

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Royston Grumble

COMPLAINANT

AND

Top Priority Security Services Limited

RESPONDENT

BEFORE:

Jamal S. Smith, Chairperson

Dr. Benedicta P.T. Samuels, Member on the recommendation of the Complainant

Yvonne Crabbe, Member on the recommendation of the Respondent

IN ATTENDANCE:

- (1) Royston Grumble, the Complainant
- (2) Daniel R. Fligelstone Davies, legal practitioner for the Complainant instructed by Silk Legal (BVI) Inc.
- (3) Top Priority Security Service Limited represented by Lesmore Smith
- (4) Michael Maduro, legal practitioner for the First Respondent instructed by Grace Chambers

ADDITIONALLY:

- (5) Malisa Ragnath-Mangal, as Secretary to the Tribunal

FINAL AWARD

01 March 2022; 14 April 2022

Table of Contents

A. INTRODUCTION	2
B. THE CASE HISTORY	3
C. THE EVIDENCE	8
(a) <i>The Evidence of Royston Grumble</i>	8
(b) <i>The Evidence of Lesmore Smith</i>	9
D. THE TRIBUNAL’S ANALYSIS	10

(a) <i>The Findings of Fact</i>	10
(b) <i>The Law</i>	13
(i) <i>Jurisdiction</i>	13
(ii) <i>The Dismissal</i>	13
(iii) <i>Punitive Damages</i>	15
(iv) <i>Costs</i>	18
(v) <i>Public Contracts</i>	18

A. INTRODUCTION

1. This labour dispute arises out of a complaint against Top Priority Security Services Limited (the “**Respondent**”) filed by Royston Grumble (the “**Complainant**”) with the Labour Commissioner on 05 May 2020 (the “**Complaint**”) and it has raised some difficult questions of fact, however, as the clownish servant, Lancelot Grobbo, said in Shakespeare’s “*The Merchant of Venice*”

“... truth will come to light, murder cannot be hid long, a man’s son may, but in the end truth will out.”

2. The Complainant alleges that he was employed as a Security Officer by the Respondent and he was given duty to work on 28 March 2020 but after he spoke about the then current situation of the virus, he was told not to work anymore and to return the Respondent’s belongings. He contends that he had no knowledge of the reason for his termination and he was seeking his rights to know his dismissal. The Complainant attached all of his pay slips to the Complaint along with a copy of his work permit.

3. In this award reference will be made to an agreed trial bundle filed by the Respondent on 28 February 2022 (the “**Trial Bundle**”). Reference will also be made to Skeleton Arguments filed by the Complainant on 23 February 2022 (the “**Complainant’s Skeleton Arguments**”) and Closing Submissions along with Authorities filed by the Complainant on 09 March 2022 (the “**Complainant’s Closing Submissions**”).

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

5. All place names used in this Final Award are references to places on the island of Tortola in the Territory of the Virgin Islands unless otherwise expressly stated. Although all attempts will be made to use official place names in accordance with the Preservation of Names of Places Act, 2001,¹ the Tribunal appreciates that the provisions of that Act have not yet come into force, nor would they apply to any order or award of this Tribunal. Reference to persons who have not appeared or given evidence before this Tribunal will be limited to their surnames or designations unless otherwise expressed to be necessary for clarity.

¹ No. 1 of 2001.

B. THE CASE HISTORY

6. After there was no settlement achieved by the Labour Commissioner, the Complaint was transferred to the Minister under a Memorandum by the Labour Commissioner dated 31 May 2021,² over one (1) year later without any indication that the parties agreed to such a lengthy extension of time. Section 26(3) of the Labour Code, 2010 (the “Code”) establishes a duty to transfer the Complaint to the Minister after thirty (30) days, and section 2(f) of the Code requires it to be done without undue delay thereafter. The Tribunal reviewed the historical development of these provisions in the case of *Devonni Christopher v. BVI Health Services Authority*,³ and expressed its displeasure with the failure of the Labour Commissioner to deal with labour disputes in a timely manner.
7. On 22 July 2021 the Minister referred the Complaint to the Tribunal pursuant to section 28(1) of the Code.⁴
8. On 28 July 2021 the Secretary to the Tribunal issued the Notice of Case Management Hearing scheduling the first Case Management Hearing for 09 September 2021 and giving the timeline for filing the pleadings and evidence in this matter.
9. On 09 September 2021 the Chairperson of the Tribunal issued a Case Management Order (the “First CMO”) found at TAB 15 of the Trial Bundle which noted unqualified disapproval of the protracted delay by the Labour Commissioner by taking a year to transmit the Complaint to the Minister contrary to the Code. By virtue of paragraph 2 of the First CMO, it was ordered and directed that:

“The Labour Commissioner shall be added as a party to these proceedings to show cause why a third-party order should not be made against him/her in respect of the costs of these proceedings due to the inordinate delay and general failure to comply with section 26(2) of the Labour Code, 2010 resulting in loss or damage to the parties.”
10. The First CMO was made while the Respondent was an unrepresented party. For this reason, it followed the procedure outlined in the Tribunal’s recent Interim Award in *Damian Chance v. Ivan Chinnery, Sharleen Chinnery and Darlene Chinnery dba White Bay Camp Ground*,⁵ where the Tribunal found that the Labour Commissioner was a person concerned in accordance with section 30(2)(a) of the Code, and it was necessary to give the Labour Commissioner an opportunity to “show cause” before determining that the Labour Commissioner had no good reason for the delay and ordering the Labour Commissioner to pay the costs and interest that would be due to such delay. The First CMO also made certain directions to put things right since the Respondent had not complied with any of the timelines outlined in the Notice of Case Management Hearing issued by the Secretary to the Tribunal and adjourned the Case Management Hearing to 12 October 2021.

² TAB 2 of the Trial Bundle.

³ BVILAT2021/008, unreported, delivered on 18 January 2022.

⁴ TAB 3 of the Trial Bundle.

⁵ BVILAT2021/012, unreported, delivered on 10 February 2022.

11. By the first adjourned hearing the Respondent was represented by counsel, but still filed the Response late, thereby causing the Complainant to be unable to file a Reply in time. The Chairperson decided to exercise his discretion to put matters right in accordance with rule 6(2) of the Labour (Arbitration Tribunal) (Procedure) Rules, 2020⁶ (the “**LPR**”), and therefore, issued a Case Management Order (the “**Second CMO**”) which, among other things, allowed the Response to be deemed to have been duly filed, which is found at TAB 4 of the Trial Bundle. It also granted more time to file the Reply, so that a further adjournment was required until 11 November 2021. For this reason, the Chairperson found that there was an exceptional reason to award costs in accordance with LPR 47(3)(d) and summarily assessed the costs in the amount of \$400.00 against the Respondent.
12. According to the Response,⁷ the Respondent is a company incorporated in the Territory of the Virgin Islands and located at Skelton Bay Lot, Fish Bay, Tortola and admitted to employing the Complainant as a security officer from on or around 2 July 2017 at an annual salary of about \$12,480.00. The employment relationship with the Complainant was ended on or around March 2020. The Complainant was formally released from employment on 07 May 2020 (the “**Termination Letter**”). However, the Respondent denied terminating or dismissing the Complainant for “talking about the current situation of the virus”. Instead, the Respondent alleged that the Complainant was dismissed for failing to show for his scheduled work for two (2) consecutive days and the Respondent formed the view that the Complainant had abandoned his post. The two (2) days in question were Saturday, 28 March 2020 (the “**Tortola Pier Park Posting**”) and Sunday, 29 March 2020 (the “**Elmore Stoutt High School Posting**”) where the Complainant refused and/or neglected and/or failed to report to duty or to provide a reason and/or any reason for his failure to report to duty. Additionally, the Respondent denied any knowledge of any conversation or talk or opinion the Complainant had or expressed in relation to the Coronavirus or the COVID-19 pandemic. As a result, the Respondent’s position is that the Complainant failed to report to duty and failed to inform the Respondent or the Respondent’s representatives as to his reasons.
13. The Respondent also raised the fact that the Complainant received two (2) previous written warnings for displaying similar unacceptable behaviour, first on Tuesday, 02 October 2018 (the “**First Written Warning**”) and the second on Tuesday, 20 August 2019 (the “**Second Written Warning**”). Both written warnings were with respect to the Complainant’s performance. Then there was a live investigation being conducted by the Principal of the Elmore Stoutt High School and the Ministry of Education and Culture of a complaint/report made against the Complainant by the parents of a female student sometime early in the month of March 2020 (the “**High School Complaint**”). Shortly after the High School Complaint was made known to the Complainant he failed to report for work or failed to communicate or return telephone calls from the representatives of the Respondent.
14. It was then claimed that pursuant to section 103(2) of the Code, the Respondent cannot reasonably be expected to continue to employ the Complainant as some six (6) months after

⁶ S.I. No. 98 of 2020.

⁷ TAB 4 of Trial Bundle.

the Respondent would have warned the Complainant that repetition of such unacceptable behaviour would result in summary dismissal, the Complainant exhibited similar unacceptable behaviour and poor judgment. This aspect of the Response complies with LPR 20(1)(f)(i) which requires the Response to include the reason for the dismissal that the Respondent intends to prove at trial. However, there was no list of documents filed with the Response in accordance with LPR 20(1)(i). Additionally, no statement was made in accordance with LPR 20(1)(f)(ii) so that the Respondent accepts that the Tribunal may order the Respondent to pay the Complainant such punitive sum as it thinks fit.

15. In accordance with LPR 20(2) the Response was accompanied by the Affidavit of Lesmore Smith⁸ along with the Certificate of Exhibits “LS-1”,⁹ which includes:
- (a) a Certificate of Good Standing issued under the BVI Business Companies Act, 2004 dated 11 March 2021;
 - (b) the Termination Letter;
 - (c) the letter to the Chief Immigration Officer dated 8 May 2020;
 - (d) the letter to the Labour Commissioner dated 8 May 2020;
 - (e) the First Written Warning; and
 - (f) the Second Written Warning.
16. To this the Complainant filed a Reply on 22 October 2021,¹⁰ where he denied abandoning his post. The Complainant put the Respondent to strict proof of the Tortola Pier Park Posting, and instead claimed that he was scheduled to work at A-Value Supermarket in Huntum’s Ghut since 21 March 2020 but claimed that when he went there the place was boarded up as a result of the COVID-19 lockdown. On the evening of 28 March 2020, the Complainant had a conversation with Ms. Bradford, the controller for the Respondent who was responsible for assigning duties to the Respondent’s security officers, to assign him to the Elmore Stoutt High School Posting and he then told her why he could not attend his duty at A-Value Supermarket. A few minutes after that conversation, the Complainant received a text message from Ms. Bradford demanding that the Complainant bring in the Respondent’s uniform. Although he reported to work the following day, he was informed by Ms. Bradford that he was off schedule, and he needed to return the Respondent’s belongings because of his indication about the COVID-19 pandemic the day before, therefore, maintaining that he was terminated for “talking about the current situation of the virus”. The Complainant further asserted that he was the one who tried to contact Mr. Lesmore Smith and not the other way around. He further indicates that the First Written Warning is irrelevant to these proceedings and he denied ever receiving the Second Written Warning, but even if he did he alleged that the circumstances arose due to being required to

⁸ TAB 5 of Trial Bundle.

⁹ TAB 6 of Trial Bundle.

¹⁰ TAB 7 of the Trial Bundle.

work overtime beyond the statutory amount allowed.

17. The Complainant also challenged the High School Complaint. He claimed that the allegation was prolix and scandalous. He also denied abandoning his post or not reporting for duty after that allegation was made since it was as a result of a cultural misunderstanding and nothing ever came of the matter.
18. In accordance with LPR 23(2) the Response was accompanied by the Affidavit of Royston Grumble¹¹ along with the Certificate of Exhibits “RG-1”,¹² which includes:
 - (a) Payslips from 31 July 2017 to 29 February 2020, with a few missing and not set out in any apparent order; and
 - (b) A screenshot of a text message with the time stamp “Saturday, Mar 28 * 18:04” and read “Mr. Smith said you should return all his uniforms and all his belongings to the Office by 9:00 am tomorrow, ID, BADGE, belt, sim-card and everything” (the “**Bradford Text Message**”).
19. By the second adjourned hearing the Labour Commissioner entered an appearance and requested additional time to address the issues raised. However, the Respondent who was at that time represented by counsel took no position with respect to the Labour Commissioner as a party to the proceedings for the purpose of costs and interest. The Chairperson issued trial directions in accordance with LPR 27 (the “**Third CMO**”),¹³ with a Pre-Trial Hearing fixed for 14 December 2021.
20. In accordance with the Third CMO the Respondent filed what it called “Additional List of Documents” on 11 November 2021,¹⁴ but that document did not comply with LPR 20(1)(i) and instead was just a bundle of documents with no index or reference point. Additionally, none of the documents that were not exhibited in Certificate of Exhibit “LS-1” were tendered into evidence during the trial and, therefore, have been ignored by the Tribunal. The Complainant filed a list of documents on 24 November 2021¹⁵ that although it complied with LPR 23(1)(e) it went far beyond what was required, and similarly on the same day the Complainant filed a Supplemental List of Documents.¹⁶ Then after the deadline had passed, the Respondent then filed a proper List of Documents on 10 December 2021¹⁷ and like the Complainant on the same day the Respondent filed an Additional List of Documents¹⁸ which was just a copy of the up-to-date trade license, but again that document was not tendered into evidence at the trial and so has been ignored by the Tribunal for the purpose of this Final Award.

¹¹ TAB 8 of the Trial Bundle.

¹² TAB 9 of the Trial Bundle.

¹³ TAB 17 of the Trial Bundle.

¹⁴ TAB 10 of the Trial Bundle.

¹⁵ TAB 11 of the Trial Bundle.

¹⁶ TAB 12 of the Trial Bundle.

¹⁷ TAB 13 of the Trial Bundle.

¹⁸ TAB 14 of the Trial Bundle.

21. Also in accordance with the trial directions in the Third CMO, the parties were to file skeleton arguments in relation to the Labour Commissioner on or before 03 December 2021. As none of the parties did so, and as the Respondent was represented by counsel who showed no interest in that course, or filed any interlocutory application to extend the time, the Tribunal could not justify acting on its own initiative to maintain the Labour Commissioner as a party to the proceedings. The Labour Commissioner was, therefore, removed as a party for the purposes of remedying any injustice that may have resulted due to the non-compliance with the statutory framework.
22. Also, in accordance with the trial directions in the Third CMO, the deadline for either party to file additional evidence was on 08 December 2021. However, no other evidence was filed other than to support interlocutory applications.
23. The Pre-Trial Hearing where the full panel was present had to be adjourned to 13 January 2021 due to technical difficulties, however, a further opportunity was provided for the parties to file any interlocutory applications and vacated the trial date by a Case Management Order (“**Fourth CMO**”).¹⁹
24. At the adjourned Pre-Trial Hearing on 13 January 2022 a new trial date was fixed for 01 March 2022 and additional trial directions were given to replace those given in the Third CMO in accordance with LPR 27 (the “**Fifth CMO**”).²⁰
25. In accordance with the trial directions in the Fifth CMO, the parties were to file skeleton arguments on or before 23 February 2022 and the final date for filing interlocutory applications was on 28 January 2022. The Respondent was also to file the Trial Bundle on or before 09 February 2022, but this was not filed until 28 February 2022. After hearing the parties as a preliminary point before the trial, the Tribunal accepted that it was agreed by the parties on the date of the trial. However, the Tribunal noted the fact that its members had to be provided with a link to the electronic copy of the bundle since they would not have had an opportunity to obtain the physical copy of the bundle which was filed the day before the trial. Additionally, only the Complainant complied with the directions to file skeleton arguments but did not provide any authorities.
26. The trial of this dispute took place on 01 March 2022 during which the full panel of the Tribunal heard the oral evidence and closing arguments from both parties and gave its final Case Management Order for the filing of closing submissions (the “**Sixth CMO**”). The entire trial took place via the WebEx video conferencing platform in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020²¹ and in accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.
27. In accordance with the Sixth CMO, the parties had until 09 March 2022 to provide written closing submissions with authorities on various points of law raised by the Tribunal during

¹⁹ TAB 18 of the Trial Bundle.

²⁰ TAB 19 of the Trial Bundle.

²¹ S.I. No. 99 of 2020.

the trial. No closing submissions were filed by the Respondent, but the Complainant filed the Complainant's Closing Submissions and referred to the following authorities:

- (a) *Bank of Antigua v. Errol Williams*,²²
- (b) *Colleth Ranger-Vassel v. Main Sail BVI Ltd*,²³
- (c) *Lady Mary L. Craufurd v. Archibald Reid*,²⁴ and
- (d) *Michelle Jones v. The Saint Vincent and the Grenadines Port Authority*.²⁵

28. The Secretary to the Tribunal issued a Notice of Decision Hearing on 08 April 2022 fixing a date for the delivery of the decision to Thursday, 14 April 2022 at 9:00 a.m. The Tribunal now gives the decision for its final award.

C. THE EVIDENCE

(a) The Evidence of Royston Grumble

29. According to the Affidavit of Royston Grumble²⁶ while he was employed by the Respondent, work duties were given to him on the telephone by the controller, Ms. Bradford.

30. He was forced to work overtime as evidenced by his pay slips which were exhibited at pages 1 – 29 of the Certificate of Exhibit. ²⁷

31. Since 21 March 2020 he was assigned to work at A-Value Supermarket in Huntum's Ghut on 28 March 2020 from 2 p.m. However, when he arrived to his assigned place of work on 28 March 2020 he found the premises boarded up as a result of the Covid-19 lockdown and so he was unable to work.

32. At about 6 p.m. on 28 March 2020 he received a call from Ms. Bradford, the Respondent's controller, to assign him duties to work at Elmore Stoutt High School in Pasea Estate on Sunday, 29 March 2020. During that conversation he relayed to Ms. Bradford that he could not attend his duty at A-Value Supermarket as it was closed and boarded up as a result of Covid-19 and the curfew which began on 27 March 2020. However, Ms. Bradford simply responded by asking him whether he was collecting his duties, to which he responded in the affirmative and proceeded to collect his duties (the "**First Bradford Conversation**").

33. Within a few minutes after the First Bradford Conversation the Complainant received the

²² [2020] ECSCJ No. 409.

²³ BVILAT2020/0002, unreported, delivered on 15 July 2021.

²⁴ [1822] 1 Shaw 124, UKHL.

²⁵ SVGHCV2009/171.

²⁶ n.11.

²⁷ n.12.

Bradford Text Message. Despite the Bradford Text Message the Complainant reported to work on Sunday, 29 March 2021 at which point he was contacted via telephone by Ms. Bradford (the “**Second Bradford Conversation**”) where she informed him that he was off schedule and further instructed him to return the Respondent’s belongings. He asked Ms. Bradford why he was off schedule and she replied that it was as a result of what he had said the previous day regarding the situation with Covid-19. During cross-examination the Complainant recounted when he arrived at the Elmore Stoutt High School at Pasea Estate that the shift supervisor informed him that he was not on the schedule for that day which led to the Second Bradford Conversation. He noted that the employees of the Respondent who worked at the Elmore Stoutt High School at Pasea Estate on that day would have seen him arrive at work and would have been aware of the Second Bradford Conversation. The Complainant recalls delivering his belongings to Mr. Davis at the Labour Department probably in April, 2020.

34. He only recalled receiving the First Written Warning and on that occasion he was not afforded his right to be heard and present his side of the story. He also claimed that he never received the Termination Letter, but he confirmed receiving correspondences from the Immigration Department and the Labour Department informing him that he had been released from employment by the Respondent.
35. He suffered about \$2,704.00 in lost wages when calculated on the basis of eight (8) hours multiplied by 52 days (two months) multiplied by \$6.50 an hour. He also claimed that he would be entitled to \$864.00 in severance pay.
36. Having had the opportunity to review the Complainant’s pleadings, written evidence and to observe his demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of his account, the consistency between his written and oral evidence under oath, as well as the internal consistency of his written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds him to have been a credible witness.

(b) *The Evidence of Lesmore Smith*

37. According to the Affidavit of Lesmore Smith²⁸ he is the Chief Executive Officer of the Respondent, and he was duly authorized to represent the Respondent in these proceedings. During cross-examination he confirmed that everything within the business of the Respondent would have to go through him and he could speak for everything that was done on behalf of the Respondent.
38. He admitted that the Complainant was employed with the Company from 2 July 2017 until 7 May 2020 in the capacity of Security Officer, which is a period of more than two (2) years. However, he denied that the Complainant was terminated or dismissed for “talking about the current situation of the virus”. He had no knowledge of any conversation or talk or opinion the Complainant had or expressed in relation to the Novel Coronavirus or Covid-19 pandemic, nor had he ever had any conversation with the Complainant concerning that.

²⁸ n.8.

He reiterated that the Complainant was not dismissed but he failed to show up for his scheduled work for two (2) consecutive days and in view of the lack of communication or non-communication from the Complainant, the Respondent formed the view that the Complainant had abandoned his post.

39. The Complainant was scheduled and/or assigned to the Tortola Pier Park Posting from 000hrs to 800hrs. The Complainant failed to report to duty or to provide a reason and/or any reason for his failure to report to duty to the Company's representative. He was also schedule and/or assigned to the Elmore Stoutt High School Posting from 1600hrs to 2400hrs, and again the Complainant failed to report to duty or to provide a reason and/or any reason for his failure to report to duty.
40. After Mr. Smith became aware of the Complainant's failure to report to work, he contacted the "Control Officer" to inform the Complainant to report to the offices of the Respondent on Monday, 30 March 2020 at 900hrs. The Complainant did not report to the said offices. Mr. Smith also claims that he attempted to contact the Complainant on various occasions after 29 March 2020 but to no avail.
41. He exhibited a copy of the Termination Letter along with a letter to the Chief Immigration Officer on 8 May 2020 and the then Labour Commissioner on 8 May 2020. He also exhibited a copy of the First Written Warning and the Second Written Warning.
42. After the Complainant had abandoned his employment with the Respondent Mr. Smith claimed that he then became aware about the High School Complaint. It is his informed position that shortly after these serious allegations would have been put to the Complainant he started to fail to report for work or to communicate with or return telephone calls from the representatives of the Respondent. He exhibited a copy of a letter from the Complainant to his immediate supervisor, Mr. Vanderstoop, about the High School Complaint.
43. During a question from the Tribunal, Mr. Smith admitted that the Complainant was last paid up to 28 March 2020 and that due to the nature of the business employees sometimes have to work overtime.
44. Having had the opportunity to review the Respondent's pleadings, the written evidence of Lesmore Smith and to observe his demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of his account, the consistency between his written and oral evidence under oath, as well as the internal consistency of his written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal has concerns about the reliability of his evidence.

D. THE TRIBUNAL'S ANALYSIS

(a) The Findings of Fact

45. There are considerable facts in dispute in this case, none less more important than the very reason for the dismissal.

46. The Complainant was already scheduled to work at A-Value Supermarket in Huntum's Ghut on 28 March 2020 and contrary to the Respondent's allegation he was not scheduled to work at the Tortola Pier Park Posting. When he went to A-Value Supermarket in Huntum's Ghut the place was boarded up and the Tribunal takes judicial notice that on 28 March 2020 the Territory was in lockdown due to the Covid-19 pandemic and, therefore, he was unable to work. He reported this situation to Ms. Bradford during the First Bradford Conversation when he was required to work at the Elmore Stoutt High School Posting.
47. The Respondent sought to discredit the Bradford Text Message during cross-examination but made no interlocutory application to have that evidence struck out in accordance with LPR 33(7), and, therefore, on a balance of probabilities the Tribunal will accept that the Bradford Text Message existed. As a result, the Respondent requested that the Complainant return the Respondent's belongings on Saturday, 28 March 2020. The Complainant was paid up to Saturday, 28 March 2020 and the evidence supports that the Complainant had worked, including overtime hours, up to Saturday, 28 March 2020.
48. The Complainant reported to the Elmore Stoutt High School Posting on Sunday, 29 March 2020 where the Second Bradford Conversation took place by telephone and in the presence of the supervisor and other staff on site. The Respondent produced no evidence to challenge this fact, and, therefore, the Tribunal will accept the Complainant's version of events.
49. The Complainant proceeded to the Labour Department where he apparently received a complaint form, and while it was curiously signed on 28 March 2020 which would have been a Saturday when the Labour Department would have been closed and may just have been a post-dating error on the part of the Complainant, it was clearly filed on 05 May 2020. Within two (2) days of the Complaint being filed with the Labour Commissioner, the Respondent issued the Termination Letter and the day after he issued the letter each to the Chief Immigration Officer and the Labour Commissioner. The Termination Letter, however, does not assert that he is being terminated but noted that he did not show up for work for two (2) consecutive days, and the letters to the Chief Immigration Officer and the Labour Commissioner claims that the Respondent was released on 07 May 2020.
50. The Tribunal accepts the Respondent's position that the Complainant was not terminated until 7 May 2020, after the Complainant filed his Complaint with the Labour Commissioner, because the Complainant was absent without leave ("AWOL") on 28 and 29 March 2020. The Tribunal was also presented with evidence about the First Written Warning and the Second Written Warning which would only be relevant if the Respondent was summarily terminating the Complainant based on repeated misconduct pursuant to section 103 of the Labour Code, 2010 (the "Code").
51. The Tribunal, however, does not accept that the evidence supports the Complainant was AWOL on 28 and 29 March 2020, or at all.
52. During oral arguments the Respondent indicated that the Tribunal must look methodically at the facts and made an passionate plea for the Tribunal to accept that the High School Complaint demonstrates that the Complainant began to absent himself from work after the

High School Complaint. According to the Respondent the Tribunal should look at the history of the Complainant's conduct coupled with the High School Complaint to justify the reason for what the Respondent considered his release from employment, as opposed to dismissal, because the Complainant went AWOL. However, after the Tribunal analyses all the evidence, the pay slips put into evidence by the Complainant clearly demonstrates that the Complainant worked consistently up to and including 28 March 2020. Therefore, the Tribunal does not accept that the Complainant's past conduct or the High School Complaint supports that the Complainant was AWOL at any time to justify the termination of employment.

53. Having determined the real reason for the dismissal, the next factual question is whether the Respondent investigated the matter that was reasonable in the circumstances of this case. Unfortunately, the mysterious Ms. Bradford appears to be like Launcelot Gobbo in Shakespeare's *The Merchant of Venice* when he meets his blind father, who must rely on Lancelot Gobbo to know what is going on around him. All the information Old Gobbo gets from his son he has no choice but to accept because at the end of the day Launcelot Gobbo become his eyes on his way to meet his son's Master. This whole case rises and falls on the information that Ms. Bradford relays between the Complainant and Mr. Smith, and Mr. Smith cannot say whether Ms. Bradford has accurately relayed the information to him because he has no choice but to rely on her account of what the Complainant said or did. Ms. Bradford, again like Shakespeare's Launcelot Gobbo, is involved in every plot within this story but is not a central character, she stands on the periphery because the Respondent has not brought her before the Tribunal, and if the observer was not careful may have overlooked her significance to the entire story.
54. The evidence before the Tribunal is that on Saturday, 28 March 2020 the Complainant had the First Bradford Conversation and shortly thereafter received the Bradford Text Message. The only other correspondence between the Complainant and the Respondent before the Termination Letter is the Second Bradford Conversation. Therefore, between 29 March 2020 and 7 May 2020 there is no evidence before the Tribunal about any investigation being conducted by the Respondent except that the Respondent claims to have been unable to get in contact with the Complainant. On a balance of probabilities, the Tribunal does not accept that the Respondent was unable to get in touch with the Complainant since it was reasonably easy to communicate with him on both 28 and 29 March 2020 and suddenly there was no further communication until 7 May 2020 where suddenly it was possible to get in touch with him a few days after the Complainant filed his Complaint with the Labour Commissioner. Additionally, one of the items that Ms. Bradford asked the Complainant to return to the Respondent was a sim-card, which suggests that the Complainant had use of a company phone for easy communication between them. Therefore, the Tribunal finds as a matter of fact that there was no reasonable investigation by the Respondent into the fact that the Complainant had gone AWOL and notes that if a proper investigation had been conducted by Mr. Smith after receiving the allegations laid by Ms. Bradford then no determination that the Complainant went AWOL could have been found.
55. The Tribunal must also determine, as a matter of fact, whether the Respondent believed, or had reasonable grounds for such belief, that the Complainant went AWOL. It appears that the First Bradford Conversation was the catalyst for the belief that the Complainant went

AWOL and the question is whether that was reasonable. The Tribunal accepts the Complainant's version of events since the Complainant was directly involved in the First Bradford Conversation and Mr. Smith was not so involved and the Respondent failed to produce Ms. Bradford as a witness before this Tribunal to be tested as to the nature of the First Bradford Conversation. For that reason, the Tribunal determines that the mere raising of the issue of the Covid-19 pandemic since the supermarket was closed which resulted in him not being able to do his work at A-Value Supermarket, was not a reasonable basis to believe that the Complainant had gone AWOL. In fact, the evidence accepted by the Tribunal is that he showed up to work on both occasions for which the Termination Letter claims he had been absent further entrenches the Tribunal's view that there were no reasonable grounds for the belief that the Complainant went AWOL.

56. Finally, and most significantly for the Tribunal, is that the Complainant was not given a fair opportunity to defend himself. It is noted that between the First Bradford Conversation and the Bradford Text Message there were only a few minutes. He was told to turn in the Respondent's belongings. There is no evidence accepted by this Tribunal that the Respondent made any genuine effort to meet with the Complainant to give him an opportunity to be heard.

(b) *The Law*

(i) *Jurisdiction*

57. The Respondent raised no challenge to the jurisdiction of the Tribunal in these proceedings. Therefore, the Respondent is deemed to have accepted the jurisdiction of the Tribunal and the Tribunal so finds that it has jurisdiction to hear this dispute upon the referral to it by the Minister.

(ii) *The Dismissal*

58. At first blush this case would have appeared to have been a dismissal in accordance with section 103 of the Code due to the First Written Warning and the Second Written Warning. However, it became clear from the Response, the evidence of the Respondent and the oral arguments made by the Respondent, that the dismissal was because of the Complainant being AWOL on 28 and 29 March 2020 which would ordinarily entitle the Respondent to summarily dismiss the Complainant pursuant to section 101 of the Code. The Tribunal considered section 103 in the case of *Colleth Ranger-Vassel v. Main Sail BVI Ltd*²⁹ but by relying on this case the Complainant appeared to have been misdirected off the proper trail by the Respondent's unnecessarily complex case, since it is inapplicable to these proceedings as far as the law on summary dismissal is concerned.
59. This Tribunal, however, has considered the application of section 101 of the Code in its decision in *Qasim Yoba v. Peter Island (2000) Ltd.*³⁰ where this Tribunal, comprised of two (2) of the three (3) members of this panel said at paragraph 76:

²⁹ n.23.

³⁰ BVILAT2017/021, unreported, delivered on 15 July 2021.

“Section 101 of the Code outlines the procedure for summary dismissal, where the employee must be guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract. It also provides two (2) examples of serious misconduct but makes it clear that it is not limited to those two (2) examples, as long as the conduct complained of is directly related to the employment contract and has a detrimental effect on the business. When summarily dismissing an employee under section 101 of the Code the employer is required to provide the employee with a written statement of the precise reason for the action and the employer is conclusively bound by the contents of the statement. The employer will be estopped by this Tribunal from introducing testimony as to facts which might have been included in the written statement upon termination.”

60. In considering summary dismissal under the common law action of wrongful dismissal the High Court Judge, Indra Hariprashad-Charles, in the pre-Code case of *Elphina Abraham v. Sunny Caribbee Herbal and Spice Company Limited*,³¹ which was referred to briefly during oral arguments by the legal practitioner for the Respondent who also appeared in that case, said:

“The question of an employee’s behaviour which warrants a dismissal, especially one which is summary, is a question of fact and degree to be determined by this Court . . .

In **Chitty on Contracts** the learned authors explained the nature of ‘misconduct’ stating that *‘the general rule is that if the employee does anything which is incompatible with the due or faithful discharge of his duty to the employer, he may be dismissed without notice; the employee’s conduct need not be dishonest, since it is sufficient if it is ‘conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee.’* (Emphasis added).

The learned authors of Halsbury’s Laws of England opined that *‘Misconduct inconsistent with an employee’s proper discharge of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal. . . An employee may also be summarily dismissed . . . if his **conduct is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of employer and employee.**’* (Emphasis added).”

61. This pre-Code case is very helpful in showing that the same principles applicable to the common law action of wrongful dismissal is applicable to the statutory action of unfair dismissal in the context of summary dismissal under section 101 of the Code. The language used in that case is very similar to the language used in section 101 of the Code, so that it is a question of fact and degree to be determined by the Tribunal whether the conduct

³¹ BVIHCV2007/0122, unreported, delivered on 29 April 2010.

complained of was serious enough to warrant dismissal. The guidance provided by the Court of Appeal decision referred to by the Complainant, *Bank of Antigua v. Errol Williams*,³² is useful where that case dealt specifically with summary dismissal of an employee who was AWOL. While finding that an employee who was AWOL would entitle an employer to summarily dismiss the employee, the statutory obligation still required the employer's actions to be reasonable.

62. The Tribunal having already made the factual determination that the Complainant was not AWOL means that the Respondent's termination on 7 May 2020 was unlawful in accordance with section 101 of the Code.
63. The Tribunal having also found that the Respondent did not conduct a reasonable investigation into whether the Complainant had gone AWOL and had no reasonable ground to hold that view as well as failing to give the Complainant an opportunity to be heard which was discussed by this Tribunal in *Qasim Yoba v. Peter Island (2000) Ltd.*³³ the Complainant was, therefore, unfairly dismissed.

(iii) Punitive Damages

64. There was no request for reinstatement or re-engagement in the Complaint but there was a request for compensation. The Response did not include a statement in accordance with LPR 20(1)(f)(ii) concerning the acceptability of the remedies under section 86(1)(a) of the Code and to determine any compensation in accordance with section 86(2) of the Code. Therefore, the Respondent accepted that the Tribunal may order such punitive sums as it thinks fit. The legal practitioner for the Respondent attempted to put forward a proposal in oral argument that there should only be payment to the Complainant from 28 March 2020 to 7 May 2020, but that concession would have required an amendment to the Response since the Respondent's pleadings never accepted that there was any obligation on the part of the Respondent to pay any compensation to the Complainant.
65. It is important for the Tribunal to pause for a brief procedural exposition on the purpose of pleadings before it. The dispute resolution mechanism is initiated by the Complaint filed with the Labour Commissioner in accordance section 26(1) of the Code, and it is that Complaint that is transmitted to the Minister in accordance with section 26(3) of the Code if there is no settlement, and finally that Complaint is referred to this Tribunal in accordance with section 28 of the Code. Therefore, the Complaint commences the process before this Tribunal and forms the first part of the pleadings. The Tribunal is empowered by section 35 of the Code to regulate its own proceedings and it is empowered to publish general guidelines concerning the procedures to be followed. According to section 23(1) of the Interpretation Act³⁴ the Tribunal, being the authority having for the time being the power to regulate its own practice and procedure, may make such rules or orders (including rules or orders regulating costs, fees, witnesses' expenses and other expenses) as appear to the Tribunal to be necessary for regulating its practice and procedure, except for any fees or

³² n.22.

³³ n.30.

³⁴ Chapter 136 of the Laws of the Virgin Islands (1990 Revised Edition).

other monies to be paid in or out of the Consolidated Fund where the Tribunal must obtain the concurrence of the Minister of Finance. This gives the Tribunal very broad powers to regulate its own affairs, and the Tribunal has done so with the publication of the LPR, and LPR 6(2) provides great flexibility so that except for LPR 26 or trial directions made under LPR 27, the parties are free to agree to vary, suspend or replace the LPR or any case management order with their own procedure. While the Tribunal generally encourages the use of this feature, it has been utilized very rarely in practice, and it would have been extremely useful to the Respondent in this case where there was general non-compliance with the LPR and the orders of the Tribunal by the Respondent.

66. Therefore, in the absence of any agreement between the parties or order of the Tribunal, the pleadings comprise the Complaint filed with the Labour Commissioner, the Response which must be filed by the Respondent in accordance with LPR 20 and the Reply which may be filed by the Complainant in accordance with LPR 23. The strict rules of pleadings utilized by the High Court do not apply before this Tribunal, as is made clear by the limited strike out powers in respect of the pleadings under LPR 21 and 24. This is as a result of section 30(2)(b) of the Code which requires the Tribunal to consider the “substantial merits of the case” so that default awards are not possible before this Tribunal, and even summary awards must consider the merits of the case based on the evidence before the Tribunal.
67. The purpose of the pleadings is to allow each party to know the case that the other party must meet. In an unfair dismissal claim, all that the Complainant must do is file a Complaint, and it is for the Respondent to prove the reasonableness of the dismissal in accordance with section 85 of the Code. Therefore, the Complainant is under no mandatory duty to file the Reply in an unfair dismissal claim, but it is helpful to outline the case. The purpose of the evidence, both written and oral, is to prove those elements that are in dispute based on the pleadings. Therefore, the case is demarcated, and lines are drawn in the proverbial sand, by virtue of the pleadings while the evidence is meant to resolve the dispute as to which side of the sand the Tribunal prefers to stand.
68. It is not every bit of evidence that would be relevant and throwing everything other than the kitchen sink at the other party is a practice that must be frowned upon since the pleadings would reveal what evidence is necessary to prove a particular fact in dispute. In this case, the Respondent attempted to bury the Complainant in a plethora of documentation that only served to unnecessarily complicate the relevant issues, and most of those documentation, including the documents in connection with the High School Complaint, were never relied on at trial. The Tribunal approved in paragraph 15 of its Final Award in *Qasim Yoba v. Peter Island (2000) Ltd.*³⁵ the proper practice adopted by the legal practitioner for the employer in that case by seeking leave to amplify evidence and then tendering evidence that had already been disclosed to the other party which was also included in the agreed trial bundle. The Respondent had ample opportunity to do this. In fact, paragraph 10 of the Fifth CMO gave the parties an opportunity to file an interlocutory application to amplify the evidence five (5) days before the trial date. The Respondent made no such application, and, therefore, never followed the procedure to tender the additionally disclosed documents that were included in the Trial Bundle. The consequence of this must be a substantial costs order

³⁵ n.30.

against the Respondent to express the Tribunal's concern with this practice and discourage its repetition. However, if the Complainant was not represented by a legal practitioner, the Tribunal would more likely further increase the costs to be awarded in a stinging rebuke for such outrageous conduct that could only have the effect of placing the legal profession in greater disrepute within the community as a whole.

69. The issue of punitive damages was fully explored and developed in the case of *Colleth Ranger-Vassel v. Main Sail BVI Ltd*³⁶ and a special carve out was further developed in the case of *Qasim Yoba v. Peter Island (2000) Ltd.*³⁷ which has come to be referred to as the *Qasim Yoba* reduction as shown in the case of *Marisa Marsha Wheatley v. The Attorney General*,³⁸ which was further discussed in *Devonni Christopher v. BVI Health Services Authority*,³⁹ where the legal practitioner for the BVI Health Services Authority successfully obtained a reduction of the punitive award. The BVI Health Services Authority had always maintained from their pleadings to their closing submissions that they recognized there was a procedural irregularity, but even if the procedural irregularities, which the Tribunal equated to Shakespeare's *The Comedy of Errors*, but without the humour, had not taken place they would have still terminated the employee and they would have been properly within their right to do so. It was for that reason that the BVI Health Services Authority was successful in getting the reduction, but in this case the Respondent has not in the pleadings or evidence claimed any procedural irregularity, the absence of which would still have resulted in the termination of the employee. In fact, considering the concession made in the oral arguments by the legal practitioner for the Respondent, one of the members of this panel who was a member of the panel in the *Qasim Yoba* case suggested to the legal practitioner for the Respondent that in the event there was an adverse finding against the Respondent he should seek to mitigate the issues to reduce the punitive award. The Respondent was given a further opportunity to file closing submissions which would allow for such mitigation to be made since it was not done during oral argument, but the Respondent failed to file any closing submissions. Therefore, there is nothing before the Tribunal in mitigation on behalf of the Respondent to allow the Tribunal to consider a *Qasim Yoba* reduction or any other reduction from the starting point of \$25,000.00.
70. Additionally, the Tribunal must express its concern for the conduct of the Respondent from the inception of these proceedings. The delays before this Tribunal were all attributed to the Respondent, so that it has taken nine (9) months for this matter to be completed before this Tribunal, which is an unacceptably protracted time for the resolution of a labour dispute. For this reason, a significantly higher than normal costs order against the Respondent would be justified.
71. Finally, the Respondent has not put forward any evidence or otherwise challenged the evidence by the Complainant in respect of the amount due to him. Therefore, the Tribunal will accept paragraph 14 of the Affidavit of Royston Grumble⁴⁰ which provides:

³⁶ n.23.

³⁷ n.30.

³⁸ BVILAT2019/027, unreported, delivered on 11 November 2021.

³⁹ n.3.

⁴⁰ n.11.

“At the very least the [sic] I suffered about \$2,704.00 in lost wages, when calculated on the basis of 8 hours multiplied by 52 days (two months) multiplied \$6.50 [sic]. I believe my severance would be about \$864.”

72. For this purpose, the Tribunal will add the possible compensation that the Complainant would have been awarded to the \$25,000.00 for a total of \$28,568.00 in punitive damages.

(iv) *Costs*

73. The Tribunal is empowered to award costs only for exceptional reasons pursuant to section 30(3) of the Code. LPR 47(3) provides a non-exhaustive list of those exceptional reasons which includes where the Tribunal awards punitive damages. For this reason, the Tribunal finds that there are exceptional reasons to award costs.

74. LPR 49 outlines the process for the assessment of costs and this would be a case where the maximum limit of costs would be \$5,250.00 based on LPR 49(5). The Tribunal is of the view that notwithstanding this limitation, as a result of the conduct of the Respondent that has already been noted in this Final Award, especially the manner in which the Respondent disclosed documents to the Complainant that would ordinarily require considerable time and expense, and the numerous delays and interlocutory applications for extensions of time, the Tribunal is not satisfied that the maximum limit of costs would be appropriate, and therefore, in accordance with LPR 49(2)(c) the Tribunal intends to allow an additional sum of \$2,250 as being appropriate in the circumstances.

75. The Tribunal also notes that it had afforded the Respondent the opportunity to have a portion of those costs paid by the Labour Commissioner before the Respondent was represented by a legal practitioner. However, the Third CMO removed the Labour Commissioner as a party to these proceedings for the purpose of costs and interest since the Respondent showed no interest in that course of action. For that reason, the Respondent must bear the full costs despite the inordinate delays by the Labour Commissioner that caused a protracted delay for the conclusion of this labour dispute.

76. Therefore, the Tribunal will award costs in the amount of \$7,500.00 to the Complainant requiring it to be paid within thirty (30) days as is the usual practice of the Tribunal.

(v) *Public Contracts*

77. In keeping with the case of *Colleth Ranger-Vassel v. Main Sail BVI Ltd*⁴¹ the Tribunal will not award pre-judgment interest on punitive sums awarded since the considerations that would warrant an award of pre-judgment interest would already be subsumed within the considerations for the punitive award. However, the Tribunal will ordinarily award post-judgment interest on the punitive sums and costs at the statutory rate of 5% per annum calculated at the daily rate. The purpose of the post-judgment interest can also be met under section 183 of the Code to guarantee that the punitive damages and costs are paid.

⁴¹ n.23.

78. In accordance with section 183 of the Code and the Schedule to the Code, where a party to a dispute before the Tribunal is a party to a public contract (a “**Public Contractor**”), other than the Government or a statutory body, and the Tribunal makes a compensation order or similar order against the Public Contractor, then the Labour Commissioner shall, failing payment by the public contractor within a reasonable time determined by the Tribunal, arrange for the payment of the compensation order out of the moneys at any time payable under the public contract and the amount so paid shall be deemed payments to the public contractor.
79. The Respondent would be a Public Contractor providing security services to the Government, based on a Cabinet Decision of 9 February 2022 as published in the Gazette for which the Tribunal has taken judicial notice, and for this reason the labour clauses outlined in the Schedule to the Code automatically apply to the Respondent. While the Tribunal was not asked by the Complainant to make any determination, and will, therefore, not make any determination as to whether the terms and conditions of employment, including the hours of work, of the Complainant were fair and reasonable, the Tribunal does have jurisdiction especially in this case where there was a concession by the legal practitioner for the Respondent that the wages between 28 March 2020 to 7 May 2020 were due to the Complainant.
80. For this reason, the Tribunal will make an order in place of its order for interest directing the Labour Commissioner to arrange payment of the punitive award and costs out of the moneys at any time payable to the Respondent if they are not paid by the deadline.

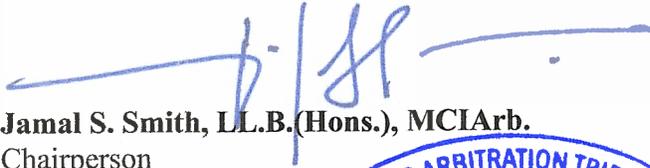
The Award

81. 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 \$28,568.00 on or before **Monday, 16 May 2022**, less all statutory deductions.
 - (c) The Respondent shall pay the costs of the Complainant assessed in the amount of \$7,500.00 on or before **Monday, 16 May 2022**.
 - (d) If the punitive sums and costs of these proceedings are not paid on or before Monday, 16 May 2022 the Labour Commissioner shall cause the punitive award and costs to be paid to the Complainant out of moneys at any time payable to the Respondent pursuant to section 183 of the Labour Code, 2010 and Clause 10 of the Schedule to the Labour Code, 2010.
 - (e) The Secretary to the Tribunal shall cause a copy of this Final Award to be served on the Labour Commissioner.

Post-Script: Any person who is dissatisfied with this Final Award may appeal to the High Court on any question of law on or before **Friday, 13 May 2022.**

By Order
Labour Arbitration Tribunal

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


Jamal S. Smith, LL.B.(Hons.), MCI Arb.
Chairperson


Benedicta P.T. Samuels, LLB(Hons), LLM, Ph.D.
Member on the recommendation of the Complainant




Yvonne Crabbe
Member on the Recommendation of the Respondent