



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Patricia Hodge

COMPLAINANT

AND

Road Town Wholesale Trading Ltd

RESPONDENT

BEFORE:

Jamal S. Smith, Chairperson

Kamika A. Forbes, Member (on the recommendation of the Complainant)

Professor Arthur Richardson, Member (on the recommendation of the Respondent)

ATTENDANCE:

- (1) Patricia Hodge, the Complainant
- (2) David A. Penn, legal practitioner for the Complainant instructed by David A. Penn & Co. Incorporated
- (3) Amanda Sutton, representative for the Respondent
- (4) Anthea Smith, legal practitioner for the Respondent instructed by Sabals Law

ADDITIONALLY:

- (5) Malisa Ragnauth-Mangal, Secretary to the Tribunal
- (6) Simon Potter, Witness for the Respondent

FINAL AWARD

18 May 2021; 15 July 2021

Table of Contents

A.	INTRODUCTION	2
B.	THE CASE HISTORY	4
C.	THE EVIDENCE	7
	(a) <i>The Evidence of Patricia Hodge</i>	7
	(b) <i>The Evidence of Simon Potter</i>	10
D.	THE TRIBUNAL'S ANALYSIS	13

(a) <i>The Findings of Fact</i>	13
(b) <i>The Law</i>	14
(c) <i>The Remedies</i>	18
The Award	21

A. INTRODUCTION

1. In this award, reference will be made to an Arbitration Bundle originally filed by the Complainant on 29 July 2016 (the “**Arbitration Bundle**”) and subsequently updated and re-filed.
2. On Tuesday, 09 September 2020 a Notice was issued by the Secretary to the Tribunal for a Status Hearing to be held on 17 September 2020 in accordance with the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (S.I. No. 98 of 2020) as it relates to pending matters before the Tribunal for which no decision had been issued on or before the coming into force of those procedural rules on 31 August 2020. The Notice can be found at TAB 13 of the Arbitration Bundle.
3. On Thursday, 17 September 2020 the Chairperson of the Tribunal issued a Case Management Order (the “**First CMO**”) found at Tab 18 of the Arbitration Bundle which, among other things, noted that the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (S.I. No. 98 of 2020) (the “**LPR**”) applied to these proceedings since a hearing took place on 16 March, 12 May and 16 June 2017 before this Tribunal and on the date of the First CMO 39 months had elapsed since the close of those proceeding without a decision and so it was necessary to re-hear the entire matter which was set for Thursday, 05 November 2020, and the re-hearing will be referred to as a trial in accordance with the LPR for the purposes of this Final Award.
4. On Tuesday, 13 October 2020 the Chairperson of the Tribunal issued a Case Management Order (the “**Second CMO**”), on an application for an extension of time by the Respondent to comply with the First CMO as it relates to filing of Affidavits, which was unopposed by the Complainant, and the Tribunal granted the extension without a hearing.
5. On Wednesday, 04 November 2020, the day before the date fixed for the trial of this matter a letter was received by the Tribunal from the Respondent opposing the then member of the Tribunal appointed by the Minister on the recommendation of the Complainant and on the day of the trial a letter of resignation was received by the Tribunal from that member resulting in the aborting of the trial and the Chairperson of the Tribunal issued a Case Management Order (the “**Third CMO**”), which was not included in the Arbitration Bundle, fixing a new date for the trial to Thursday, 25 February 2021.
6. On the date fixed for the trial a letter was received from the member appointed by the Minister on the recommendation of the Respondent, Professor Arthur Richardson, indicating that he had a medical emergency overseas and was unable to attend, as a result, the Tribunal again aborted the trial and the Chairperson adjourned the trial to

Thursday, 29 April 2021 (the “**Fourth CMO**”), but a copy of the Fourth CMO was not included in the Arbitration Bundle.

7. On the date fixed for the trial a letter was presented to the Tribunal from the legal practitioner for the Complainant, Mr. David Penn, that he was before the High Court and as such the Tribunal exercised its case management power to grant a final adjournment of the matter to Tuesday, 18 May 2021 (the “**Fifth CMO**”), but a copy of the Fifth CMO was not included in the Arbitration Bundle.
8. Except for the Fourth and Fifth CMO, which each only dealt with adjourning the date fixed for the trial, each of these Case Management Orders included a Post-Script notation to assist the parties if they wished to appeal the order on any point of law, with the Third CMO giving the deadline to do so on Friday, 04 December 2020. No notice of appeal was filed with the Secretary to the Tribunal prior to the adjourned trial date and as such the Tribunal confirms all orders made by the Chairperson prior to the date of the trial.
9. On Tuesday, 08 May 2021 the full panel heard oral evidence and oral arguments from both parties beginning at 10 a.m. and adjourned at 4:45 p.m. The whole trial took place via the WebEx video conference platform in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020 (S.I. No. 99 of 2020) and in accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.
10. At the conclusion of the trial the Tribunal made a Case Management Order (the “**Sixth CMO**”) giving directions for written closing submissions to be filed on or before Friday, 04 June 2021. On Monday, 07 June 2021 a written request was made by the legal practitioner for the Respondent for an extension of time to file the written closing submissions, without objection from the Complainant, and in accordance with that request the Respondent filed written closing submissions on Monday, 07 June 2021 (the “**Respondent’s Second Closing Submissions**”) and the Complainant also filed written closing submissions on the same date (the “**Complainant’s Second Closing Submissions**”).
11. In light of LPR 37, the Tribunal must consider whether the date fixed for the filing of written closing submissions precluded the request filed on Monday, 07 June 2021 and the trial was concluded on Friday, 04 June 2021 or it had the power to extend the time under LPR 5 even if the trial was concluded on Friday, 04 June 2021, or whether the extension of time also extended the closing of the trial to Monday, 07 June 2021. The Tribunal finds that it had the power to vary, suspend or set aside the Sixth CMO even after the closing of the trial and until it delivers its final award. As a result, the Tribunal has done so on the request of the Complainant, so that the closing of the trial was on Monday, 07 June 2021.
12. The Secretary to the Tribunal issued a Notice of Decision Hearing on Thursday, 08 July 2021 fixing a date for the delivery of the decision to Thursday, 15 July 2021 at 9:30 a.m.. The Tribunal now gives the decision for its final award.

B. THE CASE HISTORY

13. The Complainant filed a complaint with the Labour Commissioner dated 24 June 2015 (the “**Complaint**”), found as an unpaginated part of a collection of documents in TAB 1 of the Arbitration Bundle, complaining against the Respondent for terminating her on the basis of redundancy contrary to section 89(3) of the Labour Code, 2010 (the “**Code**”) and “in complete disregard” for sections 99(4) and 108 of the Code. It also alleged that the termination stemmed from her “constant discourse” with the Respondent “about the treatment of staff . . . over the past 4 years”. It also indicated that in 2011 she wrote a confidential letter to the Respondent which later “became the basis for several formal complaints to the Labour Department” and further alleged several written correspondences about breaches of the Code and also indicating that she had been wrongfully accused of theft. She alleged that the termination of her employment was “a direct result of my insistence that all forms of discrimination in the organization should cease and that there should be fairness and equality in the company’s dealings with every staff member, regardless of nationality, educational status or colour”.
14. By letter dated 05 October 2015 the Labour Commissioner transmitted the matter to the Minister in accordance with section 26(3) of the Code, which can be found as an unpaginated part of a collection of documents in TAB 1 of the Arbitration Bundle.
15. On 10 December 2015, the then Minister of Labour wrote to the legal practitioner for the Complainant confirming his referral of the Complaint to the Tribunal pursuant to section 28(1) of the Code (the “**Minister’s Referral**”). Again, this letter can be found as an unpaginated part of a collection of documents in TAB 1 of the Arbitration Bundle which makes it very difficult to find.
16. The Complainant was permitted to file a Points of Claim which was filed on 29 July 2016 (the “**Points of Claim**”) and found at TAB 1 of the Arbitration Bundle and is the first document in that collection of documents. The Points of Claim must be considered an amended complaint, as it is the Complaint that is referred to the Tribunal by the Minister in accordance with section 28(1) of the Code which gives the Tribunal its jurisdiction, and as it contains additional information that was not included in the Complaint it would be an amended complaint for the purposes of these proceedings. Therefore, as the Points of Claim included a copy of the Complaint as part of the unpaginated collection of documents, the two will be taken together and reference to the Complaint will also include the Points of Claim.
17. The Points of Claim alleges a breach of section 81(1) of the Code on the basis of lacking lawful reason, a breach of section 89(2)(c) and section 29(3) of the Code on the basis of being without notice or lawful excuse, a breach of section 82(1)(c) of the Code on the basis of retaliation for complaints made to the Labour Department, and finally a breach of section 99(4) of the Code.
18. The Points of Claim also sought damages for unfair dismissal, reinstatement, return of unlawfully deducted funds and interest, with the alternative of punitive damages. In addition to the Complaint and the Minister’s Referral while leaving out everything from the filing of the Complaint to the First CMO, the Points of Claim attached several

documents as follows:

- (a) Recommendation Letter from Mr. Simon Potter dated 18 June 2015 (the **“Recommendation Letter”**);
- (b) Letter dated 17 June 2015 from the Legal Practitioners for the Complainant to the Respondent (the **“17 June 2015 Letter”**);
- (c) Letter dated 11 June 2015 from the Respondent to the Complainant together with Cheque No. 113008 dated 11 June 2015 in the sum of \$28,584.37 (the **“Termination Letter”**);
- (d) Letter dated 10 June 2015 from the Complainant to the Respondent with the subject **“Attempt to Unlawfully Terminate My Employment”** (the **“Rejection Letter”**);
- (e) Warning Letter from the Respondent to the Complainant dated 19 December 2014 (the **“Warning Letter”**);
- (f) Road Town Wholesale Scholarship Agreement made on 12 September 2013 (the **“Scholarship Agreement”**);
- (g) Letter dated 01 May 2013 to the Senior Management Team of the Respondent with the subject **“Effectiveness as an HR Manager/Official Complaint with regards to Mr. Clayton”** (the **“Official Complaint to the Respondent”**);
- (h) Offer of Employment from the BVI Health Services Authority dated 13 December 2011 (the **“BVIHSA Offer of Employment”**);
- (i) E-mail from the Complainant to Wilbert Malone with a copy to Peter Davison sent on 21 April 2015 with the subject **“CONFIDENTIAL”** (the **“E-Mail to Wilbert Malone”**);
- (j) E-mail chain from the Complainant to Andrew Clayton ending on 18 March 2013 with the subject **“FW: Produce Team”** (the **“E-Mail to Andrew Clayton”**);
- (k) E-mail chain from the Complainant to Peter Davison and Simon Potter ending on 09 March 2015 with the subject **“RE: WRITTEN IN CONFIDENCE”** (the **“Written in Confidence E-Mail”**);
- (l) E-mail chain from the Complainant to Peter Davison ending on 12 December 2014 with the subject **“FW: JOHN CREQUE”** (the **“John Creque E-mail”**);
- (m) E-mail chain from the Complainant to Peter Davison ending on 25 November 2014 with the subject **“RE: Job Description – Pricing & Promotion Manager”** (the **“Pricing & Promotion Manager E-mail”**); and
- (n) E-mail chain from Peter Davison to the Complainant ending on 24 November

2014 with the subject “Re: Stationery – New Employee” (the “**New Employee E-mail**”).

19. In accordance with LPR 29(5), the Respondent is deemed to admit the authenticity of all the documents attached to the Points of Claim which were disclosed to the Respondent since the Respondent did not file a notice with the Tribunal within seven (7) days before the status hearing on Thursday, 17 September 2020, or made any interlocutory application for an extension of time to do so at any time before the trial. Therefore, the Tribunal will accept the authenticity of the documents disclosed in the Point of Claim. Despite this, however, the Tribunal notes that none of the documents disclosed by the Complainant were exhibited to any affidavit in these proceedings nor did the Complainant seek leave during the trial to enter any of those disclosed documents into evidence before the Tribunal. As a result, the Tribunal will only consider those documents with caution and will only attribute so much weight to those documents as would be appropriate in each circumstance.
20. The Points of Claim is supported by the Affidavit of Patricia Hodge filed on 15 October 2020, found at TAB 2 of the Arbitration Bundle (the “**Complainant’s Affidavit**”).
21. There is no Points of Defence in the Arbitration Bundle, but there was a List of Documents filed on 15 December 2016 by the Respondent at TAB 3 of the Arbitration Bundle (the “**Respondent’s List of Documents**”). The Respondent’s List of Documents also had attached to it each of the seven (7) documents listed and properly identified by numbered dividers, even though they were not paginated, as follows:
 - (a) Applicant’s Contract of Employment dated 1 May 2011 (the “**Contract of Employment**”);
 - (b) E-mail dated 04 June 2015 from Peter Davison to Patricia Hodge with a copy to Simon Potter and with the subject “Department Restructure” (the “**Payment Offer E-mail**”);
 - (c) The Rejection Letter;
 - (d) The Termination Letter;
 - (e) The 17 June 2015 Letter;
 - (f) Letter dated 02 July 2015 from the Legal Practitioners for the Respondent to the Legal Practitioners for the Complainant (the “**02 July 2015 Letter**”); and
 - (g) Letter dated 18 August 2015 from the Legal Practitioners for the Complainant to the Legal Practitioners for the Respondent (the “**18 August 2015 Letter**”).
22. In accordance with LPR 29(5), the Complainant is deemed to admit the authenticity of all the documents attached to the Respondent’s List of Documents which were disclosed to the Complainant since the Complainant did not file a notice with the Tribunal within seven (7) days before the status hearing on Thursday, 17 September 2020, or made any

interlocutory application for an extension of time to do so at any time before the trial. Therefore, the Tribunal will accept the authenticity of the documents disclosed in the Respondent's List of Documents. There was no further disclosure of documents by the Respondent for which the Tribunal would be able to appropriately consider in these proceedings. Despite this, however, the Tribunal notes that none of the documents disclosed by the Respondent were exhibited to any affidavit in these proceedings nor did the Respondent seek leave during the trial to enter any of those disclosed documents into evidence before the Tribunal. As a result, the Tribunal will only consider those documents with caution and will only attribute so much weight to those documents as would be appropriate in each circumstance.

23. The Respondent's List of Documents is supported by the Affidavit of Simon Potter filed on 19 October 2020, found at TAB 4 of the Arbitration Bundle (the "**Respondent's Affidavit**").
24. The parties relied on their submissions filed in the original hearing which included:
 - (a) Closing Submissions of Counsel for the Respondent filed on 05 July 2017 found at TAB 9 of the Arbitration Bundle, but it should be noted that page 2 was missing (the "**Respondent's Original Closing Submissions**");
 - (b) Closing Arguments of the Complainant filed on 07 July 2017 found at TAB 10 of the Arbitration Bundle (the "**Complainant's Original Closing Submissions**"); and
 - (c) Pre-Hearing Submissions of Counsel for the Respondent filed on 05 July 2017 found at TAB 11 of the Arbitration Bundle (the "**Respondent's Pre-Hearing Submissions**").

C. THE EVIDENCE

(a) The Evidence of Patricia Hodge

25. In the Complainant's Affidavit she asserts that she was employed as the Human Resources Manager of the Respondent from 02 May 2011 and during cross-examination she confirmed that she reported directly to the Managing Director.
26. She alleges that other managers expressed concerns in management meetings about the growing hostility and distrust of staff, but the then Managing Director, Mr. Peter Davison, chose to focus on her and her defence of the staff, which he took to be an obstacle to him being able to do whatever he wanted to do.
27. The Complainant also alleges that she spoke to the then Managing Director about how chaotic and haphazard the restructuring process had been but claims that she was heavily reprimanded and barred from other restructuring meetings. However, as the then Managing Director is not before this Tribunal to give evidence, the Tribunal will exclude that aspect of her evidence as hearsay.

28. She claimed that a proposed restructuring plan was submitted to the Labour Department which did not envision the termination of anyone, and she was the only person terminated because of the proposed restructuring. Under cross-examination she indicated that she was aware of the reorganization plan called "Operation Better" which was all about making the Respondent more effective and improving profitability, but she was not aware of the recommendation of the external auditors to move payroll from her department.
29. The position of Human Resources Manager was renamed Personnel Manager, but the roles and functions of the positions remained virtually the same.
30. The roles of Human Resources Manager and Assistant Human Resources Manager cannot singularly be combined because of the scope and nature of the duties, the size of the organization, employing some five hundred and three (503) employees over seven (7) properties at that time.
31. The removal of the secondary duties from the Office of the Human Resources Manager does not minimize the role of the Human Resources Manager or that of the Assistant Human Resources Manager. These are still two full-time positions which are needed for the proper management or administration of an organization of the size and scope of the Respondent.
32. The international standard for HR professionals to employees is a ratio of 1:100, however, the ratio at the Respondent is actually 1:503.
33. On 12 September 2013, the Respondent entered into the Scholarship Agreement with the Complainant. She claimed that the scholarship was as a direct result of her decision in 2011 to take up employment with the BVI Health Services Authority because of a number of unpleasant run-ins with Mr. Andrew Clayton. It was an effort to get her to stay with an increase in salary from \$60,000.00 to \$75,000.00 per annum, full medical benefits, and early acceptance into the company's pension plan.
34. She also claimed that those measures were taken with the view to her eventually acceding to the position of Managing Director.
35. It was because of those discussions and offers that she decided to stay.
36. In 2014 there was an approved change in the area of study under the Scholarship Agreement from Employment Law to Operations and Supply Chain Management, after a meeting with a representative from the University of Liverpool.
37. Under cross-examination she accepted that she did not have any experience in the management of a supermarket that is why she was doing the training. Her studies were stopped on the termination date, but they were to last for two (2) years, commencing in 2014 and were to have ended in 2016.
38. Prior to her termination there was never any conversation about her position being made redundant.

39. In April 2015 she completed her Performance Appraisal and was greatly praised for her knowledge and contribution to the department and to the company.
40. Employees brought to her attention covert attempts to have her removed from the organization, because of her continued insistence that fairness and equity should prevail in their dealing with all employees of the Respondent.
41. She was on sick leave from January to February 2015 for a major surgery.
42. Upon her return to work on 24 February 2015 she was immediately called into a meeting and told that payroll would be placed under the Accounts Department and the Training Department would be moved under the Managing Director. After enquiring when the change would take effect the Managing Director at the time told her that he would get back to her as it is a confidential matter.
43. Under cross examination she confirmed that payroll, training and reception were all under the HR department. There were two (2) staff members in the HR Department who dealt with payroll and with the movement of payroll those two (2) staff were moved out of HR. The training officer was never part of the HR department, but with reception moving from HR another two (2) staff were moved out of the HR department. This meant that, with the reorganization, the HR Department would have been losing four (4) staff members, while the HR Manager, the Assistant HR Manager and two (2) janitorial staff would remain. However, what was left was not only personnel management as her role did not change. The reorganization started in February 2015 and was an ongoing process which was still ongoing in June 2015 when she was terminated. In June 2015 there were five (5) staff members in the HR Department, three (3) HR staff and two (2) janitorial staff. She also agreed that moving payroll was a reasonable organization restructuring move.
44. She indicated that she had been wrongly accused of stealing, and every effort was made to find something on the security cameras that could incriminate her.
45. The then Executive Chairman, Simon Potter, confirmed to her that the Respondent was trying to get rid of her and that a proposal had been made, to make her position redundant. This prompted her to contact the then Minister of Natural Resources and Labour and on 3 June 2015 Mr. Clayton approached her and enquired about his meeting with the Minister. Also, on cross-examination she claimed that Mr. Clayton told her that the Minister met with him, however, as Mr. Clayton did not give any evidence before this Tribunal all the evidence about any conversations with Mr. Clayton will be excluded from the Tribunal's consideration of the evidence as being hearsay.
46. Also, under cross-examination she confirmed that she never made any written complaint to the Labour Department about Mr. Clayton.
47. On 4 June 2015 there was a meeting with Mr. Simon Potter and Mr. Peter Davison and that afternoon she received the Payment Offer E-mail outlining a package, inclusive of an offer of \$40,000.00, to agree to termination of her employment with immediate

effect. She was given until Wednesday, 10 June 2015 to give her answer.

48. On 10 June 2015 she delivered the Rejection Letter and she was then informed by Mr. Peter Davison that she was made redundant with immediate effect and that she was to clear out her office.
49. On the following day she received a phone call from Mr. Simon Potter informing her that the Termination Letter would not be released to her until she had returned all property belonging to the Respondent.
50. On cross-examination she confirmed that the Contract of Employment provided for three (3) months' notice in the event of termination. She also confirmed that Cheque No. 113008 attached to the Termination Letter included three (3) months' payment, 76 vacation hours, plus severance pay for four (4) years.
51. Having had the opportunity to review the Complainant's written evidence and to observe her demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of her account, the consistency between her written and oral evidence under oath, as well as the internal consistency of her written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds her to be a credible witness. The Tribunal also takes into consideration the fact that this incident took place almost 5 years prior to the trial and a witness' memory may fade over time so that the evidence given cannot be an exercise into a witness' powers of recall, but as to the cogency of the general nature of that evidence.

(b) *The Evidence of Simon Potter*

52. Simon Potter was the sole witness for the Respondent and prior to giving his evidence he sought to amplify his evidence, in particular paragraphs 21 and 38 of the Respondent's Affidavit.
53. Mr. Potter confirmed that there was no discussion with the Complainant on the matter of her redundancy. There was discussion with the top management of which she was a part, but he claimed that it would not have been appropriate for them to discuss it with her at an early stage. He also indicated that he had no knowledge of a discussion with the Complainant confirming allegations that she was being terminated.
54. He subsequently sought to amplify his evidence based on the cross-examination of the Complainant, to which the Complainant objected. The Tribunal decided to permit the amplification of the cross-examination evidence on a preliminary basis and invited the parties to provide written submissions on the issue. Only the Respondent provided written submissions on the point.
55. The Respondent's Closing Written Submissions relied on rule 29.9 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 to buttress the point that a witness can amplify the evidence of another witness. However, as demonstrated in the persuasive Eastern Caribbean Supreme Court decision from St. Lucia in *Frederick and*

*Frederick v The Comptroller of Customs and The Attorney General*¹ that section does not deal with amplification of another witness's evidence, but amplification of the person's own evidence. Amplification evidence cannot be used, as was attempted in this case, to plug a hole in the Respondent's case. It also appears that this was the approach of Bertram-Linton, J. (AG.) in the Jamaican matrimonial case of *Clarke v. Clarke*² which dealt with the amplification evidence of the husband, but it was amplification of his affidavit evidence and not his wife's evidence. Therefore, although it was possible to comment on the evidence of another witness such commentary within the framework of these proceedings, especially considering the protracted length of time the parties had in this case, should have been made by filing an interlocutory application to adduce additional evidence. Amplification evidence must be limited to what was said by that witness, which is also supported by *Phipson on Evidence*, 19th Edition, para. 11-06, which states in part:

“It is in the trial judge's discretion as to whether he wishes to permit supplementary questions designed to elicit evidence not contained in the witness statement, such as to amplify the statement or give evidence of new matters arising since the statement was served. Permission must be sought for this, and the court will only give permission if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.”

56. As a result, the Tribunal will exclude from its consideration the purported amplification evidence and note its displeasure with the Complainant for failing to assist the Tribunal on a point of objection she raised.
57. In the Respondent's Affidavit, Mr. Simon Potter indicated that he had been employed by the Respondent for the past 40 years and in 2015 he was the Executive Chairman.
58. The Complainant was employed by the Respondent on 02 May 2011 as the Human Resources Manager until her position was made redundant on 11 June 2015. Under cross-examination, he also indicated that during that time there was no question that the Complainant was a competent Human Resources Manager.
59. The decision was taken to make her post redundant based on an overall company restructuring by the then Managing Director, Peter Davison, on the advice and recommendation of the Respondent's auditors, as part of a program called “Operation Better”. This was implemented to streamline the business to become more effective and productive with the ultimate aim of increasing profitability.
60. The Respondent's external auditors advised that they should move payroll out of HR and into the finance department to give more payment controls. In addition to this, the Respondent identified the need to have greater focus on training to improve the Respondent's operations and ensure the Respondent's succession plans were developed. To ensure that attention was placed on training, that part of the department was realigned from HR to report directly to the Managing Director. The final change was the

¹ [2017] ECSC J0525-1.

² [2016] JMSSCiv 45.

reception area that was taken from the HR Department and moved under the control of the Executive Assistant. This left the main function of the HR department, to what he considered was just personnel management. With the removal of numerous personnel, both the HR Manager and Assistant HR Manager were no longer required because the department was now having less responsibility. Therefore, they removed the current HR head and renamed the new position as Personnel Manager. As a result, the HR position was made redundant.

61. Under cross-examination he confirmed that the human resources function included employee performance issues, keeping employee records, dealing with staff complaints, dealing with disciplinary issues and termination.
62. As a result of these changes, the Respondent sent the Complainant the Payment Offer E-mail, which was a package totalling \$40,000.00 which included the amount due to her under the Code and an additional sum which the Respondent proposed in appreciation for her services.
63. After receiving the Rejection Letter the Respondent contacted the Labour Department to confirm the amount that would be due to the Complainant under the Code in the event of termination of employment by way of redundancy. This sum was confirmed by the Labour Commissioner, Mrs. Janice Rymer. As of 11 June 2015 the sum of \$32,638.88 was due to be paid to the Complainant. From that sum \$1,400.00 was deducted which was a total outstanding loan payments due by the Complainant. This left \$28,584.37 due to be paid to the Complainant, which was paid by Cheque No. 113008, and included 3 months' pay in lieu of notice.
64. The Recommendation Letter was a general reference letter confirming her position and main duties while working for the Respondent.
65. The two full time positions of HR Manager and Assistant HR Manager are not needed for the proper management and administration of an organization the size and scope of the Respondent, as recommended by the Respondent's external auditors, and the department has been functioning efficiently and effectively. However, under cross-examination he confirmed that the Respondent's external auditors did not recommend that the post of HR Manager be made redundant.
66. He confirmed that as it was a few days before it was to be made official, the Complainant was told unofficially that her position was going to be made redundant.
67. The Complainant's position was made redundant as a direct result of the department restructuring exercise with a view to improving efficiency, and he continued to maintain that this was advised by the Respondent's external auditors, and not as the Complainant has claimed. Under cross-examination, he indicated that she was the first person to be terminated but it was intended to terminate others. He never told the Complainant, as HR Manager, of anyone else who was going to be made redundant. In fact, he indicated that he had informed her that a position would be made redundant. In re-examination he confirmed that although the HR Manager post was advertised a little before the COVID-19 pandemic it was because the current Personnel Manager intended to relocate to the

United States, however, after she changed her mind there was no longer a vacancy as she was retained in the same position.

68. Also, under cross-examination, he made it clear that he was unaware of any complaints to the Labour Department about Mr. Clayton or any unhappiness with him. However, he admitted that he was aware that Mr. Clayton accused the Complainant of theft, and she was found not to have committed any theft.
69. During cross-examination he accepted that the buildings at Pasea Estate were built from cash flow and not loan financing. However, on re-examination he confirmed that the new Pasea Supermarket was built in 2010 and 2011 and at the time shareholders received no dividends. The Tribunal will exclude this evidence as it does not find it to be relevant and “much ado about nothing” since there was no allegation that the redundancy situation arose as a result of cash flow problems, but as a result of a reorganization to improve efficiency.
70. Having had the opportunity to review Mr. Potter’s written evidence and to observe his demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of his account, the consistency between his written and oral evidence under oath, as well as the internal consistency of his written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds him to be a credible witness. The Tribunal also takes into consideration the fact that this incident took place almost 5 years prior to the trial and a witness’ memory may fade over time so that the evidence given cannot be an exercise into a witness’ powers of recall, but as to the cogency of the general nature of that evidence.

D. THE TRIBUNAL’S ANALYSIS

(a) The Findings of Fact

71. In 2015, the end of the relevant period, the Respondent operated a supermarket chain with seven (7) locations across the Virgin Islands with over five hundred (500) employees.
72. On 02 May 2011, the Respondent employed the Complainant in the position of Human Resources Manager and the Contract of Employment does not contain the basic information required by section 45(1) of the Code and no separate written statement of working conditions was provided to this Tribunal by the Respondent. There is no written evidence of the general responsibilities and related duties for which the Complainant was hired. The Respondent had a duty, under section 19(2) of the Code, to keep that information for a period of up to six (6) years after the termination of the Respondent, that is up to 11 June 2021. Therefore, there was no reason why the Respondent ought not to have produced such a written statement of working conditions if it existed, and as such the Tribunal is entitled to draw the inference that no such written statement of working conditions existed. The Tribunal will, therefore, also interpret the contractual relationship between the employer and employee by applying the *contra preferentum* rule, so that it will rely on the evidence by the Complainant as to what her general

responsibilities and related duties were.

73. For the duration of her employment, the Complainant's duties included training, benefits and compensation management, keeping employee records, dealing with staff complaints, disciplinary issues and terminations.
74. The Complainant was on track to become Managing Director and entered into the Scholarship Agreement to obtain the necessary training to manage a supermarket. The training was to take place between 2014 – 2016.
75. The Complainant was accused of theft by Mr. Andrew Clayton, the Head of Retail, but was later cleared of all charges. There can be no doubt that this situation would have created friction between Mr. Clayton and the Complainant, but what is not clear is whether that friction existed before that incident. Despite this, there is no evidence of any complaint to the Labour Commissioner in respect of Mr. Clayton as alleged by the Complainant or any complaint at all to the Labour Commissioner. Therefore, the Tribunal is unable to find that there is any nexus between any prior complaint and her termination.
76. The Respondent's then Managing Director, Mr. Peter Davison, commenced the "Operation Better" initiative, which was outlined in the Payment Offer E-mail. It was intended to streamline the business to become more effective and productive with the ultimate aim of increasing profitability. As part of "Operation Better" the external auditors advised that Payroll be moved out of the HR Department and into Finance to give more payment controls. However, the external auditors did not make any other recommendation to affect the HR Department, such as moving training and reception out of the HR Department. The Respondent also provided no evidence that those moves changed the nature of the work to be done by the Complainant, especially as the Respondent provided no written statement of working conditions, and as such the Tribunal is entitled to draw the inference, and so finds, that the reorganisation resulting in the move of staff out of the HR Department did not affect the work to be done by the Complainant.
77. The Respondent took the decision that because of the changes to the HR Department they would make the position of HR Manager redundant and as such the then Managing Director, Mr. Peter Davison, in the Payment Offer E-mail, proposed \$40,000.00 in compensation to the Complainant more than what she would have been entitled to under the Code in consideration of her past performance with the Respondent. However, the Complainant did not accept the proposal as shown in the Rejection Letter.
78. As a result of the Rejection Letter the Respondent issued the Termination Letter and the Complainant was terminated with effect from 11 June 2015 and thereafter filed the Complaint. There was payment in lieu of notice by Cheque No. 113008.

(b) The Law

79. The relevant provision relating to redundancy falls under section 89 of the Code which provides as follows:

(1) *The employment contract of an employee may be terminated with notice, or with pay in lieu of notice, for any valid and fair reason connected with the capacity or conduct of the employee, or the operational requirements of the undertaking, establishment or service.*

(2) *Without derogating from the generality of subsection (1), notice of termination may be given by an employer in any of the following circumstances:*

(a) *where two medical practitioners certify that the employee is unfit to continue in employment because of an incapacity of the mind or body which has lasted for at least six months and which is likely to be permanent;*

(b) *where the employee could not continue to work in the position held without contravention of a provision of a law; or*

(c) *where the employee is made redundant.*

(3) *For the purposes of the Code,*

“redundancy” means where the work required of the employee is affected because

(a) *the employer has modernised, automated or mechanised all or part of his or her business;*

(b) *the employer has discontinued or ceased to carry on all or part of his or her business;*

(c) *the employer has reorganised or relocated his or her business to improve efficiency;*

(d) *the employer’s need for employees in a particular category has ceased or diminished;*

(e) *it has become impossible or impracticable for the employer to carry on his or her business at its usual rate or level or at all, due to a shortage of material, a mechanical breakdown, a force majeure or an act of God; or*

(f) *a reduced operation in the employer’s business has been made necessary by economic conditions including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory.”*

80. Therefore, the first step in determining the validity of a redundancy is that there must be notice or payment in lieu of notice. The Tribunal has already established as a matter of

fact that there was payment in lieu of notice.

81. The next question to be answered is whether the termination was for a valid and fair reason. However, section 89(2) of the Code provides that notice of termination may be given by an employer where the employee is made redundant. Therefore, if the redundancy falls within section 89(3) of the Code, then the termination will be for a valid and fair reason.
82. The Respondent has relied on section 89(3)(c) of the Code as the basis for the redundancy, specifically a reorganization.
83. It should be noted, that because this is a termination under section 89 of the Code, the additional requirements under section 81(2) of the Code do not apply, and so there is no requirement for the Respondent to have provided the Complainant in writing of the nature and particulars of the reason for the termination and to have given the Complainant a fair opportunity to defend herself including access to her employment record. However, whether the redundancy was fair must take into consideration section 85(3) of the Code which imposes a test of reasonableness on the conduct of the employer.
84. To quote the persuasive decision of the English Employment Appeal Tribunal in *Robinson v British Island Airways Ltd*,³ “Cases concerning redundancy arising out of a re-organisation always cause difficulties.” Likewise, this case causes some difficulty because section 89(3)(c) of the Code requires not only a re-organisation of the business but also that it must be for the purpose of improving efficiency. Therefore, the Tribunal having found that there was in fact a re-organisation must go on to determine whether that re-organisation was for the purpose of improving efficiency and then determine whether the employee’s work was affected because of it. Neither party addressed the Tribunal in their written closing submissions on the latter part of the requirement, namely, whether the Complainant’s work was directly affected by the re-organisation.
85. According to the highly persuasive decision by the English Court of Appeal in *Lesney Products & Company Ltd v Nolan*⁴

“7. The company then re-organised the work of these 36 machine setters. Instead of these 36 machine setters working one day shift plus long overtime they changed over to a double-day shift, that is two shifts a day. One shift would work from 7.30 a.m. until 3.30 p.m. and the other shift would work from 2.00 p.m. until 10.00 p.m., and the men would work alternative shifts week by week. That was the proposed re-organisation. The company said they did it in order to organise their work more efficiently.

11. . . . it is important that nothing should be done to impair the ability of employers to re-organise their work force and their times and conditions of work so as to improve efficiency. They may re-organise it so as to reduce overtime

³ [1978] ICR 304, EAT.

⁴ [1977] IRLR 77.

and thus to save themselves money, but that does not give the man a right to redundancy payment. Overtime might be reduced, for instance, by taking on more men: but that would not give the existing staff a right to redundancy payments. Also when overtime is reduced by a re-organisation of working hours, that does not give rise to a right to redundancy payment, so long as the work to be done is the same.

12. It seems to me that the problem in this case is whether this re-organisation - whereby the one long day shift plus overtime was altered into two day shifts for the machine setters - was done in the interests of efficiency or whether it was due to a drop in the amount of work required for the men employed in the factory. The employers gave evidence (which was not contradicted) that the amount of work coming into the factory and being done on the day shifts by all the direct operatives was just the same as before. There was no reduction in it. The night shift was done away with for want of work - and on that accord the night shift people would get redundancy payments. But the day shifts turned out the same amount of work by the same number of women operatives. So far as the machine setters were concerned, they did the same work for the day shifts as they did before. They saw that the machines were properly set and maintained, and turned out the toys as before. In these cases the re-organisation was not done because of less work but it was done in the interests of efficiency and to save the employers having to pay so much overtime.”

86. Following that reasoning, which was followed by the persuasive decision of the English Employment Appeal Tribunal in *Robinson v British Island Airways Ltd*⁵ and the Tribunal having found that the relocation of the various staff members from the HR Department did not reduce the work of the Complainant, the work required of the Complainant was, therefore, not affected by the reorganisation. For this reason, the Tribunal finds that the Complainant was not terminated for reasons of redundancy, and her termination was, therefore, unfair.
87. Apart from finding that the Complainant was unfairly dismissed contrary to section 89 of the Labour Code, 2010, the Tribunal does not accept any of the other grounds advanced by the Complainant as being valid. In particular, the Tribunal does not accept that there was a violation of section 99(4) of the Code merely because there was an advertising of the post of HR Manager. In fact, that section requires the decision to hire a person for the same or substantially the same role to take place within six (6) months of the termination, which meant the decision must have been taken on or before 11 December 2015. There is no evidence that this had taken place. Certainly, the Complainant could not have meant that the Assistant Human Resources Manager, who was already employed by the Respondent, merely assuming the duties of the Complainant would be in breach of section 99(4) of the Code as there was no hiring in that case. Therefore, there is no merit to that claim or any of the other claims. The only other consideration is what remedies should be awarded to the Complainant.

⁵ (n3).

(c) The Remedies

88. Section 86(1) of the Code provides as follows:

“(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.”

(i) Re-Instatement

89. The Complainant having sought reinstatement, the Tribunal will order her reinstatement in the position of HR Manager with immediate effect. Compensation is an alternative remedy, which is only available in lieu of reinstatement or re-engagement, unlike the UK provisions which allow for compensation to be made in addition to re-instatement. However, the re-instatement can take effect from the date after termination so that it would be as though she was never terminated, thereby, avoiding the need for a compensation order, except to ensure that any salary and benefits that the Complainant would have earned as a result of the post-dated re-instatement is paid to the Complainant. Additionally, punitive damages is also an alternative remedy where none of the other options are available, and as reinstatement has been requested, the Tribunal will make no order as to punitive damages.

90. The Tribunal will order re-instatement with effect from the date after termination with all the rights and privileges at the time of her termination, which should also include the Scholarship Agreement, participation in the pension plan as though she had never been terminated and medical benefits, which should compensate the Complainant for any medical expenses that she paid since her termination that she would not have had to pay had she not been unfairly dismissed. However, the Respondent shall set off against any past salary due to the Complainant as a result of the re-instatement the sum of \$28,584.37 already paid by the Respondent.

91. Additionally, in accordance with section 45(4) of the Code the Tribunal has not been informed of any organisation representing the Complainant but was informed of a salary increase on 12 September 2013 from \$60,000.00 to \$75,000.00 (an increase in salary of

25%), but there was no salary review in 2015. Therefore, the Respondent would have been required to review the Complainant's salary and other terms and conditions of employment in 2015 and at least twice since her termination. Therefore, the Tribunal will exercise its equitable jurisdiction by making an order that a 3% increase in salary be paid to the Respondent from the date of her termination until 11 June 2017, a further 3% salary increase be paid to the Respondent from 12 June 2017 to 11 June 2019 and a final 3% salary increase be paid to the Respondent from 12 June 2019 to the date of this Final Award, and shall immediately upon re-instatement commence a review of her terms and conditions of employment, including her salary, which is now set by this Tribunal at \$81,954.53 . The effect of this final award should be that the Complainant is to be paid, less all applicable statutory deductions, a sum of \$448,959.69 in past salary which already includes the set-off for monies paid by the Respondent.

(ii) *Costs and Interest*

92. In accordance with section 30(3) of the Code, the Tribunal is only entitled to award costs for exceptional reasons, and the Tribunal finds that there are no exceptional reasons in this case to warrant costs in favour of the Complainant.
93. Section 78(2) of the Code gives the employee the right to recover wages, exclusive of sums lawfully deducted, plus interest at the rate to be determined by a court. Section 3 of the Code defines "wages" as "any money or benefit 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." Therefore, this includes various forms of compensation, including salaries and benefits. Additionally, sections 55(2)(a), 79(2), 107(2) all provide a rate of 10% as a reasonable rate of interest for monies owed to an employee.
94. While the Tribunal is not a "court", it has jurisdiction to determine any employment dispute referred to it with the broad powers to make orders and awards under section 30(2)(a) of the Code which would allow the Tribunal to award interest. Additionally, section 33(b) of the Code gives the parties and any person summoned before it the same right or privilege as he or she would have before a court. Therefore, even though on a limited view of this section it would only apply to the the right to appear before the Tribunal either personally or through a legal practitioner, including the right to call and examine witnesses, as well as the protection of legal professional privilege, on a purposive interpretation in accordance with section 42 of the Interpretation Act (Cap, 136), as amended, would include the right to be award interest by a court. Also, where an arbitral award can generally award interest, there appears to be no limitation on the power of this Tribunal to award interest. According to the highly persuasive English Court of Appeal decision in *Carrasco v Johnson*⁶ there is a broad discretion to award interest. However, in exercising that discretion the Tribunal should have regard to the general principle that interest is awarded to compensate complainants for being kept out of money which ought to have been paid to them rather than as compensation for damage done, and showed a reasonable level of pre-judgment interest, that is from the date of the complaint to the date of the award, would be 3%.

⁶ [2018] EWCA Civ 87.

95. The High Court has the jurisdiction to award pre-judgment interest as was recognized by the Court of Appeal in the binding decision of *Steadroy Matthews v Garna O’Neal*.⁷ It was stated at paragraph 69 of the judgement, referring to the Eastern Caribbean Supreme Court Act (Cap. 80):

“The effect of section 7 of the BVI Act is to give to the High Court in the BVI the same jurisdiction, and the powers and authorities incidental to the jurisdiction, as was vested in the English High Court as of 1st January 1940. The High Court of Justice in England, being vested (at least by 1934) with the jurisdiction to award pre-judgment interest on damages, the High Court of the Territory of the Virgin Islands would, therefore, be vested with the same jurisdiction.”

96. The court went on to mention that Justice Bannister, as he then was, committed a grave error in the case of *Ocean Conversion (BVI) Limited v The Attorney General*,⁸ by refusing to abide by the Court of Appeal decision in *Alphonso v Ramnath*,⁹ which allowed for the High Court to award pre-judgment interest.
97. Pre-judgment interest is not limited to the period between the initiating of the action to judgment. The persuasive case of *Clinton Belfon v The Attorney General*¹⁰ shows that pre-judgment interest can be awarded from the time that the cause of action arose, i.e., the time of the incident. This approach was later followed by Master Raulston Glasgow, as he then was, in the binding decision of *Shawn Chinnery DBA Key Rentals and Charters v Department of Customs and the Attorney General*.¹¹ In both cases the rate of pre-judgment interest is 3%, and this Tribunal intends to follow that guidance in awarding pre-judgment interest.
98. In applying that principle, however, the Tribunal does not believe that this would be an appropriate case to award pre-judgment interest since the Tribunal has exercised its equitable jurisdiction to increase the Complainant’s salary over the period that she would have been terminated based on the same principles and at the same rate.
99. After considering whether to award pre-judgment interest, the Tribunal would then consider post-judgment interest, that is from the date the award indicated payment is due, which unless the Tribunal exercises its discretion to give the party some time to pay would take effect immediately, until payment is made. The relevant law on this area was explored in the persuasive decision from the Chancery Division of the English High Court in *ACLBDD Holdings Ltd et. al. v Ruedi Staechelin et al.*¹² which again demonstrated that the purpose of interest is to compensate complainants for being kept out of money which ought to have been paid to them. In this case, however, it is meant to ensure that if there is a delay in paying the sum awarded the harm caused by the

⁷ BVIHCVAP2015/0019.

⁸ BVIHCV2008/0192.

⁹ (1997) 56 WIR 183.

¹⁰ GDAHCV2007/0439.

¹¹ BVIHCV 2013/0195.

¹² [2018] EWHC 428 (Ch).

further delay is compensated with interest. The Tribunal, therefore, has no difficulty ensuring that if the punitive sum is not paid within a reasonable time after award, which the Tribunal would ordinarily give a party thirty (30) days to pay rather than leaving it to be immediate, that interest should accrue from that date until payment is made at the rate of 5% per annum in accordance with section 7 of the Judgements Act (Cap. 35), unless a higher rate of interest is required under the Code or any other law, but calculated at the daily rate.

100. Additionally, the Tribunal also has a duty to ensure that its awards are complied with and that all other labour related legislation is also complied with. As such, the Tribunal as a matter of course, following the practice in the UK Employment Tribunal of making the award subject to all applicable taxes and ensuring that those taxes are paid, will make its award subject to all statutory deductions.

The Award

101. The award of the Tribunal is as follows:

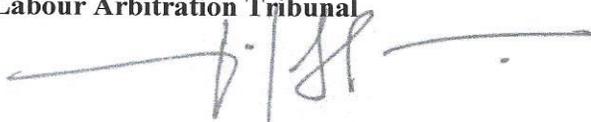
- (a) The Complainant was unfairly dismissed by the Respondent.
- (b) The Respondent shall reinstate the Complainant in the position of Human Resources Manager with effect from 12 June 2015.
- (c) The Respondent shall pay the Complainant's outstanding salary in the amount of \$448,959.69, less all statutory deductions.
- (d) The Respondent shall conduct a review of the Complainant's current salary and other terms and conditions of employment immediately upon the re-instatement of the Complainant.
- (e) The Respondent shall compensate the Complainant within thirty (30) days for any and all medical expenses incurred by the Complainant from 12 June 2015 to the date of this Final Award that she would not have had to pay had she not been terminated upon presentation of those medical expenses by the Complainant on or before Tuesday, 31 August 2021.
- (f) If the outstanding salary is not paid immediately and the medical expenses are not paid within thirty (30) days upon presentation by the Complainant, the Respondent shall pay interest to the Complainant at a rate of 5% for each day thereafter that the sums remain unpaid.
- (g) There shall be no order as to costs.
- (h) The Secretary to the Tribunal shall cause a copy of this Final Award to be served on the Director of the Social Security Board and the Commissioner of Inland Revenue for their information and further action.

- PENAL NOTICE -

If ROAD TOWN WHOLESALE TRADING LTD fails to comply with the terms of this order proceedings may be commenced for contempt of court and you may be liable to be imprisoned or to have an order of sequestration made in respect of your property.

Post-Script: Any person who is dissatisfied with this Final Award may appeal to the High Court on any question of law on or before Friday, 13 August 2021.

By Order
Labour Arbitration Tribunal



Jamal S. Smith, LLB(Hons.), MCI Arb.
Chairman

Main Office:
Ashley Ritter Building
Road Town, Tortola VG1110
British Virgin Islands

I concur.

Kamika Forbes, LLB(Hons.)
Member on the recommendation of the
Complainant

I concur.



Professor Arthur Richardson, Ph.D.
Member on the recommendation of the
Respondent

