**VIRGIN ISLANDS**

LABOUR CODE, 2010
(No. 4 of 2010)

**IN THE LABOUR ARBITRATION TRIBUNAL**

**Case No. BVILAT2021/029**

**BETWEEN**

**ROSEMARY ROSAN** **COMPLAINANT**

**AND**

**BVI TOURIST BOARD** **RESPONDENT**

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**NOTE OF DECISION ON COSTS AND INTEREST**

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**BEFORE:** **Samuel Jack Husbands**, Chairperson, and **Professor Arthur Richardson** and **Kamika Forbes**, Arbitrators

**SUBMISSIONS ON:** 28 March 2025, 14 April 2025, 27 March 2026 and 7 April 2026

**DECISION ON THE PAPERS** : 24 June 2026

**SUBMISSIONS BY:** (1) Christa Anthony of MKS Law, legal practitioners for the Complainant

(2) Anthea Smith of Sabals Law, legal practitioners for the Respondent

1. The Complainant was formerly employed by the Respondent. On 11 December 2021 she was dismissed. She filed a claim with the Labour Commissioner. The claim was subsequently referred to the Tribunal. She claimed reinstatement and compensation. After the trial the Tribunal gave judgment in her favour on 20 March 2025 and awarded her compensation of $26,050.35 with costs and judgment interest to be determined following receipt of the parties' written submissions. The parties have now filed their submissions.

**Pre-trial history**

2. This complaint had a complex procedural history. The Complainant filed a disclosure application on 24 March 2022 which was set for hearing on 10 May 2022. Hearing was adjourned after the tenure of the expiration of then chairman of the Tribunal. The Tribunal was not fully constituted until May 2023. The application did not get back on the hearing list until 9 June 2023. It was finally disposed by our written decision on 11 October 2023. We made no order as to costs.

**Order on 9 September 2024**

3. A pre-trial hearing followed on 12 January 2024. This hearing was adjourned with no order as to costs. At a further pre-trial hearing on 9 February 2024 it was ordered that the matter be set for trial on 9 and 10 September. Again, no order as to costs was made. On 9 September the trial was adjourned at the request of counsel for the Complainant on the ground of a grave family health matter. The Respondent applied for costs and it was ordered that the costs application be heard at the commencement of the trial. The new trial dates were 10 and 11 December 2024.

**Order on 10 December 2024**

4. At the commencement of the trial on 10 December the Complainant applied orally for a further adjournment and for several other orders. The Tribunal made a number of orders and adjourned the trial to 6 and 7 Match 2025. It also made two orders in respect of costs. One was that the Complainant pay the costs lost by the adjournment of the trial, such costs to be assessed if not agreed. The other was an adjournment of the Respondent's application for its costs of the trial on 9 and 10 September 2024 to be dealt with at the end of the trial.

**Order on 6 March 2025**

5. The Complainant did not comply with orders made at the hearing on 10 December 2024. As a result, the trial did not proceed on 6 and 7 March 2025 and there was yet another adjournment. Orders were made putting the matters right, adjourning the trial to 8 May 2025 and providing for costs. The Complainant was ordered to pay the costs lost by the adjournment of the trial and the Respondent was directed to serve a schedule of its costs of 9 September 2024, 10 December 2024 and 6 March 2025

**Order on 8 May 2025**

6. The trial on 8 May 2025 was adjourned to 25 and 26 September 2025 and the parties agreed to vary the trial directions made on 6 March 2025. The variations included the grant of permission to the Respondent to serve its costs schedule 6 weeks before the trial and the Complainant to serve a reply 3 weeks before the trial. There was no order as to the costs of this hearing.

**Order on 3 September 2025**

7. The Complainant applied on 29 May 2025 for permission to file a schedule of loss and to treat the case as one of unfair dismissal. The application was heard on 29 August. By order

dated 3 September 2025 the Tribunal dismissed the application for permission to file a schedule of loss and declared that the matter could proceed as an unfair dismissal claim. There was no order as to the costs of this application.

**Order on 26 September 2025**

8. The trial took place on 25 and 26 September 2025. At the end of the trial judgment was reserved and directions were issued for the filing and service of written closing submissions. The Tribunal received the submissions on 24 October 2025 and 21 November 2025.

**Order on 20 March 2026**

9. Judgment was given on 20 March 2026. It was directed that the parties file written submissions in respect of the costs already ordered and that in respect of the costs of the trial that the Complainant file a costs schedule and submissions and the Respondent file a response to the schedule and submissions. The Complainant was permitted, if so advised, to file submissions on interest and the Respondent to file a response. All submissions were received by 7 April 2026.

**Matters to be decided**

10. The purpose of these Reasons is:

   a. to assess the Respondent's costs already ordered of 9 September and 10 December 2024 and 6 March 2025,
   b. to determine if the Respondent should be ordered to pay the Complainant's costs of the trial, and if so, to assess those costs, and
   c. to determine if the Claimant is entitled to interest on the award and, if so, at what rate and for what period.

**Complainant's costs of the trial**

11. The starting point must be section 30(3) of the Labour Code 2010 (**the Code**) which provides that the Tribunal "shall not make an order as to costs except for exceptional reasons which the Tribunal considers appropriate". Rules 47 of the Labour Code (Arbitration Tribunal) (Procedure) Rules 2010 (**the Rules**) contains general guidelines on the meaning and extent of the term "exceptional reasons". The Rule contains a non-exhaustive list of factors which could be considered exceptional. Rule 49 contains detailed but general guidelines for the assessment of costs including maximum percentages of the amount claimed.

12. Christa Anthony, lawyer for the Complainant, submits that the Complainant succeeded on what she described as the central issue, i.e. that her dismissal was not a genuine redundancy was but was an unfair dismissal, and she was awarded compensation. She accepted the Complainant did not succeed on the claim for reinstatement.

13. At paragraph 13 of her submissions Ms Anthony set out the exceptional circumstances applicable to this case. They are:

a. the respondent's failure to establish a genuine redundancy,
b. the absence of supporting evidence for the Respondent's reorganisation, its failure to provide cogent evidence despite challenge, and its failure to justify selection of the Complainant for redundancy,
c. doubt as to the reasons for dismissal, and
d. the overall effect of these reasons taken together.

14. I do not find any of these reasons exceptional. These are just ordinary issues associated with cases of this type. We agree with the argument of Anthea Smith, lawyer for the Respondent, that if a party's failure to prove its case was an exceptional reason that would open the door to a finding of exceptional reasons in every case.

15. I note the statement of Phillips J in **Robinson v British Island Airways Ltd** [1978] ICR 304 at page 308 cited in **Safeway Stores plc v Burrell** [1997] ICR 523 at page 531B that cases "concerning redundancy arising out of a reorganisation always cause difficulties". I do not think those difficulties necessarily arise from or create exceptional circumstances.

16. There is, however, one element of the circumstances that may be exceptional. It was the persistence of counsel for the Complainant, including her former counsel Patricia Archibald-Bowers, that demonstrated what was so exceptional. The Complainant, not having obtained relevant information from the Respondent, was put to the task of applying, successfully as it turned out, for a disclosure order. The information unearthed by the disclosure order did not include but should have included the management memo put into evidence by Mrs Flax-Brutus. Because consultation with employees and selection protocols are desirable but not mandatory this introduces an extra layer of complexity.

17. That might explain the weight and size of the team at MK Solicitors LP, the firm that represented the Complainant. MK Solicitors came late to the proceedings after Mrs Archibald-Bowers had ceased to act. There was a lot of work to get done in a short period of time. It cannot be placed at the door of the Respondent that the Complainant changed lawyers.

18. Despite my findings at **paragraphs 14 and 15 above**, I conclude that there were some difficulties faced by the Complainant to bring this case to trial that would rank as exceptional. The Complainant was battling a large corporation which is likely well-resourced. She was forced to battle hard for the information she sought, especially the management memo put into evidence by Mrs Flax-Brutus. She was not assisted by the Respondent which took a reticent approach to the delivery of information. This is not to go back, after the fact, and add a costs element to the disclosure order of 11October 2023. It is a reflection and assessment of the overall battle waged by the Complainant.

19. I note that there are general limitations on costs in rule 49 of the Rules. In sub-rule (5), in a complainant for a sum of money, even if it includes some other remedy, total costs allowed under the rule may not exceed 15% of the monetary value of the claim or the BVI per capita GDP at the date of the complaint whichever is higher. In sub-rule (6), in a complainant for a

remedy other than a sum of money, even if it includes some other remedy, total costs allowed under the rule may not exceed 15% of the BVI per capita GDP at the date of the complaint. These rules are general guidelines.

20. Under the general rule in Part 65.5 and Appendix B and C of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 (**the CPR**), a successful party would have been entitled to costs of 20% of the amount of the award. The CPR does not of course apply to proceedings before the Tribunal and it is worth noting that the standard set by section 30(3) of the Code is even more restrictive than that contained in the CPR, rule 64.6(1) of which provides that where the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. We consider the Complainant to be successful in these proceedings even though she failed to obtain an order for reinstatement and was only awarded only a modest sum for compensation.

21. I must also take into account the Complainant's net bill of $93,633.50. This is entirely out of proportion to the award. I would award her a proportion of 20% of the award, i.e., the sum of $5,210.07. Her bill includes disbursements of $164. It is not clear what this figure represents. There are no filing fees before the Tribunal. There was an appeal to the High Court from our interlocutory judgment dated 3 September 2025. Filing fees may have been incurred by the Complainant in that appeal but the assessment of appellate filing fees would be a matter for the High Court.

**Respondent's costs of interlocutory applications**

22. At each of the hearings on 9 September 2024, 10 December 2024 and 6 March 2025 the Respondent was ready to start the trial. The applications to adjourn came late in the day, after the trial preparation had commenced or been completed. The cost to the Respondent could have been mitigated or even avoided altogether by early notice from the Complainant. The very late notice, in two cases at the start of the trial, were exceptional circumstances. The Respondent's bill was filed on 28 March 2025. The total for fees is $3,600 which is more than reasonable for a lawyer of Ms Smith's breadth of experience and seniority. The bill does not contain a statement of Ms Smith's date of admission or any aspect of her experience but counsel is well known to the Tribunal as a lawyer of over 20 years' experience.

23. The Complainant, in her objection to the bill filed on 14 April 2025, proposes a reduction of the bill to $2,595 for fees and $50 for disbursements. Her objection is mainly based on what may be called double-counting in the preparation of the trial bundle. The trial bundle is used for the trial but its cost is not an expense limited to the actual hearing. It may often need to be tweaked or amended before the commencement of the trial and it was amended in this case.

24. Second, the order of 9 February 2024 required the preparation of two paper bundles for use by the Tribunal. It must not be forgotten this was the Complainant's obligation which the Respondent undertook as it possessed the greater resources. I accept that Trial Bundle 1 was filed on 6 September 2024, just days before the adjourned trial on 9 September 2024 and Trial Bundle 2 was filed on 11 September 2025, two weeks before the actual trial of 25

September 2025. These would ordinarily be the Complainant's expense. They were assumed by the Respondent. The Respondent ought not to be at a disadvantage for having helped out by the assumption of a responsibility that was the Complainant's. The Respondent would be entitled to this expense in any event.

25. The printing costs are not fully explained. It is assumed they are for bundling. Volume 1 of the trial bundle comprised 141 pages and Volume 2 comprised 144 pages. It is not clear how many copies were printed. Two copies were required for the Tribunal. It is not clear if any additional printed copies were made for use by Ms Smith or her witness Mr McCoy. However, we do not consider the printing costs unreasonable for bundles and a case of this size.

26. Rule 49(8) contains extremely modest allowances for costs of interlocutory applications if assessed on the standard basis. We need not consider the application of these allowances. The Respondent's costs being assessed are not application costs but are costs of the trial.

27. We would allow $654 for printing and other disbursements. We would also allow $3,500 for professional fees. The Respondent was prepared and ready to start the trial on every occasions when the Complainant sought adjournments. The sum of $3,600 claimed by the Respondent was modest to start with. We allow the Respondents its costs in the amount of $4,154.

**Interest**

28. The Complainant seeks pre-judgment interest on the award from the date of her termination to the date of judgment. She also seeks post-judgment interest pursuant to section 7 of the Judgments Act Cap 35 from the date of entering up of the judgment until payment. Post judgment interest is mandated by the Judgment Act. There is no need for an order.

29. Regarding pre-judgment interest, I note that the Court of Appeal, beginning with **Alphonso & Others v Ramnath** (1997) 56 WIR 183, reaffirmed in **Adamovsky et al v Malitskiy et al** (ECCA February 2017) and in **Mathews v O'Neal** (ECCA, January 2018) and again in strong terms in **AG v SKN Choice Times Ltd** (ECCA, May 2022), adopted the rule that a party obtaining an order for damages may also be entitled to the award of pre-judgment interest. The question of pre-judgment interest was also recently considered by the Judicial Committee of the Privy Council in **Sagicor Bank Jamaica Ltd v YP Seaton & Others** [2022] UKPC 48.

30. Doubts about pre-judgment interest had arisen in the BVI because the BVI lacks the equivalent of section 3(1) of the UK Law of Property (Miscellaneous Provisions) Act 1934. This section provides that in any proceedings in any court of record [in England and Wales] for the recovery of any debt or damages, the court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit in the period between the date when the cause of action arose and the date of the judgment. In **Matthews v O'Neal** the Court of Appeal set out its reasons in answer to the submissions of counsel which are summarised at paragraphs 55 to 60 of the judgment. The court referred to the following bases for the award of pre-judgment interest:

a. the common law rule adopted in **London, Chatham and Dover Railway Co v South Eastern Railway Co** [1893] AC429,
b. the statutory basis in section 3(1) of the UK Law of Property (Miscellaneous Provisions) Act 1934 was incorporated into BVI law by virtue of section 7 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80,
c. the basis in equity exemplified by **Creque v Penn** [2007] UKPC 44, and
d. a claim which is pleaded and supported by evidence for loss for being kept out money due to the person.

31. It was not clear from **Matthews v O'Neal** if the Court of Appeal endorsed the statement by Lord Herschell in the **London, Chatham** case as a general common law principle of recovery of pre-judgment interest outside of section 3(1).

32. In any event, neither **Matthews v O'Neal** nor **Adamovsky et al v Malitskiy** go as far as saying that a claim for interest losses outside of section 3(1) may be made if particulars of the losses are not pleaded and supported by evidence in the usual way. Further concerns are that section 3(1) applies only to judgments of the High Court and that section 86 of the Code does not contain a provision for the award of interest. There is therefore no statutory authority for the inclusion of interest in an award given by the Tribunal upon the determination of a dispute referred to it under the Code for an unfair or illegal termination. In addition, neither the Dispute Claim Form nor the Reply contains a claim for interest and no evidence of interest losses was led by the Complainant.

33. It must be noted that sections 78(2) and 79(2) of the Code permit the court to include interest in certain awards for the payment of unpaid wages and that section 107(2), as amended by Act No. 11 of 2020, requires the payment of interest on severance pay in certain circumstances. Sections 78(2) and 79(2) are very specific provisions under the Code that have no application to this dispute.

34. Reference must also be to rule 39(5) of the Rules. This rule provides that an order or award by the Tribunal for a sum of money shall indicate whether interest is included from the date of the cause of the complaint to the date of the order or award. The rule presupposes the Tribunal possesses jurisdiction to award pre-judgment interest in the first place. This Tribunal has awarded such interest in a number of its decisions such as **Ranger-Vassell v Mainsail B.V.I. Limited** (BVILAT July 2021) at paragraphs 115-121 and there is no objection in principle by the Respondent.

35. Ms Smith submitted that the Tribunal should not exercise its discretion in favour of an award of interest because the Complainant did not present evidence of loss or submissions supporting compensation, but the case was fought as one of reinstatement. I note that in her Dispute Claim Form the Complainant sought both reinstatement and compensation. In our interlocutory judgment dated 3 September 2025 we refused her permission to file a schedule of loss (and the new evidence that would necessarily follow) three weeks before the trial. We were concerned that to permit new evidence would have led inevitably to another adjournment of the trial. But we also ruled that the case should also proceed as one for unfair dismissal.

36. In the circumstances I will award interest. She would have been at a disadvantage by the loss of money to which she was entitled. The Complainant's future loss could have been best assessed on the date of her termination. It was best assessed in hindsight after the passage of at least four years. Since we have awarded her the equivalent of nine months post-termination pay and noting she was paid for the first month after termination plus an amount treated as severance I would award interest from the end of the nine-months period, that is from 11 September 2021 until judgment on 27 March 2026. I consider the rate of 4% per annum to be appropriate.

**Summary.**

37. I make the following orders:

a. the Respondent pay the Complainant costs of the trial in the amount of $5,210.07,
b. the Respondent pay the Complainant interest on the compensation of $26,050.35 at the rate of 4% per annum from 11 September 2021 to the date of the award on 20 March 2026, and
c. the Complainant pay the Respondent costs lost by the trial adjournments in the amount of $4,154.

By Order
**Labour Arbitration Tribunal**

**Samuel Jack Husbands**
Chairperson

I have read the above reasons in draft and I agree the order made.

LABOUR ARBITRATION TRIBUNAL
JUN 24 2026
BRITISH VIRGIN ISLANDS

**Professor Arthur Richardson**
Arbitrator

I have read the above reasons in draft and I agree the order made.

**Kamika Forbes**
Arbitrator