THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

VIRGIN ISLANDS

CLAIM NO. BVIHCV2012/0161

BETWEEN:

RAY GEORGE

Claimant/Applicant

AND

ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant/Respondent

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mr. Jamal Smith for the Claimant
Miss Maya Barry and Miss Miglisa Cupid for the Defendant

……..
2012: September 25
2013: May 22
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RULING

[1] TABOR, M (Ag.): By notice of application and affidavit in support by Ray George filed on 10th July, 2012, the claimant applied to the court pursuant to Rule 26.3 (1) (b) and (c) of the Civil Procedure Rules (CPR) 2000 for the following relief:

(i) The defence be struck out in its entirety and/or in the alternative paragraphs 1, 3, 4 and 6 be struck out for disclosing no reasonable ground for defending the claim.
(ii) The defence be struck out in its entirety for prolixity as it does not comply with CPR 10.5 (8) since the certificate of truth is not signed by the

Respondent personally as required by CPR 3.12 (2) or given by a legal practitioner as required by CPR 3.12 (3) or is not signed by the Permanent Secretary to the Ministry of Communications and Works on behalf of the Crown.

(iii) Summary judgment be entered for the Applicant on the claim on the ground that the Respondent has no real prospect of successfully defending the claim.

(iv) The Respondent pays the Applicant's costs of this application, to be assessed if not agreed.

[2] The grounds of the application are quite extensive, but I will reproduce them for completeness. They are as follows:

1. The defence is liable to be struck out for disclosing no reasonable ground for defending the claim for the following reasons:

   (a) Paragraph 1 of the defence amounts to an admission, since the respondent admits that the applicant was contracted by the government as a Special Projects Consultant in the Ministry of Communications and Works by way of agreement entered into on 2 November, 2011 and paid from fund established for the pay of consultants.

   (b) Section 3 of the Labour Code, 2010 (No. 4 of 2010) (the "Labour Code") defines an "established employee" as:

   "a public officer or a person employed by the government whose salary is paid from or out of funds allocated for the payment of the personal emoluments of persons on the permanent establishment as included in the Official Estimates of the Virgin Islands."

   (c) Section of the Labour Code defines a "non-established employee" as:

   "a person who is employed by the government whose wage is paid from funds or out of funds allocated for the payment of the personal emoluments of persons who are not on the permanent and pensionable establishment as included in the Official Estimates of the Virgin Islands."

   (d) Section 3 of the Labour Code defines an "employee" as:

   "any person who enters into or works under, or where a contract of employment has been terminated for any reason, a person who entered into or worked under, a contract with an employer, personally to perform any services or labour, whether the contract be oral or written, expressed or implied; and the term includes:

   (a) a person whose services or labour have been interrupted by a suspension of work during a period of leave, temporarylay-off, strike or lockout;

(b) an apprentice whose services or labour may be designed primarily to train such apprentice;

(c) a commission agent;

(d) a dependent contractor; and

(e) a managerial employee who is not responsible for policy formulation or in effective control of a department or branch of the undertaking".

(e) Section 3 of the Labour Code defines a "dependent contractor" as:

"a person, whether or not employed under a contract of employment, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for that person more closely resembling the relationship of employee than that of an independent contractor".

(f) The applicant was at all material times a dependent contractor and he was paid from a fund established for the payment of consultants which is separate and apart from the funds which pay the personal emoluments of persons on the permanent and pensionable establishment as included in the Official Estimates of the Virgin Islands, and therefore, the applicant was at all material times a non-established employee.

(g) Section 4 of the Labour Code provides:

"To the extent that the Code applies to employees, it shall apply to employees of employers operating or doing business in the Virgin Islands, including employees of statutory authorities and non-established employees of the government, but they shall not apply to

(a) Established employees; and

(b) members of the Royal Virgin Islands Police Force".

(h) As a result of the clear and unambiguous provisions in the Labour Code, the applicant was a non-established employee of the government at all material times and therefore, Paragraph 1 of the defence should be struck out.

(i) Clause G.1 of the Employment Contract provides:

"The appointment is a period for two (2) years, and either party may terminate the contract at any time by serving three (3) months notice to the other party. The employer shall be entitled to the option to pay one (1) month's salary in lieu of notice".

(j) Section 90(1) of the Labour Code provides:

"Where an employer is required by section 89 to give an employee notice of termination of the employment contract, such notice shall be terminated on the following basis unless a written contract provides more favourable terms:

(a) where the employee's length of service does not exceed seven years, the period of notice shall be at least equivalent to the interval of time between the affected employee's pay days;

(b) where the employee's length of service exceeds seven years but does not exceed fifteen years, the period of notice shall be at least one month;

(c) where the employee's length of service exceeds fifteen years, the period of notice shall be at least two months'.

(k) As a result of the clear and unambiguous provisions in the Labour Code and the Employment Contract the government agreed to provide more favourable terms to the applicant by providing three (3) months notice of termination instead of the notice equivalent of time between the applicant's pay days.

(l) Section 91(1) of the Labour Code provides:

"In lieu of providing notice of termination, the employer may, at his or her discretion, pay the employee a sum equal to the wages and other remuneration and confer on the employee all other benefits that would have been due to the employee at the expiry of any required period of notice".

(m) As a result of the clear and unambiguous provisions in the Labour Code and the Employment Contract the government was required to pay the applicant a sum equal to the wages and other remuneration and confer on the applicant all other benefits that would have been due to the applicant at the expiry of the three (3) months notice period and by seeking to pay the applicant only one (1) month salary in lieu of the three (3) months notice period is below the minimum standards established by the Labour Code, and therefore, Paragraphs 3 of the defence should be struck out.

(n) Clause I of the Employment Agreement provides:

"Each paragraph of this agreement shall be and remain separate from and independent of and severable from all and any other paragraphs herein except where otherwise indicated by the context of the agreement. The decision or declaration that one or more of the paragraphs are null and void shall have no effect on the remaining paragraphs of this agreement".

(o) Section 44(1)(a) of the Labour Code provides:

"An employer and employee may enter into an individual employment contract, either written or oral, which specifies conditions of employment, but any provision which:

(a) establishes conditions which fall below the minimum employment standards established by the Code; or

(b) requires that the employee refrain from associating with other employees or with a trade union for collective bargaining purposes, is void".

(p) As a result of the clear and unambiguous provisions in the Labour Code and the Employment Agreement, the provision in the Employment Agreement that requires one (1) month's pay in lieu of the three (3) months notice is void, but section 44(1)(a) of the Labour Code does not void the entire Employment Agreement but only the offending portion of the Employment Agreement and notwithstanding that such an offending provision is void it does not affect the rest of the agreement based on Clause I of the Employment Agreement, and therefore, paragraph 4 of the defence should be struck out.

(q) As a result of the failure by the respondents to show why the applicant is not a non-established employee, and support the legality of the one (1) month's pay in lieu of three (3) months notice, and to establish that the offending provision is void, the applicant is entitled to the relief sought and paragraph 6 of the defence should be struck out.

(r) Where paragraphs 1, 3, 4 and 6 are struck out all that remains are bare admissions and, therefore the defence should be struck out in its entirety

2. The defence is liable to be struck out for prolixity since it is signed by Perline Scatliffe-Leonard, Human Resources Manager, Ministry of Communications and Works dated 6 July, 2012 and not by the Attorney General or in the alternative the Permanent Secretary in the Ministry of Communications and Works on behalf of the Crown, but further demonstrates the creation of an employment relationship between the applicant and the respondent.

3. In the premises, the defence is liable to be struck out under CPR 26.3(1)(b), (c) and/or the inherent jurisdiction of the court and summary judgment entered for the claimant/applicant.

Background Facts

[3] On 2nd November, 2011 the claimant entered into an employment agreement with the Government of the Virgin Islands to be the Special Projects Consultant for a period of two (2) years from 26th October, 2011.

[4] The claimant deposes that on 3rd November, 2011 he received a letter outlining his appointment as a Special Projects Consultant from the Ministry of Communications and

Works signed by Mrs. Perline Scatliffe-Leonard, Human Resources Manager, on behalf of the Acting Permanent Secretary. On 5th December, 2011 he received another letter form the Human Resources Manager signed on behalf of the Acting Permanent Secretary, terminating his contract with the government with effect from 5th December, 2011. The letter indicated that the claimant would be paid one (1) month's salary in lieu of notice along with payment of additional sums upon presentation of a final report. The latter was submitted to Mrs. Arlene Smith-Thompson, Acting Permanent Secretary in the Ministry of Communications and Works, on 12th December, 2011.

[5] The claimant further deposes that it was a condition of the Employment Agreement that the Government of the Virgin Islands could terminate his employment at any time by serving three (3) months notice. He contends, however, that although the Employment Agreement provided the option to pay one (1) month's salary in lieu of notice, that this was an error and it must have been intended for the payment in lieu of notice to have coincided with the notice period of three (3) months. As a consequence, the claimant is of the view that the provision in the Employment Agreement seeking to pay one (1) month's salary in lieu of three (3) month's notice should be considered void.

[6] On 17th July, 2012 when the matter came before Master Pearletta Lanns, it was remitted to the court office for the defence to be placed on the case file and the 25th September, 2012 was set for the first case management conference at which time the application to strike out the defence would be heard. The Master also directed that the defendant file their response to the application to strike out the defence by 2nd August, 2012 and that both parties should also file submissions together with authorities in support of their respective positions.

[7] On 2nd August, 2012 the defendant filed affidavits by Diane Parsons and Perline Scatliffe-Leonard in opposition to the application to strike out the defence. On 24th September, 2012 the defendant filed their submissions and authorities, while the claimant filed theirs on 25th September, 2012.

[8] The matter was heard on 25th September, 2012 and counsel for both sides made oral presentations.

The court's power to strike out a statement of case

[9] The power of the court to strike out a statement of case is provided for by Rule 26.3 (1) of the CPR 2000 which states as follows:

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
>
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
>
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[10] The striking out of a statement of case or defence is a draconian step which a court would only take in exceptional circumstances. In Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997) Dennis Byron CJ (Ag.), as he then was, restated the seminal test that should be applied by the court on an application to strike out when he said:

> "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court… Striking out has been described as 'the nuclear power' in the court's arsenal and should not be the first and primary response of the court."

[11] In his judgment in the interlocutory appeal in Tawney Assets Limited v East Pine Management et al (BVI High Court Civil Appeal No. 7 of 2012), Mitchell JA (Ag.) in underscoring the need why the court should proceed cautiously when dealing with an application to strike out noted that:

> "The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial".

Claimant/Applicant's Submissions

[12] Learned Counsel for the claimant, Mr. Jamal Smith, has submitted that the defence filed by the defendant should be struck out as it does not disclose any reasonable ground for defending the claim, the defence does not comply with CPR 3.12 (2) or CPR 3.12 (3) and is prolix. He has further submitted that if the first succeeds, then the second becomes academic and that the outcome of the first should not be conditional on the outcome of the second.

[13] In proposing the approach that the court should take in considering the application to strike out the defence, learned Counsel cited several authorities which should guide the court. He noted that under CPR 26.3 (1) (b) where the court can strike out a statement of case or a part of it if it discloses no reasonable grounds for bringing or defending a claim, generally arises as a result of two situations:

(a) the content of a statement of case is defective in that, even if every allegation contained in it were proved, the party whose statement of case it is, cannot succeed; or

(b) the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

Learned Counsel noted that in Three Rivers District Council and others v Bank of England (No. 3) [2001] 2 All ER 513, Lord Hope indicated that there is little difference between the test for an application for summary judgment and an application to strike out a statement of case. He also noted that in Swain v Hillman [2001] 1 All ER 91, Lord Woolf explained that the court is only concerned with the statement of case which it is alleged discloses no reasonable ground for bringing or defending the claim. In such a case, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.

[14] Further, he cited Lord Woolf's statement in Swain v Hillman where he indicated that:

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible…. Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

I should add that Part 24 of the UK Civil Procedure Rules is similar to Part 15 of our CPR 2000. He also cited Rawlins J, as he then was, in Robert Conrich v Ann Van Der Elst (AXAHCV 2001/0002), where after considering the case of Biguzzi v Rank Leisure plc [1999] 4 All ER 934, he stated that it is only where a statement of case does not amount to a viable claim or defence, or is beyond cure that the court may strike out.

[15] Learned Counsel has submitted, therefore, that in an application to strike out a statement of case the court should determine whether the claim is bound to fail and in that regard the court is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. Consequently, a defendant cannot be permitted to continue to pursue a defence on a statement of case which has no real prospect of success. This is also in keeping with the overriding objective of the CPR 2000 to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. Learned Counsel cited the approach of Joseph-Olivetti J in

Vijay Mehta v Rajesh Kishor Mehta (BVIHCV 2006/0176, BVIHCV 2006/0177 and BVIHCV 2006/0178), to underscore the court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the other issues.

[16] In addressing the defence filed by the defendant directly, learned Counsel noted that the defence at paragraph 1 indicated that the claimant was not paid from a fund allocated for the payment of personal emoluments in the Official Estimates of the Virgin Islands, and that such an admission must mean that the claimant was a non-established employee in accordance with the Labour Code 2010. As a consequence, Counsel contends that paragraph 1 of the defence should be struck out. I should add here, though, that both the pleadings of the claimant and the defendant failed to address the crucial factor which differentiates whether an employee is non-established or established and that is whether the employee is on the permanent and pensionable establishment as included in the Official Estimates of the Virgin Islands.

[17] With respect to Clause G1 of the Employment Agreement which deals with the termination and renewal of appointment, learned Counsel has submitted that the defence is unsustainable since it failed to show how Clause G1, which requires that either party can terminate the contract by giving three (3) months notice or that the employer can instead pay one (1) month's salary in lieu of notice, can work in practice. As a consequence, it is submitted that paragraph 3 of the defence is struck out. Learned Counsel contends that the claimant is entitled to the benefits pursuant to Section 91 (1) of the Labour Code 2010 that would accrue after the expiration of the three (3) months notice period. In that regard, learned Counsel is of the view that Clause G1 falls below the minimum standards established by the Labour Code. He suggests that the relevant provisions of the Labour Code must be given their plain and unambiguous meaning and that if the court has a difficulty in finding the plain and unambiguous meaning, then the purposive approach as shown in Bebo Investments Limited v The Financial Secertary (BVIHCV 2007/0151) should be adopted.

[18] Learned Counsel is of the view that as a result of the clear and unambiguous provisions in the Labour Code and the Employment Agreement, that the provision in the latter that requires one (1) month's pay in lieu of three (3) months notice is void. Counsel contends, however, that Section 44 (1) (a) of the Labour Code does not void the entire Employment Agreement but only the offending portion and notwithstanding that the offending provision is void it does not affect the rest of the Agreement based on Clause I (the severability clause) of the Agreement. Counsel has submitted, therefore, that paragraph 4 of the defence should be struck out.

[19] Learned Counsel has also submitted that pursuant to Rule 26.3 (1) (d) of the CPR that the defence should be struck out for prolixity since it is signed by Mrs. Perline Scatliffe-Leonard, Human Resources Manager in the Ministry of Communications and Works, and not by the Attorney General or in the alternative the Permanent Secretary in the Ministry of Communications and Works on behalf of the Crown. Counsel is of the view that the fact that the defence was signed by the Human Resources Manager in the Ministry of Communications and Works, demonstrates an employment relationship between the

applicant and the respondent. However, the employment relationship between the applicant and respondent was never in doubt. The issue in question was whether the applicant was on the established or the non-established establishment.

Respondent/Defendant's Submissions

[20] Learned counsel Miss Maya Barry urged the court that the issues to be determined are:

(i) whether the defence filed herein on 6th July, 2012, ought to be struck out on the grounds that:
   a. it discloses no reasonable grounds for defending the claim; and
   b. for prolixity;
(ii) whether summary judgment ought to be entered for the claimant/applicant herein.

[21] With respect to the test on an application to strike out, learned Counsel cited several authorities[1] to support her contention that the court must be satisfied that a party will be unable to prove the allegations made against another party, or that the statement of case is incurably bad or that it discloses no reasonable ground for bringing or defending a case, and has no real prospect of succeeding at trial. She noted further the statement of Bannister J in Sphereinvest Global High Yield Fund Limited et al v Eximtech Investments Limited et al, where he indicated that he did not think it right to strike out defences because they could have been better pleaded, or more informative.

[22] Learned Counsel has submitted that the claimant's entire claim is based on the premise that the Government terminated the Agreement signed between the parties contrary to the provisions of the Labour Code. Counsel further posited that the Government was not legally bound by the Labour Code, except in respect to Parts VIII and IX which are not applicable in the instant case, since the claimant was not a non-established employee of the Government. Moreover, Counsel is of the view that the Agreement between the Government and the claimant was terminated in accordance with the provisions o f the Agreement, which governed the relationship between the parties in relation to termination.

[23] With respect to Clause G1 of the Agreement, Counsel has submitted that no part of that Clause falls below the minimum standards established by the Labour Code as both provisions on notice i.e., that either party may terminate the contract by serving three (3) months notice and that the employer has the option of paying one (1) month's salary in lieu of notice, ought to be read together. Alternatively, Counsel has submitted that if part of Clause G1 is found to establish conditions which fall below the minimum standards established by the Labour Code, the entire paragraph should be severed from the Agreement pursuant to Clause I of the Agreement, which makes provisions for the severability of paragraphs. In the event that Clause G1 is severed, Counsel maintains that

[1] Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997); Bay View Properties v Phillipe Chalano et al (SLUHCV 2009/0592 citing Lennox Linton et al v Anthony W. Astaphan et al (DOMHCV 2008/0436); Sphereinvest Global High Yield Fund Limited et al v Eximtech Investments Limited et al (BVIHCV 2011/0087).

the claimant would be left with the protection of Sections 90 and 91 of the Labour Code, that is to say, one month's notice or one month's salary in lieu of notice.

[24] On the issue related to the certificate of truth not being signed by the defendant or the defendant's legal practitioner as required by Rule 3.12 (2) and (3), learned Counsel has submitted that the proceedings in the instant case are against the Crown, despite the fact that they are instituted against the Attorney General. In that regard, Counsel further submitted that in addition to the Attorney General, any appropriate officer of the Crown who is aware of the facts of the matter so as to give that officer direct knowledge and/or an honest belief in the truth of the contents of the defence, could sign the certificate of truth.

[25] Learned Counsel has submitted, in the alternative, should the court find that the certificate of truth in its present form results in the defence being procedurally defective, then the sanction of strike out would be disproportionate in the circumstances and not in keeping with the overriding objective of the CPR. Instead of striking out the defence, learned Counsel posited that the instant case is a fit and proper one for the court to invoke its powers under Rule 26.9 of the CPR and make such orders as are deem necessary to put matters right. To support this contention, learned Counsel cited two decisions[2] from the British Virgin Islands where the Eastern Caribbean Supreme Court declined to grant an application to strike out statements of case for non-compliance with CPR 3.12. Additionally, learned Counsel cited several cases[3] from other Caribbean jurisdictions which can provide guidance, where applications to strike out statements of case for non-compliance with rules regarding certificate of truth which are analogous to CPR 3.12.

[26] In Gilda Lewis v Board of Trustees, University of Belize et al, it was held that the omission of the certificate of truth was not fatal to the claimant's statement of case and that such an error is only as to form rather than substantive and as such it should not stand in the way of achieving the overriding objective of the rules. In Wright v Attorney General it was held that whilst the certificate of truth was not in compliance with the rule, striking out the defence on that basis would be disproportionate. In Shakira Dixon v Donald Jackson it was held that the absence of the certificate of truth was not fatal to the defence; while in Wayne Dillon v Trinity Housing Company Limited it was held that the failure of the defendant to sign the certificate of truth can be treated as a procedural defect which could be rectified by Part 26.8 and not one which would void the defence as a whole.

[27] On the basis of these judgments, learned Counsel has urged the court that if the certificate of truth is deemed to be defective as a result of not being signed by the defendant or the defendant's legal practitioner, then rather than striking out the defence the court should apply its powers under CPR 26.9 and make such orders that are deemed necessary to put matters right.

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[2] Anju Dhar et al v Glenford David et al (BVIHCV 2009/0384, paragraphs 7 to 11) and Komodo Holdings Ltd. v VP Bank (BVI) Ltd. (BVIHCV 2002/0072)

[3] Wayne Dillon v Trinity Housing Company Limited, Trinidad and Tobago High Court of Justice, CV2010-05075; Gilda Lewis v Board of Trustees, University of Belize et al (Action No. 518); Wright v Attorney General, Jamaica Supreme Court, CV No. 6023/2009; Shakira Dixon v Donald Jackson, Jamaica Supreme Court, CLD 042/2002.

[28] With respect to the relief of summary judgment sought by the claimant, learned Counsel has submitted that this relief is unavailable against the defendant by virtue of Rule 15.3 (d) (i) of the CPR which bars summary judgment from being imposed against the Crown.

Analysis and Conclusion

[29] This is an application pursuant to Rule 26.3 (1) (b) and (c) that the defence be struck out in its entirety for non-compliance with Rule 10.5 (8) and/or in the alternative that paragraphs 1, 3, 4 and 6 be struck out for disclosing no reasonable ground for defending the claim. The claimant/applicant is also seeking summary judgment on the ground that the respondent has no real prospect of successfully defending the claim.

[30] The court was presented with oral and written submissions by both learned Counsel. The court has reviewed these submissions along with all the documentary evidence that have been submitted in this matter.

[31] The background facts of the case are not really in dispute. Where both parties differ are with respect to whether the claimant was an established or non-established employee and whether Clause G1 of the Employment Agreement was void pursuant to sections 44 (1) (a) and 91 of the Labour Code. Coupled with this is the larger issue as to whether the defence discloses any reasonable grounds for defending the claim and whether it is in compliance with Rule 3.12 (2) and (3) of the CPR.

[32] I will address first the issue as to whether the claimant was an established or non-established employee. Section 3 of the Labour Code defines an "established employee" and a "non-established employee". Apart from the words "public officer" and "salary" in the definition of an established employee and the words "person" and "wage" in the definition of a non-established employee; the only fundamental difference between the two definitions can be found in the fact that in the case of an established employee, that person must be on the permanent and pensionable establishment, while in the case of a non-established employee, that person is not on the permanent and pensionable establishment.

[33] To determine whether an employee was established or non-established, therefore, one must of necessity ascertain whether the employee was on the permanent and pensionable establishment or not. In the instant case, neither side in their pleadings provided any information to indicate the employment status of the claimant with respect to whether he was on the permanent and pensionable establishment or not. As a consequence, resolution of this issue is one that must be determined at trial. I am even more convinced of the need for the latter in view of the point made by Mrs. Perline Scatliffe-Leonard in her affidavit of 2nd August, 2012 that, "the term Non-Established Employee refers to a specific category of employees, and does not mean any employee who is not on the permanent and pensionable establishment". Mrs. Diane Parsons, Budget Coordinator in the Ministry of Finance, in her affidavit filed on 2nd August, 2012 also deposed that a non-established employee in the context of the Official Estimates of the Virgin Islands, refers to a specific category of employees which is separate and distinct from other categories of Government employees. She further indicated that in the 2011 and 2012 Official Estimates, the Ministry

of Communications and Works could only hire three (3) non-established employees, namely; an electrical assistant, messenger and cleaner (Electrical Inspection Unit).

[34] The fulcrum of the instant case is Clause G1 of the Employment Agreement between the claimant and the Government of the Virgin Islands. It is the contention of the claimant that Clause G1 is void because it is in contravention of sections 44 (1) (a) and 91 of the Labour Code. Section 44 (1) (a) stipulates that any provision of an employment contract which establishes conditions that fall below the minimum standards established by the Code is void. The conditions outlined in Clause G1 are that either party may terminate the contract by giving 3 months notice or that the employer shall have the option to pay 1 month's salary in lieu of notice. Do the conditions of Clause G1 fall below the minimum standards of the Code? To answer this question one has to look at section 90 (1) (a) of the Code which states:

> "where the employee's length of service does not exceed seven years, the period of notice shall be at least equivalent to the interval of time between the affected employee's pay days".

Clearly, the claimant was on an appointment for a period of two (2) years with the employer and therefore the period of notice he was entitled to under the Code would be one (1) month since he was paid monthly. The conditions of Clause G1, therefore, could not be considered to fall below the minimum standards established by the Code when the provisions of the Code are given their plain and unambiguous meaning. Had the employer not elected the option to pay 1 month's salary in lieu of notice, the employee would have been entitled to 3 months notice and this does not fall below the minimum standards of the Code either.

[35] With respect to the issue as to whether the Government agreed to provide more favourable terms to the employee by providing three (3) months notice of termination and therefore was required to pay the employee, "a sum equal to the wages and other remuneration and confer on the employee all other benefits that would have been due to the employee at the expiry of any required period of notice" pursuant to section 91 (1) of the Code; I accept the position of learned Counsel for the defendant that Clause G1 does not include a term that is more favourable since the three (3) months notice and the one (1) month's pay in lieu of notice ought to be read together. It is noteworthy to make the point that the relationship between the employee and the employer was governed by the provisions of the Employment Agreement entered into by the parties voluntarily. Clause G1 gave the employer the option to terminate the contract by paying 1 month's salary in lieu of notice and the employer elected to enforce that option. Similarly, Clause G2 gave the employee the option to terminate the contract by paying the employer 1 month's salary as liquidated damages and forfeiting all benefits under the agreement.

[36] Now to the larger issue raised by learned Counsel for the claimant as to whether the defence discloses any reasonable grounds for defending the claim and whether it is in compliance with Rule 3.12 (2) and (3) of the CPR. Part of the relief sought by the claimant was the striking out of paragraphs 1, 3, 4 and 6 of the defence for disclosing no reasonable ground for defending the claim. Paragraphs 1, 3, 4 and 6 of the defence addressed the

issues of whether the claimant was an established or a non-established employee and whether Clause G1 was void pursuant to sections 44 (1) (a) and 91 of the Labour Code.

[37] I have considered the pleadings earlier dealing with the employment status of the claimant i.e., whether established or non-established and also whether Clause G1 was void, so I will not elaborate on those two issues again, suffice it to say, that the burden rests on a party who seeks to strike out parts or all of a statement of case to show that there is no possibility of a cause of action or defence, and I am not convinced that learned Counsel for the claimant was successful in doing that. Accordingly, I would not strike out paragraphs 1, 3, 4 and 6 of the defence.

[38] *Learned Counsel for the claimant has submitted that where paragraphs 1, 3, 4 and 6 are* struck out all that remains are bare admissions and therefore the defence should be struck out in its entirety. I agree with this submission and having not struck out those paragraphs it means, therefore, that the defence remains in toto.

[39] Another major submission that has been put forward by learned Counsel for the claimant to support the contention that the defence should be struck out, was that the defence did not comply with Rule 3.12 (2) and (3) of the CPR since it was not signed by the defendant or his legal practitioner. In reply to this submission, learned Counsel for the defendant has submitted that to strike out the defence because the certificate of truth was not in compliance with the rule would be disproportionate.

[40] In some of the cases cited by the learned Counsel for the defendant, the court treated the defective certificate of truth as a procedural error and ordered rectification of the error rather than declaring the defence void. This approach is in line with Lord Collins dictum in Pacific Electric v Texan Management and Others[4] where he said that, "in the pursuit of justice procedure is a servant not a master". I must say that I am in agreement with that approach.

[41] In the instant case the certificate of truth was signed by the Human Resources Manager, Mrs. Perline Scatliffe-Leonard, in the Ministry of Communications and Works and not by the Attorney General, his legal practitioner or the Permanent Secretary in the Ministry of Communications and Works. With respect to proceedings against the Crown, section 2 (3) of the Crown Proceedings Act (Cap. 21) of the Laws of the Virgin Islands states:

> "Any reference in Parts III and IV to civil proceedings by or against the Crown, or to civil proceedings to which the Crown is a party, shall be construed as including a reference to civil proceedings to which the Attorney General or any officer of the Crown as such is a party".

Learned Counsel for the defendant has submitted that in addition to the Attorney General any appropriate officer of the Crown close to the facts of a matter, so as to give that officer direct knowledge and/or an honest belief in the truth of the contents of the defence, could sign the certificate of truth. In her affidavit filed on 2nd August, 2012 the Human Resources

[4] UKPC [2009] 46 at para. 1.

Manager deposed that she has access to all personnel files, documents and records held by the Ministry of Communications and Works relative to the claimant's employment as a Special Project Consultant with the Ministry of Communications and Works.

[42] In Blackstone's Civil Procedure (2011, Oxford University Press, Appendix 1, Page 249), the learned authors at Part 22 dealing with Statements of Truth indicated that in the case of a registered company or corporation such persons holding senior positions as director, chief executive or manager would be able to sign a certificate of truth. In the case of companies, it is noted that it is expected that a manager who signs a certificate of truth would have personal knowledge of the content of the document or would be responsible for managing those who have that knowledge of the content. Applying this logic to the instant case, the Human Resources Manager is clearly a senior officer in the Ministry of Communications and Works and the person who was in the best position to have knowledge related to the employment of the claimant. In light of this fact, therefore, I think it would be disproportionate to strike out the defence because it was not signed by the defendant, his legal practitioner or the Permanent Secretary in the Ministry of Communications and Works.

[43] Learned Counsel for the claimant has advanced submissions that the defence is struck out for disclosing no reasonable ground for defending the claim, for the failure to comply with Rule 10.5 (8) of the CPR and summary judgment for not having any real prospect of successfully defending the claim. For the reasons advanced, I am not convinced that learned Counsel for the claimant has adduced compelling enough reasons for the defence to be struck out. In the premises, therefore, the order of the court is as follows:

(i) The application to strike out the defence is refused.
(ii) The application for summary judgment is unavailable pursuant to Rule 15.3 (d) (i) of the CPR and is accordingly dismissed.
(iii) Costs in the cause.

[44] The court is grateful for the helpful submissions of learned Counsel on each side.

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Charlesworth Tabor
Master (Ag.)