IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No GYCV2023/002
GY Civil Appeal No 101 of 2017

BETWEEN

MAURICE ARJOON **APPELLANT**

AND

THE NEW BUILDING SOCIETY LTD
TRUST COMPANY (GUYANA) LTD
EXECUTOR OF THE ESTATE OF
AHMAD KHAN, DECEASED
SEEPAUL NARINE
NIZAM MOHAMED **RESPONDENTS**

Before: **Mr Justice Saunders, President**
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Burgess
Mr Justice Jamadar

Date of Reasons: **19 March 2024**

Appearances

Mr Edward A Luckhoo SC with Mr C V Satram, Mr Ron Motilal and Ms Eleanor Luckhoo for the Appellant

Mr Stephen Fraser SC with Mr Teni Housty and Ms Shantel Scott-Lall for the Respondents

Employment law – Breach of employment contract – Wrongful dismissal – Good faith obligation in employment relationships – Implied obligation of trust and confidence in employment relationships – Whether particular instances of wrongful dismissal can be deemed involuntary retirement – Award of pension contributions as relief for wrongful

dismissal – Award of pension benefits as relief for wrongful dismissal – Pension as deferred wages for service already rendered to an employer – Whether severance benefits can be awarded in addition to pension benefits as relief for wrongful dismissal – Exemplary damages – Termination of Employment and Severance Pay Act, Cap 96:01

SUMMARY

On 14 August 2007, the First Respondent terminated the Appellant's employment as company Director/Secretary/CEO on the ground of 'serious misconduct'. Pursuant to the First Respondent's Pension Scheme Rules, the Appellant was due to retire six months later, on 24 February 2008, at age 60 and had applied for early retirement on 12 June 2007. The circumstances surrounding the Appellant's dismissal concerned withdrawal of approximately GYD70 million from a member's account at the First Respondent, by an individual using a fraudulent Power of Attorney.

While employed with the First Respondent from 1 December 1979 to 13 August 2007, pension contributions were made by the Appellant and on his behalf by the First Respondent. In the letter of dismissal dated 14 August 2007, the First Respondent advised the Appellant that a refund of his contributions to the Pension Scheme based on its rules would be settled by the Trustees after his indebtedness to the First Respondent had been determined.

The Appellant initiated proceedings before the High Court, asserting that he had been wrongfully dismissed, and seeking *inter alia* full pension benefits and termination and severance benefits under the *Termination of Employment and Severance Pay Act, Cap 96:01* ('TESPA').

Reynolds J in the High Court ruled that the Appellant had been 'wrongfully and unlawfully dismissed' by the First Respondent by its letter dated 14 August 2007. The trial judge awarded the Appellant payment in lieu of notice of GYD4,144,797, severance benefits amounting to GYD16,104,723, and pension benefits amounting to GYD59,033,281, calculated up to 30 June 2017, and from 1 July 2017 a monthly pension of GYD372,498

to continue until the death of the Appellant. Reynolds J also awarded interest and costs to the Appellant.

On appeal, the Court of Appeal agreed with the trial judge's finding that the Appellant had been wrongfully dismissed. The court however reversed the trial judge's award of full pension benefits to the Appellant. The Court of Appeal was of the view that having regard to the fact that the Appellant's employment had ceased, 'no further pension contribution or pension rights are in place'. The Court of Appeal however noted that the evidence was that the Appellant's pension contributions amounted to GYD6,287,872, and the First Respondent's pension contributions amounted to GYD12,529,560. The Court of Appeal therefore ordered that the Appellant was entitled to receive the total sum of the pooled contributions amounting to GYD18,817,432.

By Notice of Appeal filed on 11 April 2023, the Appellant appealed the decision of the Court of Appeal. The Respondents filed a notice of cross-appeal (amended on 20 June 2023). This Court heard the appeal and the cross-appeal on 10 October 2023, and by order dated 23 October 2023, the Court allowed the Appellant's appeal and dismissed the cross-appeal with reasons to follow. The Court also reversed the decision of the Court of Appeal that the Appellant was not entitled to full pension benefits. The Court restored the judgment and order of Reynolds J, save that a decision on the issue of the Appellant's entitlement to severance pay was reserved. Further, the Court ordered that the First Respondent pay to the Appellant the additional sum of GYD1,602,459 as leave pay and passage assistance for the years 2006 and 2007, and standard costs.

The Court now delivers its reasons in support of its order made on 23 October 2023, and its decision on the issue of severance. The Judges are agreed that the Appellant has been wrongfully dismissed, and that the Appellant is entitled to full pension benefits as ordered by Reynolds J. On the issue of the Appellant's entitlement to severance payment under TESPA, the Court is divided 3-2. Barrow J has written for the majority and Saunders P and Jamadar J concur.

Barrow J asserted that as a matter of law in Guyana and for the purposes of an award of pension benefits, resignation may in particular circumstances be regarded as retirement. He reasoned that it may therefore legitimately be said that what took place with the Appellant was that he involuntarily retired, or in other words, that he was required to retire in line with the First Respondent's Pension Scheme Rules allowing for entitlement to pension. Having concluded that the Appellant was to be deemed as having retired, and that he did so in line with the Pension Scheme Rules providing for entitlement to pension, Barrow J explained that it remained only to determine the pension that would be paid in a normal case of retirement before the scheduled retirement date. Given that the calculation of pension entitlement which was done in the High Court was not disputed before this Court, the award was upheld by Barrow J.

Barrow J turned to the question of the Appellant's entitlement to receive severance pay in addition to pension benefits. According to Barrow J, in view of the conclusion reached by the Court that pension is to be paid to the Appellant as if retired, the Appellant's argument that severance pay should be paid because he was terminated and was thus unable to retire, cannot succeed. Barrow J explained that were such an argument to succeed, the Appellant would be getting exactly what the statute creating this benefit of severance pay intended that he should not, that is, both severance pay and pension.

In separate opinions, Saunders P and Jamadar J agreed with the conclusion of Barrow J that where the Appellant is deemed to have retired, and entitled to pension benefits on this basis, he cannot also be entitled to severance pay under TESPA. Jamadar J further expressed the view that the Appellant was entitled, from the record and in the exceptional circumstances of this case, to a consideration of additional heads of damage, including (i) compensation and/or damages payable and/or other relief under s 20 of TESPA, and/or (ii) exemplary damages.

Rajnauth-Lee and Burgess JJ concurred with the majority save on the issue of the Appellant's entitlement to severance pay. They agreed that the Appellant was entitled to receive pension benefits, but their reasoning differed from the majority. According to

Rajnauth-Lee and Burgess JJ, under s 3(2) of TESPA, accrued or earned pension is protected to the extent it is a 'higher standard of benefit' contained in an employment agreement. They considered that the Appellant's pension rights were a higher standard of benefit to which he was entitled by virtue of his contract of employment with the First Respondent. Accordingly, they concluded that the Appellant's pension benefits were accrued or earned wages and he was entitled to full pension rights under the First Respondent's Pension Scheme and the Rules.

In relation to severance, Rajnauth-Lee and Burgess JJ were of the view that the Appellant was wrongfully dismissed as distinct from 'being retired', and that a severance allowance was a separate and distinct entitlement to pension benefits. Given what they considered the policy behind s 21(1) of TESPA as to the payment of severance, they thought it strange that the legislature would have intended to take away an employee's accrued compensation for doing service over the years, that is, his severance payment, in circumstances where the employee had been wrongfully dismissed, on the sole ground that he was entitled to a pension. They therefore concluded that there was nothing in s 21(4) (d) of TESPA which precluded the Appellant receiving his full severance entitlement under TESPA, as well as his accrued pension benefits under his contract of employment.

Cases referred to:

A v Bottrill [2003] 1 AC 449; *Addis v Gramophone Co Ltd* [1908-1910] All ER Rep 1; *A-G v Blake* [2001] 1 AC 268; *Air Jamaica Ltd v Charlton* (1999) 54 WIR 359; *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB; *Banking, Insurance and General Workers Union v PriceSmart Trinidad Ltd* TT 2008 IC 43 (CARILAW), (17 March 2008); *Barrow v A-G of Saint Lucia* LC 2014 CA 6 (CARILAW), (27 October 2014); *Blyth v Scottish Liberal Club* [1983] IRLR 245; *Burn v Alder Hey Children's NHS Foundation Trust* [2022] IRLR 306; *Chefette Restaurants Ltd v Harris* [2020] CCJ 6 (AJ) (BB), (2020) 98 WIR 79; *Christofidou v House of Fraser* (2015) UKEAT/0083/15; *Commissioner of Police v Alleyne* [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590; *Courage Group's Pension Schemes, Re* [1987] 1 WLR 495; *Guyana Sugar Corp Inc v Dhanessar* [2015] CCJ 4 (AJ) (GY), GY 2015 CCJ 1 (CARILAW); *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71; *King v University Court of the University of St Andrews* [2002] IRLR 252; *London Export Corp v Jubilee Coffee Roasting Co* [1958] 2 All

ER 411; *Macari v Celtic Football and Athletic Co Ltd* [1999] IRLR 787; *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522; *OO v BK* [2023] CCJ 10 (AJ) BB; *Paragon Properties Ltd v Magna Envestments Ltd* [1972] 24 DLR (3d) 156; *Parry v Cleaver* [1970] AC 1; *Persaud v Mongroo* [2023] CCJ 16 (AJ) GY; *Republic Bank Ltd v Tri-Star Caribbean Inc* TT 2020 CA 50 (CARILAW), (9 September 2020); *Rookes v Barnard* [1964] 1 All ER 367; *Rubel Bronze and Metal Co Ltd, Re* [1918] 1 KB 315; *Sandy Lane Hotel Co Ltd v Cato* [2022] CCJ 8 (AJ) (BB), BB 2022 CCJ 2 (CARILAW); *Shove v Downs Surgical plc* [1984] ICR 532; *Stevens v Bell* [2002] All ER [D] 301 (May); *Torres v Point Lisas Industrial Port Development Corp Ltd* (2007) 74 WIR 431; *Trust Co (Guyana) Ltd v Guyana Securities Council* [2021] CCJ 11 (AJ) GY, (2021) 99 WIR 422; *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085; *Whiten v Pilot Insurance Co* [2002] 1 SCR 595.

Legislation referred to:

Guyana – High Court Act, Cap. 3:02, Insurance Act, Cap 91:02, Law Reform (Miscellaneous Provisions) Act, Cap 6:02, Securities Industry Act Cap 73:04, Supreme Court of Guyana Civil Procedure Rules 2016, Termination of Employment and Severance Pay Act, Cap 96:01.

Treaties and International Materials referred to:

Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319.

Other Sources referred to:

Corthésy N and Harris-Roper C-A, *Commonwealth Caribbean Employment and Labour Law* (Routledge 2014); Cumberbatch J, 'The Termination of Employment Statutory Reform in Guyana' (1999) 1 Guy L R 79; Guest A G (ed), *Chitty on Contracts* (25th edn, Sweet & Maxwell 1983); Holzmann R and others, 'Severance Pay Programs Around the World: History, Rationale, Status and Reforms' (Institute of Labor Economics Discussion Paper No 5731, May 2011) 54.

Lepaulle P, 'The Function of Comparative Law' (1921-1922) 35(7) Harv L R 838; Pollard D, *Employment Law and Pensions* (2nd edn, Bloomsbury Publishing 2023).

REASONS FOR DECISION

Barrow J

Saunders P (concurring)

Jamadar J (concurring)

Rajnauth-Lee and Burgess JJ (concurring, except on the issue of the Appellant's entitlement to severance pay)

BARROW J:

[1] The Judgment of this Court was delivered on 23 October 2023 allowing the appeal and dismissing the cross-appeal in the termination of employment dispute which gave rise to these proceedings, with reasons to follow. The judgment reversed, in part, the decision of the Court of Appeal that Mr Maurice Arjoon, the Appellant, was not entitled to pension benefits; it restored the Judgment and Order of Reynolds J delivered on 20 July 2017 awarding pension benefits save that it reserved decision on the issue of entitlement to severance payment; and ordered the First named Respondent to pay to the Appellant an additional sum for leave pay and passage assistance for two years. The Respondent was ordered to pay standard costs.

[2] These are the promised reasons and the decision on the issue of the entitlement to severance pay that was reserved.

The Parties and the Legal Dispute

[3] The Appellant was elevated to the position of Director Secretary/CEO at the New Building Society ('NBS'), the First Respondent, after some 24 years of employment. His written contract of employment provided for mandatory pension contributions and for summary dismissal in circumstances of 'gross misconduct'. The First Respondent carried on business as a savings and mortgage institution. The other Respondents, stated to be represented by the same

attorneys-at-law as the First Respondent, took no apparent part in the proceedings, they are variously: Trust Company (Guyana) Ltd, Executor of the Estate of Ahmad Khan, Seepaul Narine and Nizam Mohamed.

[4] On 14 August 2007, the First Respondent terminated the Appellant's employment on the ground of 'serious misconduct'. The Appellant was due to retire six months later, on 24 February 2008, at age 60 and had applied for early retirement on 12 June 2007. The circumstances surrounding the Appellant's dismissal concerned the withdrawal from a member's account at the New Building Society of approximately GYD70 million, using a fraudulent Power of Attorney.

[5] While employed with the First Respondent from 1 December 1979 to 13 August 2007, pension contributions were made by the Appellant and on his behalf by the employer. In the letter of dismissal of 14 August 2007 sent by the First Respondent to the Appellant, he was advised that a refund would be issued in respect of pension contributions pooled over the course of his employment. According to New Building Society, this sum amounted to GYD18,817,432, less any indebtedness. The letter of dismissal stated:

> As you are aware unauthorised withdrawals took place from Account No. … amounting to the loss of funds to the Society in excess of $69M, due to fraud, dereliction of duty, negligence and/or serious misconduct.
>
> Following investigations on the part of the Society and procedures in which you decided not to personally participate, the Society's Board has taken a decision to summarily dismiss you as Director/Secretary of the Society with immediate effect for serious misconduct.

[6] The Appellant commenced proceedings before the High Court by Statement of Claim dated 16 July 2010 and this Court, while not repeating its many earlier deprecations of judicial and systemic delays, must once again regret that the parties and especially the Claimant have had to suffer the hardship and injustice of having to wait so long for a final determination of this claim. It is important

that the courts do not become resigned to accepting delay as the norm and something simply beyond our power to avoid. The Claimant sought the following reliefs: (a) One Month's pay in lieu of notice to terminate employment; (b) Outstanding Leave Pay and Passage Allowance; (c) Loss of Earnings (salary) for breach of contract; (d) Loss of Earnings (allowances) for breach of contract; (e) Full pension benefits (accrued and continuing pension); and (f) Severance benefits under the Termination of Employment and Severance Pay Act[1] ('TESP Act').

Finding of No Fault

[7] It was never alleged by NBS in these proceedings that the Appellant was complicit in the withdrawal and both lower courts were clear that the Appellant was not to be faulted, simply because he bore ultimate management responsibility, for the deficiencies in the system, of which the directors were aware, that allowed the fraud to be perpetrated, if indeed there was fraud. That notwithstanding, the submissions to this Court for the Respondents still attempted to throw some shade on the Appellant. The High Court found, and was upheld on appeal, that there was not just and probable cause for summary dismissal of the Appellant.

The Reliefs in the High Court and Court of Appeal

[8] Accordingly, the High Court ruled that the Appellant had been 'wrongfully and unlawfully dismissed' by the New Building Society by its letter of 14 August 2007[2]. The court awarded the Appellant severance benefits under TESP Act, three months' payment in lieu of notice and pension benefits to which the Appellant was entitled, calculated up to 30 June 2017 and thereafter at GYD372,498 per month to continue until the death of the Appellant, as well as interest under the Law Reform (Miscellaneous Provisions) Act, Cap 6:02. The trial judge disallowed the claim for loss of earnings, loss of allowances, leave pay

[1] Cap 96:01.
[2] Record, 898.

and passage allowances due to the Appellant as well as general damages for breach of contract.

[9] In making the award of severance payment under TESP Act, the court noted that under s 3(2) of the Act, provision is made for circumstances where a party has an entitlement under the Act and also under the terms of his contract of employment. The court explained that a party effectively has the option whether to ground his claim for severance on the Act or to rely on the terms of his contract of employment, and decided that based on the Appellant's pleadings, he had claimed under the Act. As indicated, the High Court held that the Claimant was entitled to be paid pension benefits as prescribed by the terms of his contract of employment.[3]

[10] The court dismissed the Respondents' counter claim because it found that the First Respondent had failed to prove that there were losses attributable to the action or inaction of the Appellant.

[11] On appeal by NBS to the Court of Appeal, that court reversed the trial judge's award of pension benefits and found that the Appellant was limited to receiving pension contributions in the sum of GYD18,817,432. The court decided that '… his employment having ceased, no further pension contributions or pension rights are in place'.[4] The court, therefore, allowed in part the appeal of NBS, as to pension; it dismissed the other parts of their appeal, including the appeal against the decision of the trial judge that the Appellant had been wrongfully dismissed.

The Appeal and the Cross-Appeal

[12] The Appellant appealed to this Court and NBS cross-appealed. The substantial challenge of the Appellant to the decision of the Court of Appeal was to the finding of the Court of Appeal that notwithstanding that the Appellant was

[3] ibid, 901.
[4] At [69].

wrongfully dismissed, the result of the dismissal was that his employment having ceased, even though wrongfully, he was not to be awarded accrued pension benefits.

[13] The cross-appeal by NBS was that the Court of Appeal erred in law and in fact in failing to hold that the Appellant was properly dismissed and in holding that the Appellant was entitled to pension payment over and above the sum of *his* contributions. To be clear, the First Respondent claimed that the Appellant was not entitled to the contributions made by the employer; he was entitled only to those contributions he made. This was a departure from the statement as to the amount to which the Appellant was entitled that was made by the First Respondent in the letter of dismissal.

The Dismissal

[14] The Court directed that the cross-appeal be heard first, and it became pellucid that the case for NBS, as could be gathered on a closer reading of the letter of dismissal (at [5] above), was that the serious misconduct of the Appellant that led to his dismissal was his refusal to attend a disciplinary hearing by the board of directors.

[15] Counsel for the respondents offered his full view of the background with supporting argument in tracing 'the path to dismissal', beginning, of course, with the loss suffered by the First Respondent from the withdrawal. The submissions could not resist including the now-wholly irrelevant information that the Appellant had been criminally charged with conspiracy to defraud, but the submissions managed to resist stating that the case was dismissed on a no case submission. The relevant parts of the submissions began with the assertion that despite there being no obligation under a contract of employment to afford an employee a hearing prior to dismissal, the First Respondent thought it prudent to offer the Appellant an opportunity to be heard before making any decision on disciplining or dismissing him.

[16] The submissions stated that by letter dated 12 June 2007 the Appellant was interdicted from duty without pay or benefits and requested to attend a meeting fixed for Friday, 15 June 2007 to explain why serious disciplinary action, including dismissal, should not be taken against him for failing to observe the rules and policies of the Society, and gross negligence resulting in loss of a member's funds.

Refusal to Attend

[17] As counsel characterised it, the Appellant made a pre-emptive strike at the meeting and the interdiction by filing on the day immediately preceding the meeting an ex parte application for an interim injunction restraining the First Respondent from interdicting him without pay and benefits and from proceeding with the hearing proposed for the following day. Counsel submitted, 'this was the Appellant's first and most combative challenge to the authority of the Board and to the First Respondent. By filing the action, the Appellant violated almost every covenant contained in the contract of employment. Although no injunction order was issued, the Appellant did not appear as requested at the scheduled meeting of the Board of 15 June 2007.

[18] When it was clear that no interim injunction was granted, 'the First Respondent once again, gratuitously, offered the Appellant an opportunity to be heard'. On 3 August 2007 the First Respondent wrote the Appellant inviting him to a hearing fixed for 8 August, again to explain why serious disciplinary action including dismissal should not be taken against him. The Appellant did not respond. Instead, he had his lawyer write asking that the Board reconsider its decision to proceed with the proposed hearing. In a further letter, counsel for the Appellant stated that he was 'coerced into the ignominious position of advising my client not to accept your invitation to attend the proposed meeting' and indicated that the Appellant would appear by Counsel.

[19] The Appellant did not attend the meeting. The submissions contended that 'by refusing to attend the Board meeting and participate in the Board's process for a second time once again in violation of almost every tenet of … the aforesaid employment contract, the Appellant had once again repudiated the said contract of employment. Acting on legal advice is no excuse.'

[20] The submissions continue: 'But the Appellant went yet a step further. He sent his lawyer to attend the hearing in his stead, to answer the issues raised by the Board. … A characterisation of the Appellant's conduct could be expressed in the following terms, "Don't talk to me, talk to my lawyer". This is the pinnacle of insubordination. It does not help, that it appears that the Board had received at least three investigative reports, none flattering of the Appellant.'

Fundamental Breach of Contract

[21] Counsel submitted that 'by refusing to attend to his place of work to respond to questions which may or may not lead to his reinstatement, [the Appellant] acted in a manner inconsistent with his duty to the First Respondent'. Mr Fraser SC submitted, '… this single act of defiance was a fundamental breach of contract'. He relied on the decision in the not-eponymous case of *Christofidou v House of Fraser*[5] for the proposition that the failure of the employee in that case, a store attendant, to attend a meeting that was investigating the theft from the premises of the employer of items that the employer sold, and which were being offered on the internet for sale from the address of the employee, was misconduct sufficient to warrant termination of the employment.

[22] The stark distinction in the facts of the two cases makes the case cited more telling as authority against rather than in favour of the First Respondent. In that case, an investigation was on foot, and it had been established that items apparently stolen from the employer were being offered for sale on an eBay account, from an

[5] (2015) UKEAT/0083/15.

address that was the employee's address. This situation clearly led to an inference against the employee of dishonesty. To persuade the employer of her innocence, the employee had told the investigation that her former husband had established the account and used her address without her knowledge. But the employee had refused to provide contact information for the former husband (which she had), failed to adduce evidence from the former husband (with whom she was in contact), and failed to attend a second meeting of the investigating tribunal. In those circumstances, the Employment Appeal Tribunal held, the employer was reasonable to conclude that trust and confidence was undermined, and as that went to the heart of the contract of employment, it would be perverse to find other than that the employer was justified in terminating the contract summarily.

[23] In the instant case, the hearing to which the Appellant was being invited was no investigation; the necessary investigation had been completed by the internal auditor who absolved the Appellant of any misconduct or negligence and the First Respondent had expressed full confidence in the Appellant. In what Mr Luckhoo SC, counsel for the Appellant, described as inexplicable, in defiance of logic, and a volte-face the first respondent required the Appellant to appear before its Board of Directors to answer unparticularised allegations and be present for its determination of why serious disciplinary action including dismissal should not be taken against him.

Lawfulness of the Appellant's Response

[24] This Court considers it was perfectly reasonable for the Appellant, through his attorney-at-law, to request particulars of the allegations that were being made against him. We would similarly regard the statement by the Appellant to the Board that he would have his attorney-at-law attend and represent him at their meeting - which they thereupon cancelled. As a matter of reason, we see the Appellant's response as fair and appropriate.

[25] *Blyth v Scottish Liberal Club*[6] on which the First Respondent also sought to rely is similarly unhelpful to them because the facts were so very different. Mr Blyth was hired as Managing Secretary by a club for a number of years but in the following year the club began winding up operations, and soon Mr Blyth's functions had nearly ended. Questions arose about the legality of Mr Blyth's fixed-term contract and before long he sought damages for breach of contract, while still receiving his full salary. However, he refused to attend meetings or follow instructions and claimed the contract justified this. His employment was promptly terminated. The court dismissed the claim Mr Blyth brought, finding his actions materially breached his contract and justified his dismissal. In upholding the decision on appeal, Clerk LJ stated as follows:

> In the state of affairs of the Club at the time when the breaches took place I can think of nothing which would strike more at the root of the contract than the refusal by the pursuer to service the Review Committee and to carry out orders in connection with the affairs of the Management Committee. Once it is accepted that those were duties which the pursuer was obliged to carry out under his contract, and were virtually the only ones at the time, the Lord Ordinary's finding on the materiality of the breaches is *prima facie* clearly confirmed.

[26] In *Blyth* the court thus found that the Appellant breached his contract by failing to attend meetings when he was obliged to do so as part of his function as Director and Secretary. It should not need to be stated, but apparently it does, that in the present appeal there was no failure or refusal of the Appellant to carry out any lawful order of the Board. What the Appellant refused to do was to participate blindly, which is to say without basic information as to reasons or cause, in a meeting that was called to decide upon the punishment to be imposed upon him, including his dismissal. Nor did he simply refuse to attend; he stated he would be attending by his attorney-at-law – whereupon the Respondent cancelled the meeting.

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[6] [1983] IRLR 245.

Trust and Confidence

[27] The lawfulness of the Appellant's response merits some discussion, and the research of Mr Luckhoo SC for the Appellant has been helpful. In *Commonwealth Caribbean Employment and Labour Law*[7] the authors note that in the Commonwealth Caribbean there is standard application of the principles of natural justice, especially in the context where there is a dearth of statutory provisions regarding the actual steps to be taken in terms of procedural fairness. The text refers to the case of *Banking, Insurance and General Workers Union v PriceSmart Trinidad Ltd*[8] where no investigations were made into the employee's alleged misconduct before summoning her to a meeting, and she was not advised of the charges against her, even when she requested them. The employer subsequently demanded her resignation. The court held the employer's actions were reprehensible, in breach of the rules of natural justice and quite contrary to all known tenets of what can be regarded as good industrial practice.

[28] More pointedly, counsel submitted that this Court decided that a term of mutual trust and confidence would be implied into a contract of employment, in *Sandy Lane Hotel Co Ltd v Cato.*[9] This necessarily requires that an employer must furnish an employee with particulars of allegations in circumstances similar to those in the instant case, it was submitted, and the employer cannot refuse to do so and then allege fundamental breach by the employee for opting not to appear in person but by counsel. In this vein, the court in *King v University Court of the University of St Andrews*[10] determined that the implied duty of trust and confidence subsisted whilst the investigation procedures were being carried out. Therefore, it was held, the pursuer in that case was entitled to be given a fair opportunity to reply to the complaints made against him. Another recent decision is *Burn v Alder Hey Children's NHS Foundation Trust*[11] in which Underhill LJ agreed that a separate duty of procedural fairness could readily be implied into

[7] Natalie Corthésy and Carla-Anne Harris-Roper, *Commonwealth Caribbean Employment and Labour Law* (Routledge 2014) 229.
[8] TT 2008 IC 43 (CARILAW), (17 March 2008).
[9] [2022] CCJ 8 (AJ) BB, BB 2022 CCJ 2 (CARILAW).
[10] [2002] IRLR 252.
[11] [2022] IRLR 306.

the contract of employment in the context of the disciplinary process, apart from the implied duty of trust and confidence.

[29] In the instant case, the trial judge examined the sequence of events leading to the Appellant's decision to appear by counsel and held that in the circumstances the Appellant was entitled to seek counsel and to be afforded beforehand, as his counsel requested, the details and specific nature of the infractions allegedly committed by him. The Court of Appeal endorsed the findings of the trial judge. As the material offered by counsel for the Appellants has confirmed, the jurisprudence fully supports the finding.

Repudiatory Breach

[30] Although the preceding discussion settles the matter because it was strongly argued, it would be fitting to deal briefly with the issue of repudiatory breach, of which counsel for the Respondents accused the Appellant. The matter was addressed by McCardie J in *Re Rubel Bronze and Metal Co Ltd*[12] as follows:

> In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case. If the matters alleged to constitute a repudiation are contained in written documents, then it is for the Court to determine whether such documents evince a determination not to be bound by the contract. But if such matters consist of acts or conduct, then it is for the jury as judges of fact to determine whether repudiation is established: see *George D. Emery Co. v. Wells*.

[31] In considering the factors adumbrated, the contrast with the situation in *Blyth v Scottish Liberal Club*[13] relied on by the Respondents is again apposite. Clerk LJ at [2] of his judgment found that Mr Blyth refused to carry out duties that he was required to perform under his contract; 'they were virtually the only duties which

[12] [1918] 1 KB 315 at 322-323.
[13] *Blyth* (n 6).

were left for him to perform in return for the salary which the defenders were obliged to pay to him under the contract.'

[32] Considered against factors such as the weight of the wrongful act, the intention manifested by the action, and the deliberateness of that conduct, Mr Blyth's behaviour was a textbook case of repudiation. In *Macari v Celtic Football and Athletic Co Ltd*[14] Lord Caplan noted:

> …looking to the legitimacy of the instruction it is possible that such an order may also justify the employee in ignoring what he was asked to do, on the basis that it is not within the scope of the employee's employment to carry out instructions not truly connected with his proper function; nor for that matter instructions which are fundamentally unreasonable.

[33] As we have stated, it was reasonable and sensible of the Appellant not to blindly attend what he may well have regarded as a sentencing hearing. On the advice of his attorney, he chose to appear by counsel. There is no breach in that response; no refusal to perform any contractual obligation. Accordingly, the dismissal of the Appellant was plainly wrong, unlawful and in breach of his contract of employment and having so concluded we dismissed the cross-appeal against the finding that the Appellant was wrongfully dismissed.

The Pension Entitlement

[34] The appeal and cross-appeal on the issue of pension payment are conveniently dealt with together as the Respondents contended that apart from a return of the pension contributions that the Appellant paid, he is entitled to no payment from the pension fund; whereas the Appellant sought restoration of the award made by the High Court of full pension benefits. This reduces the dispute to the single question: to what payment from the pension fund is the Appellant entitled?

[14] [1999] IRLR 787 at 798.

The Pension Rules

[35] The case for the Respondent was that the Pension Rules made no provision for payment of any benefit to a dismissed pension contributor and, therefore, the Appellant could be entitled to none. The relevant Pension Scheme was constituted under a Trust Deed and the *Rules of the New Building Society's Pension Scheme* govern its operation. First, a digression: the Respondents submitted that the pension scheme terminated by effluxion of time and, therefore, the Appellant has no claim to pension under the scheme. This was not a matter that was pleaded nor litigated in the courts below, and it is puzzling and disappointing that counsel for the Respondents sought to advance this proposition at the level of this Court. Especially so since counsel was quite unable to tell this Court what was the consequence of his assertion that this was the fact and offered no explanation of how it was that the trustees continued to collect pension contributions to this supposedly extinguished pension scheme and continued to administer it. Accordingly, the Court treated the submission as immaterial.

[36] As highlighted by the Respondents, the rules of the scheme provide that members should retire at the normal retirement age, that is on the sixtieth birthday of the member. Various provisions are made for retirement at earlier or later dates. There is provision for a member to be refunded if he resigns and does not qualify for pension. In such a case the member is entitled to the refund of his contributions plus interest together with a percentage of the employer's contribution depending on the member's years of service. Where a member is dismissed for cause, or voluntarily leaves employment, or resigns to forestall or avoid dismissal, the Managing Trustee may forfeit any benefit arising from the employer's contribution. As an alternative, they may deduct any amount the member may owe to the employer or the fund, or any shortage in funds for which the member is responsible or any amount misappropriated or defalcated as may be certified by the employer's auditors.

Benefits on Termination

[37] The Respondents submitted that r 21.00 provides that the termination of employment of a member should be effective as if the scheme were not in operation. Therefore, a member who is terminated shall not be entitled to claim or recover anything by way of compensation in respect of any benefit arising under the scheme.

[38] The Respondents submit that the obligation to make pension payments fall on the trustees and not the employer and quote Lord Millet in *Air Jamaica Ltd v Charlton*[15] who said of the obligation to make pension payments the following:

> The obligation to make pension payments was not a contractual obligation undertaken by the company, but a trust obligation imposed on the trustees. Their lordships agree with the observation of Carey JA, … that each employee becomes a member of the pension scheme by virtue of his employment, but that his entitlement to a pension arises under the trusts of the scheme.

[39] Further, it was submitted, the employee has no contractual right to pension as was said in the same case. From this proposition, the Respondent argued that the Appellant had no claim to pension or indeed any other entitlement under the pension scheme against the First Respondent. The Respondents also drew attention to the distinction between the situation in Guyana, where there is no relevant legislation, and the situation in England and Canada from which jurisdictions the Appellant relies on authorities regarding pension rights. In those jurisdictions, the Respondents submitted, the rights to pension are preserved in a case of early termination of employment, by the enabling pension-preservation legislation that has been introduced in the respective jurisdictions. Not so in Guyana, the Respondents submitted.

[15] (1999) 54 WIR 359 at 367.

[40] In conclusion on this point, the Respondents submitted that as the Appellant did not attain the normal age of retirement, and did not qualify for any measure of reduced pension under r 10.00, he was not entitled to any pension. The Respondents further submitted that neither was the Appellant entitled to the payment of any contributions made to the scheme by the employer, since r 11.00 does not apply in this case. Furthermore, the Respondents submitted, 'if terminated for cause the trustees are invested with the discretion to forfeit the pension' and submitted as well that r 21.00 excludes any claim for compensation for loss of pension benefits on dismissal.

Provisions Relating to Pension on Termination

[41] It is appropriate to consider first the submissions of the Respondent that if an employee is terminated for cause the trustees have a discretion to forfeit 'the pension.'[16] This statement in the concluding paragraph of the Respondent's submission was quite an overreach from the Respondent's earlier, and accurate, submission that 'the Managing Trustee may forfeit any benefit arising from the First Respondent's contribution.'[17] The Respondents relied on this provision, in r 11.00, as part of the foundation for their submission that the Appellant had no right to pension under the First Respondent's pension scheme. The rule provides:

> 11:02 If a member is dismissed by the society for fraud, dishonesty, defalcation or serious misconduct and voluntarily leaves the employment of the Society or resigns to forestall or avoid dismissal the Managing Trustee may forfeit any benefit arising from the contributions of the Society under the Scheme to which he might otherwise be entitled or may withhold from any such benefit to which he is entitled any amount owing to the Fund or the Society or any shortage of funds for which he is responsible or the amount of any defalcation or misappropriation as certified by the auditor of the Society and pay that sum to the society.

[16] Maurice Arjoon, 'Submissions on behalf of the Respondents', Submissions in *Arjoon v New Building Society Ltd*, GYCV2023/002, 21 July 2023, para 21.
[17] ibid, para 7.

[42] The reliance on r 11.00 by the Respondent is either confused or adventurous because, as the submissions earlier accepted, the rule has no application to this case. The rule speaks to refund of contributions and payment of reduced benefits consequent on resignation other than as provided for in r 10.00, or consequent on dismissal by the Society for cause. The Appellant was seeking neither a refund of contributions or reduced benefit and was making no claim to have resigned. The rule simply has no application in this case, whatever the intention in referring to it.

[43] In any case, there was no purported forfeiture by the trustees, as made clear by the testimony of Mr Seepaul Narine, a director of the First Respondent, who stated that 'the Board decided that the pension of the Appellant ought to settle after his indebtedness to the NBS was settled.' That decision was taken on the day the Board dismissed the Appellant, so clearly there had been no decision by the Respondents to seek forfeiture.

[44] The position is all the stronger when it is considered that there can be forfeiture only where the employee is terminated for cause. The determination of this Court, above, that there was no cause for termination of the Appellant puts the matter beyond argument. There was no forfeiture and there could not have been forfeiture.

[45] Rule 21.00 was relied upon by the Respondents, as another part of its foundation for denying the right to pension, because it provides that the termination of employment of a member should be effective as if the scheme were not in operation. Therefore, it was said, the rule provides that a terminated employee shall not be entitled to claim or recover anything by way of compensation in respect of benefits under the scheme. The rule states:

> 21:00 The rights of the Society to terminate the employment of any Member shall in no way be restricted by any of the provisions of the rules and any such termination shall be effected as if the Scheme were not in

> operation and accordingly any such Member shall not be entitled to claim or recover any such sum by way of compensation or otherwise in respect of any benefit arising from any provision of the scheme.

[46] This provision appears at the end of the rules along with others of a general nature under the heading 'Miscellaneous Provisions'. It would seem reasonable to expect that, whatever is its intended application, the provision was not intended to operate in all circumstances to disentitle to pension a member whose employment is terminated in circumstances where the rules provide that pension must be paid.

[47] Rule 10.00, reproduced at [49] below, expressly provides for payment of pension on termination of employment of a member under various circumstances. Rule 21.00 does not purport to make a nonsense of the entitlement. How to apply this general provision in r 21.00 was not argued, and the Court will not engage, unassisted by the submissions of counsel, with any broad interpreting of its purpose and operation. However, it requires no effort at interpretation to gather that what that rule does is to express that the Society is free to terminate the employment of a member, unrestricted by the provisions of the rules. It excludes claims for compensation for loss of benefits arising from the provisions of the scheme—as opposed to claims for payment of pension due to a member under the scheme. In other words, pension is paid as a matter of entitlement under the rules, not as a matter of compensation for termination.

No Provision in Respect of Wrongful Termination

[48] It was a common premise in the submissions that r 10.00 provides that an employee retires on pension on his normal retirement date and that the rule then goes on to state additional circumstances of retirement on pension. It is a straightforward statement that a member retires on pension: this, after all, is the whole purpose of a pension scheme. But it is easy to overlook the seminal nature of the statement as a declaration of the fundamental principle of the pension

scheme: when an employee retires, he is entitled to pension. That principle must be faithfully served in this and all cases. The principle applies fully to the additional circumstances specified of a member being entitled to pension apart from the entitlement at the retirement age.

[49] As provided in r 10.00, the additional circumstances include:

> 10.00 …
> (ii) if the society permits him to retire at any time not more than 5 years before his Normal Retirement Date;
>
> (iii) if the society requires him to retire at any time after he has attained the age of 55 years …

[50] It is not surprising that the rules make no provision for payment of pension where the Society wrongfully terminates the employment. The draftsperson could hardly have been required to provide for the employer acting wrongfully and, indeed, nor were they competent to so provide. Provision for the consequences of a wrongful termination is necessarily a matter left to the courts.

[51] This litigation is concerned with exactly that situation – what is the provision to be made in this case regarding the entitlement to pension of a wrongful termination of employment. The fair provision, in this case, as we have found was the straightforward remedy that the High Court granted. In effect, the Court treated the Appellant's entitlement as being the same as if the employer had permitted or required him to retire, in accordance with r 10.00. As a matter of law, resignation may be treated as the same as retirement[18] and thus it may legitimately be said that what happened with the Appellant was that he involuntarily retired, in the language of r 10.00, he was required to retire.

[18] *Barrow v A-G of Saint Lucia* LC 2014 CA 6 (CARILAW), (27 October 2014).

[52] That conclusion having been established, it remained only to determine the pension that would be paid in a normal case of retirement before the scheduled retirement date. There was no disputing the calculation of the pension entitlement that was done in the High Court, and we therefore upheld the award, with interest.

Severance Pay and Other Benefits

[53] Both the High Court and the Court of Appeal decided that the Appellant was entitled to severance pay under the TESP Act but it was left uncertain, because of the mixed result in the Court of Appeal, whether that entitlement applied where an employee was entitled to pension, as we have found to be the entitlement of the Appellant. The relevant provision is s 21 of that Act, which states as follows:

> (1) On termination of his employment, an employee who has completed one or more years of continuous employment with an employer shall be entitled to be paid by such employer a severance or redundancy allowance equivalent to …
> …
>
> (4) Subsection (1) shall *not* apply where the employee... (emphasis added)
>
> …
>
> (d) is being retired from his employment having attained the age of sixty years or such other age as may be agreed upon between the parties and is entitled to a gratuity or pension or both from his employer under any law collective, labour agreement or contract of employment whether such entitlement is under any contributory or non-contributory pension scheme, excluding benefits from the National Insurance Scheme.
>
> Provided however that where any gratuity payable on his retirement is less than the amount the employee would have received under section 21 (1), the amount under section 21 (1) shall be paid instead of the gratuity.

[54] The intention expressed by this section is that where an employment is terminated, severance pay shall be paid, but where there is retirement, and the employee is entitled to pension, it shall not be paid. The Appellant argues that he

was terminated, he did not retire, so severance pay should be paid. It is a credible argument but in view of the determination made above, that the Appellant shall be paid pension as if he retired, it cannot succeed. If it did, the Appellant would be getting exactly what the statute creating this benefit of severance pay intended he should *not* get: he should not get severance pay *and* pension.

[55] The purpose of a severance payment is not to punish an employer; it is to reward an employee for the service they gave to the employer and compensate them for the loss they have suffered by the termination of their employment, whether wrongfully or not – whether fairly or unfairly.[19] At common law, there was no obligation to make a severance payment and it developed as a practice of good employment relations. The practice having become standard in employment contracts, the legislature decided to put it on a statutory footing and make it obligatory as a matter of general fairness.[20] In this case, the Appellant is being awarded pension and by that award he is being put in the position he would have been in if his employment had properly terminated by his retirement. As s 21 provides, a properly terminated employee who retires on pension is not entitled to pension. Therefore, with the award of pension having been made to him by this Court, the employee can be in no better position than to get what he was properly entitled to upon a harmonious termination. The Appellant is now in exactly the position he would have been in had his request for early retirement been processed.

[56] Before leaving the issue of severance pay, the Court observes for the sake of future reference that the present determination of when severance pay is not payable must not be treated as a determination of principle or general application across different countries. The present determination is no more than an interpretation and application of the specific legislative provision in this

[19] *Chefette Restaurants Ltd v Harris* [2020] CCJ 6 (AJ) (BB), (2020) 98 WIR 79 at [124].
[20] R Holzmann and others, 'Severance Pay Programs Around the World: History, Rationale, Status and Reforms' (Institute of Labor Economics Discussion Paper No 5731, May 2011) 54.

jurisdiction that severance pay is not an entitlement when the employee is entitled to and receives pension.

[57] Finally, on this Court's award for leave pay and passage assistance for two years, there was no resistance to the appeal for these to be awarded by this Court, which the Court of Appeal failed to do, possibly by oversight in the view of counsel. These were outstanding entitlements in the normal course of the employment, as the evidence showed, and there was no good reason to omit them from the sum due to the Appellant and, accordingly, they were awarded.

SAUNDERS P (concurring):

[58] This Court heard the appellant's appeal in this matter on Tuesday, 10 October 2023. On 23 October we issued an Order indicating that our reasons would follow. That Order allowed Mr Arjoon's appeal and dismissed the Building Society's cross-appeal. In it, we reversed the judgment of the Court of Appeal which had held, in its judgment dated 16 September 2022, that Mr Arjoon was not entitled to pension benefits. Instead, we restored the Judgment and Orders of Brassington Reynolds J made on 20 July 2017 save that we reserved our decision on the issue of Mr Arjoon's entitlement to severance pay. We also held that the Building Society must pay to Mr Arjoon the additional sum of GYD1,602,459 being leave pay and passage assistance for the years 2006 and 2007.

[59] We reserved our decision on severance pay in order to address the question whether the Termination of Employment and Severance Pay Act ('the Act') contemplates that, in principle, it is permissible for an employee to receive both a pension and gratuity as well as severance pay. I agree entirely with the views expressed by Barrow J above on how this question should be resolved.

[60] It seems to me that when s21(4) (d) of the Act disapplied from entitlement to severance pay an employee who was:

> …being retired from his employment having attained the age of sixty years or such other age as may be agreed upon between the parties and is entitled to a gratuity or pension or both from his employer…

the Legislature must be taken as having indicated that eligibility to severance pay is lost when an employee is entitled to receive a pension. Severance pay is appropriate when your term of employment has been prematurely ended. But if you have been retired (or as in this case, treated as having been retired) and are entitled to a gratuity and a pension, you are ineligible for 'severance pay'. You can't be 'severed' and simultaneously be 'retired'. By our Order we quashed the Building Society's disallowance of a pension for Mr Arjoon and we granted him his pension as if he had attained the retirement age.

[61] In my view, two aspects of the Act lend support to this notion that the Act does not countenance the receipt of both pension and gratuity, on the one hand, and as well severance pay on the other. Firstly, the proviso to s 21 states that where any gratuity payable on an employee's retirement is less than the amount the employee would have received as severance pay, then in lieu of the gratuity severance pay shall be paid. This suggests to me that a dismissed employee must receive either pension/gratuity or severance pay.

[62] Secondly, in circumstances where an employee has made out a complaint of either unfair dismissal or the imposition of unreasonable disciplinary action, the Act grants to the courts the very wide and unconstrained power to provide the employee with compensation in 'such amount as the Court considers just and reasonable in all the circumstances having regard to the loss sustained by the employee as a consequence of the dismissal or discipline…' as well as 'any other just remedy in addition to or in lieu of the award' already granted. There is therefore no need, as it were, to top up with 'severance pay' an unfairly dismissed employee, who is entitled to receive a pension and gratuity, if a court is of the view that the employee deserves compensation that is greater than what the

employee may have received in an ordinary action for wrongful dismissal or for severance pay. It seems to me that the proper thing for an employee to do is to seek enhanced compensation in keeping with s 20. If the court is persuaded that the employee deserves such enhanced compensation, then the ultimate dollar figure awarded could be more or it could be less than what would have been calculated as severance pay if the employment had come to a premature end and severance payment was due.

[63] In this case, Mr Arjoon continually claimed exemplary damages before the High Court. No exemplary damages were awarded by Reynolds J. Among other complaints, Mr Arjoon appealed against the judge's failure to award him exemplary damages. The Court of Appeal neglected to reverse the trial judge on this issue. Mr Arjoon again raised the issue of exemplary damages in his notice of appeal to this Court but precious little was said about it in oral argument. Indeed, before this Court, counsel neglected to press for such damages.

[64] In my view, given the width of s 20 it is unnecessary to consider whether any particular common law remedies should be awarded even in an egregious case of unfair dismissal or unreasonable imposition of disciplinary action. It is merely necessary for a litigant to a) indicate that additional damages are being sought in keeping with the section, b) provide the facts and circumstances that justify the additional award and c) establish to the Court one's entitlement.

[65] Given that this Court has already issued its Order confirming Reynold J's judgment subject only to the question whether the appellant should receive severance pay, the issue of any further additional award comparable to exemplary damages is moot. I therefore support the order made by Barrow J.

JAMADAR J (concurring):

Introduction

'To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our country [in isolation].'[21]

[66] I agree with the reasoning of Barrow J and with the decision that the Appellant, Maurice Arjoon, was wrongfully dismissed. I also agree with the reasoning of Rajnauth-Lee and Burgess JJ and with the outcome that the Appellant is entitled to his full pension benefits. I further agree that he is entitled to leave pay and passage assistance for the years 2006 and 2007, as ordered. On the issue of severance, I agree that he is not also entitled to severance having been awarded his pension, but in my opinion, he is entitled to damages under s 20 of the Termination of Employment and Severance Act ('the Act')[22] and/or exemplary damages. In relation to severance and damages, I make the following comments and recommendations.

Statutory Interpretation

[67] As a matter of strict statutory interpretation and applying a purely textual approach, the analysis of Rajnauth-Lee and Burgess JJ on the issue of severance cannot be flawed. Section 21(1) of the Act specifies that on termination of employment, provided the continuous employment criteria are met, an employee is entitled to a severance allowance (calculated as provided for).[23] This is consistent with the overall purpose and objective of the Act – to provide for the grant of redundancy or severance payment to employees.[24] It is the overarching intention of the Act.

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[21] Pierre Lepaulle, 'The Function of Comparative Law' (1921-1922) 35(7) Harv L R 838, 858.
[22] Cap 96:01 (n 1).
[23] See also s 2 (definition of 'severance of employment') and s 7(a) and (c)(ii).
[24] Long title.

[68] This overarching goal is not absolute and is subject to certain statutory exceptions (as well as the qualifying criteria). Section 21(4) sets out these exceptions. For example, s 21(4) (a) disapplies the payment of severance in cases of summary dismissal (under s 10) and termination under s 9 (termination during a probationary period) or s 11 (termination for misconduct, breach of contract, or unsatisfactory performance) of the Act. Significantly, s 21(4) (d) also provides a ground of disentitlement, when an employee 'is being retired from his employment having attained the age of sixty years or such other age as may be agreed upon between the parties and is entitled to a gratuity or pension …'.

[69] On a strict application of the facts of this case as determined by this Court: (i) the Appellant was wrongfully dismissed (negating any application of s 21(4) (a) of the Act), and (ii) the Appellant did not retire at age 60 or pursuant to any agreement between the contracting parties. Thus, on the face of it, the disentitling provisions of s 21(4) do not apply. Indeed, the First Respondent has steadfastly maintained as a matter of fact and law, that the Appellant is not entitled to any pension. In fact, the Appellant's employment was prematurely and unilaterally terminated by the First Respondent, albeit unlawfully. It follows, logically and on a strict textual interpretation, that he is entitled to a severance allowance under the Act.

An Exceptional Case

[70] However, that is not the end of the matter. This case is unique and exceptional, because this Court has decided both that the Appellant was wrongfully dismissed and is entitled to his full pension. In this case the consequential and pragmatic effect of this Court's judgment is that the Appellant will receive his full pension benefits. If that had happened in the normal course of events (without any termination of employment prior to attaining age 60), he would have been an employee covered by s 21(4) (d) and disentitled to a severance allowance. This is a clear and unequivocal statutory policy.

[71] In fact, the Act intends as a policy, both that severance allowance be paid to employees provided certain conditions are met and also that it is not to be paid in certain circumstances. As explained, one such policy circumstance of disentitlement is receipt of full pension, in the ordinary course of events, at age 60 or as may be otherwise agreed. This case has introduced extraordinary circumstances.

[72] How then is this legal conundrum to be resolved as a matter of law and justice? How is the strict textual interpretation to be reconciled with a clear and contrary policy intent? What is this Court to do if the strict circumstances of disentitlement are not met?

[73] In my opinion, the solution lies in the application of the lens of fundamental rights, as juridic values, and as a guiding light to show the interpretative way forward. Wit J, in *Guyana Sugar Corp Inc v Dhanessar*,[25] alluded to this as follows:

> It cannot be assumed that the legislature intended to make ineffective legislation; certainly not in Guyana whose Constitution tells us that it is a "state in the course of transition from capitalism to socialism" (section 1) and gives special recognition to the role and value of labour: "The source of the growth of social wealth and of the well-being of the people, and of each individual, is the labour of the people" (section 21). *Workers in Guyana have a fundamental right to be protected by the law. This means that legislation must be interpreted so as to effectuate the protection it is intended to offer*.

[74] Thus, 'looking at the entire structure of the Act and given the constitutional background',[26] and bearing in mind that 'it cannot be assumed that the legislature intended to make ineffective legislation',[27] the question that arises is: How is the constitutional standard of the protection of the law to be applied in this case so as

[25] *Guyana Sugar Corp Inc* [2015] CCJ 4 (AJ) (GY), GY 2015 CCJ 1 (CARILAW) at [48] (Emphasis added). See also, *OO v BK* [2023] CCJ 10 (AJ) BB.
[26] ibid at [49].
[27] ibid at [48].

to effectively afford a worker due recognition and regard, and in doing so, to meet fundamental benchmarks of fairness and equality while adhering to the intent and policy of the Act?

[75] In my opinion, the Appellant has derived the benefit of the protection of the law by receiving his full pension. There is no undermining of that protection if he does not also receive a severance allowance, as the statutory regime ultimately intends such a result. Put another way, to award the Appellant both a full pension and a severance allowance would be contrary to the policy of the law. A purposive, policy-driven, interpretation should only permit the Appellant either his pension or a severance allowance, and in this case, we having all agreed on the former, then any claim to the latter is to be disallowed.

[76] Does such an interpretation provide a contextually just outcome in this case, given its unique circumstances? Is the fullness of the protection of the law satisfied? In my opinion, no.

Context is Everything

[77] Part of the factual matrix in this case is the unlawfulness of the First Respondent's actions, clearly intended to have the effect of depriving the Appellant of both his pension and any severance allowance. That is to say, to leave the employee with neither the benefit of deferred wages for services already rendered (a pension), nor any compensation for services rendered (severance). Actions intended to effectively punish the Appellant at the end of a lifetime of professional service and to leave him without any economic support in the latter years of his life – to deprive him of his hard-earned expectation of a pension and/or alternatively severance.

[78] To put the First Respondent's conduct in context and from the perspective of the Appellant's experience, the following is noteworthy. The Appellant is an accountant. He was initially employed by the First Respondent in 1977. By 2002

he had ascended through the ranks to the position of Director/Secretary/CEO of the First Respondent and held that position of trust and confidence until his termination on 14 August 2007. This was after 30 years of undisputed prior meritorious service. His sudden and inexplicable summary dismissal, by letter, took place six months before he would have reached the normal retirement age of 60, and was done on the basis of alleged 'serious misconduct'. An allegation which if proven, by virtue of the conjoint effects of ss 10 and 21(4) (a) of the Act, would have disentitled him from receiving any severance allowance, and could have also denied him pension.

[79] Barrow J explains some further important context, as follows:[28]

> It was never alleged by NBS in these proceedings that the Appellant was complicit in the withdrawal and both lower courts were clear that the Appellant was not to be faulted, simply because he bore ultimate management responsibility, for the deficiencies in the system, of which the directors were aware, that allowed the fraud to be perpetrated, if indeed there was fraud. That notwithstanding, the submissions to this Court for the Respondents still attempted to throw some shade on the Appellant. The High Court found, and was upheld on appeal, that there was not just and probable cause for summary dismissal of the Appellant.

[80] The First Respondent's conduct is well summarised by Barrow J, when he describes the process it adopted in relation to the Appellant, as akin to 'a sentencing hearing'.[29] In his opinion, with which we all agree:[30]

> In the instant case, the hearing to which the Appellant was being invited was no investigation; the necessary investigation had been completed by the internal auditor who absolved the Appellant of any misconduct or negligence and the First Respondent had expressed full confidence in the Appellant.

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[28] At [7] above.
[29] At [33] above.
[30] At [23] above.

[81] Yet, and as Barrow J also explains:[31]

> … in defiance of logic, and a volte-face the First Respondent required the Appellant to appear before its Board of Directors to answer unparticularised allegations and be present for its determination of why serious disciplinary action including dismissal should not be taken against him.

[82] Indeed, as Barrow J would conclude with the unanimous approval of all members of this panel: 'Accordingly, the dismissal of the Appellant was plainly wrong, unlawful and in breach of his contract of employment …'.[32]

[83] Rajnauth-Lee and Burgess JJ, for their part, explain in relation to the First Respondent's contention that the Appellant was not entitled to pension: 'In any case, we recoil from any suggestion that the rules can be interpreted to allow NBS, as the employer, to deprive Arjoon, as the employee, of his entitlement to pension benefits by wrongfully terminating his contract of employment six months before his normal retirement date.'[33] Yet, this is exactly what the First Respondent set about to do! In fact, the Appellant testified that he was not able to continue his employment until his normal retirement age of 60 because of the dismissal.[34] In my opinion, Rajnauth-Lee and Burgess JJ, correctly reason and hold that the First Respondent breached its good faith obligation to the Appellant in wrongfully dismissing him, thereby destroying his rights to pension. And, that such unlawful conduct could not operate to do so.

[84] What is a just and proportionate response to such egregious behaviour on the part of the First Respondent? What does the protection of the law demand?

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[31] ibid.
[32] At [33] above.
[33] At [153] below.
[34] In the Appellant's Statement of Claim, he specifically sought (i) an order reinstating him in the office of Director/Secretary/CEO of the First Respondent, and (ii) a declaration that he remains an employee of the First Respondent. See, Relief (g) and (h) respectively.

Good Faith

[85] The behaviour of the First Respondent in this case is particularly egregious. It is best understood in the context of the implied obligation of good faith that is inherent in all employment contracts. It too, as a principle, is a part of the protection of the law to which the Appellant is entitled, operating as an informing interpretive value-lens and substantively. This Court, in *Sandy Lane Hotel Co Ltd v Cato*,[35] has unreservedly affirmed the fundamental value of good faith and its corollary, the implied obligation of trust and confidence, as underpinning principles in the context of employment contracts. Saunders P and Rajnauth-Lee J explained the implications as follows: '… a court must be astute to secure the interests of … [e]mployees and not leave them at the complete mercy of the actions of their employer'.[36]

[86] The implications of the obligation of good faith go even further. Capricious and injurious action by an employer against employees, can potentially found a claim in contract for breach of the implied obligation of good faith.[37] Thus, if an employer without reasonable and proper cause behaves in ways that are intended (on an objective standard) and/or calculated and/or reasonably likely (on a probability standard) to cause serious injury to an employee, contrary to their good faith obligations, such conduct can be actionable.

[87] In this case, the consequence is that the First Respondent can be liable for a breach of its implied good faith obligations towards the Appellant, because of the circumstances and manner in which he was treated and unlawfully dismissed. Such a breach can attract an award of damages.

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[35] *Sandy Lane Hotel* (n 9) at [68]-[71].
[36] ibid at [72].
[37] See *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 at 597.

Section 20

[88] Within the scheme and policy of the Act this good faith obligation finds independent and statutory recognition and expression, though unacknowledged as such. Section 20(1) intends that where an employee is unfairly dismissed or a wrongful imposition of disciplinary action is imposed by an employer, and it is so held by the courts, 'it shall award the employee compensation as specified in sub-ss (2) and (3).' Conceptually, both of these circumstances are breaches of the good faith principle, grounded as they are in unfairness and wrongful action. Thus, s 20 provides an independent statutory head of damage in the stated circumstances.

[89] What damages? Subsection (2) provides that 'compensation shall be such an amount as the Court considers just and equitable in all the circumstances having regard to the loss sustained …', and sub-s (3) allows the Court a discretion 'if it deems fit, (to) award any other just remedy in addition to or in lieu of the award' made pursuant to sub-s (1). The governing principles in determining whether, and if so, what additional compensation, damages, or relief, ought to be granted are: the demands of contextual contractual (i) justice and (ii) equity. These include fundamental rule of law considerations.

[90] There does not seem to me to be any reason why, in principle and in the circumstances of this case, this additional compensatory award should not apply in favour of the Appellant. This is so especially since the Appellant has pleaded and prayed in aid for breach of the Act and claimed damages accordingly.[38] Section 20 relief was a live issue throughout these proceedings and is therefore an open issue before this Court, because it is part and parcel of the issue of severance under the Act.[39] Further, in principle exemplary damages may also be

[38] See, para 10 and relief (m) of the Appellant's Statement of Claim; and also see High Court Act, Cap 3:02 s 25: 'The Court shall, in every cause or matter pending before it, have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as the Court may think just, all the remedies or relief whatsoever to which any of the parties appear to be entitled in respect of any and every claim properly brought forward by him or them respectively in the cause or matter; …'.

[39] See also, Appellant's Notice of Appeal to the CCJ, dated 11 April 2023, para 3. d. 'Such further and/or other relief as may be just and convenient.'

awarded under s 20, given the discretionary open-endedness of the relief that a court may grant under sub-s (3).

Exemplary Damages

[91] The common law development of contract law is well known. In *Jarvis v Swans Tours Ltd*,[40] the Court of Appeal in England held that for the breach of a holiday contract, damages were not limited to the costs of the holiday and could include general damages for inconvenience, disappointment, and distress. Thus, establishing a principle that in contracts of enjoyment or entertainment damages can be awarded for failing to provide the promised enjoyment and/or entertainment.

[92] The Appellant in his Statement of Claim, at para 9, asserted and claimed: 'The dismissal of the Plaintiff by the first defendant was oppressive arbitrary and was malicious without any reasonable grounds entitling the Plaintiff to aggravated, punitive and exemplary damages.' In fact, and as a specific head of relief, the Appellant claimed: 'Exemplary and punitive damages …'.[41] The trial judge did not award any exemplary damages. The Appellant cross-appealed asserting that: 'The Trial Judge ought to have awarded general damages … as well as punitive and exemplary damages having regard to the circumstances of dismissal.'[42] The Court of Appeal also did not award exemplary damages. Neither court gave any reasons for declining to consider or award punitive or exemplary damages.

[93] On appeal to this Court, the Appellant at Ground 2(p) asserted that; 'The Court of Appeal failed to make an award for general damages … and/or exemplary or punitive damages having regard to the circumstances of the wrongful dismissal of the Appellant.'[43] In written submissions filed before this Court, the Appellant

[40] [1973] 1 All ER 71.
[41] See, Statement of Claim, relief (n). See also, Guyana Civil Procedure Rules 2016, r 8.02(4): 'A Claimant or Applicant who seeks, (a) aggravated or exemplary damages must state so;…' And note that the overriding objective of the Civil Procedure Rules is to deal with cases justly: r 1.01(1).
[42] Ground 3, Appellant's Cross-appeal, 15 August 2017.
[43] Notice of Appeal to the CCJ, dated 11 April 2023. See also, para 3. b. i.

reiterated his detailed submissions before the Court of Appeal.[44] Citing the Trinidad and Tobago decision in *Torres v Point Lisas Industrial Port Development Corp Ltd*,[45] the Appellant contended that an award of exemplary damages was justified in this matter.[46] In particular, the Appellant contended that the (i) nature of the accusations, (ii) circumstances of dismissal, and (iii) effects on his potential employment were material considerations.[47] He emphasised that his wrongful dismissal was erroneously and knowingly based on (i) unsubstantiated allegations of fraud and (ii) misplaced dereliction of duty, and spotlighted his inability to obtain employment after his dismissal.

[94] In my opinion, the Appellant was entitled to a considered determination of his claim for exemplary damages. Non-treatment, or dismissal by default, in the face of unequivocal findings of wrongful dismissal and the repeated raising of the issue by the Appellant at every level of the court system, cannot suffice juridically.

[95] Exemplary damages can be awarded in employment contracts. This is rooted in the obligation of good faith and also stands on independent bases. Such a claim forms part of the protection of the law to which the Appellant is entitled. It also advances the rule of law in liberal democratic societies, where freedom to contract is anchored in good faith and essential for effective societal functioning.

[96] The development of the law in this area has not been uniform, and there are some jurisdictions that hesitate, agonising as to whether to restrict the use of exemplary damages to torts.[48] However, in parts of the Caribbean this development of the

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[44] See, Maurice Arjoon, 'Submissions on behalf of the Appellant', Submission in *Arjoon v New Building Society Ltd*, GYCV2023/002, (30 June 2023), paras 27 – 28 and paras 108-115 of his written submissions before the Court of Appeal.
[45] (2007) 74 WIR 431.
[46] ibid at [109] – [110].
[47] ibid at [111] - [114].
[48] See, for example, contrasting approaches in *Addis v Gramophone Co Ltd* [1908-1910] All ER Rep 1 (Lord Atkinson and Lord Collins), the former denouncing an award of exemplary damages in contract and the latter affirming it. See also, *A-G v Blake* [2001] 1 AC 268, a leading English case on damages for breach of contract, where the objective of punishment was introduced into an award of damages (going beyond compensation): 'The speech of my noble and learned friend explores what is the "just response" to the defendant's conduct. The "just response" visualised in the present case is, however it is formulated, that Blake should be punished and deprived of any fruits of conduct connected with his former criminal and reprehensible conduct.' at 295 (Lord Hobhouse) .

law has taken root and I endorse and support that expansion. Caribbean courts have drawn on the jurisprudence in Canada and indigenised its application to suit local realities and needs. This is another example of the growth of Caribbean jurisprudence which this Court endorses.[49]

[97] It is well established that exemplary damages can be awarded in the law of tort.[50] It is also well established that whereas the general objective of damages is compensatory, the real purpose of exemplary damages is to denounce and deter, and in that sense, also punitive.[51] This purpose advances compliance with legal norms and practices. In doing so, it supports and sustains the rule of law.

[98] Classically, and in tort, exemplary damages are awarded to show that the law cannot be broken with impunity, to demonstrate that tort does not pay, and to vindicate the rule of law.[52] Most importantly, exemplary damages are a response to the conduct of a wrongdoer. This improper conduct has been described in many ways, and maybe the single most apt descriptor is 'outrageous conduct'.[53]

[99] In *A v Bottrill*,[54] outrageous conduct was explained conceptually, as follows:[55]

> Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrongdoer may be ordered to make a further payment, by way of condemnation and punishment.

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[49] See, Preamble to The Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319: 'CONVINCED that the Caribbean Court of Justice will have a determinative role in the further development of Caribbean jurisprudence …'.
[50] *Rookes v Barnard* [1964] 1 All ER 367.
[51] ibid at 407.
[52] ibid at 411.
[53] *A v Bottrill* [2003] 1 AC 449.
[54] ibid.
[55] ibid at [20].

[100] Once one considers the real purpose of exemplary damages, to denounce and deter, and to punish conduct that undermines the rule of law in a democratic society, its applicability to the law of employment contracts is evident. Contracts are the backbone of modern societies, whether as employment contracts, commercially, or more generally. Public and private human affairs are conducted contractually. The society therefore has a deep interest in the maintenance of contractual legal standards. One legal mechanism for doing so, in the area of employment contracts, is to condemn conduct that undermines normative legal practices. Exemplary damages, when justified, is one tool in the judicial toolkit for maintaining the rule of law in this area.

[101] Two Supreme Court of Canada decisions are illustrative. The first is *Vorvis v Insurance Corp of British Columbia*.[56] *Vorvis* was a wrongful dismissal case in which a plaintiff was dismissed prior to the vesting of pension benefits, although no complaint had been made about the quality of their work. It was not in dispute that the employer's conduct was worthy of condemnation. It was held that punitive damages may be awarded where the employer's conduct had been harsh, vindictive, reprehensible, or malicious, provided the employer's conduct that gave rise to the claim was an actionable wrong.

[102] In *Vorvis* the underlying principles are set out. The entire court agreed that (i) exemplary damages were available for breach of contract, and (ii) the focus was on the conduct of the wrongdoer (not on its legal category). McIntyre J who delivered the majority judgment of the court, cited Clement JA in *Paragon Properties Ltd v Magna Envestments Ltd* [57] on the underlying principles governing an award of exemplary damages in contract:

> The basis of such an award is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of

[56] [1989] 1 SCR 1085.
[57] [1972] 24 DLR (3d) 156 at [37].

> damages is, in the opinion of the Court, warranted. The object is variously described to include deterrence to other possible wrongdoers, or punishment for maliciousness, or supra-compensatory recognition of unnecessary humiliation or other harm to which the claimant has been subjected by the censurable act. It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred. To place arbitrary limitations upon its application is to evade the underlying principle and replace it with an uncertain and debatable jurisdiction.

[103] The second decision is particularly interesting in the context of the factual matrix in this matter. Though not an employment contract case, but an insurance matter, the common denominator is the underpinning principle of good faith. In *Whiten v Pilot Insurance Co*,[58] the court approved an award of exemplary damages made against an insurance company, where the company had acted in breach of its contractual duty of good faith and had resisted the insured's claim arising out of the destruction of their home by fire on the basis of arson, and where there was no reasonable possibility of success in relation to that allegation. Likewise, in this matter, where, following an auditor's investigation the First Respondent had expressed full confidence in the Appellant, only, in an about turn, to bring specious disciplinary proceedings against him. Noteworthy, is the reliance in *Whiten* on the implied contractual obligation of good faith.

[104] In Trinidad and Tobago, the Court of Appeal, in *Torres v Point Lisas Industrial Port Development Corp Ltd*,[59] would agree that exemplary damages could be awarded where there was a breach of contract. Warner JA explained the court's position: 'I am of the view that it is within the competence of this court to develop the law to permit the award of exemplary damages where the defendant's conduct has been reprehensible.' [60] The Trinidad and Tobago Court of Appeal has

[58] [2002] 1 SCR 595.
[59] *Torres* (n 45).
[60] ibid at [53].

confirmed this approach in the more recent decision of *Republic Bank Ltd v Tri-Star Caribbean Inc*.[61]

[105] Further, for the Trinidad and Tobago courts, the focus is on the wrongful behaviour. Warner JA stated the relevant test for awarding exemplary damages in contract, as follows:[62]

> I think that the proper approach would be to focus on the conduct of the defendant as a whole: Do the facts disclose reprehensible conduct tending to take advantage of every chance of success to the plaintiff's disadvantage? Was it outrageous, highhanded and egregious? Was the misconduct planned and deliberate? Did the defendant try to conceal the misconduct? If the breach was committed in such a manner in disregard of the plaintiff's rights, then an award of exemplary damages would be appropriate.

[106] However, in both decisions of the Supreme Court of Canada, the majorities were of the view that to succeed in a claim in contract for exemplary damages, in addition to a breach of contract, the conduct of the contract breaker had to amount to an actionable wrong (in *Vorvis*, the minority thought otherwise). This caveat is refuted in the Trinidad and Tobago development of the law, which adopts the minority view on the point as stated in *Vorvis*.

[107] Thus, in *Torres*,[63] Mendonca JA, in agreeing that exemplary damages were available in contract, would cite with approval the opinion of Wilson J in *Vorvis*, as follows:

> I do not think that it makes much sense to treat one contract breach different from another simply because one breach is accompanied by conduct that amounts to a breach of some other law. In tort the conduct that attracts exemplary damages does not do so because it amounts to an

[61] TT 2020 CA 50 (CARILAW), (9 September 2020) at [101].
[62] *Torres* (n 45) at [54].
[63] ibid at [97].

independent actionable wrong. I see no need to introduce that concept in a contract case. As Wilson J remarked in *Vorvis*:

> I do not share my colleague's view that punitive damages can only be awarded where the misconduct is in itself an "actionable wrong". In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.

[108] I agree with the position taken by the Court of Appeal in Trinidad and Tobago on this point and do so decisively in relation to applying the principle to employment contracts. There is no need for the wrongful conduct to independently constitute an actionable wrong for it to attract an award of exemplary damages in contract law. In principle, wrongful conduct attracts an award of exemplary damages because it is so outrageous that the applicable orders for compensation and redress are considered an inadequate response in law. The courts have used an award of exemplary damages to punish, to deter, and to demonstrate the court's disapproval for the wrongful behaviour. This is a development of the law of employment contracts that this Court ought to also endorse.

[109] There are several reasons why this Court ought to develop the law of contract to include awards for exemplary damages. But first a question of principle: If in appropriate cases punishment is apt for torts, why is it not for breaches of contract? Surely upholding good faith in contractual relationships has broad societal and public interest, including commercial, advantages. Awarding exemplary damages for outrageous breaches of contract sends a societal message as to the sacrosanct nature of contractual undertakings. Indeed, the availability of exemplary damages may be of particular usefulness in newly emerging democracies, such as in the Caribbean, where establishing normative contractual practices is in the best interests of sustainable societal development.

[110] Restricting my reflections to the area of employment contracts, is it societally acceptable that an employer can knowingly and intentionally take wrongful actions to deprive a long-standing employee of pension and/or severance entitlements? Is it fair or just for an employee to await some future expectation of compensation at an undetermined date? In this case the Appellant was summarily and wrongfully terminated in 2007. In 2010 he commenced proceedings in the High Court seeking redress. It is 2024 (17 years later) and the Appellant is still waiting for a final resolution of his claims – an unacceptable but well-known feature of litigation in the Caribbean.

[111] Does the normal measure of damages in such circumstances afford a just result? Surely, there are cases where a defendant's wrongful conduct so flouts the law of contract in high handed and outrageous ways, that the normal measure of damages may be perceived to be an inadequate response to achieve justice between the parties. Surely, in some such cases the courts need to say: 'This is going too far!' Surely, society has an interest in preventing, in deterring, such contractual abuse. Is this not such a case? Is this not an appropriate case for this Court to signal its disapproval for this particular behaviour and this general kind of conduct?

[112] Thus, to ask and answer the following questions in relation to the First Respondent's wrongful actions are revealing, and indicators as to why exemplary damages are apt in this case. Were the actions taken against the Appellant planned and deliberate? Were they specifically directed towards the Appellant and no one else? What were the motives and intentions in pursuing these actions when they were deployed and for how long were they pursued? Did the First Respondent persist in its conduct even when exposed as wrongful and outrageous? Who was the more vulnerable party in relation to the wrongful actions taken by the First Respondent? Who would have been more likely to have and did in fact suffer the greater detriment? What was the harm intended to and how could it have impacted the Appellant? The facts as determined by the courts in this matter, make the answers to these questions self-evident.

[113] Having reached this far, and assuming exemplary damages are apt, the question remains: What may be an appropriate award for exemplary damages? In my opinion any award must be proportionate to the purpose, the objective, of awarding exemplary damages. According to Warner JA, in *Torres*:[64] 'The award however ought to be proportionate to a defendant's conduct.'

[114] In this regard Mendonca JA, also offers the following useful guidance:[65]

> A proper award must therefore look at proportionality in several dimensions. Some of these which can impact on the quantum of the award … [are]: (1) proportionate to the blame worthiness of the defendant's conduct; (2) proportionate to the degree of vulnerability of the plaintiff, (3) proportionate to the harm or potential harm directed specifically at the plaintiff; (4) proportionate to the need for deterrence; (5) proportionate even after taking into account the other penalties both civil and criminal which have been or are likely to be inflicted on the defendant for the same conduct, and (6) proportionate to the advantage wrongfully gained by a defendant from the misconduct.

[115] Though this opinion, standing alone as it does on this point, may bear no concrete benefits for the Appellant, I hope it signals an approach to damages in contract law that may soon become mainstream. It is an opinion on an issue raised throughout these proceedings and before this Court. The development of a Caribbean law of contract is necessary to make it relevant to the needs of our societies. In *Sandy Lane*, this Court superimposed developmentally the good faith principle into the law of employment contracts. There is every good reason why, as the Appellant has persistently pleaded though brusquely ignored, exemplary damages should be considered and awarded in appropriate employment contract cases. As to whether exemplary damages should be more generally awarded in all areas of contract, may be best left to develop on an incremental Caribbean common law basis.

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[64] ibid at [55].
[65] ibid at [117]. See also, *Republic Bank Ltd* (n 61) at [128] (Mendonca JA).

Conclusion

[116] In my opinion Barrow J is right in concluding that the Appellant is not also entitled to a severance allowance as provided for by the Act. However, in my opinion that is not the end of the matter. The Appellant is also entitled, from the record and on the face of it and in the exceptional circumstances of this case as pleaded and established, to a consideration of additional heads of damage, including (i) compensation and/or damages payable and/or other relief under s 20 of the Act, and/or (ii) exemplary damages.

RAJNAUTH-LEE AND BURGESS JJ (concurring, except on severance):

Introduction

[117] This appeal implicates the interpretation of several provisions of the Termination of Employment and Severance Payments Act[66] ('TESPA'), and in particular ss 3 and 21. The Court of Appeal of Guyana agreed with Reynolds J, the trial judge, that the contract of employment between the Appellant, Mr Maurice Arjoon ('Arjoon') and the First Respondent, the New Building Society Ltd ('NBS'), had been wrongfully terminated by NBS. In his appeal to the Caribbean Court of Justice ('the Court'), Arjoon contends that contrary to the decision of the Court of Appeal, he is entitled to both his full pension under NBS' Pension Scheme, despite his dismissal prior to normal retirement age, and severance allowance under TESPA. NBS, on the other hand, cross-appealed, arguing that Arjoon's contract of employment was lawfully terminated pursuant to ss 7 and 10 of TESPA for gross misconduct and that he was not entitled to (a) pension payments in excess of his contributions and (b) a severance payment under TESPA.

[118] The Court heard the appeal on 10 October 2023 and by order dated 23 October 2023, the Court allowed Arjoon's appeal and dismissed the cross-appeal with reasons to follow. The Court also reversed the decision of the Court of Appeal that Arjoon was not entitled to pension benefits. The Court restored the judgment

[66] TESPA (n 1).

and order of the trial judge, save that a decision on the issue of Arjoon's entitlement to severance pay was reserved. Further, the Court ordered that NBS pay to Arjoon the additional sum of GYD1,602,459 as leave pay and passage assistance for the years 2006 and 2007 and standard costs. What follows are our reasons in support of the order of the Court, and our decision on whether Arjoon was entitled to severance pay under TESPA.

[119] We support fully the reasons of our brother, Barrow J, for this Court upholding the decision of the Court of Appeal that Arjoon was wrongfully dismissed and find it unnecessary to add thereto. The Respondents have simply not shown any exceptional circumstances sufficient to warrant the Court disturbing the concurrent findings of fact by the courts below, nor have the Respondents shown any error of law on the part of the Court of Appeal in its decision on this issue.[67] Our reasons are therefore restricted to two issues (a) whether Arjoon is entitled to pension benefits which Senior Counsel for Arjoon describes as the 'seminal challenge to the decision of the Court of Appeal' and (b) whether Arjoon is entitled to a severance allowance under TESPA. Before doing so, however, we find it advantageous to set out a brief statement of the factual background, including the litigation history of the appeal.

Factual Background

[120] On 1 December 1977, Arjoon, an accountant, was employed by NBS as an assistant accountant. He was promoted over the years. In 1992 he held the position of Assistant Secretary/Accountant, which was re-designated Deputy CEO from 1999, and in 2002 he was promoted to Director/Secretary/CEO, a position which he continued to hold until 14 August 2007.

[121] By a letter dated 14 August 2007, after almost 30 years of service and approximately six months before Arjoon would have reached the normal

[67] See the Court's jurisprudence on the issue of an apex court overturning concurrent findings of fact in *Persaud v Mongroo* [2023] CCJ 16 (AJ) GY, and *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB.

retirement age of sixty (60) years on 24 February 2008, NBS summarily dismissed Arjoon with immediate effect for 'serious misconduct'. At the time of his dismissal, Arjoon was a member of and contributor to NBS' Pension Scheme. It is noteworthy that membership in NBS' Pension Scheme was compulsory and was a condition of employment under Arjoon's contract of employment with NBS.

[122] On 13 May 2010, Arjoon commenced proceedings against NBS and four other defendants[68] in the High Court. The defendants in their defence contended that Arjoon was dismissed summarily for good and sufficient cause, gross dereliction of duty, negligence and gross/serious misconduct disentitling him to severance benefits. NBS filed a counterclaim for loss allegedly suffered by NBS through Arjoon's misconduct.

[123] The central issue at the trial was whether the Appellant was wrongfully dismissed in breach of his contract of employment. The trial judge ruled that on the admissible evidence adduced by NBS, NBS had failed to discharge the evidentiary burden placed on it to prove that Arjoon had been guilty of serious misconduct. The trial judge found therefore that on a balance of probabilities Arjoon had been wrongfully dismissed. The Court of Appeal upheld the finding of the trial judge.

[124] The trial judge awarded Arjoon three months' remuneration being pay in lieu of notice, and severance benefits pursuant to TESPA. This award was made against NBS. In addition, as against the first to fourth defendants before him, the trial judge awarded Arjoon pension benefits in the sum of GYD59,033,281, calculated up to 30 June 2017, and from 1 July 2017 until death the monthly sum of GYD372,498. The trial judge disallowed loss of earnings, loss of allowances, leave pay and passage allowances due to Arjoon as well as general damages for

[68] The Court notes that the third defendant Ahmad Khan passed and has been substituted by the Executor of the Estate of Ahmad Khan, deceased, the third respondent.

breach of contract. NBS' counterclaim was dismissed due to its failure to establish any loss or that any loss could be attributable to the actions or inactions of Arjoon.

[125] The Court of Appeal reversed the trial judge's award of pension benefits. The Court of Appeal, albeit agreeing with the trial judge that Arjoon had been wrongfully dismissed and stating that 'Arjoon would have had his pension but for the dismissal', held that Arjoon was entitled to receive only pension contributions in the sum of GYD18,817,432, and that 'his employment having ceased, no further pension contribution or pension rights are in place'.

[126] We turn now to address the two main issues.

Arjoon's Entitlement to Pension Following His Wrongful Dismissal

[127] TESPA was passed into law in Guyana on 20 September 1997. The Act states in its purpose clause that it is 'An Act to provide for the conditions governing termination of employment and grant of redundancy or severance payment to employees and matters connected therewith.'[69] Sections 3 and 21 (4) (d) have bearing on Arjoon's entitlement to pension claim. We discuss them hereafter.

Section 3 of TESPA

[128] Section 3 of TESPA makes provision for 'higher standards of benefit' than those set out in the Act to be granted to employees where agreed upon. It reads as follows:

> 3. (1) Nothing in this Act shall preclude higher standards of benefit to employees than those set out in this Act agreed upon through collective bargaining or other forms of negotiations or agreement or arbitration award.

[69] See Jeff Cumberbatch, 'The Termination of Employment Statutory Reform in Guyana' (1999) 1 Guy L R 79.

> (2) Where at the coming into operation of this Act, there exists any higher standard of benefit to employees which has been agreed upon through collective bargaining or forms of negotiations or agreement, other than those set out in this Act, the employer shall continue to pay or apply such higher standard of benefit as if it were provided for under this Act.

[129] It is manifest that s 3(1) of TESPA permits employees, after the coming into force of the Act, to enter into agreements for higher standards of benefit than those set out in the Act. Meanwhile, s 3(2) of TESPA ring-fences any higher standard of benefit to employees existing at the coming into force of the Act and preserves such benefit as though it were provided for under that Act.

[130] Section 3(1) is not relevant to Arjoon's pension claim, but s 3(2) is, since his claim is in respect of a pension scheme which existed at the time TESPA came into force. Thus, for Arjoon to succeed, he must prove that his full pension was a 'higher standard of benefit' to which he was entitled under an agreement with NBS.

[131] The expression 'benefit' is not statutorily defined in TESPA. It is clear from s 3, however, that that expression is to be understood in its ordinary dictionary meaning as a right provided by an employer to an employee in addition to wages or salary. Thus, a pension right, being a right provided by an employer in addition to wages or salary, falls squarely within the ambit of the section and, to the extent it constitutes a 'higher standard of benefit' to employees, existing at the coming into force of TESPA, it is preserved under s 3(2) as though it were provided for under TESPA.

[132] To be clear, s 3 of TESPA does not confer any statutory right to pension benefits. By necessary implication, however, TESPA subsumes pension benefits under the general provisions on 'higher standard of benefit to employees' in s 3. A 'higher standard of benefit' is therefore to be found in the employment agreement, not in the provisions of TESPA. Accordingly, s 3 preserves pension benefits, to the

extent that they constitute 'higher standards of benefit', as if they were provided for under TESPA.

Section 21(4) (d) TESPA

[133] An argument raised by NBS as to why Arjoon is not entitled to full pension benefits is that s 21(4) (d) of TESPA precludes such entitlement. In its written submissions, NBS' argument runs as follows:

> 25. Section 21(1) of TESPA provides *inter alia* that an employee on termination of his employment shall be entitled to a severance allowance. However, s 21(4)(d) provides that the employee shall not be entitled to severance allowance if he retires having attained the age of sixty years and is in receipt of a pension.
>
> 26. The entitlement to severance is statutory. Pension entitlements arise in private law. The legislation provides for the statutory entitlement to severance to be replaced if the employee is in receipt of qualifying pension benefits at sixty.
>
> 27. Consequently, if an employee is terminated before attaining the age of sixty, he is not entitled to pension under TESPA. TESPA does not recognise or protect accrued or earned pensions.

[134] We make two observations on this contention. The first is that Arjoon has not claimed to be entitled to pension under TESPA. His claim always has been that he is entitled to pension under NBS' Pension Scheme as he was a contributing member of that scheme since 1 December 1979 as a condition of his employment. In our opinion, s 21(4) (d) of TESPA is not directed at such a claim and certainly does not preclude an employee's entitlement to pension benefits under an employment pension scheme. The express aim of that sub-section is to disapply the right to a severance allowance provided for in s 21(1) in the circumstances where an employee is being retired from his employment having attained the age of sixty (60) years and is entitled to a gratuity or pension.

[135] Secondly, considering the foregoing, it cannot be argued, as NBS has sought to do, that s 21(4) (d) of TESPA supports a conclusion that if an employee is terminated before attaining the age of sixty (60), he is not entitled to pension under TESPA. Similarly, it is not correct to say, as NBS has also argued, that TESPA does not recognise or protect accrued or earned pensions. As we have said above, s 3 of TESPA, by necessary implication, recognises a pension benefit to the extent it is a 'higher standard of benefit' in an employment agreement and protects it as if it were provided for under the Act.

[136] Considering the foregoing, the dispositive question as to Arjoon's pension claim therefore becomes whether Arjoon's pension entitlement was such a higher standard of benefit in an employment agreement with NBS. And so, we now turn to addressing that question.

NBS' Pension Scheme and Rules

[137] Arjoon claims to derive his pension rights under NBS' Pension Scheme. NBS' Pension Scheme was established by a Trust Deed dated 31 July 1967 with a Schedule appended entitled rules of the New Building Society Pension Scheme ('the rules'). The object and purpose of NBS' Pension Scheme was stated in r 3.00 (i) to be 'the provision by contributions of the members and of the Society ('NBS') of Pensions for the Members'. By Clause 2 of the Trust Deed, NBS' Pension Scheme was to be 'governed and administered in accordance with the provisions of the Rules and the Trust Deed.

[138] By r 7.02, NBS was obligated to make it a condition of employment that every full-time employee shall become a member of NBS' Pension Scheme. In that regard, r 8 stipulates that, on becoming a member, the member must contribute 6 per cent of their salary to the Fund established under NBS' Pension Scheme. The member's obligation to contribute continues until normal retirement date, withdrawal or dismissal (r 8.02). The definition of 'pensionable service' in r 1.00 recognises that each year a member is employed in the service of NBS constitutes

'pensionable service'. It is to be noted that NBS was required under r 9.00 to contribute a sum equivalent to 12 per cent of each of the salaries of its members and such further sum that shall be required to keep the Fund viable.

[139] Rule 10 contains the provisions on entitlement to pensions. Rule 10.00 provides that every member shall retire from the services of NBS on pension on their normal retirement date which under r 1.00 is the 60th birthday. Significantly, r 10.00 sets out additional circumstances of retirement including if NBS permits the member to retire any time not more than 5 years before their normal retirement date (r 10.00 (ii)) and if NBS requires the member to retire at any time after that employee has attained the age of 55 years (r 10.00 (iii)). The rules do not specifically address a member's entitlement in the event of wrongful dismissal by NBS or where a member is terminated by notice.

[140] Rule 11.00 makes provision for a refund of pension contributions (with interest) when a member resigns other than as specified in rule 10.00, and then only where the amount of contributions paid by the employee cannot purchase an annuity of GYD200, and rule 12.0 where a member dies before retirement.

[141] It is important to note that even in circumstances where a member is dismissed for serious misconduct, he does not necessarily lose his accrued pension benefits. Under r 11.02 the Managing Trustee may forfeit any benefit arising from the contributions of NBS under NBS' Pension Scheme to which a member may otherwise be entitled, or may withhold from any such benefit to which the member is entitled, any amount owing to the Fund or the Society or any shortage in the Fund for which the member is responsible as certified by the auditors or NBS, and pay that amount to NBS.

[142] For reasons which are discussed later, r 21.00 should also be noted. That rule provides that termination of employment of a member shall be effected as if the NBS' Pension Scheme were not in operation and that a member who is terminated

shall not be entitled to claim or recover any sum by way of compensation in respect of any benefit arising under NBS' Pension Scheme.

[143] NBS disputes that Arjoon is entitled to pension under NBS' Pension Scheme. It has argued that he is not entitled to pension for the following reasons. These are (i) that Arjoon was terminated before the normal retirement age; (ii) that the rules are inconsistent with an entitlement to pension where the employee has been wrongfully dismissed; (iii) that r 21.00 precludes a claim upon termination of employment; (iv) that the claim for pension benefits should be made against the Trustees and not NBS; and (v) that NBS' Pension Scheme was in any case terminated.

[144] We will address each of these contentions in turn.

Arjoon Was Terminated Before the Normal Retirement Date

[145] Arjoon claims entitlement to full pension benefits under the rules even though he was prevented by his dismissal from reaching retirement age. NBS contends, however, that under the rules, members only become entitled to a pension at the normal retirement date, that is the 60th birthday, at the rate specified in the rules. According to NBS, as Arjoon was terminated before the normal retirement date, he could only claim under one of the 'various pension provisions' made for retirement at dates earlier or later than the normal retirement age.

[146] In our judgment, there are two compelling reasons why NBS' contention must fail.

[147] The first is based on a proper interpretation of the rules. In approaching such an interpretation, we would observe that it is clear from the authorities that there are no special rules governing the construction of pension schemes as such. As with all other documents, interpretation of pension schemes is in the words of Lord

Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[70] :

> …the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the [document].

[148] In this regard, it has been widely recognised in the authorities that although there are no special rules of interpretation of provisions of pension schemes, certain characteristics exhibited by pension schemes constitute important background which ought to be taken into consideration in interpreting these schemes.[71]

[149] Perhaps the most important characteristic relates to the juristic nature of pension schemes. In this regard, it is important to emphasise that pension schemes are fundamentally different in nature from traditional private trusts where the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of bounty. With traditional private trusts, there is normally no legal relationship between the parties apart from the trust, and the beneficiaries under the trust have given no consideration for what they receive.

[150] In describing the rights of members of pension schemes, Lady Arden observed in *Stevens v Bell*: 'members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration for their services and this is so whether the scheme is contributory or non-contributory'[72]. Similarly, in *Air Jamaica Ltd v Charlton*,[73] Lord Millett explained the right of an employee under a pension scheme as follows:

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[70] [1998] 1 WLR 896 at 912.
[71] See *Stevens v Bell* [2002] All ER [D] 301 (May) at [26] – [32] (Arden LJ).
[72] ibid at [27].
[73] *Air Jamaica Ltd* (n 15).

> The employee members of an occupational pension scheme are not voluntary settlors. As has been repeatedly observed, their rights are derived from their contracts of employment as well as from the trust instrument. Their pensions are earned by their services under their contracts of employment as well as by their contributions. They are often (not inappropriately) described as deferred pay.

[151] It is evident from the foregoing that pensions are in nature and character deferred wages for services already rendered. Indeed, this characterisation of a pension as delayed remuneration for current work was acknowledged by the House of Lords in *Parry v Cleaver*,[74] where it was held that the proceeds of a pension scheme were not to be deducted from damages awarded. In that case, Lord Reid commented on pensions as follows:

> The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income.

[152] This analysis was supported by Lord Pearce who said that pensions:[75]

> …[W]hether contributory or non-contributory, flow from the work which a man has done. They are part of what the employer is prepared to pay for his services. The fact that they flow from past work equates them to rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums.

[153] In our judgment, given the nature of pensions as deferred remuneration earned by the employee, an employee could only be deprived of these rights by clear, express words in the pension scheme rules. We were not pointed to any such language in the rules. In any case, we recoil from any suggestion that the rules can be interpreted to allow NBS, as the employer, to deprive Arjoon, as the

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[74] [1970] AC 1 at 16.
[75] ibid at 37.

employee, of his entitlement to pension benefits by wrongfully terminating his contract of employment six months before his normal retirement date.

[154] The second reason for rejecting NBS' contention flows from the fact that, as was underlined by the English Court of Appeal in *Mihlenstedt v Barclays Bank International Ltd*,[76] not only are pensions part of the consideration which an employee receives in return for the rendering of services but they are established against the background of an employment relationship. The importance of the employment relationship background for pension schemes was explicated and contextualised by Sir Nicolas Browne Wilkinson VC in *Imperial Group Pension Ltd v Imperial Tobacco Ltd*.[77] At 597 – 598 he stated:

> In every contract of employment there is an implied term:
>
> > "that the employers 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 employer and employee;" (Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 670, approved by the Court of Appeal in Lewis v Motorworld Garages Ltd [1986] ICR 157).
>
> I will call this implied term "the implied obligation of good faith." In my judgment, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer. Say, in purported exercise of its right to give or withhold consent, the company were to say, capriciously, that it would consent to an increase in the pension benefits of members of union A but not of the members of union B. In my judgment, the members of union B would have a good claim in contract for breach of the implied obligation of good faith: see *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522, 525, 531, paras 12, 64 and 70.
>
> In my judgment, it is not necessary to found such a claim in contract alone. Construed against the background of the contract of employment, in my judgment the pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligation of good faith.

[76] [1989] IRLR 522.
[77] [1991] 1 WLR 589.

[155] In *Sandy Lane Hotel Co Ltd v Cato,*[78] this Court endorsed and applied the principles of good faith and implied obligation of trust and confidence in the employment relationship as established in the *Imperial Group Pension*[79] case. Saunders P and Rajnauth-Lee J at [72] stated that the implied obligation of good faith meant that 'a court must be astute to secure the interests of…Employees and not leave them at the complete mercy of the actions of their employer'. To be sure, even though *Sandy Lane Hotel*[80] was an appeal from Barbados, it is clear from the judgment of Saunders P and Rajnauth-Lee J that the good faith and implied obligation of trust and confidence in the employment relationship are principles which apply throughout the common law Caribbean.

[156] The upshot of the implied obligation of good faith principle is that a term is to be implied into the contract of employment between Arjoon and NBS that NBS must exercise its rights and powers under the rules in accordance with the implied good faith obligation. This means that NBS must exercise its rights with a view to the effective running of NBS' Pension Scheme, and with a view to protecting the employees' rights in the scheme, not to destroy them: *Imperial Group Pension*[81]. In our judgment, in wrongfully dismissing Arjoon, who had been employed for almost 30 years, 6 months before his normal retirement age, NBS was not protecting Arjoon's rights in the scheme; it was destroying those rights. Arjoon's evidence is that he was not able to continue his employment until his normal retirement age of 24 February 2008 because of the dismissal. Accordingly, NBS was in clear breach of its implied good faith obligation.

[157] In sum, NBS' wrongful dismissal of Arjoon six months before his normal retirement age did not operate to deprive him of his full pension benefits under the scheme. For this reason, also, Arjoon is entitled to his full pension benefits under NBS' Pension Scheme.

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[78] *Sandy Lane Hotel* (n 9) at [68]-[71].
[79] *Imperial Group Pension* (n 77).
[80] *Sandy Lane Hotel* (n 9).
[81] *Imperial Group Pension* (n 77) at 599.

[158] Placing considerable reliance on the Supreme Court of Canada decision in *Vorvis v Insurance Corp of British Columbia*,[82] Counsel for NBS would contest our conclusion arguing that it is not the law that wrongful dismissal close to retirement age entitled Arjoon to pension benefits as if he had attained the age of sixty. That case concerned the interpretation of a pension retirement which provided in its relevant part as follows:

> (7) *Termination of Service*
>
> (a) *Refund of Contributions*
>
> If, prior to attaining ten years of Pensionable Service, such service is Terminated for any reason other than retirement or death, a Member's contributions will be refunded with interest to the date of termination.
>
> (b) *Vesting of Benefits*
>
> If a terminating Member has ten or more Years of Pensionable Service, the Member's required contributions will not be refundable, except in the event of death, and the terminating Member will receive, commencing at retirement date, monthly payments based on the amount of pension earned under the Plan, plus any pension that may be provided, at the option of the Former Member, in respect of any voluntary additional contributions made, with interest.

[159] The trial judge dealt with a pension claim in these words:[83]

> The plaintiff contends that a term should be implied in his contract of employment that, in the absence of dismissal for cause, the right of the employee to his pension cannot be terminated by the unilateral action of the employer. I do not think that argument can succeed in the face of the specific provisions respecting termination of service and vesting contained in cls. 7(a) and (b) above.

[160] The Court of Appeal agreed that in light of the express provisions of the pension plan it was not possible to imply a term in the contract of employment, that the

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[82] [1989] 1 SCR 1085.
[83] ibid.

employer could not prevent the plaintiff from achieving a vested pension except by termination for cause.

[161] The Supreme Court of Canada upheld the judgments of the lower courts on this view of the law. McIntyre J, delivering the judgment of the Court on the pension point invoked the general principle citing, A G Guest (ed), *Chitty on Contracts* (25th edn, Sweet & Maxwell 1983), and *London Export Corp v Jubilee Coffee Roasting Co*,[84] that 'whatever may be implied in a case of ambiguity or absence of a provision, no term may be implied in a contract which is contrary to the clearly expressed intention of the parties'.

[162] It is clear from the foregoing that *Vorvis*[85] is of little assistance in the appeal before this Court since that case turned on the interpretation of specific provisions respecting termination of service and vesting in a pension plan. There is no similar provision in the matter before us, in which the rules must be interpreted having regard to the express intention of the parties.

[163] For completeness, we feel bound to observe also that *Vorvis*[86] was decided before *Imperial Group Pension*[87] and *Sandy Lane Hotel*.[88] To the extent *Vorvis* is inconsistent with the good faith principle espoused by these cases, we would consider the decision in *Vorvis* of doubtful authority.

The Rules are Inconsistent With an Entitlement to Pension Where the Employee Has Been Wrongfully Dismissed

[164] Another line of reasoning deployed by NBS as to why Arjoon is not entitled to a full pension is that the rules read as a whole are inconsistent with such an entitlement. In this regard, NBS points out that the rules provide that members

[84] [1958] 2 All ER 411 at 417-18 (Jenkins LJ).
[85] *Vorvis* (n 56) at 1097.
[86] ibid.
[87] *Imperial Group Pension* (n 77).
[88] *Sandy Lane Hotel* (n 9).

shall retire at the normal retirement date, the 60th birthday of the member, and that on retirement, the member becomes entitled to pension at the specified rate. Also, it is argued, there are various pension provisions made for retirement at earlier or later dates than the normal retirement age.

[165] NBS points to the rule that on becoming entitled to pension, the member may elect to receive a lump sum and reduced pension in place of the normal monthly pension but that the amount of the lump sum and the reduced pension may only be determined by the Actuary. The rules also give a discretion to the Managing Trustees to pay the pension from the pension fund or to purchase an annuity with a reputable insurance company, in which case the pensioner will be paid his benefit by the insurance company.

[166] NBS further submits that there is provision in the rules for a member to be refunded if he resigns and is not qualified for pension. In such case, the member is entitled to the refund of his contributions plus interest together with a percentage of the NBS' contribution depending on the member's years of service. Further, the rules make provision for where a member is dismissed for cause, voluntarily leaves employment, or resigns to forestall or avoid dismissal. In any such case, the Managing Trustees may forfeit any benefit arising from NBS' contribution. As an alternative, they may deduct any amount the member may owe to NBS or the Fund, or any shortage in funds for which the member is responsible or any amount misappropriated or defalcated as may be certified by NBS's auditors.

[167] NBS' contention here appears to be that since the rules expressly provide for the treatment of pensions in a variety of circumstances but do not make any provision for a case of wrongful dismissal, Arjoon cannot claim full pension. We do not agree that the rules can be interpreted to support this contention.

[168] To be sure, we agree with NBS that the rules must be read as a whole and in light of the fact that there are specific rules on entitlement to pension at normal retirement age, rules on resignation where not qualified for pension, and rules on dismissal for cause, voluntary separation, and resignation to forestall or avoid dismissal. By contrast, there is no specific provision on the rights of a wrongfully dismissed employee who is prevented from retiring from the services of NBS on pension on their normal retirement date, their 60th birthday. This, notwithstanding, we do not agree that the rules can be interpreted to mean that an employee can be denied pension where, by their wrongful dismissal, they are prevented from retiring from the services of NBS on pension on their normal retirement date. Such an interpretation would undoubtedly put employees' pensions at the mercy of employers who could simply dismiss an employee (albeit wrongfully) just prior to the normal retirement age and so deprive the employee of their full pension entitlement. In our view, such an interpretation must be eschewed.

[169] Support for our approach is to be found in *Stevens v Bell*.[89] In that case, Lady Arden noted that a pension scheme trust deed (which appends the pension rules) is invariably a complex document in the sense that it must seek to provide for a number of eventualities. As such, it would be unreasonable to expect the document to provide for every eventuality. Accordingly, the document should be construed so as to give a reasonable and practical effect to the scheme. According to Lady Arden, a construction which leads to impractical consequences is an indication that some other interpretation is the appropriate one.[90]

[170] As just seen, the construction suggested by NBS leads to impractical consequences. This points to the conclusion that another interpretation is appropriate. In our judgment, an appropriate approach to the interpretation of the absence of any provision for a case of wrongful dismissal is to construe it in the

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[89] *Stevens* (n 71).
[90] ibid at [28]. See also *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505 (Millett J).

context that the NBS' pension scheme was established against the background of an employment relationship. This means that the absence of such a provision must be assessed in light of the implied good faith obligation discussed above. Thus assessed, NBS could not deny Arjoon's pension under the rules by wrongfully dismissing him and thereby preventing him from retiring on pension on his normal retirement date.

Rule 21.00 Precludes a Claim Upon Termination of Employment

[171] Another argument raised by NBS as to why Arjoon cannot claim a full pension is that he is disentitled by r 21.00 from so doing. This rule provides that termination of employment of a member shall be effected as if NBS' Pension Scheme were not in operation. Accordingly, a member who is terminated 'shall not be entitled to claim or recover any sum by way of compensation or otherwise in respect of any benefit arising from any provision of the Scheme'. In our judgment, this argument also fails.

[172] Rule 21.00 is patently inapplicable for two reasons. First, Arjoon's claim is for entitlement to pension benefits under NBS' Pension Scheme. It is not compensation. Second, as regards Arjoon's alternative claim for loss of pension rights arising from wrongful dismissal by NBS, NBS' rights to terminate the employment pursuant to rule 21.00 can only refer to lawful termination by NBS. In any event, r 21.00 cannot be construed as operating to exclude Arjoon's claim for damages or compensation for pension loss arising out of breach by NBS of the employment contract between himself and NBS. The Trust Deed in which r 21.00 is found is entered into between NBS and the Trustees. Arjoon is not a party to that Deed. A rule in the Trust Deed cannot therefore deprive Arjoon, a member, of a right to compensation against NBS for breach of contract for wrongfully dismissing him. See *Employment Law and Pensions* by David Pollard[91].

[91] David Pollard, *Employment Law and Pensions* (2nd edn, Bloomsbury Publishing 2023) paras 56.56 – 56.59.

[173] The case of *Shove v Downs Surgical plc*[92] is also instructive on this point. That case involved a claim by a director against his employer. The director was also a trustee of the pension scheme and had signed the trust deed which contained a provision similar to r 21.00 which purported to exclude compensation based on pension loss. Sheen J held that this did not affect the damages claim and at 539 observed:

> … it has been strenuously argued by Miss Caws on behalf of the defendant that this is not a head of loss in respect of which the plaintiff is entitled to compensation. That is a surprising submission, because the plaintiff has undoubtedly been deprived of this benefit solely by reason of the defendants' breach of contract. … In the light of that provision it is perhaps, surprising that the defendant, who is a party to the deed, has referred to it in proceedings arising out of the determination of the service of an employee. The plaintiff, in his capacity as an employee, was not a party to that deed.

The Claim for Pension Benefits Should be Made Against the Trustees and not NBS

[174] Citing Lord Millet in *Air Jamaica Ltd v Charlton*,[93] NBS argues that the obligation to make pension payments falls on the trustees and not NBS. In that case, Lord Millet stated as follows:

> The obligation to make pension payments was not a contractual obligation undertaken by the company, but a trust obligation imposed on the trustees. Their lordships agree with the observation of Carey JA, who was dissenting in the Court of Appeal, that each employee becomes a member of the pension scheme by virtue of his employment, but that his entitlement to a pension arises under the trusts of the scheme.

And added further as regards members' pensions:

> Their pensions are earned by their services under their contracts of employment as well as by their contributions. They are often (not inappropriately) described as deferred pay. This does not mean, however, that they have contractual rights to their pensions. It means only that, in construing the trust instrument, regard must be had to the nature of an

[92] [1984] ICR 532.
[93] *Air Jamaica Ltd* (n 15) at 367.

occupational pension and the employment relationship that forms its genesis.

[175] Relying on these statements, NBS maintained that Arjoon has no claim to pension, or indeed any other entitlement under NBS' Pension Scheme, against it. Such a claim is against the Trustees.

[176] We agree with Counsel for Arjoon that NBS' case is not assisted by the submissions that pension payments are the obligation of the Trustees and not NBS. In the first place, as pointed out by Counsel for Arjoon, the Custodian and Managing Trustees were made Appellants and reliefs were sought against the Trustees for pension benefits. Secondly, clause 13 of the contract of employment between NBS and Arjoon creates a contractual obligation in Arjoon to join the pension scheme maintained by NBS. By r 7.02 of NBS' Pension Scheme, membership in the scheme is a condition of employment. Accordingly, Arjoon's alternative cause of action against NBS is for damages arising from breach of this contract. This cause of action is based on NBS' obligation to safeguard its employees' rights to pension, and not to destroy those rights by wrongfully dismissing employees, and thereby preventing them from achieving normal retirement age.[94]

NBS' Pension Scheme has Been Terminated

[177] Finally, NBS contends that Arjoon has no claim to pension under NBS' Pension Scheme since the scheme was terminated on the nineteenth anniversary of its establishment by the effluxion of time. NBS submits that the NBS' Pension Scheme was constituted under a Trust Deed dated July 1967 and amended by instrument dated 28 January 1969 and the rules are stated as of 28 July 1969. Rule 15.00 provides that '[unless] otherwise terminated under the provisions of the Deed, the Scheme shall continue until the last day of the nineteenth Anniversary Date and shall then terminate unless there has been legislation making it lawful

[94] *Imperial Group Pension* (n 77) at 599.

for the trusts of the Scheme to continue'. As there has been no legislation making it lawful for the scheme to continue, NBS claims that the scheme is now terminated.

[178] Rule 15 notwithstanding, there is sufficient circumstantial evidence to rebut NBS' contention, made for the first time before this Court, that NBS' Pension Scheme terminated by effluxion of time. There is evidence, for instance, that deductions of contributions from employees, and payment of pensions to retired employees, have not ceased. Had the scheme in fact terminated, rr 16.00, 16.01, 16.02 and 16.03 would have taken effect and would have required that the Fund be converted in accordance with those rules. There is no evidence of such conversion.

[179] Another piece of circumstantial evidence is that NBS' Pension Scheme is listed on the website of the Bank of Guyana (the supervisor of insurance business) as a registered pension plan pursuant to s 101 of the Insurance Act[95]. By virtue of s 101, all pension fund plans must be registered with the Commissioner of Insurance. This suggests therefore that NBS' Pension Scheme continues in existence and has not been treated by NBS as having been terminated.

[180] In any event, the defence filed by NBS did not raise or specifically plead the matters now raised as to the termination of NBS' Pension Scheme by effluxion of time or the non-qualification of Arjoon to receive pension under the rules. NBS relied on its counterclaim for damages. That counterclaim was dismissed by the trial judge. There is no appeal before us against that dismissal. Accordingly, it is not open to us to consider this matter.

[95] Cap 91:02.

Conclusion on Arjoon's Pension Entitlement

[181] For the foregoing reasons, we are of the view that the trial judge was correct to award Arjoon his full pension benefits. It is clear that Arjoon's pension rights were a higher standard of benefit to which he was entitled by virtue of his contract of employment with NBS.[96] Accordingly, he was entitled to full pension rights under NBS' Pension Scheme and the rules.

Arjoon's Entitlement to a Severance Allowance Under TESPA

[182] We move on to consider whether Arjoon was entitled to a severance allowance under TESPA. Arjoon's entitlement to a severance allowance is governed by the provisions of s 21 of TESPA. That section states, as far as is relevant, as follows:

> 21. (1) On termination of his employment, an employee who has completed one or more years of continuous employment with an employer shall be entitled to be paid by such employer a severance or redundancy allowance equivalent to …
> …
> (4) Subsection (1) shall not apply where the employee...
> (d) is being retired from his employment having attained the age of sixty years or such other age as may be agreed upon between the parties and is entitled to a gratuity or pension or both from his employer under any law collective, labour agreement or contract of employment whether such entitlement is under any contributory or non-contributory pension scheme, excluding benefits from the National Insurance scheme.
>
> Provided however that where any gratuity payable on his retirement is less than the amount the employee would have received under section 21 (1), the amount under section 21 (1) shall be paid instead of the gratuity.

[183] In our view, the judgment of Saunders P and Rajnauth-Lee J in *Sandy Lane Hotel*[97] makes it plain that in approaching the interpretation of such a section it is well to be reminded of the policy behind the section. In addition, the Court's decision in *Trust Co (Guyana) Ltd v Guyana Securities Council*[98] is instructive.

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[96] TESPA (n 1) s 3.
[97] *Sandy Lane Hotel* (n 9).
[98] [2021] CCJ 11 (AJ) GY, (2021) 99 WIR 422.

In *Trust Co*, this Court observed that in interpreting a particular section under the Securities Industry Act[99], the interpretation should not be contrary to the policy, clear purpose and entire scheme of the legislation.

[184] In our view, the policy behind the section is self-evident from sub-s (1). That subsection recognises that an employee who has completed one or more years of continuous employment with an employer accrues a right in the job and that right increases in value with the years of continuous employment. Thus, on termination of employment, an employee is entitled to compensation for the loss of the job. A severance allowance is not unemployment payment. It is compensation for doing service. An employee is not entitled to a severance allowance unless employed for one or more years of continuous employment, and the amount of the severance allowance depends on the length of service. It is also clear that a severance allowance is a separate and distinct entitlement apart from pension benefits.

[185] With that policy in mind, we turn to interpreting s 21(4) of TESPA. This subsection disapplies the payment of a severance allowance in circumstances where an employee '…is being retired from his employment having attained the age of sixty years or such other age as may be agreed upon by the parties and is entitled to a gratuity or pension or both'. For this subsection to apply, therefore, the employee must be 'being retired' having attained the age of sixty or at such other agreed age. In our judgment, therefore, where an employee retires at the normal retirement age or at such other agreed age, it is clear that a severance allowance is not payable.

[186] We are firmly of the view, however, that 'being retired' certainly does not mean 'being dismissed'. As it seems to us, given the policy behind the payment of severance as explained above, it would be strange if the legislature would have intended to take away an employee's accrued compensation for doing service

[99] Cap 73:04.

over the years in circumstances where the employee had been wrongfully dismissed, on the sole ground that he was entitled to a pension. The legislature cannot be taken as having intended such a meaning.

[187] We find further support for our view in the article in the Guyana Law Review, The Termination of Employment Statutory Reform in Guyana, by Jeff Cumberbatch (later Cumberbatch JA). He observed that, 'Under Part IV, captioned SEVERANCE OR REDUNDANCY ALLOWANCE, TESPA sets out the parameters for the payment of these sums. Although the caption is framed in the alternative, it seems clear that the allowances are in fact distinct.' Further, he notes that while both are payable on the termination of employment, the redundancy allowance would seem more appropriate where there is a termination for redundancy. On the other hand, the severance allowance is payable once employment comes to an end, whether lawfully or unlawfully.[100]

[188] In addition, our view aligns with the fundamental rights accorded to workers in Guyana and set forth in the Constitution of the Co-operative Republic of Guyana. As Wit J pointed out in *Guyana Sugar Corp Inc v Dhanessar*[101] '…Workers in Guyana have a fundamental right to be protected by the law. This means that legislation must be interpreted so as to effectuate the protection it is intended to offer.' In *Trust Company*,[102] this Court agreed with the approach of Wit J and observed that the relevant statutory provisions in that case had to be interpreted in such a way as to reflect the fundamental rights of non-discrimination and equality before the law. Additionally, in the case of *OO v BK*,[103] this Court, applying the above principles, and those enunciated by Jamadar J in *Commissioner of Police v Alleyne*,[104] underscored the role played by the Constitutions of the various Commonwealth Caribbean jurisdictions in the

[100] See also Corthésy and Harris-Roper (n 7) at 179 and 181.
[101] [2015] CCJ 4 (AJ) (GY), GY 2015 CCJ 1 (CARILAW) at [48].
[102] *Trust Co Ltd* (n 32) at [47].
[103] [2023] CCJ 10 (AJ) BB.
[104] [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590.

exercise of statutory interpretation carried out by the courts, mindful that the Constitution is the supreme law in constitutional democracies.

[189] In the case before us, therefore, an interpretation of s 21(4) which has regard to the policy, clear purpose, and entire scheme of the legislation, and the fundamental rights accorded to workers in Guyana, leads to the inescapable conclusion that Arjoon is entitled to a severance allowance under TESPA. He was wrongfully dismissed as distinct from 'being retired'. In these premises, there is nothing in s 21(4) (d) of TESPA which argues against Arjoon receiving his full severance entitlement as well as his accrued pension benefits under his contract of employment.

Disposition

[190] The Court therefore makes the following order:

a. The Appeal is allowed and the Cross-Appeal is dismissed.
b. The decision of the Court of Appeal, in its Judgment dated 16 September 2022, that the Appellant was not entitled to pension benefits is reversed.
c. The Judgment and Order of Reynolds J made on 20 July 2017 is restored, with the exception of the order for payment of severance to the Appellant.
d. The First Named Respondent shall pay to the Appellant the additional sum of GYD1,602,459.00 being leave pay and passage assistance for the years 2006 and 2007.
e. The Respondents shall pay standard costs to the Appellant.

/s/ A Saunders

Mr Justice Saunders (President)

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ A Burgess

Mr Justice Burgess

/s/ P Jamadar

Mr Justice Jamadar