IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2014/006
GY Civil Appeal No 106 of 2010

BETWEEN

GUYANA SUGAR CORPORATION INC. **APPELLANT**

AND

CHANDRADAT DHANESSAR **RESPONDENT**

Before the Honourables **Mr Justice Nelson**
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Kamal Ramkarran for the Appellant

Mr Khemraj Ramjattan for the Respondent

JUDGMENT
of
The Honourable Justice Nelson
Delivered by
The Honourable Mr Justice Nelson
on the 14th day of April 2015
and
JUDGMENT
of
The Honourable Mr Justice Wit
and
JUDGMENT
of
The Honourable Mr Justice Hayton

JUDGMENT OF THE HONOURABLE JUSTICE NELSON

Introduction

[1] This appeal involves a challenge to the decision of the Court of Appeal of Guyana (Cummings-Edwards, Sukul and Persaud JJA) dated December 13, 2013 wherein it was held that the Appellant, the Guyana Sugar Corporation, was not entitled to dismiss the Respondent, Mr Dhanessar, summarily under section 10 of the Termination of Employment and Severance Pay Act 1997 as amended ("the Act"). The Court of Appeal agreed with the decision of the learned trial judge that there were grounds to terminate the Respondent's employment for good or sufficient cause. In addition to upholding the trial judge's award of one month's wages in lieu of notice, the Court of Appeal further ordered the Appellant to pay the Respondent a severance allowance.

[2] In my view, the trial judge arrived at the right decision by the wrong route, and the Court of Appeal awarded severance benefits relying on the unamended original 1997 Act. This Court has therefore allowed the appeal in part, setting aside the award of severance benefits and restoring the decision of the learned trial judge.

Background

[3] The Appellant employed the Respondent as a cane harvester, a seasonal occupation, from 1980 until he was dismissed on November 2, 2006. The Respondent's dismissal was predicated on an unfortunate incident, the facts of which are not in dispute. On October 30, 2006 the Respondent turned up at the Appellant's cane fields hoping to be allocated work. When none was forthcoming, he grabbed hold of the cloak of the foreman, Mr Karim and punched him twice on the shoulders. Later when Mr Karim sat to have something to eat, the Respondent again approached him with an upraised cutlass uttering threats and had to be restrained by fellow workers. The Appellant dismissed the Respondent without notice or payment of severance benefits two days later.

[4] On December 16, 2008 the Respondent challenged his dismissal in the High Court, claiming damages for breach of contract or, in the alternative, damages for unfair

and/or wrongful dismissal. The learned trial judge, Insanally J., held that the Respondent's conduct did not fall within the terms of section 10 of the Act which deals with summary dismissal. The learned judge, however, held that there was "good or sufficient cause" within the meaning of section 7 of the Act for terminating the Respondent's contract. Since no notice of termination had been given, the Respondent was entitled to wages in lieu of notice for a minimum period of one month as prescribed by section 15 of the Act. The judge awarded $15,000.00 in this regard, but costs were waived by consent.

[5] The Respondent appealed against the quantum of damages awarded, and the Appellant cross-appealed the finding that there were insufficient grounds for summary dismissal within section 10 of the Act. On appeal, the Court of Appeal held it was a question of fact and degree for the trial judge whether the Respondent's misconduct was serious enough to warrant summary dismissal or fell into a lower category of misconduct which justified dismissal for good or sufficient cause. It could find no basis for interfering with the trial judge's finding of fact that the Respondent's conduct did not amount to serious misconduct but rather was sufficient to justify dismissal for good or sufficient cause. The Court of Appeal, however, varied the trial judge's decision by holding that since the dismissal was for good or sufficient cause, the Respondent was entitled to a severance allowance owing to the conjoint effect of sections 7 and 21 of the Act.

The Issues

[6] The Appellant has appealed to this Court challenging the findings that it could not dismiss the Respondent under section 10 of the Act, that it must pay the Respondent one month's salary in lieu of notice and that it must pay the Respondent a severance allowance. Thus framed, the main issues in the appeal are whether the Respondent's dismissal came within the narrow confines imposed by section 10 of the Act and whether the Respondent is entitled to damages and/or severance benefits for dismissal for good or sufficient cause. Before embarking on an analysis of these two points, some observations about the legislation at the heart of this appeal bear note.

The Legislative Background

[7] The legislative background relevant to this appeal changed between 1997 when the Act was originally passed and 2006 when the Respondent was dismissed. In 1997 the Act was introduced in order to regulate the termination of the employment of workers by severely limiting the employer's right to dismiss workers summarily, by introducing in favour of workers the concept of unfair dismissal and by giving employees whose employment was terminated by redundancy or by notice certain statutory terminal benefits. In its original 1997 formulation, the payment of statutory terminal benefits could also be triggered by the employee's resignation or retirement. The protection thus afforded employees in 1997 was not perfect.

[8] Deputy Dean Cumberbatch[1] (as he then was) in a commentary on the original 1997 Act correctly made the general point that the 1997 Act does not totally abrogate the common law, as demonstrated in [28] below.

[9] Section 2 of the Termination of Employment and Severance Pay (Amendment) Act 1999 further reduced the 1997 level of protection by removing the employee's right unilaterally to terminate his or her employment and claim severance benefits. As will be seen, the 1999 Amendment also empowered the employer to terminate an employment without payment of severance benefits on the ground of good or sufficient cause and without having to navigate the narrow straits of summary dismissal.

Summary Dismissal

[10] Section 10(1) of the Act restricts the scope of summary dismissal to cases where employees are guilty of serious misconduct. Under section 10(2) of the Act serious misconduct is defined as follows:

> "The serious misconduct referred to in subsection (1) is restricted to conduct which is directly related to the employment relationship and has a detrimental effect on the employer's business."

[1] Jeff Cumberbatch: The Termination of Employment Statutory Reform in Guyana (1999) 1 Guy. L.R. 79-107

The learned judge found as a fact that the Respondent's actions on the day in question, while involving "an act of some measure of violence" did "not affect the employment relationship" and "did not have a detrimental effect on the employer's business." Thus the Appellant could not justify the summary dismissal of the Respondent.

[11] Counsel for the Appellant accepted that where a judge's findings of fact are questioned on appeal there is "universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility and bearing of a witness."[2] Counsel further agreed that this principle applied moreso when the two courts below have concurred in the finding.[3] Exceptional circumstances, he contended, had to exist for the second appellate court to revisit findings of fact. However, counsel for the Appellant submitted that where the trial judge's primary findings of fact were not called into question but only his or her ultimate conclusion (i.e. that summary dismissal was not justifiable) the rule is displaced. The learned judge, he argued, had failed to distinguish between primary facts and the inferences therefrom.[4] Therefore the trial judge's decision could be set aside if it was based on a finding of fact or inference from facts which was perverse, irrational, or which there was no evidence to support; or which was made by reference to irrelevant factors without regard to relevant factors.[5]

[12] Counsel emphasised that the learned trial judge believed the evidence of Mr Karim that the Respondent pulled him down, punched him twice and said he would have killed him if he had not been restrained by fellow employees; findings of fact which remain uncontested. However counsel submitted that the determination as to whether such misconduct was serious enough to justify summary dismissal was based on inferences to be drawn from the primary facts. Furthermore, counsel argued, the learned judge's ultimate conclusion as to whether the misconduct was serious enough to justify summary dismissal had to be reasonable and in keeping

[2] *Benmax v Austin Motor Company* [1955] AC 370, 374; *Meenavali v Georgia Matute* [2014] CCJ 8 (AJ).
[3] *Meenavali v Georgia Matute* [2014] CCJ 8 (AJ) at [4] and *Ramlagan v Narine Singh* [2014] CCJ 5 (AJ) at [8].
[4] *Benmax v Austin Motor Company* [1955] AC 370 and *Continental Biscuit Company Ltd v Albert Joseph Shanks* (1977) 24 WIR 267 (CA).
[5] *Runa Begum v Tower Hamlets London Borough Council* [2003] 1 All ER 731, 758.

with what is acceptable conduct between employer and employee. While appellate courts are slow to reverse findings of fact, they are free to question inferences from those facts if they are perverse or irrational. Counsel for the Appellant contended that the decision of the learned judge, as upheld by the Court of Appeal, that the execrable conduct of the Respondent does not warrant summary dismissal is contrary to reason.

[13] The Appellant urged that it is open to this Court to draw its own inferences as to whether the Respondent's misconduct was so serious as to warrant his summary dismissal. It invited this Court to hold that the requirements of section 10(2) have been met based on five distinct grounds. First, the Appellant contended that the Respondent's conduct was directly related to the employment relationship since it occurred during working hours. Secondly, the impugned conduct was likely to have a detrimental effect on the employer's business because other employees might fear a recurrence of such events. Thirdly, work stoppages could ensue from such threatening behaviour. Fourthly, the employer might face potential tortious liability for creating an unsafe system of work if such conduct was permitted. Fifthly, Guyanese case law demonstrated that less outrageous conduct of employees had been treated as serious misconduct justifying summary dismissal (in particular the cases of *Allan Bristol v Guyana Elections Commission and others*,[6] *Vernon Griffith v National Bank of Industry and Commerce Ltd*,[7] *Franco Fernando Boodhoo v Guyana Sugar Corporation*,[8] and *Mohamed Fazloor Yasin v Guyana Lottery Company*.[9])

[14] In response, counsel for the Respondent supported the principle that courts of appeal are reluctant to overturn findings of fact in the absence of special circumstances, citing *Prescod v Reece*[10] in support. He also relied on the reluctance of final courts to disturb concurrent findings of fact made by courts below. The Respondent submitted that the central issue was that to constitute summary

[6] Demerara Action No 447-W of 2002, unreported decision of Roy J dated September 19, 2008.
[7] Demerara Action No 806-W of 2002, unreported decision of Chang CJ (Ag) dated October 29, 2008.
[8] Demerara Action No 476-W of 2005, unreported decision of Chang CJ (Ag) delivered November 12, 2010.
[9] Demerara Action No 111-W of 2006, unreported decision of George J dated September 30, 2009
[10] (1965) LRBG 387.

dismissal, apart from proof of or a finding of serious misconduct, there must be proof of or a finding of detriment to the employer's business and that the serious misconduct related to the employment relationship. There was no proof of either ingredient of statutory misconduct owing to the failure of the Appellant to lead any evidence to satisfy the requirements of section 10(2) of the Act.

[15] The approach of appellate courts to findings of fact and the inferences arising therefrom are well-settled and need not be rehearsed in great detail, save to observe that this Court has pronounced on these principles in a more nuanced fashion in *Meenavali v Matute.*[11] A perusal of the transcript of the proceedings before the trial judge shows that no evidence was led by the Appellant in respect of the two ingredients necessary to make out their case of justifiable summary dismissal for serious misconduct under section 10(2) of the Act. It is against this background that one must interpret the learned judge's terse findings of fact, as set out in the following portion of her ruling:

> "I do not find that the Plaintiff's conduct falls under serious misconduct as defined herein. It is not, in my mind directly related to the employment relationship and did not have a detrimental effect on the employer's business. The employer's business did not suffer in any way nor did the employment relationship."

[16] In effect, the learned trial judge held that there was no evidence to support a finding that the two ingredients of justifiable summary dismissal had been proved. In my view, the Respondent rightly submitted that no evidence was led of the direct connection to the employment relationship or the detriment to the Appellant's business arising from the act of assault.

[17] In response to the Appellant's submissions on inferences, the Respondent correctly submitted that the elements of justifiable summary dismissal for serious misconduct had to be proved by evidence. The Appellant sought to fill the gap in the evidence it should have led by resorting to inferences from the fact of the assault. However, the purpose of section 10 was to whittle down the instances where an employer

[11] [2014] CCJ 8 (AJ) at [4] and [5].

might justifiably summarily dismiss an employee. Thus an employer should provide evidence as to how an incident directly related to the employment relationship, taking account, for example, of the practice in the industry and whether the incident was an isolated one or not. Even if the instant case could be considered as a case where the execrable behaviour of an employee could in itself, on a *res ipsa loquitur* basis, evidence a direct relation to the employment relationship, evidence must still be given to prove the detrimental economic or industrial relations effect of the misconduct on the business. The absence of any such evidence means that there was no serious misconduct to justify summary dismissal.

Damages and/or severance benefits re dismissal for good or sufficient cause

[18] Counsel for the Appellant submitted that the Court of Appeal had based its award of severance benefits for dismissal "for good or sufficient cause" on the unamended Act of 1997. It was further submitted that section 7(c)(i) and (ii), set out below at [21] were to be read disjunctively, with the result that section 7(c)(i), unlike section 7(c)(ii), permitted dismissal without notice. Hence, the award of wages in lieu of notice was erroneous.

[19] In answer to these submissions, the Respondent contended that even if his dismissal was justifiable only under section 7(c)(i) of the Act ("for good or sufficient cause"), he was nonetheless entitled to salary in lieu of notice. The Respondent made heavy weather of the fact that the Appellant's argument that severance payments cannot be made where an employee is dismissed under section 7(c)(i) was being raised for the first time before this Court; a course of action which is generally discouraged by appellate courts. He submitted that in the Court of Appeal there was no argument on section 7 of the Act. Furthermore, before the learned trial judge the Appellant had not sought to justify the dismissal by recourse to section 7. In the Respondent's view, the lower courts overreached themselves in holding that his dismissal was justified on the ground of good or sufficient cause.

[20] As regards the Respondent's contention that this Court should not permit the Appellant's argument on severance benefits because it was being raised for the first time, in my view that is an argument without merit. The trial judge was entitled to uphold the dismissal on any valid ground under the Act even if discovered subsequent to the dismissal.[12] In the instant appeal, the Court of Appeal's award of severance benefits was premised on the application of section 7(c)(i) to the facts of this case. The Respondent has not cross-appealed the ruling that there was a justifiable dismissal for "good or sufficient cause". The Appellant was therefore entitled to deal with the severance benefits point on the basis that the issue between the parties was simply as to legal consequences flowing from the application of section 7(c)(i). In any event, since the point is a simple point of statutory construction and the Respondent is not taken by surprise, this Court in the exercise of its discretion allowed the issue of severance benefits pursuant to section 7(c)(i) to be argued.

[21] In resolving this aspect of the appeal, a useful starting point is section 21(1) of the Act which provides that an employee who has completed one or more years of continuous employment is entitled to a severance allowance upon termination of his employment. Subsection 2 defines termination of employment to include severance of employment. In the 1997 Act, "severance of employment" is defined as follows:

> "… severance of employment' means termination of the contract of employment by an employee under section 7(a) or (c) or termination of the contract of employment by an employer for reasons other than serious misconduct under section 10, misconduct or unsatisfactory performance under section 11, or redundancy under section 12."

[22] It is this statutory provision which is quoted in the judgment of the Court of Appeal as the basis for their determination that the Respondent was entitled to a severance allowance. However the 1999 amendment transformed that definition by providing that "…*'severance of employment' means termination of the contract of*

[12] *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888) 39 Ch. D. 339 (CA).

employment by an employer under section 7(a) or (c)(ii).” Furthermore section 7 of the Act provides that:

> “a contract of employment for an unspecified period of time may at any time be terminated…
>
> (c) by either party-
>
> (i) for good and sufficient cause;
>
> (ii) by notice given to or served upon the other party.”

[23] Based on the conjoint effect of the foregoing statutory provisions it is clear that severance allowance or severance benefits are the monies payable in respect of a termination on account of “severance of employment”. Severance of employment under the Act does not, after 1999, include termination under section 7(c)(i) (i.e. “for good or sufficient cause”). Thus the Court of Appeal erred in ordering severance benefits to be paid to the Respondent on the basis of a dismissal for good or sufficient cause.

[24] In my view, the Appellant was correct in construing section 7(c)(i) and (ii) disjunctively. The language of the section is unambiguous, leading to the inescapable conclusion that the methods of termination contained in sections7(c)(i) and 7(c)(ii) are expressed in the alternative. This interpretation is further buttressed by Cumberbatch (supra) who notes that: “In the absence of the conjunctive “and” in section 7(c), it seems fairly clear that the two methods of dismissal [in section 7(c)] are to be read in the alternative - see Thornton, Legislative Drafting (2nd ed., Butterworths 1979) 79-82.” Cumberbatch also correctly observes that section 7 appears to treat dismissal for good or sufficient cause as merely an alternative to dismissal by notice.

[25] The Respondent contended that since his dismissal was a breach of the contract of employment it followed that section 21 of the Act automatically applied. This submission was misconceived. It failed to take account of the fact that the amended definition of “severance of employment” cited above did not, after 1999, include section 7(c)(i) (dismissal for good or sufficient cause) as a dismissal qualifying for severance benefits. Again there is no room for any intendment. The language of the

statute is plain and clear. Accordingly, the Respondent's submission is rejected and the award of severance benefits by the Court of Appeal is quashed.

[26] There is a further reason why the award of severance benefits must be set aside. There is no evidence to indicate what underlying facts, if any, constituted "continuous employment" for a cane cutter, a seasonal employment, and whether the 1997 Act was retrospective as to severance benefits for persons so entitled.

[27] In relation to the award of wages in lieu of notice, the decision of the learned judge was based on section 15 of the Act which she stated "deals with notice under section 7(c)." In her view, since the Respondent was employed under a contract for an unspecified period, he was entitled to an award of one month's wages in lieu of notice. These findings were upheld by the Court of Appeal.

[28] In my view though the trial judge arrived at the right conclusion, the underlying analysis is flawed. Section 15 of the Act does not abrogate the common law but sets out minimum not prescribed periods of notice where a contract of employment is being terminated under section 7(c)(i) or section 7(c)(ii). In the instant appeal the Respondent's dismissal falls under section 7(c)(i), namely for good or sufficient cause. Since there is no express stipulation in the Act as to notice in relation to such dismissals, it follows that notice at common law, i.e. reasonable notice, is to be implied subject to the minimum periods in section 15.[13] Were it otherwise there would be little discernible distinction between summary dismissal under section 10 and dismissal for good or sufficient cause under section 7(c)(i).

[29] What is reasonable notice is a question of fact depending on all the circumstances of the case and the nature of the employment. The actual period of notice may be greater than the minimum period of notice set out in section 15 of the Act and any award made need not mirror section 16 which sets out the formulae to be used in calculating payments in lieu of such notice. Based on the repeated employment relationship between the parties over the years, the nature of the contractual

[13] *Richardson v Koefod* [1969] I WLR 1812 (CA).

relationship, the common law principles in relation to notice of termination of employment and the overarching tenets of fairness, this Court is justified in concluding that the Respondent is entitled to one month's salary in lieu of notice.

Disposal

[30] Although this Court benefited by the copious citation of decided cases, ultimately the core issues for determination were really matters of statutory interpretation. For that reason, it is not necessary to burden this judgment with a detailed discussion of those cases.

[31] The order of the Court of Appeal awarding payment of a severance allowance to the Respondent is set aside. The orders of the learned trial judge and of the Court of Appeal awarding payment to the Respondent of one month's salary in lieu of notice are hereby affirmed. The appeal is allowed in part. Since this appeal involves an issue of statutory interpretation of some public importance, no order is made as to costs.

JUDGMENT OF THE HONOURABLE JUSTICE HAYTON

[32] I agree with the judgment and orders of Nelson JCCJ in construing elliptically drafted legislation, but am adding a few paragraphs of my own since he and I differ from the views of the Court of Appeal and of Wit JCCJ as to the availability of a severance allowance for the Respondent. The Court of Appeal's view would have been correct if the unamended Termination of Employment and Severance Pay Act 1997 had applied. Unfortunately, the Court overlooked the crucially significant, substituted definition in the short Termination of Employment and Severance Pay (Amendment) Act 1999 that was clearly designed to improve the position of employers at the expense of their employees.

[33] Section 7 of the 1997 Act in dealing with contracts of "employment on an hourly, daily, weekly, fortnightly or monthly basis" under section 2(f) for "an unspecified period of time", states that they "may at any time be terminated –

(a) by mutual consent of the parties;

(b) on any ground of redundancy under section 12;
(c) by either party
(i) for good or sufficient cause;
(ii) by notice given to or served upon the other party."

[34] On the face of it, taking account of the three semi-colons in (a), (b) and (c) and the absence of the word "and" between heads (i) and (ii), these heads appear to be alternative methods of terminating contracts of employment, as also appears from the substituted definition of "severance of employment" in the 1999 Amendment Act at [37] below.

[35] Section 2(p) of the 1997 Act defines "severance of employment" to mean "termination of the contract of employment by an **employee** under section 7(a) **or (c)**, or termination of the contract of employment by an employer for reasons other than serious misconduct under section 10, misconduct or unsatisfactory performance under section 11, or redundancy under section 12." (emphasis mine)

[36] Thus, an employer could terminate for the reason of "good or sufficient cause" within section 7(c)(i) but not by giving notice under section 7(c)(ii), since that is not a reason. Moreover, section 8 sets out a list of reasons that do not constitute "good or sufficient cause" but amount to "unfair dismissal" for which compensation may be claimed by an employee in the High Court under sections 19 and 20. Very significant protection was therefore afforded to employees casually employed under a customary weekly or monthly contract for an unspecified period of time. Moreover, it made sense that an employee (but not an employer) had the facility not just to terminate his contract for good or sufficient cause against a bullying employer but also to terminate his contract by notice and retain his or her right to a valuable severance allowance (a type of superannuation fund) under section 21 of the 1997 Act (below at [40]) e.g. if giving up employment to take up other employment, to move away to care for an ill relative or to retire.

[37] Section 2 of the 1999 Amendment Act substituted a shortened new definition of "severance of employment." It now simply means "termination of the contract of

employment by an **employer** under section 7(a) **or (c) (ii)**." This now fits in with section 15(1) of the 1997 Act (below at [39]) which provides statutory minimum periods of notice for terminations "by notices under section 7(c)(ii)".

[38] Although section 7(c) contemplates termination "by either party" serving notice, as indicated above at [36] in the unamended 1997 Act section 7(c)(ii) has to be restricted to an employee serving notice because, otherwise, the significant protection afforded by sections 8, 19 and 20 to employees against unfair dismissals is pointless if the employer can simply give notice in cases that would otherwise amount to unfair dismissals. Similarly, if the employer could simply terminate contracts by giving notice he would by-pass the requirements for terminating contracts on grounds of redundancy under section 12. By necessary implication, the employer's common law right to terminate a contract of employment by giving notice was excluded, despite the contrary view of Deputy Dean Cumberbatch.[14] The substituted 1999 definition, however, has deliberately changed this. It has the clear effect of enabling an employer under section 7(c)(ii) to serve a notice whenever wished, thereby undoing the statutory protection afforded to employees against unfair dismissals and against trumped-up redundancies. On the other hand, employees do, however, retain their rights to severance allowances when their contracts are terminated simply by notice from the employer.

[39] How then does section 15 headed "Notice Periods" fit in? Section 15(1) of the 1997 Act in referring to an employer giving notice under section 7(c)(ii) fits in with the substituted definition that now permits only employers to give such a notice (but not employees, so that there is now no scope for section 15(2) to cover notices given by employees). Under the original definition, the reference to an employer serving notice under section 7(c)(ii) was maladroit because, as pointed out in the preceding paragraph, the National Assembly cannot have intended to have its significant statutory protection against unfair dismissals or trumped-up redundancies rendered nugatory by the simple device of employers merely giving notice of termination of

[14] *Cumberbatch*, supra note 1.

employment under section 7(c)(ii). Because under the 1997 Act an employer could not terminate by notice under section 7(c)(ii), the reference to section 7(c)(ii) in the period 1997-1999 could be construed as a mistaken reference to section 7(c)(i) or explained as the draftsperson having at the back of his or her mind the common law practice, indicated at [28] above, to provide a written notice when terminating a contract for "good or sufficient cause".

[40] The definition of "severance of employment" is the crucial foundation of an employee's right to a valuable "severance allowance" because this right only arises under section 21(1) and (2) of the Act where there has been a "severance of employment". The employee was in the driving seat for obtaining a severance allowance until the National Assembly decided to eject the word "employee" from the definition by replacing it with the word "employer", so that now it is only a termination by the employer that entitles an employee to a severance allowance. Worse still, the reference to "section 7(c)" was deliberately restricted to "section 7(c)(ii)". Thus, if the employer has "good or sufficient cause" for terminating the employee's contract within section 7(c)(i), as in the Respondent's case, the employee has no right to a severance allowance, such clear exclusion joining those in sections 10, 11 and 12 for serious misconduct, misconduct and unsatisfactory performance, and redundancy. The employee will only receive a severance allowance as a type of superannuation if his employer terminates the contract by giving notice or there is mutual consent. The employee no longer has a right to a severance allowance if he or she terminates the contract, whether by giving notice or for good or sufficient cause. Thus such actions essentially forfeit his or her right to a severance allowance.

[41] As a human being, one cannot help but feel that the National Assembly has dealt harshly with employees, but this is a matter for the executive and the legislature (in consultations with representatives of employers and employees), not the judiciary. Nothing, however, precludes higher standards of benefit for employees being agreed upon through collective bargaining or other negotiations, as recognised by section 3(1) of the 1997 Act.

JUDGMENT OF THE HONOURABLE JUSTICE WIT

[42] Life in the cane fields of Guyana is not easy. Cane cutters have a tough job. In the words of the Trinidadian poet Faustin Charles:

> "*Cane is sweet sweat slain;*
> *cane is labour, unrecognised, lost*
> *and unrecovered;*
> *sugar is the sweet swollen pain of the years;"*

The Respondent was a cane cutter, since 1980 employed by the Appellant. But one day, in 2006, after 26 years of continuous service, he lost his temper, became violent to his foreman and threatened him with a cutlass. Although the foreman did not seem very impressed by the incident (the cane fields are obviously not comparable to a nunnery), it cost the Respondent his job. He was summarily and unceremoniously dismissed without notice or payment.

[43] I agree with the majority that the Respondent's misconduct was such as to amount to a "good or sufficient cause" for the termination of his contract of employment. I also agree that a summary dismissal was not justified in this case. The Appellant has not shown that the Respondent's misconduct, although perhaps serious and directly related to the employment relationship, has had "a detrimental effect on the employer's business." There was no evidence to this effect and from the circumstances under which the incident occurred no such detriment can sufficiently be inferred. I further agree that the Respondent should have been given notice and that he is entitled to one month's salary in lieu of that notice.

[44] Unfortunately, I am unable to agree with the majority's interpretation of sections 2, 7 and 21(1) of the Termination of Employment and Severance Pay (Amendment) Act 1999 ("the Act"). Neither do I agree with the setting aside of the Court of Appeal's order awarding payment of a severance allowance to the Respondent. I would have upheld the judgment of the Court of Appeal with costs to be paid by the Appellant.

[45] Section 7 of the Act provides, as far as relevant, that:

> "a contract of employment for an unspecified period of time may at any time be terminated-
>
> (a) by mutual consent of the parties;
> (b) …
> (c) by either party –
> (i) for good or sufficient cause;
> (ii) by notice given to or served upon the other party."

[46] The majority construes section 7(c)(i) and (ii) disjunctively. This means that in their view an employee can be fired either for a "good or sufficient cause" or "by notice." This construction appears to be based on the absence of the word "and". Indeed, the provision does not say that the termination of such a contract requires both a good or sufficient cause *and* notice, and the semicolon after "cause" seems to indicate that this interpretation is proper and logical. The problem, however, is that construing the provision in this scholarly manner does not. in my respectful view. make much sense in a world where ordinary people like the Respondent are toiling to make a living by the sweat of their brow. Let me explain why.

[47] Sections 8(1)(a) to (h) of the Act sums up the reasons that constitute a bad or insufficient cause for dismissal. In accordance with section 8(2) of the Act, a dismissal based on any of those grounds is unfair. In such a case, the employee is entitled to seek redress from the High Court in the form of an award for compensation of an amount as the Court considers just and equitable in all the circumstances or any other just remedy in addition to or in lieu of the compensatory award (sections 19 and 20).

[48] If the majority's construction were correct, it would be very easy for an employer to avoid the severe consequences of violating section 8(2). It would mean, for example, that although section 8(1)(c) prohibits dismissing a female employee because of her pregnancy, her contract of employment could nevertheless be terminated by giving her notice. This approach would cost the employer generally not more than two weeks' or a month's salary (plus, perhaps, severance pay). It

cannot be assumed that the legislature intended to make ineffective legislation; certainly not in Guyana whose Constitution tells us that it is a "state in the course of transition from capitalism to socialism" (section 1) and gives special recognition to the role and value of labour: "The source of the growth of social wealth and of the well-being of the people, and of each individual, is the labour of the people" (section 21). Workers in Guyana have a fundamental right to be protected by the law. This means that legislation must be interpreted so as to effectuate the protection it is intended to offer. If such protection, in the words of Cumberbatch,[15] is "liable to be set at nought" by the plain and (seemingly) clear language of the statute, no construction of the legal text can, in my view, be properly based on that language.

[49] Looking at the entire structure of the Act and given the constitutional background as described, the better, more plausible construction of section 7(c) would seem to be that an employer desirous of terminating a contract of employment for an unspecified period would *always* need a good or sufficient reason for it. And he would *normally*, except in case of a summary dismissal (section 10) or in case of a termination after repeated misconduct as specified in section 11(2), also be required to give adequate notice (as specified in section 15 of the Act). Of course, during a probationary period the employment may be terminated at any time "for any reason and without notice" (section 9). And when notice is required, an employer may instead pay the employee a sum equal to "the remuneration and benefits due to the employee up to the expiry of any required period of notice": section 16(1).

[50] The majority acknowledges that in the case before us the Appellant was required to give the Respondent notice but they are of the view that this is a common law requirement, although they conclude that the Respondent is entitled to the same period of notice as he would have been entitled to under section 15. In my view it is unnecessary or even impossible to resort to the common law in this case as it

[15] Cumberbatch, op cit., p 94.

would seem to me that the common law dealing with the termination of labour contracts has been largely overtaken by the statutory provisions of this Act.

[51] Section 2 of the Act contains, *inter alia*, the following definitions:

> "severance allowance" means the amount of money that an employee whose employment has been terminated on account of severance of employment is entitled to receive under this Act;"
>
> "severance of employment" means termination of the contract of employment by an employer under section 7(a) or (c)(ii);"

[52] Section 21 of the Act states that:

> "(1) On termination of his employment, an employee who has completed one year or more years of continuous employment with an employer shall be entitled to be paid by such employer a severance … allowance equivalent to … ;
>
> (2) For the purpose of subsection (1) termination of employment includes termination … by reason of severance of employment;
>
> (3) The payment of a severance … allowance under subsection (1) shall not affect the employee's entitlement if any, to payment in lieu of notice under section 16;
>
> (4) Subsection (1) shall not apply where the employee
>
> (a) is summarily dismissed under section 10 or his employment is terminated under section 9 or 11;"

[53] The majority is of the view that the Respondent is not entitled to a severance allowance. Their reasoning is as clear as it is logical: section 21(1) provides that an employee on termination of his employment shall be entitled to a severance allowance. This allowance is triggered by severance of employment which means termination of the contract of employment by an employer under section 7(c)(ii) – by notice. The Respondent's contract was not terminated under section 7(c)(ii) but under section 7(c)(i) of the Act – for a good or sufficient reason - and so, no severance allowance could or should be paid. Although clear and logical, the reasoning is flawed as it starts from a wrong premise, i.e. that termination of these contracts happens *either* for a good or sufficient reason *or* by notice.

[54] A reasonable interpretation of the concept of "severance of employment" under section 7(c)(ii) would seem to be that it refers to the termination of a contract of employment by an employer in cases where the employer must give notice to the employee. Whether he actually gives notice or in its stead pays out the amount as required by section 16 does not matter. The only relevant issue is whether or not the employer has a duty to give notice to the employee. Only where such a duty exists, will the termination of employment be a termination of severance of employment within the meaning of section 21. In that case, the employer will have to pay a severance allowance. If, however, the duty to give notice does not exist, the employee will not be entitled to such an allowance. Section 21(4) makes this perfectly clear: there is no entitlement to the payment of a severance allowance if the termination has taken place under section 9, 10 or 11(2) of the Act being the only three forms of termination that may occur "without notice." This makes sense in my view. An entitlement to severance pay over an initial probationary period is neither here nor there. On the other hand, termination of employment under sections 10 and 11(2) only happens in very serious cases which is the very reason why no notice is required and why there is no entitlement to any further payment.

[55] The Respondent's case does not fall under any of the three sections mentioned. In my view, therefore, the Respondent was entitled to receive the severance benefits that the Court of Appeal awarded him. That he ends up, after 26 years of service, with nothing more than a month's salary is bitter, very bitter indeed.

/s/ R. Nelson
The Hon Mr Justice Nelson

/s/ J. Wit
The Hon Mr Justice Wit

/s/ David Hayton
The Hon Mr. Justice Hayton