



Case No. BVILAT2021/027

**VIRGIN ISLANDS**

LABOUR CODE, 2010  
(No. 4 of 2010)

**IN THE LABOUR ARBITRATION TRIBUNAL**

**BETWEEN**

**MARIE RAMJAWAN**

**COMPLAINANT**

**AND**

**BOBBY'S (2019) LIMITED dba BOBBY'S MARKET PLACE**

**FIRST RESPONDENT**

**AND**

**UP'S CINEPLEX FAMILY FOOD AND FUN LIMITED**

**SECOND RESPONDENT**

**BEFORE:**

**Jamal S. Smith**, Chairperson

**Zebalon McLean**, Member on the recommendation of the Complainant

**Yvonne Crabb**, Member on the recommendation of the Respondent

**IN ATTENDANCE:**

- (1) Marie Ramjawan, Complainant
- (2) Jermaine Case, legal practitioner for the Complainant, instructed by George Henry Partners LP
- (4) Elton Leonard, First Respondent in person and on behalf of the Second Respondent
- (5) David A. Penn, legal practitioner for the Respondent, instructed by David A. Penn & Co.

**ADDITIONALLY:** (6) Malisa Ragnath-Mangal, as Secretary to the Tribunal

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**SUMMARY AWARD**

29 March 2022; 12 April 2022

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### A. INTRODUCTION

1. This is a summary award arising from a complaint filed by Marie Ramjawan (the “**Complainant**”) with the Labour Commissioner on 23 November 2020 (the “**Original Complaint**”) <sup>1</sup> against Elton Leonard dba Bobby’s Market Place (the “**First Respondent**”), which at the request of the Complainant was subsequently changed to Bobby’s (2019) Limited dba Bobby’s Market Place. The Original Complaint itself was blank except for a note that appeared written by the then Deputy Labour Commissioner that read “What is the complaint?”
  
2. On 04 January 2021 the Memo from the then Deputy Labour Commissioner dated 16 December 2020 <sup>2</sup> transmitted the Original Complaint to the Minister in accordance with section 26(3) of the Labour Code, 2010 (the “**Code**”). However, there was a second Memo from the Deputy Labour Commissioner dated 03 September 2021, almost a year later, again

<sup>1</sup> Page 1 of the Trial Bundle.

<sup>2</sup> Page 3 of the Trial Bundle.

transmitting the Complaint to the Minister.<sup>3</sup> There has been no submissions before the Tribunal to explain or solve this extremely strange phenomenon that in the context of the statutory dispute resolution mechanism is as bizarre as an unidentified flying object.

3. The Minister then referred the Original Complaint to the Tribunal on 22 October 2021 (the “**Minister’s Reference**”),<sup>4</sup> which referred to the First Respondent simply as Elton Leonard but indicates that the Complainant was formerly employed by “Bobby’s Market Place” and was seeking compensation for termination without cause after working for the First Respondent for almost thirty (30) years and she wanted her severance pay based on her time worked with the business.
4. The Secretary to the Tribunal issued a Notice of Case Management Hearing on 27 October 2021<sup>5</sup> giving guidance to the parties to file various documents in accordance with the timeline required under the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020<sup>6</sup> (the “**LPR**”). Among the guidelines was a requirement for the parties to recommend a member of the Tribunal by 03 November 2021 and a copy of the Form of Consent in accordance with LPR 15(1) was also sent to the parties. The guidelines also had in bold a statement that no further communication should be made with the members of the Tribunal about the matter. Although the Complainant filed her Form of Consent, the Respondent did not file any Form of Consent. In accordance with LPR 15(29) the Chairperson of the Tribunal was entitled to summarily enter an award for the Complainant due to the Respondent’s failure to file the Form of Consent. The guidelines also required a response to be filed by 10 November 2021. When no response was filed, the Secretary to the Tribunal contacted the First Respondent by electronic mail on 18 November 2021 giving guidance on how to file an interlocutory application for an extension of time, among other things, and in accordance with the guidelines the deadline to file interlocutory applications was on 16 November 2021.
5. The Case Management Hearing was scheduled for 30 November 2021 at 2 p.m. and it took place on that date from 2:05 p.m. to 2:25 p.m. with the First Respondent represented by Elton Leonard. Due to representations from both parties, including representation on behalf of the First Respondent as to some confusion as to what the Complainant wanted, the Chairperson of the Tribunal issued a Case Management Order (the “**First CMO**”)<sup>7</sup> which ordered the First Respondent to file a Form of Consent by 10 December 2021 and also gave the Complainant permission to amend the Complaint in accordance with LPR 24(2) by 15 December 2021 as well as gave the First Respondent permission to file a Response by 31 December 2021. A deadline for filing interlocutory applications was fixed for 21 January 2022 and the case management hearing was adjourned to 22 February 2022.
6. The First CMO also included a post-script notation to assist the parties if they wished to appeal the Tribunal’s decision on any question of law that they had until 29 December 2021. Up to the date of this Summary Award there has been no appeal served on the Secretary to

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<sup>3</sup> Page 5 of the Trial Bundle.

<sup>4</sup> Page 6 of the Trial Bundle.

<sup>5</sup> Page 7 of the Trial Bundle.

<sup>6</sup> S.I. No. 98 of 2020.

<sup>7</sup> Page 12 of the Trial Bundle.

the Tribunal in respect of the First CMO nor any interlocutory application to vary, suspend or set aside that order.

7. On 15 December 2021 the Complainant filed the amended complaint in accordance with the First CMO (the “**Amended Complaint**”).<sup>8</sup> It is for the first time that the Complainant’s case became clear, where she alleged that she worked for the First Respondent since 1 February 1999 and was never given a written employment agreement or any other document setting out the terms of her employment, but she understood that she would be employed as a supervisor of the Deli in the First Respondent’s Road Town location. She never received a written statement from either Respondent in accordance with section 45(2) of the Code. She was originally paid at the rate of \$7.00 per hour and over the years her salary was adjusted without any consultation with her except during 2013 when the First Respondent informed all employees that the business was experiencing financial difficulties. The Complainant agreed to continue working for several months without any or any sufficient pay, and again without anything in writing.
8. Additionally, the Amended Complaint shows that the Complainant worked for approximately 69 hours per week without overtime payment. In or about 2013 the Complainant’s feet began to swell due to the excessive periods of time on her feet and while this was allegedly noticed by the First Respondent, no alternative arrangements were made. She underwent surgery and was then required to be away from work for a few weeks, but upon her return she was told that “there was no work available for her at the time” and she never received any written indication from the First Respondent when she was to resume work. This resulted in the Complainant taking up employment at another establishment called Captain Mulligans on or about 30 January 2017 until May 2017, during which period she was requested by the First Respondent to work on a part-time basis until she recommenced on a full-time basis in May 2017.
9. The Complainant alleges in the Amended Complaint that she underwent hip surgery in or around January 2020 and presented a medical certificate to the First Respondent, and the First Respondent failed to communicate with the Complainant about her employment status or otherwise at all. She last received a salary from the First Respondent in or about January 2020 before she was advised by her physician that she would be unable to return to work for an indefinite period. That final salary was Four Hundred and Twenty-Five United States Dollars (US\$425.00) for the week, an amount less than her salary when she commenced employment, nor was she paid for the final week she worked in January 2020 before commencing her sick leave.
10. The Amended Complaint also pleads that the Complainant worked on public holidays without payment for work on public holidays in accordance with section 54 of the Code.
11. The Complainant also alleges that she did not receive any sick leave payment from the Respondents in respect of 2020 or 2021 although she confirmed that she began to receive social security payments in or around February 2020 in the amount of Nine Hundred United States Dollars (US\$900.00) per month. Additionally, she received no vacation leave payment

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<sup>8</sup> Page 16 of the Trial Bundle.

in respect of 2020 or 2021. Finally, the Complainant alleged that the Respondents did not provide a pension scheme, health insurance or other retirement scheme.

12. The First Respondent failed to file a Response in accordance with the First CMO and filed no application for an extension of time by the second deadline for filing such an application in accordance with the First CMO.
13. The inaction of the First Respondent prompted the Complainant to file an interlocutory application for summary determination of the Amended Complaint on 20 January 2022 (the “**Summary Application**”)<sup>9</sup> for which the Respondents had until 28 January 2022 to file an opposition and failed to do so. The Summary Application was supported by the Affidavit of Marie Ramjawan which was also filed on 20 January 2022 (the “**First Affidavit of Marie Ramjawan**”).<sup>10</sup>
14. On 17 February 2022 the Complainant filed a Second Affidavit (the “**Second Affidavit of Marie Ramjawan**”)<sup>11</sup> which was supported by a bundle of exhibits that was incorrectly marked “MR-2”<sup>12</sup> since there had not been any exhibit previously marked “MR-1”.
15. A whole month after the Summary Application was filed the Chairperson of the Tribunal issued the next case management order on 22 February 2022 (the “**Second CMO**”).<sup>13</sup> The Second CMO recounted the fact that the Secretary to the Tribunal sent two (2) electronic mails to the Respondents in accordance with paragraph 9 of the First CMO seeking compliance with the First CMO to which she received no response.
16. The Respondents were also required to file trade licenses for both Respondents on or before 04 March 2022, but neither Respondent complied with the Second CMO. However, the Complainant filed a trial bundle (the “**Trial Bundle**”) along with a Bundle of Authorities (the “**Bundle of Authorities**”) on 22 March 2022 which were filed after the deadline pursuant to paragraph 4 of the Second CMO as well as Skeleton Arguments (the “**Complainant’s Skeleton Arguments**”) which was also filed after the deadline pursuant to paragraph 5 of the Second CMO.
17. On 25 March 2022 at 4:25 p.m. the Respondents filed an interlocutory application for an extension of time to file “all relevant documents” (the “**Extension of Time Application**”)<sup>14</sup> which was deemed to have been filed on 28 March 2022 in accordance with LPR 5(1), the same day of the case management hearing for the determination of the Summary Application. The Respondent also filed a Hearing Bundle that was likewise deemed to be filed on 28 March 2022 (the “**Respondents’ Hearing Bundle**”) that included an unfiled Response signed on behalf of the Respondents on 24 March 2022 that was accompanied by an Affidavit of Elton Leonard upon which no stamp duty has been paid along with Exhibits “EL-1” to “EL-13-C”.

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<sup>9</sup> Page 25D of the Trial Bundle.

<sup>10</sup> Page 25A of the Trial Bundle.

<sup>11</sup> Page 26 of the Trial Bundle.

<sup>12</sup> Page 33 of the Trial Bundle.

<sup>13</sup> Page 96 of the Trial Bundle.

<sup>14</sup> Tab 7 of the Respondent’s Hearing Bundle.

It is noted that Exhibit EL-1 is a letter dated 08 March 2022 from Bobby's Market Place Limited addressed to the Tribunal and signed by Mr. Elton S. Leonard as General Manager, which letter was never filed with the Tribunal or the accompanying exhibits EL-2 and EL-3 which are the trade licenses for the Respondents that were due since 04 March 2022. The Respondent's Hearing Bundle also included an unfiled Opposition to the Application for Summary Determination that was supported by the Second Affidavit of Elton Leonard in Opposition to Application for Summary Judgment supported by Exhibits "EL-14" to "EL-16".

18. The Extension of Time Application was supported by the Third Affidavit of Elton Leonard also deemed to have been filed on 28 March 2022 wherein he claimed to have been surprised by the formalities of the Tribunal, and that he thought that his arbitrator would represent him only to realize that he needed to obtain a legal practitioner. This unidentified, intended legal practitioner did not show up at the case management hearing because he claimed to have been too busy, which caused him to retain an alternative legal practitioner, so that his failure was inadvertent and unintentional.
19. On 29 March 2022, the day the full panel of the Tribunal was to determine the Summary Application, it was the first time that the Respondents were represented by a legal practitioner. The case management hearing was scheduled to begin at 1 p.m. and began at 1:15 p.m., but it was not until 12:55 p.m., that is 5 minutes before the scheduled hearing time, that a letter from the legal practitioner was filed indicating that he had tested positive for Covid-19 the day before and was in severe distress all weekend. He, therefore, was seeking a short adjournment. The letter was not accompanied by any evidence of illness with a medical certificate exhibited as required by LPR 26(1).
20. Only on the day of today's hearing did the Tribunal receive a copy of the PCR test indicating a positive result of his COVID-19 test but was not accompanied by a medical certificate. Despite this, the request for adjournment due to illness was not opposed by the Complainant. Although the Tribunal agreed to adjourn the hearing, in the absence of evidence of illness, the Tribunal will not accept that there was any legitimate reason for the adjournment and will proceed to treat the Extension of Time Application as an oppressive application with costs not only for obtaining the adjournment without the required supporting documentation but also for obtaining it inappropriately. Such unconscionable conduct by a party must be discouraged before this Tribunal with the only power of sanction that can be imposed by the Tribunal is one of costs. For this reason, the Tribunal accepts that there are exceptional reasons to award costs in accordance with LPR 47(3)(c) and (d) and it will be fair and reasonable in accordance with LPR 49(2)(c) to allow sums above the total permitted costs.

## **B. THE EXTENSION OF TIME APPLICATION**

21. The Tribunal's procedural rules and orders providing a timetable for the conduct of its proceedings should be obeyed. Where there has been non-compliance with its timetable the Tribunal has a discretion to extend time in accordance with LPR 5(7). In exercising its discretion, it will apply the overriding objective under LPR 3. The primary task of the Tribunal in this exercise is to ensure that justice is done.

22. LPR 5(7) is very similar to rule 26.1(2)(k) under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the “CPR”) which has no application before this Tribunal but considering the similarities may provide some helpful guidance on extension of time applications. The LPR does not have any relief from sanctions provisions which is meant to reduce the likelihood of disproportionate and unjust results as occurred in the High Court before the clarification of the law by the Court of Appeal in *C.O. Williams Construction (St. Lucia) Limited v. Inter-Island Dredging Co. Ltd.*<sup>15</sup> Therefore, an extension of time application before this Tribunal should only have regard to the overriding objective and the principles outlined in *Carlene Pemberton v. Mark Bentley*<sup>16</sup> where Periera J.A. (as she then was) quoted at paragraph 14 from the decision of Byron C.J. (as he then was) in *Rose v. Rose*<sup>17</sup> where he said:

“Granting the extension of time is a discretionary power of the Court which will be exercised in favour of the applicant for good and substantial reasons. The matters which the court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice if the Application is granted.”

(a) *The Length of the Delay*

23. The failure to descend into particulars by outlining what happened to prevent the filing of the opposition to the Summary Application by 21 January 2022, and why it took more than a month since the filing of the Summary Application to file the Extension of Time Application provides the Tribunal with very little assistance to justify the length of the delay. There is no evidence before the Tribunal when the Respondents first became aware of the delay, and so the Tribunal must accept that the Respondents became aware of the delay when the Secretary to the Tribunal wrote the two (2) compliance electronic mails to file a response and oppose the Summary Application. There was also an intervening case management hearing where the Respondent was clearly aware of the consequences of failing to file the response and the failure to oppose the Summary Application, but still failed to take any action until after the Complainant had gone through the expense and trouble of filing the Trial Bundle, the Authorities Bundle and the Complainant’s Skeleton Arguments. Therefore, the Tribunal finds that the length of the delay was inordinate.

(b) *The reasons for delay*

(i) *The Inadvertence of the Respondent’s Director*

24. The Respondents allege that the Respondents’ director, Mr. Elton Leonard, was not familiar with the Tribunal’s proceedings and processes. According to the Respondents, their director thought that he could just walk with all his relevant documents “to the meeting with the Tribunal for the discussion”. The Tribunal does not accept the evidence upon which the Respondents seek to rely in this regard and believes it to be highly improbable. When the

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<sup>15</sup> SLUCVAP2011/017, delivered on 19 March 2012.

<sup>16</sup> SKNCVAP2011/009, delivered on 14 October 2011.

<sup>17</sup> SLUCVAP2003/019, delivered on 22 September 2003.

Tribunal looks at the Notice of Case Management Hearing issued by the Secretary to the Tribunal, the various chasing e-mails sent by the Secretary to the Tribunal and all that transpired since then, the Tribunal is unsatisfied that an experienced businessman, on a balance of probabilities, would have been so unresponsive to the Tribunal because he was under a misapprehension about what was required by the Tribunal to the extent that he sat down and did absolutely nothing. It demonstrates a serious lack of respect for this Tribunal and its proceedings which cannot and will not be countenanced. Therefore, this reason for the delay must fail.

(ii) *Non-Appearance of Legal Practitioner*

25. A significant concern of this Tribunal is where Mr. Leonard claims he sought a legal practitioner to represent him before this Tribunal and that legal practitioner failed to show up. The Tribunal finds it highly improbable, on a balance of probabilities, that a legal practitioner would have given a commitment to represent the Respondents and failed to show up considering a legal practitioner's ethical duties under the Legal Profession Act, 2015.<sup>18</sup>
26. According to Exhibit "EL-1"<sup>19</sup> which is the letter from Bobby's Market Place Limited dated 08 March 2022 where the Respondents forwarded their trade licenses, the Respondents claim that "The reason for the late submission is due to my lawyer been absent." Therefore, by 08 March 2022 the Respondent was aware that his legal practitioner was unavailable and still did nothing.
27. In another case where an employer consistently appeared before this Tribunal claiming to be represented by a legal practitioner, this Tribunal notes the humorous intention by the legal practitioner for the employee in that other case of referring to this non-appearing legal practitioner as Mr. Snuffleupagus. This is a reference to the fictional character from the children's television series *Sesame Street* who was Big Bird's best friend but would always disappear when adults were around making everyone assume he was an imaginary friend. If our present Mr. Snuffy does in fact exist, and failed to discharge his duties to the Respondents, then there are remedies available to the Respondents against the Respondents' Mr. Snuffleupagus, but this Tribunal cannot take any action or steps against a legal practitioner who has never entered an appearance. The Tribunal must, therefore, ignore this submission as though no legal practitioner exists. The Respondents should pursue legal action against this legal practitioner if in fact he or she does exist, either as a common law claim before the High Court or as a disciplinary action before the Disciplinary Tribunal under the Legal Profession Act, 2015. Therefore, this ground must also fail with the effect being that the Respondents have no good reason for making the Extension of Time Application.

(c) *Likelihood of Success*

28. Although the Respondents have not argued as a ground of the Extension of Time Application that they have any likelihood of success in respect of the Summary Application, they base the application on several grounds that must be weighed against whether there is an arguable case

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<sup>18</sup> No. 13 of 2015.

<sup>19</sup> Tab 3 of the Respondent's Hearing Bundle.

in opposition to the Summary Application. Each of these grounds will be considered in turn.

(i) *The Practicing Certificate*

29. The Respondents claim that the Practicing Certificate lodged by the legal practitioner for the Complainant in accordance with LPR 16(2) is dated 05 February 2020 which expired on 31 January 2021. However, the Practicing Certificate lodged with the Tribunal on 18 November 2021 pursuant to LPR 16(2) was dated 22 January 2021, which would have expired on 31 January 2022. Therefore, the Practicing Certificate remained valid when the Summary Application was filed. For this reason, the Tribunal finds that there is no merit to the issue of the Practicing Certificate and in fact finds that this allegation is a serious one that has potential disciplinary and criminal consequences for the legal practitioner if it were true. Allegations such as these should not be made lightly and for this reason the Tribunal will penalize the Respondents in costs for making this serious and unsubstantiated allegation against a legal practitioner who has performed most times with impeccable professionalism before this Tribunal.

(ii) *Statute of Limitation*

30. The Respondents also raise the concern that the Original Complaint was statute barred based on section 181 of the Code. It was filed on 23 November 2020, which is more than six (6) months after the Complainant last worked for the First Respondent in January 2020. The Respondents also claim that the Complainant left the employ of the First Respondent in February 2020.
31. The Amended Complaint discloses that she was on sick leave in January 2020 having hip replacement surgery and the Respondent did not determine when she should return to work after that point. It is, therefore, a question of fact to be determined by the Tribunal exactly when the Complainant was terminated.
32. Paragraph 6 of the Affidavit of Elton Leonard is the only evidence that deals with the last date of the Complainant's employment. It exhibits four (4) medical reports, with the last medical report dated 19 February 2020 from Bougainvillea Clinic (the "**Ahrens Report**") only indicating that she would be unable to work before an upcoming hip replacement surgery. That medical report has a stamp from the Labour Department dated 21 May 2020 which raises concerns about when the original Complaint may have been filed with the Labour Department. Again, this other bizarre situation would make unidentified flying objects easier to explain. Notwithstanding the fact that the Ahrens Report raises a factual discrepancy as to when the Complaint may have actually and originally been filed, it does not assist with determining when the Complainant's employment ended with the Respondents. All the medical certificates indicate is that the Complainant had a medical reason to be away from work and may have been entitled to sick benefit under the Social Security Act.
33. Additionally, Exhibit "EL-13-B" to the Affidavit of Elton Leonard is a letter dated 15 March 2021 from the Social Security Board<sup>20</sup> (the "**Social Security Letter**") that shows that based

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<sup>20</sup> Page 35 of the Trial Bundle.

on contributions paid she worked for the First Respondent between February 1999 and January 2020 and for the Second Respondent during the period January 2011 to November 2014. Therefore, although the Respondents claim that she would have worked up to 22 February 2020, they only paid her contributions to Social Security up to January 2020, although the Complainant alleges that she was paid benefits from the Social Security Board from February 2020. However, there is still nothing that suggests that the Respondents terminated the Complainant.

34. Most critically, however, is that a limitation period must be specifically pleaded since a party may waive the right to rely on the limitation period. The Respondents were given several opportunities to plead this point and failed to do so.
35. LPR 13(3) provides for the Tribunal to take into consideration any statutory time limit within which a person may commence proceedings before the Tribunal when considering any decision about its jurisdiction. Therefore, it was necessary for the Respondents to file an application pursuant to LPR 13(1) which was highlighted in the guidance attached to the Notice of Case Management Hearing. The failure to file the interlocutory application followed by a failure to seek an extension of time to file such an interlocutory application is fatal to this ground.
36. While this issue arose tangentially before this Tribunal in *Denley Prince v. Peter Island Resort and Spa*,<sup>21</sup> where at paragraph 67 of the Final Award, it was intended to explore the whole issue of the limitation period, but ultimately it was never thought necessary to do so to reach the conclusions that the Tribunal did. There is a need to clarify the scope of section 181 of the Code since it was relied on by the Respondents. It does not appear to the Tribunal to be as expansive and all comprehensive as the Respondents allege. Section 181 of the Code provides:
- “(1) A person shall refer a dispute or complaint to the Commissioner within six months of the ground for the dispute or complaint coming to the knowledge of that person.
- (2) The Commissioner shall not investigate or resolve a dispute or complaint referred to him or her after the six-month period mentioned in subsection (1).”
37. According to McGee on *Limitation Periods*<sup>22</sup> the three questions that the law of limitations asks are:
- “(1) When does time start to run?  
(2) How long is the limitation period?  
(3) What happens when time expires?”
38. The first two (2) questions are dealt with by section 181(1), but the third question is dealt with by section 181(2). Time starts to run against the Complainant from the date the ground for the dispute came to her knowledge. She had not received any notice of termination or any

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<sup>21</sup> BVILAT2017/020, delivered on 18 February 2021.

<sup>22</sup> Andrew McGee, *Limitation Periods*, 7<sup>th</sup> Edn. (Sweet & Maxwell, 2014).

indication about her employment status. Therefore, the Tribunal accepts the Complainant's evidence that as at February 2020 she produced a medical report indicating that she would not be able to work as a result of her required hip surgery. Section 89(2)(a) of the Code allows an employer to terminate an employee with notice, or with pay in lieu of notice, for medical reasons once two (2) medical practitioners "certify that the employee is unfit to continue in employment because of an incapacity of the mind or body which has lasted for at least six months and which is likely to be permanent". There is no other provision within the Code that allows an employer to terminate an employee for medical reasons.

39. The evidence before the Tribunal is that on 03 February 2020, Dr. Klas Buring of Eureka Medical Clinic issued a medical excuse certificate for the period 03 – 06 February 2020 which was accompanied by a medical report indicating that she was in a wheelchair with pain in her right hip area and she was to return in 3 days. He issued another medical excuse certificate on 05 February 2020 for the period 05 – 22 February 2020. Finally, on 19 February 2020 Dr. Christopher Ahrens issued the Ahrens Report indicating that "She will not be able to work before surgery and may require the left hip to be operated as well. It is therefore unpredictable when she is able to work again."
40. The sickness benefits were paid by the Social Security Board from February 2020 and would continue to be paid for a maximum of twenty-six (26) weeks, which is approximately six (6) months. For this reason, the Tribunal accepts that the Complainant would then have become aware in or around August 2020 that she was effectively terminated once she stopped receiving her sickness benefits. Effectively, time would only start to run against the Complainant, at the earliest, in August 2020. For this reason, the Complaint being allegedly filed in November 2020, the Tribunal finds that the allegations against the First Respondent fell within the limitation period. By the same token, the alleged termination by the Second Respondent in 2016 would have been outside that limitation period.
41. The final question to be answered is the consequences of the expiration of the limitation period with respect to the Second Respondent. It should be noted that section 181(1) only creates a mandatory duty on the Complainant to file the dispute within the six (6) months period, it does not prohibit the Complainant doing so after those six (6) months. The consequence for doing so outside the six (6) months period is found in section 181(2), which is simply that the Labour Commissioner is prohibited from investigating or resolving the dispute. In effect, the Labour Commissioner is stripped of his or her powers under section 26(2) of the Code, but it does not prohibit the Labour Commissioner from transmitting the Complaint to the Minister in accordance with section 26(3) of the Code. Therefore, although the Labour Commissioner could not investigate or attempt to resolve the dispute with respect to the Second Respondent, there is nothing that prohibits the Labour Commissioner from transmitting that Complaint to the Minister. The only limitation that would apply to the complaint against the Second Respondent is section 4 of the Limitation Act,<sup>23</sup> which provides for six (6) years to file a contractual dispute.
42. The Tribunal would only indicate that although the complaint against the Second Respondent is not statute barred that does not mean that the equitable remedy of laches could not have

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<sup>23</sup> Chapter 43, Laws of the Virgin Islands (1991 Revised Edition).

been raised by the Second Respondent in this case. The Tribunal's equitable jurisdiction would allow it to consider delays or inaction by a complainant even where the complaint falls within any limitation period. However, as the Second Respondent did not raise this issue, the Tribunal will make no findings in relation to the delays by the Complainant to make the complaint against the Second Respondent.

(iii) *The Original Complaint*

43. The Respondents claim that the Original Complaint made no reference to the current parties to this dispute and, therefore, is without merit. However, this ground requires an exploration of what is a complaint within the meaning of section 26 of the Code. A dispute or complaint is defined in section 3 of the Code as:
- “. . . any difference between one or more employers or organisations representing employers and one or more employees or organisations representing employees relating in whole or in part to any matter covered by the Code or any law relating to labour or generally arising out of the relationship between the employer and the employee”
44. This definition contemplates that it is possible for a single complaint to include one or more employers and would involve any difference relating to any matter covered by the Code. The other formalities with respect to the complaint are outlined in section 26(1) and (2) of the Code which provides:
- “(1) Any dispute or complaint arising out of any matter covered by the Code or any law relating to labour or generally out of the relationship between the employer and the employee may be referred by either party concerned or his or her representative to the Commissioner for settlement.
- (2) Upon receipt of the reference, the Commissioner shall investigate the matter and make every effort to dispose of the issue raised in the reference by voluntary settlement in accordance with industrial relations practice, and in pursuance thereof he or she may . . .”
45. The only formality is that it be referred to the Labour Commissioner. It does not need to be in writing, although the Labour Commissioner must keep a record of the complaint in writing pursuant to section 7(c) of the Code. Therefore, while there is no obligation on the parties to a dispute or complaint to do anything other than refer it to the Labour Commissioner, the written record of the dispute or complaint must be made by the Labour Commissioner.
46. The settlement discussions before the Labour Commissioner are meant to be informal and, therefore, there is no requirement under the Code for the parties to be properly identified other than there must be an employer and an employee, or more than one of each. The formalities that the Respondents seek to ascribe to that stage of the dispute resolution mechanism is clearly not the intention of the Code. Therefore, this ground of challenge would fail.

(iv) *The Minister's Reference*

47. The Respondents allege that the Minister did not refer any matter to the Tribunal against the Second Respondent and as such the Tribunal has no jurisdiction to hear or adjudicate on the matter.
48. The Tribunal has to determine which entity the Complainant worked for during that thirty (30) year period as shown in the UK Employment Appeal Tribunal decision in *Clark v. Harney Westwood & Riegels & Others*.<sup>24</sup> While that case failed because it did not comply with various EC requirements and was out of time, it outlined the rules for identifying the appropriate employer. When a complaint is referred to the Tribunal it is for the Tribunal to determine the proper parties to the dispute. All that is referred to the Tribunal is the nature and scope of the dispute. If the matter falls within the nature and scope of the dispute referred to the Tribunal, it is for the Tribunal to hear and adjudicate on the matter in accordance with its own procedures.
49. Justice Sharvanandada (as he then was) in the Sri Lankan case of *Caledonian (Ceylon) Tea and Rubber Estates, Ltd v. Hillman*,<sup>25</sup> distinguished the common law jurisdiction from the special jurisdiction of a Labour Tribunal in employment disputes under the Industrial Disputes Act of Sri Lanka which has very similar provisions to the Code. He said:
- “In this case that the jurisdiction that is vested in a Labour Tribunal by the Industrial Disputes Act is not a jurisdiction of merely administering the existing common law and enforcing existing contracts. The relations between the employer and his workman are no longer governed by the contract of service. The Tribunal has the right, nay the duty, to vary contracts of service between the employer and the employee—a jurisdiction which can never be exercised by a civil Court. In the course of adjudication, a Tribunal must determine the 'rights' and 'wrongs' of the claim made, and in so doing it undoubtedly is free to apply principles of justice and equity, keeping in view the fundamental fact that its jurisdiction is invoked not for the enforcement of mere contractual rights, but for preventing the infliction of social injustice. The goals and values to be secured and promoted by Labour Tribunals are social security and social justice. The concept of social justice is an integral part of Industrial Law, and a Labour Tribunal cannot ignore its relevancy or norms in exercising its just and equitable jurisdiction. Its sweep is comprehensive as it motivates the activities of the modern welfare state. The jurisdiction is designed to produce, in a reasonable measure, a sense of security in a worker that in case he performs his duties efficiently and faithfully, he can be discharged by the employer only with adequate compensation for loss of employment.”
50. This Tribunal has very broad powers under the Code to make orders and awards and to decide its own procedure. The Tribunal’s jurisdiction is not impugned or limited by the Minister’s Reference as it relates to the parties to the dispute. In this case, the Minister’s Reference sent the Complaint to the Tribunal, and it is for the Tribunal in accordance with its own procedures to determine the proper parties. For this reason, this ground must also fail.

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<sup>24</sup> UKEAT/0018/20/BA.

<sup>25</sup> 79 (1) NLR 421.

(v) *The Amended Complaint*

51. The Respondents claim that the Amended Complaint seeks to add the Second Respondent which would be to add “an entirely new complaint, against an entirely new Respondent” and cannot now be raised before the Tribunal for the very first time. If the Amended Complaint falls within the nature and scope of the Minister’s Reference as just identified, it would then be a proper Complaint for all the reasons provided before. For this reason, this ground must also fail.
52. It should be noted that there may be cases where an Amended Complaint may be warranted where the original complaint filed with the Labour Commissioner may have resulted in some matters being settled or otherwise resolved, even by effluxion of time. Therefore, to suggest that an amended complaint would never be possible before the Tribunal must be wrong in law.

(vi) *The Proper Respondent*

53. The Respondents also allege that this Tribunal has no jurisdiction to hear any matter against both the First and Second Respondents even if the Complaint is not statute barred. However, as indicated earlier, the Tribunal does in fact have jurisdiction to determine the proper employer of the Complainant and has proceeded to do so. For this reason, this ground must also fail.
54. The Respondents also allege that the Complainant was not terminated by either Respondents. However, that is a factual dispute which has already been resolved in favour of the Complainant by the inaction of the Respondents.
55. The Complainant’s Skeleton Arguments addresses the issue of the proper Respondent and relies on the UK Employment Tribunal decision of *T Astuti v. Yaser Iqbal t/a Smokin’ Rooster* to argue that Mr. Elton Leonard should be personally named as the employer. Having outlined the factual position of the Respondents as it relates to their registration status, the Social Security Letter and the Trade Licenses support the Respondents being named as parties. If in fact the Respondents, or either of them, have been struck off the register as the Complainant alleges, that does not prevent them from incurring liabilities or for any creditor, including an employee, from making a claim and pursuing it to judgment and enforcement.<sup>26</sup> It just prevents any director, among other persons, from defending any legal proceedings or claim any right for, or in the name of, the Respondents.<sup>27</sup> In effect, if the Tribunal grants the Extension of Time Application, it would entitle the Complainant to apply to strike out the purported Response and any right to rely on a limitation defence, but it does not affect whether or not the Respondents are the proper parties.

(vii) *The Truthfulness of the Complaint*

56. The Respondents are now seeking to challenge the truthfulness and foundation of the

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<sup>26</sup> Section 215(3), BVI Business Companies Act (2013 Revised Edition of the Laws of the Virgin Islands).

<sup>27</sup> Section 215(1)(b), BVI Business Companies Act (2013 Revised Edition of the Laws of the Virgin Islands).

Complainant's allegations set out in the Amended Complaint. The Respondents were given ample opportunity to file a Response and failed to do so. The Tribunal must balance the interests of the parties, and it would be patently unfair to the Complainant that after all this time the Respondents took no steps to challenge the truthfulness and foundation of the Complainant's allegations, and for that reason, that ground must also fail.

(d) *Degree of Prejudice*

57. The traditional approach to the issue of prejudice was outlined by Peter Gibson LJ in the English Court of Appeal decision of *Cobbold v. London Borough of Greenwich*<sup>28</sup> who said:

“The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed.”

58. However, allowing the application for an extension of time allows the real dispute between the parties to be adjudicated, but this must be balanced against whether the prejudice can at all be compensated in costs as shown by another English Court of Appeal decision in *Worldwide Corporation Ltd v. GPT Ltd and Another*<sup>29</sup> where Waller LJ made it clear that costs would not be an adequate remedy when the other party was being “mucked around” at the last moment as has occurred in this case. Although the Respondents have not alleged that they would be prejudiced in any way if the application is refused, any prejudice that they would suffer was all their own making. Balancing the prejudice, there would be serious prejudice to the Complainant, who was ready to receive her Summary Award when suddenly on the day before the Summary Award was likely to have been granted by the full panel of the Tribunal the Respondents then went into full swing. No amount of costs could compensate the Complainant for the two (2) years of delays with her matter where labour disputes must be resolved swiftly. The bizarre occurrences with this particular case before it arrived at the Tribunal only added to the delays where allowing the Extension of Time Application would effectively increase the related expenses with a disproportionate amount of resources having to be applied to restart the process. When having regard to the importance of this case to the Complainant and the disparity between the means and resources of the parties, it is undoubtedly critical for the Tribunal to exercise its discretion against allowing the Extension of Time Application.

59. The Tribunal remains conscious of its duty to manage and allocate its resources in a judicious manner so that Waller LJ's statement in *Worldwide* is instructive:

“Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to

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<sup>28</sup> [1999] EWCA Civ 2074.

<sup>29</sup> [1998] EWCA Civ J1202-12.

be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?”

60. For all these reasons, the Tribunal will dismiss the Extension of Time Application. The consequence of this is that the Affidavit of Elton Leonard and the Second Affidavit of Elton Leonard are not properly before the Tribunal and are disregarded in the considerations of the Tribunal. The Tribunal must now consider the Summary Application.

**C. THE SUMMARY APPLICATION**

*(a) Unfair Dismissal*

61. The Complainant has given several alternatives for the Tribunal to choose from as far as the termination of the Complainant is concerned.
62. The first option is for the First Respondent to be ordered to communicate the Complainant’s employment status in writing within five (5) days of the Tribunal’s order. This is an unusual proposal, because it then means that the Tribunal does not make any determination about the employment status of the Complainant and leave it to the First Respondent to do so. There is nothing that suggests that this would be a practical solution in the interest of the parties even if it were an order that the Tribunal would be willing to make. However, this would in effect be a reinstatement order with a condition or making it subject to a decision of the employer. The High Court has recently made it clear in *Marisa Marsha Wheatley v. The Attorney General*<sup>30</sup> that such an order would not be possible as a reinstatement order cannot have conditionalities. Therefore, the Tribunal rejects this option as not being workable or possible.
63. Ultimately, the question remains whether the Complainant was in fact terminated by the First Respondent. Sections 104(3) of the Code allows an employee to temporarily lay off an employee, and section 107(2)(c) of the Code provides that if no date of re-employment is provided and three months elapsed without the employee being re-employed then severance pay must be paid at the end of that three month period, and section 106 of the Code provides that severance pay shall not affect any other compensation for which the employee is owed.
64. The Complainant was on medical leave due to her hip replacement surgery in February 2020 and she received her last salary in January 2020. In effect, the First Respondent temporarily laid off the Complainant from February 2020 and had until May 2020 to re-instate the Complainant. The Complainant has alleged that she only was able to get in touch with the First Respondent in March 2020 who then hung up on her and did not re-engage her. For this reason, the Tribunal finds that the Complainant was terminated in accordance with section 104(3) with effect from 22 May 2020.
65. The Tribunal considered a termination under section 104(3) of the Code in *Vashti Cockburn-James v. Felix Harry dba West Side Bakery*.<sup>31</sup>

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<sup>30</sup> BVIHCV2021/0006, delivered on 17 May 2021.

<sup>31</sup> BVILAT2021/016, delivered on 17 February 2022.

66. The effect of section 107(2)(c) was merely delayed by the insertion of section 107(4) due to the Labour Code (Amendment) Act, 2020<sup>32</sup> which provides:

“Notwithstanding subsection (2)(c), where an employee is temporarily laid off on or between the period of 14 March 2020 to 31 October 2020 severance pay shall be payable immediately after 31 October 2020, except where Cabinet having regard all the circumstances has determined that the period for the payment of severance be extended by Order published in the *Gazette*.”

67. That section did not change the fact that 22 May 2020 was the last day that the Complainant should have been re-engaged or paid her severance. It only delayed the payment of the severance pay which would have been payable on 22 May 2020 to 31 October 2020. This was further extended to 31 January 2021 by the Labour Code (Extension of Severance Pay Period) Order, 2020.<sup>33</sup> This was again extended to 28 February 2021 by the Labour Code (Extension of Severance Pay Period) Order, 2021.<sup>34</sup> Therefore, 28 February 2021 was the last day on which the First Respondent was to pay the Complainant the severance pay and all other compensation that was due to her.
68. Therefore, the Tribunal finds that the Complainant was unlawfully and unfairly dismissed in accordance with section 104(3) of the Code.

*(b) Breach of section 45(2) of the Code*

69. The uncontroverted evidence before the Tribunal is that there was a breach of section 45(2)(a) to (d) and (g) of the Code, so that in effect the Complainant was never provided with the name and address of her employer, along with her general responsibilities and duties. The general difficulties with the Tribunal seeking to determine who is the proper respondent to these proceedings clearly supports this finding of fact. However, the Tribunal does not believe that it is necessary to determine whether the Complainant was provided with her leave and vacation entitlement, as the fact that there was a failure to provide the name and address of the employer and general responsibilities and duties is sufficient to make the declaration sought.

*(c) 2016 Severance Pay*

70. The Social Security Letter demonstrates that the Complainant was in continuous employment for the First Respondent between February 1999 and January 2020 and in respect of the Second Respondent from January 2011 to November 2014. The only possible severance payment that would be available in 2016 would have to be in respect of the Second Respondent. The Tribunal finds that the Complainant was unlawfully and unfairly terminated in 2016 by the Second Respondent in accordance with section 104(3) of the Code and as a result she is entitled to severance pay by the Second Respondent.

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<sup>32</sup> No. 11 of 2020.

<sup>33</sup> S.I. No. 128 of 2020.

<sup>34</sup> S.I. No. 11 of 2021.

*(d) Premium Pay*

71. The uncontroverted evidence before the Tribunal is set out in paragraphs 11 – 13 of the Second Affidavit of Marie Ramjawan filed on 17 February 2022. She claims to be entitled to 29 hours per week in overtime, but there is no documentation to support this. Therefore, the Tribunal is entitled to award a nominal sum where there is no documentation to support the claim for compensation.

*(e) Public Holiday Pay*

72. The uncontroverted evidence before the Tribunal is set out in paragraph 14 of the Second Affidavit of Marie Ramjawan filed on 17 February 2022. The evidence is not specific, and she claims only working on public holidays on “several occasions between 2010 and up to January 2020” with no documentation to support this. Therefore, the Tribunal is entitled to award a nominal sum where there is no documentation to support the claim for compensation.

*(f) Salary Review*

73. Section 45(4) of the Code requires an indefinite employee, who is not represented by an organisation, to be consulted on a review of salary and other terms and conditions of employment at least once every two (2) years.
74. The uncontroverted evidence before the Tribunal is set out in paragraph 6 of the Second Affidavit of Marie Ramjawan that the Complainant is not, and has never been, a member of a trade union or other organisation which has represented her interests. She then goes on in paragraph 7 of her Affidavit to indicate that the Respondents never consulted her regarding a review of her wages and other terms and conditions of her employment, except in 2013 where the First Respondent advised employees generally that the business was experiencing financial difficulties.
75. Therefore, there is no reason why the Tribunal ought not to grant the declaration sought. However, as it comes to compensation for that period, the Complainant seeks the Tribunal to exercise its equitable jurisdiction as it did in *Patricia Hodge v. Road Town Wholesale Trading Ltd*<sup>35</sup> to award a 3% increase in salary be paid to the employee. However, that case must be distinguished from the present case, where the contractual arrangement and previous history dictated a course of action that was likely to create a legitimate expectation of salary increase. There is no contractual or other obligation, or expectation, in this case that there would be increases. In fact, the evidence of the Complainant is quite the opposite, where she admits that there were reductions in salary over the years and that the Respondents indicated that there were financial difficulties which would have prevented salary increases. For this reason, the Tribunal is of the view that on these facts it cannot justify a similar increase.

*(g) Sick Leave*

76. In accordance with section 72(1) of the Code an employer must pay the basic wage to an

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<sup>35</sup> BVILAT2015/013, delivered on 15 July 2021.

employee while on sick leave and is entitled to a minimum of 12 days. The Complainant is seeking compensation for both 2020 and 2021. However, the Tribunal has already found that the First Respondent terminated the Complainant as of 22 May 2020, and so, therefore she would only be entitled to sick leave for 12 days in 2020. The Amended Complaint indicates that she took sick days in January 2020 but there is no evidence before the Tribunal on how many of those days were taken. The evidence is clear that she was paid for January 2020, so if she took sick days in January she would have been paid for those days, since she was paid up to January 2020 then proceeded on sick leave on 03 February 2020 and was not paid for those days.

*(h) Punitive Damages*

77. As compensation is not acceptable to the Respondents in accordance with LPR 20(1)(f)(ii) the Respondents accept that the Tribunal shall pay such punitive sum as it deems fit, pursuant to section 86(1) of the Code. The Tribunal has considered punitive damages in its decision in *Colleth Ranger-Vassel v. Mainsail B.V.I. Limited*.<sup>36</sup> The award of punitive damages is a discretionary remedy that should be used sparingly and there is no evidence before the Tribunal in mitigation that would reduce the starting point of \$25,000.00. Additionally, in light of the fact that only nominal sums can be awarded for the various failures by the Respondents in the absence of credible evidence, the Tribunal will not increase the starting point. The starting point will be divided between the two (2) Respondents with 90% ascribed to the First Respondent and 10% ascribed to the Second Respondent.

*(i) Costs and Interest*

78. In accordance with section 30(3) of the Code, the Tribunal is only entitled to award costs for exceptional reasons, and in accordance with LPR 47(3)(a), the Tribunal having made a punitive award, it will also make an award for costs. For this purpose, the maximum amount of costs allowable under LPR 49(5) would be \$5,250.00. However, the Tribunal must allow such sum as it considers fair and reasonable pursuant to LPR 49(2)(c) while applying the overriding objective, in particular LPR 3(2)(b) and (d), where the Respondents failed to comply with the rules and orders of the Tribunal and was unsuccessful in its Extension of Time Application. Taking all these factors into account, the Tribunal will order a higher sum in costs beyond the maximum amount to be assessed if not agreed.

**The Summary Award**

79. The summary award of the Tribunal is as follows:
- (a) The Extension of Time Application is dismissed in its entirety.
  - (b) The Complainant was unlawfully and unfairly dismissed by the First Respondent with effect from 22 May 2020.
  - (c) The Complainant was unlawfully and unfairly dismissed by the Second Respondent

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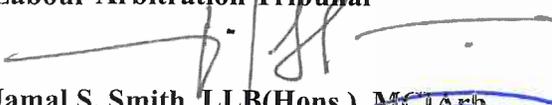
<sup>36</sup> BVILAT2020/002, unreported, delivered on 15 July 2021.

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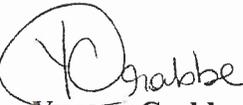
- (d) The First Respondent was in breach of section 45(2) of the Code.
- (e) The Complainant was entitled to compensation from the First Respondent for Premium Pay, Public Holiday Pay and Sick Leave Pay.
- (f) The First Respondent shall pay a punitive sum to the Complainant in the amount of \$22,500.00 on or before **Monday, 16 May 2022**, less all statutory deductions.
- (g) The Second Respondent shall pay a punitive sum to the Complainant in the amount of \$2,500.00 on or before **Monday, 16 May 2022**, less all statutory deductions.
- (h) If the punitive sums are not paid on or before Monday, 16 May 2022 the First Respondent shall pay interest to the Complainant in the amount of \$3.00 for each day thereafter that the punitive sum payable by the First Respondent remains unpaid and the Second Respondent shall pay interest to the Complainant in the amount of \$0.03 for each day thereafter that the punitive sum payable by the Second Respondent remains unpaid.
- (i) The Respondent shall pay the full costs of the Complainant to be assessed in accordance with LPR 49 if not agreed on or before **Monday, 16 May 2022**.

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

By Order  
**Labour Arbitration Tribunal**

  
**Jamal S. Smith, LLB(Hons.), MCLARE**  
Chairperson

  
**Zebalon A. McLean**  
Member on the recommendation of the  
Complainant

  
**Yvonne Crabbe**  
Member on the recommendation of the  
Respondent

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

