Case No. BVILAT2020/002

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Colleth Ranger-Vassell **COMPLAINANT**

AND

Mainsail B.V.I. Limited **RESPONDENT**

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

ATTENDANCE:
(1) Colleth Ranger-Vassell, Complainant
(2) Daniel Fligelstone Davies, legal practitioner for the Complainant, instructed by Silk Legal (BVI) Inc.
(3) Dornell Hazel, representative for the Respondent

ADDITIONALLY:
(4) Malisa Ragnauth-Mangal, Secretary to the Tribunal
(5) Rhondalyn Huggins, Witness for the Complainant
(6) Isabel Brisa, Witness for the Respondent

FINAL AWARD

18 February 2021; 04 March 2021; 15 July 2021

Table of Contents

A. INTRODUCTION

1. In this award, reference will be made to an Agreed Trial Bundle filed by the Complainant on 08 February 2021 (the "**Trial Bundle**") and a Supplemental Bundle filed by the Complainant on 10 February 2021 which was intended to include the Case Management Orders made in these proceedings (the "**Supplemental Bundle**"). Reference will also be made to "Skeletal" Arguments along with an Authorities Bundle filed by the Complainant on 15 February 2021 (the "**Complainant's Skeleton Arguments**") and the First Skeleton Arguments along with a Bundle of Authorities filed by the Respondent on 16 February 2021 (the "**Respondent's Skeleton Arguments**"). At the conclusion of the trial the Tirbunal gave the Complainant an opportunity to file Closing Written Submissions on or before Friday, 12 March 2021 (the "**Complainant's Closing Submissions**") and the Respondent to file Closing Written Submissions in Response on or before Friday, 19 March 2021 (the "**Respondent's Closing Submissions**") both of which were received by the Tribunal.

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 "Legal Submissions of the Punitive Damages" (sic) filed by the Complainant on 14 May 2021 (the "**Complainant's Further Submissions**") and the Further Written Submissions and Authorities Bundle filed by the Respondent on 14 May 2021 (the "**Respondent's Further Submissions**").

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

4. On Tuesday, 01 September 2020 the Chairperson of the Tribunal issued a Case Management Order (the "**First CMO**") found at pages 7 - 8 of the Supplemental 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 from the date of that Order and was one of the first orders issued in accordance with the LPR.

5. On Tuesday, 15 September 2020 the Chairperson of the Tribunal issued a Case Management Order (the "**Second CMO**"), which was not included in the Supplemental Bundle, but was referred to in the Case Management Order made on Tuesday, 03 November 2020 (the "**Third CMO**") which fixed the date for trial on Thursday, 18 February 2021.

6. On Tuesday, 26 January 2021, at a Pre-Trial Hearing scheduled by the Third CMO, the Chairperson made final directions for the trial (the "**Fourth CMO**"), including the issuing of witness summons to Isabel Brisa and Rhondalyn Huggins, but a copy of the Fourth CMO was indicated to be included in the Supplemental Bundle at pages 1 – 3 but what was included was a duplicate of the Third CMO, and during the trial the Tribunal directed the Secretary to the Tribunal to forward a copy of the Fourth CMO to all members of the Tribunal. 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 Fourth CMO noting the deadline to do so was Wednesday, 24 February 2021. No notice of appeal was filed with the Secretary to the Tribunal prior to the trial date and as such the Tribunal confirms all orders made by the Chairperson prior to the date of the trial.

7. The Complainant's Skeleton Arguments included copies of *British Home Stores Ltd v. Burchell*[1] and sections 80 – 104 of the Labour Code, 2010.

8. The Respondent's Skeleton Arguments included copies of *Weston Recovery Services v. Fisher*[2] and sections 23(2)(a), 98(4), 102(1) and 103 of the Labour Code, 2010.

9. On Thursday, 18 February 2021 the full panel heard witnesses from both parties beginning at 1 p.m. and adjourned at 4 p.m. The full panel resumed hearing evidence and oral arguments on Thursday, 04 March 2021 at 1:30 p.m. and concluded at 3:45 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. The Complainant's Closing Written Submissions made reference to the additional authorities of *Chefette Restaurants Limited v. Orlando Harris*,[3] *Humphrey Michael Blackburn v. LIAT (1974) Ltd.*,[4] and *Iceland Frozen Foods Ltd v. Jones*.[5]

11. 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.

---

[1] [1978] UKEAT 108 (20 July 1978).
[2] UKEAT/0062/10/ZT.
[3] BBCV2019/003, CCJ.
[4] ANULTAP2017/0001.
[5] [1982] IRlR 439.

B. THE CASE HISTORY

12. The Complainant filed a complaint with the Labour Commissioner on 25 November 2019 (the "**Complaint**") that complained against the Respondent for terminating her on the basis that she called her employer "evil" as she was "mad because she ask me to work 6 days, and I told her I can't work 6 days that's the reason she was spiting me" and also because there was a problem with Room 1512 but she admits she did not hear "about that room again, until the day when I was terminated". The Complainant originally asked for reinstatement in her complaint, but during oral submissions indicated that she would be willing to accept compensation instead as she has taken up alternative employment.

13. After there was no settlement achieved by the Labour Commissioner, the Complaint was transferred to the Minister, who then referred the Complaint to the Tribunal on 13 August 2020. The Tribunal must express its deep concern at the inordinate delay of almost a year since the filing of the Complaint before the matter was referred to the Tribunal.

14. In accordance with the First CMO, the Complainant was allowed to amend her complaint and this was done on 15 September 2020 (the "**Amended Complaint**") which is at TAB A of the Trial Bundle.

15. The Respondent filed the Affidavit of Dornelle Hazel on 30 September 2020 in response to the Amended Complaint (the "**Respondent's Affidavit**") which is at TAB B of the Trial Bundle and this was supported by a Certificate of Exhibit which is at TAB C of the Trial Bundle and included the following documents:

    (a) Excerpts of WhatsApp messages between the Complainant and her immediate supervisor, Isabel Brisa, between the period 24 May 2018 and 01 March 2020 which is just over 30 pages (the "**WhatsApp Messages**");

    (b) Interrogation Report for Lock #1512 showing the activity of keys on 10 November 2019 which is 29 pages;

    (c) E-mail from Scott McArdle, the General Manager of the Respondent, to Dornelle Hazel on 11 November 2019 at 10:45 a.m. with the caption "Maxine – Speak to Vanessa";

    (d) Coaching/Counseling [sic] /Disciplinary Record dated 04 April 2019 addressed to the Complainant in her capacity as "Housekeeping" in respect of an incident on 03 April 2019 signed by the Manager, Director of Human Resources and what appears to be the signature of Isabel Brisa on 04 April 2019;

    (e) Coaching/Counseling [sic] /Disciplinary Record dated 24 June 2019 addressed to the Complainant in her capacity as "Housekeeper Supervisor" in respect of various incidents but only the front page of that document was produced and no signature page;

    (f) Coaching/Counseling [sic] /Disciplinary Record dated 24 June 2019 in respect of an incident on 23 June 2019 but only the front page of that document was produced and

no signature page;

(g) Coaching/Counseling [sic] /Disciplinary Record dated 23 August 2019 addressed to the Complainant in her capacity as "Housekeeper Supervisor" in respect of an incident on 22 August 2019 signed by the Manager and what appears to be the signature of Isabel Brisa on 23 August 2019 and the Director of Human Resources on 24 August 2019 (the "**Final Written Warning**");

(h) Coaching/Counseling [sic] /Disciplinary Record dated 13 November 2019 which was signed by the Director of Human Resources and a witness on 19 November 2019 (the "**Termination Record**") in respect of an incident that took place on 11 November 2019, but was not signed by the Complainant and only indicates that a Written Warning was issued on 13 November 2019, and also has ticked "Team Member received three written warnings in any 12-month period";

(i) E-mail from Isabel Brisa to Dornelle Hazel on 16 September 2020 at 2:57 p.m. with the caption "schedule";

(j) Letter to Devern Davis, Labour Dispute Officer dated 28 January 2020 from Dornelle Hazel, as Director of Rooms Operation, on behalf of the Respondent with the caption "Colleth Ranger Employment";

(k) E-mail from Dornelle Hazel as Director of Rooms Operations to Vanessa Paul with a copy to Scott McArdle, the General Manager, on 12 November 2019 at 1:51 p.m. with the caption "Colleth Ranger's behaviour and performance"; and

(l) E-mail from Vanessa Paul, Corporate Director of Human Resources, to Dornelle Hazel with a copy to Scott McArdle, the General Manager, on 12 November 2019 at 4:20 p.m. which was in response to a chain of e-mails and included a response to the e-mail referred to in paragraph (k) above.

16. The Complainant filed the Affidavit in Response of Colleth Ranger-Vassell on 16 November 2020 (the "**Complainant's Affidavit**") which is at TAB D of the Trial Bundle and this is supported by a Certificate of Exhibit which is at TAB E of the Trial Bundle and included the following documents:

(a) Housekeeper's Worksheet purportedly written by Isabel Brisa ("**CV1**");

(b) Coaching/Counseling [sic] /Disciplinary Record dated 24 June 2019 and signed by the Manager on 27 June 2019 with a service report attached dated 14 June 2019 and signed by Isabel Brisa ("**CV2**");

(c) Coaching/Counseling [sic] /Disciplinary Record dated 24 June 2019 in respect of an incident on 23 June 2019 signed by the Manager on 27 June 2019 and Isabel Brisa;

(d) the Termination Record, but this copy was defaced by various written markings, and was not signed by the witness;

(e) Excerpt of text messages between Isabel Brisa and the Complainant ("**CV3**"); and

(f) Letter dated 30 June 2019 from the Complainant to Vanessa Paul, the then Human Resources Director ("**CV4**").

17. It was not until 25 January 2021 that the Complainant filed a Notice of Acting appointing a legal practitioner to represent her in these proceedings, but the Respondent continued to be unrepresented by a legal practitioner during these proceedings.

18. In addition to the evidence before the Tribunal, the parties agreed to place the following documents before the Tribunal in the Trial Bundle:

(a) the Contract of Employment dated 23 December 2015 issued to the Complainant on behalf of the Respondent, with Ishma Edwards signing on behalf of the Respondent as the Human Resources Director, and both parties signing on 25 December 2015, which is at TAB F of the Trial Bundle (the "**Contract of Employment**");

(b) a copy of the Employee Handbook (the "**Employee Handbook**"); and

(c) a copy of the Termination Record.

C. THE EVIDENCE

(a) *Introduction*

19. The Respondent manages Scrub Island Resort, Spa and Marina, an Autograph Collection, which is an independent luxury hotel in the Virgin Islands within Marriott Hotels & Resorts portfolio. This was disclosed to the Tribunal and dealt with in the Second CMO where the Tribunal ordered that the Respondent's name be corrected in the proceedings to reflect what is on the Trade License since it is very important to ensure that the names of the parties are correct in employment disputes as shown in the English Employment Appeal Tribunal case of *Clarke v. Harney Westwood & Riegels LLP*.[6]

20. Based on the Contract of Employment, the Complainant was employed by the Respondent from 25 December 2015 in the position of Housekeeper at a rate of $7.00 per hour.

21. Part of Mr. Hazel's evidence dealt with the Interrogation Report for Lock #1512 and in referring to that report Mr. Hazel brought up the name of a housekeeper, Rhondalyn Huggins. At the request of the Complainant, the Tribunal thought it was appropriate to summon Ms. Huggins to give evidence about what transpired with respect to Room 1512 which was a basis for the termination of Mrs. Vassell according to the Termination Record. The Tribunal also noted that the Letter to Devern Davis, Labour Dispute Officer dated 28 January 2020 from Dornelle Hazel, as Director of Rooms Operation, on behalf of the Respondent with the caption "Colleth Ranger Employment" dealt almost entirely with the issue of Room 1512. However, on the day of trial Mr. Hazel indicated that the real reason for the termination of the Complainant had nothing to do with the issue of Room 1512, as a

[6] UKEAT/0018/20/BA (published 21 December 2020).

result Ms. Huggins was excused without giving any evidence before the Tribunal since her evidence would no longer be relevant. As that aspect of the Respondent's case was abandoned at trial the Tribunal will not discuss that part of the evidence.

(b) *The Evidence of Colleth Ranger-Vassell*

22. As the Respondent conceded that the issues surrounding Room 1512 were not the real reason for the termination, the Tribunal will dispense with the various evidence led by Mrs. Vassell in relation to Room 1512 and will only focus on the insubordination and the calling of Ms. Brisa "evil" as the Respondent's assertion that those were the real reason for the termination.

23. During the time she spent as a supervisor, Mrs. Vassell was told by Ms. Brisa to always ensure that the full-time staff had something to do to make up their eight (8) hours or send them to tidy the hallway. Only contract workers were sent home if they didn't have anything else to do.

24. She referred to the WhatsApp Messages in support of this allegation. The relevant exchange began on 09 November 2019 at 12:30 p.m. with a message from the Complainant to Ms. Brisa who was identified as "Isa" indicating that Room 1728 was finished to which she responded "Thank you", and then at 1 p.m. Ms. Brisa asked her "Can you put in 1728 a water and a linen sign please? Thanks".

25. It was not until 1:37 p.m. that Ms. Brisa asked her "I just see the text the guest come yet"

26. Ms. Brisa responded at 1:41 p.m. "I don't know but you have to bring the water anyway", to which the Complainant responded "OK".

27. Then at 2:23 p.m. the Complainant contacted Ms. Brisa to let her know "Hi isa 1716 need service at 6pm is ther anything else I could do?"

28. At 2:25 p.m. Ms. Brisa responded "If you have finished you have to leave. I can clock you don't worry. Thanks".

29. It was at that stage the issue of the time arose when the Complainant indicated "But isa I don't do my 8 hours".

30. Ms. Brisa then responded at 2:27 p.m. "Doesn't matter, you know you have to leave when you finish. Everybody has to do it" and she continued "And always been like that."

31. The Complainant then retorted "and it have a lot of things to do or people to help it is not slow."

32. Finally at 2:29 p.m. Ms. Brisa insisted on her leaving by saying "Scott and Dornelle when somebody finish has to go home. So please just do it. You can text Dornelle, but is nothing else to do."

33. At 2:30 p.m. the Complainant responded to her supervisor, Ms. Brisa, by saying "Is not

everybody has to leave you give your favorits them things to do but its ok am not hungry you really evil".

34. According to the Housekeeper's Worksheet exhibited as "CV1" to the Complainant Affidavit, three (3) housekeepers did overtime work on 10 November 2019, the day following the exchange. According to the Complainant, it was so busy that the three (3) housekeepers were working 12 hour shifts, except for one who was scheduled to begin working at 1 p.m. but she was called in to work earlier at 11 a.m.

35. Ms. Brisa is the wife of Scott McArdle, the General Manager of the Respondent, and when they arrived at Scrub Island in 2018 after the resignation of the former General Manager, Mr. Ciampi, she only had experience as a bar manager and not in housekeeping. However, the Complainant trained Ms. Brisa who introduced the Complainant to her husband, Mr. McArdle, and told the Vice President, Mrs. Corlew, of her performance.

36. According to Mrs. Vassell, the relationship between herself and Ms. Isabel Brisa began to go downhill a few months after her promotion to Housekeeping Supervisor over an issue between Ms. Brisa and Mr. Butler in which the Complainant alleged she refused to get involved.

37. In January 2019 Mr. Butler was moved to the Villas and Ms. Brisa was then in charge of the Marina rooms. However, that did not stop the problems between Ms. Brisa and Mr. Butler, since Ms. Brisa showed the Complainant a picture allegedly taken by another housekeeper at a party during the night before then he called in sick that day. According to the Complainant, it was as a result of that incident where Ms. Brisa indicated that she was going to report him to her husband, that she realized the kind of person that Ms. Brisa was.

38. The Complainant then went on to recount the incidents of her poor performance and the various meetings as well as her claim that Mr. McArdle agreed to erase everything from her file if she returned to her previous role of housekeeper.

39. She also recounted an incident where Ms. Brisa raised an issue about a housekeeping supervisor Noelia, the same housekeeper she allegedly got the picture of Mr. Butler at a party.

40. Both in the Complainant's Affidavit and under cross examination the Complainant indicated that she had asked Mr. Hazel to be transferred to the Villa and Mr. Hazel told her that she needed to speak to the Villa Manager, Mr. Butler. According to the Complainant, she spoke to Mr. Butler the same day who confirmed that he would be willing to have the Complainant work with the Villas, but after being informed of Mr. Butler's response, Mr. Hazel never brought up the matter again.

41. The Complainant raised the fact that the Respondent alleged that the previous Housekeeping Manager, Ms. Zita Vinter, had issued her a warning letter and put the Respondent to proof of this.

42. There was a meeting with Mr. Devern Davis, the Labour Dispute Officer in the Labour Department on 21 January 2019 at which time Mr. Davis asked the Complainant why she

called Ms. Brisa evil and her response was "I was frustrated because I know she was spiting me cause whenever I'm finished with my task before completing my eight (8) hours she would always send me to do something even if its slow and on that day 10/11/19 was very busy."

43. Additionally, Mr. Davis asked her why she left an hour after Ms. Brisa told her to leave and she indicated that in the WhatsApp Messages she forgot to type "almost" before saying that she was "finished". When reading the WhatsApp Messages she was still in Room 1714 finishing up which did not have many things left to do and she left the room around 3 p.m., went to pack away her cleaning products and freshen up.

44. Having had the opportunity to review the Complainant's pleadings, 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 have been a credible witness.

(c) *The Evidence of Dornell Hazel*

45. At the time of swearing his affidavit, Mr. Hazel was the acting General Manager for the Respondent and he claims that it was always the Respondent's policy that when work was not available or slow, staff were asked to leave earlier. He denies that any of the employees of the Respondent were spiting the Complainant. However, he looked at the WhatsApp Messages and concluded that the tone and tenor of those messages show that there were no signs of anger, attitude or disgruntled behaviour from Ms. Brisa as it relates to the Complainant and therefore there was no basis for the Complainant to allege that Ms. Brisa was being spiteful toward her.

46. Mr. Hazel indicates that the Complainant did not provide any evidence to substantiate her allegation that Ms. Brisa was evil or spiteful towards her. However, under cross-examination Mr. Hazel admitted that he was unaware of what, if any, investigation took place prior to the termination of the Complainant, but he was told that an investigation took place.

47. He went on to suggest that all the conversation between Ms. Brisa and the Complainant were always professional, lenient, kind and empathetic.

48. The allegation made by the Complainant that housekeeping was very busy the day in question was not accurate and produced evidence, including an Interrogation Report for Lock #1512, seeking to disprove that it was very busy on that day.

49. Finally, there was a reference to the WhatsApp Messages where Ms. Brisa was contacted by the Complainant on 01 March 2020 at 12:33 p.m. in which she stated "You and your husband set me up an fire me you see what happened carma is not good you are reaping what you sew enjoy your sad life MAXINE . . ." and according to Mr. Hazel it was sent after Ms. Brisa went through a horrendous personal situation at the end of February 2020.

50. Having had the opportunity to review Mr. Hazel's pleadings, written evidence and to observe his demeanour, candour and responsiveness during cross-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 have been a credible witness, but in many instances, though not all, prefers the evidence of the Complainant.

(d) *The Evidence of Isabel Brisa*

51. Ms. Brisa's evidence was brief and she only gave oral evidence before the Tribunal. She informed the Tribunal that she was the Assistant Housekeeping Manager at Scrub Island and the Housekeeping Supervisors report to her. She identified the WhatsApp Messages as being sent between herself and the Complainant and in those WhatsApp Messages she referred to the Complainant as "Maxine" and she was referred to as "Isa".

52. Having had the opportunity to observe Ms. Bisa's demeanour, candour and responsiveness during examination-in-chief and cross-examination, as well as considering the inherent plausibility of her account, as well as the internal consistency of her oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds her to have been a credible witness.

D. THE PARTY'S SUBMISSIONS

(a) *Complainant's Submissions*

53. The Complainant identified the issues in the Closing Submissions as:

(i) Whether the dismissal fell under sections 89, 101 and 103 of the Labour Code, 2010;

(ii) Whether the Respondent carried out reasonable investigations into the alleged infractions which led to the Complainant's dismissal; and

(iii) Whether the Respondent terminating the Complainant fell within the band of reasonable responses to the alleged infraction.

54. The Complainant explores the issue of summary dismissal under the Labour Code, 2010 and considers that the instances under section 101 of the Labour Code, 2010 to be considered serious misconduct are not exhaustive.

55. During oral submissions the Complainant indicated that because she had already been demoted to her previous position after the last written warning before the Termination Record, she had already been disciplined for those issues and section 103 would not apply to this termination. Therefore, the question is whether or not the conduct complained of was sufficiently serious within the meaning of section 101 of the Labour Code, 2010.

56. It is for the employer to prove there was a valid and fair reason for the dismissal, and the test for proving unfair dismissal is whether the employer behaved reasonably in the circumstances. The Complainant relied on the three-part principle outlined in *British Home Stores Ltd v. Burchell*.[7]

57. The employer must then give the employee an opportunity to defend him or herself in accordance with section 81(2) of the Labour Code, 2010. The Complainant relies on the Caribbean Court of Justice's decision in *Chefette Restaurants Limited v. Orlando Harris*[8] and gave an analysis of the provisions under the Barbados Employee Rights Act and the Labour Code, 2010 to conclude that it would be an absurdity if an employee were summarily dismissed based on behaviour or conduct without due process.

58. The Complainant also relied on the Eastern Caribbean Court of Appeal decision in *Humphrey Michael Blackburn v. LIAT (1974) Ltd*[9] which applied the House of Lords decision of *Polkey v. A E Dayton Services Limited (formerly Edmund Walker (Holdings) Limited*[10] to demonstrate that the failure to give the employee a fair opportunity to be heard would render the dismissal unfair, and the principles of natural justice requires the employee to make representations to an unbiased party in the disciplinary proceedings. The fact that Scott McArdle handled the dismissal, and he is the husband of Isabel Brisa meant that there was a breach of the natural justice rights of the complainant. Therefore, the Respondent acted unreasonably in the circumstances.

59. The Complainant appeared to be of the view that a dismissal under section 89 of the Labour Code, 2010 required severance payment to be made and calculated notice and severance payments to be $3,744.00. As that was not paid, the Complainant concluded that it had to be summary dismissal.

60. As this was a summary dismissal, the reason for termination was the issue connected with Room 1512 and the Respondent would be barred from introducing any other issue. The Complainant also referred to paragraph 11 of the Affidavit of Dornelle Hazel which referred to the intention to terminate Mrs. Vassell even before the incident with Room 1512.

61. The steps that the Respondent took to investigate the incident before firing the Complainant are not outlined in the Respondent's evidence, therefore, the Complainant was deprived of an opportunity to comment, was not given an opportunity to be heard and as a result failed the third element of the *Burchell* test.[11] The Respondent, therefore, acted unreasonably.

62. Raising the issue of whether the summary dismissal fell within the "band of reasonable responses" to the conduct, the Complainant relied on the case of *Iceland Frozen Foods Ltd*

---

[7].(n1).
[8] (n3).
[9] ANULTAP2017/0001.
[10] [1987] IRLR 503, HL.
[11] (n1).

v. Jones.[12]

63. The Complainant sought to have Exhibits DH-8, DH-7, DH-3 and paragraph 9 of the Affidavit of Dornelle Hazel "barred" pursuant to section 103(3) of the Labour Code, 2010.

64. The Complainant also indicated that the Respondent acted in bad faith and ought to be penalized through punitive damages.

(b) Respondent's Submissions

65. The Complainant was terminated on 19 November 2019 based on disrespectful behaviour and insubordination.

66. When the Complainant was asked to leave the Respondent's premises at 2:25 p.m. by her then supervisor, it was more than enough time for her to board the ferry for departure as it was common practice. Instead she exchanged words with her supervisor and deliberately missed the ferry and clocked out at 3:10 p.m.

67. The Complainant disrespected her supervisor by calling her "evil" and there was no evidence presented to the Tribunal showing that this allegation was provoked in any way by her supervisor.

68. Several disciplinary actions were presented to the Complainant about performance and behaviour.

69. The Complainant received written warnings within a period of 6 to 12 months and the dismissal was fair in accordance with section 103 of the Labour Code, 2010.

70. The Complainant was always given an opportunity to defend herself but would refuse to do so and in turn make excuses for her actions.

71. The fact that Scott McArdle was handling the dismissal is not proof of bias merely because of his relationship with Ms. Isabel Brisa.

72. The employment contract states the varying degrees of seriousness which pertain to performance and/or infractions of policies, and can lead to dismissal in particular No. 13 – Insubordination, wilful disregard, or disrespect toward a supervisor or representative of management or failure to obey or perform work as required or assigned. The act of insubordination was contrary to the Contract of Employment and the Employee Handbook, and further calling her supervisor "evil" was disrespectful.

73. The Respondent acted responsibly, and the dismissal was fair.

E. THE TRIBUNAL'S ANALYSIS

[12] [1982] IRLR 439.

(a) *The Findings of Fact*

74. The Respondent hired the Complainant on 25 December 2015 as a housekeeper and terminated her on 19 November 2019. However, from 05 August 2018 the Complainant served as a Housekeeping Supervisor. Due to poor performance, disciplinary action was taken to demote the Complainant to her previous position as a housekeeper from 15 September 2019.

75. The authenticity of the WhatsApp Messages is not in dispute having been confirmed by both the sender and recipient of all the relevant messages. Therefore, the Tribunal will accept the contents of the WhatsApp Messages as being an accurate account of what transpired between Ms. Brisa and the Complainant. However, both sides have asked the Tribunal to draw certain conclusions from the WhatsApp Messages that the Tribunal is not inclined to do.

76. On the part of the Complainant, she has asked the Tribunal to find that the WhatsApp Messages suggest that it was a policy that full-time workers had to be given work to do after the work was finished. The Tribunal does not accept that the WhatsApp Messages disclose such a suggestion. The Complainant's own words suggest that it was within the discretion of Ms. Brisa to determine whether or not she would allow full-time workers to continue to work until their work was finished, and as a result she may have given her favourites more time, but there is nothing in the WhatsApp Messages that suggest a policy. In fact, the evidence from Mr. Hazel is that the policy was quite the opposite where employees were asked to leave when they finished work during the slow season to reduce financial expenditure. This is a matter to which the Tribunal will return later. However, it is sufficient to say that the Tribunal accepts Mr. Hazel's version of the policy and cannot find anything in the WhatsApp Messages, contrary to the Complainant's assertion, that supports a contrary view.

77. Additionally, the Respondent also sought to have the Tribunal look at the WhatsApp Messages and make a determination that there is nothing that would suggest that Ms. Brisa was being "evil" to Mrs. Vassell or anything other than professional. The Tribunal does not believe it is necessary for the purpose of these proceedings to make a finding of fact on that issue by drawing the inference that Mr. Hazel would like us to make.

78. There were several written reports in respect of the Complainant's performance during the period she served as a Housekeeping Supervisor leading up to the Final Written Report. These reports are disputed by the Complainant and for reasons that will become clearer later, the Tribunal does not find it necessary to determine whether any report prior to 15 September 2019 was genuine or the truthfulness of their contents only to outline for completeness what is alleged to have been the disciplinary record of the Complainant.

79. The Respondent claimed that Ms. Zita Vinter gave the Complainant a warning letter contrary to her claim that before she was promoted to Housekeeping Supervisor she never had any disciplinary issues. The Respondent was put to strict proof of this allegation but failed to do so. As section 19(2) of the Labour Code, 2010 requires an employer to preserve an employee's records for a period of not less than six (6) years after the date of

termination, the Respondent having failed to produce the alleged disciplinary record by Ms. Zita Vinters in respect of the Complainant, the Tribunal would infer that there was no such disciplinary record and accepts that the Complainant had no prior disciplinary issues until she became a Housekeeping Supervisor. There being no disciplinary issues prior to becoming a Housekeeping Supervisor, the only common denominator to the disciplinary issues against the Complainant during and after she was no longer a Housekeeping Supervisor is Ms. Isabel Brisa. This fact would ultimately require the employer to properly investigate the allegations made against the Complainant before termination and the Tribunal will consider the adequacy of the investigation later.

80. On 04 April 2019 a "Coaching/Counseling/Disciplinary Record" was issued to the Complainant in respect of her poor performance claiming that on "several occasions" they found missing items and hair in sinks and drains, but no indication was provided as to when those issues arose or any other specifics. Again, on 24 June 2019 another similar report was issued to the Complainant, this time identifying a meeting between Ms. Isabel Brisa, Mr. Hazel and Mrs. Vassel to discuss a need to improve the way she inspected rooms, and identified three (3) specific subsequent incidents, namely on 28 May, 31 May and 14 June 2019 which resulted in a written warning being issued. Again on the same day, 24 June 2019 another report was issued concerning an incident that took place on 23 June 2019. Finally, the Respondent issued the Final Written Warning in respect of a surprise inspection from "Triple A" AAA, which is a recognized rating agency for hotels and restaurants worldwide. Before the General Manager and the AAA Inspector arrived at the selected room, the Director of Rooms Operation made his own quick inspection and again found abnormalities in the room inspected by the Complainant. As a result of this disciplinary action was taken against the Complainant which resulted in her demotion from Housekeeping Supervisor to Housekeeper on 15 September 2019. These are the disciplinary records that the Tribunal will accept for the purpose of its determination in these proceedings.

81. The parties appear to be miles apart on the issue of whether Mr. Scott McArdle, the General Manager of the Respondent at the time, indicated to the Complainant that if she would go back to being a Housekeeper instead of staying as a Housekeeping Supervisor he would erase all her disciplinary records from her file. It may very well be that those were not the exact words that Mr. McArdle used, but the essence of what appears to have been suggested is that she would have been given an option to accept a demotion to Housekeeper instead of being terminated. The difficulty with the demotion is that it did not comply with section 45(3) of the Labour Code, 2010 so that a new Contract of Employment was not issued, or a written statement of the new position, either on the promotion or on the demotion of the Complainant. However, the Tribunal does not believe it needs to go any further with respect to the demotion except to say that the effect of the demotion would be precisely what the Complainant asserted, as their was a change of her contractual terms when she was promoted to Housekeeping Supervisor and another change when she was demoted. The new contractual terms had the effect of placing her in a new position and wiping the slate clean each time, so that the Complainant had a fresh start, as it were, after 15 September 2019.

82. The Complainant introduced as uncontroverted evidence, the Housekeeper Worksheet as a document written by Ms. Isabel Brisa which she normally completes every morning for the

housekeepers to do their daily tasks. Even when Ms. Brisa was called as a witness giving the Respondent an opportunity to dispute that document, no advantage was taken of that opportunity. She used this information to show that it was very busy on the day that she was sent home early and to demonstrate that it was unreasonable for Ms. Isabel Brisa to send her home early. This evidence, however, contradicts the evidence of the Respondent, where in the e-mail from Ms. Isabel Brisa to Mr. Hazel on 16 September 2020 at 2:57 p.m. with the caption "schedule", it showed a totally different story with the normal eight (8) hour shifts for everyone, including the Complainant, who was referred to as "Maxine" on the schedule. It would appear to the Tribunal, on a balance of probabilities, that the "schedule" was the initial weekly schedule prepared in advance, but the document produced by the Complainant would more accurately reflect what transpired on that particular day and will accept that it was a busy day contrary to the assertion by the Respondent. It should be noted that in making this finding the Tribunal does not suggest that the Respondent was in any way seeking to deceive the Tribunal by presenting the "schedule".

(b) *The Law*

83. As the Respondent has conceded that the termination was pursuant to section 103 of the Labour Code, 2010 there is no need for the Tribunal to explore the questions raised by the Complainant in respect of section 101 of the Labour Code, 2010 as it relates to whether there was serious misconduct. The Tribunal must, therefore, consider sections 102 and 103 in respect of this type of summary dismissal.

84. Section 102 provides as follows:

> *(1)* *An employer is entitled to take disciplinary action other than dismissal when it is reasonable to do so under the circumstances.*
>
> *(2)* *For purposes of this section,*
>
> *"disciplinary action" includes in order of severity -*
>
> *(a)* *a written warning;*
>
> *(b)* *suspension from duty for a period not exceeding one week without pay.*
>
> *(3)* *In deciding what is reasonable under the circumstances pursuant to subsection (1), the employer shall have regard to the nature of the violation, the terms of the employment contract, the employee's duties, the pattern and practice of the employer in similar situations, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee.*
>
> *(4)* *Where action is taken by an employer in accordance with this section, he or she shall advise the employee concerned in writing of the misconduct or action in breach of the employment contract and of what steps the employer*

is likely to take in the event of any repetition of the behaviour in respect of which the disciplinary action is taken.

(5) A complaint that any disciplinary action taken against an employee was unfair or unreasonable may be made by the employee to the Commissioner pursuant to section 26.

85. Section 103 provides as follows:

(1) Where an employee is guilty of an offence in breach of his or her employment contract, or of any misconduct such that the employer cannot reasonably be expected to continue to employ him or her if it is repeated, the employer may, when taking disciplinary action in accordance with section 102, warn the employee that repetition of the behaviour will result in summary dismissal.

(2) If the employee, after being warned pursuant to subsection (1), is guilty of a similar offence or misconduct in the following six months, the employer may terminate the employee's employment without further notice.

(3) An employer who dismisses an employee under subsection (2) shall provide the employee with a written statement of the reasons for the action and the principles set out in section 101(3) and (4) shall apply to the provision of, or failure to provide, such statements.

(4) The employer shall be deemed to have waived his or her right to terminate the employment of an employee for misconduct if he or she has failed to do so within a reasonable period of time after having knowledge of the misconduct.

(5) Where, after the probationary period has expired, the employee is not performing his or her duties in a satisfactory manner, the employer may give him or her a written warning to that effect.

(6) If the employee, after he or she is warned pursuant to subsection (5) and in compliance with subsection (7), does not, during the following three-month period, demonstrate that he or she is able to perform and has performed duties in a satisfactory manner, the employer may terminate the employment contract.

(7) An employer shall not terminate the employment of an employee for unsatisfactory performance unless the employer has given the employee written warning pursuant to subsection (5) and appropriate instructions to correct the unsatisfactory performance and the employee continues to perform his or her duties unsatisfactorily for a period of three months.

86. The Respondent having taken disciplinary action to demote the Complainant on 15 September 2019, the previous misconduct prior to 15 September 2019 was already covered by that disciplinary action and cannot, therefore, form the basis of the subsequent termination. As the Tribunal has not been asked to determine whether or not the demotion was reasonable or lawful in accordance with section 102 it will make no finding in respect

of the demotion,. When the demotion took place on 15 September 2019 it did not comply with section 102(4) by indicating what steps the Respondent was likely to take in the event of any repetition of the behaviour in respect of which the demotion was taken. As a result, the Tribunal cannot consider any of the performance issues that took place prior to 15 September 2019 since the demotion covered the performance issues that arose prior to September 2019.

87. The Tribunal will now consider the actions that took place after 15 September 2019 to determine whether the dismissal on 19 November 2019 was reasonable. Section 103 requires a written warning in accordance with section 102 of the Labour Code, 2010 and it must include the statement that the employer "may terminate the employee's employment without further notice" if a similar offence or misconduct occurs within the following six (6) months.

88. For there to have been a valid dismissal in accordance with section 103 the Respondent was required to show a written warning after 15 September 2019 that informed the Complainant that she would be terminated if she repeated a similar offence or misconduct. There is no evidence before the Tribunal that any such written warning was issued after 15 September 2019. Therefore, the termination would have been invalid under section 103 and the Tribunal would proceed to consider the remedies available. However, even if the Tribunal is wrong with respect to the illegality of the termination under section 103, the Tribunal must then determine the reason for the dismissal and whether or not the real reason for the dismissal was a fair and valid reason.

89. The Respondent already identified that the real reason for the termination was the insubordination and the fact that the Complainant called her supervisor "evil".

90. The Tribunal must now apply the statutory test set out in section 85(3) of the Labour Code, 2010 to determine whether the Respondent acted reasonably.

91. The first point of departure must be the Contract of Employment, and that requires close examination. It is normal practice for a contract of employment to specify the working conditions in accordance with section 45 of the Labour Code, 2010, but this Contract of Employment does not do so. It is particularly deficient in that, while it identifies the Respondent as the employer, it does not contain an address of the employer, and it does not state the regular hours of work but indicates that "You will be expected to work early morning shifts, evenings, weekends and public holidays as and when required depending on business demand". This must be subject to section 49 of the Labour Code, 2010 which requires the normal hours of work, section 50 of the Labour Code, 2010 which places limitations on overtime and, section 54 of the Labour Code, 2010 which requires payment for working on public holidays. Therefore, the Complainant is, for the purposes of the Complaint and section 49(4) of the Labour Code, 2010, an hourly paid employee and not a salaried employee. The Contract of Employment also referred to the Employee Handbook and making the violation of the policies and procedures outlined in it to be conduct warranting immediate termination without prior warning.

92. Both the Contract of Employment and the Employee Handbook clearly provide that

insubordination or disrespect toward a supervisor or failure to obey or perform work as required or assigned would warrant immediate termination. They further provide "If you disagree with your supervisor's request, providing it is not deemed to be unethical or illegal, follow instructions given at the time and discuss it later in private with your supervisor". As such the conduct complained of would certainly fall within this category.

93. Having determined that there may have been a breach of the Contract of Employment, the Respondent must have carried out an investigation into the matter that was reasonable in the circumstances and must have reasonable grounds for believing that the Complainant was guilty of the real reason for the dismissal. No evidence of the investigation was provided to the Tribunal, and, therefore, the Tribunal will infer that no investigation of the allegations was conducted. The Respondent must also give the Complainant a fair opportunity to defend herself, including access to her employment record in accordance with section 81(2) of the Act. The Respondent alleges that after the termination the Respondent illegally obtained information that she could have obtained by simply requesting it. How the Respondent obtained the information after the termination is not a relevant consideration for the Tribunal. A relevant question, however, is whether or not the Respondent gave her access to that information before the termination? There is no evidence before the Tribunal that suggests that the Complainant was given an opportunity to respond to the allegations against her and allowed access to her employment record before she was terminated as required by the decisions referred to by the Complainant, starting with the authoritative decision in *Chefette Restaurants Limited v. Orlando Harris,*[13] the highly persuasive decision in *Humphrey Michael Blackburn v. LIAT (1974) Ltd*,[14] and the authoritative House of Lords decision of *Polkey v. A E Dayton Services Limited (formerly Edmund Walker (Holdings) Limited*. [15] As a result, the Tribunal has determined that the dismissal was unfair.

94. The Tribunal having found that the dismissal was both illegal and unfair does not need to go further to consider whether the reason for the dismissal was within the "band of reasonable responses". However, in the circumstances, terminating an employee under section 103 of the Labour Code, 2010 because she called her supervisor "evil" would not fall within the "band of reasonable responses", but most importantly, there was no prior warning issued after 15 September 2019, or at all, to the Complainant about calling Ms. Brisa "evil" or about insubordination. More importantly, it would be totally outside the "band of reasonable responses" to summarily dismiss an employee under section 103 of the Labour Code, 2010 for not rushing to catch a boat to leave the place of employment within three (3) minutes and considering that insubordination. Therefore, even if the Tribunal is wrong its application of the law in respect of the investigation and giving the Complainant an opportunity to defend herself, the Tribunal would still find that the dismissal was unfair because it did not fall within the band of reasonable responses applying *Iceland Frozen Foods Ltd v. Jones,*[16] which was applied by the English Court of Appeal as being so well established it is now beyond doubt in *Foley v Post Office; HSBC Bank Plc (formerly*

[13] (n3).
[14] (n9).
[15] (n10).
[16] [1982] IRLR 439.

Midland Bank Plc) v Madden.[17]

95. The Tribunal must address the issue of an employee being stopped from working and sent home early since it appears there was "Much Ado About Nothing" in respect of this issue. Section 51 of the Labour Code, 2010 makes it abundantly clear that an employee who has worked at least six (6) hours of their eight (8) hour day would be entitled to full pay even if the employer sends them home early. Therefore, the Complainant should have proceeded to leave the workplace when instructed to do so by her supervisor with the knowledge that she must have been paid for the full day despite the total unreasonableness of the request. By the same token, it would appear totally unreasonable for an employer to terminate an employee who spent the time that they are legally required to work doing their work knowing that they would still have to pay that employee for the hours not worked. Therefore, the exchange between the parties on that issue really amounted to a non-issue in the Tribunal's view.

96. In the final analysis, the Tribunal is of the view that the dismissal was both unfair and illegal. The award must take into consideration the remedies provided under section 86(1) of the Code.

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

97. 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."*

98. The Respondent has given no indication, either in the pleadings, in the closing address or in its written submissions, that compensation would be an acceptable remedy. In fact, when posed with the question from the Tribunal as to whether compensation would be acceptable, the Respondent categorically rejected that as a possibility. The Tribunal is, therefore,

[17] [2000] EWCA Civ J0731-27, [2001] 1 All ER 550.

constrained to order the Respondent to pay the Complainant such punitive sum as it thinks fit. The Tribunal having considered the Complainant's Further Submissions and the Respondent's Further Submissions, both on the issue of punitive damages, decided to exercise its case management power under LPR 25(1)(d) to consolidate the consideration of the issue of punitive damages with that of another case, namely, *Mark McKie v. Nanny Cay Resort and Marina Limited*,[18] and has also had the benefit of the submissions on this point made in that case, which all point the Tribunal in the same direction.

(i) Punitive Damages

99. According to the authoritative House of Lords decision in *Rookes v. Bernard*[19] there are generally two categories of cases in which a court may award punitive, or exemplary, damages, but:

> *"To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute."*

100. This is a case where the statute authorizes punitive damages, therefore, there is no need to explore the usual tests for common law exemplary damages, and the sum would ordinarily be so large as to suggest that it was intended to be punitive in nature. In this case damages are said to be at large, and its primary purpose is to deter the Respondent and any other employer from any similar violations of the Code while punishing the Respondent in a similar manner as the criminal law would do. There would generally be a few things to take into consideration in making a punitive award.

101. Firstly, the award must be given in moderation as shown in the persuasive English case of *Design Progression Ltd v. Thurloe Properties Ltd*[20] where Peter Smith J said that the word "moderate" "is to be assessed in the overall facts of the case and in the light of the conduct and the need to mark disapproval." Therefore, in marking disapproval, the award must not be excessive so that it becomes an unjust award.

102. How the Tribunal would determine an appropriate starting point to ensure that it is not excessive would be to take some guidance from the legislative intent. The Labour Code, 2010 provides a range of penalties from $1,000.00 under section 78(5) for failure to grant vacation or pay vacation leave pay to $25,000.00 under section 130(8) for the worst forms of child labour. However, the median range appears to be between $5,000.00 to $8,000.00 in fines under the Labour Code, 2010, which includes sections 15, 18(2), 21, 23(1), 32(4), 34, 60(9), 78(1), 78(4), 79(1), 104(5), 126(1), 126(2), 128(1), 130(7), 131(3), 133, 163, 174(1), 175(1), 176 and 185. It would be inappropriate to limit or feter the discretion of the Tribunal to a maximum amount where the legislature has set no such limit. It must also take into consideration the various other factors discussed below in increasing or decreasing the starting point, and it is in each case for the Tribunal to determine how it will mark its

[18] BVILAT2020/0004.
[19] [1965] AC 1129.
[20] [2005] 1 WLR 1 at 150.

disapproval and attribute such amount to each factor.

103. Secondly, the award must consider the means of the parties as shown in the highly persuasive English case of *Rowlands v. Chief Constable of Merseyside Police*.[21] This is important to deterrence. Therefore, the award would be different for a large, multinational employer than for a small, mom and pop shop. Additionally, the award would be different from a small to medium sized multinational employer than a large regional or international company doing business in the Virgin Islands. However, in accordance with section 30(2)(a) of the Code, the Tribunal must have regard to the interests of the persons concerned and the community as a whole. For this purpose, the Tribunal will take into consideration the financial position of the parties. This necessarily requires the Tribunal to give trial directions under LPR 27(1)(a) for additional evidence to outline the financial position of the parties where a complaint has asked for compensation and the Respondent has not complied with LPR 20(1)(f)(ii) by providing a statement about the acceptability of the remedies under section 86(1)(a) of the Code. This would assist the Tribunal in determining whether the starting point of the punitive sum should be lowered or raised depending on the nature of the business and resources of the Respondent. However, this does not prevent the Tribunal from drawing appropriate inferences as to the means of the Respondent.

104. Thirdly, while not directly applicable to this matter, it is being stated to outline the general principle to guide the Tribunal in its future deliberations where the conduct of the parties from the beginning of the proceedings up to the date of the decision would be a relevant factor. Additionally, based on the highly persuasive English case of *Greenlands v. Wilmshurst*,[22] this includes the conduct of any legal practitioner at the trial. This would demonstrate to legal practitioners the Tribunal's disapproval of particular conduct before it where the Tribunal expects the highest standards of professional conduct in proceedings before it. Thus, conduct that does not meet the required standards under the Legal Profession Act, 2015 can be penalized as part of the punitive award. It is necessary to indicate that the only legal practitioner appearing in these proceedings was the legal practitioner for the Complainant who always displayed exemplary conduct before this Tribunal.

105. Fourthly, the relevance of the amount awarded as compensation as shown by Lord Devlin in *Rookes v. Bernard*:[23]

> *"a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to make their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."*

[21] [2007] 1 WLR 1065, CA.
[22] [1913] 3 KB 507.
[23] (n7) at 1228.

106. According to *McGregor on Damages*,[24] there is no reason why the same principle should not apply to awards made by judges sitting alone. This was followed by the English Court of Appeal in *Bradford v. Metropolitan City Council*[25] while emphasising that exemplary damages should be awarded only where compensatory damages would be inadequate to punish the defendant, upheld an exemplary award by an industrial tribunal. Therefore, if the Respondent has not expressed that compensation is an acceptable remedy, then punitive damages may take into consideration the compensation that could have been awarded and award an additional sum as punishment.

107. Fifthly, and again not directly relevant to the present case, if there was a fine or other penalty suffered by the Respondent for the wrongful conduct, then punishing the Respondent twice for the same misconduct would offend against natural justice and there should be no award at all. This can be seen, in part, by the decision of the highly persuasive English case of *Devenish Nutrition Ltd. v. Sanofi-Aventis SA*,[26] one of the trial judge's reasons for holding that exemplary damages were not available on the assumed facts was that the defendants had already been heavily fined for their conduct. It should also be noted that the existence of multiple claimants provided the trial judge with another reason for holding that exemplary damages were not available.

108. In the highly persuasive Trinidadian Court of Appeal decision in *Aron Torres v. Point Lisas Industrial Port Development Corporation Limited*[27] that dealt with an appeal from a decision that the appellant had been constructively dismissed but was refused to amend his claim to include a claim for exemplary damages and instead awarded the appellant damages equivalent to one (1) week's salary, the historic development of the law of punitive damages was explored. It was originally not possible to award punitive damages for breach of contract since the purpose of such a claim was to compensate the claimant and not to punish the defendant. However, although that limitation no longer exists, that discussion would be irrelevant to this Tribunal. As already outlined the classical framing of the award of punitive damages under the common law by evaluating the nature of the misconduct to determine whether punitive damages would be warranted is inapplicable where the Tribunal's power to award punitive damages is prescribed by statute. Punitive damages are appropriate under the Code wherever the Tribunal does not award either reinstatement, re-engagement or compensation after coming to a determination that the dismissal was unfair. Even if, as the Respondent suggests that the Complainant no longer is satisfied with compensation based on the Complainant's Closing Submissions, that does not detract from the Tribunal's power to award punitive damages. Once the Tribunal determines that a punitive sum is to be awarded all that is required is for the Tribunal to apply the relevant principles to come to a just award.

109. Applying these principles to the present case to arrive at a just award, the starting point should be section 2(s) of the Code which requires employers to aim to maximize profit by competing on the basis of managerial efficiency and use of entrepreneurial skills rather than

[24] James Edelman, *McGregor on Damages* (20th Ed., Sweet & Maxwell, 2018) para. 13-040.
[25] [1991] 2 QB 517, CA.
[26] [2009] Ch. 390.
[27] Civil Appeal No. 84 of 2005, unreported, 10 May 2007.

by seeking to reduce or otherwise derogate from their employees' working conditions. Therefore, a legitimate aim of the punitive award in labour disputes in the Virgin Islands is to rebalance the scales between employer and employee and ensure that any profit that may be derived from the conduct of the employer is removed, so that the employer does not profit from the wrong conduct.

110. The value of the compensatory award, if it were possible to make such an award, was not included in the Complaint or any evidence of the Complainant and only in the Complainant's Skeleton Arguments refers to a sum of $3,744.00 for the notice and severance. Severance is not applicable in this situation as section 89(2) never arose in this case, and there is no indication about how this amount was calculated to expunge it from the total sum. Additionally, there is no evidence before the Tribunal to determine when she commenced her new employment and how much she currently makes so as to avoid an unjust award by doubly compensating the Complainant The Tribunal is, therefore, unable to make any determination about compensation and will not include any possible compensation in computing the punitive award.

111. However, the Tribunal agrees with the argument by the Respondent that the conduct of the Complainant can also be taken into consideration and itself can be an aggravating factor tending to reduce the award from the starting point of $25,000.00. In this case, although it was not relevant to the determination of the fairness of the dismissal, the Tribunal can consider the conduct of the Complainant after the dismissal in awarding a punitive sum. The Tribunal notes that on 01 March 2020, over three (3) months after filing the Complaint, the Complainant wrote a troubling message to Ms. Brisa as part of the WhatsApp Messages. The Tribunal must discourage parties from taking matters into their own hands and behaving like they are in the "Wild, Wild West". Once the Complainant initiated the statutory process for settlement of disputes under the Code by filing the Complaint it was inappropriate for her to write that final message on 01 March 2020. As such, the Tribunal will reduce the starting point based on this aggravating conduct by the Complainant.

112. The Tribunal also notes the comments in the Respondent's Further Submissions discussing the means of the Respondent. It should be noted that no evidence was put before the Tribunal about the means of the Respondent and, therefore, the Tribunal must disregard the suggestions about the travails of the hotel industry or the "historical financial difficulties of the Respondent" as being "well known". This Tribunal cannot consider extraneous matters or take judicial notice of things that may be "well known" to one party without those matters being placed into evidence. Therefore, without any evidence about the means of the Respondent, and it is only the Respondent that can provide that evidence, either voluntarily or by directions of the Tribunal, the Tribunal will not further reduce the starting point to take into account any possible historical financial difficulties of the Respondent or any perceived state of the hotel industry.

113. Considering all the other factors in the round the Tribunal would award a punitive amount of $10,000.00. However, the Tribunal will give the Respondent until Tuesday, 31 August 2021 to make this payment, instead of making the award payable immediately which, in accordance with LPR 40, would be the consequence of not granting this extension having regard to the interests of the parties and the community as a whole.

(ii) Costs and Interest

114. 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 exceptional reasons in this case where the Tribunal has awarded punitive damages in respect of a matter that could have been amicably resolved.The Tribunal is of the view that it should award costs to the Complainant for the period that she retained a legal practitioner, noting that had the Complainant retained a legal practitioner at an earlier stage in these proceedings some of the deficiencies, including the difficulties with compensation, may have been avoided. A notice in accordance with LPR 16(2) was filed by the legal practitioner for the Complainant on 25 January 2021 and the Tribunal will award costs to the Complainant from that date to the date of this Final Award.

115. 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), and 107(2) all provide a rate of 10% as a reasonable rate of interest for monies owed to an employee.

116. 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. 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, this 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*[28] 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%.

117. 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*.[29] It was stated at paragraph 69 of the judgement, referring to the Eastern Caribbean Supreme Court

[28] [2018] EWCA Civ 87.
[29] BVIHCVAP2015/0019.

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."*

118. 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*,[30] by refusing to abide by the Court of Appeal decision in *Alphonso v Ramnath*,[31] which allowed for the High Court to award pre-judgment interest.

119. 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*[32] 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*.[33] In both cases the rate of pre-judgment interest is 3%, and this Tribunal intends to follow that guidance in awarding pre-judgment interest.

120. However, where the punitive award would normally consider the effect that the failure to compensate the Complainant 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, award pre-judgment interest. In this case, the Complainant has not done so and, therefore, the Tribunal will not award pre-judgment interest.

121. 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.*[34] 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

[30] BVIHCV2008/0192.
[31] (1997) 56 WIR 183.
[32] GDAHCV2007/0439.
[33] BVIHCV 2013/0195.
[34] [2018] EWHC 428 (Ch).

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.

122. 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.

123. The Tribunal would like to place on record its gratitude for the assistance of both parties and notes that although the Respondent was unrepresented by a legal practitioner, its representative, Mr. Dornelle Hazel, made a valiant attempt to assist the Tribunal at the same level of any party represented by a legal practitioner, and for this he should be commended. Additionally, the assistance of the legal practitioner for the Complainant proved to be invaluable to the Tribunal, and notes that the duty of a legal practitioner appearing before the Tribunal in accordance with the Legal Profession Act, 2015 is to assist the Tribunal in its duties and Mr. Davies admirably carried out that duty from the moment he placed himself on record in these proceedings.

The Award

124. The award of the Tribunal is as follows:

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

(b) The Respondent shall pay a punitive sum to the Complainant in the amount of $10,000.00 on or before Tuesday, 31 August 2021, less all statutory deductions.

(c) If the punitive sum is not paid on or before Tuesday, 31 August 2021 the Respondent shall pay interest to the Complainant in the amount of $1.40 for each day thereafter that the sums remain unpaid.

(d) The Respondent shall pay the permitted costs incurred by the Complainant from 25 January 2021 to the date of this Final Award, 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 2:00 p.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 MAINSAIL B.V.I. 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, 12 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.

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

I Concur.

John Carrington, QC
Member on the recommendation of the Respondent

LABOUR ARBITRATION TRIBUNAL
JUL 15 2021
BRITISH VIRGIN ISLANDS