

The Labour Tribunal's recent awards in relation to unfair dismissal in the British Virgin Islands

Overview

On 15 July 2021, the Labour Tribunal (the *Tribunal*) made four awards against employers relating to complaints made by employees pursuant to the Labour Code, 2010 (the *Code*) that they had been unfairly dismissed (the *Awards*). The term "unfair dismissal" refers to a situation where an employer terminates an employment contract without a valid and fair reason and contrary to the provisions of the Code. The Awards ranged from \$10,000 to \$448,959, signaling the Tribunal's clear willingness to order significant sums against employers in appropriate cases. The purpose of this article is to set out the Tribunal's approach articulated in the Awards in relation to unfair dismissals in the context of summary dismissals and redundancies, the factors that the Tribunal will take into account when assessing the amount of a punitive award against an employer and its approach to costs and interest. The full cases are available by clicking the links embedded in the names of the cases below.

Brief summaries of the Awards

In [Colleth Ranger-Vassell v Mainsail B.V.I. Limited](#), the employer contended that the employee was summarily dismissed on the basis of insubordination. The employer's position was that they gave the employee several written warnings regarding her conduct in accordance with the Code, and they were justified in summarily dismissing her due to insubordination. The Tribunal found that the dismissal was not valid as the employer had already taken disciplinary action in the form of demoting the employee following the written warnings which had the effect of wiping her record clean. The Tribunal further stated that the employer did not give the employee a written warning following the employee's demotion which complied with the provisions of the Code on which it relied. The Tribunal also determined that where an accusation against an employee formed the basis of termination as it did in this case, the employer ought to have carried out an investigation into the matter and must have reasonable grounds for believing the employee was guilty. The employee must also be given a fair opportunity to defend himself or herself. The Tribunal determined that the dismissal was both unfair and illegal.

The Tribunal also considered the issue of summary dismissal in [Qasim Yoba v Peter Island \(2000\) Ltd](#). In that case, the employee was accused of selling derelict vehicles which belonged to the employer, without the requisite authority.

The Tribunal was satisfied that the employer conducted investigations and provided a letter to the employee with a statement of the precise reason for termination, in accordance with the provisions of the Code relating to summary dismissal. Nevertheless, the Tribunal determined that the termination was unfair as the employer should have provided the employee with full details of its investigation and given him time to consider the accusations against him and to respond.

In [Mark McKie v Nanny Cay Resort and Marina Limited](#), the employee challenged his employer's decision to make him redundant. The Tribunal outlined the relevant criteria under the Code which must be satisfied for a redundancy to be considered valid. The employer argued that redundancy was based on a cash flow problem which fell within the statutory definition of redundancy under the Code. The Tribunal determined that the employer did not provide sufficient evidence that it was suffering from cash flow problems. The Tribunal found that there was no redundancy within the meaning of the Code and that the employee was unfairly dismissed.

The Tribunal also considered the legal procedure for redundancy in [Patricia Hodge v Road Town Wholesale Trading Ltd](#). The employer claimed that the termination fell within the meaning of redundancy in the Code as it reorganised its business to improve efficiency. The Tribunal accepted that there was a reorganisation of the employer's business but highlighted that the Code requires not only reorganisation of the business, but also that the reorganisation must be for the purpose of improving efficiency. The Tribunal found that the reorganisation did not reduce the employee's work and accordingly the employee's work was not affected by the reorganisation. The Tribunal ordered that the complainant be re-instated with effect from the day after termination with all the rights and privileges at the time of her termination. The employer was ordered to pay the employee \$448,959 which represents her salary for the period between termination and reinstatement less a sum of money which she received on termination. The Tribunal also ordered the employer to review her salary which it set at \$81,954.53 (up from \$75,000 at the time of termination) to take account of increases she was likely to have received had she not been terminated.

These cases highlight several requirements of the Code that employers should take into account when considering the termination of an employee's employment. We examine these considerations under the various heads below.

What are likely to be the main considerations of the Tribunal in cases of termination by way of redundancy?

In determining the validity of a termination by way of redundancy, the Tribunal indicated that it would ask itself two main questions:

- Whether the employer served the requisite notice in relation to the termination or made a payment in lieu of notice; and
- Whether the termination was for a valid and fair reason.

The Tribunal also confirmed the following important points in respect of termination by way of redundancy:

- a termination will automatically be for a valid and fair reason if it falls within one of the instances of redundancy specified in the Code;
- where an employee is terminated on the basis of redundancy there is no need to notify the employee in writing of the nature and particulars of the reason for the termination or to have given the employee a fair opportunity to defend himself or herself; and
- the employer must always act reasonably in the circumstances.

With respect to redundancies, the test will be whether, on a balance of probabilities, the evidence shows that the dismissal is for any of the specified instances of redundancy set out in the Code. The employer must therefore be prepared to adduce evidence to support the claimed basis of the redundancy. The Tribunal has also noted that if an employee is terminated for two causes, the Tribunal will consider the predominant cause of the dismissal to determine if it was valid and fair. Therefore, if the Tribunal determines that redundancy is the predominant cause, as it did in *Mark McKie*, the other cause will fail.

Employers must therefore carefully consider the reasons for any redundancy exercise and maintain the relevant evidence to demonstrate that a legitimate redundancy situation exists if it is called upon to do so.

How should employers handle summary dismissals?

The Code provides that an employment contract shall not be terminated by an employer without a valid and fair reason connected with the capacity or conduct of the employee or with the operational requirements of the business. Where an employer contemplates terminating an employment contract in such cases, the employer must inform the employee in writing of the nature and particulars of the complaint against the employee and give the employee or the employee's representative a fair opportunity to defend himself or herself including providing access to employment records.

The Code also allows an employer to dismiss an employee summarily if he or she is guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment relationship. In *Qasim Yoba*, the Tribunal appears to have accepted that even in cases of summary dismissal, the employee is still to be given a fair opportunity to defend himself or herself in keeping with the overarching requirements of natural justice.

Further, although an employee's contract of employment provides for summary dismissal, employers will still be held to the provisions of the Code.

What does the Tribunal consider when making a punitive award?

The Code states that where a dismissal was unfair or illegal, the Tribunal may order reinstatement, re-engagement or compensation, where such remedies are acceptable to both parties. The Tribunal has interpreted the Code as constraining it to make a punitive award where both employer and employee have not indicated that compensation is an acceptable remedy. The Tribunal ordered punitive sums against the employers in three of the four Awards.

The Tribunal determined that the appropriate starting point for its punitive awards should be \$25,000 which can then be increased or decreased based on various factors including:

- The nature, size and scope of the employer's business;
- The conduct of the parties from the beginning of the proceedings up to the date of the final award, including the conduct of any legal practitioner at trial;
- The relevance of any compensation that may have been otherwise awarded; and

- Any fine or other penalty already suffered by the employer for the wrongful conduct to ensure that the employer is not punished twice.

It is therefore important for an employer to present evidence of its means to the Tribunal as a reference point for the calculation of any punitive award. Otherwise, the Tribunal is entitled to make an inference regarding an employer's means which might not be as precise.

Additionally, employers should ensure their defence is carefully drafted to reduce the likelihood of a punitive award being made against them in circumstances where they would have been prepared to agree to compensation if the Tribunal found that dismissal was unfair or illegal.

When will the Tribunal order costs in proceedings?

The Code provides that the Tribunal may only award costs for exceptional reasons, which the Tribunal considers appropriate. The Tribunal has taken the position that a punitive award itself would ordinarily amount to an exceptional reason to grant costs in favour of an employee.

In the *Qasim Yoba* case, the Tribunal refused to make an order as to costs in favour of the successful employee on the basis that the assistance that the employee received from his legal practitioner fell below the required standard of a legal practitioner appearing before it. Legal practitioners should therefore monitor their actions before the Tribunal to avoid adverse costs orders against their clients.

When can the Tribunal award interest?

The Code does not expressly empower the Tribunal to award interest on any compensatory or punitive sums ordered by the Tribunal. The only potentially applicable reference to interest payable under the Code appears in respect of an employee's entitlement to recover wages in a court that have not been paid to him or her plus interest at the rate to be determined by a court.

Although the Tribunal agreed that it is not a court, it concluded that it had jurisdiction to determine employment disputes within its broad powers to make orders which would allow the Tribunal to award pre- and post-judgment interest, at the rates of 3% and 5% respectively. The Tribunal considered that it could order pre-judgment interest from the date of a complaint to the date of the award. Post-judgment interest would begin to accrue 30 days after the date of the award until payment is made.

Employers should take note that the Tribunal's approach in applying pre- and post-judgment interest could noticeably increase the size of awards made against employers in unfair dismissal cases.

Conclusion

Employers face the risk of potentially high awards in unfair dismissal proceedings before the Tribunal.

As can be seen from the Awards we discussed above, when it comes to termination of employment, the requirements under the Code must be strictly followed in each case. Employers should therefore consult with their attorneys to assure the propriety of their dismissal proceedings to the best extent possible.

These are fairly early days for the Tribunal in its current form. We will continue to report on updates in relation to its findings as it continues to develop its jurisprudence.

If you have any further questions, please feel free to contact us.

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