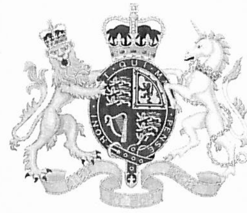

VIRGIN ISLANDS

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 **Kamika Forbes**, Arbitrator

HEARING ON: The 28th day of November 2024

DECISION ON: The 29th day of November 2024

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

ADDITIONALLY: (3) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

1. The Complainant filed a Dispute Claim Form with the Labour Commissioner on 11 January 2024 containing a claim for compensation. 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.

2. By notice dated 24 July 2024 the claim was set for case management hearing on 25 October 2024. The Respondent filed a Response on 12 August 2024. The Complainant filed a Notice of Application to strike out portions of the Response (**the Application to Strike Out**) and an affidavit in support on 27 August 2024. The Respondent filed an affidavit of

Heather Anderson in response to the Application to Strike Out on 30 August 2024. At the case management hearing on 25 October the Tribunal made certain directions for the hearing of the Application to Strike Out including the filing of written submissions by the Respondent.

3. The Application to Strike Out came on for hearing on 28 November 2024. The background of the matter is that the dismissal letter simply stated that the Complainant was dismissed as of 6 January 2024. It was accompanied by a cheque for an amount of what was stated to be severance pay. In his Dispute Claim Form filed with the Labour Commissioner on 11 January 2024 the Complainant made a complaint of unfair dismissal and claimed compensation.

4. The Respondent stated in its Response as follows:

   a. at paragraph 6, that the Complainant displayed several instances of misconduct,
   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.

5. The Complainant also bases its application on the ground that the Respondent included 'without prejudice' material in the Response. At paragraph 10 of the Response, it is stated that the Respondent attempted to settle the matter and the Complainant responded by alleging he is owed a certain sum by the Respondent.

6. The Complainant neatly summarised his position in brief oral submissions. He stated that because an employer is barred from giving evidence of misconduct which it did not disclose in the termination letter, there would be no point in the references to his conduct in the Response and therefore those reference should be struck out. His position on the reference in the Response to the settlement figure, as gleaned from the grounds set out in the Application to Strike Out, is that the correspondence with the Respondent and disclosures before the Labour Commissioner are without prejudice even if not expressly so labelled, and should not be disclosed to the Tribunal.

7. Ms Stewart, lawyer for the Respondent, argued that the unfairness of the dismissal is not in dispute. The statements about the Complainant's conduct go to the issue of compensation. The bar against the introduction of facts which may have been included in the termination letter is only in respect of proceedings contesting the fairness of the dismissal. She also argues that the bar only applies to testimony and it is clear that statements about the Complainant's conduct are not testimony but are allegations in pleadings. This appears to be too fine a distinction. When asked what then is the value or purpose of introducing allegations in a pleading that may not be introduced into evidence, Ms Stewart responded that a reduction of compensation for contributory fault of an employee is allowed in assessing compensation and that the employee's conduct is a relevant factor. She relied on an extract from **Stair Memorial Encyclopaedia Employment (3rd Reissue)** 231

(Reduction of award for contributory fault of claimant) and **Polkey v A.E. Dayton Services Ltd** [1988] AC 344.

8. Section 101(2) and (3) of the Labour Code 2010 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."

9. We are not sure if the English rule is derived from section 123(6) of the Employment Rights Act 1996 or a similar predecessor section or whether section 123(6) was brought into effect to give statutory recognition to a pre-existing rule. This 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. No such rule exists in the BVI. Nor are we sure if a rule equivalent to section 101(4) exists in the UK.

10. It is difficult to see how contributory fault would work in light of section 101. The employer, by not providing reasons, is barred from providing the evidence for dismissal but yet is able to state at the same time that on the evidence the employee may have merited dismissal so therefore a reduction may be made of the award of compensation that might otherwise be given. We are not, however, from the short argument satisfied of the point one way or the other. We would allow the allegations to remain in the Response. To what use the disputed material can be put will be dealt with as a matter of admissibility of evidence during the trial.

11. Regarding the disclosure in the Response of the amount of money discussed in settlement correspondence, a ruling would involve an investigation of whether the correspondence between the parties was without prejudice. It would also involve an investigation of the nature of the proceedings before the Labour Commissioner and the Minister. The parties attempt a resolution of the dispute at these stages. Section 26(1) of the Code provides as follows:

> "(1) Any dispute or complaint arising out of any matter covered by the Code or any law relating to labour or generally out of the relationship between the employer and the employee may be referred by either party concerned or his or her representative to the Commissioner for settlement.
> (2) Upon receipt of the reference, the Commissioner shall investigate the matter and make every effort to dispose of the issue raised in

the reference by voluntary settlement in accordance with industrial relations practice …

(3) Where the Commissioner fails to achieve a settlement within thirty days from the date of reference under subsection (2) or such longer period as the parties may agree, he or she shall transmit the matter, with a full written report on the matter, to the Minister."

12. Section 27 provides that where a dispute is transmitted by the Commissioner to the Minister under section 26(3) the Minister may, among other things, attempt to achieve a voluntary settlement. Under section 28(1) where the Minister fails to achieve a settlement, he or she may refer the dispute to the Tribunal for settlement. The figure discussed by the parties must have been disclosed to the Minister and was included in the Minister's reference which forms part of the record of the proceedings. Even if the figure was disclosed on a without prejudice basis, it would serve no purpose now, we think, to strike it out (along with references to settlement discussions) from paragraph 10 of the Response.

13. There is one other aspect of the application we must mention. We note the Respondent's argument (presented on information and belief in the affidavit of its witness) that the Tribunal does not have any statutory or inherent power to strike out (and effectively amend) any part of a Response. Because of the decision we have arrived at, we need not rule on this point today.

14. We dismiss the application with no order as to costs. We will issue draft trial directions for agreement by the parties and we will fix a further case management hearing to a date convenient to the parties in the absence of agreement.

By Order
Labour Arbitration Tribunal

Samuel Jack Husbands
Chairperson

Kamika Forbes
Arbitrator