Trinity Term
[2024] UKPC 20
Privy Council Appeal No 0010 of 2023

JUDGMENT

Ervin Dean (Appellant) *v* Bahamas Power & Light (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lord Burrows
Lady Simler

JUDGMENT GIVEN ON
4 July 2024

Heard on 1 May 2024

Appellant
Travette L Pyfrom
Mark Rolle
(Instructed by Pyfrom Farrington Chambers (Bahamas))

Respondent
Dywan A-G Rodgers
Katharine Bailey
(Instructed by Sheridans (London))

LADY SIMLER:

1. Introduction

1. An individual whose employment is terminated by their employer has two possible causes of action in The Bahamas: wrongful dismissal and unfair dismissal. The first depends on breach of contract. The second is a statutory right available to all employees in The Bahamas to be treated fairly upon dismissal, both as a matter of substance and procedure, pursuant to section 34 of the Employment Act 2001 ("the EA 2001"). Two questions are raised by this appeal. The first is straightforward and concerns the adequacy and correctness of the award of damages made to the appellant for wrongful dismissal without contractual notice or an appropriate contractual payment in lieu. The second is whether there is an additional, third, cause of action available to employees in the appellant's position that depends on being dismissed in breach of an asserted contractual right not to have one's employment terminated "unjustly".

2. As will become clear from the reasons given below, the Board has concluded that the appeal should be dismissed.

3. In summary, the Board is satisfied that the trial judge's approach to assessing the award of damages for reasonable notice in this case was wrong in principle and her assessment was one to which no reasonable judge could properly have come. The Court of Appeal was therefore entitled to overturn the award and substitute its own assessment, which has not been shown to be wrong. On the second question, there is no additional third cause of action available to the appellant: the words in his contract, requiring that any dismissal shall not be unjust, have no separate normative force and act simply as a contractual reminder or reassurance to employees that their statutory unfair dismissal rights are not excluded and can be pursued in parallel or combination with a wrongful dismissal claim.

2. Factual and procedural background

4. The facts can be summarised shortly. The respondent is the main statutory provider of electricity in The Bahamas. The appellant was employed by the respondent as a senior manager in credit and collections for about 30 years before his dismissal in 2017. He had an unblemished work record with no history of disciplinary proceedings against him and was a loyal employee.

5. The terms of the appellant's employment were governed by a standard industrial agreement made between the respondent's predecessor (Bahamas Electricity Corporation) and the Bahamas Electrical Managerial Union dated 13 January 2013 (the

"Industrial Agreement") and duly registered in accordance with the Industrial Relations Act 1971. The appellant's contract of employment reflected the terms of the Industrial Agreement.

6. Article 14 (2) of the Industrial Agreement is central to this appeal. It governs termination of employment. It provides so far as material as follows:

> "ARTICLE 14
>
> Termination of Employment
>
> 1) …
>
> 2) The Corporation may terminate the services of an employee by giving reasonable notice in writing having regard for the following criteria: length of service, age of employee, status, loyalty, education and training, health and chances of alternative employment; except that the Corporation may make payment in lieu of giving notice. The Corporation shall not, however, terminate an employee unjustly. The Corporation must settle all entitlements to the employee within two weeks of the effective date of termination as determined by the Corporation and will be no less favourable to the employee than the entitlements provided for in the Employment Act [2001]." (emphasis added)

7. Leaving to one side the emphasised words (the "Corporation shall not … terminate an employee unjustly"), article 14(2) is otherwise clear and straightforward in its operation. The respondent can terminate the employee's service by giving notice in writing that is reasonable for that particular employee having regard to the specified criteria. The notice period may be commuted to a payment in lieu of notice. Any payment in lieu (and all other entitlements) must be paid within two weeks of the effective date of termination and cannot be less than the minimum statutory entitlements specified by the EA 2001.

8. Articles 15 and 16 of the Industrial Agreement deal with disciplinary dismissals and grievance procedures. Article 15 applies where an employee's behaviour or performance is unacceptable or contrary to his or her obligations. It sets out the steps that may be taken by the respondent in response. These include suspension, investigating the conduct or performance issue, and sanctions up to and including

summary dismissal for a major breach by the employee. Where an employee is warned, suspended, or dismissed, written notice must be given "setting out the reasons for the warning, suspension or dismissal" (article 15(17)). Article 16 sets out the process for settling grievances fairly and promptly.

9. It is now common ground that articles 15 and 16 have no direct bearing on this case. The appellant's employment was terminated without cause so that article 15 does not apply and he raised no grievance to which article 16 could apply. To the extent that the judge relied on article 15(17) she was wrong to do so as the Court of Appeal held.

10. On 22 September 2017, the appellant was dismissed from his employment by the respondent without cause and with a payment in lieu of notice equivalent to the statutory minimum notice required by section 29 of the EA 2001. By a separate letter of the same day, the respondent notified him that he would be paid his accrued earnings, vacation entitlement, and Christmas bonus. He was also offered an ex-gratia sum (of $20,792.28) in settlement of his claim. The appellant rejected the ex-gratia payment but accepted the other payments.

11. The appellant pursued a civil claim for breach of contract against the respondent in the Supreme Court of The Bahamas. Although entitled to do so, he did not pursue any statutory claim for unfair dismissal under the provisions of Part IX of the EA 2001, whether in addition to the civil claim or as an alternative to it.

12. The appellant alleged two breaches of contract in his statement of claim and at trial. Both relied on the express terms of article 14(2). First, he alleged that in making the payment in lieu of notice based on the statutory minimum notice required, the respondent had failed to "have regard for length of service, age of employee, status, loyalty, education and training, health and chances of alternative employment" and thereby failed to make payment in lieu of reasonable notice. Secondly, he alleged that the respondent had terminated his employment "unjustly".

13. The appellant particularised his loss in a Reply filed on 18 December 2018. At paragraph 9(b) he claimed:

> "i) Monthly salary at $7,508.34 x 74 months = $555,617.16
>
> …
>
> x) Annual Christmas Bonus (1 week) $1,877.00 x 6 years = $11,262.00

Total = $813,648.95”

14. The appellant succeeded in his claim for breach of contract before the Supreme Court. By a decision dated 14 May 2021, Madam Justice Ruth Bowe-Darville held (in effect) that by making a payment in lieu based on statutory minimum notice only, the respondent acted in breach of article 14(2). The judge regarded the claim as limited to one for breach of contract and not extending to statutory unfair dismissal (for which she said no particulars had been pleaded or given in evidence). It can be inferred from her concise reasons that she held that where a contract affords more generous terms relating to notice of termination than the statutory minimum notice terms prescribed by the EA 2001, those contractual terms apply. The reasonable notice provision in article 14(2) of the appellant’s contract did make more generous provision for notice and so should have been applied. Accordingly, the respondent was in breach of contract in making a payment in lieu based on the statutory minimum period of notice.

15. The judge also recorded the appellant’s assertion that his termination was unjust (para 12 of her decision) and his late assertion that the respondent failed to state a reason for his dismissal as required by article 15(17) of his contract and that, accordingly, there was no justification for his dismissal (para 24). The judge’s finding of breach of contract does not expressly accept those contentions, though it is common ground that no reason was given for the appellant’s dismissal which was without cause. In her later decision dealing with quantum (see the next paragraph), the judge made no separate award of damages based on these asserted breaches of contract.

16. The judge considered the quantum of damages for breach of contract at a later hearing. By her decision, dated 19 August 2021, she accepted the approach proposed by the appellant of adopting a multiplier of 74 months (6 years and 2 months) stating that this “represents the unexpired term of employment October 2017 to November 2023 (Plaintiff’s 60th Birthday)”. The judge held accordingly that the appellant was entitled to damages for breach of contract based on 74 months’ notice (amounting to $750,012.58).

17. The Court of Appeal (The Hon Sir Michael Barnett, President, The Hon Mr Justice Isaacs JA who gave the lead judgment, and The Hon Madam Justice Bethell JA, SCCiv App No.115 of 2021) upheld the judge’s finding that the respondent was in breach of contract by making a payment in lieu of notice calculated by reference to the minimum notice period prescribed by section 29 of the EA 2001 because, in doing so, the respondent failed to have regard to the criteria specified in article 14(2) and the payment in lieu was not therefore reasonable in his case.

18. However, the Court of Appeal held that the judge erred in her assessment of quantum by basing it on a multiplier of 74 months which was unsupported by the

material available to the judge. There was no admissible evidence of any custom or practice that might justify this level of award; nor anything in the Industrial Agreement to support it. It was so excessive as to justify interference by an appellate court (para 84). The Court of Appeal considered itself well placed to arrive at an assessment of reasonable notice and, accordingly, it was unnecessary to remit the question of assessment to the judge (para 86). At paras 87 to 90 the court considered several cases where such assessments were made in broadly similar circumstances. Having considered these, together with the appellant's age, managerial status and length of service, the court assessed reasonable notice in this case to be 18 months (para 93), and made an award based on the salary and benefits he would have received in this period (equivalent to $174,806.61) (para 95).

19. In relation to what might have been interpreted as a finding by the judge that the dismissal was unjust, the Court of Appeal equated "unjust" in this context with unfair dismissal. The appeal court held that unfair dismissal was neither pleaded nor proved (article 15 not being applicable), and to the extent that the judge found the dismissal to be unjust or unfair, such a finding was not available to her.

20. The appellant now appeals as of right to the Judicial Committee of the Privy Council.

3. The material legislation

21. So far as contractual notice to terminate an employee's employment is concerned, there are two provisions in the EA 2001 that are relevant. First, section 4 of the EA 2001 provides:

> "4. The provisions of this Act shall have effect notwithstanding any other law and notwithstanding any contract of employment, arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act) so, however, that nothing in this Act shall be construed as limiting or restricting —
>
> (a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom;
>
> (b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or

> (c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act."

22. This provision makes clear that the EA 2001 sets a floor rather than a ceiling in relation to contractual and other rights afforded to employees. It was the foundation for the conclusion below that more generous contractual rights than those prescribed by the EA 2001 can be agreed by the parties to a contract and where they are provided for by the contract, they prevail over the statutory minimum notice periods prescribed by the Act.

23. Secondly, the EA 2001 prescribes a minimum notice period depending on an employee's length of service and status within the organisation. So far as material, section 29(1) provides as follows:

> "(1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —
>
> (a) …
>
> (b) …
>
> (c) where the employee holds a supervisory or managerial position — (i) one month's notice or one month's basic pay in lieu of notice; and (ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to forty-eight weeks."

24. The appellant held a managerial position and given his 30-year length of service, was entitled to at least the maximum of one month's notice or basic pay in lieu, together with 48 weeks' notice, producing a total of 52 weeks' notice.

25. Although not strictly relevant to this appeal, it is also convenient to record that all employees in The Bahamas have the right not to be unfairly dismissed: section 34 of the EA 2001. By section 35, the question whether the dismissal of the employee is fair or unfair is determined "in accordance with the substantial merits of the case". Although there are certain proscribed reasons for dismissal set out at sections 36 to 40 of the EA 2001 (including trade union membership and activities, pregnancy, and industrial action), it is now settled law in The Bahamas that these provisions do not limit the scope

of protection afforded by section 34 to dismissal on these grounds. Rather, unfair dismissal complaints can be made no matter what reason is relied on by the employer.

26. A successful complaint of unfair dismissal gives rise to the possibility of orders for reinstatement or re-engagement, or compensation calculated in accordance with sections 46 to 48 of the EA 2001. These provisions provide for a basic award that depends on the number of years' service the employee had; and a compensatory award of "such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". However, there are limits on the amount of compensation that can be awarded for unfair dismissal: in the case of an employee holding a managerial position the total award (basic and compensatory) cannot exceed twenty-four months' pay (section 48(1)). Section 48(2) makes clear that any award that would otherwise be made must take account of payments made by the employer in relation to dismissal (for example, any payment in lieu of notice) before applying the limits set out by section 48.

4. The appellant's case in summary

27. On behalf of the appellant, Ms Pyfrom (appearing with Mr Rolle) supports the approach of the trial judge in assessing damages based on her finding of unjust termination and/or breach of the pay in lieu term of the Industrial Agreement. She submits that the Court of Appeal was wrong to reduce the judge's award of damages. There was no principled legal basis for the reduction and the Court of Appeal was not entitled (and was wrong) to conclude that the trial judge was "unduly generous" in calculating the award by reference to the remaining period the appellant would have worked if he had continued to retirement. There was in fact no justification for the Court of Appeal to interfere with the award she made.

28. On the second question, whatever the appellant's case below (and it is accepted that there was a lack of clarity about what he was saying in this regard) the appellant now contends that his "unjustly" claim is a separate claim for breach of the express right in article 14(2) not to have his employment terminated unjustly. This claim, based on the contractual obligation to avoid an unjust dismissal, has a different qualitative status to either a claim for statutory unfair dismissal or wrongful dismissal. It requires the respondent not to act in an unjust manner, and breach of this obligation sounds in damages. Although Ms Pyfrom was unable to articulate the scope of this term or to identify the limits of what it requires of the employer, she submits that, even in a case where dismissal is without cause, at the very least it requires the employer to provide a reason (and therefore justification) for dismissal and to afford a fair opportunity to the employee to respond to it and to be heard.

29. In support of her argument on the second question, Ms Pyfrom relied on *Bahamas Electricity Corporation v Andrew Gilbert* (Civ App No 49 of 2022) for the proposition that the term "unjust termination" does not connote "unfair dismissal". She submitted that logic demands that the term be given a broader meaning. She also relied on the Board's judgment in *Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal* [2005] UKPC 16, [2005] All ER (D) 420 to argue that unjust dismissal is a separate concept from statutory unfair dismissal.

30. Here, she submits, the respondent breached the "unjust" prohibition as the trial judge found, and as is plain since no reasons for dismissal were given. This justified a higher award of damages than one solely based on failure to pay reasonable notice. The Court of Appeal's failure to recognise this breach as a separate breach of contract, and to address it when assessing damages, undermines the award it made. For all these reasons the trial judge's assessment of damages should be restored.

5. The assessment of damages for failure to make a reasonable payment in lieu of notice

31. The judge's award of damages based on a multiplier of 74 months is neither reasoned nor explained beyond her statement that it represented the "unexpired term of employment October 2017 to November 2023" (the appellant's 60th birthday) (para 5 of her quantum decision). This was erroneous. The appellant's employment was not for a fixed term. He was employed under an indefinite employment contract that, accordingly, had no unexpired term. This was employment expressly terminable on reasonable notice or a payment in lieu, and there was no entitlement to continue in employment until retirement age or any other fixed date. This alone justified a conclusion that the award was wrong in principle.

32. There are no hard and fast rules about the assessment of reasonable notice to terminate employment in any particular case. The common law concept of reasonable notice seeks to strike a balance between the interests of employer and employee in this context. When determining what is a reasonable period of notice in a particular case, the factors and circumstances liable to affect an employee's ability to find another comparable position are relevant but not determinative. Age and length of service are generally regarded as factors in the assessment, but as the Industrial Agreement shows, they too are not determinative. Indeed article 14(2) with which the Board is concerned, specifies a series of factors, "status, loyalty, education and training, health and chances of alternative employment" but without giving any factor priority over other factors.

33. The assessment is a question of fact and evaluative judgment. There will inevitably be a range of awards that could be made in a particular case and within that range, different judges acting reasonably may reach different decisions. Merely because

the appellate court would have awarded a different sum is nothing to the point. The appellate court does not carry out the balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of this question, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion": see for example, *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, per Lord Carnwath at para 64. It follows in this case, that it was necessary for the Court of Appeal to identify an error or flaw in the judge's assessment of reasonable notice. If there was such an error or flaw, then it was open to the appellate court to make its own assessment.

34. There was no evidence in this case to show that the appellant would not work again so that compensation until retirement age might have been appropriate. There was no evidence that his health or other factors reduced his chance of obtaining future alternative employment. His age and length of service on their own could not have justified the judge's approach, and there is nothing to suggest that the judge had any regard to the other factors expressly identified by the Industrial Agreement (and generally regarded as relevant to such an assessment). The Board has been shown no other material that could conceivably have supported the judge's assessment of reasonable notice in this case.

35. In the circumstances, the Board is satisfied that the judge erred in law in her assessment. Her approach was not only wrong in principle, but her assessment failed to have regard to the contractually relevant factors identified in article 14(2). Her award was so far outside the generous ambit of available awards that could properly have been made as to justify the conclusion that it was an assessment to which no reasonable judge could properly have come. The Court of Appeal was therefore entitled to overturn the award based on a multiplier of 74 months' notice. The Board is also satisfied that the Court of Appeal had sufficient information to conduct the assessment itself.

36. Although not strictly relevant to the assessment, the Board notes that at paragraphs 72 and 73 the Court of Appeal dealt with questions of mitigation. These paragraphs misstate the true position. There is a duty on employees who have been wrongfully dismissed to mitigate their loss by making reasonable efforts to find alternative employment. However, where there is an express contractual right to payment in lieu of notice, the obligation to mitigate does not generally apply. Moreover, the burden of proof is on the employer to show that the employee has failed to mitigate: see most recently, *Armstead v Royal & Sun Alliance Insurance Company Ltd* [2024] UKSC 6, [2024] 2 WLR 632 at para 60.

37. The Court of Appeal addressed the question of what constitutes reasonable notice at paras 87 to 93 of its judgment, holding that 18 months' notice was reasonable in the appellant's case. Leaving aside the question of the "unjustly" prohibition, it seems to the

Board that the Court of Appeal's assessment is one with which the Board should not interfere.

38. The Court of Appeal correctly considered the criteria in article 14(2) of the Industrial Agreement. It recognised the appellant's employment status and history. It observed that the appellant had offered no reasonable insight into his prospects of obtaining future employment (para 86). At para 89, the Court of Appeal considered an analogous case (involving a trained and senior employee, aged 56 at dismissal, with 34 years' service, where reasonable notice was assessed to be ten months' notice). Its reasons, while concisely expressed at paras 92 and 93, are sufficient to support its assessment that reasonable notice in this case was a period of 18 months. There was no separate claim for unfair dismissal, and even if there had been, the maximum award for both causes of action could not have exceeded an award based on a period of 24 months. In all the circumstances, it has not been shown to the Board's satisfaction that this assessment is wrong in principle or outside the reasonable range of notice periods available.

39. This ground of appeal therefore fails.

6. The proper meaning of the words in article 14(2) that dismissal shall not be unjust

40. The second question gives rise to the difficulty of making sense of the statement in article 14(2) of the Industrial Agreement that the respondent shall not "unjustly" dismiss the employee in a jurisdiction where there are two well established causes of action that may be pursued by employees who lose their jobs (wrongful and unfair dismissal), but the word "unjustly" is nevertheless used.

41. Wrongful dismissal and unfair dismissal are two distinct and separate causes of action though they are sometimes confused. Wrongful dismissal is a common law contractual claim that arises where the employer has breached an express or implied term of the employee's contract, while unfair dismissal is a statutory claim arising under legislation. By contrast with statutory unfair dismissal, wrongful dismissal is not concerned with the general fairness or unfairness of the dismissal. The only relevant consideration in an action for wrongful dismissal is the employer's contractual obligations. Unless otherwise agreed, the employer has a right to terminate the contract by giving the employee reasonable notice of termination (or an adequate contractual payment in lieu where the contract so provides). The remedy for such a breach of contract is an award of damages based on the period of notice which should have been given.

42. Moreover, at common law, unless otherwise agreed an employer can terminate an employee's contract by notice for a good reason, a bad reason, or no reason at all: see *Ridge v Baldwin* [1964] AC 40, 65 (per Lord Reid). (See also *Labour Law in The Bahamas* by Emmanuel Enebeli Osadebay, Justice of Appeal of the Court of Appeal of The Bahamas, 2nd Edn (2005) at p119 which confirms that this is the position in The Bahamas). Provided proper contractual notice to terminate the employment contract is given, there will be no breach of contract; and only where the employer purports to dismiss without notice (for gross misconduct) will the reason for termination be relevant. The fact that an employee may be dismissed without cause does not, however, cut across the statutory right not to be unfairly dismissed: see sections 34 to 48 of the EA 2001.

43. Consistently with the common law position, the Industrial Agreement expressly permits the respondent to terminate by giving reasonable notice (or to do so by making a payment in lieu) and there is nothing in article 14(2) that imposes any express obligation on the respondent to give reasons. In other words, article 14(2) positively allows the respondent to dismiss the employee (as a matter of contract) without cause.

44. The appellant's interpretation of the "unjustly" term (as imposing an obligation to give reasons in a case where dismissal is without cause) cuts across this contractual right. Moreover, it would be a profound and radical reversal of the employer's long standing common law right to dismiss for no reason at all. For these reasons, it cannot be correct. Nor in the Board's judgment can it be interpreted as a contractual right to statutory protection against unfair dismissal. That would be a recipe for chaos and confusion.

45. Against this background and read in the context of article 14(2) as a whole, the Board considers that the words stating that any dismissal shall not be unjust import no separate procedural or substantive rights or obligations. They do not qualify the assessment of the criteria for deciding what it is reasonable to pay by way of notice. Rather, the statement that the respondent shall not dismiss unjustly acts as a simple contractual reminder or reassurance to the employee that his or her statutory unfair dismissal rights are not excluded and can be pursued in parallel or combination with any contractual wrongful dismissal claim. While it is odd that the word unjust rather than unfair is used, and although this reminder or reassurance is not necessary, the Board regards it as understandable that the drafter of article 14(2) would have wished to make that clear.

46. This interpretation is consistent with and reinforces the common law right to dismiss without cause. It avoids creating chaos and confusion. It is also consistent with article 15 of the Industrial Agreement which makes express, separate provision for the provision of reasons and the operation of fair procedures where the dismissal is for cause.

47. The last sentence of 14(2) (stating that any payment in lieu must "be no less favourable to the employee than the entitlements provided for in the Employment Act") is also a reminder or reassurance to employees. An employer who opts to make a payment in lieu of notice must make the payment within two weeks of the effective date of termination, but this sentence gives contractual reassurance to the employee that whatever is paid must be at least equal to or more than his or her "entitlements" under section 29. This too is not necessary because this is achieved by sections 4 and 29 of the EA 2001, read together, but again, the Board considers it understandable that the drafter of article 14(2) would have wished to reinforce this position.

7. The authorities relied on by the appellant to support the case based on a contractual prohibition on "unjust" dismissal

48. The conclusion set out above on the second question in this appeal is reached without reference to the authorities cited to the Board. However, the Board does not consider that these authorities support the appellant's case or cause the Board to alter its conclusion.

49. The appellant relied on the Board's decision in *Jamaica Flour Mills*. The case concerned regulations made under primary legislation (the Labour Relations and Industrial Disputes (Jamaica) Act 1975) including a labour relations code to promote the principle of collective bargaining and the orderly resolution of industrial disputes. In that context, the Minister had power under the Act to refer industrial disputes to an established Industrial Disputes Tribunal. Where the dispute related to the dismissal of a worker, the Tribunal had power under section 12(5)(c) of the Act, in the event of a finding "that the dismissal was unjustifiable", to order certain remedies. One of the questions for the Board was whether "unjustifiable" in section 12(5)(c) meant simply unlawful or whether it had the wider meaning of "unfair." The Board upheld the conclusion of the courts below that "unjustifiable" had a wider meaning than merely unlawful, and the dismissals in that case which had been found to be "unfair, unreasonable and unconscionable" were unjustifiable.

50. The decision, made in a different statutory context, that the word unjustifiable is effectively to be equated with unfair does not assist the appellant's case. If anything, it contradicts it and supports the Board's own conclusion here, that the phrase used in article 14(2) has no normative meaning and is just a reminder of the employee's unfair dismissal rights.

51. The appellant also relied on *Bahamas Electricity Corporation v Andrew Gilbert*. The facts are shortly summarised in the Court of Appeal's judgment. Mr Gilbert had failed to discharge his duties to his employer, the Bahamas Electricity Corporation, to an acceptable level over a lengthy period, and matters came to a head when there was a

major incident at his station, but he was not present to deal with it and had no excuse for his dereliction of duty. He was dismissed with a payment of nine months' salary in lieu of notice. The applicable industrial agreement governing the terms of his employment was in materially similar terms to the Industrial Agreement in this case. In particular, article 11(2) was in almost identical terms to article 14(2) and included the words, "However, the corporation shall not terminate an employee unjustly". The Bahamas Court of Appeal recognised the corporation's right under article 11(2) to terminate the services of an employee on reasonable notice determined by reference to the specified criteria (age, length of service etc). Churaman JA continued:

> "The words there, 'However, the corporation shall not terminate an employee unjustly,' must be read in the context in which they appear, that is to say, the circumstances must demonstrably bear out the justification for termination, and the reasonableness of the notice must be measured by the criteria therein adumbrated. The approach of the corporation therefore must be twofold: In the first place, the decision to terminate must be justified by the circumstances leading up to termination, and in the second place, the period of notice must be reasonable having regard to the criteria already mentioned. When combined, the question must be asked: 'Did the corporation terminate the employee justly.'"

52. Mr Gilbert's dismissal was for cause. In his case, the equivalent provisions of article 15 (concerning discipline and dismissal for cause) of the Industrial Agreement should have been applied. The case seems to have been dealt with, however, as one of termination by giving reasonable notice. It appears to the Board that the Court of Appeal may have overlooked the fact that dismissal for cause and dismissal by giving reasonable notice are two distinct and alternative bases for terminating the employment contract.

53. It is difficult to see what circumstances leading to termination could possibly be relevant to justify the termination of service when that termination is not for cause. Justification for termination is simply not in issue where the right to dismiss without cause under article 14(2) is exercised. The only question is sufficiency of notice. It would be incoherent for the prohibition against unjust termination to be interpreted as importing requirements of procedural and substantive fairness beyond the entitlement to be paid reasonable notice in a clause (like article 14(2)) dealing with termination on notice without the need to give a reason or justification.

8. Conclusion

54. As the Court of Appeal observed, unfair dismissal was neither pleaded nor proved by the appellant in this case. The appellant had no other cause of action for unjust dismissal that could sound in damages. To the extent that the judge found the appellant's dismissal to be unjust, such a finding was not available to her. The Court of Appeal made no error in substituting a period of 18 months' notice for the period of 74 months' notice found by the judge. The Board upholds the award of damages made by the Court of Appeal on this basis.

55. For the reasons given above, the Board will humbly advise His Majesty that the appeal should be dismissed.