Case No. BVILAT/2016/016

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Ursuline Joseph **COMPLAINANT**

AND

Aramo Corporate Services Inc.
(formerly Aramo Trust Co. Limited) **RESPONDENT**

BEFORE: **Mr. Jamal S. Smith**, Chairman
Professor Arthur Richardson, Member (on the recommendation of the Complainant)
Ms. Kamika A. Forbes, Member (on the recommendation of the Respondent)

ATTENDANCE:
(1) Ursuline Joseph, Complainant
(2) Lennox Lawrence, legal practitioner for the Complainant
(3) Carlos Burgido, representative for the Respondent
(4) Judith Barria, witness for the Respondent
(5) Akilah Anderson, legal practitioner for the Respondent

ADDITIONALLY: (6) Malisa Ragnauth-Mangal, Secretary to the Tribunal

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FINAL AWARD

23 October 2020; 10 November 2020

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1. On Thursday, 17 September 2020 the Chairman of the Tribunal issued a Case Management Order (the "**Case Management Order**") found at **Section VIII** of the Tribunal's 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 fixed the date for the re-trial on Thursday, 23 October 2020 at 10 a.m. for six (6) hours, along with a postscript indication for the deadline to file an appeal to the High Court by Friday, 16 October 2020. No appeal on

any question of law having been served on the Secretary to the Tribunal in these proceedings the contents of the Case Management Order are now confirmed by the full panel.

2. On Thursday, 23 October 2020 the full panel of the newly reconstituted Tribunal held a re-trial of this matter by hearing witnesses and oral arguments from both parties beginning at 10:22 a.m. and concluded at 8:00 p.m. The re-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 re-trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings. The Tribunal reserved its decision and fixed the date for its decision to 10 November 2020 at 9:00 a.m. The Tribunal now gives the decision for its final award.

The Case History

3. The Complainant filed a complaint with the Labour Commissioner on 08 October 2015 although it was dated 07 October 2015 and had attached to it a Statement of Complaint that complained against the Respondent for constructive dismissal leading to unfair dismissal under section 83 of the Labour Code, 2010 (the "**Code**"). The Complainant sought to either be reinstated as Manager of the Respondent's BVI Office or be paid compensation in lieu of reinstatement and/or be awarded such punitive sums for injury to feelings, distress and loss of earnings for five years (retirement age).

4. The complaint was transferred to the Minister on 22 April 2016, some six (6) months after the filing of the Complaint. The complaint was referred to this Tribunal on 24 July 2016, some three (3) months after it was transferred to the Minister.

5. Despite the reference to the Tribunal by the Minister, it took the Tribunal until 08 and 09 February 2019 to have a hearing of the matter, almost three (3) years later, and then even after a two day hearing by a panel comprising of Mr. Paul Dennis, QC, as Chairman, Mrs. Dancia Penn, OBE, QC, as the Member recommended by the Complainant, and Mr. Jason Jagessar, as the Member recommended by the Respondent, as of the date of the Case Management Order no final award had been made by the Tribunal as constituted by those party recommended members, and as such the Minister revoked their appointments and reconstituted the Tribunal.

6. The Tribunal notes that despite the fact that the Labour Code, 2010 (No. 4 of 2010) (the "**Code**") provides for the complaint itself to be referred to the Tribunal, and pursuant to LPR 3(8)(a) this Tribunal is bound by its Preliminary Order in the case of ***Dawn G. Weekes v. Commonwealth Trust Limited*** **(BVILAT2020/003, unreported, delivered on 24 September 2020)**, it is the complaint which commences these proceedings. Despite this, Points of Claim were required to be filed by the complainant without any application to amend her complaint even where she had incorporated a very detailed Statement of Complaint when filing her complaint with the Labour Commissioner. Notwithstanding this procedural irregularity, all such irregularities would have been regularized by virtue of the Case Management Order, and the Points of Claim which was filed with the Tribunal on 18 January 2017 was included as **Section I** of the Tribunal's

Bundle that included the following exhibits:

(a) UJ1 – Letter from Aramo Trust Co. Limited dated 12 August 2015 addressed to Ms. Ursuline Joseph signed by Carlos Berguido with the subject line "RE: TERMINATION OF YOUR EMPLOYMENT WITH ARAMO TRUST CO. LIMITED (the "Company")";

(b) UJ2 – undated letter from Ursuline Joseph addressed to Carlos Berguido indicating "I hereby tender my resignation with Aramo Trust with immediate effect, today, Thursday 13 August 2015";

(c) UJ3 – Letter from Aramo Trust Co. Limited dated 14 August 2015 addressed to Mr. Kenneth Baker signed by Carlos Berguido with the sub-caption line "Resignation – Mrs. Ursuline Joseph";

(d) UJ4 – Statement of Complainant dated 07 October 2015 signed by Ursuline Joseph; and

(e) UJ5 – E-mail from Carlos Berguido sent to Ursuline Joseph and Judith Barria on Tuesday, 11 August 2015 at 6:45 p.m. in reply to an e-mail from Ursuline Joseph dated 11 August 2015 at 15:54 p.m. with the caption "Final Report".

7. In response to the Points of Claim the Respondent filed on 08 February 2017 the Respondent's Defence with Supporting Documents, found at **Section III** of the Tribunal's Bundle.

8. The Tribunal ascertained from the parties that there was general compliance with the Case Management Order and noted that the Complainant's Affidavit which was filed with the Tribunal on 08 October 2020, found at **Section II** of the Tribunal's Bundle was sworn on 9 October, but the year must be assumed to have been 2020, though the date of the affidavit was not clear, and there were several paragraphs that were different from the Witness Statements which did not comply with the Case Management Order, in particular paragraphs 1, 2, 3 4, 22, 23, 24, 25, 26, 27, 28, 29 and 43. Additionally, there were no exhibits to that affidavit as required. The Complainant requested that the Tribunal exercise its power to make matters right and as nothing was new but were being included just for information that was expanding on information presented by the Respondent as well as indicating that there was absolutely no prejudice to the Respondent. However, the Complainant accepted that the Respondent would need time to review these matters.

9. The Respondent objected to the inclusion of the additional evidence and indicated that the Respondent was prejudiced, but made no indication as to the nature and extent of that prejudice. Even when pressed by the Tribunal about whether or not any prejudice can be compensated in cost and interest, the Respondent was unable to provide a satisfactory response. However, the Respondent did accept that costs would be applicable in these circumstances. As the Tribunal is limited as to its power to award costs under section 30(3) of the Code only for "exceptional reasons which the Tribunal considers appropriate", the Tribunal was pleased that the Respondent accepted that costs

should be payable in these circumstances, and the Tribunal finds, therefore, that there are exceptional reasons in these proceedings which are appropriate to award costs. Therefore, the issue of costs will be addressed in the round in accordance with Part IX of the LPR.

10. However, the Tribunal took a brief recess to consider the arguments and decided to allow the evidence and as the exhibits referred to in the Complainant's affidavit were already exhibited in the Points of Claim under Section I of the Tribunal's Bundle the Tribunal agreed to accept those as the exhibits being referred to although they had not been identified with the sworn affidavit in accordance with the Evidence Act, 2006 (No. 15 of 2006). The Tribunal also decided to take the lunch break to allow the Respondent time to consider the additions to the Complainant's Affidavit that were not included in the Witness Statement and also allowed the Respondent the opportunity to have its primary witness, Mr. Carlos Berguido, to elaborate on that evidence before being cross-examined, even through the Tribunal noted that none of the additional information included in the Affidavit were relevant to the facts in issue that would aide the Tribunal in making its determination.

11. The Tribunal noted that the Respondent's Affidavits were in compliance with the Case Management Order and were at **Section IV** of the Tribunal's Bundle which included:

(a) Affidavit of Judith Barria filed on 09 October 2020;

(b) Affidavit of Carlos Berguido filed on 09 October 2020;

(c) Certificate of Exhibits to Affidavit of Judith Barria filed on 09 October 2020 which included the following exhibits:

(i) E-mail from Ursuline Joseph dated 19 December 2014 at 09:48 a.m. to Judith Barria and headed "EXHIBIT D";

(ii) Letter from the Financial Services Commission dated 17 December 2014 addressed to the Board of Directors, Aramo Trust Co. Limited, signed by Dwayne A. Thomas, Secretary, Enforcement Committee with the caption "Re: Aramo Trust Co. Limited (the "Licensee")" but the body stating "The Commission's Enforcement Committee . . . has decided to issue a warning, on this occasion, to address the said contraventions";

(iii) Letter from the Financial Services Commission dated 17 December 2014 addressed to the Board of Directors, Aramo Trust Co. Limited, sugned by Dwayne A. Thomas, Secretary, Enforcement Committee, with the caption "Re: Aramo Trust Co. Limited (the "Licensee") but the body stating "find enclosed the Proposed Penalty Notices";

(iv) Notice of Proposed Penalty Pursuant to Schedule 4 of the Anti-Money Laundering and Terrorist Financing Code of Practice, 2008 and Section 27(7) of the Proceeds of Criminal Conduct Act, 1997;

(v) E-mail from Ursuline Joseph dated 16 July 2015 at 02:53 p.m. to Judith Barria with a copy to L. Seaton with a subject line "Inspection Final Report" and headed "EXHIBIT E";

(vi) E-mail from Ursuline Joseph dated 16 July 2015 at 3:13 p.m. to Judith Barria with a copy to L. Seaton with a subject line "Inspection Final Report – 2" and headed "EXHIBIT E-1";

(vii) E-mail from Judy Barria dated 16 July 2015 at 4:53 p.m. to Ursuline Joseph with a subject line "Inspection Final Report" in response to the e-mail from Ursuline Joseph sent at 2:53 p.m. and headed "EXHIBIT F"; and

(viii) Letter from Aramo Trust Co. Limited dated 17 July 2015 addressed to Mrs. Yolanda McCoy, Compliance Inspection Unit, Financial Services Commission signed by Carlos A. Berguido with the caption "Re: Compliance Inspection Final Report" and headed "EXHIBIT – M".

(d) Certificate of Exhibits to Affidavit of Carlos Berguido filed on 09 October 2020 which included the following exhibits:

(i) E-mail from Ursuline Joseph dated 19 December 2014 at 09:48 a.m. to Judith Barria and headed "EXHIBIT D";

(ii) Letter from the Financial Services Commission dated 17 December 2014 addressed to the Board of Directors, Aramo Trust Co. Limited, signed by Dwayne A. Thomas, Secretary, Enforcement Committee with the caption "Re: Aramo Trust Co. Limited (the "Licensee")" but the body stating "The Commission's Enforcement Committee . . . has decided to issue a warning, on this occasion, to address the said contraventions";

(iii) Letter from the Financial Services Commission dated 17 December 2014 addressed to the Board of Directors, Aramo Trust Co. Limited, sugned by Dwayne A. Thomas, Secretary, Enforcement Committee, with the caption "Re: Aramo Trust Co. Limited (the "Licensee") but the body stating "find enclosed the Proposed Penalty Notices";

(iv) Notice of Proposed Penalty Pursuant to Schedule 4 of the Anti-Money Laundering and Terrorist Financing Code of Practice, 2008 and Section 27(7) of the Proceeds of Criminal Conduct Act, 1997;

(v) DHL Shipment Receipt with Waybill Number 3610651494 with shipment date 19 December 2014 and headed "EXHIBIT D-1";

(vi) Letter from Aramo Trust Co. Limited dated 19 December 2014 addressed to Judith Parria at Castro & Berguido signed by Rhakim Rodman, Corporate Administrator which referred to "SIX APOSTILLES", "THREE CERTIFICATES OF INCORPORATION" and under the

heading "MAILS" included "9 pieces of mail", and this is followed by an a printed document about mails going out on 19 December 2014 with 9 items none of which refer to either letter from the FSC dated 17 December 2014 in paragraphs (d)(ii) and (iii) above or the Notice of Proposed Penalty in paragraph (d)(iv) above;

(vii) E-mail from Ursuline Joseph dated 16 July 2015 at 02:53 p.m. to Judith Barria with a copy to L. Seaton with a subject line "Inspection Final Report" and headed "EXHIBIT E";

(viii) E-mail from Ursuline Joseph dated 16 July 2015 at 3:13 p.m. to Judith Barria with a copy to L. Seaton with a subject line "Inspection Final Report – 2" and headed "EXHIBIT E-1";

(ix) E-mail from Judy Barria dated 16 July 2015 at 4:53 p.m. to Ursuline Joseph with a subject line "Inspection Final Report" in response to the e-mail from Ursuline Joseph sent at 2:53 p.m. and headed "EXHIBIT F"; and

(x) Letter from Aramo Trust Co. Limited dated 17 July 2015 addressed to Mrs. Yolanda McCoy, Compliance Inspection Unit, Financial Services Commission signed by Carlos A. Berguido with the caption "Re: Compliance Inspection Final Report" and headed "EXHIBIT – M";

(xi) E-mail from Ursuline Joseph dated 17 July 2015 at 9:59 a.m. to Judith Barria but the body of the e-mail is addressed "Dear Carlos" captioned "Re: Inspection Final Report" in response to an e-mail from Judy Barria but signed Carlos Berguido in response to the e-mail identified at paragraph (d)(vii) above;

(xii) Statement of Terms of Employment dated 16 February 2011 signed for and on behalf of the Respondent on 16 February 2011 and by the Respondent on the same date showing a first date of employment as 15 November 2010 in the position of "Senior Officer/Assistant Manager" with a salary of US$45,600.00 per annum and headed "EXHIBIT A";

(xiii) Statement of Terms of Employment dated 15 June 2014 signed for and on behalf of the Respondent curiously on 15 June 2013 and by the Complainant on the same date with effect from 15 June 2013 in respect of a promotion to "Senior Officer/Manager" with a salary of US$60,000.00 per annum and headed "EXHIBIT B";

(xiv) Letter from Aramo Trust Co. Limited dated 12 August 2015 addressed to Ms. Ursuline Joseph signed by Carlos Berguido, Director, with the caption "RE: TERMINATION OF YOUR EMPLOYMENT WITH ARAMO TRUST CO. LIMITED (the "Company")" and it is noted that this is the same exhibit that the Complainant should have had exhibited as **UJ1** above;

(xv) FirstCaribbean Check No. 6288 issued by Samuels Richardson & Co dated 13 August 2015 in the amount of Six Thousand Dollars ($6,000.00) payable to Ursuline Joseph;

(xvi) undated letter from Ursuline Joseph addressed to Carlos Berguido indicating that she "hereby tender my resignation with Aramo Trust with immediate effect, today, Thursday 13 August 2015" and headed "EXHIBIT E" and it is noted that this is the same exhibit that the Complainant should have had exhibited as **UJ2** above;

(xvii) undated letter from Aramo Trust Co. Limited addressed "To Whom it May Concern" signed by Carlos Berguido, Director, with the caption "Re: Ursuline Joseph" which provided "Reference is being made in favor of Mrs. Ursuline Joseph . . . During her tenure at Aramo Trust Co. Limited she served with a high level of integrity, hard work and honesty."

12. The Tribunal has also had the opportunity to read the Complainant's Closing Submissions (some 75 pages long) and Authorities filed on 21 February 2019 which were at **Section V** of the Tribunal's Bundle and included the following authorities:

(a) Sandwell & West Birmingham Hospitals NHS Trust v. Westwood, UKEAT/0032/09/LA, unreported;

(b) Cotte v. Cooperativa De Ahorra Y Credito Yabucoena, 77 F. Supp. 2d 237 (D.P.R. 1999)

(c) Laws v. London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285;

(d) Dietmann v. London Borough of Brent [1987] IRLR 146;

(e) Cooper v. Wandsworth Board of Works [1861-73] All ER Rep Ext 1554;

(f) Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] 2 All ER 680;

(g) Wilson v. Racher [1974] ICR 428;

(h) Labour Code, 2010 (No. 4 of 2010), Part V

(i) de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 9th Ed., Chapter 7

13. The Tribunal also read the Complainant's Supplements to closing Submission (some 6 pages long) and Authorities filed on 06 March 2019 which were at **Section VI** of the Tribunal's Bundle and included the following authorities:

(a) The Attorney General of the Commonwealth of Dominica v. Mariam Williams and Ors, Civil Appeal No. 13 of 2003, unreported;

(b) Gildon Richards v. Attorney General of the Commonwealth of Dominica and Ors, DOMHCV2002/0336, unreported;

14. The Tribunal also read the Respondent's Supplemental Written Submissions (5 pages long) filed on 19 February 2019 which provided no authorities to assist the Tribunal on the law governing constructive dismissal and was at **Section VII** of the Tribunal's Bundle.

15. In addition to the Tribunal's Bundle the Tribunal also was provided with electronic copies of the Transcript of Proceedings for the hearings that took place on Thursday, 07 February 2019 and Friday, 08 February 2019, which were also made available to the parties prior to the re-trial.

16. Before hearing oral evidence, the Tribunal ascertained from the parties that these were all the documents and the Tribunal had all the relevant documents before it, to which both parties confirmed. The Tribunal has considered all the information before it, including the oral evidence given at the re-trial as well as the oral submissions. Even if the Tribunal does not refer to any specific documentary or oral evidence or submission, everything was considered by the Tribunal in coming to its decision.

The Facts

17. Based on the Statement of Terms of Employment dated 16 February 2011 referred to in paragraph 11(d)(xii) above, the Complainant was employed by the Respondent from 15 November 2010 in the position of Senior Officer/Assistant Manager and, based on the Statement of Terms of Employment dated 15 June 2014 referred to in paragraph 11(d)(xiii) above was promoted to Senior Officer/Manager with effect from 15 June 2013 at a salary of US$60,000.00 per annum and was entitled to medical insurance coverage. Clause 13 of the second Statement of Terms of Employment provides for the termination, and includes a provision for summary termination in accordance with the Labour Code, as well as termination for unsatisfactory performance, and termination with one month's notice on either side or payment in lieu of notice of a sum equivalent to $1/12^{th}$ of the annual remuneration. It also makes it clear that any termination must be for a valid and fair reason connected with the capacity of or conduct of the Complainant or the operational requirements of the Respondent.

18. The Respondent is a trust company based in Panama with an office in the Virgin Islands that is regulated by the Financial Services Commission established under the Financial Services Commission Act, 2001 (No. 12 of 2001). The Complainant was responsible for the general management of the Virgin Islands' office and various managerial functions, inclusive of human resources, banking, compliance, information technology and operations.

19. According to paragraph 3 of the Affidavit of Carlos Berguido, which is in identical terms to paragraph 3 of the Affidavit of Judith Barria, the Respondent received a notice

from the Financial Services Commission on 14 August 2014 indicating that a compliance inspection would be conducted from 1 – 3 September 2014. This evidence is uncontroverted by the Complainant. Mr. Carlos Berguido, a director of the Respondent, along with the Complainant were present on behalf of the Respondent. As a result of the compliance inspection a draft report was issued to the Respondent.

20. It should be noted that the Affidavit of Judith Barria repeats almost verbatim and reproduces the same exhibits as in the Affidavit of Carlos Berguido. For example, paragraph 2 of the Affidavit of Judith Barria includes the exact reference to the post the Complainant held and who she reported to. Paragraphs 3, 4 (except that she indicates that she also travelled to the Virgin Islands) and 5 of the Affidavit of Judith Barria are verbatim reproductions of paragraphs 3, 4 and 5 of the Affidavit of Carlos Berguido. Except for the first sentence of paragraph 6 of the Affidavit of Judith Barria, it is a verbatim reproduction of paragraph 7 of the Affidavit of Carlos Berguido, while paragraphs 7, 8, 9 and 10 of the Affidavit of Judith Barria are verbatim reproductions of paragraphs 8, 9, 10 and the first sentence of 11 of the Affidavit of Carlos Berguido. As a result of this, there are several portions of that evidence where Ms. Barria is giving evidence about things Mr. Berguido did, for example, when he travelled, what he did when he travelled and what was or wasn't received by the Complainant, among other things. No objections were raised by the Complainant to the irregularities in these Affidavits that are strewn with inadmissible hearsay and non-compliance with the Evidence Act, 2006 and, therefore, the Tribunal's only duty now is to determine what weight it can possibly attach to such evidence. It is only from paragraph 11 of the Affidavit of Judith Barria that the Tribunal has direct evidence of what Ms. Barria did or would have personal knowledge of in this case. Therefore, the Tribunal will attach no weight to the majority of Ms. Barria's evidence, and will rely on the evidence of Mr. Berguido.

21. It may be that the Respondent was attempting to provide corroborating evidence in the hope of assisting the Tribunal, but should note that section 145(1) of the Evidence Act, 2006 abolished the need for corroboration evidence, and where two or more witnesses are repeating the same evidence unnecessarily, and as a result causing an unnecessarily lengthy proceeding, this would be conduct which can be penalized in costs.

22. In December 2015 two (2) letters from the Financial Services Commission were issued to the Respondent along with a Notice of Penalty as shown in paragraph 11(d)(ii), (iii) and (iv) above, which included a warning and a proposed administrative penalty issued by the Enforcement Committee.

23. By e-mail from the Complainant dated 19 December 2014 at 09:48 a.m. to Judith Barria referred to in paragraph 11(d)(i) above, where she states:

> "The Inspection Final Report was delivered to us this morning and I must admit that it is a fairly good report considering all efforts being equal.
>
> . . .

Attached is a Letter from the Penalty and Enforcement Committee with a "Proposed Penalty Notice". . .

Also included is a final report in a book form which I will send in today's courier package. . ."

24. The Complainant insists that she sent the final report by courier as indicated in her e-mail. However, the Respondent claims that a copy of the final report was never included in the 19 December 2014 e-mail or sent by courier as indicated in the e-mail.

25. Based on the DHL Shipment Receipt referred to in paragraph 11(d)(v) above, a package was in fact sent to the Respondent's head office in Panama on 19 December 2014, and the accompanying letter from Rhakim Todman referred to in paragraph 11(d)(vi) above shows that 9 pieces of mail were sent but the uncontroverted evidence of what comprised those 9 pieces of mail shows that the final report was not included in that package. As a result, the Tribunal finds, as a matter of fact, that although the Complainant did hold the genuine belief that the final report was sent in the DHL courier by the Corporate Administrator, Mr. Rhakim Todman, to the Respondent's head office in Panama on 19 December 2014, the Tribunal agrees with the Respondent that the final report was not sent to the Respondent's head office in Panama. This, the Tribunal finds would have been an administrative oversight, or an internal procedural failure, for which the Complainant, as the Manager of the Respondent, had ultimate responsibility, but in no way amounts to misconduct, whether serious or otherwise. It was in effect, at its very highest, a failure by the Complainant to comply with Clause 15(ii) of the second Statement of Terms of Employment, and, therefore, was a performance related issue.

26. Mr. Carolos Berguido, a director of the Respondent, travelled to the Virgin Islands in or about January 2015 and had a meeting with Mr. Kenneth Baker, who at the time was the Director of the Banking and Fiduciary Services Division of the Financial Services Commission. The Complainant, having held the legitimate view that she had sent the final report to the Respondent, believed that the said meeting was for the purpose of dealing with the final report as well as the penalties. However, the Respondent contends that as they never received the final report the meeting was only, and quite rightly could have only been, in relation to the proposed penalties. The Tribunal agrees with the Respondent and finds, as a matter of fact, that Mr. Berguido only came to the Virgin Islands to deal with the penalties as at that time he had not seen the final report and its deadlines.

27. The Tribunal would pause here briefly to note its concern that although the e-mail of 19 December 2014 from the Complainant clearly indicated that a final report will be sent in the courier package for that day, and a courier package dated 19 December 2014 was in fact sent to the Respondent's head office in Panama, no one at the Respondent's head office in Panama raised a red flag that they did not receive the final report in the courier package. The uncontroverted evidence is that every Friday a courier package is prepared to be sent to the Respondent's head office in Panama, and if someone at the Respondent's head office in Panama had flagged the fact that they had not received the final report as promised in the 19 December 2014 e-mail, then the Complainant could

have easily ensured that it was placed in the courier package the following Friday, and they would have still been able to meet all their deadlines.

28. On rare occasions electronic mails are sent claiming that a document is attached but the sender inadvertently fails to attach the document, to the point where recent electronic mail programs, for example, Microsoft Outlook 365, includes a feature that warns the user that a document is referred to as being attached but no document is attached. Although that feature would only be useful in the event that only one document is proposed to be attached, it is helpful as it demonstrates the likelihood in normal business relationships that an attachment may not be included in an e-mail. The normal response by a recipient of such an e-mail without the required attachment would normally be to reply to the sender indicating that no attachment was included. Similarly, if someone indicated that they were sending a document by courier and that document did not arrive by courier it would normally be flagged by the recipient that they did not receive the particular document. This would be normal business practice in a modern business environment.

29. While the Tribunal accepts that the Complainant was negligent for failing to send the final report by courier as she indicated in her 19 December 2015 e-mail, the Tribunal does not accept that the Complainant was wholly responsible for the administrative failure and there must be some degree of contributory negligence on the part of the Respondent, although the Tribunal would find that the degree of contributory negligence on the part of the Respondent would be significantly lower than that of the Complainant, possibly at the level of 25%, if not less. However, the Tribunal only makes this point to demonstrate that this was an administrative oversight, or an internal procedural failure, but cannot be considered misconduct, whether serious or otherwise, and the Respondent has some measure of blameworthiness in the administrative failure.

30. It appears that instead of saying that the final report was not included in the courier package of 19 December 2014, Mr. Berguido and Ms. Barria kept asking Ms. Joseph whether or not she had received the final report. This despite having received the e-mail of 19 December 2014 which clearly indicated that she had received the final report and it was being sent by courier that same day. Therefore, the Tribunal accepts, as a matter of fact, the Complainant's view that she thought they were referring to something else, and her responses to their constant requests for the final report was, therefore, "nothing yet" in relation to yet another document and not the final report she had thought was received at the Respondent's head office in Panama.

31. For this reason, in relation to paragraph 9 of the Affidavit of Carlos Berguido where he states "I was under the impression that the document received in the BVI offices was the letter from the FSC outlining the proposed penalties" appears to be telling, since the very e-mail to which he refers never said that the final report was attached, but that it would follow by courier. It appears that the communication breakdown commenced from that point.

32. Additionally, paragraphs 12 and 13 of the Affidavit of Carlos Berguido also indicate the continuing breakdown in communication as a result of a misunderstanding of the e-mail of 19 December 2014 on the part of the Respondent and the failure to indicate that they

had not received the document that the said e-mail identified would have been sent by courier.

33. It was not until 16 July 2015 that, according to paragraph 14 of the Affidavit of Carlos Berguido, that they received a call from Mrs. Yolanda McCoy of the Financial Services Commission expressing concern that "since ARAMO has always complied on time with all of the FSC's requests, they were surprised that we had missed the several deadlines stipulated in the FINAL REPORT by which certain corrective actions were to be implemented and progress report submitted to the FSC."

34. The call from Mrs. McCoy is the critical juncture in the relationship between the Complainant and the Respondent when it took a turn for the worst until its ultimate demise. All the documentary evidence in this case shows that before 16 July 2015 there were no performance related issues or any problems with the Complainant.

35. The e-mail from Judy Barria dated 16 July 2015 at 4:53 p.m. referred to in paragraph 11(d)(ix) above indicates that this was the first time the Final Report was received by the Respondent. The Tribunal has no reason to doubt that this was in fact the case, and that they were surprised, since the tone of the e-mail suggests that they were rightly annoyed, since it was received by the Complainant around 19 December 2014 and they were only now, for the first time, seeing it.

36. By e-mail on 17 July 2015 at 9:59 a.m. referred to in paragraph 11(d)(xi), the Complainant wrote a comprehensive response outlining what had transpired and indicated:

> "Thirdly, somehow, for some unknown reason, I thought that your representation with Mr. Baker, considering the volume of documents that were delivered, was partly for the Enforcement committee and the Inspection Department, why? Because all along I knew and believed that the report was sent as planned by courier and response was being made accordingly.
>
> Fourthly, I had every reason to believe that the report was indeed sent to Panama, because at no time was I asked what about the report that should have been sent by courier, neither did I confirm if it was received, because I have never had in my 5 years with Aramo, never had to ask if a package was received, although I have been asked several times, if a package was sent.
>
> . . .
>
> Finally, I believe my 5 years of working at Aramo Trust has proven my competence and this incident should not be construed as a level of incompetence on my part because this should be viewed as a legitimate error and not a measure of incompetence.
>
> I have spoken with Mrs. McCoy at length on this and I believe she has clearly understood the circumstances. I also mentioned to her the fact that we now have a compliance officer and all the work that is being done to improve our rating to

full compliance. It is likely that they may have another inspection in the near future to confirm if all the corrective measures has been taken and what improvements we have made to avoid further breaches."

37. As a result of only then having seen the final report, the Respondent immediately, as a responsible and prudent regulated entity would have done in such a situation, sent a letter to Mrs. Yolanda McCoy dated 17 July 2015 referred to in paragraph 11(d)(x) above. In that letter it clearly identified that the Complainant:

> "may have explained that evidently she involuntarily thought that my response and representation made with Mr. Kenneth Baker on 16th January 2015 included the response to both the Enforcement Committee and the Inspections Department.
>
> We confirm that the final report issued by the FSC on 17 December 2014 was never delivered to the Board of Directors of Aramo Trust Co. Limited for proper attention and follow up and was only brought to our attention on 16 July 2015 . . . This was the first time this report was called to our attention."

38. Apart from the obvious mischaracterization in that last sentence, since it had in fact been called to their attention since 19 December 2015, the letter made clear reference to the Complainant's e-mail of 16 July 2015.

39. It appears that although the explanation given by the Complainant was provided to the Financial Services Commission in the hopes that the explanation would be satisfactory to the Financial Services Commission, it was still not satisfactory to the Respondent. This the Tribunal finds as disingenuous on the part of the Respondent where with one hand they are offering the same explanation as a good explanation for the failure and with the other hand saying to the Complainant that it wasn't good enough.

40. On 11 August 2015 the Complainant wrote to Ms. Judith Barria with a copy to Mr. Carlos Berguido which is referred to in paragraph 7(e) above provide the following report of the state of the relationship between the Complainant and the Respondent:

> ". . . I am very concerned with the turn of events and the atmosphere at Aramo since the incident of the compliance final report. Events where as it stands now, that I am being completely ignored or left out of business as it relates to Aramo and the BVI Office, particularly, compliance.
>
> The greatest concern however, is the change being observed in our communication and business relationship since the unfortunate oversight of the compliance report. I am left to believe that I am in complete fault and irresponsible. Thoughts that never crossed my mind in the five years that I have been with Aramo. While I am apologetic that this happened, yet this sense of disconnect is really unfortunate because we all know that we are all agents of imperfection, in other words absolutely no one is perfect, and when one acknowledges their short comings and accepts responsibility, they should be given a fair chance to reconcile, be forgiven and move on forward with a view of

making positive changes for the benefit of all.

. . .

Let me say here, that if this change in relationship is due to the unfortunate circumstance of the FSC final report, it is my hope that someone would see beyond the error and realize that under no circumstance could this have been deliberate nor wilfull, nor irresponsible, but just a legitimate unfortunate oversight and be willing to put every effort together to work towards a non-recurrence of this action. . . . While the action may be hard, yet it is not too hard to be forgiven and run again."

41. Despite lodging her complaint, which received a brief response from Mr. Carlos Berguido on the same day, by letter dated 12 August 2015 referred to in paragraph 11(d)(xiv) above, the Respondent sought to terminate the Complainant in the following terms:

> "This termination will take effect on 13 August 2015 pursuant to the provisions of section 101 of the Labour Code.
>
> The board has taken this decision to dismiss you summarily as a direct result of your failure to transmit critical information from the Financial Services Commission relevant to the compliance inspection carried out by the Commission on 1st to 2nd September, 2014 and your inability to provide any satisfactory explanation for this.
>
> . . .
>
> By e-mail of 16th July director Carlos Berguido asked for an explanation as to how and why this extraordinary delay could have occurred. No satisfactory explanation has been given.
>
> As a result of your failure to transmit this important document to the Company's head office a number of critical deadlines which would have given the Company the opportunity to remedy the breaches and other regulatory concerns identified during the inspection process were missed.
>
> Given your responsibility as the manager of the Aramo Trust Co. Limited we consider your action or lack thereof to amount to serious misconduct of a nature that would be unreasonable to require the Company to continue your employment contract.
>
> We nevertheless have decided to make and (sic) ex gratia payment to you the sum of $6,000.00. This represents one month's salary plus outstanding vacation pay until 13 August 2015.
>
> A cheque representing this payment is enclosed."

42. As a result of that termination letter the Complainant admitted during her oral evidence on questions posed by the Tribunal that she asked Mr. Carlos Berguido if she would instead tender her resignation because it would make it difficult for her to obtain alternative employment within the financial services sector as a senior officer. In light of that a letter of resignation was sent to Mr. Carlos Berguido dated 13 August 2015 as referred to in paragraph 11(d)(xvi).

43. On 14 August 2015 the Respondent wrote to Mr. Kenneth Baker, the then Director of Banking and Fiduciary Services at the Financial Services Commission, referred to in paragraph 7(c) above, to inform him of the resignation of the Complainant. This document was also relied on by the Respondent in cross-examination to establish that the Respondent had written to the Financial Services Commission after the Complainant denied knowledge of the undated reference letter, which the Respondent incorrectly referred to as a character reference, referred to in paragraph 11(d)(xvii) above. The Tribunal does not find that anything turns on the subsequent letters other than to demonstrate that the Respondent accepted the resignation of the Complainant.

44. The Tribunal finds, as a matter of fact, that taken together, the e-mail of 11 August 2015 complaining about the deteriorating relationship and the termination letter dated 12 August 2015, were the reason for the letter of resignation dated 13 August 2015. In essence, had the deteriorating relationship not taken place and the termination letter not been issued, the Respondent would not have resigned, as it is clear from the e-mail of 11 August 2015 that she was hoping to be forgiven for the administrative oversight and for the relationship to return to a state of normalcy. When that did not happen and instead she was faced with termination, she opted instead to resign.

45. The Tribunal also finds, as a matter of fact, that apart from the e-mail from Judy Barria dated 16 July 2015 at 4:53 p.m. referred to in paragraph 11(d)(ix) above, the Respondent did not carry out any investigation into the matter, and despite having written to Ms. McCoy at the Financial Services Commission relying on the explanation given by the Complainant, still determined that the explanation was unsatisfactory without any evidence of any further inquiry. Therefore, the Tribunal also finds, as a matter of fact, that the Respondent did not have any reasonable grounds for believing that the Complainant was guilty of any misconduct, but had reasonable grounds for believing, and did believe, that the Complainant failed to send the final report to them.

46. While the response from Mr. Carlos Barguido to the Complainant's e-mail of Tuesday, 11 August 2015 referred to at paragraph 7(e) above, indicates that "I hope that we will have time to speak at length on Thursday, you deserve no less", the Tribunal finds, as a matter of fact, that on Wednesday, 12 August 2015 the Respondent was terminated before the intended Thursday meeting and, therefore, the Respondent did not give the Complainant any fair opportunity to defend herself since by the Thursday, 13 August 2015 the decision to terminate and the cheque to pay her had already been made.

The Tribunal's Analysis

47. The case before the Tribunal is one of constructive dismissal.

48. Section 83 of the Code governs constructive dismissal claims and provides as follows:

> "(1) An employee is entitled to terminate his or her employment contract without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term, where the employer's conduct has made it unreasonable to expect the employee to continue the employment contract.
>
> (2) Where the employment contract is terminated by the employee pursuant to subsection (1), the employee shall be deemed to have been unfairly dismissed by the employer for purposes of the Code."

49. Section 85 of the Code provides the burden of proof required for constructive dismissal claims as follows:

> "(1) In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to prove the reason for the dismissal.
>
> (2) In the circumstances referred to in section 83, it shall be for the employee to prove the reason which made the continuation of the employment contract unreasonable.
>
> (3) The test as to whether or not a dismissal was unfair under section 82 or 83 is whether or not, under the circumstances the employer acted unreasonably."

50. Therefore, the statutory requirement for a constructive dismissal claim is that:

(a) There must be some conduct on the part of the employer;

(b) The employer's conduct must be unreasonable;

(c) It is the employer's unreasonable conduct that must make it unreasonable to expect the employee to continue the employment contract; and

(d) It is for the employee to prove the employer's unreasonable conduct.

51. The Tribunal having found, as a matter of fact, that the reason for the Complainant's resignation letter were the state of the relationship as indicated in her e-mail of 11 August 2015 but she would not have resigned had it not been for the termination letter of 12 August 2015 since she was still hoping for forgiveness. Therefore, the termination letter being the catalyst for her resignation, that must be the conduct on the part of the employer that this Tribunal must examine.

52. That takes care of two questions and the next question, therefore, is was the termination letter reasonable?

53. The termination letter was in respect of section 101 of the Code and sought to

summarily dismiss the Complainant. Whether or not that was reasonable requires the Tribunal to explore whether a section 101 termination would be valid and lawful in law. If it would be valid and lawful then, prima facie, it would be reasonable, but if it is not be valid and lawful in law, then ipso fact, it would be unreasonable.

54. Section 101 of the Code provides as follows:

> "(1) An employer is entitled to dismiss summarily, without notice, an employee who is guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract.
>
> (2) The serious misconduct referred to in subsection (1) is restricted to that conduct which is directly related to the employment contract and has a detrimental effect on the business and it includes, but is not limited to, situations in which the employee has
>
> (a) conducted himself or herself in a manner as to clearly demonstrate that the employment contract cannot reasonably be expected to continue;
>
> (b) been convicted of an offence in the course of his or her employment, the penalty for which prevents the employee from meeting his or her obligations under his or her employment contract for twelve working days or more.
>
> (3) The employer shall, when terminating an employment contract under the provisions of this section, provide the employee with a written statement of the precise reason for the action and the employer shall be conclusively bound by the contents of the statement in any proceeding contesting the fairness of the dismissal.
>
> (4) An employer who fails to provide the statement referred to in subsection (3) shall be stopped from introducing testimony as to facts which might have been included in the statement, in any proceeding contesting the fairness of the dismissal."

55. LPR 45(3) has codified the common law position as it relates to summary dismissal, and seeks to comply with the recent High Court appeal from a decision of this Tribunal in ***Teshawn Cameron v. MarineMax Vacations*** **(BVIHCV2019/0216, unreported, delivered on 06 August 2020)** which is binding on this Tribunal. It provides as follows:

> "(3) An award of the Tribunal in respect of the termination of an employment contract pursuant to section 101 of the Act shall take into consideration the following
>
> (a) the reason for the dismissal, which must be given to the employee in writing, and must be precise in accordance with section 101(3) of the Act and the Tribunal shall grant an estoppel in accordance with rule 3(4)(c) against any employer who seeks to introduce

any new reasons or clarifications of the precise reason for the dismissal;

(b) the reason for the dismissal must be the real reason for dismissing an employee, so that it cannot be a set of facts or beliefs that the employer did not know, or could not reasonably hold, at the time of the dismissal of the employee;

(c) once the employer has established the real reason for dismissing the employee, then the Tribunal must decide whether the dismissal was for a fair reason which requires, first and foremost, the application of the statutory test set out in section 85(3) of the Act, and the Tribunal may accordingly determine that the dismissal was unfair;

(d) the Tribunal shall consider three (3) aspects of the employer's conduct to determine the fairness of the decision

(i) did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?

(ii) did the employer believe, or have reasonable grounds for such belief, that the employee was guilty of the reasons for the dismissal?

(iii) did the employee have a fair opportunity to defend him or herself, including access to his or her employment record in accordance with section 81(2) of the Act?

(e) the Tribunal must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the reason for the dismissal was within the "band of reasonable responses". If it was, then the reason for the dismissal will be fair;

(f) during this exercise the Tribunal shall not substitute its own evaluation of a witness for that of the employer at the time of the dismissal, save in exceptional circumstances, and if it does it must expressly outline those exceptional circumstances; and

(g) the Tribunal shall only focus on the fairness of the conduct of the employer at the time of the dismissal and not on whether in fact the employee has suffered an injustice."

56. The precise reason for the dismissal must be contained in the termination letter and the Tribunal would have granted an estoppel against the Respondent from seeking to introduce any new reasons or clarifications of the precise reason for the dismissal. Therefore, the reason for the dismissal was "a direct result of your failure to transmit

critical information from the Financial Services Commission relevant to the compliance inspection carried out by the Commission on 1st to 2nd September, 2014 and your inability to provide any satisfactory explanation for this". The remainder of the dismissal letter goes into the fact that an explanation was requested and that they were unsatisfied with the explanation, despite the fact that they relied on that same explanation to the Financial Services Commission expecting them to accept that explanation as reasonable. As a result of this failure, and no satisfactory explanation was given for the failure, critical deadlines were missed. They then characterised the failure as serious misconduct because of her position. No other reason for the summary dismissal was given and any other reason or clarification for the dismissal must be ignored by the Tribunal.

57. It is clear from all the correspondence surrounding the dismissal, both the 11 August 2015 e-mail and the 13 August 2015 resignation letter, that everything touched and concerned the failure to transmit the final report. This, therefore, was the real reason for the dismissal. It had nothing to do with any behaviour or conduct by the Complainant, it was solely about the failure to transmit the final report in time to meet the deadlines.

58. In determining whether or not the termination was for a fair reason, the Tribunal has already concluded that there was no reasonable investigation into the matter, and the Respondent had no reasonable grounds to believe that she had committed an act of serious misconduct, though the Respondent had reasonable grounds to believe that she had not transmitted the final report in time to meet the critical deadlines. However, importantly, there was no fair opportunity for the Complainant to defend herself.

59. As a result, the Tribunal finds that the section 101 dismissal was unfair.

60. The band of reasonable responses for a summary dismissal requires several factors, including immediacy of the response. The fact that they became aware of the failure on 16 July 2015 and only terminated her on 12 August 2015, almost a month later, would not stand up to the test of a reasonable response for a summary dismissal. To meet the threshold the response must be swift to stop the detriment to the business, otherwise, it means that the action was not so serious that termination would be necessary to stop the detriment.

61. There were other options available to the Respondent other than summary dismissal, and the Respondent failed to avail themselves of those other options to discipline the Complainant and avoid an unfair dismissal claim. During the period 16 July 2015 to 12 August 2015 there was sufficient time for the Respondent to have exercised better management decisions in how to deal with the Complainant, but instead created a hostile environment that prompted the Complainant's 11 August 2015 e-mail and by the termination letter thereby prompting her resignation. This unstable work environment was clearly not what is contemplated as decent work under section 2(o) of the Code which relates directly to the ILO standards governing decent work. This type of situation should always be avoided in the workplace. The option available was to issue her with a disciplinary letter. If it was seen that the employment relationship could no longer move forward based on the situation, then termination through the normal process, by giving notice or payment in lieu, would have been the appropriate option, and it appears strange that the Respondent could have deployed that very option as they had the cheque

available, but instead chose not to do so and take an unnecessary nuclear option. However, keeping the Complainant employed under those circumstances was not acceptable and lead to her constructive dismissal and effectively demonstrates a lack of human resource skills by the Respondent.

62. Therefore, the dismissal under section 101 having been found to be unfair, ipso facto, then the employer's conduct must be unreasonable, and as such the Complainant was constructively dismissed which means that she was unfairly dismissed.

63. The Tribunal having found that the dismissal was unfair, the award must take into consideration the remedies provided under section 86(1) of the Code as the next step required by LPR 45(6).

64. 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."

65. 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. As a result the Tribunal is constrained to order the Respondent to pay the Complainant such punitive sum as it thinks fit.

66. According to the highly persuasive House of Lords decision in ***Rookes v. Bernard* [1965] AC 1129** 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."

67. This is a case where the statute authorizes punitive damages, therefore, we do not have

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. This would be the major difference between "punitive" and "exemplary" because 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.

68. Firstly, the award must be given in moderation as shown in the highly persuasive English case of ***Design Progression Ltd v. Thurloe Properties Ltd*** **[2005] 1 WLR 1 at 150** 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.

69. 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*** **[2007] 1 WLR 1065, CA**. 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.

70. Thirdly, the conduct of the parties from the beginning of the proceedings up to the date of the decision would be important. Additionally, based on the highly persuasive English case of ***Greenlands v. Wilmshurst*** **[1913] 3 KB 507**, 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.

71. Fourthly, the relevance of the amount awarded as compensation as shown by Lord Devlin in ***Rookes v. Bernard*** **(supra) at 1228**:

> "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."

72. According to **McGregor on Damages (20th Ed.), para. 13-040**, 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*** **[1991] 2 QB 517, CA** 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 would take

into consideration the compensation that could have been award and award a higher sum as punishment.

73. Fifthly, 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*** **[2009] Ch. 390**, 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.

74. 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 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. This would also include any attempt by an employer to avoid paying pension to an employee who would become pensionable within a few years, as in this case, five years from the date of termination. Additionally, the managerial inefficiency of the Respondent to deal with this situation appropriately must be effectively addressed in the award.

75. All the evidence presented to this Tribunal about the Respondent is that, at the time of the filing of the Complaint in 2015, it was a trust company with its head office in Panama and an office in the Virgin Islands. There is no further information about the size and scope of the Respondent's business. No evidence was advanced by the Respondent to mitigate against the fact that it is a multinational entity with an office in the Virgin Islands, which would automatically make it other than a mom and pop shop. It is clear that it has a Board of Directors, and these persons make regular visits to the Virgin Islands. As a result, the Tribunal will consider the Respondent to be at least a medium sized multinational business with sufficient resources to maintain its operations in the Virgin Islands.

76. The value of the compensatory award, if it were possible to make such an award, would have been in the region of $250,000.00 based on the submissions by the Complainant and the Tribunal has no submissions before it to suggest that those proposed compensation amounts would be excessive or were calculated incorrectly. In fact, the Complainant's Affidavit outlines extensively how she calculates the compensation due to her and neither Affidavit on behalf of the Respondent addressed those calculations or provided any response, nor was the Complainant cross-examined on those calculations. As a result, the Tribunal accepts the Complainant's calculation of what the normal compensation would have been.

77. The Complainant further suggests that $60,000.00 in punitive damages would be

reasonable and suggests that she suffered emotional and psychological injury and damage leading to distress, sleep deprivation, loss of appetite and loss of interest in day to day activities. None of this evidence was controverted either in the Respondent's Affidavits or during oral evidence, and while the Tribunal notes that it has no evidence before it to support these claims, as the evidence is uncontroverted, it will accept them, but cannot agree that punitive damages should be $60,000.00 for those alone, and by themselves would only attract a nominal award. However, considering all the other factors in the round the Tribunal would add a punitive amount to what would have been compensation for a total punitive award of $400,000.00. However, the Tribunal will give the Respondent until 01 February 2021 to make this payment.

78. The Tribunal is entitled to award pre-judgment interest as an equitable remedy pursuant to LPR 3(4) and pursuant to LPR 39(5). Therefore, it will award pre-judgment interest calculated based on 3% per annum from 13 August 2015 to 10 November 2020 for a total of $63,000.00.

79. The Tribunal is also entitled to order post-judgment interest at the statutory rate of 5% per annum to commence if the damages and pre-judgment interest are not paid on or before 01 February 2021 at the daily rate of $63.42 for each day that the sums remain unpaid.

80. The Tribunal is also entitled to order costs and having already penalized the Respondent for its failures through the punitive award, will only award the Complainant 60% of the costs allowed pursuant to LPR 49(5), to be assessed if not agreed.

81. On the issue of costs it should be noted that the Tribunal allowed the presence of Jodie Locke and Michael Maduro, legal practitioners who were noted to be assisting the legal practitioner for the Complainant, solely because the trial is to be held in public for fair hearing purposes. However, following the BVI Court of Appeal decision in ***Dmitry Garkusha v Ashot Yegiazaryan & Others*** **BVIHCMAP 2015/0015, unreported, delivered in 2016** that was confirmed by the BVI Court of Appeal decision in ***John Shrimpton & Anor v Dominic Scriven & Ors*** **BVIHCMAP 2016/0031, unreported, delivered in 2017**, any costs associated with the work of Jodie Locke must be excluded, but costs by Michael Maduro can be included as disbursements.

82. Section 7(1)(c) of the Payroll Taxes Act, 2004 (No. 14 of 2004) provides as follows:

> *"any money or other thing of value paid or given to him as an employee or an ex-employee in connection with the permanent termination of his employment on account of redundancy or otherwise, whether or not so paid or given in a lump sum or in a series of payments or in respect of one or more financial years, being, money or a thing paid or given for services to the employer wholly or mainly in the Virgin Islands; and it shall be assumed that any money or thing paid or given by an employer to, or with respect to, an employee or ex-employee of his at, or within three years of, the permanent termination of the employment is remuneration for the purposes of this Act unless the contrary is proved;"*

83. For the avoidance of doubt, notwithstanding the presumption does not exist after the

three year period since the permanent termination of the Complainant, that does not mean that the obligation to pay taxes on the income does not arise simply because the three-year period has expired. In fact, the Tribunal finds that the payment is in respect of the permanent termination of the Complainant and, therefore, will order that the punitive damages and pre-judgment interest awarded should be subject to the relevant taxes. Therefore, the Respondent is obligated to pay the employer portion of the applicable taxes and the Complainant is obligated to pay the employee portion of the applicable taxes on the total sum awarded.

The Award

84. The award of the Tribunal is as follows:

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

(b) The Respondent shall pay punitive damages to the Complainant in the amount of $400,000.00 on or before 01 February 2021, less all applicable taxes.

(c) The Respondent shall pay pre-judgment interest to the Complainant in the amount of $63,000.00 on or before 01 February 2021, less all applicable taxes.

(d) If the punitive damages and pre-judgment interest are not paid on or before 01 February 2021 the Respondent shall pay statutory interest to the Complainant in the amount of $63.42 for each day thereafter that the sums remains unpaid.

(e) The Respondent shall pay 60% of the permitted costs incurred by the Complainant from the date of the filing of the complaint with the Labour Commissioner to the date of this Final Award, to be assessed if not agreed on or before Friday, 27 November 2020.

(f) If the parties fail to agree on the costs to be paid to the Complainant on or before Friday, 27 November 2020, a costs hearing in accordance with Part IX of the LPR is fixed for **Tuesday, 15 December 2020** 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).

(g) 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.

- PENAL NOTICE -

If ARAMO CORPORATE SERVICES INC. fails to comply with the terms of this order proceedings may be commenced for contempt of court and you, CARLOS BERGUIDO, 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 Wednesday, 09 December 2020.

By Order
Labour Arbitration Tribunal

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

Mr. Jamal S. Smith, LLB(Hons.), MCIArb.
Chairman

I Concur.

Professor Arthur Richardson
Member on the recommendation of the Complainant

I Concur.

Kamika Aisha Forbes
Member on the recommendation of the Respondent