THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 46 OF 2002

BETWEEN:

CLAUDE LEACH

Claimant

V

THE DEVELOPMENT CORPORATION OF SAINT VINCENT AND THE GRENADINES

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Appearances:
Mr. S. E. Commissiong for the Claimant
Mr. Camillo Gonsalves for the 2nd Defendant

2006: July 17 and 19
2007: January 29

JUDGMENT

[1] **THOM, J**: The Claimant was employed as General Manager of the First Defendant. On May 31, 2001 the Claimant's employment was terminated with immediate effect and the Claimant was advised by the First Defendant by its letter dated May 31, 2001 that he would be informed of his benefits when advice was received from the appropriate authorities. The First Defendant subsequently paid the Claimant the sum of thirty-seven thousand, six hundred and thirty one dollars and eighty-seven cents ($37,631.87) being thirty-three thousand, three hundred and thirty-six dollars ($33,336.00) for severance payment, Sixteen thousand, six hundred and forty nine dollars and twenty-five cents for

three months pay in lieu of notice less National Insurance Scheme (NIS) deductions, and the First Defendant deducted a sum of twelve thousand, three hundred and fifty-three dollars and thirty-eight cents ($12,353.38) for advances made to the claimant during the period 1996 – 2001 and which were not retired by the Claimant.

[2] The Claimant being dissatisfied with the payment made by the First Defendant instituted these proceedings in which the Claimant sought payment of the following sums:

(a) holiday pay for 291.5 days = $54,004.32
(b) housing allowance of $250.00 per month for three months = $750.00
(c) telephone allowance of $50.00 per month for three months = $150.00
(d) wrongful deduction of sum paid as advance to the Claimant = $12,353.00
(e) out of pocket expenses = $2,285.57
(f) 100 watts phase line = $604.73
(e) Speaker = $45.00

[3] By Act of Parliament No. 4 of 2003 the First Defendant was dissolved. On the 18th day of June 2004 an order was made joining the Second Defendant, the Attorney General as a party to this claim.

[4] The Claimant testified on his own behalf , no witnesses were called. No witnesses testified on behalf of the Second Defendant.

[5] The Claimant testified that he was employed as the General Manager of the First Defendant from the 19th day of January, 1987 to the 31st day of May, 2001. The terms of his employment were outlined in a written contract between himself and the First Defendant dated 19th day January, 1987. In August 1992 the terms of his employment were modified as outlined in the letter from the Claimant of the First Defendant dated 6th day of August, 1992. The Claimant further testified that during the period of his employment he seldom took vacation. He would sometimes take a “holiday or two” during business trips. When his employment was terminated on May 31st, 2001 he was not paid

holiday pay for vacation which was not taken during his employment and which amounted to 291.5 days, housing allowance for three months being the period of notice that he was entitled to receive pursuant to the terms of his employment, telephone allowance for three months for the said period. He was also not paid for items he purchased for the First Defendant and for expenses incurred while traveling overseas on behalf of the First Defendant. He also purchased a Phase Linear and a Speaker which he installed the First Defendant's vehicle which he used while employed as General Manager. The Phase Linear and Speaker were not returned to him. The Claimant further testified that the sum withheld for advances not retired was wrongfully withheld since he had accounted for those sums in a letter to the First Defendant dated July 18. 2001 and he attached the original receipts.

Under cross examination the Claimant agreed that there was considerable delay in accounting for the advances. He explained it was due to his inadvertence. The Claimant also agreed under cross examination that he was inadvertent in his record keeping and explained this was due to him being very busy in the discharge of his duties as General Manager.

[6] The issue for determination is whether the Claimant is entitled to be paid the sums claimed.

[7] Both the Claimant and the Second Defendant agree that the terms of employment of the Claimant with the First Defendant are outlined in the contract dated January 19th, 1987 and the letter dated August 6, 1992.

A. HOLIDAY PAY

[8] The Claimant in his Claim Form alleged that he is entitled to payment of holiday pay in the sum of fifty four thousand and four dollars and thirty-two cents ($54,004.32) being 291.5 days or 9.72 months salary at the rate of $4,725.83. However in his evidence he stated that the sum owed to him for holiday pay was forty five thousand, nine hundred and thirty five dollars and seven cents ($45,935.07) being 291.5 days or 9.72 months at a salary of

four thousand, seven hundred and twenty five dollars and eighty three cents ($4,725.83) per month. This latter calculation is correct. This holiday accrued over the period 1987 - 2001.

[9] Learned Counsel for the Second Defendant submitted that the Claimant is not entitled to payment on termination of his employment for holiday not taken during the period of employment for the following reasons.

(a) the Claimant's employment contract did not provide for automatic payment in lieu of accrued holiday on termination.

(b) The Claimant's employment contract did not provide for yearly "Roll-Over" of accrued holidays.

(c) The Claimant has not produced evidence to show that he is owed any pay for allegedly accrued holidays.

[10] I will deal first with the third submission by Learned Counsel for the Second Defendant, than the second submission and I will deal with the first submission last. I have adopted this approach since if there is no credible evidence of accrued holiday then there will be no need to consider the first and second submissions.

Accrued Holiday

[11] Did the Claimant during the period 1987 to 2001 fail to utilize 291.5 days of his vacation leave?

[12] The onus was on the Claimant to prove that he did not utilize 291.5 days of vacation leave due to him while he was employed by the First Defendant.

[13] The Claimant in his witness statement which was admitted into evidence as evidence in Chief stated in paragraphs 6(ii) and 6 (iii)

> "6(ii) …….. To take holiday required the approval of the Board of the Defendant Corporation and whether they approved or not depended on the volume and urgency of business. For the Defendant I was like a workaholic substantially because of the absence of qualified and experienced staff.
>
> 6(iii) Of the years I spent at the Defendant Corporation I seldom traveled for personal reasons or to take holidays only. I would go on business trips and take a holiday or two in between. That was the nature of my job. It happened even when I left the State for Christmas. Indeed whenever I was out of the State the entire staff at the Corporation knew where I was going and the purpose of my traveling because I had to let them know who would be in charge during my absence."

[14] Under cross-examination the Claimant agreed that he did not provide to the court any documentary evidence of consultation with the First Defendant or consent of the First Defendant for vacation leave. The Claimant also agreed that he did not provide to the court any document showing the First Defendant found it impracticable to approve his holidays. The Claimant explained that his request for holidays would have been placed in the General Manager's file. He would have discussed his request with the Chairman of the Board of the Corporation. He would take directions from him. Very often the problem was one of shortage of managerial staff in the Corporation.

The Claimant produced a chart showing the number of days taken during each year of his employment with the First Defendant. He explained it was a copy of the record left in the First Defendant's file. Under cross-examination the Claimant could not recall the specific dates when he took vacation and explained that it would be in the First Defendant's File.

[15] The provisions of the Claimant's terms of employment dealing with vacation leave are clause 4 of the January 19, 1987 and paragraph 4 of the letter of August 6, 1992. Clause 4 reads:

> "The General Manager shall be entitled to thirty (30) working days vacation in each year of the contractual period but such vacation shall not be taken without the prior consultation and consent of the Corporation having regard to the demands of business at the time that the General Manager requests his vacation."

[16] While paragraph 4 of the August 6, 1992 letter reads:

> You will be entitled to thirty (30) working days vacation for every year of your employment. This must be taken at a time mutually convenient to you and the Corporation. Where the Corporation finds it impracticable to approve your holidays, having regard to the demand of its business it may, with your concurrence, decide to pay you for the same. You will also be paid for such vacation to which you were previously entitled but could not take owing to the business demands of your office.

[17] The Claimant's case is that he did not utilize all of the vacation leave due to him during the period of his employment due to the exigencies of the business of the First Defendant and the shortage of managerial staff. There was an outstanding amount of 291.5 days at the time of termination of his employment. Learned Counsel of the Claimant submitted that the evidence addressed by the Claimant was not credible.

[18] Having seen and heard the Claimant testify I believe the testimony of the Claimant. I found him to be a credible witness. The Claimant's evidence was not contradicted. Indeed paragraph 4 of the letter of August 6, 1992 from the Chairman of the Board the First Defendant acknowledged that the Claimant had not utilised all of his vacation leave prior to August 6, 1992 due to the business demands of his office and agreed to pay him for the unused vacation leave. The relevant part of paragraph four (4) reads:

> "……. You will also be paid for such vacation to which you were previously entitled but could not take owing to the business demands of your office."

[19] There is no evidence to show that the situation changed. The Claimant's evidence is the only evidence before the court and as stated earlier it was not contradicted. I have no reason for disbelieving him. I find that the Claimant had not utilised a total of 291.5 days of vacation leave that was due to him.

"Roll Over"

[20] Learned Counsel for the Second Defendant submitted that in the absence of specific provisions in the Claimant's terms of employment for the roll-over of vacation leave not taken such leave cannot be rolled over from one year to the next. Learned Counsel referred the court to the cases of **Morley v Heritage Plc**. [1993] IRLR P. 400, **Rowley v Stagecoach South Ltd**. Where the United Kingdom Employment Appeal Tribunal stated at paragraph 5:

> "…… under the general law, in the absence of agreement, the Appellant would not be entitled to carry forward holiday pay from one year to the next. We think that principle is to be found in the court of Appeal decision in **Morley v Heritage Plc**."

[21] Learned Counsel also relied on **Witty v Stamps Solicitors Employment Appeal Tribunal** Appeal No. EAT/35/97 21st March, 1997 where the Appeal Tribunal stated.

> "as a matter of law in the absence of an express term, the court will not imply a term that unused holiday can be carried forward to the next holiday year."

[22] Learned Counsel for the Claimant submitted that the last sentence in clause 4 clearly shows that there was an agreement for vacation leave not taken to be rolled over.

(i) Employment period 1987-1992

23] During the period 1987 to August 1992 the Claimant leave entitlement was governed by clause 4 of the January 1987 contract. Under clause 4 leave could only be taken with the prior consultation and consent of the First Defendant and whether leave was granted depended on the business demands of the First Defendant. Clause 4 does not contain any express provision for leave not taken to be carried forward to another year. However when the Claimant's terms of employment were revised in 1992 the First Defendant acknowledged that holiday was due and owing to the Claimant and agreed to pay him for such holidays. I believe it is appropriate to repeat the relevant part of paragraph 4 of the August 6, 1992 letter, it reads:

> "You will also be paid for such vacation to which you were previously entitled but could not take owing to the business demands of your office."

[24] The Claimant testified that during the period 1987 – 1992 of the one hundred and fifty days vacation that he was entitled to he only took forty-seven days. He is owed one hundred and three days for the period. He also testified that he was not paid for the vacation not taken. This evidence was not contradicted. I find that the claimant is entitled to be paid for the holiday not taken in accordance with paragraph 4.

(ii) Employment Period 1992 -2001

[25] In relation to vacation leave between 1992 and 2001 this is governed by paragraph 4 of the August 6, 1992 letter. I am of the opinion that under paragraph 4 the Claimant could only take vacation at a time convenient to the First Defendant. When the time requested was not convenient to the First Defendant then the Claimant could seek to take leave at another time convenient to the First Defendant or within the agreement of the First Defendant be paid for the vacation. Paragraph 4 contains no express provision for roll over of holiday not taken.

[26] The Claimant's testimony is that during the period 1992 to May 31, 2001 he was entitled to 282.5 days of which he took 94 days. He was not paid for the remaining 176.5 days. The Claimant further testified that leave requested was denied due to the business demands of the First Defendant. Paragraph 4 in effect provided that where it was not convenient to the First Defendant for the Claimant to take vacation the Claimant would be paid for such vacation.

[27] I agree with the submission of Learned Counsel for the Second Defendant that based on the decision in **Morley's case** unless there is express provision in the employment contract vacation not taken cannot be rolled over. However in this case unlike **Morley's case** the Claimant's terms of employment provide for the Claimant to be paid where it was not appropriate for him to take holiday owing to the business demands of the First

Defendant. The Claimant's testimony that vacation leave was refused due to the business demands of the First Defendant was not contradicted.

[28] Learned Counsel raised the issue of limitation in his submissions. However this issue was not raised in the pleadings.

Payment on termination

[29] It is not disputed that he Claimant's terms of employment contain no express provision for payment of vacation leave not taken on termination.

[30] Learned Counsel for the Claimant submitted that the effect of paragraph 4 of the August 6, 1992 letter is that vacation not taken would be paid for. The vacation was therefore converted into a money debt which the Claimant is entitled to recover. The Defendant did not plead the Limitation Act and even if it was pleaded such plea would not have been successful.

[31] Learned Counsel for the Second Defendant submitted that in the absence of provision for payment on termination of vacation leave not utilised during the term of the employment the Claimant is not entitled to payment. Learned Counsel referred the court to **Morley v Heritage Plc** [1993] IRLR p. 400; **Hurt v Sheffield Corporation** [1916] 85 LJKB 1684; **Miller v Bowden** EAT/129/95, 15th May 1996.

[32] In **Morley v Heritage Plc** the Court of Appeal of England held that in the absence of an express contractual provision an employee is not entitled on termination to payment for holiday not taken during the period of employment. The Court of Appeal refused to imply such a term to give business efficiency to the contract. Lord Justice Rose stated at paragraph 33:

> "For my part, whatever may have been the change in the statutory climate towards the contracts of employers and employees since **Hurt v Sheffield Corporation** was decided, in my view that is not the termination of the present case in one way or the other. This contract for this group financial director contained the clauses to three of which I have referred and in my judgment, despite the skill and ingenuity

> of Mr. Pearl's submissions, it is an impossible contention that there should necessarily be implied into this clause 10 such a term as here the plaintiff seeks to rely upon . The business efficacy of the contract does not require the implication of any such term."

[33] In **Morley's case** it was not argued that the term should be implied on the basis of custom or practice. It must also be noted that in **Morley's case** and the other cases cited by Learned Counsel for the Second Defendant which applied the decision in **Morley's case,** the contract did not provide for payment of holiday not taken because it was not convenient for the employer. Clause 10 of the contract in **Morley's case** reads:

> "The executive shall in addition to customary, statutory and bank holidays be entitled to four weeks (30 working days) holiday with pay during each year commencing on 1 January in each year and pro-rata for any lesser period. Such holiday shall be taken at such time and periods as may be mutually agreed between the executive and the board to suit the convenience of both parties."

[34] In **MJ & CL EVANS and Bradley** EAT/437/97, 6 May 1998 the contract of employment provided for holiday entitlement of 1 week paid holiday after 1 year of continuous employment and two weeks paid holiday after 2 years of continuous employment. The Defendant left the employment at the end of the 2nd year. The Employment Tribunal in holding that the Defendant was entitled to be paid two weeks paid holiday stated.

> "Our view is that most employers and employee expect that if an employee leaves during the course of the holiday year having accrued some holiday that they are entitled to be paid for days not taken.

[35] The Appeal Tribunal in dismissing Evan's appeal stated:

> "The decision which was referred to by the Employer, is one which we have considered. It is a decision of the Court of Appeal in **Morley v Heritage** [1993] IRLR p. 400. It is clear here that the Court of Appeal dismissed an appeal where the employee claimed holiday pay. The employee in that case had a written service agreement running into many pages and many clauses; on the construction of that agreement, the Court of Appeal held that a condition for the employee to receive holiday could not be implied. The facts were very different to these which the Industrial Tribunal had to be considered. In our judgment on the

facts as presented to them in the context which they were presented the Industrial Tribunal were entitled to imply the term as they did."

[36] Indeed in **Morley's case** in determining whether to imply the term to give business efficacy to the contract Rose LJ stated at paragraph 32 that:

> "It is the term of the particular contract and the status of the particular employee to which the court is entitled to have regard."

[37] In the present case paragraph 4 of the August 6, 1992 letter does make provision for payment of holiday pay by consent of both parties where it was not possible for the Claimant to utilize the holiday due to the business demands of the First Defendant.

[38] Learned Counsel for the Second Defendant submitted that under paragraph 4 of the August 6, 1992 letter there was no automatic payment for holidays accrued but not taken. Learned Counsel further submitted that :

> "DEVCO only considered compensation for accrued holidays in the narrow potential circumstances that the Claimant's requested vacation was refused by the Corporation. In other words, the Revised Employment Contract never contemplated payment for all unused holiday time. Rather, only vacation that had been requested by the Claimant but refused by DEVCO would be eligible for discretionary payment. The Claimant has produced no evidence indicating a single request for vacation or any refusal of such by DEVCO. Indeed, at trial the Claimant admitted that he had no such evidence to substantiate his claim. Accordingly his claim to payment for vacation falls outside of the parameters of his contract."

[39] I agree with the above submission of Learned Counsel on the interpretation of paragraph 4, except for payment being at Devco's discretion, however Learned Counsel is mistaken In relation to the evidence. I have already referred to the relevant evidence at paragraph 14 of this judgment. In essence the evidence is that the Claimant applied for vacation and was only permitted to take a limited amount due to the business demands of the First Defendant. He did not produce any documentary evidence to support his oral testimony but explained that documents relevant to request for leave and approval of leave were in the General Manager's file kept by the First Defendant.

[40] I do not agree with the submission of Learned Counsel for the Second Defendant that "may" in paragraph 4 meant that it was within the discretion of the First Defendant to pay for holiday which could not be taken due to business demands of the First Defendant. If Learned Counsel's interpretation of paragraph 4 is correct it would mean that the First Defendant could have refused the Claimant holiday on the basis of the First Defendant business demands and then also decide that it would not pay the Claimant for the holiday which he could not take because the First Defendant refused to approve the holiday because of its business demands. This interpretation of paragraph 4 in my opinion cannot be correct. Where the First Defendant determined that the Claimant could not take holidays during the year because of its business demands the Claimant was entitled to be paid for such holidays in accordance with paragraph 4.

[41] While there is no express provision for payment on termination of holidays not taken during the period of employment, paragraph 4 of the August 6, 1992 letter provides for payment when holiday was refused due to the business demands of the First Defendant. The evidence shows that the holiday was not taken because the First Defendant through its Chairman determined it was not convenient due to the business demands of the First Defendant. The Claimant was entitled to be paid for the holidays. He was not paid at the time of termination. The issue of Limitation was not pleaded. I find that the Claimant is entitled to be paid for the holidays not taken during the period 1992 – 2001.

B. HOUSING AND TELEPHONE ALLOWANCE

[42] The Claimant submitted that on termination without the required notice as was provided for in paragraph 5 of the August 6, 1992 letter he is entitled to all of the benefits he would have earned if the First Defendant had given him three months notice in accordance with the said paragraph 5. The benefits are the housing and telephone allowance paid to him monthly. Learned Counsel referred the Court to the case of **Straughn v Lodge School** (1997) 55WI I.R. p. 576.

[43] Learned Counsel for the Second Defendant submitted in reply that the Claimant is not entitled to be paid housing or telephone allowance on termination of employment. Learned Counsel submitted that there is a distinction between salary and allowance and referred the Court to the case of **Mulraine v St. Patrick's Training School Case** Ref. No. 03254/96BC.WO Northern Ireland Industrial Tribunal 13th January 2003, and the Claimant's contract of employment where the salary and allowances are dealt with separately. Learned Counsel further submitted that there is no provision in the contract for payment of allowances on termination. Learned Counsel also referred the Court to the decision of the Court of Appeal in the case of **Ducreay v Dominica Water & Sewerage Co. Ltd**. Civil Appeal No. 20 of 2004 ECCA (Dominica) 14th October 2004 where Gordon JA in delivering the Judgment of the Court of Appeal stated at paragraph 4:

> "…….we are of the view that the allowance of $1,500.00 per month must have been conceived as an allowance for some expenditure, and therefore the lack of employment means that any expenditure which was meant to be covered by that allowance would not be incurred. The allowance will therefore not be given."

[44] Both the contract of January 19, 1987 and the letter of August 6, 1992 contain provisions for termination of the Claimant's contract of employment. The two provisions are the same. The relevant clause in the January 19, 1987 contract is clause 13. This clause reads as follows:

> "Notwithstanding any other provision of this agreement either party shall be entitled to determine this contract by giving to the other three (3) months' written notice to that effect."

[45] While the relevant paragraph in the August 6, 1992 letter is paragraph 5 which reads:

> "In the event that either party wishes to terminate the other's employment without cause, the one shall give to the other three (3) months notice in writing to that effect."

[46] The Claimant's terms of employment made no provision for payment in lieu of notice. It is not disputed that the First Defendant paid the Claimant three (3) months salary on termination in lieu of notice as required by paragraph 5 of the August 6, 1992 letter. It is also not disputed that the Claimant was paid an allowance for housing and telephone each month during his employment.

[47] I agree with the submission of Learned Counsel for the Claimant that where the contract of employment provides for notice to be given and the employer without the consent of the employee terminates the employment without notice and tenders payment in lieu of proper notice, the employer is in breech of the contract by dismissing the employee without notice. In such circumstances the employee is entitled to all of the benefits he would have received had the employer terminated the contract in accordance with the terms of the contract. In this case by giving the Claimant three months notice.

[48] In House of Lords decision in the case of **Delaney v Staples** [1992], AER p. 944 at p. 947 Lord Browne-Wilkinson gave the following analysis of the phrase payment in lieu of notice":

> "The phrase payment in lieu of notice is not a term of art. It is certainly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principle categories.
>
> (1) …….
> (2) …….
> (3) …….
> (4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship whether or not it unilaterally discharges the contract of

employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense, since it is not a payment for work done under the contract of employment.

The nature of a payment in lieu of falling within the fourth category has been analysed a payment by the employer on account of the employee's claim for damages in breach of contract. In **Gatheird v Mirror Group Newspapers Ltd**. [1989] ICR 729 at p. 733 Lord Donaldson MR stated the position to be as he had stated it in **Dixon v Stenor Ltd**. [1973] ICR 157 at p 158: If a man is dismissed without notice, but with money in lieu, what he receives is a matter of law, payment which falls to be set against and will usually be designed by the employer to extinguish any claim for damages for breach of contract i.e. wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer."

[49] In **Ducreay's case** the Court of Appeal took the view that the allowance of $1500.00 must have been an allowance for some expenditure. In this case the purpose of the allowance is clearly stated in the terms of the Claimant's employment being for housing and telephone. Based on the decision of the Court of Appeal in the **Ducreay case** and the decision of the House of Lords in the **Delaney case**. I am of the opinion that the Claimant is not entitled to the telephone allowance claimed. The telephone allowance is for expenditure that the Claimant would have incurred in performing his functions as the General Manager of the First Defendant. Since he was no longer employed the expenditure would not have been incurred therefore he is not entitled to the allowance to cover an expenditure which was not incurred.

[50] In relation to the housing allowance I find that was a benefit of the employment to which the Claimant was entitled see **Lindsay v Queen's Hotel Corporation Ltd. [1919]**. **British**

Guiana Corporation v DaSilva [1965] IWLR. 12 p. 248 where the Privy Council held that the Defendant was entitled inter alia to compensation for loss of furnished quarters for the period of the notice.

[51] Further I would adopt the approach taken by the Court of Appeal in **Ducreay's case** that the housing allowance and in of Gordon JA " was merely a tax efficient form of packaging a salary." In view of the above I find that the Claimant is entitled to the housing allowance for a period of three months which is the period of notice to which he was entitled under the terms of his employment.

[52] The Claimant claims housing allowance at a rate of $250.00 per month. However in paragraph 2 of the August 6, 1992 letter the quantum of the housing allowance is stated a $2,500.00 per annum. Paragraph 2 reads:

> "As part of your emoluments, you will be paid a housing allowance of $2,500.00 annually plus a monthly sum of $50.00 for telephone services. These allowances will be paid retroactively from January 1, 1990 and will continue at the same rate until you are otherwise advised of any increase thereof."

[53] No evidence was led to show that paragraph 2 was amended. I therefore find that the Claimant is entitled to be paid housing allowance for three months at the rate of $208.33 per month.

C. PHASE LINEAR AND SPEAKER

[54] The Claimant alleges that while he held the post of General Manager he was given the privilege of the use of the First Defendant's vehicle. He used his own funds to purchase a phase linear for the sum of $604.73 and a Speaker for $45.00 which he installed in the said vehicle. He was unable to recover those items when his services were terminated. Under cross examination he agreed that he did so for his own comfort.

[55] The Claimant's evidence of the purchase and installation of the phase linear and speaker was not contradicted. His evidence that he did not recover these items was also not contradicted. However the Claimant led no evidence to show when the phase linear and

speaker were purchased and installed into the First Defendant's vehicle. The Court is therefore unable to make any assessment as to the value of these items when his services were terminated. I note that the Claimant was employed by the First Defendant in the post of General Manager from 1987 and he would have enjoyed the comfort of these items. In view of the circumstances I find that the Claimant has failed to prove this part of his claim.

D. ADVANCES

[56] For clarity I will deal separately with the advances and the sums the Claimant claimed he expended in the purchase of items for the First Defendant.

(i) Advance of $12,353.00

[57] Learned Counsel for the Claimant conceded that the Claimant was unable to provide any documents in relation to the advance of $5,450.00 for his travel to New York on the 17th December, 1998 and abandons that part of his claim.

[58] The Claimant alleges he is entitled to recover $6,903.50. Learned Counsel for the Claimant submitted that the Claimant had no obligation to provide any evidence of the expenditure of per diem money. Learned Counsel urged the Court to take judicial notice of this fact.

[59] Learned Counsel for the Second Defendant in reply submitted that the Claimant did not produce any credible evidence to show that the advances were retired.

[60] It is not disputed that the Claimant received the sum of $6,903.50 from the First Defendant as advance to cover expenditure while traveling overseas on behalf of the First Defendant between the period 1996 to 2000. It is also not disputed that at the time of termination of the Claimant's employment the advances were not retired.

[61] Under cross-examination the Claimant admitted that his family resided in New York while he was employed by the First Defendant and when he traveled to New York on the First Defendant's business he would stay with his family and not in a hotel. The Claimant also

agreed that part of the per diem was to cover hotel expenses. Learned Counsel for the Second Defendant submitted that the accounts submitted by the Claimant could not be accurate since he claimed the full amount for per diem when he did not incur expenses for hotel stay.

[62] I agree with the submission of Learned Counsel for the Claimant that the per diem covers the personal expenses of the employee when traveling overseas. An employee is not required to provide a breakdown of how a per diem is spent. If an employee chose to stay at an expensive hotel and incurred expenses in excess of the per diem he would not recover the additional expense. Likewise if he chose to stay at a less expensive accommodation and his expenses are less than the per diem he would not be required to return the extra sum. A per diem is a fixed sum given to the employee to cover his personal expenses while overseas. While he is required to give an account of the sum advanced in doing so he is not required to give a break down of how the per diem was spent.

[63] In the Claimant's letter of July 18, 2001 to the General Manager of the First Defendant the Claimant stated in paragraph 3:

> "I herein enclosed (sic) a statement of expenditure and the supporting bills retiring the advances."

In paragraph 4 he wrote:

> "I am available if necessary for any clarification in this matter."

[64] The Claimant in the attachment to the said letter of July 18, 2001 admits that he owed the First Defendant the sum of $1,010.67 on the advance for his travel to Martinique in 1997. Therefore the total sum which the Claimant admitted he could not account for from the advance is $6,460.67.

[65] The testimony of the Claimant was not contradicted. The evidence is that receipts were submitted with the Claimant's letter of July 18, 2001. The letter of the General Manager of the First Defendant dated September 6, 2001 simply stated that the Board had decided to recover the $12,353.28. Nowhere is it stated that the receipts were not received or the accuracy of the statement was challenged. Also there is no evidence to suggest that the Claimant's letter of July 18, 2001 and the attachment were brought to the attention of the Board.

[66] In view of the above I find that the Claimant is entitled to recover the difference between the sum deducted by the First Defendant being $12,353.38 and the sum the Claimant failed to account for being $6,460.67, the difference being $5,892.71.

(ii) Expenditure while traveling overseas

[67] The Claimant also claimed that while he traveled on business on behalf of the First Defendant during the period 1998 – 2000 he incurred expenses in excess of the advances made to him in the total sum of $4,365.94. This expenditure was outlined in the attachment to the letter dated July 18, 2001 with supporting receipts. The evidence disclosed that there were three instances where the advance was insufficient, being the July 1998 meeting in the United States of America for six days, the advance received was $500.00; the July 2000 United Nations meeting the in excess of the advance received was $1.12; while for the September 2000 United Nations meeting held in the United Nations meeting held in the United States for a period of six days the advance received was $1,360.00 from which the cost of the ticket had to be paid the cost being $1325.40. The Claimant's evidence was not contradicted at trial. I have no reason to disbelieve the Claimant . I find that the Claimant is entitled to receive this sum of $4,365.94.

(iii) Expenditure incurred in the purchase of items for the First Defendant.

[68] The Claimant testified that during his travels overseas he purchased items mainly computer software for the First Defendant's business and he attached the Bills for the items to the July 18, 2001 letter.

[69] Learned Counsel for the Second Defendant urged the court not to accept the evidence of the Claimant.

[70] The testimony of the Claimant was not contradicted. The attachment which was admitted in evidence along with the July 18, 2001 letter outlined each item purchased and the cost for each item, the total sum being $4,383.71. The General Manager's letter dated September 6, 2001 makes no reference to the expenditure claimed. There is no evidence to even suggest that the Claimant's request for reimbursement was ever querried by the General Manager. In the fourth paragraph of his letter of July 18, 2001 the Claimant stated that he was available if necessary for any clarification on the matter.

[71] In view of the above I find that the Claimant is entitled to recover the sum of $4,383.71.

[72] In conclusion I find that the Claimant is entitled to be paid the following sums by the Second Defendant:

(a) holiday pay in the sum of $45,935.07
(b) housing allowance of $624.33
(c) sum of $5,892.71 wrongfully deducted as advance not retired
(d) $4,365.94 being sums expended while traveling on behalf of the First Defendant
(e) sum of $4,383.71 being sums
(f) expended in the purchase of items for the First Defendant
Total $61,201.76

[73] I find that the Claimant is not entitled to the sum of $150.00 for telephone allowance nor is he entitled to be paid for the phase linear in the sum of $604.73 nor the speaker in the sum of $45.00.

[74] Judgment is entered for the Claimant. It is ordered that the Second Defendant shall pay the Claimant :

(a) the total sum of $61,201.76

(b) Interest on the said sum of $61,201.76 at the rate of 5% per annum from the date of the filing of the claim to the date of payment

(c) Costs in the sum of $16,240.35

Gertel Thom
HIGH COURT JUDGE