

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0120

BETWEEN

NIGEL RUSSELL

CLAIMANT

AND

MUSTIQUE COMPANY LTD

DEFENDANT

Appearances:

Mrs. Kay Bacchus-Baptiste of counsel for the claimant.

Mrs. Mandella Peters with her Mrs. Cheryl Bailey of counsel for the defendant.

2023: Jun. 27 & 29
Nov. 2
2024: Feb. 9

JUDGMENT

INTRODUCTION

[1] **Henry, J.:** This is a claim¹ by Mr. Nigel Russell against the Mustique Company Limited ('MCL') for damages for breach of contract and constructive dismissal. Mr. Russell claimed the total sum of \$945,099.79 as special damages and an unspecified amount for general damages. He also sought interest and costs. He alleged that after working with MCL on a series of contracts between June 1st 1999 and 2nd March 2014 that he was terminated by MCL without due cause. He claimed that he was entitled to receive payments for conducting OHS training, overtime, outstanding salary, vacation

¹By regular claim form filed originally on 29th August 2017 and amended on 23rd November 2018.

pay, travelling allowance and balance on gratuity.

[2] MCL denied those allegations. It maintained that by letter dated 27th February 2015 Mr. Russell's contract was terminated consensually between the parties with effect from March 2nd 2015. It contended that the elements of constructive dismissal and the alleged breach of contract have not been particularized in the claim, that in any event the termination was lawful and further that Mr. Russell was paid his lawful termination benefits inclusive of severance.

[3] For the reasons set out in this judgment I have found that MCL is not liable for breach of contract, wrongful dismissal or constructive dismissal as alleged by Mr. Russell.

ISSUES

[4] The issues are: -

1. Whether the Mustique Company Limited constructively dismissed Mr. Nigel Russell?
2. Whether the Mustique Company Limited is liable to Mr. Nigel Russell for breach of his contract of employment?
3. Whether Mr. Nigel Russell's claim for unfair dismissal is justiciable in the High Court?
4. Whether MCL is liable to Mr. Russell for wrongful dismissal or breach of the Mustique Company Limited Act?
5. To what remedies if any, is Mr. Russell entitled.

Issue 1—Did the Mustique Company Limited constructively dismiss Mr. Nigel Russell?

[5] Mr. Russell began working with the Mustique Company Limited on June 1st 1999 as the Quartermaster in its Security Department. He testified that his first period of employment was based on an oral contract which was not formalized in writing until September 1st 2002. Thereafter, he executed a series of other contracts of employment with the final such contract being signed on September 14th 2007². He accepted that he remained in the Mustique Company's employ until March 2nd 2015 when his employment was terminated by letter dated February 27th 2015.

² See pg. 26-33 of TB.

[6] Mr. Russell claimed that prior to receiving the termination letter he had worked with MCL on the island of Mustique for several years. Under cross-examination he admitted that he signed two contracts of employment, one dated 6th April 2006 and another dated September 14th 2007³. Mr. Russell accepted that the contract dated September 14th 2007 replaced any former agreements and arrangements for employment with the MCL. It was tendered into evidence as part of exhibit 'SH1' by Mr. Simon Humphrey, former Chief Security Officer with MCL, now retired.

[7] The contract contained the terms and conditions of employment that applied to Mr. Russell as MCL's Quartermaster of Grand Bay Workers Accommodation Area. It gave the date of commencement of employment as June 1st 1999 and the date of reissue as September 14 2007. It identified the Chief Security Officer/Company Senior Manager as the officer to whom Mr. Russell would be reporting.

[8] Other relevant terms were set out as follows:

'3 DURATION OF CONTRACT

The Contract of Employment shall be for a fixed period with effect from the commencement date of employment and shall continue until the discontinuation of employment date. It will be automatically renewed every year, unless terminated by either the employee or the Company with either party giving the other one (1) month's notice, such notice to be given in writing.

4 PRIOR AGREEMENTS

This Contract replaces and supersedes all former and existing agreements or arrangements for the employment of the Employee by the Company (if any) all of which shall be deemed to have been cancelled with effect from the date of commencement of this agreement.

...

15 RETIREMENT AGE

³ At pg. 26-33 of the Trial Bundle.

Retirement age is normally 60 years of age. Retirement at an earlier or later age may be allowed at the Company's discretion.'

[9]Mr. Russell testified that he is in full agreement with all of the terms in that contract. He accepted that it replaces all former employment agreements and arrangements between him and MCL. He claimed that his employment was terminated without due cause. He explained that towards the end of 2013, about 2 ½ years before his retirement was due to occur on his 60th birthday he requested a transfer to another department. He stated that Mr. Humphrey who was the head of his department had threatened him and asked him to carry out duties that he considered may compromise him. Consequently, he was of the view that the working environment on Mustique Island had become stultifying and unbearable and this led to him asking for a transfer.

[10] He stated that the request was approved and he was told to report for duty to one Mr. Dale Cain at the Kingstown office on mainland Saint Vincent in October 2014. However, when he got there he realized that Mr. Cain was not expecting him and no office furniture was provided for him. He said that Mr. Cain found a space in his office which could accommodate a desk and chair for his use. However, while the other staff were setting up the space, Mr. Joachim ordered them to stop because the MCL would have to rent other space for him. He stated that he found space wherever he could and at one point shared space in the office of another staff member. However, one day Mr. Joachim, Mr. Humphrey and one Mr. Pritchard told him that he could not use that space on a permanent basis and thereafter he could not perform his duties as normal.

[11] Mr. Russell explained that he telephoned Mr. Humphrey to apprise him of the situation and they thereafter held further telephone conversations about his position with MCL. During one of those conversations Mr. Humphrey broached the subject of him taking early retirement and thereafter opening a consultancy with MCL for two years to do occupational health and safety regulation ('OHS') training of MCL's employees. He indicated to Mr. Humphrey that he had no issue with providing OHS training as a consultant but he did not wish to take early retirement. He also told Mr. Humphrey that if the company could not resolve the issue of office space, he would be prepared to consider other options proposed by MCL.

[12] He testified that he received an email on 22nd October 2014 from Mr. Humphrey to the effect that MCL would like him to concentrate forthetimebeing on health and safety training, risk assessment and SOPs for the staff and this would require that he travel to Mustique once or twice weekly for training purposes and to assess the work environment. Further, that after Christmas 2014 they will begin discussions about his possible retirement from MCL.

[13] Mr. Russell claimed that by email dated 23rd October 2014, he agreed to coordinate the safety training and asked Mr. Humphrey to confirm that he had permission to work from home; that his new retirement date may be December 2014 and that they would finalize the OHS consultancy in January 2015. In a return email that same day, Mr. Humphrey granted permission for him to work from home and indicated that they would re-visit the retirement discussions in January 2015. Mr. Russell noted that Mr. Humphrey insinuated that there may have been something wrong with his (Russell's) health although this was not the case. He denied being ill and stated that he was fatigued from doing the same job for 14 years.

[14] By email dated 7th January 2015 Mr. Russell asked that his employment status with MCL be clarified. Mr. Humphrey responded that he was looking to resolve his case in February 2015. He suggested to Mr. Russell that he should retire and MCL would pay him gratuity, based on severance calculations. Mr. Russell testified that he telephoned Mr. Humphrey and told him that he had never requested early retirement and that the idea was proposed by MCL.

[15] Mr. Humphrey replied by email dated January 9th 2015 outlining certain steps that would lead to the end of Mr. Russell's employment with MCL. They were:

1. Confirm the gratuity amount in writing and that it would be paid to Mr. Russell.
2. Write a letter to the effect that he was retiring.
3. Confirm those arrangements with Mr. Pritchard.

[16] Mr. Russell stated that Mr. Humphrey told him that MCL did not want to dismiss him but since dismissal was the only way he could legally get severance, it was best that 'he retire/resign and

MCL agree in writing beforehand that he will receive a gratuity that is exactly the same as the severance payment as a thank you for years of service to the company'. He testified that he telephoned Mr. Humphrey and told him that he was not willing to resign or retire from MCL as suggested. He stated that it became clear after that conversation that MCL had decided to terminate him and was not willing to provide office space for him to work from or commit to a two year OHS consultancy with him. He therefore, without the benefit of legal advice accepted the arrangements for severance from MCL.

- [17] Mr. Humphrey sent Mr. Russell another email on 27th February 2015 advising that all arrangements to formally 'let him go' from MCL 'with a full severance package' had been completed. Mr. Russell stated that by letter dated March 2nd 2015 from Mr. Humphrey, MCL terminated him without cause and with immediate effect. He asserted that had he not been dismissed he would have continued working with MCL until retirement at age 60 in 2016. He asserted further that he would have in such circumstances been entitled to a gratuity calculated on the basis of a severance entitlement without deduction including PAYE.
- [18] Mr. Humphrey testified on behalf of MCL. He refuted Mr. Russell's claim that he was constructively dismissed. He explained that Mr. Russell's employment with MCL for the material period was governed exclusively by a contract of employment dated 2007. He acknowledged that it was terminated by letter dated 27th February 2015 becoming effective on March 2nd 2015. He stated that the termination was done consensually following a series of conversations and emails between Mr. Russell and senior management officials at MCL. He asserted that it is 'patently ingenuous' (presumably disingenuous) for Mr. Russell to claim that he was terminated without due cause. He denied that this happened or that any threats were made to Mr. Russell or that he was asked to do anything which entailed compromising his integrity.
- [19] Mr. Humphrey stated that in response to Mr. Russell's transfer request and in light of his constant complaints about his health and the effects of stress and anxiety on him, the request was carefully and sympathetically considered. Although it was not easy to find an alternative role within the company, MCL on compassionate grounds created a role that did not previously exist in

circumstances where there were no vacancies, although it had no obligation to do so. There was nothing suitable or available in Mustique so MCL tried to accommodate Mr. Russell at its Kingstown office as an assistant to Mr. Cain who had a high workload. However, this attempt failed because no suitable role existed.

[20] Mr. Humphrey acknowledged that he floated the idea of early retirement to Mr. Russell as well as the possibility of him finding private employment as a consultant and that discussions were held regarding those matters. Ultimately, Mr. Russell agreed to be terminated in accordance with the terms of his contract. He stated that all financial obligations to Mr. Russell were settled when he was terminated.

Mr. Russell's submissions

[21] Mr. Russell contended that the courts recognize that there are circumstances in which the employer, although not acting explicitly to terminate an individual's employment alters the employment relationship's terms and conditions to such a degree that an employee is entitled to regard the employer's conduct as termination and claim wrongful dismissal as if he had been let go without notice or pay in lieu of notice.

[22] He submitted that when MCL transferred him from the island of Mustique to the Kingstown Office it knew that there was no room for him at that office and it thereby substantially altered the conditions of his contract which had become 'stultifying and unbearable'. He submitted further that MCL by so doing effectively constructively terminated his contract. He contended that it is disingenuous for MCL to aver that he requested a transfer 'from the island of Mustique' when he merely asked for a transfer to another department in the company.

[23] He argued that after he vehemently complained about his lack of work and the working conditions, Mr. Humphrey altered his conditions and duties in an email of 22nd October 2014 by saying 'for the time being we would like you to concentrate on the delivery of OHS Training' in conjunction with

two other employees. He contended that he was thereby demoted. I must interject here that this claim about a demotion was not pleaded. I therefore disregard it.

[24] Mr. Russell submitted that Mr. Humphrey's oral testimony on cross examination underscores that MCL constructively dismissed him in that no procedure was followed for the transfer; no job

description was provided and no name assigned to the post; he had no office, desk or duties; MCL knew in advance that there was no vacancy, office space, or role for him to fill yet they sent him knowingly; and MCL changed the conditions of his employment by requiring him to deliver OHS training. He added that it was stultifying, unbearable and distasteful. However, I make the observation that in his testimony he attached those descriptions to the period before the transfer took place. It is therefore not clear if he intended to rely on his experience before the transfer as constituting constructive dismissal. In any event, his case was not presented in that way.

[25] He pointed to other factors that he claimed establish constructive dismissal. These were his assessment that it was not professional sending him to the Kingstown Office; Mr. Humphrey knew that he did not wish to retire; 'they suggested "retirement" and "gratuity", he suggested "severance"'. He argued that the facts will show that he was constructively dismissed in October 2014 when he was sent to the Kingstown office where he was demoted, his working conditions and job description were completely altered and as a result he was 'in limbo' and left the employment with MCL which he held from 1st June 1999 up to October 2014.

[26] Mr. Russell submitted that since October 2014, MCL completely breached its contract of employment with him when it sought to begin a new kind of employment agreement. He argued further that there was absolutely no termination of the contract pursuant to clause 3 as claimed by MCL. He submitted that on the authority of **Jenny Lindsay v Webster Dyrud Mitchell (A Partnership) et al**⁴ he has proven that MCL's treatment of him when they sent him to the Kingstown Office was such that he was entitled to terminate the contract without notice and further that MCL admitted a series of acts or incidents which amounted to repudiatory breach of the terms of the contract.

⁴AXAHCV2003/0060 (unreported, delivered on 20th December 2016).

[27] He submitted that he accepted the breach, ended his written contract and left the island of Mustique whereupon his employment was at an end. He contended that having constructively dismissed him, MCL sought to re-employ him as an OSHE Consultant.

MCL's submissions

[28] MCL relied on **Jenny Lindsay** regarding what constitutes constructive dismissal. In this regard, they extracted from the judgment the learned judge's statement of the four main elements of constructive dismissal:

- 'a. A repudiatory breach on the part of the employer. ... may be an actual or anticipatory breach. ... must be sufficiently serious to justify the employee resigning.
- b. An election by the employee to accept the breach and treat the contract as at an end.
- c. The employee must resign in response to the breach.
- d. The employee must not delay too long in accepting the breach, as it is always open to an innocent party to waive the breach and treat the contract as continuing.'⁵

[29] MCL submitted that constructive dismissal does not apply to the case at bar because Mr. Russell has accepted that his services were terminated by MCL and did not allege that he resigned or retired as a result of a repudiatory breach by the MCL. It argued that to the contrary, Mr. Russell maintained in his pleadings and testimony that he refused to retire or resign.

DISCUSSION

[30] Constructive dismissal is defined in **Osborn's Concise Law Dictionary** as 'a dismissal to be inferred from the fact that the employer's conduct is such that the employee has no choice but to resign.'⁶ In **Jenny Lindsay**, the learned judge adopted the following test as articulated by Lord Denning in **Western Excavating Ltd. v. Sharp** (1978) 1 QB 761 at page 769:

'Where an employee complains that they have been constructively dismissed, **it is necessary for them to prove that they terminated the Contract in circumstances such that they were entitled to terminate it without notice by reason of the employer's conduct.** The conduct must therefore be repudiatory and sufficiently serious

⁵ At para. 4.

⁶ 7th Edn by Roger Bird, Sweet and Maxwell, 1983.

to enable the employee to leave at once. On the other hand it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial which cumulatively amount to a repudiatory breach of the implied term of the Contract of employment that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.’(Emphasis added)

I, likewise, accept that the essence of constructive dismissal is acceptance by an employee of an employer’s repudiatory breach of a contract of employment, through the employee’s resignation in response within a reasonably short period of time.

[31] In this case, Mr. Russell neither claimed in his pleadings nor his evidence that the contract was repudiated by MCL or that he resigned as a consequence of such breach. Those two elements are essential for purposes of establishing constructive dismissal. Mr. Russell’s failure to plead and establish those ingredients of constructive dismissal is fatal to that limb of his claim. I find therefore that he has not established on a balance of probabilities that he was constructively dismissed by MCL.

Issue 2– Is the Mustique Company Limited liable to Mr. Nigel Russell for breach of contract?

Mr. Russell’s Submissions

[32] It is Mr. Russell’s contention that MCL breached its contract with him when it suddenly transferred him without stating the reasons for so doing or the terms of the transfer and because he made a complaint⁷. This is contrary to his account that he requested a transfer. He argued further that MCL breached the contract by terminating his employment prematurely before his retirement age on May 1st 2016; by unfairly and unreasonably failing to provide a place for him to work; by failing to provide clear transfer or documentation; by demanding longer hours of work than contracted for without pay; and by breach of paragraphs 8 and 15 of the contract. He submitted further that by failing to pay overtime MCL acted in breach of the Wages Council Regulations.

⁷ See para. 37 of the Claimant’s submissions filed on 30th January 2020.

MCL's submissions

[33] MCL pointed out that Mr. Russell acknowledged under cross-examination that he was in full agreement with the terms of the contract of employment dated 14th September 2007 and accepted that it replaced and superseded all former and existing agreements or arrangements and that he had read, understood, and agreed to comply with the terms and conditions of that contract of employment. Furthermore, he admitted that clause 3 of the contract expressly stated that it was for a fixed period; and he agreed that the contract was subject to an automatic yearly renewal, unless it was terminated by MCL or by him on one month's notice in either case. He accepted also that under clause 15 of the contract MCL retained the discretion to increase or decrease an employee's retirement age.

[34] MCL submitted that Mr. Russell presented no cogent evidence which established that his contract was for a fixed period up to the retirement age of 60 years. It submitted further that it was not in breach of the contract of employment because Mr. Russell was terminated prior to 1st May 2016. Therefore, he is not entitled to 'salary to retirement from May 2015 – April 2016', gratuity referable to that period, loss of retirement benefit, travelling allowance for those two years or vacation pay in relation to that period.

[35] MCL argued that the uncontroverted evidence at trial is that Mr. Russell left the island of Mustique in 2014 and was accommodated within its Kingstown office and was later permitted to work from his home. Further, that since Mr. Russell was now based in Kingstown he could no longer perform the duties and responsibilities detailed in the contract and instead made efforts to find an alternative role for him within MCL. It contended that the evidence reveals that MCL was fair and reasonable in its dealings with Mr. Russell and tried its best to accommodate him by seeking to find a suitable place of work and a new role for him. It did not thereby breach his contract as alleged, or at all in this respect.

[36] As to the allegation that MCL demanded longer hours without pay from Mr. Russell, MCL countered that with respect the document labelled 'Job Description and Terms of Employment' dated 1st September 2002, Mr. Russell reviewed it during cross-examination and confirmed that his

salary in respect of those terms was about \$2,860.00; and agreed that his daily hours of duty were 8 hours but that this varied based on specific requirements. He accepted too that under the 6th April 2006 contract, that the section with respect to his hours of work had changed as a result of specific workload needs and that there had been an increase in salary to cover extra duties and responsibilities. Similarly, under the 14th September 2007 contract, his salary had been increased from \$5,000.00 to \$7,000.00 and this increase took into account the extra duty regarding 'uniform' responsibilities and the need for him to work flexibly to cover certain hours in the evenings and at weekends, reflecting the unpredictability of the work and the additional demands created through increased volume.

[37] MCL noted that Mr. Russell alleged⁸ that he is entitled to *inter alia* certain payments from the it including overtime in the amount of EC \$42,370.26 for Saturdays worked after 1200 noon between 2011 and 2014; overtime in the sum of EC\$144,252.80 for Sundays worked from 1999 to 2014; and overtime in the amount of EC\$45,171.96 for weekdays worked between 1999 and 2014. However, he acknowledged in his witness statement⁹ that he 'was paid for the Sundays worked from 2001 to 2006' and has therefore contradicted his assertions that he is entitled to overtime pay for Sundays worked between 1999 and 2014. I agree with MCL on this score.

[38] MCL submitted that while Mr. Russell testified that he received only 5 payments in respect of overtime in the year 2008 and identified those payments by reference to pay slips dated 18th December 2008, 27th November 2008, 28th October 2008, 28th August 2008 and 29th May 2008, the pay slips do not prove that he only received five payments for overtime in 2008. In reality, the Supplemental Trial Bundle contains an additional pay slip dated 19th March 2008 which refers to both overtime and double time payments made to him by the MCL¹⁰. Therefore, there are at least six months during the year 2008 when he received overtime and double time payments. Moreover, he did not produce his salary slips for the years after 2008 to substantiate his claims that he received no overtime payments after 2008.

⁸At para. 34 of his witness statement.

⁹ At para. 42.

¹⁰ Page 43 of the Supplemental Trial Bundle.

[39] MCL noted further that in respect of overtime payments, its witness testified that if Mr. Russell worked overtime, he would produce an overtime claim which would have been approved and then processed. He testified further that Mr. Russell could request pay for overtime for additional work done Mondays to Fridays, or if he worked for prolonged periods on Saturdays or Sundays. It submitted that Mr. Russell did not disclose or produce any supporting documents that detail any overtime claims that were submitted by him and/or rejected or the times and dates on which he allegedly worked overtime on weekdays, Saturdays, and Sundays. He has also not provided any basis for the calculations of the overtime payments supposedly due to him.

[40] MCL argued that it is trite law that special damages must be pleaded, particularized and proved by evidence capable of supporting the conclusions which the Court is invited to reach. It contended that Mr. Russell has not presented a scintilla of extraneous or corroborative evidence of his claim for overtime payments. He has therefore failed to prove that MCL is in breach of paragraph 8 of the contract of employment or the Wages Council Regulations. Accordingly, his claim for overtime payments should be dismissed.

[41] MCL pointed out that during cross-examination, Mr. Russell agreed that the duties and responsibilities assigned to him during his employment were contained in the contract of employment dated 14th September 2007 and that by signing the contract, he agreed to carry out those duties. Noting that items 8 and 9 expressly state:

- ‘8. You will implement a structured fire plan which is regularly tested. You will also ensure that proper systems and equipment are maintained.
9. Any other duties as assigned by the Management of the Company and in your capacity to perform.’

it submitted that the evidence illustrated that the OHS trainings which he conducted and his role as a Fire Safety Officer fell squarely within the ambit of his duties under the contract of employment.

[42] MCL argued that having accepted that he received an increase in salary under the 2007 contract which took into account ‘the extra duty regarding uniform responsibilities’, Mr. Russell has failed to establish that there was any obligation on its part to make additional payments to him outside of the contractually agreed salary in respect of the OHS training that he provided or in respect of

his role as a Fire Safety Officer. Further, he has not provided any evidence of any separate agreement between him and MCL which would require MCL to pay him for OHS training conducted by him in 2013 and 2014, or for his role as a Fire Safety Officer from 2011 to 2014. MCL reasoned that his claim for payments for the OHS trainings and for his role as a Fire Safety Officer is without merit, and as a result, he is not entitled to such payments.

DISCUSSION

[43] It is trite law that a party to a contract commits a breach of the agreement when he fails to carry out his obligations under the contract. The breach may be of an express term of the contract or a term that may be implied from the circumstances surrounding the consummation of the agreement.

[44] The learning on what constitutes an implied term was articulated by Lord Hughes in **Ali v Petroleum Company of Trinidad and Tobago** as follows:

'It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. ... The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.'¹¹

The Court of Appeal applied this principle in **The Attorney General of The Virgin Islands v Global Water Associates Limited**.¹²

¹¹ [2017] ICR 531, at para. 7. See also *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd* [2016] AC 742.

¹² BVIHCMA2016/0007 (unreported, delivered February 13th 2018).

[45] It is readily discernible that of the six breaches complained of by Mr. Russell that two areas find no expression in the contract, namely in relation to provision of a place to work and reference to the Wages Council Regulations. As regards the latter, it is noteworthy that the **Wages Council Act**¹³ creates an offence for failure of an employer to pay the minimum stipulated wage, punishable under section 11 with a fine and also rendering the employer liable to be ordered to pay the difference between the stipulated rate and that actually paid. Mr. Russell's recourse for any default by MCL in this regard is by virtue of that law and not by application to the High Court in this manner. This conclusion is equally applicable to his assertion that in breach of clause 8 of the contract MCL failed to pay him overtime. That is a matter regulated and enforced under the **Wages Council Act** and not in this forum.

[46] The onus is on Mr. Russell as the claimant to establish his claim on a balance of probabilities by presenting evidence. His claim that MCL demanded longer hours of work than contracted for, without pay has been rebutted by MCL as outlined at paragraphs 38 and 39¹⁴ above. Their arguments are compelling and serve as a complete answer to this aspect of Mr. Russell's claim. I therefore find that there has been no breach of his contract in this regard. Additionally, this too is a matter which fittingly is to be reserved for resolution in accordance with the provisions of the **Wages Council Act**.

[47] As to provision of a place to work, it was not expressly pleaded that such a term is to be implied and on what basis. Mr. Russell also did not indicate by oral or documentary evidence what arrangements were in place in Mustique before his requested transfer to Kingstown regarding a place to work. The job description in the contract does not lend itself to a conclusion necessarily that MCL and Mr. Russell intended that an office space was to be provided for him from which to discharge his duties. For the most part, based on the job description his duties on Mustique appeared to involve moving between venues, residences, houses and other property on Mustique and issuing of uniforms. I do not interpret the terms of the contract to necessitate a designated and

¹³ Cap. 217 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

¹⁴ Said to be paragraphs 43 and 44 before it was discovered that there were errors in numbering of paragraphs.

dedicated place or office from which to perform those duties. This did not appear to have changed when he was transferred to Kingstown.

[48] Applying the learning outlined earlier, I conclude that even if Mr. Russell had pleaded this breach as being an implied term, I have great difficulty in finding that it was necessary to give the contract business efficacy or to make it work or that it was so obvious as to not need expression in the contract. I am satisfied that there was no breach as alleged in this regard.

[49] As stated earlier, I am satisfied that Mr. Russell requested the transfer and went along with the transfer right up to the point that he finalized and implemented arrangements for his termination on early retirement terms as described by Mr. Humphrey. Mr. Russell's belated complaint that he was transferred without his consent and without documentation is incredible and has been totally discredited even from his own lips. I find that this allegation is false and further that MCL did not breach the contract by transferring him.

[50] Clause 15 of the contract sets out the parties' agreement that while the retirement age is 60 years, MCL may permit retirement at an earlier age. This was an agreed term of the contract. Mr. Russell's election to proceed on early retirement in March 2015 was permitted by MCL in terms of the letter of termination issued following negotiations between the parties. I find that it was a consensual parting of ways on terms negotiated between competent contracting parties. No breach is made out as alleged or at all. I find therefore that MCL did not breach the contract with Mr. Russell.

Issue 3 – Unfair dismissal

[51] In relation to his claim for unfair dismissal Mr. Russell cited **Josandre Bain and the Incorporated Trustees of the Westmoreland School**. He maintained that he had been unfairly dismissed.

[52] MCL countered that it is settled law that that an employee's remedy for unfair dismissal, whether actual or constructive, is a statutory remedy in respect of which the High Court lacks jurisdiction. It

submitted that the **Protection of Employment Act**¹⁵ makes provisions for unfair dismissal matters to be adjudicated by the Labour Tribunal as the exclusive adjudicator of such matters. It cited **Michelle Jones v The Saint Vincent and the Grenadines Port Authority Saint Vincent and the Grenadines**¹⁶ and **Alicia Sardine Browne v RBTT Bank Caribbean Limited**¹⁷.

[53] This issue may be disposed of shortly. Part IV of the **Protection of Employment Act** makes provision for employees and employers to pursue disputes arising under the Act through the mechanism outlined there. This includes disputes concerning allegations of unfair dismissal as expressly provided under section 17. The dispute process outlined in the Act is presided over by the Labour Commissioner and the Labour Tribunal at different stages. The Supreme Court is not involved in such proceedings. As submitted by counsel for MCL, it is now well-established that the Supreme Court plays no role in such disputes except at the appellate level on appeal to the Court of Appeal. Mr. Russell's complaint in this forum of unfair dismissal is misdirected and must be dismissed.

Issue 4 – Remedies

[54] Having found that Mr. Russell has failed to establish any part of his claim against MCL, it follows that he is not entitled to the remedies claimed. I therefore make no such award to him.

Miscellaneous – Breach of Mustique Company Act and Wrongful Dismissal

[55] Mr. Russell raised in his submissions the subject of wrongful dismissal. He contended that his was a case of unlawful dismissal for breach of contract. Under that rubric, he cited authorities which address the issue of unfair dismissal. I have already dealt with that issue above.

[56] MCL quite correctly pointed out that as stated by Lord Hoffman in **Johnson v Unisys Ltd**¹⁸ wrongful dismissal was quite aptly described by McLachlin J of the Supreme Court of Canada as being:

¹⁵Cap. 212 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009.

¹⁶SVGHCV2009/172 (unreported Judgment delivered on 20th August 2014).

¹⁷SVGHCV2006/0520 (unreported Judgment delivered on 13th July 2015).

¹⁸[2001] 2 All ER 801.

'based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal ... A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given. ...

The action for wrongful dismissal could therefore yield no more than the salary which should have been paid during the contractual period of notice.'¹⁹

[57] MCL reasoned that since Mr. Russell received payment of his monthly salary in lieu of notice as stipulated in clauses 3 and 7 of his contract and accepted the payment, his dismissal cannot be construed as having been wrongful. I agree entirely with the logic founded as it is on a correct statement of the applicable legal principle as to what constitutes wrongful dismissal. I find therefore that Mr. Russell was not wrongfully dismissed by MCL and he is not entitled to recover general or any damages.

[58] As to his claim for breach of the **Mustique Company Limited Act**²⁰, suffice it to note that the provisions that Mr. Russell has invoked under that Act embodies an agreement between the Government of Saint Vincent and the Grenadines and MCL to which Mr. Russell is not party. Furthermore, clause 26 of the agreement provides for resolution of disputes under that agreement to be by arbitration.

[59] It states:

'All differences whatsoever which may at any time hereafter arise between the parties hereto or their respective representatives, or between the Company and the Licensees, touching these presents or the subject matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise, and all differences relating directly to Mustique which may at any time hereafter arise between Licensees or between

¹⁹In *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1 at paras. 39 and 41.

²⁰Cap. 153 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

the Company and Licensees, shall be referred to arbitration pursuant to the provisions of the Arbitration Ordinance, 1952 of Saint Vincent and any statutory modifications or re-enactment thereof, for the time being in force. The arbitration procedure will be the two arbitrators procedures.'

Therefore, the court would not be the appropriate forum unless the parties waive the right to arbitration.

[60] For the foregoing reasons, Mr. Russell would not be able to avail himself of the benefit of the **Mustique Company Limited Act**. That aspect of his claim must also fail.

Costs

[61] The successful party is generally entitled to recover its costs. Mr. Russell is therefore required to pay costs to MCL on the prescribed costs regime under CPR 65.5(2)(b) in the amount of \$7,500.00.

DISPOSITION

[62] It is ordered:

1. Nigel Russell's claim is dismissed.
2. Nigel Russell shall pay the Mustique Company Limited prescribed costs of \$7,500.00.

[63] I am grateful to the legal practitioners for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar