 for salary from 1-6 February 2023
 - d. \$403.85 for 4.5 days' vacation pay
 - e. \$1,413.48 for all other accrued and unused vacation pay
 - f. \$60,072.69 for severance pay
 - g. \$5,535 for his 10% gratuity for the period August 2022 to February 2023

The total received was \$96,777.28.

32. Having been unfairly dismissed, he is entitled to compensation, which must take into account the amount of severance. In his witness statement and closing submissions the Claimant assessed his compensation without taking into account the duty to mitigate in section 86(2)(e) of the Code as set out at **paragraph 29** above.
33. An employee cannot ordinarily receive the equivalent of the salary he would have drawn for the remainder of his term of employment. He must take steps to mitigate or reduce his losses by, for example, finding suitable employment. He gave evidence of attempts to find

suitable employment. He believes he was blackballed in the market as someone hard to handle. He is satisfied this has affected his employment prospects. He has not produced rejection letters or witnesses (and we acknowledge it is highly unlikely that witnesses refused to hire a dismissed employee because of rumour of stigma associated with his dismissal would come forward to admit they did so).

34. We would allow the Complainant compensation of loss of salary for an additional one year post-termination. From the annual salary and allowances of \$119,100 we would deduct the severance of \$60,072.69 for a total of \$59,027.31.

Summary of order

35. We find that the Complainant was unfairly dismissed. We order as follows:
- a. that the Respondent pay the Complainant compensation of \$59,027.31, and
 - b. this sum carry interest at the rate of 3% per annum from 6 February 2023 to the date of this judgment, and
 - c. there shall be no order as to costs.
36. This order shall take effect on 10 June 2025

By Order
Labour Arbitration Tribunal


Samuel Jack Husbands
Chairperson


Dr Benedicta Samuels
Arbitrator




Kamika Forbes
Arbitrator