



VIRGIN ISLANDS

**LABOUR CODE, 2010
(No. 4 of 2010)**

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/019

BETWEEN

GERARD BROWN

COMPLAINANT

AND

**GEORGE TURNBULL (TRADING AS GEORGE
TURNBULL CONSTRUCTION)**

RESPONDENT

REASONS FOR DECISION

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

TRIAL ON: 28 February and 29 May 2025

SUBMISSIONS ON: 16 June, 2 and 11 July 2025

MADE ON: 29 July 2025

IN ATTENDANCE: (1) Gerard Brown, the Complainant
(2) Allydah George of DenJen Law, legal practitioners for the Complainant
(3) George Turnbull, the Respondent
(4) Ruthilia Maximea of Maximea & Co, lawyers for the Respondent
(5) Mundelle Bardouille of Maximea & Co, lawyers for the Respondent

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

Post-trial application

1. The Complainant filed a Dispute Claim form dated 3 April 2024 containing a claim for compensation against the Respondent. The claim was referred to the relevant Minister pursuant to section 26(3) of the Labour Code 2010 (**the Code**) and it was further referred

by the Minister to the Tribunal for resolution pursuant to section 28(1) of the Code on 11 July 2024 (**the Minister's Reference**).

2. A Notice of Hearing was sent to the Respondent before the case management hearing on 20 December 2024. After the conclusion of the hearing, the Tribunal received an email from the law firm of Maximea & Co on behalf of the Respondent. It was timed at 2.58pm on 20 December. Attached to the email was a medical certificate of the Respondent's inability to discharge the duties of his office until 20 December. Maximea & Co did not state they were acting for the Respondent in these proceedings and did not provide an address for service for the Respondent. By the time the email was received the case management hearing had been adjourned on the basis of lack of proof of service. Further hearing was adjourned to 30 January 2025.
3. On 3 January 2025 service was attempted on the Respondent at his residence of a notice of hearing on 30 January. The process server left the documents being served at the Respondent's gate. The Respondent did not attend the case management hearing on 30 January 2025. The Tribunal directed that personal service be attempted and adjourned the matter to 20 February 2025 for further case management hearing or for trial if the Respondent did not appear.
4. Personal service was again attempted and on 6 February 2025 bailiff personally served the Respondent with the notice of hearing and the case management orders. The order dated 30 January 2025 was endorsed with a notice in red font on page 1 that if the Respondent failed to attend the next hearing on 20 February 2025 the case may be tried in his absence and orders made against him including the entry of judgment.
5. At the hearing on 20 February 2025 the Tribunal, being satisfied that the Respondent had been served on 6 February 2025 and had received notice of the proceedings before 20 December 2024, commenced the trial in his absence. At the end of the trial, judgment was reserved to 28 February 2025. There then followed correspondence between the Respondent's lawyers and the Tribunal about whether the Respondent had been served with a full set of necessary documents.
6. Ruthilia Maximea of Maximea & Co appeared at the hearing on 28 February and was allowed to make submissions. It was explained to her that the Respondent must have become aware of the hearing on 20 December and that could have been the only reason he asked her to submit a medical certificate of unfitness to attend the hearing on that date. She was invited to submit an application to the Tribunal for permission to file a witness statement and participate in the proceedings.
7. The hearing was adjourned to 28 March 2025. On 18 March the Respondent filed an application for an extension of the time to file and serve witness statements. The application was heard on 28 March. Directions were also made for the filing of a Response, an Amended Reply and witness statements and the trial was further adjourned to 29 May. The Respondent filed a Response but not a witness statement. His counsel notified the Tribunal by email on 6 May that no witness statements would be filed on his behalf. The trial thereafter proceeded on an inter partes basis.

Evidence

8. The Complainant filed a witness statement and was cross-examined. He was born on 29 January 1956. In his witness statement he stated he was employed by the Respondent as a mason for 23 years from February 1999 to March 2022 and his last wages were \$600 per week.
9. The Respondent carried on business as a building contractor. His trade licence shows he carried on business under the name of George Turnbull Construction.
10. At the trial the Complainant sought to amplify or correct his witness statement by oral evidence. He testified that his wages were \$630 per week and not \$600. He also sought to correct or supplement paragraph 2 of his witness statement by stating he commenced work prior to February 1999. In his Dispute Claim Form he gave his start date as February 1999. At paragraph 2 of his Amended Reply he alleged he was employed from before July 1999. The Respondent objected but there was nothing to amplify or change. All the Complainant may have needed to do is to state that he was relying on the date in his witness statement and not the date in his Amended Reply. The Complainant abandoned his attempt at amplification. The Complainant had already stated in paragraph 3 of the Amended Reply that 1999 was 26 years ago and he could not remember his start wages. In respect of wages of \$630 per week, the Respondent objected on the basis that the amount of \$600 is already mentioned in his witness statement and in his Dispute Claim Form and that notice of the increased figure should have been given. There was no reason why at the trial the new figure could not have been raised in the evidence because it had not been raised before. A party may seek to correct evidence contained in a witness statement. Averments in pleadings are not evidence but an opposing party must feel confident that at trial he will meet the case that is pleaded. The change from \$600 to \$630 is not such a dramatic change that it ought not to be allowed. The amount of \$630 would have been a recent wage not one from 1999. It may have included payment for work on some Saturdays. It is also consistent with the wages declared in the Social Security record for 2019 to 2021 – see pages 49 and 50 of Bundle 2.
11. The Complainant accepts he was not fully employed by the Respondent without breaks for the entire period of 23 years. He said when one project finished he would wait to be called for the next one. The longest period between projects was 4 months. His Social Security contributions record produced by the Respondent shows a gap from January 2010 to August 2014. There is no record of payment of contributions by another employer. There is no evidence that all contributions were paid in by the Respondent. We believe the Complainant was employed continuously since 1999 though with breaks in service. In his rebuttal closing submissions filed on 11 July 2024 we were reminded by his counsel, Ms George, that the contributions record is proof of contributions made not proof of employment. It is very difficult to re-establish his employment record up to the end of 2009. His contributions from 2014 are far more consistent and show full year-round employment. His entire contributions record is as follows:
 - a. 6 months in 1999 commencing July

- b. 9 months in 2000
 - c. 7 months in 2001
 - d. 10 months in 2002
 - e. 7 months in 2003
 - f. 5 months in 2004
 - g. No contributions in 2005
 - h. 4 months in 2006
 - i. 2 months in 2007 and 2008
 - j. 12 months in 2009
 - k. no contributions from January 2010 through August 2014
 - l. contributions every month from September 2014 through September 2021
12. The Complainant did not have a written employment contract. The terms upon which he worked were agreed orally and confirmed by the manner in which he worked. Over the course of several years from 1999 Social Security contributions were made consistently, with some gaps as stated above which included the entire 2005 and the period from January 2010 to September 2014. Since the last contribution by a previous employer in January 1990, no contributions are recorded by any employer other than the Respondent which started in July 1999.
13. The absence of contributions suggests that the Complainant was either overseas, unemployed, or he was employed by an employer who did not submit contributions. That does not necessarily translate into gaps in employment. It has been a long time ago. The Complainant could not recall if he worked during all the contribution gaps. He may have worked. He was not asked if he worked for another employer or if there were long periods when he was off work ill, or overseas or just unemployed. He did refer to one period when he was off work undergoing surgery followed by a period of post-surgery recovery. Having seen and heard the Complainant we are satisfied he gave his evidence truthfully and with sincerity and that he did work exclusively for the Respondent. This was not rebutted by the Respondent. We are also satisfied he worked for the Respondent continuously over the years. It could have been that the missing contributions were as a result of non-payment. But the Complainant could not satisfy us of the specific periods in which he worked. It would be mere speculation for us to fill in the missing months. We also note it was the Respondent, not the Complainant, who produced the Social Security contribution record.
14. In early March 2022 the Complainant overheard that the Respondent was retiring. He approached the Respondent the same day. The Respondent confirmed that he was indeed retiring but would not be paying severance. On the completion of the project the Complainant was then working on, he did not receive instructions to join another project. It was customary that on the completion of a project, the employees would be notified of the start date and location of the next project. He waited about 3 to 4 weeks. The Complainant did not return to the Respondent after the 3-week break. He asked no further questions of the Respondent and did not seek the Respondent's confirmation that the employment contract was at an end. He had by then known the Respondent for at least 23 years. He must have taken him at his word. He was satisfied, without seeking further confirmation, that the Respondent had ceased business or would be continuing in business without him or that he had transferred the business to his son.

15. The Complainant's evidence is consistent with the statements or findings of the Minister recorded in his reference at page 4 of Trial Bundle 1 filed in February 2025. The Respondent did not give evidence. He did concede, however, lack of work at paragraphs 10 and 14 of his Response although he did not disclose details of the periods or extent of the slowdown. We accept the Complainant's evidence.

Relevant provisions of the Code

16. It is not in dispute that the Complainant was an "employee" of the Respondent as that term is defined in section 3 of the Code.
17. The term "part-time employment" means an employment contract, or a succession of employment contracts, with the same employer or a successor employer or another employer, in which an employee is required to provide his or her services at intervals, so that the employee is not, in any twelve month period, continuously employed by that employer, and the term includes casual employment.
18. The term "periodic employee" means an employee who has worked for at least four months but less than twelve months per year.
19. Section 89 of the Code provides as follows:
 - (1) The employment contract of an employee may be terminated with notice, or with pay in lieu of notice, for any valid and fair reason connected with the capacity or conduct of the employee, or the operational requirements of the undertaking, establishment or service.
 - (2) Without derogating from the generality of subsection (1), notice of termination may be given by an employer in any of the following circumstances:
 - (a) where two medical practitioners certify that the employee is unfit to continue in employment because of an incapacity of the mind or body which has lasted for at least six months and which is likely to be permanent;
 - (b) where the employee could not continue to work in the position held without contravention of a provision of a law; or
 - (c) where the employee is made redundant.
 - (3) For the purposes of the Code, "redundancy" means where the work required of the employee is affected because
 - (a) the employer has modernised, automated or mechanised all or part of his or her business;
 - (b) the employer has discontinued or ceased to carry on all or part of his or her business;
 - (c) the employer has reorganised or relocated his or her business to improve efficiency;
 - (d) the employer's need for employees in a particular category has ceased or diminished;

- (e) it has become impossible or impracticable for the employer to carry on his or her business at its usual rate or level or at all, due to a shortage of material, a mechanical breakdown, a force majeure or an act of God; or
- (f) a reduced operation in the employer's business has been made necessary by economic conditions including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory.

20. Section 104 provides as follows:

- (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.

21. Section 105(1) provides as follows:

- (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.
- (2) In the case of an employee who is not a periodic employee and 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, and for the purposes of this subsection one day's pay shall be equal to his or her earnings over the period of thirteen weeks immediately preceding the date of termination, divided by the number of days worked.
- (3) In the case of a periodic employee,

- (a) severance payment shall consist of three-quarters of one day's pay or nine days' pay per year for each twenty-nine days worked;
 - (b) any fraction of a day which is obtained by dividing the number of days worked by twenty-nine shall be reckoned as one day; and
 - (c) one day's pay shall be calculated as equal to the total of his or her basic wage in the last twelvemonth period worked divided by the number of days worked.
- (4) The method of calculation of severance payment specified in subsection (1), (2) or (3) shall take effect from the date the Code comes into force.
- (5) The method of calculation of severance payment in respect of service prior to the date the Code takes effect shall remain at six days for each year of service.
- (6) Where an employees' basic rate of pay is reduced during the last six months of his or her employment prior to retrenchment, the basic rate of pay to be used for calculation of severance payment of that employee shall be his or her basic rate of pay prior to that pay cut.

Redundancy or unfair termination

22. The circumstances surrounding how the Complainant came to cease working for the Respondent are set out in paragraph 14 above. After the Complainant had not been recalled for further work, he concluded he must have been severed. He may have meant 'terminated'. That was a reasonable conclusion. The Respondent did not give evidence denying this or putting forward a different version of the conversation he had with the Complainant. He put in copies of his trade licences since March 2022, i.e., for 2023, 2024 and 2025. It would be unfair if these trade licences could be used as evidence against the Complainant when the Respondent did not file a witness statement and was not cross-examined. Respondents are normally directed to file a copy of their trade licences in order to assist in the verification of the identity of the employer. The trade licences are of little value without explanation. We do not know if the Respondent ceased then resumed business or if the business is now being carried on by his son who shares the same name or whether he has obtained trade licences but carries on only a very reduced operation. We do not think, therefore, that the continuation of trade licences after the year of termination is necessarily probative of the continuation of business at the pre-termination level in March 2022.
23. We are conscious that the lack of evidence on behalf of the Respondent does not somehow corroborate the Complainant's evidence although it is a factor that may be taken into account – see **Calvin Todman v Marguerite Hodge** (ECCA, October 2012) a decision of the Court of Appeal containing a discussion of the extent to which adverse inferences may be drawn from a defendant's election not to give evidence or may tip the scale in favour of a plaintiff. The Complainant's evidence must still stand on its own and it must be sufficient and credible.
24. An employer terminating an employment contract on the ground that the employee is being made redundant under section 89(2) must give notice of termination and the termination reason must be valid, fair and genuine. It ought not to be left to the employee to guess or work out the reason. When challenged by the Complainant about his continued employment

the Respondent simply responded by stating he was retiring. It would be reasonable to construe retirement by a sole practitioner as the discontinuation or cessation of business even if no retirement date was given. We are satisfied that the statement of his retirement coupled with his declaration that he would go to jail rather than pay severance was a clear declaration of redundancy pursuant to section 89(3)(b) of the Code.

25. In another case on similar facts against Mr Turnbull, **Lewis v Turnbull** (BVILAT, May 2024), the Tribunal concluded that the employee had been unfairly dismissed, not made redundant. We did not find the evidence of redundancy conditions under section 89(3) of the Code sufficiently strong. We founded our decision, instead, on the fact that the employee had been constructively dismissed because the employer has persistently failed to submit his statutory contributions to the relevant government departments. In the present case it seems clearer to us that there has been a redundancy event.

Remedies

26. The Complainant qualified for severance pay under section 104(1) of the Code on the basis that upon termination of his employment in March 2022 his period of continuous employment was at least 12 months. In addition, he was not required to provide his services at intervals and for at least 8 years leading to his termination he was continuously employed by the Respondent. At the time of his dismissal, he was therefore not a periodic employee and neither was he in part-time employment or paid on a piece-work basis.
27. We accept that his employment commenced in February 1999. We are satisfied that he worked for the Respondent from that time until March 2022. There were gaps in his Social Security contribution he was not able to explain. He did not complain that he worked but his contributions were not paid in. In the absence of a better recollection by the Complainant of his period of employment we would be guided by the contribution record. His liability to make Social Security contributions would have on his attainment of age 65 in January 2021. This would explain why there are no contributions in the evidence down to his termination in March 2022.
28. His severance consists of three-quarters of one day's pay for each month or "major fraction" of a month for his period of employment – see section 105(1) of the Code. This method of calculation took effect from 4 October 2010, the date of commencement of the Code – see section 105(4). From that date to the termination of the employment contract in March 2022 a total of 127 months was recorded. For the period from February 1999 to 3 October 2020, the method of calculation is 6 days' pay for each year of service – see section 105(5).
29. We calculate the severance as follows
 - a. Period since commencement of the Code
 - i. Daily pay = weekly pay of \$630 ÷ 5 = \$126
 - ii. $\frac{3}{4}$ of daily pay = \$94.50
 - iii. Number of months = 127

iv. Severance = $\$94.50 \times 127 = \$12,001.50$

b. Period before commencement of the Code

- i. Daily pay = weekly pay of $\$630 \div 5 = \126
- ii. 6 days' pay = $\$567$
- iii. Number of months = 67
- iv. Number of years = 5 and 7/12
- v. Severance = $\$567 \times 5 \text{ and } 7/12 = \$3,165.75$

c. Total severance = $\$15,167.25$

30. The Complainant is entitled to interest on severance pay pursuant to the proviso to section 107(2)(c) of the Code at the rate of 10% per annum from three months after the termination, that is from 1 July 2022, until payment.
31. Ms George, counsel for the Complainant, argued in her written closing submissions that the Complainant was entitled to both severance pay and compensation for unfair termination. Her basis was that he was unfairly dismissed in circumstances which entitled him to severance pay. It is our understanding that the remedies of severance on redundancy and compensation for unfair dismissal are separate and mutually exclusive remedies. The special remedy of severance is applicable to the categories of termination under section 89(2), 93 and 94 only. Section 106 of the Code provides that the payment of severance pay under section 104 shall not affect, nor shall it be affected by, the employee's entitlement, if any, to payment in lieu of notice under section 91 or to any compensatory award made under section 86. If, for example, under a employment contract an employee is entitled to a special bonus or award on termination and is terminated in circumstances that entitle him or her to severance, the employee would remain entitled to that contract bonus or award despite also being entitled to severance pay.

Pay in lieu of notice

32. The Complainant was entitled to notice of termination or payment in lieu of notice by virtue of section 89(1) and 90(1) of the Code. We agree with Ms George that he was employed in excess of 15 years. There is no evidence of a notice period under the employment contract. The Complainant's length of service having exceeded 15 years he was entitled under section 90(1)(c) to two months' notice (or under section 91(1) to two months' pay in lieu of notice). That is roughly a period of 9 weeks wages totalling $\$5,670$.

Order

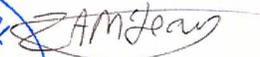
33. We order the Respondent to pay the following amounts to the Complainant:
- a. the sum of $\$15,167.25$ for severance pay,
 - b. the sum of $\$5,670$ less statutory deductions for payment in lieu of notice,
 - c. interest at 10% per annum on the sum of $\$15,167.25$ from 1 July 2022 to the date of payment.

34. We will hear the parties on costs.

By Order
Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



Zebalon McLean
Arbitrator