IN THE EASTERN CARIBBEAN SUPREME COURT

COURT OF APPEAL

COMMONWEALTH OF DOMINICA

CIVIL APPEAL NO: 6 OF 1999

BETWEEN:

GARNET L. DIDIER **APPELLANT**

AND

GEEST INDUSTRIES (W.I) LTD **RESPONDENT**

BEFORE: **THE HON. MR. SATROHAN SINGH** **JUSTICE OF APPEAL**
THE HON. MR. ALBERT REDHEAD **JUSTICE OF APPEAL**
THE HON. MR. ALBERT MATTHEW **JUSTICE OF APPEAL (AG)**

APPEARANCES: **Mr. Justin Simon, for the appellant**
Mr. Michael B. G Gordon, Mr Ronald Armour with him for the respondent

[Sept. 14, Oct. 25, 1999]

J U D G M E N T

SATROHAN SINGH JA

The banana industry is the largest single industry in Dominica employing some 35,000 persons at all levels of the industry out of a population of about 83,000 people. **Geest Industries (W.I) Ltd, (the respondent),** was in the business of purchasing all of the bananas of merchantable quality produced in the Windward Islands.

Garnet Didier, the appellant, at the material time, occupied the position of the respondent's senior executive, as Manager of Lands and Agricultural Consultant in Dominica. He was first employed by the respondent on July 15th 1957 in a lesser capacity. This employment as a senior executive was terminated on April 2nd, 1990 by the respondent,

because the appellant entered into the active politics in Dominica when in March 1990 he was chosen as a candidate to contest the 1990 general elections. The contention of the respondent purporting to justify this dismissal, was that the appellant's entry into active politics, was inimical to the proper functioning of the respondent's business and that there should be implied in the appellant's contract of employment, a term, that because of the nature of the business of the respondent, the appellant should refrain from doing anything that was inimical to the proper function of the respondent company. The appellant was first asked to resign and when he failed to do so, he was dismissed with an offer of three months compensation in the sum of $67,800: in lieu of notice.

The appellant was dissatisfied and sued the respondent for wrongful dismissal. **Cenac J** heard the matter and on March 29w, 1999, found the appellant's dismissal not to be wrongful. The learned judge also found that the respondent was correct in offering the appellant three months compensation in lieu of notice. The appellant's claim was for damages totalling $387,020.01 for wrongful dismissal as per particulars set out in its statement of claim, based on a suggested termination notice of twelve months.

The issues for determination by us are (1) the existence of the implied term; (2) the validity of the three months notice and (3) the quantum of compensation.

THE IMPLIED TERM: THE DISMISSAL

On the issue of the implied term, it was accepted by both sides before us, that in the appellant's contract of employment with the respondent, the term to be implied should be that the appellant will do nothing that may prove inimical to the respondents business. It was also

accepted before us that the respondent had advised the appellant that should he enter active politics he would have to resign, that the appellant never responded to this advice and that the appellant did in fact enter active politics. The real question in controversy therefore, was, whether there was any evidence from which the Court could have found that the appellant's entry into politics was in fact inimical to the proper functioning of the respondent's business.

I have perused the transcript before us and, except for a letter which contained this aforementioned advice to the appellant from the General Manager of the respondent Mr Rapier, there was absolutely no evidence to support such an opinion. No one testified on behalf of the respondent. For the respondent to have succeeded on this issue, it had to show the relevant facts and circumstances, which went towards justification of this opinion of Mr Rapier, that the appellant' s entry into politics would be inimical to the proper functioning of the business of the respondent. Mr Rapier's mere ipse dixit on the issue would not be enough. Mr Rapier did not testify. It is interesting to note that the appellant' s political party is now the Government of the day in the Commonwealth of Dominica.

The learned judge, in determining this issue, found that the appellant wilfully disobeyed a lawful and reasonable order of his employers, when he entered into active politics and therefore his dismissal was justified. In so finding, the learned judge relied on the learning in **Chitty on Contracts 26th Edition at para 3977** where it is stated.

> **"An employee may be summarily dismissed if he wilfully disobeys any lawful and reasonable order of his employer, provided that "The disobedience must at least have the quality that it is 'wilful': it does ... connote a deliberate flouting of the essential contractual conditions". In circumstances which show that the employee is repudiating one of the essential conditions of the contract of employment, a single act of disobedience will justify dismissal".**

The judge apparently implied into the contract of employment, the term, that the appellant' s entry into politics would be inimical to the respondent's business and would result in termination of his employment. The learned judge therefore went further than the implied term accepted by both sides before this Court, i.e., that the appellant ought not to do anything that would be inimical to the proper functioning of the respondent's business.

It is a question of law, whether on the facts adduced in evidence, that a true inference can be drawn for the inclusion of a term into a contract **[O'BRIEN v. ASSOCIATED FIRE ALARMS LTD. [1969] 1 ALL ER. 93.]** A term can be implied by the conduct of the parties demonstrating that they did agree upon a certain point even though they did not so state: **[WILSON v. MAYNARD SHIPBUILDING CONSULTANTS AB [1978] 2 ALL E.R.78.]** It may be implied if it is something so obvious that the parties must have intended it, and in this, the "officious bystander" test, it is necessary to show that the exasperated cry of "Oh. of course!" would have come from both parties: **[SHLRLW v. SOUTHERN FOUNDRIES (1926) LTD. [1939] 2 ALL E.R. 113.]** It may be implied by custom in which case the parties must be taken to have agreed on the obvious; the custom must therefore be found to be "reasonable, notorious and certain". Finally, a term may be implied if it is found to be necessary for the contract to work properly. It must be "founded on presumed intention and upon reason": **[THE MOORCOCK [1989] 14 PD 64.]** It must be "necessary in the business sense to give efficacy to the contract" **[ROUSE v. MENDOZA [1967] 12 WIR 1.]**

It is my considered opinion, based on the aforesaid authorities, that the term accepted before this Court as the implied term is more in keeping with this law than the one found by the judge. The evidence shows that the appellant by his conduct never agreed to the term as found by the learned judge. The evidence also does not make that term so obvious that the officious bystander would cry out “oh, of course!” It is not a term that could be implied by custom as being reasonable, notorious and certain. There was also no evidence that it was necessary in the business sense to give efficacy to the contract. The evidence also did not show that a true inference can be drawn for the inclusion of such a term in the contract. In my view, the term implied by the judge was no more than a suggestion from Mr Rapier that was not responded to by the appellant. I would therefore hold that the term to be implied was the one accepted by both sides in this Court, already mentioned.

It was accepted that there was obvious wilful disobedience of the suggestion of Mr Rapier. However, for this wilful disobedience to be a ground for dismissal, it must be evident that the disobedience was a deliberate flouting of the essential **contractual conditions** of the appellant’s contract. In my judgement, this suggestion of Mr Rapier was not part of the express contractual conditions of the appellant’s terms of employment or of his job duties and could not be so implied. **In the Law Of Dismissal in Canada by Howard Levitt 1985,** the learned author referring to **Smith -v- Mills (1913) 1OD LR 589, Beal -v- Grant (1983) 44NBR (2CH) 477QB** and other cases, supports this opinion of mine when he stated that the order disobeyed must be within the scope of the employee’s job duties.

Given those circumstances, I regret I cannot agree with **Cenac J** that the dismissal of the appellant for that reason was not wrongful. There was an onus placed on the respondent to

prove on a balance of probabilities that the appellant' s entry into politics was inimical to the proper functioning of the business of company. This they have failed to do.

The 3 MONTH'S NOTICE:

In purporting to dismiss the appellant, the respondent offered him compensation allegedly amounting to three months benefits in lieu of notice. The respondent alleged that this was an express term of the employment contract. The appellant claimed that in relation to him specifically, no such term existed in his contract and that he was therefore entitled to reasonable notice which he opined to be twelve months. **Cenac J** in his judgement, found the existence of such an express term in the contract and disagreed with the appellant.

I would have to delve very briefly into the history of the appellant' s employment in order to determine this issue. The appellant commenced his employment with the respondent in July 1957. This portion of his employment was terminated in December 1979 and he was given full and satisfactory gratuity. In January 1980, the respondent retained him as a consultant and in September 1980, he was re-employed full time with the respondent. In January 81' he was the respondent' s senior executive in Dominica and was responsible for the respondents' operations in Dominica. In 1987, in order to avoid income tax, he formed a company, Woodford Holdings Ltd. The larger part of his salary was paid to Woodford Holdings. His duties were then diminished, and he occupied the position of Manager of the respondent's lands in Dominica and their Agricultural Consultant. He occupied this position until his dismissal in 1990. At that time he was 58 years old. In January 1989, the appellant advised the respondent that his monies that were being paid to Woodford, be, from then on

paid to his account at Scotia Bank. The respondent had a separate and distinct contract with Woodford Holdings to that with the appellant personally.

It is to be observed from the transcript, that in none of the contracts of employment between these parties, was there ever mentioned a termination notice. Indeed, in one of the letters from the respondent to the appellant dated December 21, 1989, Mr Rapier wrote thus:

> "In view of the matters raised by both sides, it will be necessary to review your letter of appointment to take effect from 1 / 1/90 and as is customary insert a clause which appears to have been omitted that either side can give three months notice to each other to terminate the agreement."

There is no evidence that the appellant accepted this as a term of the contract. As against this, the respondent, in confirming the agreement between itself and Woodford Holdings, had such a term in that agreement.

The learned judge found it "impossible to separate the terms and conditions of the plaintiff from the device of appointing Woodford Holdings Ltd to perform certain services...", and used the term in the Woodford agreement as to notice, as a term affecting the appellant in his personal contract with the respondent.

It is my considered opinion that the learned judge erred when he so transposed to the appellant's personal contract, that term from the contract with Woodford Holdings. At the time when the Woodford Holdings' contract came into existence, the appellant had his own contract with the respondent and no such term existed in that contract. If the respondent intended the three months' termination notice in the Woodford Holdings contract of 1987 to apply to the appellant personally in his own contract, why was it necessary for Rapier to speak about such an omission in the appellant's personal contract. In my opinion, implied in this reference by Rapier to this so called omission, was acceptance by the respondent that the termination clause

in the Woodford Holdings contract did not apply to the appellant in his personal contract.

For these reasons, I am compelled to disagree with **Cenac J** that there existed in the appellant's contract of employment with the respondent the alleged termination clause. I have to therefore now consider the concept of reasonable notice.

REASONABLE NOTICE

An employee who has been wrongfully dismissed is entitled to such damages as will compensate him for the wrong he has suffered. However, if an Employer wrongfully terminates a Contract that could be terminated validly, the Employee's entitlement is that which he would have earned up to the time at which the Contract could validly be terminated. **(Chitty on Contracts 22nd edition paragraph 1141).**

The determination of the issue of a valid termination of a contract, revolves around the issue of what constitutes reasonable notice, and this always depends on the particular facts of each case. In deliberating on this concept, in the context of this case, I have to consider **inter alia,** the character of the employment, the appellant's qualifications, his stature in the position he held, his age, the availability of similar employment within a reasonable time,(this was not ventilated evidentially or otherwise in the Court below or before this court) his experience, his skill, his training, the length or duration of his employment, and the responsibilities that attended themselves to that position. **[See Saunders -v- St Kitts Sugar Manufacturing Corp. Civil Appeal No 1 of 1993 St Kitts (unreported) and Waithe -v- Caribbean International Airways Ltd [1987] 39 WIR 61].** The principles of fairness and equity also apply in the

treatment of employees. Dismissal can have a serious impact on the reputation of an employee and managers should carefully consider all options before recommending dismissal. **[Mendez -v- Bank of Nova Scotia High Court Civil 93/1991 St. Kitts.]**

There are numerous cases which are capable of guiding a Court in its deliberations on this issue. I have already set them out in our judgement in **SAUNDERS** and also in the High Court judgement of **MENDEZ.** I do not propose to do so again in this judgement. I have allowed myself once more to be guided by them. Included in my deliberations also is the case of **Clarence Edwards -v- Antigua Commercial Bank** No 39 of 1986 out of the High Court of Antigua and the cases referred to therein by my brother **Redhead J** (as he then was) and a chart of awards to be found at P706-707 of **The Law of Dismissal in Canada (Supra).**

I have already alluded to the appellant's history of his employment with the respondent. Even though the relevant portion of this history for the purposes of this appeal is between September 1980 and his dismissal in April 1990, it is pertinent to remember also that he was in the employ of the respondent from 1957. During the arguments, it was more or less accepted that he was the "Mr Geest" of Dominica. When the factual circumstances of the appellant's employment are juxtaposed with the legal principles to be applied, already mentioned, and following the guidelines in the cases aforementioned, I am of the firm opinion that reasonable notice in these circumstances should be nine months.

The circumstances of this case are not too dissimilar to the circumstances in **MENDEZ** (Supra) where nine months was considered by the High Court in St Kitts to be reasonable notice. In **Mendez,** the employment before termination was for

some eleven years, and the position held was that of an Assistant Manager of a branch of Scotia Bank. In the instant matter, the length of employment was about the same and the position held was that of a senior executive in a branch of the respondent. In my judgement therefore, the appellant is entitled to all that he could have earned up to nine months after the date of his purported dismissal. I now address that aspect of the appeal.

THE ENTITLEMENT

Salary

The appellant is entitled to nine months salary in lieu of notice at the accepted rate of $7,100: per month or $63,900:

Earned vacation

It is conceded by the learned counsel for the respondent that the appellant should also receive $33,468.45 being salary for 20 weeks earned vacation.

Pension

It is also conceded that his monthly pension should be increased by $137.62 from May 1, 1993 for the rest of his life.

Health Benefits

The appellant claimed $55,000: as medical expenses for an injury he suffered after he was purportedly dismissed. It is accepted that under his health insurance coverage with the respondent, had he still been on the job at that time, this sum if proved would have been reimbursed to him. Mr Gordon opposed this claim on the ground that at the time of the injury

the appellant was already dismissed and in any event, no documents or receipts were produced to justify this claim.

The evidence of the appellant was that he suffered this injury in April 1991, or some twelve months after he was purportedly dismissed. His evidence on the figure of $55,000: was not challenged in the Court below. Given these circumstances, I do not consider the mere non-production of documents in support thereof enough to reject his evidence. Unfortunately however, because the injury he suffered happened outside of the nine months notice allowed in this judgement, he will not be entitled to this sum. I therefore make no award under this head.

Land Sales

Addressing the issue of commission on land sales, like Mr Simon, I am in a quandary in determining this figure. Learned Counsel suggests that we award a reasonable sum. I find this a daunting exercise because in order to find a reasonable sum, there must be evidence of the actual transactions. I consider the evidence on this issue to be too vague to afford of a reasonable quantification.

The learned trial judge dismissed this aspect of the claim on the ground that it was statute barred. I agree. The sales allegedly happened between 1981 and 1986. The limitation period was 6 years. The writ was not filed until 1993. Mr. Simon referred us to a certain paragraph in a letter from the respondent dated December 1988, and submitted, that implicit in that paragraph, was an acknowledgment by Geest, of the land sales commission due to the appellant and therefore time should begin to run from 1988. That paragraph reads as follows.

> "That in view of the fact that the Company has continued to use your services in one form or another that at your ultimate retirement from

> the Company, termination pay would be considered as from January 1980 and in addition the unusual problems which you subsequently encountered would be given some consideration in finalising your termination payment at that time. However no commission as such would be considered."

With the greatest respect for Mr Simon, I find that letter too vague to merit the finding of an acknowledgment. I would therefore disallow any sum of money for land sales commission on the ground that such a claim was statute barred.

Gratuity

The learned trial judge deprived the appellant of his claim for gratuity for 11 months on the basis of the customary one month's pay for each year of services rendered, on the ground that there was no evidence to support such a claim.

I have to disagree with the learned judge and agree with Mr Simon. In their dismissal letter of April 1990, one of the benefits offered the appellant upon his purported dismissal was "final gratuity for services rendered. Also, when his services were properly terminated in 1979 he was also paid a gratuity. In my view, this was evidence enough for the trial judge to find justification in the appellant's claim for gratuity. Accordingly, I would award him one month's salary for each of the eleven years of service which I quantify at $66,550: based on his basic salary of $6050: per month.

Insurance Premiums: Top-up Policy Entitlements

What is described in these proceedings as **Top-up Policy** was an insurance policy the respondent had with Barbados Life in favour of the appellant. That policy had matured and was valued at $51,147.80. The respondent was responsible for the payment of the premiums. However, at maturity it was discovered that premiums totalling $12,913.49 and interest

$1,275.02 grand-totalling $14,188.51 remained unpaid. As a result Barbados Life deducted that sum and described the net maturity proceeds as $36,959.29.

In my judgement, because, the appellant's dismissal was wrongful, he is entitled to the full value of the policy of $51,147.80 as it was the obligation of the respondent and not his, to pay the premiums.

Additional Voluntary Contribution Scheme

This was a scheme the respondent provided the appellant whereby the appellant contributed 10% of his salary. The respondent would invest these payments and the value of this investment was to be refunded to the appellant on retirement. Upon termination of his employment, the respondent in May 1993 paid the appellant $102,641: less 10 %, which they withheld from the appellant until they would have determined the tax liability of the appellant, if any, on this investment. To date, that question has not been answered and the respondent still holds that 10 %. The evidence of the appellant was that he told the respondent, that if there was any question of tax liability, he would deal with it.

It is my view, that the respondent should pay this 10% value of the investment to the appellant. The tax authorities are legally empowered to secure their pound of flesh from the appellant as they wish, if the law so authorised them. I quantify this entitlement at $10,264.10. The respondent has shown no legally acceptable reason for withholding this sum. I therefore agree with the submission of Mr Simon that they should also pay interest on the same at 6 % per annum from the date of the payment of the substantial sum, i.e., May 1st 1993 until fully paid.

CONCLUSION

In concluding this judgement. I would order that this appeal be allowed and that the judgement of the trial judge be set aside. I conclude that the appellant was wrongfully dismissed and that he is entitled to the following benefits:

1.	Nine months salary in lieu of notice @ $7,100: per month	-	$63,900.00
2.	Earned vacation salary for 20 weeks	-	$33,468.45
3.	Health benefits	-	Nil
4.	Land Sales Commission	-	Nil
5.	Gratuity	-	$66,550.00
6.	Top-up Policy Entitlement	-	$51,147.80
		Total -	$215,066.25
7.	Monthly pension to be increased by $137.62 from May 1st, 1993 for the rest of his life.		
8.	Additional Voluntary Contribution Scheme with interest at 6% per annum from May 1st, 1993 until paid.	-	$10,264.10

The respondent will pay to the appellant his costs of this appeal and in the Court below to be taxed if not agreed. The Registrar is ordered to forward a copy of this judgement to the Income Tax department of Dominica for their information.

SATROHAN SINGH
JUSTICE OF APPEAL

I concur

ALBERT REDHEAD
JUSTICE OF APPEAL

I concur

ALBERT MATTHEW
JUSTICE OF APPEAL (AG)