



Case No. BVILAT2021/028

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

LATOYA LEWIS

COMPLAINANT

AND

BVI HEALTH SERVICES AUTHORITY

RESPONDENT

BEFORE:

Jamal S. Smith, Chairperson

Professor Arthur G. Richardson, Member on the recommendation of the Complainant

Kamika A. Forbes, Member on the recommendation of the Respondent

IN ATTENDANCE:

- (1) Latoya Lewis, the Complainant
- (2) Marie-Lou Creque, legal practitioner for the Complainant instructed by Creque Global Group
- (3) Sarah Potter-Washington, legal practitioner for the Respondent, as In-House Counsel

ADDITIONALLY:

- (4) Malisa Ragnath-Mangal, Secretary to the Tribunal

FINAL AWARD

15 & 17 March 2022; 14 April 2022

1. This labour dispute arises out of a complaint against the BVI Health Services Authority (the “**Respondent**”) filed by Latoya Lewis (the “**Complainant**”) with the Labour Commissioner on 28 January 2021 (the “**Complaint**”).
2. The Complainant alleges that she was employed as a Registered Nurse by the Respondent from 12 February 2018 until she was terminated on 26 January 2021. The termination was based on allegations of misconduct on 20 January 2021 and a personal incident in February 2019 resulting in a written warning at that time. She alleges that the dismissal was unfair

and not entirely in accordance with the Labour Code as well as the Respondent's employee handbook, which according to the then Human Resources Manager, inappropriate conduct occurring after a year is to be treated as a new offence. Beside those two (2) incidents there were no other occurrence of inappropriate conduct against her during her tenure. There was also no discussion or meeting held with her. She provided a report on the allegations as was required, but she never got an opportunity to defend herself. There was no adjudication regarding the repeated incident. She was just called to a meeting while she was informed of termination with immediate effect. No due notice period was given, and she had to sit in the HR Manager's office while the letter for her termination was prepared (the "**Termination Letter**"). She was bewildered, distraught by the unexpected decision. She was not mentally prepared to sign and the HR Manager at the time, Mr. Lettsome, informed her that if she didn't sign then she will have to appeal through the Labour Board which is a long process and until she sign the termination letter she could not be allocated payment. As a result of that she left the office.

3. In this award reference will be made to an agreed trial bundle filed by the Respondent on 14 February 2022 (the "**Trial Bundle**"). Reference will also be made to a signed agreed statement of Facts, Issues and Law filed by the Complainant on 03 March 2022 (the "**Agreed Statement**"), Skeleton Arguments filed by the Complainant on 04 March 2022 (the "**Complainant's Skeleton Arguments**") and the Skeleton Arguments filed by the Respondent on 04 March 2022 (the "**Respondent's Skeleton Arguments**").
4. Together, the Trial Bundle, the Agreed Statement, the Complainant's Skeleton Arguments and the Respondent's Skeleton Arguments contain all the documents and legal arguments considered by the Tribunal, unless otherwise expressly stated in this Final Award.
5. The Secretary to the Tribunal issued a Notice of Decision Hearing on 06 April 2022 fixing a date for the delivery of the decision to Thursday, 14 April 2022 at 9:00 a.m. The Tribunal now gives the decision for its final award.
6. All place names used in this Final Award are references to places on the island of Tortola in the Territory of the Virgin Islands unless otherwise expressly stated. Although all attempts will be made to use official place names in accordance with the Preservation of Names of Places Act, 2001,¹ the Tribunal appreciates that the provisions of that Act have not yet come into force, nor would they apply to any order or award of this Tribunal. Reference to persons who have not appeared or given evidence before this Tribunal will be limited to their surnames or designations unless otherwise expressed to be necessary for clarity.
7. 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 14 September 2021,² almost eight (8) months 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

¹ No. 1 of 2001.

² TAB 2 of the Trial Bundle.

Tribunal reviewed the historical development of these provisions in the case of *Devonni Christopher v. BVI Health Services Authority*,³ and continues to express its displeasure with the failure of the Labour Commissioner to deal with labour disputes in a timely manner. Eight (8) months to transmit a complaint to the Minister is unacceptable without good cause and there is nothing on the face of the record that seeks to justify this delay.

8. On 22 October 2021 the Minister referred the Complaint to the Tribunal pursuant to section 28(1) of the Code.⁴
9. 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. However, the parties agreed to a different timeline pursuant to rule 6(2) of the Labour (Arbitration Tribunal) (Procedure) Rules, 2020⁵ (the “LPR”), and so the Secretary to the Tribunal issued an Amended Notice of Case Management Hearing rescheduling the first Case Management Hearing for 14 December 2021. The Tribunal always encourages parties to any dispute to utilize the mechanism pursuant to LPR 6(2) where they can determine for themselves how they wish the matter to proceed before the Tribunal.
10. On 14 December 2021 the Chairperson of the Tribunal issued a Case Management Order (the “**First CMO**”)⁶ which approved the consent agreement made by the parties and gave trial directions fixing the date for the Pre-Trial Hearing to Tuesday, 22 February 2022 and the trial date was fixed for two (2) days on 15 and 17 March 2022.
11. In accordance with the consent agreement the Complainant filed an Amended Complaint on 19 November 2021 (the “**Amended Complaint**”) claiming unfair dismissal. The Amended Complaint included a list of documents with those documents attached, which were tendered into evidence at the trial without objection:
 - (a) The contract of employment dated 7 February 2018, although the second page of that contract is dated 11 February 2018 and appears to be in two (2) parts, with the first part being the accepted offer letter that does not indicate that it is subject to contract and a second part which is headed “AN AGREEMENT” signed and witnessed also on 07 February 2018 with two schedules attached, and took effect from 12 February 2018 (the “**Employment Contract**”);
 - (b) A Letter from the Respondent to the Complainant dated 08 February 2019 captioned “NOTICE OF INVESTIGATION: ALLEGATIONS OF RUDENESS OR DISCOURTESY AND THREAT” (the “**Notice of Investigation**”);
 - (c) A letter from the Respondent to the Complainant dated 27 February 2019 captioned “FINAL WRITTEN WARNING” (the “**Final Written Warning**”);

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

⁴ TAB 3 of the Trial Bundle.

⁵ S.I. No. 98 of 2020.

⁶ TAB 15 of the Trial Bundle.

- (d) A Memorandum from Mr. Peters, the Emergency Department Nurse Manager, to Mrs. Sylvester Thomas, the Director of Nursing, dated 20 January 2021 (the "**Peters' Memo**");
 - (e) A Memorandum from the Complainant to Mrs. Sylvester Thomas, the Director of Nursing, dated 22 January 2021 captioned "TELEPHONE INCIDENT WITH EMERGENCY ROOM NURSE MANAGER ROLAND PETERS" (the "**Complainant's Memo**");
 - (f) A Letter from the Respondent to the Complainant dated 26 January 2021 captioned "NOTICE OF TERMINATION OF EMPLOYMENT AS REGISTERED NURSE" (the "**Termination Letter**");
 - (g) A series of Staff Performance Evaluation Forms issued by the Respondent in respect of the Complainant (the "**Performance Evaluation Forms**");
 - (h) The Complaint;
 - (i) A series of electronic mail between 06 - 30 August 2021 between the Complainant and the Respondent with the captioned "VERIFICATION OF EMPLOYMENT" (the "**Verification of Employment Request**"); and
 - (j) A letter from Creque Global Group on behalf of the Complainant to the Respondent dated 10 September 2021.
12. The Respondent filed a Response on 30 November 2021 that was accompanied by the Affidavit of Pearla Sylvester Thomas as well as the Affidavit of Levor Lettsome which referred to two (2) Exhibits "LL-1" being the BVI Health Services Authority Act, 2004 and "LL-2" being the Respondent's Employee Handbook, but the Certificate of Exhibit only exhibited "LL-2".
13. In accordance with the First CMO, the Complainant filed the Affidavit of Latoya Lewis along with the Certificate of Exhibits that included a second index of documents as follows:
- (a) A Screenshot of the Complainant's Banco Popular Account showing a deposit from the Respondent on 29 January 2021;
 - (b) A Letter from GRR Gordon & Co on behalf of the Complainant to the Respondent dated 19 March 2021;
 - (c) A Letter from the Respondent to GRR Gordon & Co on behalf of the Complainant dated 06 April 2021;
 - (d) A Letter from GRR Gordon & Co on behalf of the Complainant to the Respondent dated 19 April 2021;

- (e) A Letter from the Respondent to GRR Gordon & Co on behalf of the Complainant dated 10 May 2021;
 - (f) Extract from the Complainant's passport depicting an entry visa and work permit;
 - (g) An employment agreement between the Complainant and Bougainvillea Clinic dated 16 April 2021;
 - (h) Payslips issued by Bougainvillea Clinic to the Complainant dated 30 July and 15 August 2021; and
 - (i) Payslips issued by the Respondent to the Complainant dated 15 & 30 December 2020.
14. Further in accordance with the First CMO, the Complainant also filed the Affidavit of Janice Lewis both on Wednesday, 12 January 2022 and the Respondent filed the Affidavit of Roland Peters on Wednesday, 12 January 2022.
15. At the Pre-Trial Hearing on Tuesday, 22 February 2022 the Tribunal having reviewed the Trial Bundle and found everything to be in order but realized there was some significant differences between the parties on whether the Complainant was terminated with payment in lieu of notice or based on repeated misconduct, and, therefore asked the Complainant to file the Agreed Statement (the "**Second CMO**").⁷
16. The Tribunal issued Witness Summons for all the witnesses on Friday, 11 March 2022, which would have been short service.
17. The trial of this dispute took place on 15 and 17 March 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, 2020⁸ and in accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.
18. On the day of trial the Respondent discovered getting in touch with Mr. Lettsome, who had been placed on administrative leave by the Respondent, proved futile and Mr. Peters was overseas. Therefore, the only witness that was available for the Respondent was Mrs. Sylvester-Thomas. The Complainant closed its case on the first day of trial and the evidence of Mrs. Sylvester-Thomas was taken immediately thereafter. The Tribunal then adjourned the trial to give the Respondent more time to produce her witnesses for cross-examination.
19. On the second day of the trial the Respondent informed the Tribunal that it was withdrawing the evidence of Mr. Lettsome and Mr. Peters. Therefore, the Tribunal will disregard all evidence in connection with those two (2) witnesses. Also, since the evidence

⁷ TAB 19 of the Trial Bundle.

⁸ S.I. No. 99 of 2020.

of Janice Lewis was in response to the evidence of Mr. Lettsome her evidence will also be disregarded by the Tribunal.

20. The Employment Contract would have expired on 12 February 2021, less than a month after the Termination Letter. Therefore, this Tribunal does not have to consider the issues raised in *Devonni Christopher v. BVI Health Services Authority*⁹ about the consequences of an expired employment contract. However, based on Clause 5 of the Employment Contract (the first part) and based on the good performance of her work, at the end of her employment the Complainant claims that she was entitled to a 5% tax free performance incentive, which must mean that the Respondent was undertaking to pay both the employer and the employee portion of the payroll tax.
21. Additionally, Clause 9 of the Employment Contract (the first part) provides:

“We provide a 24 hour service operation, however your head of department determines the work week schedule and all breaks including lunch according to operational needs. In departments or units in which work schedules vary, you may be required to work on a rotating basis; such information will be provided to you by your immediate Unit Head Manager or Supervisor.”
22. Clause 10 of the Employment Contract (the first part) provides that the Complainant was accountable for the Employee Handbook as well as “the BVIHSA’s Code of Conduct and such other regulations as the BVIHSA Board of Directors may introduce for the conduct of officers and the dispatch of the Authority’s business.”
23. Clause 11 of the Employment Contract (the first part) provides:

“You will be required to comply with all departmental instructions and lawful orders issued to you and any duties upon which your Unit Head Manager or Supervisor of the Department may consider acceptable in the interest of the Authority.”
24. The Peters’ Memo described a request for a shift change between the Complainant and another nurse, Nurse Cister, for that night, 20 January 2021, but Nurse Cister did not countersign the required form. During a telephone conversation between the Complainant and Mr. Peters, the Emergency Department Nurse Manager, he informed the Complainant the proper procedure to facilitate a shift exchange. According to the Peters’ Memo the Complainant began to raise her voice and insisted that she was working that night despite him explaining to her that it does not work that way. At which point, he claimed she said “you are a fucking idiot” at which point Mr. Peters ended the telephone call. She then called him back a few minutes later to inform him that Nurse Cister will work his shift that night but he needed to find someone else to work her shift on Saturday because she will not be working.
25. Mrs. Sylvester-Thomas as well as the Complainant both under cross-examination confirmed that the Complainant was sent on Administrative Leave on 21 January 2021 for three (3)

⁹ n.3.

days (the “**Administrative Leave**”). There was some confusion over when the Administrative Leave ended, but the Tribunal does not believe that is a relevant fact for determination of the issues in this case.

26. The Complainant’s Memo indicated that Nurse Cister and the Complainant agreed to exchange their shifts on Wednesday, 20 January 2021 and Saturday, 23 January 2021. However, when Nurse Cister was unable to sign the form, the Complainant decided to contact Mr. Peters. She confirmed that the conversation with Mr. Peters did take place and he indicated that he could not facilitate the shift exchange to which she replied, “you are being ‘fluffing’ difficult”. She acknowledged being wrong for raising her voice and using an expletive. She acknowledged it was disrespectful. During cross-examination the Complainant admitted that “fluffing” is a Jamaican derivative of the word “fucking” (the “**Fluffing Incident**”).
27. The Termination Letter refers to the Administrative Leave along with the Final Written Warning, and that the misconduct referred to in the Peters’ Memo were similar to those that were brought against the Complainant in the Final Written Warning. As a result, the Termination Letter quoted passages from the Employee Handbook dealing with inappropriate conduct, as well as from the BVIHSA’s Code of Conduct. For those reasons, she was terminated with one (1) month’s salary in lieu of notice and was also paid her vacation leave, less a debt owed to the Respondent, for a total payment of \$11,862.30. The Employment Contract (second part) required payment of three (3) months’ in lieu of notice and not merely one (1) month’s salary. Therefore, even if the Respondent had argued that this was a termination in lieu of notice pursuant to sections 89(1) and 91(1) of the Code, the termination would have been invalid on the mere basis that the payment in lieu of notice was inadequate.
28. During cross-examination Mrs. Sylvester-Thomas confirmed that the Respondent would not have terminated the Respondent had it not been for the Final Written Warning. It was only when the then Human Resources Manager looked at the Complainant’s file and saw the Final Written Warning that the decision was taken to terminate the Complainant.
29. During oral arguments the Respondent conceded that the Complainant was terminated pursuant to section 103 of the Labour Code, 2010 even though nowhere in the Termination Letter was there any reference to section 103 of the Labour Code, 2010. Based on paragraph 15 of the Agreed Statement both parties sought the Tribunal’s determination on whether, since the Fluffing Incident followed the expiration of more than six (6) months since the Final Written Warning, as stipulated by the Labour Code, the Respondent fairly dismissed the Complainant. Therefore, based on the Agreed Statement, the Tribunal cannot further consider the issue of termination based on payment in lieu of notice, but termination for repeated misconduct under section 103 of the Labour Code, 2010. As a result of this, the Respondent made a further concession during oral arguments that in fact section 103 of the Labour Code, 2010 required the Final Warning Letter to have been no more than six (6) months before the Termination Letter for the dismissal to be valid. The fact that this concession came so late in these proceedings, which could have avoided two (2) days of trial is of grave concern to the Tribunal.

30. Section 103 of the Code contains two (2) separate termination processes. The first process requires a warning for breach of the employment contract or misconduct which must include a statement “that repetition of the behaviour will result in summary dismissal”. Under section 103(2) of the Code if that employee commits a similar infraction within six (6) months after receiving that warning, the employer can terminate the employee without notice. If an employer terminates an employee pursuant to section 103(2) then the provisions of section 101(3) and (4) of the Code applies, which means that the employer is bound by the written statement of the reasons for the termination and will be estopped by this Tribunal from introducing any extrinsic evidence that could have been provided in the written statement. However, by virtue of section 103(4) the employer is not allowed to have an infraction hanging over an employee’s head like Damocles’ sword, but upon becoming aware of the infraction the employer must act within a reasonable time otherwise the employer cannot rely on that infraction just because they have six (6) months to terminate the employee from the warning letter. By the same token, a previous infraction older than six (6) months cannot be hanging over an employee’s head either.
31. The Final Written Warning contains the statement that “Any further incidents of non-compliance or any other inappropriate behavior will result in further disciplinary action, up to and including termination.” However, the Complainant claims that because the Final Written Warning did not include the exact language required under section 103(1) of the Code that the Final Written Warning was invalid to be used for the purpose of termination. However, the Tribunal does not accept that section 103(1) requires a formulative approach to the statement in the warning letter. Where a statute prescribes a form section 26 of the Interpretation Act allows for deviations from that prescribed form that doesn’t materially affect the substance nor calculated to mislead without invalidating the form used. This is in keeping with the equitable principle that “Equity regards substance rather than form” and based on section 30(2)(b) of the Code provides that in exercise of its powers the Tribunal shall “act in accordance with equity” among other things. Therefore, the Tribunal is of the view that where the Code prescribes a form of words, there is no need for the exact words to be used as long as the substance of the intended words is conveyed. In this case, the Final Written Warning effectively conveyed that in the event of another occurrence of a similar nature the Complainant would be subject to further disciplinary action that could include termination. The Tribunal finds that language to be sufficient within the meaning of section 103(1) of the Code.
32. However, the second termination process under section 103 deals with performance related issues that arise after the probation period for which a written warning may be given. Unlike the infraction process which requires a specific statement in the warning letter, the employer must provide appropriate instructions to correct the unsatisfactory performance and no special language is required. If within three (3) months after the written warning along with the appropriate instructions and the performance has not improved, section 103(6) allows the employer to terminate the employee. However, in this case there has been no question of the performance of the Complainant, as she was considered a very good nurse. Based on the Agreed Statement, this is a case about the repeated misconduct of the Complainant and not about poor performance.
33. Based on the concession by the Respondent, the Tribunal accepts that the Final Written

Warning was more than six (6) months before the Termination Letter, and, therefore, the dismissal was unlawful.

34. The Tribunal must also consider whether the dismissal was unfair, which requires determining whether a reasonable investigation was conducted into the Fluffing Incident and there were reasonable grounds for believing that the Fluffing Incident had taken place as well as whether the Complainant had a fair opportunity to defend herself, including access to her employment record in accordance with section 81(2) of the Code.
35. The Tribunal is satisfied that there was a reasonable investigation conducted by the Respondent into the Fluffing Incident, and that the Respondent did in fact have reasonable grounds for believing that the Fluffing Incident did occur, especially since the Complainant admitted and apologized for it. The Tribunal is also satisfied that the Respondent would have had a fair opportunity to defend herself if the Termination Letter only relied on the Peters' Memo to terminate the employee, as she was placed on Administrative Leave during which time she was given the opportunity to respond in writing to the Peters' Memo and she did provide a response. The Respondent was entitled to consider both the Peters' Memo and the Complainant's Memo to decide to terminate her, as contrary to the position of the Complainant, a fair opportunity to defend oneself does not mean in every circumstance there must be a hearing, it only requires that all the allegations against the Respondent be placed before her, and she then be given an opportunity to respond to those allegations. However, the Termination Letter also considered the Final Written Warning as the basis of the termination and not merely the Peters' Memo, and the first opportunity the Complainant had to address the Final Warning Letter would have been at the meeting at which she was terminated. Although this issue was not addressed by the Complainant as the basis for the unreasonableness by the Respondent, the Tribunal finds that the failure to also put the Final Written Warning to the Complainant when the Peters' Memo was put to her and she was placed on Administrative Leave was not reasonable in the circumstances, and, therefore the Tribunal finds that the Complainant did not have a fair opportunity to defend herself.
36. More egregiously, however, is that section 81(2) requires that an employee should have access to their employment record, and section 19(2) requires that those employee records should be maintained for six (6) years after termination. The Verification of Employment Request demonstrates that the employee did not have access to her employment records during the termination process and the delay in providing the requested employment records within six (6) years after termination is an egregious act by the Respondent that should not be countenanced. The Tribunal does not accept the suggestion by Mrs. Sylvester-Thomas that it was merely a misunderstanding as to who was responsible for issuing the requested information. Based on the Verification of Employment Request and the various correspondence from the Complainant's legal practitioners which followed also demonstrates that it was not a mere misunderstanding, but a wilful act on the part of the Respondent.
37. For these reasons, the Tribunal does not believe it needs to explore whether termination for the Fluffing Incident fell within the band of reasonable responses, since the failure to afford the Complainant a fair opportunity to defend herself is sufficient to find that the Complainant was unfairly dismissed. However, the Tribunal notes that the Respondent's

Skeleton Arguments relied on the pre-Code case of *Elphina Abraham v. Sunny Caribbee Herbal and Spice Company Limited*,¹⁰ which provides:

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

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

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

38. 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 and the question of whether the Fluffing Incident would fall within the band of reasonable responses is one of fact and degree. If it were necessary to determine this issue, the Tribunal would not consider the Fluffing Incident to fall within the band of reasonable responses especially since the reason the Respondent considered termination was not the Fluffing Incident by itself but it was coupled with the Final Written Warning.
39. Having found that the Complainant was unlawfully and unfairly dismissed, the Tribunal must now consider the remedies to be granted to the Complainant. There was no request for reinstatement or re-engagement in the Amended Complaint but there was a request for compensation. The Response did not include a statement in accordance with LPR 20(1)(f)(ii) concerning the acceptability of the remedies under section 86(1)(a) of the Code and to determine any compensation in accordance with section 86(2) of the Code. Therefore, the Respondent accepted that the Tribunal may order such punitive sums as it thinks fit.
40. The issue of punitive damages was fully explored and developed in the case of *Colleth Ranger-Vassel v. Main Sail BVI Ltd*¹¹ and a special carve out was further developed in the

¹⁰ BVIHCV2007/0122, unreported, delivered on 29 April 2010.

¹¹ n.**Error! Bookmark not defined.**

case of *Qasim Yoba v. Peter Island (2000) Ltd.*¹² 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*,¹³ which was further discussed in *Devonni Christopher v. BVI Health Services Authority*,¹⁴ where the legal practitioner for the BVI Health Services Authority successfully obtained a reduction of the punitive award. The BVI Health Services Authority had always maintained from their pleadings to their closing submissions that they recognized there was a procedural irregularity, but even if the procedural irregularities, which the Tribunal equated to Shakespeare's *The Comedy of Errors*, but without the humour, had not taken place they would have still terminated the employee and they would have been properly within their right to do so. It was for that reason that the BVI Health Services Authority was successful in getting the reduction, but in this case the Respondent has not in the pleadings, evidence or submissions claimed any procedural irregularity, the absence of which would still have resulted in the termination of the employee. Therefore, there is nothing before the Tribunal in mitigation on behalf of the Respondent to allow the Tribunal to consider a *Qasim Yoba* reduction or any other reduction from the starting point of \$25,000.00.

41. Additionally, the Tribunal must express its concern for the conduct of the Respondent with respect to the Verification of Employment. The delay in providing the Verification of Employment is unacceptable and so the Tribunal would not reduce the starting point of \$25,000.00 even if there were possible grounds for such reduction based on the Complainant's conduct.
42. The Complainant has claimed the balance outstanding on the contract for \$2,850.00, a 3 months salary in lieu of notice for \$12,068.25, the 5% tax free performance incentive for \$2,413.65, loss of income for 4 months and 2 weeks for \$18,102.38, the reduction in income from 15 June – 15 September for \$3,423.25, plus damages for unfair dismissal in the amount of \$24,126.50. The Tribunal, however, notes that the Respondent already paid the Complainant one (1) month's notice, therefore, that amount must be deducted for a total compensation claimed by the Complainant in the amount of \$58,629.03.
43. For this purpose, the Tribunal will add \$55,000 in possible compensation to the \$25,000.00 for a total of \$80,000.00 in punitive damages.
44. 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.
45. LPR 49 outlines the process for the assessment of costs, and this would be a case where the maximum limit of costs would be \$12,000.00 based on LPR 49(5). The Tribunal does not believe there is any need to adjust this maximum limit and will allow the parties to agree costs or have it assessed.

¹² n.**Error! Bookmark not defined.**

¹³ BVILAT2019/027, unreported, delivered on 11 November 2021.

¹⁴ n.3.

46. Additionally, the Tribunal will exercise its discretion to award post-judgment interest at the rate of 5% per annum calculated based on the daily rate if the punitive sums and costs are not paid by the deadline.

The Award

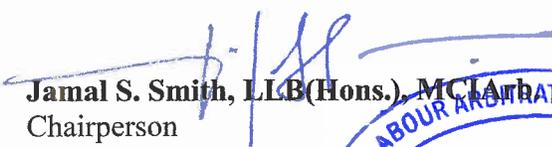
47. The award of the Tribunal is as follows:

- (a) The Complainant was unlawfully and unfairly dismissed by the Respondent.
- (b) The Respondent shall pay a punitive sum to the Complainant in the amount of \$80,000.00 on or before **Monday, 16 May 2022**, less all statutory deductions.
- (c) If the punitive sum is not paid on or before Monday, 16 May 2022 the Respondent shall pay interest to the Complainant in the amount of \$11.00 for each day thereafter that the sums remain unpaid.
- (d) The Respondent shall pay the permitted costs incurred by the Complainant from the filing of the Complaint to the date of this Final Award up to \$12,000.00, to be assessed if not agreed on or before Monday, 16 May 2022.
- (e) If the parties fail to agree on the costs to be paid to the Complainant on or before Monday, 16 May 2022, a costs hearing in accordance with Part IX of the LPR is fixed for **Thursday, 19 May 2022** at 2:00 p.m. at the Office of the Tribunal.
- (f) If the parties agree on the costs of these proceedings the Complainant shall give notice of the agreement to the Secretary to the Tribunal and the date fixed for the costs hearing shall be vacated.

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

By Order
Labour Arbitration Tribunal

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


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


Professor Arthur Richardson, Ph.D.
Member on the recommendation of the
Complainant



A handwritten signature in blue ink, appearing to be 'K.A. Forbes', with a stylized flourish at the end.

Kamika A. Forbes, LLB(Hons.)
Member on the recommendation of the
Respondent