

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2024/015

BETWEEN

DENISE STANLEY

COMPLAINANT

AND

THORNTON SMITH

RESPONDENT

NOTE OF DECISION ON PRELIMINARY POINT

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Professor Arthur Richardson**,
and **Zebalon McLean** Arbitrators

HEARING AND

SUBMISSIONS ON: 20, 23 and 30 June, 11 July and 17, 23 and 31 October 2025

DECISION ON: 6 March 2026

IN ATTENDANCE: (1) Denise Stanley, the Complainant
(2) Sarai Smith, the administrator of the estate of Jamal Smith, principal
of the Respondent
(3) Marie-Lou Creque, lawyer for the Respondent

ADDITIONALLY: (4) Troya Audaine-Stevens, acting as Secretary to the Tribunal

1. The Complainant was employed by the Respondent from October 2019 until her termination on 5 August 2022. She filed a Dispute Claim Form with the Labour Commissioner on 16 August 2022. It which was referred to the Tribunal pursuant to section 28(1) of the Labour Code 2010 on 2 January 2024. At the first case management hearing on 29 February 2024 the following applications came on for hearing:

- a. application filed by the Respondent on 29 January 2024 seeking a determination of the jurisdiction of the Tribunal or the arbitrability of the Complaint (**the Stay Application**), and
 - b. application filed by the Respondent on 31 January 2024 objecting to and seeking the removal of the arbitrator appointed on the recommendation of the Complainant (**the Recusal Application**)
2. At the hearing on 29 February 2024 the hearing of the Stay Application was adjourned to 22 March 2024 before a full panel. Regrettably, Jamal Smith, the sole principal of the Respondent, died suddenly in mid-March 2024. The matter was removed from the hearing list.
3. A grant of letters of administration has now been made to Sarai Smith by the High Court. The matter has been restored to the hearing list on the application of the Complainant. Ms Smith represents the estate of the Respondent and is assisted by counsel, Marie-Lou Creque. After hearing from Ms Creque, the hearing of the questions reserved for determination was eventually set for 20 June 2025.
4. After the hearing on 20 June 2025, Mrs Creque filed brief submissions on 23 and 30 June. on the question of the continuation of the matter after the death of Mr Smith. In a ruling dated 11 July 2025 the Tribunal directed the parties that it required assistance on how it should deal with proceedings after the death of a party. The Tribunal suggested that the personal representative might wish to seek directions from the High Court or an opinion of counsel as whether it ought to defend the complaint.
5. A new date was fixed for the resumption of the case management conference. The Respondent proposed to make a without prejudice offer of settlement. The hearing was adjourned on 17 and 23 October to facilitate discussions between the parties and a written proposal by the Respondent. It was further adjourned to 31 October for the resumption of the case management. At the hearing on 31 October, it was clear the parties would not be able to resolve their differences. It was noted by Mrs Creque that there still had not been a ruling on the stay application. The Tribunal agreed to give a ruling by 14 November. One of the arbitrators was not available in November and December for medical reasons. We now issue our decision.
6. I have considered the following:
 - a. the Dispute Claim form
 - b. the employment contract dated 10 October 2019 at page 8 of Exhibit JSS-1
 - c. the termination letter dated 5 August 2022
 - d. the interlocutory application filed on 29 January 2024
 - e. exhibit JSS-1 containing the first affidavit of Rafique Pope
 - f. the letter from Minister for Financial Services to Mr Smith dated 20 November 2023 at page 7 of Exhibit JSS-1
7. The employment contract contains a dispute resolution clause. It provides as follows:

- a. Any claim or dispute between you and the Law Firm or against the other or any agent or employee of the other, whether related to the employment relationship or otherwise, including those created by practice, common law, statute for the time being, including any allegations relating to discrimination, and all disputes about the validity of this agreement, shall be determined exclusively in accordance with the Disciplinary and Grievance Procedures in our Policy Manual and Staff Handbook and shall be binding on all parties.
8. Disciplinary and Grievance Procedures are referred to in the dispute resolution clause. They are said to be contained in the handbook. The handbook is not in evidence but the Disciplinary and Grievance Procedures are set out in the Interlocutory Application. They are as follows:

“Procedure

STEP 1

The employee should immediately raise any grievance with the immediate supervisor who, in most cases, will be best placed to respond to a complaint. However, a grievance is deemed to have expired if it does not relate or is not connected to a current problem or one that has taken place within twenty-five (25) business days.

STEP 2

If, however, the matter cannot be satisfactorily resolved the employee should raise the grievance, using a form for this purpose provided by the Human Resources Center. If the grievance is contested the Human Resources Center should invite the employee to a hearing to discuss the grievance. The Human Resources Center will confirm any decision or proposed action to the employee in writing within ten (10) working days after the hearing or, where no hearing has taken place, within five (5) working days of the grievance being raised. If it is not possible to respond within the specified time the employee will be given an explanation for the delay and told when a response can be expected.

STEP 3

If the employee is dissatisfied with the outcome, the employee should submit a statement of its case using a form for this purpose provided by the Human Resources Center (the "Statement of Case") to the Human Resources Center and all the other parties to the grievance and follow the Dispute Resolution Rules below.”

9. The terms of the dispute resolution clause and the three-step procedure for the handling of grievances are vague. The first step is for the employee to raise the grievance with her immediate supervisor. It does not appear the Complainant had a supervisor other than Mr Smith. No supervisor is mentioned or included in the termination and pre-termination letter or in the interlocutory application or supporting affidavit. The next step is to raise the grievance with Human Resources Center. If the employee is still dissatisfied she may submit a statement of case to the Human Resources Center and follow the Dispute Resolution Rules set out in the handbook. The Human Resources Center is not defined. It is far from clear who comprises it and what its functions are. The dispute resolution mechanism, especially since

the passing of Mr Smith, strikes me as a sort of legal blackhole into which the dispute can disappear and never reappear.

10. Section 36 of the Code provides that the Arbitration Ordinance shall not apply to any proceedings of the Tribunal. The Code came into force on 4 October 2010. The Arbitration Ordinance, Cap 6, was repealed and replaced by the 2013 Arbitration Act which was enacted in 2013 and came into force in 2015. I hold therefore that the Code also generally disapplies the 2013 Arbitration Act.
11. I will, however, refer now to section 18 of the 2013 Arbitration Act where it is provided that

18. (1) Article 8 of the UNCITRAL Model Law, the text of which is reproduced below, has effect:

“Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”.

(2) If a dispute in the matter which is the subject of an arbitration agreement involves a claim or other dispute that is within the jurisdiction of the Arbitration Tribunal established by section 29 (1) of the Labour Code, 2010, the Court may, if a party so requests and notwithstanding any provision of the Labour Code, 2010, refer the parties to arbitration under this Act if it is satisfied that (a) there is no sufficient reason why the parties should not be referred to arbitration under this Act in accordance with the arbitration agreement; and (b) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration, and remains so.

(3) Where the Court refuses to refer the parties to arbitration under this Act, any provision of the arbitration agreement that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall be of no effect in relation to those proceedings.

(4) Where the Court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action.

12. Basing himself on section 3(2)(b) of the 2013 Arbitration Act, Bannister J termed the position of the courts regarding arbitration agreements as a “policy of absolute non-interference unless the Act expressly permits it” - refer to paragraph 19 of **Sonera Holding B.V. v Cukurova Holding A.S.** (ECHC, Feb 2015). The onus is on the Complainant to establish that the arbitration agreement is null and void, inoperative or incapable of being performed.


13. I am satisfied that for the reasons stated at **paragraph 9** above the arbitration contract is inoperative and incapable of being performed. I am of the opinion we have a discretion to stay our proceedings to permit the arbitration to proceed and that we should generally exercise the discretion in favour of a stay. I also think we have a general discretion to refuse to grant a stay on grounds similar to those contained in Article 8(1) of the Model Law set out above. Having found that the agreement is inoperative and incapable of being performed, I would refuse to exercise our discretion to grant a stay.
14. After the last hearing on 31 October the Tribunal conducted much of its own research. We would normally refer the matter to the parties for consideration of any new points we raise but as this matter is already old, we have decided to issue our decision without further ado.
15. We direct the Secretary of the Tribunal to fix a date for resumption of the case management hearing.

By Order
Labour Arbitration Tribunal




Samuel Jack Husbands
Chairperson

I have read the above decision of the chair in draft and I agree the order.



Professor Arthur Richardson
Arbitrator

I have read the above decision of the chair in draft and I agree the order.



Zebalon McLean
Arbitrator

