



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

KLAYTO SUTHERLAND

COMPLAINANT

AND

PENN MEDICAL CENTER INC (a partnership)

RESPONDENT

BEFORE:

Jamal S. Smith, Chairperson
Yvonne Crabbe, Member on the recommendation of the Complainant
Dr. Benedicta P.T. Samuels, Member on the recommendation of the Respondent

IN ATTENDANCE:

- (1) Klayto Sutherland, in person
- (2) Penn Medical Center Inc, represented by Dr. Mitchel Penn and Mrs. Faye Smith Penn
- (3) Nelson Samuel holding for David Penn, legal practitioner for the Respondent, instructed by David A. Penn & Co.

ADDITIONALLY:

- (4) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

FINAL AWARD

14 June 2022; 28 July 2022

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A. INTRODUCTION

1. This labour dispute arises out of a complaint against Penn Medical Center Inc (the “**Respondent**”) filed by Klayto Sutherland (the “**Complainant**”) with the Labour Commissioner on 28 January 2021 (the “**Complaint**”). The Complaint was filed as a result of a letter of termination dated 10 January 2021 (the “**Termination Letter**”) which reads as follows:

“This is to inform you that your employment with Penn Medical Center has been terminated effective immediately. At this critical period of contract negotiations, we have come to the point of unreconcilable differences. The board of directors reviewed your case in detail and decided to terminate you on account of misbehavior toward management.

Despite several requests that you follow all directives given to you by senior management, you have done the contrary. You have been warned of:

1. Leaving the clinic before all patients are processed.
2. Leaving the clinic without the knowledge of the physicians on duty
3. Sending threatening and intimidating communications to the female clinic manager.
4. Shirking responsibilities and duties.
5. Unauthorized freelance work outside of Penn Medical Center.

In healthcare, it is important that patient safety be placed above all other interests. Your misbehavior cannot go without the strongest censure. You are hereby restricted from entering the Penn Medical Center facility for any reason. Failure to comply will result in legal action.

Sincerely,

Dr. Mitchel E Penn
Director”

2. This is the ultimate tragedy of a successful doctor, Dr. Mitchel Penn, and his wife, Mrs. Faye Smith-Penn, who manages his medical practice and on the path to success there is strewn the casualties of their partnership reminiscent of the “toxic relationship”, to borrow a

phrase used by both parties, that developed throughout Shakespeare's *Macbeth*. As Lady Macbeth becomes racked with guilt from the crimes she and her husband have committed, she sleepwalks through the castle and while in her trance she tries to wash off the imaginary bloodstains while revealing all then says:

“To bed, to bed! there's knocking at the gate: come, come, come, come, give me your hand. What's done cannot be undone.—To bed, to bed, to bed!”

3. The Complainant's allegations can be summarized based on the summary filed with his Complaint as follows:
 - (a) The Respondent made a false allegation that he made threats to the “female clinic manager”.
 - (b) The Respondent made a false allegation that he was often absent from work, or work station and not completing patients check. Even if that was the case, the Complainant claims that there was no written warning in accordance with section 103 of the Labour Code, 2010 (the “**Code**”).¹
 - (c) There is an environment of victimization, marginalization, grave indifference toward employees and abuse by the Respondent. He claims that the Respondent has the highest attrition rate for clinical staff in the British Virgin Islands having lost six (6) pharmacists in four (4) years and four (4) nurses in two (2) years either through the staff walking off the job, resigning after a short tenure at the organization or being fired. This, he suggests, demonstrates a pattern with respect to his dismissal.
 - (d) He further says that stating that the Complainant was freelancing is impeachable and made knowing it not to be true.
4. In this award reference will be made to an agreed trial bundle filed by the Respondent on 13 May 2022 (the “**Trial Bundle**”). The Trial Bundle contains all the documents and legal arguments considered by the Tribunal, unless otherwise expressly stated in this Final Award. In particular, the Trial Bundle failed to include any of the Case Management Orders in this matter, but this Final Award will make reference to those Case Management Orders and documents and evidence referred to in those Case Management Orders.
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, 2001,² 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. 4 of 2010.

² 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 06 October 2021,³ 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*,⁴ and expressed its displeasure with the failure of the Labour Commissioner to deal with labour disputes in a timely manner.
7. On 22 October 2021 the Minister referred the Complaint to the Tribunal pursuant to section 28(1) of the Code.⁵
8. On 28 October 2021 the Secretary to the Tribunal issued the Notice of Case Management Hearing scheduling the first Case Management Hearing for 02 December 2021 and giving the timeline for filing the pleadings and evidence in this matter.⁶
9. On 02 December 2021 the Chairperson of the Tribunal issued a Case Management Order (the “**First CMO**”)⁷ which noted that the Minister had appointed Yvonne Crabbe on the recommendation of the Complainant and Dancia Penn, OBE, QC on the recommendation of the Respondent and neither party raised any objections to the appointments. The Case Management Hearing had to be adjourned because the Respondent effectively filed the Response⁸ and evidence on the day of the hearing contrary to the deadline provided in the Notice of Case Management Hearing, and the Tribunal ordered costs against the Respondent in the amount of \$500.00. In accordance with LPR 20(2) the Response was accompanied by the Affidavit of Mitchel E. Penn⁹ and the Affidavit of Faye Smith-Penn¹⁰ which was supported by a Certificate of Exhibits FSP1 – 12.¹¹
10. According to the Response, a monthly salary of \$3,200.00 was agreed between the Complainant and the Respondent but denied that any monies were owed to the Complainant. The Respondent claimed that the Complainant was habitually absent when needed, left work before closing, or before all the patients were attended, as well as took long and extended lunch breaks. The Respondent also denied any violation of the Criminal Code, 1997, and it should be noted that the Tribunal is not the proper forum to adjudicate any violation of the Criminal Code, 1997. The Respondent alleged that the Complainant had a one (1) hour per day lunch break and was not required to take just 15 minutes for lunch

³ This was not included in the Trial Bundle.

⁴ BVILAT2021/008, unreported, delivered on 18 January 2022.

⁵ TAB 2 of the Trial Bundle at p. 88.

⁶ This was not included in the Trial Bundle but was referred to in the First CMO.

⁷ This was not included in the Trial Bundle.

⁸ TAB 3 of the Trial Bundle at pp. 87 – 97.

⁹ TAB 3 of the Trial Bundle at pp. 98 – 105.

¹⁰ TAB 3 of the Trial Bundle at pp. 106 – 114.

¹¹ TAB 3 of the Trial Bundle at pp. 115 – 131.

and deny engaging in any kinds of “Skulduggery”, underhand, unscrupulous or dishonest behaviour. The Respondent maintained that the Complainant was engaged in freelance work, and also claimed that the Complainant was very disrespectful to the Respondent’s Managing Director, Faye Smith-Penn, shouting at her in the Clinic, in front of other staff members and attending clientele of the Clinic, including calling Mrs. Smith-Penn at home, late in the night in a tyrannical rant. Additionally, the Respondent was unable to reconcile changes to the contract of employment which the Complainant wanted, in particular to pay the cost of his work permit where in the past they paid 50% of the cost of the work permit. The Respondent also denied that there is any pattern of repressive action against employees as claimed by the Complainant. The Respondent claims that they never denied any staff members’ request for Personal Protective Equipment (“PPE”), and it was the Complainant’s duty to ensure that stocks remained at the ready for the operation of the Clinic.

11. The Respondent also alleges that the Complainant was employed by the Respondent after being terminated from Bougainvillea Clinic. The Respondent was asked to give the Complainant a chance as he had recently been terminated from his previous place of employment. However, within six (6) months of employing the Complainant he began to display serious unprofessional behaviour and misconduct. He refused to take instructions from females that were in authority over him. He had constant conflict with the Managing Director, Faye Smith-Penn. He would challenge her authority. He would utterly disregard her organizational or operating instructions. He would be rude and belligerent, constantly being confrontational with the Managing Director.
12. According to the Respondent, the Complainant was repeatedly warned about his absences from work and his tardiness. This was also communicated to the Complainant in an email from the Managing Director dated 30 May 2020.
13. A serious allegation was made against the Complainant that whenever the Complainant failed to requisition the necessary medical supplies, he would take from the supplies of the associate medical practitioners who have an affiliate relationship with the Respondent and would obtain their own supplies. In an email from the Complainant dated 5 May 2020 he acknowledges taking the said supplies from the stock of one of the affiliated medical practitioners.
14. Another serious allegation was made against the Complainant that he would make personal purchases on the Respondent’s accounts with vendors without the knowledge or authorization of the management. He was admonished for this conduct. He would also copy external persons on internal emails which gave the Managing Director cause to admonish him. The working relationship was described as a “toxic relationship” and it was necessary to terminate the Complainant with immediate effect.
15. The Respondent claims to have summarily terminated the Complainant pursuant to section 101 of the Code. However, it further went on to claim that the “last straw” came as a result of the increased threats and attacks on the Managing Director during the week prior to the termination. The Managing Director recommended the suspension of the Complainant for a period of two (2) days without pay. The Respondent claims that it does not have the time to

be constantly dealing with the unnecessary, seemingly perennial, distracting and unprofessional conduct on an ongoing basis, and, therefore, the decision was taken to terminate the Complainant.

16. In accordance with the First CMO, the Complainant filed a Reply to the Respondent's Response on 24 January 2022 and in accordance with LPR 23(2) it was accompanied by separate responses to the Affidavit of Mitchel E. Penn and the Affidavit of Faye Smith-Penn. The Reply and each of the separate responses were all sworn before the Secretary to the Tribunal pursuant to LPR 14(7), and, therefore, complies with the requirements of the Evidence Act, 2006.¹² In effect the Complainant denied all the allegations made by the Respondent. He also explained the situation with respect to using the Respondent's account to order PPE and the allegation about the use of supplies from one of the overseas doctors affiliated with the Respondent. Additionally, he refuted the allegation that he was terminated from Bougainvillea Clinic and exhibited as "**KS-1**" a copy of a letter from Bougainvillea Clinic dated 08 April 2019 accepting his resignation with immediate effect.
17. By the first adjourned case management hearing on 27 January 2022 the Complainant had filed an objection to the arbitrator appointed on the recommendation of the Respondent, as well as challenging certain evidence filed by the Respondent and requesting the disclosure of his attendance records. The nature of those allegations made against the appointed arbitrator who responded in writing as part of a letter of resignation, prompted another Case Management Order (the "**Second CMO**")¹³ which provided for the further adjournment of the case management hearing and raised grave concerns by the Chairperson who ordered costs against the Complainant in the amount of \$500.00 and gave directions for the hearing of the Complainant's applications.
18. The Second CMO required the Respondent to file a response to the Complainant's applications on or before Friday, 11 February 2022, but this was not done until 25 February 2022 by virtue of the Second Affidavit of Faye Smith-Penn,¹⁴ which was accompanied by a Certificate of Exhibits "**FSP-13**" to "**FSP-27**".¹⁵ It is important to reproduce paragraphs 5 – 7 of the Affidavit of Mrs. Smith-Penn as follows:

“5. Further to the letter in response from our Attorney, Mr. David A. Penn to Mr. Sutherland's request for a copy of his attendance record while working at Penn Medical, Mr. Sutherland is very much aware that he, nor any other employee at Penn Medical Center were ever required to record their every arrival to and departure from the Clinic.

6. While there are video cameras located around the premises of Penn Medical Center for security purposes, these recording are on a Ninety (90) day recording loop. Which means that the recordings are only stored electronically for 90 days, after which they are recorded over.

¹² No. 15 of 2006.

¹³ This was not included in the Trial Bundle.

¹⁴ TAB 5 of the Trial Bundle at pp. 208 – 2015.

¹⁵ TAB 5 of the Trial Bundle at pp. 216 – 237.

7. Accordingly, all recordings which were recorded during the time of Mr. Sutherland employment at Penn Medical Center have long been recorded over.”
19. Although the Second Affidavit of Faye Smith-Penn was filed late, the Respondent filed an interlocutory application for an extension of time on 25 April 2022 which was supported by the Third Affidavit of Faye Smith-Penn. She indicated that her legal practitioner suffered a computer crash and was unable to perform his duties as a legal practitioner while his network was down.
20. The Second CMO had adjourned the case management hearing to 10 March 2022 at 10 a.m. and it became necessary to alter the start time of that hearing to 1 p.m. which was done by a further case management order made on 11 February 2022 (the “**Third CMO**”)¹⁶ pursuant to LPR 25 after consulting with the parties.
21. The Respondent filed submissions on 09 March 2022, the day before the adjourned date for the case management hearing.
22. During the further adjourned case management hearing on 10 March 2022 the Chairperson issued another case management order (the “**Fourth CMO**”)¹⁷ to, among other things, adjourn the hearing of the Complainant’s applications to the Pre-Trial Hearing which was fixed for 12 April 2022.
23. On 12 April 2022 the full panel of the Tribunal was convened to hear the applications, but the Respondent had failed to comply with the Fourth CMO so that the Tribunal did not have any bundle before it and the Tribunal had to use an electronic copy of the file provided by the Secretary to the Tribunal for the purpose of disposing of the extant applications. After hearing both parties, and after considering the evidence, in particular paragraphs 5 – 7 of the Second Affidavit of Faye Smith-Penn which resulted in the Complainant abandoning the request for the disclosure of the attendance record, the Tribunal issued another case management order (the “**Fifth CMO**”)¹⁸ which, among other things, gave the Complainant leave to file additional evidence and the Respondent leave to file evidence in reply as well as provided that:
- “6. The Respondent shall on or before **Friday, 22 April 2022** disclose to the Complainant the names of patients who are mentioned in the Affidavit of Faye Smith-Penn upon the Complainant giving an undertaking not to disclose those names to third parties or otherwise contacting or interfering with those patients and upon making the disclosure to the Complainant the Respondent shall on or before **Wednesday, 27 April 2022** file any supplemental evidence with anonymized names of patients being referred to.

¹⁶ This was not included in the Trial Bundle.

¹⁷ This was not included in the Trial Bundle.

¹⁸ This was not included in the Trial Bundle.

7. Unless the Respondent files the supplemental evidence referred to in paragraph 6 hereof, the references to any third party whose name is not anonymized or otherwise fully disclosed in evidence shall be struck out as being hearsay.”
24. In accordance with the Fifth CMO the Complainant filed the “Witness Statement of Doreen Bucknor”¹⁹ and the “Witness Statement of Terry-Ann Sutherland”²⁰ on 20 April 2022. Although a witness statement is not permitted under the LPR, they both comply with the requirements for evidence under LPR 33(1), and they are deemed to be duly sworn affidavits for the purposes of these proceedings.
25. On 11 May 2022 the Respondent filed the Fourth Affidavit of Faye Smith-Penn in response to the Affidavits of Terry-Ann Sutherland and Doreen Bucknor. The deadline for filing the additional evidence in accordance with the Fifth CMO was 27 April 2022, and so the additional evidence was gravely out of time without any explanation as to the reason for the delay. The Respondent also filed no supplemental evidence with anonymized names in accordance with the Fifth CMO and, therefore, all references to third parties in the Respondent’s evidence has been struck out as hearsay evidence and will not be considered in this Final Award.
26. Neither party filed any skeleton arguments in accordance with the Third CMO.
27. In accordance with the Third CMO the trial was to take place on 24 March 2022, but on 17 May 2022 the Respondent filed a letter which advised the Tribunal that the legal practitioner for the Respondent will be involved in a trial before the High Court which had been rescheduled to Tuesday, 24 May 2022. The legal practitioner for the Respondent was unable to confirm when he first became aware of the rescheduled trial date by the High Court to assist the Tribunal in ascertaining whether he acted with promptitude. The Tribunal was not satisfied that he acted with any promptitude in this regard, although finding that he had a good reason for requesting the adjournment. For that reason, any prejudice suffered by the Respondent was of their own making considering the lack of promptitude, but the prejudice suffered by the Complainant could have been compensated in costs and the Tribunal determined that there were exceptional reasons to award costs in accordance with LPR 47(3)(d). The Tribunal noted that the Complainant had his witnesses on call and he was present for the trial, so that costs were summarily assessed for wasted preparation for this trial caused by the adjournment and the Complainant would be entitled to costs thrown away for the entire day of the trial that both he and his witnesses, who were on call, would have incurred in the amount of \$4,000.00. The Tribunal adjourned the trial to 14 June 2022.
28. The trial of this dispute took place on 14 June 2022 during which the full panel of the Tribunal heard the oral evidence and closing arguments from both parties. 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

¹⁹ TAB 6 of the Trial Bundle at pp. 238 - 241.

²⁰ TAB 8 of the Trial Bundle at pp. 278 – 279.

²¹ S.I. No. 99 of 2020.

accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.

29. The Secretary to the Tribunal issued a Notice of Decision Hearing on 21 July 2022 fixing a date for the delivery of the decision to 28 July 2022 at 10:00 a.m. The Tribunal now gives the decision for its final award.

C. THE EVIDENCE

(a) The Evidence of Klayto Sutherland

30. The Complainant's evidence did not deviate from his pleadings even under rigorous cross-examination and, therefore, it is not necessary to recount his evidence in full, except that under cross-examination he accepted that he may have been absent from work at most four (4) times. However, one critical point arose from cross-examination where the legal practitioner for the Respondent sought to question him about whether he was working at Hotel Castle Maria during his employment with the Respondent, an allegation the Complainant vigorously denied.
31. During cross-examination an extended period of time was taken to go through numerous electronic messages between himself and the Respondent's Managing Director, Faye Smith-Penn.
32. 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 Terry-Ann Sutherland

33. According to the Witness Statement of Terry-Ann Sutherland, she is the wife of the Complainant and to the best of her knowledge he was not employed by anyone other than the Respondent.
34. She claims to also be a registered nurse employed at the D. Orlando Smith Hospital during the time her husband was employed by the Respondent. For most of the time while the Complainant worked for the Respondent, she worked the day shift from 7 a.m. to 7 p.m. and she would take her husband to work prior to signing into work. On cross-examination she qualified this statement with "most times", but indicated that she would drop him off at the Respondent's premises or out by RiteWay Food Market's nearby store, part of a local chain of supermarkets. She further confirmed under cross-examination that the Complainant would go to the back to get a key to get in the building.
35. According to her Witness Statement, during the latter part of the Complainant's employment with the Respondent, her husband would charter a taxi to take the children to

daycare and get to work or she would take him to work usually before 8 – 8:20 a.m. Under cross-examination when asked if she knew that her husband arrived to work late, she said that would be surprised because she dropped him off before 7 a.m.

36. She indicated that she knew of only two (2) occasions when her husband was compelled to report that he was unable to attend work. First, on 03 March 2020 for the birth of their second child when she suffered minor post-partem complications and he stayed with her. The second occasion arose from a medical emergency which forced him to stay home to care for the children since the daycare was closed due to COVID-19 restrictions.
37. Having had the opportunity to review Mrs. Sutherland’s written evidence and to observe her demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of her account, the consistency between her written and oral evidence under oath, as well as the internal consistency of her written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds her to have been a credible witness, but must address certain inconsistencies between her evidence and the evidence of Doreen Bucknor as well as the plausibility of certain aspects of her evidence in light of the evidence of the Complainant.

(c) *The Evidence of Doreen Bucknor*

38. According to the Witness Statement of Doreen Bucknor she is a registered pharmacist in Jamaica, Anguilla and the Virgin Islands. She said she became acquainted with the Complainant in September 2019 when he joined the Respondent’s staff as a nurse. She claimed he exemplified a high degree of enthusiasm and dedication on many occasions to external and internal customers alike. She described him as “dependable, thorough, a stickler for perfection and prided himself in a job well done.”
39. She would reach work at approximately 8:15 a.m. and most times she would meet the Complainant there, especially when he had to do dressings. She also never observed him operating a motor vehicle. He would normally leave work accompanied by other employees of the Respondent usually after 5 p.m. and sometimes she would also give him a lift home. The pharmacy staff were the last to leave work apart from the janitor who did the cleaning. She could only recall two (2) occasions when the Complainant was late for work.
40. She identified three entrances to the Respondent’s premises, including one via the pharmacy. She claimed to have been able to observe users of the Pharmacy’s entrance to enter or leave daily. She also indicated that there were surveillance cameras inside and outside the building to observe when anyone entering or leaving the establishment.
41. She claimed that most days the Complainant didn’t take a lunch break and would purchase a light snack and drink at the pharmacy. Sometimes he would go across to the nearby store of RiteWay Food Market, a local supermarket chain. In the event she was going into town she indicated that she would also inform him in the event she could pick up something for him to eat.
42. On two (2) occasions the Complainant told Ms. Bucknor why he reported to work late. One

was due to the birth of his child and the other was when his wife was being quarantined due to her exposure to COVID-19 patients. It is with respect to this evidence that the Tribunal must consider how it will approach that evidence in light of the evidence of Mrs. Sutherland.

43. She confirmed that she had no knowledge of any attendance record being kept by the Respondent.
44. During cross examination, she indicated that although the PPE were in the pharmacy, she did not sell PPE but an employee, Ms. Winifred Motilall (referred to at paragraph 12 of the Second Affidavit of Faye Smith-Penn) oversaw selling the PPE and she didn't know who she sold them to. Also, she confirmed that she didn't purchase PPE from Ms. Motilall as she believed they were too expensive. On questioning by the Tribunal she revealed that Ms. Motilall was the janitor and she didn't know why she was assigned to the task of selling PPE.
45. There was some extensive cross examination about Ms. Bucknor's "napping" habits to which she confirmed that during her lunch break her head would be down and she would not be able to see who was coming and going at that time.
46. Having had the opportunity to review Ms. Bucknor's written evidence and to observe her demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of her account, the consistency between her written and oral evidence under oath, as well as the internal consistency of her written and oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds her to have been a credible witness.

(d) The Evidence of Faye Smith-Penn

47. During cross-examination Mrs. Smith-Penn indicated to the Tribunal that she kept attendance records in Excel spreadsheets. When pressed on this she indicated that her legal practitioner had put the statements in the Second Affidavit of Faye Smith-Penn. However, she claimed that there were several meetings with Mr. Sutherland and herself confirming the attendance issues. The video recordings were for security reasons to protect the safety of patients and employees. It also serves a dual purpose, but it is not a recording mechanism or have biometric features integrated into it.
48. This is a significant departure from the Second Affidavit of Faye Smith-Penn,²² and a grave concern to the Tribunal. It was because of her previous evidence that caused the Complainant to withdraw his application for the attendance records and the reason the Tribunal proceeded in the manner that it did in its Fifth CMO. This would be material evidence upon which these proceedings could have been compromised, and it is either that the evidence in the Second Affidavit of Faye Smith-Penn is false or the oral evidence given under oath before the Tribunal is false. In either case, in accordance with LPR 33(13), the Tribunal must direct the Secretary to the Tribunal to refer this matter to the Commissioner

²² TAB 5 of the Trial Bundle at pp. 208 – 2015.

of Police to investigate the breach of section 110(1) of the Criminal Code, 1997,²³ by Faye Smith-Penn and possibly by the legal practitioner for the Respondent.

49. Considering the obvious inconsistency between the written and oral evidence of Faye Smith-Penn, the Tribunal does not accept her as a credible witness. In doing so, it is now open to this Tribunal to disregard the portion of the evidence that is tainted by the inconsistency by accepting some of her evidence, or consider all the evidence tainted as a result of the inconsistency by disregarding all of her evidence, or disregard the inconsistency as being trivial and accept all of her evidence. Considering the seriousness of what transpired, that it was not merely about previous inconsistent statements but a calculated decision to deceive this Tribunal and frustrate the administration of justice, either by her personally or at the behest of her legal practitioner, it is necessary to disregard her evidence in its entirety.

(e) The Evidence of Dr. Mitchel Penn

50. According to the Affidavit of Mitchel E. Penn, he is a director of the Respondent whose offices are located at No. 104, 1st Floor, Rodus Building, Road Reef Marina, Tortola. He claimed that the Complainant was terminated from Bougainvillea Clinic and a colleague asked him to “give him a chance as he was in need of employment”. However, under cross-examination the language used was a little different, so that the Complainant may have been forced to leave.
51. In his Affidavit he further stated that when they hired the Complainant they were looking for a nurse and thought that it would have been a good opportunity, but turned out to be an enormous mistake. This is reminiscent of Banquo’s famous statement in Act 1, Scene 3 of *Macbeth* where he said:

“If you can look into the seeds of time,
And say which grain will grow and which will not.”

52. Dr. Penn went on to indicate that the Complainant commenced working for the Respondent at the beginning of September 2019. Within six (6) months the Complainant began to display serious unprofessional behaviour and misconduct. In particular, he identified a conflict with the Managing Director. At paragraph 11 of the Affidavit he says:

“Of even greater concern to me, and alarmingly so, was Mr. Sutherland being rude and belligerent with my wife and being in constant confrontation with her.”

53. This was a distraction to Dr. Penn as a practicing physician.
54. He claimed that the Complainant would regularly arrive to work late, take long lunches, and he would also leave the Clinic early. During regular working hours, the Complainant would just go missing. Under cross-examination, he admitted that none of these were documented “in print” and he also confirmed that he reviewed the surveillance data to know that his

²³ No. 1 of 1997.

statements were accurate. He also referred to an e-mail dated 30 May 2020 where the Respondent's Managing Director, Faye Smith-Penn, admonished the Complainant for his absences and tardiness.

55. After going into further details of the relationship between the Complainant and the Respondent's Managing Director, Faye Smith-Penn, he said at paragraph 29 of his Affidavit:

“Management had absolutely no choice but to terminate the toxic employment relation and contract with Mr. Sutherland with immediate effect.”

56. To that end, he terminated Mr. Sutherland by letter dated 10 January 2021 outlining the issues which management had been writing to him about for several months. He claimed that Mr. Sutherland was warned on numerous occasions of this behaviour and his repeated and continuous absences from the job.

57. While an Affidavit is not the place for legal arguments which should be reserved for skeleton arguments and oral submissions, as neither party produced skeleton arguments and both parties are guilty of conflating evidence with legal arguments, it is noted that he relied on section 101 of the Code to justify the summary termination of the Complainant, and also relying on section 90(2) of the Code so that notice was not required when the employer was entitled to summarily dismiss an employee.

58. The Respondent claimed that the “last straw” came as a result of “increased threats and attacks on the Managing Director, during the week prior to the termination”. The Managing Director recommended that the Complainant be suspended from work for a period of two (2) days without pay, but he chose to terminate his employment to avoid any harm to patients or disruption of services due to the Complainant's character defects as he saw them.

59. In his Affidavit, at paragraph 2, it referred to the Complainant as “the young man” and at paragraph 32 he took it a step further by saying “This seriously made me wonder, if the young man was OK”. Under cross-examination he was generally combative with the Complainant, to the point the Tribunal had to interject on numerous occasions to have him answer the questions, but he did not deviate from his written evidence.

60. During the proceedings Dr. Penn could be observed holding his wife, Faye Smith-Penn, in a very close embrace or just merely holding her hand in support, especially during the oral evidence of the Complainant. It demonstrates a very sincere love and devotion to his wife. However, he was also admonished by the Tribunal for giving assistance to her while she was giving her evidence as it was clearly his intention to help his wife through what he must have perceived as a very stressful ordeal for her. No mala fides is attributed to Dr. Penn for his loving interventions on his wife's behalf.

61. Having had the opportunity to review Dr. Penn's written evidence and to observe his demeanour, candour and responsiveness during cross-examination and re-examination, as well as considering the inherent plausibility of his account, the consistency between his written and oral evidence under oath, as well as the internal consistency of his written and

oral evidence, the consistency of such evidence with other evidence before the Tribunal, the Tribunal finds him to have been a credible witness.

D. THE TRIBUNAL'S ANALYSIS

62. It is common ground that the Complainant was summarily dismissed pursuant to section 101 of the Code.
63. This Tribunal, however, has considered the application of section 101 of the Code in its decision in *Qasim Yoba v. Peter Island (2000) Ltd.*²⁴ where this Tribunal, comprised of two (2) of the three (3) members of this panel said at paragraph 76:

“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.”

64. Furthermore, this Tribunal comprised of all three (3) members of this panel further considered section 101 of the Code in its recent decision in *Royston Grumble v. Top Priority Security Services Limited*,²⁵ where in considering the pre-Code case of *Elphina Abraham v. Sunny Caribbee Herbal and Spice Company Limited*,²⁶ concluded at paragraph 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 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*,²⁷ 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

²⁴ BVILAT2017/021, unreported, delivered on 15 July 2021.

²⁵ BVILAT2021/018, delivered on 14 April 2022.

²⁶ BVIHCV2007/0122, unreported, delivered on 29 April 2010.

²⁷ n.**Error! Bookmark not defined.**

reasonable.”

65. Therefore, the first step is to determine the real reason for the termination and then determine whether those reasons would fall within the ambit of section 101 of the Code as a matter of fact and degree. Even if they do fall within the ambit of section 101 of the Code, the employer must still act reasonably as to the way the employee is terminated. This follows the procedure for coming to its final award outlined in LPR 45(3).
66. The precise reason for the dismissal was provided in the Termination Letter in accordance with section 101(3) of the Code and the Tribunal will grant an estoppel against any employer who seeks to introduce any new reasons or clarifications of the precise reason for the dismissal.
67. In assessing misconduct within section 101 of the Code it is important to understand that the qualifier to that misconduct is “serious”. Therefore, while it would be a valid and fair reason to terminate an employee for misconduct by, for example, giving notice, the Tribunal agrees with the Respondent that section 90(2) of the Code does not require notice when an employer is entitled to summarily dismiss an employee. It should also be noted that there are two (2) separate and distinct summary dismissal processes under the Code, notably under section 101 and also under section 103. The process under section 103 was dealt with by the Tribunal with a differently constituted panel in the case of *Colleth Ranger-Vassel v. Main Sail BVI Ltd*²⁸ but as this case deals with summary dismissal pursuant to section 101 of the Code, that case does not apply.
68. The Tribunal accepts that the reasons outlined in the Termination Letter would amount to misconduct which would be valid and fair reasons for termination, but the Tribunal must examine, whether as a matter of fact and degree any of those reasons would be “serious misconduct”. The Tribunal also notes that there is no formal contract which could determine any matter that is peculiar to this employer that would amount to “serious misconduct”.
69. As it relates to the misbehaviour towards management, the Tribunal accepts as a matter of fact that the Complainant called the Respondent’s Managing Director, Faye Smith-Penn, at her home. However, her evidence was that the call was in the presence of her son who was not called as a witness to support her characterization of the Complainant’s behaviour over the telephone. Additionally, she claims certain conduct by the Complainant was witnessed by a Labour Officer, but no attempts were made to summon that Labour Officer to support that evidence. Having already found that Mrs. Smith-Penn is not a credible witness, and without any corroborating evidence the Tribunal does not accept that the behaviour of the Complainant was of the “degree” that warrants a characterization of serious misconduct. It was accepted by both parties that there was a “toxic relationship”, but that does not in itself create serious misconduct. The toxic relationship must be detrimental to the business. The evidence of Dr. Mitchel Penn at paragraph 38 of his Affidavit is that it “can potentially result in patient harm, and disruption of services”. There is no evidence of the patient harm or the disruption of services as a result of the “toxic relationship”. This evidence would

²⁸ BVILAT2020/0002, unreported, delivered on 15 July 2021.

have been critical to support a finding of fact that the misbehaviour towards management rose to the level of “serious misconduct” and was not just merely “misconduct”.

70. The other reasons outlined in the Termination Letter rely on the fact that the Complainant had “been warned”. This suggests that there were prior notifications about the alleged misconduct to which the Complainant could have responded. It is, therefore, necessary to examine each of those reasons individually.
71. The first reason for which it is alleged that the Complainant had been warned, is “Leaving the clinic before all patients are processed”. There is no evidence that the Respondent gave the Complainant any such warning, but more egregiously there is no evidence that the Respondent complied with section 45(1)(b) of the Code to provide a written statement of the regular hours of work and rest periods against which this may be assessed, because this reason does not say that he did not leave at the end of his required working period, and in the absence of any attendance records it would be impossible to assess whether the Complainant had worked the minimum standard of hours in accordance with sections 47 and 48 of the Code. Additionally, there is no means of determining whether section 49(1) of the Code applies to the time which the Complainant worked due to the lack of record keeping by the Respondent, or whether he would have been exempt from premium pay by virtue of section 49(4) of the Code because he was adequately compensated or held a supervisory or management position. In the absence of those records, the Tribunal finds that the Respondent has failed to discharge the burden of proof required by section 85 of the Code with respect to this reason for dismissal.
72. The second reason for which it is alleged that the Complainant had been warned, is “Leaving the clinic without the knowledge of the physicians on duty”. Although extensive cross-examination dealt with the electronic messages between the Complainant and the Respondent’s Managing Director showing the possibility of tardiness, none of those correspondences amount to any warning. Despite this, however, for this to amount to “serious misconduct” and not mere “misconduct” there must be some written policy established by the Respondent and adequately communicated to the Complainant that makes it clear that if he left the clinic without the knowledge of the physicians on duty during normal working hours excluding meal intervals that would amount to serious misconduct. Or it may be that an employer requires an employee to state that he or she is leaving the workplace at the end of the day or before a meal interval, but in order for a failure to do so to amount to serious misconduct, it must be made clear to the employee that due to the nature of the business failure to do so will be detrimental to the business and will amount to serious misconduct. In the absence of such policies, the Tribunal finds that the Respondent has failed to discharge the burden of proof required by section 85 of the Code with respect to this reason for dismissal.
73. The third reason for which it is alleged that the Complainant had been warned, is “Sending threatening and intimidating communications to the female clinic manager”. In respect of Dr. Penn’s reliance on an e-mail dated 30 May 2020 which was exhibited to the Affidavit of Faye Smith-Penn as “FSP-5”,²⁹ and over 7 months before the Termination Letter, it shows a

²⁹ TAB 3 of the Trial Bundle at p. 121.

rather incoherent reference to previous discussions “not in much long detail” concerning the Complainant’s absence and tardiness. There is no evidence of anything “threatening” and what may be considered “intimidating” took place some 7 months before the Termination Letter and while this no doubt would amount to “serious misconduct” and is directly related to the employment contract, there is no evidence that it “has a detrimental effect on the business” as required by section 101(2). Although Dr. Penn spoke of incidents occurring the week before the Termination Letter, the Respondent failed to discharge the burden of proof required by section 85 of the Code with respect to any such incidents of threatening and intimidating communications.

74. The fourth reason for which it is alleged that the Complainant had been warned, is “Shirking responsibilities and duties”. This appears the most trivial of reasons to light the cannon loaded with the nuclear warhead of section 101 of the Code, the most dreadful weapon in the armoury of an employer. The summary dismissal process under section 103(5) – (7) of the Code directly relates to an employee who is failing to perform his or her duties in a satisfactory manner after the probationary period. It requires an understanding of section 46(2) of the Code which specifically requires that an employee be given reasonable training and general orientation in the duties and responsibilities of the position for which he or she was hired. Therefore, to terminate an employee for unsatisfactory performance, and without deciding this point, unless there is some written policy established by the employer and adequately communicated to the employee that a specific performance issue would amount to serious misconduct, it would make nonsense of the clear intention and purpose of section 103(5) – (7) of the Code. Therefore, shirking responsibilities and duties cannot, in this case, amount to “serious misconduct”.
75. The final reason for which it is alleged that the Complainant had been warned, is “Unauthorized freelance work outside of Penn Medical Center”. As the Respondent presented no policy that would govern employees within their establishment when embarking on “freelance work” or prohibiting “freelance work”, it is difficult to see how this would amount to “serious misconduct”. Despite this, the Tribunal finds that the Respondent has failed to discharge the burden of proof required by section 85 of the Code with respect to any allegation that the Respondent was freelancing.
76. As the Tribunal has found, as a matter of fact, that none of the grounds for which the Complainant was terminated were proven by the Respondent, there is no need for the Tribunal to further examine the reasonableness of the Respondent’s conduct since that would put an end to the question. However, for the avoidance of doubt the Tribunal will also consider the fairness of the decision, which requires the Respondent to have carried out an investigation into the matters for which the Complainant was terminated. There was no evidence that an investigation was conducted, as the recommendation was made by the Respondent’s Managing Director to suspend the Complainant for two (2) days, which would have complied with section 102 of the Code and would have lead to compliance with section 103 of the Code should termination later be deemed necessary. Instead, Dr. Penn decided to terminate the Complainant without giving him an opportunity to defend himself. Additionally, the Complainant’s request for access to his employment record, which included his attendance record, was denied by the Respondent in the most recalcitrant manner. For all these reasons, the Tribunal finds that the Complainant was unfairly

dismissed.

77. Where the Tribunal finds that there has been unfair dismissal, the question of remedies arises in accordance with section 86 of the Code. There was no request for reinstatement or re-engagement in the Complaint but there was a request for compensation. It was accepted that the Complainant was to be paid \$3,200.00 per month, or \$1,600.00 bi-monthly with an annual salary of \$38,400.00 which when divided by 52 weeks would be a weekly salary of \$738.46. He should have received \$1,476.92 for 10 days gross vacation pay, but instead by virtue of Cheque No. 5573 he was paid the amount of \$1,132.01 for 10 vacation days. The difference owed to the Complainant for vacation days would be \$344.91. The contractual sum that was agreed to be paid to the Complainant was \$3,200.00 per month, but the evidence before the Tribunal is that he was only paid \$3,000.00 per month for the sixteen (16) months he was employed by the Respondent. Therefore, he was due \$3,200.00 in additional compensation, and when combined with his vacation pay should be \$3,544.91 due to the Complainant.
78. 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. Although the legal practitioner for the Respondent attempted to put forward a proposal in oral argument that he would be willing to withdraw the extant appeal in this matter on costs if the Tribunal considered its position on compensation, but the Tribunal must and will ignore that proposal as being inappropriate.

(i) *Punitive Damages*

79. The issue of punitive damages was fully explored and developed in the case of *Colleth Ranger-Vassel v. Main Sail BVI Ltd*³⁰ and a special carve out was further developed in the case of *Qasim Yoba v. Peter Island (2000) Ltd.*³¹ 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*,³² which was further discussed in *Devonni Christopher v. BVI Health Services Authority*,³³ 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 *Qasim Yoba* 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. Therefore, there is nothing before the

³⁰ n.**Error! Bookmark not defined.**

³¹ n.24.

³² BVILAT2019/027, unreported, delivered on 11 November 2021.

³³ n.4.

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.

80. 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 \$28,544.91 in punitive damages.
81. The punitive sums are to be paid within thirty (30) days as is the usual practice of the Tribunal, bearing in mind the Tribunal's summer break when its Trinity Term ends on 31 July 2022 and will, therefore, extend the payment period to the start of the Michaelmas Term. If the Respondent fails to pay the punitive sums by the deadline interest at the rate of 5% per annum shall accrue, calculated based on the daily rate of \$3.91.

(ii) Costs

82. 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.
83. LPR 49 outlines the process for the assessment of costs and this would be a case where the maximum limit of costs would be \$4,281.74 based on LPR 49(5). This should be in addition to the costs order made on 24 May 2022 in the amount of \$4,000.00.
84. The costs are to be paid within thirty (30) days as is the usual practice of the Tribunal, bearing in mind the Tribunal's summer break when its Trinity Term ends on 31 July 2022 and will, therefore, extend the payment period to the start of the Michaelmas Term. If the Respondent fails to pay the costs by the deadline interest at the rate of 5% per annum shall accrue, calculated based on the daily rate of \$1.13.

The Final Award

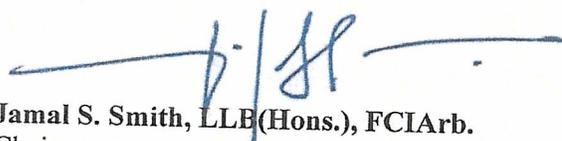
85. The final award of the Tribunal is as follows:
 - (a) The Complainant was unfairly dismissed by the Respondent.
 - (b) The Respondent shall pay to the Complainant compensation in the amount of \$28,544.91 on or before **Thursday, 01 September 2022**.
 - (c) If the compensation is not paid on or before Thursday, 01 September 2022, the Respondent shall pay post-award interest to the Complainant in the amount of \$3.91 for each day thereafter that the compensation remains unpaid.
 - (d) The Respondent shall pay the costs to the Complainant, in addition to all outstanding costs to be paid to the Complainant, summarily assessed in the amount of \$4,281.74 on or before **Thursday, 01 September 2022**.
 - (e) If the costs are not paid on or before Thursday, 01 September 2022, the Respondent

shall pay post-award interest to the Complainant in the amount of \$1.13 for each day thereafter that the costs remain unpaid.

- (f) The Secretary to the Tribunal shall refer all information concerning any offence under section 110(1) of the Criminal Code, 1997 by Faye Smith-Penn and/or the legal practitioner for the Respondent to the Commissioner of Police.

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, 26 August 2022.

By Order
Labour Arbitration Tribunal



Jamal S. Smith, LLB(Hons.), FCI Arb.
Chairperson

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



Yvonne Crabbe
Member on the recommendation of the
Complainant



Benedicta P.T. Samuels, LL.M, Ph.D.
Member on the recommendation of the
Respondent