

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 17 OF 2000

BETWEEN:

MALCOLM ALPHONSO EDWARDS

Plaintiff/Appellant

and

ANTIGUA PUBLIC UTILITIES AUTHORITY

Defendant/Respondent

Before:

The Hon. Mr. Satrohan Singh
The Hon. Mr. Albert Redhead
The Hon. Mr. Joseph Archibald, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal (Ag.)

Appearances:

Mr. Gerald Watt QC and Mr. H. Asquith Fearon for the Appellant
Mr. Clare Roberts for the Respondent

2001: June 7;
October 1.

JUDGMENT

The Pleadings

- [1] **ARCHIBALD, J.A. [AG.]:** On 22 August 1995 the Plaintiff, a national of Antigua and Barbuda (“the State”) sued the Defendant Antigua Public Utilities Authority (“the Authority”) by issuing a Writ of Summons specially endorsed with Statement of Claim. The Statement of Claim was according to paragraph 3 of the Judgment of the trial Judge Georges J, “most inelegantly drawn”. It was certainly unusual in style. It commenced with four (4) numbered paragraphs of claims, followed by ten (10) numbered paragraphs of particulars, and ended with six (6) numbered claims for remedies. Having regard to the issues which arose for

determination at trial and on appeal, it would be worthwhile to set out the pleadings of statement of claim, defence and reply in full as follows:

"STATEMENT OF CLAIM

The Plaintiff's claim is for:

- (1) A declaration that the Plaintiff is entitled to be paid retirement benefits in the form of a pension and gratuity as calculated according to the formula used for the calculation of a monthly non-established worker employed with the government of Antigua and Barbuda, and which formula has been formerly adopted and utilized by the Defendant.
- (2) Damages for breach of contract with regard to the non-payment of retirement benefits, including pension and gratuity to the Plaintiff by the Defendant in respect of the Plaintiff's period of service with the Defendant authority.
- (3) The sum of \$148,887.50 being the total sum due to the Plaintiff by the Defendant in respect of a gratuity which lawfully became due to the Plaintiff as a result of his forced retirement for the Defendant's employment on the 30th November, 1994.
- (4) Alternatively damages for wrongful dismissal from the Defendant's employment as assistant to the General Manager on the 30th November, 1994.

PARTICULARS

1. The Plaintiff was at the date of his termination of employment with the Defendant, Assistant to the General Manager, and had been employed by the Defendant for a period in excess of 25 years at termination to Plaintiff's gross annual salary was \$103,200.00 paid in a monthly sum of \$8,600.00.
2. The Plaintiff's employment with the Defendant commenced on the 4th July, 1973, as Chief Engineer and Manager for the Electricity Division. The Plaintiff having been seconded to the Defendant's employment by the Government of Antigua and Barbuda with whom the Plaintiff worked, sundry other workers, Government employees, both established and non-established, were seconded to the Defendant by the said government. Each employee being given the option of remaining with the Defendant on secondment or taking up permanent employment with the Defendant.
3. On the 4th July, 1973, the Plaintiff elected to work with the Defendant Company and continued to do so continually until the date of his purported termination on the 30th of November, 1994 and during this period of time occupied the following positions:
 - (a) Electrical Engineer
 - (b) Chief Engineer
 - (c) Chief Engineer/Manager Electricity
 - (d) Telephone Manager

- (e) Telephone Manager/Telephone Project Manager
- (f) Assistant to the General Manager

During the Plaintiff's employment with the Defendant both monthly and weekly employees who were previously transferred and/or seconded to the Defendant retired from the service of the Defendant and were paid their retiring benefits without exception.

4. It was an express condition of the Plaintiff and other seconded employees that those persons taking up permanent employment with the Defendant would take with them all existing retirement benefits as Government employees and that any retirement benefits introduced by the Defendant subsequently would be no less favourable than those of the government from whose employment they had been transferred, a letter to this effect was signed by the then Minister of Public Utilities and Communications and delivered to all transferred employees.
5. On or about the 15th September, 1994, the Plaintiff without any notice or discussion was summoned to the General Manager's office and abruptly informed by the said General Manager that in the month of November he would be required to retire as he would have attained the age of 60 years, and the Plaintiff was then instructed to proceed on pre-retirement leave for 1 month, concluding on the 30th November, 1994, upon which date the Plaintiff was forced to retire.
6. The Plaintiff denies that the Defendant had a policy of retirement at 60 years of age in place at the material contends that to the contrary, the Defendant had on permanent employment several employees in various categories well over the age of 60 years and who continue to be so employed. Further and in particular, the Defendant has on occasion employed persons over the age of 60 years and in particular one MALCOLM GREENE who had previously retired from the employment of Cable and Wireless.
7. By letter of 26th October, 1994 the said PETER BENJAMIN wrote to the Plaintiff as follows:
"I refer to our previous discussion on your retirement and wish to inform you that you may continue to work until the due date of your retirement, at which time you will be paid for all outstanding leave and your retiring benefits."
8. By letter of the 11th December, 1994, PETER BENJAMIN wrote to the Plaintiff, for the first time informing the Plaintiff inter alia that he was not entitled to an A.P.U.A. pension and recommending an exgratia payment to the Plaintiff of a sum equivalent to one (1) year's salary. The said letter was copied to ROBIN YEARWOOD, the Minister of Public Utilities and CORA HILL, Personnel Officer.

9. The Plaintiff contends that ROBIN YEARWOOD, PETER BENJAMIN and CORA HILL, the Minister, General Manager and Personnel Officer respectively are perfectly aware that the Defendant has in the past paid pensions and gratuities to retiring employees which benefits have been calculated on a formula used by the Government of Antigua and Barbuda for payment of benefits to non-established weekly and monthly paid workers, and which formula was prepared by CORA HILL and forwarded to D.M. WOODRUFF, former General Manager on the 25th March 1993 and the Plaintiff will rely on the contents of the Memorandum at the Trial of the action.

10. The Plaintiff contends that he has worked faithfully and competently for the Defendant in the various positions heretofore pleaded and continued to do so up to the 26th October, 1994. That he was at all material times in excellent health with an exceptional attendance record and possesses the qualifications to enable him to continue to work productively for the Defendant's benefit. Further it has been a policy of the Government of Antigua to continue to utilize the expertise and knowledge of qualified personnel and to allow them to work long after the age of retirement. And the Plaintiff contends that this forced retirement contrary to contract was predicted by spite, ill will, was contrary to natural justice, and amounts to a wrongful dismissal.

AND the Plaintiff claims:

- (i) Damages for wrongful dismissal;
- (ii) The sum of \$148,887.50 being the sum due to the Plaintiff in respect of his gratuity;
- (iii) The monthly sum of \$2,977.75 to the Plaintiff by the Defendant as a pension payment calculated on the pension plan therefore pleaded in paragraph 9 of this Claim;
- (iv) Interest pursuant to the Supreme Court (Amendment) Act No. 10 of 1970 from the 30th November, 1994 until the date of judgment;
- (v) The costs of this action;
- (vi) Such further or other relief as the court may deem fit.

Dated the 22nd day of August, 1995

/s/ Gerald A. Watt

.....
WATT & ASSOCIATES
Solicitors for the Plaintiff"

"DEFENCE

1. The Defendant denies that it was guilty of the alleged or any breaches of contract as alleged in the Statement of Claim or at all that the Plaintiff is

entitled to be paid retirement benefits in the form of a pension and gratuity or at all.

2. The Defendant denies that it has a pension scheme but states that the Defendant contributed to the Social Security Scheme on behalf of the Plaintiff and that the Plaintiff is entitled to retirement and other benefits under the Social Security Scheme.
3. The Defendant states that the Plaintiff prior to his return to Antigua in 1969 requested and was granted employment on a contractual basis as Electrical Engineer, Electricity Department. He completed his first two years contract with the government on 22nd February 1972 and was paid a gratuity. He commenced a second contract of 23rd February 1972 and was midway through this contract when the Electricity Department was succeeded by the Defendant with whom he continued to work. Consequently, the Defendant contends that the Plaintiff does not fall with the category of workers whose pensionable status was retained and whose rights and benefits the Government of Antigua agreed would have borne by the Government up to and until December, 1973.
4. On the 15th September, 1994 before the alleged termination of the Plaintiff's service, the Defendant gave to the Plaintiff orally notice of the Defendant's intention to put an end to the said service on the grounds that he had reached the retirement age of 60 years.
5. The Defendant states that it is its policy to retire its employees at 60 years. The Defendant reserved the right to employ workers over the age of 60 years [on a month to month basis] where the exigency of the service so requires, or weekly, or by contract.
6. Paragraph 10 of the particulars of the Statement of Claim is not admitted.
7. Save as hereinbefore specifically admitted, the Defendant denies each and every allegation as contained in the Statement of Claim as though the same were herein set out and traversed seriatim.
8. The alleged cause of action did not arise within six months before this action and is barred by Section 2 of the Public Authorities Protection Act, Cap. 66 of the Laws of Antigua and Barbuda (1962 Revised Edition).

/s/ Roberts & Co.

.....
ROBERTS & CO.
Solicitors for the Defendant"

"REPLY

1. The Plaintiff joins issue with the Defendant on paragraphs 1, 2, 4, 5 and 7 of its Defence (save in so far as the same consists of admissions).
2. As to paragraph 2 the Plaintiff states that while the Defendant has not to date set up a Pension Scheme of its own, it has always paid pensions to its retiring employees based on the formula used by the Government of Antigua and Barbuda in relation to its retiring civil servants.
3. As to paragraph 3 of the Defence, the Plaintiff says that he and other Government employees were not transferred to the employment of the Defendant by the Provisions of the Public Utilities Act No. 10 of 1973, or any other Act, but in fact was permanently employed by the Defendant and worked continually for the Defendant under the very same conditions of employment as all other Government workers who were permanently employed by the Defendant at the same time.
4. As to paragraph 5 of the Defence, the Plaintiff denies that there was at any material times a definite policy of the retirement for its employees attaining the age of 60 years and says that the Defendant has habitually allowed employees to work long after they attained the age of 65 under their continuing contract of employment.

Dated the 12th day of January, 1996.

/s/ Gerald A. Watt

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WATTS & ASSOCIATES
Solicitors for the Plaintiff"

Further and Better Particulars of Pleadings

[2] By letter of 23rd October, 1995 the Defence furnished further and better particulars of paragraphs 3 and 5 of the Defence as follows:

"Paragraph 3

- (a) By the provisions of the Public Utilities Act, No. 10 of 1973, the Plaintiff was transferred to the Defendant. The Defendant is not in a position to state whether or not the Plaintiff received any gratuity upon the completion of the said second contract.
- (b) The succession of the Plaintiff to the Defendant took place with the enactment of the said Public Utilities Act, July 4, 1973.

- (c) There was no documented contract of employment between the Plaintiff and Defendant, but it would be regarded as the date immediately following the cessation of the second 2 year contract between the Plaintiff and the Government of Antigua and Barbuda, i.e. February 23, 1974.
- (d) The defendant alleged no differences between the Plaintiff's contract of employment and those of other employees employed by the defendant, past July, 1973.

Paragraph 5

The policy was guided by the dictates of statute, i.e. section 27(1) (a) Social Security Act, section 8(1) Pension Act Cap. 311 and by the current trends of business culture.

We trust that the above information satisfies your queries. We accordingly consent to the service of reply by you on or before 14 days of receipt of this letter."

[3] By letter of 7th December, 1995 the Plaintiff furnished further and better particulars of paragraphs 3, 4 and 10 of the Statement of Claim as follows:

"Under Paragraph 3 of the Plaintiff's Statement of Claim

- (a) The Plaintiff elected to work for the Defendant and did in fact so work for a period in excess of 25 years.
- (b) The identity of the monthly and weekly employees previously transferred and/or seconded to the defendant who retired and were paid their retiring benefits are persons known to the defendant and would form part of its personnel records. These records would of necessity contain the dates of employment and retirement.

Under Paragraph 4

- (a) The Plaintiff is unable to provide particulars of the Minister's letter as described in paragraph 4 of the Statement of Claim.

Under Paragraph 10

- (a) The Plaintiff has alleged no contravention of any contract between the parties in paragraph 10 of the Statement of Claim.
- (b) The policy of the Defendant to utilize qualified and other personnel after retirement is not contained in any document or documents.

- (c) Details of the spite and ill will alleged is evidence to be led by the Plaintiff at the trial and he is not therefore liable to disclose his evidence to the Defendant at this time and declines to do so."

Documentary Evidence

- [4] The Discovery proceedings prior to trial resulted in a Plaintiff's List of 15 documents and a Defendant's List of 18 documents, 8 of which were common to both sides; but at trial there were 64 admitted documents (some of them duplicated) numbered consecutively but not chronologically as Exhibits in the Record of Appeal ("the Record").

The Statute establishing the Authority

- [5] On 4th July 1973 the State Parliament enacted the Public Utilities Act, now Cap. 359 ("the Act"), with exclusive rights to supply electricity, to provide telephone service and to supply water within the State. The Act established the Authority as a body corporate, and included a Second Schedule thereto with reference to the appointment and conditions of service and otherwise in relation to officers and employees of the Authority. The Second Schedule envisaged a possible Pension Scheme for the benefit of employees of the Authority. For ease of reference Sections 3(1) (relating to establishment and incorporation of the Authority), 3 (4) (relating to Second Schedule), 12 (relating to powers of the Authority to borrow from Government), 13 (relating to application of the revenue of the Authority), 19 (relating to Rules), 37 (relating to power of the Minister to give policy direction), 38 (relating to power of the Cabinet to act in the interest of the State), and the Second Schedule (relating to employees) are set out in full as follows:

"3. (1) There is hereby established a body to be called the Public Utilities Authority which shall be a body corporate with perpetual succession and a common seal with power to purchase, take, hold and dispose of land and other property, to enter into contracts, to sue and be sued in its said name and to do all things necessary for the purposes of this Act.

(4) The provisions of the Second Schedule shall have effect as to the officers and employees of the Authority, their appointment, dismissal and conditions of service and otherwise in relation thereto.

12. (1) The Authority may with the approval of the Minister responsible for finance, from time to time borrow by way of advances from the Government such sums as may be necessary for carrying out its functions under this Act.

(2) For the purpose of making advances to the Authority under this section, the Minister responsible for finance may authorize advances out of the proceeds of any loan raised for the purpose or out of the reserve fund, revenues or surplus balances of Antigua and Barbuda.

(3) Pending the raising of any such loan, the Minister responsible for finance by warrant under his hand may authorize the Accountant-General to make advances out of the revenues of Antigua and Barbuda to the Authority in such sums and on such terms and conditions as the Minister responsible for finance may think fit for the purposes authorized by this Act.

(4) The repayment of any such advances and the payment of interest thereon shall be made by the Authority in like manner and on like conditions as borrowings by the Authority, subject to any special terms and conditions which may be stipulated with respect to any such advance by the Minister responsible for finance upon the making thereof.

13. (1) The revenue of the Authority for any financial year shall be applied in defraying the following charges:

(a) the remuneration, fees and allowances of the members of the authority or of any committee thereof;

(b) the salaries, fees, remuneration and gratuities, including payments for maintenance of the Provident Fund or Pension Fund authorized by this Act, of the officers, or agents and employees, and technical and other advisers, of the Authority.

(c) working expenses, and expenditures on, or provision for, the maintenance of the property and of any of the works of the Authority, and the insurance of the same and the discharge of the functions of the Authority properly chargeable to revenue account;

(d) interest on any debenture and debenture stock or other security issued, and on any loan raised by the Authority;

(e) sums required to be transferred to a sinking fund or otherwise set aside for the purpose of making provision for the redemption of debentures or debenture stock or other security or the repayment of other borrowed money;

(f) such sums as it may be deemed appropriate to set aside in respect of depreciation on the property of the Authority having regard to the amount set aside out of the revenue under paragraph (e);

(g) any other expenditures authorized by the Authority and properly chargeable to revenue account.

(2) The balance of the revenue of the Authority shall be applied to the creation of reserve funds to finance future modernization and expansion.

19. The Authority shall by resolution make rules in respect of the following matters:

(a) the manner in which and the officers by whom payments are to be approved;

(b) the bank or banks into which the moneys of the Authority are to be paid, the title of any account with any such bank, and the transfer of one fund from one account to another;

(c) the appointment of a member of the Authority or an officer of the Authority to countersign cheques on behalf of the General Manager or in the absence of the General Manager;

(d) the sum to be retained by the accountant to meet petty disbursements and immediate payments and the maximum sum that may be so disbursed for any one payment;

(e) the method to be adopted in making payments out of the funds of the Authority; and

(f) generally as to all matters necessary for the proper keeping and control of the accounts and books and the control of the finance Authority

37. (1) The Minister may give to the Authority such directions as to the policy to be followed by the Authority in the performance of its functions as appear to the Minister to be necessary in the interests of Antigua and Barbuda and the Authority shall give effect to such directions.

(2) The Authority shall furnish the Minister with returns, accounts and other information as he may require with respect to the property and activities of the Authority and shall afford to him facilities for verifying such information in such manner and at such times as he may reasonably require.

38. (1) Notwithstanding any other provision of this Act, where the Cabinet is satisfied –

(a) That there has been failure by the Authority to comply with or to give effect to any direction or requirement of the Minister pursuant to section 37; or

(b) That with respect to any public utility, the Authority is for any reason unable or unwilling to act and that such conduct on the part of the Authority is contrary to the interest of Antigua and Barbuda

the Cabinet may assume the control and management of such public utility for such period as the Cabinet may deem necessary and may perform all functions and exercise all the rights, powers and duties appertaining thereto as are vested in the Authority under and by virtue of this Act.

(2) In the exercise of its functions under subsection (1) of this section, Cabinet may delegate any of its rights, powers or duties or issue directions to such public authority, public officer, committee or person as to Cabinet may seem fit in the interests of Antigua and Barbuda.

(3) A notice published in the Gazette stating that the Cabinet has acted in pursuance of subsection (1) of this section shall be conclusive evidence of the assumption by the Cabinet of the functions, rights, powers and duties mentioned in that subsection and of the date of such assumption stated in the notice; and the Cabinet may in like manner by notice published in the Gazette specify the termination of any such assumption of control and management and the date thereof.

(4) For the avoidance of doubt, it is hereby expressly declared that the assumption of control and management by the Cabinet as provided for in this section shall be to the exclusion of any other Authority, body or person whatsoever, or their agents; and such exclusion shall continue until the publication of a notice of termination of control and management as provided for in subsection (3) of this section.

(5) This Act shall, for the purposes of this section, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this section.

Second Schedule

1. (1) Subject to the provisions of this Act, the Authority may appoint and employ at such remuneration and on such terms and conditions as it thinks fit a General Manager, an accountant and such other employees as may be necessary and proper for the due and efficient administration, management and performance by the Authority of its functions under this Act.

(2) The Authority may, with the approval of and subject to such terms and conditions as may be imposed by the Governor-General, provide for the establishment and maintenance of a Pension Scheme or a Provident Fund Scheme for the benefit of employees of the Authority, and in every such scheme different provisions may be made for different classes of employees.

2. (1) The emoluments of any public officer who is in the service of the Authority shall, at the end of every month after the commencement of this Act, be paid into the Consolidated Fund by the Authority for the benefit of such public officers.

(2) The sums payable as contributions by Government under the Social Security Act in respect of such public officers shall at the end of every month after the commencement of this Act be paid into the Consolidated Fund by the Authority and such sums shall be paid by Government into the Social Security Fund established under the Social Security Act.

(3) The Authority shall, within three months after the end of each financial year, pay to the Government in respect of such public officers as a contribution to the pension and other rights of such public officers under the Pensions Act such sum or sums of moneys as would have been due by Government in respect of the accruing pension and other rights of such public officers under the Pensions Act had such public officers not been in the service of the Authority.

(4) In the event of the winding up or dissolution of the Authority any sums of money due under subparagraphs (1), (2) or (3) shall rank as preferred debts.

Chronology of Events

[6] From the Record a chronology of some relevant events is as follows:

1969	Plaintiff returned to Antigua
23 February 1970	Plaintiff appointed by Establishment Division of Ministry of Finance of the State as Electrical Engineer on a two year contract. (Exhibit 34).
22 February 1972	Plaintiff's contract completed and was paid gratuity.
23 February 1972	Plaintiff appointed by Establishment Division of Ministry of Finance of Antigua by second contract for three years with gratuity entitlement at its end. (Exhibit 43 and Defence paragraph 3).
3 July 1973	Circular policy letter from Minister of Public Utilities to staff members of the Public Service concerning their secondment with their

permission to the Departments under the Authority. (Exhibit 44).

4 July 1973

The Act enacted into law creating the Authority.

4 July 1973 or thereabouts

Circular letter from the Establishment to staff members including the Plaintiff signed by the Assistant Secretary on instructions from the Minister of Public Utilities asking each worker including the Plaintiff (whose name was listed first among others) to indicate whether he or she would like to be seconded or would prefer to be turned over immediately to the Authority; and including an indication opposite the name. The Plaintiff indicated in writing opposite his name ***"To turn over to the Authority"***. (Exhibit 45).

20 December 1973

The State Cabinet Decision relating to established workers of the Authority (Exhibit 50).

31 December 1973

Memorandum from the Chief Establishment Officer to the Permanent Secretary, Ministry of Public Utilities concerning release of established workers who have signified their intention in writing to be employed by the Authority. (Exhibit 54).

1 January 1974

Plaintiff confirmed by Deputy Chief Establishment Officer Coralie Edwards to be included as established worker under Paragraph one (1) of the Cabinet Decision in Exhibit 50. (Her evidence pages 75, 76 of the Record).

2 February 1974

Letter from Chief Establishment Officer, Planning Division to Mr. Charlesworth Massiah concerning his release by the Public Service Commission to the Authority and consequential pension rights (Exhibit 2), a similar letter the Plaintiff contends he received ***"but it got burnt"*** (His evidence page 56 of the Record)

5 February 1974

Memorandum from the Chief Establishment Officer to Permanent Secretary of Ministry of Public Works with reference to Exhibit 54 concerning certain officers employed by the Authority who exercised their option to be seconded or to turn over to the Authority; a

number of names listed therein, but not the Plaintiff's; including a paragraph stating:

"3. A further communication will be addressed to you with regard to the officer employed on contract." (Exhibit 61).

1 July 1980

Cora Hill commenced employment with the Authority as Public Relations Manager (Her evidence page 77 of the Record).

1 July 1980

Staff Rules and Regulations of the Authority already in place. (Cora Hill's Evidence page 78).

18 December 1985

Final draft of New Staff Rules and Regulations of the Authority signed by Staff Rules and Regulations Committee comprising the Plaintiff as Chairman and Cora Hill and W. Daniel as members (Exhibit 27 and Cora Hill's evidence page 78 of the Record) recommending under paragraph 11 relating to retirement as follows:

" Staff members will be required to retire at the age of sixty (60) years provided that, in exceptional circumstances, a staff member may be permitted to remain in the service of the Authority beyond retirement." (Exhibit 27).

25 March 1993

Memorandum of the Authority signed by Cora J. Hill as Personnel and Public Relations Manager to Mr. D. M. Woodroffe, General Manager, copied to the Plaintiff, setting out **the formula for the calculation of pension and gratuity for monthly paid employees, the Plaintiff being one of the monthly paid employees** (Exhibit 8)

25 July 1994

Memorandum from Chief Establishment Officer to Cora Hill, Personnel and Public Relations Officer of the Authority concerning the Plaintiff as captioned, advising in paragraph one that Plaintiff would attain his 60th birthday on 21st November 1994 referring to his contracts which *"gave way to the Authority with whom he continued to work"*; and concluded in paragraph 3 as follows: *"Consequently, Mr. Malcolm Edwards does not fall in the category of workers whose pensionable status was retained and whose rights and benefits the Central Government*

agreed will be borne by them up to and including 31st December, 1973." (Exhibit 29).

15 September 1994

General Manager of the Authority orally notified the Plaintiff of the Authority's intention to put an end to his service on 30th November 1994 upon his reaching the retirement age of 60 years. (Defence paragraph 4).

26 October 1994

Letter from Peter Benjamin, General Manager of the Authority (hereinafter called "the General Manager") to Plaintiff, copied to Mr. E. Martin, Manager, Finance and Accounting and Miss C. Hill, Personnel Officer, referring to previous discussions on his retirement, and informing him that "... *you may continue to work until the due date of your retirement, at which time you will be paid for all outstanding leave and your retirement benefits.*" (Exhibit 21)

10 November 1994

Memorandum of the Authority from Personnel Department signed by Cora J. Hill as Personnel and Public Relations Manager to the General Manager on the subject "**Calculation of Retirement Benefits – Mr. Malcolm Edwards – Asst. to the General Manager**", calculating a monthly pension of \$2,250 and a gratuity of \$112,500 in respect of service from 1 January 1974 to 21 November 1994, equal 20 years 10 months 21 days, and calculated on a monthly salary of \$7,200.00. (Exhibit 22)

21 November 1994

Sixtieth birthday and retirement age of Plaintiff set out in memorandum of the Authority dated 23 November 1994 from Personnel Department signed by Cora J. Hill as Personnel and Public Relations Manager to the General Manager (Exhibit 23)

2 December 1994

Letter from General Manager to the Plaintiff on the subject of retirement stating in the second paragraph thereof "*on the subject of your pension/gratuity I will further communicate to you by the 15th December 1994*". (Exhibit 24).

11 December 1994

The Authority's letter signed by the General Manager to the Plaintiff on the subject of

retirement benefit set out in paragraph 2: "***The reality of the situation now, is that APUA does not have a pension scheme. This is regrettable ...***"; and stating at paragraph 3 the following: "***I wish to advise therefore that you are not entitled to an APUA pension....***" (Exhibit 25).

23 January 1995

Letter from the Plaintiff to the General Manager copied to same recipients of Exhibit 25 and also Mr. Gerald Watt, Barrister and Solicitor stating at paragraph 2: "***I regard the contents of your 11th December 1994 letter enclosed in an envelope dated with your office stamp 3rd January 1995 and received by me on 5th January 1995 to be totally irrelevant***"; referring to letters signed by the then Minister of Public Utilities concerning retirement benefits for transferred employees, and stating in paragraph 3: "***...this practice has been in effect for the last twenty years***"; referring in paragraph 4 to his total service with Government and the Authority; and concluding in paragraph 5 as follows: "***I shall allow seven days from the date of this letter for a resolution in principal of this matter and a further seven days for payment of my gratuity for which I opt under the established formula, with my pension to commence as soon as it becomes due.***" (Exhibit 12).

21 March 1995

The Authority's letter signed by General Manager to the Plaintiff on the subject of retirement benefits. (Exhibit 13).

March 1995

Expiration of Plaintiff's leave period in respect of which he was paid. (Plaintiff's Evidence page 56 of the Record).

22 August 1995

Commencement of litigation with issue of Plaintiff's Writ against the Authority, within six months of the expiration of his paid leave in March 1995 after retirement age.

14 September 1995

Entry of Appearance by Defendant.

11 October 1995

Defence served.

22 October 1995	Further and Better Particulars of Defence. (Exhibit 15).
7 December 1995	Further and Better Particulars of Statement of Claim. (Exhibit 17).
12 January 1996	Plaintiff's Reply.
8 May 1996	Plaintiff's List of 15 Documents with verifying Affidavit under Order 24 R.S.C.
11 January 1996	Defendant's List of 18 Documents with verifying affidavit under Order 24 R.S.C.
20 January 1996	Plaintiff's Request for Hearing.
25 January 1996	Plaintiff's Notice to Defendant that Request for Hearing filed.
8 September 1999	Memorandum from the Authority's Personnel Department signed by Cora J. Hill, Personnel and Public Relations Manager to Mrs. Jane Benjamin, Telephone Operator A at the Telephone Division concerning her Retirement copied to the General Manager and the Telephone Manager, stating in paragraph 1: <i>"The Authority has an Agreement with the Accountant General to pay the Gratuity"</i> ; stating in paragraph 2 that retirement is from age 60 years on 25 August 1998 and stating her annual pension and gratuity; and stating in paragraph 3: <i>" The Authority will advance you fifty per cent (50%) of your gratuity which is \$24,087.50 on that day and any accrued vacation leave."</i> (Exhibit 28)
13 October 1999 to 15 April 2000	Trial on 13 th , 14 th , 15 th , 18 th , 19 th October 1999; and 13 th , 14 th , 15 th April 2000.
18 October 2000	Judgment dismissing action. (pages 88 – 115 of the Record).
19 October 2000	Notice of Appeal by Plaintiff. (pages 1-6 of the Record)
17 November 2000	Notice of Cross-Appeal by the Authority.

Important Exhibits

- [7] Because of their importance in this judgment the following Exhibits are set out hereunder in full, but in chronological Order:
Exhibits 2, 8, 12, 13, 21, 22, 23, 25, 28, 29, 44, 50, 54, and 61.

Exhibit 44:

"Ministry of Public Utilities & Communications
St. John's
Antigua

3rd July, 1973

Dear Staff Member,

In view of the recent amendments to the second schedule of the Public Utilities and Port Authority Legislation, and in view of certain public pronouncements made by individuals purporting to be on behalf of the Public Service Association, I wish to indicate to you fully Government's policy regarding the staffing of both Statutory Authorities.

All Public Servants i.e. Civil Servants or members of the establishment will be seconded with their permission to various departments in which they now work; as seconded officers they will of course, continue to be members of the Public Service for all purposes, i.e. their emoluments, disciplinary proceedings and their pension schemes.

At a later date, those persons who elect voluntarily to leave the service and work for either of the Authorities shall have their service with the Authority deemed pensionable service, and this will be gazetted.

Government wishes to stress that Government Departments forming a part of the Statutory Authorities are not being handed over to private enterprise, but are in fact genuine authorities wholly owned by the Government and people of the State, and will be operated by a Statutory Board answerable to a Minister of Government and thus through him to Parliament. Stanley Consultants, for a fee, will provide management services on contract, and will not have shares in or benefit from any profits of either Authority. To say, therefore, that these departments are being handed over to private enterprise and therefore changing the status of workers is false and calculated to mislead.

Government is satisfied that with your goodwill and cooperation this turnover can be effected with a minimum of problems and without any loss of status to public servants, and indeed feels that a wide range of benefits will arise not only to Public Servants and non-established staff, but to the State as a whole.

Very truly yours,

/s/ Gerald A. Watt
Minister of Public Utilities &
Communications."

Exhibit 50:

"IN THE CABINET OF ANTIGUA

Thursday 20th December, 1973

Established Workers – Statutory Authorities
C/N PUC 20th December, 1973

Cabinet agreed –

- (1) that Established workers in the Electricity, Water, Telephone, and Harbour Divisions who have signified their intention in writing to be employed by the Public Utilities Authority and the Antigua Port Authority be officially released by the Public Service Commission.
- (2) that those workers who have signified their desire to be seconded to the Statutory Authorities be so seconded by the Public Service Commission.
- (3) That the effective date for (1) and (2) above to be 1st January, 1974.
- (4) Cabinet ratifies the letter from the Honourable Minister of Public Utilities and Communications to Staff Members in the Electricity, Water, Telephone, and Harbour Divisions dated 3rd July, 1973.
- (5) Cabinet confirms that Service with the Public Utilities Authority and the Antigua Port Authority will be pensionable and that such Pension rights will not be less favourable than those presently enjoyed with Government.
- (6) Cabinet approved that Pension rights and other benefits for workers in (1) above be borne by Government up to and including 31st December, 1973, and to be gazetted in the Antigua Official Gazette".

Exhibit 54:

"From: The Chief Establishment Officer
To: Permanent Secretary, Ministry of Public
Utilities & Communications
Date: December 31, 1973
No: CEO/80

PRIORITY

Please note that the Public Service Commission has agreed to-

- (a) officially release Established Workers in the Electricity, Water, Telephone and Harbour Divisions who have signified their intention in writing to be employed by the Public Utilities Authority and the Antigua Port Authority with effect from 1st January, 1974, and
- (b) second those workers who have signified their desire to be seconded to the Statutory Authorities with effect from 1st January, 1974.

2. The Government confirms that Service with the Public Utilities Authority and the Antigua Port Authority will be pensionable and that such Pension rights will not be less favourable than those presently enjoyed with Government and also, that Pension rights and other benefits for workers in (a) and (b) above will be borne by Government up to and including 31st December, 1973, and will be Gazetted in the Antigua Official Gazette

3. Grateful if you would advise all officers concerned of the above decision. Individual letters will be issued in due course.

/s/ Chief Establishment Officer

c.c. Accountant General
Chief Auditor
Secretary, Public Service Commission"

Exhibit 2:

"Establishment Division
Ministry of Planning, Development

External Affairs
St. John's

The Chief Establishment Officer
Antigua

A.E. 7632

FEB 2 1974

Sir:

I am to inform you that consequent upon a Government decision, the Public Service Commission has agreed that as you have signified your intention to be employed by the Public Utilities Authority, you be officially released from your appointment as Combination Jointer Technician, Telecommunications Division, with effect from the 1st January, 1974.

2. Government has also confirmed that your service with the Public Utilities Authority will be pensionable and that such pension rights will not be less favourable than those enjoyed with Government.

3. Your rights and other benefits will be borne by Government up to and including 31st December, 1973.

I am,
Sir,
Your obedient servant,

Chief Establishment Officer

Mr. Charlesworth Massiah
Ufs Permanent Secretary,
Ministry of Public Works,
Housing & Communications"

Exhibit 61:

"FROM: The Chief Establishment Officer
TO: Permanent Secretary, Ministry of Public Works
Housing & Communications
DATE: 5th February, 1974
NO.: CEO/80

Reference my minute of even number dated 31st December, 1973 – Decision re officers employed by the Public Utilities Authority.

2. I forward herewith individual letters addressed to the following officers of the Electricity Division who exercised their option to be seconded or to turn over to the Public Utilities Authority:-

Seconded:	Theodore George	Mr. Steadroy Browne
	Miss Helen Henry	Mr. Clibert Hector
Released:	Mr. Staffil Thomas	Mr. Archibald Joseph
	Miss Isa Friday	Mr. Daveston Richardson
	Miss Catherine Paul	Miss Idona Samuel
	Miss Helen Spencer	Miss Melvina Broodie
	Miss Elma James	Mr. Randolph Looby
	Mr. Erwin Peters	Mr. Abraham Benjamin
	Miss Marcia Lowe	Miss Primrose Lewis
	Mr. Denfield Roberts	Miss Pauline Humphreys
	Mr. Fitzroy Bridges	Miss Geraldine Sheppard
	Mr. Foster Bennett	Mr. Foster Payne
	Mr. Anthony Ramsay	Miss Genevieve Henry
	Mr. William Andrew	Mr. Samuel Nickeo

3. A further communication will be addressed to you with regard to the officer employed on contract.

4. There is no record in this office of any further options from established officers. Grateful to receive the options of the remaining officers of the Electricity Division in order that their positions may be clarified.

Chief Establishment Officer"

Exhibit 8:

"From ANTIGUA PUBLIC UTILITIES AUTHORITY

MEMORANDUM

Our Ref: PD/GM/90/93

From: Personnel Department

To: Mr. D.M. Woodroffe – General Manager

Date: 25th March, 1993

Subject: Calculation of Pension

As per your Memo dated 15th March, 1993 and your request as to how APUA workers' pension is calculated for employees retiring in 1993 who worked for the Government as Non-Established Workers since 1963 and transferred in 1973.

The formulas for the calculation of retirement benefits by Government for the weekly and monthly paid employees are attached.

/s/ Cora J. Hill
PERSONNEL & PUBLIC RELATIONS MANAGER
ANTIGUA PUBLIC UTILITIES AUTHORITY

CJH/cl

Cc: Mr. M. Edwards – Asst. to the General Manager
File"

March, 1993

Formula for the Calculation of
Non-Established Workers Pension & Gratuity Payments

1. **Calculation of Monthly Pension**

Number of years of service times current weekly rate multiply by 52 and divide by 50 and divide by 12 to get the full monthly pension. Reduce pension is three quarter (3/4) or 75% of the full pension.

2. **Calculation of Gratuity**

Gratuity is calculated by 150 items the difference of the full pension less the reduce pension.

3. **Guidelines to be noted**

The monthly pension should not exceed the worker calculated monthly earnings. If and when this happens the monthly pension is calculated at the reduced rate of 2 & 2/3 or 2.67% of the worker's weekly wage.

When the number of months is over six (6) months or even six (6) months one (1) day, one year is added to the number of years of service.

4. **EXAMPLE**

Calculation of Monthly Pension

James Williams – Water Division
 Foreman "B" Operator/Backhoe – Weekly Wage \$497.00
 Years of Service = 27 years. 1 months. 23 days
 Weekly wage = \$497.00 x 27 = \$013,419.00
 \$013,419.00 X 52 = \$697,788.00
 \$697,788.00 ÷ 50 = \$013,955.76
 \$013,955.76 ÷ 12 = \$001,162.98 – Full

Pension

\$001,162.98 x 75% = \$000.872.24 – Reduce

Pension

Difference of Full Pension is \$290.74

5. **Calculation of Gratuity**

Gratuity is 150 items full pension
 Less reduce pension which is ¾ or 75% of full pension

Difference of full pension multiply by 150 gives the amount of the Gratuity.

e.g. \$290.74 x 150 = \$43,611.00 or
 \$1,162.98 x 150 = \$174,447.00 - Full Pension
 \$0,872.24 x 150 = \$130.836.00 - Reduce
 Pension \$ 43,611.00 - Gratuity

March, 1993

Formula for the Calculation of
Non-Established Workers Pension & Gratuity Payments

1. **Calculation of Monthly Pension**

The worker last annual rate of pay multiplied by the number of months in the full period of service divide by 600 equals full pension.

The calculation of the reduced pension is three quarters (3/4) or 75% of the full pension.

2. **Calculation of the Gratuity**

The Gratuity is calculated by 12 ½ or 12.5 times the difference of the full pension less the reduced pension.

3. **Guidelines to be Noted**

When a worker period of service goes beyond 33 yrs. 4 months his/her gratuity and pension benefits are calculated only on that years of service.

The monthly pension should not exceed the worker's monthly earnings. If and when this happens the monthly pension is calculated at the reduced rate of 2/3 or 67% of the worker's monthly salary.

4. **EXAMPLE**

Calculation of Monthly Pension

Amos Davis – Electricity Division
Operator

Date of Employment with the Civil Service – May 1st, 1967

Seconded to APUA – Jan 1st, 1974

Date of Retirement – Feb. 25, 1993

No. of years of service – 25 years, 8 months, 25 days

No. of months of service - 308

Monthly Salary = \$2,755.00

Annual Salary - \$33,060.00 x 308 =

\$10,182.480.

\$10,1821.480.00 ÷ 600 =	\$16,970.80	- Full Pension
\$16,970.80 x 75% =	<u>\$12,728.10</u>	- Reduce Pension
	\$4,242.70	- Difference

5. **Calculation of the Gratuity:**

The Gratuity is calculated at \$4,242.70 x 12.5 = \$53,033.75

Exhibit 29:

"MINUTE

FROM: Chief Establishment Officer

TO: Miss Cora Hill
Personnel and Public Relations Manager, A.P.U.A.

DATE: 25th July, 1994

NO.: A.E. 5865

Mr. Malcolm Edwards
Assistant General Manager

Your letter Ref. No. PF/RTD/23/94 PD 7002 dated 7th June, 1994, advising that Mr. Malcolm Edwards, Assistant to the General Manager will attain his sixtieth birthday on 21st November, 1994, refers.

2. Mr. Malcolm Edwards, prior to his return to Antigua in 1969, requested and was granted employment on a contractual basis as Electrical Engineer, Electricity Department. He completed his first two year contract on 22nd February, 1972 and was paid a gratuity. He commenced a second contract on 23rd February, 1972 and was midway through this contract when the Electricity Department gave way to the APUA with whom he continued to work.

3. Consequently, Mr. Malcolm Edwards does not fall in the category of workers whose pensionable status was retained and whose rights and benefits the Central Government agreed will be borne by them up to and including 31st December, 1973.

/s/ C.E. Edwards
Chief Establishment Officer

EXHIBIT 21

"P. O. BOX 416
THAMES STREE
ST. JOHN'S, ANTIGUA, WI

October 26, 1994

Mr. M. Edwards
Asst. to General Manager
c.o. APUA
Thames Street
St. John's
Antigua

Dear Mr. Edwards,

I refer to our previous discussion on your retirement and wish to inform you that you may continue to work until the due date of your retirement, at which time you will be paid for all outstanding leave and your retirement benefits.

Also, in recognition of your years of service to APUA, I have asked Miss C. Hill to arrange a luncheon in your honour at a date to be advised.

I wish to take this opportunity on behalf of the Management and staff of APUA to thank you for your years of service with APUA and to wish you a happy and peaceful retirement.

Yours respectfully,

Peter Benjamin
General Manager

cc: Mr. E. Martin – Manager Finance and Accounting
Ms. C. Hill - Personnel Officer"

Exhibit 22

FROM: ANTIGUA PUBLIC UTILITIES AUTHORITY

MEMORANDUM

Our Ref: PD/GM/90/94

From: Personnel Department

To: Mr. Peter Benjamin – General Manager

Date: 10th November, 1994

Subject: Calculation of Retirement Benefits
Mr. Malcolm Edwards – Asst. to the General Manager

Outline below for your information is the calculation of retirement benefits for the abovementioned employee who will reach the age of retirement on the 21st November, 1994. The retirement benefit is calculated in accordance with the Pensions Act CAP. 210 for monthly paid employee.

Yrs. Of Service 1 Jan 1974 – 21 Nov 1994 = 20 yrs. 10 mths. 21 days

Monthly Salary = \$ 7,200.00

Annual Salary = \$86,400.00

Full Pension = $\frac{\$86,400 \times 250}{600}$ (months) = \$36,000 per annum

Reduced Pension = 75% of \$36,000 = \$2,500 p.a.

Monthly Pension = $\frac{\$27,000}{12}$ = \$2,250.00

Gratuity is \$36,000.00 - \$27,000.00 = \$9,000 x 12.5 = \$112,500.00

/s/ Cora J. Hill
PERSONNEL & PUBLIC RELATIONS MANAGER
ANTIGUA PUBLIC UTILITIES AUTHORITY"

Exhibit 23

FROM: ANTIGUA PUBLIC UTILITIES AUTHORITY

MEMORANDUM

Our Ref: PD/GM/90/94
PF/9002

From: Personnel Department

To: Mr. P. Benjamin – General Manager

Date: November 23rd, 1994

Subject: Mr. Malcolm Edwards – Assistant to the General
Manager – Balance of Vacation Leave

The above-mentioned employee reached the retirement age of 60 years on the 21st November, 1994. He was on 22 days vacation leave from the 31st October – 22nd November, 1994. He is still entitled to 70 days accrued vacation leave up to the date of his retirement.

/s/ Cora J. Hill

PERSONNEL & PUBLIC RELATIONS MANAGER
ANTIGUA PUBLIC UTILITIES AUTHORITY"

Exhibit 25:

"11th December, 1994

Mr. Malcolm Edwards
Royal Estate
St. John's
Antigua (W.I.)

Dear Mr. Edwards,

Re: Retirement Benefit

Further to my letter to you dated 2nd December, 1994 I now wish to address the issue of your retirement benefit.

As you know, the issue of pension provision for APUA employees has been discussed for quite sometime. When the anomaly was realized, the former General Manager, Mr. M. Woodroffe, set the wheels in motion for the introduction of an APUA pension scheme. To this end, a draft proposal was circulated to the unions and senior management staff as a basis for discussion. This document is still being studied. Meanwhile, we have through your office requested proposals from selected insurance companies for an APUA contributory pension scheme. To date, the process has not been finalized. The reality of the situation now is that APUA does not have a pension scheme. This is regrettable and really emphasizes the urgent need to put a scheme in place.

I wish to advise therefore that you are not entitled to an APUA pension, however provision has been made under the Social Security Scheme. Under the circumstances, I am recommending that an ex gratia payment be made personal to you in an amount equivalent to one (1) year's salary.

Best wishes

/s/ Peter Benjamin
GENERAL MANAGER
A.P.U.A.

C.c.: Hon. R. Yearwood – Minister of Public Utilities
Mr. E. Martin - Manager, Finance & Accounting
Ms. Cora J. Hill - Personnel Officer
File"

Exhibit 12

"P O Box 180
St John's, Antigua

23rd January 1995

Mr Peter Benjamin
General Manager
APUA
P O Box 416
Thames St
St Johns
ANTIGUA, WI

Dear Sir,

REF: RETIREMENT

I refer to your letter dated 11th December 1994, which coming from a person in your position I find surprising and truly incredible, follows as it does your letters of 26th October 1994 and 2nd December 1994.

I regard the contents of your 11th December 1994 letter enclosed in an envelope dated with your office stamp 3rd January 1995 and received by me on 5th January 1995 to be totally irrelevant.

You must know or should at any rate know, that at the time of vesting of the APUA, all pre-vesting rights of employees who had previously worked for either The Electricity Division, The Telephone Division, or The Water Division of Government were transferred. Letter signed by the then Minister of Public Utilities and given to each employee stated that retirement benefits would be no less favourable to transferred employees, than those benefits would have been to those employees had they remained with Government. As you are perfectly well aware, this practice has been in effect for the last twenty years.

In my case, by the end of my leave period I will have completed just over twenty five years of unbroken service. Two years of this (February 1970 – January 1972) as a contract employee, and for which I make no claim. The period between February 1972 and December 1973 (twenty three months) – Government. Period January 1974 to March 1995 – APUA.

I shall allow seven days from the date of this letter for a resolution in principal of this matter and a further seven days for payment of my gratuity for which I opt under the established formula, with my pension to commence as soon as it become due.

Yours faithfully

Malcolm A Edwards

cc Hon. R. Yearwood, Minister of Public Utilities
Mr E. Martin, Manager Finance and Accounting
Ms C. J. Hill, Personnel Officer
Mr Gerald Watt, Barrister & Solicitor"

Exhibit 13

"21 March, 1995

Mr. Malcolm Edwards
Royal Estate
St. John's
Antigua (W.I.)

Dear Mr. Edwards,

Retirement Benefits

I am in receipt of your letter dated January 23, 1995, and comment as follows:

1. You were on contract with the Government at the time of your transfer to the Authority.
2. Because you were on contract with the Government, the retirement benefits mentioned in the letters you referred to signed by the then Minister, would not have been applicable to you. However, I believe that you have claim to your gratuity which would have been due at the end of your contract.

I suggest that you give careful consideration to the facts, and if it is that you are in effect claiming your gratuity I shall be obliged to pursue settlement of your claim.

Yours sincerely,

/s/ Peter Benjamin
GENERAL MANAGER

c.c.: Hon. R. Yearwood – Min. of PWUA, E & C"

Exhibit 28

"FROM: ANTIGUA PUBLIC UTILITIES AUTHORITY

MEMORANDUM

PD/RTD/23/99

PF/3048

From: Personnel Department
To: Mrs. Joan Benjamin – Telephone Operator “A”
Telephone Division
Date: 8th September, 1999
Subject: Your Retirement

The Antigua Public Utilities Authority is required to pay towards the retirement benefits of those Government Employees who were seconded to APUA in July, 1973 and January 1974. The Authority has an Agreement with the Accountant General to pay the Gratuity.

Subsequent to our discussion today on your retirement you reached that age 60 years on the 25th August, 1998. As a former Establishment employee your retirement benefit is calculated by that department. Your annual pension is \$11,562.00 and your gratuity is \$48,175.00.

In this regard as you have passed the age of retirement you will proceed on your retirement effective 30th September, 1999. The Authority will advance you fifty per cent (50%) of your gratuity which is \$24,087.50 on that day and any accrued vacation leave. As soon as the Accountant General informs the Authority of your retirement benefits the balance will be paid to you. The monthly pension will be paid by the Government Treasury retroactive from when you reached the age of 60 years.

/s/ Cora J. Hill

PERSONNEL & PUBLIC RELATIONS MANAGER
ANTIGUA PUBLIC UTILITIES AUTHORITY

c.c.: Mr. P. Benjamin – General Manager
Mr. M. Green - Telephone Manager
File”

The Judgment

- [8] The Judgment of twenty-two (22) numbered paragraphs dismissed the Plaintiff’s action in its entirety; and I refer specifically to the following portions thereof:

(a) **Out of paragraph 1:**

"As I see it however and so indicated from the outset, this is basically an open and shut case".

(b) **Paragraphs 3, 4 and 5 wholly:**

[3] The Plaintiff's statement of claim is with respect most inelegantly drawn. It opens with a prayer followed by particulars in which the plaintiff "denies" and "contends" various matters. The Rules of the Supreme Court (RSC) 1995 Edition at paragraph 6/2/3 under the rubric "indorsement with statement of claim" states that the indorsement on the writ must be full and proper statement of claim with proper particulars to be given. It must properly plead a cause of action. There are no averments in the statement of claim and since a party is not required to plead to particulars there can be no implied admission by non-traverse. As far as can be gleaned the plaintiff's claim essentially is for non-payment by the defendant ("APUA") of pension and gratuity benefits on his retirement from the defendant's employ on 30th November, 1994 having attained his 60th birthday to which the Plaintiff claims that he is entitled by law. There is an alternative claim for wrongful dismissal from the defendant's employ as Assistant to the General Manager on the said 30th November, 1994.

[4] In a nutshell, the plaintiff's case, which is largely undisputed, is that he was first recruited from England as an Electrical Engineer by the Electricity Division of the Government of Antigua and Barbuda on a two year contract effective 23rd February, 1970. On the expiration of that contract, he was paid a gratuity and his contract was renewed by the Public Service Commission for a further three years with effect from 23rd February, 1972. Meanwhile on 4th July, 1973 the Public Utilities Authority ("APUA") was established (Cap. 359) and by letter from the then Minister of Public Utilities and Communications dated 3rd July, 1973 each and every public servant i.e. civil servant or member of the Establishment in the said Ministry, was duly informed that he or she would be seconded with his or her permission to the various departments in which they then worked and as seconded officers they would continue to be members of the Public service for all purposes including their pension schemes (sic). At a later date those persons who voluntarily elected to leave the public service and work for either of the Authorities (i.e. APUA or the Port Authority) would have their service with the Authority deemed pensionable service and this would be gazetted.

[5] On 1st January, 1974, having opted so to do, the Plaintiff commenced work with APUA and worked in various managerial positions until 21st November, 1994, when having attained age 60 he was retired after 21 years service without any pension or gratuity from APUA who stated that as they had no existing pension scheme the Plaintiff was not entitled to

any retirement benefits save that provided by the State under the Social Security Scheme. APUA further contended that the Plaintiff did not fall within the category of workers (formerly in the public service) whose pensionable status had been retained and whose rights and benefits the Government of Antigua and Barbuda had agreed to bear up to and until 31st December, 1973. Such workers were also informed individually by letter by Government (through the Establishment Division) that their service with APUA would be pensionable and that their pension rights would not be less favourable than those enjoyed with Government."

(c) **Out of paragraph 6**

"[6] The crucial issue then as I see it is what precisely was the nature of the position which the Plaintiff held immediately prior to his "turn over" to employment with APUA on 1st January, 1974."

(d) **Out of paragraph 10**

"I pause at this juncture to observe that as early as 25th July 1994 Government's own position regarding Mr. Edwards' pension status is reflected in a Minute of that date from the Chief Establishment Officer to Miss Cora Hill, Personnel and Public Relations Manager APUA (**Document 29**)"

"It is clear from the foregoing that the Plaintiff as a public servant holding a contractual appointment with Government, could not as at 31st December 1973 have been in the pensionable service of the Crown and enjoy any pensionable status which needed to be protected. He was so to speak "the odd man out". If anything, only his right of his gratuity at the end of the three year contractual period would remain to be secured. This was never however apparently addressed. Prior to 1st January, 1974, Mr. Edwards never was a member of the permanent Establishment with any pension entitlement. In principle, it would seem that Government would at the very least have been liable to pay the pro rated portion of the Plaintiff's gratuity up to and including 31st December, 1973".

(e) **Out of paragraph 11:**

"Not surprisingly, the Plaintiff appears to have laboured under the erroneous impression, that he would like his other colleagues to be entitled to a pension and gratuity from APUA. As however pointed out earlier, he unfortunately did not fall into the category of workers whose pensionable status was retained and whose rights and benefits the Government agreed would be borne by the Crown up to and including 31st December, 1973. For he clearly had none."

(f) **Paragraph 12 wholly:**

"It will no doubt be recalled that under cover of a Minute dated 5th February, 1974 (**Document 61**) the Chief Establishment Officer had forwarded to the Permanent

Secretary of the Ministry **individual letters** addressed to a number of officers of the Electricity Division who had exercised their option to be seconded or to turn over to the Public Utilities Authority. Two such officers had elected to be seconded and the remainder (26) had opted to turn over to the Public Utilities Authority. Significantly, the Plaintiff's name does not appear among the list of officers to whom that letter was addressed and more significantly paragraph 3 of the covering letter states that a **further communication would be addressed to the Permanent Secretary aforesaid with regard to the officer employed on contract** (viz Mr. Edwards) the obvious and logical inference being that the terms of the individual letters sent to the various officers listed in Document 61, did not pertain to the plaintiff Malcolm Alphonso Edwards. Paragraph 4 of the said covering letter states that there was no record in the office of any further options from established officers. It is therefore difficult especially in the light of paragraph 3 of Document 61 to believe that the Plaintiff would have received a letter from establishment which was word for word with paragraph 2 of the letter sent to Mr. Charlesworth Massiah dated 2nd February, 1974 (**Document 2**). That view is further reinforced by the absence of the Plaintiff's name from the list of officers to whom individual letters had been addressed by the Chief Establishment Officer via the Permanent Secretary of the Ministry and who for all intents and purposes were public officers with pension status and who (save for two had opted for secondment) **were officially released** by the Public Service Commission from the public service on turning over to the Public Utilities Authority."

(g) **Paragraph 14 wholly:**

"Learned Senior Counsel Mr. Gerald Watt contended that Mr. Benjamin's action in sending Mr. Edwards on retirement leave claiming that he had reached retirement age on his attainment of age 60 on 21st November, 1994 and failing and/or refusing to pay the plaintiff's retirement benefits in the form of pension and gratuity, was contrary to law and a serious breach of the Plaintiff's contract with the Authority. Learned Counsel further submitted that after the creation of the Authority by Act of Parliament on 4th July, 1973 ("the Act") all arrangements promises and undertakings given by the Minister and the Ministry and by Government and the Cabinet decision of 20th December, 1973 to public servants in general and to the Plaintiff in particular, were given by Government acting for and on behalf of its wholly owned statutory body which had no chairman, officers or Board by which it could properly and legitimately (sic) act, which took the benefit of the terms of the agreement made between the public servants and the Government on its behalf."

(h) **Out of paragraph 15:**

"Firstly, as I see it, it is plain from a reading of the Act, that there is no statutory duty imposed on the Authority to provide any pension or gratuity for its employees. . . . In any event, the allegation of breach of statutory duty is no where pleaded by the Plaintiff and no evidence has been addressed in support of it. In the circumstances I fail to see how the failure or refusal of the Defendant to pay the

Plaintiff's retirement benefits in form of a pension and gratuity could be said to be contrary to law and a serious breach of his contract with the Authority as Learned Senior Counsel contends."

(i) **Paragraph 16 wholly:**

Secondly, the issues of promissory estoppel and estoppel by representation were raised and elaborated upon at some length by Mr. Watt on behalf of the Plaintiff. Here Learned Senior Counsel evidently relies on paragraph 4 of the particulars of the Statement of Claim which avers that:

"It was an express condition of the Plaintiff and the other seconded employees that those persons taking up permanent employment with the Defendant would take with them all existing retirement benefits introduced by the Defendant subsequently would be no less favourable than those of the government from whose employment they had been transferred. A letter to this effect was signed by the then Minister of Public Utilities and Communications and delivered to all transferred employees".

It will be recalled that earlier in this judgment, I found as a fact that since at the turn over date to the Authority the Plaintiff was in actual fact an officer on contract in the employ of the Government, he would as a result have had No accrued or existing retirement benefits to take with him to the Authority as a government employee at that point in time. Nor could be reasonably have expected that any retirement benefits introduced by the Authority would be no less favourable than those enjoyed by other employees of the government who had transferred to the Authority, since in actual fact he would have had no such pensionable emolument or entitlement in the first place. Hence it comes as no surprise that the Plaintiff's name does not appear on the list of officers (**Document 61**) to whom individual letters had been sent by the Chief Establishment Officer through the Permanent Secretary of the Ministry dated 5th February, 1974 confirming that their service with the Authority would be pensionable and that pension rights would be no less favourable than those (presently) enjoyed by them with Government.

The Plaintiff never had any pension rights or retirement benefits and could not logically expect to have derived any from APUA which were no less favourable than he had previously enjoyed since he previously had no such entitlement. It is for that selfsame reason that at paragraph 3 of his covering letter to the Permanent Secretary of the Ministry dated 5th February 1994 that the Chief Establishment Officer stated that a further communication would be addressed to him (the PS) with regard to the officer on contract – no doubt referring to the plaintiff Malcolm Edwards. For he was the odd man out since he did not fall within the parameters of the arrangements which were designated to cover the category of employees whose pensionable status had been retained and whose rights and benefits Government agreed to underwrite up to 31st December 1973. And it is for that reason that I find it must unlikely that a memo to that effect signed by the then Minister would have been delivered to Mr. Edwards as alleged at paragraph 4 of

the Plaintiff's Particulars of Claim. It simply does not make sense. No such letter produced in evidence. So that the pleas of promissory estoppel and/or estoppel by representation are wholly unsupported and cannot in the circumstances be sustained as they have no basis in fact, in law or in equity. It is therefore quite unnecessary in the circumstances to discuss the cases which were referred to in support of that submission by Learned Senior Counsel.

(j) **Out of paragraph 17:**

Further, I cannot agree that the Authority would be bound by the promises, arrangements of agreements purportedly entered into or made on its behalf by a Minister or by Cabinet or Government before its own enactment by law. As the learned authors of the **4th Edition of Asbury's Law at Volume 7, paragraph 727** explain (by analogy), after incorporation, a company cannot ratify or adopt any such contract because in such cases there is no agency and the contract is that of the parties making it. The adoption and confirmation by a director's resolution of a contract made before the incorporation of the company by persons purporting to act on its behalf does not create any contractual relation between it and the other party to the contract, or impose any obligation on it towards him. In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement. In any event, the Authority, being a creature of statute, would have its rights of obligations set out in the Act itself and as regards superannuation schemes, section 2 (1) of the Second Schedule to the Act provides that . . .

There is nothing mandatory or compulsory in that provision."

(k) **Out of paragraph 18:**

"But, as a result of typical bureaucratic delay and inertia the provisions of the draft Staff Rules & Regulations were never formally adopted and implemented so that to this day the Authority does not have a pension scheme of its own in place. The whole scenario is aptly summarized in the second paragraph of Peter Benjamin's letter to Mr. Edwards dated 11th December 1994 in which the General Manager lamented . . . "

"In the result Mr. Benjamin recommended that an ex gratia payment equivalent to one year's salary (\$103,200.00) be paid to Mr. Edwards. The Plaintiff claims that he in fact received no such sum albeit that two cheques in his favour for \$51,600.00 dated 31st January, 1995 drawn on the Royal Bank of Canada appears to have been issued by the Authority but were not cashed.

It is clear from the foregoing that morally the Authority's case is indefensible but legally it is unassailable."

(l) **Out of paragraph 19:**

"At the inception of the trial, Mr. Roberts raised the point in limine that section 2(a) of the Public Authorities Protection Act (Cap 352) precluded the plaintiff from bringing this action as it had not been instituted within six months after the cause of action arose....."

"Mr. Watt in response quite rightly in my view made short shrift of the point by submitting that the Act afforded no protection to the Authority in the circumstances which gave rise to the present action as they were collateral to the main purpose and function of the Authority and not integral to its functioning. I fully agree. The point, which is amply covered by judicial authority was accordingly overruled."

(m) **Out of paragraph 20:**

"On the issue of retirement age, Mr. Benjamin told the Court that it had been the policy of the Authority to retire its employees at age 60. Mr. Edwards declared that he had been aware of no such policy so that when in October 1994 Mr. Benjamin had summoned him to his office and told him that he was to proceed on pre-retirement leave as he was to retire on the attainment of his sixtieth birthday on 21st November, 1994, he was to say the least, very much taken aback – all the more so he added as there were at the time employees past age 60 and one past 70 who were still working with the Authority."

(n) **Paragraph 21 wholly:**

"On the other hand, the Staff Rules & Regulations Committee of which Mr. Edwards was Chairman, recommended at Regulation 11 of its final draft on the subject of "**Retirement**" that Staff Members should be required to retire at the age of sixty (60) years provided that in exceptional circumstances, a staff member may be permitted to remain in the service of the Authority beyond retirement. This in fact was the reason given by the Authority for its continued retention and/or engagement of certain employees over age sixty. In the normal course of things this does seem eminently reasonable. And the collective agreement in respect of monthly paid Employees of the Authority up to Grade F stipulates in Articles 29 that the normal age of retirement for employees covered by the Agreement shall be sixty (60) years, and the Pensions Act (Cap. 311) in respect of public officers prescribe at section 8(1) that:

"(1) An Officer shall retire from the public service on attaining the age of sixty years".

"On the basis of the foregoing I accept Mr. Benjamin's evidence, that it was the Authority's policy to retire its employees at age sixty unless there are exceptional circumstances which warrant their retention or re-engagement as the case may be.

It follows therefore that the plaintiff's claim for damages for wrongful dismissal as well as for severance pay (which was not pleaded) would implicitly fall away and that claim and his claim on the whole stands dismissed and I so order.

As indicated earlier, on realizing that the plaintiff was not in the light of the circumstances which obtained, entitled to any retirement benefits, an ex gratia payment equivalent to one year's salary (\$103,200.00) was recommended by the General Manager to be paid to Mr. Edwards. It is to be hoped that this does still in fact hold good."

(o) **Paragraph 22 wholly:**

"Having regard to the circumstances of the case I would order that each party bear its own costs."

Appeal and Cross-Appeal

[9] The Plaintiff's Grounds of Appeal and Reliefs sought, are set out in paragraphs 3 and 4 of his Notice of Appeal as follows:

"3. Grounds of Appeal

1. The Learned Trial Judge erred in Law, when he failed to find that the Defendant/Respondent's Defence failed to specifically traverse, or deny the specific allegations contained in paragraphs 1 – 9 of the Plaintiff's Statement of Claim, and were therefore deemed to have been admitted.
2. The Learned Trial Judge erred in Law, when he proceeded to allow the Defendant/Respondent to offer in evidence facts to deny the allegations contained in paragraphs 1 – 9 of the Plaintiff's Statement of Claim, even though the Defendant's defence contained no such pleadings.
3. The Learned Trial Judge erred in Law when he failed to find that the arrangements made by the then Minister, and Ministry of Public Utilities and Communications and by the government of Antigua and Barbuda, subsequent to the 4th July, 1973, and the Cabinet decision of the 20th December, 1973, on behalf of its wholly owned statutory body properly bound the Defendant which had taken the benefit of the terms of the Agreement made between the Public servants and the Government on its behalf.
4. The Learned Trial Judge misdirected himself in law and in fact when he failed to find that in the absence of a Chairman, officers, and Board, it was unable to properly and lawfully act on its own behalf with regard to the employment of the Plaintiff/Appellant and other public servants but had as

a matter of Law ratified and confirmed the decisions taken by the Government of Antigua and Barbuda on its behalf.

5. The Learned Trial Judge erred in law when he misdirected himself with regard to the legal effect of Section 3(4) of the Public Utilities Act Cap. 359 and S I ss 2 of the Second Schedule of the Act, and specifically failed to find that the conjoint effect of these sections created a statutory obligation upon the Defendant/Respondent to provide Pension benefits for all classes of its officers and employees, and not merely those employees who had hitherto enjoyed pensionable status with the Crown.
6. Alternatively the judge erred in law and/or fact when he found that the Plaintiff/Appellant was a Public Officer under contract and was therefore not entitled to retiring benefits, but failed to address his mind to other benefits to which the Plaintiff/Appellant was entitled, to wit a gratuity of 12% of his basic salary at the end of every 2 years of employment, which said gratuity was never paid by the Defendant/Respondent during the Plaintiff/Defendant's entire period of employment.
7. The Learned Trial Judge misdirected himself when he found as a matter of Law that failing and or refusing to set up a pension scheme under the terms of the Public Utilities Act Section 2(1) of the Second Schedule, entitled the Defendant/Respondent to discriminate against the Plaintiff/Appellant, and to treat his conditions of service as being different to those of his fellow Public Service employees.
8. The Learned Trial Judge misdirected himself, and erred in law when he failed to invoke the doctrine of Equitable Estoppel, in circumstances, and facts to which it was clearly applicable.
9. The Learned Trial Judge erred in law when he based his rejection of the doctrine of Equitable Estoppel purely on the fact that the Plaintiff/Appellant had been unable to produce a letter written by the Minister to him on the same terms as those written to the pensionable public servants, and ignored other uncontroverted testimony and relevant settled legal authority which indicated conclusively that the said doctrine ought to have been applied.
10. The Learned Trial Judge misdirected himself and erred in law and fact when he found that the Defendant/Respondent was legally correct in retiring the Plaintiff/Appellant at age 60 years, on the strength of draft regulations which were neither implemented or adopted as resolutions by the Board of Directors of the Defendant/Respondent, nor passed as regulations under the provisions of the Public Utilities Act.
11. The Learned Trial Judge erred in law and fact when he failed to find that in the circumstances the Plaintiff/Appellant was not retired, but was

unlawfully dismissed, and/or made redundant and was entitled to damages or compensation therefor.

12. Alternatively the Learned Trial Judge erred in law and/or fact when he failed to hold, that the Defendant/Respondent having by letters of the 26th October, and 2nd December, 1994 respectively, retired the Plaintiff and committed itself to paying the Plaintiff/Appellant his outstanding leave and retirement benefits was estopped from resiling from its contractual position.

4. The Plaintiff/Appellant seeks the following relief:

1. A Declaration that the Plaintiff is entitled to be paid retirement benefits in the form of a pension and gratuity as calculated according to the formula used for the calculations of a monthly non-established worker employed with the Government of Antigua and Barbuda which formula has been formerly adopted and utilized by the Defendant/Respondent.
2. The sum of \$148,887.50 being the sum due to the Plaintiff/Appellant by the Defendant/Respondent which is lawfully due and owing to the said Plaintiff/Appellant.
3. Payment of the monthly sum of \$2,977.75 by the Defendant/Respondent, to the Plaintiff/Appellant as a monthly pension, calculated on the pension plan heretofore referred in paragraph 4 (1).
4. Interest on the sum of \$148,887.50 aforesaid pursuant to Section 27 of the Eastern Caribbean Supreme Court Act Cap. 143 The Laws of Antigua and Barbuda 1992 (R.E.).
5. Statutory interest on all unpaid pension payments as aforesaid.
6. Alternatively damages for wrongful dismissal from the Defendant/Respondent's employment as Assistant to the General Manager on 30th November, 1994.
7. Statutory interest as heretofore pleaded.
8. The Plaintiff/Appellant costs in this Court, and in the Court below.
9. Such further or other relief as this Honourable Court may deem fit."

[10] The Authority's Grounds of Cross Appeal are as follows:

- "1. The Learned Trial Judge erred in law when he failed to award costs to the Defendant/Respondent, holding instead that each party should pay his own costs. Having held against the Plaintiff, costs ought to have followed the result.
2. The Learned Trial Judge erred in law and exercised his discretion wrongly when he failed to have the Plaintiff pay the Defendant's costs, having held that the matter was "an open and shut case".
3. The Learned Trial Judge erred in law and misdirected himself when he held that a contract of employment between the Defendant/Respondent and the Plaintiff/Appellant does not come within the provisions of the Public Authorities Protection Act, Cap 352."

The Cross Appeal fails

[11] I agree with the Judge in not granting costs to the Defendant at Trial. He exercised a proper discretion in ordering "that each party bear its own costs" after he concluded in his paragraph 18 "morally the Authority's case is indefensible but legally it is unassailable".

[12] I also agree with the Judge in his rejection of the point in limine mentioned in paragraph 19 of the Judgment for the reasons there given, and for the additional reason revealed from the chronology that the action commenced in August 1995 within the 6 months limitation period after the Plaintiff's paid vacation leave ended in March 1995.

Appeal Grounds 1, 2, 3,4, 5, 6, 7, 10 and 11 fail

[13] Ground 1 fails because the Judge was right in his reliance on established law that the Defendant was not obliged or required to plead to any of the 10 paragraphs of Particulars in the Statement of Claim, and there could be no implied admissions by non-traverse.

[14] There is a consequential failure of Ground 2.

[15] On Ground 3 it was submitted by Learned Counsel Gerard Watt QC for the Appellant (underlining his for emphasis) in his skeleton argument for the Appellant as follows:

"It is therefore submitted that all arrangements, promises, and undertakings given by the Minister, or the Ministry of Public Utilities and Communications, and by the Government of Antigua and Barbuda prior to the 4th July 1973, and the Cabinet decision of the 20th December 1973, (*Ex 45*) to the Public Servants in general, and the Appellant in particular, were given by the Government acting for and on behalf of its wholly owned statutory body, which at the time had no appointed Chairman, Commissioners, or Staff through whom it could act on its own behalf, but which took the benefit of & and assumed the responsibilities under the terms of the agreement made between the Government of Antigua and Barbuda and the Public Servants on its behalf.

In addition to being bound by the Cabinet and other decisions S 3 (4) of The Act states as follows:

"The provisions of the Second schedule shall have effect as to the officers and employees of the Authority, their appointment, dismissal and conditions of service and otherwise in relation thereto".

The second schedule then proceeds in SI ss 2 to provide for the establishment and maintenance of a Pension Scheme or a Provident Fund Scheme for the benefit of employees of the Authority See A.P.U.A. Second Schedule S 1 (2).

The conjoint effect of Section 3 (4) of The Act and the Second Schedule was to create a Statutory obligation upon the Authority to provide Pension Benefits for ALL classes of officers and employees of the Authority AND NOT MERELY GOVERNMENT EMPLOYEES.

In failing to obey the dictates of these mandatory provisions of the act, the authority were and continue to be in breach of a statutory duty to each and every employee of the authority including the Plaintiff and are liable to him in damages.

It is submitted that the Learned Trial Judge was wrong in Law when he found that the allegation of breach of Statutory Duty was not pleaded by the Appellant and no evidence had been addressed in support of it. (*see p105 L21-25*). On the contrary the record is full of evidence from both Appellant and Respondent to support a finding of Breach of Statutory duty which is a matter of Legal interference and did not have to be pleaded."

[16] I am not persuaded by this argument in the absence of a sufficient pleading, and/or evidence, and/or legal authority. It is an attractive argument but it overlooks the fact that the Authority was established as a body corporate with power to enter into contracts on its own behalf.

- [17] Ground 4 fails for lack of evidence to show that the Authority was incapable of acting on its own behalf with regard to the employment of the Appellant and its other employees.
- [18] On Ground 5, I do not find any statutory obligation on the part of the Defendant to provide a statutory pension scheme. For such a scheme to be established the Authority would have had to exercise its permissive power under paragraph 1 (2) of the Second Schedule to the Act, with the approval of and subject to such terms and conditions which may be imposed by the Governor General. Such approval and terms and conditions were matters outside of the ultimate control of the Authority. Therefore it cannot be held that Section 3 (4) of the Act in combination with the Second Schedule created a statutory obligation on the Authority to provide a pension scheme in the manner contemplated in the Second Schedule.
- [19] On Ground 6, I do not find any evidence to support the contention that the Judge should have addressed his mind to the Appellant's entitlement to a gratuity of twelve per cent of his basic salary at the end of every two years of employment, as such an entitlement was not a part of his pleaded claim.
- [20] On Ground 7, I do not agree that the Judge made the alleged finding of law.
- [21] As to Ground 10, I agree with the Judge's finding that the Authority had a policy for retirement of its employees at age 60 years. On the evidence the Plaintiff was mistaken in interpreting service beyond 60 years to be all pre-retirement service. On the evidence he was in a position to know and to ascertain this retirement age especially as the final draft New Staff Rules and Regulations dated 18 December 1985 from the Committee under his Chairmanship contained a recommendation in paragraph 11 thereof calling for staff members to retire at the age of 60 years, provided that, in exceptional circumstances, a staff member may be permitted to remain in the service of the Authority beyond retirement.
- [22] As to Ground 11, I consider that the Judge was right to dismiss the claim for unlawful dismissal or redundancy and damages flowing therefrom. On the issue of wrongful

dismissal the Plaintiff did not allege any inadequacy of notice for termination of employment, and did not plead any special damages flowing from such inadequate notice; there was consequently no room for a claim for unlawful dismissal to succeed. A claim for redundancy compensation was not properly made on the pleadings or otherwise. The Plaintiff in his testimony was cross examined on pension, social security, pension scheme and wrongful dismissal; and the Judge's notes of evidence of the Plaintiff's final testimony under cross-examination (he was not re-examined) shows at page 59 of the Record as follows:

" I disagree that APUA does not owe me a pension.

Refers to Document #26. APUA paid Social security not specifically for me but for all employees as regarded by law. The scheme came into effect in 1973. I am getting my Social Security Pension. This is \$999.00 per month. I began to draw that pension at age 60.

APUA has never to my knowledge set up a pensions scheme.

And to whether I was wrongfully dismissed. I would need a definition of wrongful dismissal to answer that question."

Appeal Grounds 8, 9 and 12 succeed

[23] Paragraph 6 of the Judgment states:

"The crucial issue then as I see it is what precisely was the nature of the position which the Plaintiff held immediately prior to his "turn over" to employment with APUA on 1st January, 1974."

[24] I respectfully differ from the Judge as to what was the crucial issue in the case having regard to the statement of claim; the pleadings; the oral evidence of the Plaintiff, the Defence witness Coralie Edwards (The Deputy Chief Establishment Officer) and the Defence witness Cora Hill the APUA Personnel Officer; the documentary evidence; and the rival contentions of Counsel.

[25] I am of opinion that the Plaintiff was at all times primarily claiming from the Defendant a retiring benefit in the form of a pension and gratuity as calculated according to the formula used for the calculation of a monthly non-established worker employed with the

Government of Antigua and Barbuda and which formula has been formally adopted and utilized by the Defendant.

[26] The first paragraph of the statement of claim seeks a declaration of entitlement to be paid retiring benefits in the form of a pension and gratuity as mentioned in paragraph 25 hereof.

[27] What the Plaintiff throughout his case was primarily saying is this:

“Quite apart from whether the Authority had any statutory pension scheme under the Act, my employment with the Authority from 1973 is admitted in the pleaded defence; and I was an established worker of the Authority from 1973; and I claim payment of monies on retirement in the nature of a pension and gratuity as follows:

- (a) as calculated on 25 March 1993 by the Authority in Exhibit 8 and copied to me the Plaintiff while serving as Assistant to the General Manager, which Exhibit is mentioned in paragraph 9 of the Particulars of my pleaded Statement of Claim;
- (b) as specifically calculated by the Authority on 10 November 1994 in Exhibit 22 as the retirement benefit of me the Plaintiff as Assistant to the General Manager in the amount of \$2,250 monthly pension and \$112,500 gratuity, albeit in error because the basic salary was understated at \$7,200 per month rather than \$8,600 per month as admitted by the defence in calculation of the ex gratia payment of \$103,200 equivalent to one year salary;
- (c) as confirmed to me the Plaintiff on 26 October 1994 by the Authority of General Manager’s letter of 26 October 1994 Exhibit 21 to me the Plaintiff confirming that I may continue to work until the due date of retirement at which time I will be paid for all outstanding leave and my retirement benefit;
- (d) on the basis of which calculations and promised payments I departed on retirement leave in November 1994;
- (e) hence in response to the Authority’s General Manager’s letter of 11 December 1994 Exhibit 25 stating that the Authority did not have a pension scheme and advising that I the Plaintiff was not entitled to a pension, I responded by letter 23 January 1995 Exhibit 12 that the said letter of 11 December 1994 Exhibit 25 was totally irrelevant”.

[28] That is the primary case which the Plaintiff/Appellant seeks to make throughout the litigation. He did not limit his claim to any statutory pension based on the Act or its Second

Schedule. In his evidence he said that he was aware that the Authority never had a pension scheme. Indeed, Section 13 (1) (b) of the Act provides for the revenue of the Authority for any financial year to be applied in defraying the charge of "gratuities", outside of the Pension Scheme envisaged by the Second Schedule to the Act. And it is noteworthy that Exhibit 28 dated 8 September 1999 demonstrates the capacity of the Authority to pay a gratuity and monthly pension to its employees retired at the age of 60 years, as claimed by the Plaintiff/Appellant, quite apart from any payment under an approved pension scheme contemplated by the Second Schedule to the Act.

[29] The Plaintiff's evidence at Trial was very clear. Extracts from the Judge's Notes of his evidence show the following:

"Letter #9 is dated 26th October 1994. In that letter Mr. Benjamin specifically states that my retirement benefits will be paid. He also promised a luncheon in my honour (which never materialised).

Document # 10 pinpoints my retirement as effective 21st November 1994.

Document#11 shown to witness. This states that contrary to what Mr. Benjamin had earlier promised re retirement benefits. I was not infact entitled to a pension."

"There was a reply dated 25th March 1993 and a formula was drawn by Miss Cora Hill and copied to me. She described that formula as the calculation of retirement benefits for weekly paid and monthly paid based on the formula used by Government for its own employees. See Document #8. She thought I requested to prepare a formula for APUA workers pension. Attached to that document were two calculations in respect of two workers viz. James Williams of the Water Division and Amos Davis of the Electricity Division. I agree with the formula Miss Cora Hill used in these two calculations.

Document #22 and 23 referred to: Document #22 is a memo form Personnel Department to Mr Peter Benjamin setting out the retirement benefits of myself and signed by Cora Hill Manager Personnel dated 10th November 1994.

I agree with the formula used but not the amount.

My monthly salary is shown as \$7,200 which is incorrect. That purports to be my basis pay which in fact was \$7,250.00. In my view, the figure which ought to have been used was \$8,600.00 i.e. my gross salary.

The components which were left out of my salary are:

- A. My responsibility allowance of \$1,000.00 per month.
- B. My telephone allowance of \$50.00 per month.
- C. My transportation allowance of \$300.00 per month.

I now tender in evidence (no objection Mr. Roberts) my last salary receipt dated 27th October, 1994 – admitted as Document #26.

Q. What exactly are you claiming in the form of retirement benefits from APUA

A. I am claiming benefits as described in the formula based on my total emolument in addition to which I claim accumulated interest on that sum. I am claiming a reduced pension and gratuity." . . .

"I am saying that I am entitled to a gratuity of \$148,887.50 and a pension of \$35,733.00 per annum or \$2,977.75 per month from 21st November 1994 to date of death. I am asking for my arrears of monthly pension that I have not been paid."

"I first began working for the authority on 4th July 1973. All staff were seconded including myself. Government agreed that the Authority would take responsibility for retirement benefits as of 1 January 1974. I believe it is in the statute. Until December 1973 responsibility for retirement benefits remained with Government. I was however employed on secondment with the Authority from 4 July 1973.

I elected to transfer to the authority when the first offer was made. I cannot however remember the date. Most of the employees opted to go over to the Authority at that time.

Re Document #12 paragraph 3. This means that years of service with Government prior to that with the authority would be carried over and there would be a continuity.

That was my understanding of the position and that which was explained to us prior to the time of vesting. Statutory provisions followed my understanding.

Re paragraph 4 of document #12. This is my period of employment with APUA.

I was retired on 21 November 1994 and my leave period took me to March 1995. I was paid for my leave period."

[30] In her testimony Coralie Edwards the Deputy Chief Executive Officer stated under cross-examination as follows:

"My office deals with established personnel. Established personnel can be contract officers or pensionable. Malcolm Edwards was an established officer at the date of cut over 1/1/74.

All I was saying to this Personnel Officer in my memo dated 25th July 1994 was that Mr. Edwards being a contract officer would not be eligible for a pension or they accrual of pension rights between 23/2/70 to 31/12/73. I was not suggesting that he was not an established officer going over to APUA. From my office I knew that Mr. Edwards got a gratuity for his first contract. And according to our records he had not been paid gratuity for the period he had worked (17 months) of the second contract prior to the cut over.

Re Document #45. I agree that all that Government sought to achieve was to preserve the pension rights of its established officers up to 31st December 1973.

Re Cabinet decision 20th December 1973. I would think that Mr. Edwards fell into the category of workers at paragraph (1).

At paragraph 5 Cabinet is saying that service in respect to workers who turn over to APUA will be pensionable and APUA shall pay such pensions which will be no less favourable than those enjoyed with Government. Re paragraph (6) Government is assuming liability for pension and other benefits for employees up to 31st December 1973.

Refers to release dated 31st December 1973 paragraph 1 (a) would include Mr. Edwards. In paragraph (2) Government confirms that service with APUA will be pensionable and would apply to Mr. Edwards.

As regards paragraph 3 no letter went to Mr. Edwards according to our records. I do not know if Mr. Edwards would be inclusive as he was on contract.

Nothing in that Memo exclude contract workers.

Refers to Draft by CEO.

According to the document Mr. Edwards's service with APUA would be pensionable. A gratuity is a benefit. I agree that Mr. Edwards' contract with government came to an end on the cut over and Government would preserve his contractual rights up to December 1973. And he was entitled to a gratuity. There was no follow up with Mr. Edwards and he continued to work with APUA until 21st November, 1994.

I cannot give an answer as to why other established workers got a pension and Mr. Edwards did not."

[31] Cora Hill the Personnel Officer of the Authority testified in portions as follows:

"Cora Hill statement of Claim-Live Alfred Peters Street and I work at APUA and I am Public Relations Manager in personnel. I first started work at APUA ON 1/1/80.

My job is to employ employees and to make sure that their benefits are paid according to APUA policy and collective agreements. I knew Mr. Malcolm Edwards. When I went to APUA in 1960 he was working there at Telephone Manager.

When I went to APUA the weekly paid employees had a collective agreement and the monthly paid falls under Staff Rules and Regulations. The collective agreements were 3 year agreements after which these would be renegotiated. These negotiations were conducted between teams. The team would consist of the General Manager, the Divisional Manager and myself representing the employees. As telephone manager Mr. Edwards was a Divisional Manager. He was therefore part of the negotiating team.

The Staff Rules and Regulations set out the condition of employment for monthly paid employees. The Staff Rules and Regulations were part of my responsibility. I was responsible for their administration.

I met the conditions when I went there in 1980 and they were subsequently amended in 1986. There was a committee set up to do so for better conditions. The committee was chaired by Mr. Malcolm Edwards. Members were Walter Daniel the then Accountant and myself. We went through the old Staff Rules and Regulations and recorded them. We produced a new set of Staff Rules and regulations They were submitted to the General Manager Milton Rogers. There was a covering letter with them which I signed.

Admitted in evidence as Exhibit #27. This is the draft and final copies were prepared in 1986. I played a role in the circumstances leading to Mr. Edwards' retirement.

Employees who were seconded from Establishment Division to APUA as they approached the age of retirement they got their annual salary and their years of service is compiled and the information is sent to Establishment Division for computation of their retirement benefits. This was done by me. Correspondence was received from Establishment Division stating that Mr. Edwards was not eligible for retirement benefits. See Exhibit 29. Paragraph 3 is the section to which I referred. As a result of that letter I informed the General Manager who then instruct me to organize a Retirement Lunch for Mr. Edwards. I did so. It did not take place."

[32] It is important to note that on 25 July 1994 Exhibit 29 the Chief Establishment Officer notified the Authority's Personnel Manager Ms Cora Hill in paragraph 3 of the Exhibit:

"Consequently, Mr. Malcolm Edwards does not fall in the category of workers whose pensionable status was retained and whose rights and benefits the Central

Government agreed will be borne by them up to and including 31st December, 1973."

[33] Nevertheless Exhibit 21 dated 26 October 1994 and Exhibit 22 dated 10 November 1994 eventuated, allied undoubtedly to Exhibit 8 dated 25 March 1993 and they must therefore be construed within the context of the classic meaning of promissory estoppel defined in 16 Halsbury's Laws of England, 4th Edition (Reissue) paragraph 1071 on which the Appellant's Learned Counsel Mr Gerald Watt QC has rightly relied as follows:

"1070. Promissory estoppel. When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced. The doctrine of promissory estoppel derives from a principle of equity enunciated in 1877, but has been the subject of considerable development. It differs from estoppel in pais in that the representation relied upon need not be one of present fact.

The doctrine cannot create any new cause of action where none existed before, and it is subject to the qualification that:

- (1) the other party has altered his position;
- (2) the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position;
- (3) the promise becomes final and irrevocable only if the promisee cannot resume his position.

The doctrine is known variously as 'equitable' or 'promissory' or 'quasi' estoppel."

[34] And I am of this opinion, even though I agree with the Judge that it was unlikely that the Plaintiff received the alleged letter similar to Exhibit 2 which he claimed to have been burnt.

[35] I consider that the Judge was right in paragraph 4 of the Judgment to say that the Plaintiff's case was "largely undisputed".

Judgment for the Appellant

[36] In these circumstances I consider that the Appeal of the Plaintiff/Appellant must succeed; and I would accordingly order Judgment for him in the amounts set out in his Statement of Claim and confirmed in his oral testimony at Trial, that is to say,

- (a) \$148,187.50 in the form of a gratuity;
- (b) \$2,977.75 monthly in the form of a pension but commencing on 1 April 1995;
- (c) interest on the unpaid amounts stated above in this paragraph pursuant to section 27 of the Eastern Caribbean Supreme Court Act (Cap 143) of the State, which interest, in the absence of evidence in the action, I think fit to be at the rate of 5% per annum mentioned in section 7 of the Judgments Act (Cap 227) of the State, for the period from 1 April 1995 to the date of this Judgment,

together with his costs in the Appeal and the Cross-Appeal and in the Court below certified fit for two Counsel.

Joseph Archibald, QC
Justice of Appeal [Ag.]

[37] **SINGH, J.A.:** I agree with the conclusion arrived at by my learned brother Archibald J.A. [Ag.] in this matter.

Satrohan Singh
Justice of Appeal

[38] **REDHEAD, J.A.:** I have read the draft judgment of Archibald J.A. [Ag.] and I agree with his conclusion.

Albert Redhead
Justice of Appeal