



**VIRGIN ISLANDS**

**LABOUR CODE, 2010**  
(No. 4 of 2010)

**IN THE LABOUR ARBITRATION TRIBUNAL**

**Case No. BVILAT2022/002**

**BETWEEN**

**ALCEDO FAHIE**

**COMPLAINANT**

**AND**

**FINANCIAL INVESTIGATION AGENCY**

**RESPONDENT**

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**REASONS FOR DECISION**

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**BEFORE:** **Samuel Jack Husbands**, chairperson, and **Prof Arthur Richardson**, and **John Carrington KC**, arbitrators

**TRIAL ON:** 7, 8 and 26 March 2024

**SUBMISSIONS ON:** 16 April and 3 May 2024

**DECISION ON:** 8 May 2025

**IN ATTENDANCE:** (1) Alcedo Fahie, Complainant  
(2) Daniel Fligelstone Davies of Silk Legal (BVI) Inc., legal practitioner for the Complainant.  
(3) Errol Geroge, director of the Respondent  
(4) Akilah Anderson of HP Anderson, legal practitioners for the Respondent

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

## The Parties

1. The Respondent is a corporation set up by the Financial Investigation Agency Act 2003. It is a body corporate. At the time of the Complainant's dismissal, it was responsible for receiving, obtaining, investigating, analysing and disseminating information which relates or may relate to (a) a financial offence or the proceeds of a financial offence or (b) a request for legal assistance from an authority in a foreign jurisdiction which appears to the Agency to have the function of making such requests. Section 4 was repealed and replaced after the Complainant's termination in February 2021.
2. In carrying out its objectives it is empowered, inter alia, by the former section 4 (a) to receive all disclosures of information required to be made pursuant to any financial services legislation which is relevant to its functions or pursuant to any other enactment relating to a financial offence, including information from any foreign financial investigation agency, (b) upon receipt of a request from a foreign financial investigation agency or a law enforcement authority, order in writing any person to freeze a person's bank account for a period not exceeding five days if satisfied that the request relates to the proceedings of a financial offence, and (c) may require in writing the production of such information, excluding information subject to legal professional privilege, that the Agency considers relevant to the performance of its functions.
3. An important feature of the work of the Respondent is the management of Suspicious Activity Reports (**SARs**). This includes the receipt and timely analysis of SARs and taking action that is permitted under the FIA Act. It is common knowledge that a SAR is a report made to the Respondent detailing activities or transactions that are suspected to involve the abuse or misuse of the financial system to commit a criminal offence. SARs are normally made by financial institutions and by lawyers and accountants and other professionals who advise in connection with financial transactions and who are subject to the supervisory regime of the FIA.
4. The Complainant was employed by the Respondent from 8 November 2004 to 5 February 2021 in various capacities and ultimately as Deputy Director. As Deputy Director, he was head of the Financial Instigation Unit (**the FIU**) of the Respondent. The FIU's role is to analyse and disseminate financial information in addition to the supervision of Non-Charitable Organisations and designated business and professionals.
5. His contract of employment is not in evidence. The Complainant admitted at paragraph 7 of his affidavit that he was responsible for the "oversight" of SARs, mutual legal assistance requests (**MLARs**), requests for information from local and foreign law enforcement and financial intelligence units, supervising the Senior Analyst and the Senior Investigating Officer, along with other responsibilities under section 4 of the FIA Act. He was also assigned the task of risk-rating SARs which he claimed is a task normally performed by Directors of FIUs in the region.

## Summary of the Complainant's case

6. The Complainant claims he was unfairly dismissed. On 5 February 2021 he received a termination letter dated 3 February 2021 [E74]. The letter set out the reasons for and background to the dismissal. The background included a termination hearing on 30 July 2020 at which the Board issued a reprimand and suspension from duty for two weeks from 10 to 23 August 2020, one week of which was without pay, with a caution that if there was a repetition within the following 6 months (which expired on 6 February 2021) the Respondent would be entitled to summarily dismiss the Complainant.
7. The termination letter dated 3 February 2021 set out the following grounds for termination:
  - a. a lack of urgency for critical matters particularly related to the management of SARs
  - b. resistance to recommended changes
  - c. an unreasonable demonstration of adherence to ineffective and inefficient processes
8. In his Complaint, the Complainant set out his case on the following bases:
  - a. He was unfairly terminated in February 2021 only days after receiving a positive appraisal rating.
  - b. The rating could have been higher but the Director of Respondent held completely unreasonable expectations of him.
  - c. The reasons for his termination as outlined in the termination letter were baseless and inadequate.
  - d. The findings of a lack of urgency, resistance to changes, adherence to ineffective and inefficient processes and wilful insubordination were unreasonable, irrational, unlawful and excessive.
  - e. He was terminated without notice and severance in breach of the Code.
  - f. Prior to termination sought to have him resign which would have denied him any cause of action.
  - g. The two-week suspension imposed by the Respondent amounted to placing him on probation in breach of the Labour Code 2010 (**the Code**).
9. The Complainant salary was \$90,000 per annum. He claimed damages and reinstatement.
10. In his Reply he set out the following additional grounds:
  - a. The Respondent acted in bad faith by ridiculing his suggestions and humiliating him, disregarding information he presented, assigning additional duties on top of an already heavy workload, blaming him for neglecting duties which were not assigned to him, and treating him as the personal assistant of the Acting Director. These particulars seem more akin to allegations of bullying rather than bad faith.
  - b. He carried out all his duties, actively participated in meetings and worked assiduously on all assignments (in other words he was not guilty of unsatisfactory performance or gross misconduct).
  - c. The disciplinary procedures contained in clause 5.7 of the Employee Handbook were not followed by the Respondent in that he was not afforded counselling or oral warnings nor was he given an opportunity to be heard prior to dismissal.

- d. He did not receive three warnings during the 6-month period before dismissal.
  - e. He was not found guilty of gross misconduct.
11. The Reply did not contain a Schedule of Loss as required by rule 23(1)(f) of the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (**the Rules**).
12. In his affidavit, dealt with in greater detail later, he denied the Respondent's allegations and generally supported the case he set out in his Complainant and his Reply.
- a. His appraisal was clearly positive although conceding there were some negative aspects at the end it. If his performance was as bad as alleged by the Respondent this was not reflected in the appraisal. The implication is that the appraisal is at odds with the grounds for dismissal and a finding of unsatisfactory performance. We will deal this at **paragraph 84 below**.
  - b. The finding of resistance to changes was not a reasonable ground for termination as no changes had actually been implemented. We will deal this at **paragraphs 48, 76b and 78 below**.
  - c. The management of SARs is a lot of work. He required more staff to manage the large number of SARs. We note here that this point is not made by him in any correspondence. He had ample opportunity to do so. In his evidence he said that he was expected to personally analyse the SARs while he was responsible for overseeing them.
  - d. The Respondent or Mr George himself (see paragraph 5 of the Complaint and paragraph 19 of his Affidavit) had unreasonable expectations of him. He gave as an example of these expectations a request by Mr George that he make a certain report during his vacation.
  - e. He had not been given an opportunity to be heard prior to termination, meaning between the termination hearing on 30 July and his termination on 5 February 2021. We will deal this at paragraphs 70 and 89 below.
13. The Complainant claimed damages and reinstatement. He subsequently abandoned his claim for reinstatement. He stated he has been unable to find comparable employment and he has suffered injury to his reputation, loss of pension and loss of MASA benefits (i.e. evacuation to an overseas hospital in case of illness or injury) and loss of the employer's portion of National Health Insurance contributions.

### **Summary of the Respondent's case**

14. In its defence of the claim the Respondent filed a Response dated 2 May 2022. It relied upon its termination letter and the grounds stated therein and denied that the Claimant had been unlawfully terminated. It responded to the specific allegations as follows:
- a. The Complainant's performance approval rating of 2.91 was not positive and was subject to the notation by the Director that the performance fell disappointingly below the expectations during the appraisal period.
  - b. It did not have unreasonable expectations of him. What was expected was not outside his ordinary job description,

- c. The termination hearing held on 30 July 2020 gave the Complainant a fair opportunity to defend himself against the charges against him and that he was suspended and the warning that a repetition the conduct similar conduct was not unlawful but was in accordance with the Code. The evidence against the Complainant demonstrated poor and inefficient standards of work which were tantamount to misconduct and the findings were reasonable. For completeness we add that the Respondent denied it sought to have the Complainant resign.
  - d. The Complainant was paid the amounts to which he was entitled which were salary through 6 February 2021, 14 days' vacation due, and pension benefits.
  - e. The termination was in accordance with the Respondent's policy and the Code.
15. The Respondent admitted the Complainant's salary was \$90,000 per annum paid in instalments bi-monthly. It neither admitted nor denied his alleged loss or damage but denied he was entitled to damages or reinstatement generally. It is noted the Response does not include a statement pursuant to rule 21(1)(f)(ii) of the Rules as to whether the remedies of reinstatement or compensation would be acceptable in the event it is found to have unfairly dismissed the Complainant.

## **The evidence**

### *Evidence of David Archer Jr*

16. David Archer is the chairman of the Board of the Respondent. He described the recent history of the Complainant within the organisation. The Respondent sought to fill the post of Director of the Respondent in August to September 2017. No suitable candidate was found and the Complainant, being second in command, was asked to act as interim Acting Director. In 2019 he asked to revert to his post of Deputy Director. Another person, Wade Smith, commenced work as Acting Director on 1 November 2019. It did not take long for the Acting Director Smith to raise concerns about the Complainant's performance. By letter dated 6 March 1990, he issued a reprimand to the Complainant about the Complainant's uncooperative behaviour and failure to follow through with directives. He issued another written reprimand dated 11 May 2020 concerning the Complainant's failure or refusal to follow through on directives and concerning the Complainant's non-participation in the SAR project team to address the SAR backlog. Finally, the Acting Director issued another written reprimand dated 9 June 2020.
17. In light of these reprimands and after consultation with the Staffing Committee, a recommendation was made for the Complainant's termination. The Staffing committee is sub-committee of the Board. By letter dated 15 June 2020 the Acting Director wrote to the Board of the Respondent specifying in some detail the reasons for the recommendation to terminate the Complainant. On 19 June 2020 the Complainant was informed of the recommendation and given one week to respond. The Complainant replied by letter dated 25 June 2020. The letter is not in evidence. The Board agreed that the evidence submitted by the Acting Director supported the recommendation for termination but prior to making a final decision it decided to hold a termination hearing The Complainant was notified of this decision and of the charges by letter dated 17 July 2020. He was given an opportunity to be heard. The termination hearing was held on 30 July 2020.

18. The Complainant was represented by counsel at the hearing. The Board found the charges were made out and that they amounted to misconduct as specified in the Employee Handbook. Despite its finding, the Board decided to give the Complainant one last chance, according to Mr Archer. In its letter dated 6 August 2020 summarising the proceedings at termination hearing, the Board instead of dismissing the Complainant, gave him a “severe reprimand” and suspension for two weeks including one week without pay. The Complainant was also warned that a repetition of the behaviour in the next 6 months could result in his dismissal without further notice.
19. The substantive Director, Errol George, returned to duty following the suspension. The Board was not satisfied there were significant changes in the Complainant’s performance, and it again presented the matter to the Staffing Committee. The Staffing Committee made a recommendation for termination. The Board accepted the recommendation and gave the Complainant a Statement of Termination dated 3 February 2021. The Statement of Termination contained the reasons for termination and the separation procedures. The Complainant was offered two financial options. He was asked to respond by noon on 5 February, the same day he received the Statement of Termination. He did not respond to the Respondent in time. It would have been a matter of hours. There being no response, he was terminated without the benefits offered. He was notified his final payment would be made on 15 February 2021.

*Evidence of Errol George*

20. *Errol George is Director of the Respondent.* He was on study leave from August 2017 to August 2020. The Complainant was appointed interim Acting Director in his place but reverted to his substantive role as Deputy Director in September 2019 as stated above. On his return to the post of Director Mr George was briefed by Mr Smith, whom he replaced, about the underperformance of the Claimant and the termination hearing on 30 July 2020 and the disciplinary action imposed. He continued to monitor the Complainant’s performance. He however witnessed some of the same difficulties already reported on. He stated when he left to pursue studies in 2017 there was a backlog but the number was nowhere near what it was on his return. He did not provide “before and after” figures.
21. He issued a letter to the Complainant dated 9 December 2020. He highlighted the Complainant’s continued performance deficiencies he had identified since his return, particularly in relation to SARs. As of 8 December 2020, the number of SARs completed was 97. He considered this was below expectations. He did not issue a Performance Improvement Plan. He did not refer to the charges of wilful insubordination, lack of urgency in other matters besides SARs, resistance to recommended changes, and adherence to ineffective and inefficient processes. He however recommended that the Complainant consider a committee’s comments regarding the Strategic and Operational Analysis Policy document and that he work with another officer to draft a guidance document for conducting strategic analysis and to submit the draft by 15 December.
22. Mr George considered that as the person with oversight of the Financial Intelligence Unit, the Complainant was under a duty to ensure that all efforts were made to reduce the SAR

backlog. This observation was that the Complainant left the management of the SAR process almost entirely to the Senior Analyst. The proper management of SARs is crucial to the operations of the Respondent and the effectiveness of the Anti-money Laundering, Countering Terrorism and Proliferation Financing framework largely depends of how effectively the Respondent manages SARs. The Mutual Evaluation Assessment (MEA) by the Caribbean Action Task Force (CATF) was scheduled for June or July 2022. A lot of work therefore had to be done to reduce the SARs backlog. We note here that is well known that successful assessments are entirely critical to the success of the Virgin Islands as a financial centre.

23. Mr George made the point in relation to SARs that he did not expect the Complainant to stand over people and get them to do their jobs. He expected the Complainant to supervise them. Mr George saw it as the Complainant's duty to ensure a strategy was developed. He said in analysing SARs you follow the requirements set out in the Standard Operating Procedures. He did not set out this policy or the requirements in his affidavit.
24. In his letter of 9 December 2020 Mr George also provided the Complainant with an outline of the key areas to complete and for which draft reports were to be submitted by 20 and 21 December 2020. I note here that the Complainant denied he received the letter when it was sent. He first saw it when it was shown to him by his lawyer after it appeared in the trial bundle and he first read it on the day he gave his evidence. Mr George denied this. He says he handed the letter to the Complainant and that the practice is that letters such as this are handed to the recipient.
25. Mr George next followed up with an email dated 7 January 2021 in which he reminded the Complainant of the failure to meet the deadlines and requested an update of the process by close of business the next day, 8 December. He denied receiving an oral update from the Complainant.
26. Regarding SARs, Mr George did agree that it was not part of the job of the Deputy Director to analyse SARs and that his responsibility was to give guidance.
27. The Complainant stated at paragraph 15 of his affidavit that the Respondent was under-resourced. Mr George did not agree. He said after the Complainant's departure the same resources were utilised in getting rid of the backlog. He was, however, seeking to add analysts to the staff. There was a growth in the number of SARs. The additional analysts were not used to clear the backlog. The old team dealt with backlog before the new analysts came on board.
28. Mr George's letter of 9 December 2020 was put to him by Mr Davies as an example of his having held unrealistic expectations of the Complainant. Mr George approved the Complainant's vacation for December 2020. He said it was possible he handed the Complainant the letter after his vacation had been approved. He considered it was reasonable to set tasks for completion during the vacation. His rationale for this is that the Complainant was a supervisor and he must delegate. Given the significance of the challenges the Respondent was facing, it was his expectation that the Complainant would

have delegated the tasks that needed to be completed and would have overseen those tasks even when on vacation. He did not expect the Complainant to be involved in performing the actual tasks but he could have ensured they were completed, which he did not.

29. At paragraphs 17 and 18 of his affidavit Mr George dealt with instances where he considered the Complainant showed resistance to adopting proposed changes to processes and procedures.
30. On 22 January 2021 Mr George carried out a performance and development appraisal of the Complainant for the year 2020. Out of a maximum grade of 4 he generally gave the Complainant scores of 3. His scores for the following critical areas were:
  - a. Score of 2.5 for managing the collection, reporting and analysis of statistics relating to the work of the Respondent (including SARs, requests for information and MLATs)
  - b. 2.5 for productivity, i.e. carefully and efficiently embarking on objectives and completing tasks in time
  - c. 2.5 for leadership
  - d. 2.5 for planning, organisation and delegation
31. In his comments included in the appraisal, Mr George acknowledged that the Complainant was very knowledgeable about his job functions and met the general requirements for his role. He listed a number of weaknesses such as:
  - a. Failure to demonstrate a sense of urgency in addressing the backlog of SARs, and rather than taking the lead he mainly left it to the Senior Analyst.
  - b. Focus is on tasks rather than overall effectiveness and strategic goals
  - c. Showing a general lack of self-awareness regarding his areas of weakness and tended to blame others
  - d. Showing little interest in motivation and team building
  - e. Exhibiting a tendency to resist change
  - f. Paying little attention to established deadlines and must be reminded to provide updates on the progress of assigned tasks
32. Mr George made recommendations for corrective action. He stated that in its totality the appraisal was not a positive assessment, and it demonstrated the Complainant fell below expectations during the appraisal period. He saw no improvement in the Complainant's work and no attempt to remedy performance deficiencies.

#### *Evidence of Wade Smith*

33. Mr Smith encountered "resistance" from the Complainant. The Complainant failed or refused to carry out his instructions. He referred to the written reprimand of 6 March 2020 in which he specified what he perceived to be the Complainant's deficiencies including his failure to follow up with directives and his pattern of uncooperative behaviour. He was dissatisfied with the Complainant's management and handling of SARs. He considered the management and SARs to be critical to the effectiveness of the Respondent. He was mindful of the fact that the CATF's Mutual Evaluation exercise was due around June or

July 2022. He referred to his second written reprimand to the Complainant dated 11 May 2020 which he issued a result of additional failures on the part of the Complainant including his failure to produce the weekly report that detailed SARs analysed by week and to update the Standard Operating Procedures, and to provide SAR statistics. Despite the Complainant's insistence there was no backlog, Mr Smith noted there were 3,411 SARs dating from 2015 to 2019 that had not been risk-rated. One trust company alone had over 1,000 SARs that had not been analysed or administered. The team wanted to understand why so many SARs were filed by one company. In February 2020, the Complainant was given instructions to contact the company and arrange a meeting. That was never done. Mr Smith stated he had to do it himself.

34. Arrangements were made for the Complainant to work with his team on the backlog after work from 6.00pm to 6.30pm. Despite these arrangements the Complainant failed to participate or enquire how he could support the process. Mr Smith detected lack of interest in the SAR process even though the process was an integral part of the Respondent's operations that primarily fell within the Complainant's scope of responsibility. He found this to be unacceptable and a demonstration of a lack of urgency. Mr Smith saw bundles of documents or letters on the floor. When he asked about them it was just brushed off.
35. Mr Smith denied he used the Complainant as his personal assistant. In the penultimate paragraph of page 1 of his March 2020 reprimand letter, he referred to an agreement at a meeting on 23 January 2020 for an addendum to the Standard Operating Procedure. He does not state that the Complainant was the person requested to prepare the addendum.
36. Regarding SAR statistics, he said these were not provided by the Complainant. They were prepared and provided by a group the Respondent employed to do so.
37. Mr Smith in his oral evidence described the level of compliance with the disciplinary procedures in the Handbook. He did not issue a personal improvement plan. Letters of reprimand were handed to the Complainant and meetings were held with him regarding his shortcomings in accordance with Step 1 of the grievance procedure in clause 5.5.1. He did not record the oral warnings.
38. Mr Smith discovered on 5 June 2020 that the revision to the Standard Operating Procedures for the management of SARs had not been implemented. He issued the third written reprimand dated 9 June 2020 for this failure. What he described as the cumbersome procedure was still being utilised because of the Complainant's failure to implement the newly established protocols for the management of SARs. He was of the view that the continued under-performance by the Complainant amounted to misconduct and that the Complainant be terminated. Such a recommendation was contained in his letter to the Board dated 15 June 2020,
39. On 19 June 2020 Mr Smith issued a letter to the Complainant notifying him of the recommendation for termination. He notified the Complainant he would be provided with an opportunity to be heard and to defend himself. The letter also informed the Complainant

why the action was being taken. The Complainant was given until 26 June to reply. He replied on 25 June.

*Specific comments about the reprimand letters*

40. In his March reprimand letter Mr Smith cites instances of failure of **just** days in November 2019 to provide SAR statistics and in February to schedule a meeting. Further the allegation that at a committee meeting on 4 March 2020 at which he was asked to provide historical statistical data, the Complainant showed “blatant reluctance and inability to give consideration to alternative resolutions that would allow for this critical data to be provided” seems us to be too vague and unsupported by particulars – see the description of the incident at paragraph 16 of Mr Smith’s affidavit.
41. However, the Complainant’s failure between 23 January 2020 and the date of the letter to provide a weekly SARs report is of a different magnitude. It is a matter of several weeks over which this data was not provided. Mr Smith does not state that the Complainant himself was asked to provide the addendum to the Standard Operating Procedure. At paragraph 18 of his Affidavit the Complainant denied the task was delegated to him.
42. In the May reprimand letter Mr Smith again referred to the committee meeting of 23 January 2020. He recited three specific tasks that were assigned to the Complainant, namely he was to ensure that the analysts update the logs after analysing SARs, and that he provide weekly reports to Mr Smith, that he conduct a risk rating and update the risk column, and that he ensure that SARs be assessed with respect to the risk rating and he provide instructions on the degree of analysis. Mr Smith described the changes to the Standard Operating Procedures as “recommended changes”. He does not state in the letter that the Complainant was the person who was required to draft the amendments. He told the Complainant he had not once participated in after-hours work to reduce the SARs backlog which he assessed at 3.411 that had not been risk rated. He found that to be evidence of a lack of interest.
43. In the June reprimand letter Mr Smith referred to a meeting held with the Complainant on 5 June 2020 and he later discovered that Complainant had not been truthful when he said he had shared the new Standard Operating Procedures with staff but had in fact only done so after the meeting. The result not only showed that the staff of the FIU were unaware of the new procedures but that the Complainant was prepared to lie about it.

*Evidence of Kenneth Baker*

44. Kenneth Baker, the chairman of the Staffing Committee also gave evidence. The Staffing Committee is a sub-committee of the Board. Having considered Mr Smith’s recommendations for the termination of the Complainant, the Staffing Committee expressed its support for the recommendation. The Board held a termination hearing on 30 July 2020. It did not dismiss the Complainant but decided to give him a chance and, instead, imposed disciplinary action of suspension for one week without pay.

45. On Mr George's return to the post of Director in August 2020, he brought the matter of the Complainant's performance to the attention of the Staffing Committee. He informed the Committee that despite efforts to assist the Complainant, in effect nothing had changed. The Committee met on 26 January 2021. It was agreed that the Complainant be terminated.

*Evidence of the Complainant*

46. The Complainant admitted he was dismissed on or about 3 February 2021 but stated he was not given warnings between the end of the termination hearing (in July) and his termination. And at the date of termination he was not given an opportunity to be heard. This was in violation of the Employee Handbook. As Deputy Director he was responsible for the oversight of SARs reports, MLATs, requests for information from local and foreign law enforcement units and financial intelligence units, supervision the Senior Analyst and Senior Investigating Officer along with responsibility under section 4 of the FIA Act. He was assigned the task of risk-rating SARs. He said this function is generally reserved for the Director. He admitted he was dismissed on the grounds stated by the Respondent at paragraph 7 above.

47. His appraisal rating in January 2021 was a score of 2.91 out of 4. He claimed it was a positive appraisal.

48. He denied resistance to changes. The changes referred to by the Respondent's witnesses had not been implemented and it is therefore unreasonable to dismiss him for failure to follow them. With respect to lack of urgency and the management of the SARs backlog, he noted that SARs management takes time and was a serious matter which requires extensive analysis and proper resources. He felt he was assigned to personally analyse all SARs rather than overseeing their management. This created an incorrect view that he had a "hands off approach". He worked hard to reduce the backlog while prioritising high risk, urgent and new matters.

49. He considered that the Respondent was under-resourced, and his team too small. He and his team just could not get through the volume of SARs in the available time. He required more than a Senior Analyst and a Senior Investigating Officer and the team below these officers. We note here that this appears to be a misunderstanding of the Respondent's position on the Standard Operating procedures. It is the Respondent's case that the Complainant failed or refused to follow the revised Standard Operating Procedures but stuck instead to old or outdated procedures.

50. The Complainant denied he was assigned the task of updating Standard Operating procedures. He recalled a meeting at which several staff members were present but he states he was never assigned the task of drafting updates. He said the policies were written by Mr George in about 2008. He considered it unreasonable to terminate him for following a procedure written by Mr George.

*Mr Archer's letter dated 17 July 2020*

51. This letter is a good starting point for a consideration of the termination hearing and the termination letter. It contains a summary of the various concerns of the Respondent over the years regarding the Complainant's conduct.
52. It raised first the charge of wilful insubordination and made reference to an event as far back as 2014 when the Complainant failed to follow an instruction from Mr George and was issued with a written reprimand. We do not consider that a charge of the nature and of the age of that described in the letter is helpful in the assessment of the Complainant's conduct in 2020. In any event the reprimand is not in evidence.
53. Similarly, Mr Archer refers to a leadership coaching programme which was established to assist the Complainant and to a development plan that followed. The plan was not introduced into evidence. Mr Archer also stated that the training agency made adverse comment regarding the Complainant's lack of receptiveness to the programme but there is no direct evidence on this.
54. Mr Archer next summarised the reprimand letters of 6 March 2020, 11 May 2020 and 9 June 2020. He pointed to the following:
- a. The Complainant's refusal to discuss strategies with the SAR project team to address the SAR backlog and to participate and work with the team and to implement newly established protocols for the management of SARs.
  - b. His refusal to prepare an addendum to the Standard Operating Procedures to include submission of weekly reports although it was discussed and agreed at a meeting of the SAR group on 23 January 2020.
  - c. His refusal to schedule a meeting with representatives of a local trust company to address major concerns with submissions in relation to a client of the trust company.
  - d. His refusal to provide SAR statistics
  - e. His failure to cooperate during the Respondent's SAR Assessment Committee meeting held on 4 March 2020 by demonstrating reluctance and a refusal to consider alternatives resolutions and this this was a pattern displayed by the Complainant.
  - f. His failure to ensure that the analysts update the SARs logs and provide a weekly report.
  - g. His failure to conduct risk rating and make corresponding updates simultaneously and to ensure that SARs were assessed with respect the risk rating and to provide instruction on the degree of analysis.
  - h. His incorrect assurance at a meeting with Mr Smith on 5 June 2020 that he had communicated the newly established Standard Operating Procedures to staff within the FIU and had had discussions with them. It was discovered later that the Complainant had only emailed the new procedures to staff after the meeting.

## **The termination procedure**

### *Dismissal procedure under the Code*

55. The general principles and procedure for the valid termination of employees are governed by the Code. Under section 81 of the Code the employer (a) must have a valid and fair

reason for termination connected with the capacity or conduct of the employee, or with the operational requirements of the undertaking, establishment or service, (b) must give notice, and (c) must inform the employee in writing of the nature and particulars of the complaint against him and give him or his representative a fair opportunity to defend himself including access to his or her employment record. I am satisfied that the Respondent has fulfilled these three conditions.

56. Additional procedure in respect of summary dismissal is contained in section 101. Subsection (1) provides that an employer is entitled to dismiss summarily, without notice, an employee who is guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract. Subsection (2) provides that the serious misconduct referred to in subsection (1) is restricted to that conduct which is directly related to the employment contract and has a detrimental effect on the business.
57. The parties dispute whether a guide in assessing the fairness of a termination to which sections 82 and 83 apply is the test of reasonableness. Section 85(3) which provides that the test as to whether a dismissal was unfair is whether or not, under the circumstances the employer acted unreasonably. Section 102(2) provides that an employer may take disciplinary action short of dismissal when it is reasonable to do so. It would be difficult to resist the conclusion that the standard of reasonableness must also apply to termination for misconduct.
58. Special procedures are contained in section 102 of the Code for termination after the imposition of disciplinary action short of termination and in section 103 where the termination is on the ground of unsatisfactory performance. We set out these sections in their entirety.
59. Section 102:
  - (1) An employer is entitled to take disciplinary action other than dismissal when it is reasonable to do so under the circumstances.
  - (2) For purposes of this section, “disciplinary action” includes in order of severity - (a) a written warning; (b) suspension from duty for a period not exceeding one week without pay.
  - (3) In deciding what is reasonable under the circumstances pursuant to subsection (1), the employer shall have regard to the nature of the violation, the terms of the employment contract, the employee’s duties, the pattern and practice of the employer in similar situations, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee.
  - (4) Where action is taken by an employer in accordance with this section, he or she shall advise the employee concerned in writing of the misconduct or action in breach of the employment contract and of what steps the employer is likely to take in the event of any repetition of the behaviour in respect of which the disciplinary action is taken.

- (5) A complaint that any disciplinary action taken against an employee was unfair or unreasonable may be made by the employee to the Commissioner pursuant to section 26

60. Section 103:

- (1) Where an employee is guilty of an offence in breach of his or her employment contract, or of any misconduct such that the employer cannot reasonably be expected to continue to employ him or her if it is repeated, the employer may, when taking disciplinary action in accordance with section 102, warn the employee that repetition of the behaviour will result in summary dismissal.
- (2) If the employee, after being warned pursuant to subsection (1), is guilty of a similar offence or misconduct in the following six months, the employer may terminate the employee's employment without further notice.
- (3) An employer who dismisses an employee under subsection (2) shall provide the employee with a written statement of the reasons for the action and the principles set out in section 101(3) and (4) shall apply to the provision of, or failure to provide, such statements,
- (4) The employer shall be deemed to have waived his or her right to terminate the employment of an employee for misconduct if he or she has failed to do so within a reasonable period of time after having knowledge of the misconduct.
- (5) Where, after the probationary period has expired, the employee is not performing his or her duties in a satisfactory manner, the employer may give him or her a written warning to that effect.
- (6) If the employee, after he or she is warned pursuant to subsection (5) and in compliance with subsection (7), does not, during the following three-month period, demonstrate that he or she is able to perform and has performed duties in a satisfactory manner, the employer may terminate the employment contract.
- (7) An employer shall not terminate the employment of an employee for unsatisfactory performance unless the employer has given the employee written warning pursuant to subsection (5) and appropriate instructions to correct the unsatisfactory performance and the employee continues to perform his or her duties unsatisfactorily for a period of three months.

*Disciplinary procedure in the Handbook*

61. Section 1 of the Handbook provides that the Handbook is designed to acquaint the employee with the policies, practices, values and benefits of the Respondent and that the contents shall not constitute nor be construed as a contract of employment.
62. Disciplinary policy and procedures are set out in section 5.5. It is provided in section 5.5.1 that nothing in the disciplinary policy and procedure provides any contractual rights regarding employee discipline or counselling. The disciplinary procedures are a set of steps contained in section 5.5.2. Step 1 creates an opportunity for an employee's immediate supervisor to bring attention of an existing performance or conduct issue to the employee by oral counselling. What is expected of the employee and what steps must be taken to improve performance or resolve the problem must be described to the employee.

63. Step 2 comprises a written warning in which the consequences of continued failure to meet performance or conduct expectations must be outlined and a formal performance improvement plan issued. Step 3 deals with suspension of the employee from the workplace and a final written warning. The final stage is step 4. This is the recommendation for termination.
64. A Code of Conduct is contained in section 5 of the Handbook. In section 5.1.2 the type of conduct for which an employee may be terminated without notice is “gross misconduct”. This is described as conduct, generally of an unscrupulous or unethical nature which makes the employee liable for dismissal without notice for a first offence. Though the word “gross” prefaces and qualifies the misconduct, the term equates roughly with “serious misconduct” referred to in section 101(1) of the Code.

### **The parties’ submissions**

65. The Complainant raised a number of points concerning the process and the evidence tendered to justify the dismissal. They are:
- a. that he was not given an opportunity to be heard between the termination hearing in July 2020 and the termination in February 2021,
  - b. that his score of 2.91 out of 4 in appraisal in December 2020 does not support the findings of the Respondent,
  - c. the Respondent acted in bad faith
  - d. the disciplinary procedures in clause 5.7 of the Employee Handbook were not followed,
  - e. the Complainant did not receive three warnings before termination
  - f. the Complainant was not guilty of gross misconduct
  - g. in any event, the termination was not within the band of reasonable responses.
66. He submitted in effect that the termination hearing on 30 July 2020 was not sufficient process; that the Complainant was entitled to another hearing before the actual termination in February 2021. He argued that the allegations against his client were allegations of unsatisfactory performance and not misconduct and that therefore, the Respondent would have been required to issue a warning and instructions to correct the unsatisfactory performance, and if after 3 months the Complainant had still not demonstrated his ability to perform in a satisfactory manner, the Respondent should have held a hearing on notice to the Complainant before dismissing him. This, he submitted, is in keeping with section 103(5), (6) and (7) and section 81(2). It is also in keeping with the requirements of the procedure set out in the Handbook which require a formal performance improvement plan before dismissal for performance. Mr Davies noted that the version of the Handbook in evidence was dated September 2021, after the date of termination.
67. Mr Davies submitted further that that there was no investigation in accordance with the Burchell principles established in **British Home Stores Ltd v Burchell** [1978] UKEAT 108\_78\_2007. The principles are that the employer must establish that it believed that the

employee engaged in the misconduct, that it had reasonable grounds to sustain that belief, and that it carried out a reasonable investigation.

68. Finally, Mr Davies submitted that that the facts do not support the grounds of termination.
69. Ms Anderson for the Respondent submitted that a proper reading of section 85(3) of the Code limits the test of reasonableness to termination in the case of the categories outlined in sections 82 and 83 of the Code. She reinforces this point by reference to **Chefette Restaurants Ltd v Harris** [2020] CCJ 6 which suggests caution when applying foreign cases. Ms Anderson submitted that in any event the decision to terminate was a reasonable response to the Complainant's conduct. She also submitted that even if the Respondent had not followed the applicable procedure the dismissal can still be found to be fair if a reasonable employer on the evidence could have decided to dismiss. Ms Anderson relied for this proposition on **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91 at page 92 cited with approval in **Blackburn v LIAT (1974) Ltd** (ECCA, September 2020). See also **Blackburn v LIAT (1974) Ltd** [2020] UKPC 9 at paragraph 48. I doubt whether the principle is so wide. A failure to follow the procedure in a clear (and rare) case might justify a reduction in compensation.
70. As to whether there ought to have been a second hearing in February 2021, Ms Anderson submits that the statement of the Tribunal at paragraph 86 of its judgment in **Ranger-Vassell v Mainsail B.V.I. Ltd** (LAT July 2021) must not be taken out of context. In **Ranger-Vassell** it was stated that previous misconduct that was already dealt with by disciplinary action could not form the basis of a subsequent termination. The disciplinary action taken by the Respondent was continuous. It did not end with the reprimand and suspension detailed in Mr Archer's letter of 6 August 2020. It was meant to be continuous assessment of the Complainant's conduct and performance and it was for that same conduct found at the hearing on 30 July 2020 that he was dismissed. Statutory recognition of this is provided by section 103(2) which permits the termination within 6 months after a previous finding of misconduct without further notice to the employee.
71. It is common ground that it is for the Respondent to prove the reasons for the termination. See section 85(1) of the Code.

### **Analysis of the evidence and findings of fact**

72. The evidence of the Respondent shows well-documented, detailed and careful steps taken by the Respondent in relation to the Complainant's performance. From at least November 2019 the Respondent had been very concerned about the performance of the Complainant. Mr Smith was clearly concerned that the Respondent had to start early to get its house in order to be ready for the Mutual Evaluation assessment in 2022 The number of outstanding SARs remained unhealthy.
73. It may better show the timeline of the various steps taken by the Respondent if they are placed in chronological order

- a. Mr Smith's three letters of reprimand in March May and June 2020.
- b. Mr Smith's recommendation for termination dated 19 June 2020 summarising the various reprimands and notifying the Complainant of the recommendation for his termination and the factors upon which the recommendation was made. The factors were distilled in the three grounds of complaint, namely that his behaviour demonstrated lack of urgency in critical matters particularly related to SARs, his resistance to changes, and his unreasonable adherence to ineffective and inefficient procedures. In the letter the Complainant was also invited to respond to the Respondent's assertions.
- c. Mr Archer's notice of the termination hearing dated 17 July 2020 again summarising the reprimand letters, adding a charge of wilful insubordination and notifying him of a termination hearing to be scheduled.
- d. Mr Archer's August 2020 letter summarising the proceedings at the hearing including the charges, the findings, and the disciplinary action taken. Mr Archer also cautioned the Complainant that if there was a repetition in his behaviour within the next 6 months he would be liable to summary dismissal without further notice. Mr Archer further noted that the Board would support the Complainant in seeking personal or professional support to enhance his overall effectiveness. I note here that a transcript of the termination hearing is not in evidence.
- e. Mr George's December 2020 letter notifying the Complainant of deficiencies on his part related to the management of SARs, the lack of training of the Senior Analyst which likely contributed to the low proportion of SARs having been analysed, and the lack of interest on the part of the Complainant in engaging with and motivating his analysis team. Mr George outlined five areas which he considered to require the attention of the Complainant and might assist him in addressing his shortcomings.
- f. The notes of the performance review in January 2021.

*Wilful insubordination*

74. Although this was a charge against the Complainant it was not a ground for termination.

*Valid and fair reason for termination*

75. The Complainant was given written reprimands in which details of his performance deficiencies were described. He was also given instructions as to how to correct them. In his letter dated 9 December 2020 Mr George set out five areas requiring the Complainant's attention as a way to assist the Complainant. Mr George's letter was followed up by his email to the Complainant dated 7 January 2021 in which it was pointed out that the objectives or tasks still had not been carried out. The Complainant did not often reply in writing or engage with Mr George. When he did reply (e.g. noted at page 1 of the reprimand letter dated 6 March 2020) the reply is not in evidence. He said he gave oral responses. He would have had conversations with Mr George. I do not believe he engaged with Mr Smith or Mr George to any appreciable degree.

76. My findings on the grounds for termination are as follows:

- a. Lack of urgency for critical matters particularly related to SARs

- i. The Respondent established that there was a large build-up of SARs and that the management of SARs was critical to its role. It also established that the backlog was the subject of meetings with the Complainant and letters of reprimand. Adverse findings were made against the Complainant in relation to his management of SARs at the termination hearing in July 2020. He displayed refusal to discuss strategies with the SAR project team to address the SAR backlog and to participate and work with the team and to implement newly established protocols for the management of SARs. He failed or refused to participate in the after-hours work to reduce the backlog.
  - ii. The number of SARs that had not been risk-rated was into the thousands. The Complainant failed to contact a company with over 1,000 SARs that had been brought to his attention by Mr Smith.
  - iii. As the person with oversight of the Financial Intelligence Unit, he failed in his duty to ensure that all efforts were made to reduce the SAR backlog. He left the management of the SAR process almost entirely to the Senior Analyst. Given the critical importance of SARs management not only to the operations of the Respondent but to the overall effectiveness of the Territory's Anti-money Laundering efforts it was reasonable for the Respondent to terminate the Complainant.
  - iv. Six months after the termination meeting on 30 July 2020 there had been no appreciable improvement. The allegation of the poor management of SARs called for an explanation from the Complainant. No satisfactory explanation was offered.
  - v. The Complainant was tasked with ensuring the SARs logs were updated after being analysed and he would provide a weekly report to the Director or Acting Director. He failed in this task and when confronted he gave inaccurate information to Mr Smith.
  - vi. I find a serious lack of urgency in the management of SARs.
- b. Resistance to recommended changes and unreasonable adherence to ineffective and inefficient processes
- i. There is not sufficient specific evidence of these charges. It is not clear, for example, whether the Complainant was asked to prepare the addendum to the Standard Operating Procedures

77. I do not find the allegation of the Complainant's refusal to include an addendum to the Standard Operating Procedures proved. At paragraph 13 of his affidavit Mr Smith referred to a meeting of the SAR Project Team on 23 January 2020 at which it was agreed, as outlined via email, that an addendum would be made to the Standard Operating Procedures. It was not said that it was the Complainant's duty. The Complainant denied it was his duty to draft the addendum. The Standard Operating Procedures are not in evidence nor the request to the Complainant nor a description of what was intended nor the emails to the Complainant. There is in my view no way of assessing whether the assignment was even in the Complainant's field of competence.

78. The Tribunal is left with no satisfactory response from the Complainant to the persistent allegations made by the Respondent at paragraph 76a above. I do not think, however, that

the Respondent has established a case on resistance to change and on unreasonable adherence to processes as stated at paragraph 76b.

79. Of course, it is accepted the Complainant was not a clerk or junior officer but SARs fell within his area of responsibility. He ought to have given this much more attention in the correspondence. He stated in his oral evidence that on receipt of a SAR he would direct it to one of his staff. He would not make the actual entries. Given the persistent allegations of the Respondent a proper account for the backlog was called for. He was constantly being written to by the Director and Acting Director. He should have responded. If it was a question of lack of resources, he should have brought this to the attention of the management and made recommendations. He did not reply in writing to contradict the criticisms of his conduct or performance contained in the letters from Mr Smith, Mr Archer and Mr George although he said he replied orally at times. Mr Smith gives the number of outstanding SARs dating from 2015 to 2019 that had not been risk-rated at 3,411. The Complainant could not recall if the SARs log had been updated by 21 December 2020. He stated that in 2019 alone there were over 1,000 SARs. The management of SARs was critical for the Mutual Evaluation. As the officer of the Respondent directly responsible for the management of SARs the Complainant was expected by the Respondent to initiate active steps to process SARs and should have been proactive in working closely with the Director to see that the backlog was being eliminated.
80. Faced with clear and persistent requests to improve SARs management the Complainant appeared to do nothing. His unresponsiveness and failure to address the Respondent's concerns must have clearly eroded the confidence on which the relationship of employer and employee (and a very senior employee in this case) is built. It was serious or gross misconduct. It involved if not a flouting of the instructions of the Board a persistent failure regarding a matter of great importance. The boundaries between unsatisfactory performance and misconduct are not always easy to detect. What matters in this case that on more than one occasion the Complainant was asked to improve SARs management and to take certain steps, yet he did not engage with the Respondent.
81. In his letter dated 15 June 2020 containing recommendations for termination, Mr Archer put the case on two bases: misconduct and unsatisfactory performance. We agree there were aspects of both. The continued failure by the Complainant to bring the SARs profile up to date and ready for a successful evaluation in our view amounts to misconduct and not just poor performance. There were several direct requests and demands for the reduction of the number of outstanding SARs and the improvement of their management. The Complainant seems to have ignored the requests and demands. Mr Archer refers at page 5 of his letter of 15 June 2020 to "gross insubordination" in paragraph 5.1.2 of the Employee Handbook. At paragraph 10.3 of the Handbook it is provided that the Respondent may dismiss employees for "gross unsatisfactory performance". It is the Complainant's failure or refusal to engage with the Respondent on matters of this performance from March to December that certainly elevates his behaviour to misconduct.
82. The Complainant's claim of being subject to unrealistic expectations is a reference to Mr George's email of 7 January 2021. This is just a small snapshot of a wider relationship and

not too much should be made it. The Complainant went on vacation from 16 to 23 December 2020. In his letter dated 9 December Mr George had asked for a report on four matters. Mr George also sent the Complainant an email on 23 December requesting an appraisal of another employee by 31 December. Mr George complained that the Complainant failed up to 7 January 2021 to provide an update or status report regarding these assigned tasks.

83. The Complainant did not respond to Mr Smith's written reprimands or Mr George's letter of 9 December. The Respondent has done all it could to document the performance issues in writing, to seek feedback and action from the Complainant and ultimately to hold a termination meeting. The Complainant had reasonable notice of the date of the meeting and a description of the charges against him, and an opportunity to be heard and to be represented by counsel.
84. The Complainant relied on his appraisal score. Mr George did not consider it was a positive outcome. In his appraisal note he was critical of the Complainant's performance, and it was clear he felt the weaknesses far outweighed the strengths. He said the Complainant fell "disappointingly below expectations", he failed to demonstrate a sense of urgency or leadership. Indeed, he repeated much the same allegations as are contained in Mr Smith's letters and in Mr Archer's letter of 15 June. It is not possible for us to describe the appraisal score in the manner the Complainant referred to it at paragraph 6 of his Reply or paragraph 9 of his witness statement.

*Was the termination process procedurally fair*

85. As stated above, the Complainant was given ample notice of the termination hearing and he was given a summary of the findings and of the disciplinary action imposed within a reasonable time after the hearing. I find the Respondent's decision was procedurally and substantively fair.
86. I must remind myself that this is not a case of breach of contract simpliciter. The question is whether the Complainant is guilty of misconduct that makes it reasonable for the employer to terminate him based on facts known to the employer.

*Was the decision to terminate reasonable?*

87. The next question is whether it was reasonable, not having had its concerns allayed or answered and bearing in mind that the Complainant's responsibility included the management of the SARs, for the Respondent to terminate him. This decision seems to be within a band of reasonable responses of a body changed with the handling of SARs and the preparation for an international evaluation. The Respondent was justified in my view of taking steps one year ahead of the evaluation to put its house in order and reduce the significant backlog and to do so by parting company with the Complainant. The Respondent cannot be faulted for imposing disciplinary action short of termination in the first instance. The Respondent was entitled, despite the strength of its case, to impose the lesser sanctions of reprimand and suspension after the termination hearing in July. It was not satisfied thereafter that he had improved. There is no evidence of the figure for

outstanding SARs immediately before the termination but the uncontroverted evidence of Mr George is that it had not been substantially reduced.

*Compliance with sections 102(4) and 103(1)*

88. The Complainant was advised in writing in the 6 August 2020 letter of the misconduct and that in the event of a repetition of the conduct within the next six months, he would be liable to be summarily dismissed.

*Should there have been a second termination hearing?*

89. The Code permits dismissal, without further notice, after disciplinary action following a termination hearing in the event of a repetition of the misconduct – see section 103(2) of the Code. I have found that the Complainant's conduct amounted to misconduct. No reliance need therefore be placed on section 103(6) as contended by Mr Davies.

**Summary and costs**

90. For the reasons I have given I do not find that the Complainant was unfairly dismissed. I find he was dismissed for serious misconduct in compliance with the provisions of the Code and in substantial compliance with the terms of the Handbook.

91. We will hear the parties on costs.

92. I apologise for delay in giving this judgment and thank the parties for their patience.

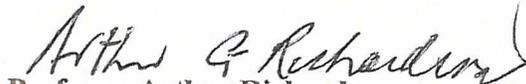
By Order  
**Labour Arbitration Tribunal**



**Samuel Jack Husbands**  
Chairperson



I have read a draft of the reasons of the chair. I regret I am unable to agree with his conclusions. For my part, I would find in favour of the Complainant and award him compensation for unfair dismissal.



**Professor Arthur Richardson**  
Arbitrator

I have read a draft of the reasons of the chair. I agree with the finding that the Complainant was not unfairly terminated.



**John Carrington KC**  
Arbitrator