

DETERMINATION & ORDER

**THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021
BEFORE THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL.**

TRIBUNAL HEARING

Members of Tribunal: **Edward Ball Jr, JP, LLB, FCMI Chairman**
 Betty Christopher JP, Deputy Chair
 Charlene Scott FCI Arb

Directions Hearing: **October 17, 2022**

Hearing Dates: **February 6, 2023**
 February 10, 2023

Adjournment **February 10 to March 16, 2023**

Resumption of Hearing **March 17, 2023**

Hearing Places:
February 10, 2023 **National Drug Control**
 Melbourne House
 Suite 304
 11 Parliament Street
 Hamilton HM 12

HEARING

**IN THE MATTER OF A DISPUTE UNDER THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 2021 BEFORE THE EMPLOYMENT &
LABOUR RELATIONS TRIBUNAL.**

Pursuant to **Sections 67 & 80 of the Trade Union and Labour Relations
(Consolidation) Act 2021,**

BETWEEN

THE BERMUDA FIRE SERVICE ASSOCIATION (“BFSA”) Complainant

-and –

THE BERMUDA FIRE AND RESCUE SERVICE (“BFRS”) Respondent

March 17, 2023

Department of Labour Section
23 Parliament Street
Hamilton HM 12

Complainant Representative: Kyle Masters - Senior Counsel
Marcus Symonds Junior Counsel
Carey Olsen Bermuda Limited
5th Floor, Rosebank Centre
11 Bermudiana Road
Pembroke HM 08

Respondent Representative: Brian Myrie Senior Crown Counsel
Attorney General's Chambers
Global House
46 Church Street
Hamilton HM 12

STATUTORY AUTHORITY TO HEAR THE MATTER

1. The Tribunal Hearing was convened on February 6, 2023. The Chairman confirmed the points to be considered by the Tribunal. The Chairman stated that the Employment and Labour Relations Tribunal Hearing was to be conducted in accordance with **section 44B(2), section 44C the General Powers, section 44D Power to Obtain Information** and that the Tribunal shall regulate its own proceedings as it sees fit pursuant to **Schedule 2 (20) of the Employment Act 2000 ("the Act")**.
2. The parties were given an opportunity to make remarks and the Chairman then afforded the parties the opportunity to meet without the Tribunal's assistance to engage in meaningful dialogue to attempt to reach a settlement to their dispute.

After a lengthy period of time, the parties returned to the table still at an impasse.

Background

3. The Complainant's and the Respondent's Written Submissions, Statement of Facts and Amended Statement of facts, sworn Witness Statements, and Closing Submissions form the basis of the Tribunal's deliberations the Award.

PRELIMINARY MATTERS BEFORE THE TRIBUNAL

4. Despite the Tribunal's efforts to have this dispute heard following the agreed Directions Hearing Consent Order, the Tribunal expressed its frustration with the continued delays by Respondent on agreed Hearing dates.

5. As this matter was referred under ***Schedule 3 Essential Services subsection 7 of the TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021 TULRC ("Labour Code) 2021***, the Tribunal was mindful of the public's interest in a speedy resolution to the Fire Service Association's dispute and the Tribunal's responsibility to resolve the dispute in a timely manner.

6. The Tribunal referred the Parties to ***section 44E Power to exclude the Public of the 2000 Act*** that provides, unless both parties consent, to exclude the public or any representative of the press where it considers it necessary or desirable to protect the privacy of parties to a Hearing. The parties did not consent to exclude the press or the public.

7. In accordance with ***section 44D Power to Obtain Information of the 2000 Act***, the Tribunal invited Permanent Secretary Christopher Farrow to attend the Hearing to give sworn evidence to assist the Tribunal in its deliberations.

8. On February 10, 2023, the Tribunal ordered an adjournment of the hearing for a month, to allow the BFSA and the designated the Bermuda Government

Stakeholders (the Employer), to engage in additional meaningful dialogue, with the purpose of achieving a settlement to resolve the documented impasse.

9. The parties were unable to reach a voluntary settlement during the adjournment resulting in the substantive Hearing resuming on March 17, 2023.

SUMMARY OF SUBMISSIONS

By the Complainant

10. The Bermuda Firemen's terms and conditions are governed by:

a. *The Fire and Rescue Service Act 1982;*

b. *The Fire Safety Act 2014;*

c. The provisions of the National Fire Protection Association (NFPA) standards and Codes of Practice as amended;

d. Under Chapter 5 of NFPA code of practice 1710 ("Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments (Code 1710), specifies that the crew staffing level must be with a minimum of four (4) on-duty members.

e. In urban zones with a high number of incidents, fire companies were staffed with a minimum of five (5) on-duty members. In dense urban areas, fire companies are staffed with a minimum of six (6) on-duty members. Chapter 3 of Code 1710 states that where a firefighting crew operates two separate vehicles, it will only be considered a single 'company' if those vehicles continuously operate together. With respect to firefighting companies are limited to two (2) on-duty members.

f. The CFO has the authority draft and enforce Bermuda Fire and Rescue Service General Orders (“FSGOs”) for the general control, direction, and information of the BFRS. **FSGO 8.8.3(5)(c)** states that in special circumstances, the BFRS Operations Officer may permit crew levels to be reduced to five (5) firefighters per fire engine, provided that firefighters on leave will be immediately recalled if shift levels fall below five (5) firefighters per fire engine which is contrary **FSGO**.

11. The BFRS owes a common law duty to each fireman to take reasonable care to see that the plant, tools, equipment, premises and system of work used in its business are safe. This duty is an implied term of the firemen’s employment contracts, including the employment contracts in place between the BFRS and its firefighters.

12. Further, that the **Occupational Safety and Health Act 1982 (“OSHA 1982”)** **Section 3(1)**, legislates that the BFRS is under a general duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of the firemen.

13. In addition to Firemen’s statutory regime, policies and procedures, the BFSA is a registered trade union and has the fundamental right to collectively bargain with the Bermuda Government on terms and conditions of employment for its members. Further in the context of collective bargaining, the Union has the right to initiate labour disputes and represent its members to such grievances as contained in the Bermuda Government and the Fire Service association Collective Bargaining Agreement (“CBA”) April 1, 2017 – March 31, 2020. The CBA will continue in effect until superseded by a new Agreement.

COMPLAINANT’S (“BFSA”) ARGUMENTS OF THE DISPUTE

14. The BFSA’s arguments were set out in the Statement of Facts (“SOF”) dated June 29, 2022 and the Amended SOF dated December 28, 2022.

15. The BFSA claims were as follows:

- a) The BFSA sought, by way of the Tribunal Complaint, to implement the Ambulance Suspension Option, with immediate effect, as a temporary solution to the understaffing of the Clearwater Station (“CWS”), until the BFRS, in consultation with the BFSA and the Bermuda Hospitals Board (“BHB”) implemented a permanent solution.
- b) The BFSA also sought an order that any future agreement between the BFRS and the BHB with respect to ambulance services be subject to prior consultation with the BFSA (as required under the CBA).
- c) The Complainant presented an Amended SOF which specified that:

“In the alternative, the BFSA invites the Tribunal to make non-binding recommendations that the BFRS should again implement the Ambulance Suspension Option, with immediate effect, as a temporary solution to the understaffing of the CWS, until the BFRS, in consultation with the BFSA and the BHB, implements a more permanent solution and/or that any future agreement between the BFRS and the BHB with respect to ambulance services be subject to prior consultation with the BFSA (as required under the CBA)”.

- d) In addition, the BFSA seeks a declaration from the Tribunal that the BFRS requirement that CWS operate both a fire engine and an ambulance without sufficient staffing constitutes a breach of its contractual duty of care to its firefighters and/or a breach of its duties under **OSHA 1982** and, specifically that the BFRS's failure to:
- e) *To comply with the standards and codes of practice set out in **Code 1710**;*

- f) *To comply with the **FSGOs**; and*
- g) *To mitigate the risks to firefighters' health and safety by implementing one or a combination of the Overtime Option, the Redeployment Option and the Ambulance Suspension Option to alleviate the impact of understaffing at CWS, each constituting such a breach.*

16. Prior to 2006, all BFRS fire engines were crewed by four (4) to five (5) firefighters. In February 2006, a number of firefighters attended the 2006 World Firefighters Games in Hong Kong for eight (8) days from February 18 – 25, 2006. The BFRS and FSA agreed a Memorandum of Understanding (“**MOU**”) to temporarily lower the minimum crew strength for each fire engine to four firefighters (**2006 MOU**). A Temporary solution of managing a reduced staff was made permanent without further consultation.

17. From 2006, the enforced minimum BFRS crew strength remained at four (4) firefighters, despite the BFSA was not privy to details of the 2006 MOU. Additionally, the BFSA did not understand the logic of the current minimum fire engine crew strength of two (2) firefighters.

18. In February 2016, the BFRS and the BHB agreed the 2016 MOU such that:

- a) the BHB shall provide an ambulance vehicle to the CWS, and
- b) the BFRS shall either provide staff for the ambulance capable of fulfilling medical transport responsibilities on a continuous basis or otherwise develop alternate strategies that are acceptable to BHB's EMS Medical Director.

19. The BFSA was not a party to the 2016 MOU which expired on February 4, 2021. From 2016 to the present, the complement of BFRS firefighters declined and accompanied with sporadic recruitment of new firefighters confined by the BFRS' statutory budgets.

20. The BFRS employed sixty three (63) active firefighters. The BFSA estimated that the Service was under manned by thirty three (33) firemen, where the estimated crew strength would be ninety six (96) active firefighters to man current Service shift patterns, and to cover periods of leave, including but not limited to vacation and sick leave.

21. In October 2020, the BFRS and BFSA held a Joint Consultative Committee ("**JCC**") to discuss:

- a) Staffing levels of twelve (12) firefighters on-shift island-wide.
- b) Increasing the number of working firefighters by pursuant to Overtime Option where overtime payment is offered to firefighters who would not otherwise be on shift.
- c) Chief Fire Officer (CFO) Lloyd Burchall informed the BFSA that increasing overtime payments was not an option due to budgetary constraints and that the Ministry of National Security had to approve additional BFRS funding.
- d) The BFSA countered that when the crew strength was more than twelve (12) firefighters on-shift island-wide that any extra firefighters be ordered to the CWS under the Redeployment Option. However, that suggestion was never enforced by the CFO and the results of a BFRS manpower study was not shared with the BFSA.

- e) In relationship to the CWS staffing issues, the BFSA met with the Minister of National Security and the Permanent Secretary (“PS”) and presented the Association’s concerns.
- f) The Overtime Option, and when CWS was manned by fewer than six firefighters.
- g) The suspension of the ambulance services while continuing to offer medical services from the CWS fire engine (Ambulance Suspension Option).
- h) The Overtime Option required and The Ambulance Suspension Option with the BHB pursuant to MOU 2016.
- i) In November/December 2021, CFO Burchall presented the BFSA with the following proposals for the BFSA membership acceptance.
- j) The amended rescheduling of shifts and annual leave.
- k) The feasibility of a minimum crew of six (6) firefighters to be assigned to the CWS.
- l) That the BFRS would not implement the Overtime Option.
- m) That the Ambulance Suspension Option would be implemented from December 2021, and that the Acute Wing of King Edward VII Memorial Hospital (“KEMH”) would provide patient transport services to KEMH.
- n) That the Minister of National Security would be discussing the issue of CWS staffing with Cabinet.

22. The BFSA membership accepted the BFRS's proposals, which was confirmed with the Labour Manager of the Department of Labour.

23. In recognition of the Settlement Agreement, on December 22, 2021, the BFRS, BFSA and BHB agreed to temporarily restore the CWS Ambulance Services Option which would expire in March 2022 or one week following the cessation of the Government's 2022 fiscal year budget debates (Provisional Agreement).

24. In January 2022, at a JCC meeting, the BFSA informed the BFSA that the Management team could not sign the written Settlement Agreement or the CWS Ambulance Service Provisional Agreement without consulting with the Attorney General's Chambers, which the BFSA opposed as the Chamber's opinion was not a conditional term of the December 2021 settlement between the parties. Hence the settlement agreement was not signed.

25. In a further attempt to settle the parties' impasse, in February 2022, CFO Burchall presented the BFSA with another draft MOU where the protocol scenarios for the CWS of having a crew strength of fewer than six (6) firefighters as denoted in a draft 2022 MOU.

26. In March 2022, the BFSA presented counter amendments to the 2022 MOU offered by the BFRS Management team as noted at paragraph 24.

27. On April 4, 2022, without prior notice or consultation with the BFSA, CFO Burchall stated that all BFRS personnel of the CWS ambulance services would be fully restored with immediate effect, contrary to the agreement between the BFSA and the BFRS.

28. On April 8, 2022, for a second time (first being November 12, 2021), the BFSA membership voted to submit to the Manager of Labour Relations:

a) That a labour dispute existed pursuant to **section 67 of the TULRCA 2021**.

b) That a notice of irregular industrial action, pursuant to **section 80 of TULRCA 2021**, in relation to the BFSA members' intention to implement the Ambulance Suspension Option with effect from April 29,2022.

29. On April 14, 2022, the Acting Minister of Economy and Labour informed the BFSA and the BFRS that the dispute was referred to the Employment and Labour Relations Tribunal (Present Tribunal Complaint).

30. On May 4, 2022, CFO Burchall resigned from the BFRS with immediate effect. Dana Lovell is the current Acting Chief Fire Officer (“ACFO”) of the BFRS. The MOU's have not been signed.

31. The BFSA urged the Employment and Labour Relations Tribunal to make an order that they should only operate the ambulance when they have sufficient staff to run both vehicles, understood to be six (6) people.

RESPONDENT'S (“BFRS”) ARUGMENTS OF THE DISPUTE

32. The BFRS argued that the dispute fell outside the remit of the Tribunal and that only four (4) firefighters were needed to operate both vehicles at Clearwater.

33. The Respondent directed the Tribunal that the BFRS was tasked with operating the ambulance service in the East End of the Island through a 2016 MOU with the BHB.

34. The Respondent's Witness 1, the ACFO stated that the MOU has since expired, and that both parties continued to honour its terms through a **“Gentleman's Agreement”**.

35. The ACFO said that the Airport Division (“AOD”) of the BFRS was about twenty (24) firefighters below strength, and that the Structural Division of the CWS Fire Station had a “full complement” of four (4) firefighters on duty.

36. The ACFO also noted that ten (10) fire cadets were undergoing training in the United Kingdom and the Bermuda Government begun to advertise to hire additional cadets to further bolster firemen numbers.

37. The ACFO held that the staffing of the BFRS was “adequate”, but with future additional new hires on deck those firefighters/cadets would be an improvement.

The ACFO informed the Tribunal that each of the island’s fire stations had a duty strength of four (4) officers, although CWS was the only fire station that was assigned the additional responsibility of an ambulance.

38: The AFCCO expressed that:

“Operationally when the fire service looked at it we looked at the general area of activity and determined that to include and ambulance as a feature would not be considered to be overly burdensome.”

39. The ACFO testified that the CWS firefighters were already delivering medical services prior to 2016, but EMS services were via a fire truck which did not give the firemen the ability to transport patients.

40. The ACFO declared that he could not say why a similar approach was ever taken with the Port Royal (“PRS”) Fire Station, other than a Cabinet decision.

41. The ACFO agreed that there was likely a larger number of firefighters in the service when the MOU was signed, although he could not recall how many there

were and that the budgeted figures for the time period – which suggested as many as ninety-eight (98) firefighters was an inaccurate figure.

42. When questioned about safety concerns voiced by firefighters in written statements, the ACFO said or was aware of the concerns that were prior to the current dispute before the Tribunal and added that the Fire Service was being run “safely”.

43. The ACFO further remarked that:

“I’m not suggesting that we couldn’t have a Rolls-Royce version of it, but it’s safe,” he said. “The red line would be if the numbers at the stations fall below four.”

44. The ACFO further stated that the suspension of the Ambulance Service in the East End of the Island was “not an option” because of the impact it would have on the community.

Witness 2 Dr. Chikezie Dean Okereke

45. As the Chief of Emergency at King Edward VII Memorial Hospital (KEMH), Dr. Okereke said that at the time of the MOU, it was determined that it was “financially not viable” for the BHB to run the ambulance in the East End:

“If you look today when the Government has less money and BHB also has less money, it makes it more difficult,” he said.

46, Dr. Okereke said the objective of the agreement was to get patients to the hospital for treatment faster, and that at the time the BFRS already had staff able to take on the responsibility:

"At the time they already had people who were trained up and funded by another department," he said.

47. Dr. Okereke also confirmed that KEMH ambulances are staffed with two paramedics when sent out on calls.

Witness 3 Allan Wilkinson

48. Allan Wilkinson was a past President of the BFSA, testified that the BFSA's Executives were involved in discussions about the MOU, although he could not recall if there was a meeting with all member firefighters on the subject:

"Members were aware that talks were ongoing," he said. This wasn't a one-time decision. It was additional to something we were already doing"

49. Mr. Wilkinson confirmed that it was common practice for the fire service to make a "tandem approach" when responding to road traffic collisions, sending both an ambulance and a fire truck.

50. Mr. Wilkinson also agreed that the minimum standard of staffing for a fire truck was four (4) people, but said not all collisions required two (2) people in an ambulance and four (4) on a fire truck.

51. Mr. Wilkinson accepted that the tandem approach meant a traffic collision in the East End of the Island would result in four (4) firefighters responding, while a similar collision in the West End of the Island could result in four (4) firefighters and two (2) EMTs.

BFSA'S COUNSEL REPLY TO THE RESPONDENT WITNESSES TESTIMONY

52. The BFSA's Counsel referred to the Respondent's Counsel arguments that the Tribunal did not have the jurisdiction to make determinations sought by the Complainant because the Tribunal cannot make an award which is inconsistent with the Respondent's duties under the BFRS Act.

53. First, the Respondent's Counsel argued that the **BFRS Act** required the BFRS to provide assistance to persons requiring immediate medical attention via ambulance services. The **BFRS Act** makes mention of the provision of ambulance services. Until the 2016 MOU, the Respondent's provision of medical services was limited to services provided from fire trucks. Further, the Respondent did not explain why, if it was right, that the BFRS only requires the provision of ambulance services from CWS but not from any other station.

54. Under cross-examination by the BFSA's Counsel, the ACFO confirmed to the Tribunal that the Respondent did not provide an ambulance service during the **2006 World Firefighter Games** from February 18 - 25, 2006 (**eight (8) days**).

55. Under cross-examination of the Respondent's Witness Allan Wilkinson, he confirmed to the BFSA's Counsel that during his employment of 2016, an ambulance service was provided only as "backup" in the event other ambulances provided by BHB were occupied.

56. The BFSA's Counsel continued by referencing the Respondent's argument that the Tribunal did not have the jurisdiction to make determinations sought by the Complainant because the Tribunal cannot make an award which was inconsistent with the Respondent's duties under

section 6(1)(c) of the BFRS Act to comply with directions of the Minister responsible for the Fire Services.

57. To support this contention, the Respondent presented an email chain to the Tribunal in which it contained directives that the Respondent cannot implement the Ambulance Suspension Option. A close reading of the full email chain and analysis of the law is required to confirm that this contention cannot be supported.

58. The Minister made two (2) "Directives"

*"We want the Fire Service to provide the ambulance service from the East, as they have been doing all this time (**First Directive**), and*

*"Option 1- 24-hour service. In other words, go back to the original. With the priority being ambulance over fire. The fire issues with the airport and Clearwater should be dealt with in a Cabinet paper." (**Second Directive**)*

59. Both directives were given in direct response to the PS Farrow's suggestion that CWS firefighters would be assigned to the Airport, to the detriment of the ambulance service (the Respondent's attempted redaction of this evidence, if successful, would have hidden this context from the Tribunal).

60. The BFSA's Counsel stressed that the First Directive and the Second Directive could be interpreted in a manner that could be compatible with the Ambulance Suspension Option. The BFSA's Counsel opined that it appears that the Minister did not say that the ambulance and fire truck must run when CWS is understaffed. There is no reason why either of directions can be interpreted in this way.

61. The First Directive and the Second Directive were made during a period when the Respondent's management was itself implementing the Ambulance Suspension Option. The Minister's statements "*as they have been doing all this time*" in the First Directive "*go back to the original*" in the Second Directive could indicate that the Minister expressing a preference for implementation of the Ambulance Suspension Option over deployment of CWS firefighters to the airport.

62. The statement "*With the priority being ambulance over fire*" in the Second Directive did not provide any clarity as to how ambulance services was to be prioritised over fire services. The BFSA's Counsel stressed that the suggestion made by the Respondent meant the fire truck must go offline when the ambulance was out which was not supported by any evidence {other than the former Fire Chief's interpretation of the directive) which was proffered to the Tribunal without benefit of the full context of the email.

63. The BFSA's Counsel further proffered that the Respondent was required under **section 6(1)(c) of the BFRS Act** to carry out the duties imposed on it by both Ministerial direction and law.

64. The BFSA's Counsel further remarked that the Respondent could not carry out a Ministerial directive if carrying out that directive would cause the Respondent to act unlawfully (e.g. the Minister cannot direct the Respondent to mandate a minimum staffing level which breaches the **FSGOs**).

65. A Ministerial directive cannot require the Respondent to do any act which it is not already empowered to do (e.g. the Minister cannot direct the Respondent to order its employees to perform duties which are excessively unsafe. The BFSA's Counsel referenced the ***Corporation of Hamilton v The Attorney General [2002] Bda LR 17 at paragraph 128.***

THE BFSA'S COUNSEL ARGUMENT OF THE JCC CONSULTATION PROCESS

66. The BFSA's Counsel was firm that the Respondent must consult with the BFSA before the Respondent entered into any further agreements with the BHB pertaining to the ambulance services. The Respondent's Counsel failure to consult prior to 2016 was a breach and its failure to consult now was an ongoing breach.

OSHA 1982 Requirement

67. The BFSA's Counsel stressed that the Respondent's mandated minimum staffing levels of four (4) crew members across two (2) vehicles unlawfully created working conditions that were unsafe. The CWS crews were entitled to exercise their rights under the **OSHA 1982** to refuse work where they have reasonable cause to believe that the conditions of articles or places of employment presented imminent and serious danger to their health or life. The BFSA's Counsel contended that the Respondent did not provide any compelling argument why the BFRS should not comply with:

"30 8.8.3(S)(c), which states that shift staffing levels may only be "reduced to five" firefighters in specific circumstances".

68. During cross-examination by the BFSA's Counsel, the ACFO stated that the Respondent had operated in accordance with the section of the **FSGOs** "for many years".

69. The BFSA's Counsel took issue to the Respondent's Counsel contention that it was not the intention of lawmakers that the **Fire Safety 2014**

(“FSA 2014”) should give all NFPA standards and codes force of law in Bermuda that pertained to prior years to building safety. The Respondent did not provide any compelling argument why the section of the **BFSA 2014** should not be given its plain meaning until it was revised by lawmakers, or why the NFP safety standards relating to staffing levels would not be best practice in Bermuda.

70. As proof of the effect of understaffing on the CWS health and safety, the BFSA’s Counsel relied on the following incidents from BFSA sworn witness statements:

- a) An incident where two CWS firefighters had to tackle a boat fire alone;
- b) An incident where two (2) CWS firefighters, exhausted from ambulance duties, fell asleep on the fire truck enroute to a call;
- c) An incident where a firefighter worked or was on call for thirty-three (33) hours in a two-day period;
- d) An incident where, because of understaffing, bystanders had to assist firefighters with firefighting equipment;
- e) Incidents where the firefighters had to prematurely leave one scene to attend to a second scene/call;
- f) An incident where the patients were left without medical attention for 30 - 60 minutes, despite firefighters being stationed nearby;

- g) An incident where following active firefighting the firefighters were dispatched on medical calls without decontaminating, potentially exposing patients to harmful substances, and
- h) Incidents of unsafe dispatches, some of which were acknowledged by the ACFO in an email.

THE RETROSPECTIVE & PROSPECTIVE CHALLENGE BY THE RESPONDENT'S COUNSEL

71. The BFSA's Counsel asserted that the Tribunal did have the authority to impose prospective terms and conditions.

72. The BFSA's Counsel referred to the Respondent's Counsel Closing Submission with regard to the decision in:

Bermuda Prison Officers Association v Labour Dispute Tribunal and Minister of National Security [2020] SC (Bda) 2 Civ (Prison Officers Case), which discussed the earlier case of Kentucky ***Fried Chicken (Bermuda) Limited v The Minister of Economy, Trade and Industry [2013] BDA IR 19 (KFC case)***.

73. The Respondent's Counsel submitted that these cases provided support for its argument that the Tribunal's powers under the ***Labour Code*** to resolve the present dispute was fettered to the extent that the granting of the determination sought by the BFSA would impose new, prospective terms and conditions on the parties.

74. These cases can be distinguished from the present case, for the reasons set out below. In both cases, the Tribunal was being asked to determine the scope and content of the contractual bargain between the parties in the absence of a CBA in the ***Prison Officers Case***, with respect to employees' obligations to

contribute towards health insurance costs in circumstances where the relevant CBA had expired; and in the **KFC Case**, with respect to which terms and conditions from an expired CBA had been incorporated into individual employment contracts.

75. This was emphasized by Hargun CJs comment at paragraph 5 of the **Prison Officers Case** that:

"This Judgment is concerned with the narrow issue whether the Tribunal has the jurisdiction to impose terms on the parties when an employer and a trade union, representing the employees, are unable to agree to the terms of a new collective bargaining agreement".

76. The BFSA's Counsel remarked that the determination in the **Prison Officers Case** was predicated on a finding that the dispute in that case was not a "labour dispute" but was instead a difference arising between the parties in negotiations respecting a new collective agreement.

77. As established above, the BFSA's Counsel said the dispute in the current matter was a labour dispute for the purposes of the **Labour Code**. The current dispute did not include a difference arising between the parties in negotiations respecting a new collective agreement. Presently, the BFSA has in place a CBA between the BFSA and BFRS.

78. Further, it must be noted that the Bermuda legislation considered in the **Prison Officers Case** had been repealed and replaced by the **Labour Code**. Unlike the repealed legislation, the **Labour Code** explicitly envisages the Tribunal's granting of awards with prospective effect.

79. The BFSA's Counsel commented further that, it should be noted that **ss. 44I(1) and (2) of the Employment Act** provides as follows:

Tribunal Binding Award

Section 44I:

"An award made by the Tribunal shall be binding on the parties to the matter before it— as from the date of the award; or

*subject to **section 44J**, from such date as may be specified in the award (not being earlier than the date on which the matter to which the award relates first arose).*

It shall be an implied term of the contract of employment between the employer and employee, to whom an award under subsection (1) relates, that the terms and conditions of employment to be observed under the contract shall be in accordance with such award until the same are varied —

a) by a subsequent binding award; or

b) by agreement between the employer and employee or employee representative. "

80. To this extent, **s.44I** substantively reflects **section 16** of the prior **Labour Act**. However, **ss. 44I(3)** then provides as follows:

(i) *"For the avoidance of doubt, no award which specifies a period during which it is to be binding, whether made by the Tribunal to have prospective or retrospective effect, shall be binding for a period in excess of the period specified" (emphasis added).*

81. The BFSA's Counsel further expanded that the current Bermuda Legislation was therefore distinguished from the prior **Labour Act** in the sense that it

expressly envisaged that the Tribunal may make a determination of prospective terms and conditions. This was confirmed in the Explanatory Memorandum to the **Trade Union and Labour Relations (Consolidation) Bill 2020** which provided as follows:

"sections 44I and 44J provide for awards to be binding on parties as from the date of the award (and may be binding prospectively), but awards may in certain cases also be retrospective to the date the matter was reported to the inspector or Labour Relations Manager.

82. Therefore, the BFSA's Counsel contended that the imposition of prospective terms and conditions is within the Tribunal's jurisdiction under the **Labour Code**.

83. In the event the Tribunal determined that the imposition of prospective terms and conditions is not within the Tribunal's jurisdiction under the **Labour Code**, the BFSA's Counsel invited the Tribunal to find that the BFSA would be entitled, without any imposition of new terms and conditions, to itself implement the Ambulance Suspension Option, without having the Tribunal impose it on the parties.

84. To the extent the Tribunal's involvement was required for the BFSA to take this action, the BFSA's Counsel opined that this step was purely procedural, by virtue of **s.80(2) of the Labour Act** which, in summary, freezes an industrial dispute while it is referred to the Tribunal for a determination.

**SIR KEN KNIGHT CBE, QFSM DL (CHIEF FIRE AND RESCUE ADVISER)
REPORT OF OCTOBER 16, 2010**

85. The BFSA's Counsel cited key references to Sir Knight's report:

"9.3 Crewing levels are currently insufficient to meet Service requirements. Operatic crewing relies upon the support of off duty firefighters 'recall to duty' and overtime which is costly. Some of these deficiencies would be covered by the absence control policy outlined previously (see 5.9).

There is a need to provide more resilience so that this is restricted to large scale or major incidents."

"9.4 It is recommended that sufficient personnel are recruited for the 3 whole time stations to provide an establishment of 20 per watch (across the Service) which is based on a factor (13 x 1.5 = 19.5). This factor has been determined by current projections ta account of sickness levels and detached training requirements."

"Recommendation 22: In order to help maintain current minimum crewing levels whole time stations (structural firefighting), a strategic reserve should be established Hamilton Fire Station to enable personnel to be assigned to stations across the island. It is recommended that sufficient personnel are recruited for the 3 whole time stations (excluding personnel assigned to airport firefighting duties) to provide an establishment of 20 per watch across the Service."

86. **"12.3** The team recognises that there are advantages in Bermuda Fire and Rescue Service taking on full responsibility for emergency medical services across the island (i.e., addition of the Hamilton district). However any proposal in this respect will need to be treated with caution unless it is adequately resourced in terms of finance, personnel and equipment."

Sir Knight's Report of January 20, 2010 reiterates:

87. **"Structural Firefighting** - In order to help maintain current minimum crewing levels whole time stations (structural firefighting), a strategic reserve

should be established Hamilton Fire Station to enable personnel to be assigned to stations across the island, recommended that sufficient personnel are recruited for the 3 whole time stations (excluding personnel assigned to airport firefighting duties) to provide an establish men 20 per watch across the Service."

88. The BFSA's Counsel stressed that the Respondent had not complied with Sir Ken Knight's guidance, and had not recruited sufficient personnel to provide for the recommended personnel per watch across the Fire Service, and, in any event, Sir Ken Knight's recommendation of 20 personnel per watch was made before the Respondent's operations expanded to include ambulance services; and without adequate resourcing in terms of finance or equipment, in addition to its continue personnel deficiencies.

89. With regard to the Respondent's (the AFCO's) testimony and response to the BFSA Statement of Facts that a staff of seventy two (72) structural firefighters would be "effective and efficient", and that ninety six (96) structural firefighters would be "ideal". In cross-examination, the ACFO stated that the actual number of active structural firefighters was sixty six (66). The BFSA remarked that there are approximately 30% fewer firefighters employed by the BFRS today than there were in 2016. The BFSA opined that the BFRS currently has as fifty seven (57) structural firefighters.

90. During cross-examination by the BFSA's Counsel of the ACFO on February 6, 2023, when asked if the BFRS was sufficiently staffed, the ACFO stated that his answer could not be a "simple yes or "no". The ACFO confirmed to the Tribunal that the BFRS does not deploy sufficient staff to comply with the best practices set out in its own training.

91. The ACFO further informed the Tribunal that there were plans to "staff up" the service. However, in the Tribunal hearing of March 17, 2023, the ACFO confirmed that even fewer resources will be allocated to structural firefighting. The ACFO did

not challenge the BFSA assertion that this reduction in resources would result in the continuous closure at least one of the Island's three (3) fire stations. Therefore, the BFSA submitted that the Respondent's underfunding does not entitle it to disregard its employee's occupational safety.

92. The BFSA's Counsel urged the Tribunal to note that the Respondent had failed to protect the health and safety of its employees and the people it serves. The Respondent cannot be allowed to continue to prioritize the L. F. Wade Airport Fire Service over the people of Bermuda, money over safety and faulty statistics over real life challenges. The BFSA's Counsel argued that the Respondent had chosen to hide behind budget cuts and technical (and poor) legal arguments to avoid making hard choices, and needs to employ commonsense and realistic solutions to this issue. The Tribunal must act to correct this. It has the power to do so.

93. For the reasons set out in the BFSA's Statement of Facts, the Amended SOF, Reply, Written Submissions of December 28, 2022 and the March 30, 2023 Closing Submissions, the Tribunal was invited to grant the relief sought by the Complainant.

THE RESPONDENT'S COUNSEL'S CLOSING ARGUMENTS

94. The Respondent's Counsel Closing Submissions was in response to the BFSA claims from dated July 18, 2022 in which the BFSA sought the following awards to be issued by the Employment and Labour Relations Tribunal (collectively the "Award") reiterated the BFSA's claim:

- (a) the BFSA seeks, by way of the Present Tribunal Complaint, to again implement the Ambulance Suspension Option, with immediate effect, as a temporary solution to the understaffing of the CWS, until the BFRS, in*

consultation with the BFSA and the BHB, implements a more permanent solution.

(b) The BFSA also seeks an order that any future agreement between the BFRS and the BHB with respect to ambulance services be subject to prior consultation with the BFSA (as required under the CBA).

95. The Respondent's Counsel stressed to the Tribunal that the meaning of "Ambulance Service" in the BFRS's submission has the same context as used by the ACFO, as stated in his witness statement dated December 6, 2022.

THE RESPONDENT'S COUNSEL'S CLOSING ARGUMENTS ON THE JURISDICTION OF THE TRIBUNAL OPERATIONAL MATTERS

96. The Respondent's Counsel submitted that the Tribunal did not have jurisdiction to make an Award in response to the BFSA's claims, and that the Tribunal may only make recommendations or suggestions.

97. The Respondent's Counsel advised the Tribunal that the operations of the BFRS included, but was not limited to, the provision of fire protection services and emergency medical services. The BFRS operated three (3) fire stations:

PRS which primarily responds to emergencies located in Bermuda's western parishes.

98. The Hamilton Station ("**HAMS**") which primarily responds to emergencies in the central parishes; and

99. The **CWS** which primarily responds to emergencies in the eastern parishes. The CWS deploys both structural firefighters and the **AOD**.

100. The Respondent's Counsel emphasized that the BFRS Management of personnel service was provided in accordance with the **Act** assigned as a task of the ACFO. The Respondent's Counsel placed emphasis on the BFRS:

- (i) Incident types, history of emergency incidents in Bermuda;
- (j) Data on Firefighter injuries;
- (k) Our community risk profile;
- (l) Fiscal responsibility;
- (m) The Respondent's management was of the view that twelve (12) Firefighters was adequate to operate safely, e.g. Firefighters were not scheduled to work hours in excess of their scheduled duty shifts nine (9) hour days and fifteen (15) hour nights); and,
- (n) Firefighters are permitted to sleep between the hours of midnight and 06:45am, in beds provided by the Respondent.

101. The Respondent was keen to share that the average call volume for the CWS was Ambulance is 2.4 calls and 0.59 calls for fire related incidents involving the Fire Engine, per 24 hours.

102. The Respondent's Counsel stressed that the ACFO stated that formerly, five (5) Firefighters were assigned to HAMS with the other fire stations having four (4) firefighters each, where there was a verbal agreement to allow the minimum duty strength at HAMS to go from five (5) to four (4) was initiated by the BFSA's as a request for accommodation to attend the World Firefighter's Games. The ACFO denied the BFSA's allegation that the Respondent agreed to maintain a current minimum of two (2) Fire fighters.

103. The Respondent's Counsel opined that the ACFO stated that there was a minimum staffing level of two (2) operators in an ambulance at CWS which should be maintained at all times. This was in alignment with local and industry standards and system of work. The Respondent's Counsel remarked further that there was a standing procedure which required a Fire Engine to remain off - line when an Ambulance was called out for service as policy.

104. The ACFO stated that a fire truck would however, respond in tandem with the Ambulance to emergency incidents where additional resources were needed on scene such as: road traffic accidents, multi-casualty incidents, Industrial accidents etc. (this list is not exhaustive).

105. The Respondent's Counsel reiterated that in situations where vehicles respond in tandem, all four (4) officers were at the same incident.

106. The exception to that scenario, was for multi-casualty incidents that would quickly overwhelm the two (2) ambulance operators. In situations such as this, all four (4) CWS Fire Officers were deployed in two (2) vehicles to deal with the same incident. Once the Incident was managed and the patient transported to the Hospital were undertaken, the two (2) Fire Engine Officers were sent back to the station where they remained offline.

107. The Respondent's Counsel explained that in incidents of Fire emergencies would activate a minimum predetermined attendance of four (4) Fire fighters riding in the Fire Engine. During this call out, the Ambulance was automatically taken offline until the Fire Engine returned to CWS and the Fire Station Supervisor was satisfied the Ambulance was available for Service.

108. The Respondent's Counsel opined that the BFRS continuously evaluated officers' risk both systemically and dynamically until it was satisfied that both

vehicles, equipment and systems of work, including staffing and operational procedures that were commensurate with the types of tasks the firefighters were required to deal with, in accordance with the Act.

109. However, the Respondent's Counsel noted there was the exception of the primary first response fire truck (duty appliances), where the BFRS did not consider the deployment of two (2) firefighters in the remaining categories of its vehicles as an unacceptable risk.

110. The Respondent's Counsel explained that there was a long-standing practice to mobilize specialist vehicles with two (2) fire fighters, when there was the high-volume unit, emergency support unit, water tanker, Ariel Ladder Platform truck and the ambulance. This is a management decision of the Respondent.

111. The Respondent's Counsel directed the Tribunal to consider the Respondent's Witness Dr. Okereke testimony, where he provided evidence on behalf of the Respondent in which Dr. Okereke stated that the BHB provided an ambulance service in years past, but between BHB and the Bermuda Government, it was felt that combining this ambulance service was in the best interest of Bermuda.

112. The Respondent's Counsel then turned to the Respondent's Witness, Alan Wilkinson, the former FSA President's testimony who confirmed that in order for the BFRS to remain relevant, they needed to undertake more services. Mr. Wilkinson stated that the Complainant was consulted and agreed to this combining of the provision of an ambulance service.

113. To recap that factoid, The Respondent's Counsel directed the Tribunal to paragraph 31 of the Respondent's response to the BFSA's Statement of Facts provided on July 18, 2022 (the "**Response**"). The statement confirmed that the ACFO was still adhering to custom and practice in maintaining minimum station

crew strength which was four (4) since 2006 and that the minimum riding strength of four (4) permitted the control of overtime expenditure and permitted firefighters to apply and take leave with less complications.

114. The Respondent's Counsel directed the Tribunal to the BFRS's Operational Directives of 911 Dispatchers who were prohibited to assign emergency tasks to vehicles that were depleted of staff, if these protocols were altered, it would be considered a violation of directives and any actions would be done without the BFRS's knowledge and considered misconduct.

115. The Respondent's Counsel explained that if the BFSA was aware of such breaches, the BFSA was under a duty to formally inform BFRS Senior Officers. If a firefighter violated this directive, it would be considered a self-deployment and that firefighter would be subject to discipline.

116. The Respondent's Counsel again emphasised that, there were no formal complaints made to the Respondent from the BFSA in accordance with its policy.

117. The Respondent's Counsel directed the Tribunal to **paragraph 12 (e)** of the BFRS's Response, where emergency personnel, i.e. firefighters and emergency medical dispatchers, were expected to dynamically risk assess every call for service based on information received and utilizing the principal of situation awareness by:

- a) Gathering information;
- b) Understanding the information;
- c) Anticipation of how the incident may potentially develop.

118. At **paragraph 12 (f)** of the BFRS's Response, based on the Respondent's operations and procedures, the BFRS would never engage in rapid deployment by committing two (2) people into a compartment fire risk area without the provision of an emergency team of two (2) or more team members being enroute.

TESTIMONY OF THE BFSA'S WITNESSES

119. The Respondent's Counsel referenced the BFSA's three (3) sworn witnesses who attended to be cross examined at the hearing on March 17, 2023 and who were Fire Officer ("FO") Ryan DeSilva, FO Jean Dominique Nanette and FO Anthrun O'Brien.

120. The Respondent's Counsel was keen to note that all the BFSA's witnesses admitted that they had not provided formal specific complaints regarding any of their allegations which meant the firefighter officers were in breach of **General Order 5**, which states:

"Formal communication throughout the Service will be in the form of written reports. Verbal remarks, suggestions or complaints are not acceptable methods of formal communication and shall not be acted upon."

121. The Respondent's Counsel contended that the Tribunal should note the importance of **General Order 5** because the BFSA's witnesses stated that the various complaints were made at the JCC meetings to the Respondent and that these complaints should have been acted upon. However, under cross examination, the BFSA's witnesses confirmed that they never formally provided complaints in accordance with **General Order No. 5**.

122. The Respondent's Counsel stated the ACFO also confirmed that he was hearing these specific complaints for the first time and that if the Respondent was

unaware of these specific complaints, then the BFRS could not be expected to respond and then to act on them.

123. The Respondent's Counsel contended that the BFSA's witnesses made various allegations regarding the use of the Respondent's firefighters at CWS.

124. Mr. DeSilva was asked if there was any policy which provided for how many firefighters were required at any station. Mr. DeSilva could only point to **General Order 8.8.3 5(c)**, which, drew from an **Order** that spoke to authorization of overtime. This **Order** was to maintain minimum riding strength in a vehicle. The Respondent's Counsel emphasized that there was **no policy** or requirement in existence that directed firefighting personnel to operate an ambulance without at least two (2) person. The Respondent's Counsel also remarked that the "first due" fire engine could not commit personnel into a fire risk area with less than four (4) firemen.

125. Under cross examination, the BFSA's witnesses admitted that they did not have the right to be engaged with third party agreements entered into by the Respondent.

RESOURCING AND FINANCING

126. The Respondent's Counsel directed the Tribunal to be mindful of PS Farrow's testimony, who gave evidence on March 17, 2023 regarding budgetary constraints in providing the service in accordance with the Act. The PS confirmed that he was not involved with operational decisions as that was for the ACFO. However, any additional monies for the Respondent was the decision of the Bermuda Legislature and that the Bermuda budget for 2023/2024 had already been set.

127. This fact was also confirmed in a March 2023 "**Without Prejudice**" meeting between Executive Officers of the BFSA (without the attendance of the BFSA's

Counsel and BFSA's Junior Counsel) and the Premier and Minister of Finance, The Hon. E David Burt, JP, MP and the Minister of National Security, the Hon. Michael Weeks, JP, MP.

THE BFRS COUNSEL'S RESPONSE TO OCCUPATIONAL SAFETY AND HEALTH BREACHES TESTIFIED THE BFSA WITNESSES AT CWS

128. The Respondent's Counsel pronounced that the BFSA's witnesses testified that there were breaches to the **OSHA 1982** and its **Regulations 2009** without foundation or evidence.

129. The BFRS required that any claim under the **OSHA 1982** to be made in accordance with the statutory procedure for making such a claim, which included an onsite visit from a Safety and Health Inspector and a report substantiating the claim. This statutory procedure was not commenced.

130. All of Respondent's vehicles utilized for operational purposes were fully functional and maintained and were safe and without risks to officer health and safety. The Respondent's Counsel stated that when it was put to the BFSA's witnesses to provide any evidence where the BFSA submitted any written claims related to occupational health and safety in the workplace.

131. Upon re - examination by the Respondent's Counsel of the ACFO, he confirmed there was no record of any complaints related to **OSHA 1982**.

132. In addressing questions put to the ACFO on March 17, 2023 from the Tribunal on why there was no Safety and Health Committee meeting, the Respondent's Counsel reflected that although there may have been a delay in the Respondent setting up a Health and Safety Committee, the lack of a Committee would not have prevented any written allegations of breaches of the **OHS 1982**.

THE RESPONDENT'S COUNSEL'S CHALLENGE TO THE TRIBUNAL'S JURISDICTION PURSUANT TO THE BERMUDA ACTS

133. The Respondent's Counsel argued that the Tribunal cannot make an order which was in conflict with any other **Bermuda Act** and further submitted that in any event, there was a directive from the Minister on April 1, 2022, which was provided in accordance with **section 6(1)(c)** of the **Act**, which stated:

"We want the Fire Service to provide the ambulance service from the East, as they have been doing all this time."

134. Additionally, the Respondent's Counsel submitted that the Tribunal could not make an order which had an effect on future terms and conditions.

135. The Respondent's Counsel referenced **section 44I of the Employment Act 2000**. The wording used in the **Employment Act 2000** was in fact "*prospective effect*" and not prospective terms and conditions.

136. The Tribunal is clear that if the Bermuda Legislature had meant for an award to have an effect on future terms and conditions, they would have said so, e.g. **section 44J of the Employment Act 2000** explicitly states that an award may have "*Retrospective Effect*". There was no mention of the term, prospective terms and conditions in the **Employment Act 2000**.

137. The Respondent's Counsel stressed that "*prospective effect*" meant an award which had a future effect on the parties, i.e. **section 44I(2) of the Employment Act 2000**, which included an implied term into employment contracts to allow for an award made by the Tribunal which would have a "*prospective effect*" on the parties e.g. an employee was unlawfully terminated and the employer either has

to make re-instate that employee or make restitution in payment, to that employee. Both these instances have a “*prospective effect*” on the employer and the employee. This is what is meant by “*prospective effect*”. The Respondent’s Counsel acknowledged that many rulings will have a “*prospective effect*” on the parties.

138. The Respondent’s Counsel purported that the Tribunal was empowered to make an award which would amend the terms and conditions of employment and not just had a “*prospective effect*”, i.e. suspension of a service provided under an act has the effect of changing terms and conditions of service.

139. The Respondent’s Counsel referenced the following case of ***Bermuda Prisons Officers Association v Labour Dispute Tribunal et al [2020] SC Bda civ 2 (the “Prison Officers case”)*** at the following paragraphs:

Paragraph 51: *“In my judgment what the Tribunal sought to do in this case was precisely what Kawaley CJ said, in paragraph 82 of **Kentucky Fried Chicken case**, the Tribunal could not do. This is so because the Tribunal lacked jurisdiction to impose upon the parties new terms and conditions arising out of their failure to agree a new collective bargaining agreement.”*

Paragraph 52: *“However, as paragraph 82 of the judgment shows, Kawaley CJ’s conclusion that the legislative scheme under the Act does not allow the Tribunal to make binding awards in relation to future terms and conditions of contract and collective bargaining agreements, was not confined to small businesses. Kawaley CJ’s conclusion was based upon the proper construction and scope of the LDA and was applicable in all cases.”*

140. In referencing the BFSA’s December 28, 2022 Written Submissions questioning the reasons upon which the decision of the Minister’s direction was based, however, questioning the reason why the Minister came to his

decision is not a relevant argument because if the Complainant sought to challenge the decision of the Minister, that challenge could only be made by an application for Judicial Review.

141. The Respondent's Counsel stressed that Tribunal did not have the jurisdiction to go behind the Act and the Minister's directive related to ambulance Service provided by the Respondent.

THE RESPONDENT'S COUNSEL'S CLOSING POSITION

142. That the Tribunal cannot grant an Award to the BFSA's claims for the following reasons:

- (a) The granting of the Award to either suspend or freeze the provision of the Ambulance Service will amend the terms and conditions of employment i.e. the Ambulance Service is required to be provided in accordance with the Act, as directed by the Minister and this is a part of the employment contract of service for members of the Complainant;
- (b) The granting of the Award will not just have a "*prospective effect*", but rather, would be an award which is in breach of a Ministerial direction given in accordance with the Act;
- (c) The granting the Award would be in breach of the management rights as set out in the collective agreement between the Complainant and the Respondent;
- (d) The grant of the Award would be ultra vires, as in the Prison Officers case; and

143. There was no written evidence of any breach of **OSHA 1982** and there were no written reports of any allegations made against the Respondent.

144. Much of the allegations made by the BFSA were actually of an operational nature and should be resolved at a JCC meeting.

145. The Respondent's Counsel concluded by reaffirming his stance throughout the Tribunal Hearings that the Tribunal has no jurisdiction to grant the Award and to grant an Award would be in breach of the **Employment Act 2000** and therefore, it is submitted that the Complainant's allegations must be dismissed.

146. The Respondent's Counsel argued that the Tribunal did not have the jurisdiction to grant any Award because the claim:

*"seeking to implement the Ambulance Suspension Option", was inconsistent with **Bermuda Fire and Rescue Service Act 1982** at **section 6 (bb)**, which states: "in the case of fire or other calamity, to assist any person who appears to need prompt or immediate medical attention by....".*

147. Further in accordance with **section 44H of the Employment Act 2000**, the Respondent's Counsel proclaimed that the Tribunal cannot make an order which sought to limit the services provided by the Respondent, in accordance with the Act. *Section 44H states:*

*"Where any matter referred to the Tribunal involves questions as to wages, or as to hours of work, or otherwise as to terms or conditions of or affecting employment which are regulated by any Act under the **Employment and Labour Code** or by any other Act, the Tribunal shall not make any award which is inconsistent with that Act."*

DELIBERATIONS OF THE TRIBUNAL

Meaning of “Trade Union”

148. Pursuant to *Part 2 Chapter 1 Objects, purpose and registration of the Trade Union and Labour Relations Consolidation Act (“TULRCA”) 2021*, the Bermuda Fire Services Association is a registered Trade Labour organization where its principal purpose is:

- (a) Representation and promotion of workers’ interests and;
- (b) The regulation of the relations between workers and employers, or between workers and workers or between employers and employer.

149. Paramount to the Bermuda Government’s (the Employer’s) BFSA’s relationship are trust, respect for each other’s roles and responsibilities, a willness to resolve grievances and issues in a timely manner to the benefit of the Employer and the BFSA. These maxims are key to good industrial relations.

150. The Tribunal understood from the reading of Article 2 of the Collective Bargaining Agreement (“CBA”), that the BFSA asserted the right to be consulted before the Employer (the Bermuda Government) made any changes to the rates of pay, hours of work and other working conditions of service of its CWS members.

151. In this regard, the Tribunal noted at **paragraph 16**, with reference to the 2006 World Firefighters Games in Hong Kong that was held for only eight (8) days from February 18 – 25, 2006, the Tribunal agreed with the BFSA’s Counsel that eight (8) days of World Firefighters Games should not have given rise to a “temporary

solution” of managing a reduced staff being made “permanent” without further consultation with the BFSA.

THE “PSYCHOLOGICAL CONTRACT”

152. The Tribunal was mindful of the globally recognized and accepted Chartered Institute of Personnel and Development (“CIPD”) term that the “Psychological Contract” refers to individual workers expectations, beliefs, ambitions and obligations as perceived by the employer and the workers. The Psychological Contract is an agreement usually signed and written concerning the mutual obligations of the employer and the worker.

153. The Psychological Contract is also based on the employees’ sense of fairness and trust, and their belief that the employer is honouring the ‘deal’ between them. A violation (or breach) of the psychological contract by the employer can have sudden and powerful consequences for the CWS.

154. The BFSA’s Witness Statements and testimonies of Fire Officers (“FO”) Ryan Desliva, FO Jean Dominique Nanette and FO Anthrun O’Brien were well founded on the effects of undermanned station crews, safety and health issues, and equipment faults that they experienced and testified that were negatively affecting job satisfaction, commitment, and performance of the CWS Officers.

155. Hence, the purpose and the format of the Joint Consultative Committee (“JCC”) provides a forum for the Employer (BFRS) and the BFSA to have meaningful dialogue.

FORMAT OF THE JOINT CONSULTATIVE COMMITTEE MEETINGS

156. The Tribunal recognized the right of the BFSA to be at the table to discuss with the Employer and BHB the status of the 2016 MOU of the Ambulance

Suspension Option and any probable amendments of the MOU on behalf of its members stationed at the CWS.

157. In addition to the definition of meaningful dialogue on the Ambulance Suspension Option, the BFSA's Executive Officers are obligated to ensure that the working conditions of the CWS members is consistent with similar working conditions of their fellow brothers and sisters stationed at the PRS and the HamS such as manpower statistics, health and safety measures and associated benefits.

158. The Tribunal noted the Respondent's Counsel's constant referral to the BFRS's Management Rights CBA Clause, while negating the comparable CBA Clause on the BFSA's rights on behalf of the membership of firefighters.

159 On February 10, 2023, as a last ditch effort for the Parties to reach a settlement amongst themselves, without the assistance of the Tribunal, the Tribunal ordered an Adjournment for one (1) month, so that the Parties could have meaningful dialogue and find a resolution.

160. It is the opinion of the Tribunal that either party could have suggested the Employer to formally request the Bermuda Government as the Employer, to engage the services of Sir Ken Knight CBE, QFSM, the Chief Fire and Rescue Adviser, who in his report of January 20, 2010, on the Bermuda Fire and Rescue Services, noted particular concerns of the BFRS's Operational (Structural Firefighting) Response as noted at page 23 of 40.

THE EAST/WEST FIRE STATIONS DIFFERENCES

161. The Tribunal noted the Respondent's witness statement of the Dr. Okereke's where the Doctor stated that on December 21, 2015, BHB and BFRS entered into a MOU for an integrated Island - Wide Ambulance Service to establish *a "fit for purpose" prehospital care and response EMS service with primary purpose of*

preventing delays in the transport of critically ill patients from the East End to KEMH Emergency Department.

162. Dr. Okereke also testified that due to budgetary constraints of the BHB, the BFRS is financial responsible for the ambulance and manpower of the CWS, which is not the case for the ambulance services of PRS and HAMS where the financial budget is wholly under the auspices of BHB.

163. In spite of this factoid, PRS and HAMS were manned by a minimum of six (6) emergency personnel where two (2) workers are KEMH personnel, HAMS central parishes are also staffed by a similar number of four (4) BFRS Officers and two (2) worker being KEMH personnel. However, in the eastern parishes CWS has a minimum of four (4) BFRS firefighters who perform both firefighting and ambulance services.

164. The Tribunal reinforced that the key theories of trade unionism of “equal pay for equal work” and “equal pay for equity and equality” cannot be ignored for the CWS firefighters, compared to the firefighters of the two western fire stations - PRS and HAMS as noted above.

165. What crystallized for the Tribunal was the imbalance of the minimum number of full-time equivalent firefighters for each of the three (3) Fire Stations.

166. The CWS firefighters have dissimilar working conditions because of the minimum of four (4) stationed firefighters as compared to the minimum of six (6) firefighters stationed at the PRS and the HAMS.

167. The Tribunal noted from the sworn testimony of FO Ryan DeSilva that on October 5, 2022, the Junior Minister of National Security confirmed in the Senate that the PRS required twenty-six (26) firefighters, but only had twenty one (21); HAMS required twenty eight (28) firefighters but only had twenty two (22), and the

CWS required thirty four (34) firefighters but only has twenty one (21). The Senator remarked that the shortages were causing stress for the firefighters.

168. What was very alarming to the Tribunal and noted from the BFSA's witness testimony of FO Anthrun O' Brien that from his oral testimony there was a Road Traffic Collision ("**RTC**") incident, and the fire truck was attending a fire at another emergency and the CWS ambulance (**Medic 10**) was also engaged, then CWS (**Clear 1**) fire truck would not be able to attend as a primary response vehicle.

169. However if similar incidents occurred in the West and Central Parishes both PRS and HAMS fire trucks could attend as primary response vehicles.

170. In addition, reinforcing the BFSA's dispute on minimum staffing of four (4) firefighters stationed at CWS was the continued testimony of the BFSA's FO O'Brien who testified of an incident where **Medic 4** was responding to one incident, and enroute to that call, **Medic 4** chanced upon another RTC on the Causeway and so attend to the injured person at that scene. Therefore, **Medic 4** discontinued to the RTC at South Side Pizza House. Consequently, **Medic 7** ambulance attached to the western parishes attended to the South Side Pizza RTC.

171. Even with CWS **Clearwater 1** within yards of the South Side Pizza House RTC, the person had to wait for 30 minutes to one (1) hour without medical attention.

172. The Tribunal found the reported delayed incident very disconcerting as it related directly to the Bermuda public's right to urgent medical care which in our opinion, is not consistent with the testimony of Dr. Okereke who advocated and testified that the *EMS service has the primary purpose of preventing delays in the transport of critically ill patients from the East End to KEMH Emergency Department.*

173. And while it is recognized that the South Side Pizza RTC person did not have any life-threatening injuries, all RTC incidents have the potential to be life threatening until a medical assessment is undertaken at KEMH.

OCCUPATIONAL SAFETY AND HEALTH ACT 1982 & THE OCCUPATIONAL SAFETY AND HEALTH REGULATIONS 2009

174. The **1982 Act** and its **2009 Regulations** reference the Safety and Health Committees and the role and function of the Employer and Workers' Representatives. The Regulations stipulate that all places of employment, which include the Bermuda Government Departments and Ministries, do not exempt BFRS from the statutory requirements of the **1982 Act** and **2009 Regulations**.

175. Whilst the Respondent's Counsel was keen to examine the BFSA's witnesses for failing to report incidents of equipment failures like the Zetron system as stipulated under **FSGO** or following the BFSA's and BFRS's CBA Grievance Procedure steps, every occupational safety and health incident that impacts the smooth operation of **CWS Clearwater 1** and **Medic 10** in saving lives or minimizing patients' acuity rates, the CWS firefighters must attend and report to the nature of the incident.

THE BERMUDA GOVERNMENT'S BUDGETS AND FINANCING OF L. F. WADE INTERNATIONAL AIRPORT FIREFIGHTERS, THE BERMUDA POLICE SERVICE AND THE BFRS

176. Each of these Departments are housed under the Ministry National Security ("**the Ministry**") with the Department Heads updating the Minister on operational matters of each Department.

177. Each Department of the Ministry has a 2023 – 2024 Bermuda Fiscal Budget commensurate to the will of the House of Parliament for this corresponding 2023 – 2024 Fiscal year. The current Bermuda Government Departmental Budgets clearly defines the importance of each Bermuda Government Department and the mandate and service delivery to the Bermuda community.

MEETING OF THE PARTIES TO THIS DISPUTE DURING THE FEBRUARY – MARCH 2023 ADJOURNMENT

178. The Tribunal was surprised to learn that the only matter that was mentioned by the Respondent of a March 2023 meeting of senior Ministry Officers, several Government Ministers and BFSA Executive Officers (not the BFSA's legal Counsels) was the statement to the Trade Association that there were no Bermuda Government budgeted funds to hire additional CWS firefighters for March 2023 which was the end of the 2022 – 2023 fiscal year.

179. The Tribunal was very disappointed that the March 2023 meeting was a lost opportunity for such high-level resources to have a discussion on the ending of the Fiscal Budget of 2022 – 2023, when the parties were encouraged by the Tribunal to suggest solutions to the BFSA's and BFRS's impasse.

180. When questioned by the Tribunal relating to the hiring of cadet firefighters for CWS, the AFCO's response was that the Respondent was prioritizing the Air Division Services and manpower at the L F. Wade International Airport, as compared to the BFRS's Structural Division. Therefore, there was no increases to the BFRS Structural Division's staffing levels.

181. The ACFO also testified that the BFRS would encounter further reductions of the resources accessible to the BFRS's Structural Division. Despite the Tribunal's direct order to the Respondent to provide further information with respect to the impact to these 2023 - 2024 Bermuda

Government's budgetary reductions on the BFRS's resources and the efficiency of the BFRS's Structural Divisions and by extension, the CWS, there was no information submitted in the Respondent's Closing Submissions.

182. In cross-examination by BFSA Counsel, PS Farrow emphasized that the Respondent's staffing issues were "urgent and important" but not an "emergency". The PS further confirmed to the Tribunal that he would not advise the Minister to seek a Bermuda Government Fiscal supplement for the Respondent's budget to fund the CWS.

183. By contrast as stated by the BFSA's Counsel, the Junior Minister of National Security, confirmed in the Bermuda Senate that the Respondent's understaffing was causing stress for firefighters.

184. Upon cross-examination by the BFSA's Counsel, the ACFO stated that a manpower study was last completed in 2010. The ACFO also expressed that a further manpower study would not be completed until an undetermined plan is authorized in 2023.

185. The Tribunal views these matters as worrisome and with recent public criticisms on prolonged arrival times of ambulance services to attend various 911 calls throughout Bermuda, the Tribunal recommends that the Employer, BHB and the BFSA meet as a team to address, to discuss and to agree a way forward being mindful of the public's desire for an efficient ambulance service.

186. While the Tribunal recognized that four (4) firefighters (where two (2) of the firefighters attend EMS incidents) were tasked with handling emergencies in the East End of the Island were also expected to handle both a RTC and a fire at the same time in the East End. The CWS firefighters are trained and tasked, as best as they can, to handle these incidents. However, the continued combined tasks of

EMS and firefighting for the CWS will not be good for their morale. The Tribunal is firm that there has to be the “political will” to address the CWS dispute.

LEGAL ARGUMENTS ON THE RESPONDENT’S COUNSEL’S CHALLENGE TO THE MANAGEMENT RIGHTS AND OPERATIONS OF THE BFRS AT JCC MEETINGS BY THE BFSA

187. In the judgment of *the Gunning v LB of Brent case*, the court offered four rules on meaningful consultation, which if followed, were written to make consultation fair and a worthwhile exercise:

- (1) That consultation must be at a time when proposals are still at a formative stage.
- (2) That the proposer must give sufficient reasons for any proposal to permit intelligent consideration and response.
- (3) That adequate time is given for consideration and response; and
- (4) That the product of consultation is conscientiously considered when finalizing the decision.

188. Based on the **Gunning Consultation Principles**, the Tribunal is firm that frequent meaningful consultation for the BFRS and the BFSA did not occur at the JCC meetings.

189. The Tribunal was also mindful of the legal axiom of “**Legitimate Expectation**” and the BFSA’s position on the MOU - the Suspension Ambulance Service Option, manning shortages at the WS and the safety and health issues at the CWS workplace.

190. To paraphrase, in its broadest terms:

“the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has relied on the statement should in the absence of good reason be entitled to rely on the statement and enforce it in this tribunal or the Courts,”

at paragraph 37 of the *United Policyholders Group and Others (Appellants) v the Attorney General of Trinidad and Tobago (Respondent)*.

191. In the present dispute, the Tribunal noted that there was an unwillingness by the Employer (the Bermuda Government) to accept the BFSA's concerns and take the BFSAs remarks seriously. The Tribunal stressed to the Respondent that the CWS firefighters' working conditions cannot be so different (as testified by the BFSA's witnesses' and arguments by the BFSA's Counsel) compared to their brothers and sisters firefighters' posted at PRS, HAMS, the AOD.

192. The Executive Officers of the BFSA are mandated as advocates for their entire firefighter membership, and within reason, to negotiate terms and conditions of work that are equitable.

THE TRIBUNAL'S REVIEW OF THE RESPONDENT'S COUNSEL'S CONTENTION THAT THE TRIBUNAL HAD NO JURISDICTION TO GRANT AN AWARD TO THE BFSA

193. In December 2022, The Respondent's Counsel on behalf of the Respondent argued that the Employment and Labour Relations Tribunal had no jurisdiction to grant any Award because the claim of:

*"seeking to implement the **Ambulance Suspension Option**", is inconsistent with **Bermuda Fire and Rescue Service Act 1982 ("Act")** at **section 6 (bb)**, which states:*

"in the case of fire or other calamity, to assist any person who appears to need prompt or immediate medical attention by...."

194. The Respondent's Counsel further professed *that* pursuant with **section 44H of the Employment Act 2000**, the Tribunal cannot make an order which

seeks to limit the services provided by the Respondent, in accordance with the Act or make an order which is in conflict with any other act.

Section 44H of the Employment Act 2000 states:

“44H Where any matter referred to the Tribunal involves questions as to wages, or as to hours of work, or otherwise as to terms or conditions of or affecting employment which are regulated by any Act under the Employment and Labour Code or by any other Act, the Tribunal shall not make any award which is inconsistent with that Act.”

195. The Respondent’s Counsel also declared that the email directives from the Minister of National Security and Transport on April 1, 2022, which when read in conjunction with **Section 6(1)(c)** of the **Act**, which stated:

“We want the Fire Service to provide the ambulance service from the East, as they have been doing all this time.”

196. With regard to the latter Ministerial Orders, the Respondent’s Counsel argued that the Tribunal cannot make an order which has an effect on future terms and conditions.

197. The Respondent’s Counsel was firm that the Complainant misread the meaning of **Section 44I of the Employment Act 2000**. The Respondent’s Counsel contended that the **Employment Act 2000** wording on “*prospective effect*” and not prospective terms and conditions has to be noted as read.

198. The Respondent’s Counsel further declared that if the Bermuda Legislature wanted an award to have the effect on future terms and conditions, the House of Parliament would have legislated it.

199. The Tribunal's rebuttal is that the Bermuda House of Parliament will only legislate on those matters brought before it. The CWS dispute was only passed to the Minister of National Security who did not bring the full gravity of the situation before the House of Parliament because the CWS dispute was referred to the Employment and Labour Relations Tribunal in order to seek some resolve for it.

200. The Tribunal noted that the Respondent's Counsel did not present any arguments to dispel the Tribunal's views to an opposing position that the House of Parliament would consider the CWS staffing and budget concerns. The Tribunal was acutely aware that the only urgent firefighters' dispute was the **AOD** staffing and manning shortages at the Airport and that went before the House of Parliament, as there was the statutory requirement to man the L.F. Wade International Airport with the correct complement of firefighters.

201. The Respondent's Counsel also referenced **section 44J of the Employment Act 2000** that explicitly stated that an award may have "*Retrospective Effect*" and that there was no mention of the term, "*prospective terms and conditions*" in the **Employment Act 2000**.

202. The Respondent's Counsel further contended that "*prospective effect*" meant an award which would have a future effect on the parties, i.e. **section 441(2) of the Employment Act 2000**, which included an implied term into Employment Contracts to allow for an award made by the Tribunal which would have a:

"Prospective effect" on the parties e.g. an employee was unlawfully terminated and the employer either has to make re-instate or make restitution in payment to that employee.

203. The Respondent's Counsel referenced, which the Tribunal revisited, the case law of the **Bermuda Prisons Officers Association v Labour Dispute Tribunal et al [2020] SC Bda civ 2 (the "Prison Officers case")** where at paragraphs:

Paragraph 51: *"In my judgment what the Tribunal sought to do in this case was precisely what Kawaley CJ said, in paragraph 82 of Kentucky Fried Chicken, the Tribunal could not do. This is so because the Tribunal lacked jurisdiction to impose upon the parties' new terms and conditions arising out of their failure to agree a new collective bargaining agreement."*

Paragraph 52: *"However, as paragraph 82 of the judgment shows, Kawaley CJ's conclusion that the legislative scheme under the Act does not allow the Tribunal to make binding awards in relation to future terms and conditions of contract and collective bargaining agreements, was not confined to small businesses. Kawaley CJ's conclusion was based upon the proper construction and scope of the LDA and was applicable in all cases."*

THE TRIBUNAL'S REVIEW OF THE BFSA'S COUNSEL'S CLOSING ARGUMENTS

204. The BFSA's Counsel on behalf of the BFSA, first retorted to that Respondent's assertion that the BFSA's relied on **section 7 BFRS Act** to not "fetter" the Minister's directive.

205. The BFSA's Counsel further alleged that in accordance to the **TULRC Act 2021 ("Labour Act")**, states that when a "labour dispute" existed between an employer and workers or a trade union on their behalf, relating wholly or mainly to:

- (1) "terms and conditions of employment";
- (2) "conditions (whether physical or otherwise) in which workers are required to work"; and/or
- (3) "allocation of work as between workers or groups of workers";
- (4) "to the terms and conditions of employment of the work place; and
- (5) "the allocation of work as between workers and groups of workers.

206. The BFSA's Counsel stressed that the Minister of Economy and Labour referred the current labour dispute twice to the Tribunal for determination or settlement.

207. The Tribunal whole heartedly acknowledged BFSA Counsel's argument that it does not have the jurisdiction to go behind the Act and the Minister's direction related to service provided by the Respondent.

THE TRIBUNAL'S REVIEW OF THE BFSA'S COUNSEL'S COUNTER TO THE RESPONDENT'S COUNSEL'S STATUTORY ARGUMENTS ON SECTION 44I-1 AND THE PROSPECTIVE AND RETROSPECTIVE ARGUMENTS

208. Further, to the Respondent's Counsel's arguments on **section 44I (1)**, BFSA's Counsel averred that **section 44I(1) of the Employment Act** prohibits the Tribunal in making an Award that prevents a group of employees from exercising their rights under the OSHA and its Regulations, to refuse work where the BFSA Members of CWS have a reasonable belief that the conditions of equipment or the work place presented an imminent and serious danger to their health or life.

209. With respect to the Respondent's Counsel's positions on the following cases, the BFSA's Counsel countered key legal difference of these case by arguing that:

(a) the ***Bermuda Prison Officers Association v Labour Dispute Tribunal and Minister of National Security [2020] SC (Bda) 2 Civ (Prison Officers Case)***, and the case of

(b) the ***Kentucky Fried Chicken (Bermuda) Limited v The Minister of Economy, Trade and Industry [2013] BDA IR 19 (KFC case)***,

cases are distinguished from the circumstances of the current BFSA arbitration matter which is based on the following reasons.

210. In both Supreme Court cases, the Tribunal was asked to determine the scope and content of the contractual bargaining/negotiations between the parties in the absence of an expired CBA.

211. In the ***Prison Officers Case***, the issue was the employees' obligations to contribute towards GEHI health insurance costs that were germane to an expired CBA.

212. In the ***KFC Case***, the terms and conditions of the former agreed CBA expired such that the terms and conditions of the employees' CBA had been incorporated into the individual KFC employees' employment contracts.

213. Hargun CJs crystallized that factoid where he commented at paragraph 5 of the ***Prison Officers Case*** that:

"This Judgment is concerned with the narrow issue whether the Tribunal has the jurisdiction to impose terms on the parties when an employer and a trade

union, representing the employees, are unable to agree to the terms of a new collective bargaining agreement".

214. The BFSA's Counsel was firm in arguing to the Tribunal that **the *Prison Officers Case*** was predicated on the finding that the dispute was not a "***labour dispute,***" but was instead a difference arising between the parties in negotiations respecting a new collective agreement.

215. The BFSA's Counsel further stressed that the current BFSA matter was a labour dispute for the purposes of the ***2021 Labour Code***. Further that the BFSA dispute did not involve a difference arising between the parties in negotiations for a new CBA , especially as there is a current CBA between the BFSA and BFRS.

216. The Tribunal considered and ably assisted by BFSA Counsel's arguments that the ***Prison Officers Case*** was repealed and replaced by the ***Labour Code*** where the Code explicitly provided that the Tribunal grant awards with prospective effect.

THE TRIBUNAL'S REVIEW OF SS.44I(1) AND (2) OF THE 2002 ACT

217. The BFSA's Counsel directed the Tribunal that this section of the law states that the Tribunal *function as noted **section 44I(1)***:

To make an award that shall be binding on the parties to the matter before it— from the date of the award; or

*subject to **section 44J**, from such date as may be specified in the award (not being earlier than the date on which the matter to which the award relates first arose).*

(2) It shall be an implied term of the contract of employment between the employer and employee, to whom an award under subsection (1) relates, that the terms and conditions of employment to be observed under the contract shall be in accordance with such award until the same are varied—

by a subsequent binding award; or

by agreement between the employer and employee or employee representative. "

218. Continuing with the BFSA's Counsel arguments on the reading of **section 44I(3)**:

"(3) For the avoidance of doubt, no award which specifies a period during which it is to be binding, whether made by the Tribunal to have prospective or retrospective effect, shall be binding for a period in excess of the period.

219. The Tribunal concurred with BFSA Counsel that the **EA 2000** and the **2021 TULCA** does distinguish that the prior Labour Act was different to what the Legislature foresaw in 2020 on the role and function of the Tribunal where it may make a determination of prospective terms and conditions. The Explanatory Memorandum to the Trade Union and Labour Relations (Consolidation) Bill 2020 is clear that:

"sections 44I and 44J provide for awards to be binding on parties as from the date of the award (and may be binding prospectively), but awards may in certain cases also be retrospective to the date the matter was reported to the inspector or Labour Relations Manager.

220. The Tribunal observed an egregious situation where something devastating could be avoided if the parties came together and worked towards

the goodwill of all concerned. Some way forward needs to be implemented. Much of what is going on between the parties can be avoided with some common sense discussions and reallocation of funds. A supplemental request for additional monies at this stage in a new fiscal budget year may seem extreme. However, with the Bermuda 2023 - 2024 budgeted funds that were allocated being re-distributed, so as to employ perhaps four (4) – to six (6) additional persons, now or later, can be made to request the additional funds. The **Monies** may be found elsewhere in the overall Bermuda Government's Fiscal Budget. This would relieve the stress of the CWS firefighters operating on a "**shoe string**" of patience and feeling as though the firefighters and the BFRS are out on a limb by themselves.

221. The Tribunal does concur with the BFSA Counsel that the burden of *prospective terms and conditions* is within the Tribunal's jurisdiction under the **Labour Code**.

222. However, to the Respondent's Counsel's arguments on "*prospective effects*" and "*retrospective effects*", the Tribunal is minded to not place much weight on the Respondent's Counsel's argument, if at all. What is being asked by the BFSA is to have adequate firefighting coverage along with the assistance from the BHB who could provide ambulance support. This was provided in the past and with a bit of re-organizing, can be done in the present until a better solution can be found.

223. The Tribunal does recognize and agrees with the BFSA's Counsel that the **OSHA 1982** statutory obligations that are imposed on Bermuda's work places are to ensure that employees have the right to raise matters on safety issues that they believe will affect their health (both physical and mental) and wellbeing as sacrosanct.

THE TRIBUNAL'S REVIEW OF THE BFSA'S COUNSEL'S SECOND AWARD POSITION FOR THE TRIBUNAL'S CONSIDERATION

224. THE BFSA's Counsel presented an alternative set of arguments for the Tribunal to consider if the Tribunal is persuaded by the Respondent's Counsel's arguments.

225. That the Tribunal recommend that the BFSA is entitled, without any imposition of new terms and conditions of employment, that the BFSA negotiate the implementation of the Ambulance Suspension Option, without having the Tribunal impose it on the parties.

226. Further, the Tribunal recommends that the BFSA, as a procedural matter, act within the spirit *of s.80(2) of the Labour Act* which freezes an industrial dispute which is referred to the Tribunal for a decision.

227. With regard to both sets of arguments of the BFSA's Counsel and from the Respondent's Counsel, the overarching question for the Tribunal was whether a lacuna exists as it pertains to the powers and authority of the current Tribunal to make an award on the BFSA disputed matters.

228. As a persuasive legal case, the Tribunal noted the judgment of the statutory worth of a lacuna in, **Union of India & Others v. V.R., Nanukuttan Nair** delivered by Justice L. Nageswara Rao and Justice Hemant Gupta, at the Supreme Court of India held that:

“ if the legislature has left a lacuna, it is not open to the Court to fill it on some presumed intention of the legislature”.

229. Elaborating further, by way of clarification, the Court stated that:

"..but where the Courts find that the words appear to have been accidentally omitted, or if adopting a construction deprives certain existing words of all meaning, it is permissible to supply additional words but should not easily read words which have not been expressly enacted.

The Court should construct the provisions harmoniously having regard to the context and the object of the statute in which a provision appears, to make it meaningful. An attempt must always be made so to reconcile the provisions, so as to advance the remedy intended by the statute".

230. In applying the Indian Judges arguments to the BFSA matter, the Tribunal recognises that unless there are any UK and Bermuda case law that inhibits this Tribunal is making an award that does not conflict with **section 44H** which reads:

"Where any matter referred to the Tribunal involves questions as to wages, or as to hours of work or otherwise as to the terms or conditions of or affecting employment which are regulated by any Act under the Employment and Labour Code or by any other Act, the Tribunal shall not make any award which is inconsistent with this Act,"

231. That the Tribunal does not accept the Respondent's Counsel's arguments that the Tribunal cannot decide the merits of the BFSA claims in this dispute.

232. In reviewing the Respondent's Counsel's arguments on the said **section 44H**, the Tribunal is of the opinion that it can make an award that is fair and just in the circumstances and is not inconsistent with the **2021 Act**.

THE TRIBUNAL'S DELIBERATIONS AND AWARD

233. The Tribunal recommends to the Bermuda Government as the Employer and the Minister of National Security, to engage the service of Sir Ken Knight, CBE, OFSM DL to review the BFRS's Operational, Structural and EMS services with emphasis on the staffing full time employees ("FTEs") of the CWS. The request for Sir Knight (or such person comparable to Sir Knight's caliber and with his expertise, in the event Sir Knight is not or no longer available) should be as soon as it is practicable to arrange for his visit to BFRS Stations and Headquarters.

234. The Tribunal recognizes that if there are any Bermuda Government Budgetary and Financial implications to implementing Sir Knight's future recommendations, that the Ministry may take those recommendations under advisement. The Tribunal is aware and respectful of the Minister's responsibilities pursuant to *BFRS Act*.

235. The Tribunal recommends that all the parties, the Employer (The Bermuda Government), the PS, the ACFO, the BHB (Dr. Okereke) and the Executive Officers of the BFSA, convene a JCC meeting to explore and agree on the impact of amending the 2016 Suspension Ambulance Option MOU within sixty (60) days of the Tribunal's Recommendation. The purpose of the JCC is to arrive at a new Suspension Ambulance Option MOU.

236. The Tribunal encourages the JCC parties to use the service of a facilitator to assist in the creation of a new MOU Suspension Ambulance Option and that the consultation process encourages mutual trust and respect for each party's positions and that the parties remain cordial to the views of all the stakeholders.

237. The Tribunal recommends that the BFRS and the BFSA continue with their plans to form a Safety and Health Workplace Committee pursuant to the **OSHA 1982** and its accompanying **OSHA Regulations**.

238. The Tribunal recommends both the Employer and the BFSA to utilize the Services of the Safety and Health Officer to ensure the spirit of the **OSHA1982** and its **OSHA Regulations** are accomplished for the CWS.

239. The Tribunal strongly urges the Employer (the Bermuda Government) and BFSA to formalize the Workplace Safety and Health Committee within sixty (60) days of the Tribunal's Recommendation.

240. That the ACFO meet with the Executive Officers of the BFSA to review the **Bermuda Fire and Rescue General Order ("FSGOs")** so that the **FSGOs** reflect current policies of the Fire Service Operation and is similar in scope to the Bermuda Public Service Code of Conduct and Conditions of Employment.

241. Lastly, the Tribunal encourages the Employer (the Bermuda Government) and the BFSA to be cognizant of the Psychological Contract criteria and the characteristics that impact an efficient and harmonious CWS. The Tribunal opines that the public is dependent on BFRS and BHB ambulance service being dispatched as quickly as possible to attend to citizens' emergency safety and health incidents.

THE AWARD

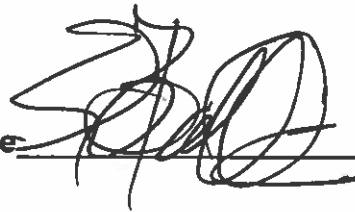
242. The Tribunal agrees that the BFSA dispute is meritorious and proven and that the Tribunal's recommendations are to implement for an efficient CWS.

243. There will be no order for costs.

The parties to this Hearing were reminded and acknowledged that the Determination and Order of this Tribunal are binding. It was also made clear that, in accordance with Section 44J and section 44I of the Employment Act 2000, a party aggrieved by a Determination or Order of the Tribunal may appeal to the Supreme Court *on a point of law*.

Edward Ball Jr, JP, LLB, FCMI
Chairman

Signature

Handwritten signature of Edward Ball Jr in black ink, written over a horizontal line.


Betty Christopher, JP
Deputy Chair

Signature

Handwritten signature of Betty Christopher in black ink, written over a horizontal line.

Charlene Scott, FCIArb

Signature

Handwritten signature of Charlene Scott in black ink, written over a horizontal line.

Date: May 2, 2023