



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/031

BETWEEN

MURCELLA GORDON

COMPLAINANT

AND

TOWERLINK MANAGEMENT SERVICES LTD

RESPONDENT

REASONS FOR DECISION

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

TRIAL ON: 1 and 2 May and 5 June 2025

SUBMISSIONS ON: 27 June and 18 July 2025

WRITTEN REASONS ON: 16 October 2025

IN ATTENDANCE:

- (1) Murcella Gordon, the Complainant
- (2) Theresa Felix, Managing 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. This is a case on whether dismissal was within or outside the probationary period. The arithmetic is tight. It is a question of days or hours – did the Complainant’s employment commence on 22 May or 26 May (**para 4, page 6 of the trial bundle**). The commencement date would determine whether the probationary period plus 14 days (**the Protected 14-day Period**) had expired at the time of her termination or whether the Complainant was still on probation when she was terminated.

2. The Respondent employed the Complainant as a Client Account Administrator under a contract of employment dated 22 May 2023 (**pages 80 and 298**). The contract was of indefinite duration but could be terminated under clause 11 by one month's or 30 days' notice (**page 81**). The parties have proceeded on the basis that the Complainant was on probation for the first three months.
3. Under section 46(4) of the Labour Code (**the Code**) an employer must inform a probationer in writing within the Protected 14-day Period whether the employee has satisfactorily completed probation, failing which the employee is deemed to have satisfactorily completed it. Regarding termination before the expiry of probation, it is provided by section 88(2) of the Code that the employment contract of any employee may be terminated by the employer at any time during the probationary period for any valid and fair reason with twenty-four hours' notice.
4. The Respondent's case is that it took the following steps leading up to and shortly after the end of the probationary period:
 - a. It carried out an evaluation of the Complainant's work around 15 August 2023 and finding her performance was not meeting expectations and having pointed out her shortcomings, nevertheless extended the probationary period by an additional "30 to 60 days" and agreed to reassess her performance (**para 8, page 7**). A formal written note of this meeting and the extension was not produced but jottings are found at **page 109** of the bundle.
 - b. The Complainant was told if she did not improve, she would be terminated, that her prospects of permanent employment were low, and it was indicated she was not meeting work expectations (**para 9, page 7**).
 - c. The Complainant then went on vacation and during that time the Respondent discovered numerous errors in her work and several urgent outstanding tasks dating back from the commencement of her employment (**para 10, page 7**).
 - d. They informed her by email dated 4 September 2023 of their findings and that she would be suspended for one week (**para 11 page 8 and also at page 86**). It must be noted that in this letter the Respondent said that "consideration" had been given for the extension of the probationary period. There was no concession that it had been actually extended.
 - e. The Respondent concluded its investigations and formed the view that her probationary period should not be extended and she was terminated as of 8 September – see the Respondent's email dated 9 September 2023 (**para 12 page 8 and also at page 88**). By a letter dated 8 September 2023 attached to the email the Complainant was notified that due to her unsatisfactory performance she would not be confirmed in her position but would be terminated with immediate effect (**para 12 page 8 and also at pages 90-91**). The letter made reference to section 88(1) of the Code cited above. The letter also stated that at the Complainant's evaluation on 15 August it was noted to her that her probationary period would be extended by "30-60 days" on the basis that her performance was average to below average.
5. It is the contention of the Respondent that the Complainant did not satisfactorily complete the initial probation period from 26 May to 25 August 2023 or any extension to the period

and that she was terminated on 8 or 9 September 2023 for a valid and fair reason within her probationary period or extended probationary period.

6. As stated above, the parties dispute the date of commencement of the employment. The contract (**page 80**) did not contain a start date. It was dated 22 May 2023, a Monday, and was signed and accepted by the Complainant on the same day. The Complainant was already committed for that date and a few days following and was only able to work in the afternoons. She worked half-time on the Monday and on Tuesday 23rd, Wednesday 24th, and Thursday 25th May. She commenced on a whole-day basis on Friday 26 May. She was sent an email by Theresa Felix, director of the Respondent, officially welcoming her to the company. In the email, Ms Felix called the 26th her “first official working day” (**page 85 and para 4, page 6**). The Respondent was therefore able to state that the termination letter emailed to the Complainant on 9 September 2023 was given within the Protected 14-day Period if the period had not been extended for 30 to 60 days. If it had been extended, the termination would have been well within the period,
7. The issues for determination therefore are:
 - a. what were the start and end dates of the initial probationary period?
 - b. was the probationary period extended for “30 to 60 days”?
 - c. was the termination of the Complainant within or outside the Protected 14-day Period in accordance with section 46(4) and (5) of the Code?
 - d. if the termination date was outside of the Protected 14-day Period, was it in accordance with the provisions of sections 103 of the Code governing termination for unsatisfactory performance?

The statutory provisions

8. Section 46 provides as follows:
 - (1) The probationary period of any employee shall not exceed four months, except in the case of an employee of the rank of a supervisor or above, where the probationary period shall not exceed six months.
 - (2) During the probationary period the employee shall be given reasonable training and general orientation in the duties and responsibilities of the position for which he or she was hired and the employee shall be informed on a monthly basis of his or her progress.
 - (3) Notwithstanding subsection (1),
 - a. where the contract of employment does not exceed four months, probationary period need not be included in the contract of employment, but where the contract does not specify a probationary period, subsection (1) shall apply; and
 - b. the employer may, after consultation with the employee, or his or her representative extend the probationary period for a further period not exceeding the duration of the original probationary period, where it is in the interest of the employee to do so.
 - (4) An employer shall, within fourteen days of the expiry of the probationary period, inform the employee in writing of whether the employee has satisfactorily completed the probationary period, failing which the employee is deemed to have satisfactorily completed the probationary period.

- (5) An employer who has informed an employee that the employee has satisfactorily completed the probationary period shall not place the employee on any further period of probation for the same job.
9. Section 88 provides that:
- (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 of 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.
10. Section 88 provides that:
- (1) The employment contract of any employee may be terminated by the employer at any time during the probationary period for any valid and fair reason with twenty-four hours notice.
 - (2) Where an employment contract is for a specified term not exceeding four months, an employer may terminate the employee's services for any valid and fair reason with twenty-four hours' notice.
11. Sections 103 of the Code provide as follows:
- (1) Where an employee is guilty of an offence in breach of his or her employment contract, or of any misconduct such that the employer cannot reasonably be expected to continue to employ him or her if it is repeated, the employer may, when taking disciplinary action in accordance with section 102, warn the employee that repetition of the behaviour will result in summary dismissal.
 - (2) If the employee, after being warned pursuant to subsection (1), is guilty of a similar offence or misconduct in the following six months, the employer may terminate the employee's employment without further notice.

- (3) An employer who dismisses an employee under subsection (2) shall provide the employee with a written statement of the reasons for the action and the principles set out in section 101(3) and (4) shall apply to the provision of, or failure to provide, such statements,
- (4) The employer shall be deemed to have waived his or her right to terminate the employment of an employee for misconduct if he or she has failed to do so within a reasonable period of time after having knowledge of the misconduct.
- (5) Where, after the probationary period has expired, the employee is not performing his or her duties in a satisfactory manner, the employer may give him or her a written warning to that effect.
- (6) If the employee, after he or she is warned pursuant to subsection (5) and in compliance with subsection (7), does not, during the following three-month period, demonstrate that he or she is able to perform and has performed duties in a satisfactory manner, the employer may terminate the employment contract.
- (7) 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.

The start and end dates of the probationary period

12. The facts and the allegations surrounding the commencement of the Complainant's employment are set out above. The Complainant performed work from 22 to 25 May 2023. Ms Felix, confirmed in oral evidence that the Complainant was paid for working on these days [**para 6 of Respondent submissions**]. Although an alternative view is possible, this is sufficient for a reasonable conclusion that the Complainant commenced work on 22 May and that date was the start of her probationary period. The start date may have been pursuant to an arrangement to permit her to work despite her other commitments but that does not alter the date [**para 5 of Respondent's submissions**]. Ms Felix's welcome email of 26 May simply meant, in our view, that the Complainant was officially on the team in the sense that she had commenced working whole-day. We find that the employment commenced on 22 May. The initial 3-month period would therefore have expired on 21 August 2023 and the Protected 14-day Period on 4 September. The notice of non-satisfactory performance on 9 September would therefore have been outside the Protected 14-day Period.

Extension of probationary period

13. We have summarised at paragraph 4 above the statements on behalf of the Respondent regarding the extension. The extension period is not precise. It is not clear from the pleadings and from the evidence of Ms Felix whether the extension had actually been granted or was under consideration. Ms Felix was the person in management who dealt directly with the Complainant in respect of the Complainant's contract of employment, job performance, non-confirmation, and termination. She mentioned the extension at paragraph 21 of her witness statement [**page 67**]. She testified she told the Complainant the probation would be extended for "another 30 to 60 days" from the Complainant's return from vacation. While the Complainant's permanent employment was not confirmed in writing we do not accept that the probationary period was extended in the vague and apparently unofficial manner as

claimed by Ms Felix. We have greater reason to doubt the extension because in just a matter of two weeks from the first mention of the extension on 15 August (confirmed by Ms Felix's email dated 4 September 2023 [page 86]), the Complainant was placed on suspension and then swiftly terminated on 8 September [page 90] on her return from vacation. A real attempt to extend the probation would have given the Complainant time to work through any problems and show her true value. Yet the opposite happened. The purported extension would only have given the Respondent extra time to dismiss the Complainant while she was still on probation.

Was the termination within or outside the Protected 14-day Period

14. Having found that no notice had been given to the Complainant within 14 days of the end of her probationary period, we conclude that the Complainant was deemed to have satisfactorily completed her probation. The non-conformation letter given on 9 September was, therefore, ineffective to bring her service to an end
15. The Tribunal therefore need not consider what standard was applicable to justify a decision of non-satisfactory completion under section 46(4) of the Code. We will nevertheless refer for completeness to **Freeman v BVI Ports Authority** (BVILAT, March 2024). In this case, the Tribunal noted that under section 88 of the Code an employee is entitled to a valid and fair reason for dismissal during the probationary period. It was also held that an employee is not in effect "fair game" during, or in the 14 days immediately after, the expiration of the probationary period. Although a lighter standard may be applicable to non-confirmation of a probationer than applies to termination of a permanent employee, it is not absolutely in the discretion of an employer to confirm the employment or not. The employee must be given a fair chance of success (see for example the employer's obligations under section 46(2) of the Code) and then the employer must give proper consideration of the performance of the employee to determine if it was satisfactory. To find otherwise would be to render probation purely voluntary work at the whim of the employer and with no protection for the probationer.

Was the termination in accordance with sections 103 of the Code

16. We have found that the probation had not been extended and that it ended before 9 September when the notice of non-satisfactory completion was given by email [page 90]. The termination was summary and was on the ground of unsatisfactory performance and must therefore have been governed by section 103(5), (6) and (7) of the Code. The clock on unsatisfactory performance starts from the confirmation of the probation. Unsatisfactory performance during the probationary period may not be relied upon in terminating the employee. Section 103(5) expressly refers to unsatisfactory performance "after the probationary period has expired". Without expressing a decided view, it would appear to us that a deemed satisfactory completion under section 46(4) wipes the slate clean so that the probationer commences permanent employment with an unblemished performance record. Whatever view we take, the Complainant could not have been dismissed for unsatisfactory performance within days of becoming part of the permanent establishment.

17. In the circumstances, we are of the view that the Complainant's termination was in breach of the Code and was unfair and unreasonable. She is accordingly entitled to compensation which we will now assess.

Compensation

18. Under clause 1 of her employment contract the Complainant's salary was \$34,800 per annum payable by monthly instalments of \$2,900. She was entitled to an allowance of \$215 under clause 4 [pages 80-81 and page 298-299]. She also claimed a benefit of \$99 per month for the employer portion of her pension contributions. There is no accounting for the pension contribution in the statement of monthly pay at page 102 of the trial bundle.
19. In her Supplemental Witness Statement filed on 9 May 2025 [para 6 page 305], the Complainant testified that except for a temporary work stint in July to August 2024 she remained out of work from the date of termination to 11 March 2025 when she found permanent employment. She claimed compensation of \$53,693.47 made up as follows:
 - a. \$44,550.00 for loss of salary at the rate of \$2,700 per month for 16.5 months,
 - b. \$1,648.35 for pension contributions at the rate of \$99 per month or 3.7% of gross salary,
 - c. \$2,153.25 for Social Security contributions at the rate of \$130.55 per month or 4.5% of gross salary,
 - d. \$1,794.37 for National Health Insurance at the rate of \$108.55 per month or 4.5% of gross salary, and.
 - e. \$3,547.75 for an allowance at the rate of \$215 per month pursuant to clause 4 of her employment contract [pages 80-81].
20. Evidence of loss and of attempts to mitigate loss was scanty. Ms Stewart, counsel for the Respondent, submitted that in the event the Tribunal found that the termination was outside of the Protected 14-day Period, Ms Gordon would be entitled only to compensation for the minimum notice period specified in her employment contract (and under section 90(1)(a) of the Code) of one month. Having already received \$1,450 on termination, any remaining amount payable, if any, would be \$1,450.00, being the balance of one month's pay. Ms Stewart submitted further, based on the evidence of Ms Felix, that due to Ms. Gordon's performance, her employment was precarious and no reasonable employer would have retained her for long. It would therefore be wholly unreasonable, in her submission, for compensation to be granted in respect of 16.5 months' wages, when the employee had served for only 2.5 months if her vacation is excluded. On this point it is noted that even though vacation could not be taken in the first six months of employment the Complainant had applied for and was granted three weeks or so.
21. The Complainant is entitled to the full amount of her pay in lieu of notice of \$2,900, being one month's pay. We agree with Ms Stewart that account must be made for \$1,450 received. The Complainant is entitled to the balance of \$1,450 plus the allowance of \$215 for a total of \$1,665.
22. The Complainant is also entitled to loss of earnings down to the date of trial if the circumstances permit. We do not think the circumstances permit recovery of lost earnings over such period. The Complainant was terminated very early in her employment. The

Respondent was already seriously dissatisfied with her performance. We must build in the uncertainty of the marketplace. We are also not impressed with the steps the Complainant took to mitigate. She was put on notice by the Respondent at para 16 of its Response [page 8] to provide job applications and responses and to disclose all remuneration received. The Complainant stated at paragraph 6 of her witness statement [page 305] that she worked for only two weeks between the date of termination and the start of a permanent job. She did not disclose that she was pregnant and delivered a baby and would have been on maternity leave or away from the workplace. We cannot assess from the little evidence with any reasonable accuracy to what extent she was simply unfortunate not to find work or whether it was her own lack of effort.

23. We would allow her four months loss of earnings. Even if the Respondent had followed the requirements of section 103 it would have taken about that time to lawfully terminate the Complainant. We would add the allowance of \$215 for a further of amount of \$860 for the 4 months. We do not include statutory contributions of Social Security and National Health Insurance in the loss of future earnings. Regarding the claim for \$99 per month for pension contributions, it does not appear from the evidence that the pension was in operation.

Order

24. Our order is as follows:
- a. The Respondent pay the Complainant \$13,325 comprising
 - i. \$1,665 for the balance of pay in lieu of notice and the allowance,
 - ii. \$10,800 for loss of earnings for 4 months, and
 - iii. \$860 for loss of allowance for 4 months.
 - b. The Complainant was self-represented. We make no order as to costs.
25. We will hear the parties on interest.

By Order
Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



Professor Arthur Richardson
Arbitrator



Kamika Forbes
Arbitrator