IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COMMONWEALTH OF DOMINICA

[CIVIL]

SUIT NO. DOMHCV2010/0297

BETWEEN:

KENRICK AMBO

Claimant

And

DOMINICA AIR & SEAPORT AUTHORITY

Defendant

Appearances:

Mrs. Laurina A. Vidal-Telemacque of Law Office of Laurina A. Vidal-Telemacque,
Counsel for the Claimant
Mr. Alick C. Lawrence S.C. and with him Ms. Vincia Auguiste,
Counsel for the Defendant

2013: October 31st
2014: April 11th

JUDGMENT

[1] THOMAS, J. (Ag.): By way of a claim form filed on 4th October, 2010 the claimant, Kenrick Ambo seeks various reliefs against the defendant, Dominica Air & Seaport Authority (the Authority).

[2] In his Statement of Case the following issues are detailed as giving rise to the claim: On 1st April 2010 the claimant was transferred from the Woodbridge Bay Port, at Roseau to the Long House Port at Portsmouth without receiving the $400.00 monthly allowance as provided for under Article 16 of the collective agreement ("the Agreement") between the defendant and the Public Service Union; between August 2005 and 13th September 2010 the defendant refused/neglected to evaluate the claimant's job performance despite requests, resulting in non receipt of increments; on 5th and 6th April 2010 the claimant reported sick and $185.00 was wrongfully deducted from the claimant's pay contrary to Article 18 (2) B of the Agreement; on 25th December 2009 and 16th February 2010 the defendant wrongfully removed the claimant's name from the duty roster

resulting in financial loss to the claimant; by letter dated 13th September 2010 the defendant by letter signed by the defendant's General Manager, was wrongfully/unfairly summarily dismissed the claimant; and as a result of the foregoing the claimant suffered damages including, loss of salary, gratuity, and social security benefits.

[3] At paragraph 10 of the said Statement of Case that the claimant avers that will rely on the conduct of the defendant as well as unfair treatment meted out to him by the defendant through its General Manager to support a claim for aggravated damages.

[4] The particulars of the damages claimed are pleaded and the result is a total of $869,934.40. And the following are now claimed: reinstatement to his position as Shift Supervisor and damages; alternatively damages with interest thereon and costs.

Amended Defence

[5] At paragraph 2 of the amended defence the defendant admits paragraph 4 of the Statement of Case but avers that the claimant was not entitled to the allowance because he did not meet the requirements of Article 16.3 of the Agreement.

[6] The matter of requests for appraisals is denied by the defendant and states further that: the claimant was only appointed in 2006 and the policy in force required appraisals to commence one year after appointment and in 2007 there was a salary freeze; in 2008 to 2010 no employees were appraised due to a problem with the appraisal system; when entitlement to increments were found the payments were made with retroactive effect.

[7] With respect to the deductions on two days of sick leave taken by the claimant; the defendants avers that with respect to 5th April 2010, the claimant was not scheduled to work and no deduction was made, while as regards 6th April 2010, the defendant admits that the claimant did report sick but contends that the defendant admits that the defendant did not accept this reason for the claimant's absence and as such was not paid.

[8] The matter of the removal from the roster is denied by the defendant. Instead, it is pleaded that the claimant was removed because the claimant indicated he had no wish to work on those days. Further, or in the alternative the reasons pleaded are: the employer could alter the roster at any time pursuant to Article 3 of the Agreement, and the two days in issue were public holidays and

work on such days was in the discretion of the management pursuant to Article 15.2 of the Agreement.

[9] In relation to paragraph 8 of the Statement of Case, the defendant admits the issue of the letter but denies that the dismissal was wrongful or unfair. In this regard the defendant avers that the dismissal was grounded in gross misconduct, namely refusal to follow lawful oral and written instructions of his supervisor to report for work at the Cabrits Cruise Ship Berth.

[10] At paragraphs 8 and 9 of its Amended Defence the defendant denies that it is liable for any loss suffered by the claimant and that any loss was due to the claimant's unlawful conduct. Also denied is the claimant's prayer for aggravated damages as no proper basis exists for such an award.

[11] As regards loss of salary the defendant avers that: "…if the claimant is entitled to loss of salary (which is denied) such salary should be based on a reasonable notice period for termination of the claimant's employment, and having regard to the position of the claimant and that he only commenced working with the defendant on 2nd August 2005, three months notice or salary in lieu of notice would be reasonable."

Reply

[12] With respect to paragraphs 2 and 3 of the Amended Defence the claimant avers that: No. 4 Leblanc Lane, Goodwill was his address since 2000 which was known by the General Manager and the claimant's immediate supervisor; and that "appraisal is good management practice and a sine qua none for him to request appraisal but rather it was incumbent on management to appraise him."

[13] In response to sub-paragraphs 3 (i), (ii) and (iii) of the Amended Defence the claimant contends that it is clear that the defendant admits that the claimant's rights were violated since: (a) Under the Protection of Employment Act the claimant is protected and automatically became permanently established six months after the commencement of his employment, being August 2005; (b) the claimant has a right to be appraised; (c) the claimant reported sick on the 6th and 7th April 2010 and the defendant refused to pay the claimant; (d) the claimant's desire not to work is related to the claimant's Sabbath and his religion, being Seventh Day Adventist, and the removal of the claimant were discriminatory.

[14] Finally, the claimant repeats that his dismissal was both wrongful and unfair because the defendant failed to observe the principles of natural justice as he was never informed of the charges against him in writing, the defendant did not provide the claimant and the union representative with a copy of the organizational chart; the order to the claimant was unlawful in that junior officers purported to order the claimant to do tasks set aside for junior officers.

Evidence

Kenrick Ambo

[15] In his witness statement Kenrick Ambo gives the sequence of his employment with the defendant from August 2005 when he commenced 14th September 2010 when he was handed a letter indicating his summary dismissal.

[16] The major events in the course of the claimant's employment in summary are as follows: commencement of employment in August 2005 as a Security Liaison Officer; his new position of Security Shift Supervisor effective 1st July 2006; after contesting the Salisbury constituency in 2005 as a candidate for the Dominica Labour Party the claimant severed ties with the party; at the end of 2006, was detailed to work as Shift Supervisor on 25th December 2006, but the roster revealed he was "off duty"; was informed by letter dated 26th March 2008 that he was exempt from secular employment during the period Friday sunset to Saturday sunset; despite the exemption the claimant was detailed to work on Saturday 2nd January 2010 before sunset; three weeks after being detailed to work on his Sabbath, the claimant was transferred to the Longhouse Port at Portsmouth at which time he resided in Roseau; the claimant informed management of the hardship that would be caused to the claimant and his family if the claimant was transferred to Portsmouth from 1st April 2010; the claimant was detailed to work on 5th February 2010 during the claimant's Sabbath and refused permission to leave work at the beginning of the claimant's Sabbath; the claimant was detailed to work on 16th February 2010 "a double day" but the claimant noted that his name was crossed out; on reporting to work in Portsmouth the claimant was informed that he had been detailed to work as an ordinary Security Officer rather than as a Shift Supervisor; the claimant objected to this new arrangement, and on 11th April 2010 the claimant wrote to management stating his objection to what he considered to be an unlawful order; on 15th April 2010 the claimant received a letter from Eric Charles regarding the claimant's insubordination and dereliction of duties and asked to attend a disciplinary hearing on 20th April 2010; the claimant

never received a displacement allowance of $400.00 to which he was entitled under Article 16 (3) of the Agreement; the claimant applied for leave from July 2010 to 20th August 2010 which was not approved, but was instructed to proceed on leave from 12th July 2010 to 7th September 2010; on 6th August 2010 the claimant was informed of his transfer to Woodbridge Bay the claimant was informed that he was detailed as an ordinary Security Officer to which he objected; the claimant was summoned to the office of the Chief Executive Officer for a meeting but the Chief Executive Officer did not turn up; the claimant was summoned to a meeting with the Chief Executive Officer on 13th September 2010 which the claimant attended with his union representative; at the meeting the claimant was informed by the Chief Executive Officer that the Chief Executive Officer wanted to have a disciplinary hearing; at the meeting the claimant was asked to give an explanation for his actions by his union representative; on 14th September 2010 the claimant was handed a letter dated 13th September 2010 in which he was summarily dismissed for serious misconduct; on 16th September 2010 the claimant's attorney wrote to the defendant seeking the claimant's re-instatement but this was refused; and on 14th September 2010 the claimant wrote to the Port Council Chairman requesting his intervention but there was no response.

[17] At paragraphs 38 to 40 the claimant says that during his tenure at the Port Authority: he was victimized and humiliated, openly threatened by the Chief Executive Officer in the presence of Port Officers, never received an appraisal and denied increase of salary for five years, and was summarily dismissed by the Port Authority and was not afforded the opportunity of due process.

[18] Under cross examination the claimant said his transfer to Portsmouth was not fair but went on to say that he was deprived of over-time unfairly. In further cross-examination concerning his transfer, the claimant testified that he was detailed to do the work of an ordinary Security Officer, but he agreed that the duties included the ordinary security duties. The witness also went on to say that he had been performing those duties as well as supervisory duties. The witness however conceded that his supervisor can instruct him to perform the ordinary duties.

[19] In the matter of the claimant's refusal to work, it was put to him that his refusal to work was based on his detail to work as an ordinary Security Guard; to which the claimant responded by saying that he told Mr. Bardouille that his instructions were unlawful. The claimant's evidence continued thus: "During that morning I spoke to Mr. Bardouille and I asked him why he told me to report to his

office. In turn he asked me why I was not obeying instructions and I told him that persons below me were giving me instructions. I never uttered the words 'I was not going to Portsmouth'.

[20] When it was put to the claimant that his conduct on that morning was a refusal to obey a lawful order, the claimant responded by saying that he behaved in a normal manner, and it was not unreasonable. He added that there were others there to perform the duties.

[21] Concerning the meeting summoned by the Chief Executive Officer, the witness said he was told now for now and that his union objected to the meeting because Mr. Bardouille wanted a hearing in breach of the agreement. He went to say that: "They were supposed to write to me and request an explanation." In further evidence on the hearing, the claimant testified that to give an explanation of his conduct, but the Chief Executive Officer wanted a hearing. And when it was put to him that there was no mention of a disciplinary hearing, the claimant said he was called to a discussion.

[22] Concerning the displacement allowance the claimant's evidence as that he was never paid although he did qualify. He went on to say that he lived in Goodwill since 2000.

[23] In the remainder of the cross-examination the claimant was questioned as to his qualification and his attempts to secure a job. In all of this, the claimant revealed that he is a qualified Plumber but went on to say that there are a lot of good Plumbers in Dominica; and he even tried giving out cards. And in terms of a job, he said that he did apply for a job as a Plumber but people call him to do jobs.

[24] In re-examination the claimant testified that most of the complaints just died out after they wrote to him and that he attended hearings in relation to the complaints.

Benoit Bardouille

[25] In his witness statement, Benoit Bardouille, says he is Manager/Chief Executive Officer of the defendant since 2002.

[26] In speaking of the claimant the witness says that: he knows the claimant who was employed from 2nd August 2005, by the defendant as Security Liaison Officer and in the same year was given the post of Security Shift Supervisor; in the claimant's application he gave his address as Salisbury and never informed him of a change of address.

[27] At paragraphs 4 and 5 of his witness statement, the witness explains the appraisal system in general as an annual exercise, but goes on to explain the situation where an employee changes his position prior to the anniversary of his appointment. And according to the witness no appraisal is made in such circumstances. The witness went on to explain the claimant's non-receipt of an appraisal in that context from 2008 to 2010.

[28] In the remainder of his witness statement Benoit Bardouille details the events leading up to the dismissal of the claimant: Included are the following: by letter dated 29th January 2010 the claimant was transferred to the Security Department, Long House Port, Portsmouth and was expressly instructed in the letter to report to the Acting Divisional Supervisor; on 12th July 2010, the claimant went on vacation; by letter dated 6th August 2010, the claimant was instructed to report to work at Roseau on 9th September 2010; on 8th September 2010, after the claimant returned to work at Portsmouth certain instructions were given as to where the claimant should work; the telephone conversation with the claimant concerning his duties at his new assignment to Cabrits, and his refusal to perform same; the meeting convened on 13th September 2010 by management to look into the matter of the claimant's refusal to comply with the order to work at Cabrits and to which the claimant was invited; and at the end of the meeting the termination letter was prepared and singed and sent to Mr. Ambo.

[29] In amplification of his witness statement the witness said that he has been involved in disciplinary hearings which lasted 2 to 3 hours. The witness went on to say there were no acts of victimization against Mr. Ambo.

[30] In commenting on paragraph 31[1] of the claimant's witness statement, the witness said that it was not true.

[31] In cross-examination the witness sought to explain the chain of command with the security staff with the head reporting to him. The witness was also cross-examined on the operation of the roster and the claimant's request for exemption from duty in keeping with his religious beliefs. He went on to say that the claimant did not work on 16th February and 25th December 2010, as he was given his wish. In further evidence on the matter of work on public holidays, the witness said that

[1] Paragraphs 31 of the claimant's witness statement relates to his arrival in Portsmouth and the instructions he received to work as an ordinary Security Officer

the claimant did come to see him in this connection, and maintained that position when the contrary proposition was put to him. The witness, however, conceded that he and the claimant did not have a good working relationship. The witness also conceded that he was aware the claimant had written to the Board about him. According to him, "my name was in the letter, and further that he was not furnished with a copy of the letter. The witness also denied that he was victimizing the claimant. He added that victimizing is contrary to the Agreement.

[32] With respect to the claimant's place of abode, the witness said that: the claimant's place of abode is Salisbury; he never said he lived in Goodwill; the claimant never informed anyone of a change of address; he was not aware that Mr. Charles dropped Mr. Ambo to his house in Canefield; and he was not aware that on 14th September 2010 the letter was delivered to the claimant's house in Goodwill.

[33] When the witness, Benoit Bardouille, was cross-examined with respect to the claimant's transfer to Portsmouth this was acknowledged and he went on to say that a Shift Supervisor is not necessarily entitled to a displacement allowance and that he did not consider the transfer to be unreasonable.

[34] Regarding the claimant's transfer back to Roseau the evidence of the witness is: When the claimant was transferred back to Roseau I did not have his file. Human Resources gave me the information. The claimant was never told to report as an ordinary Security Officer, but received the pay of a Shift Supervisor. When I was informed of it I said "the instructions should be in writing. If it is in writing it can be since the instructions were given."

[35] Continuing his dealings with the claimant on 8th September 2010, Benoit Bardouille said this:

> "On 8th September 2010 I spoke to the claimant. He was outside my office. I came out to speak to him. I spoke to him at my office. He waited three hours. I came out and spoke to him. On 13th September 2010 a meeting was scheduled. The office made the arrangements before no letter was issued but it was a disciplinary hearing. The Collective Agreement calls for a letter to be issued. The claimant was not issued in writing. No written notice was given to Mr. Ambo."

[36] In giving further testimony concerning the claimant's position, the witness said that: "If the claimant is a Shift Supervisor and worked as an ordinary Security Officer, it would be a lower rank. On 8th July 2010 there was no Shift Supervisor. Every shift should have a Shift Supervisor except in Portsmouth. When he came back he was not to continue as a Shift Supervisor." The witness went on to add that the claimant was never before, but that after the Olan Bannis incident Mr. Ambo was issued a termination letter.

Olan Bannis

[37] Olan Bannis according to his witness statement is a Security Officer employed by the defendant. He also says that he knows the claimant.

[38] According to Olan Bannis, he acted as Divisional Supervisor for the north and as such he was responsible for the Long House Port and Cabrits Cruise Ship Berth. Further, that as Divisional Supervisor, he was responsible for all Security Officers stationed at Long House and the Cruise Ship Berth.

[39] It is the evidence of the witness that the claimant worked in Portsmouth under the authority of the then acting Divisional Supervisor from 1st April 2010 to 11th July 2010, when he went on leave, and that it was his understanding that the claimant on return from his leave was required to take up duty at Woodbridge Bay in Roseau. Against the foregoing, the witness in his further evidence says that he was surprised to see the claimant on the premises of Long House on 8th September 2010, and because of this he called the Chief Executive Officer and had a conversation with him.

[40] At paragraphs 7 to 12 of his witness statement the witness goes on to detail his conversation with the claimant about his deployment to Cabrits, and the claimant's refusal to go to Cabrits. Also in evidence is the witness' conversation with the Chief Executive Officer and the claimant's departure for Roseau.

[41] In commenting on paragraph 31[2] of the claimant's witness statement, the witness testified that it is not entirely true that he was an ordinary Security Officer.

[42] Under cross-examination Olan Bannis gave evidence of his employment and the structure of the Security Officers at Portsmouth. As regards the 8th September 2010, the witness gave evidence of instructions he received from the Chief Executive Officer with respect to the claimant and of transferring the claimant to the Chief Executive Officer on the telephone. In further evidence the witness said that the Chief Executive Officer did not tell him to send the claimant to Cabrits as an ordinary Security Officer. When it was put to the witness that he did not give the letter at page 127

[2] In this paragraph the claimant's evidence relates to what this witness told him when he arrived at Portsmouth as to his position as an ordinary Security Officer.

of Trial Bundle B to the claimant this is his response: "Yes I did. I wrote the letter but I did not write at the top right corner. I do not know who wrote it".

[43] In re-examination Olan Bannis said that he sent a fax copy of the said letter to Mr. Bardouille as soon as it occurred.

ISSUES

[44] The issues for determination are:

1. Whether the claimant was wrongfully dismissed by the defendant.
2. If the claimant's dismissal was wrongful, whether the claimant should be re-instated in his post with the defendant.
3. Whether the disciplinary hearing was in accordance with Article 23 of the Agreement.
4. Whether the claimant is entitled to the reliefs sought.

Issue No 1.

Whether the claimant was wrongfully dismissed by the defendant.

[45] The matter at bar arises as a result of the summary dismissal of the claimant by the defendant acting through Benoit Bardouille, Chief Executive Officer. The letter to the claimant is dated September 13, 2010 and states in part, in the final paragraph: "… you are hereby summarily dismissed as an employee of the Authority on the grounds of serious misconduct by your failure to follow a lawful order."

[46] The claimant's case as pleaded is that his dismissal was wrongful and a number of acts are pleaded in support. In turn, in his witness statement, the case is detailed. It is against this background that learned counsel for the claimant, Mrs. Laurina A. Vidal-Telemacque, submits that: "The claimant avers that he was ordered to work as an ordinary Security Officer when he returned to work in September 2010, despite the fact that there was no Supervisor on duty. The claimant states, and it was confirmed by the Chief Executive Officer, that he had complained about a similar incident in April of the same year when Mr. Victor gave him instructions to work as an ordinary Security Officer."

[47] Against the submission it is further submitted that the court should believe the claimant's evidence that he was asked to work as an ordinary Security Officer. The reasons advanced will be tested at a later stage.

[48] As far as the defendant is concerned, learned counsel, Mr. Alick Lawrence, SC, contends that the issues in the case turn on what happened at Portsmouth on 8th September 2013, when the claimant returned to work from vacation. Learned senior counsel is urging the court to accept the evidence of the Chief Executive Officer and Olan Bannis who from July to October 2010 acted as Divisional Supervisor of the defendant for the north.

[49] Learned senior counsel is asking the court to accept the version of the evidence given by the Chief Executive Officer and Olan Bannis which is that when the claimant reported at Portsmouth, Bannis received orders from the Chief Executive Officer to detail the claimant to work at the port facilities at the Cabrits. Further, that when the claimant was so detailed he refused by saying he was not going there. And further still, when Olan Bannis informed the Chief Executive Officer of this happening the Chief Executive Officer directed him to put his instructions in writing which he did, whereupon the claimant said he was not accepting it because it was not stamped. But even after the written instructions were stamped the claimant refused to accept the document as it was not on letter head or carbon copied. In any event, Bannis' further evidence is that he faxed the document to the Chief Executive Officer.

[50] Additional submissions are that: Bannis' account is supported by Bardouille that he had given Bannis instructions to detail the claimant to the Cabrits and put the instructions in writing; and according to the record of the disciplinary hearing (or meeting according to the claimant), the authenticity of which has not been challenged by the claimant as required by CPR 28.18(1), the claimant admitted that he had received written instructions from Bannis.

[51] Part of the requirements in dealing with the current issue is whether or not the claimant disobeyed the order given to him concerning going to Cabrits. In this regard the court finds that the claimant did refuse to go to Cabrits even inspite of his denials. This is based on evidence of the Chief Executive Officer and Olan Bannis. In particular note paragraph 6 of Olan Bannis' witness statement in which he details what happened on the morning of 8th September 2010, when he said he saw the claimant on the premises at Long House. The last sentence reads: "I therefore called the General Manager/CEO –Mr. Bardouille- on the telephone and I informed him of this. Mr. Bardouille told me that I should assign the claimant to work at the Cabrits Cruise Ship Berth for the day."

[52] The related question is whether the claimant was detailed to work at Cabrits as an ordinary Security Officer. In this regard, learned senior counsel relies on the evidence of the Chief Executive Officer and Olan Bannis who all denied giving the instructions.

[53] In his witness statement at paragraphs 30 to 32 the claimant details the events leading up to and including 8th September 2010. In particular at paragraphs 31 and 32 the claimant's evidence read thus:

> "31 When I arrived at work at Portsmouth, Olan Bannis the then acting Northern Divisional Supervisor informed me that he was instructed by the CEO to detail me to work as an ordinary Security Officer and that he should inform the Junior Security Officers that they should not take any instructions from me.
>
> 32 I immediately objected to this. About 30 minutes later I received a call from the CEO who demanded that I report to his office. I did so. I waited at his office for 3 hours but he never showed up."

[54] But credence is given to the claimant's contention by way of circumstantial evidence even in the face of Bannis being described as a credible witness. This comes from the claimant's evidence regarding a similar incident in April 2010.

[55] In his witness statement at paragraph 15 the claimant's evidence is this:

> "15. On the 1st day of April 2010 I reported to work at the Long House Port in Portsmouth. Upon arrival I met the Northern Divisional Supervisor (AG) Mr. Michael Victor who informed me that he was instructed by Mr. Benoit Bardouille, Chief Executive Officer of the Port, to detail me to work as an ordinary Security Officer and not a Shift Supervisor and that Security Officers should not take instructions from me as a Supervisor.
>
> 16. I immediately objected to this and reminded Mr. Victor that I was appointed and hold the position of Security Shift Supervisor. I also told Mr. Victor that my job description states that I am Shift Supervisor and that I am required to monitor the performance of Security Officers, assist them, ensure that they perform their duties and therefore I cannot be detailed merely as a Security Officer.
>
> 17. I then asked Mr. Victor whether he had these instructions in writing and he said he did not. Thereafter, on every occasion I reported to work I noted that another Security Officer was detailed as Shift Supervisor. I refused to adhere to this."

[56] At paragraph 18 of his witness statement, the claimant gives evidence as to who he contacted to register his objection regarding the matter. These were his supervisor, Jefferson Casey and the Port Facility Security Officer who referred him to the Port CEO and the Human Resource Manager, whom he contacted and followed this up with a letter to "management" dated 11th April 2010.

[57] The claimant continues his evidence of the events at paragraphs 21-24, after being away from work for two days due to illness, was detailed to work as an ordinary security officer on 8th September 2010. These are the reasons:

> "21. On 8th day of April 2010 I received a letter from Mr. Victor stating that I had failed to comply with instructions, that is, reporting to work. In that letter Mr. Victor addressed me as 'Security Officer'. I reported to work.
> 22. I received a letter dated 15th April 2010 from the Port CEO stating that he received a memo dated 12th April 2010 from Eric Charles regarding my insubordination and dereliction of duties. I was asked to attend a disciplinary hearing on Tuesday April 20, 2010 at 2:30 pm.
> 23. At the hearing I was represented by my union representative, Mr. Thomas Letang. Mr. Letang requested that the CEO furnish him with my Letter of Appointment, my job description and the organization chart of the Security Department. The meeting was adjourned for the CEO to provide these documents.
> 24. I know for a fact that to date these documents were never given to my union representative and the CEO never scheduled another meeting."

[58] In the view of the court the defendant's contention cannot overcome the sheer similarity of the events of 1st April 2010, and following and 8th September 2010. These cannot be mere coincidences. In fact apart from the date, the only difference in the material fact is that the earlier event involved Mr. Michael Victor while in the latter it was Mr. Olan Bannis. But the instructions are the same. This aspect of the evidence remains unchallenged.

[59] It is therefore a finding of fact by the court that the claimant did receive instructions from the Chief Executive Officer thru Olan Bannis that he was to work at the Cabrits Berth on that day and he should report for duty there which he disobeyed and was dismissed. But was the dismissal wrongful?

[60] Article 21 of the Agreement speaks to "Termination of Employment" and in section 1 the terms for termination for serious misconduct are provided as follows:

> 1. (a) The Authority may terminate the employment of any employee without notice or payment of any severance pay, or pay in lieu of notice or other termination benefits where the employee has been guilty of serious misconduct in or in relation to his employment.
>
> (b) Serious misconduct means misconduct that is such that the Authority cannot reasonably be expected to take any course other than to terminate the employment of the employee."

[61] Article 23 deals with 'Discipline" and section 6(c) provides that:

> "An employee who is guilty of misconduct may be subject to disciplinary action in accordance with the collective agreement and legislation. Such disciplinary action shall include, but not limited to the following:
>
> (a)Warning
> (b)Suspension without pay
> (c)Dismissal
>
> Misconduct shall be understood to include but not limited to the commission of any act without reasonable excuse which
>
> (a)Amount to failure to perform in a satisfactory manner any duty assigned to an employee;
> (b)Contravenes any of the provisions of the Authority rules and regulations;
> (c)Is otherwise prejudicial to the efficient conduct of the Authority or tends to bring the Authority into disrepute.
>
> Providing always that nothing shall preclude the Authority from reporting a breach of the Criminal Law to the police."

[62] The claimant's letter of dismissal dated 13th September 2010 begins in this way:

> "Dear Mr. Ambo,
>
> On September 08, 2010 you vehemently refused to follow directions given to you by Mr. Olan Bannis, Acting Divisional Supervisor for the Northern Security Department. At a special meeting with management on Monday, September 13th 2010 you were asked to provide an explanation to management on your reasons for not following the instructions of Mr. Bannis. The reasons provided for failure to follow a lawful order from your immediate Divisional Supervisor were unacceptable."

The letter goes on to quote Article 21 1 (a) and 23 6 (c) of the Agreement, and ends in this way:

> "In reference to the above, you are hereby summarily dismissed as an employee of the Authority on the ground of serious misconduct by your failure to follow a lawful order."

[63] A signature appears under the name Benoit Bardouille Chief Executive Officer Dominica Air and Sea Ports Authority, however, there was no issue as to the creator of the signature.

[64] In submitting that the claimant's dismissal was wrongful, learned counsel cites a number of cases in this regards.[3] Based on these cases the conclusion advanced is that having regard to all the circumstances of the case, the actions of the claimant were not such which could be deemed gross misconduct.

[3] Cases cited on behalf of the claimant are: Evelyn Henry v. Mount Gay Distilleries [1999] UKPL 39, Laws v. London Chronicle Ltd [1959] 2 All ER. 285, Dietmann v. London Borough of Brent [1988] 1. C.R 801.

[65] On the other hand, learned senior counsel submits that it is settled law that an employer may summarily terminate the employment of an employee for a single act of indiscipline if that act goes to the root of the contract between them.[4]

[66] While this court cannot appear to contradict the settled law, it may be said that the cases show degrees of disobedience in the particular context to justify summary dismissal. It is not all on a single plane. "The question whether misconduct is such as to justify summary dismissal is a question of fact and degree."

[67] A number of cases establish that if the employee's action amounts to a repudiation of the contract with his employer summary dismissal is warranted. In this regard, the case of Hilton International v Boyce[5] illustrates the point as the employee's conduct in refusing to refill the generator fuel tank resulted in a disruption of the appellant's hotel business. This is the critical reasoning the acting Chief Justice Sir Clifford Husbands:

> "The evidence does not point to any misconduct other than one act of disobedience of the respondent. We have considered that his act led to a lack of diesel in the generator prompting him to shut it down. In fact the generator broke down. The result of his disobedience was to interfere with and prejudice the proper conduct of the appellant's business. In the circumstances we hold that the appellant was justified in dismissing the appellant."

[68] In the like manner, "the deliberate flouting of the essential contractual conditions" will justify dismissal.

Conclusion

[69] It is the view of the court that this case is distinguishable from the cases cited by the defendant in which there was summary dismissal. At this stage it is important to return to some of the pleadings in the defence and reply. This begins with paragraph 6 of the defence when the averment is this:

> "As to paragraph 8, the Defendant admits that the letter was issued but denies that the dismissal was wrongful and unfair. The Claimant was lawfully dismissed for gross misconduct; namely the refusal to follow the lawful order of his supervisor."

[4] Cases cited by learned senior counsel: Hilton International (Barbados) Ltd. v. Boyce [1996] 52 WIR 59; Pepper v Webb [1969] 1 WIR 514

[5] 1996] 52 WIR 59

[70] Paragraph 3 (e) (b) of the reply says that:

> "In reply to paragraph 6 of the Defence the Claimant repeats that his dismissal was both wrongful and unfair for the following reasons.
>
> (b) The order to the Claimant was unlawful in that junior officers purported to order the Claimant to do task set aside for junior officers."

[71] The court has already determined that the orders for the claimant to act as a Security Officer came from the Chief Executive Officer. Against that, there is no evidence that the claimant was demoted to a mere Security Officer when his substantive post was that of Shift Supervisor.

[72] And while it is accepted that the duties of a Security Officer and Shift Supervisor must overlap, the point is that the claimant's substantive post was taken out of the equation. Indeed under cross examination the Chief Executive Officer conceded if the claimant is a Shift Supervisor and worked as an ordinary Supervisor, it would be a lower rank.

[73] From this it must follow that the Chief Executive Officer had no legal basis to give those orders to the claimant. In any event, the "Recording Data"[6] of 13th September 2010, shows that the claimant remained at Long House in the shed and on the wharf and his absence from the job came when the Chief Executive Officer asked him to come to his office which the claimant did and remained there for 3 hours without seeing the Chief Executive Officer. The court finds it necessary to draw the inference that the Chief Executive Officer implicitly accepted the claimant's account of his whereabouts at the material time since he then asked the claimant if he did not go to Customs. At the same time the Chief Executive Officer did testify that he did speak to the claimant at his office.

[74] In this case and the cases cited, the employees refused to do as ordered and were dismissed which were upheld at the highest level in the case of Evelyn Henry v Mount Gay Distilleries.[7] But in those cases the employees had no basis for their refusal and their refusal either put the employer's business at risk or interrupted the delivery thereof. In this case there is no evidence of any disruption or otherwise at Long House or Cabrits. In fact, this is not a case where the claimant told the Chief Executive Officer or Olan Bannis that he could not care less about security and left[8].

[6] Trial Bundle B at page 130

[7] [1999] UKPC 39

[8] See: Pepper v Webb -supra

Even the document which was embodied the written instructions,[9] and which the claimant said he did not see that it contained certain markings at the top right of the document, namely, "Rec'd 8/9/10, 8:40 A.M." In this regard Olan Bannis said under cross-examination that he did not know who wrote it. In this respect the circumstantial evidence is that the claimant and Bannis were in close proximity at the material time, yet Bannis does not know.

[75] Under section 6 of Article 23 of the Agreement, the Authority in the context of discipline has power to give a warning, suspend without pay. These actions are premised on the absence of reasonable excuse on the part of the employee. And misconduct shall be understood to include but not limited to the commission of any act without reasonable excuse (a) amount to a failure to perform in a satisfactory manner any duty assigned to an employee; (b) contravenes any of the provisions of the Authority rules and regulations; (c) is otherwise prejudicial to the efficient conduct of the Authority into disrepute.

[76] Given the absence of "or" or "and" at the end of paragraph (c) above, it is not clear whether the requirements are conjunctive or disjunctive. But in any event given the fact that the claimant made it clear "immediately" of his objection and the determination of court that the Chief Executive Officer had no authority to give such an order, plus the Chief Executive Officer's concession that working as a mere Security Officer was lower in rank, it means that the claimant had a reasonable excuse. In any event, given that the Chief Executive Officer considered the claimant a "serious worker" the options of warning or suspension without pay were open to him.

[77] It is therefore the conclusion of the court that the claimant's summary dismissal was wrongful because:

(a) The Chief Executive Officer of the Authority had no authority or power to order the claimant to perform the duties of an ordinary Security Officer without regard for his substantive post of Shift Supervisor and without the claimant being demoted in accordance with the Agreement;

(b) Given the foregoing the claimant had a reasonable excuse within the meaning of section 6 of Article 23 of the Agreement which he made clear "immediately" by saying the instructions were unlawful;

[9] Trial Bundle B at page 127

(c) The Chief Executive Officer had other options by virtue of section 6 of Article 23 of the Agreement, including a warning or suspension without pay coupled with the CEO's evidence under cross-examination that he and the claimant did not have a good working relationship, and that the claimant was a serious worker, and was never disciplined before.

Issue No. 2

If the claimant's dismissal was wrongful whether the claimant should be re-instated in his post with the defendant.

[78] The claimant claims to be entitled to re-instatement.

[79] In submissions in this regard learned counsel for the claimant refers the court top Article 26 of the Agreement which speaks to a circumstance where the Union and the Authority are *ad idem* concerning re-instatement flowing from unfair dismissal.

[80] On the other hand learned senior counsel advanced the following submissions:

> "In summary therefore, the defendant submits that if the claimant seeks reinstatement he should have brought unfair dismissal proceedings before the requisite statutory tribunal. Instead he seeks the remedy of the court. Such a remedy is a common law one and does not include reinstatement."

[81] The submissions go on to say even if the court had the power to reinstate, the power to order reinstatement, this is not a case in which it should be exercised since the relationship between the claimant and the Chief Executive Officer was very bad as admitted under cross examination by the CEO.

[82] Learned senior counsel ends his submissions by referring to the numerous "allegations" between the claimant and the Chief Executive Officer and then ends on this note: "Although it is not suggested that they are all true, it shows how acrimonious the relationship had become. To order the claimant be reinstated would be to create a very unpleasant and disruptive environment and perhaps even a combustive one."

[83] The court agrees entirely and infact the Chief Executive Officer testified under cross-examination that: "we did not have a good working relationship."

[84] Accordingly, no order is made on the matter of reinstatement as it does not arise under the law or the factual circumstances.

Issue No. 3

Whether the disciplinary hearing was in accordance with Article 23 of the Agreement

[85] Sections 1 to 3 of Article 23 "Discipline" describes the procedure to be followed in this context. Given the central place of those provisions they are reproduced entirely:

> 1. When disciplinary action is contemplated against an employee, the Authority undertakes first to inform the employer of the general nature of the allegation in writing against him and shall be given a reasonable time to state his case.
> 2. Notice of such discipline shall be made in writing and served in person or by registered or certified mail upon the worker. The conduct for which discipline is being imposed shall be specified in the notice. The notice served on the worker shall contain a detailed description of the alleged acts and misconduct, including references to dates, time and placed. The worker shall be provided with three (3) copies of the notice which shall include the statement, 'you are provided with three (3) copies in order that one may be given to your Union and another to your Shop Steward…'
> 3. The worker shall have the right to be accompanied by a fellow worker/Shop Steward or a Union representative, 'if any hearing before a decision is reached."

[86] The evidence in this regard comes from the claimant and the CEO. In the case of the claimant at paragraphs 33 and 34 the evidence is:

> "33. On the 13th day of September 2010 I was summoned to a meeting with the CEO. I attended the meeting together with my Union Representative. At the meeting the CEO informed us that he wanted to have a disciplinary hearing. My Union Representative objected to this and informed the CEO that he did not follow the correct procedures and as such he cannot proceed with a 'disciplinary hearing'. The CEO insisted and my Union Representative referred him to the collective agreement and told him he was not following the proper procedure.
> 34. At the meeting, Mr. Letang, my Union Representative told me that I could give an explanation for my actions however this was not a disciplinary hearing. I gave an explanation since I considered it respectful to do so."

[87] Under cross-examination the CEO gave this testimony: "On 13th September, 2010 a meeting was scheduled. The office made arrangements before. No letter was issued but it was a disciplinary hearing. The Collective Agreement calls for a letter to be issued. The claimant was not informed in writing and no written notice was given to his Union."

Submissions

[88] Learned counsel for the claimant in placing reliance on the cases of Elphina Abraham v Sunny Caribbee Herbal and Spice Co Ltd[10] and Kanda v The Government of the Federation of

[10] BVIHCV2007/0122

Malaya[11], submitted that: " [T]he defendant's actions during the claimant's employment went against the spirit of the collective agreement, the defendant breached the agreement by failing to give the claimant an opportunity to be heard according to the provisions of the collective agreement."

[89] As far as the defendant is concerned, learned senior counsel, dwells on the contention that despite the fact that the claimant was not notified in accordance with Article 23, yet the claimant participated fully in the proceedings on 13th September 2010.

[90] The salient submissions are as follows:

> "22. We therefore respectfully ask the court to find that the Claimant and his Union representatives knowingly, voluntarily and fully participated in the disciplinary hearing.
>
> 23. It is the law that a party can waive a provision in a contract, which is intended for his benefit. For example in Irwin v Wilson [2011] EWHR 326 at para. 34,0 the court stated: 'The principle is that a party may waive a contract term if that term, if performed, is of benefit to him but not to the other party (or parties) to the contract.'
>
> 24. In the case of Chatham Bay Club Limited & Chatham Bay Development Corporation Limited v Judith Jones-Morgan (Attorney General for the State of Saint Vincent and the Grenadines). HCVAP2007/0021, at paragraph 24, George-Creque JA, as she then was, states: 'It is well recognized and accepted that the words or conduct relied on as waiver must be clear and unequivocal.' "

[91] The Recording Data of the disciplinary proceedings held on 13th September 2010, the claimant agreed to continue the meeting after the union representative departed. Thus, by implication, the claimant decided to continue as part of the hearing which falls to be considered as waiver of his unfulfilled rights under the Agreement. Therefore, based on the rule enunciated by Justice of Appeal George-Creque (as she then was) the conduct of the claimant amounted to a waiver. However, since Article 23 of the Agreement seeks to reflect the spirit of a fair hearing as exists at common law and embodied in section 8 (8) (2) of Constitution of Dominica, the matter of fair hearing prevails since the defendant is an "authority" within the meaning of the said section 8 (8) of

[11] [1962] UKPC 2

the Constitution since it has the power to *inter alia,* determine rights. It means further that the *maxim nemo iudex* in *sua causa* is applicable to the disciplinary hearing by the Authority.

[92] The evidence that goes in this direction is that the Chief Executive Officer is the person who gave the instructions to Olan Bannis to transmit to the claimant, the Chief Executive Officer spoke to the claimant on the phone about the said instructions, ordered the claimant to come to his office in this connection on the said day and then sat as part of "management" to conduct the proceedings and a decision taken, with the Chief Executive Officer present, to dismiss the claimant summarily. The Chief Executive Officer questioned the claimant extensively at the said disciplinary hearing and then signed the letter of dismissal.

[93] In the case of R v Sussex Justices, ex parte Mc Carthy[12], Lord Chief Justice Hewart laid down these fundamental principles:

> "…[A] long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should only be done, but should manifestly and undoubtedly be seem to be done.
> The question therefore is not whether in this case the deputy clerk made my observation or offered any criticism which he might not properly have made or offered, the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done.
> Nothing is to be done which creates even a suspicion that there was an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not; if he had been required to do so, discharge the duties which his other position involved. His two fold position was a manifest contradiction."

[94] Therefore, the multiple positions of the Chief Executive Officer in this matter is a manifest contradiction which offend against the letter and spirit[13] of Article 23 of the Agreement by extension the rules of natural justice both at common law and section 8 (8) of the Constitution. The short

[12] [1923] ALL ER Rep. 233 see also: R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet (No. 2); See further: Egerton v Lord Derby [1613] 12 Co Rep 114- Judge was a party in the matter; Dimes v Grand Junction Canal [1852] 3 ALC 759-Judge was a shareholder in the defendant company

[13] See: Akar v Attorney General of Sierra Leone

point must be that there was no compliance with Article 23 of the Agreement since the Chief Executive Officer was a judge in his own cause which cannot be nullified by the claimant's waiver of non-compliance with the other procedural requirements of Article 23 of the Agreement.

Issue No. 3

Whether the claimant is entitled to the reliefs sought

[95] The claimant claims damages, including aggravated damages. The particulars pleaded are as follows:

1. Failure to pay displacement allowance: $2000.00
2. Loss of increments -5 years at $77.00 monthly.
   $77.00 monthly from 2005 to October 2009.
   $100.00 monthly from October 2009 to September 2010: $4620.00
3. Refusal to allow claimant to work on public holidays at double pay: $370.00
4. Wrongful deduction of salary during 2 days sick leave
5. Loss of salary at $2770.00 to age of retirement. That is for 23 years old[14] and four months
6. Loss of gratuity for 28 years service
7. Loss of pension

Failure to pay displacement allowance.

[96] This issue comes down to whether the claimant resided at Salisbury or at Goodwill when he was transferred to work in Portsmouth.

[97] In submissions on behalf of the claimant, learned counsel, points to the following: the displacement allowance is provided for by Article 16 (3) of the Agreement and to which the claimant is entitled by virtue of the transfer to Portsmouth; the claimant's evidence is that he was residing in Goodwill since 2000; Salisbury was only put on the curriculum vitae since that is where he is from; the claimant claimed he informed the defendant of his change of address; which was given in writing to the defendant on the instructions of the CEO; under cross examination the CEO said he could not recall if the claimant sent a letter to the Authority; the claimant said under cross examination that his dismissal letter was sent to him at his home in Goodwill; the CEO affirmed in cross-examination that other officers who were transferred to Portsmouth from Roseau or vice versa, were paid the allowance.

[14] Sic

[98] Learned senior counsel for the defendant contends that the claimant is not entitled to the displacement allowance as he resides in Salisbury.

[99] The matter comes to who the court believes and in this instance it is the claimant since his evidence is that he did inform the Authority and he was told he would receive the allowance. Accordingly, the amount of $2000.00 is hereby ordered to be paid to the claimant by the defendant.

Double pay work and wrongful deduction for sick days

[100] Learned senior counsel concedes that the amounts of $370.00 and $185.00 are payable in this regard and are hereby ordered to be paid.

Loss of increments

[101] It is the claimant's contention that he is entitled to increments for five years. On his behalf it is submitted that since the CEO said in evidence that the claimant is a serious worker which translates to mean that he was steadfast, purposeful and resolute worker and as such entitled to the increments.

[102] On the other hand, learned senior counsel holds fast to the Chief Executive Officer's witness statement which gives the reasons why the claimant would not have been entitled to increments for the year 2005 to 2007. According to learned senior counsel, the CEO's evidence was not challenged…And further he concedes that the claimant would have been entitled to increments from 2008 to the date of his dismissal.

[103] The court accepts the submission on behalf of the defendant, in part, in that the claimant's confirmation came with effect from July 01,2006[15] and there was a wage freeze in 2006. However the date of the freeze is not before the court.

[104] In all the circumstances there is nothing in evidence to suggest that the claimant would not have been awarded increments. This is implicitly conceded by learned senior counsel. Accordingly, the court awards 12 increments at $77.00 per month for the period October 2008 to October 2009 yielding $924.00; 11 increments at $100.00 per month for the period November 2009 to September 2010 yielding $1100.00.

[15] Trial Bundle at page 106

Loss of salary

[105] The claimant seeks loss of salary at the rate of $2770.00 per month to the age of retirement.

Submissions

[106] Learned counsel for the claimant submits that the claimant's appointment with effect from 1st July 2006, created a life contract which excluded the general powers of notice and that the appointment granted to the claimant.

[107] The claimant seeks loss of salary at the rate of $2770.00 per month to the age of retirement, giving a quantum of $784,875.00.

[108] In their submissions learned counsel on both sides advance various authorities[16] in support of their positions in this regard.

[109] However, the law is well settled in this regard and essentially comes down to damages being awarded to the claimant equivalent to what he would have earned had the contract not been terminated, subject to mitigation by the claimant.

[110] In arriving at a quantum that is fair and reasonable the court must take into account: the claimant's salary at the time of his dismissal, the fact that his appointment was confirmed, with effect from July 01, 2006 in his post of Shift Supervisor, the experience as a police officer which he brought to the Authority, plus present age of 40 plus.

[111] In McGregor on Damages the learning reads thus:

> "The measure of damages for wrongful dismissal is *prima facie* the amount that the claimant would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the claimant in minimizing damages, either had obtained or should have reasonably obtained."

[112] The measure of damages is usually calculated on the amount of notice that is appropriate compounded by the salary at the time of dismissal. In this connection learned counsel for the

[16] Learned counsel for the claimant cited: Saunders v St. Kitts Manufacturing Corp. Civil Appeal No. 1 of 1993, Chitty on Contracts, 22nd Ed. Para. 1141; Halsbury's Laws of England, Vol. 12, paragraphs 651 -653. Learned senior counsel cited: McGregor on Damages, 18th Ed., para 28-002, Beckham v Drake [1849] 2 HL 579. Halsbury's Law of England, Vol. 12, para. 1193

claimant submits that 9 months is appropriate while learned senior counsel for the defendant submits that 3 months is appropriate.

[113] In Salyaprakash Rajmangel v British Virgin Islands Corporation, Madam Justice Joseph Olivetti (as she then was) determined that 12 months notice was appropriate for a General Manager who was wrongfully dismissed. A similar determination was made in Waithe v Caribbean International Airways with respect to a General Manager.

[114] In Dominica Agricultural and Industrial Bank v Mavis Williams[17], Barrow J.A. was guided by the dicta of Flossiac CJ in Saunders v St. Kitts Manufacturing Corporation[18] and arrived at the following reasoning:

> "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 6 months payment that the judge had awarded. Reasonable notice was a matter of law, he stated, that 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 courts award in that case were that at the time of his dismissal the employee was 56 years old, was three from the top of the field side of his employment, had undergone specialized training, he had national responsibility and had given the employer 34 years service."

[115] Probably because of the claimant's evidence regarding mitigation, learned senior counsel contends that "mitigation looms large"[19]. In any event the rule still is that the onus rests on the claimant but the court may grant some latitude where, for instance, the situation is complex are issues of health are involved[20]. But the onus still rests on the claimant.

[116] In this case the claimant held a supervisory position so that reasonably seeking an equivalent position in the field of security may not be entirely unreasonable. But learned senior counsel submits otherwise. This is what he says at paragraphs 50 and 51 of his submissions:

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[17] Civil Appeal No. 20 of 2005; Commonwealth of Dominica
[18] Civil Appeal No. 1 of 1993
[19] The authorities cited are: McGregor on Damages, 18th ed., para. 28-002; Yetton v Eastwoods [1967] 1 WLR 104, 114
[20] Geest Plc v Monica Lansiquot. Privy Council Appeal No. 27 of 2001

"50. In so far as the employment prospects of the claimant is concerned, the evidence from his cross-examination shows that the private security business is a growth business in Dominica and the claimant was well qualified to take advantage of it. He could also find employment as a plumber. Further, the claimant was not engaged in a highly specialized field that would narrow his prospects on the job market or in alternative employment. In any event the claimant was not averse to move from one employment to another outside his area of skills. He had studied to be a plumber while a police officer. Then, he left the Police Service to pursue a career as a politician. Unfortunately, after his dismissal he showed no such flexibility in searching for alternative employment. Additionally, he has not alleged that the manner of his termination or anything done subsequently by the defendant made it more difficult for him to find employment in the job market.

51. It is respectfully submitted that the Claimant acted unreasonably and in breach of his duty to mitigate by not trying to find alternative employment. It is further submitted that on the basis of his admission that the private security business was a growing business in Dominica, and his eminent suitability for that field, the court should find that he could have found suitable alternative employment within three months of his termination. In the circumstances he would only be entitled for damages for three months."

[117] The court agrees that the claimant has not discharged the burden to mitigate which was made in unequivocal terms; but considering the factors mentioned above, the court awards damages by way of seven months' salary of $2770.00 per month as pleaded. Central to the court's determination are the claimant's age with almost 15 years of his working life where a retirement age of 65 is applicable, his experience and training as a police officer and then as a security officer, the seniority of his post with the Authority plus his two courses of training in plumbing.

Aggravated damages

[118] At paragraph 10 of his statement of claim the following is pleaded:

"The claimant will rely on the conduct of the defendant as well as the unfair treatment meted out to him by the defendant through its General Manager to support a claim for aggravated damages."

[119] There are no submissions on behalf of the claimant on this head of damages. However, learned senior counsel contends that such damages were not expressly pleaded as required by CPR 8.6 (3). But while the pleadings may not have been in the most elegant form the court does not ignore the rule that the purpose of pleading is to "mark out the parameters of the case that is

being advanced by each party."[21] Here the claimant is saying what he wants and what he will rely on.

[120] Aggravated damages are not confined to any particular context. Such damages have been awarded in the context of defamation and in respect of trespass to land. And over the years the courts at the highest levels have maintained the operative words in relation to the defendant's conduct are: high handed, insulting or oppressive.[22]

[121] The portion of the pleadings at paragraph 10 of the statement of claim speaks to the conduct of the General Manager of the defendant to support to the claim.

[122] In seeking to make submissions in support of wrongful dismissal of the claimant; learned counsel gave instances of the defendant's conduct mostly handed out by the Chief Executive Officer. These instances are derived from the evidence, and except for certain loaded words and phrases the court accepts them as being truthful. In turn these facts go towards the defendant being high handed, insulting or oppressive. They are as follows:

a. Being [taken] before a disciplinary tribunal after refusing to work on his Sabbath after being given an exemption.
b. Being [told] by the CEO that 'you not here for long. I watching you.'
c. Being denied the opportunity to work on public holidays and earning double pay after already being scheduled to work. The CEO unilaterally removed his name from the duty roster.
d. Thereafter, being transferred to Portsmouth where there had never been a Shift Supervisor.
e. Being denied a displacement allowance which he felt he was entitled [because he now resided in Goodwill, rather than Salisbury]
f. Having his request for vacation leave denied by the CEO one day after he complained being detailed to work as an ordinary Security Officer and despite the fact that his request for leave was approved by the head of Port Security Division.
g. Being the only Shift Supervisor not invited to a supervisory training session.

[123] To the foregoing must be added that the Chief Executive Officer's evidence under cross examination that the claimant was not paid for the two days sick leave taken because he (the Chief Executive Officer) did not approve the reasons given for his absence on the second day. In all of this there is no evidence that the claimant was a frequent sick leave taker.

[21] Per Lord Woolf Mr. Mc Philemy v. The Times Newspaper [1999] 3 All ER 775, 792-793
[22] See: Cassell v. Broome [1972] A C 1027, Basdeo Panday v Kenneth Gman [2005] UKPC 59, Joseph Horsford v Lester Bird et al [2006] UKPC 3, Terrence Celix v Attorney General of Trinidad and Tobago [2013] UKPC 15.

[124] In the circumstances the court awards $10,000.00 as aggravated damages.

Gratuity and Pension

[125] The sum of $58,170.00 for 28 years service is claimed further to the provisions of the Agreement: The submissions on behalf of the claimant relate to the evidence of the Chief Executive Officer that the claimant would have been entitled to gratuity if he had completed ten years service.

[126] As far as pension is concerned, the claim is for $18,614.40. There are no submissions in this regard on behalf of the claimant to show for example how the 28 years service and the quantum of $18,614.40 were arrived at.

[127] The court considers that the matters of gratuity and pension are not properly before the court and no determination is made.

Costs

[128] The claimant is entitled to his prescribed costs based on the total award of damages.

Appreciation

[129] The court wishes to express sincere and profound appreciation to counsel on both sides for their contribution to this important case.

Order

[130] IT IS HEREBY ORDERED AND DECLARED as follows:

1. The claimants summary dismissal was wrongful because:

   (a) The Chief Executive Officer of the Authority had no authority or power to order the claimant to perform the duties of an ordinary Security Officer without regard for his substantive post of Shift Supervisor and without the claimant being demoted in accordance with the Agreement;

   (b) Given the foregoing the claimant had a reasonable excuse within the meaning of section 6 of Article 23 of the Agreement which he made clear “immediately” by saying the instructions were unlawful;

   (c) The Chief Executive Officer had other options by virtue of section 6 of Article 23 of the Agreement, including a warning or suspension without

pay coupled with the CEO's evidence under cross-examination that the claimant was a serious worker, and was never disciplined before.

2. No order for the re-instatement of the claimant since it does not arise under the law or in the factual circumstances.

3. There was non compliance with Article 23 of the Collective Agreement since the Chief Executive Officer was a judge in his own cause which cannot be nullified by the claimant's waiver of non-compliance with the other procedural requirements of the said Article 23 of the Agreement.

4. The claimant is awarded the following amounts by way of damages:

   a. $2000.00 for displacement allowance;

   b. $370.00 and $185.00 for double pay work and wrongful deduction of sick days;

   c. $2024.00 for lost increments for the periods October 2008 to October 2009 and November 2009 to September 2010;

   d. $19,390.00 for loss of salary;

   e. $10,000.00 as aggravated damages.

5. No award is made regarding pension and gratuity as these matters are not properly before the court.

6. The defendant must pay the claimant prescribed costs based on the total award of damages.

……
Errol L. Thomas
High Court Judge (Ag)