VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/036

BETWEEN

MYRLA-MAY BARZEY-PENN — **COMPLAINANT**

AND

SHRM TRUSTEES (BVI) LIMITED — **RESPONDENT**

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Christopher Graham** and **Kamika Forbes**, Arbitrator

TRIAL AND SUBMISSIONS: 14 April 2025, 30 May 2025, 3 July 2025, 22 July 2025, 31 July 2025, 26 August 2025 and 9 October 2025

DECISION ON: 13 March 2026

IN ATTENDANCE:
(1) Myrla-May Barzey-Penn, the Complainant
(2) David Penn, legal practitioner for Complainant
(3) Reid Thurlow, Managing Director of the Respondent
(4) Litrow Hickson of Agon Litigation, legal practitioners for Respondent

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

1. The Respondent carries on trust and company management business in the BVI [**p160**]. It employs a compliance team to work on the various anti-money laundering and other compliance issues that arise during the course of its business. It from time to time receives requests from the Financial Investigation Agency (**the FIA**) for information on companies it administers. It employed the Complainant as Compliance Officer from 17 February 2020 until her termination on 5 December 2022 [**pp 16-19 of Trial Bundle**].

2. The Complainant's employment contract contained the following confidentiality and termination provisions at clauses 12, 14 and 15 **[p135]**:

a. Clause 12
"Due to the nature or our business, absolute confidentiality is an extremely important element of the services expected by our clients. All documents, information, data and correspondence relating to clients and SHRM Group must be treated in strict confidence and not divulged, used or employed except in the Firm's services."

b. Clause 14
"Your employment hereunder after the three (3) month probationary period is successfully completed, shall continue indefinitely unless terminated by SHRM for any material breach of a material obligation or in the event that you are found guilty of a grave or serious misconduct."

c. Clause 15
"After the end of the Probationary Period, you may bring this agreement to an end by giving SHRM not less than two (2) months notice in writing of your intention to terminate this contract."

3. The Complainant filed a Dispute Claim Form with the Labour Commission on 5 December 2022 (erroneously dated 5 December 2023) containing a claim for reinstatement [**pp 4-5**]. The Commissioner by a memo dated 23 April 2024 referred the claim to the Minister pursuant to section 26(3) of the Labour Code 2010 (**the Code**) and the claim was further referred by the Minister to the Tribunal for settlement pursuant to section 28(1) of the Code by notice dated 21 October 2024. The Complainant found new employment and has limited her claim to compensation only [**para 149 of her witness statement at p190** and **Schedule of Loss at p237**].

4. The circumstances of the dismissal are that on Tuesday 27 September 2022 the Complainant received a request from the FIA requiring the provision by the Respondent of certain information on a company within 7 days. The request is not in evidence. The FIA must have calculated that the period of 7 days would expire on Tuesday 4 October 2022. On the 5th, before the Respondent had provided the information, the FIA imposed a financial penalty or a fine.

5. Upon receipt of the FIA request on 27 September 2022, the Complainant emailed Reid Thurlow, the Respondent's Managing Director, and Aliza Tyson, the Director for Corporate and Fiduciary Services. She informed Mr Thurlow and Ms Tyson that she would send the client an email asking for the relevant information [**p43**]. Regrettably, the Complainant was due to go on vacation the next day. The FIA, as stated above, imposed the fine early on 5 October 2022 before the Complainant provided the information. No-one had actioned the request nor sought an extension of time in her absence. Mr Thurlow assumed she was handling the request.

6. The Complainant notified Mr Thurlow and Ms Tyson of the fine by email of 5 October 2022 timed at 1.00pm [**p47**]. She stated she had been working on the matter and had received the final details "a little while ago". Mr Thurlow replied at 1.11pm querying the reasons for not having replied and provided the information to the FIA. He scheduled a meeting for 3.00pm

and at 2.22pm the Complainant replied with an explanation for having missed the deadline. She stated she had received the FIA's request the day before she went on leave and she thought she had enough time to respond upon her return. She recommended an appeal and undertook to draft it [**p46**]. At 3.35pm she submitted a draft letter seeking a waiver of the fine [**pp46-47**]. The letter was approved and issued later that day [**pp44-45**].

7. The FIA responded. That response is not in evidence. They must have sought further information. The Respondent had until 12 October 2022 to respond [**para 68 of Complainant's witness statement at 174**]. The Complainant drafted a second appeal letter to the FIA. In this letter, she quoted from the Interpretation Act in calculating the period of time for the response to the FIA request for information [**pp49-54**]. In the meantime, the Respondent sought legal advice. The advice they received was that the view expressed in the draft of the second appeal letter to the FIA was not correct and that it was best to pay the fine [**pp56-57**].

8. Ms Tyson for one had doubts about the draft letter. To her it looked like it had been drafted by a lawyer or that the Complainant had consulted a lawyer. She asked the Complainant if that was the case. The Complainant denied it. Mr Thurlow at paragraph 7 of his affidavit filed on 28 November 2024 [**pp64-65 para 7**] referred to a meeting with the Complainant on 12 October 2022 at which the fine was again discussed. In the meeting notes at paragraph 7 of the affidavit, the Complainant was asked to confirm that she followed company protocols with respect to confidentiality. She confirmed she was aware of the protocols, that she had not discussed or shared details or information related to the matter with anyone outside the company, and that she used her designated office computer and/or the company-issued laptop for all correspondence and documents. [**pp65-66**]. The Complainant denied this meeting ever took place.

9. Mr Thurlow remained troubled by the possibility that the Complainant had violated the confidentiality protocols and had shared information with someone outside the company, specifically her husband who is a lawyer. He must have felt she would not have been able on her own and without the assistance of a lawyer, to produce a legal opinion on the computation of time with reference to the Interpretation Act.

10. Matters stood as they were until a visit by Bart d'Ancona, the Respondent's CEO. On Thursday 1 December 2022 Mr d'Ancona attended the Respondent's board meeting. One of the topics at the meeting was the FIA fine. Mr d'Ancona instigated a more detailed investigation of the matter. The Respondent found, according to Ms Tyson, that the digital footprints showed the draft appeal letters had been prepared on the Respondent's laptop, but by a person who was not its employee or agent, and that a David A Penn was the author. The Board met later that day with the Complainant. At that meeting, according to Ms Tyson, the Complainant changed tack and admitted that she used her home computer to draft the reply to the FIA [**pp39-40 para 12-14**]. Mr d'Ancona then notified the Complainant that the Board had lost confidence in her and offered her the option of resigning with three months' pay. He suggested she take next day, 2 December 2022, off to consider her position. [**p40 paras 9-12**]

11. Mr d'Ancona then met with the Complainant privately, again on 1 December 2022. He informed her again that the Respondent had lost confidence in her and he offered her the option of resigning on 3 months' pay. [**p23 24 paras 8-14** and **p40 paras 10-14** and **p66-67 paras 9-14**]. After the private meeting, the Complainant sent him an email later that day. She cited sections 81(1), 103(2) and 103(7) of the Code to remind him of her entitlement to a hearing and that the claims against her must be substantiated [**p24 paras 11-12** and **pp33-35]**. In spite of the Complainant's email, after the completion of the Complainant's appraisal on 2 December 2022 Mr Thurlow convened a meeting with the Complainant and informed her she was being summarily dismissed for breach of clause 12 of her employment contract and for her dishonesty in explaining her actions [**para 17 p67**]. He next convened a meeting with the Complainant and the Chief Operations Officer Kevin Naylor and asked her to hand over company property including laptops, filing cabinet keys, security cards and login details. The Complainant insisted on a formal letter of termination. He said the letter had not yet been prepared but would be issued as soon as possible. The Complainant did not deliver the property [**pp36 paras 5-6 and p67 paras 16-17**].

12. Mr Thurlow stated further at paragraph 22iii of his affidavit [**p70**] that the termination letter was sent to the Complainant by email dated 5 December 2022. A print-out of the email and a copy of the termination letter are at pages 115-117 of the trial bundle. The Complaint denied receiving the letter until 15 December 2022.

13. The grounds specified in the termination letter were loss of confidence in the Complainant's ability to carry out her duties by virtue of her breach of clause 12 of her employment contract caused by the sharing of information with a third party outside the company who drafted the appeal letter. The Respondent considered these sufficient grounds for summary dismissal in accordance with clause 3.13 of the employment contract. It reproduced this clause in the termination letter [**p116**]. The clause provided that "breach of confidentiality in any way" was a ground for immediate dismissal.

14. The Complainant filed a Dispute Claim Form with the Labour Commissioner in early December 2022. The parties engaged in mediation before the Labour Commissioner and the relevant Minister and exchanged correspondence but the settlement of this matter eluded them. The file was received by the Tribunal in November 2024.

15. Mr Penn, counsel for the Complainant, stated in his letter to the Labour Commissioner dated 14 March 2023 [**para 22 on page 101**] that the Respondent voluntarily accepted the fine. The fact is that the Respondent sought legal advice and were advised to pay the fine. He also stated that it was the responsibility of the Compliance Department, and not that of the Complainant alone, to respond to the FIA's request for information. Both these submissions miss the point. The reason for dismissal was not the late response to the FIA. It was breach of confidence caused by sharing information with a third party, and by not using the firm's laptop, then by her failure to admit it.

Relevant statutory provisions

16. Relevant provisions governing the manner of termination of employees are as follows:

Section 81:

(1) The employment contract of an employee shall not be terminated by an employer without a valid and fair reason for such termination connected with the capacity or conduct of the employee, or with the operational requirements of the undertaking, establishment or service, pursuant to section 88, 89, 101 or 103, and unless the notice requirements in section 90 are complied with.

(2) Subject to section 89, an employer may not terminate the appointment of an employee unless the employer has informed the employee in writing of the nature and particulars of the complaint against the employee and has given the employee or his or her representative a fair opportunity to defend himself or herself including access to his or her employment record.

Section 101:

(1) An employer is entitled to dismiss summarily, without notice, an employee who is guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract
(2) The serious misconduct referred to in subsection (1) is restricted to that conduct which is directly related to the employment contract and has a detrimental effect on the business and it includes, but is not limited to, situations in which the employee has
    a. conducted himself or herself in a manner as to clearly demonstrate that the contract cannot reasonably be expected to continue;
    b. of an offence in the course of his or her employment, the penalty for which prevents the employee from meeting his or her obligations under his or her employment contract for twelve working days or more.
(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.

Applicable legal principles

17. The case was tried over three days. There was extensive cross-examination of the Respondent's witnesses. Section 81 prescribes the conditions for a valid dismissal upon notice and section 101 the additional conditions for a valid dismissal without notice. In summary, (i) the Complainant must be guilty of serious misconduct, i.e. the Respondent must establish the employee's guilt, (ii) the Respondent must inform the employee of the nature and particulars of the complainant, (iii) the Respondent must give the Respondent or her representative a fair opportunity to defend herself including access to her employment record, and (iv) the decision must be reasonable. The very short meetings on 1 and 2 December 2022 cannot be considered fair opportunity to be heard. Mr d'Ancona had made it clear to the Complainant that it was resignation on three months' pay or else. The Complainant drew his

attention to the requirement for a fair hearing but Mr d'Ancona treated the allegations as proved or as it were a fait accompli.

18. We are of the opinion that this failure renders the decision unfair. It is also unreasonable in the light of the reminder given by the Complainant in her email dated 1 December 2022 of provisions in the Code which require the employee to be given a fair opportunity to be heard [**p215**] which was ignored or disregarded by the Respondent. The issue seems to us to be what is the consequence of this failure.

19. We believe the Respondent's witnesses that the Complainant initially misrepresented her use of the company-issued laptop. She did use her home computer to draft the appeal letters. The Respondent did not establish that her husband used the office computer or that he drafted the letters. Mr Thurlow's evidence contained his own personal opinions regarding the metadata and the digital footprint [**p30** and **para 10 of p66** and **para 21b on page 68**]. The Respondent has not called evidence of a person with expertise in making this finding such as an information technology specialist. We therefore could make no finding of the extent to which the Complainant may have shared confidential information with her ghost legal advisor, although the reference to legal authorities contained in the letter along with writing style and formatting creates a strong suspicion of the Complainant having relied on the advice of an outside person not authorised by the Respondent and that, in order to obtain the advice, the underlying facts must have been shared with that person.

20. We accept that the breach of a procedural safeguard does not necessarily render the termination unlawful. The opportunity for the employee to provide a defence is a fundamental requirement but it must be measured against the facts. In the face of very strong evidence the Tribunal may find that the failure of the employer to comply fully with the notice provision in section 81, for example, did not lead to an unfair decision The Complainant expressly asked for an opportunity to be heard, The Respondent may have considered that she did have such an opportunity at the meetings on 1 December 2022 or that the evidence against her was overwhelming and impregnable. We ought not lightly, and possibly only in rare cases, excuse an employer's failure to comply with clear and reasonable notice and other safeguards contained in the Code.

21. It might be argued that the question for the employer is not the guilt of the employee but whether it was reasonable on the available evidence for the employer to dismiss. See for example the passage adopted in **Polkey v AE Dayton** [1988] ICR 142 at p156C-H. Section 85(1) of the Code specifically provides it is for the employer to prove the reason for dismissal. On a summary dismissal under section 101(1) the employee must be guilty of the serious misconduct alleged. This makes the requirement to adhere to the procedural safeguards all the more compelling.

22. We therefore find that the Complainant was unfairly dismissed.

Deduction from compensation

23. We now consider whether, in a case with strong evidence such as this, there ought to be a deduction in compensation to reflect a realistic assessment of the loss the Complainant would

have suffered. If there is evidence known to the Respondent at time of termination upon which a reasonable employer could have dismissed the Complainant it may be argued that compensation may be reduced to reflect this assessment. The purpose of the deduction is to prevent an unmeritorious complainant from benefitting unduly from his action. The employee is awarded only so much compensation that is reasonable and deserving in the circumstances. This type of deduction was recognised in **Polkey v AE Dayton** cited above. Polkey is of course a decision of the House of Lords of the UK and on a statute other than the Code. The deduction was also considered by the Caribbean Court of Justice in **Chefette Restaurants Ltd v Harris** [2020] CCJ 6 (AJ) and in particular the statement at para 127 et seq on the assessment of compensation for lost wages.

24. In Polkey it was stated at page 162H that "in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee has to say in his defence or in explanation or mitigation". Mr d'Ancona did put to the Complainant his suspicion that she had violated the confidentiality protocols and had shared information with someone outside the company, specifically her husband who is a lawyer and the Complainant initially denied this but when presented with the digital footprints she changed her story and admitted that she used her home computer to draft the reply to the FIA. Was this a full and fair investigation of the complaint? Was it a chance to hear what the Complainant had to say in her defence, or by way of explanation or mitigation. We would answer both of these questions in the negative. There was an element of hurry or pressure. The Complainant sought a hearing. In other words she insisted on her rights. It would take stronger evidence to prod us to relax the statutory safeguards.

25. If Polkey is applicable, we would not apply a deduction in this case. In any event, the period of loss is only two months.

Compensation

26. We now assess the compensation to which the Complainant is entitled. We note the Respondent was directed by the case management order dated 16 January 2024 to file a statement in compliance with rule 20(1)(f) of the Rules as to whether the remedy of re-engagement, reinstatement or compensation would be acceptable to it if the Complainant should establish unfair dismissal [**p241**]. The Respondent filed a statement but did not indicate if it would accept a compensatory award in the event the Complainant should succeed at the trial [**p161**].

27. We also note that the Complainant was directed to file a Schedule of Loss. The Schedule is at page 237. We note, however, that her claim was for reinstatement only [**p5**]. No amendment was sought to claim compensation even after she was directed to file a Schedule of Loss. At paragraphs 51 to 58 of her counsel's letter to the Labour Commissioner dated 14 March 2023 [**p104**] a claim for compensation was signalled. The case proceeded on the basis of a claim for compensation but she did not, however, give evidence of her loss. We are therefore restricted in the compensation we may award. After termination she was paid the amount of seven days unused vacation days of $2,987.81 and pension pay-out of $12,972.50 which should have totalled $15,960.31 [**bottom of p11**]. She received only $15,037.60.

28. We assess her claim for compensation in **paragraphs 29 to 41** below.

Salary from termination to date of new employment

29. The Complainant commenced a new job from February 2023. She is entitled to loss of salary for December 2022 and for January 2023. We do not allow the statutory deductions. We award her the net amount of her salary after deductions. Taking the payroll sheet for July 2022 [**page 15**] as an example, her deductions for that month totalled $1,131.25. Deductions for December 2022 would have been similar. There may, however, have been no payroll tax in January 2023 and so deductions for that month may have been $431.25. We would award $17,500 less deductions of $1,562.50 (the total of $1,131.25 and $431.25). The net amount of the award is $15,937.50.

Loss of salary from February 2023 to December 2023

30. The Complainant. claimed $2,090 for her loss from February 2023 to the end of 2023. That works out at $190 per month. As stated above, she gave no evidence of loss, i.e. the start date of the new job and her salary. According to her CV [**p192**], she was employed as Compliance Officer/ Money Laundering Reporting Office from February 2023. There is no mention of her salary. We have no information on which to assess loss. We do not make an award under this head.

Bonus for 2022 to 2024

31. There is no evidence that the bonus was guaranteed. In fact, it was discretionary. No award is made.

Unused vacation of seven days for 2022

32. This amount of $2,987.81 has been partly paid and is not disputed.

Accrued vacation days for January 2023

33. This is a claim for compensation for payment for the vacation the Complainant would have taken had her employment not been terminated. It is not a claim for payment in lieu of notice. We therefore do not take account the paid vacation leave to which the Complainant would have been entitled. It would not have been a loss over and above her salary. We make no award for future vacation. In respect of vacation pay, section 86(2)(a) of the Code requires the Tribunal to take account only of vacation pay earned but not taken, i.e., the amount due at the date of termination.

Pension payout

34. This amount of $12,972.50 has been partly paid and is not disputed.

Loss of pension coverage at 5% of salary from December 2022 to February 2023

35. The Complainant was entitled to benefits during the three-month period of notice to which she was entitled. This includes her pension contributions.

36. Section 91(1) of the Code provides as follows:

(1) In lieu of providing notice of termination, the employer may, at his or her discretion, pay the employee a sum equal to the wages and other remuneration and confer on the employee all other benefits that would have been due to the employee at the expiry of any required period of notice.

37. The Complainant would ordinarily be entitled to the payment of this benefit subject of course to the terms of the employment contract. There is no evidence of the mode of calculating it. The Complainant states in the Schedule of Loss that the rate is 5% of salary per month for the period of three months from December 2022 to February 2023 for a total of $1,312.50. She has not produced the pension agreement and we are unable to make an award for lack of any supporting evidence.

Loss of private health insurance premiums for Complainant and dependant at $150 per month

38. An employee is entitled to the continuation of private insurance benefits during the notice period. The benefit of $150 per month is not referred to in the Complainant's witness statement but is included in her Schedule of Loss [**p237**]. There is no reason to treat this as fictitious. The Respondent has disputed it [**p11**]. It ought to be included in the net amount of salary for December 2022 and January 2023. We are unable to determine on the evidence whether it was included or not. We are unable to make an award for lack of evidence.

Loss of private health insurance cover for three months' notice period

39. We make no award for this loss. We are unable to make an award for lack of evidence. For example, it is not established there was a "loss", that is to say whether the Complainant incurred medical or other covered expenses in December 2022 and January 2023 over and above what would have been her co-pay amounts. It is not likely that benefits will accrue to the Complainant and her family in future for those months.

Damage to professional career and reputation

40. We considered such loss in **Dennis v First Caribbean International Bank** (BVILAT2022/004, August 2025) where we held that no award is generally made for compensation for reputational damage. The limited circumstances in which such an award may be made do not arise here. In any event, there was no evidence on which we could base loss of reputation.

Compensation for three years' loss of *salary*

41. The Complainant seeks compensation of three years' salary in the amount of $315,000. She obtained new employment within about two months. There is no evidence of loss suffered except in December 2022 and January 2023 which has been dealt with in **paragraph 29 above.**

Summary

42. To summarise, we award the Complainant the sum of $16,860.21 made up as follows.

Net salary for December 2022 and January 2023	$15,937.50
Seven days unused vacation	$2,987.81

Pension payout	$12,972.50
	$31,897.81
Less amount pre-paid	$15,037.50
Total	$16,860.21

Costs

43. We will hear the parties on interest and costs

By Order
Labour Arbitration Tribunal

Samuel Jack Husbands
Chairperson

LABOUR ARBITRATION TRIBUNAL
MAR 16 2026
BRITISH VIRGIN ISLANDS

Kamika Forbes
Arbitrator

Christopher Graham
Arbitrator