EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV2013/0215

IN THE MATTER OF THE SERVICE COMMISSIONS ACT, 2011

AND

THE VIRGIN ISLANDS CONSTITUTION ORDER, 2007

BETWEEN:

DAVID PENN

Claimant

AND

GOVERNOR OF THE VIRGIN ISLANDS

Respondent

Appearances:

Mr. Terrence Neale of McW Todman & Co., Counsel for the Claimant
Dr. Christopher Malcolm, Attorney General with Mrs. Giselle Jackman-Lumy, Senior Crown Counsel and Ms. Maya Barry, Crown Counsel of the Attorney General's Chambers, for the Defendant

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2014: July 2nd
July 28th

JUDGMENT

[1] **BYER J.:** On the 20th day of November 2013, the Claimant filed an application by Fixed Date Claim, claiming Judicial Review against the 20th June, 2013 decision of the Respondent (the "Letter"), purportedly summarily terminating his employment as Crown Counsel in the Attorney General's Chambers.

[2] The Fixed Date Claim sought the following relief:

(1) An order quashing the decision of the Respondent to terminate the Claimant's employment as a Crown Counsel in the Attorney General's Chambers with immediate effect.

(2) An order quashing the decision of the Respondent to forfeit the Claimant's vacation leave.

(3) A declaration that the Claimant is not in breach of the terms and conditions of his Study Leave Bond Agreement No. 354 of 2003.

[3] This application was supported by the Affidavit of the Claimant filed on 26th November 2013. In response, the Respondent's case is supported by the Affidavits of His Excellency Mr. Boyd McCleary, Phyllis Evans, and Michelle Donovan-Stevens, all three having been filed on the 6th May 2014.

[4] A detailed history of how the events unfolded leading up to the Letter was helpfully provided by the Claimant in his trial submissions and is briefly summarised hereunder with some additions from the skeletons provided by the Respondent:

(a) **1994** – The Claimant joined the civil service shortly after completing his university studies.

(b) **2003** – Claimant entered study bond agreement to pursue studies in Law.

(c) **2008** – After the successful completion of his legal studies at the University of the West Indies, the Claimant was appointed a Crown Counsel in the Attorney General's Chambers and took up the appointment and commenced work duties.

(*It should be noted, the Claimant, as a condition of receiving a scholarship from the Government of the Virgin Islands to pursue his legal studies, the Claimant's bond agreement required that he was to remain in the employ of the Government of the Virgin Islands for a period not less than eight (8) years after the completion of his studies. It was also a condition of the bond that if the Claimant failed to remain in the said employ, he would become personally liable for the repayment of the monies advanced under the bond).*

(d) **2012** – Throughout the course of the year, the Claimant periodically failed to present himself for duty for continuous periods in excess of ten (10) working days.

(e) **2nd April 2013** – The Claimant received a letter from the Secretary of the Judicial and Legal Services Commission (the "Commission"), advising him that it had been reported to the Chairman that he had been absent from his duties as Crown Counsel in the Attorney General's Chambers for a period in excess of ten (10) days contrary to Section 22 ("the Section") of the Service Commission's Act 2011 ("the Act") and that further, the Commission was undertaking an inquiry into the report.

(*The letter also instructed the Claimant that he was summoned to a hearing/meeting before the Commission on the 17th April 2013 where he would be given an opportunity to make representations as to why he should not be found to have deemed to have resigned from the service pursuant to the Section of the Act*).

(f) **17th April 2013** – The Claimant attended the hearing of the Commission, where as part of his defence, he tendered evidence both medical and otherwise, to support his position that he had been assessed as "*Electromagnetically Hypersensitive"* since 2007. The Claimant submitted that this hypersensitivity made it extremely difficult for him to work from his office for any extended period of time due to the great pain and discomfort experienced and affected his health due to the fact that his workplace and space were in close proximity to certain cellular antennae. The Claimant therefore commenced working from home periodically without the requisite permission.

(g) **13th May, 2013** – The Commission recommended to the Respondent to terminate the employment of the Claimant.

(h) **20th June, 2013** – The Claimant received a letter from the Acting Director of Human Resources in the Department of Human Resources, advising him that his employment had been "terminated" pursuant to Section 22 with immediate effect.

(i) **24th July, 2013** – The Claimant filed his application seeking the leave of the court to apply for judicial review.

(j) **4th November, 2013** – The leave application was heard and judgment was reserved.

(k) **26th November, 2013** – Leave was granted to the Claimant by the Court to issue a claim for judicial review.

The Claimant's Submissions

[5] The Claimant, in the agreed trial memorandum filed on 23rd May 2014, his trial submissions filed on 4th June 2014 and by oral submissions at trial made by Counsel Mr. Terrence Neale, argued very narrow issues upon which he sought the determination of the Court.

[6] The issues for the Claimant were therefore as follows: (1) Whether he is entitled to an order quashing the decision of the Respondent to summarily terminate his employment as a Crown Counsel in the Attorney General's Chambers on the

ground that the Respondent was either guilty of an error of law in the performance of his duty and/or that he had failed to follow the proper procedure in carrying out his duties under the Act; and flowing therefrom, (2) whether he is entitled to any consequential relief in the matter.

Illegality – Is the Respondent guilty of an error in the performance of his duty?

[7] Under this principle, the Claimant submitted to this Court that the Respondent in terminating his employment as a Crown Counsel in the Attorney General's Chambers acted contrary to the provisions of the Section of the Act.

[8] The Claimant argued that the Section did not make provision for the Respondent's termination of his employment with the Government of the Virgin Islands. The Section only conferred on the Respondent, it was argued, the power to make a declaration in terms of the deemed resignation for failure to attend his post for a period in excess of ten (10) days.

[9] Having therefore "terminated" the Claimant, the Respondent had therefore acted ***ultra vires*** the Act and he having done so, resulted in the act of the Respondent being rendered illegal in the terminology of judicial review proceedings.

[10] The Claimant argued that this misapprehension on the part of the Respondent with regard to his powers under the Section resulted in the actions of the Respondent in reality relying on other considerations regarding termination. The Claimant argued that these specifically would have been the provisions provided for under the disciplinary portions of the Act which were completely separate to the Section.

[11] Learned Counsel Mr. Neale argued vigorously that the meaning of the Section was clear and unambiguous. The only power conferred on the Respondent was with regard to the right to make a declaration; it was not open to the Respondent to terminate. Learned Counsel in support of his contention that the reading of the Section needed no assistance by the use of aids of statutory interpretation including the use of side or marginal notes, sought to rely on several authorities which elucidated the point with regard to the limited utility of marginal notes in cases such as the one at Bar. Learned Counsel therefore submitted that there being a clear power vested in the Respondent by the Act, meant that it would be inappropriate for the Court to try to define or refine those clear words.

[12] The Claimant strenuously argued that there could be no serious dispute that *"resignation"* from employment was a completely different specie from *"termination of employment".*

[13] Therefore, he submitted to this Honourable Court that the subsequent termination of the Claimant's employment which could only have been carried out under

Sections 28 to 36 of the Act (the relevant Section of the Act that deals with termination of employment, as opposed to resignation) was wrong in law, since although referring to the Section of the Act, the Respondent nevertheless purported to exercise a power of termination which was not available to him under that very same Section.

Procedural Impropriety - Has the Respondent failed to follow the proper procedure in carrying out his duties under the Act?

[14] Under this limb, the Claimant submitted that as a result of the failure of the Respondent to follow the specific procedure under Section 28 to 36 of the Act to terminate the Claimant, the action of the Respondent was not in accordance with law and therefore subject to judicial review by the Court.

[15] To this end, the Claimant contended that since the Section only provided for resignation from the public service due to unexplained absence, the termination of the Claimant's employment by the Letter could only have been carried out pursuant to Sections 28 to 36 of the Act.

[16] In support of this assumption, the Claimant sought to illustrate to the Court that it was clear that Sections 28 to 36 of the Act provided a specific procedure for the termination of the employment of a Public Officer. Having therefore not followed that procedure, the Claimant argued that the act of the Respondent could not stand, it amounting to blatant procedural impropriety.

[17] Therefore, the Claimant submitted, that the Respondent terminated the Claimant's employment without providing him with the mandatory safeguards under Sections 28 to 36, and, as such, exceeded his authority under the Act, and/or, failed to follow the required procedure. Thus, making his decision a nullity and subject to be quashed by the Court upon judicial review.

Relief - Is the Claimant entitled to any other consequential relief in the matter?

[18] Under this subheading, the Claimant submitted that a resignation under the Section as opposed to termination under Sections 28 to 36, on the ground of misconduct or other similar reasons, have different consequences for an employee. This is quite clear from the Act itself and the General Orders of the Public Service of the British Virgin Islands ("the General Orders").

[19] Learned Counsel for the Claimant therefore argued, that the consequences for termination which were applied against this Claimant were quite draconian in character and could only have been properly used where there was a finding made that he should have been dismissed.

[20] Learned Counsel argued that there having therefore been no finding of fault on the part of the Claimant meant that the reference in the Letter to paragraph 6.22 of the General Orders which referred to the loss of leave benefits upon dismissal was a clear indication that the Respondent, whether administratively or not, considered that the Claimant was dismissed from the service as opposed to being "deemed to have resigned".

[21] Therefore the Claimant argued that it was improper to have those consequences applied in his instant case and asked that the Court quash this determination.

The Respondent's Submissions

[22] The Respondent, by way of submissions, including oral submissions made by the Learned Attorney General has not disputed the root of the issues that were canvassed by the Claimant for the Court's determination.

[23] The Respondent has of course vehemently denied that he has been guilty of an error of law or has failed to follow the proper procedure under the Act. It was therefore maintained throughout the proceedings that the Respondent validly exercised all powers conferred on him in relation to the determination of the Claimant's employment.

Illegality – Is the Respondent guilty of an error in the performance of his duty?

[24] The Respondent submitted that the Claimant's employment as Crown Counsel with the Government of the Virgin Islands was lawfully terminated pursuant to the Section of the Act after it was determined that the Claimant had been absent from duty for a continuous period in excess of ten (10) working days without reasonable excuse.

[25] In support of this submission, it was contended, that there was no failure of the Respondent to *"understand correctly the law that regulate[s] his decision-making power and ... give effect to it"* and there also was no *"failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who [would] be affected by the decision"*[1]. There could therefore be no illegality or error of law.

[26] It was submitted to this Court that the term "termination" is a broad one, which captured the various means by which one's employment, comes to an end and included both resignation and dismissal. It is therefore immaterial that the conclusion of the Claimant's employment was referred to as a 'termination', as opposed to a 'resignation', since the latter was merely a subset of the former.

[1] Paragraph 12 of the Respondent's submissions filed 20th June 2014

[27] As a result, the Respondent argued: (1) the contents of the Letter as communicated to the Claimant was that his employment was being determined pursuant to the Section of the Act. The term "terminate" was qualified in this fact scenario by reference to a particular legislative provision. The conclusion of the Claimant's employment can therefore be attributed to nothing other than the operation and application of the referred to Section; (2) that the use of the term was meant to convey the determination or conclusion of the Claimant's employment and not a legal term of art[2]; (3) the Respondent unequivocally stated that his decision in this matter was solely based on the application of the Section and there was no other reliance.[3]

[28] The Respondent further asserted that having used the word "terminate" in relation to the determination of the Claimant's employment did not mean in any event that it was in fact incompatible with the evidence that the Claimant had been deemed to have resigned. They further argued that this was so, since resignation was just one of the ways the employment of a public servant's employ could be determined or terminated.

[29] Contrary to and ardently against the Claimant's submission, the Respondent affirmed that a perusal of the Section made it clear that the legislative intention was that a resignation which followed an officer's abandonment was a species of termination. This, they sought to glean from a reading of the marginal/side notes which the Respondent submitted, was a most useful aid to interpretation of the Section.

[30] As a result, they asserted that if the Section is assessed with the marginal note in mind, it becomes clear that resignation due to abandonment is merely a subset of the broader category of termination of appointment/employment. Accordingly, any contention to the contrary must be considered inconsistent with the entire wording of the legislation.

[31] The Respondent gave three reasons to support this submission. Firstly, the marginal note accompanying the Section reads *"Abandonment as reason for termination of employment".* This side-note, they submit, clearly speaks to termination being a broad category under the ambit of which resignation/abandonment falls. Secondly, the Courts have willingly taken marginal notes into account when considering a statute.[4] Thirdly, that in the Virgin Islands, marginal notes are debated together with the substantive provisions which they support and ultimately passed for promulgation as part of the legislation.[5] As such, consideration of these marginal notes is quite useful in the instant case although

[2] Paragraph 12 of the Affidavit of His Excellency Boyd McCleary filed 6th May 2014
[3] Paragraph 13 of the Affidavit of His Excellency Boyd McCleary filed 6th May 2014
[4] Paragraph 21 of the Respondent's submissions filed 20th June 2014
[5] Paragraphs 7 to 9 of the Affidavit of Phyllis Evans filed 6th May 2014

they readily agreed that the general consensus is that these notes are not generally relied upon in statutory interpretation where the words of the statute are clear.

[32] Therefore, they claim, the legislative intention was that resignation under the Section was to be considered a species of termination and there was therefore no concomitant illegality.

Procedural Impropriety – Has the Respondent failed to follow the proper procedure in carrying out his duties under the Act?

[33] In relation to this issue, the Respondent submitted by the Learned Attorney General that the decision to determine the employment of the Claimant was made clearly pursuant to the Section. There was no other reference to any other power and there could not be imbued to him that he purported to rely or utilise any other power. Accordingly, the Claimant's argument that the Governor ought to have regard to Sections 28 to 36 of the Act is without merit.

[34] The Respondent further submitted that upon that basis, the other aspects of the Claimant's claim in relation to procedural impropriety are unsubstantiated. They argued there was no need to invoke the disciplinary procedure provided for at Sections 28 to 36 of the Act, since the Claimant was not dismissed in the manner contemplated there. There was therefore no need for any reference to be made to that procedure.

[35] The Respondent further submitted, that the Claimant having had an opportunity to be heard in relation to whether he was absent without reasonable excuse, meant that the Claimant could not now argue that he was denied an opportunity to have his side heard. The only reference point was to determine whether he had a reasonable excuse for his absence. He was heard and that was all that was required of the Respondent. Certainly, they argue, the Claimant not having made the Commission a party was not entitled to have any inquiry as to what transpired before them. Thus, the Claimant is essentially estopped from seeking to rely on anything that transpired before the Commission. The inquiry was properly conducted. There was no need to have a disciplinary hearing as that was not the power being exercised and as such this ground must also fail in the Respondent's submissions.

Relief - Is the Claimant entitled to any other consequential relief in the matter?

[36] Finally, the Respondent submitted, the Claimant is not entitled to the relief sought, as the Letter cannot be properly impugned. Thus, the Claimant's employment came to a lawful and proper conclusion and there can be no relief due to him as a result thereof.

[37] The Respondent sought to advance to this Court that in any event, the consequences that were stated to be referable to the determination as stated in the Letter, resulted in the same being more beneficial to the Claimant than what may have applied under paragraph 8 of the General Orders which makes provision for the employee who has resigned without adequate notice being liable to pay, in lieu of that notice, one month's salary.

[38] The Respondent therefore rested on their submissions that the action in the Letter was completely within the powers conferred under the Section for which the Claimant was afforded a fair, just and *bona fide* opportunity to be heard.

[39] In these circumstances, the Respondent contended that these judicial review proceedings are without merit and ought to be dismissed with costs.

The Court's Analysis and Finding

[40] In addressing its mind to this matter, the Court has addressed the submissions from both Counsels for the Claimant and the Respondent and the authorities provided and I wish to go on the record now to express my gratitude to both sides for their assistance.

[41] By trial memorandum filed the 23rd May 2014 by both Counsel, the parties agreed that the issues were as follows:-

(a) Whether the Claimant is entitled to, an order, quashing the decision of the Respondent to summarily terminate the Applicant's employment with the Public Service of the Government of the Virgin Islands as a Crown Counsel in the Attorney General Chambers on the grounds of illegality and/or procedural impropriety and

(b) Whether the Claimant is entitled to any other consequential relief in the matter.

[42] These having been agreed, this Court will adopt the same to the analysis of the matter and its final determination.

Whether the Claimant is entitled to, an order, quashing the decision of the Respondent to summarily terminate the Applicant's employment with the Public Service of the Government of the Virgin Islands as a Crown Counsel in the Attorney General Chambers on the grounds of illegality and/or procedural impropriety.

[43] The decision of the Respondent, as all parties agree, is contained in the letter of the 20th June, 2013 from the Acting Director of Human Resources ("the Letter").

[44] It would therefore be useful to set out the text of that letter here:
"*20th June 2013*

Mr. David Penn
Ufs. Permanent Secretary, DGO
Attorney General
Attorney General Chambers
Road Town, Tortola VG1110
British Virgin Islands

Dear Mr. Penn,

I refer to your appointment as Crown Counsel, Attorney General's Chambers, and to the 2nd April, 2013 correspondence to you from the Secretary, Judicial and Legal Services Commission. In that correspondence, you were notified that the Judicial and Legal Services Commission were in receipt of a report of your contravention of Section 22 of the Service Commission Act, 2011. You were also then notified that there would be a hearing on 17th April, 2013, at which you would have been given an opportunity to make representations why you should not be deemed to have resigned from the service by reason of your absence. Furthermore, you were by the said letter notified as well that at the hearing you could have been represented and would have been able to call such witness as you wish, but if you did not attend the Commission would be able to proceed in your absence.

For the record, it is here noted that Section 22 of the Service Commission Act, 2011 provides:

> *"**Unless declared otherwise by the Governor, an officer who is absent from duty for a continuous period of ten working days without reasonable excuse, shall be deemed to have resigned from the relevant service and thereupon his or her office becomes vacant and the officer ceases to be an officer."***

I am directed by His Excellency the Governor to inform you that he has, since the hearing of 17th April, 2013 received advice from the Judicial and Legal Services Commission and that after due consideration he has accepted same. In the circumstances, he has, in his own discretion and after due consideration, decided to terminate your employment with the Public Service pursuant to Section 22 of the Service Commission Act. Your termination is with immediate effect.

In light of the above, you are with immediate effect, required to comply with this mandatory order that you handover to your Department Head or Supervisor any keys, equipment, employment identification card as well as any other government

documents, files or property that would now be in your possession or under your control.

Please note that any vacation leave you may have accumulated has been forfeited in accordance with General Orders 6.22 (1) (a). In addition, if enrolled with the Government's group health insurance plan coverage will end on the last day of the month in which your employment with the Public Service was terminated.

Your Study Leave Board Agreement No. 354 of 2003 has not been fulfilled. Therefore, you can expect a separate letter, which will include information on your outstanding legal obligation to the Government of the Virgin Islands. The said letter will also propose or seek a proposal from you concerning the liquidation of your Bond.

On behalf of the Government of the Virgin Islands, I wish to thank you for your service with the Public Service.

Sincerely,

Michelle Donovan-Stevens
Ag. Director of Human Resources

cc: Permanent Secretary, DGO
Attorney General"

[45] It therefore, can be seen, that in this Letter to the Claimant, the Respondent through the Acting Director of Human Resources stated that they had decided "*to **terminate** [his] employment with the Public Service pursuant to Section 22 of the Service Commission Act*."

[46] It is the definition and contextual meaning of the word "terminate" here that the Claimant now seeks to be determined by this Court and whether by its usage alone, it is sufficient to quash the effect of the Letter for illegality and/or procedural impropriety.

[47] Illegality has been defined as a ground for judicial review in the case of ***Council of Civil Service Unions ors v Minister of the Civil Service*** [6] by Lord Diplock in the following terms"***... that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question in the event of the dispute..."***

[6] [1984] 3 ALL ER 935 at page 950

[48] Thus, in the instant case, the Claimant has stated that the Respondent has acted illegally by misunderstanding the power that was conferred by Section 22 (the Section) of the Service Commission Act 2011 (The Act) which is set out in its entirety as follows:

> **"22. *Unless declared otherwise by the Governor, an Officer who is absent from duty for a continuous period of ten working days without reasonable excuse, shall be deemed to have resigned from the relevant service and thereupon his or her office becomes vacant and the officer ceases to be an officer."***

[49] From this Section, it is clear that there are two operative parts. Firstly, the officer must have been absent *without reasonable excuse* and secondly, that there shall be an automatic action thereafter of him having been "*deemed to resign*" without more.

[50] It is therefore pellucid, that upon this Section becoming operational by the actions of the officer himself, the employment of that officer comes to an end-pure and simple.

[51] Thus, there must be at first an investigation whether the first limb has been satisfied. By the triggering of this investigation, it must be accepted that there would be a requirement to ensure that any inquiry is conducted with procedural fairness. In other words, to ensure that the affected person is given an opportunity to be heard and is in fact heard.

[52] By letter dated 2nd April 2013, the Judicial and Legal Services Commission invited the Claimant to attend a meeting to inquire into the "report" made to them that the Claimant had absented himself from work at the Attorney General's Chambers in excess of ten (10) days.

[53] Indeed, no details of this report or the nature of the report were ever given to the Claimant. But as stated in the case of ***Siobhan Nicola Gilepsie & Citco BVI Ltd v The Minister of Natural Resources and Labour*** [7] by Ellis J., it has long been recognized by the courts that "***substantial fairness may in some circumstances be satisfied by disclosing the substance of the case without disclosing the precise evidence..."***

[54] In fact, "***ultimately ... a decision maker must consider whether the individual has sufficient information and material as to the case against him, so that he was able to make informed submissions. Otherwise an individual would not be able to properly defend himself and could not effectively persuade the***

[7] BVI HCV 2003/003

decision maker that his information is inaccurate or exaggerated or at any rate does not justify an adverse decision."[8]

[55] I find that in this case the Claimant was given sufficient information to know the nature of the case against him. In fact if one assesses the facts that were accepted by both sides in this case it is clear that: 1. The Claimant received the letter of invitation from the Commission with the indication given that an inquiry was to be had into the unexplained absences from work and 2. The Claimant attended the inquiry and participated in the same by proferring his explanation for his absence from the workplace.

[56] Yet, having not joined the Commission as a party to these proceedings, this Court has to agree with Counsel for the Respondent that, the Claimant cannot now raise any issues he may have had with the procedure that may have occurred before it. Any irregularity that occurred would therefore have to be taken as having been accepted and is not open for review.

[57] This Court must therefore rely upon and accept the prima facie evidence that the inquiry took place, the Claimant participated and a finding was made. The requirement of fairness was therefore clearly adhered to by the parties.

[58] Upon the completion of the inquiry, the Commission forwarded its findings to the Respondent by memorandum dated the 13th May 2013.

[59] The terms of the memorandum are as follows:

> "***JUDICIAL AND LEGAL SERVICES COMMISSION RECOMMENDATIONS***
>
> *The Judicial and Legal Services Commission at a meeting on 17th April, 2013 advised on the following memorandum and asked that this memorandum be fast tracked to you for further consideration.*
>
> *Termination for the Attorney General Officer – Mr. David Penn, Crown Counsel, Attorney General Chamber – Memo No. 006 of 2013*
>
> *The Commission advises that Mr. David Penn, Crown Counsel, Attorney General's Chambers be terminated from the Public Service pursuant to Section 22 of the Service Commission Act, 2011.*

[8] **Siobhan Nicola Gillespie** case Op cit at paragraph 60

In justification of their advice the Commission deliberated and considered the following:

1. *Mr. David Penn assumed that the general position on the matter was sufficient for him to be away from the office;*

2. *He was absent from duty without reasonable excuse in excess of ten (10) days which is documented in terms of his claim;*

3. *He never received clear authorization/permission from the Attorney General or his Supervisor that it was acceptable for him to work from home;*

4. *He felt he was justified in being away from the Office;*

5. *It does not seem that the problem would be solved by finding an office in a remote location, given he is not at a stage to work independently and the disproportionality of making such an arrangement for one officer;*

6. *The manner in which he dealt with the matter is not in accordance with Section 22 of the Service Commission Act, 2011;*

7. *On his own admission the period he remained away from the office is in excess of ten (10) days;*

8. *He never applied for sick leave because by his own admission, he is not sick;*

9. *The Commission is not satisfied that his absence from duty was with reasonable excuse."*

[60] It is upon this Memorandum that the ultimate Letter was given and the Respondent issued a decision to "terminate" the employ of the Claimant.

[61] I wish at this juncture to however pause for a thought. Despite the vigorous arguments mounted by the Claimant regarding whether the act of the Respondent was in fact a termination, at no point did this Claimant seek to advance that there had in fact been no determination of his employment.

[62] There was no allegation that the Claimant was not deemed to have resigned his post, which in the view of this Court was perfectly proper.

[63] The nub of the submission of the Claimant is therefore, not that my employment was determined by my own action, but rather, the Respondent could not fire me.

All the Respondent could have done in the view of the Claimant was to say to him *"I declare you to have abandoned your post and you are therefore deemed to have resigned your post*". Not as was stated "*terminate you pursuant to Section 22*".

[64] This Court is therefore being asked to determine whether the word "terminate" was being used as a term of art or was simply an inappropriate and wrongly chosen word in the context of the circumstances which could lead to the act of the Respondent being illegal.

[65] In so determining, the Court has heard the submissions of the Respondent who has sought to rely heavily, and one might say, almost exclusively, on the words contained in the marginal or side notes that appear to the Section being ***"Abandonment as reason for termination of appointment".***

[66] It is these words that the Respondent says shows quite clearly the intention to be ascribed to the words in the Section and as such should be sufficient to bolster the argument that there was no termination on the part of the Respondent.

[67] However this Court is not persuaded by this argument. The Court instead finds favour with the argument of the Claimant in this regard.

[68] In the authorities relied on by both the Claimant and the Respondent, it is quite clear that where the words are clear and unambiguous in the statute, they must be read in their plain and grammatical meaning. Thus, "*the dominant purpose in construing a statute is to ascertain the section of the legislation as expressed in the statute, considering it as a whole and in its context... it is only where words of the statute are not clear and ambiguous that it is necessary to enlist aids for interpretation*" per Hariprashad-Charles J. in ***Bebo Investments Limited v The Financial Secretary***.[9]

[69] Thus, it is clear that the words of the Statute, once clear require no aids to interpretation, including no reliance on marginal notes. These must be seen therefore in their proper context as being "***no more than guides to the contents of the Part or of the Sections which follow and are not meant to control the operation of the enacting words"*** per Viscount Dilhorne in ***DPP v Schildkamps***[10].

[70] This Court is of the opinion, in looking at the wording of the Section, the words are clear. Once there is absence without a reasonable excuse, there is abandonment

[9] BVI Unreported 151/2007 at paragraph 23
[10] 1971 AC 1

by resignation. There is therefore no need, as submitted by the Claimant, to adopt any other interpretational aid.

[71] Having determined that there is no need to seek assistance for the interpretation of the Statute, the question for this Court must be - what is in fact the practical effect of the resignation by abandonment? In answer to that question, this Court is of the opinion that the **only** logical response to that is, that it signifies the end of the employment of the employee.

[72] The word "termination" in the Thesaurus[11] is stated as "*to bring or come to a natural or proper end"* or "*to relinquish one's engagement in or occupation with*". It is therefore clear that it signifies without more, the end.

[73] This Court is therefore of the opinion that there was no need for any action being taken on the part of the Respondent to end the employment of the Claimant once it was determined that he had run afoul of the Section. The Letter rendered was simply, in this Court's opinion, in fact a declaration to the effect that the employment **had** come to an end even though those specific words were not used.

[74] I am therefore not convinced that the word "termination" was being used as a term of art - reflective of there in fact being an active step being undertaken by the Respondent. As unfortunate as the word may have been, the additional fact that the entire Letter made reference to the effect of the Section fortifies me in that position. It was simply a statement of fact.

[75] I therefore find that there was not any active participation on the part of the Respondent in ending the employment of the Claimant.

[76] As was stated by the learned author Robert Upex in his book "***The Law of termination of Employment,***" "as a general rule it may be stated that ***termination*** occurs when either party informs the other clearly and unequivocally that the contract is at an end." (my emphasis)

[77] This Court therefore determines that the Letter was simply that, an unequivocal statement that the contract was at an end, brought to that state by the acts of the Claimant himself.

[78] I having so determined this issue, that there was no act of termination on the part of the Respondent, I also find that there was therefore no dismissal of the Claimant pursuant to the Sections 28 to 36 of the Act and as such there was no need to adopt or adhere to the procedures set therein regarding disciplinary hearings.

[11] Rogets II Thesaurus 1980

[79] This Court is therefore of the opinion that the Claimant is not entitled to an order quashing the decision in this regard as prayed.

Whether the Claimant is entitled to any other consequential relief in the matter.

[80] In the Letter, the Claimant was informed that he would be held to have forfeited his leave and benefit entitlements. This for the Claimant was also seen as further evidence that the act of the Respondent was to terminate him. In so far as this Court is not persuaded by that argument and has now so ruled, the Court must assess what in fact is the outcome of the end of the employment of the Claimant.

[81] In the Letter, reference was made to the operation of paragraph 6.22 of the General Orders and this was taken to be operative in relation to the Claimant.

[82] Paragraph 6.22 states as follows:

> ***(1)*** "***An officer or employee who***
>
> ***(a) Is dismissed; or***
>
> ***(b) Is discharged for misconduct; or***
>
> ***(c) Resigns to avoid being discharged for misconduct;***
>
> ***will forfeit any leave for which he may be eligible***."

[83] By this paragraph, it is clear that the forfeiture of leave can only be contingent upon one of the stated events having occurred which results in the end of employment. It is therefore clear that this could not have been applicable to the Claimant in the present circumstances.

[84] I therefore find that in this regard, the portion of the Letter which seeks to rely on the provisions of paragraph 6.22 should be quashed as being outside of the scope of available consequences.

[85] The Respondent in submissions sought to argue before this Court that the Claimant should be content to have the consequences of his action being those as prescribed under paragraph 6.22, because, in fact the relevant paragraph of the General Orders should have been Chapter VIII of the General Orders and in particular 8.1 (4) which states as follows:

> **"*Notwithstanding the provisions in paragraphs (1) and (2) of this order, an officer other than an officer appointed on contract terms may instead of giving due notice resign his appointment at any time after paying to the Government one month's salary in lieu of notice. In such cases, the officer will forfeit all leave and passage privileges for which he might be eligible."***

[86] The Court however has not found favour with this argument either. The Court finds that in this case there was no issue of notice being given or not by the Defendant and is an entirely different position from what occurred here by the deemed resignation due to abandonment.

[87] When a perusal is in fact made of the General Orders, it is very clear that despite the Legislators retaining the provision for abandonment of a post, there is no concomitant provision made for the effects of that abandonment.

[88] In this case the employee is now deemed to have resigned; he has acted in a way that his post is no longer available to him. The question that must be therefore asked – Is it the intention of the employer in those circumstances that the employee remains entitled to retain all the benefits that would have accrued to him up to the point of determination of the employment?

[89] In order to determine this, this Court has had to turn its mind to the law of contract there being no assistance offered by the General Orders or the legislation itself.

[90] In so doing, this Court is of the considered opinion that the action of an employee in a situation where there is abandonment is akin to the act of repudiation of one party to a contract. It is thereafter open to this Court to determine what if any benefits would have accrued upon such repudiation.

[91] When one party refuses or fails to perform obligations under a contract, it is recognised that the other party is entitled to consider that contract at an end. Such finality however can only actually take effect if there is acceptance by the other party of the act as being sufficient to bring about that determination. Thus by the tenets of repudiation, there must be an act sufficiently serious to be considered a breach of the contract and an acceptance that it is in fact a breach.

[92] The act perpetrated by the individual only has to be serious but it need not be an overt action once it is sufficient for a reasonable person in the shoes of the person who is entitled to the benefit of the contract to conclude that the other party has repudiated it. As stated by Coleridge J. in the case of ***Freeth v Birth***[12] the acts must be assessed as to "*whether [they] ...amount to an intimation of an intention to abandon and altogether refuse performance of the contract*". Therefore "*such an "intimation" will be established if the words and conduct of the promisor make it "quite plain" that the promisor will not (or cannot) perform or will perform the contract in a manner which is substantially different from that required."*[13]

[12] [1874]LR9 CP 208 at 213

[13] Butterworths Common law series: The law of Contract paragraph 7.20

[93] It cannot be disputed in this Court's mind that the actions of the Claimant in absenting himself from his post were sufficient to amount to a repudiation of his contract with the Government of the Virgin Islands.

[94] Upon that event occurring it was still at that point open to the Respondent to accept that behaviour as a repudiation or not. The words of the Section having given him that discretion encapsulated in the words "***unless the Governor declares otherwise***". The Respondent having not declared otherwise must be taken to have accepted that the acts of the Claimant were sufficient to satisfy the triggering of the Section. Having accepted that (and being analogous to the acceptance under repudiation) made the declaration as to the end of the employment of the Claimant and the contract came to an end.

[95] The Claimant is therefore entitled and this Court so finds that he is so entitled to any and all benefits accrued to him up to the period of the acceptance of the repudiation, being the date of the Letter, that is the 20th June 2013.

[96] I am fortified in this decision by the words of Dixon J in ***Mcdonald v Dennys Lascelles Ltd.***[14] and adopted in the later case of ***Johnson v Agnew*** [15] "***when a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired***.." (my emphasis)

[97] The Court is therefore of the firm opinion that the Claimant is entitled to have his leave as accrued up to the date of the determination of the contract.

[98] With regard to the issue surrounding the Bond Agreement entered into by the Claimant, even though this matter was not specifically argued by either side it must be considered by the Court it being one of the grounds of relief sought.

[99] Therefore insofar as this Court is concerned, the Court is of the opinion that the determination of the Claimant's employment due to his own action has resulted in the contractual arrangement entered under the Bond Agreement being breached. This Court therefore finds that the Claimant must now make arrangements to pay the value of the remaining portion of the Bond being the three years left under the said Bond for the period 2013 to 2016, the date at which the Bond would have naturally expired.

[14] [1933] 48 CLR 457 at 476-7
[15] [1980]AC 367 at 396

[100] The order of the Court is therefore as follows:

1. The order seeking the quashing of the decision of the Respondent to terminate the Claimant's employment is refused.

2. The order seeking the quashing of the decision of the Respondent to forfeit the Claimant's vacation leave is granted. The Claimant is entitled to his leave as accrued up to the date of determination of the Claimant's employment which for the avoidance of doubt is the 20th June 2013.

3. The declaration that the Claimant is not in breach of his Study Leave Bond Agreement No. 354 of 2003 is refused. The Claimant shall be responsible for the value of the remaining portion of the Bond for the period 2013 to 2016.

4. Despite the Respondent seeking costs in this matter upon dismissal of the Claim, this Court having determined that the Claimant is partially successful is prepared to exercise its discretion and make no order as to costs pursuant to Part 56.13 (6) of the CPR 2000.

Nicola Byer
High Court Judge