

10/1/02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1992/D-025

BETWEEN	BALTEANO DUFFUS	PLAINTIFF
AND	NATIONAL WATER COMMISSION	1 <sup>ST</sup> DEFENDANT
AND	WAYNE REID	2 <sup>ND</sup> DEFENDANT

Mr. Bert Samuels instructed by Knight, Pickersgill, Dowding & Samuels for the Plaintiff.

Mr. Andre Earle and Ms. S. Thompson instructed by Rattray, Patterson, Rattray for the Defendants.

**Heard on 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 20<sup>th</sup> October 2000, 16<sup>th</sup> and 17<sup>th</sup> July 2001 and 1<sup>st</sup> July 2002**

**Campbell J.**

On the 9<sup>th</sup> March 1992, the Plaintiff filed a Writ against the Defendants for breach of contract of employment in that the Second Defendant, acting as servant and agent of the First Defendant, wrongfully terminated the Plaintiff's employment as Director of Commercial Operations by letter dated the 28<sup>th</sup> April 1990. The Amended Statement of Claim alleged inter alia;

- 1) The 1<sup>st</sup> Defendant was at all material times the employer of the Plaintiff and a statutory body set up under the Water Commission Law.

- 2) The 2<sup>nd</sup> named Defendant was at all material times the Chairman of the Board of Directors of the 1<sup>st</sup> named Defendant and the servant and or agent of the said 1<sup>st</sup> named Defendant.
- 3) The Plaintiff was, by letter dated the 7<sup>th</sup> of September 1989, appointed to the post of Director, Commercial Operations with effect from 1<sup>st</sup> January 1987. By letter dated the 28<sup>th</sup> of April 1990 the Defendants wrongfully and in breach of the said Agreement terminated the said employment.

On the 11<sup>th</sup> October 2000, the Defendants filed a further Amended Defence and counterclaim, which alleged inter alia;

2. Save that the 1<sup>st</sup> Defendant was established pursuant to the National Water Commission Act (and not the Water Commission Law) the Defendants admit paragraph 2 and 3 of the Amended Statement of Claim. At all material times, the 2<sup>nd</sup> Defendant acted in pursuance, or execution, or intended execution of his duties in the capacity of Chairman of the 1<sup>st</sup> Defendant, and the Defendants rely, inter alia, on Section 13 of the First Schedule of the National Water Commission Act.
3. The Defendants admit Paragraph 4 of the Amended Statement of Claim and state that the Plaintiff's appointment to the said post was retroactive to the period commencing 1<sup>st</sup> January, 1987 and ending 4<sup>th</sup> September, 1989. The said letter (hereafter referred to as "the 1<sup>st</sup> letter") was written as a matter of record to confirm that the Plaintiff had held the substantive position of Director, Commercial Operations (Grade 14) for that period.
4. The Defendants also state that by a separate letter also dated 7<sup>th</sup> September, 1989 (hereinafter referred to as "the 2<sup>nd</sup> letter"), the Plaintiff was re-assigned to the post Director, Corporate Planning - Finance (Grade 14) with effect from 4th September, 1989.
5. The Defendants further state that by letter dated 28<sup>th</sup> May, 1990, the Plaintiff was advised that the said post of Director, Corporate

Planning – Finance (Grade 14) was abolished by the 1<sup>st</sup> Defendant.

### The Plaintiff's Case

Mr. Balteano Duffus was, in May 1990, a public servant for twenty-three years. He had been employed at NWC since September 1980, having transferred from the Ministry of Agriculture. In 1982, NWC had facilitated his participation in post-graduate studies at University of Western Ontario.

He returned in 1985 from Canada and in 1986 was appointed to act in the post of Director of Commercial Operations. He remained in that post up to 1987 when he was summoned by the Managing Director, Mr. Bennett. The Plaintiff's unchallenged testimony was that he was asked by Bennett to take a special post to assist in taking NWC to "a more business-like level" and that Bennett needed someone to carry-out a special assignment in corporate and business planning. In order to accomplish this task, Duffus was to take the post of Director of Corporate Planning. Some two weeks after that conversation he received two letters, both of which were dated 7<sup>th</sup> September 1989. One appointing him to the post of Director of Commercial Operations, with effect from the 1<sup>st</sup> January 1987. The other re-assigned him to the post of Director of Corporate Planning, with effect from the 4<sup>th</sup> September 1989. Eight months after his re-assignment he received a letter, (Exhibit 4), retiring him from his newly assigned post. This letter contained a cheque and

advised him that the post of Director of Corporate Planning was being abolished, and that he was being retired.

The Plaintiff testified that he had entertained aspirations of becoming President of NWC. He claimed the Post of Director Corporate Planning was not a pensionable post, not having been gazetted. He said that he agreed with Dr. Reid's letter dated 16<sup>th</sup> October, 1990 that the position of Director, Corporate Planning was an interim organisational structure, was not an approved budgetary position as it was not gazetted and therefore not considered a part of the establishment (ex 15).

Cross-examined by the Defendant's Counsel, it was suggested to Mr. Duffus that there was nothing in the letter of re-assignment stating it was temporary. Mr. Andre Earle, on behalf of the Defendants, asked the Plaintiff if he knew that NWC may appoint anyone on its own terms as it thinks fit. The Plaintiff said he was not so aware.

The Plaintiff testified that on the 17<sup>th</sup> December 1990, the Plaintiff's Attorneys-at-Law wrote the 1<sup>st</sup> Defendant, for the attention of the 2<sup>nd</sup> Defendant, demanding his re-instatement to the post of Director, Commercial Operations.

### **The Defendant's Case**

Dr. Wayne Reid testified that he was Chairman of NWC from April 1989 to March 1995. He further testified that the Plaintiff's appointment to the post of

Director of Corporate Planning was a permanent one. He said the same day the Plaintiff left the post of Director of Commercial Operations was the same day he was appointed to the Post of Director of Corporate Planning.

Dr. Reid said, "shortly after the Plaintiff's assumption of the new post, the Board based on policy guidelines from the Minister and Cabinet, and in order to effect an improvement in efficiencies in the organization, instituted certain changes. The board had found, after a number of analysis, some by internal staff, others by external management consultant (Price Waterhouse), that there was a significant number of areas, e.g., internal organisation of the NWC, the management of the various disciplines, and condition of plant that needed improvement. Dr. Reid testified that "the benchmark that hit us hardest was the way our human resources was deployed. We were spending 35 – 40% of income of NWC in wages, salary and the packages that went with them." In continuing to outline the conditions that existed at NWC, Dr. Reid testified that, "In addition to that problem, there were areas where although a superfluity of staff, there were gaps in the delivery of the products." He gave illustrations of such gaps occurring between the Commercial Operations Division and other divisions.

The Board addressed these problems by correcting the billing systems – in relation to staffing, an entire division was eliminated; some divisions were merged, new ones were created in an attempt to streamline the operations.

Dr. Reid said that the Plaintiff was not the only person that was "reengineered". In 1990 the number of persons who lost jobs as a result of "reengineering" was 800. Subsequent to 1990, about 1700 persons lost their jobs, bringing the total to 2,500. The financial efficiencies achieved brought about significant improvement. He testified that the post of Director of Commercial Operations survived the first phase of reengineering. It was eventually abolished in 1993, the year the incumbent Violet Reynolds retired.

Cross-examined, Dr. Reid said that there was a time lapse between the creation and the gazetting of a post. He was not aware that when Reynolds was appointed she was one month away from retirement, and she was succeeded by a Ms. Florence Logan. He said at the date of the abolition of the post, it had not been gazetted, and the proper and legal procedure was for gazetting of the post, and admitted candidly that "NWC did not have a very tidy Personnel Section." He said that in 1990 when massive computersation was being carried out, he was not aware that Mr. Duffus had a specialised knowledge in that area. He said that the Plaintiff was not an asset to the organisation and that if a post was abolished, it was not necessary for the incumbent to go, as he could be redeployed if he could assist the organisation. He does not recall if he considered the redeployment of Mr. Duffus.

Mr. Gawain Forbes, General Manager for Legal Affairs, testified that the NWC operations are governed by the NWC Act primarily.

He said he advised that a counterclaim be filed in respect of the action brought by the Plaintiff for the pension benefits the Plaintiff received. Cross-examined by Mr. Samuels he says that he is unaware that regulations have been made pursuant to section 12, dealing with appointment of officers. He was also unaware of regulations being made in respect of dismissals. He says there are regulations in place in respect of pensions and gratuities. He testified that the Board has passed a set of rules that are found in the Commission's Manual that deals with dismissal and employees grievances. These "set of rules" were not in evidence. Neither was the Court told by what procedure they came to be adapted.

Ms. Sharon Fender, with experience in Pensions and Salaries, testified that a commuted allowance is only paid on retirement. She gave the formula for the computation of the various pension entitlements. Looking at exhibit 12 she said that the Plaintiff received a lump sum and a reduced pension - a total of \$208,650. In addition, he has received from October 1990 to June 1993, monthly payments of \$2,250 per month, amounting to \$80,000. Thereafter from 15<sup>th</sup> July 1993 to August 1999, he was paid \$650 per month, that is a period of 74 months for a total of \$270,000. The total alimentary allowance received was \$350,000.00.

In cross-examination, she stated that the rules of the Civil Service were used in respect of terms and conditions of service. She said that, where there were no

rules, the Commission would look to the Civil Service Rules. The leave regulations are borrowed from the Civil Service.

### **The Law**

The National Water Commission is established and incorporated as a body corporate with power to sue and be sued in its name and to do all things necessary for the purpose of the Act (see s3 National Water Commission Act).

The functions of the National Water Commission are enumerated at S. 4 of the Act and may be summarised thus as (a) the preparation and submission of proposals for an economical water supply system, (b) preparation and submission for ministerial approval schemes for the development and supply of water in particular areas, (c) review the reliability and availability of water supply and rates charged and advise the Minister accordingly, (d) supply and improve water supply services throughout the island, (e) to maintain those supplies.

It is clear that the powers described in that section are conferred for the public purposes from which the Commission is not entitled to depart. If those powers are conferred, as in this case, by Parliament, with certain conditions necessary for their exercise, it is that those conditions must be satisfied. A departure there from will constitute an abuse of power.



### **Legality of the Abolition of Post**

s13(2) of the National Water Commission Act provides;

“All new posts, and any proposed variation in the salary of an existing post, shall be subject to the specific approval of the Minister.”

The National Water Commission (Pensions) Regulations, 1968 defines what constitutes a pensionable office at Section 2,

“In these Regulations –  
‘pensionable office’ means an office for which separate provision is made in the annual estimates of the Commission and which has been declared to be pensionable by resolution of the Commission approved by the Minister and notified in the Gazette.”

Compliance with this section is evidenced by a notification in the Jamaica Gazette - Proclamations, Rules and Regulations, as in this example, L/N 143 of 1979.

"It is hereby notified that the Minister has approved the Declaration, by resolution of the National Water Authority passed on June 27, 1979, of the offices set out in the Schedule to this notification to be pensionable offices for the purposes of the National Water Authority (pensions) Regulations, 1967, with effect from the respective dates set out in the Schedule.

### Schedule

OFFICE	Effective Date
General Manager	1.10.74
Director, Regional Liaison Services	1.4.79"

It is to be noticed that there is firstly required a resolution of the NWC, declaring the post to be pensionable, followed by an approval by the Minister then notification by publication in the Gazette.

This procedure is necessary because of the important implications it is likely to have on budget. A pensionable post has serious and far-reaching effects on the holders of such posts. Regulation 3)(1) Pensions Regulations prescribe;

“The Commissioner may, with the approval of the Minister, grant a pension, or other allowance to any person who, *immediately prior to retirement*, held a pensionable office in the service of the Commission.”

The would-be pensioner must have held a pensionable post immediately before retirement.

Alternatively, if the applicant for a pension was not in a pensionable post, then he must have been in a non-pensionable post on the appointed day, i.e. 28<sup>th</sup> of September 1967 and on the day of his retirement.

Regulation 4 provides;

“The Commission may, with the approval of the Minister, grant a pension, gratuity, or other allowances to any person who, **on the appointed day and upon**

**retirement**, is the holder of a non-pensionable office, etc.”

Regulation 2 defines thus;

“Appointed day' means the 28<sup>th</sup> September, 1967.”

Regulation 3(1) and regulation (4), provide the only lawful procedure for the payment of pensions to officers of the First Defendant. See *Gatherer v Gomez* (1992) 41 WIR 68 at page 75. Although the Plaintiff was granted a pension, such a grant was not permitted if the Plaintiff occupied the non-gazetted post of Director of Corporate Planning as alleged by the Defendants. The grant of a pension to the Plaintiff was therefore in breach of the regulations on the Defendant's case.

The post of Director of Corporate Planning was not gazetted. There is no evidence that it was declared pensionable by a resolution of the Commission and approved by the Minister and notified in the Gazette. The Chairman describes it as “an interim organisational structure”, not an approved budgetary structure. It therefore begs the question, which audit or analysis found it necessary to abolish this post in order to improve the efficiency of NWC's operation, as the Chairman's letter of 28<sup>th</sup> May 1990 explains. When was this audit or analysis done? Was it before the Plaintiff was “re-assigned” to it? If yes, why was he then re-assigned?

In those circumstances, the criticism of Counsel that this is a “dismissal masquerading as a retirement” would be pertinent. If the recommendation was

done after the assignment of the Plaintiff, was the Consultants advised that it was merely “interim”, and was not a burden on the NWC’S budget? Importantly, the interim status of the Director of Corporate Planning supports the Plaintiff’s contention that he was never appointed to that post. The Chairman letter of 28<sup>th</sup> May 1990 supports the Plaintiff’s evidence that his re-assignment would be temporary. It follows therefore that the Plaintiff’s substantive post would be as he alleged, i.e., the Director of Commercial Operations. And I so hold.

– **Conditions and terms of service**

The regulations make reference to the terms and conditions of service for agents and servants of the First Defendants in two areas.

(1) The first Schedule at Section 11 provides;

“The Commission may appoint and employ at remuneration and on such terms and conditions as it thinks fit, a Secretary and such officers, agents and servants as it considers necessary for the proper performance of its functions.”

(2) The First Schedule to the Act provides at s12;

“The Commission may, with the approval of the Minister, make regulations determining generally the conditions of service of officers and servants of the Commission and in particular, but without prejudice to the generality of the foregoing power, may make regulations relating to (a) the appointment, dismissal, discipline, hours of employment pay and leave of such officers or servants; (b) appeals by

such officers or servants against dismissal or other disciplinary measures;  
(c) the grant of pensions, gratuities and other benefits to or in respect of the service of such officers or servants;  
(d) the establishment and maintenance of sick funds, superannuation funds and provident funds, the contributions payable thereto and the benefits receivable therefrom.”

On what terms and conditions was the plaintiff appointed to the National Water Commission?

Dr. Reid states that “in relation to appointments of officers and servants of the Commission”, these were done by the Board at a certain level after consultation with the minister subject to *emanations from the Ministry of Public Service*, from Cabinet as to what level of staffing had to have prior approval.” He further said that the Civil Service Regulations did not govern the National Water Commission. Shown exhibit 15, he said he had formed the view that the post of Director of Corporate Planning was not a part of the establishment.

Mr. Forbes, General Manager for Legal Affairs, stated he was unaware of regulations made dealing with appointments or dismissal; there were regulations in respect of pensions. The Board has a set of rules found in the manual dealing with dismissals and grievances of employees. There is a heading “personnel policy”, under which appointments and dismissals were dealt with.

Ms. Sharon Fender, in cross-examination said the rules of the Civil Service are used in respect of terms and condition of service “where there were no rules in the Commission, we would look to the Civil Service”. She said the leave regulation is borrowed from the Civil Service Rules. The Staff Orders of the Civil Service are used as guidelines.

I was impressed with the evidence of Ms. Fender, her job description and experience. She had worked in the Human Resource Department, from 1977-1994. Her testimony supported the Plaintiff's evidence that the Civil Service Regulations were used at NWC. The Plaintiff had relied successfully on the Staff Orders in his application for free passages for himself and his family (ex.8). The Chairman relied on Staff Orders 5.32 (1) (b) to deny the Plaintiff's application for recreational leave (ex.15). The Plaintiff in his testimony said the terms of his service was covered by the Civil Service regulations.

The provisions of s12 were first enacted in 1967, and were retained in the Act after the amending legislation of number 26 of 1980.

On the evidence, the only regulations that have been made are those in relation to pension benefits. It is the evidence of Mr. Forbes that there exist a bundle of procedures in relation to staffing, but we were not pointed to any statutory authority for such a procedure. Neither have we been told what conditions exist to provide for appeals against dismissal as is mandated by s12 (b). In this case

the Plaintiff is claiming he has been wrongfully dismissed, and Parliament has mandated the making of rules to deal with dismissals from the establishment of the National Water Authority in 1967, the Commission has not seen it fit so to do.

This is more so alarming in light of the Learned Chief Justice's comments in 1984 where in the matter of R v the National Water Commission, ex parte Desmond Alexander Reid (1984), 21 JLR, 62- Smith C.J comments at page

"Paragraph 12 of the First Schedule expressly stipulates the means whereby the NWC may make provisions for exercising disciplinary control over its employees. This is by means of regulations approved by the Minister. Though not compelled to make such provisions, if the NWC elects to make them, it *must*, in my Judgment, *do so by regulations*. The provisions contained in the second part of the resolution are, therefore, ultra vires and void, having been made without legal authority."

The Chief Justice's comments were referring to disciplinary proceedings, but they are of equal weight to all the matters in paragraph 12 of the First Schedule.

The abolition of the post of Director of Corporate Planning was done pursuant to the National Water (Pensions) Regulations, 1967, s3(ii), where it is provided at

- (ii) The grant of Any such pension, gratuity or other allowance **shall be determined in accordance with the relevant provisions of the Pensions (Parochial Officers) Act, etc.**
- (iii) The Pensions (Parochial Officers) Act at Section 7 provides;
  - (1) Subject to subsection (3), no pension, gratuity, or other allowance, shall be granted under this Act to any officer except

on his retirement from the parochial service in one of the following cases -:

- (a)
- (b) on abolition of his office;
- (c) on compulsory retirement for the purpose of facilitating improvement in the organisation of the department of the Parish Council to which he belongs, by which greater efficiency or economy may be effected.

Although the Statute provides for the retiring of a holder of a pensionable post for either of the reasons of (i) abolition (ii) improvement of efficiencies, it is clear that the reason given for the retirement of the Plaintiff is the abolishment of the post of Director of Corporate Planning. Having decided that the post must be abolished, the severance is swift and uncompromising. The Chairman writes "...your position as Director, Corporate Planning has been abolished. Consequently, you are required to proceed on 105 days pre-retirement leave from June 1, 1990, at the end of which you will be retired from the service of the Commission. Attached please find a cheque...." It appears that the rules of the Commission made no express provision for the procedure to be implemented in the selection of employees where several employees have similar posts, and it becomes necessary to bring about premature retirement of some of their number. If such rules exist, there was no evidence that they were applied in the case of the Plaintiff. These rules are a feature of the conditions of service of the Civil Service



Regulations when the question, the abolishment of post arises, which Ms. Fender's evidence is, that these Regulations are used in the absence of Rules in the N.W.C Pension Regulations.

The Public Service Regulations 25 (1) provides;

“Where a post (being one of a number of like posts) has been abolished but one or more than one of such posts remains, the Permanent Secretary or Head of Department shall—

- (a) if the post is one in respect of which the power to appoint has been delegated to such Permanent Secretary or Head of Department, *determine which substantive holder of such post shall have his appointment terminated; and*
- (b) in any other case submit to the Chief Personnel Officer for consideration by the Commission, a report thereon containing his recommendation, *with reasons therefor, as to which substantive holder of such post ought to have his appointment terminated; and the Commission shall make such recommendation thereon to the Governor General as it may think proper (including if it thinks fit a recommendation that the officer concerned be transferred to another post not lower in status than that which has been abolished).*

(2) Paragraph (1) shall apply in relation to the termination of appointments for the purpose of facilitating improvement in the organization of a Ministry or Department in order to effect greater efficiency or economy.”

The safeguard afforded by the Public Service Regulations to the public servant and which is of widespread practice in industrial relations, was to cause the Board to *determine* which substantive holder of such post ought to have his appointment terminated. This is a crucial consideration in the instant case, because Dr. Reid had testified that there was a great deal of duplication of posts. Moreover, the evidence reveals that Violet Reynolds and her successor in office, Florence Logan, occupied *like posts* as the Plaintiff. Had the procedure mandated by the Civil Service Rules been implemented, there would be a selection process. There is no evidence before this Court that an inquiry was made by the Commission to determine which substantive holder of such posts should have his/her appointment terminated. This is particularly so, because the Plaintiff had undergone a course of specialised training at the direction of the Commission. The Chairman was unaware that the Plaintiff had pursued this specialised training. He was similarly unaware that the Plaintiff had an upper second honours degree in management studies. He was unaware if the person who had replaced the Plaintiff in the post of Director of Commercial Operations had a university degree and that she was only one month removed from retirement. Albeit Dr. Reid had said that he had not looked at the relative qualifications. He looked at the attributes the person had to run that important position. He was unaware that the Managing Director had selected the Plaintiff to undertake special duties on behalf of the organisation. He

did not know whether a performance evaluation was done in respect of Mr. Duffus and admitted candidly that the Personnel Section was “not very tidy”. The Court is loathe to second guess executive decisions, but looks askance at the procedure in light of breaches of the statutory guidelines.

In the absence of evaluation reports on the Plaintiff and the Chairman’s apparent limited knowledge of the Plaintiff’s performance, the question must be asked, what are the relevant attributes that the Chairman would have considered?

As we have seen, Section 11 of the First Schedule allows the Commission to make such terms and condition as it thinks fit for appointment of officers or servants. This does not allow the Commission an unfettered discretion.

In Roberts v Hopwood (1925) A.C. 578, a borough council had power to “employ...such...servants may allow to such...servants such wages as...*(the council) may think fit.*” The House of Lords held – that the discretion conferred upon the council by the statute must be exercised reasonably, and that the fixing by the council of an arbitrary sum for wages without *regard for the existing labour conditions was not an exercise of that discretion.* Lord Wrenbury said at page 613;

‘A discretion does not empower a man to do what he likes but what he ought. In other words, he must, by use of his reason ascertain and follow the course which reason directs. He must act reasonably.’

The Plaintiff's unquestioned testimony was that he understood that the Civil Service Rules governed his contract of employment with NWC. The witness, Fender, has testified that where there is a gap in NWC's rules, the Public Service Rules are used. I find that rules provided by Public Service Regulations s25(1) were a part of the Plaintiff's condition of service.

Even if the Public Service Regulations 25(1) were not a part of the Plaintiff's condition and terms of service, they would be incorporated to give efficacy as the parties must have intended.

*In the Worker and the Law, Second Edition* by K.W. Wedderburn, the learned writer under the rubric, implied obligations in the contract, at page 95.

As we have seen, the written particulars are, however, not conclusive; and the problems of real life are always sufficiently unpredictable to bring to light gaps in the express terms of any contract. In such a case, the Court can imply a term for;

“It is well recognised that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that it goes without saying some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended.

But, of course, the parties have usually not considered the matter at all. That is why there is a gap in the terms expressly agreed.”

Lord Wright in Luxor Ltd. v Cooper [1941] A.C. 108 at page 137.

The purported termination of the Plaintiff's appointment on the ground of abolishment of post was wrong. Even if there were statutory authority for abolishing the post of Director of Corporate Planning, and I find there was none; the pre-mature retirement of the Plaintiff was without statutory authority and is therefore unlawful. Further, the retirement was done in disregard of the contractual arrangements between the parties. In *Principles of Labour Law* by Rideouts – Fifth Edition, Sweet & Maxwell, 1989 at page 192.

“There seems little reason to doubt that both industrial tribunals and courts begin with an assumption that it must be open to an employer to dismiss for redundancy, provided that he does so in a reasonable manner either hallowed by good industrial relations practice or a practice in accordance there with. It may still be questioned, however, whether it was fair to choose a particular complainant.... *Procedural defects, and particularly absence of consultation, may also render dismissal, particularly selective dismissal, for redundancy unfair.*” (Emphasis mine)

I hold that the Plaintiff was wrongfully dismissed.

**Is the Plaintiff's claim Statute-barred?**

The Defendant has claimed that the action of the Plaintiff is statute barred pursuant to the Public Authorities Protection Act. This has come about because these proceedings were not instituted within the one-year limitation period prescribed for acts done in pursuance of the public authorities lawful duty. There was no challenge to the Defendant's assertion that the First Defendant was a public

Authority for the purpose of the Public Authorities Act. It appears to me that the actions of the Defendants cannot be said to have been done in execution of the purpose of the Act. The post which the Defendant last occupied was quite clearly not a pensionable post. The Chairman acknowledged the interim nature of the post in his letter of 16<sup>th</sup> October, 1990 before the institution of the proceedings. He was therefore imputed with knowledge that his actions were ultra vires the relevant pensions rules. He could not have honestly believed that they were sanctioned by some authority. Despite this knowledge, he persisted with the unlawful retirement of the Plaintiff. The First Defendant persisted with the retirement of the Plaintiff, although it was clear that he occupied no post that was being abolished, thus leaving the Court to draw the inference that the Defendant's actions were aimed at the Defendant and not at his post, that the relevant factors of his qualifications, e.g., that he had been singled out for a special assignment were not considered. Mr. Samuels, in his written submissions addressed the matter this way, "Indeed, when one looks at the letter written by Dr. Wayne Reid confessing that Duffus was transferred to a non-existing position at NWC" (Ex.15). The Defendants fit squarely into the observations of the Defendants in the case of Campbell J when at page 22 the learned Chief Justice said; -

**"The employees here allege that theirs were cases of wrongful dismissals masqueraded as dismissals for redundancy"**

The Plaintiff and his attorneys had written several letters to the Defendants before initiating action. The continuation of the retirement of the Plaintiff in spite of the acknowledgement contained in the Chairman's letter of 28<sup>th</sup> May, 1990 (Ex. 5) constitute a pretended use of the pension rules. In Bryan v Lindo (1986) 44 WIR 295 at page 304, Carberry J.A. said;

"The Defendants pleaded the Public Authorities Protection Act. In his judgement, Scrutton L.J. observed (at page 427);

*'To require the application of the Public Authorities Protection Act, the Acts must be Acts not authorised by any statute or legal power. It would appear, therefore, if illegal Acts are really done from some motive other than an honest desire to execute the statutory or legal duty and an honest belief that they are justified by statutory or other legal authority; if they are done by a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by statutory authority, the Public Authorities Protection Act is no defence, for the Acts complained of are not done in intended execution of a statute, but only in pretended execution thereof (emphasis supplied).<sup>2</sup>'*

The Defendant's actions are not protected by the Act and, therefore, not protected by the limitation period. See also Gordon (Lemuel) v Attorney General (1997) 44 WIR 280 at page 283 (b-d).

To my mind The Defendants' argument in respect of estoppel is without merit. The representation by the Plaintiff, if representation it is, ought not to have caused the Defendants to alter their position, because the Plaintiff was steadfastly maintaining his right to be reverted to his substantial post of Director of Commercial Operations.

The Defendants' counter claim fails. The First Defendant paid the sum claimed acting outwith their statutory powers. The Plaintiff has been prevented from pursuing more expeditious means of challenging the Defendants actions because of the First Defendant's failure to enact the necessary guidelines to facilitate that process.

### **Damages**

The Plaintiff claim is for loss of income from the 30<sup>th</sup> October 1990, and continuing. The claim was totaled at \$3,530,447.43 as of 9<sup>th</sup> March 1992, the date of the filing of the Writ. The essence of the Plaintiff's claim is that the Defendants' act of repudiation, did not have the effect of terminating the Plaintiff's contract, implicit in the claim is the contention that the Plaintiff has not accepted the



Defendants' repudiation, therefore, the contract is still subsisting. The Defendants' contend that the Plaintiff's letter undated, (exhibit 5) is confirmation of the First Defendant's letter of 28<sup>th</sup> April, 1990, and cites R v Minister of Labour and Employment, the Industrial Disputes Tribunal, Devon Barrett et al Ex Parte West Indies Yeast Co. Ltd. (1985) 22 J.L.R. 407, where Theobalds J. states at pages 413 i-414a;

"Once you accept payment, then you are accepting the terms on which such payment is made or offered and the contract of employment is legally brought to an end"

Additionally, the Defendants list Exhibits 8, 12, 13 and 19 as evidence that the Plaintiff has no entitlement to his post.

In Gunton v Richmond-upon-Thames L.B.C. (1981) CH.448, an appeal from the decision of a High Court Judge granting declaratory relief to the Plaintiff in relation to his contract of service with the Defendant's Council on the basis that the decision of the High Court was ineffective lawfully to determine the Plaintiff's contract and the Court ordered an inquiry on the basis that *the Plaintiff was entitled to remain until retirement age unless liable to dismissal or redundancy under the Defendant's disciplinary procedure.* The Court of Appeal held that an unlawful repudiation of a contract of service which was not accepted by the innocent party did not result in the automatic termination of the contract.

Buckley L. J. at page 467;

"It is for the innocent party to elect whether he wishes to be so relieved, which he does by accepting the repudiatory act of the guilty party, as a repudiation of his the guilty party's obligations under the contract. In those circumstances the innocent party may treat the guilty party as having committed an entire breach of the contract notwithstanding that the time for performance has not yet arrived."

On these facts, I find that Mr. Duffus has accepted the Defendants' repudiation, thereby bringing the contract to an end. I ask myself, if the Plaintiff had not accepted the termination of the contract, what was is explanation for seeking alternative employment? The basis of the Plaintiff's claim is therefore not for remunerations and the relevant benefits, but for damages.

In Guntons case, (Supra) Buckley L. J., at page 463, aligned himself with the views of the Judicial Committee, in Frances v Kuala Lumpur Councilors (1962) 1 W.L.R.1411, where at page 1417 it was said;

"Their Lordships consider that it is beyond doubt that on October 1, 1957 there was de facto a dismissal of the appellant by his employers, the respondents. On that date he was excluded from the Council's premises. Since then he has not done any work for the Council. In all these circumstances, it seems to their Lordships that the appellant must be treated as having been wrongly dismissed on October 1, 1957, and that his remedy lies in a claim for damages. It would be wholly unreal to accede to the contention that since October 1, 1957 he had continued to be, and still continues to be in the employment of the respondents."

It would no less unreal, in the circumstances of this case, to find that the Plaintiff is still employed to the First Defendant. Further on at page 1417 – 1418, in Francis v. Kulu Lampur, Councilors (Supra):

"In their Lordship's view, when there has been a purported termination of a contract of service, a declaration to the effect that the contract still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made, and its making will normally be in the discretion of the court."

The consequence of the Plaintiff being bound to claim damages, is that the Plaintiff could not maintain an action in debt for remuneration in respect of any period after the wrongful dismissal, and he comes under an immediate duty to mitigate his losses (see Buckley L.J pg. 468). How then are the damages to be assessed?

Buckley L.J states the principle on which the damages are assessed at page 469;

"Where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. The date the contract would have come to an end, however, must be ascertained on the assumption *that the employer would have exercised any power he may have had to bring the contract to an end in a way most beneficial to himself*; that is to say, he would have determined the contract at the earliest date at which he could properly do so; see

McGregor on Damages, 13<sup>th</sup> ed. (1972) paras 884, 886 and 888."

I find that the Plaintiff made substantial efforts to obtain a job, but failed. It is the evidence before me that his post, that of Director of Commercial Operations, was eventually abolished in 1993. That constitutes the earliest opportunity for the First Defendant to properly determine the Plaintiff's contract. Brightman L.J. says at page 473 Gunton;

"The damages recoverable.....are the moneys needed to compensate the plaintiff for his net loss of salary or wages during the period for which the defendant was bound by his contract to employ the plaintiff."

The Plaintiff is entitled to damages in a sum equivalent to the salary he would have earned for the period from the 30<sup>th</sup> October, 1990 to 31<sup>st</sup> December 1993. This sum to include all allowances that he was in receipt of up to his unlawful retirement. Including a sum to represent the loss of use of any motor vehicle he was legally entitled to. The Court orders that he be compensated in lieu of all vacation leave for which he would have been entitled had he been at work during the said period. His retirement will be computed on the basis that the last post he held was that of Director of Commercial Operations, up to the 31<sup>st</sup> December 1993. The funds disbursed to the Plaintiff on his unlawful retirement will be offset from the damages due to the Plaintiff. Cost to the Plaintiff on the claim and counterclaim.