

## **BY ANY MEANS UNNECESSARY: COURT ACTION AND THE CONCILIATION PROCEDURE FOR UNFAIR DISMISSALS IN THE BRITISH VIRGIN ISLANDS**

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### **ABSTRACT**

Part V of the Labour Code of the British Virgin Islands seeks to protect certain employees against unfair dismissals and dismissals without just cause in keeping with the principles of the ILO 1963 Recommendation 119 and the 1982 Convention 158 and Recommendation 166 concerning Termination of Employment at the Initiative of the Employer. However, the Code does not expressly provide for direct access to the Court for an employee who alleges that he has been unfairly dismissed. Rather, he is entitled to seek a resolution of the issue by filing a complaint with the Labour Commissioner. If the Labour Commissioner fails to achieve a voluntary settlement after twenty-one days he must transmit the matter to the Labour Minister who shall then attempt to settle it. Should he fail to do so within thirty days, he returns the matter to the parties for, *inter alia*, "the pursuit of any legal action which may be available to them." In the face of such provision, is a dismissed employee nevertheless entitled to bypass these procedures and commence High Court action or raise unfair dismissal as a defense to an action? The author argues that based on legal principles, there ought to be no such entitlement and analyzes a decision to the contrary. In the second part of the study, the author examines the weakness of the protection against unfair dismissal afforded to Commonwealth Caribbean employees generally and suggests the need for reform.

It has never been seriously suggested that the courts, sated with a diet of the weak gruel that is the workers' common law employment rights in the Commonwealth Caribbean [1], are best placed to protect what might be called the new

employment rights [2]. The broad, liberal interpretations these rights demand, the recognition that there has been what may be quaintly called “a paradigm shift” in the nature of the managerial prerogative [3], and the withering away of the master and servant contract analysis of employment in favor of a new industrial relation of equals [4], are not second nature to the common law judicial function. Indeed, some regional jurisdictions have dealt with this phenomenon by creating industrial tribunals to adjudicate areas of industrial conflict [5]. At the same time, it must be conceded that, in most instances, the new employment rights are found in legislation that is, at times, unhappily drafted or unduly restrictive. It might be that this is the necessary compromise between a social and electoral policy keen to improve and protect the workers’ rights and an economic policy that seeks assiduously to attract the investment of foreign capital [6]. In this context, a matter such as job security cannot be ignored, yet at the same time it cannot be such that foreign investors would be deterred by a suspicion that they would no longer be masters of their capital. The managerial prerogative to order the workforce, one incident of which is dismissal, is one of the rights normally attached to the investment of capital in employment creation, and an entitlement that goes with ownership of the firm.

This mixture of judicial inertia and political dilemma results in frustration for the worker who might seriously wonder whether anything has really changed [7]. And it is not only in those circumstances—where the worker is on the losing end—that those who hope for a new dawn are disenchanting. This is also the case where a decision demonstrates a failure to appreciate the mechanics of this new regime of rights, limited as they are. Such persons would have been offered little comfort by the recent decision in *Michael Burill et al. v. Morton Schrader et al.* [8].

## FACTS AND DECISION

In this case, the respondent, Schrader, entered into a verbal contract of employment with Burrill and the other appellant. Under this agreement, Schrader employed the appellants as joint managers of his island resort, Marina Cay, in the British Virgin Islands, for a fixed term of two years from November 1, 1986. This contract provided that the appellants were to be paid a joint salary of \$3000 per month and a commission based on 5 percent of the resort’s gross profits. The appellants were also entitled to rent-free accommodation in a cottage on the island. On January 20, 1987, Schrader summarily dismissed the appellants, who resisted this action. Schrader and the new manager then sued, claiming injunctions and damages in respect of the appellants’ continued occupation of the premises. The appellants then filed a defense and counterclaim seeking damages for breach of the contract of employment. Ultimately, these damages were agreed to be recoverable, if at all, for “unfair or wrongful” (sic) dismissal. The central issue in the case was whether the appellants had to exhaust the conciliation procedure

provided in the Labour Code of the British Virgin Islands (BVI) (1976) as a prerequisite to an action in the High Court. The relevant sections provide:

**C 59** (1) Should any question arise as to whether an employee has been unfairly dismissed, the employee *may* seek a resolution of the question by filing a Complaint of the Unfair Dismissal with the Labour Commissioner.

**C 60** (1) Immediately upon receipt of the said Complaint, the Labour Commissioner, using the means described in section B5(2)(a) [9] shall call all interested parties together or otherwise seek to settle the matter by voluntary adjustment or settlement.

(2) Within twenty-one days after the filing of the Complaint if he has failed to achieve a voluntary adjustment or settlement, the Labour Commissioner shall transmit the matter, with a full report thereon, to the Minister.

**C 61** On transmittal of the matter to him, the Minister shall seek to settle the matter as called for by Section B6(1) [10] and, should he fail to effect a voluntary adjustment or settlement of all issues within thirty days after the filing of the Complaint, he shall take one of the steps open to him under section B6(2) [11].

The trial judge, Bishop J., agreed with the submission of Schrader's counsel that the appellant's exhaustion of the procedure for conciliation prescribed by these sections of the Labour Code was a prerequisite to their recourse to the High Court:

. . . it is only after the Minister has made his attempt to achieve voluntary adjustment or settlement of the matter by taking such steps as he deems appropriate, and after such effort has resulted in failure, and he has remanded the matter back to the parties that legal action in the High Court might be taken, and in my view this is necessary even where the parties may agree that the dismissal was unfair . . . Any short circuiting of the statutory procedure must be, in my view, wrong in law . . . the filing of this action by counterclaim was premature [8, pp. 3-4].

The court of appeal approached the matter on the basis that there is a common law right of access to the courts "for the purpose of vindicating and enforcing . . . common law *and statutory rights*" [8, p. 5]. This right was not to be abolished or restricted except by a clear legislative intention. Before he resolved that issue however, Floissac C.J., who gave the only judgment, noted that the Labour Code provided no remedy by way of compensation for a breach of the employee's statutory right not to be dismissed. Conciliation he "hesitated" to classify as a remedy and in his view a dismissed employee was entitled to waive the conciliation process since

... no statutory duty is imposed either on the employer or on the employee to explore the possibility of conciliation. The Code merely confers a right or option on the employee to explore that possibility. No such right or option is given to the employer ... [8, p. 7].

Moreover, since the respondents had first spurned the procedure for conciliation by suing after the appellants had initiated it and before it was exhausted, they had therefore submitted to the jurisdiction of the High Court to resolve a dispute that would involve the issue of unfair dismissal:

The appellants [*quaere* respondents?] were therefore estopped by their conduct from invoking the procedure for conciliation to exclude the appellants' defence and counterclaim in the said suit ... [8, p. 8].

The court of appeal then returned to the first issue of the legislative intent and concluded that there was none to restrict the common law rights of access to the courts and the sections cited earlier were not mandatory. The procedure was waived by "both the appellants and the respondents" as a result of the action, and the exhaustion of the conciliation procedure was not a prerequisite to the exercise by the appellants of their right to sue in the High Court.

Even though it is not germane to this study, it is worth noting that the court of appeal ultimately considered the counterclaim as one for breach of the appellants' common law rights not to be wrongfully dismissed [12]. This, in spite of the fact that the defense/counterclaim alleged wrongful *and* unfair dismissal and that the earlier discussion could only have arisen if the new employment right not to be fairly dismissed was in issue [13]. One is therefore tempted to dismiss the reasoning on the exhaustion of remedies point as so much *obiter dicta*. That apart, an action for breach of contract ought not to be conclusive of the issue since, by virtue of section C55 of the Labour Code, every contract of a qualified employee would include a term incorporating the right not to be unfairly dismissed and finally, in the absence of any provision of the code with respect to a remedy [14], an action for damages could possibly be brought in a case of unfair dismissal [15]. These issues merit detailed discussion in the future.

The main purpose of this article is to critically examine the court of appeal's decision. It also offers a general comment on the code's provisions with respect to unfair dismissal. This is done in two parts. With respect to the decision, the discussion involves an analysis of the principles of access, waiver, and estoppel as applied by the court of appeal. Remarks on the legislation are confined to a comparative analysis of nature of the right not to be unfairly dismissed, with some attention being paid to the absence of any express provision for a remedy in BVI legislation.

## ANALYSIS OF THE DECISION

The nebulous character of the provision granting the right not to be unfairly dismissed did not assist, in the slightest, the court of appeal's task in this case. This opinion is fully discussed later, but it bears statement at this stage that the legislation could have been much clearer, and bolder, in its content.

### The Common Law Right of Court Access

In the view of the court, section C55 of the Labour Code creates the employee's statutory right not to be unfairly dismissed. In less than exemplary drafting, this section provides:

Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause.

It is unfortunate that Floissac C.J., in his judgment, chose to concentrate on the undoubted common law right of access to the courts rather than on the precise nature of the right granted under section C55. With all respect, his reliance on the citation from *Halsbury* [16] concerning the legislative alteration of the common law was misguided since section C55 makes it quite clear that, in respect to dismissals at least, a new right has been created. The right not to be unfairly dismissed is purely a creature of statute and there is no equivalent common law right [17]. It is, therefore, the code that determines the manner in which that right is to be enforced and the nature of such enforcement. Nor is it entirely accurate to assert that the code provides an alternative remedy or restricts or excludes the right of access to the court. As sections C59-61 and B6 of the statutory regime indicate, the matter of unfair dismissal is one to be dealt with through the process of conciliation or voluntary settlement primarily. In other words, the tenor of the statute is that matters of unfair dismissal (as opposed to wrongful dismissal) should be dealt with in a fashion that is as nonadversarial as possible. This is not dissimilar to the mechanism in the United Kingdom [18]. Thus, there is no attempt to displace the court process as section B6(2)(a) indicates [11, at (a)], but to have problems in the industrial relation resolved principally by settlement rather than the slow, wasteful, and expensive court process. It is right to state, as Floissac C.J. did, that one would hesitate to classify conciliation as a "remedy." Indeed, as Bishop J. noted, conciliation would generally result in a referral to the courts unless a settlement was reached or there was an agreement that the dismissal was fair. The latter would be a highly unlikely scenario given that the complaint has been made. However, the process of conciliation could possibly result in a changed perspective of the matter [19].

By this argument, the decision in *Pyx Granite Co. Ltd. v. Ministry of Housing & Local Government et al.* [20] is not strictly relevant since it dealt with the

separate issue of whether the provision of an alternative remedy could debar recourse to the courts. Here, there is no attempt to prohibit any recourse at all to the courts but simply an effort to supply a means of possible dispute resolution. Thus, whether or not conciliation is a remedy or, indeed, whether or not the Labour Code provides a remedy for an unfair dismissal, recourse to the courts will still exist. The true issue, therefore, is whether this must be postponed for any reason—a different question.

It is further to be regretted that in an era in which alternative dispute resolution procedures are being emphasised [21], the court of appeal would condemn a process, notorious in the resolution of industrial conflict in general and inherent in the area of unfair dismissal in particular [18], as threatening the common law rights of court access.

Floissac C.J. also held, though without reasoned discussion, that those sections of the code “which prescribe the procedure for conciliation were not intended to be mandatory” [8, p. 9]. Though consistent with his earlier holding that the code did not remove the right of immediate access to the courts, this view appears to be inconsistent with certain basic principles of statutory interpretation.

In the first place, section C59 seems unambiguous that the context of conciliation assumes relevance “should *any* question arise as to whether an employee has been unfairly dismissed.” Although it further provides that the employee “*may*” seek a resolution, a form of words which *prima facie* denies an obligation to do so, it is a preferable construction that the section merely provides the employee with the option whether or not to seek a resolution of the issue of the unfairness of the dismissal rather than a choice of forum [22]. Certainly, such an interpretation fits more easily with a machinery directed to achieving a voluntary settlement or adjustment and which, in the absence of such, provides no remedy but a reversion of the matter to the parties. Indeed, as Floissac C.J. himself stated, “the Code merely confers a right or option on the employee to explore [the] possibility [of conciliation]” [8, p. 7]. If the employee were permitted to sidestep the machinery and to proceed directly to the court, the machinery established by the code would be rendered otiose. This point is reinforced by the argument that the common law remedies are still available for a wrongful dismissal and therefore the conciliation machinery can only be relevant in the context of unfair dismissal. An interpretation of the code that would render the machinery effective and relevant ought to be preferred to one that treats it as a luxurious option [23].

Secondly, the decision of the court of appeal is seemingly inconsistent with that of the Grand Court of the Cayman Islands in *Roulstone and Coffee v. Cayman Airways Ltd.* [24], which was not cited in the present case. In that case, the plaintiffs brought proceedings against the defendant for damages for unfair dismissal and, in the alternative, for wrongful dismissal. The defendant company had terminated the plaintiffs’ employment as flight attendants and tendered to each his due allowances and one month’s salary in lieu of notice. Their employment agreement provided for their dismissal without cause “only after giving

fourteen . . . days' notice in writing." In respect of wrongful dismissal, it was held it was lawful for an employer to give salary in lieu of notice to terminate an employee's services and there was nothing in the facts to suggest this course was improper [25]. Insofar as the claim for unfair dismissal went, his lordship considered section 48 of the Labour Law of the Cayman Islands [26]. This provides:

Where upon a complaint of unfair dismissal, the Director [of Labour] has determined that the dismissal was unfair, he may order the payment by the employer to the person dismissed of a sum of money by way of compensation for unfair dismissal.

It was further provided by sections 69 and 71 that an appeals tribunal was to be established for the purpose of hearing appeals against decisions of the director and that a further appeal could be made to the Grand Court upon a point of law only.

It is to be noted that the Caymanian legislation provided for a primary remedy, unlike the BVI legislation, even though, like that legislation, it could be said to have restricted access to the court. In fact, such access was even more restricted in the Cayman Islands, being by way of appeal only rather than by default of the primary machinery. One central issue for the Grand Court was whether an action could be brought in respect of unfair dismissal without first making a complaint to the director of labour. Schofield J. disposed of the matter in this way:

This court does not recognize unfair dismissal as a cause of action . . . the common law does not provide a remedy for unfair dismissal. Unfair dismissal is recognized by the Labour Law and the remedy open to an employee under that Law is a complaint to the Director of Labour, and thereafter, by a party aggrieved by the Director's decision to an Appeals Tribunal. A final appeal lies to this court from the Tribunal's decision. No cause of action in the first instance lies with the court. Accordingly, I strike out the prayer in the statement of claim for damages for unfair dismissal [24, at 259, 260-61].

This decision was reached without reference to precedent, but it is clear that Schofield J. regarded unfair dismissal as entirely a creation of statute and the enforcement of the right not to be unfairly dismissed as being exercisable only within the four corners of the relevant statute.

### **Waiver of the Conciliation Procedure**

First, Floissac C.J. considered that the statute imposed no duty on either of the parties to explore conciliation. However, since it gave the employee, not the employer, a right or option to do so, his lordship inferred from this "discrimination" that the procedure for conciliation was prescribed "solely for the benefit of the employee . . . the person entitled to waive the right (if any) to insist on the

observance and exhaustion of the procedure” [8, pp. 7-8]. This reasoning is difficult to follow. A far simpler and more persuasive explanation for the difference is that the employer could never be the one to institute a complaint of unfair dismissal. Since this will be the employee’s injury peculiarly, it seems only logical that the provision should permit him/her, and not the employer, to submit the complaint to the labor commissioner. This, however, does not mean that the substantive procedure itself is not for the benefit of both parties to resolve their dispute, if possible, in an alternative manner.

Secondly, the decision relied on in support of the waiver, *Kamins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [27] seems to be both out of context with, and unhelpful to, the court of appeal’s assessment. It seems overly reductionist to categorize the new industrial relations machinery for conciliation established by the code as mere “a procedure preliminary to the institution of legal proceedings” [8, p. 7] and, as suggested above, it is not at all clear that this machinery is to be regarded as being for the sole benefit of one party, given that its ultimate objective is “voluntary conciliation and settlement” (emphasis added). Indeed, it appears that the only two occasions on which the machinery could be regarded as final are where the employee agrees the dismissal was fair, hardly a result in his favor, and where, on a concession from the employer that the dismissal was unfair, the parties reach a settlement. In neither case, however, can the employee be said to have benefited from the conciliation while the employer has not.

Apart from this, *Kamins* speaks to a special type of waiver where a procedural requirement has been imposed *on another party* for the benefit of the waivor. In such a case, there will indeed be a waiver when the waivor “has chosen not to rely on the non-compliance of the other party with the requirement, or has disentitled himself from relying on it either by [agreement] or because of such [conduct] that it would not be fair to allow him to rely on the non-compliance” [27, at 871, 893]. Plainly, this is not the identical type of waiver contemplated by Floissac C.J. For him, the employee is not waiving a procedural requirement imposed on the employer for the employee’s benefit. Instead, the employee is attempting to waive a procedural requirement that is a necessary precondition for the exercise of the statutory right and one that is imposed on the employee him/herself. This distinction is crucial. In fact, the impish observation could be made that since only the employee can institute the procedure, then any available waiver, on *Kamins*’ principles, would be for the employer [28].

## Estoppel

That aspect of the judgment pertaining to estoppel is very difficult to grasp. Floissac C.J.’s view was that the action by the respondent employer for an injunction and damages in respect of the occupation of the employment premises, once the conciliation procedure has been initiated by the employees, was a



submission to the High Court of a dispute that would inevitably involve the issue of wrongful or unfair dismissal. Because of this, the employers were estopped by their conduct from excluding the employee's defense and counterclaim by invoking the procedure for conciliation. For this proposition, he relied on the decision of the House of Lords in *Wandsworth London Borough Council v. Winder* [29] and, specifically, a small passage from Lord Fraser of Tullybelton in which the lord refused to characterize as an abuse of the process of the court the defense of proceedings by a respondent.

In *Wandsworth*, the defendant refused to pay increased rents demanded by the council. The council brought proceedings in the county court claiming arrears of rent and possession of the flat. By his defense, the defendant contended he was not liable to pay the arrears because the notices of increase were *ultra vires* and void, and he counterclaimed a declaration to this effect. The council applied to strike out the defense and counterclaim as an abuse of the process of the court. This was upheld by the judge (on appeal from the registrar's decision) on the ground that it was an abuse of process and contrary to public policy to challenge the conduct of a public authority other than by an application for judicial review under R.S.C., Order 53, whether the challenge was brought by initiating an action or by a defense. The court of appeal allowed the defendants' appeal. The council's further appeal to the House of Lords was dismissed on the ground that it was a paramount principle that the private citizen's recourse to the courts for the determination of his/her rights was not to be excluded except by clear words. Lord Fraser, in the passage cited by Floissac C.J., stated:

It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing, he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff [29, at 509].

Superficially, this passage would appear to lend some support to the argument that so long as the appellants in this case were merely raising the dismissal as a defense to the respondents' suit for an injunction and damages with respect to the appellants' continued occupation of the premises after the summary termination of their employment, then there was no need to invoke and exhaust the conciliation procedure. However, closer analysis reveals at least two points of departure between the two situations. In the first place, and as has already been noted in this article, the counterclaim was for damages for breach of the employment contract. Even though it seems to be generally accepted that wrongful repudiation of a contract of an employment does not, by itself and without more, bring that contract to an end without the innocent party treating the breach as rescissive

[30], this does not require a finding that the appellants could continue to occupy the premises, principally because the remedy for a wrongful dismissal in a private employment contract is an action for damages and not a finding that the purported dismissal was a nullity [31], nor an order that the contract should be specifically performed [32], nor that the *status quo* should remain in place [33]. This should be contrasted with the counterclaim in *Wandsworth* where the purported increase by the council could have been declared a nullity, thus entitling the defendant to remain in possession of the flat. Secondly, in this connection, even if the counterclaim is to be treated as one for unfair dismissal, no remedy of reinstatement or reengagement is provided in the BVI legislation for an unfairly dismissed employee; indeed, no remedy at all is specified [14]. The exact nature of the counterclaim would therefore appear to make no difference in the present case and is to be contrasted with the factual situation in *Wandsworth*. Apart from this, however, there also appears to be a distinction between the language of the respective sections used to stymie the counterclaim of the defendants in the two cases. Clearly, in *Wandsworth*, order 53 could not be taken to have abolished the right to challenge the decision of a local authority since it did not purport to set up a new right but merely to provide a form of procedure for vindicating a right. On the other hand, section C59(1) is part of a legislative scheme that not only provides for the method in which a right might be availed of but also establishes the right for the first time. Further, section C59(1) seems quite clear in its import, providing for the employee's entitlement to seek a resolution of the question "should *any question* arise as to whether an employee has been unfairly dismissed" [34]. It might be argued that these words are not sufficiently clear to prevent the issue being determined in the course of a court action, but *Wandsworth* seems an unlikely authority for the argument since, in that case, there was no independent machinery set up by which the defendants could have brought a claim, except the court itself. An argument in such a context that the issue of *ultra vires* could not be decided by the court because the defendant had not brought an action seems spurious, especially since the positive determination of the council's claim would not have precluded the defendant's later application for judicial review, which, if successful, would have had the effect of nullifying the legality of the council's actions. In contrast, as has been pointed out earlier, the respondents' later claim in the present case, even if successful, would not alter the rights of the appellants with respect to possession of the property. Nor would it be required that the respondents' claim be brought in the same court but rather under the machinery established for the resolution of these issues.

In any event, the court's appeal to estoppel here seems odd. It is true that this holding was not arrived at after any sustained analysis. However, to determine an estoppel by conduct simply because the respondents had submitted to the jurisdiction of the High Court "to resolve the dispute which existed between [them] and which would inevitably involve the issue of wrongful or unfair dismissal!"

and in the absence of any finding that the appellants had been prejudiced in any way by the respondent's suit [35] must be considered suspect. The holding is not further strengthened by the fact that there is no necessary connection between the wrongfulness or unfairness of a dismissal and the continuation of the terms of the employment, such as entitlement to accommodation, after the dismissal in the British Virgin Islands. In that case, the respondent's action for possession would not have precluded the appellants from invoking the conciliation procedure. Indeed, the best result would then be for one of the procedures to be stayed, not because the outcome of any one of them depended on the other but simply to preserve the *status quo* for a better concentration on the relevant, particular issue [36].

### THE LEGISLATION

As argued earlier in this article, while those Commonwealth Caribbean jurisdictions that have enacted some form of legislation with respect to unfair dismissal are to be commended for taking this progressive step, most of the statutory provisions, whether by error or design, reveal some regrettable inconsistencies and suggest the respective drafters felt a certain amount of unease at the whittling down of the formerly absolute managerial prerogative to dismiss.

For example, the Cayman Islands' statute [37], while it gives the right not to be unfairly dismissed to those who have completed their probation period or, where there is no probation, have completed six months of continuous employment with the employer [37, §43(1)], nevertheless provides only for monetary compensation on a finding of unfair dismissal [37, §49; 38]. This compensation is limited to one week's wages for each completed year of service, to a maximum of twelve years.

In Montserrat, the *Employment Ordinance 1979* provides two catalogues of reasons, those that "shall not give a right to compensation" and those that "shall not constitute valid reasons for termination of employment [39], yet section 22 cryptically states that nothing in that part of the ordinance "shall be construed as derogating from the existing common law rights of the employer or employee." If this section is to be literally construed, the notoriety of the weak protection afforded by the common law of dismissal makes an absurdity of any inquiry into the reasons for a dismissal [40].

The *Protection of Employment Act 1980* of St. Vincent and the Grenadines proclaims that relevant employees "stand protected against unfair termination of service by [their] employer" [41], yet there is also a provision that termination for good cause [41, §5], which includes immoral behavior in the course of duties [41, §5(2)(a)(iii)], does not entitle the dismissed employee to compensation. Despite this latter provision, however, the decision as to whether a termination was unfair or not must pay due consideration to "whether the employer acted

reasonably or unreasonably . . .” [41, §7]. Is it to be assumed therefore that a termination for good cause is always reasonable and therefore fair? If so, this is a lesser form of protection than that generally assumed to be provided by the concept of unfair dismissal [42]. Such an inference is, however, hard to resist in light of section 8 of the act, which appears to equate *unfair* and *unjustifiable* dismissal [43].

A similar observation may be made of the Anguillan statute [44], which refers to the concept of fair dismissal without ever defining it [44, §16(1); 45]. It might be supposed, however, that in light of its identification with *illegal* dismissal in section 16(1), a dismissal is unfair if it is based on one of the prohibited grounds [44, §11(2)(a)-(f)].

Given this sampling of defects, the absence of a remedy in the BVI legislation is not surprising in the context of the generally equivocal nature of the right not to be unfairly dismissed in the region. Indeed, the right is not present in some jurisdictions [45]. This hold-and-nudge approach to unfair dismissal might well be the necessary compromise referred to in the introduction between the regional need to attract foreign investment for its development and the regional obligation to uphold the dignity and autonomy of its workers [46].

Specifically, with regard to the BVI legislation, some further criticisms may be made. First, the employees who are given the right not to be unfairly dismissed are those “whose probationary period [have] ended” [47]. The question therefore immediately arises as to the rights of an employee who is not subject to a probationary period. It could be argued that such an employee would enjoy the right from the date of employment but this should have been made clear. In the Cayman Islands, there is express provision concerning those without a probation period; such employees are protected against unfair dismissal after they have completed six months of continuous employment [37, §43(1)(b); 48].

Further, the BVI legislation (1976) in section C55 goes on to provide that no employer shall dismiss a qualified employee without just cause, as if such a right were either essentially coterminous with, or an improvement on, the right not to be unfairly dismissed [49]. However, it is trite that the validity of the cause or reason for dismissal is but one element of the determination of whether a dismissal is unfair. Indeed, section C57(2) appears to make this clear:

The test . . . for determining whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted reasonably or unreasonably . . .

The reasonableness of an employer’s conduct is generally taken to be further along the continuum of fairness than the validity of grounds on which such dismissal took place [50], involving issues of consistency, fairness, and at least

some degree of objectivity [51]. It might have been better, for drafting purposes, if there were no statement of the employer's duty not to dismiss without just cause in section C55, since it might suggest that any dismissal for good cause will, *ipso facto*, not be unfair. It may be, though, that the reference is made *ex abundantia cautela* [52].

Finally, it is expressly provided that the termination of employment at the expiration of the term specified at the time of the employee's hire will not be deemed an unfair dismissal [§C56]. This section, though not peculiar to the British Virgin Islands [53], seems particularly favorable to employers, who could simply employ an individual on a series of fixed term contracts without ever incurring the obligation not to unfairly dismiss. It is at least arguable that the section does not preclude the treatment of a termination in such instances as a *dismissal*, but only as an unfair dismissal. If this is accepted, then it might be that the employer would still be required to show a just cause for such a dismissal, *secundam* section C55 [54]. The issue then becomes, is the expiry of the fixed term a just cause for dismissal in addition to being the mode of termination [55]. In an analogous context, it should be noted that the issuance of a valid notice of termination does not per se justify a dismissal [56].

The BVI Labour Code was enacted over twenty years ago. *Burrill v. Schrader* suggests the time has come for its reform.

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## ENDNOTES

1. See R. Rideout, *Principles of Labour Law* (5th edn., 1989) p. 144—"The common law afforded no job security . . .". London.
2. J. Cumberbatch—"Plus Ça Change . . . : The Interpretation of New Individual Rights in the Commonwealth Caribbean, (1995) 5 *Caribbean Law Review*, pp. 342-378.
3. H. Collins, *Justice in Dismissal—The Law of Termination of Employment* (Oxford, 1992), especially pp. 34-37. United Kingdom.
4. K. Stone, "The Post War Paradigm in American Labor Law" [1991] 90 *Yale Law Journal*, pp. 1511, 1580; D. M. Beatty, "Labour is not a Commodity" in *Studies in Contract Law*, B. Reiter and J. Swan, eds. (Butterworths, Canada, 1980), pp. 315, 328; *Woods v. W. M. Car Services (Peterborough) Ltd.* [1981] I.R.L.R. 347.

5. See, for example, Industrial Relations Act 1986, section 3 (Commonwealth of Dominica); Industrial Court Act 1976, section 4 (Antigua and Barbuda); Industrial Relations Act 1972, section 4 (Trinidad & Tobago); and Labour Relations and Industrial Disputes Act 1975, section 7 (Jamaica).
6. E. I. Nwogugu, *The Legal Problems of Foreign Investment* (Oceana, 1965), 14. United Kingdom.
7. See *John Ryan v. Olga Lindsey* (Civil Appeal, No. 11 of 1992, ECS Court of Appeal (Montserrat), October 11, 1993, unreported), discussed by Cumberbatch [2].
8. *Michael Burill et al. v. Morton Schrader et al.*, Civil Appeal, No. 11 of 1994, ECS Court of Appeal (*British Virgin Islands*) unreported.
9. §B5(2)(a) of Labour Code of British Virgin Islands:
 

“In addition to his other duties [The Labour Commissioner] shall receive and cause to be recorded all questions, complaints, petitions or notifications with respect to employer-employee relations in the Virgin Islands and he shall take the preliminary steps thereon, namely—

  - (a) Upon receipt of any such question, complaint, petition, or notification, he shall investigate the matter and shall make every effort to dispose of the issues raised therein by voluntary adjustment or settlement, the terms of which adjustment or settlement are not clearly repugnant to the principles and purposes of the Code; and in pursuance thereof—
    - (i) he may request the parties to meet with him, jointly or severally;
    - (ii) he may request the parties to state the facts as they know them and to set forth their respective positions on the issues;
    - (iii) he may request the parties to present witnesses to facts and he may, *sua sponte*, examine any person as to the matter, alone or in the presence of others, at his discretion; and
    - (iv) he may utilise the proces[s]es of medication or conciliation, or any other device designed to facilitate voluntary adjustment or settlement.”
10. §B6(1): “In addition to his other duties, the Minister, upon receipt of a report of the Labour Commissioner . . . , shall himself attempt to achieve voluntary adjustment or settlement of the matter by taking whatever steps he deems appropriate.”
11. §B6(2): “Failing to achieve voluntary adjustment or settlement—
  - (a) he may remand the matter back to the parties for private negotiations or resort to any machinery for resolving the issues which they have established or may establish, or for the pursuit of any legal action which may be available to them; and
  - (b) he may refer the matter to the proper authorities if he believes prosecution for the commission of an offence is indicated.”
12. As Floissac C.J. said at p. 9 of the transcript [8]: “Although the appellants alleged in their Defence and Counterclaim that they were wrongfully and unfairly dismissed, the appellants’ counterclaim against the respondents was for damages for breach of contract. The cause of action relied on by the appellants was therefore breach of contract *or breach of the appellants’ common law rights not to be wrongfully dismissed*” [emphasis added].
13. Since the common law right is not subject to the conciliation procedure—see text of section C 59(1) in text, *supra*.

14. Contrast the Antigua Labour Code 1975, on which the BVI legislation is fashioned, which provides in section C65 for a Hearing Officer to hear and determine the issues surrounding a complaint of unfair dismissal. By section C65(3) he is empowered to issue "any remedial order which is relevant to the issues and is just and reasonable on the merits of the case." See also section B12(1)(b) which provides for the remedy of reinstatement or reengagement. This decision may be reviewed by a Board of Review—Section C60.
15. There is however, express provision for reinstatement/reengagement in some other jurisdictions—see for example, *Antigua*, Labour Code 1975—section B12(1)(b); *St. Vincent & the Grenadines*, Protection of Employment Act 1980, section 8; *Dominica*, Protection of Employment Act 1997, section 39(1)(b); *Montserrat*, the Employment Ordinance 1979, section 20(1); *Turks & Caicos Islands*, Employment Ordinance 1988, sections 44-47.
16. *Halsbury's Laws of England* (4th edn). Vol. 44 para. 904: . . . Except insofar as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law. . . .
17. See *W. Devis & Sons Ltd. v. Atkins* [1977] A.C. 931, per Phillips J.: [Unfair dismissal] is narrowly and to some extent arbitrarily defined . . . it is a form of words which could be translated as being equivalent to dismissal "contrary to statute" and to which the label unfair dismissal has been given. . . .
18. See generally, I. T. Smith and J. C. Wood, *Industrial Law* (4th edn; 1989) especially at pp. 235-251 and 256-258. Further, per May L.J. in *Neale v. Hereford and Worcester C.C.* [1986] 1 CR 471, 483—"Deciding these cases is the job of industrial tribunals and when they have not erred in law neither the appeal tribunal nor [the Court of Appeal] should disturb this decision unless one can say in effect: 'My goodness, that must be wrong'." See also *Anguilla*, Fair Labour Standards Ordinance, 1988, section 16(2); *Cayman Islands*, Labour Law, 1987, ss. 48, 49(1).
19. See generally Smith and Wood [18, pp. 256-259]. According to the Advisory Conciliation and Arbitration Service Annual Report (1987), 69 percent of applications notified to conciliation officers were settled or withdrawn without proceeding to a hearing. The further procedure of the prehearing assessment has also reduced the incidence of tribunal hearings. According to the 1987 Employment Gazette, in 1986-87, percent of those applications who had been warned at a prehearing assessment that they might be mulct in costs, settled, or withdrew their applications and of the 97 who proceeded to a tribunal hearing in spite of a costs warning 82 failed, 30 of whom were actually ordered to pay costs.
20. *Pyx Granite Co. Ltd. v. Ministry of Housing & Local Government et al.*, [1959] 3 All E.R. 1.
21. See, for example, W. Douglas "Alternative Methods of Conflict Resolution under Common Law" in *Justice and Development in Latin America and the Caribbean* (IADB, Washington 1993) 33, 34: "The main advantage conferred by an efficient and widely accepted conciliation service would be to remove a large number of cases from the formal justice system, thus freeing the courts for the work they do best, adjudicating on the constitutional and public rights and obligations of citizens."

22. [8, p. 7]: “[N]o statutory duty is imposed either on the employer or on the employee to explore the possibility of conciliation.”
23. In accordance with the maxim “*ut res magis valeat quam pereat*” See generally P. St. J. Langan, *Maxwell on the Interpretation of Statutes* (12th edn. Sweet & Maxwell, 1969) 201: “Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act . . .” See further *Skelton v. Jones* [1962] 1 WLR 840; S.G.G. Elgar, *Craies on Statute Law* (7th edn., 1971) 103-106.
24. *Roulstone and Coffee v. Cayman Airways Ltd.*, [1992-93] C.I.L.R. 259.
25. [24, at 262]. See on this point, *Delaney v. Staples* [1992] 1 All E.R. 944 (H.L.).
26. Act No. 30 of 1987.
27. *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*, [1970] 2 All E.R. 871.
28. In fact, however, Floissac C.J. averred that the procedure was “in fact waived by both the appellants and the respondents as a result of their pleadings . . .” [8, p. 9].
29. *Wandsworth London Borough Council v. Winder*, [1985] 1 A.C. 461.
30. *Thomas Marshall (Exports) Ltd. v. Guinle* [1978] 3 All E/R. 193; *Gunton v. Richmond-upon-Thames London Borough Council* [1980] I.C.R. 755; *Dietman v. Brent London Borough Council* [1987] I.C.R. 737; *Shook v. Ealing London Borough Council* [1986] I.C.R. 314.
31. *R. v. East Berkshire Health Authority, ex p. Walsh* [1984] I.C.R. 743.
32. Cf. *Hill v. C.A. Parsons & Co. Ltd* [1972] Ch. 305.
33. *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 41 (C.A.).
34. Labour Code of the British Virgin Islands 1976, Section C59(1). (emphasis added).
35. On estoppel, see generally, Sir A. K. Turner, *Spencer Bower and Turner, The Law Relating to Estoppel by Representation* (2nd ed. Butterworths 1966), especially Ch. 5.
36. There was such a provision in the Labour Relations (Amendment) Act 1982 of South Africa. A party who had referred a dispute concerning, *inter alia*, the termination of employment to a conciliation board could approach the industrial court for a form of relief known as a *status quo* order. In such a case, section 43 permitted the reinstatement of the employee until final determination of the matter. See P. A. K. LeRoux and A. Van Nickerk, *The South African Law of Unfair Dismissal* (1994) 22 et seq.
37. Labour Law 1987 (Cayman Islands).
38. It should be noted here that even the availability of compensation is not an employee right. According to the section: “. . . [w]here . . . the Director has determined that the dismissal was unfair he *may* order the payment by the employer to the person dismissed of a sum of money by way of compensation for Unfair Dismissal.” (emphasis added). See further [15].
39. Employment Ordinance 1979 (Montserrat), Section 12(2) and section 12(4), respectively.
40. See the comment on *John Ryan v. Olga Lindsey* [7] by J. Cumberbatch in “Plus Ça Change . . . [2].
41. Section 3(1). The relevant employees are those engaged in a “protected” employment—See Protection against Unfair Dismissals Notification 1982, (SI 1982/50).



42. Generally, the validity of the reason for termination is not considered to be decisive of the issue; see section 57(3) of the Employment Protection (Consolidation) Act 1978: “. . . the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, *shall depend on whether in the circumstances . . . the employer acted reasonably* in treating it as a sufficient reason for dismissing the employee . . .” (emphasis added). The Vincentian equivalent to this section merely requires that “due regard” should be had to whether the employer acted reasonably “or unreasonably.” This is clearly a weaker provision as far as the rights of employee are concerned but the point has not been litigated. However, the terms of the section show plainly that the conduct of the employer is a relevant consideration. Perhaps the only dismissals that could be considered automatically fair under the generally accepted concepts of unfair dismissal would be a dismissal where it was for the purpose of safeguarding national health, safety or security and a dismissal during a strike or lockout in some cases: (section 62 EP(C)A 1978)—See M. Edwards, *Understanding Dismissal Law* (Waterlow, 1984), 78. *Sed quaere*, section C57(1) in the Labour Code, BVI and text to [52].
43. “If it is found that the employee was *unfairly or unjustifiably* dismissed . . .”. Section C55 of the Labour Code of the British Virgin Islands is to similar effect and see text accompanying [12, 13].
44. Fair Labour Standards Ordinance, 1988: It might be presumed that an “illegal” dismissal, like an “unfair” dismissal, is one contrary to the ordinance. This would include consideration of the requirements as to notice (section 12). However, notice is not a factor generally relevant to the fairness of a dismissal [7; 52].
45. For example Barbados, St. Lucia, the Bahamas and Guyana. There have, however, been judicial and other attempts to ameliorate the position of employees with respect to the law of dismissal in these jurisdictions. In Barbados, see *Barbados Plastics Ltd. v. Juliet Taylor* (1981) 16 Barb. L.R. 79 but cf now *Correias Ltd. v. Forde* (1992) 46 WIR 57 and Cumberbatch, “Wrongful Dismissal and the Retreat from *Barbados Plastics* (1995) 24 *Anglo American Law Review* 314; also Cumberbatch, “*Plastics Surgery—Wrongful Dismissal in Barbados . . .*” (1995) *Caribbean Law Review* 314 and *Grosvenor v. the Advocate Co. Ltd.* (January 24, 1994, Court of Appeals (Barbados), unreported). In St. Lucia, see *Scholar v. Hess Oil Co. Ltd.* July 3, 1987 (High Court of St. Lucia, unreported). In the Bahamas, there was an attempt to use section 56(3) of the Industrial Relations Act 1970 to introduce a notion of unfair dismissal but this has failed. See E.E. Osadebay, *Labour Law in the Bahamas* (1985) 24-30.
46. See [6] and the text accompanying. And see *First National Maintenance Corp. v. National Labour Relations Board* (1981) 101 Sup. Ct. 2573, 2579 per Blackman J.: “In view of an employer’s need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labo[u]r management relations and the collective bargaining process, outweighs the bargaining process.” Also C. J. Arup, “Redundancy and the Operation of an Employment-Termination Law” (1983) 9 *Monash University Law Review* 167.
47. Labour Code of British Virgin Islands, 1976, section C55.

48. For comparative purposes, the relevant employment period in Montserrat is thirteen weeks—section 12(1), Employment Ordinance 1979 and in Antigua & Barbuda, the provision is identical to that in the BVI—section C58, Labour Code 1976. See also section 41(1), Employment Ordinance 1981, Turks & Caicos Islands (one year).
49. The right not to be dismissed without just cause exists at common law in the context of summary dismissal. If no good cause exists, then the dismissal is simply wrongful as having been effected without valid notice, *Bourne v. Smith & Oxley Advertising Ltd.* (1981) 16 Barb. L.R. 67. On the other hand, under an unfair dismissal regime, notice is of evidential value only in that giving proper notice does not make a dismissal fair, and conversely, that giving improper notice does not make a dismissal unfair—*Treganowen v. Robert Knee & Co. Ltd* [1975] ICR 861. See further [42] and text accompanying. It appears that there is a just cause jurisprudence in Canada which marks an advance on the common law position. See Levitt, *The Law of Dismissal in Canada* (2nd edn. 1992) Ch. 6, and for a Barbadian attempt in this context, see *Barbados Plastics Ltd. v. Juliet Taylor* (1981) 16 Barb. L.R. 79 [45].
50. See generally M. Mead, *Unfair Dismissal Handbook* (2nd edn. Longman, 1983), Ch. 7, 121-124 *et seq.*; H. Collins, *Justice in Dismissal—The Law of Termination of Employment* (Oxford, 1992), chs. 1 and 2 especially at 46-52.
51. Collins [50, pp. 37-40]; *Iceland Frozen Foods Ltd. v. Jones* [1982] I.R.L.R. 439 per Browne-Wilkinson J. (“band of reasonable responses”).
52. This submission is not made with a great deal of force, however. Section C57(1) provides that a dismissal shall not be unfair if the reason assigned for it is one listed in (a) to (e), provided there is a factual basis for the assigned reason. Thus it would seem that the concept of unfair dismissal in the BVI, Antigua, and Barbuda differs to this extent from that in the UK. It seems that if the concept of just cause is wholly incorporated into section C57(1)(a)-(e), an unfair dismissal and a dismissal for just cause are identical. *Sed quaere*, however, the test for determining the unfairness of a dismissal in section C57(2)? And *quaere*, further, whether in any case section C57(2) is not displaced by section C57(1) on the basis of the principle, “*Generalia non specialibus derogant*”?
53. See also St. Vincent & the Grenadines, Protection of Employment Act 1980, section 4; Cayman Islands, Labour Law 1987, section 44; Montserrat, The Employment Ordinance 1979, section 21; Antigua & Barbuda, Labour Code 1976, section C59.
54. Unless the concepts of just cause and the fairness of a dismissal are identical in the BVI; ref. discussion [52].
55. *Prima facie*, a “dismissal” in such circumstances would be for a just cause (expiry) but what of the employer who uses a series of fixed term contracts in order to frustrate the purposes of the legislation? See Montserrat’s answer in section 21 of the Employment Ordinance 1979: “Provided that the Tribunal may deem a series of more than one fixed-term contracts between an employer and an employee to be a contract for an indeterminate period and therefore subject to the provisions of . . . this Ordinance, if in the Tribunal’s opinion the series of contracts is a wilful attempt on the part of the employer to avoid the provisions of this part of the Ordinance.”

56. In those circumstances, neither should the expiry of a fixed term; see the discussion in [49], Employment Ordinance 1988 (Turks & Caicos Islands), section 34(2)(b):

“ . . . an employee shall be treated as *dismissed* by the employer if, but only if—

(a) . . .

(b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract . . .” (emphasis added).

For the purposes of unfairness of the dismissal, however, the parties may contract out of this provision; see section 58.

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