



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

REASONS FOR DECISION

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

TRIAL AND

SUBMISSIONS ON: 10 December 2024; 6 March, 8 May, 25 and 26 September, 24 October, 21
November and 27 November 2025

DECISION ON: 20 March 2025

IN ATTENDANCE: (1) Rosemary Rosan, the Complainant
(2) Christa Anthony of MKS Law, legal practitioners for the
Complainant
(3) Clive McCoy, Director of the Respondent
(4) Anthea Smith of Sabals Law, legal practitioners for the Respondent

ADDITIONALLY: (5) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

1. The Complainant was employed by the Respondent as an Events Coordinator in its Marketing Department from about 2014 to 11 December 2020 when she was **summarily** dismissed. She did not have a copy of her contract of employment. She asked the Respondent for a copy. The Respondent's copy was lost in the devastating hurricanes of 2017. They could not produce it. There is no doubt however that the Complainant was employed from about 2014

as Events Coordinator as stated above. Her job description is at page 30 of volume 1 of the trial bundle and is summarised by Mr McCoy at paragraph 5 of his witness statement [pages 151-152]. Her last salary was \$57,700 as stated by Mr McCoy at paragraph 10 of his witness statement [page 153] (the figure is given as \$54,700 in the salary increase letter at page 178).

2. In its termination letter dated 11 December 2020, the Respondent stated as follows:

“The purpose of this letter is to inform you of the outcome of a recent review by the BVI Tourist Board of its operational requirements and what this means to you.

Please note that as a result of changes being made within the organization the position of Events Coordinator is no longer needed as such your position has been made redundant. Regrettably this means your employment with the BVI Tourist Board and Film Commission has been terminated with immediate effect.”

3. The Complainant was paid a total of \$20,293.34 on termination made up as follows:

- a. \$4,558.34 for salary for December
- b. \$5,049.12 for accrued but unused vacation
- c. \$11,597.20 for severance

The above payments actually come to \$21,204.66.

Facts leading up to termination

4. The Complainant alleged in her Dispute Claim Form filed with the Labour Commissioner on 14 May 2021 that she was made redundant with immediate effect from 11 December 2020 due to what was said to be restructuring but, in reality, she was targeted, victimised, and wrongfully dismissed. She sought reinstatement and compensation. The Respondent admits dismissing her but claimed the dismissal was by way of redundancy under section 89(3) of the Labour Code (the Code). The Complainant insists that it was not a genuine redundancy.

5. Section 89(3) of the Code provides as follows –

- (3) For the purposes of the Code,
“redundancy” means where the work required of the employee is affected because
- (a) the employer has modernised, automated or mechanised all or part of his or her business;
 - (b) the employer has discontinued or ceased to carry on all or part of his or her business;
 - (c) the employer has reorganised or relocated his or her business to improve efficiency;
 - (d) the employer’s need for employees in a particular category has ceased or diminished;

- (e) it has become impossible or impracticable for the employer to carry on his or her business at its usual rate or level or at all, due to a shortage of material, a mechanical breakdown, a force majeure or an act of God; or
- (f) a reduced operation in the employer's business has been made necessary by economic conditions including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory.

6. The Complainant is a public figure. She expresses views openly concerning public affairs. Some of her views are not aligned with those of the government. She could be uncompromising in her criticism. The Respondent is a state-owned corporation. Its board is independent but is appointed and may be removed by the Minister under whose portfolio it falls.
7. The job as Events Coordinator included responsibility for the maintenance of and advertisement of all the Respondent's events, and the supervision of events. It involved essentially the coordination, planning of and execution of marketing events, the management of the events budget and the general promotion of the Respondent's business through marketing events.
8. The Respondent claims in paragraph 10 of its Response [**page 53 of the trial bundle**] that as a result of the Covid-19 pandemic, it was unable to host its usual events for the entire year of 2020, and on 11 Dec 2020 the functions of and need for an Events Coordinator were significantly affected and diminished by the lack of the usual events. It needed to reassess its business and it was deemed necessary to eliminate the Complainant's post as there was no longer the need for an officer to carry out functions solely related to events. The job functions of the Complainant could be assigned to existing employees. It stated at paragraph 4.4 of the Amended Response that the termination was on grounds (c), (d) and (e) of section 89(3) of the Code [**page 54**].
9. Despite these reasons as set out in its Response, the Respondent did not mention Covid-19 in its termination letter. It simply stated in the letter that the Respondent's position of Events Coordinator was no longer needed and that the redundancy was "as a result of the changes being made within the organization".
10. In his Witness Statement, Mr McCoy referred at paragraph 6 to the effect of Covid-19 and the mandatory lockdown from the end of March to May 2020. He stated further at paragraph 10 that the reassessment of the need for a dedicated Events Coordinator was caused by the Covid-19 pandemic. Regarding the position immediately after the Complainant's termination, Mr McCoy stated events could not be carried on at the pre-2020 scale. Only one event was hosted in 2021 and that was in November. Sponsorship had also seriously decreased. He denied the Complainant was targeted or victimised or unfairly dismissed. He said the functions of and need for an Events Coordinator were significantly affected and diminished by the lack of the usual events as a result of the pandemic. The pandemic also resulted in the need to reassess the organisational structure of the Respondent and to address the most affected areas. There was no longer the need for personnel to carry functions related solely to events. It was determined that the Complainant was being paid her annual salary in circumstances where there was no longer a need for her services [**paragraph 10 at page 15**].

11. Mr McCoy testified further of a review of the relevant job descriptions and the organisational chart. He said his review established that it was necessary to remove the posts of Events Officer and Events Coordinator and that future events and related functions could be carried out by existing employees of the Marketing Department and other departments as were deemed necessary. The Respondent was therefore saving costs by eliminating a role that had practically diminished. Mr McCoy then outlined the events that had closed in 2020 and 2021. Only the Lobster Fest in November 2021 continued. He denied the Complainant was targeted or victimised.
12. The Complainant did not accept her post had ceased to exist [**paragraph 2 of her Reply at page 141**]. She did not set out a case but simply put the Respondent to proof of its own allegations contained in the Response. In her first Witness Statement [**page 161**] she did not challenge the Respondent's description of the fall-off in marketing events. It would have been hard to deny a significant decrease in events when, as is well documented publicly, the Government's response to the Covid-19 pandemic was to impose a lockdown followed by restrictions on face-to-face meetings and events and this lasted to mid-to-late 2021.
13. The Complainant however raised a series of circumstances in support of her claim that her dismissal was unfair. In her Witness Statement in Response (her second Witness Statement) filed on 22 April 2025 she stated work continued at the Respondent's business despite the Government's lockdown, with management directing staff to continue planning and adjusting operations from home through remote work and modified events, including smaller-scale, virtual, or hybrid formats. In her opinion, her operations as Events Coordinator were not significantly affected by the pandemic as of January 2020 but that her job was not affected until the mandatory shutdown in the summer months of 2020. She said the mandatory stoppage did not result in a complete stoppage of all work and some departments continued to function on a limited capacity and that work continued, albeit under restricted circumstances. She was very specific and denied that the function of and need for the Events Coordinator were significantly affected or diminished by the lack of the usual events as a result of the pandemic. In support of this, she referred to repurposing of some employees and the retention of departments such as Department Hosts and the UK office and the return of the first cruise ship in July 2021, seven months after her termination. Overall, she denied a restructuring of the organisation was necessary or that there was no longer a need for personnel to carry out event-related functions. She did not deny that the only event hosted by the Respondent in 2021 was the Lobster Fest in November 2021. She also did not deny that the pandemic impacted the scale of events and caused a decline in sponsorships [**pages 252-256**].
14. At paragraphs 12 and 13 of her first Witness Statement [**pages 161-162**] she stated she consistently raised concerns over public issues and has been an outspoken critic who expressed candid and forthright views on controversial matters. She was reprimanded in June 2019 for absence from the office during work hours and in October 2019 for comments she had posted online concerning the then Premier and tourism officials. The Board considered that her public statements were inconsistent with her mission to promote the BVI. The Complainant felt she had an overriding constitutional right to free speech. She responded to the warnings and did not admit the conduct alleged against her. She stated that following the

general elections in early 2019 the workplace became an uncomfortable environment for her. She was not given prior notice of the restructuring or an opportunity to work in any other department. Of the 60 employees of the Respondent, she was the only one made redundant.

15. Her witness, Sharon Flax-Brutus, testified that she was director of the Respondent up to May 2020 when she resigned. She agreed that the Complainant was a vocal and outspoken individual and on issues regarding the workplace and the wider community and affairs of the country. She described pressure from other Board members to discipline the Complainant. The Board sought legal advice from two law firms. She said she believed the Respondent was really intent on terminating the Complainant. The Complainant was frequently discussed by Board members. The Respondent considered disciplinary action in April 2020. She recommended a final warning and a one-week suspension. She produced into evidence an unsigned decision paper on proposed disciplinary action in April 2020 confirming the disciplinary options and her recommendation. More is said of Mrs Flax Brutus's evidence.
16. The Tribunal also considered the evidence of the Complainant's witnesses, namely Mr Skelton and Mr Hull.

Legal requirements for redundancy

17. Section 89(3)(c), (d) and (e) which are relied upon by the Respondent require that the employer is to establish redundancy. The work of the employee must be "affected" by the permitted steps taken by employer pursuant to those sub-sections. In this case, there was no doubt that the work required by the Complainant was also affected by the Covid-19 pandemic. The question is whether it was affected by a demonstrated reaction of the Respondent to the pandemic of the type set out in subsections (c), (d) and (e).
18. It is a question of fact whether the Respondent so reorganised its business in response to the pandemic or whether the need for marketing staff such as the Complainant had ceased or diminished or it had become impossible or impractical for the Respondent to carry on business at the usual level. This would not be a difficult standard to prove in the case of Covid-19 restrictions.
19. As stated above, the Respondent did not mention Covid-19 in the termination letter. The question is therefore whether, despite the rigours of the pandemic and the stated reaction of the Respondent, the reorganisation and restructuring of the Respondent was the cause of the termination.
20. We must remind ourselves of the requirements for a valid redundancy as set out in **Safeway Stores Plc v Burrell [1997] I.C.R. at p.529 C-D**:
 - a. was the employee dismissed
 - b. has the redundancy situation been well established, i.e. that the Respondent reorganised its business or its need for employees in marketing or events coordination has ceased or diminished or has it become impossible or impracticable to carry on business at the usual level due to force majeure or act of God

- c. was the termination the result of the Complainant's employment being affected by the state of affairs identified at stage b above.
21. We note the warning about the application of UK and other Caribbean authorities on the law of unfair termination and redundancy. In **Chefette Restaurants Ltd v Harris** [2020] CCJ 6 (AJ), Anderson JCCJ stated at paragraph 45:
- “It bears emphasis that the procedural obligations in section 29(5) are prescribed by statute and therefore cannot be watered down by interpretational gloss obtained from foreign cases. The House of Lords’ decision in *Polkey v A. E Dayton Services Ltd* illustrates this point in an acute form. The employer in that case dismissed a van driver without any warning or consultation. That was a breach of the code of practice then in force under UK legislation. The House of Lords held that such a procedural flaw would render a dismissal unfair, except in the rare case where a reasonable employer could properly take the view that whatever the employee might say would have made no difference to the decision to dismiss. In the recent case of *Blackburn v LIAT (1974) Ltd*, the Privy Council assumed that the Polkey principle remains good law in the UK, subject to statutory exceptions introduced by subsequent legislation in that country. The Privy Council also noted that counsel on both sides in *Blackburn* appeared to have proceeded on the basis that the Polkey principle applied in Antigua and Barbuda. Both counsel place reliance on *Whitbread plc v Hall*, which was to the same effect as *Polkey*. Whatever may be the position in Antigua and Barbuda, neither the Polkey principle, nor the ‘band of reasonable responses’ test associated with *Whitbread*, has any place in relation to the procedural requirements for dismissal under the ERA of Barbados. Those procedures are mandated by the Parliament of Barbados in the ERA which it adopted in 2012 to ‘to make new provision for the rights of employed persons and for related matters.’”
22. It is not for the Tribunal to assess the business efficacy, or possibly even the reasonableness, of reorganisation and restructuring. In the case of Covid-19, it might be expected that employees in marketing or events coordination are not required to the same degree as before or that business cannot be carried on as usual due to force majeure.
23. Ms Anthony, counsel for the Complainant, attacked the termination on other grounds. She submitted that the employer must produce documentary evidence of the redundancy factors or financial records; that there must be genuine business needs and employee consultation, notice and redeployment safeguards. Counsel cited **McKie v Nanny Cay Resort and Marina** (BVILAT2020/004, July 2021) and **Hodge v Road Town Wholesale Trading Ltd** (BVILAT2015/013, July 2021). There is no legal requirement for documentary evidence. The witness statement and oral evidence of management itself could successfully support the redundancy events. Of course, in many cases, the evidence may be so finely balanced that documentary evidence will tip the scales.
24. The Tribunal will not second-guess the decisions of management or substitute its own opinion for those of the persons charged with management of the company unless there was no evidence to support management decisions or the evidence of the management was clearly discredited.

25. Counsel also cited **Polkey v A.E. Dayton Services Ltd** [1988] ICR 142, a decision of the House of Lords of the UK and **Williams v Compair Maxam Ltd** [1982] ICR 156, a decision of UK Employment Appeal Tribunal for the proposition that the decision to terminate an employee on the ground of redundancy must be based on the reasonableness of the employer’s decision and that reasonableness will include an assessment of warnings of redundancy, consultation, the adoption of a fair basis for selection of such employees to terminate, and steps to avoid redundancy by offers of redeployment within the organisation.
26. We note that the Code does not impose any requirements for warnings or consultation, for selection protocols, or offers of redeployment. The code of practice on consultation in the UK considered in **Polkey** was made pursuant to the Employment Protection Act 1975 Schedule 17 paragraphs 4 and 46 which provided as follows:
- “If redundancy becomes necessary, management in consultation, as appropriate, with employees or their representatives, should: (i) give as much warning as practicable to the employees concerned ...; (iii) establish which employees are to be made redundant and the order of discharge; ...”
27. In **Compair** consultation factors were again referenced at pages 164E to 165C and guidelines on fairness are set out at page 162C–F.
28. BVI law does not contain any such code of practice or regulation requiring consultation. In **Prince v Bitter End Yacht Club** (BVILAT2023/001, October 2024) we encouraged consultation. We do not accept that a duty to consult is a necessary element of the employer’s duty to act reasonably. In an appropriate case, the absence of consultation might suggest that the process was not genuine or that the designated employee was singled out but that is not to require consultation as a matter of law or practice.
29. The drafter who prepared the Code must have had knowledge of the UK consultation regime yet omitted it from the Code. It would be wrong for us to take it upon ourselves to insert it by implication. Following the guidance of Anderson JCCJ in **Chefette Restaurants**, we decline to put too much weight on consultation and warnings although we acknowledge there are circumstances in which they are sensible and relevant. In **Cable and Wireless (Antigua and Barbuda) Ltd v Antigua and Barbuda Workers’ Union** (ECCA, May 2019) the Court of Appeal adopted the guidelines set out in **Compair** as a guide to whether a redundancy was reasonable.
30. Before leaving this point it may be important to mention the notification and consultation provisions in the Code. Section 99, so far as is relevant, provides as follows:
- “(1) Where an employer intends to terminate simultaneously the employment contract of three or more employees on the grounds of redundancy, he or she shall notify the Commissioner as soon as practicable and, except in exceptional circumstances, not less than one month before the effective date of termination.
- (2) The notification to the Commissioner shall state the number and categories of employees to be terminated, the reasons for that action, the period over which the termination is to take place, whether there has been any consultation with a trade

union, any other representative of the employees or with the employees themselves to mitigate the effects of the redundancy and the results of that consultation.

(3) The Commissioner shall, as soon as possible after receipt of the notification under subsection (1), inform the Minister of its contents.”

31. This provision for notification or consultation is clearly not applicable to the present case.

Has the redundancy situation been well-established?

32. No reference was made in the termination letter to redundancy events other than reorganisation and restructuring (most likely under section 89(3)(c) and (d)). **Reference was made to a recent review of its operational requirements and to changes being made within the organisation and to the position of Events Coordinator being no longer needed.** Busy business people who draft redundancy letters are not to be held to exacting standards of the lawyer with detailed knowledge of section 89. The Tribunal must read the letter to discover if the redundancy issues were fairly signalled to the employee. We think it was a fair reading of the letter, coming as it did during the pandemic, that Mr McCoy was intimating the Complainant was being dismissed for redundancy under section 89(3) of the Code, That it must have been clear to the Complainant is shown by the fact that in the Dispute Claim Form she refers to her dismissal as one of redundancy.
33. If reasonableness is a condition of a valid redundancy there may be a case that the Respondent’s decision on the reorganisation, the impossibility of carrying on its usual business and the decreased need in marketing events personnel to be one that a reasonable employer could make. If reasonableness is applicable to the selection of the Complainant, Ms Anthony says it is not demonstrated because there was no consultation, no selection protocols, and no offer of redeployment. As we have stated above, while the absence of these steps may be taken into account, they are not necessary under the Code.
34. Ms Anthony sought to establish that the Complainant’s role had not diminished even in the face of the massive disruption in business caused by Covid-19 and the significantly reduced number of events. She submitted that the fact that there was some doubling up with other staff in the planning of one event in November 2021 and the redistribution or reassignment of some of the Complainant’s duties to other staff members is far from showing that the Complainant’s role had diminished.
35. Ms Anthony next submits the Respondent has not provided any information in support of reorganisation in the form of minutes, internal memos, correspondence or reports and no financial analysis and that there is nothing to support the reorganisation except the word of Mr McCoy. Mr McCoy did produce organisational charts, one of which one was illegible. They were not accompanied by a narrative.
36. The bare assertion by Mr McCoy could in some circumstances be satisfactory, for example where the reorganisation is not disputed. In this case the Complainant not only disputed the reorganisation but applied for disclosure of information via her interlocutory application filed on 24 March 2022. After a hearing the Tribunal ordered on 11 October 2023 that the Respondent produce the following, among other documents:

- a. the review which led to the decision to make the Complainant redundant,
- b. number of persons made redundant,
- c. persons not made redundant but relocated to other departments of the Respondent's business, and
- d. forecasts used to determine the redundancy policy referred to at paragraphs 4 and 5 of the Amended Response [**pages 53 and 54**]

It could only be fair that the Respondent produce the very material on which it expressly relied in its Amended Response and termination letter such the reorganisation and review, if written confirmation existed.

37. The Respondent produced a number of documents. In relation to the review it stated the review was not in writing. It gave the names of three other employees not made redundant but who were relocated. No other persons besides the Complainant were made redundant. The Respondent also said the Complainant's personnel file was not in its possession. It did not say what had become of it.
38. These circumstances led to questions about the genuineness of the reorganisation. The Complainant had requested information that could test or confirm the reorganisation and restructuring. This absence of this information has not been properly accounted for. It must be kept in mind that the onus is on the Respondent to prove the redundancy event and the reasons for termination.
39. In the case of **Prince v Bitter End Yacht Club** (BVILAT2023/001, October 2024) the Tribunal accepted the evidence of a director about a reorganisation of her company without the production of a written plan. In that case the director had given detailed evidence of the reorganisation and the fact of the reorganisation was not in doubt. But where, as here, the Complainant challenges the fact of a real reorganisation itself (and in fact the mode of selection of a candidate for redundancy) and seeks disclosure of the relevant background information, the absence of the requested information leaves it open to question whether there was indeed a reorganisation that complied with sections 89(3)(c) and (d).
40. The Respondent relied on the well-known Covid-19 restrictions as justification for the redundancy but it must do more. For even if Covid-19 produced genuine and compelling factors that that could lead an employer to take the steps at section 89(3) it must still be determined that the individual employee selected for termination was indeed a proper candidate for termination.
41. Mr McCoy referred to changes in the Respondents' organisational chart at paragraph 11 of his witness statement [**page 153**]. The chart is also referred to at paragraph 4.3 of the Amended Response [**pages 53-54**]. Ms Smith, counsel for the Respondent, relies on it at paragraphs 41(d) and (e) and 44(iii) of her closing submissions. It is questioned by the Complainant at paragraphs 8 and 8.1 of her Reply [**page 142**]. Enough has not been said of the chart to explain its significance in the reorganisation or why it had to be the Complainant who was selected as the sole target of the redundancy exercise.

Was there a genuine selection of the Complainant/was the termination the result of the Complainant's employment being affected by events identified at sections 89(3)(c) and (d)

42. Even when the redundancy event is established the test for the selection of an individual employee to be made redundant may often be difficult to satisfy. The employee or her particular category of employment need only be “affected” by the redundancy event but that need not obscure the investigation of the true reason for the redundancy or the selection of those made redundant. There is no doubt that the marketing events were substantially curtailed in 2020 and 2021 and that there may have been excess capacity in the Marketing Department as there may have been in other departments.
43. The additional factors relied on by Ms Anthony, no doubt mirroring the factors set out in **Williams v Compair Maxam Ltd** [1982] ICR 156 at p162C-G, may be summarised as follows:
- a. there was no warning or consultation,
 - b. there was no selection criteria, and
 - c. there was no attempt to redeploy the Complainant.
44. We have considered the approach to take where there are a number of possible underlying causes tending to redundancy. The existence of facts that might support a genuine need to make redundancies does not by itself demonstrate that an employee dismissed in those circumstances was dismissed for the reason, or principal reason, of redundancy or for the reason that the work required of her was affected because of the employer's reaction to a business threat. Whether that is the case is a question of fact and causation for the tribunal.
45. In the case of the Complainant, the competing circumstances are the undoubted economic consequences of the pandemic and the Respondent having had enough of the Complainant over her public statements critical of the government. Had the Respondent been able to produce a documentary review or evidence of the reorganisation, the answer to the question of whether there was a reorganisation or a restructuring or that its need for employees in events coordination and marketing had ceased or diminished, would have been a relatively simple one. In the absence of better evidence of a true redundancy event, the Tribunal is not satisfied that the termination of the Complainant was on the ground of redundancy.
46. The evidence of Mrs Flax-Brutus casts much doubt on the state of mind of the Respondent. It was the next step to terminate the Complainant. The pandemic could have provided the opportunity where there was some inclination. Faced with the compelling claim by the Complainant, the Respondent would have been expected to present cogent evidence of the redundancy event. It did not do so.

Decision

47. We are not satisfied, even in the face of the Covid-19 health crisis and the widespread restrictions on gatherings and movement, that the Complainant was dismissed pursuant to a reorganisation or lack of need for employees of her category.

48. In the circumstances we find the termination was not by reason of redundancy and was unfair.

Remedies

49. The Complainant claims both reinstatement and compensation. The short answer to the claim for reinstatement is that it is not acceptable to the Respondent and therefore the Tribunal may not award it— see paragraph 2 of the Amended Response [**page 52**] and the proviso to section 86(1) of the Code. See also **Road Town Wholesale Trading Ltd. v Patricia Hodge** (ECHC, April 2024).

50. We will therefore deal now with the claim for compensation. The Complainant was earning \$54,700 per annum at the time of dismissal. She outlined her loss at paragraphs 52 to 58 of her first witness statement [**pages 166-167**]. Her annual post-termination income is far less than it was in the Respondent’s employment. She was unable to pay bills. The stress brought on by financial insecurity caused her emotional strain which affected her mental and physical health.

51. As stated above, on termination the Complainant was paid \$20,293.34 for salary for December, accrued but unused vacation and severance but as we have found she was unfairly dismissed rather than terminated by redundancy, she was entitled to compensation and not to severance pay.

52. Compensation for unfair dismissal is a statutory remedy created by section 86 of the Code. Section 86(2) sets out a non-exhaustive list of factors that may be taken into account in the assessment of compensation. These include (i) vacation pay earned but not taken, (ii) wages lost by the employee on account of the dispute up to the date of determination of the issue by the Tribunal, (iii) termination notice to which the employee was entitled, and (iv) the employee’s employment category, seniority and the ease of difficulty with which the employee can secure alternative employment. The employee also has a duty to seek to mitigate her losses.

53. We are also guided by the principle that in the assessment of compensation the Tribunal tries to achieve a realistic and reasonable figure, taking into account matters that would affect the post-termination loss. To quote this aspect of decision of Barrow JCCJ (obiter) at paragraph 127 of **Chefette Restaurants Ltd v Harris** cited above:

“In addition, over the two months or so leading up to the dismissal, relations undoubtedly soured, as revealed by the witness statement of the employee before the ERT. The Tribunal could well have decided this made the continuance of the employment relationship fraught.”

54. We therefore took into account a number of factors that may have impacted the Complainant’s longevity or continuation in the Respondent’s employment, that the pandemic created a situation in which the Complainant’s position was precarious and she could have been made redundant once the proper procedures were followed and documented. We also note that as a marketing professional she would have been at a disadvantage on the labour market during the pandemic in the not-unlikely event of her termination.

55. There is no doubt that during the Covid-19 era jobs were precarious and employees could have been made redundant once the proper procedures were followed. There is also no doubt that the Respondent was considering terminating the Complainant. We ought to take these factors into account.
56. The Complainant concentrated on the remedy of reinstatement and did not place a calculation of compensation before us. The Respondent succeeded in resisting reinstatement and did not offer any submissions on the quantum of compensation. Faced with this, we are reluctant to ask the parties for submissions at this late stage. The termination took place in 2020. Though the Complainant contributed to some delay, the initial delay when the Tribunal was not fully constituted was not her fault. And it is now four months since the post-trial submissions. We have decided not to ask for submissions on compensation.
57. In the circumstances, we would limit the Complainant’s future loss of wages to a period of nine months after termination including the period of one month for which she was paid in lieu of notice, that is to **11 September 2021**. The evidence shows that the Covid-19 restrictions through 2021. There was just the Lobster Fest event in late 2021. The consequences for the Respondent did not improve. They worsened in 2021. It was not unlikely that staff would have to be let go or reassigned in 2021 if not in 2020. We therefore allow until September 2021
58. According to the evidence contained in paragraphs 52 to 56 of her first witness statement [**page 166**] the Complainant had no “real earnings” in 2021 and 2022. We take that to mean her earnings were negligible. She began earning from 2023. She stated she took proactive steps to secure employment and reached out to a number of businesses but it was still during the time of what she termed “the challenging COVID climate” and opportunities were limited – see paragraph 56 of her first witness statement [**page 166**]. We accept that she would have struggled to find work immediately after termination. She exhibited evidence of earnings from 2023 to 2025 [**pages 180-226**].
59. Punitive damages are not sought.
60. We would assess her compensation at \$26,050.35 made up as follows:

Accrued but unused vacation	\$5,049.12
One month’s pay in lieu of termination notice	\$4,588.33
Eight months’ net pay lost on account of the termination	<u>\$36,706.24</u>
Subtotal	<u>\$46,343.79</u>
Less amount paid on termination	<u>\$20,293.34</u>
Compensation	\$26,050.35

Costs and interest

61. We will hear the parties on interest and on the costs of the proceedings other than the costs already ordered.


62. In respect of the costs already ordered, the Respondent filed submissions on 28 March 2025 and the Complainant filed a response on 14 April 2025. The Tribunal will assess those costs on the submissions.
63. In respect of the costs at large, the Complainant will file a costs schedule and submissions by **4.00pm on Friday 27 March 2026** and the Respondent will file a response to the schedule and submissions by **4.00pm on Tuesday 7 April 2026**.
64. The Complainant will, if so advised, file submissions on interest by **4.00pm on Friday 27 March 2026** and the Respondent will file a response by **4.00pm on Tuesday 7 April 2026**.

Samuel Jack Husbands



Chairperson

65. I have read the draft of the reasons of the chair. I respectfully agree the orders made and have nothing further to add.



Professor Arthur Richardson
Arbitrator

66. I have read the draft of the reasons of the chair. I respectfully agree the orders made and have nothing further to add.



Kamika Forbes
Arbitrator

