

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2023/0009

BETWEEN:

ANGELA ESTWICK

Appellant

and

**[1] THE DEPUTY GOVERNOR
[2] THE ATTORNEY GENERAL OF MONTSERRAT**

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Eddy D. Ventose
The Hon. Mr. Gerard St. C Farara

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Jean Dyer for the Appellant
Ms. Renee Morgan for the Respondents

2024: November 27;
2025: April 10.

Civil Appeal – Entitlement to pension benefits - Pensions Act of Montserrat – Voluntary retirement – Transitional provisions – Statutory interpretation – Section 21 of the Pensions Act 2011 – Whether section 21 of the Pensions Act 2011 has the effect of preserving the application section 6(1)(h) of the Pensions Act 1947 – Whether applying the strict literal interpretation of section 21 would cause an absurd and unfair result – Whether the appellant was entitled to early retirement under the Pensions Act 2011 – Regulation 33 of the Public Service Regulations – Whether appellant needed permission of the Deputy Governor to voluntary retire – Whether the appellant had “resigned to retire” without due notice thereby forfeiting her accumulated leave days and owes the Government one month’s salary -

Whether there were disciplinary proceedings pending against the appellant when she terminated her employment – Legitimate expectations – Whether the Government of Montserrat had by practice and/or promise committed itself to a consistent practice that continued under the Pensions Act 2011 of allowing pensionable officers who had served for 20 or more years but had not attained the age of 55 to retire pursuant to section 6(1)(h) of the Pensions Act 1947 with an immediate gratuity and pension in the same manner under the Pensions Act 1947 – Whether the Deputy Governor acted in excess of her powers in withholding the appellant's pension benefits as she did not consult the Public Service Commission as mandated by section 88(1) of the Constitution of Montserrat – Early exit benefit – Whether the judge was wrong to consider early exit under section 13 of the Pensions Act 2011 when the appellant had not pled any such entitlement

The appellant, who was born in 1970, had been employed in the permanent pensionable establishment of the Government of Montserrat (the "Government") from 1st December 1987 until 12th November 2018, when she purportedly voluntarily retired pursuant to section 21 of the Pensions Act (the "Pensions Act 2011"). In or about 2018, the appellant applied for and was offered a position at the Eastern Caribbean Central Bank (the "ECCB"). Thereafter the appellant informed the Premier and the Financial Secretary of her intention to voluntarily retire. The appellant also notified the Government through the Chief Human Resources Officer (the "CHRO") via letter dated 3rd October 2018 of her intention to voluntarily retire pursuant to the 'transitional provisions' of section 21 of the Pensions Act 2011 and requested permission to take her outstanding 70 days accrued vacation leave prior to her retirement on 8th October 2018. The appellant noted that, having commenced working in the public service since 1987, she would have completed just over 28 years of service at that date.

Having not received a reply to her letter dated 3rd October 2018, and her numerous follow up emails, the appellant wrote a second letter on 12th November 2018 to the CHRO informing the CHRO that since she had not received a reply from the Deputy Governor, she had elected to voluntarily retire 'with immediate effect' pursuant to the 'transitional provisions' of section 21 of the Pensions Act 2011 and requested payment in lieu of accrued vacation leave as of 12th November 2018. The CHRO responded to the appellant on 30th November 2018 via letter with the heading 'Resignation from the Public Service', informing the appellant that the Deputy Governor had accepted her resignation from the public service and confirmed that her employment with the public service came to an end on 12th November 2018. The CHRO also stated in the letter that the appellant had failed to give three (3) months' notice (exclusive of leave) as required by General Order 701(1) and consequently the appellant had forfeited all her vacation leave entitlement and was also liable to the Government for a month salary in lieu of notice.

Prior to this, the Public Service Commission (the "Commission") had issued a report on 1st October 2018 in relation to disciplinary proceedings commenced against the appellant under regulation 48 of the Public Service Regulations. The Acting Deputy Governor, via written submission to the Commission dated 8th December 2017, alleged that the appellant had 'left the country without permission and proceeded on leave without the approval of the acting Deputy Governor'. The Commission found that the appellant had sought to comply with General Order 604(1) by applying to the Deputy Governor for vacation leave. However, the appellant's application was unfortunately denied by the Deputy Governor although she was

aware of the appellant's challenging work environment. The Commission held that the actions of the appellant could reasonably be attributed to the sustained and multiple challenges of her work environment, exacerbated by repeated deferrals of vacation leave which denied her periods of respite and rest. The Commission noted that this situation had existed for an unacceptably prolonged period. The Commission also held that the appellant provided a reasoned defence to the charges laid against her.

The appellant, through her counsel, sent pre-action letters to the Governor and the CHRO concerning her pension options and quantum relative to her pension entitlements and accumulated leave, including interest on her pension entitlements. In response, the appellant alleged that she was told that she had resigned on 12th November 2018 since she had not received permission to retire or settled her pension benefits. The appellant also alleged that the Deputy Governor had failed and/or refused to pay the appellant her pension benefits and/or accrued vacation on the basis that she had resigned without giving the requisite notice and as such had forfeited same.

The appellant stated that, by virtue of section 6(1)(h) of the Pensions Act 1947 (the "Pensions Act 1947"), she was entitled to the payment of a non-contributory pension from the Government and to voluntarily retire before attaining the age of 55 years because she had completed more than 20 years of continuous service before the 1947 Act was repealed and replaced by the Pensions Act 2011. The appellant alleged that her right to receive a pension and gratuity and to voluntarily retire before age 55 under the Pensions Act 1947 were (or were to be) preserved by virtue of the 'transitional provisions' of section 21 of the Pensions Act 2011. It was not disputed between the parties that at the time the Pensions Act 1947 was repealed and replaced by the Pensions Act 2011, the appellant had already completed 22½ years of continuous pensionable service.

The appellant sought and obtained leave to file an application for judicial review which was filed on 28th October 2021 and amended on 7th July 2022. The judicial review application came on for hearing before the learned trial judge on 3rd April 2023 and he handed down his written judgment on 21st July 2023. The judge held, inter alia, that: since the appellant was neither aged 55 nor with 30 years' service, she was not entitled to early retirement pursuant to section 21 of the Pensions Act 2011; the literal rule applies to section 21 of the Pensions Act 2011 since the words are clear and there is no need to substitute the word 'before' for the word 'in' as it appears in section 21 of the Pensions Act 2011; the appellant was entitled to 'early exit' under section 13 of the Pensions Act 2011; by retiring the appellant resigned, and by resigning the appellant retired; to 'retire' under either sections 8 or 13 of the Pensions Act 2011, permission is required under regulation 33 of the Public Service Regulations which has to be read as adapting to the evolution of pensions benefits beyond 1980 and beyond merely having reached normal retirement age; although the appellant resigned abruptly, which was accepted, and therefore she retired, absent any good reason not, an early exit benefit was payable to her; the appellant, by resigning without giving three (3) months' notice, had lost the accumulated leave that she claimed.

The appellant filed her notice of appeal on 1st September 2023 which contained seven grounds of appeal with many sub-grounds totaling approximately twenty (20) in all. The following issues arise in respect of the several grounds of appeal: (1) whether the learned

trial judge was correct in law when he held that the appellant was not eligible for early retirement under section 8 of the Pensions Act 2011; (2) whether the learned trial judge was correct in his interpretation of section 21 of the Pensions Act 2011; (3) whether the learned trial judge was correct in finding that permission is required under regulation 33 of the Public Service Regulations to retire early by reason of age or years of service; (4) whether the learned trial judge was correct in finding that the appellant “resigned to retire” without due notice and as such forfeited her 70 days’ leave and owes the Government a month’s salary; (5) whether the Deputy Governor acted in excess of her powers in withholding the appellant’s pension benefits as she did not consult the Public Service Commission as mandated by section 88(1) of the Constitution of Montserrat; and (6) whether the Government had by practice and/or promise committed itself to a consistent practice that continued under the Pensions Act 2011 of allowing pensionable officers who had served for 20 or more years but had not attained the age of 55 to retire pursuant to section 6(1)(h) of the Pensions Act 1947 with an immediate gratuity and pension.

The respondent on 19th September 2023 filed a counter notice of appeal. The issues that arise in respect of the counter notice of appeal are as follows: (1) whether the appellant could claim any pension benefits after the termination of her employment with the Government; (2) whether there were any pending disciplinary proceedings against the appellant when she terminated her employment with the Government; and (3) whether the trial judge erred in awarding the appellant interest on the early exit benefits.

Held: allowing the appeal in part against the decision of the learned trial judge, dismissing the counter notice of appeal, setting aside the orders made at paragraph [70] of the judgment in the court below and making the orders at paragraph 89 of this judgment, that:

1. Section 21 of the Pensions Act 2011 is a transitional provision as its overall heading makes clear. It was meant to make special provision for persons, namely the protection of pensionable officers with twenty years continuous service who had not yet reached the age of 55, who would have qualified for pension benefits under section 6(1)(h) of the Pensions Act 1947. This is made clear from an examination of the heading of section 21 as well as the explanatory memorandum that accompanied the Pensions Bill. Headings and explanatory notes are relevant to the extent that they can assist with understanding the context of or the mischief at which legislation, such as section 21, is aimed. The learned trial judge was therefore wrong not to construe the explanatory memorandum as providing appropriate and relevant context for section 21 or assisting with ascertaining the mischief to which it is aimed.

Britnell v Secretary of State for Social Security [1991] 1 WLR 198 applied; **Bennion, Bailey and Norbury on Statutory Interpretation** 8th Edition, 2020 considered; **Regina v Montila and others** [2004] 1 WLR 3141 applied; **Project Blue Ltd (formerly Project Blue (Guernsey) Ltd) v Revenue and Customs Commissioners** [2018] 1 WLR 3169 considered; **Regina (Westminster City Council) v National Asylum Support Service** [2002] 1 WLR 2956 applied; **Flora v Wakom (Heathrow) Ltd** [2007] 1 WLR 482 applied.

2. As to the interpretation of section 21 of the Pensions Act 2011, the question is whether the reference to an existing officer born 'in 1961' properly reflects the purpose of section 21. Having determined that in enacting section 21 of the Pensions Act 2011, Parliament intended to protect pensionable officers to whom section 6(1)(h) of the Pensions Act 1947 applies from the application of the provisions of the Pensions Act 2011, it was an obvious mistake by Parliament in including the words 'in 1961' in section 21 of the Pensions Act 2011. If section 21 were to be read as is, it would have the result that such a pensionable officer would have to wait until 60 years of age to be able to take normal retirement and would have to serve for 30 years to obtain any pension benefit. This would defeat a claim under section 6(1)(h) of the Pensions Act 1947 which applies to a person who has not yet reached the age of 55 and who had acquired 20 years' continuous service. In summary, any protection that section 21 was intended to provide to such pensionable officers from the new pension regime established by the Pensions Act 2011 would be eviscerated and eligible officers would suffer the harm or injury that section 21 of the Pensions Act 2011 was intended to shield them from, and consequently they would not be able to continue to benefit from section 6(1)(h) of the Pensions Act 1947. To correct this error, the word 'in' appearing before '1961' as it appears in section 21 of the Pensions Act 2011 should be deleted and substituted with the word 'before'.

Bank of Nova Scotia v Comptroller of Inland Revenue (SLUHCVP2022/0007 delivered 24th May 2024, unreported) followed.

3. The Court having accepted that it is correct as a matter of principle and of statutory interpretation for section 21 to be amended by replacing the word 'in' as it appears before '1961' with the word 'before', the learned trial judge erred in finding that the appellant was not entitled to early retirement under the Pensions Act 2011. Albeit, the appellant's eligibility for early retirement accrued pursuant to section 21 and not section 8 of the Pensions Act 2011. Under section 8 of the Pensions Act 2011 the appellant would not be eligible for a pension benefit if only that section were applied to her case. Consequently, the appellant is entitled to a declaration that she is entitled to be paid a gratuity and pension in accordance with the Pensions Act 2011.
4. Pursuant to regulation 33 of the Public Service Regulations an officer may at any time after he or she has attained the minimum age specified in the pensions law for retirement, apply to the Deputy Governor for permission to retire and state the grounds on which his or her application for retirement is based. Regulation 33, however, is plainly not applicable to pensionable officers to which section 21 of the Pensions Act 2011 applies. There is no minimum age requirement under section 6(1)(h) of the Pensions Act 1947 which an eligible officer would have to attain before being able to retire pursuant to section 21 of the Pensions Act 2011. Consequently, the permission of the Deputy Governor to retire is not required in respect of persons to whom section 21 of the Pensions Act 2011 applies.
5. Under section 21 a pensionable officer to whom the section applies may elect to receive pensions benefits under Part 2 of the Pensions Act 2011. Part 2, section 6

states that a pensionable officer is eligible for pension benefits upon: a) normal retirement (section 7); b) early retirement (section 8); c) retirement on medical grounds (section 9); and d) termination to the extent that the public service law provides that he is so eligible. None of the other criteria apply to the appellant except section 6(d), i.e. termination of employment. The appellant's eligibility for pension according to the law is section 21 of the Pensions Act 2011. Regulation 31(a)(vi) states that one of the ways in which the services of an officer who is confirmed in a permanent appointment may be terminated, is on resignation. Therefore, the appellant's letter dated 12th November 2018 in which she elected to take voluntary retirement with immediate effect can only be construed as a termination of her employment by resignation. It follows that pursuant to regulation 32 the appellant had to give due notice in writing of her intention to resign to the Deputy Governor. General Orders 701(2) and 701(4) also state that this notice was to be not less than three months' notice (exclusive of leave) in writing and that the officer 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, and that in such cases the officer will forfeit all leave for which he might be eligible. The learned trial judge was correct in finding that the appellant "resigned to retire" without due notice and as such forfeited her 70 days' leave and owes the Government a month's salary.

6. A distinction must be made between the concepts of retirement and resignation because they are treated differently in the Public Service Regulations. Resignation is where a person chooses voluntarily to terminate their employment. Retirement usually occurs at an age stipulated by the employer or legislation. Once a person reaches that age, the employee's employment comes to a natural end. An employer may also stipulate other requirements that an employee must satisfy for them to 'retire'. In such cases, such as those under section 6(1)(h) of the Pensions Act 1947, the employee is not obligated to 'retire' but if he or she wishes they have the option of so doing. It is clear that the appellant 'retired' since she met the requirements for so doing and terminated her employment with the Government by 'resigning'. The learned trial judge was not correct in holding that the appellant had to resign to obtain the benefit of early retirement. A person does not lose their pension benefits by resigning. A resignation, whether it complies with the notice period or other requirements of regulation 32, is a termination of employment. An employee whose employment is terminated is still entitled to pensions benefits in accordance with section 6(d) of the Pensions Act 2011. Resignation was merely a lawful option available to the appellant.
7. When disciplinary proceedings were instituted against the appellant under regulation 48 of the Public Service Regulations, it was the duty of the authorised officer to conduct an inquiry into the matter and if after the inquiry the authorised officer was of the opinion that the alleged misconduct was proved, the officer may recommend to the Deputy Governor such punishment other than dismissal, as may seem just. Therefore, the authorized officer can either find that the alleged misconduct was proved or not proved. In this case, since the Commission did not find the charges proved against the appellant and made no recommendations in respect of any punishment of the appellant, there was nothing else for the Governor

to do on receiving the report of the Commission. Consequently, there were no pending disciplinary proceedings against the appellant when she applied to retire on 3rd October 2018 or when she resigned on 12th November 2018. The learned trial judge was correct in not considering this issue since there were no open disciplinary proceedings against the appellant that would warrant the refusal of her resignation in accordance with General Order 702(c) which provides that notice of resignation may be refused if disciplinary proceedings against the officer are contemplated or pending.

8. The doctrine of legitimate expectations does not arise on the facts of this case. Legitimate expectations begin where rights end; so, having found that the appellant was eligible for pension benefits pursuant to section 21 of the Pensions Act 2011, it is not necessary to decide this issue. Second, it is doubtful that there was any established practice by the Government of allowing pensionable officers to retire pursuant to section 6(1)(h) of the Pensions Act 1947 with an immediate gratuity and a deferred pension as they did under the 1947 Act. Third, the personnel files referred to by the appellant in the court below do not establish any consistent practice. Fourth, the eligibility to a pension is to be determined based on the interpretation of the Pensions Act 2011. It is unlikely that any such legitimate expectation could arise (from the actions of the Executive) which would have the effect of supplementing or overriding the will of Parliament expressed in the provisions of the Pensions Act 2011. This ground of appeal therefore has no merit.
9. As to whether the Deputy Governor acted in excess of her powers in withholding the appellant's pension benefits as she did not consult the Commission as mandated by section 88(1) of the Constitution, the Court is of the view that the Deputy Governor was under the mistaken belief that the appellant was not entitled to any pension benefits under section 21 of the Pensions Act 2011 based on advice she received from the Attorney General (Ag.). The Deputy Governor was therefore not withholding a pension from the appellant.
10. The learned trial judge was wrong to decide the appellant's case on a section in the Pensions Act 2011 without first inviting the parties to file submissions or to otherwise comment thereon. The appellant did not plead any such entitlement to early exit under section 13 of the Pensions Act 2011 and had plainly grounded her entitlement to pension benefits under section 21 of the Pensions Act 2011. Given the findings above and the entitlement of the appellant to claim pension benefits under section 21 of the Pensions Act 2011, that order of the trial judge ought to be set aside.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal against the decision of the learned trial judge dated 21st July 2023 in which he held that the appellant was not eligible for early retirement

but was eligible for early exit thereby refusing the reliefs sought by the appellant in her application for judicial review.

The Factual Background

- [2] The facts underlying this appeal are largely not in dispute and are reproduced in part from the decision of the learned trial judge and the evidence of the parties. The appellant, Ms. Angela Estwick, was born in Montserrat on 16th July 1970. She was employed in the permanent pensionable establishment of the Government of Montserrat (the “Government”) from 1st December 1987 to 12th November 2018 when she purportedly voluntarily retired pursuant to section 21 of the **Pensions Act**¹ (the “**Pensions Act 2011**”). From 1987 she worked as a statistician and was confirmed in that position in September 1995. The appellant was appointed to the post of Director of Development, Planning and Policy Unit in September 2010 and held that post until she was no longer employed with the Government in 2018.
- [3] In or about September 2018, the appellant applied for a position at the Eastern Caribbean Central Bank (the “ECCB”). The ECCB sought the approval of the Government to employ the appellant through her immediate supervisor, the Financial Secretary, Mr. Colin Owen. Approval was subsequently granted by the Premier of Montserrat and the Financial Secretary and ECCB thereafter made a formal offer of employment to the appellant. The appellant had by that time completed almost 28 years of continuous pensionable service with the Government.
- [4] The appellant informed the Premier and the Financial Secretary of her intention to voluntarily retire pursuant to the ‘transitional provisions’ of section 21 of the **Pensions Act 2011** and requested permission to take her outstanding 70 days accrued vacation leave. The appellant notified the Government through the Chief Human Resources Officer (the “CHRO”) via letter dated 3rd October 2018 of her voluntary retirement under section 21 of the **Pensions Act 2011** and requested that her accrued vacation commence prior to her retirement on 8th October 2018. The

¹ Cap 06.07 of the Revised Laws of Montserrat.

appellant noted that, having commenced working in the public service since 1987, she would have completed just over 28 years of service at that date. The appellant stated that the Financial Secretary signed the leave form that was submitted by the appellant to the CHRO and that she received no response to her letter or formal acknowledgment of her voluntary retirement.

- [5] The Public Service Commission (the “Commission”) issued a report on 1st October 2018. The Acting Deputy Governor, via written submission dated 8th December 2017 to the Commission, alleged that the appellant had ‘left the country without permission and proceeded on leave without the approval of the acting Deputy Governor’. In accordance with regulation 37(2) of the **Public Service Regulations**,² the Commission determined that a disciplinary hearing should be convened to consider the disciplinary charge against the appellant. The Commission subsequently instituted ‘Proceedings for misconduct not warranting dismissal of officer’ in accordance with regulation 48 of the **Public Service Regulations**. The appellant was notified and given an opportunity to make representations to the Commission. She was represented at the hearing by her legal counsel. The hearing before the Commission took place on 27th September 2018. The Commission found that the appellant had sought to comply with General Order 604(1) by applying to the Deputy Governor for vacation leave. According to the Commission, the appellant’s application was unfortunately denied by the Deputy Governor although she was aware of the appellant’s challenging work environment. The Commission held that the actions of the appellant could reasonably be attributed to the sustained and multiple challenges of her work environment, exacerbated by repeated deferrals of vacation leave which denied her periods of respite and rest. The Commission also noted that this situation had existed for an unacceptably prolonged period. The Commission also held that the appellant provided a reasoned defence to the charges laid against her.

² Cap 1.06 of the Revised Laws of Montserrat.

- [6] It is to be noted that on 11th March 2019, while the appellant was no longer employed by the Government, she received a letter from the CHRO noting that the Governor found that the appellant's action in proceeding from sick leave to a "two week foreign holiday without authority was a clear and significant breach of the General Orders and fell short of the standards expected of Public Officers, especially at the senior level". The letter continued that since the appellant had left the public service the Governor felt it would not be appropriate to apply any of the financial disciplinary penalties outlined in the **Public Service Act** and the **Public Service Regulations**, but that the Governor had decided that the appellant's breach of discipline must be recorded. The letter continued that it was a formal reprimand to the appellant for breach by her of the General Orders in taking vacation leave without authorization in November 2017 and that the letter will be placed on her public service record.
- [7] The appellant stated that she was advised by her immediate supervisor, the Financial Secretary, to retire at the end of October 2018 and accept payment in lieu of her accumulated vacation leave. The appellant also stated that Financial Secretary accepted responsibility to communicate this agreed course of action to the Governor. The Financial Secretary, however, wrote to the Deputy Governor and the CHRO on 23rd October 2018 via email and informed them that the appellant raised the following two concerns which he had undertaken to bring to their attention: (1) that the appellant "is asking for confirmation of her retirement"; and (2) the appellant "is looking to start her new role from 1st of November 2018, she is wanting to convert her outstanding leave into a financial settlement."
- [8] Having not received a reply to her letter dated 3rd October 2018, and her numerous follow up emails, the appellant wrote a second letter on 12th November 2018 to the CHRO informing the CHRO that since she (the appellant) had not received a reply from the Deputy Governor she (the appellant) had elected to voluntarily retire 'with immediate effect' pursuant to the 'transitional provisions' of section 21 of the **Pensions Act 2011** and requested payment in lieu of accrued vacation leave as of 12th November 2018. The CHRO responded to the appellant on 30th November 2018

via letter with the heading 'Resignation from the Public Service', informing the appellant that the Deputy Governor had accepted her resignation from the public service and confirmed that her employment with the public service came to an end on 12th November 2018. The CHRO stated that the appellant had failed to give three (3) months' notice (exclusive of leave) as required by General Order 701(1) and consequently the appellant had forfeited all her vacation leave entitlement and was also liable to the Government for a month salary in lieu of notice.

- [9] The appellant, through her counsel, sent a pre-action letter to the Governor dated 29th January 2021 in which she outlined the facts stated above and asked whether the Government intended to pay her all of her entitlements due to her and interest by 12th February 2021. The appellant stated that the Governor replied to her on 12th February 2021 informing her that this was an administrative matter that should be addressed to the Human Resources Department. This letter was not exhibited in the bundle of documents filed in the appeal. The appellant issued another pre-action letter, but this time addressed to the CHRO on 14th April 2021 requesting a meeting to discuss her pension options and quantum relative to her pension entitlements and accumulated leave, including interest on her pension entitlements.
- [10] The appellant stated that the CHRO responded to the appellant via letter dated 19th April 2021 and asserted that appellant had resigned on 12th November 2018 since she had not received permission to retire or settled her pension benefits. This letter was not exhibited in the bundle of documents filed in the appeal. On 29th April 2021, the appellant responded to the CHRO: (1) stating that she had voluntarily retired under the "transitional provisions" of section 21 of the **Pensions Act 2011** and therefore did not need permission to be given; (2) stating that she was opting in accordance with Regulation 3(1)(f) of the **Pensions Regulations** to receive a commuted pension calculated in accordance with Part 6 of the **Pensions Regulations**, terminating on her death or on the expiration of 10 years after the date of her retirement, whichever comes later, and a commuted gratuity; and (3) demanding payment for her 70 days accrued vacation leave and interest thereon.

- [11] The appellant stated that Deputy Governor responded to her on 30th April 2021 and failed and/or refused to pay the appellant her pension benefits and/or accrued vacation on the basis that she had resigned without giving the requisite notice and as such had forfeited same. This letter was also not exhibited in the bundle of documents filed in the appeal.
- [12] The appellant stated that, by virtue of section 6(1)(h) of the **Pensions Act 1947** (the “**Pensions Act 1947**”), she was entitled to the payment of a non-contributory pension from the Government and to voluntarily retire before attaining the age of 55 years because she had completed more than 20 years of continuous service before it was repealed and replaced by the **Pensions Act 2011**. The appellant alleged that her right to receive a pension and gratuity and to voluntarily retire before age 55 under the **Pensions Act 1947** were (or were to be) preserved by virtue of the ‘transitional provisions’ of section 21 of the **Pensions Act 2011**. It was not disputed between the parties that at the time the **Pension Act 1947** was repealed and replaced by the **Pensions Act 2011**, the appellant had already completed 22½ years of continuous pensionable service.
- [13] The appellant sought and obtained leave to file an application for judicial review which was filed on 28th October 2021, and amended on 7th July 2022, with supporting affidavit filed on 31st January 2022 seeking the following orders:
- “1. A declaration that the Claimant having voluntarily retired pursuant to section 21 of the Pensions Act Chapter 6.07 was not required to seek the permission of the Deputy Governor to effect said retirement.
 2. A declaration that the Claimant is entitled to be paid retirement benefits in the form of a pension and gratuity under the statutory scheme for public officers under the Pensions Act Chapter 06.07 and by virtue of the Government of Montserrat’s consistent practice in relation to other voluntary retirements under the ‘transitional provisions’ of section 21 of Pensions Act, Cap. 06.07.
 3. A declaration that the Government of Montserrat is in breach of its statutory obligation under the Pensions Act, Cap 06.07, the express terms of the Claimant’s contract of employment and/or the Claimant’s legitimate expectation in failing and/or refusing to pay the Claimant

retirement benefits in the form of a gratuity upon her voluntary retirement from the public service.

4. An order that directs the Defendants to pay to the Claimant her full pension entitlement under the terms of the Pensions Act upon the Claimant reaching the retirement age of 55.
5. A declaration that the Claimant is entitled to be paid a gratuity and pension in accordance with the Pensions Act Chapter 6.07.
6. An order that directs the Defendants to pay to the Claimant the gratuity and pension forthwith.
7. Damages for pay in lieu of vacation leave to be assessed.
8. Alternatively,
 - (a) certiorari to remove to the High Court and quash the decision of the First named Defendant refusing to pay to the Claimant:-
 - i. a gratuity and pension in accordance with the Pensions Act Chapter 6.07; and
 - ii. pay in lieu of the Claimant's 70 days accumulated vacation leave upon her voluntary retirement pursuant to section 21 of the Act and/or in accordance with the Government of Montserrat's consistent practice in relation to other voluntary retirements under the 'transitional provisions' of section 21 of Pensions Act Cap 06.07; and
 - (b) mandamus requiring the first named Defendant to pay to the Claimant a gratuity and pensions in accordance with the Pensions Act Cap 6.07 and pay in lieu of the Claimant's accumulated vacation leave.
9. Costs.
10. Such further or other relief as the Court deems fit."

The decision in the court below

- [14] The judicial review application came on for hearing before the learned trial judge on 3rd April 2023 and he handed down his written judgment on 21st July 2023. The learned trial judge held as follows: (1) since the appellant was neither aged 55 nor with 30 years' service, she was not entitled to early retirement pursuant to section 21

of the **Pensions Act 2011**;³ (2) the literal rule applies to section 21 of the **Pensions Act 2011** since the words are clear;⁴ (3) there is no need to substitute the word 'before' for the word 'in' as it appears in section 21 of the **Pensions Act 2011** since the meaning of the word 'in' is not difficult;⁵ (4) the debates in Parliament during the passage of the **Pensions Act 2011** found in the Hansard do not assist in interpreting section 21 of the **Pensions Act 2011**;⁶ and (5) the explanatory memorandum to the Pensions Bill from the Attorney General (Ag.) does not reflect the letter of the Pensions Bill and cannot define the court's approach to interpreting section 21 of the **Pensions Act 2011**.⁷

- [15] The learned trial judge noted that since the appellant in her application for judicial review sought, among other things, 'such further or other relief as the Court deems fit', this entitled him to continue his analysis by asking 'to what is [the appellant] entitled under the Pensions Act [2011]?' The learned trial judge further held that: (1) the appellant was entitled to 'early exit' under section 13 of the **Pensions Act 2011**;⁸ (2) early exit under section 13 is a type of early retirement with lesser years' service than in section 8 of the **Pensions Act 2011**;⁹ (3) there is no absolute entitlement to an eligible benefit under the **Pensions Act 2011** – it can be reduced, suspended or withheld, but this must be appropriate within public service law, and reasonable;¹⁰ (4) the evidence showed that there were no grounds for withholding any benefit from the appellant, except that there was a resignation, and permission had not been formally sought to retire;¹¹ (5) to receive benefit for any type of early retirement a person by a voluntary act resigns;¹² (6) to retire early requires an action, which is resignation;¹³

³ MNIHCV2021/0027 **Angela Estwick v The Deputy Governor and the Attorney General of Montserrat** (delivered 21st July 2023, unreported), hereinafter referred to as "the Judgment in the court below" at paragraph 8.

⁴ Ibid at paragraphs 18 and 20.

⁵ Ibid at paragraph 11.

⁶ Ibid at paragraph 13.

⁷ Ibid at paragraph 14.

⁸ See the Judgment in the court below at paragraph 31.

⁹ Ibid at paragraph 32.

¹⁰ Ibid.

¹¹ Ibid at paragraph 33.

¹² Ibid at paragraph 39.

¹³ Ibid at paragraph 40.

(7) the appellant should have sought early exit and the effect would have been the same, as section 13 of the **Pensions Act 2011** specifically contemplates early exit as 'retiring', and so to claim her retirement benefit as early exit in like manner the appellant had to resign;¹⁴ and (8) by retiring the appellant resigned, and by resigning the appellant retired.¹⁵

[16] The learned trial judge also held that: (1) to 'retire' under either sections 8 or 13 of the **Pensions Act 2011**, permission is required under regulation 33 of the **Public Service Regulations** which has to be read as adapting to the evolution of pensions benefits beyond 1980 and beyond merely having reached normal retirement age;¹⁶ (2) the permission being sought is to obtain the pension benefit;¹⁷ (3) permission cannot be withheld without good reason;¹⁸ and (4) although the appellant resigned abruptly, which was accepted, and therefore she retired, though failing to observe the niceties of language to seek permission to retire, nevertheless, absent any good reason not, an early exit benefit is payable to her, no such reason having been offered in the proceedings.¹⁹

[17] In respect of the appellant's accumulated leave, the learned trial judge held at paragraph [59] that the appellant, by resigning without giving three (3) months' notice, had lost the accumulated leave that she claimed. The learned trial judge also held that judicial review was available under general principles and that aside from the misunderstanding of section 21 of the **Pensions Act 2011**, there was a procedural impropriety and technically an illegality to construe that resignation meant no benefit, and this was reviewable by the court. The learned trial judge also rejected an argument of the respondent concerning unreasonable delay by the appellant in making the judicial review application.²⁰

¹⁴ See the Judgment in the court below at paragraph 41.

¹⁵ Ibid at paragraph 42.

¹⁶ Ibid at paragraph 47.

¹⁷ Ibid at paragraph 49.

¹⁸ Ibid at paragraph 50.

¹⁹ Ibid at paragraph 53.

²⁰ Ibid at paragraph 29-30.

[18] The general conclusions of the learned trial judge were as follows:

“65 On review:

- a. Estwick was not eligible for ‘early retirement’ benefit under s8.
- b. Estwick was eligible for ‘early exit’ benefit under s13, for which the Act says she ‘*may retire*’.
- c. To retire, either for early retirement or early exit, Estwick had to resign.
- d. By her letter of 03.10.18, she purported to retire for 16.01.19, taking account of accumulated leave, but her implicit resignation was not yet responded to as accepted under GO rule 702, there being no reply yet from the CHRO, where the DG was not yet aware of the PSC report of 01.10.18 which may have had an effect on benefit payable.
- e. Then by her letter of 12.11.18 Estwick, purporting to retire immediately, resigned with immediate effect, but without due notice and therefore under GO rule 701(4) she lost her 70 days accumulated leave and owed a month’s salary.
- f. Her resignation was on 30.11.18 accepted under GO rule 702.
- g. Receipt of her early exit benefit requires permission under reg 33 from the DG, meaning consideration as to whether there are grounds to withhold, suspend or reduce it, and where on the facts offered there is no reason so to do.
- h. No benefit was paid because in good faith it was mistakenly thought in the AG memo of 22.11.18 resignation meant no benefit.
- i. Weighing all the above, the court finds Estwick should receive early exit benefit.”²¹

[19] The consequential orders of the learned trial judge were as follows:

“70 As to the Order of the Court:

- a. It is declared Angela Estwick is owed early exit benefit under s13 Pensions Act 2011, the details of which will need to be discussed with her by the CHRO.
- b. Interest at 4% is payable on any lump sum sought under s13(1)(a), arising from 12.05.19.

²¹ See the Judgment in the court below at paragraph 65.

- c. By act of mandamus - arising because there has been a good faith misapplication and therefore ultra vires assessment of the statute and regulations, leading to procedural error in assessing whether Estwick could claim a benefit, though not because the GoM has acted out of reason - the lump sum if sought, with interest, is ordered paid within three months; and
- d. Each party shall bear their own costs.”²²

The appeal

[20] The appellant filed her notice of appeal on 1st September 2023 which contained seven grounds of appeal with many sub-grounds totaling approximately twenty (20) in all. The following issues arise in respect of the several grounds of appeal: (1) whether the learned trial judge was correct in law when he held that the appellant was not eligible for early retirement under section 8 of the **Pensions Act 2011**; (2) whether the learned trial judge was correct in his interpretation of section 21 of the **Pensions Act 2011**; (3) whether the learned trial judge was correct in finding that permission is required under regulation 33 of the **Public Service Regulations** to retire early by reason of age or years of service; (4) whether the learned trial judge was correct in finding that the appellant “resigned to retire” without due notice and as such forfeited her 70 days’ leave and owes the Government a month’s salary; (5) whether the Deputy Governor acted in excess of her powers in withholding the appellant’s pension benefits as she did not consult the Public Service Commission as mandated by section 88(1) of the **Constitution of Montserrat**;²³ and (6) whether the Government had by practice and/or promise committed itself to a consistent practice that continued under the **Pensions Act 2011** of allowing pensionable officers who had served for 20 or more years but had not attained the age of 55 to retire pursuant to section 6(1)(h) of the **Pensions Act 1947** with an immediate gratuity and pension.

²² Ibid at paragraph 70.

²³ Cap 1.01 of the Revised Laws of Montserrat, 2013.

[21] The respondent on 19th September 2023 filed a counter notice of appeal, relying on the following grounds:

- “(1) The Court erred in treating the 1st Respondent as having withheld or refused to pay pension benefits as at November 2018 when the true circumstances were no decision had been made at the time of the Appellant’s leaving office and pursuant to the Pension Act such a decision should have been made before the Appellant left office.
- (2) The Court erred in interpreting the Pension Act as meaning that the 1st Respondent was enabled to accede to an application for pension benefits after the Appellant resigned her office.
- (3) The Court erred in finding that the Public Service Commission cleared the Appellant of charges of misconduct. The evidence before the Court the Public Service Commission’s role was to make a recommendation and not a final decision. Though they had made a recommendation on October 1, 2018, the final decision was still with the Governor and therefore disciplinary proceedings were still open when the Appellant applied to retire on October 3, 2018. The Governor further considered the matter and issued a decision against the Appellant on those same charges.
- (4) The Court erred in not considering that open disciplinary proceedings were a good reason not to make a decision in respect of an application for permission to retire.
- (5) The Court erred in finding that opinion of the Attorney-General dated November 23, 2018 which guided the Deputy Governor’s decision was incorrect;
- (6) The Court erred in awarding the Appellant interest on early exit benefits as the Appellant never applied for or sought early exit benefits and therefore this was not a benefit which had been withheld by the 1st Respondent.”

[22] The issues that arise in respect of the counter notice of appeal are as follows: (1) whether the appellant could claim any pension benefits after the termination of her employment with the Government; (2) whether there were any pending disciplinary proceedings against the appellant when she terminated her employment with the Government; and (3) whether the trial judge erred in awarding the appellant interest on the early exit benefits.

The Relevant Statutory Provisions

- [23] It is important first to outline the relevant provisions of the **Pensions Act 1947** before examining section 21 of the **Pensions Act 2011**. Section 6(1)(h) of the **Pensions Act 1947** states that:

“Circumstances in which pension may be granted

6. (1) No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases—

...

(h) upon the voluntary retirement before the age of fifty-five years of an officer who has completed twenty years continuous service.

- [24] Sections 5 to 8 of the **Pensions Act 2011** are as follows:

“Entitlement

5. (1) This Act does not confer on a pensionable officer the right to compensation for past services.

(2) The entitlement, if any, to compensation for past services, and the circumstances in which any such compensation may be reduced, suspended or withheld is determined under the public service law. (Amended by Act 9 of 2011)

Eligibility

6. A pensionable officer is eligible for pension benefits upon—

- (a) normal retirement;
- (b) early retirement;
- (c) retirement on medical grounds;
- (d) termination of employment, to the extent that the public service law provides that he is so eligible. (Amended by Act 9 of 2011)

Normal Retirement

7. (1) A pensionable officer may take normal retirement if he has ten years or more service and—

- (a) is an existing officer who—
 - (i) was born in a year set out in Column 1 of the Schedule; and
 - (ii) has attained the corresponding age set out in Column 2 of the Schedule; or
 - (b) is a new officer who has attained the age of sixty five.
- (2) For the purpose of this section, a person does not have the required years of service unless he served consecutively at least five of the required number of years.

Early Retirement

8. (1) Subject to subsection (2), a pensionable officer may take early retirement if—

(a) he is an existing officer and—

(i) he has completed the years of service set out in Column 4 of the Schedule that corresponds to the year of his birth in Column 1; or

(ii) he has completed at least ten years—but not the years required under sub-paragraph (i)—and has attained the age set out in Column 3 of the Schedule that corresponds to the year of his birth in Column 1; ...”

[25] Section 21 of the **Pensions Act 2011** states as follows:

“PART 6

TRANSITIONAL PROVISIONS

Protection of persons with twenty years of service

21. A pensionable officer with twenty or more years continuous service (within the meaning of the Pensions Act 1947, (Act 12 of 1947) repealed by section 23) at the date of commencement of this Act, at any time after the commencement of this Act may elect to receive pension benefits under Part 2 as if they were an existing officer born **in 1961.**” (emphasis added)

[26] The Schedule to the **Pensions Act 2011** is as follows:

Column 1	Column 2	Column 3	Column 4
Birth year	Normal Retirement Age	Early Retirement	
		Age*	Years of* Service
Before 1961	55	N/A	N/A
1961	60	55	30
1962	60	55	31
1963	60	55	31
1964	61	56	32
1965	61	56	32
1966	61	56	33
1967	62	57	33
1968	62	57	34

1969	62	57	34
1970	63	58	35
1971	63	58	35
1972	63	58	35
1973	64	59	35
1974	64	59	35
1975	64	59	35
After 1975	65	60	35

[27] Also relevant are regulations 31-33 of the **Public Service Regulations** which provide as follows:

“Reasons for termination of appointment

31. The services of an officer may be terminated only for the reasons stated hereafter -

(a) where the officer is confirmed in a permanent appointment -

- (i) on dismissal or removal in consequence of disciplinary proceedings;
- (ii) on compulsory retirement;
- (iii) on voluntary retirement;
- (iv) on retirement for medical reasons;
- (v) on being retired in the public interest;
- (vi) on resignation;
- (vii) on abolition of office;

...

Resignation

32. An officer who wishes to resign his appointment shall give due notice in writing of his intention to the Deputy Governor, or where an authorised officer is empowered to accept such notice, to such authorised officer.

Retirement

33. Any officer may at any time after he has attained the minimum age specified in the pensions law for retirement, apply to the Deputy Governor for permission to retire and shall in his application state the grounds on which it is based.”

Issues One and Two – Voluntary retirement under section 21 of the Pensions Act 2011

The appellant's submissions

- [28] The appellant submits the following: (1) the interpretation given by the learned trial judge defeats the object of section 21 as it takes away the vested rights of public officers, who had served more than 20 years under the **Pensions Act 1947**, to voluntarily retire and receive deferred pension benefits at age 55; and (2) it offends against the presumption against retrospective application of statutes. For the latter point, the appellant relies on section 71(c) of the **Interpretation Act**²⁴ which provides as follows:

“Effect of repeal

71. Where an Act is repealed in whole or in part, the repeal does not-

...

(c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed...”

- [29] The appellant cites the decision of this Court in **Gany Holdings (PTC) SA et al v Zorin Sachak Khan et al**²⁵ where it cited the following from the decision of the Privy Council in **Yew Bon Tew v Kenderaan Bas Mara**:²⁶

“Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.”

- [30] The appellant also cites the following passage from **Yew Bon Tew**:²⁷

“Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the

²⁴ Cap 1.02 of the Revised Laws of Montserrat, 2013.

²⁵ BVIHCMAP2018/0045 (delivered 30th March 2020, unreported).

²⁶ [1983] 1 A.C. 553 at 558.

²⁷ Ibid at 559.

wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.”

- [31] The appellant submits that the wording of section 21 of the **Pensions Act 2011** does not state that it was also intended to operate retrospectively as seemingly found by the learned trial judge at paragraph [21] of the written judgment. The appellant further submits that the issue raised was whether the **Pensions Act 2011** was intended to have retrospective effect in relation to public officers who had already served 20 years, not whether the appellant was, on the face of the **Pensions Act 2011**, entitled to retire early. The appellant contends that her case was as follows. First, the Schedule to the **Pensions Act 2011** is incorporated by reference in section 21. Under the Schedule, the only persons who are able to retire on the basis of 20 years or more service are persons born ‘before 1961’. It follows that this is the Schedule line which was intended to be incorporated by reference and not the Schedule line pertaining to born ‘in 1961’. Second, the use of the words ‘in 1961’ in line 5 of section 21 leads to an absurd and or unfair result and as such its language ought to be modified or varied by replacing same with ‘before 1961’ to confer the protection that Parliament intended and not to offend the presumption against interference with vested rights. The appellant contends that her right to a deferred pension had vested under section 6(1)(h) of the 1947 Act because she had already served 20 years when the **Pensions Act 2011** came into force.
- [32] The appellant submits that an absurd result would obtain in applying the strict literal interpretation of the words used in section 21 because eligibility to retire early would no longer be linked to 20 or more years’ service as Parliament clearly intended. The appellant also submits that persons who were to be ‘grandfathered in’ under the **Pensions Act 2011** would have to serve 30 years before they could voluntarily retire, and their normal retirement age would be 60 and not 55. In the appellant’s view, this means that no protection would have been provided to those persons to whom section 21 of the **Pensions Act 2011** were to apply if a literal meaning is applied to section 21 and that this could not have been the intention of Parliament.

The respondents' submissions

- [33] The respondents submit the following: (1) in order to retire and access pension benefits, the appellant must satisfy the requirements of section 7 or 8 of the **Pensions Act 2011**; (2) section 21 provided a possible avenue for the appellant to segue into section 8 of the **Pensions Act 2011**, provided she met the requirements; (3) applying section 21 means that the appellant, at the time of retirement, who was an existing officer at the time of the passage of **Pensions Act 2011** and had twenty years of continuous service, would be eligible to receive the same benefits as an existing officer born 'in 1961'; (4) the Schedule to the **Pensions Act 2011** sets out the requirements for early retirement for a person born 'in 1961', namely, either 30 years of service or reaching 55 years of age; and (5) the appellant did not meet either of these criteria for early retirement at the time that she left the public service.
- [34] The respondents contend that the appellant presents three main arguments to sustain an interpretation that reads section 21 as referring to an existing officer born 'before 1961', namely, that: first, this was the intent of the legislature as gleaned from the Hansard; second, there was a legitimate expectation on the part of the appellant to be treated as if born 'before 1961'; and, third, section 71 of the **Interpretation Act** saved the former benefits under the repealed **Pensions Act 1947** so that the appellant should now be treated in the same way. The respondents also submit in reply that, first, the decision of **Pepper (Inspector of Taxes) v Hart**²⁸ does not provide for recourse to the Hansard where the words of a statute are clear and do not present a manifest absurdity or ambiguity, and that in this instance the words of section 21 are clear. The Hansard does not assist, and the learned trial judge found that the ministers' statements contained therein to be unclear. Second, there can be no legitimate expectation that an authority will act *ultra vires*, and this is what would be done if the Deputy Governor were to substitute the words 'before 1961' for the words 'in 1961' in section 21 and award pension benefits to the appellant outside of the remit of the statute. The respondents state in addition that of all the personnel files referred to by the appellant in the court below, the appellant could only show

²⁸ [1993] AC 593.

that one person had received notification of such award, and this award was rescinded because the authorities realized that it had been awarded in error. No legitimate expectation could therefore arise.

- [35] In respect of the third argument relating to section 71 of the **Interpretation Act**, the respondents contend that it does not assist the appellant for the following reasons. First, the instant matter does not involve a mere repeal but repeal and replacement in that the **Pensions Act 1947** was not only repealed but it was replaced with the **Pensions Act 2011** with specific clauses dealing specifically with the appellant's case. The respondents contend that section 72(f) is the applicable and relevant provision, which provides as follows:

“72. Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefore –

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment must not be held to operate as new law, but must be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment.”

- [36] The respondents contend that section 72(f) of the **Interpretation Act** means that the words of the new enactment prevail over the old where they are different in substance. The respondents also contend that by stating that the officer might receive benefits as if ‘they were an existing officer born in 1961’ and referring to a column where such a person born in 1961 must attain 55 years or 30 years’ service to retire, section 21 of the **Pensions Act 2011** provides for something substantially different than section 6(1)(h) of the **Pensions Act 1947**. The respondents submit that the **Pensions Act 2011** cannot therefore be treated as being merely declaratory of the old law; it provides a different, transitional benefit to those it covered. In other words, section 21 of the **Pensions Act 2011** represented an additional benefit to those it covered, for example, the appellant, being born in 1970, would otherwise have had to meet the requirements of either reaching the age of 58 years and 35 years of service to retire, or reaching the age of 63 years.

[37] The respondents submit that what the appellant had was the right, once certain conditions were met, to request consideration of a pension award under section 6(1)(h) of the **Pensions Act 1947**, and that this was different from the 'right' envisaged as being protected by section 71 of the **Interpretation Act**. The respondents also submit that, first, section 5 of the old legislation created terms of employment where there was no absolute right to a pension, where the issue of pension, until it was actually awarded, rested in the future until determined; and, second, the **Pensions Act 1947** therefore did not create a right of the kind protected by section 71 of the **Interpretation Act**.

Conclusion

[38] Section 6(1)(h) of the **Pensions Act 1947** allows a public officer to receive his or her pension who: (1) has not yet attained the age of fifty-five (55) years; and (2) has completed twenty (20) years of continuous service. The parties are not in dispute as to the meaning of section 6(1)(h) of the **Pensions Act 1947**. The question is whether any of these provisions, particularly section 6(1)(h) of the **Pensions Act 1947**, are applicable under the **Pensions Act 2011**. At the heart of this appeal is the proper interpretation of section 21 of the **Pensions Act 2011** and whether it has the effect of preserving the application of section 6(1)(h) of the **Pensions Act 1947** to the public officers to whom it properly applies. Before examining this issue, I will examine the other provisions of the **Pensions Act 2011** to determine whether the appellant would qualify for any pension benefit under section 8 of the **Pensions Act 2011** that deals with early retirement.

[39] Section 4 of the **Pensions Act 2011** provides that pension benefits are to be awarded to a pensionable officer who is eligible under section 6. Section 5(1) provides that the **Pensions Act 2011** does not confer on a pensionable officer the right to compensation for past services. Section 5(2) states that the entitlement, if any, to compensation for past services, and the circumstances in which any such compensation may be reduced, suspended or withheld is determined under the public service law. It is section 6 which deals with eligibility for a pension. Section 6

provides that a pensionable officer is eligible for pension benefits upon: (a) normal retirement; (b) early retirement; (c) retirement on medical grounds; (d) termination of employment, to the extent that the public service law provides that he is so eligible. Section 7 outlines the conditions for normal retirement; section 8 provides the conditions for early retirement and section 9 states the conditions for retirement on medical grounds. The **Pensions Act 2011** does not specifically provide for the conditions for pension eligibility on termination of employment but notes that any such person would be eligible for pensions benefits ‘to the extent that the public service law provides that he is so eligible’.

[40] The eligibility criterion that is applicable in this appeal is early retirement. Section 8(1) provides that a pensionable officer may take early retirement if: “(a) he is an existing officer and: (i) he has completed the years of service set out in Column 4 of the Schedule that corresponds to the year of his birth in Column 1; or (ii) he has completed at least ten years—but not the years required under sub-paragraph (i)—and has attained the age set out in Column 3 of the Schedule that corresponds to the year of his birth in Column 1.” Section 2 defines an ‘existing officer’ as “a person who held a pensionable office on or before 31 May, 2011 ...”. The appellant, having been employed by the Government since 1987 was an existing officer for the purpose of section 8(1).

[41] Leaving section 21 aside for the moment, applying section 8(1) to the appellant would be as follows. The appellant at the date when her employment with the Government ended, had approximately 28 years of service. Section 8(1)(a)(i) would not apply to her since the minimum years of service in Column 4 is 30 years and the appellant only had 28 years. Section 8(1)(a)(ii) is potentially applicable since the appellant would have completed at least ten (10) years. The next step is to determine whether the appellant had attained the age set out in Column 3. At the date when her employment with the Government ended, the appellant was 48 years old. Consequently, none of the dates in Column 3 are applicable to her since the minimum

age set therein is 55 years. The appellant therefore would not be eligible for a pension benefit if section 8(1) only were to be applied in her case.

[42] The appellant, perhaps appreciating that a strict application of section 8(1) would mean that she would not be eligible for a pension benefit, hinges her entitlement on section 21 of the **Pensions Act 2011**. Section 21, which lies at the heart of this appeal, under the heading, '**Protection of persons with twenty years of service**', states that a pensionable officer with twenty or more years continuous service (within the meaning of the **Pensions Act 1947**) at the date of commencement of the **Pensions Act 2011**, at any time after the commencement of the **Pensions Act 2011** may elect to receive pension benefits under Part 2 as if they were an existing officer born in 1961. Section 21 is the only section found in Part 6 which is entitled, 'TRANSITIONAL PROVISIONS'.

[43] It will be remembered that section 6(1)(h) of the **Pensions Act 1947**, under the heading, '**Circumstances in which pension may be granted**', provides that no pension, gratuity or other allowance shall be granted under the **Pensions Act 1947** to any officer except on his retirement from the public service in one of the following cases listed including 'upon the voluntary retirement before the age of fifty-five years of an officer who has completed twenty years continuous service'. Section 6(1)(h) of the **Pensions Act 1947** allows a person to voluntarily retire from the public service before that officer has reached the age of 55 if they have completed 20 years of continuous service. Once those two conditions are satisfied, the officer will be entitled to a pension, gratuity or other allowance provided for under the **Pensions Act 1947**.

[44] Section 21 is in fact a 'transitional provision' as the overall heading makes clear. Does this fact assist in understanding the rationale for section 21? The House of Lords in **Britnell v Secretary of State for Social Security**²⁹ provides some guidance on what constitutes a transition provision by stating:

²⁹ [1991] 1 WLR 198 at 202.

“As Staughton L.J. observed in the Court of Appeal, it is not possible to give a definitive description of what constitutes a transitional provision. In Thornton on Legislative Drafting, 3rd ed. (1987), p. 319, it is said:

“The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force.”

One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage. In the present instance regulation 20(2) must eventually become spent, although it may be envisaged that that could take a considerable period of time.”

[45] Section 21 therefore was meant to make special provision for persons who would have qualified for pension benefits under section 6(1)(h) of the **Pensions Act 1947**. No doubt that over time the persons to whom section 6(1)(h) of the **Pensions Act 1947** applies would become spent because the age of 55 is the age limit after which it would not apply to that officer.

[46] Another consideration that might provide some guidance in ascertaining the meaning of section 21 is its heading. In **Bennion, Bailey and Norbury on Statutory Interpretation**³⁰ (“**Statutory Interpretation**”) at paragraph 2.6 it is stated that:

“The function of the heading is to give a short indication of the content of the section. It is a brief description, not a summary, and will not necessarily cover everything dealt with in the section.”

[47] In **Regina v Montila and others**,³¹ the House of Lords considered the extent to which a heading may be considered in construing a provision of an Act as follows:

“34 The question then is whether headings and sidenotes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in

³⁰ 8th Edition, 2020.

³¹ [2004] 1 WLR 3141 at 3151.

Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and sidenotes are included on the face of the Bill throughout its passage through the legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.

...

36 The headings and sidenotes are as much part of the contextual scene as these materials, and there is no logical reason why they should be treated differently. That the law has moved in this direction should occasion no surprise. As Lord Steyn said in that case, at p 2958, the starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used."

[48] The authors of **Statutory Interpretation** state at paragraph 16.7 that a heading may be relevant as a guide to the meaning of a section or the mischief that it is intended to address. They cite the decision of the United Kingdom Supreme Court in **Project Blue Ltd (formerly Project Blue (Guernsey) Ltd) v Revenue and Customs Commissioners**³² where Lord Hodge stated at paragraph [42] that "[t]he heading is relevant to assist an understanding as to the mischief which the provision addresses ...".

[49] The heading of section 21 of the **Pensions Act 2011** provides context for the section as a whole and assists in an understanding of the mischief which section 21 addresses. The first question is what exactly does section 21 make provision for? The answer is immediately clear from the heading of section 21, which is for the '[p]rotection of persons with twenty years of service' (emphasis added). The body of the section makes clear that this is a reference to section 6(1)(h) of the **Pensions Act 1947** which allows an officer to voluntarily retire from a public service if they have served 20 years of continuous service and has not yet reached the age of 55. *Protection* of officers eligible under section 6(1)(h) of the **Pensions Act 1947** is at the core of section 21. In fact, it is its *raison d'être*. In this context, does the heading have any relevance? What does the word '**protection**' in the heading mean?

³² [2018] 1 WLR 3169 at 3185.

[50] The **Oxford Advanced Learner's Dictionary** (1995 edn.) defines 'protection' as the action of protecting somebody or something or the condition of being protected. The word protection is the noun for the verb 'to protect' which is defined as to keep somebody or something safe from harm, injury, etc. or to defend somebody or something. Applying this to section 21, it seems to be that section 21 was intended to keep officers to whom section 6(1)(h) of the **Pensions Act 1947** applied from the new pension regime being established by the **Pensions Act 2011**. The harm or injury to those persons is that they would not continue to benefit from section 6(1)(h) of the **Pensions Act 1947** had section 21 not been included in the **Pensions Act 2011**. Those persons would be governed by the applicable provisions of the **Pensions Act 2011**.

[51] In the explanatory memorandum, drafted by the Attorney General (Ag.) that accompanied the Pensions Bill, it was stated that the Pensions Bill repeals and replaces the current law relating to pensions for public officers and police officers. It continued the Pensions Bill introduces a plan that is more sustainable and more in accordance with international best practices. The explanatory memorandum states that "however, **it protects the accrued benefits of existing officers** and adopts a gradual approach to effecting the change" (emphasis added). As mentioned earlier, section 21 is the only section in Part 6 which is headed 'TRANSITIONAL PROVISIONS'. The explanatory memorandum had the following to state about Part 6:

"Part 6 protects pension benefits that have already accrued to persons who have completed 20 years of service before the commencement of this Bill and who are therefore eligible to retire under the law in force before the commencement of this Bill."

[52] In relation to explanatory notes, the House of Lords in **Montila** stated at paragraph [35] that:

"35 There is a further point that can be made. In *Pickstone v Freemans plc* [1989] AC 66, 127 Lord Oliver of Aylmerton said that the explanatory note attached to a statutory instrument, although it was not of course part of the instrument, could be used to identify the mischief which it was attempting to remedy: see also *Westminster City Council v Haywood* (No 2) [2000]

ICR 827, 839; [2000] 2 All ER 634, 645, para 19, per Lightman J. In *Coventry and Solihull Waste Disposal Co Ltd v Russell* [1999] 1 WLR 2093, 2103, it was said that an Explanatory Note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous. In *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, 2959 b–c, Lord Steyn said that, in so far as the Explanatory Notes that since 1999 have accompanied a Bill on its introduction and are updated during the parliamentary process cast light on the objective setting or contextual scene of the statute and the mischief at which it is aimed, such materials are always admissible aids to construction. It has become common practice for their Lordships to ask to be shown the Explanatory Notes when issues are raised about the meaning of words used in an enactment.”

- [53] The authors of **Statutory Interpretation** state at paragraph 24.14 that explanatory notes to an Act may be used to understand the background to and context of the Act and the mischief at which it is aimed. In **Regina (Westminster City Council) v National Asylum Support Service**,³³ the House of Lords explained that:

“5 The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In regard to contractual interpretation this was made clear by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384–1386, and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H E Hansen-Tangen)* [1976] 1 WLR 989, 995–996. Moreover, in his important judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913 Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. In *River Wear Comrs v Adamson* (1877) 2 App Cas 743, 763, Lord Blackburn explained the position as follows:

“I shall ... state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible [2002] 1 WLR 2956 at 2959 to know what

³³ [2002] 1 WLR 2956.

that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.”

Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cross, *Statutory Interpretation*, 3rd ed (1995), pp 160–161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 407; *Robinson v Secretary of State for Northern Ireland* *The Times*, 26 July 2002, in particular per Lord Hoffmann, at para 40. On this basis the constitutional arguments which I put forward extra-judicially are also not engaged: “*Pepper v Hart: A Re-examination*” (2001) 21 *Oxford Journal of Legal Studies* 59.

6 If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.”

[54] In ***Flora v Wakom (Heathrow) Ltd***,³⁴ the Court of Appeal of England and Wales stated that:

³⁴ [2007] 1 WLR 482.

“15 The use that courts may make of explanatory notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, paras 2–6; see also *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, para 4. As Lord Steyn says in the *National Asylum Support Service* case, explanatory notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone; they aim to explain the effect of the text and not to justify it.

16 The text of an Act does not have to be ambiguous before a court may be permitted to take into account explanatory notes in order to understand the contextual scene in which the Act is set: see the *National Asylum Support Service* case, para 5. In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of explanatory notes as an aid to construction by saying [2002] 1 WLR 2956, para 6:

“What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.”

17 The value of para 354 of the explanatory notes as an aid to construction in the present appeal is that it identifies the contextual scene as containing a determination “To ensure that the real value of periodical payments is preserved over the whole period for which they are payable”. That is all. If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the Government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them.”

- [55] These authorities make plain that explanatory notes may be used to shed light on the context of or the mischief at which legislation, such as section 21, is aimed. The explanatory notes to Part 6 (effectively section 21) states clearly that it “**protects pension benefits that have already accrued to persons** who have completed 20

years of service before the commencement of the [Pensions Act 2011] and who are therefore eligible to retire under [section 6(1)(h) of the 1947 Pensions Act]” (emphasis added). This accords with the analysis with respect to the heading as explained above. The learned trial judge was wrong not to construe the explanatory memorandum as providing appropriate and relevant context for section 21 or assisting with ascertaining the mischief to which it is aimed.

[56] The parties do not dispute that section 21 is applicable in the case of the appellant. They also do not dispute the general purpose of section 21 or any of sections 5 to 8 of the **Pensions Act 2011**. Where the parties differ is in respect of the words ‘in 1961’ found in section 21 and the application of the Schedule, in particular, Column 1, Birth year, ‘**Before 1961**’ (emphasis added). It will be remembered that section 21 states in effect that a pensionable officer to whom section 6(1)(h) of the 1947 Act applies, “at any time after the commencement of this Act may elect to receive pension benefits under Part 2 as if they were an existing officer born **in 1961**” (emphasis added).

[57] The appellant is of the view that only persons born ‘before 1961’ can retire based on at least 20 years continuous service and that if the words born ‘in 1961’ were to apply the result would be absurd and unfair, and it would offend against the presumption against interference with vested rights. The respondents are of the view that the words ‘in 1961’ in the Schedule are clear and there is no room for any other interpretation. The respondents continue that section 21 provides an additional benefit to those whom it applied, for example, the appellant, being born in 1970, would otherwise have had to meet the requirements of either reaching the age of 58 years with 35 years of service to retire, or reaching the age of 63 years. The question therefore is whether the reference to an existing officer born ‘**in 1961**’ properly reflects the purpose of section 21, which, as explained above, is to protect the pension benefits that have already accrued to persons who had completed 20 years of service before the commencement of the **Pensions Act 2011** and who are therefore eligible to retire under section 6(1)(h) of the **Pensions Act 1947**.

[58] The application of the line 'in 1961' in the Schedule would have the result that such a pensionable officer would have to wait until 60 years of age to be able to take normal retirement and would have to serve for 30 years to obtain any pension benefit. For two principal reasons, a pensionable officer to whom section 6(1)(h) of the **Pensions Act 1947** applies would not obtain any protection under section 21 of the **Pensions Act 2011** at all applying the words born 'in 1961'. First, the early retirement age of 55 years would defeat a claim under section 6(1)(h) of the **Pensions Act 1947** which applies to a person who has not yet reached the age of 55. Second, the years of service for early retirement would be increased to 30 rather than a minimum of 20 years continuous service. This would eviscerate any protection that section 21 was intended to provide to such pensionable officers from the new pension regime being established by the **Pensions Act 2011**. They would suffer the harm or injury that section 21 of the **Pensions Act 2011** was intended to shield them from, and they would consequently not be able to continue to benefit from section 6(1)(h) of the **Pensions Act 1947**.

[59] The application of the line 'Before 1961' in the Schedule is in accordance with the purpose of section 21 of the **Pensions Act 2011**. In fact, the application of that line is perfectly in sync with the requirements of section 6(1)(h) of the **Pensions Act 1947**. In Column 2, the normal retirement age is 55 and this was the case under the **Pensions Act 1947**. In Column 3, the age for early retirement is stated as 'N/A' and this is understandable since a pensionable officer can retire at any age if they satisfy one of the conditions for the application of section 6(1)(h) of the **Pensions Act 1947**, namely, be under 55 years of age. In Column 4, the years of service is stated as 'N/A' because a pensionable officer can retire early if they have a minimum of 20 years of service. Clearly, a pensionable officer would be able to retire early if they have more than 20 years under the **Pensions Act 1947**. In my view, the line 'Before 1961' is in keeping with the purpose of section 21 of the **Pensions Act 2011**.

[60] In **Bank of Nova Scotia v Comptroller of Inland Revenue**,³⁵ this Court had to consider whether the words 'or branch' should be inserted after the word 'person' appearing in paragraph 1(1) of Schedule 3 of the Income Tax Act of Saint Lucia to give effect to a 2006 amendment of the Income Tax Act which was intended to create a new category of entities to which withholding tax applied. Before 2006, withholding tax was payable only where "[e]very person who makes payments to a non-resident" but this was expanded in 2006 to include where "a branch of a non-resident company makes payments to its head office or to some other branch or associate outside Saint Lucia". Section 76(1) and section 39(1)(b) of the Income Tax Act contemplate the application of paragraph 1(1)(a) and 1(1)(b) of Schedule 3 relating to expenditures made by a branch of a non-resident company to its head office or to some other branch outside Saint Lucia of such a company. The entities that were included in the 2006 amendment were not captured in Schedule 3. This Court applied the following principles in correcting obvious drafting errors:

"[36] This Court in Attorney General's Reference (Saint Lucia) at paragraph [8] cited with approval the following passages from the decision of the House of Lords in *Inco Europe Ltd v First Choice Distribution*:

"... It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opusculum, *Statutory Interpretation*, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:

"In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding

³⁵ (SLUHCVP2022/0007 delivered 24th May 2024, unreported).

or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105–106. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature.”

- [61] In my view, in enacting section 21 of the **Pensions Act 2011**, Parliament intended to protect pensionable officers to whom section 6(1)(h) of the **Pensions Act 1947** applies from the application of the provisions of the **Pensions Act 2011**. There cannot be any clearer intention of Parliament in inserting section 21 in the **Pensions Act 2011** as reflected in: (1) the wording of the section itself; (2) the heading; and (3) the explanatory memorandum, and its nature as a transitional provision. I agree with the appellant’s submission that the use of the words ‘in 1961’ would conflict with the purpose of section 21 and would lead to an absurd and unfair result. I agree with the learned trial judge that the statements in the Hansard are of no assistance as they are not as clearly directed at this central issue with which we are concerned. Given the above considerations, it is my considered view that it is an obvious mistake by Parliament in including the words ‘in 1961’ in section 21 of the **Pensions Act 2011**. To correct this error, I would delete the word ‘in’ appearing before ‘1961’ as it appears in section 21 of the **Pensions Act 2011** and substitute it with the word ‘before’. As this Court stated in **Bank of Nova Scotia**:

“[42] There is an obvious omission by Parliament to add the words ‘or branch’ after the word ‘person’ appearing in paragraph 1(1) of Schedule 3. I am mindful of the words of the House of Lords in **Inco Europe Ltd**. The Court has the power to correct obvious drafting errors and in appropriate cases, in discharging its interpretative function, the court can add words, or omit words or substitute words in a statute. In this case, there is a plain drafting mistake in not adding the words ‘or branch’ after the word ‘person’ as it appears in paragraph 1(1) of Schedule 3. No doubt I have exercised considerable caution before adding the words ‘or branch’ and I am satisfied that: (1) the intended purpose is to ensure that Schedule 3 applies in the circumstances outlined in section 76(1)(b); (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question by not including the words ‘or branch’ after the word ‘person’ in paragraph 1(1) of Schedule 3; and (3) the Parliament would have made that change in paragraph 1(1) of Schedule 3 had the error been noticed before the **2006 Amendment** was made.”³⁶

[62] Likewise, here, I have also exercised considerable caution before deleting the word ‘in’ and substituting it with the word ‘before’ and I am satisfied that: (1) the intended purpose of section 21 of the **Pensions Act 2011** is to ensure that pensionable officers to whom section 6(1)(h) of the **Pensions Act 1947** applies continue to benefit from that section; (2) by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question by not including the words ‘before 1961’ rather than the words ‘in 1961’ in section 21 of the **Pensions Act 2011**; and (3) the Parliament would have made that change to section 21 had the error been noticed before the **Pensions Act 2011** was passed. Contrary to the view of the learned trial judge it was not ‘plainly bold, and so arguably’ wrong to do as the appellant suggested in the court below and which this Court now accepts as correct as a matter of principle and of statutory interpretation. Section 21, amended in accordance with the above, should now read as follows:

“PART 6

TRANSITIONAL PROVISIONS

Protection of persons with twenty years of service

21. A pensionable officer with twenty or more years continuous service (within the meaning of the **Pensions Act 1947**, (Act 12 of 1947) repealed by section 23) at the date of commencement of this Act, at any time after the

³⁶ (SLUHCVP2022/0007 delivered 24th May 2024, unreported) at paragraph 42.

commencement of this Act may elect to receive pension benefits under Part 2 as if they were an existing officer born before 1961.”

- [63] It follows, therefore, that the appellant who was 48 at the material time with 28 years continuous service was entitled to early retirement under section 21 of the **Pensions Act 2011**. The learned trial judge erred in finding that the appellant was not entitled to early retirement under the **Pensions Act 2011**. Consequently, the appellant was entitled to a declaration that she is entitled to be paid a gratuity and pension in accordance with the **Pensions Act 2011**.

Issue Three – Permission to retire under regulation 33 of the Public Service Regulations

The appellant’s submissions

- [64] In respect of whether the appellant needed the permission of the Deputy Governor to voluntary retire, the appellant submits that the overall scheme of the **Pensions Act 2011** and in particular section 21 does not expressly require the Deputy Governor to approve voluntary retirements based on 20 years or more continuous service in the public service. Further, regulation 33 of the **Public Service Regulations** only applies to public officers who wish to retire “... after he has attained the minimum age specified in the pensions law for retirement...”. The appellant also submits that, alternatively, even if the respondents were correct that the Deputy Governor had the power to approve voluntary retirements, the Deputy Governor had laboured under a misapprehension as to the limits of that power and as such contravened section 88(1) of the **Constitution** by failing to consult with the Commission in relation to the withholding of the appellant’s pension.
- [65] The appellant contends that the learned judge erred in law in finding at paragraph [46] of the written judgment that permission is required under regulation 33 of the **Public Service Regulations** to retire early by reason of age or years of service. The appellant also contends that section 88(1) of the **Constitution** vests the power to grant any award under any pensions law (other than an award which, under that law, the person to whom it is payable is entitled as of right) in the Governor acting after consultation with the Commission. In the appellant’s view, the learned trial judge

failed properly to consider the appellant's argument that section 88 of the **Constitution** recognizes that public officers may be entitled to receive pensions and gratuities 'as of right' in accordance with the provisions of the pensions law and that in such circumstances the Deputy Governor's approval is not required. The appellant submits that, having completed 22.5 years of pensionable service with the Government when the **Pensions Act 2011** was passed, the appellant's pension benefits had already accrued to her under the **Pensions Act 1947**. Consequently, it was submitted that the appellant is entitled to her pension benefits 'as of right'. In the appellant's view, it follows that the Deputy Governor's permission was not required and the learned trial judge's decision finding otherwise was wrong.

The respondents' submissions

- [66] The respondents submit that regulation 33 makes it clear that retirement requires permission and that this is a procedural necessity, because persons may be mistaken as to whether or not they qualify and might need to be advised.

Conclusion

- [67] Regulation 33 of the **Public Service Regulations** states that any officer may at any time after he has attained the **minimum age** specified in the pensions law for retirement, apply to the Deputy Governor for permission to retire and shall in his application state the grounds on which it is based. In my view, regulation 33 is not applicable to pensionable officers to which section 21 applies. To be eligible under section 21, the pensionable officer must have served for a continuous period of twenty years and be under the age of 55 in accordance with section 6(1)(h) of the **Pensions Act 1947**. To engage regulation 33, the officer must "apply to the Deputy Governor for permission to retire and shall in his application state the grounds on which it is based" but only "at any time after he has attained the minimum age specified in the pensions law for retirement".
- [68] It cannot be doubted that there is no minimum age requirement under section 6(1)(h) of the **Pensions Act 1947**. In my view, regulation 33 would plainly not apply to any

person retiring under section 21 of the **Pensions Act 2011**. Consequently, the permission of the Deputy Governor to retire is not required in respect of persons to whom section 21 of the **Pensions Act 2011** applies.

Issue Four – Forfeiture of 70 days’ leave

- [69] In relation to the fourth issue, namely, whether the learned trial judge was correct in finding that the appellant “resigned to retire” without due notice and as such forfeited her 70 days’ leave and owes the Government a month’s salary, the learned trial judge was plainly correct. Regulation 32 of the **Public Service Regulations** states that an officer who wishes to resign his appointment shall give due notice in writing of his intention to the Deputy Governor, or where an authorised officer is empowered to accept such notice, to such authorised officer. Rule 701(2) of the General Orders states that an officer who has been confirmed in his appointment to a pensionable post may resign after giving not less than three months’ notice (exclusive of leave) in writing to the permanent secretary, administration. Rule 701(4) of the General Orders states that notwithstanding the provisions in paragraph (2) an officer 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, and that in such cases the officer will forfeit all leave for which he might be eligible.
- [70] Regulation 31(a) states that the services of an officer may be terminated only for the following reasons where the officer is confirmed in a permanent appointment: (i) on dismissal or removal in consequence of disciplinary proceedings; (ii) on compulsory retirement; (iii) on voluntary retirement; (iv) on retirement for medical reasons; (v) on being retired in the public interest; (vi) on resignation; (vii) on abolition of office. It will be remembered that 6(d) of the **Pensions Act 2011** provides that a pensionable officer is eligible for pension benefits upon termination of employment, to the extent that the public service law provides that he is so eligible. Termination of employment is one of the ways in which a pensionable officer thereby becomes eligible for pension benefits.

[71] The appellant's letter dated 12th November 2018 to the CHRO stated that she had elected to voluntarily retire **with immediate effect** pursuant to the 'transitional provisions' of section 21 of the **Pensions Act 2011**. There is no question therefore that the appellant had elected to take voluntary retirement with immediate effect. The appellant did not qualify for normal retirement under section 7 of the **Pensions Act 2011**, because having been born in 1970 she was not 63 years old; she was therefore not eligible for pension benefits under section 6(a) of the **Pensions Act 2011**. As explained above, the appellant did not qualify for early retirement under section 8, thereby being ineligible for pension benefits under section 6(b) of the **Pensions Act 2011**. Retirement on medical grounds under section 9 or eligibility under section 6(c) of the **Pensions Act 2011** are not applicable. The only remaining eligibility criterion is section 6(d) of the **Pensions Act 2011** which provides that a pensionable officer is eligible for pension benefits upon termination of employment, to the extent that the public service law provides that he is so eligible. The appellant's eligibility for a pension is section 21 of the **Pensions Act 2011**.

[72] While the appellant in her letter dated 12th November 2018 mentioned retirement under section 21 of the 2011 Act, she could only become eligible for a pension benefit under section 6 upon: (a) normal retirement; (b) early retirement; (c) retirement on medical grounds. Neither of these applied so, the appellant's letter dated 12th November 2018 can only be construed as a termination of her employment. In such circumstances the appellant is only entitled to a pension to the extent that the public service law provides that she is so eligible in accordance with section 6(d). Otherwise, the appellant would not be entitled to any pension benefit. Regulation 31(a)(vi) states that one of the ways in which the services of an officer who is confirmed in a permanent appointment may be terminated is on resignation. None of the other methods outlined in section 31(a) are applicable to the appellant.

[73] It is my view that the appellant's letter dated 12th November 2018 can only be construed as a termination of her employment by resignation. It follows that pursuant to regulation 32 the appellant had to give due notice in writing of her intention to

resign to the Deputy Governor. There is nothing unlawful in the appellant applying for the pension benefits to which she was entitled in accordance with section 21 of the **Pensions Act 2011** after she had resigned. It is her resignation (termination of employment) that triggered her eligibility for pension benefits under section 6(d) and section 21 of the **Pensions Act 2011**. According to General Order 701(2) the notice period was three (3) months. The appellant did not give three (3) months' notice in writing because in her letter dated 12th November 2018, she stated that she retired 'with immediate effect'. General Orders 702(d) provides that notice of resignation may be refused if the requisite period of notice is not given or salary in lieu of notice is not paid.

[74] It was open to the Deputy Governor or the Government not to accept the appellant's resignation dated 12th November 2018 because the: (a) three (3) months' notice was not given; or (b) one (1) month's salary in lieu of notice was not paid to the Government by the appellant. However, via letter dated 30th November 2018 from the CHRO to the appellant, it was expressly stated that the Deputy Governor had accepted the appellant's resignation from the public service and it was confirmed that her employment in the public service came to an end on 12th November 2018. That letter also noted that the appellant had failed to give three months' notice (exclusive of leave) as required by General Order 701(2). Therefore, the letter continued, the appellant had forfeited all her vacation leave entitlement in accordance with General Order 619(e) and that the appellant was also liable to the Government for a month's salary in lieu of notice in accordance with General Order 701(4).

[75] It was permissible for the appellant to resign with immediate effect, but General Order 701(4) becomes engaged and provides that an officer 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, and that in such cases the officer will forfeit all leave for which he might be eligible. By resigning on 12th November 2018, with immediate effect, the appellant: (1) became liable to pay the Government one month's salary in lieu of notice; and (2) forfeited all leave for which she would otherwise be eligible.

The learned trial judge was correct in finding at paragraph [65](e) that the appellant by resigning without giving the Government the required three (3) months' notice, lost the accumulated leave she claimed in her application for judicial review. While the trial judge did not include this in his order at paragraph [70], it is clear that this was an express finding with which I am in full agreement.

[76] I agree with the respondents that retirement and resignation are treated differently in the **Pensions Act 2011**. There are two forms of retirement – the first is normal retirement as provided for in section 7 and for which an officer becomes eligible for pension benefits in accordance with section 6(a) and the second is early retirement as provided for in section 8 and for which an officer becomes eligible for pension benefits in accordance with section 6(b). Resignation is not mentioned in the 2011 Act as a specific ground on which a pensionable officer becomes eligible for pension benefits. Regulation 31(a)(vi) states that resignation is one of the ways in which the services of an officer who is confirmed in a permanent appointment may be terminated. Consequently, a pensionable officer is eligible for pension benefits if the public service law so provides. Since the appellant was not eligible for normal retirement or early retirement pursuant to sections 7 and 8 of the **Pensions Act 2011**, the issue of whether one can resign to retire under those provisions would have to be left to another day when the issue is properly before this Court. My provisional view is that a person who wishes to retire (normal retirement or early retirement) must seek permission to do so (Regulation 33). However, a person who wishes to resign must simply give notice in writing to do so (Regulation 32). However, a person does not lose any pension benefits (normal or early retirement) to which they are entitled by resigning. Retirement and resignations are two different concepts and operate differently. Permission to retire may be denied and resignation may be refused for a myriad of reasons.

[77] As noted above, the appellant in her letter dated 12th November 2018 stated that she had elected to voluntarily retire 'with immediate effect' pursuant to the 'transitional provisions' of section 21 of the **Pensions Act 2011**. In the CHRO's response dated

30th November 2018, the appellant was informed that the Deputy Governor had accepted her resignation from the public service and confirmed that her employment with the public service came to an end on 12th November 2018. As stated above, the letter from the appellant dated 12th November 2018 was a resignation with immediate effect and this was accepted by the Deputy Governor in the letter dated 30th November 2018. In my view, having resigned from the Government, the appellant was not required to seek permission to retire from the Deputy Governor in accordance with regulation 33. It is regulation 32 that was applicable in her case and has already been explored above.

[78] However, something more needs to be said about retiring and resignations because it was clear that the appellant 'retired' since she met the requirements for so doing and terminated her employment with the Government by 'resigning'. A distinction must be made between the two concepts because they are treated differently in the **Public Service Regulations**. However, a person does not lose their accrued pension benefits by resigning. I agree with the learned trial judge that resignation is where a person chooses voluntarily to terminate their employment. Retirement usually occurs at an age stipulated by the employer or legislation. Once a person reaches that age, the employee's employment comes to a natural end. An employer may also stipulate other requirements that an employee must satisfy for them to 'retire'. In such cases, such as those under section 6(1)(h) of the **Pensions Act 1947**, the employee is not obligated to 'retire' but if he or she wishes they have the option of so doing.

[79] How then does one exercise that option? It can be exercised by seeking permission to retire in accordance with regulation 33 or by resigning with the appropriate notice in accordance with regulation 32. A resignation, whether it complies with the notice period or other requirements of regulation 32, is a termination of employment. An employee whose employment is terminated is still entitled to pensions benefits in accordance with section 6(d) of the **Pensions Act 2011**. This will be explored further below. In my view, the learned trial judge was not correct in holding that the appellant

had to resign to obtain the benefit of early retirement. Resignation was merely a lawful option available to the appellant; she could have also sought permission from the Deputy Governor to retire.

Issue Five - Resignation and Disciplinary Proceedings

- [80] Disciplinary proceedings were brought against the appellant under regulation 48 of the **Public Service Regulations**, which provides as follows:

“Proceedings for misconduct not warranting dismissal where powers of disciplinary control have been delegated to an authorised officer

48. (1) Where—

(a) it is represented to an authorised officer to whom power to exercise disciplinary control has been delegated that an officer holding an office in respect of which such powers have been delegated has been guilty of misconduct; and

(b) the authorised officer is of the opinion that the misconduct alleged is not so serious as to warrant proceedings with a view to dismissal;

the authorised officer (or the Commission at the request of the Deputy Governor) may cause an inquiry to be made into the matter; and the officer whose conduct is under inquiry shall be entitled to know the whole case made against him and shall be given an adequate opportunity of making his defence.

(2) If, after inquiry, the authorised officer is of the opinion that the alleged misconduct is proved, he may recommend to the Deputy Governor such punishment other than dismissal as may seem just. (Amended by Act 10 of 2011)”

- [81] It seems to me that under regulation 48 an authorised officer after conducting the inquiry can either find that the alleged misconduct is proved or not proved. If the authorised officer is of the opinion that the alleged misconduct is proved, he or she may recommend to the Deputy Governor such punishment other than dismissal as may seem just. There can be no recommendation if the authorised officer is of the opinion that the alleged misconduct is not proved. At paragraph 10.4 of its report, the Commission noted that the appellant sought to comply with General Order 604(1) and that it was unfortunate that her application for vacation leave was denied by the Deputy Governor. It also noted at paragraph 10.5 that the requests to defer her leave in 2017, meant that although the appellant was entitled to 27 days leave during the year, she was effectively denied her legitimate entitlement to the rest and respite

which the Commission explained the appellant so badly needed, especially given the challenging working environment of which the Deputy Governor was aware. At paragraph 11.3, the Commission concluded that the appellant provided a reasoned defence to the charges laid against her. I read this conclusion as the Commission accepting the appellant's defence to the charges and while not making an express statement that the charges were not proved, there is no other reasonable way to read the report than that the Commission had not found the charges proved. It was therefore no surprise that there was no recommendation by the Commission of any punishment of the appellant.

- [82] In their grounds of appeal in the counter-notice of appeal, the respondents state that the learned trial judge erred in finding that the Commission cleared the appellant of charges of misconduct. The respondent continued that the evidence before the court below was that the Commission's role was to make a recommendation and not a final decision. That is true but the role of the Commission under regulation 48 was to make recommendations to the Deputy Governor if the charges were proved of such punishment other than dismissal as may seem just. No such recommendation was made by the Commission since there was no finding that the charges were proved. The 'recommendations' made by the Commission in its report can only be considered as general suggestions for the proper administration of the public service. The respondents are not correct in submitting that the Commission had made a recommendation on 1st October 2018, and that the final decision was still with the Governor and therefore disciplinary proceedings were still open when the appellant applied to retire on 3rd October 2018. In my view, the disciplinary proceedings against the appellant ended with the submission of the Commission's report to the Governor. Since the Commission did not find the charges proved and made no recommendations in respect of any punishment of the appellant, there was nothing else for the Governor to do on receiving the report of the Commission. Consequently, there were no pending disciplinary proceedings against the appellant when she applied to retire on 3rd October 2018 or when she resigned on 12th November 2018.

[83] When the appellant wrote the letter dated 3rd October 2018 and on 12th November 2018, there were no pending disciplinary proceedings against her. The Commission had issued its report on 1st October 2018 and did not find that the charges against the appellant were proved. Consequently, the Commission made no recommendations to the Deputy Governor concerning any such punishment other than dismissal as may seem just in relation to the appellant. In the letter dated 11th March 2019 from the CHRO to the appellant explaining that the Governor noted that her conduct fell short of the standards expected of public officers, especially at the senior level. The CHRO's letter continued that since the appellant had left the public her breach of discipline must be recorded and that the letter represented a formal reprimand to the appellant for breach by her of the General Orders in taking vacation leave without authorization in November 2017 and that the letter will be placed on her public service record. The Commission did not find the charges proved and made no recommendations for any punishment for the appellant and by the date of the letter the appellant had already resigned from the public service.

[84] Contrary to the submission of the respondents, the learned trial judge was correct in not considering this issue since there were no open disciplinary proceedings against the appellant that would warrant the refusal of her resignation in accordance with General Order 702(c) which provides that notice of resignation may be refused if disciplinary proceedings against the officer are contemplated or pending.

Issue Six - Legitimate Expectations

[85] The question of whether the Government had by practice and/or promise committed itself to this consistent practice that continued under the **Pensions Act 2011** of allowing pensionable officers who had served for 20 or more years but had not attained the age of 55 to retire pursuant to section 6(1)(h) of the **Pensions Act 1947** with an immediate gratuity and a deferred pension as they did under the 1947 Act, deserves a short response. First, legitimate expectations begin where rights end; so, having found that the appellant was eligible for pension benefits pursuant to section 21 of the **Pensions Act 2011**, it is not necessary to decide this issue. Second, it is

doubtful that there was any established practice by the Government of allowing pensionable officers who had served for 20 or more years but had not attained the age of 55 to retire pursuant to section 6(1)(h) of the **Pensions Act 1947** with an immediate gratuity and a deferred pension as they did under the **Pensions Act 1947**. Third, I agree with the respondents' submission that the personnel files referred to by the appellant in the court below do not establish any consistent practice. Fourth, the eligibility to a pension is to be determined based on the interpretation of the **Pensions Act 2011**. It is unlikely that any such legitimate expectation could arise (from the actions of the Executive) which would have the effect of supplementing or overriding the will of Parliament expressed in the provisions of the **Pensions Act 2011**. This ground of appeal therefore has no merit.

The Remaining Issues

- [86] Two additional issues can be briefly disposed of considering the findings on the issues in this appeal.

Consultation with the Commission

- [87] The question of whether the Deputy Governor acted in excess of her powers in withholding the appellant's pension benefits as she did not consult the Commission as mandated by section 88(1) of the **Constitution** does not arise for consideration given the findings above. The Deputy Governor was under the mistaken belief that the appellant was not entitled to any pension benefits under section 21 of the **Pensions Act 2011** based on advice she received from the Attorney General (Ag.). The Deputy Governor was therefore not withholding a pension from the appellant, as the appellant submits. The reasoning above makes clear that the notion that resignation implies no pension benefit under section 21 of the **Pensions Act 2011** is plainly wrong in principle and as a matter of statutory interpretation.

Early Exit Benefit

- [88] The learned trial judge held that the appellant was entitled to early exit under section 13 of the **Pensions Act 2011**. The appellant did not plead any such entitlement under

that section and had plainly grounded her entitlement to pension benefits under section 21 of the **Pensions Act 2011**. It was always the appellant's case that she was entitled to pension benefits in accordance with section 21 of the **Pensions Act 2011**. I agree with the appellant that the learned trial judge was wrong to decide the appellant's case on a section in the **Pensions Act 2011** without first inviting the parties to file submissions or to otherwise comment thereon. Given the findings above and the entitlement of the appellant to claim pension benefits under section 21 of the **Pensions Act 2011**, that order of the trial judge, as stated below, will be set aside. Consequently, there is no need to address the respondents' ground of appeal relating to the award of interest by the learned trial judge on the early exit award.

Disposition

[89] Based on the foregoing, I would allow the appeal in part against the decision of the learned trial judge, dismiss the counter notice of appeal, set aside the orders made at paragraph [70] of the judgment in the court below and make the following orders:

- (1) A declaration is granted that the appellant is entitled to be paid a gratuity and pension in accordance with section 21 (as amended) of the **Pensions Act 2011**.
- (2) Interest of 4% is payable on the total sum representing gratuity and pension that is due to the appellant under paragraph (1) from 12th November 2018 to the date of payment.
- (3) The appellant shall have her costs in the court below and in this Court to be assessed if not agreed within 21 days of today's date.

[90] I would not grant any of the coercive remedies sought by the appellant in the court below. The order of mandamus compels the performance of a public duty by a public authority. The Government was operating under the mistaken belief that the appellant was not eligible for a pension benefit under section 21 of the **Pensions Act 2011**.

Now that the appellant's eligibility has been clarified above, there is no reason to suppose that the Government will not in good faith comply with the declaration made above concerning the appellant's eligibility to be paid (and pay) her pensions benefit and gratuity pursuant to section 21 of the **Pensions Act 2011**.

[91] I am grateful for the assistance provided by learned counsel.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar