Case No. BVILAT/2017/020

VIRGIN ISLANDS

LABOUR CODE, 2010
(No. 4 of 2010)

IN THE LABOUR ARBITRATION TRIBUNAL

BETWEEN

Denley Prince **COMPLAINANT**

AND

Peter Island Resort and Spa **RESPONDENT**

BEFORE: **Mr. Jamal S. Smith**, Chairman
Ms. Dancia Penn, OBE, QC, Member (on the recommendation of the Complainant)
Mr. John Carrington, QC, Member (on the recommendation of the Respondent)

ATTENDANCE:
(1) Denley Prince, Complainant
(2) David A. Penn, legal practitioner for the Complainant instructed by David A. Penn & Co. Incorporated
(3) Mr. Chad James, Respondent's Representative
(4) Mrs. Hazelann Hannaway-Boreland, legal practitioner for the Respondent, instructed by Harney Westwood & Riegels

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

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FINAL AWARD

19 November 2020; 18 February 2021

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1. On Tuesday, 06 October 2020 the Chairman of the Tribunal issued a Case Management Order (the "**Case Management Order**") which was subsequently corrected pursuant to rule 41 of the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (S.I. No. 98 of 2020) (the "**LPR**") which, among other things, noted that the LPR applied to these proceedings from the date of that Order and fixed the date for the trial of this dispute on Thursday, 19 November 2020 at 9:30 a.m. for three (3) hours, along with a postscript indication for the deadline to file an appeal to the High Court by Wednesday, 04

November 2020. No appeal on any question of law having been served on the Secretary to the Tribunal in these proceedings the contents of the Case Management Order are now confirmed by the full panel.

2. On Thursday, 19 November 2020 the full panel heard witnesses and oral arguments from both parties beginning at 10:00 a.m. and concluded at 5:00 p.m. which was much longer than the allotted time. The trial took place via the WebEx video conference platform in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearing) Guidelines, 2020 (S.I. No. 99 of 2020) and in accordance with those Guidelines the trial was electronically recorded for the sole purpose of obtaining a transcript of the proceedings.

3. During the course of the trial the Tribunal had at its disposal a Trial Bundle filed by the Respondent on 05 November 2020 whereby the Respondent did so to assist the Tribunal after realizing that the Complainant had failed to comply with the Case Management Order. However, the Complainant subsequently filed his own Trial Bundle on 09 November 2020 despite being aware of the filing by the Respondent and the Tribunal agreed to rely on the Complainant's Trial Bundle for the purposes of the trial. However, the Tribunal finds the Complainant's Trial Bundle inadequately put together which makes it difficult to follow, despite the Respondent's Trial Bundle having inappropriate markings on the documents. Nonetheless, for purposes of this Final Award references to Tabs in Square Brackets shall be references to the section dividers in the Respondent's Trial Bundle, for example, "**[TAB 1]**". However, it should be noted that the corrected Case Management Order **[TAB 31]** was inserted in the Complainant's Trial Bundle before the first sectional divider and unlike the Respondent's Trial Bundle did not include a Table of Contents but a separate Table of Contents was filed with it despite the tardiness of the Complainant in filing his bundle.

4. In addition to the Respondent's Trial Bundle the Tribunal also had at its disposal the Complainant's skeleton arguments with authorities filed on 12 November 2020, some six (6) days late (the "**Complainant's Original Submissions**"). The Respondent also filed its Authority Bundle on 11 November 2020, some five (5) days late, so that neither party fully complied with the Case Management Order for filing skeleton arguments. The purpose of providing the Tribunal with the skeleton arguments and authorities well in advance of the trial is to allow the Tribunal to be prepared for the trial. The late submission of documents to the Tribunal must be discouraged as it has the potential to hinder the administration of justice by reducing the ability of the Tribunal to be prepared for the trial where all members of the Tribunal are volunteers and not salaried members.

5. At the conclusion of the trial the Tribunal indicated to the Complainant that it would give him an opportunity to reconsider his complaint and gave him permission to amend the Complaint with consequential orders as a result. On 04 December 2020, the Tribunal received an amended Points of Claim from the Complainant along with amended Submissions (the "**Complainant's Amended Submissions**"). On 21 December 2020, the Tribunal received an Amended Points of Defence from the Respondent along with Closing Submissions and authorities.

6. The Tribunal reserved its decision but in accordance with LPR 38(1) the Tribunal extended the time for delivering its decision on the basis of the administration of justice whereby permission to amend the pleadings was granted to the Complainant and to allow additional time to consider the revised pleadings and submissions. On Thursday, 11 February 2021, the Secretary to the Tribunal gave notice to the parties of the date for the delivery of the decision. The Tribunal now gives the decision for its final award.

The Case History

7. The Complainant, through his legal practitioner, filed a complaint with the Labour Commissioner on 15 July 2016 alleging unequal remuneration and discrimination. Nowhere in either party's Trial Bundle was the complaint provided and the only reference to the complaint is in the Case Management Order.

8. The complaint was referred to the Tribunal by the Minister on 18 May 2017 **[TAB 15]**.

9. On 22 June 2017 there was a Directions Hearing by the then Chairman of the Tribunal, Mr. Paul Dennis, QC, but based on the Directions issued on that date **[TAB 16]** there was no appearance from the Complainant or his counsel but the Respondent's counsel appeared, and the date for pre-arbitration review was fixed for 14 September 2017, but there is no record of that second hearing or if it was vacated or otherwise adjourned.

10. On 11 July 2017 the Complainant recommended Captain Rudolph Vanterpool, a former employee of the Respondent, to be a member of the Tribunal **[TAB 17]**. However, it was not until 21 December 2018 that the Respondent filed an objection **[TAB 18]** which was supported by the Affidavit of Kimberly Crabbe Adams **[TAB 19].** Additionally an application for Strike Out/Dismissal was filed by the Respondent on 22 January 2019 **[TAB 26]** and supported by the Affidavit of Marcia McFarlane **[TAB 27]** with a Certificate of Exhibit that is strangely designated "KCA-1" which was referred to in the Affidavit of Kimberly Crabbe Adams (supra), but the exhibit referred to in the Affidaivt of Kimberly Crabbe Adams was not included in either Trial Bundle. However, in the top right corner of the heading of the Certificate of Exhibit to the Affidavit of Marcia McFarlane it refers to the exhibit as "MM-1", which appears to be more appropriate and the Tribunal considers the designation "KCA-1" in the body of the exhibit to be a typographical error and for the purposes of these proceedings will designate the exhibit as "MM-1". A directions hearing being held on 31 January 2019 and directions being given for the hearing of the objection to take place on 28 February 2019 and filing dates issued **[TAB 21]**, but again due to the non-compliance by the Complainant that hearing date was adjourned to 28 March 2019 by Directions issued on 22 February 2019 **[TAB 22]**. On 20 March 2019, the Complainant filed an Affidavit in Support of Response Opposing Application to Strike Out Complaint made by Eunice Lettsome **[TAB 29]** along with Points of Claim **[TAB 1]**. It should be noted that the complaint filed with the Labour Commissioner is what starts the process before this Tribunal, and as the Tribunal permitted the Complainant to file Points of Claim, must be interpreted as the first opportunity to amend the complaint, since the Respondent had so far been before the Labour Commissioner and the Minister on the basis of the complaint filed by the Complainant and was again given an opportunity to put forward a whole new complaint

which must be taken to have replaced the previous complaint since it was never presented to the Tribunal. The Tribunal, therefore, considers the Points of Claim as the "**First Amended Complaint**". The amended Points of Claim received on 20 December 2020 will be considered as the "**Second Amended Complaint**".

11. On 28 March 2019, the application to strike out or dismiss the complaint for want of prosecution since the Complainant had, by that time, failed to comply with any previous directions of the Tribunal, was dismissed and consequential directions given **[TAB 23]**. The Respondent then filed Points of Defence on 17 June 2019 **[TAB 2]**, which was supplemented by disclosure of "Documents to Accompany Points of Defence" which was filed on 28 June 2019 **[TAB 2B]**. Finally, the Complainant filed a Reply to Points of Defence on 02 September 2019 **[TAB 3]**.

12. Again, a pre-trial review was fixed for 26 September 2019 by Directions issued on 25 July 2019 **[TAB 24]**, but there is no record as to what happened to that pre-trial review, whether it was vacated or otherwise adjourned. Nonetheless, on 31 October 2019 fresh directions were again issued **[TAB 25]** scheduling the objection to be heard on 13 December 2019. This was followed by the withdrawal of Captain Vanterpool as a member of the Tribunal by the written submissions of the Complainant filed on 22 November 2019 **[TAB 20]** (almost a year after the objection was filed) and the replacement appointment of Mr. Akeem Cassean Williams.

13. A directions hearing was held on 30 January 2020, where again the Complainant and his counsel were both absent, but the Respondent was present, and directions were given for the arbitration to take place with the date to be fixed in consultation with the parties. However, no date was fixed during the course of 2020 until the Case Management Order was made.

14. As a result of the Case Management Order the Witness Statements filed previously were all converted into Affidavits **[TABS 33 – 35]** and they were to stand as examination-in-chief during the trial. Times were fixed for cross-examination, re-examination and closing addresses. Unfortunately, the parties did not comply with the timeline fixed by the Case Management Order.

The Facts

(a) The Evidence of the Complainant

15. Based on the Affidavit of the Complainant **[TAB 32]** he is a Belonger of the Virgin Islands who lived and resided in the Virgin Islands all his life. He is a certified captain in both the United Kingdom and the Virgin Islands since 2005 when he obtained his 100 Ton Captain's License. He claimed that he worked as a Boat Captain for ten (10) years. However, under cross-examination he admitted that prior to working with the Respondent he had no experience as a captain.

16. He joined Peter Island Resort and Spa in August 2006 as a Mate working on the ferry between Peter Island and the CSY Dock in Baughter's Bay, Torrtola, and he was paid at the rate of $8.00 per hour, while the Captains were paid at the rate of $16.00 per hour.

17. In November 2007 he was promoted to the position of Captain and was then paid $16.00 per hour, at the same rate of pay as the other Captains working for the Respondent. As this was not a fact in dispute it appeared rather strange to the Tribunal that under cross-examination this appeared to be a fact that the Respondent sought to solicit from the Complainant.

18. In or about 2008 the other Captains' salaries were raised from $16.00 per hour to $20.00 per hour, while his salary, without explanation remained at $16.00 per hour, despite carrying out the same duties and responsibilities as the other Captains.

19. He alleges that some Captains who were being paid more than he was only had 50 Ton Captain's Licenses.

20. He further alleges that the only notable distinction between the Captains who were being paid more than he was has been their nationalities, where he listed five (5) other captains, indicating two (2) were from St. Vincent and the Grenadines, one (1) from Trinidad and Tobago, one (1) from St. Kitts and Nevis and another from Anguilla. It should be noted that the Tribunal does not accept this evidence for the purposes of the issue of discrimination for reasons that will become clearer later.

21. According to the Complainant, one of the captains was terminated for failing the 100 Ton UK Captain's Qualifying Examination, was rehired and was paid $17.00 per hour. Again, for reasons that will become clearer later, the Tribunal does not accept this evidence for the purposes of the issue of discrimination.

22. He included the daily ferry schedule by the Respondent and indicated that all the Captains were required to do the same job and claims that the Labour Code, 2010 (the "**Code**") provides that there ought not to be any "disparagement" in the rates of pay for persons carrying out the very same duties, doing the very same work, and having the very same responsibilities.

23. The Complainant indicated that there was another pay raise for the other Captains to $21.00 per hour but he was only given a raise to $16.48 per hour. Again, in January 2016 his rate of pay was increased from $16.48 to $17.34 per hour which was still significantly less than what the other Captains were being paid.

24. Complaints and representations were made to the management of the Resort by the Complainant about the unfair and very biased way in which he was being treated and the disparaging difference in his rate of pay as compared to that of the other Captains, but it was all to no avail, which led him to make the complaint to the Labour Commissioner.

25. He asked for his salary to be regularized and that he be compensated for the duration of his tenure, as a Captain at the requisite rate of pay when the other Captains wages prevailed at $20.00 - $22.00 per hour, made payable retroactively from the time of his promotion to the position of Captain in 2007. As will be come clearer, the date when he was promoted to Captain is disputed by the Respondent.

26. The Complainant also recounted an incident on 07 January 2016 where the General Manager of the Respondent, Mr. Scott Hart, angrily and viciously, used indecent and foul language to him and another employee, exclaiming that they were "Always giving fucking problems", which he claimed was unwarranted and unprovoked.

27. He made a formal complaint to the Human Resources Department of the Respondent about what transpired. This was followed by a letter of apology dated 14 January 2016 from Mr. Hart, which he indicated that he refused to accept the apology in an e-mail response. According to the Complainant, had he used such indecent language to anyone in management he would have been summarily dismissed. In support of this, he quoted from the Respondent's Employee Handbook and Code of Conduct **[TAB 14]**, in particular, page 36, which provides that in respect of those rules marked with an asterisk (*), a single breach is regarded as "sufficient grounds" to terminate the services of the employee, and one of those rules included using obscene, discourteous, abusive or rude language to a guest or fellow employee. As a result, the Complainant, demanded that Mr. Hart be terminated.

28. The Complainant further alleges that the use of such foul and offensive language by an employer or one representing the employer, to an employee, constitutes a breach of the implied employment term of "trust and confidence", which must exist between an employer and an employee. The destruction of which would undermine the necessary harmonious relationship that fosters the maintenance of a proper and healthy working environment. Under cross-examination the Complainant indicated that the loss he suffered was being disrespected in front of his Mate and other employees.

(b) <u>The Evidence of Captain Vanterpool</u>

29. Based on the Affidavit of Rudolph Vanterpool **[TAB 33]**, he holds both a United Kingdom and Virgin Islands 500 Gross Ton Captain's License and previously worked for the Respondent for eleven and a half (11½) years starting in about June 2006.

30. His main navigational route was operating the ferry between Peter Island and the CSY Dock on Tortola.

31. In 2007 the Ferry Captains were being paid at the hourly rate of $16.00 per hour.

32. In 2008 the Captain's wages were raised to $20.00 per hour.

33. His last salary from the Respondent was around $22.30 per hour.

34. Captain Vanterpool was not certain why the Complainant's wages were not raised, but indicated that the Complainant carried out the same duties and responsibilities as any of the other Captains working for the Resort, and the duties and responsibilities of the Captains operating the ferry remained the same.

35. He was not aware of there ever being any hierarchy or difference in the category or levels of the Captains working at the Resort, whether based on experience, seniority or otherwise. According to Captain Vanterpool "We were all carrying out the same duties."

(c) The Evidence of Chad James

36. Based on the Affidavit of Chad James **[TAB 34]** he is the Human Resources Director of the Respondent.

37. He first recounts the incident with the then General Manager, Mr. Scott Hart, that took place on 07 January 2016, where he used indecent language in the presence of the Complainant and another employee.

38. In paragraph 5 of the Affidavit of Chad James he recounts, verbatim, what was told to him by Mr. Scott Hart, but in that discussion he was retelling an "asserted fact" contrary to section 67 of the Evidence Act, 2006 where that asserted fact is restricted first hand hearsay in accordance with section 68 of the Evidence Act, 2006. While it is possible to provide restricted first hand hearsay, the person with personal knowledge of the facts must be unavailable to give that direct evidence in accordance with section 69 or if available, it would cause undue delay or expense or would not be reasonably practicable to call that person in accordance with section 70 of the Evidence Act, 2006. Although no objection was raised by the Complainant in respect of that evidence, the Tribunal is concerned about relying on such evidence where the Respondent failed to give notice of or make any application with respect to the admissibility of that evidence in accordance with section 73 of the Evidence Act, 2006 which would have allowed the Complainant an opportunity to challenge that evidence, if necessary. As a result, the Tribunal will exclude paragraph 5 of the Affidavit of Chad James from its consideration of the facts.

39. Mr. James then went on to indicate that as a result of the conversation he had with Mr. Hart he admonished him and advised him to meet with the Complainant and the other employee, then extend to them both a verbal and written apology.

40. The corporate office, known as AHC Hospitality, reviewed the matter and Mr. Hart was called to a conference call and subsequently reprimanded, whereby a memorandum from Steve Nawrocki, VP of Human Resources, and George Aquino, VP of Operations, was placed on Mr. Hart's file and identified as exhibit "CJ-1" **[TAB 35]**. In that memo, it was stated:

> "George and I both reiterated that this conduct and use of this type of language is not reflective of how we would like our associates to be treated no matter what the circumstances. Mr. Hart was regretful for his behavior that day and prepared an apology letter to both associates. . . We agreed that this should never be

tolerated from any member of management and especially the General Manger moving forward."

41. Mr. Hart confirmed to him that he had in fact extended the apologies to both employees and a copy of the apology letter is identified as exhibit "CJ-2" **[TAB 35]**. However, the Complainant returned his letter by e-mail which is identified as exhibit "CJ-3" **[TAB 35]** indicating that he will not accept the apology from Mr. Hart. There was also meetings between the Complainant's lawyer and the lawyers for the Respondent, but the Complainant insisted that he wanted Mr. Hart summarily dismissed. In the circumstances, however, the Respondent took the view that the summary dismissal of Mr. Hart was unjustified.

42. Mr. James then discussed the issue of the unequal remuneration, recounting that the Complainant had come to him sometime around the beginning of February 2015 to raise his grievance, but he suggested that perhaps the difference in pay was because some of them possessed decades more experience than he did.

43. The Complainant came back to him concerned that a captain who was fired and brought back was now being paid more than he was. Mr. James clarified that the particular captain was never fired by the Respondent, but because of his foreign status, new captaincy requirements were imposed locally and he had to resign and obtain recertification before returning to his post with the Respondent on 17 November 2014. This meeting was followed up by an e-mail which is identified as exhibit "CJ-4" **[TAB 35]** in which the Complainant states:

> ". . . I don't understand why my wage of pay have to be different from every captain, holding the same certification and tonnage licence. Captain Moses, Captain Vanterpool don't hold no special duties than I do, then you hire another captain who was fired between 2006 – 2007 who didn't had the right tonnage licence, now he have it, you start him on a higher wage of pay than me, considering I was captain from 2008 to present. I voiced my right to equal pay for awhile now, haven't receive a good explanation or satisfaction on this matter. I am looking forward to your response."

44. In light of the e-mail and the wage review that was being conducted for all staff, which was the first in seven years, in March 2015 the Complainant was brought up to the same level as the captain for which he complained of, which was $17.00 per hour and it was made retroactive to the previous pay period. The rate of pay for both captains were produced and identified as exhibits "CJ-5", "CJ-6" and "CJ-7" **[TAB 35]**.

45. Despite that, however, the Complainant wrote by e-mail dated 09 March 2015 and identified as exhibit "CJ-8" **[TAB 35]** refusing to accept the pay increase and wanting no less than $19.50 - $20.00 per hour. Mr. James again informed the Complainant that there are reasons why some captains were at a different wage level to others. This led to a series of correspondence between the lawyer for the Complainant and the lawyers for the Respondent which were collectively identified as exhibit "CJ-9" **[TAB 35]**.

46. On 29 August 2016 the Complainant tendered his resignation, just over a month after filing his complaint with the Labour Commissioner. A copy of the resignation e-mail is identified as exhibit "CJ-10" **[TAB 35]**.

47. By letter dated 12 November 2007 identified as "CJ-12" **[TAB 35]**, the Complainant was appointed as a probationary captain for ninety (90) days and so he was not confirmed as a captain until February 2008.

48. Mr. James outlined the nationality of five (5) captains, showing that three (3) of the five were Belongers of the Virgin Islands. He showed that the Marine Supervisor was employed for 7 years at the time of the Complainant's complaint with 8 ½ years of experience and so was paid $29.57 per hour. The second highest paid captain was Captain Vanterpool, who is a Belonger of the Virgin Islands, at $21.43 per hour where he was employed for 10 years with over 20 years' experience and he started as a captain. The third highest paid captain also is a Belonger was paid at $21.01 per hour who at that time was employed for 7 years with over 30 years' experience and he also started as a captain. The fourth highest paid captain was also a Belonger and was paid at $17.79 per hour who at that time was employed for 44 years with over 40 years experience, which raises some confusion where Mr. James also indicated that this fourth highest paid captain also started as a captain, but this may very well have been a typographical error inverting the two (2) years. Then fell the Complainant along with the other captain that he had raised concerns about claiming that he was fired, that captain worked for 6 ½ years with the Respondent but had over 22 years' experience as a captain, and he started his employment with the Respondent as a captain. This was contrasted with the Complainant who at the time of his complaint worked for 7 ½ years with over 8 years of experience, but he started as a mate and was later promoted to the post of Captain.

49. When the Complainant was promoted to Captain his pay was increased to $16.00 per hour which at that time was the starting rate for captains. Those captains who were paid relatively close to the salary of the Complainant possessed more years of experience than the Complainant. Captain Vanterpool and another captain were both paid roughly $21.00 per hour due to their decades of experience, while the Marine Supervisor's post entailed not only captaincy requirements, but he also had a managerial role with responsibility for the supervision of all of the Respondent's crew, mates and captains, and as a result there had to be a divergency in his rate of pay.

50. Mr. James claims that the Complainant's allegations are without merit as the captains' salaries varied in terms of experience and seniority with the Respondent.

The Submissions

(a) *The Complainant's Submissions*

51. The Complainant's Original Submissions focused on section 120 of the Labour Code, 2010 which deals with equal remuneration between men and women performing work of equal value. The Complainant sought to show that "from the inception of the

employment of Mr. Prince" he was refused compensation "at the same level as the other Captain [sic] for the Company. Notwithstanding the fact that Mr. Prince, was carrying out the same duties and responsibilities as these said same other Captains." The Complainant also relied on section 120(3) of the Labour Code, 2010 to indicate that the burden of proof would shift to the employer in such a claim. The Complainant further considered that section 120 of the Labour Code, 2010 has the equivalent effect of the UK's Equal Pay Act 1970 which according to the Complainant "was enacted to ensure that women working in the same or substantially the same jobs as men, receives equal pay".

52. The Complainant relied on paragraph 423 of Volume 13 "Discrimination" of Halsbury's Laws of England, 4th Edition (**"Halsbury's"**), a copy of which was attached, to suggest that the provisions apply equally where a man does not receive equal pay. In fact, all that Halsbury's said was that this requirement was added by the Sex Discrimination Act 1975, s. 8(6) and amended by the Equal Pay (Amendment) Regulations 1983 (UK SI 1983/1794) and the Equal Pay Act 1970 (Amendment) Regulations 2003 (UK S.I. 2003/1656, reg. 10). Therefore, the effect in the United Kingdom is that a man can also file a claim for unequal remuneration where men are being discriminated against. The Tribunal agrees that these provisions have similar effect but could not agree with the Complainant that section 120 of the Labour Code, 2010 went so far as to deal with a situation where a man is raising unequal remuneration vis-à-vis other men, since the purpose of that statutory provision, both in the Virgin Islands and in the United Kingdom, is to deal with sex discrimination.

53. On the Complainant's own facts there was no unequal remuneration based on sex discrimination in this complaint and was only unequal remuneration simpliciter. Furthermore, the allegation that had the Complainant not been "ethnically black", the General Manager of the Respondent would not have used indecent language towards the Complainant and another employee is also not supported by section 120 of the Code but the Complainant relied on the prohibited characteristics for discrimination under section 114 of the Code, namely emphasising (without indicating that emphasis was added) "race", "colour", "indigenous population" and "national extraction", which is the only indication as to what possible characteristics were being relied on, but went on to indicate that based on section 115 of the Code the Complainant was either denied some opportunity for advancement or other benefits or subjected to some disadvantage as a result of the Respondent's response to the General Manager's use of indecent language.

54. After the Tribunal gave the Complainant an opportunity to rethink its case the Complainant filed the Complainant's Amended Submissions which no longer relied on section 120 of the Code, and in the Tribunal's view rightly so. However, whether or not the mere bringing of the unequal remuneration claim within the ambit of the general discriminatory provisions was enough as opposed to removing that limb of the complaint altogether is quite another matter.

55. In the Complainant's Amended Submissions he relied on section 114 of the Code for both limbs of his complaint but now only emphasising (without indicating that emphasis was added) "indigenous population" and "national extraction" as the only means by

which the Tribunal could glean what possible characteristics were being relied on to allege discrimination. Additionally, it appears that the Complainant sought to rely on section 115 of the Code as was done in the Complainant's Original Submissions, but emphasised different aspects of the disadvantage suffered by the Complainant, and now relying on section 115(2)(a), (d) and (f) of the Code.

56. The only main difference between the Complainant's Original Submissions and the Complainant's Amended Submissions as it relates to the broader context of discrimination has to do with the remedies available to this Tribunal by outlining section 127 of the Code. However, by emphasising section 127(2)(a) of the Code, the Tribunal is directed to ordering compensation for any loss caused directly or indirectly as a result of the contravention. This, however, does not assist the Tribunal in respect of the second limb of the complaint, namely the indecent language from the General Manager, and it would, therefore, be necessary for the Tribunal to consider the entirety of section 127(2) of the Code to determine what remedies, if any, it may grant, including the very general power under section 127(2)(d) of the Code that allows the Tribunal to prescribe any other remedy the Tribunal may deem fair and just to remedy the cause and effect of the act or omission of the employer.

57. The Complainant's Amended Submissions also discussed the reason for the inordinate delays caused by the Complainant up to the Directions issued on 28 March 2019, but did nothing to explain the numerous irregularities after 28 March 2019. Additionally, the Complainant sought to indicate that because there was no order as to costs in relation to strike out application somehow that meant that the issue of costs for the irregularities in the entire case was "res judicata". This the Tribunal believes it must address in detail.

(b) The Respondent's Submissions

58. The Respondent identified three (3) issues in the complaint based on the Complainant's Amended Submissions, which can be summarized as: (i) the unequal remuneration; (ii) the discrimination based on the indecent language; and (iii) harassment because of his complaint about the unequal remuneration.

59. To each of these issues the Respondent has mounted a hard-fought defence to the effect that:

(i) the Complainant was not subjected to discrimination in respect of pay contrary to sections 114 and 115 of the Code;

(ii) the Respondent conceded that indecent language was used by the General Manager it was not directed to the Complainant and in any event the use of indecent language by a supervisor as alleged is not a legal basis for the redress sought by the Complainant; and

(iii) the Complainant was not continually harassed on the job by virtue of his complaints of being subjected to discriminatory remuneration.

60. The Respondent spent a considerable amount of time exploring section 120 of the Code in its Closing Submissions, which may have been more helpful in its skeleton arguments. As the Complainant withdrew his reliance on section 120 of the Code, the Tribunal will only consider the aspects of the Respondent's submissions that deal with sections 114 and 115 of the Code.

61. Relying on ***Kemilia Hazelwood-Bruce v. St. Vincent and the Grenadines Public Union*** **[SVGHCV2017/0098, unreported, delivered 06 April 2020]** which is at TAB 11 of the Respondent's Authorities Bundle, the party asserting discrimination must plead a factual basis of discrimination "with sufficient particularity" and there must be actual evidence of discrimination.

62. Also relying on ***Dennison Daley v Denzil West, Director of Duties, the Attorney General of Montserrat*** **[MNIHCV2018/0015, unreported, delivered 16 September 2019]** which is at TAB 09 of the Respondent's Authorities Bundle and also attached to the Respondent's Closing Submissions, which may have been intended to indicate to the Tribunal the high importance the Respondent placed on this case, the Complainant must provide an "evidentiary basis to substantiate the allegation of discrimination. Mere allegation of a breach is insufficient to found a cause of action."

63. Further relying on ***Enderby v. Frenchay Health Authority and another*** **[1994] 1 All ER 495**, which was purported to be included as TAB 05 of the Respondent's Authorities Bundle but instead only the final page of that decision was provided to the Tribunal, but the general proposition relied on by the Respondent was that pay statistics disclosed an appreciable difference in pay between nationals and non-nationals for work of the same value. The Respondent argued that no evidence of BVI nationals being paid disparagingly less when compared with other nationals.

64. The Respondent then referred the Tribunal to the Irish case of ***Andrius Jokubaitis v. Seamus McQuaid*** **DEC-E2013-113**, which was attached to the Respondent's Closing Submissions. In that case the employees were proven to have been treated relatively the same and there was nothing to suggest that the Complainant was singled out because of his nationality. As a result, it showed that while all that is required is that there must be sufficient facts to raise a presumption of discrimination, there must be credible evidence and not mere speculation or assertions, unsupported by evidence, which is sought to be elevated to a factual basis upon which an inference of discrimination can be drawn.

65. Similarly, another Irish case, ***Damian Tomaszewski v. Integrated Communications Limited*** **DEC-E2013-118**, which was also attached to the Respondent's Closing Submissions, shows that the Complainant must produce some evidence of less favourable treatment and that treatment must be linked to his nationality. As a result, the Respondent maintained that there was no evidential link between the Complainant's wage and a scheme of pay discrimination against BVI nationals.

66. The Respondent also maintained that between 2008 and 2014 or 2015 there were no pay raises among the general staff and so there would be no equitable basis for compensation which would have put the Complainant in a different position than that of

his counterparts during that period. However, the Respondent attempted to rely on a document annexed to the Closing Submissions which was not exhibited to any affidavit before the Tribunal or tendered in evidence during the trial. This is highly irregular and the Tribunal will refuse to accept or acknowledge the annexed document since the Complainant was not given an opportunity to test its authenticity nor does the Tribunal have the means to do so at this stage of the proceedings without recalling the parties. However, the Tribunal does not believe that would be necessary in the circumstances.

67. The limitation period of six (6) years was also raised in accordance with section 4 of the Limitation Act (Cap. 43), but the Respondent only provided a copy of section 4 of the Limitation Act to the Tribunal in the attachments to its Closing Arguments having raised the point at the trial. The Tribunal intends to explore the limitation point in full, whereby the Respondent claims that the arbitration commenced with the filing of the complaint with the Labour Commissioner on 15 July 2016 and, therefore, if the Respondent is correct any claim for compensation prior to 16 July 2010 would be statute barred. It is of grave concern to the Tribunal that a limitation point was only being raised on the day of trial and was never included in the Points of Defence or in any submissions prior to the Closing Submissions. Despite this, it is noteworthy that the Complainant having been taken by surprise at the trial was given an opportunity to amend his complaint for a second time and did not address that issue in his Supplemental Submissions, but more significantly, the Respondent filed an Amended Points of Defence and again failed to raise that as a point of defence, but continued to rely on the limitation period in the Closing Submissions where the Complainant had no opportunity to respond.

68. The Respondent contends that the onus for proving actual discrimination lies with the employee who makes the assertion. Therefore, there being no evidence of nationality discrimination in violation of sections 114 and 115 of the Code the claim based on unequal remuneration ought to be dismissed with costs.

69. The Respondent then moved on to deal with the discrimination as a result of the indecent language incident and referred to an alleged concession by the Complainant in paragraph 37 of the Complainant's submissions that the General Manager, Mr. Scott Hart, was not using indecent language directed at the Complainant but was a general one to everyone in the area. The Tribunal does not see paragraph 37 of either the Complainant's Original Submissions or Amended Submissions as amounting to a concession of any kind, nor does anything in any submissions provided by the Complainant support the contention suggested by the Respondent.

70. There is no evidence that the General Manager's actions amounted to discriminatory conduct as asserted and the facts do not satisfy the threshold for an actual breach of mutual trust and confidence. The Respondent relied on the case of ***Cecilia Deterville v. Foster & Ince Cruise Services (St. Lucia) Ltd*** **[SLUHCV2009/0811, unreported, delivered 23 May 2011]** which is at TAB 02 of the Respondent's Authorities Bundle and the limiting principles given by Lord Steyn in ***Malik v. Bank of Credit and Mahmud*** **[1998] AC 20** which is at TAB 03 of the Respondent's Authorities Bundle. Additionally, the Complainant's demand is for the termination of the General Manager

and not an action for loss. As a result, the second ground of the complaint must also fail and ought to be dismissed with costs.

71. As it relates to the final ground of the Complaint, namely, the continuous harassment, the Respondent points out that the Points of Claim contained no particulars of the alleged continuous harassment and the Complainant's submissions reproduce the same statement from the Points of Claim. There is also nothing in the Affidavits filed on behalf of the Complainant. As a result, the Respondent alleges that this ground must also fail for lack of particulars, evidence or even legal submissions on the point.

72. The Complainant provided no basis for a claim for interest and accordingly the Respondent alleges that no interest should be awarded.

73. The contention that the issue of costs is res judicata was also addressed by the Respondent who pointed to the Affidavit of Marcia McFarlane **[TAB 27]** that showed breaches outside the period dealt with by the application for strike out and contents that costs should be awarded with respect to those matters.

74. The Respondent argued that the order of the Tribunal with respect to the strike out application does not negate the fact that the Respondent suffered hardships arising from the efflux of time by virtue of the Complainant's repeated defaults including difficulty in locating witnesses and the destruction of the Respondent's physical records due to the intervening 2017 storms. While the Affidavit of Chad James **[TAB 34]** at paragraph 10 lends some credence to the second point about the loss of physical records, there is no evidence before the Tribunal about any difficulty in locating witnesses and the Tribunal will not accept that point as a hardship suffered in this case.

75. Again, the Respondent sought to rely on correspondence annexed to the Closing Submissions that was not exhibited to any affidavit before this Tribunal or tendered as evidence at the trial, and sought to do so to rebut the arguments by the Complainant about the reason for the non-compliance with numerous directions by the Tribunal both before and after the Case Management Order. As the Tribunal does not believe there would be any harm to the Respondent in any event, the Tribunal will not allow that unauthenticated evidence on that point.

76. The Respondent submitted that $6,875.00 in "wasted costs" was caused by the Complainant's non-compliance. While the Tribunal is of the view that the term "wasted costs" is being used by the Respondent for special effect, the Tribunal will not consider taxing costs at this stage. Additionally, there is a sum of $20,000.00 in costs for this arbitration alone, but this is not the time or the venue to address the issue of costs, since those costs must be taxed appropriately once a bill of costs is produced to the Tribunal in accordance with the LPR.

The Tribunal's Analysis

(a) *The Tribunal's Findings of Fact*

77. As there is no dispute about the nationality of the Complainant, the Tribunal will accept for the purposes of this dispute that the Complainant is a Belonger of the Virgin Islands and he holds a 100 Ton Captain's License for both the United Kingdom and the Virgin Islands since 2007. He was employed by the Respondent as a Mate in August 2006 and was promoted to captain in February 2008 after a ninety (90) day probationary period starting in November 2007 no doubt as a result of having then obtained his Captain's License.

78. For the purpose of the prohibited characteristics that will be discussed further by this Tribunal, it is important to note that the complaint made by the Complainant was of discrimination because of his nationality. His amended pleading was that "the only notable difference between the Complainant and the other Captains is that the Complainant is from the British Virgin Islands, while most of the other Captains hail from outside of the B.V.I. ..." . . As such, this Tribunal will only be concerned about "national extraction" as a basis for founding discrimination in this case.

79. The Respondent's staff included a Marine Supervisor whose responsibilities includes management and not only the duties of a captain, along with five (5) other captains, including the Complainant. Of those five other captains only one (1) was not a Belonger of the Virgin Islands, whom the Complainant claimed had been fired and rehired and was being paid more than he was, although the evidence does not support any difference in salary between the Complainant and the sole non-Belonger captain as both were paid $17.34 per hour at the time of the complaint. In the Tribunal's view it is not necessary for the purposes of its decision to determine whether or not that non-Belonger captain was fired and rehired as expressed by the Complainant, and makes no determination on that fact, except to say that it was not appropriate for the Complainant to seek to introduce hearsay evidence to establish how he came to the knowledge of whether or not that other captain was fired and rehired. Therefore, the only appropriate evidence that the Tribunal can accept would be the evidence of Mr. Chad James about the status of that other captain.

80. The Tribunal notes that the Complainant alleged in paragraph 3 of his First Amended Complaint that he was harassed continually on the job as a result of his complaint about the wage difference between himself and other captains and the Respondent challenged the Complainant to prove that allegation. However, the allegation was not advanced in any evidence put before the Tribunal but despite the lack of evidence to support it, this allegation was maintained in the Second Amended Complaint. Instead, the Respondent has proven that there were legitimate disciplinary issues raised against the Complainant by producing the documented history of disciplinary actions taken against the Complainant. None of those documented disciplinary actions were challenged by the Complainant. As a result, the Tribunal does not accept as a matter of fact that the Complainant was harassed continually on the job, or at all, as a result of his complaint about the wage difference.

81. The Complainant resigned on 29 August 2016 and therefore would have only worked as a Captain for approximately 8 ½ years and unlike all other captains employed by the Respondent at the time of the complaint, he was not originally hired as a boat captain

but as a Mate at which time he was paid $8.00 per hour while the captains at that time were paid $16.00 per hour and when he was promoted to Captain in February 2008 he was paid $16.00 per hour. Those boat captains who were being paid considerably higher salaries had more years of experience as boat captains than the Complainant.

82. The highest paid captain other than the Marine Supervisor was Captain Vanterpool, who the Tribunal accepts is a Belonger of the Virgin Islands.

83. Any wage discrepancy was resolved in March 2015 when he was paid $17.00 per hour bringing him to the same level of the non-Belonger captain. Therefore, any wage discrepancy must be limited to the period from February 2008 until March 2015, a period of seven (7) years.

84. The Tribunal also finds that the then General Manager of the Respondent, Mr. Scott Hart, used indecent language directed to the Complainant and another employee. However, the Tribunal does not agree that based on the Employee Handbook and Code of Conduct that the only recourse that can be provided in the circumstances is summary dismissal. It is merely an option available to the Respondent if they so choose, and in this instance the Respondent chose not to exercise that option whether rightly or wrongly but to take different disciplinary action against Mr. Hart. The Complainant led no evidence that persons of other races or national extraction were treated differently under similar circumstances.

(b) *The Law of Discrimination in the Virgin Islands*

85. The law of discrimination in the Virgin Islands covers both employees engaged under an existing contract of employment as well as applicants for employment. The first major piece of discrimination legislation was the Anti-Discrimination Act, 2001 (No. 2 of 2001) which did not come into force until 15 November 2006 which prohibits discrimination inter alia on racial grounds, which are defined in section 3(1) as including nationality which encompasses citizenship. Discrimination under this legislation includes, by virtue of section 4, treating a person less favourably than he treats other persons. This legislation is enforced by way of civil proceedings in tort. As this Tribunal is a creature of statute with a statutory jurisdiction that is limited under the Labour Code 2010, a claim under that legislation falls outside the jurisdiction of this Tribunal. Section 26 of the Virgin Islands Constitution Order 2007 prohibits discrimination based on inter alia national origin by legislation or persons acting under a written law or performing the functions of public office or a public authority. None of these considerations arise in this case.The right to be protected from discrimination in the workplace was not fully implemented until the Code came into force on 04 October 2010 some three (3) days after the Equality Act 2010 came into force in the UK.

86. The legislative framework under the Labour Code, 2010 begins with section 114 which defines "discrimination" in the Virgin Islands workplace and provides:

> **"114.** (1) For the purposes of this Part, a person discriminates against another person if the first-mentioned person makes, on any of the grounds mentioned in subsection (2), any

distinction, exclusion or preference the intent or effect of which is to nullify or impair equality of opportunity or treatment in occupation or employment.

(2) The grounds referred to in subsection (1) are

(a) race, colour, sex, sexual orientation, religion, ethnic origin, political opinion or affiliation, indigenous population, social origin, national extraction, disability, HIV or other medical status, family responsibility, pregnancy, marital status or, except for purposes of retirement and restrictions on work and employment of young persons and children, age;

(b) any characteristic which pertains generally or is generally imputed to persons of a particular race, sex, sexual orientation, religion, colour, ethnic origin, indigenous population, nationality, political opinion, disability, HIV or other medical status, family responsibility, pregnant state, marital status or, except for purposes of retirement and restrictions on work and employment of young persons and children, age.

(3) Discrimination on the grounds of HIV or other medical status includes the requirement by an employer to have an applicant for a job or an employee subjected to an HIV test.

(4) Discrimination on the grounds of pregnancy includes the requirement to have an applicant for a job subjected to a pregnancy test."

87. Section 114(1) prohibits an employer from making any distinction, exclusion or preference the intent or effect of which is to nullify or impair equality of opportunity or treatment in occupation or employment on the grounds set out in s. 114(2). Section 114(2) sets out two broad grounds. Section 114(2)(a) sets out grounds based on the existence of certain facts in relation to the employee, such as race, colour, sex including national extraction. Section 114(2)(b) prohibits discrimination based on any particular characteristic pertaining or imputed generally to persons who satisfy the factual criteria in paragraph (a) of that subsection. In other words, the Code for example prohibits discrimination based on race etc or based on persons who have characteristics that are generally associated with persons of a particular race etc. The two paragraphs under section 114(2) are not identically worded so for example (a) prohibits discrimination based on national extraction while (b) prohibits discrimination based on characteristics pertaining or imputed generally to nationality. The Complaint did not plead or lead evidence of discrimination under section 114(2)(b).

88. The definition of "discrimination" under section 114 of the Code is a broad definition typical of direct discrimination regimes such as section 13 of the UK's Equality Act, 2010. In direct discrimination there is less favourable treatment of a person based on one of the prohibited grounds. It requires a comparison with how the person treats others, although a hypothetical comparator can be used in certain circumstances. The prohibited ground must be the cause of the treatment as shown in ***English v. Thomas Sanderson Blinds Ltd*** **[2008] EWCA Civ 1421, [2009] 2 All ER 468**. The definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic as shown by the European Court of Justice in ***Coleman v. Attridge Law*** **[2008] All ER (EC) 1105**.

89. In the present case, the relevant prohibited ground under consideration appears to be that of national extraction, which is a phrase that finds its genesis in the employment sphere in the International Labour Standards C111, Discrimination (Employment and Occupation) Convention 1958 (No. 111), where Article I states:

> "For the purpose of this Convention the term discrimination includes....
>
> (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, ***national extraction*** or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
>
> (b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." *(emphasis added)*

90. According to the decision from the Victoria Supreme Court in the Australian decision of ***Merlin Gerin (Australia) Pty Ltd v. Wojcik*** **[1994] VicSC 209**, the phrase "national extraction" is wider than the typical word "nationality" or the phrase "national origin", which is restricted to citizenship of a country whereas "national extraction" also refers to past history or previous circumstances. It includes both the place from which a person is derived and the nationality, either by birth or by self and community identification. Therefore, it includes a person's place of birth or place of ancestry, for example, national or linguistic minorities, naturalized citizens as well as those persons who have descended from foreign immigrations. This very wide phrase, therefore, can capture a person who is deemed to belong to the Virgin Islands.

91. In the instant case, it appears there may have been an attempt by the Complainant to make a distinction between persons who acquired their status as a Belonger by certification and others, such as the Complainant, who acquired their status by descent. However, there was no evidence before the Tribunal to support any such distinction. The only national extraction ground that could be gleaned from the pleadings, the evidence and the submissions of the Complainant is that of Belongers since that is how the Complainant identified himself.

92. Section 115 of the Code provides the prohibition against discrimination in the Virgin Islands workplace as follows:

> **"115.** (1) Subject to sections 116, 117 and 118, an employer, or any person acting or purporting to act on behalf of a person who is an employer, shall not, in relation to recruitment, selection or employment of any other person for purposes of training, apprenticeship or employment, discriminate against that other person in
>
> (a) the advertisement of a job;
>
> (b) the procedures used for the purpose of determining who should be offered that employment;

(c) determining who should be offered employment;

(d) the terms or conditions on which employment is offered; or

(e) the creation, classification or abolition of jobs.

(2) Subject to sections 116, 117 and 118, an employer shall not discriminate against an employee

(a) in the terms or conditions of employment afforded to that employee by the employer;

(b) in the conditions of work or occupational safety and health measures;

(c) in the provision of facilities related to or connected with employment;

(d) by denying access, or limiting access, to opportunities for advancement, promotion, transfer or training, or to any other benefits, facilities or services associated with employment;

(e) by retrenching or dismissing the employee; or

(f) by subjecting the employee to any other disadvantage."

93. It is important to note that the phrase "an employer, or any person acting or purporting to act on behalf of a person who is an employer" means that the liability for discrimination is not confined to the person who discriminates, since employers can be vicariously liable for the acts of their employees done while in the course of the employment as well as the authorised acts of their agents. This was shown in the English Court of Appeal decision of ***Jones v Tower Boot Company Ltd*** **[1997] 2 All ER 406** per McCowan, LJ at para. 17:

> "So, argues Mr Allen, for the common law doctrine to apply two conditions must exist: first, the relationship of master and servant must exist between the defendant and the person committing the wrong complained, and, second, in committing the wrong the servant must have been acting in the course of his employment, whereas the Act goes wider than the master and servant relationship—see the definition of employment in Section 78 of the Act where it includes persons "under a contract personally to execute any work or labour"."

94. It would be necessary for the Complainant to establish a set of facts that prove the Respondent provided less favourable treatment as a result of the fact that he is a Belonger. The less favourable treatment in the case under argument are twofold: (a) unequal remuneration; and (b) subjected to indecent language. Unlike the UK Equality Act, which by section 109(4) creates a defence for employers whose employees or agents discriminate against another of its employees, there is no defence for an employer in the Virgin Islands by taking reasonable steps to prevent the discrimination as the prohibition under Virgin Islands law is absolute. The only exceptions are under section 116 which deals with bona fide occupational qualifications that do not arise in the case under argument.

95. The absolute prohibition applies to the recruitment and selection process, that is before actual employment, as well as at the commencement of the employment, which is

covered by section 115(1) and is different from section 115(2) of the Code, which deals with the course of the employment, i.e., after the commencement of the employment up to and including termination of employment. The case under argument is concerned about discrimination that took place during the course of employment. It is, therefore, necessary for the Complainant to show under section 115(2)(a), (b) or (f) that there was some discrimination on any one or more of those grounds. For the reasons stated later in this Award, the pleadings, evidence and submissions by the Complainant do not meet the standard required for the Tribunal to grant a remedy to the Complainant..

96. It is important also to outline the jurisdiction of this Tribunal as provided under section 127 of the Code. Under section 127(2), the Tribunal may, if an offence is proved, make certain orders. The offence to which that section refers is found undersection 126 which provides:

> **"126.** (1) Any person who
>
> (a) commits an offence under section 122 or 123, or
>
> (b) otherwise contravenes the provisions of this Part commits an offence and,
>
> is liable on summary conviction to a fine not exceeding seven thousand dollars, and for a second or subsequent offence, to a fine not exceeding ten thousand dollars.
>
> (2) Where any partnership, or group of persons proposing to form themselves into a partnership, contravenes section 121(1), the individual partners shall, upon the contravention being proved, be each liable to a fine not exceeding two thousand dollars, and for a second or subsequent offence, to a fine not exceeding five thousand dollars.
>
> (3) Where an offence under this Part is proved to have been committed by an employer who is not a natural person, and is proved to have been committed with the consent or connivance of, or to have been facilitated by any neglect on the part of any director, chairman, manager or other officer, they shall each be liable to be proceeded against accordingly."

97. Therefore, the Tribunal can only proceed to provide a remedy under section 127(2) if an offence is proved in accordance with section 126 of the Code. The Complainant led no evidence to prove any such offence took place. The result is that this Tribunal can give no remedy for any breach by the Respondent of its duties under Part VII of the Code unless an offence has been proven.

98. In the circumstances, the complaint is dismissed in its entirety.

99. There remains the question of costs. Section 30(3) of the Code only permits the Tribunal to award costs for "exceptional reasons" which the Tribunal considers appropriate. The analogous phrase "exceptional circumstances" used in civil proceedings before the High Court has been interpreted by both the High Court and the Court of Appeal in the context of setting aside default judgments to mean there must be a case of unjust enrichment, or where a grave injustice would result if the default judgment is not set aside, or where the claim raises an area of law which there is need for clarification as shown in the case of ***The Marina Village Ltd v St. Kitts Urban Development***

Corporation Ltd **[SKBHCVAP2016/0012 (delivered 19 May 2016)]**, per Thom, J.A., where the BVI decision of ***Inteco Beteiligungs AG v. Sylmord Trade Inc.*** **[BVIHCM2012/0120 (delivered 09 May 2013)]**, per Bannister, J., was considered. According to Bannister, J. there must be a "compelling reason" which for the purposes of this Tribunal is only an alternative way of saying the same thing without defining the term. While the considerations for setting aside a valid judgment of a court and awarding costs must be different, the idea is that there must be something outside the normal scope of things that would move the Tribunal to award costs. According to LPR 47(3), the Tribunal would be guided by "any situation that arises outside the standard practice and procedure contemplated by the Act or these Rules" and goes on to provide a non-exhaustive list of circumstances. None of those non-exhaustive circumstances arise in this situation, however, the Tribunal notes that every opportunity was afforded to this Complainant by the Tribunal, including an opportunity to amend his pleadings after the hearing of evidence, and also notes that the Complainant failed to comply with the orders of this Tribunal on numerous occasions and took no steps to mitigate the harm this caused to the Respondent. Additionally, the numerous non-compliance and the late amendment caused considerable costs by the Respondent in defending this claim and seeking to comply with every order of this Tribunal. During the trial the Complainant also accepted the responsibility for costs if the Tribunal allowed him to amend his complaint at such a late stage. As a result, this Tribunal will award the Respondent's permitted costs in accordance with LPR 49(5).

The Award

97. The award of the Tribunal is as follows:

(a) The complaint filed with the Labour Commissioner on 15 July 2016, as subsequently amended, and referred to this Tribunal by the Minister is dismissed in its entirety.

(b) The Complainant shall pay the permitted costs incurred by the Respondent from the date of the filing of the complaint with the Labour Commissioner to the date of this Final Award, to be assessed if not agreed on or before Tuesday, 02 March 2021.

(c) If the parties fail to agree on the costs to be paid to the Respondent on or before Tuesday, 02 March 2021, a costs hearing in accordance with Part IX of the LPR is fixed for **Thursday, 15 April 2021** at 10:00 a.m. at the Office of the Tribunal in accordance with the Labour Code (Arbitration Tribunal) (Telephone and Video Hearings) Guidelines, 2020 (S.I. No. 99 of 2020).

(d) If the parties agree on the costs of these proceedings the Respondent shall give notice of the agreement to the Secretary to the Tribunal and the date fixed for the costs hearing shall be vacated.

Post-Script: Any person who is dissatisfied with this Final Award may appeal to the High Court on any question of law on or before Friday, 19 March 2021.

By Order
Labour Arbitration Tribunal

Main Office:
Ashley Ritter Building
Road Town, Tortola VG1110
British Virgin Islands

Mr. Jamal S. Smith, LLB(Hons.), MCIArb.
Chairman

I Concur.

Ms. Dancia Penn, OBE, QC
Member on the recommendation of the Complainant

I Concur.

Mr. John Carrington, QC
Member on the recommendation of the Respondent

LABOUR ARBITRATION TRIBUNAL
FEB 18 2021
BRITISH VIRGIN ISLANDS