IN THE LABOUR ARBITRATION TRIBUNAL

Section 29 of the Labour Code (2010)

Case: BVILAT2024/035

BETWEEN

ERROL MAYNARD

Complainant

and

THE MOORINGS LIMITED

Respondent

BEFORE: Mr William Hare (Chairperson), Mr Zebalon Mclean, Ms Miglisa Cupid

Date of Hearing: 14 August 2025

Mr Lewis Hunte KC, of Hunte & Co, for the Complainant
Mrs Hazelann Hannaway-Boreland, of Harney Westwood & Riegels, for the Respondent

Unfair dismissal – substantive fairness established, procedural fairness breached – section 81(1) and 81(2) Labour Code distinguished and applied separately – valid misconduct reason proved – procedural lapses included incomplete written particulars, no representation right advised, no appeal offered – Polkey applied – high likelihood of same outcome, but reduced compensatory award ordered to vindicate statutory process rights – exceptional reasons for an award of costs.

DECISION AND AWARD

Introduction

1. This is the Tribunal's unanimous decision in the complaint of Mr Errol Maynard against The Moorings Limited. The complaint was lodged under the Labour Code, 2010 (the "**Code**"). The Complainant alleges that his engagement was terminated in breach of the Code. He seeks declarations, compensation, and associated relief.

2. The Respondent denies liability. It says The Complainant was not an "employee" within the meaning of the Code. It says that, if he was, his dismissal was for gross misconduct, was procedurally fair, and that no sums are owed beyond what has already been paid.

3. The Complainant has worked as a skipper for the Respondent over a period of many years. His engagements varied in frequency and duration. On Friday, 27 October 2023 he was called to a disciplinary "hearing" on Monday, 30 October 2023, following a complaint from charter guests that he was intoxicated while in charge of a vessel. He denies intoxication and says the process adopted was procedurally unfair.

4. The Respondent relies on:

   - The guest complaint and accounts of corroborating admissions to its staff.
   - The company's Skipper Standard Operating Procedures, said to prohibit alcohol during working hours at sea.
   - A prior written warning issued in March 2023 for similar conduct (albeit the alleged intoxication was before a charter commenced and the Complainant was taken off that charter).

5. The dismissal was with immediate effect. The dispute now encompasses questions of employment status, liability, and quantum.

Issues for determination

6. The following issues fall to be determined.

   a. Employment Status: Whether The Complainant was an "employee" within section 3 of the Code at the material time.
   b. Jurisdiction: If he was not an employee, whether the Tribunal has jurisdiction to grant any relief.
   c. Reason for Dismissal: If he was an employee, whether the Respondent has proved, on the balance of probabilities, that the reason for dismissal was misconduct.
   d. Procedural Fairness: Whether the procedure adopted complied with section 81(2) of the Code and the principles of natural justice.
   e. Substantive Fairness: Whether, if misconduct was the reason, the Respondent acted reasonably in treating it as sufficient grounds for dismissal without notice within the meaning of section 101 of the Code.
   f. Remedies: If liability is established.

Employment Status

7. The first question is whether, at the material time, The Complainant was an "employee" within the meaning of section 3 of the Code. If he was not, the Tribunal has no jurisdiction to entertain his complaint.

8. The Tribunal notes that on 31 January 2025 the Respondent filed a Response to the complaint herein pursuant to part 3 of the Labour Code (Arbitration Tribunal) (Procedure) Rules 2020 (the "**Rules**"). Paragraph 3 of that Response states:

   > *The Respondent admits that the Complainant was employed with the Respondent for over 25 years and was hired by the Respondent as a freelance boat captain from sometime about July 1996.*

   This admission seems difficult to reconcile with the Respondent's argument at the hearing, on which the Complainant was cross-examined, that he was not in fact an employee but a

self-employed contractor. As the parties did not address the Tribunal on the pleading, however, we have nevertheless considered this question in light of the submissions of the parties and the evidence adduced.

9. Section 3 of the Code defines "employee" as a person who has entered into or works under a contract of employment, whether oral or written, expressed or implied. "Contract of employment" means a contract, whether oral or written, expressed or implied, whereby one person agrees to employ another as an employee and that other agrees to serve as such.

10. The absence of a written contract is not determinative. The Tribunal must examine the reality of the working relationship, looking to the substance rather than the label or form chosen by the parties. These principle are well-established:

    - *Autoclenz Ltd v Belcher* [2011] UKSC 41 – the court will look beyond the written terms to the actual legal obligations, having regard to inequality of bargaining power.
    - *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 2 QB 497 – tripartite test: (i) mutuality of obligation, (ii) control, and (iii) other provisions consistent with a contract of service.
    - *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 – reiterating that the whole picture must be considered, including integration into the business.

    Although developed in English case law, these principles are consistent with the purposive approach to section 3 of the Code.

11. The Tribunal heard evidence that worked for the Respondent over many years as a captain, and from time to time assisted with boat deliveries. He is described in the Respondent's documentation as a "Freelance Bareboat Captain" yet is also elsewhere described as an "employee". There was an issue as to when this exactly started (on the Complainant's case it was in 1993, whereas the Respondent's records suggest it was in 1996), but we do not think it necessary to reach a finding on that. What the evidence showed was that, while his engagements varied in length and frequency, there was an overarching arrangement under which the Respondent could and did call upon his services without fresh negotiation on core terms for each occasion. We also heard evidence that the Complainant was "on call" for the Respondent. While he could refuse work, and occasionally did so (for example, where no accommodation was provided), it is apparent that the Respondent looked to him as part of its regular pool of captains and he, in turn, made himself available to assist at the base in addition to skippering charters.

12. In assessing the integration and control of the Complainant it is apparent that, when engaged, he worked under the Respondent's operational procedures, including its Skipper Standard Operating Procedures. He represented the Respondent to customers and operated its vessels in line with its instructions.

13. Finally, we think the manner of the termination is instructive as to how the Respondent itself saw the reality of the relationship. The Respondent did not simply decline to offer further engagements. Instead, it convened a disciplinary hearing and issued a letter of dismissal with immediate effect. In our view this is conduct more consistent with the termination of an employment relationship than with ending a purely commercial arrangement.

14. Taking these matters together, the Tribunal is satisfied, on the balance of probabilities, that the Complainant was an employee for the purposes of the Code. While certain features,

notably the absence of a written contract, irregular income, and his ability to refuse work, point towards an independent contractor model, the weight of the evidence adduced in this particular case suggests that, in substance, the Respondent engaged him within an ongoing employment relationship, exercised control over his work, integrated him into its operations, and terminated the relationship in a manner characteristic of employer and employee.

Jurisdiction

15. It follows from our finding that the Complainant was an employee within the meaning of section 3 of the Code that the Tribunal has jurisdiction to determine his complaint and to consider any remedies available under the Code.

Reason for Dismissal

16. The Respondent's case is that the Complainant was dismissed for misconduct following events said to have occurred during a charter from 16 to 21 October 2023.

17. According to the Respondent's records, guests on that charter submitted feedback through the post-vacation satisfaction survey alleging that the Complainant appeared to be intoxicated throughout the trip. They reported a specific incident in which they had to assist him out of a dinghy because of his alleged condition. They further stated that a complimentary gift basket containing a bottle of rum had been placed on board at the start of the charter; they had not consumed any of it themselves, yet the bottle was empty within 36 hours.

18. The Respondent regarded these matters as serious. It considered that the alleged conduct presented a risk to the safety of both the Complainant and the guests and was directly contrary to the Respondent's policies and Skipper Standard Operating Procedures, of which the Complainant was said to be fully aware.

19. By letter dated 27 October 2023, and in a telephone call the same day, the Complainant was required to attend a disciplinary meeting on 30 October 2023. The Respondent's witness, Mr Phillipe Renard, stated that at that meeting the Complainant admitted to drinking while responsible for the vessel, acknowledged that it was wrong, expressed remorse, and undertook not to repeat it. Mr Renard's evidence was that the Complainant admitted to drinking some of the complimentary rum during the charter, but denied consuming all of it.

20. In light of this alleged admission, coupled with what it viewed as credible guest evidence and the Complainant's prior warning for similar misconduct (albeit an occasion where it was said the Complainant was prevented from undertaking the charter in question), the Respondent concluded that there had been gross misconduct which warranted summary dismissal. It provided him with a written summary of the reasons for his dismissal, which included the allegations of intoxication and that it was said to constitute a "Violation of company policy or procedure" and "Unacceptable conduct/ Violation of conduct standards".

21. The Complainant, on the other hand, denies that he was intoxicated during the charter from 16 to 21 October 2023. He disputes the truth and reliability of the guests' reports, and emphasises that he was given no opportunity to question those who made the complaints. He asserts that the guests in question had left a gratuity of USD 1,000, which he suggest is inconsistent with their later allegations about him.

22. He denies knowledge of the complimentary bottle of rum being placed on board, and rejects any suggestion that he consumed all, or a significant part, of such a bottle. His evidence has varied in detail but has consistently been to the effect that, if he consumed alcohol at all during that charter, it was in minimal amounts: at one stage he stated he had not drunk anything; at another, that he had one drink on the Monday and one on the Tuesday; and elsewhere, that he had two drinks on the Monday and two on the Tuesday.

23. He disputes the Respondent's assertion that he made any admission at the disciplinary meeting of 30 October 2023 to being intoxicated while in charge of the vessel, or to breaching the company's policies. His position is that the Respondent has misrepresented his words, and that the investigation was procedurally unfair in denying him the opportunity to challenge the guests' accounts or to put his own evidence in full before a neutral decision-maker.

Hearsay

24. It was submitted on behalf of the Complainant that the Respondent's case on the October 2023 incident relied materially on hearsay, namely written and oral accounts from guests who did not attend the hearing, and that such evidence was therefore inadmissible. We politely reject that submission.

25. Neither the Labour Code nor our procedural rules render hearsay inadmissible *per se*. We may receive hearsay evidence, whether in writing or orally recounted by another witness, and we must then determine what weight, if any, to attach to it in light of all the circumstances. The appropriate approach is two-fold, involving consideration of admissibility and weight. Hearsay is not excluded merely because it is hearsay. If relevant to an issue the Tribunal must determine, it is admissible. That said, such evidence is to be evaluated cautiously, taking into account its source, whether and how it could be tested, its consistency with other evidence, and its inherent plausibility.

26. In the context of the hospitality sector in the Virgin Islands, we consider it will rarely be proportionate or in the public interest to require visiting guests, often from overseas, to give live evidence in an employment dispute to which they are not a party. Doing so risks embroiling paying customers in workplace litigation, with a likely chilling effect on candid feedback and consequent detriment to service quality and safety oversight. That is not to say guest complaints should be accepted uncritically. Where hearsay accounts are central to an allegation, fairness may require that the employer keep and disclose contemporaneous records, identify the source in general terms, and allow the employee a meaningful opportunity to respond. The Tribunal will then decide what weight to give such accounts, applying the safeguards above. The Tribunal accepts that there may be some cases where the centrality of the guests' account is such that the employer will have to decide whether and how it is possible to hold a fair disciplinary process without involvement of guests as witnesses. This is in our view, however, not such a case.

Findings on Reason for Dismissal

27. In the present case, while we have taken the guest accounts into consideration and scrutinised them in accordance with these principles, the Respondent's case does not rest solely, or even primarily, on hearsay. It relies also, and decisively, on the Complainant's alleged admissions at the disciplinary meeting on 30 October 2023.

28. Having admitted the guest statements notwithstanding their hearsay nature, we have also considered certain features said to undermine them. We also do not consider the leaving of a gratuity of USD 1,000 inconsistent with the incidents described. We understand that the guests in question were American, and that in that cultural context it is not unusual for gratuities to be given as a matter of course at the conclusion of a charter, notwithstanding any reservations about aspects of the service. Such payments may reflect a wish to follow custom, to reward parts of the experience which were satisfactory, or simply to avoid an awkward departure. They are not, in our view, a reliable indicator that no service failings occurred. Indeed, in this instance the gratuity may even reinforce, rather than weaken, the weight of the complaint. The guests were plainly not manufacturing or exaggerating grievances as a pretext for withholding payment; on the contrary, they chose to tip generously and yet still made a formal complaint. That sequence is in our view consistent with a genuine dissatisfaction which they considered serious enough to raise despite having already observed what they may have considered the expected gratuity custom.

29. We also note that, at the hearing, the Complainant admitted to having consumed two alcoholic drinks on each of the Monday and Tuesday evenings in question. Further, given his more than 25 years' experience in the charter industry with the Respondent, we find it inherently unlikely that he was unaware of the gratuitous bottle of rum placed aboard. These factors, taken together with the other evidence, mean that neither the gratuity nor the Complainant's account of those evenings materially diminishes the weight we have given to the guests' complaints.

30. We found Mr Renard to be a credible witness who gave clear, consistent and straightforward evidence. The Complainant's evidence on the central question of whether he had been drinking at all, and if so how much, was not entirely consistent. His account shifted in material respects over the course of the proceedings.

31. We accept the evidence that guests on the charter from 16 to 21 October 2023 reported that the Complainant appeared to be intoxicated throughout, including an incident in which they assisted him from the dinghy. We further accept that they reported that a complimentary bottle of rum was placed on board and found empty within approximately 36 hours, and that the guests stated they did not themselves consume any of it.

32. Mindful that the evidential standard before this Tribunal is the balance of probabilities, on the disputed question of what occurred at the disciplinary meeting of 30 October 2023, we find the evidence of Mr Phillipe Renard to be more reliable than that of the Complainant. We accordingly find that the Complainant admitted at that meeting to drinking whilst responsible for operating the vessel, acknowledged that it was wrong, expressed remorse, and undertook not to repeat the behaviour. We also find that he accepted having consumed some of the complimentary rum during the charter, though he denied having consumed all of it.

33. Pursuant to section 45(3)(c) of the Rules, we consider that the reason for the dismissal was the admitted allegations of drinking. Having regard to section 85(3) of the Code, we do not consider that dismissal is an unreasonable response.

34. Our acceptance of Mr Renard's account, however, does not imply that the disciplinary process overall met the standards of procedural fairness required by the Labour Code. We address those procedural issues separately below.

Procedural Fairness

35. In this case we note that the letter of 27 October 2023, while containing the gist of reported guest allegations of "being intoxicated and exhibiting inappropriate behaviour", contained no further details, and lacked the specificity that was put to the Complainant at the disciplinary hearing. We note that the letter was sent on a Friday, requiring attendance at a "hearing" on the Monday. There was furthermore nothing in the letter advising the Complainant of his right to bring a colleague or representative, and we note that the timing of the letter and the meeting would likely have made legal representation or advice difficult to arrange.

36. The Tribunal accepts that the Labour Code, 2010 contains no express statutory right to be accompanied at a disciplinary hearing. Section 81 prohibits an employer from terminating an employee's appointment unless the employer has first informed the employee in writing of the nature and particulars of the complaint, and has given the employee or his or her representative a fair opportunity to defend against it, including access to their employment record. This provision embodies the principle that a fair process may be conducted either by the employee in person or through a representative of their choosing. In the present case, given the allegations which the Respondent knew in detail but which had been conveyed in a very general form to the Complainant, the dismissal of the Complainant was plainly a contemplated outcome. The Respondent, a large and well-resourced employer with dedicated HR support and as part of an international group, did not advise the Complainant that they could be represented at the disciplinary hearing. That omission curtailed the procedural protection expressly envisaged by section 81 and deprived the Complainant of the advocacy and support that could have assisted in marshalling his defence.

37. Furthermore, the requirement that, before terminating employment, an employer must inform the employee in writing of "the nature and particulars of the complaint" is not met by vague or generic descriptors. The particulars should be sufficiently clear and detailed to allow the employee to understand exactly what conduct is alleged, when and where it occurred, and why it is said to breach workplace standards.

38. In the present case, the written invitation to the disciplinary meeting referred to "being intoxicated and exhibiting inappropriate behaviour which is not in line with company policy and goes against the company's code of conduct." While the allegation of intoxication is in our view reasonably specific, the description of "inappropriate behaviour" is vague and unsatisfactory, failing as it does to set out specific acts or words alleged. The Respondent's own contemporaneous documents show that by the time of the letter it already knew details of the guests' account, including the dinghy-assistance incident and the bottle of rum. Those particulars were not set out in the letter. The absence of such detail limited the Complainant's ability to prepare a focused response to the full case against him, and in our view represents a further shortcoming in the procedural standard mandated by section 81.

39. We moreover note that the Respondent did not provide the Complainant with any right of appeal. In the standards of this jurisdiction, and mindful that the Respondent is by local measures a large employer with its own HR function and part of an international group, that is in our view a material omission. An appeal is an important safeguard: it affords the employee a final opportunity to challenge factual findings or raise mitigating circumstances, and it gives the employer a chance to correct defects in the first-instance decision. It also aligns with the aims of procedural economy and fairness under the Rules: the absence of an appeal in this case meant that the Complainant's only recourse was to bring his complaint to the Tribunal, with the attendant delay and cost. That is a further deficiency in the process.x

40. While in this case we have found that the Respondent relied decisively on the Complainant's own admissions, and that the absence of greater particularity probably did not alter the outcome, these procedural deficiencies are nevertheless important.

41. Applying the principle in *Polkey v A E Dayton Services Ltd* [1987] UKHL 8, [1987] IRLR 503, the Tribunal must consider whether, and to what extent, the outcome would probably have been the same even if a fair procedure had been followed. On our factual findings, we are satisfied that the Respondent genuinely and reasonably believed the Complainant had consumed alcohol while on duty, in breach of its policies, and that dismissal was within the range of reasonable responses. We also note the Complainant's own admissions on consumption during the charter. We also find that the presence of the bottle of rum on board, observed by the customers and noted in the Respondent's records, was consistent with the Respondent's belief that alcohol had been consumed. While not conclusive on its own, it formed part of the circumstantial evidence supporting the Respondent's conclusion.

42. Even so, we cannot exclude the possibility that an appeal conducted in accordance with good practice might have led to some different outcome, whether by affording the Complainant an opportunity to explain the circumstances more fully, by prompting a lesser sanction, or by resolving the matter internally without recourse to this Tribunal. In our judgment, there was a real, albeit limited, chance of that occurring.

Substantive Fairness

43. Section 81 of the Labour Code contains two distinct and cumulative requirements for a lawful termination. Subsection (1) imposes a *substantive* threshold: the employer must establish a valid and fair reason related to the employee's capacity, conduct, or the undertaking's operational requirements, in compliance with the applicable notice provisions. Subsection (2) imposes a *procedural* threshold: before termination, the employer must set out in writing the nature and particulars of the complaint, and afford the employee (or representative) a fair opportunity to respond, including access to their employment record.

44. On the evidence, the Tribunal finds that the Respondent satisfied the substantive requirement in subsection (1): the Complainant's proven misconduct constituted a valid and fair reason for dismissal. In our view, however, the Respondent failed to meet the procedural requirement in subsection (2): the written particulars were incomplete, the right to representation was not communicated, and no internal appeal was offered. The dismissal was therefore substantively fair but procedurally unfair within the meaning of section 81, and the Tribunal must proceed to consider the effect of that procedural unfairness on remedy in accordance with the *Polkey* principle.

Procedural and Substantive Fairness

45. The Tribunal's finding that the dismissal was substantively fair but procedurally unfair engages the principle articulated in *Polkey*. The relevant question is whether, had the Respondent complied with the procedural requirements of section 81(2) of the Code, the outcome would, on the balance of probabilities, have been the same.

46. On the evidence, the Complainant's misconduct was in our view established to a degree that would likely have resulted in dismissal even after a procedurally fair process. That said, the

procedural failings were not merely technical. The absence of full written particulars, the failure to advise of the right to representation, and the lack of any internal appeal deprived the Complainant of a meaningful opportunity to challenge the allegations or to make submissions in mitigation. These defects represent a material departure from statutory and good-practice standards within the hospitality sector, where clarity of allegations and representation rights are central to procedural integrity.

47. Applying *Polkey*, the Tribunal finds that there was a high probability that dismissal would still have ensued following a fair process, but the Complainant was nevertheless deprived of the statutory protections to which he was entitled. This deprived the Complainant of a meaningful statutory protection and an opportunity to challenge or mitigate the outcome (even if that outcome would probably have been the same). This justifies a significantly reduced compensatory award to reflect that likelihood, while recognising that some award is appropriate to mark the procedural breaches.

Award and Costs

48. Having regard to the seriousness of the procedural failings, balanced against the high probability that dismissal would have occurred even after a fair process, the Tribunal considers it appropriate to make a compensatory (*Polkey*) award in the sum of **USD 5,000** in favour of the Complainant to reflect the loss of procedural protections, tempered to recognise the likelihood of the same substantive outcome.

49. In considering the question of costs, the Tribunal has regard to section 30(3) of the Code and to section 47 of the Rules. An award of costs may only be made for exceptional reasons. In this case, the Complainant has not succeeded in showing that his dismissal was substantively unfair, but we have found that there were important procedural deficiencies. We also have regard to the fact that by challenging his employment status the Respondent effectively challenged the Tribunal's jurisdiction.

50. In our view these features justify an exceptional but modest award of costs in favour of the Complainant for the following reasons:

    a. The Respondent, despite having apparently admitted to the employment relationship, disputed the same at the hearing (on which issue it did not succeed), thus engaging the question of the Tribunal's jurisdiction and section 47(3)(d) of the Rules.

    b. The absence of an appeal process, in circumstances where we would have expected to see one, meant that the Complainant was constrained to bring his complaint to the Tribunal.

    c. The raising of the issue of the employment status in our view justified the Complainant seeking legal assistance.

51. We have had regard to the apparently mandatory provisions of section 49(1)(b) of the Rules, and we note that the provision contemplates a further hearing before determining the quantum of costs. We interpret this provision purposively, however, in light of section 3 and the Overriding Objective. In the present case, the Tribunal is satisfied that the amount proposed is modest, proportionate, and readily ascertainable on the existing record. Convening a further hearing would, in our judgment, impose unnecessary delay and expense,

contrary to the Overriding Objective, and would not materially assist in determining the appropriate contribution.

52. For the exceptional reasons stated, we therefore award a contribution towards the Complainant's costs in the sum of **USD 2,500**. We are satisfied that we have jurisdiction to make this award without a further hearing under section 49(1)(b) in the circumstances described. If we were wrong, however, we would have been minded to increase the compensatory (*Polkey*) award by the same sum, for the same reasons, so that the overall outcome would be identical.

Conclusion

53. For the reasons set out above, the complaint succeeds in part: the dismissal was substantively fair but procedurally unfair, warranting a reduced compensatory award and a modest contribution to costs.

54. The total sum therefore payable by the Respondent to the Complainant is **USD 7,500.** This sum is to be paid by the Respondent to the Complainant within 21 days.

55. Finally, we would like to express our gratitude to both counsel for their written submissions and assistance.

LABOUR ARBITRATION TRIBUNAL

William Hare
Chairperson
31 August 2025