Case No. BVILAT2020/004

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Mark McKie **COMPLAINANT**

AND

Nanny Cay Resort and Marina Limited **RESPONDENT**

BEFORE: **Jamal S. Smith**, Chairperson
Kamika A. Forbes, Member (on the recommendation of the Complainant)
Dancia Penn, OBE, QC, Member (on the recommendation of the Respondent)

ATTENDANCE:
(1) Mark McKie, Complainant
(2) Nelson Samuel, legal practitioner for the Complainant, instructed by NR Samuel & Co
(3) Miles Sutherland-Pilch, representative for the Respondent
(4) Mishka Jacobs, legal practitioner for the Respondent, instructed by Harney Westwood & Riegels LP

ADDITIONALLY:
(5) Malisa Ragnauth-Mangal, Secretary to the Tribunal
(6) Steve Martin, Witness for the Respondent

FINAL AWARD

25 March 2021; 15 July 2021

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A. INTRODUCTION

1. In this award, reference will be made to an Agreed Trial Bundle filed by the Complainant on 18 March 2021 (the "**Trial Bundle**"). Reference will also be made to Skeleton Arguments filed by the Complainant on 19 March 2021 (the "**Complainant's Submissions**") and Skeleton Arguments filed by the Respondent together with an Authorities Bundle on 17 March 2021 (the "**Respondent's Submissions**").

2. After the receipt of both sets of closing submissions the Tribunal made the decision to reopen the trial and a Notice to Reopen Trial was issued pursuant to LPR 37(2) requesting additional submissions on punitive damages and reference will also be made to the Further Submissions filed by the Complainant on 17 May 2021 (the "**Complainant's Closing Submissions**") and the Further Written Submissions and Authorities Bundle filed by the Respondent on 17 May 2021 (the "**Respondent's Closing Submissions**").

3. Together, the Trial Bundle, the Complainant's Submissions, the Respondent's Submissions, the Complainant's Closing Submissions and the Respondent's Closing Submissions contain all the documents and legal arguments considered by the Tribunal, unless otherwise expressly stated in this Final Award.

B. CASE HISTORY

4. On 24 March 2020, the Complainant filed a Complaint Form with the Labour Department (the "**Complaint**"), found at TAB 1 of the Trial Bundle, which indicated that he was hired as a Carpenter with the Respondent on 30 January 2019 and terminated on 15 October 2019 and was claiming compensation for wrongful dismissal.

5. On 28 October 2020, the Minister referred the Complaint to the Tribunal as there had been no settlement achieved either by the Labour Commissioner or the Minister pursuant to section 28 of the Labour Code, 2010 (the "**Code**"). It is noted that the Minister's referral to the Tribunal was not included in the Trial Bundle and there is no evidence of any agreement by the parties for any extension of time during the settlement discussions to allow some seven (7) months before the Complaint was referred to the Tribunal.

6. On 04 November 2020, the Secretary to the Tribunal issued a Notice of Case Management Hearing (the "**Notice of Case Management Hearing**") outlining the deadlines for the

parties to file documents in preparation for the first hearing on 12 January 2021. Again, the Tribunal notes that a copy of the Notice of Case Management Hearing was not included in the Trial Bundle.

7. On 09 November 2020, the Complainant filed a Form of Consent recommending the appointment of Kamika A. Forbes as a member of the Tribunal which complied with the Notice of Case Management Hearing. However, it was not until 07 January 2021 that the Respondent filed its Form of Consent recommending the appointment of Dancia Penn, OBE, QC as a member of the Tribunal, well outside the time fixed for doing so by the Notice of Case Management Hearing in accordance with the LPR.

8. On 18 December 2020, the Respondent filed a Response (the "**Response**") along with the Affidavit of Miles Sutherland-Pilch (the "**First Affidavit of Miles Sutherland-Pilch**"), well outside the time fixed for doing so by the Notice of Case Management Hearing in accordance with the LPR. However, the Response raised a defence against unfair dismissal based on redundancy claiming that it decided to reduce its construction team and identified Steve Martin as the person managing the construction projects for the Respondent who met with the Complainant to inform him that he would be laid off. As a result, the Respondent indicated that the Complainant was paid and is, therefore, not due any compensation as requested.

9. At the Case Management Hearing on 12 January 2021 the Tribunal, with the Chairperson sitting alone, made its first order (the "**First CMO**") where it was noted that the Respondent did not file, among other things, an up-to-date trade license as outlined in the Notice of Case Management Hearing in accordance with LPR 16(3) and although the Respondent argued that despite its failure to file the Response in time the Complainant suffered no detriment, the Tribunal disagreed with the Respondent since as a result of the late filing the Complainant was unable to file a Reply in accordance with the timetable set by the Notice of Case Management Hearing. Therefore, the Tribunal found that there were exceptional reasons in accordance with LPR 47(3)(d) to award costs to the Complainant in the amount of $350.00. The First CMO also gave trial directions including fixing the date for the trial to 04 March 2021 and a date for the pre-trial hearing to 16 February 2021.

10. On 25 January 2021, the Complainant filed its Reply, along with the Affidavit of Mark McKie (the "**Affidavit of Mark McKie**") in accordance with the First CMO. The Affidavit of Mark McKie had five (5) exhibits as follows:

    (a) "MM-1" – a copy of the Contract of Employment with his Job Description and Employment Rules (the "**Contract of Employment**");

    (b) "MM-2" – a copy of a salary slip;

    (c) "MM-3" – a copy of the final salary slip (the "**Final Salary Slip**");

    (d) "MM-4" – a copy of the letter of release dated 07 January 2020 (the "**Release Letter**"); and

(e) "MM-5" – Job Letter from Maclin Maintenance (the "**Job Letter**").

11. On 29 January 2021, the Chairperson issued a Case Management Order (the "**Second CMO**") after consultation with the parties to change the dates fixed for the pre-trial hearing to 02 March 2021 and the trial to 25 March 2021.

12. On 29 January 2021, the Respondent filed an interlocutory application to strike out the Reply and/or respond to the Affidavit of Mark McKie which was supported by the Affidavit of Marcia McFarlane (the "**First Interlocutory Application**").

13. On 05 February 2021, the Complainant filed an affidavit to oppose the First Interlocutory Application.

14. On 24 February 2021, an interlocutory application for variation of the First CMO was filed by the Respondent, although it was described as a joint application it was only signed on behalf of the Respondent, however, that interlocutory application was unopposed, and was supported by the Affidavit of Kimberly Crabbe-Adams which exhibited various correspondence between the parties seeking to agree new dates.

15. On 25 February 2021, the Respondent filed submissions in support of both interlocutory applications, while the Complainant filed submissions opposing the First Interlocutory Application.

16. At the Pre-Trial Hearing on 02 March 2021 the Chairperson heard both interlocutory applications in public and issued a Case Management Order (the "**Third CMO**") which varied the trial directions made in the First CMO as well as refused to strike out paragraphs 9 and 10 of the Complainant's Reply but provisionally allowed the Respondent to file the Affidavit of Steve Martin.

17. On 12 March 2021, the Respondent filed the Affidavit of Steven Martin (the "**Affidavit of Steven Martin**") in accordance with the Third CMO which was supported by a bundle of exhibits "SM-1" that only include a single document, an approved vacation leave request that was not signed by the Complainant showing dates of absence from 04 April 2019 to 04 March 2019 but was intended to be for one (1) day with him returning to work on 05 March 2019 (the "**Vacation Leave Request**"). The Respondent also filed, without authority from the Tribunal, a supplemental affidavit of Miles Sutherland-Pilch (the "**Second Affidavit of Miles Sutherland-Pilch**").

18. At the trial on 25 March 2021 the full panel heard the oral evidence and closing arguments from both parties and reserved its decision. The entire trial took place via the WebEx video conferencing 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.

19. As the Respondent did not agree that compensation was an appropriate remedy in this case,

if the Tribunal did not accept its redundancy defence it would be open to the Tribunal to order punitive damages. Therefore, the Tribunal re-opened the trial to obtain written submissions on the issue of punitive damages. The Tribunal has considered the Complainant's Closing Submissions and the Respondent's Closing Submissions. The Tribunal also notes that the deadline for issuing its final award was on 17 June 2021 but in accordance with LPR 38(1) required additional time to consider the various evidence and submissions in the interests of the administration of justice and hereby orders the extension of the delivery of its decision within a further thirty (30) days.

20. 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.

C. THE EVIDENCE

(a) Evidence of Miles Sutherland-Pilch

21. He is the General Manager of the Respondent which is a company duly incorporated and existing under the laws of the Virgin Islands. Under cross-examination he admitted that he is also a director and shareholder of the Respondent.

22. The Complainant was employed with the Respondent from 29 January 2019 to 15 October 2019 in the capacity of a Carpenter, however, prior to 29 January 2019 the Respondent worked with the Complainant for about ten (10) years on a casual basis and his work permit was in the name of someone else. On 12 December 2018, a work permit application was submitted by the Respondent on behalf of the Complainant. However, in the Second Affidavit of Miles Sutherland-Pilch he admitted that he had been mistaken about the Complainant's prior work with the Respondent.

23. In October 2019, the Respondent decided to reduce its construction team, thereby making "positions" redundant. Steve Martin met with the Complainant to inform him that he would be laid off, and thereafter, the Complainant requested, and the Respondent agreed to keep his work permit until his application for exemption was processed. In the Second Affidavit of Miles Sutherland-Pilch, the redundancy was due to the size of their rebuilding team which was affected due to cash flow restraints. The cash flow restraints even caused payroll to be late, which had never happened in his history with the Respondent. After the Complainant was made redundant, the Respondent had to reduce the size of the rebuilding team in early December of that same year and to stop sub-contracted construction crew entirely as the cash flow position did not improve. However, on cross-examination he acknowledged that the tourist season normally begins in late October to early November each year and in 2019 tourism was beginning to improve since the 2017 hurricanes. He also described obtaining loan financing for various construction projects and the requirement from the bank for contractors on those projects and also confirmed the financing of those projects.

24. On 15 October 2019 Steve Martin met with and paid the Complainant for an additional two

(2) weeks and vacation pay amounting to $2,460.00. He indicated that he had not heard from the Complainant regarding the matter after that. He first became aware that an issue existed when he was contacted by the Labour Department and attended a meeting with the Labour Department around 14 May 2020, but the Complainant was absent from that meeting. On 21 May 2020, he and the Complainant met with a view to addressing the Complaint, but no settlement was reached. However, in the Second Affidavit of Miles Sutherland-Pilch he accepted that a meeting between the Complainant, Steve Martin and himself took place on 29 October 2019 at which time the Complainant requested that his work permit be kept until the exemption was approved. Any other subsequent meetings were informal and may have happened when the Complainant popped up to see if things had changed or to collect his tools or for other reasons and the Complainant may have just stuck his head at the door and so he cannot recall those specific meetings. He also claimed that the Complainant only had five (5) vacation days owed to him as he had already taken two (2) days earlier in the year. Additionally, he had only accrued one (1) vacation day for every month worked which would have entitled him to nine (9) vacation days and he relies on Exhibit SM-1.

25. The Complainant was affected due to the reduced operation in the Respondent's business, the lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory in accordance with section 89(3)(f) of the Code and the Respondent's need to reorganize its workforce to improve efficiency due to the economic down-turn experienced by the Company pursuant to section 89(3)(c) of the Act.

26. Due to the economic climate since the termination of the Complainant, the Company has had to release additional workers due to redundancy. In the Second Affidavit of Miles Sutherland-Pilch he indicated that he never promised any employee that they will work until retirement as situations can change, particularly in the construction field.

27. In the Second Affidavit of Miles Sutherland-Pilch he indicated that it is highly unlikely that the Complainant would be in a position to know who the Respondent sponsored and how many. He would not have been privy to the employment particulars of other workers save for what they tell him, and such parties are not before the court to test the information told to the Complainant.

28. In the Second Affidavit of Miles Sutherland-Pilch he denied that every worker at the Respondent company continued working until the lockdown in March 2020 and also denied that it was only after the lockdown in April/May that some workmen were laid off. The subcontracted crew were ordered to stop work in December 2019. Furthermore, the Complainant was in no position to know with certainty the details of the construction work at the Respondent's company, and any information he alleges to know would be hearsay at best.

29. In the Second Affidavit of Miles Sutherland-Pilch he claimed that he did not believe the Complainant's evidence that he did not begin work again until 20 February 2020.

30. In the Second Affidavit of Miles Sutherland-Pilch he claimed that the Complainant did not

contribute to its pension scheme and based on the pension scheme policy, there is a 5-year vesting period and the Complainant was only employed for mine (9) months.

31. Having had the opportunity to review Mr. Pilch'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 has concerns about this witness' credibility finding this witness to be largely untruthful and unhelpful to the Tribunal. The Tribunal also takes into consideration the fact that this incident took place almost two (2) years prior to both the written and oral evidence of Mr. Pilch 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) *Evidence of Steve Martin*

32. In accordance with the Third CMO the Tribunal agreed to provisionally permit the Affidavit of Steve Martin and to summon him to be cross-examined on that evidence despite Steve Martin's evidence being filed out of time. However, the Response had already identified Steve Martin as the person who managed the construction projects and who informed the Complainant that he was going to be laid off. The Respondent, therefore, had an early opportunity to produce Steve Martin as a witness and failed to do so but instead produced the Affidavit of Miles Sutherland-Pilch which was scant at best and very unhelpful in proving the reasonableness of the Respondent's conduct, then sought to improve that evidence by introducing the Affidavit of Steve Martin out of time and the Second Affidavit of Miles Sutherland-Pilch without the leave of this Tribunal. Section 85 of the Code places the burden of proof on the employer where the employee alleges unfair dismissal. The failure by the Respondent to adequately defend the allegations made by the Complainant by calling Steve Martin at the first available opportunity would have mitigated the concerns raised by the lateness of this evidence and therefore the Tribunal will not place any significant weight on Steve Martin's evidence.

33. Steve Martin's evidence-in-chief was that at all material times he was the Project Manager for the Respondent which entails, among other things, supervising the maintenance department and the project team. The Complainant was part of the project team.

34. Following the 2017 floods and hurricanes which devasted the infrastructure of the Territory, the Respondent had also suffered damage and was still in its rebuilding phase. The maintenance department and the project team were assisting in rebuilding the Respondent's building and another 3 – 4 projects.

35. He claimed that he did not fire the Complainant. The directors of the Respondent made a business decision to make some employees of the maintenance department and the project team redundant which was communicated to Steve Martin by Miles Sutherland-Pilch.

36. In or about August 2019 Steve Martin made the decision to transfer the Complainant from the specific projects team to work with concrete, because he realized that he was very skilled in that field as he was a very good mason and there was more masonry work at that time. Further, at that time, there were four (4) carpenters including the Complainant, but the Complainant was the least skilled of the carpenters. One of their sub-contractors was better at carpentry work and he decided to swap the Complainant to work with concrete and the sub-contractor to work in carpentry. The Complainant was unhappy with the decision.

37. On 01 October 2019 he informed Mr. McKie that the concrete jobs were coming to an end and that is where his skill set was best utilized. Further, that Mr. Martin was given the directive to reduce staff and he had to make him redundant by giving him two (2) weeks' notice. Under cross-examination he indicated that when he tells an employee to do something he expects them to do it.

38. On 15 October 2019 he informed the Complainant that he had to make him redundant as the masonry project that he was working on was coming to an end and that he was being pressured by the owners of the Respondent to cut the team.

39. That same day he spoke with Miles Sutherland-Pilch about the redundancies and he included a two (2) weeks' pay for the Complainant. The Human Resources Department drafted a letter to the Complainant and he had to return to collect the release letter, but he left for vacation shortly after 15 October 2019.

40. Shortly after returning from vacation, the Complainant met with him and Miles Sutherland-Pilch when he indicated that he was unhappy about being unfairly dismissed.

41. The Complainant indicated that he wanted the Respondent to continue to hold his work permit until he got his work permit exemption. It was not his idea but the Complainant's idea.

42. There were no other formal meetings with the Complainant, but from time to time the Complainant would stop by to see if the Respondent's situation changed or to collect his tools or for some other reason.

43. The decision to transfer the Complainant was not based on anything that Mr. Martin had heard about him. It was purely a business decision to utilize the person best suited for the work.

44. He denied ever having a conversation about the Complainant with a person named "South".

45. The Complainant was doing a good job in the new position but he was not fitting in with the team. They were not getting along for reasons amongst themselves which was not known to Mr. Martin.

46. No one was hired by the Respondent to replace the Complainant's position. The staff and the subcontractors were shuffled around, in about August 2019, to the position that they

would have been best utilized in the rebuilding phase.

47. Having had the opportunity to review Mr. Martin'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 did not find this witness to be credible and was untruthful and unhelpful to the Tribunal. The Tribunal also takes into consideration the fact that this incident took place almost 2 years prior to both the written and oral evidence of Mr. Martin 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.

(c) *Evidence of Mark McKie*

48. He is a national of Jamaica, having lived and worked in the Virgin Islands for over fifteen (15) years.

49. He first worked for the Respondent on or about 27 August 2018 on a temporary basis before he was formerly employed on 29 January 2019 as a full time Carpenter.

50. When Steve Martin fired him he never mentioned redundancy, neither the company's intention to reduce its construction team nor that his position would be made redundant. Mr. Martin clearly stated that the Complainant did not fit in when he complained about what the men were doing to him. Mr. Martin did not take time out to listen to what the Complainant had to say neither did he investigate his complaint nor what he had heard about the Complainant.

51. His performance was evaluated several months after his full employment with the Respondent and he was graded at maximum and above expectation which resulted in a wage increase from $20.00 to 20.50 an hour as shown in the Salary Slip.

52. In or about August 2020, the Complainant was working in the workshop building and installing hurricane shutters and building rails when Steve Martin told the Complainant he will transfer the Complainant to do mason work and that he would take someone named "Rohan" from the other project and put him to do what the Complainant was doing. He got information that another employee had carried wrong news about him to Steve Martin and that was the true reason for the transfer, which was confirmed by an employee called "South", who later told Steve Martin that the Complainant was not a problem and that he was a good workman.

53. On 09 October 2019 just before 12 noon, the Complainant told Steve Martin that he was not comfortable in the new position and he wanted to be returned to his previous position, but instead he fired the Complainant and said that he was not fitting in, therefore, there was no place for him. After pleading for his job, Steve Martin then said that the Complainant had until 15 October 2019 and no more instead of being terminated immediately out of good

will. The following week he was terminated and told that his termination letter was not ready. He received his Final Pay Slip but he did not receive the Release Letter until a meeting between the Complainant and Miles Sutherland-Pilch on 15 January 2020.

54. On 18 October 2019 he still had not received the Release Letter and a couple days later he went back again when he was told that someone by the name of Kelly was responsible for writing the Release Letter. He then went to speak with the person named Kelly and she indicated that she had not received the information to put in the Release Letter. She then spoke with Miles Sutherland-Pilch by phone and reported to the Complainant that he will arrange a meeting with the Complainant.

55. When no one called the Complainant he went to speak to Miles Sutherland-Pilch who said that Steve Martin was not there and would not be back until the following week so he arranged a meeting for the Complainant to meet with him and Steve Martin.

56. There was a meeting with Miles Sutherland-Pilch, Steve Martin and the Complainant at which Steve Martin indicated that he was told to do some work on a beam and the Complainant refused do it which resulted in him being moved to do the mason work. Before that point Steve Martin kept telling him that no one had complained about the Complainant. However, at a later meeting in December with Miles Sutherland-Pilch, it was confirmed to the Complainant that it is the negative arguments that people made about him was the reason for his termination.

57. It was at that meeting that they first indicated they will make it easy for the Complainant by saying that they made him redundant. However, the Complainant responded that there was no room for redundancy outlining various reasons including that they "put somebody in my place who you have not sponsored".

58. Also during that meeting the Complainant relayed the effect that the termination would have on his family and the fact that he had been working in the Virgin Islands for fifteen (15) years which would mean he would lose all his social security and his time. It was as a result of that indication that Steve Martin suggested that they can keep his work permit until he got his exemption. The Complainant agreed to this suggestion. At a subsequent meeting with Miles Sutherland-Pilch, the Complainant told them that he already had a job and a work permit when he was recruited by the Respondent, but the Respondent wanted to form their own construction division to save money and offered him $20.00 an hour, a pension, a full-time job until retirement with holiday and vacation pay. The Complainant left his old job based on that offer and now they fired him.

59. At a subsequent meeting with Miles Sutherland-Pilch the Complainant was informed that the Respondent had already put someone by the name of Rohan in the Complainant's place.

60. It was only after the lockdown in April/May that some of the workmen were laid off. So there was no reduction in work prior to the lockdown. At least one more person was given new employment during that period.

61. Miles Sutherland-Pilch suggested dating the letter 7 January 2020 with his redundancy becoming effective on 06 January 2020 which was not true. He was fired on 15 October 2019 and he did not work again until 20 February 2020.

62. The Complainant began work with Maclin Maintenance on 20 February 2020 at the rate of $6.50 per hour which is $52.00 per day. However, the Complainant described the difficulties he had obtaining alternative employment. He described having to leave his apartment because he could not pay the rent and that he still owes the Landlord. He lost his savings and could no longer afford to put his daughter through University while owing tuition fees for his son. He has had to rely on assistance from his brother and sister.

63. Having had the opportunity to review Mr. McKie'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 2 years prior to both the written and oral evidence of Mr. McKie 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

64. The Respondent operates a resort and marina in the Virgin Islands and from 28 August 2018 to 29 January 2019 the Complainant worked with the Respondent on a temporary basis until he was employed on a full-time basis as a Carpenter in the project team reporting to the Project Manager, Steve Martin.

65. The Complainant had been given a great review for his work performance during his performance review by the Respondent and as a result was given a raise from $20.00 an hour to $20.50 an hour.

66. However, because of a negative report from other employees to Steve Martin he was moved from the project team to do masonry which was within his Job Description and Steve Martin indicated that a sub-contractor was assigned to do the carpentry work that the Complainant was doing.

67. The Complainant then met with Steve Martin on 09 October 2019 and asked to be returned to his former project team, but instead Steve Martin told him that he was not fitting in and terminated him giving him until 15 October 2019. Steve Martin, as the Project Manager, decided when he tells an employee to do something he expects them to do it, and he expected the Complainant to do the job he assigned to him. If he didn't want to do that job then he had to leave. That was final and the Tribunal does not accept Steve Martin's

evidence that he did not "fire" the Complainant, and in fact finds that Steve Martin was the only person who terminated the Complainant and then informed Miles Sutherland-Pilch of his decision to terminate him.

68. The Tribunal does not accept Steve Martin's evidence that on 01 October 2019 he gave him two (2) weeks' notice of his termination on 15 October 2019 and prefers the evidence of the Complainant that it was on 09 October 2019 when he went to meet with Steve Martin to ask to be re-transferred to his previous job. Therefore, the Tribunal finds that the Complainant was not given two (2) weeks' prior notice but does find as a matter of fact that payment in lieu of two (2) weeks' notice was paid to the Complainant.

69. The last day of employment for the Complainant was 15 October 2019 but he was not given a termination letter that day, however, he did receive the Final Pay Slip which provided payment in lieu of notice. It was not until January 2020 when Miles Sutherland-Pilch gave him the Release Letter showing that he was made redundant on 06 January 2020 instead of 15 October 2019 which was fraudulent regardless of the intention.

70. There is no reliable evidence before this Tribunal that the Respondent was suffering any cash flow problems as no accounting information or other documentary evidence that supports a cash flow problem was produced to this Tribunal and with the lack of confidence in the cogency of the Respondent's evidence, the Tribunal is unable to support a finding of fact that the Respondent suffered a cash flow problem in or about October 2019 at the very start of the 2019 tourist season.

71. There is no reliable evidence before the Tribunal that the directors of the Respondent made any decision to make employees redundant. There was conflicting evidence by the Respondent concerning whether it was Miles Sutherland-Pilch who informed Steve Martin about the redundancy prior to the 09 October 2019 meeting between Steve Martin and the Complainant or if it was Steve Martin who informed Miles Sutherland-Pilch about the termination who then decided to make the Respondent redundant in keeping with the alleged decision of the directors. This makes it difficult for the Tribunal to accept that the redundancy was a decision of the directors and not a reflex reaction to Steve Martin's decision to "fire" the Complainant simply because he asked to be re-transferred to his previous position.

72. There is no reliable evidence before this Tribunal that the Respondent terminated any other employee until after the COVID-19 lockdown in March 2020 and with the lack of confidence in the cogency of the Respondent's evidence, the Tribunal will infer that the Respondent did not terminate any other employee until after the COVID-19 lockdown in March 2020.

(b) *The Law*

73. 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."

74. 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.

75. The next question to be answered is whether or not the termination was for a valid and fair reason. However, section 89(2) 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), then the termination will be for a valid and fair reason.

76. The Respondent has relied on section 89(3)(c) and (f) as the basis for the redundancy, specifically that there was a cash flow problem which required them to reorganize the project team. However, the Tribunal having found that there was no cash flow problem or any genuine reorganization, the Tribunal, therefore, finds that there was no redundancy.

77. It should be noted, that because this is a termination under section 89 of the Code, the additional requirements under section 81(2) does 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) which imposes a test of reasonableness on the conduct of the employer.

78. The test is whether, on a balance of probabilities, the evidence shows the dismissal was for any one of these criteria and the Tribunal will assess all the evidence as shown in the persuasive English employment case of *Greater Glasgow Health Board v. Lamont*.[1] It is for the employer to adduce evidence of the redundancy as shown in the highly persuasive English Court of Appeal case of *Willcox v. Hastings*.[2] The Tribunal has already found that the Respondent has not adduced any reliable evidence to show the dismissal fell under section 89(3)(c) or (f) and the Respondent had failed to adduce any reliable evidence of the redundancy.

79. Even if the Tribunal is wrong in its assessment of the evidence on a balance of probabilities that there was no redundancy situation, there would still be no serious miscarriage of justice as shown in the persuasive English Court of Appeal case of *Hindle v. Percival Boats Ltd*,[3] since it is sufficient to show that the predominant cause was not redundancy. If there are two causes of dismissal and the Tribunal takes the view that the employer has not shown that the cause other than redundancy was the predominant cause, the other cause must fail as shown in *Wilcox v. Hastings*[4] and *Baxter v. Limb Group of Companies*.[5] Therefore, the Tribunal has found that the predominant cause was not redundancy, and as such the Respondent's claim for redundancy must fail.

80. The Respondent having failed to show the reasonableness of the dismissal by solely relying on their claim of redundancy, the Tribunal finds that the Complainant was unfairly dismissed.

(c) <u>The Remedies</u>

[1] UKEATS/0019/12/BI (21 June 2012, unreported).
[2] [1987] IRLR 298, CA.
[3] [1969] 1 All ER 836, CA.
[4] (n2).
[5] [1994] IRLR 572, CA.

81. 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."*

82. The Complainant has not asked to be reinstated pursuant to section 86(1)(a)(i) of the Code where the Tribunal finds the dismissal was unfair but has asked for compensation in lieu of reinstatement or re-engagement under section 86(1)(b)(iii) of the Code. However, compensation may only be awarded by the Tribunal where it is acceptable to both parties and the Respondent has not expressed, either in pleadings or in evidence, that compensation would be an acceptable remedy. As a result, section 86(1)(b) allows the Tribunal to award such punitive sums as it thinks fit where it finds the dismissal was unfair.

83. It should be noted, however, that the power to make a punitive award should be used sparingly and is subject to the general obligation of the Tribunal to make an order or award as it considers fair and just having regard to the interests of the persons concerned and the community as a whole under section 30(2) of the Code. Therefore, the punitive award must balance the interests of the Complainant and the Respondent and take into consideration the community as a whole.

84. The Tribunal has explored the principles upon which it will make a punitive award in its decision in *Ursuline Joseph v. Aramo Corporate Services Inc*,[6] and recently in *Colleth Ranger-Vassell v. Mainsail B.V.I. Limited*.[7] In the latter case, the Tribunal examined the statutory penalties created by the legislature to determine an appropriate starting point for its punitive awards that was determined to be $25,000.00, which can then be increased or decreased based on various factors, which would include:

(a) the nature, size and scope of the Respondent's business based on evidence produced to the Tribunal, either voluntarily or by directions issued by the Tribunal in

[6] BVILAT2016/016.
[7] BVILAT2020/002.

accordance with LPR 27(1)(a) where the Respondent has failed to comply with 20(1)(f)(ii) to state whether compensation is an adequate remedy, but this does not limit the Tribunal's discretion to make any inference about the Respondent's means where it fails to comply with any such directions given by the Tribunal;

(b) the conduct of the parties from the beginning of the proceedings up to the date of the final award, and this would also include the conduct of any legal practitioner at trial;

(c) the relevance of any compensation that may have otherwise been awarded, and the punitive award should be in addition to any sum that would have been awarded as a means of punishment; and

(d) any fine or other penalty already suffered by the Respondent for the wrongful conduct to ensure that the Respondent is not punished twice, and this would also include ensuring that the Complainant is not compensated twice by ensuring that any mitigation of the loss suffered by the Complainant through other employment is taken into consideration when considering any compensation that would ordinarily have been awarded to the Complainant.

85. Applying those principles, the Tribunal has considered the fact that the Respondent provided no credible evidence of its means, and the Complainant did not make any request for any such directions to be given to ensure that the Respondent provided that information, as a result the Tribunal cannot make any adjustment to the starting point based on any knowledge of the Respondent's means. However, the Tribunal notes that based on the Contract of Employment, the likely level of compensation to have been awarded would have been about $25,000.00, especially in light of the Complainant's evidence that, although he has found employment, he has not found comparable employment since termination. Therefore, adding that loss of compensation to the starting point, that would increase the award to $50,000.00. Additionally, the Tribunal has taken into consideration the conduct of the parties throughout these proceedings which the Tribunal has already mentioned, as well as prior to these proceedings, in particular the fraudulent conduct of the Respondent, regardless of the intention. Ordinarily the Tribunal would be concerned that the Complainant has obtained a benefit from the fraudulent conduct, namely, the work permit exemption, the Tribunal is satisfied that had the termination not taken place the Complainant was more likely than not to have obtained it in any event, and, therefore, the benefit was not a direct result of the fraud. Therefore, the Tribunal considers the fraud by itself a significant aggravating factor and will increase the award by a further $25,000.00. Therefore, taking all these factors into consideration, the Tribunal is of the view that a punitive award of $75,000.00 would be fair and just in the circumstances.

(d) *Costs and Interest*

86. Section 30(3) of the Code limits the Tribunal's power to award costs only for exceptional reasons which the Tribunal considers appropriate. A punitive award would ordinarily amount to an exceptional reason to grant costs in favour of the Complainant where it was possible for a settlement to have been achieved, or for an agreement as to compensation being an appropriate remedy.

87. 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.

88. 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 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 awarded 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*[8] 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 set a reasonable level of pre-judgment interest, that is from the date of the complaint to the date of the award, at 3%.

89. 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*.[9] It was stated at paragraph 69 of that 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."*

90. 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*,[10] by refusing to abide by the Court of Appeal decision in *Alphonso v Ramnath*,[11] which allowed for the High Court to award pre-judgment interest.

[8] [2018] EWCA Civ 87.
[9] BVIHCVAP2015/0019.
[10] BVIHCV2008/0192.
[11] (1997) 56 WIR 183.

91. 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*[12] 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.*[13] In both cases the rate of pre-judgment interest is 3%, and this Tribunal intends to follow that guidance in awarding pre-judgment interest.

92. However, where the punitive award would normally consider the effect that the failure to compensate the Complainant would have had in making a global award, there would ordinarily not be a good reason to award pre-judgment interest on a punitive award, and it would be for the Complainant to demonstrate sufficient grounds upon which the Tribunal must, in addition to its punitive award, to award pre-judgment interest. In this case, the Complainant has not done so and, therefore, the Tribunal will not award pre-judgment interest.

93. After considering whether to award pre-judgement 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.*[14] 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 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.

94. 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

95. The award of the Tribunal is as follows:

[12] GDAHCV2007/0439.
[13] BVIHCV 2013/0195.
[14] [2018] EWHC 428 (Ch).

(a) The Complainant was unlawfully and unfairly dismissed by the Respondent.

(b) The Respondent shall pay punitive damages to the Complainant in the amount of $75,000.00 on or before Tuesday, 31 August 2021, less all applicable taxes.

(c) If the punitive damages are not paid on or before Tuesday, 31 August 2021 the Respondent shall pay interest to the Complainant in the amount of $10.53 for each day thereafter that the sums remains unpaid.

(d) The Respondent shall pay the permitted costs incurred by the Complainant to be assessed if not agreed on or before Tuesday, 31 August 2021.

(e) If the parties fail to agree on the costs to be paid to the Complainant on or before Tuesday, 31 August 2021, a costs hearing in accordance with Part IX of the LPR is fixed for **Tuesday, 21 September 2021** at 10:00 a.m. at the Office of the Tribunal in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearings) Guidelines, 2020 (S.I. No. 99 of 2020).

(f) If the parties agree on the costs of these proceedings the Complainant shall give notice of the agreement to the Secretary to the Tribunal and the date fixed for the costs hearing shall be vacated.

(g) 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 NANNY CAY RESORT AND MARINA LIMITED 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

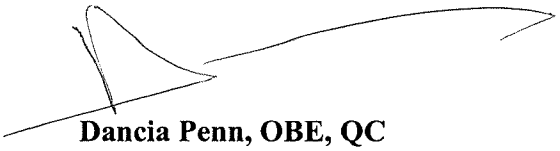
Main Office:
Ashley Ritter Building
Road Town, Tortola VG1110
British Virgin Islands

Jamal S. Smith, LLB(Hons.), MCIArb.
Chairperson

I Concur.

Kamika A. Forbes
Member on the recommendation of the Complainant

I Concur.



Dancia Penn, OBE, QC
Member on the recommendation of the Respondent