VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/022

BETWEEN

JONATHAN WOODS **COMPLAINANT**

AND

WILLIAM THORNTON CO. 95 LIMITED **RESPONDENT**

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Professor Arthur Richardson** and **Kamika Forbes**, Arbitrators

TRIAL ON: 23 May 2025
SUBMISSIONS ON: 6 and 27 June 2025
DECISION ON: 13 October 2025

IN ATTENDANCE: (1) Jonathan Woods, the Complainant
(2) Ewan Anderson, director of the Respondent
(3) Lesley-Ann Stewart of George Henry Partners LP, legal practitioners for the Respondent

ADDITIONALLY: (4) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

1. The Complainant was employed by the Respondent initially as a general helper and cook from 19 December 2022 to 6 January 2024. Without any changes of duties, responsibility or wages his job title was changed to Assistant Manager in 2023. His wages were $120 per day plus gratuities. He worked roughly 16 days per month. He had previously worked for the Respondent from June to December 2019. Upon his dismissal he was offered $2,160 which included severance pay at the statutory rate of 9 days per year for one year's employment

plus one day's pay since his last pay period, and 8 days in lieu of notice, a total of 18 days' pay.

2. The Complainant promptly filed a Dispute Claim Form with the Labour Commissioner on 11 January 2024 containing a claim for compensation for unfair dismissal. The claim was ultimately referred by the responsible Minister to the Tribunal for settlement pursuant to section 28(1) of the Code by notice dated 11 July 2024. He claimed compensation of $564,185 including $420,000 for loss of future earnings and $63,000 for actual loss of earnings between dismissal and trial.

3. The Respondent filed a Response on 12 August 2024 pursuant to rule 20 of the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (**the Rules**) and the Complainant filed a Reply pursuant to rule 23 on 6 January 2025 and a witness statement on 17 March.

The Complainant's strike out application

4. The Complainant applied on 27 August 2024 to strike out paragraphs 7 to 9 of the Response for the reasons set out here. He found fault with these paragraphs because section 101(3) and (4) of the Code provide that an employer must give a statement of its reasons for termination and is bound by the reasons and if it fails to provide a statement it is prohibited from introducing testimony as to the facts which might have been included in it. The Complainant argued therefore that the contents of these paragraphs were prohibited testimony on this basis.

5. The Respondent opposed the application on the grounds that the prohibition on introducing testimony on statement of reasons only applies in proceedings testing the fairness of the termination. Ms Stewart, counsel for the Respondent, argued that the fairness of the termination was not being tested by these proceedings. What was in issue, counsel argued, was the reasonableness of the decision to terminate and the amount of compensation. Counsel also submitted that on the authority of **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, [1988] AC 344, the Tribunal may reduce the amount of compensation based on the contributory fault of the employer and that testimony of the Complainant's misconduct is relevant and admissible for that reason.

6. The Tribunal issue a written decision dated 29 November 2024. It did not strike out the paragraphs that offended the Complainant but reserved the admissibility of the evidence of the Complainant's alleged misconduct for determination at the trial.

The Respondent's strike out application

7. The matter had been set for trial on 23 May 2025 when the Respondent made an application on 9 May to strike out parts of the Reply and parts of the Complainant's witness statement. These paragraphs introduce the Respondent's reasons for the termination.

8. The Tribunal heard the application at the start of the trial. The application was successful in large part. By order dated 23 May parts of paragraphs 1 and 5 and all of paragraphs 2 and 3 of the Reply were struck out as well as paragraphs 2, 3, 4, 5, 8, 13, 21, and part of 23 of the Complainant's witness statement filed on 17 March 2025.

Relevant statutory provisions

9. The definition of "wages" in section 3 of the Code is as follows:

> "wages" means any money or other benefits however designated or calculated, paid or contracted to be paid, delivered or given, at periodic intervals, as recompense, reward or remuneration for services rendered or labour done

10. Section 30(2) of the Code provides as follows:

> (2) The Tribunal shall in the exercise of its powers
> (a) make an order or award as it considers fair and just having regard to the interests of the persons concerned and the community as a whole; and
> (b) act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations having regard to the principles and practices of good industrial relations.

11. Section 81 provides as follows:

> (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.

12. Section 101(3) and (4) provides as follows:

> (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.

13. Section 103(7) provides as follows:

> An employer shall not terminate the employment of an employee for unsatisfactory performance unless the employer has given the employee written warning pursuant to subsection (5) and appropriate instructions to correct the unsatisfactory performance and the employee continues to perform his or her duties unsatisfactorily for a period of three months.

14. Rule 45(5) of the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (**the Rules**) provides as follows:

> (5) Where the Tribunal finds that any dismissal was invalid the award shall take into consideration compensation in accordance with section 86(2) of the Act, and

in respect of any loss of benefits or bonuses it may apply good conscience in accordance with rule 3(5) against an employer who seeks to argue that any benefit or bonus payment was not triggered before the dismissal or otherwise act in bad faith, perversely, irrationally or capriciously. However, where the Tribunal finds that notwithstanding the fact that the dismissal was invalid, if it also finds that the dismissal would have taken place in any event but for the invalidity, it may take into account the reasonable time it would have taken for the dismissal to have been valid and reduce any compensation accordingly.

The Polkey deduction

15. Relying on **Polkey**, a decision of the House of Lords of the United Kingdom, the Respondent did not dispute the Complainant's case that section 101 of the Code was not complied with, that is to say that he was terminated summarily without having been given a statement of the reasons for his dismissal or an opportunity to be heard. The Respondent claimed that despite its non-compliance with these statutory pre-conditions the Complainant was guilty of several instances of misconduct such that the Respondent could not reasonably be expected to continue his employment.

16. The Respondent's defence called for an inquiry into the Complainant's conduct; the very inquiry section 101(3) of the Code is meant to avoid if a termination notice specifying grounds for dismissal had not been given. When asked during the trial if this defence does not subvert or undermine the clear obligations imposed on an employer under the Code counsel for the Respondent stated that testimony could be allowed of misconduct because the proceedings are not testing the fairness of the termination.

17. **Polkey** has been referred to in a number of decisions of the Tribunal including:

    a. **Chrisopher v BVIHSA** (BVILAT, January 2022) at para 108
    b. **Wheatley v AG** (BVILAT, November 2021) at para 36
    c. Calderon v Bargain Center (BVILAT, Jan 2025) at para 20
    d. Felix v Yates Associated Construction Co Ltd (BVILAT, May 2025**)** at para 42
    e. Wilkins v Delta Petroleum (Caribbean) Ltd (BVILAT, April 2025) at paras 31-32
    f. Maynard v The Moorings Limited (BVILAT, May 2025) at paras 41-47

18. As we stated at paragraph 26 in **Wilkins** the following are essential elements of a dismissal:

    a. the person bringing the proceedings must be an employee and the employment contract must have been terminated,
    b. the reason for termination must be connected with the capacity or conduct of the employee or with the operational requirements of the undertaking,
    c. the disciplinary procedures, including a warning in an appropriate case, written reasons for termination, and a fair opportunity for the employee to defend herself, must be complied with, and
    d. the dismissal was fair and reasonable in the circumstances.

19. In his Dispute Claim Form the Complainant claimed he was unfairly dismissed. He was not given any reason for his termination or afforded the opportunity to defend himself. Notwithstanding section 101(4), the Respondent sought to show in its Response:

    a. at paragraph 6, that the Complainant displayed several instances of misconduct such that the Respondent could not reasonably be expected to continue to employ him,
    b. at paragraph 7, that the Complainant was often late and was not a team player and was disrespectful to a director,
    c. at paragraph 8, that the Complainant was warned several times,
    d. at paragraph 9, that the Complainant was not suitable for the employment due to his consistent misconduct.

20. Ms Stewart repeated her submission that this is permissible despite the wording of sections 101(4) because the contest is not about the *fairness* of the dismissal but its *reasonableness*, and is doing so to demonstrate that the conduct of the Respondent is such that he could have been fairly dismissed and that his damages ought therefore to be reduced in proportion to his misconduct or the likelihood that he was at serious risk of termination. Her argument is that a procedural flaw in terminating an employee does not necessarily render the termination unfair and it is open to the Tribunal to assess whether the termination was reasonable in the circumstances. We will accept for the sake of Ms Stewart's argument that a decision in breach of the statutory requirements can still be considered reasonable.

21. Ms Stewart further argued that in assessing compensation the Tribunal must consider all facts and that it is impossible to get at a just and fair award in accordance with equity, good conscience and the substantial merits of the case as required by section 30(2) of the Code, without an examination and analysis of the entirety of all the Complainant's conduct. That would hold true even if the conduct you are examining is the very conduct the employer is prohibited from relying on.

22. I accept that **Polkey** is about arriving at just compensation in all the circumstances. It is noted, however, that neither the Polkey deduction nor the doctrine of contributory fault is included in the non-exhaustive list of considerations in section 86(2) of the Code. It is also noted that the Code does not include a provision similar to section 123(6) of the UK Employment Rights Act 1996. That section provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

23. If **Polkey** applies it would be limited to those rare cases in which the misconduct of the employee may have been so demonstrably clear and serious that it would be futile to insist upon the procedural safeguards. There must at least be a high probability that a reasonable employer would have terminated the employee had it followed the termination procedure. We do not believe this is such a case. In her written closing submissions Ms Stewart referred to paragraph 36 of the decision of the Tribunal in **Wheatley v AG** (BVILAT, November 2021) in which the Tribunal endorsed the **Polkey** principle. In our respectful view, too light a test was applied. It is not that the employee had to show that a reasonable employer could have reached a different decision had the proper termination procedures been followed.

Rather, the burden is on the employer to show the likelihood or perhaps the certainty of termination. The evidence against the employee must be strong. That is a high threshold.

24. We do note that Polkey is not authority for what Lord Browne-Wilkinson referred to in **Sillifant v Powell Duffryn Timber Ltd** [1983] I.R.L.R. 91 as the "all or nothing" outcome but that it is meant to adjust compensation to account for the "contributory fault" or likelihood of early dismissal of the employee. The full quote of Lord Browne-Wilkinson's statement is at page 96 of the case report.

> "There is no need for an all or nothing decision. If the industrial tribunal thinks that there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

25. Further clarity was provided as recently as 2024 in the case of **Matthew v CGI IT UK Ltd** [2024] EAT 38. The Tribunal summarised **Polkey** principle as follows:

> "51 In [Polkey], the House of Lords considered how the equivalent provision to section 98(4) [of the UK Employments Rights Act should be applied where the procedure under an applicable code (in that case a dismissal for redundancy) was not followed. In that case, a van driver was made redundant without any consultation and claimed unfair dismissal. The industrial tribunal had agreed that the employer was in breach of their obligations under the code but concluded that if there had been consultation the result would have been the same and dismissed the complaint. The House of Lords considered this "no difference" approach to be wrong.
>
> 52 Lord Mackay gave the leading judgment and said:
> *"If the employer could reasonably have concluded in light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirements of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee".*
>
> 53 Lord Mackay made it clear in his decision that it is the reasonableness of the employer's actions that has to be assessed and this should not be confused with injustice to an employee."

26. And at paragraph 57 it was stated further:

> "67 The error said to be demonstrated by paragraphs 170 and 172 is that the ET impermissibly speculated about what would have happened had a warning or appeal been given and, further, applied the wrong threshold of "likely" instead of "utterly useless" or "futile". However, these paragraphs have to be read in the context of the whole judgment. In particular, paragraph 165 sets out the ET's conclusion that *"this is one of the rare cases where the decision to dismiss without a prior warning and*

without affording the claimant the opportunity for appeal was within the range of reasonable responses". This is a clear reference back to paragraph 91, when setting out the relevant law, including *Polkey,* the ET say "*Only in rare cases a dismissal would be fair in the circumstances where the employer dispensed with any procedure because it considered to be futile".* It is clear that the ET had in mind the **"**rare" case where the employer considered the procedure to be "futile" and the ET concluded the present case fell into that category."

27. Section 98(4) of the ERA provided that where an employer established that there was a potentially fair reason for the dismissal, "*the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee: and (b) shall be determined in accordance with equity and the substantial merits of the case".*

28. I must confess I find it difficult to determine a difference between the impermissible speculation about what the outcome would have been had a warning or appeal been given and the permissible consideration of a band of reasonable responses to the employee's conduct where the employer did not consider anything the employer might have said in his defence, except in a hopeless or utterly futile case. The answer might lie, as stated above, in the restriction of Polkey to the rare cases, cases in which the misconduct is clear and serious but bearing in mind that the employer has failed to comply with mandatory provisions of a statute enacted for the protection of employees.

29. As stated above, the position in the UK is reinforced to some extent by section 123(6) of the Employment Rights Act 1996. No such rule exists in the BVI. Nor are we sure if a rule equivalent to section 101(4) exists in the UK.

30. The grounds given by Mr Anderson are set out in paragraphs 11 and 12 of his witness statement. They are that the Complainant was late for most if not all allotted shifts thereby causing inconvenience to his co-workers, that he made no effort to get along with co-workers, and that he alienated himself from them and that he was disrespectful to Mr Anderson. The Respondent did not state reasons for termination. It is difficult to apply **Polkey** in such ~~as~~ a case where there is the lack of a basis for the assessment of reasonableness

31. The instances of misconduct or unsatisfactory performance are denied by the Complainant. The very matters that assist a tribunal in its determination of the fairness or reasonableness of a termination are absent. There exists no record of written warnings or complaints. The Complainant may have been late on occasion. Mr Anderson gives very generalised statements at paragraphs 11 to 13 of his witness statement of misconduct or unsatisfactory performance. The unparticularised and unsupported allegations are not sufficient to establish reasonableness.

32. We therefore do not take into account, in assessing compensation, the evidence given by the Respondent's witnesses about the conduct of the Complainant. In the circumstances, we do not find the Respondent has succeeded in establishing any misconduct, whether as a matter

of fact or belief, which would have provided it with a reasonable basis for termination and that a reduction in compensation is appropriate.

33. The Respondent gave another basis for a reduction in compensation. It is rule 45(5) of the Rules. This rule appears to give statutory recognition to the Polkey deduction. The rule is a substantive statement of the law. It cannot be characterised as a procedural rule or as guidance on the application of a procedural rule. It comes from nowhere in the Code. Section 35 of the Code provides that the Tribunal shall regulate its own proceedings and publish general guidelines concerning the procedures to be observed. It would be difficult to fit the rule within the ambit of a procedural regulation or as a general guideline. The rule, instead, offers a limitation on the substantive operation of section 86(1) of the Code.

The remedy

34. The Complainant was offered severance and he rejected it. The Respondent may have intended to make the Complainant redundant but it did not do so. There is no indication of that. The conditions in section 89(2) of the Code for the entitlement to severance have not been met. We are left with unfair dismissal. The term "severance pay" is sometimes used as a loose term for compensation due to an employee on dismissal.

35. The Complainant was born in 1997. He earned a basic wage of $120 per day. With gratuities it could be as much as $3,000 per month. Gratuities are not within the definition of "wages" in section 3 of the Code. He claimed he routinely worked in excess of the standard 40-hour week for the duration of his employment and had not been given overtime pay. The restaurant was a floating barge at sea. Shifts were 4 days on and 4 days off. Staff slept on the ship while they were on. He said each day comprised a 16-hour shift and there was a three-hour period for changing over of crews coming and going. He said this was his schedule for 46 weeks in all. He also claimed he was promoted from general helper and cook to Assistant Manager and had not received commensurate increase in salary that came with more burdensome terms of employment. He was offered $2,160 on termination comprising 9 days severance, one day's wages that were due since his last wages, and 8 days wages in lieu of notice.

36. He stated he took steps to mitigate his loss. He sought work but he considered he was discriminated against and this limited his opportunities. He said as follows at paragraph 21 of his witness statement filed on 17 March 2025 [**page 43 of the Main Trial Bundle**]:

> "*In the tight-knight hospitality industry of the Virgin Islands, where reputation is everything; I have still not been able to secure a new job where they require a CV and my most recent work history. In this tight-knight, where reputation is paramount, being unfairly dismissed under baseless allegations of misconduct – never documents or addressed during my tenure – has tarnished my professional standing and has made employers hesitant to figure me despite my extensive experience. During this ongoing labour dispute, I have struggled to find work comparable to my previous role; as the reputational damage, emotional fallout, and financial loss has left me and my parents struggling to survive*."

37. No details of the alleged hesitancy by prospective employers is in evidence, perhaps understandably so. There is no evidence of rejection letters or emails from prospective employers. We understand the difficulties in the way of a dismissed employee in furnishing evidence of rejection or of being blacklisted or being distanced from. This is a claim, not so much for loss of earning, but for damages for discrimination in the labour market and so-called stigma damages. The Tribunal has dealt with this in previous decisions, most recently in **Dennis v First Caribbean International Bank** (BVILAT, August 2025) at paragraphs 69-72. The tribunal considered the case from England and Wales of **Chagger v Abbey National PLC & Another** [2009] EWCA Civ 1202. Stigma damages were sought by the employee. Such damages arise where the employee, in most cases a whistleblower or a person discriminated against, claims to be stigmatised by having brought proceedings against the employer. We do not find that the Complainant has established entitlement to such damages.

38. Regarding a pure case of loss of future earning, it is not clear exactly what steps the Complainant took to secure new employment or the exact periods during which he was unemployed. Ms Stewart made the point that his position with the Respondent was not a specialist one. It was one in which he should have been able to secure new employment even if not at the same salary.

Severance pay

39. The amount of $1,080 claimed is agreed.

Pay in lieu of notice

40. The amount of $1,920 claimed is agreed.

Overtime pay

41. The amount of $34,425 is claimed. Ms Stewart opposed an award for overtime on the basis that (i) under section 78(2) of the Code proceedings for the recovery of overtime pay should be pursued in court, (ii) a claim for overtime pay was not made in the Dispute Claim Form and is not contained in the Minister's reference, and (iii) the claim would be barred by section 181 of the Code. Sections 181(1) and (2) together provide that disputes or complaints shall be referred to the Commissioner within six months of the ground for the dispute or complaint coming to the knowledge of the applicant and the Commissioner shall not investigate or resolve a dispute or complaint referred to him or her after this six-month period. It seems to us, with regard to section 78(2), that an employee may sue in court for the recovery of overtime pay but if the employee makes a statutory claim for unfair dismissal the section ought not to be a bar to the Tribunal awarding unpaid overtime wages as part of the compensation awarded under section 86(1).

42. In any event, the claim for overtime pay was struck out by our order dated 23 May 2025.

Accrued but unused vacation

43. The amount of $1,440 claimed is agreed.

One day's pay earned but not paid

44. The amount of $200 is claimed. The flat wages were $120 but the Complainant would likely have earned gratuities. The term "gross wages" in section 2 of the Code means the total

remuneration for services received in money, in kind and in privileges or allowances, including gratuities and premium pay. There is evidence that Complainant would earn up to $3,000 per month. In assessing compensation under section 86(2) of the Code the Tribunal is required by paragraph (b) to take into account any wages lost by the employee, on account of the dispute, up to the date of determination of the issue by the Tribunal. We would therefore add $30 for gratuities for an award of $150 for the day.

Underpayment as a manager

45. The Complainant claims $5,120. The evidence is that the Complainant stared out as general helper and cook and after some months was granted the title of Assistant Manager This claim was struck out by our order dated 23 May 2025.

Emotional and reputational damages

46. The Complainant claims $10,000. This head of damages in generally not allowed in unfair termination cases nor is compensation awarded for the manner of dismissal. For the reasons stated at **paragraph 37 above**, we do not allow it.

Damages for unfair discrimination

47. The Complainant claims $10,000. We do not find the Complainant was subject to discrimination or that he was unfairly assigned work outside of his job description or without appropriate pay of that he terminated to make place for the hiring of a non-belonger. We do not allow this claim.

Loss of future earnings

48. The Complainant had no qualifications, but he was experienced in the hospitality industry. He claims $483,000 comprising $63,000 for the 18 months from dismissal to trial and $420,000 from the trial into the future. Despite his assertion in the Reply [**page 20**] we regret we do not share his view that his position was unique and irreplaceable. To the contrary, the skills he possessed were the ordinary skills that would be welcome at the numerous coffee shops, bars and restaurants in Road Town and elsewhere in Tortola and on the numerous charter vessels that ply BVI waters. He stated in paragraph 22 of his witness statement [**page 43**] that he has struggled to find comparable employment. That may be correct. He did not state what effort he made. He has changed his employment somewhat. He has been doing mechanical work. He applied unsuccessfully for work as a fisherman and at a restaurant. As stated above, there is no evidence of how long he was out of work or for what periods. He claimed it was due to reputational damage, tarnished professional standing, and emotional fallout, all matters that have not been established. We did not take these allegations into account. He could not say that Mr Anderson had blackballed him. We also note that his contract of employment was terminable, with cause, on 2 weeks' notice. The fact that he applied for jobs and was unsuccessful indicates he must have been out of work for some time after termination. For these reasons and the reasons stated at **paragraph 38 above**, we would award him two months' wages in the amount of $3,840 less statutory deductions of $288 for a total of $3,552. We are guided by the pay slips for the period 1 January to 31 December 2023 [**pages 58-68**].

Damages for moral/emotional/exemplary/loss of benefits

49. The Complainant claims $17,000. There is no head of damages that fits the claim for moral or emotional damages. Ms Stewart relied on **Dunnachie v Kingston upon Hull City Council** [2004] UKHL 36 for her submission that non-economic loss may not be awarded for unfair dismissal. As to punitive damages, the case was fought on the basis that the remedy of compensation would be acceptable. Even so the Tribunal does not wish to add on a punitive award to the breach of a contract for the manner of the breach and in any event, although we recognise that the punitive award under the Code is a statutory remedy which may have a different basis from punitive awards in tort at common law, there are none of the classic conditions that justify a punitive award. We do not allow this claim.

Damages for stress

50. The Complainant claims $10,000. We do not allow this claim.

Summary

51. We order that the Respondent pay the Complainant the sum of $8,142 made up as follows:
    a. $1,080 for severance
    b. $1,920 for pay in lieu of notice
    c. $1,440 for vacation pay
    d. $150 for one day's wages
    e. $3,552 for loss of earnings

52. We will hear the parties as to costs.

By Order
Labour Arbitration Tribunal

Samuel Jack Husbands
Chairperson

LABOUR ARBITRATION TRIBUNAL
OCT 16 2025
BRITISH VIRGIN ISLANDS

Professor Arthur Richardson
Arbitrator

Kamika Forbes
Arbritator