



FOCUS

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WHAT'S INSIDE

- > Testamentary Freedom and Wills in the Cayman Islands
- > Arbitration and Trust Dispute Resolution in The Bahamas
- > H&J in the News

The Bahamas: Employer Obligations During COVID-19

Oscar N. Johnson, Jr., Keith O. Major, Jr., David J. Hanna



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On Wednesday, 11th March 2020, the World Health Organization (“WHO”) declared the novel coronavirus (“COVID-19”) a pandemic. In making its determination to declare COVID-19 a pandemic, the WHO has cited the wide spread of COVID-19 (more than 10-fold in worldwide cases outside China) and the tripling in the number of COVID-19 affected countries in recent times. Although this is the first pandemic caused by a coronavirus, the WHO highlights that this is also the first pandemic that can be controlled and one that requires a whole-of-society

approach to prevent infections, save lives and minimize impact. Key among measures being promoted to assist the prevention of the further spread of COVID-19, is the adherence to social distancing. Inevitably, the means by which employers may wish to implement social distancing in the workplace and reduce exposure to COVID-19 (e.g. reducing hours, revocation/imposition of approved vacation, laying-off personnel, closing stores/businesses outright, etc.) have legal implications under Bahamian law. This bulletin is geared towards

addressing the same and providing guidance to employers as to their obligations during this current global pandemic.

Duties of Employers

Employers under the provisions of the Health and Safety at Work Act, 2002 (“HSWA”) are under a duty to ensure, so far as is reasonably practicable, the health, safety and welfare of its employees in the workplace. This duty extends but is not limited to the provision of systems of work and maintenance of places of work that are safe and without risks to health so far as is reasonably practicable. Additionally, employers are required to provide (so far as is reasonably practicable), information, instruction, training and supervision as is necessary to ensure the health and safety of their employees at work.

The HSWA also imposes a duty on employers to conduct their enterprises in such a way so as to ensure that persons not in their employment who may be affected (including but not limited to patrons) are not exposed to risks to their health or safety, as far as is reasonably practicable. Employers are also mandated to establish a health and safety committee at every place of employment where twenty or more persons are employed. While the implementation of measures by employers to ensure adherence to their duties under the HSWA is likely to result in additional costs, employers are prevented from passing on such costs by way of levying on or permitting charges to their employees.

Duties of Employees

Employees are also obligated under the HSWA to:

- take reasonable care for the health and safety of not only themselves but also other persons who may be affected by their acts or omissions at work (including but not limited to co-workers and patrons of their place of employment);
- and to cooperate with their employer so far as necessary to allow the employer to perform its obligations under the HSWA.

Duties of All Persons

All persons are prohibited from interfering with or misusing (whether intentionally or recklessly) anything which is provided or implemented pursuant to the HSWA in the interests of health, safety and welfare at work. Any person who is found to have contravened any provision of the HSWA is guilty of an offence and shall be liable on summary conviction to a fine of five thousand dollars (\$5,000.00).

The steps that employers may wish to implement, in adherence to their duties owed under the HSWA, are addressed specifically below.

Laying-off of Personnel & Reducing Hours

Employers may wish to limit or cease their hours of operation to the public to reduce potential COVID-19 exposure of their employees from the public and vice versa. This may, by extension, have the effect of leading to a reduction or cessation of employee hours. The Employment Act (“EA”) provides that unless otherwise agreed by contract, an employer shall not lay-off or place an employee on short-time without consulting with the employee, his trade union (if any) and the Minister responsible for Labour in writing of the applicable reasons and

surrounding facts. Such consultation is to take place at least one week in advance when less than twenty employees are involved and two weeks in advance when twenty or more employees will be affected. Where an employee is temporarily laid off by an employer, such period is not to be treated as interrupting the employee’s continuous employment.

Revocation of approved vacation

The EA entitles employees who have been employed for one year or more to paid vacation leave.

The unilateral revocation of an employee’s scheduled paid vacation leave or compulsory use of an employee’s paid vacation leave entitlement by an employer is a novel issue in the context of determination by Courts in The Bahamas. However, the issue of unilateral variation generally is well settled in this jurisdiction. In the Bahamian case of *Morris (in a representative capacity) v. Paradise Enterprises Limited* – [2018] 1 BHS J. No. 10, Winder, J at paragraphs 16-17 thereof, cites with approval the speech of Lord Denning in a decided case, which held that in order for an employer to be found liable for unilateral variation, the employer’s conduct must represent a significant breach going to the root of the contract or which demonstrates that the employer no longer intends to be bound by an essential term or terms of the contract. In addition to the breach being significant, for an employee to be successful in a claim for unilateral variation, he must not have affirmed / condoned the variation and instead leave his employment shortly after the unilateral variation complained of.

While the revocation or mandatory use of an employee’s vacation time if

not agreed would in effect be unilateral, an employer may most likely avoid liability in the context of the current circumstances in respect of which such action is being imposed. This is so, as the cancellation of scheduled vacation and imposition of paid vacation may be argued as not being in breach of an essential term of a contract of employment nor demonstrative of an unwillingness on the part of an employer, to no longer be bound, given the circumstances in which such actions are being implemented.

Other points to consider

Under the EA, employees who have

been employed for at least six months are entitled to one week of paid sick leave and are required to produce to their employer a medical certificate for and on their second consecutive day of sickness. However, to avoid abuse of this procedure, employers are allowed to require such an employee to be examined by an independent physician and may refuse such leave if the employee is deemed fit for work. Conversely, employees are protected from termination by employers during legitimate sick leave.

It must be borne in mind that the EA

serves as a minimum standards Act, which sets out the minimum obligations owed by employers to their employees. As such, to determine the specific rights of an individual employee and conversely the contractual obligations of a particular employer, regard must always be had to the specific terms and conditions of an employee's employment (which may be more favourable than those imposed by Bahamian statute law.) 🇧🇸



Oscar N. Johnson, Jr. is chair of the Litigation practice group and practises a full range of corporate and commercial law, specialising in commercial and civil litigation, admiralty law, insurance, and employment law. ojohnson@higgsjohnson.com



Keith Major, Jr. is an associate in the Firm's Litigation Practice Group where his practice includes matters relating to aviation, asset recovery and general civil litigation. kmajor@higgsjohnson.com



David J. Hanna is an associate in the firm's Litigation and Commercial Transactions Practice Groups. dhanna@higgsjohnson.com

STEP Federation Conference



Private client and wealth management partner, Paul Davis, recently shared his insights on trustee regulation and economic substance at the Switzerland and Liechtenstein STEP Federation conference.

Arbitration Panel Discussion



Litigation attorney, Theominique Nottage, in her role as Young ICCA Co-Chair, was one of the panelists for the session 'Expanding Arbitration in Your Practice: An Open Roundtable Discussion.' She joined The Hon. Barry Leon and other leading proponents of international arbitration in the Caribbean region for this discussion.

Testamentary Freedom and Wills in the Cayman Islands

Wendy Stenning

The Cayman Islands Wills Law (2020 Revision) (the “Law”) allows persons to freely dispose of their assets on their death by a Will executed in accordance with the Law. This principle of testamentary freedom is discussed further below in addition to possible benefits to executing a Will.

Some jurisdictions have forced heirship or community property regimes or other laws in place that dictate in whole or in part to whom a person’s property is to be distributed on their death. The Cayman Islands, however, follows the principle of testamentary freedom and allows individuals to fully provide through their Will who they want (or don’t want) to inherit their estate where they are domiciled in the Cayman Islands or hold immovable property (such as land) on the Islands. Testators can provide for distributions to family members, friends, charities or other entities under a Will as they see fit.

Other potential benefits to executing a Will are:

- **A testator can decide who will be the guardian of his or her minor children.** Without a Will, the Court will decide who will be guardian of one’s minor children assuming that there is no one with parental responsibility remaining on the testator’s death. With a Will, a person can choose exactly who will be guardian of his or her children.

- **A testator can minimize the process needed to administer ones estate.** An application for probate is generally more straightforward and less time consuming than an application for letters of administration (the process where a person dies without a Will). There is generally no need for the Court to go through the process of determining who should be appointed as executor or who the beneficiaries of one’s estate will be, as that would all be provided in the Will, thus allowing a simpler and faster application process.
- **A testator can decide who will be in charge of the administration of his or her estate.** Executors play the most important part in administering an estate, including paying the testator’s outstanding liabilities and making the distributions directed by the testator. Having a Will allows the testator freedom to appoint the person or persons that are best trusted to administer his or her estate.
- **Expressing one’s wishes.** A testator may wish to express through a Will any specific burial, cremation or other post death wishes that they may have.

Where any of the above features are attractive to a person with property in the Cayman Islands, it is advisable for them to draw up a Will with a

Cayman Islands attorney-at-law. Below are some of the key points for a testator to consider when contemplating drafting his or her Will:-

- **Who will the executor be and will there be any substitute executor?** The testator should have a discussion with a proposed executor to confirm his or her willingness to be so appointed. The testator should also discuss what the testator’s wishes would be and whether the executor has any questions in relation to them. The testator should consider identifying a substitute executor in the event that the testator’s proposed executor is unable or unwilling to act.
- **Who will the guardian of minor children be?** Assuming guardianship of a child is a major responsibility. To ensure that a proposed guardian is best suited to the role, the testator should have a discussion with them to confirm their willingness to be appointed as guardian and any concerns relating to the appointment.
- **What assets does the person have? How are they held? Where are they located?** Testators need not only consider what assets they hold but how they are held. This is a point sometimes overlooked by would-be testators. For example,

property held by the testator may have a charge over it limiting the testator's ability to dispose of it. Alternatively, the property may be held jointly so that it automatically becomes the property of the surviving joint owner by operation of law. Other complexities can arise where the testator is not domiciled in the Cayman Islands or where property is not situated in the Cayman Islands. Testators are best advised to consider such matters with their attorney to ensure the smoothest possible handling of their estate.


- **Who are the Beneficiaries?** One needs to consider who the beneficiaries will be and whether there will be any specific gifts to particular persons. One also needs to consider how the residuary estate is to be held and

distributed (e.g. in equal shares, with any age contingency). If property is subject to a liability (e.g. a mortgage) and is to be given as a specific legacy, it should be confirmed how that liability will be settled (e.g. from that asset or from other assets within the estate).

Once the testator executes a Will, he or she will need to decide where the Will is to be held. The executor and any suitable beneficiary should know where the Will is located so it can easily be retrieved on the testator's death. The testator should also regularly update a list of his or her assets and give the executor a copy. When the testator's assets change, he or she should consider whether an update to the Will is necessary.

Similarly, if there is a change in circumstances of the testator or of

any of the beneficiaries (e.g. a marriage, divorce, separation, death of a beneficiary, birth of a child), a new Will or codicil (being an instrument that adds to or amends ones Will) should be considered. Where a testator marries any Will made prior to the marriage is generally automatically revoked under the Law.

Having a Will allows a person the best opportunity to direct the management and the distribution of his or her assets on death. A Will also generally aids in a smoother and timelier administration of an estate. The Wills Law requires certain formalities be followed to validly execute a Cayman Islands Will. One should consult with a Cayman Islands attorney-at-law to ensure that their Cayman Islands Will is validly executed and meets their objectives. 



Wendy Stenning is a Senior Associate in the firm's Private Client & Wealth Management practice group in the Cayman Islands and provides Will drafting for local and international clients and advises on Probate and Estate administration. wstenning@higgsjohnson.com

Sir Geoffrey Johnstone Scholarship



Higgs & Johnson expanded its corporate social responsibility programme with the establishment of the Higgs & Johnson Charitable Trust ('H&J Trust'). A key award of this programme is the Sir Geoffrey Johnstone Memorial Scholarship (the 'Scholarship'), tenable at the Eugene Dupuch Law School ('EDLS') and named for the firm's late Senior Partner who headed the firm from 1968 until 1998.

Miss Rhodreka Strachan (*center*), a first year student of EDLS, has been awarded the renewable Scholarship (\$10,000 over two years) which commenced in the 2019/2020 school year. Strachan was selected after displaying remarkable commitment

in her academic pursuits, extra-curricular participation and community service. Strachan says she was 'honored to be the first recipient' of the Scholarship and was sincerely grateful for the 'lightening of her financial burden'.

EDLS Principal, Mrs. Tonya Bastian-Galanis (*second from left*) in expressing her appreciation said, "On behalf of Ms. Strachan and all future awardees of the Scholarship, we thank the Trustees of the H&J Trust for your generosity and support."

"We wish to congratulate Miss Strachan on being our very first award recipient", said Dr. Earl A. Cash (*second from right*), Partner and a trustee of the H&J Trust. "We applaud her dedication to becoming a practicing attorney and wish her continued success in her educational pursuits."

Arbitration and Trust Dispute Resolution in The Bahamas

Theominique Nottage

Among The Bahamas' arsenal of financial products and services is the Bahamian trust which serves as one of the more favoured tools in wealth management attracting individuals and corporate entities alike to The Bahamas.

The Bahamian trust benefits from The Bahamas' strong jurisprudential foundation rooted in the English common law coupled with innovative statutory reform like the Trustee Amendment Act, 2011 (the "Act"). Through the Act, The Bahamas introduced the possibility of resolving trust disputes through arbitration. Arbitration is an alternative form of dispute resolution which has become more popular in recent years as a means to avoid extended and costly litigation proceedings due to the level of party autonomy, its confidential character and speedy nature.

Section 91A of the Act enables any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument thus providing for the incorporation of arbitral clauses in trust instruments. While the provision for the resolution of trust disputes by arbitration was an exciting development in 2011, in more recent years, that excitement has increased two-fold by the application of the law in the decision of the Bahamian Court in *Volpi v Delanson Services Limited* and another [2018] 1 BHS J. No. 195.

In October 2006 Gabriele Volpi ("GV") settled the Winter and Summer Trust appointing Delanson Services Limited ("DSL") as trustee for both of the trusts.

Several years later, in March 2012 GV settled the Spring Trust in similar terms of the Winter and Summer Trust also with DSL as trustee. The objects of the discretionary powers in the Winter, Summer and Spring Trusts (the "Trusts") included GV, his children and descendants.


In October 2016, DSL made a distribution of all (or the majority) of the assets of the Trusts to GV. DSL then executed a Termination of Trusts in January 2017. In response, GV's son, Matteo Volpi ("MV") commenced litigation proceedings, alleging that DSL was in breach of the Trusts as it had improperly distributed the entirety of the Trusts to GV. MV also contended that GV was liable to account for the assets received from the distribution. The Court had to determine, inter alia, whether the matter ought to proceed to arbitration and therefore the action should be stayed.

Ultimately, the Court determined that the trust instruments contained valid arbitral clauses. The clauses required that any dispute [other than a dispute relative to the validity of the Trusts] (i) which related to the establishment or effects of the Trusts or (ii) between the Settlor or Trustee or (iii) between Protectors or the parties to the Trust (which included the beneficiaries), should be determined by arbitration. Consequently, the Court was constrained to order the action stayed and direct the matter to proceed to arbitration.

The Volpi decision creates an opportunity for The Bahamas to develop a niche area in the field of trusts arbitration as it already seeks to

develop itself as a competitive international arbitration centre by the steps it has taken to incorporate the UNCITRAL Model Law on International Commercial Arbitration. Moreover, according to the respected arbitral institution, the International Chamber of Commerce (the "ICC"), in the last decade there has been an increased demand to resolve trust disputes through arbitration. This demand has led the ICC to issue an updated ICC Arbitration Clause for Trust Disputes and Explanatory Note which is to act as guidance to trust practitioners when including arbitral clauses in trust instruments. Interestingly enough, the arbitral clause which was at the center of the Volpi decision is consistent with the standard created by the ICC. In effect The Bahamas is ahead of the pack in terms of providing a viable option for the resolution of trusts disputes.

As one of the few jurisdictions which has legislation to support the resolution of trust disputes through arbitration and now with the precedent created by virtue of the Volpi decision, The Bahamas' legitimacy as a well-regulated international financial centre ("IFC") is reinforced in that it demonstrates that Bahamian Courts will support the proper construction, interpretation and application of trust instruments in accordance with The Bahamas' statutory regime.

It also reflects The Bahamas' determination to protect and strengthen its long standing and established reputation as a leading IFC seeking to add value for individuals and corporate entities alike. 



Theominique Nottage is a member of the firm's Litigation practice group. She has experience in commercial litigation, civil litigation and trusts litigation. Ms. Nottage has specialty training in international arbitration and is also Co-Chair of Young ICCA, a world-wide arbitration and skills network for young practitioners.
tnottage@higgsjohnson.com

First Female Co-Managing Partner Appointed



Oscar N. Johnson, Jr.
Global Managing
Director



Surinder Deal
Co-Managing
Partner

Higgs & Johnson is pleased to announce the appointment of Ms. Surinder Deal as the new Co-Managing Partner of the firm effective 1 January 2020. She will serve alongside current Managing Partner, Oscar N. Johnson, Jr. who has led the firm since 2012. This appointment reflects the firm's response to its continued growth and preparation for further expansion of Higgs & Johnson. Surinder, the first woman to serve in this capacity in the firm's 70-year history, is a seasoned corporate and commercial attorney and former chair of the firm's Commercial Transactions practice group.

As Co-Managing Partner, Surinder, together with Oscar N. Johnson, Jr., will oversee the day-to-day management of Higgs & Johnson, including all aspects of the firm's operations. They will work closely with the firm's partnership on strategic initiatives for the firm. Boasting of female leaders for half of its practice groups and with the appointment of its Cayman Country Managing Partner, Gina M. Berry in 2014, Higgs & Johnson continues to make strides in advancing more women to leadership positions

Global Managing Director, Oscar N. Johnson, Jr. noted, "It is with great pleasure I welcome Surinder to the leadership ranks of the firm. Her longstanding commitment to Higgs & Johnson is to be commended and I am confident in her ability. She is an astute attorney and the firm will be stronger as we share the demands and responsibility of leading the firm."

For more than 32 years, Surinder has represented clients ranging from small privately held companies to multinational companies in diverse industries such as banking and finance, manufacturing, real property development, hospitality, and gaming. She is an experienced practitioner in the areas of Corporate and Commercial Law, Banking and Finance Law and Real Estate Law.

For the last decade, Surinder has been recognized as a 'highly regarded' attorney by leading legal directories, IFLR1000 and Chambers Global. She was named 'Lawyer of the Year' by TerraLex, a global network of independent law firms, where she is a former Director Emeritus, having spent ten years as a Director and nine years as Regional Co-Chair of the Central America and Caribbean regions. Surinder is called to the Bars of England & Wales, Malaysia and The Bahamas.

Commenting on her appointment, Surinder Deal said, "I am honoured to join the firm's leadership and am looking forward to working closely with Oscar whose management and leadership has ensured the firm's progress and success. Higgs & Johnson is indeed a trailblazer in the jurisdiction and this appointment is representative of the firm being at the forefront of change in the legal arena."

Higgs & Johnson provides clients with innovative, quality and pro-active services and continues to be recognized globally for excellence and integrity. The firm remains committed to being a world-class, local and offshore provider of legal and professional services. In this regard, the role of Co-Managing Partner will be an evolving one, ensuring that different perspectives and skill sets are utilized in the leadership position of the firm in the years to come.

2020 Attorney Rankings



Philip C. Dunkley QC
Ranked by Chambers Global & Legal 500 Caribbean



Oscar N. Johnson, Jr.
Ranked by Chambers Global & Legal 500 Caribbean



Surinder Deal
Ranked by IFLR1000, Chambers Global & Legal 500 Caribbean



Gina M. Berry
Ranked by Chambers Global & Legal 500 Caribbean



Dr. Earl A. Cash
Chambers Global



Sterling H. Cooke
Ranked by Legal 500 Caribbean



Vivienne M. Gouthro
Ranked by IFLR1000 & Legal 500 Caribbean



Zarina M. Fitzgerald
Ranked by Legal 500 Caribbean



Stephen J. Melvin
Ranked by Chambers Global & Legal 500 Caribbean



Tara Archer-Glasgow
Ranked by Chambers Global & Legal 500 Caribbean



N. Leroy Smith
Ranked by Legal 500 Caribbean



Christel Sands-Feaste
Ranked by IFLR1000, Chambers Global & Legal 500 Caribbean



Tara Cooper Burnside
Ranked by Chambers Global & Legal 500 Caribbean



Portia J. Nicholson
Ranked by Legal 500 Caribbean



John Harris
Ranked by Chambers Global, Legal 500 Caribbean & WWL



Karen S. Brown
Ranked by Legal 500 Caribbean



Audley D. Hanna, Jr.
Ranked by Legal 500 Caribbean



Alexandra T. Hall
Ranked by IFLR1000



Philip S. Boni
Ranked by Legal 500 Caribbean

Higgs & Johnson has received the top tier ranking by leading legal directories IFLR1000, Chambers Global and Legal 500 Caribbean in the respective 2020 editions.

The guide to the world's leading financial law firms, **IFLR1000** noted that The Bahamas team has a *'very practical legal knowledge combined with an astute legal view of the local environment'* with sources stating that *'the firm's work is of the highest quality.'* In the Cayman Islands the firm was lauded for having a *'stellar team with an understanding of global law applied to Cayman bar none.'*

According to **Legal 500 Caribbean**, in The Bahamas the firm is said to have, *'a strong presence in the market'*, with clients praising attorneys for *'always meeting expectations and providing great customer service'*. In the Cayman Islands, real estate clients hailed the team for *'meeting impossible deadlines without comprising accuracy'* and litigation clients noted that the team *'quickly assesses situations and mitigates clients' risks while aggressively working towards swift resolutions.'*

In **Chambers Global**, The Bahamas was recognized as one of the most prominent firms in the market and was praised for maintaining a *'culture of collaboration and excellence.'* Sources stated that they have been *'very well served by a responsive and smart team' with commentators noting that the firm has 'experts in many disciplines.'* In the Cayman Islands, the firm was ranked in the area of Real Estate with clients expressing their appreciation for the *'first-class turnaround time'*. Lauded as being *'extremely dependable'* the real estate team was also highlighted for *'always protecting their clients and paying stellar attention to fine detail.'*