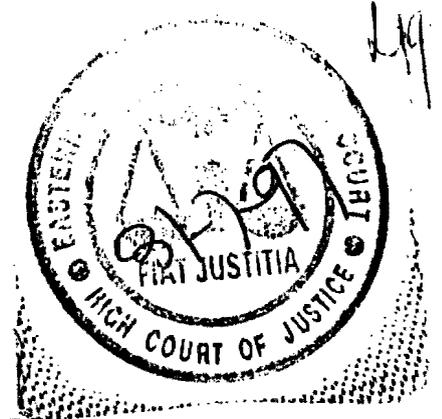


# SAINT VINCENT AND THE GRENADINES



## IN THE HIGH COURT OF SAINT VINCENT AND THE GRENADINES AND THE WEST INDIES ASSOCIATED STATES (CIVIL)

Suit No. 356/1989

Between **Felix DaSilva** - Plaintiff  
v  
**Attorney General of St.VG** - First Defendant  
**Kenneth John et al** - Second Defendants

Appearances: Mr. O.R. Sylvester, Q.C., and Miss N. Sylvester for the plaintiff  
Mr. Joseph Delves for the Attorney General  
Mr. A. Cummings for the second defendants

1994: 20th, 21st December  
1995: 26th, 27th June,  
18th, 19th, 20th, 28th September.

Delivered 31<sup>st</sup> July 1997

### JUDGMENT

#### JOSEPH, MONICA J.

The plaintiff filed a writ of summons on 16th August 1989 followed by a statement of claim filed on 12th December 1989. He alleges that as a result of wrongful acts of the Public Service Commission (the Commission) he has been unlawfully and wrongfully deprived of salary and benefits and has suffered financial loss and damage:

The reliefs sought are:

- 1) A declaration that the removal of the plaintiff from office of Superintendent of Airports by letter dated 7th July 1988 with effect from 24th May 1988 was wrongful and nullity.
- 2) Alternatively a declaration that the purported removal of the plaintiff as Superintendent of Airports a Head of Department and the purported posting to a post of Assistant Secretary in the Ministry of Tourism, Aviation and Culture is a dismissal within the meaning of S 87 of the St. Vincent Constitution Order 1979 No. 916

- 3) A declaration that the letter dated 18th January 1989, purporting to retire the plaintiff in the public interest is an assertion that the plaintiff is still a public officer in the service of the Government of St. Vincent and that the suspension of the payment of the plaintiff's salary was wrongful and unlawful and a nullity.
- 4) Further a declaration that the retiring of a public officer in the public interest is punitive and/or penal and/or disciplinary and was not invoked in accordance with any law and or civil Service Regulations and is a nullity.
- 5) Damages
- 6) An order that the plaintiff be restored to office (This claim was withdrawn during trial).
- 7) Such further orders or declarations as to the Court seems fit.

Leave was granted to enter a conditional appearance for the Attorney General and this was filed on 28th September 1989. A defence was filed on 22nd December 1989, on behalf of the Attorney General and a reply and joinder of issue was filed on 25th June 1990. After judgment was handed down in a preliminary issue leave was granted to join the second defendants.

### **Statement of claim**

The statement of claim alleges that the plaintiff was a public officer holding the post of Superintendent of Airports having been so appointed by letter dated 9th October 1978 with the approval of His Excellency the Governor. The plaintiff states that he was head of a department of government and subject to sections 79 and 87 of the St. Vincent Constitution Order 1979 No. 916 (the Constitution).

The plaintiff asserts that arrangements were made to transfer him to the post of Assistant Secretary, Ministry of Tourism, Aviation, Culture and Women's Affairs, despite his protests that he had no training or skills in Aviation and that that post was tantamount to a change or alteration of his duties and a reduction of his rank.

The plaintiff states that about 25th May 1988 he lodged an appeal to the Public Service Board of Appeal (the Appeal Board); notified the Commission and was notified by the Chief Personnel Officer (CPO) by letter dated 8th June 1988 that, in accordance with the Commission's Regulations, the decision to transfer is not subject to appeal in accordance with the Public Service Commission Regulations.

The plaintiff further states that an application for an interlocutory injunction came on for hearing in Chambers on 1st July 1988, during which the then trial judge observed to the Solicitor General that the plaintiff's appointment being one which was made by the Governor General it was the Governor General to act on the advice of the Commission but that he was not advising anyone. After arguments the Solicitor General sought and was granted an adjournment for the next Chamber Day.

The plaintiff's allegation is that he received a letter dated 7th July 1988 from CPO informing him that the Governor General acting on the advice of the Commission had approved his removal from the post of Superintendent of Airports with effect from 24th May 1988, and that approval has also been given for his appointment as Assistant Secretary, Ministry of Tourism, Aviation and Culture with effect from 24th May 1988. The plaintiff withdrew the appeal he had filed and filed another appeal which when it was about to be heard on 19th January 1989, his attention was drawn to a letter dated 18th January 1989, purporting to retire him in the public interest.

### **Defence of Attorney General**

A Defence filed on behalf of the Attorney General denies that the plaintiff was Head of Department and asserts that he was employed as Superintendent of Airports under the supervision of the Permanent Secretary, Ministry of Tourism, Aviation and Culture: that if he had taken up his transfer his lone superior would have been the Permanent Secretary, and that the plaintiff was Superintendent of Airports in scale 14 - 10 which is the same scale as Assistant Secretary.

The defendant alleges that the plaintiff was properly retired in the public interest under section 36 of the Public Service Commission Regulations 1969 (SRO No. 48 of 1969 as amended by SRO No. 16 of 1976).

A further allegation is that when the plaintiff was transferred he submitted a series of sick leave certificates: that he refused to be transferred or to report for work and was properly retired in the public interest.

It is also alleged that the plaintiff had not complied with the provisions of the Crown Proceedings Act No. 37 of 1952 and the Public Officers Protection Act No. 4 of 1991 and its amendment No. 17 of 1988 in bringing this action.

The matter came on for trial on 29th July 1991 when submissions were made in limine and rulings on these submissions were delivered on 30th September 1991. The Attorney General then indicated that he could no longer represent the Commission.

On 12th October 1994 an order of Court was filed joining Kenneth John, Chairman of the Commission, and Commission members Frank Williams, Sylvester Taylor and Daphne Frederick. There followed an amendment to the statement of claim:

**"paragraph 16: that on 30th September 1991 there was delivered in this action a judgment to the effect inter alia that "the purported retirement of the plaintiff is void and of no effect." As a consequence the plaintiff has suffered loss and damage which is still continuing:**

- |     |  |                     |
|-----|--|---------------------|
| (1) | <b>Loss of salary from July 1988 - September 1994</b>      | <b>\$188,853.67</b> |
|     | <b>as follows:</b>   |                     |
| a)  | <b>up to June 1989 at \$1984.00 per month</b>              |                     |
| b)  | <b>July 1989 - December 1990 at \$2474.00 per month</b>    |                     |
| c)  | <b>January 1991 - December 1991 at \$2647.00 per month</b> |                     |

d)	January 1992 - December 1992 at \$2726.00 per month	
e)	January 1993 - September 1994 at \$2807.00 per month	
(2)	Commuted travelling allowance May 1988 - September 1994 (at \$375.00 per month after June 1989)	27,475.00
(3)	Duty allowance May 1988 - September 1994	8,470.00
(4)	Uniform allowance May 1988 - September 1994	1,925.00
(5)	Telephone allowance May 1988 - September 1994	1,309.00
	<b>Total</b>	<b>230,032.67</b>

### DEFENCE OF SECOND DEFENDANTS

On 25th October 1994 a defence was filed on behalf of the second defendants denying that the transfer to the post of Assistant Secretary is a reduction in rank of the plaintiff and asserting that both positions (Superintendent of Airports and Assistant Secretary) were within the scale 14 - 10 in the Public Service.

The second defendants allege that the plaintiff was properly retired in the public interest under section 36 of the Public Service Commission Regulations 1969 S.R.O. 48 of 1969 as amended by S.R. & O. No. 16 of 1976, the plaintiff having been retired by them from an office falling under section 78 of the Constitution.

The second defendants further allege that if the plaintiff was dissatisfied with his retirement in the public interest he had a remedy by appealing to the Public Service Board of Appeal as provided under section 87 of the 1979 Constitution and that it is an abuse of the process of the Court for the plaintiff to bring proceedings in the High Court without first exercising his constitutional rights to appeal to the Public Service Board of Appeal and the High Court has no jurisdiction to entertain this action.

Further or in the alternative, the second defendants claim that the High Court has no jurisdiction to entertain this action as a common law action by a crown servant against alleged wrongful dismissal, since the plaintiff's remedies if any are adequately provided for in the Constitution by means of an application under section 96 thereof.

There is an allegation that upon transfer to the post of Assistant Secretary the plaintiff protested by submitting medical certificates, and that after 5th August 1988, he ceased to submit sick leave certificates and had effectively abandoned his post.

The second defendants say that when the plaintiff was appointed Superintendent of Airports his letter of appointment clearly stated that he was governed by the Public Service Commission Regulations and Civil Service Orders, Order 217 (2) clearly states that an officer can be transferred from one post to another post of equivalent grade.

The second defendants further say that the plaintiff refused to be transferred, or to report for work and was properly retired in the public interest as he had clearly

demonstrated a total defiance of authority and had rendered himself liable to have been deemed to have abandoned his post.

Still further, the second defendants state that the plaintiff has not complied with the provisions of the Public Officers Protection Act No. 4 of 1981 and its amendments No.17 of 1988 in bringing this action.

The second defendants claim that the plaintiff in these proceedings cannot raise or sustain any challenge to the legality of his transfer from the post of Superintendent of Airports to the post of Assistant Secretary, Ministry of Tourism, Aviation and Culture, in that that issue was rendered *res judicata* or was issue estopped by virtue of the ruling of his Lordship Mr. Justice Singh on 19th June 1989 in High Court Action suit No. 146 of 1989 in which the plaintiff had unsuccessfully sought from the High Court an order of mandamus to compel the Public Service Board of Appeal to hear or to continue to hear the plaintiff's appeal against his said transfer.

#### **Reply and joinder of issue - with Attorney General**

This was filed on 25th June 1990 in which the plaintiff contends :

(a) that at the time of the purported transfer there was no post of equivalent status offered.

(b) that the purported retirement of the plaintiff in the public interest was not done in accordance with the law as alleged in paragraph 10 of the defence or any law.

(c) that the purported retirement in the public interest was a deliberate and calculated act to thwart and/or frustrate the pending appeal and (as the fact turned out) the Appeal Board declined to hear the appeal.

The plaintiff says that he has endeavoured to pursue his constitutional rights by initiating proceedings but each attempt was thwarted and frustrated by other proceedings or acts on the part of the defendant, or other government department or its agents or servants. The plaintiff itemized particulars of proceedings to pursue constitutional rights and particulars of other proceedings and acts on part of the defendant or government department or its agents or servants to thwart and/or frustrate.

#### **Reply and joinder of issue - with the second defendants on 31st October 1994:**

In Joining issue with the second defendants the plaintiff claims that the defendants are precluded from further litigating or raising the issues in light of the ruling of the court delivered on 30th September 1991 which raises an estoppel or *res judicata*.

Further, the plaintiff denies that there was any ruling in suit No. 146 of 1989 which amounts to issue estoppel or *res judicata* as alleged by the second defendants.

#### **Facts**

The plaintiff was a public officer employed by the Government of St. Vincent and the Grenadines having joined the service as Meteorological Assistant, Arnos Vale Airport, Ministry of Communications and Works, with effect from 16th September 1968. On

the 1st June 1971 he was appointed Airport Officer, Arnos Vale Airport, Ministry of Communications, Works and Labour with effect from 1st January 1971.

By letter dated 9th October 1978 the C.P.O informed the plaintiff that His Excellency the Governor had approved his appointment to the post of Superintendent of Airports, Airports Department, Ministry of Communications, Works and Labour with effect from 1st July 1977.

He worked as Superintendent of Airports until April 1988, when he received a copy of a memorandum dated 29th March 1988, addressed by the CPO to the Permanent Secretary, Ministry of Tourism, Aviation, Culture and Women's Affairs (the Permanent Secretary) indicating that arrangements were being made for the plaintiff to report for duty in the Ministry of Tourism.

By memorandum dated 6th April 1988, the Permanent Secretary informed the plaintiff that the Commission had approved his transfer to the post of Assistant Secretary, Ministry of Tourism, Aviation and Culture. The plaintiff by letter of 11th April 1988, replied expressing his "non interest" in the post to which he was being transferred, protested his transfer and requested that the protest be conveyed to the relevant authorities.

The CPO by letter of 16th May 1988 wrote to the plaintiff reiterating that his transfer would take effect from 24th May 1988, and directing him to comply with directives given to him by the Permanent Secretary. On 24th May 1988 the plaintiff reported for duty at the office of Superintendent of Airports, Arnos Vale, and was advised by the Permanent Secretary to leave that office. This matter formed the subject of another suit and it is unnecessary for me to recount the details in this suit.

The plaintiff lodged an appeal to the Appeal Board by document bearing date 25th May 1988. By letter of 8th June 1988, the CPO informed the plaintiff that, in accordance with Public Service Commission Regulations, the Commission's decision to transfer him is not subject to appeal.

This appeal was withdrawn after the plaintiff received the CPO's letter dated 7th July 1988 informing him that the Governor, General acting on the advice of the Public Service Commission had approved his removal from the position of Superintendent of Airports with effect from 24th May 1988, and another appeal which bears date 15th July 1988 was filed. This document bears the Registry's stamp of 8th November 1988. This appeal was due to be heard on 19th January 1989, when a letter of 18th January 1989 written by the CPO to the plaintiff was received the first paragraph of which reads:

"I am directed by the Public Service Commission to refer to previous correspondence dated 15th December 1988 and 21st December 1988 and to inform you that they have directed that you should be retired in the public interest under section 36 of the Public Service Commissions Regulations 1969 (S.R. & O. No. 48/69) as amended by S.R. & O. No. 16/76 - and you are hereby retired in the public interest".

In reply to the Court Mr. Delves agreed that rulings in the judgment delivered on 30th September 1991 covered many of the issues now being canvassed. Mr. Cummings contended that the Court could and should reconsider its earlier rulings as the second defendants had not had an opportunity to put forward their case and also that it is an interlocutory and not a final judgment which is open to challenge and reception of further evidence. He cited from Phipson's on Evidence 13th ed. Ch. 28-05 which reads:

"All judgments are impeachable on certain grounds.

Judgments of courts in this country when tendered to prove the truth of the finding may, in general, be impeached on the grounds that they were."

The headings then given were that they were not (a) final (b) not on the merits (c) without jurisdiction (d) fraudulent, collusive or forged, none of which apply to this case.

I do not agree with the arguments advanced by Mr. Cummings. The suit was commenced against the Attorney General. The rulings on the preliminary points related to alleged wrongs by the Commission, the Attorney General having been proceeded against by virtue of the Crown Proceedings Act (Cap.95).

Let me test it. If proceedings had been filed only against the second defendants would not the second defendants been able to obtain leave to enter a conditional appearance because the plaintiff had not adhered to the provisions of the Crown Proceedings Act by proceeding against the Attorney General? I am of the view that the second defendants may be made parties with the Attorney General but to proceed against them without joining the Attorney General would have been fatal.

The Attorney General would have received instructions from the second defendants to enable him to file a defence and in effect the defendant ante the preliminary rulings and the defendants after joining of the second defendants in effect are one and the same. In the suit filed against the Attorney General the chairman and members of the Commission could have been called to give evidence. Many of the issues now sought to be raised by the second defendants have been decided in the rulings already handed down and I am functus in relation to those issues.

In *Jowett v Earl of Bradford* (1977) 2 AER 33 at p.35 Kilner Brown J. said:  
letter "d" Halsbury 16 para.1518 4th ed.

"But when one applies those tests to the position with regard to the first tribunal, it seems to us that the first matter to be looked at is whether or not there was a decision conveyed to both parties. If there was, then unless and until it could be shown to be the result of an error of law, or a complete absence of evidence, or a misdirection or an unreasonable approach, that decision stands. The general propositions are well known."

At letter "f"

"So it is argued that in this case there was not a final judgment in that sense; it was not final for two reasons: first, that it was not more than an expression of opinion until it became converted into perfect form -that is to say, properly signed, properly recorded, properly sent to the parties, and the decision supported by reasons. Secondly, it is said that in any event it was not final because the matter was left in such a state that reinstatement was to be considered. As against that, counsel for the employee argued in advance, by way of anticipation, that once there has been - call it what you like - an expression of opinion, a finding, a declaration by spoken word, the employee's case was accepted and that that for the purposes of the later jurisdiction was a previous final judgment. In our unanimous view that is right. We do not think that the mere fact that the various procedural steps were not followed, because they could not be followed, invalidates that expression by way of conclusion."

In a British Virgin Islands case (unreported) C.A. 2/1994 Geoffrey Holt v Endless Summer Charters our Court of Appeal held that the judge in High Court suit 174/1989 having handed down a decision was functus. The brief facts of that matter are that, after handing down a decision, the judge varied his decision to accord with a Privy Council decision. The Court of Appeal held that, having given a decision, the judge was functus and that his decision could only be varied by the higher Court.

In the judgment handed down on 30th September 1991, I ruled on the following and I am functus:

- 1) whether the removal of the plaintiff from office of Superintendent of Airports by letter dated 7th July 1988 with effect from 24th May 1988 was wrongful and a nullity.
- 2) whether the removal of the plaintiff as Superintendent of Airports a Head of Department and a posting to post of Assistant Secretary was a dismissal within the meaning of section 87 of the Constitution:
- 3) whether a transfer from the office of Superintendent of Airports to post of Assistant Secretary was a reduction of rank:
- 4) whether the plaintiff fell under section 78 or section 79 of the Constitution:
- 5) whether the plaintiff has complied with the provisions of the Public Officers Protection Act No. 4 of 1981.

The issues to be now considered are:

- 1) whether the plaintiff is debarred from obtaining reliefs sought because he did not first appeal to the Board of Appeal as provided for under section 87 of the Constitution:
- 2) what is the effect, if any, of a failure of the plaintiff to report for work after 24th May 1988:

- 3) whether by operation of law the plaintiff had abandoned his post and whether subsequent acts of the Commission could affect this abandonment:
- 4) whether the plaintiff is entitled to damages and, if so, quantum.

### **IS THE PLAINTIFF BARRED FROM OBTAINING RELIEF**

Does failure to have a hearing before the Appeal Board set up under section 87 of the Constitution debar the plaintiff from proceeding in the High Court?

Section 87 of Part 4 of the Constitution enacts:

(1) This section applies to -

(a) any decision of the Governor General, acting in accordance with the advice of the Public Service Commission, or any decision of the Public Service Commission, to remove a public officer from office or to exercise disciplinary control over a public officer

(2) Subject to the provisions of this section, an appeal shall lie to the Board from any decision to which this section applies at the instance of the public officer, ....in respect of whom the decision is made.

Mr. Delves argued that the plaintiff's action was premature and cannot be sustained as he had failed to appeal against the Commission's decision of January 1989, to retire him from the public service. Counsel cited from *Judicial Review of Administrative Action* by de Smith Constitutional and Administrative Law 4th ed. p.561 -595 and *Barraclough v Brown* (1897) A.C. 615

The *Barraclough v Brown* case is distinguishable from this case. In that case liability was created by legislation and exclusive jurisdiction to determine that liability was committed to the summary court. It was held by the House of Lords that the High Court had no jurisdiction to decide matters which had been committed to the summary court. In his judgment Lord Herschell stated:

"By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore by plain implication, enacted that no other court has any authority to entertain or decide these matters.....It cannot be the duty of any Court to pronounce an order when it plainly appears that, in so doing, the Court would be using a jurisdiction which the Legislature has forbidden it to exercise.

The appellant's counsel maintained that your Lordships ought to substitute for a debt decree, which is the only remedy claimed under s. 17 a declaration that, under that clause, he has a right to recover from the respondents, who were admittedly the owners of the *J.M. Lennard* at the time when she sank. It is

possible that your Lordships might accede to such a suggestion, it were necessary, in order to do justice. But apart from the circumstance that such a declaration would not be in accordance with law, the substance of it is one of those matters exclusively committed to the jurisdiction of the summary court. In the absence of authority, I am not prepared to hold that the High Court of Justice has any power to make declarations of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature."

I am of the view that the scheme of Part 4 of the Constitution is to establish the Board: to outline the functions of the Board and to entrench appeal provisions for the protection of public officers but I do not think that the intent and purpose of this Part is to take away from a public officer any right he has outside of Part 4 to institute legal proceedings for any alleged wrong. If this had been the intent then an exclusionary provision would have been included in legislation. In the absence of such a provision I would say that both rights co exist, that is, a public officer may appeal against a decision of the Commission to the Appeal Board (section 87 of the Constitution) or he may choose to seek declarations from the High Court for an alleged wrong by the Commission, as the plaintiff has done. The plaintiff does not have to exhaust his rights before the Appeal Board before he may proceed in the High Court. This principle is enunciated in a number of cases.

In *Enderby Town F.C. Ltd. v Football Association Ltd.* (1971) Ch. 591 Ld. Denning M.R. had this to say at p 604:

"I quite appreciate Mr. Sparrow's submission that these are difficult points of law on which there are authorities to be cited and rules to be construed. So much so that I do not think the F.A. is itself a suitable body to decide them. It would be much better, I should think, for the club to bring these points straight away before the court in an action for a declaration. That is a course which they are perfectly entitled to take at once before the appeal is heard by the F.A. : see *Lawlor v Union of Post Office Workers* (1965) Ch. 712.....As an alternative the club could wait until after the hearing of the appeal by the F.A. and then bring an action for a declaration. They would not be prejudiced by so doing: see *Annamunthodo v Oilfields Workers' Trade Union* (1961) A.C. 945. But either way, the points of law would be better decided by the courts than by the F.A. As Roffler L.J. said in *Lee v Showmen's Guild of Great Britain* (1952) 2 Q.B. 329 at 354:

"The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates are fitted for the task".

In *Lawlor v Union* (supra) 732 letter "G" Ungood-Thomas J. stated:

"It was then submitted by the union that the plaintiffs were not entitled to relief from the courts until the domestic remedy by appeal within the union to the annual conference was exhausted. Reference was made to a statement in Norman Citrine's book on Trade Union Law, 2nd ed. (1960) p.233, "It is clear that where "there is appeal machinery available under the rules, the court will not interfere before that machinery has been used."

But that statement is not supported by authority, and in its present terms it is clearly too widely stated. Counsel referred me to *White v Kuzych*, where the Privy Council decided that a member of a trade union was bound to exhaust a right of appeal within the union before resorting to the courts. But in that as the member was contractually bound by express provision in the union by-laws to exhaust the domestic remedies before resorting to the courts, and that essential element is lacking here. .... Lord Denning, in delivering the judgment of the Privy Council, referred to the "special circumstances that prevailed in *White v Kuzych*, evidently referring to the express provision which I have mentioned limiting recourse to the courts. And he added that it was quite proper for the appellant to appeal to the annual conference before resorting to the courts "even though he was not bound to do so." The Privy Council thus seems to have been of the opinion that, in the absence of express provision to the contrary, a right of appeal to a domestic tribunal does not preclude resort to the courts before exercising that right. In *Bonsor v Musicians Union* (1954) 1 AER 822 C.A. the court intervened in favour of a trade union member where his expulsion was ultra vires the union rules despite his omission to exercise a domestic right of appeal within the union.

Trade union rules clearly cannot oust the jurisdiction of the courts. Contracts, including a contract constituted by trade union rules, may provide that recourse to domestic tribunals shall be exhausted before there is recourse to the courts, and the courts may recognise and give effect to that contract; but that does not oust its jurisdiction. So in his case, the court has jurisdiction, and here there is no contractual provision requiring domestic remedies to be exhausted before resort to the courts."

I do not think that the plaintiff is debarred from obtaining the reliefs sought because of a failure to first appeal to the Appeal Board which is established by section 86 of Part 4 of the Constitution .

#### WHETHER HIGH COURT HAS JURISDICTION TO HEAR MATTER

The second defendants claim that this Court has no jurisdiction to entertain this action as a common law action by a crown servant against alleged wrongful dismissal as the plaintiff's remedies are adequately provided for in the Constitution by means of an application under section 96.

I have already commented that the plaintiff has 'co-existing rights'. I think this Court has jurisdiction to entertain the action. It is for the plaintiff to decide how he desires to proceed - whether at common law or under the Constitution. In *Kodeeswaran v Attorney General of Ceylon* (P.C.) (1970) A.C. 1111, it was held that under the common law of Ceylon an action did lie at the suit of a civil servant for remuneration agreed to be paid to him by the terms of his appointment and remaining unpaid as arrears of salary which accrued due during the currency of his employment. At p. 1116 letter "G" their Lordships said:

"In the case of most former British colonies which were acquired by conquest or cession, the English common law is incorporated as part of the domestic law

of the now independent State because it was imposed upon the colony by Order in Council, Proclamation, or otherwise under the prerogative powers of the Crown".

### **Is there an abandonment of post?**

An allegation in the defence is that when the plaintiff was transferred to the post of Assistant Secretary, Ministry of Tourism, Aviation and Culture he showed his protest by submitting a series of sick leave:

- (a) 26th May to 1st June 1988
- (b) 2nd June to 8th June 1988
- (c) 9th June to 15th June 1988
- (d) 16th June to 29th June 1988
- (e) 30th June to 13th July 1988
- (f) 16th July to 5th August 1988

It may well be that the plaintiff was being defiant but the Commission accepted the medical certificates. The medical certificates covered the period 25th May 1988 to 5th August 1988. The earliest date that there can be an abandonment of post is 16th August 1988, that is, ten days after the last medical certificate. If the Commission had done nothing the plaintiff would have been regarded as having abandoned his post but the Commission addressed a letter dated 18th January 1989, to the plaintiff informing him that he is retired in the public interest from 11th April 1989. The relevant portions of that letter read:

"You have been granted 55 days vacation leave due you with effect from 19th January 1989 to 10th April 1989 at the end of which your retirement will be effective.

You will be granted whatever retirement benefits are due you under the Pensions Law No. 16/48."

Mr. Cummings contended that, by operation of law, the plaintiff had abandoned his post and that no subsequent act of the Commission could restore the plaintiff to that post.

Paragraph 31 of Public Service Commission Regulations Booklet 4 of the Constitution of St. Vincent and the Grenadines Ch. 2 of the Revised Laws of St. Vincent and the Grenadines Vol.1 (the regulations) provides:

"Abandonment of office. An officer who is absent from duty without leave for a continuous period of ten working days unless declared otherwise by the Commission, shall be deemed to have resigned his office, and thereupon the office becomes vacant and the officer ceases to be an officer."

The plaintiff was absent from duty for more than ten days and, as I said earlier, could have been deemed to have resigned his office. I am however of the view that meaning must be given to the expression "unless declared otherwise by the

Commission". Did the Commission declare otherwise? Is a declaration to be express or can it be implied from the Commission's conduct? Is there a time limit for a declaration?

It is my view that the expression "unless declared otherwise by the Commission" was inserted to ease the rigidity of that regulation and to give the Commission a discretion after the passage of ten days to hold that there has not been an abandonment.

I give an example of a situation that I think the expression was designed to cover: Mr. X a civil servant is granted vacation and departs for a tour of South America. His family in St. Vincent know this but they do not know exactly where he is. While in Brazil he is involved in a vehicular accident during which his passport is lost. He remains in a coma for two months after which time he recovers completely and contact is made with relatives in St. Vincent and with the Commission.

By operation of law Mr. X is deemed to have abandoned his post after ten days. However the Commission may exercise the discretion given by paragraph 31 to declare that Mr. X has not abandoned his post. The Commission may do this by expressly so stating or impliedly by authorizing the Accountant General to pay his salary or by directing Mr. X to serve on a board of survey at department Y.

Dr Kenneth John stated:

"When ten days had elapsed after coverage by medical certificates Public Service Commission decided to retire him in the public interest. Can't recall how long medical certificates went on for. We chose ten days as if public officer does not report then he could be deemed to have abandoned his post.

Public Service Commission didn't invoke that paragraph 31. If we had invoked paragraph 31 all retiring benefits would have been forfeited if it was validly done. We decided to take more humane part of retiring him in the public interest.

We invited him to attend meeting citing date and time for meeting and the reason for the meeting. He didn't turn up. He wrote us through his solicitor. Gist was that there was appeal pending before Public Service Commission concerning his dismissal and that while this was pending nothing else could go on.

We proceeded to hold meeting and we retired in public interest. He was retired from post of Assistant Secretary, Aviation. Up to that point in time he would

have been entitled to all his benefits. He had ceased to function at all and so he was retired amounting to frustration in administrative process."

And in xxd.:

After 10 days we made decision to consider retiring him in the public interest. Public Service Commission didn't advise Governor General in this case. We acted on our own." It was four months after last medical certificate that decision was taken to consider retiring him in public interest."

By deciding to retire the plaintiff in the public interest, the Commission impliedly declared that the plaintiff was not deemed to have resigned his office and was a public officer.

In an earlier judgment I held that the purported retirement of the plaintiff by letter of 18th January 1988, is void and of no effect. Can I hold that letter void for one purpose and valid for another purpose. I think I can. I have held that the Commission acted without authority when it purported to retire the plaintiff in the public interest and the retirement was void and of no effect. However the implied declaration in that letter that the plaintiff was a public officer is valid as the Commission had authority to so declare by virtue of paragraph 31 of the Regulations. That regulation does not specify a time limit within which the Commission may so declare and I hold that there is no time limit.

The facts of Mr. X's case I have used to illustrate how the regulation operates are a far cry from the instant case but all I am trying to demonstrate is that the Commission has a discretion that may be exercised without a limitation as to time.

## DAMAGES

As the purported retirement of the plaintiff from the post of Assistant Secretary is wrongful the question of damages arises. Damages would be based on the salary of the post of Assistant Secretary which was the post to which the plaintiff was transferred. The plaintiff did not give any evidence relative to the salary of the post of Assistant Secretary. His evidence dealt with the salary of Superintendent of Airports. The case for the defendants was that the plaintiff was not reduced in rank and that both posts were in the same salary scale. Mr. Cummings in his address observed that there was no demotion of the plaintiff and there was no lower salary. I accept the plaintiff's evidence as to salary for Superintendent of Airports and use it to arrive at damages.

I have been referred to Civil Appeal 13/1992 Godwin Daniel v. Attorney General where Byron, J.A. had this to say:

"On my assessment of the circumstances of this case the appellant's decision not to report for duty as Agricultural Planner could not be justified on the basis that the appointment was unreasonable. On the other hand, I find it more probable than not that his entry into the extended commercial farm provides the reasonable explanation for the decision he took. I support the judgment of the learned trial judge that the wrongful dismissal of the appointment by the A.D.C. was not the cause of any loss of earnings."

In this case the loss of earnings flowed from the purported retirement of the plaintiff from the public service. In arriving at a period of time for damages I have attempted to take into consideration whether he acted reasonably.

The plaintiff's evidence was that he received salary up to June 1988. I will award damages based on three years salary. My reason for selecting that period - I think I should allow for a period of time when the plaintiff having filed proceedings which included a claim for reinstatement to his post would be waiting to see if this would

materialize. Included in the three year period is a period of one year during which he would be expected to mitigate and attempt to find employment. The evidence was that the plaintiff made no real efforts to find alternative employment.

From July 1988 to June 1989 @ \$2474.00 p.m.	23803.00
From July 1989 to December 1990 @ \$2647.00 p.m.	14844.00
From January 1991 to December 1991 @ \$2647.00 p.m.	31764.00
Total	70411.00

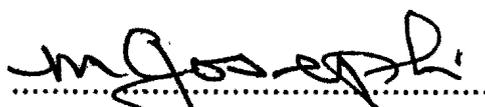
No evidence was led as to what allowances are attached to the post of Assistant Secretary. I can use the salary of the Superintendent of Airports to ascertain damages for the reason earlier given but I cannot use the evidence relative to allowances attached to the post of Superintendent of Airports as allowances may differ from post to post. The plaintiff's evidence was that he borrowed money at 12 1/2% interest but there was no document to support this and I do not allow it.

I give judgment to the plaintiff with damages in the sum of \$70411.00 and declare: that the letter dated 18th January 1989 from the Commission to the plaintiff purporting to retire the plaintiff in the public interest was an assertion that the plaintiff was still a public officer in the service of the Government of St. Vincent and the suspension of the payment of the plaintiff's salary was wrongful and unlawful.

#### COSTS

I am of the view that the plaintiff acted wrongfully when he failed to take up his appointment on transfer as directed by the Commission. If he had done as he had been directed to do this matter would not have reached the Court. I have held that the Commission used the wrong procedure in retiring the plaintiff. So all parties committed wrongs. Therefore, I think the best course to take is not to award costs and I make no order as to costs.

I regret the delay in the delivery of this judgment. Towards the latter part of last year I was informed that the Registry was experiencing difficulty in locating the notes of evidence. A few months ago I was informed that the notes of evidence had been located. I received the notes of evidence in the first half of May 1997. I altered my schedule to enable me to write this judgment so that it can be delivered before the commencement of the court vacation next month.

  
 .....  
 MONICA JOSEPH

20th July, 1997