



VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/036

BETWEEN

MARLON FELIX

COMPLAINANT

AND

YATES ASSOCIATES CONSTRUCTION CO. LIMITED

RESPONDENT

REVISED REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, chairperson, **Yvonne Crabbe** and **Kisha Forbes**, arbitrators

DECISION ON: 22 April 2025 (revised on 25 April)

IN ATTENDANCE: (1) Marlon Felix, the Complainant
(2) Christina Yates, Director of the Respondent

ADDITIONALLY: (3) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

1. The Respondent, properly called Yates Construction Co. Limited, carries on business as a construction company at Valley, Virgin Gorda. Christina Yates is its managing director. The Complainant was employed as a quantity surveyor by the Respondent from 27 October 2000 to 4 May 2022 when he was summarily dismissed for serious misconduct.
2. Ms Yates issued a very detailed dismissal letter to the Complainant dated 4 May 2022 setting out the reasons for the dismissal. The Complainant replied, also in a detailed manner, on 7 June 2022. These two letters formed the basis of the evidence in the case. The Complainant filed an affidavit with an attached statement dated 8 January 2024. We treated the affidavit and the statement as the Complainant's written evidence. The Respondent filed three affidavits and also relied on witness statements from two witnesses. The witness statements were typed as letters to the Tribunal, but they were intended to be witness statements, and we treated them as such. The Complainant, Ms Yates and the witnesses attended the trial on 3 May 2024, and were cross-examined.

Procedural history

3. These proceedings were commenced by a Dispute Claim Form filed with the Labour Commissioner on 15 June 2022. The Labour Commissioner referred the dispute to the responsible Minister who, being unable to resolve the dispute, referred it to the Tribunal pursuant to section 28(1) of the Code by reference dated 20 September 2023.
4. The Respondent initially challenged the jurisdiction of the Tribunal to hear the case. In paragraph 3 of her affidavit sworn on 18 December 2023, Ms Yates stated that the procedure before the Minister had been bypassed and that the Minister had failed to consider the dispute and the Respondent was therefore denied the benefit of the procedures to make a case to the Minister and have it considered pursuant to section 27(1). Ms Yates further elaborated on the challenge in her third affidavit which is dated 8 March 2024.
5. There was a break in the constitution of the Tribunal until the appointment of a new chairman in May 2023. A case management hearing was scheduled for 25 January 2024 but was adjourned to 29 February 2024 at the request of the Respondent and with the consent of the Complainant. The Respondent withdrew its jurisdictional challenge by email from Ms Yates dated 12 March 2024. At a second case management hearing held on 22 March 2024, directions were made for the disclosure of documents, the exchange of witness statements and the filing of a trial bundle and the trial date was fixed for 3 May 2024.

Summary of the grounds for dismissal

6. The dismissal followed what occurred at two meetings between the Complainant and Ms Yates. The first meeting was sometime in April 2022 and the second meeting was about three weeks later, on 2 or 3 May 2022. We would summarise the grounds for dismissal in Ms Yates' letter of 4 May 2022 as follows:
 - a. The Complainant failed to correct inaccuracies in the final payment certificate based on the Bill of Quantities (**the BOQ**) for the MI2 building project despite having been asked to make the corrections several months earlier.
 - b. At the meeting in April 2022 at which Ms Yates pointed out errors, the Complainant failed to acknowledge or accept the errors and proceeded instead to laugh at and make fun of Ms Yates and treat her as if she were stupid or senile. It took all that day before the Complainant finally admitted the errors.
 - c. Ms Yates found the Complainant's behaviour during the meeting to be disrespectful to her as his employer.
 - d. At the meeting on 2 or 3 May 2022, Ms Yates and the Complainant together reviewed the BOQ and found that \$65,000 had not been included in the final payment certificate for pipework and that \$47,500 had also not been accounted for. The total of the sums omitted was \$112,000.
 - e. It took the intervention of another staff member, Keith Burroughs, to convince the Complainant that the amount of \$47,500 had not been paid to Yates and remained due.
 - f. The mistakes could have cost the company \$112,000.

- g. The Complainant attempted to ridicule Ms Yates at the two meetings in the presence of other persons who were in the office. The Complainant's conduct was calculated to make Ms Yates look like she did not know what she was doing when all she did was ask for explanations of accounting in respect of large sums of money in the BOQ that should have been due to the company.
 - h. Ms Yates was then forced to investigate other aspects of the BOQ to determine their accuracy.
 - i. Over the two months leading up to the May 2022 meeting, Ms Yates received reports from clients about the Complainant's attitude with one client saying that he would hire the company again but would not deal with the Complainant as he found the Complainant to be extremely rude.
 - j. The Complainant's behaviour at the two meetings was extremely insulting, offensive, and unprofessional and, by shouting down Ms Yates's arguments and constantly interrupting, he was also intimidating. His overall behaviour was such that Ms Yates could no longer work with the Complainant or have any confidence in his work product.
7. In his reply dated 7 June 2022, the Complainant denied any misconduct and asserted his dismissal was unjustified and unfair. In summary, he stated that:
- a. The figures he submitted came from the final approvals of the directors.
 - b. He was not disrespectful.
 - c. The errors pointed out by Ms Yates were the work of another director.
 - d. Even if he had made the errors pointed out by Ms Yates, they would not have cost the company any money because the accounts reviewed at that stage were only preliminary and the final accounting would have picked up all changes and errors.
 - e. He was bewildered to hear that some clients had issues with his attitude, as nobody had brought it to his attention.
 - f. His dismissal appeared to be personality-driven. He had not received warnings and there were no previous incidents which could have led to his dismissal.
 - g. He never intimidated or disrespected Ms Yates.
 - h. He was singled out as other employees displayed poor behaviour but were not dismissed.

Relevant statutory provisions

8. Before analysing the evidence, it is important to bear in mind the following provisions of the Labour Code (**the Code**).
9. Section 101:
- (1) 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.
 - (2) 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 and it includes, but is not limited to, situations in which the employee has

- a. conducted himself or herself in a manner as to clearly demonstrate that the contract cannot reasonably be expected to continue;
- b. been convicted of an offence in the course of his or her employment, the penalty for which prevents the employee from meeting his or her obligations under his or her employment contract for twelve working days or more.

(3) The employer shall, when terminating an employment contract under the provisions of this section, provide the employee with a written statement of the precise reason for the action and the employer shall be conclusively bound by the contents of the statement in any proceeding contesting the fairness of the dismissal.

(4) An employer who fails to provide the statement referred to in subsection (3) shall be stopped from introducing testimony as to facts which might have been included in the statement, in any proceeding contesting the fairness of the dismissal.

10. Section 85(1) and (3):

“(1) In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to prove the reason for the dismissal.

(2) In the circumstances referred to in section 83, it shall be for the employee to prove the reason which made the continuation of the employment contract unreasonable.

(3) The test as to whether or not a dismissal was unfair under section 82 or 83 is whether or not, under the circumstances the employer acted unreasonably.”

11. Section 81:

(1) The employment contract of an employee shall not be terminated by an employer without a valid and fair reason for such termination connected with the capacity or conduct of the employee, or with the operational requirements of the undertaking, establishment or service, pursuant to section 88, 89, 101 or 103, and unless the notice requirements in section 90 are complied with.

(2) Subject to section 89, an employer may not terminate the appointment of an employee unless the employer has informed the employee in writing of the nature and particulars of the complaint against the employee and has given the employee or his or her representative a fair opportunity to defend himself or herself including access to his or her employment record.

12. 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.

The evidence on behalf of the Respondent

13. The following affidavits and witness statements were filed on behalf of the Respondent and were admitted into evidence as the evidence in chief of the witnesses:
- a. the affidavit of Ms Yates dated 18 December 2023,
 - b. the affidavit of Ms Yates dated 21 February 2024,
 - c. the affidavit of Ms Yates dated 8 March 2024,
 - d. the witness statement of Simon Fox dated 1 April 2024, and
 - e. the witness statement of Keith Burroughs (undated).

Evidence of Ms Yates

14. The Respondent was involved in the construction of Villa #2 at Mosquito Island. The project was termed “MI2”. The Respondent commenced the project with a preliminary contract which included a BOQ for reinforced concrete. This allowed the project to commence while the client completed the design and finishes. Some “roughing in” of the mechanical, electrical and plumbing work (MEP) was required. The term “roughing in” is defined as the stage of a construction project when the various MEP lines are brought in and, once the framing is up, the rough-in stage of construction begins. This is when lines are laid out, but final connections are not made until other stages of the project are completed.
15. Ms Yates’s scope of involvement in respect of the MI2 project was to verify the section of the BOQ relating to electrical works against the work included in the BOQ and make any adjustments required to ensure the Respondent was paid for the works done. The first of the two meetings between Ms Yates and the Complainant was based on Ms Yates’ examination of the electrical section of the MEP. Ms Yates was trying to price the section for connecting the electrical supply to the pool equipment. While reviewing this data she did not find any allowance for pipework. She then cross-checked the plumbing BOQ sections of the finishes BOQ and noticed that a \$65,000 deduction had been made in the plumbing pricing for work on the pool. It was then that she requested a meeting with the Complainant. While going through the documents with the Complainant, the Complainant assured Ms Yates that the

\$65,000 amount had been paid to the Respondent. The Complainant's comment was "See I told you it was okay and paid". Ms Yates pressed further. She asked to see further documents. The Complainant did a lot of grinning and stated he had just shown where the \$65,000 was, and he did not understand why she could not get it. He assured her he was correct. He was getting very agitated and doing lots of head shaking and standing up and telling Ms Yates she did not know or understand what she was doing. After a long time and much more head shaking and grinning and arm waving, the Complainant eventually agreed that the pool pipework was not in the contract.

16. The second meeting (on 2 or 3 May 2022) proceeded in much the same way as the first. The Complainant refused to admit the error as to the \$47,500. This is the sum of four items (comprising \$35,000 + \$5,000 + \$5,000 + \$2,500). Again, the Complainant dug in his heels. He called in Keith Burroughs. Mr Burroughs gave evidence for the Respondent. Mr Burroughs asked to see where the \$47,500 had been paid to the Respondent.
17. In paragraph 11 of her first affidavit (December 2023), Ms Yates concluded that the Complainant had not been picked upon and that his errors would have constituted a very serious adverse result financially for the Respondent. What seems to have worried Ms Yates is that the Complainant never really acknowledged he was wrong, even after he was proved wrong. It is probably more correct to say that the Complainant never acknowledged he could be wrong until he was demonstratively proved to be wrong.
18. In her affidavit sworn on 21 February 2024 answering the Complainant's criticisms of the Respondent's evidence, Ms Yates exhibited her handwritten notes to justify the change order No. 54 and payment applications dated 14 November 2022 and 25 September 2023.
19. In cross-examination by the Complainant, Ms Yates reinforced her view that the Complainant constantly sat back and waved his hands during the two meetings and told her she did not understand what she was doing, when he was in fact the one who was wrong. She did accept that the \$65,000 was provisional at the time of the meetings. The final payment application had not yet been issued.
20. Through the arbitrators, Ms Yates said that the Complainant had worked with the firm for over 10 years and had not been reprimanded for any serious or gross misconduct, and she was not aware of any misconduct on his part. She conceded that there were a couple of occasions when work did not get done but, on those occasions, it may have been the fault of many persons and not the Complainant alone.

Evidence of Simon Fox and Keith Burroughs

21. Simon Fox is a civil engineer and a director of the Respondent. His witness statement dealt with a telephone call he had with the Complainant in August 2017. The Complainant secretly recorded the call. The Complainant produced two audio recordings with his affidavit but did not ask for the recordings to be played at the trial. From Mr Fox's evidence, the call had concerned an incident in August 2017 in which a director had blamed the Complainant for a BOQ or payment application that was issued late. At the end of his email dated 18 August and attached to Mr Fox's witness statement, the Complainant accepted responsibility for not

getting the quotation finished on time. In cross-examination by the Complainant, Mr Fox conceded that before this case there had been no disciplinary action against the Complainant. Indeed, it appears that no reprimand or warning was issued to the Complainant and the matter was forgotten.

22. Mr Fox also referred to an email from Eoghan Hoare dated 3 May 2022 on page 5 of the hearing bundle. He had asked Mr Hoare (known in the firm as “Owen”) to put in writing what had occurred at the meeting on 2 May 2022. The email was Mr Hoare’s response. Mr Hoare has left the company and did not give a witness statement.
23. Keith Burroughs is employed by the Respondent to provide estimates of the cost of labour and materials on construction projects. He gave an undated witness statement. He overheard a conversation at the office between Ms Yates and the Complainant. It must have been the meeting on 2 May 2022. He was sitting about 14 feet away. The conversation went back and forth. Ms Yates was asking the Complainant to show her his calculations of the provisional sum and the Complainant kept responding that the sum was included within his final account and that the Complainant stood up and laughed at Ms Yates in a disrespectful manner and said that Ms Yates does not understand how things are done. After Ms Yates persisted calmly in presenting her own calculations and the discrepancies she was seeing and asked him to show her where the money was allowed, the Complainant became irate and called on Mr Burroughs for help as Ms Yates was set in her old-time ways.
24. Mr Burroughs joined Ms Yates and the Complainant. He asked the Complainant to show him the evidence. The Complainant sat down, went back on his computer and proceeded to ignore Ms Yates. He said he issued the final payment application. The Respondent received the disputed \$47,500 and some additional funds. Ms Yates prepared a handwritten note of changes. Mr Burroughs said it looked like the \$47,500 had been omitted from the BOQ. Ms Yates worked on Change Order No. 54 and made corrections to the amount of approximately \$204,000. Mr Burroughs was of the view that this sum (which included the \$47,500 and the \$65,000) would have been picked up had the omissions not been discovered by Ms Yates. He would describe the Complainant’s conduct as disrespectful. This would not however, in our view, justify the sort of conduct or approach by the Complainant as described by Ms Yates and Mr Burroughs.

The evidence of the Complainant

25. The Complainant relied on his affidavit sworn on 8 January 2024 and accompanied by a statement of the same date.
26. Regarding his behaviour, the Complainant denied he was disrespectful. Regarding the sums of money, that the Respondent claimed were missed by him, he says Ms Yates failed to provide the backup information or a breakdown of details for the change orders.
27. He also stated that Ms. Yates failed to produce evidence to show that BCQS, the client’s representative, approved payment for the change orders. He said the figures they discussed in the meetings were all provisional. Provisionals are acceptable where there is no solid information to justify the figure but, once solid information becomes available, the actual

figures replace the provisional figures, and you do a change order to record the difference. It was put to the Complainant by Ms Yates in cross-examination that only the items marked PS on the documents at Tab 15 of the bundle, namely at pages 100 and 103, were provisional figures. The Complainant said finally that even if Ms Yates is correct and he did make errors, the firm did not lose any money. The suggestion was that up to May 2022 the final payment application had not been made nor the final accounts settled, so the firm had not been underpaid. Again, even if this were correct it would not, in our view, justify the sort of conduct or approach of which the Complainant was accused.

Other allegations

28. Regarding the reports of complaints by clients of rudeness on the part of the Complainant, none of the clients' representatives who made these allegations gave evidence.
29. Both the Complainant and Ms Yates were permitted to give oral evidence-in-chief at the trial to explain much of the technical data and cost figures contained in the written evidence and exhibits. As non-lawyers, they would not have been aware of the rule that witnesses are generally not permitted to add to their written evidence by further oral statements except in answer to questions in cross-examination. Their oral evidence was very helpful because the raw written data by itself, without explanation, would not have been easy for the members of the Tribunal, all non-engineers or builders, to grasp.
30. The Complainant attached recordings of telephone conversations he had with Mr Fox in August 2017 concerning a missed deadline. It would appear that Mr Fox was secretly recorded. The missed deadline and whether the Complainant was responsible for it were not ventilated in the case and did not influence the decision to dismiss the Complainant. The Complainant did not ask to have the recordings played. Accordingly, they were not treated as evidence at the trial.
31. Ms Yates mentioned additional sums to which the Respondent was entitled but which were missed by the Complainant. These sums include the missing \$65,000 and \$47,500 and are in paragraph 7 of her affidavit dated 21 February 2024 and her handwritten statement. The Respondent relied, however, on the missing \$65,000 and \$47,500 only.

Analysis of the evidence

32. We are satisfied that the Complainant was difficult, and he resisted what he saw as meddling by Ms Yates. We believe Ms Yates's version of the two meetings in April and on 2 May 2022. She appeared to us to be a truthful and compelling witness and a builder of great experience who oversaw significant building projects. The Complainant seems to have viewed Ms Yates as outdated and not computer-savvy and therefore not competent to question his statements. That type of attitude could be dangerous in an enterprise with multiple projects being worked on simultaneously and involving revenue in the millions. The accounts could be complex, and management must be able to rely on open-minded staff who are not overly defensive regarding questions about their work. What may have made matters worse was not only the manner in which the Complainant talked down and showed his lack of patience and good manners by flinging around his hands and grinning and the

Complainant's lack of good manners, but that this conduct, although confined to one corner of the office, took place in an open-plan office in view, if not in hearing, of other members of staff.

33. The Complainant eventually acknowledged, that he may have erred in omitting to take account of the missing \$65,000 and \$47,500. He however said that the statements he prepared were only provisional and so there was no loss to the Respondent as the missing amounts would have been picked up and accounted for when the statement was being made final. He also suggested he relied on information input by other persons and that the blame was not his.
34. To the suggestion by the Complainant that others may have been responsible for producing the incorrect data that came to him, we think that this is beside the point. It was his duty to produce statements that were accurate so far as the provisional material and estimates allowed. It should not matter who initially generated the data. An employee in the position of the Complainant must be open to a reconsideration of his work product if it is queried by senior staff members. Otherwise, there would be no easy way to arrive at the best data.

Application of the law

35. Having accepted that the Complainant fended off Ms Yates's reasonable queries, we must now assess his conduct against the standards set by his employment contract and the Code.
36. Section 101(3) provides that when terminating an employee under this section, the employer shall provide the employee with a written statement of the precise reason for the action and ~~the employer~~ shall be conclusively bound by it.
37. The combined effect of sections 81 and 101 is that (i) an employment contract shall not be terminated by an employer without a valid and fair reason, and (ii) unless the notice requirements in section 90 are met, and (iii) in the case of summary dismissal, where there is no requirement to give advance notice or to give payment in lieu of notice, the employee must be guilty of serious misconduct in circumstances where it is reasonable to dismiss and must be given a fair opportunity to defend himself or herself including access to his or her employment record.
38. The Tribunal takes guidance from one of its early decisions. In **Sutherland v Penn Medical Center Inc.** (BVILAT, July 2022) the Tribunal stated in paragraph 65:

“The first step is to determine the real reason for the dismissal and then determine whether the reasons would fall within section 101 of the Code as a matter of fact or degree. Even if they fall within the ambit of section 101 of the Code the employer must still act reasonably as to the way the employer is terminated.”
39. We have also considered **Qasim Yoba v Peter Island (2000) Limited** (BVILAT, April 2021). In that case the Tribunal considered the approach to the application of section 101 of the Code along with sections 81(1) and (2), 88, 89 and 103. The Tribunal stated as follows in paragraphs 75 and 76:

“75. Section 81(2) of the Code gives an additional requirement to inform the employee in writing of the nature and particulars of the complaint against the employee and to give the employee a fair opportunity to defend himself or herself including access to his or her employment record, except where section 89 is involved which is termination with notice. As section 89 does not apply to this particular case, the requirement of section 81(2) must have been followed by the Respondent to effect a valid termination. Therefore, the Respondent had an obligation to inform the Complainant in writing of the nature and particulars of the complaint and then give the Complainant a fair opportunity to defend himself.

76 Section 101 of the Code outlines the procedure for summary dismissal, where the employee must be guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract. It also provides two (2) examples of serious misconduct but makes it clear that it is not limited to those two (2) examples, as long as the conduct complained of is directly related to the employment contract and has a detrimental effect on the business. When summarily dismissing an employee under section 101 of the Code the employer is required to provide the employee with a written statement of the precise reason for the action and the employer is conclusively bound by the contents of the statement. The employer will be estopped by this Tribunal from introducing testimony as to facts which might have been included in the written statement upon termination.”

40. We have summarised the grounds for dismissal in paragraph 6 above. They can be further reduced into the following three grounds namely (i) that the Complainant was disrespectful and rude in the way he spoke to and diminished Ms Yates, (ii) that he provided inaccurate information that could have caused the Respondent a significant financial loss, and (iii) that he was overly defensive and failed to acknowledge his errors even in the face of evidence and reason.
41. Despite what Ms Yates may have considered to be a clear case of serious misconduct by the Complainant, she was required by section 81(2) of the Code to pause and give the Complainant a chance to explain or defend himself. She did not do so. This breach would normally render a dismissal unfair but would not necessarily lead to that consequence in every case. The Tribunal cannot reliably infer what the Complainant could have said at the time to convince Ms Yates that this was a case for a warning or suspension rather than a dismissal.
42. Even if, but for the procedural flaw, a reasonable employer could have taken the view that whatever defence the employee might have deployed would not have changed the decision to dismiss, we must consider whether a ‘Polkey deduction’ is appropriate. In England and Wales, it is or was the law, based on the decision of the House of Lords in **Polkey v A. E. Dayton Services Ltd** [1988] AC 344, that a tribunal could award a reduced compensation for contributory fault of the employee even if the employer did not follow the dismissal procedure. In **Chefette Restaurants Ltd v Harris** [2020] CCJ 6, an appeal to the Caribbean Court of Justice from Barbados, the CCJ was not entirely convinced that **Polkey** applied in Antigua and held that it had no application in Barbados in relation to procedural requirements for dismissal under the Employment Rights Act. The **Polkey** decision would open an avenue for departure from the clear procedural rules designed for the benefit and protection of

employees. While we do not rule out the argument that there is some conduct that so demonstrably justifies dismissal even in the absence of an opportunity having been afforded to the employee to be heard, we do not think that this is one of those rare cases.

Remedies

43. Section 86 of the Code provides the remedies for unfair dismissal. The Complainant claimed compensation instead of reinstatement or re-engagement. There is no doubt that compensation is an acceptable remedy to both parties. No question of punitive damages arises.
44. In his Dispute Claim Form the Complainant gives his salary as \$5,333.33 per month. This is confirmed by Ms Yates in paragraph 10 of her first affidavit dated 18 December 2023. The Complainant states his net salary as \$4,556.68. We assume this sum represents his gross salary less statutory deductions of payroll tax, Social Security contributions and National Health Insurance contributions. There is no evidence that the Complainant has found new employment and, if so, from what date and at what salary. He would have been entitled on dismissal to at least one month's notice – see section 90(1)(b) of the Code – plus compensation for future loss.
45. The evidence regarding future loss of earnings is inadequate. Section 86(2) of the Code provides that in ordering compensation the Tribunal shall take into account several matters including wages lost by the employee up to the date of determination of the dispute and the duty of the employee to mitigate damages. There is no evidence of salary lost or the extent to which any loss may have been mitigated or offset. It is not clear (i) if the Complainant has found work, (ii) if he has, when and in what capacity and at what salary or, (iii) if he has not, what steps he took to seek employment.
46. The Code is silent on who has the burden of proving mitigation or the lack of mitigation. Section 86(2)(e) expresses it as a duty on the part of the employee. That does not necessarily mean the burden of proof is on the employee. The rule at common law is that the claimant must prove his or her loss and, if the defendant thinks the amount claimed is greater than what it should have been, the defendant must prove that the claimant did not take adequate steps to limit or control the loss. Often, that information is entirely within the knowledge of the person seeking damages. The person being asked to pay must probe the evidence. Ideally, in cases before the Tribunal the employee should first kick the ball into touch by including a Schedule of Loss in the Reply – see rule 20(1)(f)(ii) of the **Labour (Arbitration Tribunal) (Procedure) Rules 2020** (SI 2020 No. 98). Once there is some evidence of loss, the Respondent would then have a basis for challenging it on the ground of lack of mitigation.
47. The Tribunal assesses compensation at two months' pay.
48. We calculate his compensation as follows:
 - a. \$4,556.68 for one month's salary in lieu of notice, and
 - b. \$4,556.68, being the equivalent of one additional month's salary.

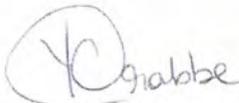
Summary of order

49. The following orders are made:
- a. the Respondent shall pay the Complainant compensation in the total sum of \$9,113.36,
 - b. the sum of \$9,113.36 shall carry interest at the rate of 3 per cent per annum from 4 May 2022 until 3 August 2024.
50. There shall be no order as to costs.
51. The Tribunal apologises for the delay in issuing this decision.

By Order
Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



Yvonne Crabbe
Arbitrator



Kisha Frett
Arbitrator