BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2006/0270

BETWEEN:

SATYAPRAKASH RAJMANGAL

Claimant

AND

BRITISH VIRGIN ISLANDS ELECTRICITY CORPORATION

Defendant

Appearances:

Mr. Terrence Neale of Mc W. Todman & Co. for the Claimant

Ms. Paul Dennis of O'Neal Webster for the Defendant

2008: Dec 15, 16, 19.

2009: October 1

CATCHWORDS:

Wrongful Dismissal - Employment Law – British Virgin Islands Electricity Ordinance, Cap 277 - Labour Code Ordinance 1975, Cap 293, Sections C 57 and C 58 - BVI Electricity Corporation's Terms and Conditions of Employment – power of British Virgin Islands Electricity Corporation and its general manager to dismiss employee – senior, permanent and pensionable employees – ratification of wrongful dismissal, after the dismissal - Administrative Operating Policies – unsatisfactory performance of employee - misconduct and serious misconduct – right of appeal – formal inquiry – assessment of damages for wrongful dismissal – reasonable notice to be given for dismissal - pensions and gratuities – contra proferentum.

[1] **Joseph-Olivetti J**:- Mr. Satyaprakash Rajmangal was employed as a generation engineer with the British Virgin Islands Electricity Corporation ("the Corporation") for nigh on 16 years and was a member of the established workforce. On 17 May 2006, he was summarily dismissed and paid six months' salary in lieu of notice. He now contends that his dismissal was wrongful and sues for damages. The Corporation says that Mr. Rajmangal failed to perform his duties satisfactorily and that they were entitled to dismiss him in the manner in which they did.

BRIEF BACKGROUND

[2] The Corporation is a statutory corporation established under the provisions of the British Virgin Islands Electricity Ordinance, Cap 277 (the Act). It is solely responsible for generation, transmission, supply, distribution and sale of electricity in all of this happy archipaelago.

[3] Mr. Rajmangal is a highly qualified engineer. He commenced employment with the Corporation on 22 September 1986 as a generation engineer on a two year contract. In September 1990 he was again given another two year contract but he resigned before the end of the contractual period. Subsequently, in May 1991 he was again employed on contract. By letter dated July 21, 1999, he was appointed on a permanent and pensionable basis with effect from July 17, 1999. However, by a subsequent letter dated 19 May 2003 this appointment was made retroactive to September 22, 1990. The Corporation takes issue with that letter.

[4] The terms and conditions of Mr. Rajmangal's employment immediately prior to his dismissal were contained in the letter of appointment of 21 July 1999. It is noted that the letter specifically stated in para. 1, "your **appointment is on a permanent and pensionable basis"**. And in para. 6, "the **general terms of your employment are in accordance with the Labour Code Ordinance 1975** ("the Labour Code") **and the BVI Electricity Corporation's Terms and Conditions of Employment,**" ("the Terms and Conditions").

[5] Mr. Rajmangal was dismissed by a letter dated May 17, 2006 from the general manager, Mr. Leroy Abraham. The letter states that the Corporation cannot reasonably be expected to continue his employment given his inability to discharge his responsibilities to the standard expected by the Corporation and the resulting continuous increase in administrative and operational costs to the Corporation.

[6] Mr. Rajmangal was the head of his department, yet he was most unceremoniously evicted from his office within 2 hours of receiving the letter and was subjected to apparent strong-armed methods by security personnel. He testified that he was prevented from taking away his personal files and thus, was unable to respond to certain allegations. This has not been refuted. It is mystifying how a trusted employee can automatically be deemed to have metamorphosed into almost a common criminal on dismissal. The civil scenes we see on American television where a dismissed employee is courteously allowed to clear his/her office and to put personal belongings in carton boxes and to bid farewell to his /her colleagues, obviously have little or no resonance here.

[7] Mr. Rajmangal, as he was obliged to do in law, made several unsuccessful attempts to obtain alternative employment. He was finally constrained to accept a position with a company based here at a salary far below that which he enjoyed with the Corporation.

[8] Mr. Rajmangal contends that his dismissal was wrongful for the following reasons:-

a. The general manager, without a specific delegation of the power of dismissal of employees as contemplated under s.11 (7) of the BVIEC Act, had no authority to terminate the employment of the Clamant.
b. The reasons for the dismissal expressed by Mr. Abraham in his letter of dismissal were without merit and could not be regarded as sufficient to meet the requirements under section C.57 and or C.58 of the Labour Code.
c. Mr. Rajmangal was not provided with the appropriate written warning as required by section C.58 (3) of the Labour Code.

[9] It is remarked, in answer to Mr. Rajmangal's claim that the general manager had no authority to dismiss him without the Corporation conferring that power upon him by resolution, that the Corporation relies on a resolution dated 30th November 2007, as ratifying the dismissal by the general manager. That date is well after this suit had been brought and the said issue apparently commented on in the Court of Appeal when the Corporation obtained leave to defend this action after it had failed to file a defence within the stipulated time. The Corporation also relies on a letter dated 30 August 2006 refusing to entertain Mr. Rajmangal's appeal as also ratifying the dismissal.

ISSUES

[10] The main issues for determination, as the court sees it, are as follows:-

a) Whether the Corporation's general manager, Mr. Abraham, had authority to dismiss Mr. Rajmangal and, if so, whether he followed the proper procedure for so doing.

b) Assuming that Mr. Abraham did not have the requisite authority from the Corporation to dismiss Mr. Rajmangal whether the Corporation had the power to ratify his dismissal as it purported to do in its resolution of 30 November 2007 and by the said letter dated 30 August 2006.

c) In the event that the court finds that Mr. Rajmangal was wrongfully dismissed what is the proper measure of damages and quantum of damages to be awarded to him?

Issue 1 - Whether the Corporation's general manager, Mr. Abraham, had authority to dismiss Mr. Rajmangal and, if so, whether he followed the proper procedure for so doing?

[11] The submissions of Mr. Neale, learned counsel for Mr. Rajmangal, can be summed up. The Corporation by section 11(5) of the Act has the power to dismiss employees. By section 11(7) the Corporation can, by resolution, delegate that power to the general manager. The letter of dismissal was not on its face or on the evidence written pursuant to a resolution of the Corporation and therefore Mr. Abraham, as general manager, had no authority to dismiss Mr. Rajmangal, since that power had not been delegated to him.

[12] Mr. Dennis, learned counsel for the Corporation, asserts that the Corporation had delegated the power to dismiss employees to the general manager, by virtue of its approval of the Terms and Conditions which the Corporation promulgated in the year 1999 pursuant to a written recorded decision of the Corporation which was tantamount to a resolution. The Terms and Conditions by Clause 10.5 (v) give the general manager the power to dismiss employees and accordingly Mr. Abraham had authority to dismiss Mr. Rajmangal. Furthermore, counsel relied on the letter from the Corporation refusing to entertain Mr. Rajmangal's appeal and the Corporation's subsequent written resolution of 30 November, 2007, passed solely as a cautionary measure, on the face of the resolution itself, as ratification of the dismissal.

[13] The Corporation is a statutory body established under the Act and, it follows, that as a creature of statute, the Corporation only has the powers given to it by the Act. By Section 11(2) of the Act, the Corporation has the power, *with the approval of the Governor in Council, to appoint a general manager on such terms and conditions as may from time to time be determined*. The general manager is the chief executive officer of the Corporation and has the duties as set out in section 11 of the Act. Under section 11 (5) the Corporation has the power, *after consultation with the general manager, to determine and appoint such staff as may be necessary for the proper discharge of its functions.* And by section 11 (7), the Corporation ,***subject to such exception as it may make**, may, **by resolution** delegate to the general manager the exercise of any of the powers of appointment, discipline and dismissal of staff vested in the Corporation by the Act.*

[14] Although there is no express power given to the Corporation to discipline and dismiss employees in the Act, such a power is, by law, implicit in the power to determine and appoint the staff of the Corporation, as given in section 11(5) and furthermore it can be inferred from section 11(7), and, in any event, is a necessary or corollary incidence of the right to appoint employees. Therefore, in my view, the Corporation has the power to dismiss employees. Furthermore, I also observe in passing Clause 8 of the Administrative Operating Policies (AOP) which provides that a violation of any of the work rules contained in that clause will constitute just powers for disciplinary action up to and including

discharge. Clause 8(9) refers to unsatisfactory performance on the job, incompetence, or carelessness restricting production. This clause indicates that the Corporation has the power to dismiss and specifically, despite the reference to permanent employment in Mr. Rajmangal's letter of appointment, that it nevertheless has the right to dismiss him for unsatisfactory performance.

[15] However, the key question to determine is whether the Corporation by its approval of the Terms and Conditions delegated the power to dismiss senior employees to the general manager.

[16] The Corporation specifically approved the Terms and Conditions at its meeting of 15th December 1987. The Terms and Conditions took effect from 1st January 1988. That decision was recorded in the minutes of that meeting. No issue is taken with the validity of the Terms and Conditions generally. I find that the Terms and Conditions can be deemed to have been passed by resolution within the meaning of section 11(7) of the Act, since a resolution, in this context, means no more than a decision taken with the required majority. To my mind one does not have to use the word 'resolution' to render a decision, that has been properly taken, a resolution, for the purposes of section 11(7).

[17] The next concern is whether the Terms and Conditions vest a right to dismiss in the general manager. The Terms and Conditions are to my mind comprehensive, as they attempt to set out the general terms and conditions of employment of all employees. In fact, Clause 1.2 expressly states, *inter alia*, that the Terms and Conditions form a code of discipline for the officers and employees as well as a comprehensive code of procedure covering work and privileges, and is to be read with the rules, regulations and orders of the Corporation and the administrative operating policies, but are subject to all applicable legislation.

[18] By clause 2.1(a), appointments to the service of the Corporation are made by the Corporation or by the general manager or his delegate in accordance with Part IV of the Act. Clause 2.4 provides that a person employed to a non-established post or who is

engaged for a fixed period only will be employed on contract or on month to month terms to be stated in writing.

[19] Clause 3 deals with termination and provides, *inter alia*, for established employees to resign upon giving three months prior written notice of resignation and that employees on contract can only be terminated in accordance with the contract. There is no provision in the Terms and Conditions for the Corporation to terminate an employee's services on notice. Moreover, there is no clause which expressly grants the power of dismissal to the general manager.

[20] Clause 10 deals with disciplinary procedure. Clause 10.3 provides for the general manager to carry out an investigation where it is represented to him/her that an employee has been guilty of "misconduct" and the charge is so serious as to warrant a formal inquiry. The general manager has to ensure that the employee knows the whole case against him and is given an adequate opportunity to be heard. If misconduct is established the general manager may reprimand, suspend or transfer the employee.

[21] "Misconduct" is not defined in the Terms and Conditions but must be taken to bear the usual meaning attributed to it in the context of employment or labour law. In Chitty on Contracts[1] the learned authors explained the nature of misconduct, stating, 'the general rule is that if the employee does anything which is incompatible with the due or faithful discharge of his duty to the employer, he may be dismissed without notice; the employee's conduct need not be dishonest, since it is sufficient if it is "conduct of such a grave and weighty character as to amount to a breach of the confidential relationship" between employer and employee" (emphasis added).

[22] Therefore, Clause 10.3 empowers the general manager, where he is of the opinion that an employee has been guilty of serious misconduct, to hold a formal inquiry at which time the employee is entitled to representation. And Clause 10.5 provides for the penalties he can impose for serious misconduct.

[1] Vol. 2, 29th Edition (2004), para 39-176.

[23] Clause 10.5 headed "Permitted Penalties within the Formal Procedure" authorizes the general manager to impose certain penalties if he finds an employee guilty of serious misconduct after the formal inquiry. One of these penalties is dismissal (see clause 10.5(v)). Apart from this Clause 10.5(v), there is no other provision which purports to invest the general manager with the power of dismissal.

[24] As much reliance is placed on this clause by the Corporation I will set it out in full. Clause 10.5 (v) reads:- "The employee may be dismissed from the service of the Corporation without the benefit of pension and/or gratuity in circumstances falling within the provisions of sections C57 and C58 of the Labour Code." What does this clause mean? As I have already mentioned, it falls under the heading, "Permitted Penalties within the formal Procedure". It is a sub–clause of Clause 10 which bestows on the general manager, the power to discipline for misconduct or serious misconduct and impose penalties including dismissal without pension and gratuity for serious misconduct, all according to an established procedure.

[25] To my mind, on a proper construction, it can only mean that dismissal without the benefit of gratuity or pension can only be imposed by the general manager by way of a penalty for serious misconduct and only after the holding a formal inquiry. And, it is noted that clause 10.6 gives an employee who has been found guilty of serious misconduct the right of appeal to the Corporation and then to the Appeal Tribunal established by the Act. In passing, I observe what is more that the Act itself by section 11A gives any employee, who is aggrieved by any decision of the Corporation, the right of appeal to Appeal Tribunal. Even that right was denied to Mr. Rajmangal.

[26] There is no dispute that Mr. Rajmangal was not dismissed for serious misconduct after a formal inquiry. The Corporation ,having regard to the correspondence exchanged prior to action and to Mr. Dennis' submissions before me, is adamant that Mr. Rajmangal was not dismissed for misconduct but for failure to perform his functions satisfactorily. As a result it denied him any right of appeal which he had attempted to exercise first to the Corporation and then to the Appeal Tribunal in accordance with his rights under the Terms and

Conditions and the Act. Having regard to the foregoing provisions of the Act and the Terms and Conditions I have no hesitation in holding that the general manager had no authority by clause 10(5)(v) of the Terms and Conditions to dismiss Mr. Rajmangal for unsatisfactory performance of his duties.

[27] If I am mistaken in so finding, the clause itself is in my view is ambiguous. It provides that this penalty can only be imposed in circumstances falling within the provisions of C57 and C58 of the Labour Code. Section C57 provides that a dismissal shall not be deemed unfair if the reason assigned for the dismissal relates to misconduct on the job, the employee's capability or qualifications to perform the work, redundancy , the fact that the employee could not continue work without contravening the law and any other substantial reason which would entitle a reasonable employer to dismiss .The section also sets out the test for determining unfair dismissal as distinct from wrongful dismissal with which we are concerned. The distinction between the two kinds of claims was recently revisited and put beyond all doubt by the Privy Council in Julius Corbette v. National Bank of Dominica[2].

[28] Section C58 provides for the dismissal of an employee for serious misconduct, defines serious misconduct and sets out the procedure to be followed. Any reference to C57 can only mean in relation to the definition of serious misconduct therein for which dismissal would be appropriate and would be in keeping with the intention expressed in clause 10(1). However, section C 58(3) gives an employer the right to dismiss for unsatisfactory performance according to an established procedure.

[29] Are the references to these two sections of the Act in sub-clause 10(5) (v) of the Terms and Conditions intended to expand the scope of clause 10 and in particular to give the general manager the right to dismiss for unsatisfactory performance? I think not as it would import an expansion and conflicting procedures simply by reference and this without more cannot be read as the intention of the Corporation. In the face of this ambiguity which cannot be sensibly resolved having regard to the whole of clause 10 I will apply the general rule in construing documents, which is that any ambiguity must be resolved contra

[2] P.C.41/2008.

proferentum and hold that clause 10(50(v) does not give the general manger the right to dismiss for unsatisfactory performance.

[30] I therefore find that the general manager only has authority to dismiss for serious misconduct after holding a formal inquiry. He has no authority to dismiss for unsatisfactory performance. Furthermore, even if, contrary to this finding, clause 10 (5)(v) of the Terms and Conditions can be read as giving the general manager authority to dismiss for unsatisfactory performance under C 58 (3) of the Labour Code, then he must follow strictly the procedure set out in the Code which was laid down for the protection of employees. This he has not done, as he cannot rely on the letter of 29 July 2005 as proper notice as it was given about 2 years prior to dismissal and section C 58 (3) contemplates that the decision to dismiss is to be taken within 3 months after the notice. (Surprisingly, the letter of 2005 refers to matters occurring for many years prior to that and itself raises the spectre of the general manager perhaps not carrying out his duties as chief executive officer properly if these complaints were still unresolved in 2006). I also do not accept that a notice is not mandatory, as such a construction as argued for by the Corporation, would render the rights given to employees by the Code wholly nugatory.

[31] Alternatively, if I am mistaken and it can be said that having regard to its provisions on its face the Terms and Conditions confer on the general manager the power to appoint, discipline and dismiss staff, a further issue arises, which is, whether the Corporation in practice reserved the right to dismiss and discipline senior employees to itself despite the provisions of the Terms and Conditions, and did not in fact delegate that power to the general manager.

[32] On this issue Mr. Rajmangal relied on the evidence of Mr. Alexander Shirley, a former Chairman of the Corporation, who served in that capacity from 1990 to his retirement in July 2003. Mr. Rajmangal also sought to rely on the evidence of Ms. Pearl Smith, a former corporate secretary of the Corporation, from 1990 until her retirement in 2004. She actually filed a witness statement but apparently was told by the Corporation on the eve of the trial that she could not give evidence on Mr. Rajmangal's behalf as it would be a conflict of

interest. If this was so, that would be wrong and even if it were not so one would have thought that the Corporation being a statutory body would in the interest of justice have allowed her or allowed her to testify for Mr. Rajmangal. Be that as it may, she was not called to give evidence in the trial.

[33] Mr. Shirley testified that when it came to the dismissal of senior employees, the Corporation had always dealt with that at its meetings, and not the general manager. The Corporation called no evidence to dispute this, and I was impressed with Mr. Shirley despite his mistaken belief as to the law on whether the Corporation had the power to delegate the power of dismissal of senior employees to the general manager. Further, if the Corporation changed its practice after 2003, then I am sure that the Corporation would have had no difficulty in referring us to a decision to that effect or to bringing evidence as to the senior employees dismissed by the general manager. It offered no such evidence just the ipse dixit of Mr. Abraham as to the source and extent of his powers of which it appears he was not altogether certain. Accordingly, I find that in respect of senior employees that despite the Terms and Conditions, in practice the Corporation did not delegate the power to discipline and dismiss them to the general manager and retained or reserved that power to itself. Accordingly, Mr. Abraham had no authority to dismiss Mr. Rajmangal.

[34] The Corporation says further that it gave the general manager power to dismiss Mr. Rajmangal at a meeting of 26 October 2005. Mr. Abraham gave testified that at that meeting he submitted a report and raised his concerns about Mr. Rajmangal's unsatisfactory performance to the Corporation and was told he had power to deal with the matter. He did not disclose the report to the court. That, without more, is not sufficient evidence on which to find that such a grave matter as dismissal of a senior employee was delegated to him in accordance with section 11(7) of the Act

Issue 2 - Assuming that Mr. Abraham did not have authority of the Board to dismiss Mr. Rajmangal did the Board have the power to ratify the dismissal of the Claimant?

[35] Mr. Dennis, for the Corporation, relied on Firth v Staines[3], where Wright J gave an explanation of "ratification" stating as follows:

> "To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and thirdly, at the time of the ratification the principal must be legally capable of doing the act himself."

[36] The Corporation relies further on a letter dated 30 August 2006 from the Corporation's lawyers to Mr. Rajmangal's lawyers as ratifying the general manager's decision to dismiss him. The gist of the letter is that the Corporation refused to entertain Mr. Rajmangal's appeal. This argument is patently flawed. The Terms and Conditions gives a person, who is dismissed for serious misconduct a right of appeal to the Corporation and then to the Appeal Tribunal. How then can the appeal process be said to ratify a decision that was made without the authority of the Corporation? The appeal process and the process of ratification of an unauthorized decision are two distinct processes and one cannot ratify the other. I therefore find that the decision to dismiss Mr. Rajmangal was not ratified by that letter.

[37] Now to the resolution. The Corporation relies further on a resolution dated 30th November 2007 which Mr. Denis submitted ratified the dismissal. First this was an obvious attempt to patch up matters after suit was filed in 2006 and issue taken with the general manager's authority to dismiss. It would have been better to let the court determine the issue as it was already before the court and the damage had been done. Be that as it may, when one considers the resolution it is based on a wrong premise, namely, that the Terms and Conditions authorized the General Manager to appoint, discipline and dismiss staff in

[3] (1897) 2 OB 70, See also Vol 1, Halsbury's Laws of England, 4th Ed, paras 756-768, and Hogg v Cramphorn Ltd (1967) 1 Ch 254..

every case. Further, it reiterates the erroneous view that the Corporation, by refusing to entertain Mr. Rajmangal's appeal, ratified his dismissal. The Corporation appeared not to have taken any note of the purpose and meaning of section 11(7) of the Act and to the fact that the dismissal had already taken effect. The resolution therefore could not validate the dismissal and therefore the resolution is of no effect.

Issue 3 - Assessment of Damages for Wrongful Dismissal

[38] I now turn to the assessment of damages for wrongful dismissal. This is governed by the common law. The duty of the Court in assessing damages for wrongful dismissal is to put the successful employee as far as practicable in the financial position that he/she would have been in if his employment had not been wrongfully terminated; bearing in mind that the employee is under a duty to mitigate his loss. And in Burrill v Schrader [4] it was held that," the net pecuniary loss which the employee suffered (or will suffer) as a result of the wrongful dismissal and the probability of which should be presumed to have been within the reasonable foresight and contemplation of the employer and employee at the time of the making of the contract of employment" is recoverable as damages.

[39] Mr. Neale submitted that damages should be assessed on the basis that the Corporation could properly have terminated Mr. Rajmangal's employment on giving him reasonable notice and argued that in all the circumstances 12 months notice was reasonable. Having regard to his terms and conditions as contained in his letter of appointment and to the case of McClelland v Northern Ireland General Health Services Board I am not wholly convinced that this was necessarily a contract that could be determined by the employer on reasonable notice. However, that is the basis which was argued and no issue was joined with that although Mr. Denis contended that 6 months notice was adequate. This then is the issue, what would have been reasonable notice.

[40] Guidance can gleaned from some decided cases. In Waithe v Caribbean International Airways Ltd, the employee was an experienced traffic controller with impressive qualifications and held the position of a general manager for approximately 6 years. Sir

[4] [1995] 50 W.I.R. 193 at p.201

Denys Williams CJ in the High Court of Barbados held that what would have been reasonable notice is a question of fact to be determined in light of all the circumstances and that twelve months notice would have been reasonable. He also had regard to the character of the plaintiff's employment, the availability of similar employment having regard to the plaintiff's experience, training and qualifications and the fact that opportunities open to him must be very few.

[41] In Dominica Agricultural and Industrial Development Bank and Mavis Williams[5] Barrow J.A. relied on Flossiac C.J's dicta in Saunders v St. Kitts Sugar Manufacturing Corporation[6] and observed:-

> "The Chief Justice reviewed a number of decisions in arriving at his decision that the appellant in that case was entitled to the equivalent of 10 months' salary and benefits in lieu of notice, and not the 6 months' payment that the judge had awarded. Reasonable notice was a matter of law, he stated, and its determination always depended on the circumstances of each case. The court should consider, among other things, the employee's qualifications, his stature in the position which he held, his skill, his training, the very senior position he occupied, the duration of his employment, the responsibilities of his position and the reasonable length of time it would take him to obtain alternative employment. Among the particular facts that influenced the court's award in that case were that at the time of his dismissal the employee was 56 years old, was three from the top on the field side of his employment, he had undergone specialised training, he had national responsibility and he had given the employer 34 years service." [emphasis added]

[42] In Dominica Agricultural and Industrial Development Bank the court held that reasonable notice was 12 months. Similarly, in Margaret Penn v British Virgin Islands Ports Authority[7] 12 months was also considered to be reasonable notice for a managing

[5] Civil Appeal No. 20 of 2005 Commonwealth of Dominica Judgment delivered on 29 January 2007 [unreported]
[6] Civil Appeal No. 1 of 1993 St. Kitts [unreported]
[7] BVIHCV109/2000, Judgment delivered on 31 March 2003 and 7 April 2003

director. (See also Garnet Didier v Geest Industries[8] and Dexter Ducreay v Dominica Water and Sewerage Company Ltd[9]).

[43] Mr. Rajmangal was employed with the Corporation on a permanent and pensionable basis for approximately 16 years. He is highly qualified, holding a Bachelor of Science degree in mechanical engineering and a Master's degree in Business Administration. He was employed as the generation engineer and he was the head of the Generation Department. From his evidence he was unemployed after his dismissal from the Corporation until February 2007, when he was employed by BVI Marine Management at a much lower salary of $2,500 per month. He made several attempts to get a job both in the BVI and the wider Caribbean but was not successful. To my mind 12 months notice is a reasonable period that should have been given to Mr. Rajmangal in all the circumstances of the case..

[44] Therefore, I find that Mr. Rajmangal should have been paid twelve months' salary, in lieu of notice. Since he was already paid six months' salary in lieu of notice this payment must be deducted from the twelve months' salary he ought to have been allowed to earn and credit given for monies earned during any part of that 12 month period. From the evidence he was effectively unemployed for about 8 months, as he obtained employment in February 2007.

[45] At the time of his dismissal Mr. Rajmangal was entitled to the following emoluments totaling approximately $6,200.74 per month. This included a basic salary of $5,154.05 , month; a personal to the present holder allowance of $346.69, an entertainment allowance of $250.00; the use of a cell phone up to the limit of $150.00 per month; telephone allowance of $30.00, car allowance of $150.00 and two full tanks of petrol valued at approximately $120.00 per month. In addition he was entitled to 30 working days per annum for vacation and had the benefit of a non-contributory pension and medical insurance. He also gave evidence that had he remained in the employ of the Corporation he would have been entitled to a 6 percent increase on his basic salary retroactive to

[8] Civil Appeal No. 6 of 1999 Dominica, A manager of Land and Agricultural Consultant was given 9 months notice
[9] Suit No. 283 of 2000 – Dominica, 7 months notice was given to a manager of a public utility company

January 2006 ($70,366.20 per annum) and this is the figure on which all calculations of salary must be based and from that period as he must be compensated for the loss of that increase.

[46] No issue is taken with his emoluments save as regards the cell phone and petrol allowance and his claim for pension or gratuity. With respect to the cell phone allowance I accept the evidence of Mr. Abraham that Mr. Rajmangal was given a cell phone to assist him in the discharge of his duties as he was required to be accessible by telephone 24 hours per day, and find that the cell phone was not intended to be a personal benefit and that he cannot recover that. This is further supported by memorandum dated 27 April 2006 from the Human Resources Manager to Mr. Rajmangal signed by both parties and a letter written by Mr. Abraham to Mr. Rajmangal dated 3 January 2003 to the effect that his cellular calls were limited to $150.00 per month and that the costs of personal calls were to be deducted from his monthly salary. This claim is clearly distinguishable from that in Waithe v Caribbean International Airways Ltd[10] relied on by Mr. Neale. In that case, damages were awarded for the loss of benefit of limited free and/or rebated travel on an airline which had employed the plaintiff. It was held to be a personal benefit.

[47] I also find that the benefit of the two full tanks of petrol is not recoverable as having regard to the evidence that that too was meant to assist Mr. Rajmangal with the traveling required whilst going about his duties. It was clearly not a personal benefit.

[48] Now to medical benefits, gratuity and pension. Mr. Rajmangal testified that the Corporation paid medical insurance for him during his employment. This is not disputed. He lost that benefit of those payments during the notice period and he is entitled to recover sums representing the sums that would have been paid in that respect. He was prevented from calling Ms Smith and therefore the Corporation must disclose the amount paid on his behalf to enable the court to compute that amount.

[10] (1988) 39 WIR 61

[49] In addition Mr. Rajmangal claims full statutory pension of $41,047.32 per annum or a reduced statutory pension of $30,785.49 per annum and a gratuity of $128,272.88 subject to a deduction of 10% for an accelerated lump sum payment in realization of a mere expectation and for the contingencies and vicissitudes of life. Mr. Neale argued that Mr. Rajmangal is entitled to any loss of pension rights which he suffers as a result of the wrongful termination on the basis that the Corporation denied him the opportunity to complete 25 years of service and to earn the statutory pension that he would have been entitled to.

[50] The Corporation contends that it was entitled to terminate Mr. Rajmangal's employment at any time, upon giving proper notice as the term "permanent employment" in his appointment letter does not connote a promise of lifelong employment and therefore he is not entitled to any loss of pension rights. In addition, Mr. Dennis argued that Mr. Rajmangal was only entitled to all benefits which had already accrued to him or to which he became entitled during the notice period; and since he did not become eligible to the payment of pension at the time of his dismissal or during the notice period, he is not entitled to such payment.

[51] In Maurice Silvey v Pendragon PLC[11] the appellant's employment was terminated on the grounds of redundancy by letter dated 6 November 1997. His termination letter also indicated that he was entitled to 12 weeks notice for which payment will be made in lieu of notice. The Court of Appeal noted that the appellant was 55 years old on 18th November 1997, which was only 12 days after the date of the termination letter. If he had remained in the respondent's employment until then, he would have been entitled to the accrued pension rights, which it is agreed, amounted or would have amounted to £5788.57 more than he in fact received. The court held that as the appellant would have been entitled to the extra £950, if his employment had lasted another 12 weeks, he was, in principle, entitled to recover that sum as damages for breach of contract.

[11] [2001] EWCA Civ 784

[52] It follows from the decision of Maurice Silvey that Mr. Rajmagal will only be entitled to pension and gratuity if that right had accrued at the time of his dismissal or accrued during the notice period. The question then is whether the right to pension accrued to Mr. Rajmangal in May 2007 (the time when the proper notice period would have expired).

[53] By law the Corporation is obliged to put in place a scheme no less favourable than that for government employees. And Mr. Rajmangal testified that the Corporation's scheme is based on the scheme which exists for government workers. Full pension benefits accrue after 25 years of service or the attainment of 60 years and computation is based on the final annual salary. There is also provision for a reduced pension and gratuity as an alternative.

[54] Clearly, Mr. Rajmangal is not entitled to pension and gratuity under the scheme as he has not served for the qualifying period neither has he attained the requisite age. However, he has lost the right to earn that benefit, an immensely valuable one, as a result of the Corporation's breach of contract and must be compensated for same. As this was a non-contributory scheme I am of the view that adequate compensation would be the payment of an amount equal to all contributions made to the scheme on his behalf and for his benefit by the Corporation for the period from when he became part of the permanent and pensionable establishment up to his dismissal.

[55] In addition they must also pay sums representing the contributions which would have been paid, had he been given adequate notice. This strikes me as fair, having regard to his age, now 52, and to his evidence that it is most unlikely that he will find a pensionable position. His current position does not have such a benefit. According to the letter of 19 May 2003, his employment, as part of the permanent and pensionable establishment, was made retroactive to 1990. However, Mr. Abraham testified that this letter is not valid simply because it was signed by the acting general manger when he, Mr. Abraham, was on leave and that therefore the acting general manager had no authority to do so. That evidence is not sufficient to invalidate the letter as it was relied on by Mr. Rajmangal and Mr. Abraham,

and the evidence has pointed us to no decision of the Corporation reneging from the letter or curtailing the powers of an acting general manager.

Conclusion

[56] For the foregoing reasons I find that Mr. Rajmangal was wrongfully dismissed from his employment with the Corporation and that he is entitled to damages representing the monies he would have earned had he been given 12 months notice. In addition he is entitled to a sum equivalent to all contributions made and which ought to have been made on his behalf to the pension scheme for the whole of the period during which he was a member of the permanent and pensionable establishment and including the proper notice period. He is also entitled to a sum equivalent to monies that would have been paid for medical insurance during the notice period. This is a benefit he lost.

[57] He must give credit for the monies paid in lieu of notice as well as for monies earned in alternative employment during the proper notice period. Further, allowance must be made for any income tax due on the salary. Damages will bear interest at the statutory rate from the date of filing the claim to the delivery of this judgment. Mr. Rajmangal is to have his prescribed costs based on the total amount of damages awarded. I invite both counsel to cooperate on making the final calculations and counsel for Mr. Rajmangal must file a formal order for approval with the court within 7 days hereof.

[58] It would be remiss of me if I did not express my appreciation for the very helpful written submissions which were lodged by both counsels. I must confess it would have been difficult to manage without them. And finally I must apologize for the lengthy delay in handing down this decision. Many events have conspired in the delay, but suffice it to say, the substantial reason was the fact that I was assigned to other duties which took me outside the jurisdiction for the term immediately succeeding the hearing of this matter. I am grateful to the parties and counsel for their forbearance.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands