

EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS  
IN THE HIGH COURT OF JUSTICE

BVIHCV: 2009/0277

BETWEEN:

DECA PENN

Claimant

and

SCOTIABANK (BRITISH VIRGIN ISLANDS) LIMITED

Defendant

Appearances:

Dr J S Archibald of J.S. Archibald & Co for the Claimant  
Mr Terrance Neale and Sonjah Smith of McWTodman & Co for the Defendant

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2013: January 28<sup>th</sup>  
2013: February 28<sup>th</sup>

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JUDGMENT

- [1] **Ellis J:** This is a very straightforward case of wrongful dismissal. Neither the Claimant's pleadings nor her witness statement discloses that she takes any issue with underlying basis for the termination of her contract of employment. Rather, the Claimant alleges that her dismissal was wrongful because the Defendant dismissed her with insufficient notice under her contract of employment. In the premises she claims damages for breach of contract, interest and prescribed costs.
- [2] The evidence in this matter discloses that the Claimant entered into an employment agreement with the Defendant on 3<sup>rd</sup> June 1997. By letter dated 25<sup>th</sup> November 2008, the Defendant

terminated the Claimant's employment with immediate effect. She was paid three months salary totalling \$14,799.81 in lieu of notice.

- [3] The Claimant's contract of employment was for an indefinite term and made no provision for termination. The Claimant contends that in such circumstances she is entitled at common law, to a reasonable period of notice on termination. Based on all of the circumstances of the case she contends that a reasonable period of notice would have been twelve months. She therefore asserts that she was legally and contractually entitled to twelve months notice and claims the sums of \$53, 499.79 representing the salary which she would have earned over a period of 9 months (the difference between the salary she should have received over 12 months and that which she actually received in lieu of the three month notice period) plus vacation pay for 20 days.
- [4] The Defendant does not dispute that the Claimant's employment agreement had no specific provision dealing with notice upon termination or payment in lieu such notice. However, the Defendant asserts that under section C9 (3) (c) of the British Virgin Islands Labour Code Cap 293 of the Revised Laws of the Virgin Islands (the Code), the Claimant was legally entitled to no more than one month's notice. The Defendant contends that the Claimant was in fact paid three months salary in lieu of notice which was in excess of her statutory entitlement. It contends that this was done as an act of generosity and in recognition of her length of service.
- [5] Section C9 of the Code provides as follows;
- (1) *An employer may without advance notice terminate the employment of any person who had engaged in misconduct related to his work within the limitations of C58 (1) or (2).*
  - (2) *With respect to a person who has been engaged for a specified term of employment of less than one week's duration, the employer need give no further notice of his intention to terminate said employment at the end of the specified term unless the terms of his employment specify otherwise.*
  - (3) *In all other cases the employer must give advance notice to the affected employee of an intention to terminate that person's employment, as follows –*
    - (a) *With respect to an employee within his probation period, an employer must give at least 24 hours advance notice of his intention to terminate said employee's employment;*

- (b) *With respect to all other employees, the period of said advance notice shall be at least equivalent to the interval of time between the affected employee's pay days;*
  - (c) *In no case need the period of said advance notice exceed 30 days unless an employment contract calls for a longer notice period.*
- (4) *Having given due advance notice to terminate employment, an employer may terminate the employment prior to the effective date of termination under the notice provided that he pay the employee a sum equivalent to that he would have paid if the employee had worked throughout the period.*

[6] The Respondent contends that the section C9 (3) (c) of the Code prescribes the maximum rather than the minimum periods of notice to which the Claimant would be entitled upon termination. Counsel for the Respondent therefore submitted that in circumstances where the Claimant admittedly received three months salary in lieu of notice, which far exceeded the maximum prescribed statutory entitlement of one month; she cannot maintain that she was wrongfully dismissed. He urged the Court to conclude that the Defendant did not act in breach the employment agreement.

[7] In support of this contention, Counsel for the Respondent referred the Court to the case of **Ray A. George v British Virgin Islands Port Authority**<sup>1</sup> where Barrow JA in considering section C9 (3) of the British Virgin Islands Labour Code stated as follows:

*"That provision settles the matter to my mind it specifically permits an employment contract to provide for termination by giving advance notice not exceeding 30 days. It mentions nothing about and imposes no limitation on reasons for termination. Limitations on reasons for termination arise only in the context of unfair dismissal."*

[8] The Court is not satisfied that this authority provides the assistance which Counsel for the Respondent posits. At that point in the judgment the Court of Appeal was clearly concerned with the central issue of whether an employer was obliged to provide reasons for termination and not whether the section prescribed statutory maximum notice periods. In fact later on in the judgment, the Court of Appeal was definitive in confirming the strength of the notice of termination provisions under the Code. After referencing section C9 (employer's notice of

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<sup>1</sup> British Virgin Islands Civil Appeal No. 28 of 2006; judgment delivered July 2<sup>nd</sup> 2007

termination) and C11 (employee's notice of termination) of the Code, Barrow JA made the following statement:

*"The two sets of provisions concerning notice of intended termination, it seems to me, are the minimum employment standards established by the Code relevant to termination. Therefore, the termination clause in this case, which provided for a greater notice period than the Code required, was a perfectly valid provision of the contract."*<sup>2</sup>

[9] It is clear that this statement contradicts the position advanced by Counsel for the Defendant.

The Defendant's defence is in any event trenchantly opposed by the Claimant who contends that this claim seeks recognition and enforcement of her common law rather than statutory rights. Counsel for the Claimant submitted that under common law, where a contract of employment makes no provision for termination, the law will imply a term that an employee is entitled to reasonable notice of termination. He submitted that in such circumstances what constitutes reasonable notice is to be decided by the Court. The Court is satisfied that this general statement of the law cannot be faulted.<sup>3</sup>

[10] Counsel for the Defendant however contended that the Labour Code must in any event be taken as superseding the common law in all circumstances where the concept for reasonable notice becomes relevant. He submitted that the Code provides the legal benchmark unless there is a contractual obligation to give more.

[11] The Court must therefore consider the statutory legal framework relevant to termination of employment within the Territory, vis-à-vis the common law position. How these two legal systems interact is in the Court's view critical to determining the principal issue which arises in this case.

### **Employment – The Relationship between Statute and Common Law**

[12] In the British Virgin Islands the employment contract is governed both by statute and common law. At the time of the filing of this action the operating statutory regime regulating employment in the

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<sup>2</sup> Ray A. George v British Virgin Islands Port Authority at paragraph 14

<sup>3</sup> Fuller v Revere Jamaica Alumina Ltd (1980) 31 WIR 304 at 309; Rouse v Mendoza (1967) 12 WIR 1

Territory included the Labour Code Cap 293 of the Revised Laws of the Virgin Islands (the Code)<sup>4</sup> as well as certain constitutional provisions<sup>5</sup>.

[13] Section A5 of the Code set out the general application the Code as follows:

*(1) To the extent that provisions of this Code purport to apply to employers, they shall apply to employers operating or doing business in the Virgin Islands including the Government as the employer of its non-established employees, but they shall not bind the Government as the employer of its other employees.*

*(2) To the extent that the provisions of this Code apply to employees, they shall apply to all employees of employers operating or doing business in the Virgin Islands, including the non-established employees of the Government; but they shall not apply to*

- (a) established employees of the Government;*
- (b) persons in the naval, military or air forces of the Government*
- (c) the Police Force*
- (d) persons holding status of diplomatic agents or*
- (e) persons employed by the United Nations or its specialized agencies.*

[14] The Code takes into account applicable international standards, in prescribing minimum conditions of employment covering the hiring of employees, wage and hours of work, employment discrimination, leave of absence, individual rights, benefits and termination. Section A7 of the Code therefore provides that:

*Nothing in the Code shall be construed as prohibiting an employer, either unilaterally by individual contract with an employee or with employees, or by collective agreement with employees' representatives, from establishing working conditions more advantageous to employees than those minimum standards which are set forth in the Code.*

[15] It follows that all employers operating or doing business in the British Virgin Islands have an obligation to adhere to and maintain the minimum standards which are set forth in the Code. This would include any minimum standards prescribed in regards to termination of employment – in particular the notice period. Consequently, while it is open to the parties to contractually agree to a notice period that exceeds the prescribed minimum, where there is a termination provision in an

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<sup>4</sup>On 4 October 2010 the new Labour Code 2010 came into force.

<sup>5</sup> Section 60 (1) (d) and Chapter 2 and 7 of the Virgin Islands Constitutional Order 2007

employment agreement which purports to provide less than the statutory minimum it will have no legal effect. This is reinforced in section C7 (i) of the Labour Code which provides that:

*"It shall be lawful for an employer and employee to enter into an individual contract of employment, either written or oral covering terms of employment, but-*

*(i) any provision thereof which establishes conditions which fall below the minimum employment standards established by the Code shall be null and void;"*

[16] Notwithstanding these statutory provisions, there is a plethora of judicial authorities which make it clear that an employee's entitlement to notice on termination may be derived both from statute and the common law. It is now settled that in employment contracts of an indefinite term (that is, not "fixed-term" contracts or contracts which otherwise provide for termination), the right to *reasonable* notice is an implied term. Failing to provide reasonable notice constitutes wrongful dismissal at common law and could make an employer vulnerable to a wrongful dismissal claim and liable for damages.

[17] For an employer, determining what constitutes "reasonable" notice is therefore crucial in order to avoid possible litigation by employees. This is particularly so in light of the fact that courts have often determined that an employee is entitled to "reasonable notice" at common law which may exceed the prescribed statutory entitlement. In so ruling the Courts have acknowledged that an employee's statutory entitlement co-exists with his rights under the common law.

[18] In **Burrill and Another v Schrader and Another**<sup>6</sup> the Court of Appeal definitely clarified the relationship between the common law and statute thusly

*"A statute should not be construed so as to abolish or restrict a common law right of remedy in the absence of unequivocal language or necessary implication from the statutory context indicating a legislative intention to abolish or restrict that right or remedy."*

[19] This decision has been applied in the case **Ray A. George v British Virgin Islands Port Authority**. At page 15 of that judgment, Barrow JA noted the following

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<sup>6</sup> (1995) 50 WIR 193

"In **Burrell v Schneider** Sir Vincent Floissac CJ explained that as a result of the provisions in the Labour Code there were now two regimes governing employment relationships and an employee was entitled to different rights under them. He said:

"At the time of the enactment of the Labour Code, an employee had a common-law right not to be wrongfully dismissed. The Labour Code did not abolish that right. The Labour Code merely supplemented that right by a statutory right not to be dismissed. ...

"The common law right is based on contract and the statutory right is based on social policy. The provisions of sections C57 and C58 of the Labour Code ensure that the two rights harmoniously co-exist."

[20] It follows that in the wake of its enactment, the Code did not abolish an employee's right to pursue a claim for wrongful dismissal under the common law.

[21] Based on the foregoing, it would therefore be incorrect to assume that the statutorily prescribed minimums are the only obligations which an employer has when contemplating termination of an employee. Satisfying the statutory prescribed periods, does not relieve an employer of his common law obligation to provide "reasonable notice". Indeed, in the absence of a contractual stipulation to the contrary, courts have routinely implied an obligation on the employer to provide far more generous notice periods than are prescribed under the statute.<sup>7</sup>

[22] In the premises and in the absence of an express contractual stipulation dealing with termination of the Claimant's contract of employment, the Court must therefore now seek to determine what would have been a reasonable period of notice under the common law.

#### **EMPLOYER'S NOTICE OF TERMINATION - REASONABLE NOTICE**

[23] At common law when an employee is hired for an indefinite period and there is no express contractual provision for termination on notice, the employee is entitled to reasonable notice of termination. The question as to what is a reasonable period of notice is one of fact, depending on all the circumstances of the case and the nature of the employment.<sup>8</sup>

[24] In determining what constitutes reasonable notice of termination, the courts have generally considered all of the circumstances of the case including the nature and character of employment including seniority and stature, salary and benefits; the employee's age, the employee's

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<sup>7</sup> Anthony Edwards v Nautool Machine Limited per Georges J at page 20; Clarke v American Life Insurance Co. (2002) 62 WIR 1

<sup>8</sup> McGuire v Wardair Canada Ltd. 71 WWR 705; Waithe v Caribbean International Airways (1988) 39 WIR 61

experience, training and qualifications, the length of service, and the availability of similar employment.<sup>9</sup> What then are the circumstances of this case?

### The Claimant's Evidence

[25] The Claimant gave evidence on her own behalf and called no other witnesses. In her witness statement she stated that she entered into a written agreement with the Defendant in June 1997. She was initially employed as a commercial credit account officer earning a gross salary of US\$25,000.00 per year. She also received standard employee benefits which included 12 days vacation per year.

[26] During the course of her employment she received salary increases and was eventually promoted to the position of Accounts Manager in the Commercial Credit Department in September 2005. In that capacity her duties included;

- i. Granting, renewing or declining credit requests within specified lending limits and making recommendations to higher lending authorities for loans over these limits.
- ii. Keeping abreast of changes in accounting practices, government and tax regulations and other factors as they relate to financial statement preparation.
- iii. Designing and negotiating profitable and effective banking proposals with customers and prospects.
- iv. Analyzing accounts and negotiating detailed account compensation packages with customers to maximize profitability and correct any revenue deficiencies.

[27] At the date of termination (25<sup>th</sup> November 2008), the Claimant was earning an annual salary of US\$64,815.00 and was entitled to 20 days vacation per year. The Claimant also stated that she obtained Bachelor of Arts in Accounting and Associate of Arts in Business Management.

[28] During the trial the Claimant was examined by her Counsel. She confirmed that she had worked at the Defendant Bank for 11 years. In amplifying her witness statement she indicated that she did not

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<sup>9</sup> Mendez v the bank of Nova Scotia [1990-1991] 4 CCLR 205; Margaret Penn v BVI Ports Authority British Virgin Islands BVIHCV Claim No.2000/109

agree with the basis upon which she was terminated. She testified that the Defendant did not follow the Bank's human resource management operating procedures prior to terminating her employment.

[29] Counsel for the Defendant strenuously objected to this evidence on the basis that it was not relevant to the issues which are to be determined by the Court. He noted that the Claimant's pleadings do not establish that she takes issue with the reasons for her termination and her witness statement also corroborates this position.

[30] In response, Counsel for the Defendant confirmed that the evidence was important only because the Claimant wished to place on record her opposition to the matters raised in paragraph 6 of the Defendant's defence filed on 28<sup>th</sup> August 2009 and in the witness statement of the defence witness, Joycelyn Murraine.

[31] Under cross examination the Claimant testified that following her dismissal, she secured employment with Deloitte in May, 2009. She maintained that job for a period of 3 months at a monthly salary of \$3195.00.

### **The Defendant's Evidence**

[32] The Defendant's Managing Director, Ms. Joycelyn Murraine gave evidence on behalf of the Defendant. In her witness statement she confirmed the Claimant evidence as to her designation remuneration and length of service at the time of her termination. Ms. Murraine also stated that in her capacity as Managing Director of the Defendant she decided to terminate the Claimant's employment by giving her three months salary in lieu of notice on the ground that she had failed to perform her duties satisfactorily despite several warnings

[33] The Claimant chose not to cross examine Ms. Murraine during the trial.

### **Analysis of Evidence / Law**

[34] On, the evidence disclosed the Court finds that the Claimant was employed on an indefinite contract of employment which did not provide for termination by notice or payment in lieu. The Claimant is therefore entitled to reasonable notice.

[35] At that date of termination the Claimant had been employed with the Defendant for approximately 11 years. She entered employment at an entry level position but in September 2005 she was promoted to the position of Accounts Manager in the Commercial Credit Department, a position which she held until her termination in 2008: a little over 3 years. Her annual salary was US\$64,815.00 and she was entitled to 20 days vacation per year.

[36] The Parties' evidence as to the Claimant's duties deviates only slightly. The Court therefore accepts that her duties as Accounts Manager in the Commercial Credit Department were as pleaded in her statement of claim. There is no evidence that she headed that department and no further evidence was provided regarding the seniority and stature of her post.

[37] In his closing submissions Counsel for the Claimant alluded to the fact that the Claimant is currently employed at the Financial Services Commission in the insurance division and urged the Court to conclude on that basis that the Claimant is a valuable and competent employee who deserved more than three months notice of termination. He also contended that Claimant's remuneration made her the highest paid person to have initiated a suit for wrongful dismissal within the Territory. While it is clear that the Claimant's salary was significant, the Court is satisfied that this is just one of many factors that must be taken into account in considering the question of reasonable notice. The Court is not satisfied that this factor should be more heavily weighted in determining reasonable notice.

[38] The Claimant also did not plead or give any evidence as to her age. Further, other than the bare assertion that she obtained a Bachelor of Arts in Accounting and Associate of Arts in Business Management, the Claimant provided no documentary evidence in support and gave no indication as to the date when these qualifications were obtained.

[39] The Claimant also elected not to provide any evidence and made no submissions relative to her employability or the availability or unavailability of similar employment in the Territory.

Given the Claimant's cause of action and burden of proof which follows as a consequence, the Court was generally surprised at the paucity of evidence proffered in support of her claim. If a claimant is to satisfy this Court that he/she was not given reasonable notice upon termination that

claimant is obliged to provide the Court with sufficient evidence relevant to the factors which the Court must consider and which have been well established at common law.

- [40] It is one of the fundamental principles of the conduct of litigation that a party seeking to prove an allegation bears the burden of proof in respect to that fact. In grounding a claim for wrongful dismissal, it is therefore critical that a claimant's case be proved by formal evidence and where necessary, he must condescend to the relevant particulars.
- [41] In the case at bar, the Court was left to speculate on aspects of the evidence which should have been clear and cogent. As a result, this left a vacuum for the Court which would inevitably affect its findings.
- [42] Both counsel however assisted the Court by submitting a number of judicial precedents on reasonable notice. The Court has carefully considered the case law provided. However, the Court recognizes that there is no precise formula which emerges or which would lead to a common result in all cases, since the facts will often vary from one case to another. At best the authorities provide a useful guide as to what other courts have decided on the facts presented before them.
- [43] Ultimately, what would constitute reasonable notice is a question of fact to be determined with reference to the facts and the surrounding circumstances of each particular case. The Court must therefore have regard to the particular facts and evidence of the case at bar, taking into account the factors which it is obliged to consider at common law.
- [44] In support of her claim that twelve months notice would have been reasonable in the circumstances the Claimant relied on the following cases
- i. **Mendez v Bank of Nova Scotia (1990-1991)** – Claimant employed as the Bank's Assistant Manager of Operations for three years; Claimant's position was fourth from top of the Bank's organizational chart; – Court found that dismissal would seriously impact his employability for many years and determined that reasonable notice would be 9 months.
  - ii. **Jamie Holmes v Peter Island Estates Limited (1997)**<sup>10</sup> – Claimant employed as General Manager of the Defendant's resort for 5 years; Claimant had a significant

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<sup>10</sup> British Virgin Islands BVIHCV 1996/124 judgment delivered 10<sup>th</sup> April 1997

remuneration package which included accommodation, bonuses and allowances – Court agreed that 5 months notice would be reasonable

- iii. **Margaret Penn v British Virgin Islands Ports Authority (2003)** - Claimant employed as the Deputy Managing Director/ Managing Director Designate of the Authority for eleven years; Claimant appointed an Managing Director and ex officio member of the Authority's board; Claimant a certified public accountant since 1980 – Court found that reasonable notice would be 12 months.

[45] Counsel for the Defendant referred the Court to the following cases:

- i. **Waithe V Caribbean International Airways Ltd. (1988)**<sup>11</sup> – Claimant employed as General Manger of the Defendant Airline for six years; prior to this Claimant was experienced and very well qualified air traffic controller, deputy airport manager and senior research officer with the Ministry of Civil Aviation; Claimant had significant training and qualifications; Claimant unable to find suitable alternative employment – Court determined that reasonable notice would be 12 months.
- ii. **Anthony Edwards v Nautool v Machine Limited (1996)** – Claimant an experienced and expert machinist; Court acknowledged that there were limited employment opportunities in the Territory for Claimant's skills - Court determined that reasonable notice would be 3 months.
- iii. **Rajmangal v BVI Electricity Corporation (2009)** – Claimant was highly qualified engineer with a Masters Degree in Business Administration. He was the head of his department and had served the Corporation for a period of 16 years and he remained unemployed for a period of 8 months following his termination – the Court determined that reasonable notice would be 12 months.

[46] Looking at the cases cited by Counsel for the Claimant, the Court finds her claim for 12 months notice to be unsupportable.

[47] In the Courts view, the Claimant's position in the Defendant Bank could not be said to be comparable with any of the claimants in the cases submitted by the Counsel for the Claimant. In all of these cases the facts disclose that the claimants were in the highest ranking tieres of the management structure in their organizations. Their positions would have clearly involved significant autonomy; organizational responsibility and accountability.

[48] Although the Claimant was eventually promoted from an entry level position to a position of some responsibility and trust, it is apparent that her responsibilities and duties were more limited in

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<sup>11</sup> (1987) 39 WIR 61

nature. There is no indication that she held a position of equivalent stature and dimension as obtained in the cases referred to by Counsel.

[49] Also of great significance in this case is the fact nature and character of the Claimant's employment and the availability of suitable or similar employment having regard to her experience and qualifications. On the whole, the Claimant did not demonstrate that there was any unique feature of her position, employment, qualification or experience which would make it difficult for her to obtain similar employment within the Territory. While she was not a certified accountant, the Claimant stated that she has accounting qualifications at an undergraduate level combined with at least 11 years of experience in the banking sector. The Court has no basis upon which to conclude that she would have any difficulty securing similar employment within a relatively reasonable time frame following termination.

[50] Again, this contrasts with the case law referred to by Counsel. The facts of these cases disclose that the claimants either held unique positions which would have made it particularly difficult to secure similar employment or alternatively, there was evidence that their dismissal would have impacted their future employability. The Court is not satisfied that either of these factors obtained in this case.

[51] In much the same way, the Court finds that the judicial authorities relied on by Counsel for the Defendant (justifying a notice period of three months) are also not entirely comparable. In the case of in **Edwards v Nautool**, the Claimant was a skilled machinist who earned an hourly wage of \$8.25 - \$9.25 per hour for a 40 hour week. The nature and character of his employment is not analogous to that of the claimant. There was evidence that he trained other employees and it was also clear that following termination the claimant in that case remained out of work for 10 months. In those circumstances, the Court was forced to accept that he would have limited employment opportunities despite his specialized skill.

[52] The Court also considered the following judicial authorities:

- i. **Rouse v Mendoza**<sup>12</sup>: Claimant was a senior clerk with 24 years' experience – 3 months notice held to be reasonable.

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<sup>12</sup> (1968) 12 WIR 1

- ii. In **Didier v Geest Industries (W.I.) Ltd. (1999)**<sup>13</sup>: the Claimant held a senior executive position as Manager of Lands and Agriculture and had worked with the Defendant for 33 years- the Court held that a reasonable period of notice was 9 months.
- iii. **Saunders v St. Kitts Manufacturing Corporation**<sup>14</sup>: Claimant employed as the Defendant's Area Manager with 34 years' service, at the time of his dismissal the claimant, was third from the top on the field side of his employment, he had undergone specialized training, he had national responsibility– Court held that 10 months was reasonable notice.

## CONCLUSION

- [53] In the final analysis the primary object of notice is to provide the terminated employee with a reasonable opportunity (given his age, training, qualifications, skills and experience) to seek alternate suitable employment.<sup>15</sup>
- [54] In the case at bar the Claimant does not contend that her termination affected her employability or that similar employment was unavailable in the Territory. The Claimant's evidence (albeit under cross examination) is that she secured alternative employment at a lower monthly salary of \$3195 approximately five to six months after being terminated.
- [55] The Claimant's professed academic qualifications include an accounting degree at an undergraduate level with an additional associate of arts degree in business management although it is not clear whether these qualifications were obtained prior to or following her termination. At the date of her termination, the Claimant was a full time salaried employee who had 11 years of banking experience in commercial credit. The evidence revealed that during her tenure she rose through the ranks from an entry level position to that of accounts manager, a position of some responsibility and trust. The Court is satisfied that her duties were closely defined and her responsibilities departmentalized.

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<sup>13</sup> [1999] E.C.L.R. 335

<sup>14</sup> St Kitts and Nevis, Civil Appeal No 1 of 1993

<sup>15</sup> *Bramble v Medis Health and Pharmaceutical Services Inc.* [1999] 175 DLR (4d) 385

[56] The Court considered the relevant authorities and has taken into account all of the relevant factors including the duties, responsibilities and skills necessary to the claimant's post, her professional experience and qualifications and her length of service and remuneration. On the facts and evidence of this case, the Court is satisfied that the Claimant's employment was terminated with insufficient notice under her contract of employment. The Court finds that an appropriate notice having regard to all the circumstances of this case would be five months. Consequent upon this determination and in so far as three months salary has already been paid, the Claimant is entitled to additional two months salary net any taxes and social security contributions, the details of which must be settled as between Counsel.

[57] The Court is satisfied that no deduction is warranted in respect of mitigation. Although the Claimant has a duty to mitigate her loss by demonstrating that she made reasonable efforts to obtain alternative employment suited to her employment and abilities, the burden of demonstrating that the employee has not met that duty rests with the Defendant, who must show either that the Claimant found or by the exercise of proper industry in the search could have procured other employment of a similar kind. It would need to establish that the Claimant's failure to take reasonable steps **and** that had her job search been active; she would have been expected to have secured not just a position but a comparable position reasonably suitable to her abilities.

[58] The evidence here is that the Claimant secured alternative employment albeit at a much lower salary within five to six months following termination or about two months after her notice period had expired. The Defendant has not shown that the Claimant's actions in the circumstances were un reasonable.

### **Pre-judgment interest**

[59] At the commencement of the trial Counsel for the Claimant made an oral application to amend Claim Form and Statement of claim in order to insert a claim for pre judgment interest. No Application or affidavit in support having been filed, the Defendant had no notice of the application and was clearly caught unawares.

[60] The Court considered CPR Part 20.1 and Practice Direction 5 of 2011 including the factors prescribed and declined to entertain the application.

[61] Counsel for the Claimant then submitted that the Court had an equitable jurisdiction to consider the claim for pre judgment interest in the absence of such an amendment and proffered the following judicial authorities in support: **Creque v Penn** [2007] 70 WIR 150 – 157; **Jamie Holmes v Peter Island Estates Limited and Norbert Daliewicz and Another v West Indian Development Company Limited**.

[62] The Court referred both Counsel to the case of **Ocean Conversion (BVI) Limited v Attorney General of the Virgin Islands**<sup>16</sup> and invited written submissions. Having carefully read those submissions the Court can find no basis to differ from the reasoning and the conclusions drawn by Bannister J in that case. Further, having reviewed the Court of Appeal judgment in **Dominica Agricultural and Industrial Development Bank v Mavis Williams**<sup>17</sup> the Court is satisfied that the Claimant's equitable claim for prejudgment interest is not maintainable and must be refused.

[63] **In the circumstances and for the reasons outlined above, it is ordered that:**

- i. Judgment is entered for the Claimant.
- ii. The Defendant shall pay the Claimant damages representing two months salary in lieu of notice net any applicable taxes and social security contributions. The details of such amounts are to be settled as between Counsel.
- iii. The judgment will carry interest from the date of this order until payment.
- iv. The Defendants shall pay the Claimant's prescribed costs on the total amount of damages awarded in accordance with CPR Part 65.

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**Vicki Ann Ellis**  
**High Court Judge**

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<sup>16</sup> British Virgin Islands BVIHCV 2008/192 judgment delivered December 2009

<sup>17</sup> Dominica Civil Appeal No. 20 of 2005 judgment delivered 29<sup>th</sup> January 2007 per Barrow JA paras 60-65