REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 101 of 2006

IN THE MATTER OF

WINSTON E. BARROW

Appellant

AND

THE BOARD OF INLAND REVENUE

Respondent

PANEL:
I. Archie, C.J.
M. Warner, JA
W.N. Kangaloo, JA

APPEARANCES:
Appellant in person.
Ms. Esther Rajpaul for Respondent.

DATE OF DELIVERED: 11th April 2008.

I have read the judgment of Kangaloo, JA and agree with it.

I. Archie
Chief Justice

I, too, have read the judgment of Kangaloo, JA and agree with it.

M. Warner
Justice of Appeal

JUDGMENT

Delivered by Kangaloo, J.A.

FACTUAL BACKGROUND

1. From 5th October 1982 the Appellant was employed in the capacity of a professional accountant with the Trinidad and Tobago National Petroleum Marketing Co Ltd (NP). On 6th June 1990 this employment ceased by virtue of the termination of the Appellant's contract of employment by the said employer. The Appellant continued his professional career in the post of Chief Accountant at the National Insurance Board (NIB) from 1st June 1992 through to the year 1998. By letter dated 17th August 1998 his employment at this organisation was terminated by the employer.

2. The dispute between the parties to the instant appeal centres on certain payments made by the respective employers upon the termination of the Appellant's employment. More particularly the sum of $148,688.69 paid by NP in the income year 1990 and the $95, 847.92 payment made by NIB in the income year 1998 were assessed by the Board of Inland Revenue (BIR) as wages pursuant to **section 5(1)(e)** and **section 100** of the **Income Tax Act**, despite objections raised by the Appellant to such a categorisation. By notice of appeals I32 and I33, dated 29th July 2002, the Appellant exercised his right to appeal to the Tax Appeal Board against the assessment by the BIR with respect to the income years 1990 and 1998.

PROCEEDINGS BEFORE THE TAX APPEAL BOARD

Issues

3. The payments which remained in issue before the Tax Appeal Board can be summarily described as follows:

NP Payment – 1990:	Annual Vacation Leave-	$28, 702.04
	June 1990 Salary -	$12, 051.55
NIB Payment - 1998:	Three months pay -	$31, 786.20
	Vacation Leave (131 days)-	$64, 061.42

Consequently the following three questions engaged the Board's attention, namely:

(a) Whether the payments in question were emoluments and therefore liable to be charged with tax within the meaning of **section 5(1)(e)** and **section 100** of the **Income Tax Act**;

(b) Whether the payments represented compensatory payments for wrongful dismissal;

(c) Whether the payments qualified for exemption in accordance with the provisions contained in the **Income Tax Act: sections 5(6), 5 (6B) and 5(7)**.

Arguments advanced before the Tax Appeal Board

Vacation Leave – NP and NIB

4. With respect to the issue of the payment made to the Appellant both by NP and NIB in relation to vacation leave, the Appellant contended that his services were already terminated when these sums were paid. Furthermore his contract of employment did not provide for payment for unutilised vacation leave in the event of termination. Thus

these payments were not made pursuant to his contract and were therefore in the nature of ex-gratia payments. The Respondent in turn countered that the conclusion that a payment was ex-gratia did not automatically follow from the finding that the payment was not made pursuant to a contract of employment. Instead due consideration must be given to the nature of the payment as well as the reason which acted as the motivating factor behind the payment. In the Respondent's mind the payments were made as a result of the Appellant's services to the respective organizations and amounted to vacation leave accumulated during the course of his employment. Thus they could not fall within the purview of ex-gratia payments. Rather these payments had to be treated as emoluments and could therefore be subject to tax.

June 1990 Salary - NP

5. The argument raised by the Appellant regarding this issue was that he only worked for six days in the month of June and the excess of salary for the remaining days of the month was ex-gratia. It therefore followed that there must be an apportionment of his salary for this month along these lines so that only the amount paid for his six days of work should be taxed. In response the Respondent contended that no evidence was led with respect to the circumstances surrounding the Appellant's termination and that whilst the date of June 6th 1990 appeared in the Settlement Statement issued by NP, this must not unreservedly be taken to mean that this was the date of termination of the Appellant's contract. Additionally the point was made that were the Appellant unilaterally dismissed, as he in fact contended, it would not stand to reason that he would have been the recipient of an ex-gratia payment from his employer.

Three Months Notice – NIB

6. The Appellant's case in this regard was that his contract of employment stipulated that his services could be terminated by three month's notice to that effect being given by the employer. However the contract was silent as to the ability of the employer to tender three months salary in lieu of notice. This scenario therefore fell within the category of a breach of contract and thus the payment must be considered as being in the nature of liquidated damages. The Respondent's contention was that this payment could be regarded as 'garden leave'. According to their submission the payment by NIB was simply an advance of wages and therefore would be taxable as such.

Were the Payments Compensation for Wrongful Dismissal?

7. The Appellant argued that his employment was wrongfully terminated by both NP and NIB. The payments received by him were terminal payments made to extinguish a claim for breach of contract and did not fall within section 5(1)(e). It was submitted by the Respondent that this issue was outside the purview of the Court's jurisdiction and was more amenable to an action before the High Court. Additionally they contended that the Appellant had led no evidence to prove this allegation of wrongful termination namely: (i) that there was a finding of wrongful termination by the High Court, (ii) that the payments were compensatory in nature and (iii) that the payments were made so as to extinguish any claim for damages or breach of contract.

Whether the payments exempt from assessment to tax in accordance with the provisions contained in the Income Tax Act: sections 5(6), 5 (6B) and 5(7).

8. The Appellant's submission on this issue was that the payments made to him were not related to any office or service but rather were terminal payments made to extinguish any claim for damages for breach of contract. Such payments fell to be exempted from tax up to the prescribed level under section 5(6B) which expanded the scope of section 5(6) to include all terminal payments regardless of whether the payments were made on the basis of redundancy or ill health. The Respondent countered that these sections related solely to severance pay and were irrelevant to this matter as the Appellant did not contend that he was paid severance pay. The sections were also inapplicable as the Appellant's termination was not related to ill health or redundancy. Instead the Appellant was entitled to the payments in question in pursuance of the terms of his contract and as a result of the services rendered to his former employees. Objection was also taken to the Appellant's attempt to apply section 5(6B) to his tenure at NP in 1990 as this section was introduced in 1995 and was not specifically enacted so as to have retroactive effect.

Decision of the Tax Appeal Board

9. The Tax Appeal Board held that the payments made to the Appellant for the income years 1990 and 1998 were in the nature of emoluments and thus fell to be charged with tax in accordance with the provisions of section 5(1)(e) of the **Income Tax Act**. In relation to the payments made in respect of vacation leave the Tax Appeal Board was of the view that the Appellant was entitled to vacation pursuant to the terms of his contract. It was also held that they had no jurisdiction to interpret clauses in a contract of employment and therefore they could not entertain the Appellant's contention that his contract of employment did not provide for payment for unutilised vacation leave. The view was taken that at the time of his termination he had

accumulated vacation leave and the payments were made by his former employers were made in recognition of this fact. Therefore they were in the nature of emoluments and were taxable. The Tax Appeal Board accepted the submissions of the Respondent on the issue of the payment made by NP for the June 1990 salary. Thus it was held that there was no legal basis upon which the Appellant could rely to support his contention that the salary should be apportioned in relation to the days which he actually performed his duties. Additionally the Tax Appeal Board found that the Appellant had failed to lead sufficient evidence in order to discharge the onus of proof which was cast upon him to demonstrate that the payment was otherwise than in the nature of his due salary. Regarding the payment made by NIB for three months salary the Tax Appeal Board decided that this sum was paid to the Appellant as 'emoluments due'; a categorization which is evident from the terms of the Settlement Statement itself. It therefore fell squarely within the terms of section 5(1)(e) and was correctly assessed to income tax for the year 1998.

10. It was also held by the Tax Appeal Board that it was outside the remit of their jurisdiction to determine whether the payments in question arose out of the wrongful termination of the Appellant's employment. Rather the scope of their authority was limited to the determination of appeals regarding objections to assessments to income tax. Thus it did not fall to them to engage in a determination of the issue raised by the Appellant as to whether the payments were compensation for wrongful dismissal. A similar conclusion was arrived at in relation to the applicability of **sections 5(6), 5(6B) and (7)** to the case. The Tax Appeal Board found that as it had no jurisdiction to determine matters pertaining to the breach of a contract of employment, the question of the application of the aforementioned sections did not arise. Thus the Tax Appeal Board dismissed the

appeal of the Appellant and confirmed the assessment made by the BIR as being unassailable in point of law.

APPEAL TO THE COURT OF APPEAL

11. By Notice to the Registrar of the Tax Appeal Board dated 20th August, 2004, the Appellant indicated his intention to appeal the decision of the Court and made a request to have the Court state and sign a case in accordance with section 9 of the **Tax Appeal Board Act**. The Tax Appeal Board acceded to the Appellant's request but in the case stated indicated its reservations as to whether the Appellant's appeal to the Court of Appeal was out of time. They were of the view that the 21 day time limit prescribed by section 9(1) may be interpreted to include the date of the delivery of the decision. The necessary corollary of such a view is that the time for appealing the decision expired on 19th August 2004. (see: page 60 of the case stated.) The Tax Appeal Board however left the task of the determination of this preliminary point of law in the hands of the Court of Appeal.

Rival Contentions of the Parties on Appeal

The Appellant's Submissions

12. From an analysis of the Appellant's grounds of appeal as contained in his Notice of Appeal as well as his skeleton arguments the following submissions can be gleaned:

(a) The Tax Appeal Board erred in holding that it lacked jurisdiction to determine the issue of wrongful dismissal and to engage in an interpretation of clauses in an employment contract; a finding which amounted to an infringement of the Appellant's constitutional rights to a fair hearing and to protection of property. In the instant case the Appellant was dismissed by his

employers NP via the instigation and offer of the option to resign and in the case of NIB the employers shut him out on 18/8/98 by a letter purporting to dismiss him. In both cases these dismissals were unlawful because the employers tendered monetary payments in lieu of notice in the absence of any provision in the contract of employment authorising such action. The court erred in failing to consider the termination provisions in the contract (**EMI v Coldicott (1999) STC 809** per Lord Templeman). The payments made by NP and NIB therefore amounted to damages for breach of contract (**Gothard v Mirror Group Newspapers Ltd (1988) IRRL 396 CA** per Lord Donaldson MR) and damages are not taxable.

(b) The payment of three months salary by NIB amounted to payment in lieu of notice as the employee was not allowed to work out the notice period but was instead immediately dismissed. This case falls within the fourth category of payment in lieu of notice as contained in the case of **Delaney v Staples (1992) I.C.R. 483** per Lord Browne-Wilkinson namely where the employer summarily dismisses the employee and tenders a payment which is designed to extinguish a claim for damages for breach of contract. It therefore follows that the sum paid by NIB is not an emolument and cannot be subject to tax.

(c) The Tax Appeal Board erred in failing to apportion the June 1990 salary along the lines of 1/5 salary, 4/5 ex gratia payment in recognition of the fact that the Appellant only worked for 6 days in the said month. Two defining characteristics of a salary are that it is compensation for services rendered and it is paid in relation to some office. The payment beyond the 6th of June fulfills neither criterion and must be regarded as an ex-gratia

payment. The case of **Mairs v Haughey (1993) All E.R. 80** provides authority for the view that if a payment is made for two separate considerations they can be apportioned along those lines in the assessment of the same for tax purposes.

(d) The Tax Appeal Board erred in not properly considering the nature of the payments made to the Appellant in relation to vacation leave. The fact that the employer describes such payments as 'emoluments' is not determinative of their true nature. Instead the Court must consider whether the contract provided for payment for vacation leave which had not yet been taken in the event of any termination of services: **Colombo v Sutherland (1952) AC 469**. As neither contract of employment contain any terms authorising payment for leave not taken, the payments made by NP and NIB under this rubric must be considered as ex-gratia payments.

The Respondent's Submissions

13. The counter arguments raised by the Respondent in their skeleton submissions are as follows:

(a) The payments made to the Appellant by NP and NIB were in the nature of emoluments within section 5(1)(e) of the **Income Tax Act.** Section 100 of the Act defines an emoluments as meaning, *inter alia*, "all salary, wages, overtime, bonus, remuneration, perquisites….arising or accruing in or derived from or received in Trinidad and Tobago." It is clear that the amounts paid by NP for annual vacation leave and salary for June 1990 fall within this definition. The payments from NIB which covered three months salary and vacation leave also fall within the remit of section 100 and are therefore properly considered as

emoluments. All of these payments were made in accordance with the terms of the respective contracts of employment, and thus although they were paid upon the termination of the Appellant's services, they are still taxable: **Comptroller-General of Inland Revenue v Knight (1973) A.C. 428**.

(b) The Appellant cannot contend that the payments were made as a form of compensation for wrongful dismissal because no evidence has been adduced to demonstrate that: (a) there was a dismissal, (b) there was a decision of the High Court or Industrial Court to the effect that that there was a wrongful termination of employment, and (c) the payments were made so as to extinguish a claim for damages or breach of contract.

(c) The payment of three months salary by NIB cannot be considered as being within the realm of the fourth category of payments contained in **Delaney v Staples (ibid)**. There is no evidence of wrongful dismissal or breach of contract which would render the payment liquidated damages. Instead the payment must be held as falling within the purview of the first category delineated in **Delaney**, namely that of 'garden leave' where the employer gives proper notice of termination and tells the employee that he need not work out the notice period. In such a case the payment made by the employer must be regarded as an advance payment of wages which falls squarely within the definition of an emolument and is therefore taxable.

(d) The Appellant has provided no evidence to substantiate his claim that the payments made to him are exempt from tax up to the prescribed limits under sections 5(6) and (7) of the **Income Tax Act**. These sections apply only to severance payments

made on the termination of employment by reason of redundancy, ill health or retirement. In the instant case the payments made to the Appellant were benefits to which he was entitled pursuant to his contract, formed part of the remuneration for his services and were made as a result of the Appellant's service to the respective employers. Such payments are properly considered as being subject to income tax: **Heywood v Comptroller General (P.C.) 3 W.L.R. 794**.

Issues

14. At the hearing of the appeal the following issues were ventilated:

(a) Whether the Appellant's appeal to the Court of Appeal was out of time (preliminary point);

(b) Whether the payment made by NP of $12, 051.55 under the rubric of June 1990 salary should be apportioned so that only the sum paid up to 6th June would be taxable, the rest being ex-gratia;

(c) Whether the payment in 1990 by NP and 1998 by NIB to cover vacation leave which had not been taken up to the time of termination were made pursuant to the contract thus rendering it an emolument and therefore taxable under section 5 (1)(e) of the **Income Tax Act**; and

(d) Whether the payment in 1998 by NIB of three months salary could properly be made subject to tax.

Preliminary Point – Is the Appellant's appeal out of time?

15. The time limit within which a party can seek to appeal a decision of the Tax Appeal Board is circumscribed by section 9 of the **Income Tax Act** which reads as follows:

> *"**9.** (1) The appellant or the Board of Inland Revenue or other respondent, if dissatisfied with the decision of the Appeal Board as being erroneous in point of law, may, within twenty-one days after the delivery of the decision or within such other time as may be prescribed by rules of court under section 10, appeal against such decision by-*
>
> *(a) filing with the Registrar a notice in writing, in the prescribed form, requesting the Appeal Board to state and sign a case for the opinion of the Court of Appeal; and*
>
> *(b) by serving a copy of the said notice on the Board of Inland Revenue or other respondent or on the appellant as the case may be."*

16. In the instant case the decision of the Tax Appeal Board was delivered on 30th July 2004. The appellant filed the requisite notice with the Registrar indicating his intention to appeal and requesting that a case be stated by the Tax Appeal Board on 20th August 2004. The issue which consequently falls for resolution is whether the 21-day time limit begins to run from the date of the decision or whether time starts to accrue on the date following that of the decision of the Appeal Board. This determination is germane to the instant case owing to the fact that the Appellant's notice would fall one day out of time should the view be taken that the time for filing an appeal commenced on the 30th

July 2004; in which case the time limit would have lapsed into expiration on 19th August 2004. In the event that the appeal is indeed out of time the Court of Appeal can take no judicial notice of the matter because they would lack the jurisdiction to entertain the case at the appellate level.

17. Neither party to the instant appeal addressed this crucial preliminary point in their skeleton arguments or in their oral submissions to the Court. The ventilation of this issue requires that recourse be had to the **Interpretation Act**;[1] more specifically section 25(1) which provides as follows:

> *"**25.** (1) Where in a written law a period of time is expressed to be reckoned from a particular day or a particular event, that day or the day of the event shall not be included in the period."*

18. This section is pertinent to this preliminary issue by virtue of the fact that section 9(1) operates so as to express the period of time for appealing as being reckoned from the date of the decision of the Tax Appeal Board. From an application section 25(1) the conclusion can validly be drawn that the 21-day time limit for appealing the decision of the Tax Appeal Board begins to accrue from the day after their decision is rendered. It therefore cannot be said that the Court of Appeal has no jurisdiction to entertain the instant appeal on the basis that it is out of time. Section 25(1) expressly provides that the 30th July 2004 is not to be counted in the computation of the time within which the Appellant was required to file his notice with the Registrar. In fact, the accrual of the 21-day time limit commenced on 31st July 2004. Thus the reservations expressed by the Appeal Board that the Appellant's appeal is out of time because section 9(1) "may be

[1] Ch. 3:01

interpreted to mean that the 21 days include the date of the delivery of the decision" (at page 60 of the case stated) are unfounded. Consequently the instant appeal can engage the attention of the Court at the appellate level and this issue is therefore decided in favour of the Appellant.

Is the Payment by NP of $12, 051.55 representing salary for June 1990 to be apportioned?

19. This issue was exhaustively addressed by the Appellant in his skeleton arguments wherein he contended that the salary for June 1990 should apportioned in the assessment to tax by the Respondent in recognition of the fact that he did not work for NP beyond 6th June 1990. Thus it was submitted that the payment for the dates 7th June through till 30th July were properly regarded as ex-gratia. The Respondent's written submissions are devoid of any arguments which would indicate that they took notice of this issue. However at the hearing of the appeal, the Respondent initially stated that its position on this matter was that they had no evidence indicating what the payment in question was intended to represent. Thus they had regard to the settlement statement of NP which provided that the payment was made under the rubric of 'salary' and therefore it can validly be deduced that this sum was paid in relation to the Appellant's employment. Thus they consequently concluded that the payment was subject to tax. However upon closer reflection the Respondent wisely decided to recant their earlier submissions. They therefore conceded that the amount of the June 1990 salary which related to payment for the period 7th June to 30th June 1990 could not attract tax. This concession was based on the finding of the Tax Appeal Board that the Appellant's employment with NP ceased on 6th June 1990; a finding of fact which cannot be disturbed at the appellate level. Thus there must

be an apportionment of this payment along the lines of 1/5 being taxable under section 5(1)(e) of the **Income Tax Act** as an emolument (namely a salary) and 4/5 being ex-gratia, as contended for by the Appellant.

Is the payment in 1990 and 1998 for vacation leave properly regarded as an emolument within the meaning of section 5(1)(e) and therefore taxable?

20. An appropriate starting point in the resolution of this issue is an analysis of the provisions contained in section 5(1)(e) of the **Income Tax Act**, which section reads thus:

> *"**5.** (1) Income tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereafter for each year of income upon the income of any person accruing in or derived from Trinidad and Tobago or elsewhere, and whether received in Trinidad and Tobago or not in respect of-*
>
> *(e) gains or profits from any employment or office including pensions or emoluments within the meaning of section 100….."*

The expression 'emolument' is thus defined by Section 100:

> *"all salary, wages, overtime, bonus, remuneration, perquisites including the value of board and lodging, stipend, commission or other amounts for services, directors' fees, retiring allowances or pension, arising or accruing in or derived from or received in Trinidad and Tobago and which are assessable to income tax, but does not include any salary or share of profits arising from a*

trade, business, profession or vocation carried on by any person either by himself or in partnership with any other person."

21. At the hearing the Respondent contended that these sums paid in 1990 and 1998 represented payment for vacation leave which the Appellant had earned over the period of his employment. Thus it was submitted that based on the authority of **Comptroller-General of Inland Revenue v Knight (1973) A.C. 428** these payments which were made pursuant to a contract of employment were emoluments and therefore taxable. However the Respondent was unable to unearth any authority relating to the legal position regarding leave which is acquired but not taken at the date of the termination of employment. The Appellant's submission was that the contract of employment with NP and NIB contained no provision pursuant to which he was entitled to be paid upon termination of his employment for vacation leave which he had not taken and thus these payments were ex-gratia.

22. The Appellant's submissions on this issue are well founded in law. The case of **Commissioner of Income Tax and Colombo v Sutherland (1952) AC 469** expressly addresses this issue of whether payment for leave not taken by an employee before his death is a gratuitous payment or a profit of employment due to the deceased or his estate which could be made subject to income tax. Here the company Colombo Apothercaries Co. Ltd paid a sum of $RS15,750.00 to the respondent as executrix of the estate of the late R.S. Sutherland, who was employed by the said firm as a managing director until his death. This sum was subsequently held to be assessable to income tax by both the Commissioner of Income Tax and the Board of Review on the basis that it was a profit of the deceased employment and therefore fell into the category of leave pay under section 6(2)(a)(i) of

the **Income Tax Ordinance, Ceylon**. This decision was reversed by the Supreme Court of Ceylon, consequent to which the Commissioner lodged an appeal. The Privy Council upheld the decision of the Supreme Court. It was held that in a case such as this:

> *"the question is whether a payment was made ex-gratia or in discharge of a contractual obligation [in which case] the best evidence is the contract. If the contract is in writing or, if it is oral but its terms are known beyond doubt, the question whether the payment was contractual depends on the contract alone." Per Lord Normand at page 478.*

This learning led the Court to hold that based on the terms of the contract as construed in its natural sense, there was no provision by which the employers were bound to pay leave pay when no leave was taken, neither was there any basis for implying such a term. Thus the sum of $RS15,750.00 which was paid to the respondent was properly regarded as being a gratuitous payment. It was not a payment which was made pursuant to the terms of the contract of employment and therefore did not fall to be assessed for income tax purposes.

23. Judicial consideration was also paid to this issue in **Morley v Heritage [1993] IRLR 400**, upon which the Appellant placed strong reliance at the hearing. Here the plaintiff bought a claim against his employers for the sum of ₤2000 plus interest which represented 13 days pay in relation to holiday leave which had accrued but which he had not yet taken at the cessation of his employment. His contract of employment contained a term entitling him to four weeks holiday with pay for each year of his employment, the time and period of such leave being determined by the mutual agreement of the parties. The plaintiff contended that there should be implied into the contract a term to the

effect that if his employment terminated without his having taken any part of his holiday entitlement the company would pay him in lieu thereof. This contention failed to meet with success as the Court held that under the contract of employment, the employers never expressly agreed to make such payments neither was there any reason for implying such a term in the contract on the basis that it was necessary in order to give business efficacy to the contract.

24. The aforementioned cases aptly demonstrate that in determining whether a payment for accumulated vacation leave made to an employee upon the termination of his employment is liable to income tax, the initial determination to be made by the Court is whether this payment is made pursuant to the contract of employment or whether it is in the nature of a gratuitous payment. A resolution of this issue is purely a mater of the construction of terms of the contract of employment. Once there is no term which has the effect of compelling the employer to pay the employee for the accumulated leave, the employee has no entitlement to such payment. In the event the employer makes such a payment, in the absence of a term in the contract expressly authorising payment in lieu for accumulated leave, the payment is gratuitous and therefore cannot attract income tax. Applying this principle to the instant appeal it must be concluded that the sum of $28, 702.04 for the income year 1990 and the sum of $64, 061.42 for the income year 1998 cannot be held as being an emolument and therefore taxable within the purview of section 5(1)(e) of the **Income Tax Act**. The Appellant's appeal must therefore succeed with regard to this issue.

Is the payment of three months salary in 1998 taxable?

25. The case of **Delany v Staples [1992] I.C.R. 483** provides useful assistance in this regard. The question in that case was whether a payment in lieu of notice paid by an employer upon the termination of a contract of employment without notice fell within the definition of 'wages' as prescribed by section 7 of the **Wages Act 1986, UK**. Both parties to the instant appeal placed extensive reliance upon the following passage from the judgment of Lord Browne-Wilkinson, which must be quoted at length to make the matter plain:

> *"The phrase "payment in lieu of notice" is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories.*
>
> *(1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.*
>
> *(2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.*

(3) *At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.*

(4) *Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment.*

The nature of a payment in lieu falling into the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages for breach of contract." (page 488-489 of the **Delaney** case)

26. The Respondent's submission is that the 1998 payment fell squarely with the situation described at category 1 in the **Delaney** case; known colloquially as 'garden leave.' Thus the payment

represented an advance of wages and could be made subject to income tax by the application of section 5(1)(e) of the **Income Tax Act**. On the other hand, the Appellant contends that his case falls within the parameters of category 4 of **Delaney** because he was summarily dismissed without proper notice being given by the employer. At the hearing Mr. Barrow submitted that proper notice involved three elements: it must be written, it must be of a certain length (as prescribed by the law or the terms of the contract) and the employee has a right to work out the notice period. As authority for the last mentioned submission the case of **William Hill Organisation v Tucker [1998] IRLR 313** was cited.

27. Before going into an analysis of the **William Hill** case and its relevance, the matter may be put beyond doubt by referring in full to the letter of termination given to the appellant by NIB. It is:

"The National Insurance Board
Head Office, Cipriani Place
2 A Cipriani Boulevard
Port of Spain

August 17, 1998

Mr. Winston E. Barrow
137 Alyce Glen
Petit Valley
Diego Martin

Dear Mr. Barrow,

We hereby give you three (3) months notice of termination of your employment effective November 16, 1998. You will not be required to report for work during the period of notice and should therefore ceased reporting immediately. You may collect a cheque which represents three (3) months pay and all termination allowances from the Board on the 21st day of August, 1998 from the Executive Director.

We have been advised that grounds may also exist for summary termination of your employment and we reserve our position in this regard.

Yours sincerely,
For and on behalf of the
Board of Management,

Sgd. Trevor Romano
Executive Director"

From this letter it is abundantly clear that the termination of the appellant's employment was effective on the 16th November 1998, three months after the notice was given on the 17th August 1998.

This therefore becomes a classic case of 'garden leave', in which the sum paid of $31,786.20 represents an advance on wages and therefore taxable.

28. Upon careful examination of the **William Hill** case it is apparent that there are several characteristics which operate so as to enable it to be distinguished from the instant appeal. Firstly that case arose out of a factual matrix which is at odds with the instant appeal. **William Hill** involved an application for an injunction by which the plaintiff, the defendant's employers sought to restrain him from taking up a position with a major competitor for 6 months; this six month period being the period of notice which the employee was required to give the employer before withdrawing his services, a term to that effect being contained in Mr. Tucker's contract of employment. Secondly the position held by Mr. Tucker was a specific and unique post. Thirdly the skills necessary to the proper discharge of his duties as a senior dealer necessitated their frequent exercise. It is in that context that the court held that there was to be implied into the contract of employment a term which entitled the employee to a right to work; that is Mr. Tucker had the right to work out any notice which he may have given and it was the employer's duty to allow him to exercise this right. The Court also made the observation that the implication of such a right was dependent upon the construction of the particular contract in light of its surrounding circumstances.

29. The following passage from the judgment of Morritt LJ, though in the nature of obiter dicta, is worthy of note:

> *"In my view, in all cases involving garden leave the first question must be that posed by Sir John Donaldson in Langston v AUEW (no. 2) [1974] IRLR 182. Does the consideration moving from this employer extend to an obligation to permit the employee to do the work or is it confined to the payment of the remuneration agreed? If the answer is in the sense of the latter alternative, then the employer is entitled to send his employee home on garden leave notwithstanding the absence of an express or implied power to do so because there is no contractual obligation to prevent him. If the answer is in the sense of the former alternative, then the employer needs a provision entitling him to send his employee on garden leave so as to absolve him from what would otherwise be a breach of contract. It is unlikely, given the hypothesis upon which the point arises, that there could be an implied power for that purpose. Thus, in practice, an employer will need to stipulate for an express power to send his employee on garden leave in all cases in which the contract imposes on him an obligation to permit the employee to do the work."* (page 317 – 318 of the **William Hill** case)

30. An application of the aforementioned principles to the instant appeal leads me to the conclusion that there is no ground for implying a right to work into the contract of employment with NP, as contended for by the Appellant. There is no evidence demonstrating that this case falls within the circumstances of the **William Hill** case which specifically dealt with persons who possessed a highly specialised skill. Thus, contrary to the Appellant's contention, there is no basis upon which to imply a 'right to work' term into his contract of

employment with NP. Thus the employers had the right to send Mr. Barrow on garden leave. It is their right to say "Mr. Barrow your employment is being terminated with the requisite three months notice being given. However here is the money for the three months, don't bother to come to work." It is not incumbent upon them to demonstrate that there is some term in the contract enabling them to waive the obligation of the employee to report to work. This appeal therefore falls within the first category of 'payment in lieu of notice' scenarios described in **Delaney** and thus the 1998 payment is simply an advance payment of wages. It therefore falls within the definition of an emolument pursuant to section 100 of the **Income Tax Act** and emoluments are subject to tax in accordance with section 5(1)(e) of the said Act. It therefore follows that the Appellant's appeal in relation to this item must fail.

CONCLUSION

31. The Appellant's appeal in this matter is allowed in part. Thus he is entitled to succeed in relation to the issue of the apportionment of the June 1990 salary payment made by NP. Therefore there must be an apportionment of this payment along the lines of 1/5 being taxable under section 5(1)(e) of the **Income Tax Act** as an emolument (namely a salary) and 4/5 being ex-gratia. The Appellant's appeal in relation to the payments made in relation to vacation leave is also allowed as such payments were ex-gratia owing to the fact that neither contracts of employment authorised any payment being made in relation to accumulated vacation leave which had not been utilised by the employee at the termination of his employment. However the appeal in relation to the three month salary payment made in 1998 must fail because the payment was simply an advance of wages and therefore fell squarely within the purview of section 5(1)(e). It follows that this matter must be remitted to the BIR for an assessment of tax in

accordance with the legal opinions expressed in this judgment. Given the outcome and the fact that the appellant represented himself, I will make no order as to costs.

Wendell N. Kangaloo
Justice of Appeal