

**“SO FAR AS MONEY CAN DO IT . . .”
SOME ASPECTS OF DAMAGES FOR
WRONGFUL DISMISSAL IN BARBADOS**

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ABSTRACT

Barbados, unlike most of the other states of the Commonwealth Caribbean has not enacted legislation for the purpose of regulating an employer's power to dismiss his employees at will or with reasonable notice, in either case without any need to show good cause for doing so. However, in the absence of such legislation, generally accepted to be a result of International Labour Organisation Recommendation 119 (1963), the Barbadian Court of Appeal has held in the case of *Barbados Plastics Ltd. v. Juliette Taylor* (1979) that the employee who has worked for more than two years is entitled not to be dismissed without good cause, based on the provisions of the Severance Payments Act. The remedy for such a dismissal is damages assessed at an amount not less than what a severance payment would have been. In this article, the author examines the nature of this remedy and analyzes it in the light of two recent cases dealing with, *inter alia*, gratuity, the availability of the award in conjunction with the common law remedy for wrongful dismissal and lastly, its subjectability to tax. The author concludes that legislation should be enacted to reinforce the employee's protection and to provide for the remedy of reinstatement.

The Termination of Employment Recommendation 1963 of the International Labour Organization (ILO) [1] is generally regarded as the basis of the concept of unfair (as opposed to wrongful) dismissal [2]. Its requirement, *inter alia*, that dismissal should be for a justifiable reason [3], has generated substantial Commonwealth Caribbean legislation to enhance the limited employment security which workers are granted under common law [4]. In the main, the major remedy for an unfair dismissal is reinstatement or reengagement [5], adequate compensation being a subsidiary remedy. Not all jurisdictions, however, provide for the remedy of reinstatement or reengagement [6].

Barbados has not enacted specific unfair dismissal legislation, although its Court of Appeal decision in *Barbados Plastics Ltd. v. Juliette Taylor* established that a qualified employee may be validly dismissed only for just cause [7]. This result has been achieved through an arguably unwarranted, even if eminently desirable, construction of “wrongful dismissal” [8] in section 45(1) of the Severance Payments Act 1971 [9] to mean “dismissal without just cause” and not merely “dismissal in breach of contract” [10].

With respect to the remedy available for such a wrongful dismissal, however, no such judicial creativity was at all possible. This is so for at least two reasons. First, reinstatement, being in substance the specific enforcement of a contract of service, was not obtainable, at least directly, at common law [11]. Second, section 45(1) expressly provides a remedy for a wrongful dismissal. It is instructive at this stage to quote the section:

Notwithstanding any rule of law to the contrary, where, in an action brought by an employee against an employer for breach of their contract of employment, the employee claims damages for wrongful dismissal, the court shall, if

- (a) it finds that the employee was wrongfully dismissed;
- and
- (b) it is satisfied that, had the employee been dismissed by reason of redundancy or natural disaster, the employer would be liable to pay him a severance payment,

assess those damages at an amount not less than such severance payment [9].

The section is side-noted: “Measure of damages for wrongful dismissal in certain cases” [12]. Certain aspects of the nature of the award under this section were explored in two relatively recent decisions of the Barbadian courts.

In *Patrick Hinds v. The Barbados Board of Tourism* [13], one of the major issues was whether the plaintiff was entitled to damages under the section. The material facts were that the plaintiff was appointed director of tourism effective October 24, 1979, on a four-year contract. This contract was renewed effective October 24, 1983, for a further period of three years but was terminated by the defendant on August 15, 1986, effective immediately. The plaintiff sued for damages for wrongful dismissal. Chief Justice Williams, after reaffirming his decision in *Barbados Plastics Ltd. v. Taylor* [14], held however that the plaintiff was not entitled to damages as assessed under section 45(1) for two reasons. First, his contract of service was one for a fixed period renewable only by mutual agreement [13, n. 5, p. 4] and, second:

. . . he was, during his period of service with the defendant, entitled to be, and in fact paid, a gratuity in respect of each year of employment . . . [13, n. 15, p. 5].

On the basis of this, William C. J. concluded that

The plaintiff, by making a claim for a severance payment (sic), is in effect seeking to be paid twice in respect of the same service. Under his contract he received payment related to the satisfactory completion of each year of service. And now he is seeking another payment related to those years. And it is not as if his contractual payment was less advantageous than the statutory one, for under his contract he received 2-2/5 months salary for each year. In my view *his claim for a severance payment* is misconceived and must be dismissed . . . [13, n. 4, p. 5, emphasis added].

It seems clear that this decision is based on one particular view of the nature and purpose of the damages award under section 45(1), bearing in mind that the wrongfulness of the plaintiff's dismissal was conceded [13, n. 4, p. 8]. At the same time, the Chief Justice appeared to have paid no attention to those provisions of the Act which, it may be argued, were germane to the discussion. These matters may be discussed *seriatim*.

THE NATURE OF THE AWARD UNDER SECTION 45(1)

In *Barbados Plastics* [7], and again in this case, Chief Justice Williams appeared to equate the sum awarded as damages for wrongful dismissal under section 45(1) with a severance payment available on redundancy [7, p. 81]. His Lordship stated here: that The Court of Appeal [in *Barbados Plastics*] held that [Juliette Taylor] was entitled to a severance payment [13], and, after twice speaking of the plaintiff's claim in this case as one "for a severance payment" [13, p. 5], Chief Justice Williams held that such a claim was misconceived and must be dismissed.

It is submitted that this equation of the two concepts is incorrect, both as a matter of statutory interpretation of the section and under general principles of law concerning the nature of a severance payment.

First, section 45(1) makes it clear, by its marginal note [12] and its specific provision, that it deals only with the assessment of damages for wrongful dismissal. While the damages are to be "not less than [any] severance payment" that would have been payable in circumstances of redundancy, there is no attempt to convert the claim for damages into one for a severance payment save to the extent that the dismissed employee must show that he would have been entitled to a severance payment had he "been dismissed by reason of redundancy or natural disaster." It is therefore textually inexact to treat the claim under section 45(1) as equivalent to a claim under section 3 of the Act [9, 15]. The quantity of the awards may be similar [9, 16], and the preconditions for each claim substantially the same [9, 17] but they serve two distinct purposes.

Bob Hepple, in his study, "Security of Employment" [18], seems to bear this out. He noted:

There has been much discussion about the nature of severance allowances. Are they an element of wages, payment of which has been postponed? Or are they a worker's share in the undertaking, increasing with his length of service? Or a valuation of his job property rights? Or simply a means of income protection during a period of unemployment, helping him to adjust and move on to new employment? The answers to these questions depend on the terms of the specific legislation and collective agreements in each country . . . *These allowances should be distinguished from wages in lieu of notice and compensation for unjustified dismissal* . . . [18, p. 483, emphasis added; 19].

In this case, the plaintiff's action was for compensation for wrongful dismissal and not for a severance payment, even though it is conceded that he first had to establish that he would have been entitled to a severance payment. This was, however, not *qua* claim, but *qua* precondition to recovery under section 45(1). Chief Justice Williams decided that the plaintiff could not establish this since (a) he was employed under a fixed-term contract and (b) he was paid a gratuity for each completed year of service under his contract. These reasons need to be more closely examined.

Fixed Term Contract

It is difficult to understand why the mere fact that the contract of service was one "for a fixed period, renewable only by mutual agreement" should preclude entitlement to a severance payment. Section 4(3) of the Severance Payments Act [20] provides, in relation to fixed-term contracts, that an unreasonable refusal of an offer of renewal of contract on the prescribed terms disentitles an employee from a severance payment [21]. This seems to imply that where no such offer of renewal is made, there may be entitlement to a severance payment. Further, it is expressly provided by section 16(i) that for the purposes of the Act, an employee shall be deemed to be dismissed by his employer if

- (a) the contract under which he is employed by the employer is terminated by the employer . . .
and
- (b) . . . where, under that contract, he is employed for a fixed term, that term expires without being renewed under the same contract . . .

One may argue, therefore, that the fact of employment under a fixed-term contract does not per se preclude recovery of a severance payment. The respondent employee in *Barbados Plastics* [7] was not employed under a fixed-term contract, but this factor was not the key to her entitlement to damages under section 45(1); merely that she had satisfied the condition in paragraph (b) of that subsection. This would not appear to exclude employees under fixed-term contracts.

Gratuity

The plaintiff's receipt of a gratuity was the main reason why his claim, in this case under section 45(1), failed. In the view of Chief Justice Williams, the severance payment is to be regarded as a payment for each completed year of eligible service, fulfilling a purpose identical to a gratuity. Thus, both could not be recovered, especially in a case where the gratuity exceeded what the putative severance payment would have been. On this view, the Chief Justice did not regard the severance payment as a means of income protection during unemployment but rather as an element of postponed wages, an identical role performed, to his mind, by the gratuity payment [13, 22].

There was, unfortunately, no extensive discussion of principle in this regard, and it is to be questioned whether the decision was not influenced by the manner of calculation of the severance payment. This is done *by reference* to the number of years of continuous employment [23], a factor which might easily lead to a view that the payment is *for* those years of employment, and therefore analogous to a gratuity. There is, however, nothing in the Act to compel such a conclusion [24].

This consideration apart, there would seem to be a relevant provision in the Act to which his lordship was not referred and which dealt with entitlement to a severance payment where a gratuity is payable.

EXCLUSION FROM SEVERANCE PAYMENTS [9, §4, 10, 11, 14, 37, 41]

In section 11(1) it is provided that:

The Minister may, by regulation, make provision for excluding the right to a severance payment, or reducing the amount of any severance payment, in such cases as may be prescribed by the regulations, being cases in which an employee has (whether by virtue of an enactment or otherwise) a right or claim (whether enforceable or not) to a periodical payment or lump sum by way of . . . gratuity . . . which is to be paid by reference to his employment by a particular employer and is to be paid, or to begin to be paid, at the time when he leaves that employment . . .

On the facts of the present case, the gratuity, though *payable* upon satisfactory completion of each year's service either monthly, quarterly, yearly *or* at the end of the term, was in fact paid on a monthly basis. *Prima facie*, therefore, the above section is inapplicable since the gratuity is not "*to be paid or to begin to be paid* at the time when [the plaintiff] leaves the employment." On this construction, the question arises whether it is

- i. that a severance payment is payable in all instances where there is a gratuity, unless excluded by Ministerial regulation or,

- ii. that it is payable only in those instances mentioned by the section, again unless excluded by Ministerial regulation, or,
- iii. that it is always payable, unless excluded by Ministerial regulation, and only in the cases mentioned by the section is such exclusion possible.

It is submitted, given the purport of the section, which seems to be to avoid the likelihood of double payments for termination of employment (i.e., severance and gratuity in certain circumstances), and the nature of the gratuity payment in this case, which though paid monthly, was to all intents and purposes a termination payment [13, 25], that the first formulation is the preferable one. The second is unnecessarily narrow, especially since there is a general right to a severance payment [7, 26], while the third would seem to be overly restrictive of the minister's regulatory power, excludability would be prevented simply by payment of the termination emolument during the period of employment. On this argument, the plaintiff would have been entitled to a severance payment in spite of the payment of gratuity.

In any event, it would seem that consideration of this section would be indispensable for any determination of the plaintiff's entitlement to a severance payment in this case, and a decision given without reference thereto must be considered, with respect, to have been given *per incuriam* [27].

The second case is the Court of Appeal decision in *Caribbean International Airways Ltd. v. Samuel Waithe* [28]. Here, two not unimportant issues pertaining to the assessment of damages for wrongful dismissal arose: first, whether in Barbados, damages for wrongful dismissal were subject to tax and, second, whether, in a circumstance where an employee was entitled to damages for wrongful dismissal as well as a severance payment, the amount of such severance payment was to be taken into account in assessing the former [29].

In *Waithe*, the respondent employee was dismissed by the appellant company from his post as general manager of its operations on January 30, 1987. The letter of dismissal informed the respondent that the company had decided to reorganize its operations and to terminate his services immediately. It further invited him to make a claim for all sums due to him. It was agreed that the respondent was entitled to severance pay and to compensation for wrongful dismissal [30]. After dispute on a number of issues, Waithe sued for wrongful dismissal and was awarded damages by the High Court. The appeal was based on the grounds, *inter alia*:

- (a) that the Chief Justice erred in not taking into account, in assessing the damages, the employee's right to receive severance pay,
and
- (b) [the result of a cross-appeal] that payments under section 45 of the Severance Payments Act were not subject to income tax.

The appellants argued, with respect to the first ground, that the amount of the severance payment should have been deducted from the damages for wrongful dismissal. The two issues are addressed separately.

Deduction of Severance Pay

As it had been agreed between the parties that the employee was entitled to a severance payment, the Court of Appeal saw this as sufficient to dispose of the matter:

... It is our view that the entitlement to severance payment ... never arose for determination by the learned Chief Justice. Paragraph 5 of the "Statement of Issues" was specific in this regard. It is as follows:

(5) ... "Further the parties are also agreed that the Plaintiff is entitled to severance pay and have agreed to submit the same to the Severance Pay Tribunal for determination."

We are of the view that the Appellant cannot properly raise before this court a matter which was not an issue for consideration at the trial. Ground 2 of the grounds of appeal accordingly fails [28, p. 15].

Whatever the merits of this last assertion [31], this dictum would appear, with respect, to misstate the appellant's claim. There was no dispute, it seems, with regard to the availability of a severance payment, only that it should have been deducted from the damages to be awarded for wrongful dismissal. In any case, the proposition of counsel for the respondent that damages are awarded for the purpose of providing compensation for further loss while one is paid severance for past services would seem to be inaccurate. In the first place, this is to compare the awards at two different levels. Both are paid in respect of the future unemployment of the employee on the termination of a present employment. The severance payment, it may be argued, is made because of the loss of the statutorily recognized right to remain in a job [18] through frustration of the employment relationship [32]; the damages award is made because the employment relationship is terminated at the initiative of the employer in breach of contract or without good cause [30]. It is true that the severance payment is calculated on the basis of, or by reference to, the years worked [33], but this is not to signify that the award is *for* those years [23, 24]. By the same token, it might be argued that the award of damages for wrongful dismissal is calculated on the basis of the years worked, not only at common law where the required notice period for dismissal may increase proportionately with the length of service, but also in Barbados where, under section 45(1), damages are to be assessed at not less than a putative severance payment. At identical levels of comparison therefore, there is no substantial difference between the two awards, either in the interests they protect or the methods of their calculation [34], though they are not given for identical purposes and the facts that engender each award differ.

Second, the claim in this case might be taken to be based on a wrongful redundancy, i.e., that the employee was not given proper notice of his redundancy [35]. In such a case, his dismissal would be wrongful and he would be entitled to damages therefor but, since the severance payment was made, it would seem that any damage suffered would be limited to the loss of the amount of wages, etc. he would have been paid had the proper notice period *for his redundancy* [9, §20ff]

been observed. This would arguably be less than the twelve-month period assessed for proper notice of dismissal in this case. It must be noted, however, that section 45(1) is not so limited and damages for any such wrongful period of notice thereunder would have to be assessed at “not less than” the severance payment. On the other hand, if there was no question of redundancy but merely a common law wrongful dismissal, the entitlement to a severance payment *qua* severance payment would seem superfluous [36].

In the author’s view, the issue in this case seems to be confused by the concession that the respondent was entitled to a severance payment. This concession would appear to be based on the misconception that a severance payment is always available on dismissal, especially since there was no appearance of redundancy on the facts [37]. This has been caused partly by the nomenclature of the payment—severance as opposed to redundancy [38]—and the nature of the award for wrongful dismissal—damages assessed at “not less than [what the] severance payment [would have been]” [9, §45(1)(b)]. Further, the rationale that informed the decision in *Barbados Plastics* [7]: that since a severance payment is not payable where the employer is entitled to, and does, terminate the contract of employment without notice because of the employee’s conduct, a severance payment should be payable once the employer terminates in a circumstance where notice had to be given [7, p. 81]; (i.e., in all other circumstances) is palpably illogical [8, pp. 27ff], apart from which it wrongly purports to equate a severance payment with damages for wrongful dismissal. All these factors have led to the view that so long as a dismissal has occurred, a severance payment is payable, once the dismissal cannot be justified [39]. This, in turn, would seem to account for the concession in this case. The matter should have been treated as a wrongful dismissal because of inadequate notice.

There is one further point to be made. Section 45(1) provides that the damages are to be assessed at an amount not less than a severance payment would have been, and the courts have treated this as entitling a wrongfully dismissed employee to both a severance payment and damages for the period of notice, if any, that should have been given [40]. This has been generally done without dissent, but it may be submitted that the measure of damages adopted in section 45(1) might have been intended to entirely replace the common law measure [41], especially in cases where the severance payment period exceeds any due notice period [42]. It is not immediately clear why, in other cases, the damages must be the sum of *both* the presumed severance payment and common law wrongful dismissal damages. Still, it must be nevertheless conceded that the section is not transparent in its intentment on this point.

Subjectability to Tax

At first instance, Chief Justice Williams had held that the case of *British Transport Commission v. Gourley* [43] was binding on him and he therefore

deducted from the award such income tax as would have been payable by the employee on its receipt. The respondent appealed from this, arguing that the Income Tax (Amendment) Act 1986 [44] repealed the Income Tax (Amendment) Act 1984 [45] which had made severance payments and compensation for wrongful or unfair dismissal subject to Income Tax and thus such awards were no longer taxable [46].

It was also argued that since damages for wrongful dismissal under section 45(1) were to be assessed at an amount not less than the presumptive severance payment available, and since such severance payment was no longer subject to income tax, any compensation for wrongful dismissal should sincerely be exempt, "or else there is the danger that such compensation would be less than a severance payment" [28, p. 22]. This argument was accepted by the court of appeal:

It seems to us that there is some merit in this argument. We are of the opinion that the sum of money awarded in this case as compensation for loss of earnings for wrongful dismissal is not subject to the deduction of . . . Income tax [28, p. 22].

It may be suggested that this argument, though ingenious, requires further analysis. It has already been argued that damages for wrongful dismissal and a severance payment serve two distinct purposes. It is clear that the philosophy behind an award of damages for wrongful dismissal is to compensate for the breach of contract, even if these are now measured differently from those governed by common law, by virtue of section 45(1). Thus, they are no longer based on the wages etc., for the period of notice that ought to have been given but on the quantum of the employee's presumptive severance payment. The question therefore arises as to whether this is an entirely new award, not referable to the extent of the breach, but merely ensuring that the dismissed employee receives a termination payment. In such a case, the sum should not be *prima facie* subject to tax, unless there is some legislative provision to the contrary.

Similarly, the severance payment, not an award for lost earnings, is not *prima facie* taxable in the absence of legislation [45]. It might have been safer, therefore, to base the argument for nonsubjectability to tax in this case on the fact that the award is not one for lost earnings but based on an entirely new assessment. It is not sufficient to argue that the severance payment on which its quantification is based is not taxable since section 45(1) does not refer to the taxability of either sum, merely requiring that the damages should be "assessed" at not less than the severance payment. It might be that the amount at which damages are assessed and the amount of damages actually awarded could differ, depending on the tax position; alternatively, that damages awards can be taxed but not to such an extent as to make them fall below the level of the presumptive severance payment. This issue also requires clarification.

CONCLUSION

The two cases examined above have raised serious questions concerning certain important aspects of the award of damages for wrongful dismissal under section 45(1) of the Severance Payments Act in Barbados. This section, which has already been used as the progenitor of one type of unfair dismissal [7], is an attempt to free the award of damages from its common law restrictions [8, p. 281]. However, by providing that the award should be related to the putative severance payment payable, the section appears to blur the distinction between these two awards. Further, there is uncertainty as to whether this new form of award has replaced the common law award in its entirety or whether damages assessed on the latter basis may still be awarded in addition to the amount of the possible severance payment [40-42]. The expression "not less than . . ." is unhelpful in this regard.

In light of the discussion above, it may be submitted that even though a wrongfully dismissed employee will not be entitled to an award under section 45(1) unless s/he would also have been entitled to a severance payment [9], the two claims are not identical. Secondly, there is still some debate as to whether or not any severance payment made is to be deducted from the compensation for wrongful dismissal in Barbados. A literal interpretation of the section suggests that no such deduction may be possible [47]. Finally, it would appear that an award under the section is not subject to income tax, though it is not clear from the decision in *Waithe* on what authority this is based [48].

The remedies available for wrongful dismissal in Barbados need to be reformed. At the general level, the law should provide for reinstatement and reengagement as mandated by the ILO instruments [1, 5], with compensation affording a remedy *in lieu*. Specific provisions should also be made for the measure of compensation available, its nature and relationship to other forms of termination awards, its subjectability to tax, and the type of dismissal that is to warrant such compensation [49].

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ENDNOTES

1. Termination of Employment Recommendation 1963 (No. 119); International Labour Conference, 47th Session, Geneva. See also Termination of Employment Convention 1982, Termination of Employment Recommendation 1982;—Brian Napier, "Dismissals—The New ILO Standards," (1983) 12 I.L.J. 17.
2. Unfair dismissal is defined as dismissal "contrary to statute," per Phillips J. in *W. Devis & Sons Ltd. v. Atkins* [1976] 2 All E.R. 822, 828. Wrongful dismissal is "determination of employment in breach of contract which cannot be justified at law . . ." per Wooding C. J. in *Fernandes (Distillers) Ltd. v. Transport and Industrial Workers Union* (1968) 13 W.I.R. 336, 340; see also *Fuller v. Revere Jamaica Alumina Ltd.* (1980) W.I.R. 364, 369.
3. These would include those reasons connected with the capacity or conduct of the worker, or based on the occupational requirements of the enterprise, and not, *inter alia*, union membership or participation in union activities, race, colour, sex, marital status, religion . . . See further the 1982 Convention, n. 1, arts 4-6.
4. See, for a comment on the common law position, R. Rideout, *Rideout's Principles of Labour Law* (5th edn., Sweet & Maxwell, 1989), 144 ["The common law afforded no job security"]. Some examples of Commonwealth Caribbean legislation are: Labour Code Act, 1975 (British Virgin Islands); Labour Code, 1975, Part V (Antigua); Protection of Employment Act, 1977 (Dominica); Employment Ordinance, 1979, (Montserrat); Protection of Employment Act, 1980, Part V (St. Vincent and the Grenadines); Employment Ordinance, 1988, Part V (Turks & Caicos Islands).
5. See 1982 Convention, n. 1, art. 10, Employment Protection (Consolidation) Act 1978 (U.K.) ss. 68-71; Protection of Employment Act 1977 (Commonwealth of Dominica) ss. 39-40.
6. See s. 49, Labour Law 1987 (Cayman Islands), which makes provision for compensation only.
7. (1981) 16 Barb. L.R. 79, 81. A qualified employee is one who would have been entitled to a severance payment had the dismissal been for redundancy. See section 45(i)(b) and text *infra.*, *Power v. C.M.G. (B'dos) Ltd.* (Feb. 1984, unreported), *High Crust Pastries v. Nathu* (No. 16/92, C.A., unreported).
8. For criticism of the decision see R. Bacchus, "The Development of the Law of Wrongful Dismissal in the Commonwealth Caribbean" [1991] 1 Carib. L.R. 13, J. Cumberbatch, "Without Good Cause—Unfair Dismissal in Barbados" in *Commonwealth Caribbean Legal Studies* (P. K. Menon and G. Kodilinye (eds.), Butterworths, 1992) 267, 278; argument of counsel in *Cheeseman v. Kirton* (December 16, 1983, unreported). Other Commonwealth Caribbean countries that have not enacted unfair dismissal legislation include Anguilla, Grenada, Guyana, St. Lucia and St. Kitts-Nevis but cf. in St. Lucia, *Scholar v. Hess Oil Co. Ltd.* (July 3, 1987, unreported) which applied the decision in *Barbados Plastics*.
9. Cap. 355 A, Laws of Barbados (1986).
10. See Mead, *Unfair Dismissal Handbook* (3rd. edn., Longman, 1987)—["a breach of contract resulting from the employer's wrongful termination of the . . . contract of service" . . .]
11. *Johnson v. Shrewsbury and Birmingham Ry.* (1985) 3 D.M. & G 358, cf. *Lumley v. Wagner* (1852) 1 D.M. & G 604, *Hill v. C. A. Parsons Ltd.* [1972] Ch. 305. An agreed

- dismissal procedure must be followed: *Gunton v. Richmond-Upon-Thames L.B.C.* [1981] ch. 448.
12. As to the importance of the sidenote see Cross, *Statutory Interpretation* (2d edn. 1987, J. Bell & Sir G. Engles, eds.) pp. 122, 129-130; Section 12(2), Interpretation Act, Cap 1, Laws of Barbados (1986); *Stephen v. Cuckfield R.D.C.* [1960] 2 Q.B. 373, 383; *Tudor Grange Holdings Ltd. v. Citibank N.A.* [1991] 4 All E.R. 1.
 13. [No. 1196 of 1986, October 16, 1990, unreported.]
 14. [1981] 16 Barb. L.R. 70, see also *Watts v. Paper Converters Ltd.* (June 9, 1983, unreported); *Cheeseman v. Kirton* (December 16, 1983, unreported).
 15. "General Provisions as to right to severance payment." Section 3 provides for the employer's liability to pay an employee for the requisite period who has been continuously employed where relevant a severance payment if (a) the employee is dismissed by his employer because of redundancy or (b) is dismissed by his employer because of a natural disaster. But cf. section 4 which speaks of an employee "not entitled to a severance payment because of dismissal . . ." Here, the words "of the type mentioned under section 3" must be understood.
 16. Section 45(1)(b). Note, however, that in addition to damages of an amount not less than the severance payment, Barbadian courts award a sum for common law wrongful dismissal: *Bourne v. Smith & Oxley Advertising Ltd.* (March 10, 1981, unreported); *White v. Welcome Inn Hotel (Barbados) Ltd.* (March 9, 1988 unreported). This point is discussed in the text, *infra*.
 17. *Power v. C.M.G. (Barbados) Ltd.* (Feb. 1984, unreported). Section 45(1)(b) presumes that the dismissal is because of a redundancy or a natural disaster, for the purposes of assessment of damages.
 18. *Comparative Labour Law and International Relations* (R. Blanpain, ed. Kluwer 1982) Ch. 20.
 19. See also Packer et al., *Effects of the Redundancy Payments Act*.
 20. Cap 355 A, Laws of Barbados (1986).
 21. See also Cyril Grunfeld, *The Law of Redundancy*, (1971) 55.
 22. At p. 5 of the transcript: "The plaintiff, by making a claim for a severance payment, is in effect seeking to be paid twice in respect of the same service."
 23. See First Schedule (as amended) to the Severance Payment Act, paragraph 2: *Calculation of Severance Payment* "[F]or each complete year of employment (a) 2.5 weeks basic pay for each such year up to 10 years, (b) 3 weeks basic pay for each such year by which the employment exceeds 10 years but does not exceed 20 years (c) 3.5 weeks basic pay for each such year . . . 20-33 years."
 24. For example, an employee who is summarily dismissed for misconduct is not entitled to a severance payment: see section 3(2) of the Act. Theoretically, his accrued rights should not be disturbed by this subsequent misconduct. *Aliter*, if his rights arise on termination.
 25. At p. 5 of the transcript: ". . . 5 . . . This gratuity shall be paid on a monthly . . . basis or at the end of your term as decided by you."
 26. Unless expressly excluded. See generally sections 3 and 14 of the Act [7].
 27. In the U.K., the Minister may by order reduce the amount of the severance payment by the deduction of the gratuity—s. 14(i), Redundancy Payments Act 1965. Additionally, in this case, the employee was an employee of a Statutory Board but

- section 14(i)(a)(ii) excludes from entitlement to a severance payment only those employees of the Statutory Boards set out in the Schedule to the Statutory Boards Pensions Act, Cap. 384—These are the Child Care Board and the Sanitation Service Authority. For obvious reasons the point was not mentioned in argument.
28. Civil Appeal No. 3 of 1988, (December 14, 1990).
 29. As discussed in the text, *infra*, even though there was an admission that the respondent was entitled to a severance payment there seems to have been no evidence that he was dismissed because of redundancy or a natural disaster. See section 3, Severance Payments Act.
 30. Wrongful dismissal seems to have been construed here in the conventional sense—“inadequate contractual notice”—See S. D. Anderman, *The Law of Unfair Dismissal* 2nd edn., Butterworths, (1985) p. 4. It would appear therefore that in Barbados the action for wrongful dismissal under section 45 includes *both* the common law and *Barbados Plastics* meanings of the term.
 31. Generally, a new point cannot be raised on appeal, *Re Walton, ex parte Reddish* (1877) 5 Ch.D 882; but new argument on a point raised below is permitted: *Misa v. Currie* (1876) 1 App. Cas. 554, 559.
 32. At least where dismissal occurs because of a natural disaster—ss. 3(1)(c), 3(3)(b).
 33. See First Schedule (as amended, 1992) to the Severance Payments Act.
 34. Section 45(1)(b).
 35. The acceptance of liability clouded many of the issues in this case.
 36. Since the severance payment is only properly available on redundancy, etc. See [15] and text accompanying.
 37. But cf. s. 38(2) of the Act [9]—For the purpose of a reference to the Severance Payments Tribunal a dismissal is presumed to be for redundancy unless the contrary is established [15].
 38. See R. L. Chaudhary and M. Castagne, *Aspects of Caribbean Labour Relations Law* (Coles, 1979) p. 149 [“. . . many people in Barbados believe that whenever their employment is severed, they are entitled to a handshake . . . and it does not matter why it is that they are severed . . . if the law was called ‘The Redundancy Payments Act,’ . . . this would help the situation . . .”]. Also *Hindle v. Percival Boots Ltd.* [1969] I.T.R. 86, 93 per Sachs L.J. [“. . . it may lead to confusion to liken redundancy payments to golden handshakes.”]
 39. See section 4(2) of the Act [9]; *Cheeseman v. Kirton* (December 16, 1983, unreported) at p. 2 of the transcript. And see s. 38(2) of the Act [37].
 40. *Bourne v. Smith & Oxley Advertising Ltd.* (March 10, 1981, unreported); *White v. Welcome Inn Hotel* (March 9, 1988, unreported).
 41. Section 45(1) begins “*Notwithstanding* any rule of the law to contrary . . .” (emphasis added) and continues “. . . the court shall . . . assess those damages at an amount. . .” As iterated, the side-note reads “Measure of damages for wrongful dismissal in certain cases”—ref. n. 14 and materials cited therein.
 42. In other cases, such as the instant one, where the common law damages awarded exceeds, by itself, the severance payment, it might be more beneficial to the employee to have the assessment made under common law principles. *Sed quare* as to whether such damages are also awarded under section 45(1).

43. [1956] A.C. 185; *see also* *McKeever v. The Crane Estate Ltd.* (May 29, 1990, unreported).
44. Act No. 25 of 1986.
45. Act No. 90 of 1984.
46. There was no citation of the relevant statutory provision.
47. Since any wrongful dismissal justifies, at least, damages *not less than* a presumptive severance payment, and the severance payment, available for redundancy, is in respect of a different loss. *See O'Laoire v. Jackel International Ltd. (No. 2)*, [1991] IRLR 170.
48. Semble, either the Income Tax (Amendment) Act 1986 or that the damages *awarded* should not be less than the non-taxable severance payment would have been; *McKeever v. The Crane Estate Ltd.* (May 29, 1990, unreported).
49. It seems that any dismissal of worker employed for more than two years in Barbados is now presumed to be summary and therefore in need of justification—*See* [8, p. 282].

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