IN THE SUPREME COURT OF BELIZE, A. D. 2013

CLAIM NO. 200 OF 2013

	(MARK MENZIES	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(BELIZE WATER SERVICES LTD.	**DEFENDANT**

CLAIM NO. 260 OF 2013

(DON GILLETT	**CLAIMANTS**
(COLIN MORRISON	
(CHARLETTE BARNETT	
(MICHAEL NOVELO	
(JOURNETT MCKOY	
(	
(AND	
(	
(BELIZE WATER SERVICES LIMITED	**DEFENDANT**

BEFORE THE HONORABLE MADAM JUSTICE MICHELLE ARANA

Mr. Said Musa, S.C., of Musa and Balderamos for the Claimant Mark Menzies

Mrs. Tricia Pitts-Anderson of Pitts and Elrington for the Claimants Don Gillett, Colin Morrison, Charlette Barnett, Michael Novelo and Journett McKoy

Mr. Rodwell Williams, S.C., along with Julie-Ann Ellis Bradley of Barrow and Williams for the Defendant Belize Water Services Ltd.

D E C I S I O N

The Facts

1. "**The moving finger writes, and having writ moves on." - Omar Khayya'd**. Sometime in July 2012, a series of salacious letters began circulating on the Belize Water Services (BWS)

compound, Belize's state controlled water services company. The evidence did not reveal the contents of those letters except to allege that certain managers of the organisation were engaged in immoral practices including partaking of sexual intercourse on the workplace. An investigation was launched by the management of Belize Water Services to determine who the author(s) of these letters were. On February 6th, 2013 the Claimants were all dismissed from employment at the company (except Journett McKoy who was dismissed one week later on February 14th, 2013). Mr. Menzies' Claim No. 200 of 2013 and that of the Claimants Don Gillett, Colin Morrison, Charlette Barnett and Journett McKoy in Claim No. 260 of 2013 were consolidated into this single claim as both claims arise out of the same series of events and involve the same parties. The Claimants assert that Belize Water Services dismissed them unlawfully and that their termination was due to their refusal to cooperate with the company's investigation into the letters. The Claimants ground their claim largely on a Memorandum which was sent to Belize Water Services' staff by the Chief Executive Officer Mr. Alvan Haynes on February 7th, 2013 (the day after their dismissal) which stated that the reason for the employees' termination was their refusal to cooperate with the investigation into the letters. The Claimants also allege that the President of their Union Mrs. Lorelei Westby did not protect their rights as she was required to do under the Collective Bargaining Agreement; as she was herself a Supervisor of BWS and apparently "*in cahoots*" with the management team of BWS at the material time. BWS, in its defence, contends that all these Claimants were lawfully terminated in keeping with the company's redundancy measures to cut cost which began as far back as 2009, several years before any investigation of the employees took place in 2012. The company further alleges that all the Claimants have been fully compensated for their service and that they are not owed anything further by Belize Water Services.

The Issues

2. i) Were the Claimants wrongfully or unlawfully dismissed due to their refusal to cooperate with BWS' investigation, or were they dismissed lawfully in accordance with BWS' policy of redundancy?

   ii) If the employees are entitled to compensation from BWS, how much are they entitled to? Have they each been fully compensated?

The Claimants' Case

3. The evidence of all the Claimants is that they were terminated by BWS because they did not cooperate with the company's management in the investigation launched into the salacious letters floating around the workplace. Mr. Mark Menzies stated in his witness statement that he had been employed by BWS as a meter reader at the age of 18 years; at that time BWS was known as WASA (Water and Sewerage Authority), a Government of Belize owned statutory corporation, which later became privatised as the Defendant company Belize Water Services Ltd. (BWS) in 2001. In 2005, the Government of Belize repurchased the majority shareholding from the Norwegian Company CASCAL. Mr. Menzies remained employed with BWS for (33) thirty three years until the date of his termination in 2013. During the years of his employment Mr. Menzies was evaluated on an annual basis and each of his appraisals resulted in a good/satisfactory rating followed by attendant increments in salary. He was duly promoted to the job of Lab Technician after successfully completing on the job training at BWS. He also pursued and completed an intensive course at the College of Arts, Science and Technology in Jamaica.

   Mr. Menzies further testified that he was asked into the office of the Chief Executive Officer Mr. Alvan Haynes in 2012 and questioned on two separate occasions by an investigative panel comprised of three Managers of BWS. He was questioned on how often he spoke with one

Florencia Rodriguez, a former secretary of BWS of some 20 years standing, who had been terminated from the company about four years prior. He deduced from the questions he was being asked that management suspected Ms. Rodriguez of being the author of the malicious letters; he told them he knew nothing of the letters or of the source of the letters.

Mr. Menzies stated in his witness statement that the reason stated in his letter of termination dated February 6th, 2013 was redundancy. However the day after the letter was given to him by BWS, the Chief Executive Officer Mr. Alvan Haynes issued a memorandum to BWS staff dated February 7th, 2013 reproduced in part as follows:

> *"Yesterday the company has terminated the services of several Belize City staff members. As you know we have been conducting detailed investigations into a number of malicious letters which contain slander, gossip, and misuse of information. The terminations were primarily due issues to do with confidentiality of information or failure to cooperate fully with the investigation including providing false information or withholding information."*

It is on this basis that Mr. Menzies is claiming the following relief:

(i) A declaration that on the 6th February, 2013 he was unlawfully terminated from his employment with the Defendant Company Belize Water Services Ltd.;

(ii) Compensation for loss of salary at the rate of $36,081.36 per year together with loss of increments or benefits;

(iii) Severance pay for his 33 years of continuous service with BWS and its predecessor corporation WASA;

(iv) Exemplary damages or aggravated damages;

(v) Interest and costs.

4. The case of the Claimant Don Gillett is that he was employed by BWS as a Senior Customer Service Representative in the Customer Service Department of BWS at the time his services were terminated on 7th February, 2013. He had worked for BWS for (7) seven years and was earning $17,136.00 per annum. His position was below that of a supervisor and he often held

over for supervisors who were absent. Mr. Gillett states he had been told by BWS that he was next in line for a promotion as soon as a post became vacant. He says he had never been disciplined by the company for any reason. He also states that he received above average performance appraisals each year and increments in his salary, as well as letters of commendation from BWS for outstanding work in 2008 and 2009. None of this evidence has been refuted by BWS.

Mr. Gillett claims that he was interviewed about the salacious letters by the management team at BWS on three separate occasions. He was questioned about his relationships with persons mentioned in these letters, about his personal life and about his union activities as the 2nd Vice President of Belize Water Services Workers Union (BWSWU). Mr. Gillett told the panel he knew nothing of the letters. He mentioned to the Human Resources Manager Mr. Haydon Brown that he had seen another employee move the Union President's speech but beyond that he knew nothing. He was terminated by BWS since February 2013 and was only able to get a job at Home Protector Insurance in December 2014. He has been working there since.

5. Colin Morrison was an Information Technology Technician employed by BWS for almost 8 years. He states that he scored 7 out of 10 on his last job appraisal. At the date of his termination from BWS only one other person, a Mr. Dale Hulse, had served the company longer than he had in that department. He never received any disciplinary action during his years at the company. In 2006, Mr. Morrison was named "*Rookie of the Year*" and commended for his work performance. At the time of his termination, Mr. Morrison had served as a trustee for the union and had recently resigned as an executive member of the union.

   In his witness statement, Mr. Morrison testified that he was interviewed on at least four separate occasions by the BWS investigative panel. He said he was questioned extensively about

the scandalous letters and threatened that if he did not cooperate fully or if he withheld information, then that lack of cooperation would be deemed serious misconduct and he could be terminated. Two days after the fifth such interview which took place in February 2013, Mr. Morrison was handed his letter of termination. He also claims that he was terminated not due to redundancy as the letter from BWS states, but due to his refusal to cooperate with their investigation.

6. Ms. Charlette Barnett was a Customer Service Representative/Dispatcher in the Customer Service Department of the Belize Water Services Ltd for the (9) nine years she worked for the company. She states that her performance appraisal for 2009 to 2010 and for 2010 to 2011 was 7.8 out of 10, and that she received annual salary increases based on her appraisal scores. At the time of her termination, Ms. Barnett's salary was $17,180.16 per annum. She states that during her nine years of employment she has never been disciplined by BWS for any reason. Ms. Barnett was the General Secretary of the Belize Water Service Workers Union (BWSWU) up to the date of her termination. This evidence has not been refuted by BWS.

   In her witness statement, Ms. Barnett recounts in detail her experiences (similar to that of the other Claimants) of being interrogated by the panel of BWS Managers seeking to determine who the author(s) of the salacious letters were. She stated that at the Annual General Meeting of the union in May 2012, the Union President Lorelei Westby read out the entire offensive letter (a copy of which had been sent to the Prime Minister) along with her speech. Ms. Barnett was questioned extensively by the panel on a number of different occasions about her personal life and her friendships/relationships (quite inappropriately in my view) with various staff members such as Journett McKoy, Florencia Rodriguez and Brian Lindo. She was called to a final interview on February 6th, 2013 consisting of the Chief Executive Officer Mr. Haynes, the Human Resources Manager Mr. Brown and two other Managers and she was given her letter of

termination. She says that Mr. Brown told her upon handing her the letter that because they could not find out who was responsible for the offensive letters and because of her relationship with one Brian Lindo, they had no choice but to terminate her services; if at the end her name was cleared, then they could reinstate her. This evidence is unchallenged by the Defence.

7. Mr. Michael Novelo states that he was employed as a Waste Water Technician for almost three (3) years in the Operations Department at BWS before he was terminated. He asserts that he passed all of his performance appraisals and received salary increase in December 2012 based on his performance evaluation. Mr. Novelo admits that he was suspended by BWS on one occasion early in 2012 for not working on a Sunday that he had been assigned to work; however this is the only infraction during his tenure. He recalls that prior to his termination he was called to an interview with Managers of BWS including Mr. Hayden Brown and Mr. Keith Hardwick. He was questioned about a scandalous letter that was circulating on the workplace. He informed the panel that he had no knowledge of the letter. On the 7th February, 2013 he was called to Mr. Brown's office where he was handed a letter which said that the company was going through a redundancy exercise and that his services were no longer needed as his post had been made redundant.

8. Mr. Journett McKoy says that he was the Foreman of the Operations Department at BWS and at the time of his termination he had worked at the company for 24 years. He states that he received raises commensurate with his performance for every year except one, and that he was generally commended for his work performance by his supervisors and management. He cited the company's Newsletter "*Pipeline*" where in the January 2006 edition he was described by his then Supervisor Dennis Tillett as "*one of the most knowledgeable employees in his field of work*". He admits that he was briefly suspended on at least three separate occasions for infractions. He was completed vindicated in the case of missing water meters, and the other two

incidents for which he paid compensation to the aggrieved customer for an accident and also for unauthorized use of the company vehicle to drop his wife home after he worked late one evening. He states that none of these relatively minor incidents can justify his being made redundant by BWS.

Mr. McKoy recounts that he was investigated by BWS on the 14th February, 2013. The company's Chief Executive Officer Mr. Haynes, Mr. Brown (Human Resources Manager) and two other Managers/Supervisors. He was asked to surrender his work phone and he did. He was then asked if he knew about a letter that had been circulating and he said he had no personal knowledge of it. Mr. McKoy says he was then interrogated about his relationship with Ms. Barnett and he responded saying he is close with her because they work together and share information about daily work. He was asked about the letter and the people who no longer worked at BWS. He said he knew nothing. After several questions from the panel (many of which in my view were highly intrusive and accusatory), Chief Executive Officer Haynes told Mr. McKoy that he can no longer work with the company as he does not trust him anymore. Mr. Haynes mentioned that the investigation is not over and that Mr. McKoy will be investigated by the police, to which Mr. McKoy replied "*Anytime they come, I will be ready.*" The Human Resources Manager Mr. Brown then gave Mr. McKoy an envelope (containing his termination letter) and told him to clear up his personal things. None of this evidence was challenged by the Defence.

9. All these Claimants allege that their termination was wrongful as it was not based on redundancy as BWS states in each letter, but on the former employees' failure or refusal to cooperate in the company's investigation into the malicious letters. They therefore seek the following relief:

    i. Declaration of unlawful termination;

ii. Damages;
iii. Loss of salary and benefits;
iv. Interest;
v. Further or other relief;
vi. Costs.

The Defendant's Case

10. Mrs. Lorelei Westby is the Procurement Supervisor at BWS. She states that she has been employed by BWS since March 15th, 1989 and that she has held the post of Procurement Supervisor since 2007. The Union (BWSWU) was established April 22nd, 1995 and she states that she served as President of the BWSWU from 2009 to 2013. She now serves as First Vice President of the Union since May 2013 until present date. Interestingly enough, Mrs. Westby states that the Union is responsible to bargain for the employees and to ensure that their rights are not violated. I shall return to this salient point later in this decision. She went on to describe that the Collective Agreement requires that the management of the company give the union notification that the company is carrying out a redundancy exercise. She also says that the reason why notification is necessary is to allow the union to give suggestions and generally allow representations from the Union on behalf of the employees. Mrs. Westby says that BWS management informed the staff that they would be looking at more strategic ways of spending, reviewing and revising the salary scale to see where they could be combined or removed. She stated that union and staff were aware that in the process positions would become redundant.

11. According to Mrs. Westby, the staff at BWS were made aware of the redundancy exercise since meetings were held between the union executive and the general membership to discuss salary scale review and other matters related to this ongoing redundancy exercise as they arose. She exhibits an email "LW1" between the Claimant Don Gillett and the union executive as an example of one such discussion. She also testifies that she was advised that the necessity to restructure and improve efficiency was made even more so due to the fact that in March 2012

the Public Utilities Commission issued tariff reduction of 7.2% effectively reducing the company's budgeted revenues and cutting profits by half. Due to this reduction in tariff, Management was mandated to reduce costs wherever possible, including restructuring of staffing by units or departments where practicable. She states that this was communicated to the Union in a letter dated October 2nd, 2012 and marked "LW2". She also referred to two additional letters from BWS management addressed to her as President of the Union dated November 27th, 2012 and January 28th, 2013 marked LW3 and LW4 respectively.

12. Mrs. Westby testified that the Union assisted in the redundancy exercise by cooperating, dialoguing and reviewing documentation, meeting with Management and ascertaining that the post was made redundant before any termination was carried out. She said that the union received satisfactory information that each employee who was made redundant received their full entitlement in terms of benefits, pension and severance as per clause 12.2 of the Collective Agreement.

13. In relation to the malicious letters, Mrs. Westby stated that the Union and Management together determined that it was important to investigate the letters and called on all staff members to participate fully in an effort to bring closure and hopefully identify the source of the letters. She stated that these letters had caused significant disharmony in the workplace and created mistrust among employees. Mrs. Westby said she did not take part in the investigations due to a conflict of interest since her name and signature appeared on some of the letters. One Russell Young was appointed to act as Union representative on the investigation team in her stead. To Mrs. Westby's knowledge, the author of the letters was never discovered.

14. Mr. Alvan Haynes, Chief Executive Officer of BWS, also testified on behalf of the company. He said that since 2009 there has been a process of rationalization and strategic planning at BWS in

order to improve efficiency while cutting costs. This was to be achieved by trimming departments in some instances and in other areas expanding the capability of the department and investing in systems and processes to better deal with the increased demand for infrastructure and countrywide coverage. He said that it was hoped that this could be done with as little job loss as possible in a way which would yield positive net returns.

15. Mr. Haynes said that from a business perspective, the re-structuring had to be accelerated due to an order in March 2012 from the Public Utilities Commission reducing tariffs charged by BWS by 7.2%. He said that this had the effect of reducing the company's budgeted revenues and cutting profits by half. Management was mandated to try and reduce costs wherever possible, including re-structuring of the staffing of units and departments where practicable. In addition, the company consistently worked at improving processes and efficiency, leading to changes in structure and staffing, sometimes due to removal of posts and sometimes due to the taking on of personnel with improved computer, technical or specialized skills. The Chief Executive Officer said he wrote an article in BWS' internal electronic newsletter entitled "*Tapping In*" dated January 9th, 2013 in which he communicated to staff the pressures which were facing the company (Exhibit AH1). The factors considered by management in conducting this redundancy exercise were as follows:

    A. Needs of unit and/or department;
    B. Employee's skill set and overall capability;
    C. Employee's performance and work ethic;
    D. Where all things were equal "*Last in, First Out*".

16. Mr. Haynes said that using those factors a number of employees were terminated. I note that of the 9 employees listed by him, 6 of them were the Claimants all of whom were terminated on February 6th, February 7th and February 14th, 2013. He exhibits a letter dated January 28th, 2013 which he wrote to Mrs. Westby as President of the BWS Workers Union advising of the need to

further restructure the units and departments (Exhibit AH 2). In that letter, he confirmed that performance as well as the "*last in, first out"* principle would be the main factors for consideration where redundancy was necessary. He says the redundancy exercise continues through attrition and he lists 4 additional employees who either retired or resigned and the company has not hired new staff to replace them. He further states that the company has not breached the Collective Agreement. In his view, all the Claimants' performance in their respective posts were generally below or co-ordinate with that of their counterparts, and some of them had had performance issues leading to disciplinary measures taken against them by the BWS.

17. The Chief Executive Officer also said that the malicious letters circulating at BWS created an extremely suspicious and uncomfortable atmosphere within the Company, with some employees threatening to do harm to anyone they felt was directly involved with the production of these letters. In this troubled atmosphere of suspicion and mistrust, he says he made the decision to release an intra-company memorandum on February 7th, 2013 implying that the terminations of several workers were related to the investigations into the letters. Mr. Haynes said he did this in the hope that any employees who had knowledge regarding these letters would come forward to help bring closure to the investigation. He had issued previous memoranda on gossip on a prior occasion (Exhibit AH3) and that had resulted in cooperation from the staff. He says each of the Claimants were issued with letters from BWS stating the reason and basis for their termination, and that the memo was not addressed to them, but for internal confidential circulation within the company as follows:

"MEMORANDUM

TO:	*All Employees*
CC:	*HR Manager*
FROM:	*Alvan Haynes, CEO*
DATE:	*February 7, 2013*
SUBJECT:	*Recent Termination of Staff*

Yesterday, the company has terminated the services of several Belize City staff members. As you know, we have been conducting detailed investigation into a number of malicious letters which contain slander, gossip, and misuse of information. The terminations were primarily due issues to do with confidentiality of information, or failure to cooperate fully with the investigation, including providing false information or withholding information.

We had previously informed staff of expectations regarding the investigations. The excerpts below are from the second Memo dated July 27th, 2012:

> *It is obvious that a great deal of the content of this letter, and its predecessor, was based on office gossip that has been spread from person to person, or group to group. As the article points out, "while gossips themselves might not immediately suffer for their loose tongues, eventually they will be found. The consequences may include poor performance reviews, no pay raises, reprimands from supervisors, or possibly dismissal because of their involvement in destroying office morale or committing slander."*
> *The investigations by both the Police and the internal team continue. As indicated in the reference memo, every employee is instructed to cooperate with the investigating team and to report any issue which they feel may be of assistance. Furthermore, failure to cooperate, including providing false information or withholding information, will be deemed as serious misconduct. The seriousness of the situation caused by this letter, which includes the possibility of both criminal and civil charges in court, cannot be understated.*

I take this opportunity to remind everyone to the dangers of gossip and maligning others. Let's each of us individually take positive steps to help improve morale and professionalism in the workplace and to kill gossip before it even starts."

Under intense cross-examination by Mrs. Pitts Anderson, Mr. Haynes stated that he lied in the memorandum to his staff members in an effort to boost morale in the wake of the letters.

18. The final witness for the Defence was Mr. Haydon Brown, Human Resources Manager. Mr. Brown stated that the company has been conducting a phased restructuring since 2009. He describes how BWS tried to address its challenges in improving revenue streams while expanding its operations in some areas to meet the basic needs and serve customers countrywide. This meant significant capital investments and the need to closely monitor productivity and efficiency to ensure a positive net result. Mr. Brown said that several

workshops were held by BWS Management between 2009 and 2014 to come up with a strategic plan to address the situation. He exhibits an email (Exhibit HB2) dated October 31st, 2011 which he sent to his fellow managers inviting feedback on salaries and positions at BWS; attached to the email was an April 2009 excel document containing the salary scales and positions of all BWS employees.

19. Mr. Brown also states that as Human Resources Manager he had the direct responsibility to communicate with union executives on directives and decisions of Management, while reviewing with managers their departmental structural needs to determine their current and future needs relative to their department's need for greater efficiency. The company embarked on a new strategic initiative and this resulted in structural staff changes. In some instances staff would resign, get terminated, die or retire and the company would look closely at whether they would be replaced. In all cases where it was agreed that employees would be replaced, it was agreed that educational improvement would be a major requirement considering the strategic direction the company had embarked on. Mr. Brown says that all documentation including organization charts with the suggested changes were shared with the Union executives. He goes on to cite the major tariff reduction of 7.2% ordered by the Public Utilities Commission in March 2012 as the reason why BWS had to accelerate the restructuring of its operations leading to some unavoidable redundancies. He exhibits a letter (Exhibit HB4) dated October 2nd, 2012 which he wrote to the President of the Union Lorelei Westby advising of the challenges posed by the PUC memorandum and the need for company restructuring which was expected to result in some posts being made redundant. He also reiterated management's commitment to seeking the Union's input throughout the process. The managers consulted with BWSWU executive on matters surrounding staff issues, training development and any other relative issues to deal with staffing within the company. Mr. Brown says that BWS takes great pride in the relationship with

the BWSWU, and the track record of the company is there to show that never once in the past 10 years did the company ever have a dispute with the Union that led to even the threat of industrial action.

20. Mr. Brown then goes on to reiterate Mr. Haynes' statement that the Claimants were terminated as a result of BWS' redundancy and that the redundancy was conducted in stages; the Union was informed in writing at each stage. He exhibits letter dated November 27th, 2012 (Exhibit HB5) notifying Union President Mrs. Westby of the intended redundancies, and a letter from Chief Executive Officer Haynes to Mrs. Westby dated January 28th, 2013 notifying her of the intended organizational restructuring.

21. Mr. Brown then went on to discuss each Claimant's record with BWS, highlighting their job function, skill set and work ethic as well as the needs of their department to illustrate the basis of the Company's decision to make these employees redundant.

    In the case of Mark Menzies, Mr. Brown said that Mr. Menzies was the least qualified of the three Lab Technicians in that department. He said since Mr. Menzies' departure the department is now staffed with more qualified water analysts who have more academic and formal training and can provide more technical capabilities.

    Mr. Brown said that Colin Morrison is limited to computer networking and could not be utilized in data administration or application software support tasks. His skill set seemed inadequate for department needs.

    Don Gillett was not able to successfully supervise a branch in Dangriga and he displayed poor performance and work ethic.

Michael Novelo's performance was far from exemplary. He was served a letter of warning by the company for his unreported absences from work in October 18th, 2011. He was involved in a company vehicle accident in February 2013 which he did not report.

Journett McKoy's performance deteriorated in the last three years of his 23 year tenure. He could not cope with work requirements. His computer skills, analytical ability and overall academic capabilities were not on par with the skills required for his position held within the company.

Charlette Barnett was identified as one of the weakest members of staff due to her limited capabilities and educational background. She was unable to deliver well when more technical requirements were demanded of her.

Mr. Brown was cross-examined extensively about these infractions.

Mr. Brown then says that the Claimants were all paid as per the collective agreement upon their redundancy. He gives a detailed breakdown of how each employee's severance package was calculated. This included BWS Pension Plan, Notice Pay, Vacation Pay and additional salary for six days.

He then says that he is aware of the Chief Executive Officer's memorandum about the salacious letters, but he can confirm that each of these Claimants were terminated due to restructuring. He was responsible for dealing with each terminated employee and personally involved with the Union and departments in achieving this restructuring.

Legal Submissions on Behalf of the Claimants

22. Mr. Musa, SC, on behalf of Mark Menzies submits that there is no evidence that "*all reasonable efforts*" were made "*to avoid the possibility of retrenchment*" as Article 12.2 of the Collective

Agreement mandates. The company did not inform the Union in writing in a reasonable time of any intended retrenchment as the letter of 29th January, 2013 merely mentions "*the main factor to be considered where redundancy is necessary*". It referred only to a hypothetical situation with no reference to any impending termination.

23. There was no reasonable time given to the Union to make any suggestions and there is no evidence that the company had taken into account any suggestions made by the Union. The Collective Bargaining Agreement was intended to provide security of tenure to permanent employees especially long service employees who have demonstrated good performance over the years. Mr. Musa, SC, highlights the fact that in cross-examination both Chief Executive Officer Haynes and Human Resources Manager Brown conceded that Mark Menzies had always shown good and satisfactory performance on his job. His work was always up to standard and he improved his skills and knowledge through studies at CAST in Jamaica and through on the job training at BWS. He had worked with the company since 1985 and in 2012 he again received a good performance rating at his last appraisal and a salary increase. Contrary to the stated reason in the Claimant's letter of termination, Mr. Menzies was not made redundant. His post was not abolished and (as admitted by Mr. Haynes) Mr. Menzies was replaced by a new recruit, increasing the number of staff in that unit from three persons to four.

24. Mr. Musa, SC, further argues that the factors that can justify termination due to redundancy are expressly set out in Section 45 of the Amendment to the Labour Act, Act No. 3 of 2011; these include factors such as modernization of the business or reorganization of the business to improve efficiency.

> "44 (1) *The employer may give a written warning to a worker where that worker*
>
> *(a) breaches a condition of employment,*
> *(b) behaves in a manner which constitutes a misconduct, or*

(c) behaves in a manner which constitutes gross misconduct.

(2) If the worker after being warned pursuant to subsection (1) commits the same or similar misconduct, the employer may terminate the worker's contract of employment without notice.

(3) Where the employer acted pursuant to subsections (1) and (2), the employer shall be deemed to have waived any right to terminate the employment of a worker for misconduct if the employer failed to terminate the employment after having knowledge of the misconduct or at the end of any investigation of the said misconduct.

(4) The employment of a worker sha11 not be terminated for unsatisfactory performance unless the employer has given the worker instructions as to how the worker should perform his duties and a written warning to adhere to the employer's instructions and the worker continues to perform any duty unsatisfactorily.

45 (1) The employer may terminate the employment of the worker by giving the required notice according to section 37, if the worker becomes redundant under the provisions of subsection (2).

(2) The worker becomes redundant under subsection (1) where, in relation to his employer's business where he is employed, his termination of employment is or part of a reduction in the work force that is a direct result of

(a) the modernization, automation, or mechanization by the employer of all or part of the business,
(b) the discontinuance by the employer to carry on all or part of the business,
(c) the sale of or the disposition of all or part of the business,
(d) subject to section 44(4), the reorganization of the business by the employer to improve efficiency,
(e) the impossibility or impracticability for the employer to carry on the business at its usual rate or level or at all due to

(i) a shortage of materials,
(ii) a mechanical breakdown,
(iii) an act of God,

(f) a reduced operation in the employer's business made necessary by economic conditions, including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory,

(g) any other circumstances which the Minister may by Order published in the Gazette, determine.

(3) Prior to terminating the employment of any worker pursuant to this section, the employer shall

(a) inform as early as possible but not later than one month from the date of the existence of any circumstances mentioned in subsection (2), the recognized trade union, or if none exists, the workers' representative, and in any case with the Labour Commissioner of

(i) the existence of any of the circumstances mentioned in subsection (2),
(ii) the reasons for the contemplated termination of employment,

(iii) the names, numbers and categories of the persons likely to be affected,
(iv) the period over which such terminations are likely to be carried out,
(v) a list of existing or expected claims of the workers employed by the employer arising from or in context with the employment (such as compensation, benefits or other payments due), and
(vi) any other matter as may be relevant.

(b) consult as early as possible but not later than one month from the date of the existence of any of the circumstances mentioned in subsection (2), with the recognized trade union or if none exists, the workers' representative and in any case with the Labour Commissioner, on

(i) the possible measures that could be taken to avert or minimize the adverse effects of such situations on employment,
(ii) the planned settlement of the workers claims, and
(iii) the possible measures that could be taken to mitigate the adverse effects of any terminations on the workers concerned.

(4) The Minister may by written order, prior to a change of name, or sale, or transfer, or closure of an enterprise request the employer to provide financial security in the amounts he sees fit to satisfy the existing claims from workers and the employer shall comply with such order within one month from the date of receipt of the Minister's order.

(5) The financial security made by order under subsection (3) shall be made with the Commissioner in an account set up for that purpose.

(6) Where an employer fails to comply with an order under subsection (3), the Commissioner shall recover the amount due in a civil suit.

(7) Notwithstanding subsection (4), a new employer planning to take over an employment relationship from the current employer may agree with the current employer and the worker to take over part or all of the claims of the worker concerning the previous employment relationship."

25. He also states that Section 44 of Act No. 3 of 2011 clearly mandates that a worker shall not be terminated for unsatisfactory performance unless the employer has given the worker instructions as to how the worker should perform his duties, a written warning to adhere to the employer's instructions and the worker continues to perform his job unsatisfactorily. Learned Counsel also makes the point that Human Resources Manager Brown claims that management had to reduce costs wherever possible including restructuring of staff, so Mr. Musa, SC, argues that the redundancy arose not as a need to improve efficiency, but out of a desire to cut costs. If it were to improve efficiency, then management would have had to weed out workers whose

performance was unsatisfactory, who failed to carry out the Company's instructions and workers, who despite written warning, continued to perform their duties unsatisfactorily. He submits that there is no evidence of compliance with Section 44(4) that would allow the Defendant to rely on Section 45(2) (d) of Act No. 3 of 2011 to justify making Mark Menzies redundant.

26. Mr. Musa, SC, submits in conclusion that the simple truth is that the Claimant was dismissed not for redundancy but for the reason stated in the Chief Executive Officer's memorandum of February 7th, 2013: *"The terminations were primarily due to issues to do with confidentiality of information or failure to cooperate fully with the investigation… "* He submits that Mr. Menzies is therefore entitled to damages for unlawful termination as well as damages for distress and injury to feelings, severance pay, interest and costs. He cites Claim No. 142 of 2007 *Christine Perriott v. Belize Telecommunications Ltd.* where Sir John Muria included in his award of damages, damages for injury to hurt feelings and mental distress in the circumstances of that case, and urges this court to do the same.

27. On behalf of Don Gillett, Colin Morrison, Charlette Barnett, Michael Novelo and Journett McKoy, Mrs. Tricia Pitts-Anderson contends that the gravamen of the Claimants' case is that they were wrongfully terminated on the pretext of redundancy, when in fact the true reason for their purported redundancy was suspicion of their alleged involvement in the authorship and/or dissemination of distasteful letters within the Defendant company. The Claimants also claim that even on the pretext of redundancy their terminations were in breach of the procedures laid out in the Collective Bargaining Agreement (CBA) which governed their contract of employment with the Defendant.

28. Mrs. Pitts-Anderson argues that it is common ground between the parties that the Collective Bargaining Agreement stylized the "*Employee Handbook*" is incorporated into the Claimants' employment contract thereby regulating their employment with the Defendant. She also cites Halsbury's Laws of England 4th Edition Vol 16 para 451 on wrongful dismissal as follows:

> *"… there may be cases where the contract of employment limits the grounds on which the employee may be dismissed or makes dismissal subject to contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason without observance of the procedure is wrongful dismissal on that ground."*

She then cites Clause 12.2 of the Collective Bargaining Agreement which sets out the procedures to be followed where the redundancy of an employee is inevitable:

> *"The Company and the Union agree that all reasonable efforts shall be made to avoid the possibility of retrenchment. The Company shall inform the Union in writing in a reasonable time of any intended retrenchment. The Company will take into account any suggestions the Union may submit prior to the retrenchment. If retrenchment appears inevitable, the main deciding factor will be performance and then the principle of last in first out shall apply where all other things are equal, but the final decision shall be solely at the discretion of management.*
>
> *Employees whose post becomes redundant shall be paid as follows:*
>
> *(a) Entitlements provided for in the Company's Pension Plan.*
> *(b) Accumulated vacation leave calculated up to date of termination.*
> *(c) All other benefits covered under this Agreement for which the Employee is eligible.*
> *(d) Notice pay will be paid in accordance with the Labour Laws of Belize.*
> (e) *An ex-gratia payment may be made at the sole discretion of Management.*"

Learned Counsel also submits that in determining the question of what amounts to redundancy, since the Collective Bargaining Agreement is silent on that point, resort must be had to section 45(2) of the Labour Act, Chapter 297 of the Laws of Belize, as amended by Act No. 3 of 2011 which categorizes the circumstances under which a worker may become redundant.

> *"45 (1) The employer may terminate the employment of the worker by giving the required notice according to section 37, if the worker becomes redundant under the provisions of subsection (2).*
>
> *(2) The worker becomes redundant under subsection (1) where, in relation to his employer's business where he is employed, his termination of employment is or part of a reduction in the work force that is a direct result of*

> *(a) the modernization, automation, or mechanization by the employer of all or part of the business,*
>
> *(b) the discontinuance by the employer to carry on all or part of the business,*
>
> *(c) the sale of or the disposition of all or part of the business,*
>
> *(d) subject to section 44(4), the reorganization of the business by the employer to improve efficiency,*
>
> *(e) the impossibility or impracticability for the employer to carry on the business at its usual rate or level or at all due to*
>
> > *(i) a shortage of materials,*
> > *(ii) a mechanical breakdown,*
> > *(iii) an act of God,*
>
> *(f) a reduced operation in the employer's business made necessary by economic conditions, including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory,*
>
> *(g) any other circumstances which the Minister may by Order published in the Gazette, determine.*

29. Mrs. Pitts-Anderson contends that while it is clear that Section 45(2) of the Labour Act contemplates that an employer may reduce his workforce, it is patently clear that for the termination to be justified as redundancy, the termination must be as a direct result of the factors enumerated at s 45(2)(a) to (g) above. *What is important to recognize is that, if the elements of the definition are not satisfied, no assertion of redundancy can be sustainable regardless of how "redundant" the worker may appear to the ordinary man*. ***Corthesy, Natalie G.S. and Larris-Rope, Carla Anne, Commonwealth Caribbean Employment and Labour Law*** pg. 182.

30. Mrs. Pitts-Anderson mounts a two pronged approach to determining whether the Claimants were wrongfully dismissed. Was there a redundancy exercise at the company as a direct result of the factors prescribed at s 45(2)(a) to (g) of the Labour Act. If so, were the procedures for termination redundancy followed? Learned Counsel submits that the evidence does not bear out that there was a redundancy exercise which directly resulted in the Claimants' termination. She states that all the Claimants maintained that while there were talks of cutting costs and

seeking employees' cooperation by turning off air condition units and lights when not in use, not running vehicles unnecessarily, etc., the employees had no knowledge of any redundancy exercise taking place within the company.

31. BWS internal circular "*Pipeline*" dated November 2010 and July 2011 was exhibited by the Human Resources Officer Hayden Brown to prove that it was common knowledge among employees that redundancy was the inevitable outcome of an ongoing restructuring exercise. However, Mrs. Pitts Anderson points out that there is no mention of any impending redundancies in these circulars. Lorelei Westby testified that BWS held staff conferences in 2009 and 2012 where the company's strategic planning objectives dealt with empowering employees, improving knowledge, increasing/improving strategic partnerships, maintenance and effective cost control. She also makes the point that while BWS claims that restructuring was an ongoing exercise since 2009, the evidence shows that none of the terminations or resignations which the Human Resources Manager cited as examples of this redundancy exercise took place in 2009, 2010 or 2011.

32. Mrs. Pitts Anderson also assesses the letters dated October 2nd, 2012 (LW2) and November 27th, 2012 (LW3) which the Defendant rely on to show that the company made the union aware of company restructuring and redundancy of two Dangriga employees. She says that the Claimants testified that they were not aware of these letters, and Mrs. Westby as Union President could not produce the minutes of any meeting to prove that these letters were brought to the attention of the union executive or the general membership. She points out that when Charlette Barnett was recalled by the Defendant she stated that she had been unable to prepare any minutes of the meeting of November 2012 because Chief Executive Officer Haynes instructed her not to do so. Learned Counsel therefore submits that neither of these letters are indicative of an ongoing redundancy/restructuring exercise. She goes further to state that the letter of

November 2012 concerning the termination of two BWS employees from Dangriga highlights the failure of BWS to follow the correct procedure in the Collective Bargaining Agreement with regard to the Claimants. There was no evidence that the Claimants were given advanced notice by BWS of their termination, nor was there any evidence that BWS informed the Union in writing of its intention to make these Claimants redundant. Mrs. Pitts-Anderson submits that the termination of the Dangriga employees was isolated; however even if as the Defendant asserts the termination was due to redundancy, the failure to follow the proper redundancy procedure still makes the redundancy unlawful. ***Yancy Habet Morrison v. British High Commission*** Claim No. 324 of 2010 delivered on November 29th, 2013**.** In addition, there is no evidence that the Claimants were replaced due to modernization or technological advances; that their posts were abolished or integrated into other posts or that the company reduced its operation.

33. Learned Counsel also contends that while the Human Resources Manager Brown tried to paint the Claimants with a broad brush of incompetence as the reason for their redundancy, the evidence of Chief Executive Officer Haynes acknowledged the good appraisals received by each Claimant. In addition, the non-reduction in the number of employees in each department clearly shows that redundancy was a red herring as the posts of each Claimant remained in existence in the wake of their termination from the company.

34. Mrs. Pitts Anderson also places great emphasis on the memorandum from the Chief Executive Officer Haynes dated February 7th, 2015. She submits that this memorandum reveals the true reason for the Claimants' terminations and belies the assertion that these terminations were as a direct result of the company's restructuring exercise. The memorandum stated that the Claimants were dismissed for failure to cooperate with the investigation into the circulation of malicious letters. The memorandum further warned employees that they could meet with a

similar fate if they chose not to cooperate with the investigation. Under cross-examination, Chief Executive Officer Haynes explained that the memorandum was a deliberate misrepresentation of the true reason for the Claimant's dismissal, stating that it was meant to assuage the tension within the company created as a result of the salacious letters. Mrs. Pitts Anderson submits that such a deliberate misrepresentation cannot be attributed to the poor decision making of such an experienced Chief Executive Officer. She also submits that the fact that BWS was faced with tariff cuts is a bare assertion without any demonstrable link to the Claimants' unlawful dismissal. The Claimants were unlawfully terminated for an extraneous reason inconsistent with the provisions of section 45(2) (a) to (g) of Act No. 3 of 2011.

35. Mrs. Pitts Anderson also addresses the non-compliance of BWS with the redundancy procedure set out in the Collective Bargaining Agreement. In evidence, both President of the Union Westby and Human Resource Manager Brown admitted that no offers were made to transfer the Claimants or to pay them lower salaries as a means of averting their purported redundancies. In addition, it is beyond dispute that BWS did not communicate the individual fate of each Claimant to the Union. There was also no written notice of the intended termination of the Claimants given to the Union. Further, the Collective Bargaining Agreement states that in determining who is to be made redundant, an employee's performance is priority, and the policy of last in first out is considered. Mrs. Pitts Anderson submits that all the Claimants were good performing employees and none of them were the last to be employed in their respective departments. To rebut the charges of incompetence and misconduct set out in Human Resources Manager Brown's affidavit as justification for making the Claimants redundant, Mrs. Pitts Anderson then sets out the performance record of each Claimant as follows:

> Don Gillett: *"Don is a very knowledgeable and hard-working employee who has supervisory qualities that needs to be developed. He has assisted the department tremendously by holding over at different districts where he has*

done well but has also been shown his shortcoming which I believe he needs to work on to go to the next level. Don has made improvements definitely to his attitude and demeanor and I wish for him to continue.

Don held over in Dangriga and Orange Walk as Acting Supervisor. He also visited Cotton Tree, Saint Mathews to take applications as well as to get maps for areas. Don can generate all crystal reports needed by districts."

Charlette Barnett: *"Knowledgeable of processing jobs in JTS and dispatching to Operation Supervisor. She works with speed and accuracy when processing jobs. She is focused and committed to her tasks*.

Charlette completes her tasks as per normal and when she is needed to fill in at any aspect, she does. An example of this is when the Billing Clerk is out, she picks up the slack as well as tracks and dispatches jobs when Carolyn is out."

Michael Novelo: *"Computer literate, has good knowledge of sewer camera, has become more reliable in dealing with customers and general waste water situations, has the potential to improve*."

His most outstanding contribution for that year was has done a good job with two tents flushing zone S8 and a portion of S5. This has caused significant improvement in the odor at S6."

Journett McKoy: *"Journett has made great strides in improving his overall performance. Whilst complaints have been made by members of staff and customers, I haven't found any occurrence when he has exhibited that type of behaviour under my supervision. He has actually received commendations from two customers who called in and expressed their appreciation for the professionalism Journett and his crew has exhibited*."

36. In conclusion, Learned Counsel submits that since the assertions of incompetence were met with recorded recommendations of good performance, there can be no doubt that the Claimants' termination had nothing to do with their performance during their years of employment with BWS.

Legal Submissions on behalf of the Defendant

37. Mr. Rodwell Williams, SC, and Mrs. Julie-Ann Ellis-Bradley on behalf of BWS argue that the Defendant Company has been in redundancy mode since 2009 which has resulted in a phased restructuring of its operations to improve efficiency and to save costs. The Defence submits that the terminated employees were all selected as candidates for redundancy, and even where a

Claimant was perceived to be involved with the malicious letters or failed to cooperate in the investigation, the company chose not to implement sanctions and instead proceeded with their redundancy. The Defendant says further that BWS adhered to the terms of the Collective Bargaining Agreement which stipulates performance as the main deciding factor and the principle of last in first out applies when all things are equal. In addition, all the Claimants were employed under an indefinite contract of employment.

38. Leaned Counsel submit that the company had ongoing meetings and dialogue with the Union, seminars with staff and utilized internal message boards and newsletters to encourage increased efficiency. This was corroborated by the evidence of Charlette Barnett on being recalled. She confirmed that the meeting was requested and that she sent an email on September 28th, 2012 notifying the Union Executive and that the Union Executive met to consider and prepare their representatives ahead of the meeting. She confirms that on October 1st, 2012 President Westby and Russell Young Union Representative on behalf of the Union Executive met with BWS management on proposed salary scale review for BWS employees. The letter which the Defendant relies on is as follows:

> *"October 2, 2012*
>
> *Lorelei Westby*
> *President*
> *Belize Water Services Workers Union*
> *No. 7 Central American*
> *Belize City, Belize*
>
> *Dear Ms. Westby,*
>
> *Thanks for meeting to discuss the ongoing review of the proposed salary scales, which are intended to help with streamlining salaries for staff, as well as with corporate planning.*
>
> *As per our discussion (Westby/Brown) the need for a companywide restructuring is fast becoming a reality. The recent 7.2% reduction on our tariffs, coupled with our focus on our newly identified strategic objectives, is leading the Board and Management into taking a serious look at the overall company status and its direction. The restructuring is*

expected to result in new or additional posts in order to improve corporate efficiency and performance, but, unfortunately it is also expected to result in some posts being made redundant.

Improving security has now been identified as one urgent strategic objective, especially due to recent threats on the business. As such, we are considering external security for all plants, which may require phasing out those who are employed as yardman/watchman (i.e. essentially security personnel), as a first phase in this direction.

Furthermore, taking in mind our cash shortage, managers have been tasked by the Board to seriously revisit each department structure to tighten requirements, so that efficiency and/or cost savings can be realized.

Management commits to seeking the Union's input and recommendations as we go through these changes. Since much of what we want to do is dependent on tariff reviews and budget approvals, this is expected to be a process which may extend well into next financial year.

Sincerely yours,

Haydon Brown
Human Resources Manager"

39. Learned Counsel for the Defendants submit that there is sufficient evidence to prove not only that the meeting took place but also that the letter of October 2012 is a sufficient recital of the matters that were discussed in the meeting. It is submitted that based on this letter, the evidence of the Claimants (who were part of the Union Executive) that they had no knowledge of the matters discussed in the meeting and no knowledge of the letter is not to be believed. The letter of October 2nd, 2012 is instrumental as it signals the engagement of the Union by the Defendant's management on matters of redundancy and confirms that the dialogue would be ongoing. It is further submitted that the security officers in Dangriga were the first set of persons to be made redundant after the October 2nd, 2012 letter.

40. It was also argued that the Defendant has no obligation to inquire into matters occurring internally in the Union, once BWS sends correspondence properly addressed to the Union. The submission is that there is ample evidence that a restructuring exercise was ongoing at the Defendant Company, the Union was informed and the Union had discussions with management

about the redundancies as required by the Collective Bargaining Agreement. The determination as to who would be made redundant were made after consultation with the Union Executive and with the respective managers of the various departments.

41. On the issue of the malicious letters, while the Chief Executive Officer's memorandum states that the primary reason for the Claimants' terminations was due to lack of cooperation with the investigation, the Chief Executive Officer gave evidence that the memo was an attempt on his part to secure cooperation of existing employees and to seek to address what was an unbearable circumstance.

42. The Collective Agreement is the governing document as agreed among all parties. Section 42 of the Trade Unions and Employers' Organisations (Registration. Recognition and Status) Act provides as follows:

> *"A collective bargaining agreement is binding on the trade union and the employer who are parties to the agreement, and unless stated otherwise, on every employer who is a member of such trade union or who is a member of the bargaining unit in respect of which the trade union is certified as the bargaining agent.*
>
> *(2) The terms of the collective bargaining agreement are and shall be deemed to be incorporated into the employment contract of each employee to whom the agreement applies.*
>
> *(3) Where any person alleges a breach by any person of any of the provisions of a collective bargaining agreement, such person may apply to the Supreme Court for redress, and the Supreme Court may make such orders and grant such other relief in respect of the application as it may think appropriate to ensure compliance with the provision of the collective bargaining agreement."*

Redundancy as defined by the Labour Amendment Act 2011 is the loss of employment as defined in section 45. Redundancy benefit is also defined to mean "*the amount of money that an employee whose employment has been terminated on account of redundancy is entitled to receive from his employer pursuant to section 183*".

43. Counsel goes on to cite section 12.2 of the Collective Bargaining Agreement. The submission on behalf of the Defendant Company is that should the Court find that the Company was in

retrenchment mode, the further question to be determined is, can the Court inquire into the reasons for the bases for selection of candidates for redundancy? Learned Counsel then urges this Court to follow the reasoning in the dissenting judgment of Lord Justice Nelson in the Caribbean Court of Justice decision of ***Mayan King Ltd v Jose Reyes et al*** [2012] CCJ 3**.** While a two third majority of the CCJ answered the question in the affirmative, it is contended on behalf of the Defendant that Lord Justice Nelson was correct in stating as follows:

> *"For the purpose of this case, there are two types of dismissal. First there are dismissals in breach of section 5(2) of the Act, which is an unlawful dismissal. Secondly, there are dismissals by reason of redundancy, which are lawful dismissals. In the UK, in the Industrial Relations Act 1971, from which the Act draws some inspiration, if the reason is redundancy a dismissal may still be considered discriminatory in that the worker was selected for dismissal because of 26(2) of the UK Act. In Belize, there is no such provision, and I agree with Mr. Courtenay S.C. that the method of selecting or the order of dismissals does not vitiate the dismissal. Therefore, once the courts below accepted the company was in a redundancy mode, they should have held the dismissals of the Respondents were valid."*

44. An indefinite contract is terminable at will by the employee or the employer according to the terms of the contract; in the instant circumstances the terms of the Collective Agreement are incorporated into the contracts of employment of the Claimants. It is alleged that the reason for termination was for lack of cooperation with the investigations and perceived involvement with the malicious letters, none of which are prohibited by statute as a basis for termination. It is submitted that the Mayan King decision helpfully distinguishes what amounts to unlawful as opposed to wrongful termination and the appropriate measure of damages for each.

Decision

Issue 1: Were the Claimants wrongfully or unlawfully dismissed, or were they lawfully terminated in keeping with BWS' policy of redundancy?

45. I have considered all the evidence in this matter, and I am grateful to counsel for their helpful and extensive submissions on the law. I am not satisfied on the balance of probabilities, that the

Defendant Company was conducting a redundancy exercise at the time these Claimants were terminated. I say this because I am convinced by the evidence that the true reason for the abrupt termination is clear from the uncontroverted evidence of the Claimants of the relentless and invasive manner in which each of them was interrogated by the panel of investigators at BWS immediately prior to their dismissal and the proximity of the date of their dismissal to the date of the memorandum from Chief Executive Officer Haynes. This evidence is bolstered by the memorandum of the Chief Executive Officer Haynes. The Chief Executive Officer of a company is the captain of the ship, the dominant voice of the company and he spoke loudly and clearly to BWS staff in that memorandum that the reason for the termination of these Claimants was their refusal to cooperate with BWS' investigation into the salacious letters that were circulating on the workplace. In fact, the memorandum went further and threatened the staff that if they did not cooperate with the investigations then that would be deemed serious misconduct. I find that despite the fact that the reason stated by BWS in the letter given to the Claimants for their termination was redundancy, there is no evidence that any of the procedures for redundancy which are set out in the Collective Bargaining Agreement were carried out by BWS. If you are going to make employees redundant you are taking away their livelihood so you must ensure that each and every option is thoroughly explored before doing so, and that there is clear and incontrovertible evidence that you have explored every possible option before proceeding on that draconian course of action.

46. I have no doubt that BWS was implementing changes in an effort to cut costs due to the tariff reduction imposed by the Public Utilities Commission and that Management had discussed with Union that different measures needed to be undertaken to improve efficiency and reduce expenditure. I accept that Management sought to address these concerns with Union and with staff through email, circulars, retreats etc. But all this sensitisation was done in a vague and

general way much like the general warning given to citizens during hurricane season by the National Meteorological Service to stock up on canned goods since there are six or seven storms in the Atlantic Ocean that may or may not impact the country between the months of June to November. Such a situation can clearly be contrasted with a direct, detailed, specific warning or notification by the National Meteorological Service to the citizens of Belize that Hurricane X is headed directly towards Belize at 155 miles per hour moving at 20 miles per hour with expected storm surge of 20 feet and is expected to make landfall in Belize City within the next 12 to 24 hours. There was certainly no evidence produced in this court that the requirements of the Collective Agreement set out in Clause 12.2 were complied with any degree of specificity in regard to these particular Claimants, e.g., no evidence that the Company informed the Union in writing of the impending retrenchment of Journett McKoy or Charlette Barnett, nor was there any evidence that the Union made suggestions to BWS as to options other than redundancy, or that the Company took into account suggestions as to alternative course of action in respect of these Claimants. Clearly there was no "*red flag warning*" from BWS as to this drastic course of action taken against these Claimants.

47. At this point, I must address the role of the Union President in these proceedings. I must confess that I was bemused at the fact that no less a person than the President of the Belize Water Services Workers Union came to testify on behalf of the Defendant Company against these terminated employees. While I fully understand that Ms. Westby is also an employee of BWS and a Supervisor there, I am at a loss as to why she was not at the vanguard of this struggle fighting to ensure that the rights of these workers were not trampled upon by the company. Under cross-examination, it became painfully clear that Mrs. Westby had done virtually nothing as Union President to ensure that these Claimants were not wrongfully dismissed. I will end by saying that the positions of Union leadership are not for the faint of heart. No stone must be left

unturned in championing the rights of workers. While I fully appreciate the challenging position in which Mrs. Westby found herself since she had been implicated in this controversy as the author in these salacious letters, that is, in my respectful view, no reason to abandon ship and abdicate one's role and duties as President to Union Representative Russell Young who incidentally has been inexplicably and conspicuously absent from these proceedings. There may be an inherent difficulty in striking a balance between one's role as employee/supervisor in a company and being Union President, and some might consider it an inevitable conflict of interest, but as soon as the battle cry is sounded when the company begins to talk of redundancy/retrenchment as Union President you must be prepared to spring into action and valiantly defend the rights of your members, even at extreme cost to yourself. You do not abandon your membership in their darkest hour, for while an annual salary of $17,136 earned by Don Gillett might be scoffed at as a mere pittance by those with overflowing pockets and limitless resources in this society, we must remember that stripping a person of his livelihood reduces that individual to gross indignity. He cannot pay his mortgage, his children cannot be fed and he is left to flounder in a sea of debt, made worse by the ridicule now heaped upon him because he is now unable to meet his responsibilities. So if you as a Union Leader are not prepared to stand with your membership and defend them to the bitter end, even in times of your own personal distress, then you need to step aside and relinquish that position to someone prepared to do so.

48. I am not convinced by the evidence of Haydon Brown, Human Resources Manager, that these employees were incompetent and underperforming and therefore BWS was justified in making them redundant. Suffice it to say that the performance appraisals and the attendant increases in salary with which each Claimant was rewarded by BWS at the end of each year is to my mind a complete rebuttal of such evidence. I see such assertions as no more than a frantic attempt to

justify the wrongful dismissal of these Claimants *ex post facto*. I am certainly not satisfied that the transgressions and shortcomings enumerated by Mr. Brown were what fuelled their termination. If that were the case, instead of accruing 3 to 33 years of service to BWS, these Claimants would have been long dismissed from the company.

49. I also find as a fact that the submission that BWS followed the principle of 'last in, first out' in terminating these Claimants goes against the weight of the evidence. All these Claimants were of several years standing as employees of BWS, ranging from 3 years to 33 years duration, and they were certainly not the most recent employees in their department to be employed at the time BWS terminated them. These regulations are not to be trifled with; they are in place to protect the tenure of employees as well as to safeguard the employer in the course of the working relationship. I find on the balance of probabilities that the Claimants have proven their case that they were wrongfully dismissed, that the Collective Bargaining Agreement was breached by BWS, and the Claimants are entitled to compensation in the form of damages.

50. I must state as an aside that while it is true that parties are entitled to bring their matters to litigation, it is unfortunate that this matter was not settled by BWS through mediation as it was very troubling to see a Chief Executive Officer of such experience and imminence as Mr. Haynes mangled by the extremely effective and lethal cross examination of Mrs. Pitts Anderson for the Claimants. As Chief Executive Officer of BWS, his credibility was utterly decimated when confronted with the weight of his own words by the unrelenting cross-examination of counsel, and pummelled into submission, beating an ignominious retreat into the unsavoury position that he had lied to the staff when he wrote that memorandum. I have no doubt that the memorandum which Mr. Haynes wrote was sent to BWS' employees in the spirit of sincerely trying to put an end to the salacious letters and eventually bolstering the demoralized spirits of BWS' staff and management in the wake of the circulation of those malicious letters. I believe

that he was also desperately attempting to get the author(s) of these letters to cease and desist by warning remaining members of staff that they will be terminated in like manner if they continue in this behaviour; he was clearly fighting against an unknown and invisible but very destructive enemy. However, his decision to write and circulate this memorandum was in my view the death knell of the Defendant' Company's defence, as it placed in black and white irrefutable evidence as to the real reason for the termination of all the Claimants. I therefore rule in favour of the Claimants on this first issue.

Issue 2: Quantum of Damages: How much compensation are the Claimants entitled to, or have they already been fully compensated?

51. Having found in favour of the Claimants on the substantive issues, all that remains is for this Court to determine the measure and quantum of damages.

Mr. Musa, SC, on behalf of the Claimant Mark Menzies seeks the following relief.

> (a) loss of salary consisting of a sum equal to the remaining years that the Claimant would be reasonably expected to remain employed in the Defendant company under normal circumstances. At 50 years of age at the time of his dismissal, Mark Menzies had 12 years of employment before his retirement age of 62.
>
> (b) The Claimant is also entitled to damages for distress caused by the embarrassment of being dismissed by the Defendant as someone unqualified for the job and therefore redundant despite his 33 years of faithful and dedicated service to the Company. There is case law to support a claim for injury to feelings and mental distress in the circumstances of this claim. ***Johnson v. Unisys*** (2003) UK HL Lord Hoffman at para. 35, 43, 44 and 55 Claim 142 of 2007 ***Christine Perriott v Belize Telecommunications Ltd*** at para 151 and 152.
>
> (c) Mr. Musa, SC, also submits that Mark Menzies is entitled to severance pay. He cites Sir John Muria in the ***Christine Perriott*** case as follows:

> *"On severance benefits Mrs. Molina said the defendant does not pay severance benefits for employees including the Claimant since a pension plan is in place into which the Defendant makes regular payment. I feel that this criticism of the Claimant's severance benefits protection ignores the fact that pension scheme is not the same thing as severance pay. By its nature, severance pay is granted to an employee when his services to the employer are terminated and it is contingent on a number of things including the length of service and the employee's level in the employer's company."*

In addition, Mr. Musa, SC, argues that the Labour Act Cap 297 as amended by Act No. 3 of 2011 is unambiguously clear when it comes to severance pay to be paid.

Section 183 (1) (b) provides "*where an employee who has been continuously employed by an employer for a period of over ten years and his employment is terminated by the employer… the worker shall be paid a severance pay computed as follows:*

> *(i) For the period served before the commencement of Act No. 3 of 2011 at the rate of one week's pay for each completed year of service;*
>
> *(ii) For the period served after the commencement of the Act at the rate of two weeks pay for each completed year of service".*

Mr. Musa, SC, submits that the Claimant would therefore be entitled under the law for his 32 years of service at the rate of one week for each year and 1 year's service at the rate of 1 week's pay.

Mr. Musa, SC, submits that this is a mandatory provision of the law and BWS cannot opt out of this legal obligation especially since the pension scheme was a scheme to which the Claimant as employee has contributed. The Claimant is therefore entitled to severance pay as well as damages, interest and costs.

52. On behalf of Don Gillett, Colin Morrison, Charlette Barnett, Michael Novelo, and Journett McKoy, Mrs. Pitts Anderson argues that in assessing the amount of damages to be awarded for wrongful dismissal, two broad heads must be considered. She cites Awich JA in Civil Appeal No.

35 of 2010 ***Christine Perriott v. Belize Telecommunication Ltd***. His Lordship referred to quantifiable loss (such as loss of worker's wages and benefits which can be calculated) and non-quantifiable loss which he explained as follows:

> *"'The not so quantifiable loss' is represented by 'a lump sum' estimate which is not too high or too low, taking into consideration awards in previous cases of dismissal. I understand this to mean that it is loss for which a sum of money cannot be mathematically calculated, such as loss of opportunity in the same employment, loss due to diminished prospects of obtaining another employment and loss due to distress and inconvenience. The lump sum damages are assessed by considering, 'all the circumstances surrounding the dismissal so that ultimately compensation that is just and equitable can be given'. Factors such as the age of the claimant, the period for which the claimant had been employed, her salaries or wages, benefits and other remuneration, prospects of obtaining other employment, the manner of dismissal and distress and inconvenience are taken into consideration."*

53. Mrs. Pitts-Anderson also urges this court to factor in loss of future earnings in assessing damages as was done in the *Christine Perriott* case. She says that the Court should attempt to put the worker as far as reasonably practicable in the position he would have been in had the wrongful termination not taken place. In making the case for the court to include damages for distress, Learned Counsel highlights the impact of the dismissal on Claimants such as Journett McKoy and Colin Morrison who have remained unable to find jobs up to the date of trial. The other Claimants (such as Charlette Barnett who applied for ten job vacancies and Journett McKoy who sent out 33 resumes) endured several months of being unemployed before finally getting a job, often at a lower wage than what was previously earned at BWS. Mrs. Pitts-Anderson acknowledges that an employee is not entitled to employment for life in the absence of a contract to that effect. However, she submits that it is expected that, discounting the vicissitudes of life, an employee would continue in his employment until retirement. She urges this Court to award damages as the Claimants have established that they are so entitled, and the law would be found wanting if it can offer no remedy for these serious breaches which go to the Claimants' livelihood.

54. On behalf of the Defendants, Mr. Rodwell Williams, SC, and Mrs Julie-Ann Ellis Bradley argue that an indefinite contract is terminable at will by the employee or the employer according to the terms of the Collective Bargaining Agreement (CBA) which are incorporated into the contracts of employment of the Claimants. Learned Counsel then draw an important distinction between the ***Mayan King*** decision and the case at bar. The CCJ found in ***Mayan King*** that the employees who had purportedly been made redundant were in fact terminated because of their activities in trying to unionize workers on banana farms. The Trade Union Employer Organization Act specifically prohibits the termination of an employee due to involvement in union activities, i.e., union busting. In the case at bar, it is alleged by the Claimants that the reason for termination was lack of cooperation with the investigations and perceived involvement with the malicious letters. Such an allegation is not prohibited by statute as a basis for termination. It is submitted that the ***Mayan King*** decision helpfully distinguishes what amounts to an unlawful as opposed to a wrongful dismissal.

55. Learned Counsel argue that an employer is entitled in law to terminate an employee's contract of employment either on notice or summarily where the employee has committed a material breach, or because he alleges that he was improperly selected as a candidate for redundancy he may seek damages for wrongful dismissal. *"If a contract of employment makes no express or specifically implied provision for its duration or termination by notice, there is likely to be implied at common law a presumption that the contract is for an indefinite period and terminable by reasonable notice given by either party."* ***Chitty on Contracts*** 25th Ed. Vol II Specific Contracts Sweet & Maxwell para. 3490**.** Counsel also cite from the text ***Employment Law*** by Gwyneth Pitt, Professor of Law at p 176 in expressing the essence of the position at common law with respect to the termination of employment contracts:

> *"At common law it is still true that if reasonable notice to terminate is given then the contract is terminated lawfully, and it follows that the employee has no claim for wrongful dismissal. It does not matter that the employee was terminated for a bad or arbitrary reason, or indeed for no reason at all; nor how long the employee has been employed, nor his record; provided that the employer has given notice or pay in lieu of notice, the employee has no claim."*

56. Mr. Williams, SC, and Mrs. Ellis Bradley cite the Labour Act s. 40 which prescribes notice periods when notice of termination of contracts of service of an indefinite time must be given, e.g., two weeks notice is required for an employee working for same employer for more than one year, while four weeks notice is required for an employee of more than two years standing. They also cite Section 43 of the Labour Act which provides that *"Where an employer fails to give the said notice, he shall be liable to pay to such worker a sum equal to the wages that would be payable in respect of the period of notice." "The normal measure of damages is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably expect to earn in another employment…"* ***Chitty on Contracts 25th*** ed Vol II para 3522**.** Learned Counsel also submit that the Claimants would not be entitled to a compensatory award in addition to the basic award for the notice period and benefits; compensation for hurt pride and injury to feelings is not available to an employee who is wrongfully dismissed, without more. The sums already paid by the employer ought properly to be set off against any award to the Claimants as well as any sum that they may have earned during the notice period. The award as a remedy for breach of the employment contract is an award of damages based on the period of notice which should have been given. The question which the court must determine is how this ought to have been dealt with under the Collective Bargaining Agreement. It is submitted that the disciplinary procedure would have taken a few days to a few weeks, after which BWS as employer would be entitled to dismiss the Claimants if their conduct was deemed to amount to misconduct. It is further submitted that the Act s. 46 enables the Employer to dismiss an employee without notice for

good and sufficient cause where a worker is guilty of misconduct; no notice pay or severance would be due to employees terminated lawfully in those circumstances.

57. Learned Counsel finally argue that the Claimants have received severance pay as express provision for payment of severance was done by BWS in accordance with the terms of BWS Pension Plan and Rules and Trust Deed. In Claim No. 727 of 2010 ***Florencia Rodriguez v. Belize Water Services*** Madam Justice Hafiz Bertram (as she then was) after considering the terms of the pension plan and trust deed and all the evidence of payment made by BWS found that BWS contribution to the pension scheme includes severance and the employee was therefore not entitled to a further severance payment in addition to the sums received. It is therefore submitted that the Claimants have been fully compensated by BWS as follows:

a) Don Gillett- $10, 116.65

$6, 852.69 - BWS Pension Plan
$2, 761.74 - Notice Pay
$ 207.13 - Vacation Pay
$ 295.09 - Additional Salary for 6 days

b) Colin Morrison - $13, 964.74

$9, 072.61 - BWS Pension Plan
$4, 228.84 - Notice Pay
$ 211.44 - Vacation Pay
$ 451.85 - Additional Salary for 6 days

c) Charlette Barnett - $12, 044.04

$8, 968.37 - BWS Pension Plan
$2, 643.10 - Notice Pay
$ 132.16 - Vacation Pay
$ 282.41 - Additional Salary for 6 days

d) Michael Novelo - $3, 155.69

$1, 364.00 - BWS Pension Plan
$1, 293.30 - Notice Pay
$ 64.67 - Vacation Pay
$ 111.28 - Additional Allowance (Overtime/Sub)
$ 322.44 - Additional Salary for 6 days

e) Journett McKoy - $65, 502.08

$61, 397.02 - BWS Pension Plan
$ 3, 618.24 - Notice Pay
$ 361.82 - Vacation Pay

$ 125.00 - Additional Salary for 6 days

58. What amount of damages are the Claimants entitled to?

I agree with the submissions made on behalf of the Defendant that this is a case of wrongful dismissal as opposed to unfair dismissal. In the cases of ***Christine Perriott v BTL*** Civil Appeal No. 35 of 2010 and ***Mayan King Ltd v. Jose Reyes et. al.*** CCJ Appeal No. CV 3 of 2011, the Claimants brought their actions pursuant to section 11 of the ***Trade Unions and Employers Organisations (Registration, Recognition and Status) Act*** which in the words of Saunders J specifically renders such a dismissal "*unlawful*". The heads of damages awarded to those Claimants were based on the ***Trade Union and Employers Organizations Act*** **(TUEO Act)**, which (as stated by Saunders J in para 2 of the judgment) was enacted in part to comply with two International Labour Organisation Conventions; namely, the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention 1949 (No. 98); both Conventions have been ratified by Belize. In the ***Mayan King*** decision Saunders J in giving the majority decision of the CCJ cited with approval Sosa P's finding in the Court of Appeal that the ***Trade Union and Employers Organisations Act*** gave rise to *"a new cause of action in Belize, [namely] dismissal in violation of a right specified in section 4(2) of the Act"* and that the pursuit of this right *"cannot, by analogical reasoning, be affected by common law rules and authorities relating to any other form of dismissal known to law in this jurisdiction…"* The measure of damages was therefore not to be confined to the strict common law heads available for cases of wrongful dismissal; this was specifically endorsed by the CCJ and it was on that basis that the Court awarded damages for the "*bad faith*" manner of termination of the banana workers, the distress and inconvenience to which they were put in having to find new places to live all because they were trying to organize themselves into a union, etc. As Saunders J went on to note:

> "Parliament having legislated this new right and afforded ample means for its enforcement, it is now the duty of the court to ensure that the right has content and meaning. To do less would impact negatively on the efficacy and standing of the justice system."

In the case at bar, there is no allegation made or proven that BWS terminated these Claimants as an act of "*union busting*", and unfortunately the common law does not provide compensation for injury to feelings or distress for cases of wrongful dismissal. In England there is a statute for

unfair dismissal under which such remedies can be recovered as duly noted in Claim No. 624 of 2010 ***Yancy Habet v. British High Commission of Belize*** where Olivetti J lamented the fact that Belize did not have an Industrial Relations Act as in the UK which provides a "statutory remedy for unfair dismissal which would provide job security for employees". Olivetti J went on to state that *"the right to work is a fundamental human right and it behoves our Government to ensure that each person can enjoy that benefit by ensuring that our labour laws are updated and accord with international norms and best practices"*. In Claim No. 175 of 2005 ***Romel Palacio v. Belize City Council*** (Awich J as he then was) bemoaned the state of the Labour Act of Belize as "*hopelessly out of date*" and called on Parliament to adopt international conventions concerning employment and labour. In Belize we do not have a corresponding Act so as the law stands, all that the Claimants can rightfully claim is damages for wrongful dismissal. The measure of such damages is confined to "*a reasonable period of notice*" assessed by considering the minimum statutory period of notice due under the Labour Act and the Collective Bargaining Agreement. Learned Counsel for the Defence estimates the grievance process for misconduct (if BWS had conducted disciplinary proceedings against the Claimants under the Collective Bargaining Agreement) would have been concluded in four weeks. I have no evidence as to the length of time such a process would last, but considering the general pace at which processes move in Belize that seems a very optimistic figure and I would estimate the disciplinary process to last three months, at the end of which the Defendants would be legally entitled to dismiss the Claimants once they have complied with the Rules of the Employee Handbook.

On the issue of severance pay, I accept and agree with the Defendant's submission that this point was canvassed extensively and decided in Claim No. 727 of 2010 ***Florencia Rodriguez v. Belize Water Services*** where Madam Justice Hafiz (as she then was) held that since BWS' contribution to the pension scheme includes severance and Ms. Rodriguez was therefore not entitled to further severance payment in addition to sums already received from the pension plan. I therefore hold that having received the payment from the Pension Plan from BWS, the Claimants cannot recover additional sums for severance as that has already been included under the payments made to them by BWS .

As general damages for wrongful dismissal in this case, I award each Claimant three months' salary as well as vacation pay for this additional three months. From this sum would be

deducted the sum already paid by BWS for notice pay, along with deductions for Income Tax, as well as any sums the employees could reasonably be expected to earn in those three months.

In Claim No. 517 of 2011 ***Lloyd Enriquez v. Belize Tourism Board,*** a recent case of wrongful dismissal, Benjamin CJ awarded the Claimant the sum of $35,195.76 as general damages based on 12 months' notice. The Defendant admitted liability for wrongful dismissal so this was a hearing for the Assessment of Damages. Mr. Lloyd Enriquez held a Masters Degree in Business Administration and was appointed Registrar of Hotels and Tourist Accommodation for seven years and was appointed Director of Destination Planning in September 2010 for an indefinite period upon the same terms and conditions as his previous appointment. He was terminated by letter with immediate effect and tendered payment in lieu of notice. Mr. Enriquez sought four years emoluments as damages estimated at $315,200 based on a benefit package of $78,800 per annum. His Lordship in assessing compensation stated as follows:

> *"The measure of damages seeks to put the Claimant as far as is practicable in the financial position he would have enjoyed had his engagement not have been terminated. The Claimant is however under a duty to take tangible steps to mitigate his loss. Put another way, the Claimant's entitlement is to be compensated for whatever loss would have resulted from the failure of the employer to give reasonable notice. In the case at bar the Claimant plainly took steps to mitigate his loss but he was only able to secure employment with substantially lower emoluments. The Claimant had been employed for eight years when his engagement was terminated. His age was given as 38 years at the time of his termination. He held a senior management position at a unique statutory body thus rendering comparable employment not readily available. The remit of the Court is to compensate the Claimant for the loss of earnings arising from not having been accorded reasonable notice. In my considered view, based on the circumstances to which I have referred, 12 months would be a reasonable period in this case."*

On that Claim seeking $315,200 in general damages for wrongful dismissal of Mr. Enriquez as a highly qualified and experienced employee, Benjamin CJ calculated the sum of $35,195.76 to be awarded to the Claimant thus:

Basic salary of $76,440 for 12months	$76,440.00
Paid vacation leave for 20 days	$4,188.40
Annual increment of 5%	$3,822.00
End of Year Christmas Bonus of 3.5%	$2,675.40
	$87,125.80
LESS: 25% Income Tax	$21,781.45
	$65,344.35

ADD: Contribution to pension at 7%	$5,350.80
	$70,695.15
LESS: UB Salary and Vacation Pay	$21,353.75
($18,012.75 + $3,341.00)	**$49,341.40**
LESS: Amount already paid	$14,145.76
	$35,195.76

Unlike the Court in ***Enriquez v. Belize Tourism Board***, this Court is not in a position at this time to make an informed decision as to the quantum of general damages to be awarded to the Claimants in this matter, as this Court has no evidence as to the rate of annual increment payable at BWS, rate of income tax payable, length of time since termination before any of the Claimants gained new employment, other benefits to which the Claimants would have been entitled. There is also no evidence of the respective ages of each of the Claimants, nor the amount of remuneration they presently earn (if employed). The Court will therefore set a further date for a proper Assessment of Damages and invites Counsel to make submissions to determine the quantum to be awarded to each Claimant as general damages, bearing in mind the Court's finding of three months as a reasonable period of notice in these proceedings.

Judgment is in favour of the Claimants. Costs awarded to the Claimants to be assessed or agreed.

Dated this 25th day of November, 2015

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Michelle Arana
Supreme Court Judge