IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. C.L. 2000/E024

BETWEEN	**JANICE ELLIOT**	**CLAIMANT**
AND	**EURO STAR MOTORS LIMITED**	**DEFENDANT**

Heard May 8, 9 and 10, 2008 and November 12, 2009.

Whether breach of contract; whether Claimant was wrongfully dismissed; extent of damages in wrongful dismissal; whether Claimant entitled to incentive bonus on a proper construction of the contract of employment; no evidence of satisfaction of conditions precedent to entitlement; Defendant deciding not to call witnesses; effect thereof on burden of proof; Claimant putting in witness statement of Defendant's witness as hearsay under CPR 29.8(3); whether this would be the evidence of the party putting such in; weight to be attached thereto.

Mr. John Graham and Ms. Analeisa Lindsay instructed by Khara East of John G. Graham and Company for the Claimant; Mr. Jermaine Spence and Ms. Kedian Francis instructed by Dunn Cox for the Defendant.

CORAM: ANDERSON J.

1) Janice Elliot, ("the Claimant") who at the time of trial on May 8, 2008 resided in Tamarac, Broward County, Florida in the United States of America, had previously been employed as Sales Manager at the Defendant's business. Euro Star Motors Limited ("the Defendant") is a car dealer which sells motor vehicles and is a general distributor for Daimler-Benz AG in Jamaica. According to the Claimant's Witness Statement, and admitted by the Defendant, on or about the 27th November 1997, she had signed an agreement to act in the aforesaid position. The agreement did not define the length of the contract but inter alia, provided for either side to be able to terminate the contract on giving one month's notice. The agreement also provided that:

   a) the Claimant was to be remunerated at the rate of $850,000.00 per annum payable monthly;

b) she was also to be paid an incentive bonus at the end of each trading period based upon the earnings of the Sales Department;

c) She would be provided with a fully maintained motor car;

d) She was entitled to vacation leave of three (3) weeks after the first year of service and four (4) weeks after five (5) years of service and a further three (3) weeks for each successive year thereafter.

2) According to the Claimant, on or about the 19th of January 2000, she met with the then General Manager of the Defendant, Mr. Marc Doig, who demanded that she submit her resignation from her position with the company. She said she refused. Her refusal was followed the same day by a letter of request in the same terms. Following her refusal to resign, she wrote a letter to Mr. Doig requesting that he state the reasons for the request for her resignation. It was her testimony that in response she received a letter of dismissal dated January 26, 2000 which was superseded by another letter a day later in which she was accused of "serious breaches of the company's policies and procedures as it relates to the receipt and handling of monies for company transactions".

3) It was this dismissal which the Claimant in her statement of claim alleges is a breach of her contract of employment. According to her pleadings, by reason of the breach of contract, she has suffered loss and been deprived of the salary that she would have earned had she not been terminated. In particular, it is pleaded that the Defendant has failed and/ or refused to pay over to the Claimant sums due her as commission under the terms of her contract "including the commission due to the plaintiff from the sale of approximately 112 Mercedes Benz buses sold by the Defendant to MMTH from which the Defendant earned US$1,608,746.17 in total commissions". According to the statement of claim, "Notwithstanding her request for an account of the net profits earned over the period April 1, 1998 to March 31, 2000, the Defendant has failed or refused to give an account to the plaintiff. Consequently the plaintiff is unable to give particulars of the commissions payable to her by the Defendant until after the said account has been given by the defendant".

4) In her statement of claim the Claimant sought the following reliefs:

a) Damages for breach of contract of employment made between the Claimant and the Defendant on the 27th day of November 1997.
b) A Declaration that the Defendant is liable to pay to the Claimant commission on the net sales for the period 1st April 1998 to 31st March 2000, including but not limited to approximately US$160,374.62 as commission from the sale of approximately 112 Mercedes Benz motor buses to MMTH.
c) An account of the monies due to the Claimant for the period 1st April 1998 to 31st March 2000.
d) That the Defendant pay to the Claimant such monies as are found to be due to the Claimant for the period aforesaid.
e) Interest on such sum found to be payable as at March 31, 2000.
f) Further and other relief, including costs.

5) The Defendant, in response to the Claimant's Amended Statement of Claim, filed its own Amended Defence on May 2, 2008 in which it admitted the averments made in paragraphs 1 to 3 of the Claimant's statement of claim subject to the assertion that with respect to her leave entitlement, the Claimant was entitled to three (3) weeks leave after the end of year one and four (4) weeks after the end of year five. It also admitted that services of the Claimant were terminated by letter dated January 26, 2000.

6) The Defendant also set out a number of averments in its defence which seem to be directed at establishing that the Claimant had breached an implied term of her contract, the duty to act in good faith, by depositing monies received for and on behalf of the Defendant, into her personal bank account and had thereby made a secret profit.

7) The Defendant called no witnesses in order to support the averments contained in its defence. It had indeed filed and served a witness statement of one Dermot Ricketts but had decided not to call him. As a consequence of that decision, the Claimant applied and was granted permission to put in the witness statement of Mr. Ricketts as hearsay. I shall return to the implications of that later.

8) The issues raised in the Claimant's statement of claim are:
   a) Whether she was wrongfully dismissed;
   b) If so, what are the consequences of that dismissal;
   c) Has the Claimant established that she is entitled to the commissions claimed in her statement of claim?

9) In terms of evidence before me, the only evidence I have is that of the Claimant as contained in her witness statement or adduced in cross examination, and the hearsay evidence of Mr. Ricketts, to the extent that I afford the latter any weight.

10) The Claimant in her witness statement focuses upon what she says were arrangements between the Defendant company, and an English Company named Charter Young Limited who apparently acted as a go-between for Daimler Benz AG and the Defendant in transactions involving the purchase of cars for resale on the local market. There was no document which was provided as an exhibit that would demonstrate how the arrangement worked and so the only evidence of this is that given by the Claimant. According to the Claimant's evidence, the transactions for the purchase of cars from Daimler Benz AG required the interposition of a local "nominee" who was paid a certain sum. The monies for the payment of these "nominees" were sent from the representative of Charter Young Ltd. Mr. Heywood, directly and according to the Claimant had nothing to do with the Defendant, although the Defendant benefited by the increase in the number of vehicles it sold locally. It is not clear from her evidence why this system of nominees was necessary and the court will not speculate. What is clear is that the payments for these "nominees" were made directly to the Claimant into her account at the National Commercial Bank. Indeed, the Claimant in her witness statement said: "All the monies paid to me by Mr. Heywood were not stated in any way to be for the benefit of the Defendant. They were paid to me for the sole purpose for me to pay the persons whose names would be used as nominees to facilitate the purchase of vehicles from Daimler Benz. These purchases however directly benefited the Defendant and its relationship as the dealers of Mercedes Benz in Jamaica as they resulted in the Defendant recording larger sales from Daimler Benz".

11) The Claimant does, however, state in her witness statement that in or about February 1999, the new financial controller at the Defendant requested "a reconciliation of the Defendant and Charter Young's accounts". She further stated that in November of 1999, Mr. Heywood came to Jamaica and contacted the former financial controller, Ms. Lui, with a view to "reconcile the Charter Young account". It seems clear that the Claimant proceeds on the basis the termination of her contract of employment by

the Defendant on the basis of "serious breaches of the company's policies and procedures as it relates to the receipt and handling of monies for company transactions", is a direct reference to the handling of the sums she said she received from Charter Young to pay nominees. This is not specifically stated in the dismissal letter.

12) The Claimant acknowledged in cross examination that at the time of her dismissal she received a cheque for $161,888.25. She also acknowledged that this was more than her monthly salary, which based on her contract, would have been some $70,833.33 before tax and other deductions. She could not confirm that this represented pay in lieu of notice. She also did not dispute receipt of other sums for refund of pension contributions as well as another payment in the sum of $69,063.77. The Claimant also claimed that the Defendant had not paid her the incentive commissions/bonus to which she was entitled in respect of sales concluded while she was still contracted to the Defendant. However, neither in her statement of claim nor witness statement does she say what that sum is. In fact, she says, she has not been able to compute it because she does not have the basic information to do so.

13) While the Defendant called no witnesses, the Claimant did apply and was granted permission to put into evidence the witness statement of Dermot Ricketts who had provided one for the Defendant but had not been called by it. In Blackstone's Civil Practice 2008 at paragraph, the learned author states:

> Once it becomes clear that a party who has served a witness statement is not going to use it, and it is indicated that another party wishes to use the disclosed statement, the judge has a discretion whether to permit use of the statement (**McPhilemy v Times Newspapers Ltd and Others (No. 2)** [2000] 1 WLR 1732)

14) I had said earlier that I would comment upon the fact that the Claimant successfully applied to have the witness statement of Dermot Ricketts, put in as hearsay evidence pursuant to CPR 29.8(3). Mr. Ricketts had provided a witness statement on behalf of the Defendant but the Defendant had then decided not to call him to testify. Rule 29.8 (3) of the Civil Procedure Rules (2002), provides as follows:

'Where a party who has served a witness statement does not-

(a) intend to call that witness at the trial: or

(b) put the witness statement in as hearsay evidence,

any other party may put the witness statement in as hearsay evidence.'

Upon the application of the Claimant and over the objections of the Defendant I allowed Mr. Ricketts' witness statement to be put in.

The question which arises is: "What is the status of this hearsay evidence"? It was the submission of Defendant's counsel that it was now evidence for the Claimant and that while its weight was still an issue, the Claimant was bound by its contents. He also submitted that the Court is also obliged to give significant weight to the evidence contained in the statement. It was further submitted that the party that introduces the evidence is bound by it and counsel cited Stewart Sime, in A Practical Approach To Civil Procedure, Tenth Edition, at page 498, paragraph 39.43. There the learned author states:

> "The CPR, r 32.5(5), provides that where the party who has disclosed a witness statement does not use it at trial, 'any other party may put the witness statement in as hearsay'. In **McPhilemy v Times Newspapers Ltd No.2** [2000] CPLR 335 the party who disclosed a witness statement decided against calling the witness. The opposite side then attempted to put the statement into evidence for the purpose of proving that its contents were untrue. Permission was refused, because of the general rule of evidence that a party is not allowed to adduce evidence that his own witnesses (in this case the witness who made the witness statement) are not to be believed on their oaths."

The passage would suggest that the witness who gave the witness statement becomes the witness for the person tendering the statement.

The Issues

15) Claimant's counsel in his closing submissions, having posited that this may be regarded as "a simple case of breach of contract and wrongful dismissal, which may appear to be simply determined" stated the issues in the following propositions:

a) The Defendant wrongfully terminated the Claimant's employment contract, thereby breaching the employment contract;

b) The Defendant also breached the Claimant's employment contract by failing and/or refusing to pay her all outstanding incentive bonus (commission) due and owing to her for the relevant period; and

c) The quantum of damages to which the Claimant is entitled which includes damages for wrongful termination and the calculation of the outstanding incentive bonus (hereafter referred to as commission) due and owing to the Claimant.

16) Defendant's counsel in his own closing submissions does not take issue with this formulation of the issues by the Claimant, although he does object to what Claimant's counsel purports to raise as "ancillary matters" in his closing submissions. Although the Defendant has not led any evidence through its own witnesses, it must be remembered that the rule, "she who alleges must prove", still requires the Claimant to establish her case on a balance of probabilities. Where a defendant fails to provide any evidence in support of its defence, and assuming the credibility of the claimant has not been destroyed in cross examination, there would normally be a strong basis for saying that, given that the only evidence is that of a claimant, then the claimant should succeed on a balance of probabilities.

Has the Claimant been wrongfully dismissed?

17) At Common Law an employer was entitled to dismiss an employee for any reason or no reason at all. The only issue was whether any notice required had been given. Wrongful Dismissal has been defined as where an employee has been dismissed without notice or an employee has not been given the right amount of notice, or the employment is terminated contrary to the contract. Wrongful Dismissal is based upon the actual contract between the employer and the employee and so breaches of that contract by the employer could give the employee the right to sue for Wrongful Dismissal.

18) For the purposes of this discussion, I adopt the following from Gwyneth Pitt, **Employment Law, Fifth Edition**, paragraph 8-004.

"Contracts of employment are usually drawn up to last indefinitely. But people cannot be tied to each other forever and at Common Law the rule grew up that either party could lawfully terminate the contract of employment provided that reasonable notice was given. .....At Common Law, it is still true that if reasonable notice to

terminate is given, then the contract is terminated lawfully, and it follows that the employee has no claim for wrongful dismissal. It does not matter that the employer has terminated for a bad or arbitrary reason or indeed no reason at all; nor does it matter for how long the employee has been employed, nor his record; provided that the employer has given adequate notice, the employee has no claim. This is seen as the major defect of the Common Law position".

19) It is not surprising that most Common Law jurisdictions have intervened statutorily the redress this seeming imbalance in favour of the employer. In the instant case, the contract provided for termination on one month's notice. It is trite law that where the contract provides for a period of notice, payment in lieu thereof is an adequate alternative. In fact, as a matter of practice, it is accepted for an employer to give the employee wages in lieu of notice even if the contract does not provide for this. The case of **Konski v Peet** [1915] 1 Ch 530, a decision of the House of Lords, is authority for this proposition. In that regard, it is to be noted that the Claimant in the course of her cross examination agreed that she did believe part of the payment she received on termination was pay in lieu of notice.

20) According to the termination letter the Claimant was dismissed immediately but the evidence from the Claimant and the witness statement of Dermot Ricketts taken together, give reason to believe that pay in lieu of notice was indeed received. Indeed, the hearsay evidence of Ricketts was to the effect that the sum of $161,888.25 which was paid to the Claimant was for "vacation leave pay, notice pay and incentive bonus". As noted above, the Claimant was unable to say that the sums she had been given in the cheques in January 2000, was not for notice pay.

21) For these purposes, I accept the submission by the Defendant that where a witness statement of a witness who is not called is put in by the party on the other side, that is not the party for whose benefit the statement was originally given, the evidence is that of the party who puts it in. Thus, in this case, the evidence of Mr. Ricketts is relevant as to the matters deponed to therein, subject to the question of the weight this court should attach to it.

22) The question which this court must decide is whether the fact that the letter of termination said that the dismissal was summary and for cause but has failed to

provide the evidential basis of the "cause", is determinative of the question whether the dismissal was with notice and not wrongful or, alternatively, is per se wrongful. The Claimant says her dismissal was wrongful and she must show by evidence that it is. She must show by reference to the contract terms that she was not given payment in lieu of notice in accordance with its terms. It seems to me that she must do more than come to this court and say: "I do not know if I was given notice pay: make the Defendant show that it did pay me such". That would be to reverse the burden of proof. She must assert that she was not paid in lieu of notice or that any pay received was not appropriate for the period of notice.

23) In that regard, the submission of the Claimant that the Defendant "has abandoned its position that the Claimant was dismissed for cause" by not calling evidence, is wholly misconceived. Indeed, the following closing submissions of the Claimant reinforce the misconception as they seem to seek to put the burden of proof on the Defendant to show that the Claimant was not wrongfully dismissed rather than remaining with the Claimant to show that she was.

a) The Claimant pleaded that she was wrongfully dismissed and has shown the circumstances, she believes led to her termination, which have not been refuted. Further, she has shown by evidence that she did not receive and use for her own purpose or benefit, funds meant for the Defendant, which is what the Defendant pleaded in its statement of case, but has brought no evidence to prove.

b) The Defendant could have relied on Mr. Doig to confirm its statement of case, that the Claimant was terminated for cause and what that 'cause' was, if any. The Defendant failed to do this.

c) The Defendant could have called evidence to show that the Claimant was terminated with one month's notice or one month's payment in lieu of notice, if that was the case. The Defendant failed to do this. The Defendant could have called evidence to clarify figures and letters that were written to the Claimant by the Defendant, but failed to do so.

d) It is submitted that the Defendant's failure to call such evidence was as a result of its incapacity to call such evidence. It is further submitted that the Defendant therefore ought not to be allowed to ask the Court to draw inferences from

documents relied on by the Defendant, which it ought properly to have called evidence to clarify.

24) In considering the facts of this case I have found to be extremely instructive, the unreported case of **LisaMae Gordon v Fair Trading Commission Claim** No HCV 2699 of 2005, decided by my learned brother Brooks J on March 28, 2008. The judge in that case adverted to the classification of dismissals articulated by Lord Reid in **Ridge v Baldwin** [1963] 2 All E.R. 66, cited before him. These were characterized as "dismissal of a servant by his master; dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal". In the instant case, as in Gordon, it seems clear that the circumstances fall within the third category. I shall make extensive citations from the Gordon judgment below.

25) In **LisaMae Gordon**, the claimant an attorney-at-law was employed to the Fair Trading Commission ("FTC"). The FTC purported to terminate her employment contract. It was submitted on her behalf that her employer was seeking to dismiss her without adhering to the terms of the contract. The judge found that a line of cases cited before him provided authority for the proposition that where an employer seeks to terminate an employment contract *without adhering to the terms of the contract*, then the termination would be deemed wrongful.

26) In the case of Ms. Gordon, the contract provided that the agreement could be terminated:

a) by either party giving to the other party three (3) months notice in writing (or three months pay in lieu thereof) of intention to so to terminate unless any of the parties agree to waive their right to notice;

b) By the Commission with notice or payment in lieu of notice in the event of any of the following :-

   i) Poor performance or non performance;

   ii) Neglect of duty;

   iii) Breach or non-observance of any of the stipulations herein contained;

c) By the Commission giving three months notice in the event the Commission ceases to operate.

d) By the Commission without notice or payment in lieu of notice in the event of dishonesty, misconduct or gross negligence which is in the opinion of the Commission likely to bring the Commission or its employees into disrepute if such dishonesty or misconduct is in relation to the affairs of the commission.

27) It is clear from this case that where appropriate notice has been given or payment in lieu thereof has been made, consistent with the terms of the contract, there is no obligation to give reasons for dismissal. Indeed, also as noted in **Halsbury's Laws of England (4th Ed Reissue)** Volume 16, paragraph 299 there is no common law right for an employee to be given reasons for his dismissal by his employer. Nor under the Employment (Termination and Redundancy Payments) Act is any such right given.

28) The letter of termination which was given to Ms. Gordon in that case was in the following terms:

> "We are of the view that the course of your employment here at the Fair Trading Commission has not been as smooth as we would have liked it to be. An excessive number of working hours has been spent settling recurrent disputes and addressing numerous concerns related to a wide variety of matters.
>
> By your own account, as expressed in your letter to the Permanent Secretary of the Ministry, you do not believe that it is possible for you to have a fair hearing within the FTC of a number of concerns regarding your contract of employment. This indicates an irretrievable breakdown of your relationship with the organization.
>
> For these reasons, we have decided that it is in the best interest to release you from your contractual obligations, *with immediate effect,* and to compensate you for the unexpired portion of your contract".

29) It will be noted that in the LisaMae Gordon case the dismissal letter spoke of "immediate dismissal" and also seemed to set out the bases for dismissal for cause, similar to the instant case. There, the judge upheld the submission for the defendant FTC that the FTC had complied with the conditions of the contract by having paid the sum due in lieu of notice. He continued: "The fact that the letter mentions other matters does not detract from its stated adherence to the contract". He then went on

to adopt the dicta of Wolfe J.A. (as he then was) in **Cocoa Industry Board and Others v Melbourne**, (1993) 30 J. L.R. 242, when he said, in what Brooks J referred to as "similar circumstances" at page 246.

> "The letter of dismissal ... did purport to set out reasons for the dismissal. However, the letter clearly stated that the employee was being paid one month's wages in lieu of notice. ... The manual clearly states that dismissal for cause attracts summary dismissal, that is, dismissal without the necessity to give notice or wages in lieu of notice. Having stated that there were reasons for the dismissal the (employers) were entitled to dismiss the employee without notice or wages in lieu of notice. The tendering of one month's wages in lieu of notice is cogent evidence that the dismissal was not for cause. The (employers) in terminating the contract, employed one of the methods permitted by the manual ... to terminate the contract."

30) Brooks J accordingly found that Ms. Gordon's contract had not been wrongfully terminated. The judge also held that the further dicta of Wolfe J.A. in the Cocoa Industry case, insofar as it purported to consider what would be the appropriate payment in lieu of damages in a wrongful dismissal case, was apposite, when he said:

> "In any event this type of award is only properly made where the contract is for a fixed period of time and is terminated before the effluxion of time in which case, the measure of damages is for the unexpired portion of the contract, or for so long as it has taken the injured party to obtain new employment, whichever is less, subject to the requirement to mitigate one's loss".

31) In the instant case, counsel for the Claimant has submitted that the fact that the defence referred to the Claimant having improperly dealt with monies allegedly received for and behalf of the Defendant was evidence that the Claimant's employment was terminated "for cause". Given the dicta in **Gordon** referred to above which I accept as a correct statement of the law, as well as the summary of the law on wrongful dismissal I am prepared to hold that the termination was not unlawful. The Claimant has failed to provide evidence which on a balance of probabilities shows that her dismissal was wrongful.

32) But even if I am wrong on that, the fact is that the Claimant would be in no better position as she would not have been able to establish any damages flowing from the dismissal, other than the amount of salary that she would have earned for the period of notice. Indeed, as the Defendant's counsel submits, since the contract of employment is determinable by notice, the employee is entitled to recover only the amount of remuneration payable during the notice period (**Addis v Gramaphone Co Ltd** [1909] AC 488). As the Claimant has already been given pay in lieu of notice, even if her termination is deemed to be in breach of contract, she would not be able to recover any sum in the way of damages.

33) Lord Loreburn's admirable summary of the case and articulating the futility of some litigation captured in his own words in the following, is apposite:

> The plaintiff was employed by the defendants as manager of their business at Calcutta at £15 per week as salary, and a commission on the trade done. He could be dismissed by six months' notice.
> In October, 1905, the defendants gave him six months' notice, but at the same time they appointed Mr. Gilpin to act as his successor, and took steps to prevent the plaintiff from acting any longer as manager. In December, 1905, the plaintiff came back to England.
> The plaintiff brought this action in 1906, claiming an account and damages for breach of contract. That there was a breach of contract is quite clear. If what happened in October, 1905, did not amount to a wrongful dismissal, it was, at all events, a breach of the plaintiff's right to act as manager during the six months and to earn the best commission he could make.
> When the action came to trial ... the jury found for the plaintiff in respect of wrongful dismissal £600 and £340 loss of commission. As to the damages of £600 for wrongful dismissal...[a] further controversy ensued, whether the £600 was intended to include salary for the six months, or merely damages because of the abrupt and oppressive way in which the plaintiff's services were discontinued, and the loss he sustained from the discredit thus thrown upon him. And, finally, a question of law was argued, whether or not such damages could be recovered in law.
> My Lords, it is difficult to imagine a better illustration of the way in which litigation between exasperated litigants can breed barren controversies and increase costs in a matter of itself simple enough.
> To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission

> which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case ...

Has the Claimant established that she is entitled to the Incentive payments?

34) It will be recalled that the second relief sought by the Claimant was "a Declaration that the Defendant is liable to pay to the Claimant commission on the net sales for the period 1st April 1998 to 31st March 2000, including but not limited to approximately US$160,374.62 as commission from the sale of approximately 112 Mercedes Benz motor buses to MMTH". It will also be recalled that her contract provided that she should be paid a commission based on sales in certain amounts. The Claimant in these circumstances, must show that there is a breach of contract and that the sums claimed arise as a result of that breach. According to the **Addis** case, the wrongfully dismissed employee also has a right that, in computation of such damages, "commissions, bonuses, gratuities etc., which were contractually due to the employee" are to be taken into account.

35) The question is whether the pleading is supported by the evidence The contract provided for an incentive bonus to be paid at the end of the trading period and based, not upon "net sales" as claimed by the Claimant, but on *"net profit"* in excess of $6.5 million at the rate of 5% on the first $2 million over the $6.5 million; 7.5% on the next $2 million and 10% above that figure. In order to substantiate a claim for this incentive bonus payment, the Claimant must show that the conditions precedent to its payment, have been met. No right to payment arises unless and until net profits exceed $6.5 million.

36) It is to be noted that the claim is for the incentive payments for the period April 1998 to March 2000. But as pointed out by the Defendant's counsel in his closing submissions, the Claimant did in fact receive payment of her commission for the period 1998-1999, contrary to the averment in her pleadings. Under cross-examination, the Claimant did positively state that she *would have and did in fact receive commission for that year*, contrary to the Claimant's closing submissions. There was no application to amend the claim to exclude that period and it may be that that is sufficient to dispose of the matter in terms of that particular term. However,

there is also the issue of whether the precondition for the making of the payment has, in any event, occurred. Did net profits exceed the threshold of $6.5 million?

37) The Defendant submits that the Profit and Loss accounts for the year 1999-2000 showed a net loss so that the Claimant would not have been entitled to any commission. In that regard the Mr. Spence cites the profit and loss account of the Defendant for the period ending March 31, 2000 (Exhibit 10). Those accounts showed a net loss of $3.828 million. In addition to admitting in cross examination that, contrary to her witness statement in which she had indicated she had not received incentive bonus for the 98/99 trading period, she had in fact been paid, she also conceded that she had seen exhibits 9 and 10. Exhibit 10 is the profit and loss account for the period 1999 to 2000.

38) En passant I should note that although the Claimant refers to the sale of 112 buses to MMTH, she says these sales took place between 1998 and 2000. She does not specifically place it in the 1999 to 2000 period. As I have stated elsewhere, the Claimant did admit that she received her incentive bonus for 1998 to 1999. It is difficult to see how this court without more evidence could conclude that the sales were referable only to the latter period, she having agreed that she got her bonus payment for 1998/1999, so as to entitle the Claimant to the bonus she now claims.

39) With respect to the financial figures for 1999 to 2000, the Claimant's attorney says that the Claimant "has some concerns" over the negative results revealed in the statement, and the disparity between the budgeted and actual figures. He also states that in giving her evidence the Claimant "was emphatic that she was not sure of the validity of the figures reflected in the financial statement for the year ended March 31, 2000" and that the figures were not audited accounts. No issue is, however, taken with whether the figures for the previous period, 1998 to 1999 had been audited and were accurate.

40) The Claimant's counsel complains that by not calling any evidence in vindication of the financial statements, the Defendant "strategically prevented the Claimant from mounting any challenge to the figures reflected in Exhibits 9 and 10". This is clearly not correct. There was nothing to prevent the Claimant from calling her own evidence to show that the accounts proffered were not accurate. She did not do so.

41) Mr. Graham in his closing submissions for the Claimant submitted that the Defendant did not call evidence to assert that the incentive bonus had been paid thereby depriving the Claimant an opportunity to challenge such a witness. Accordingly, he urged the court to accept the proposition of the Claimant that she had not been paid the relevant incentive and grant the declaration sought by the Claimant. I decline to do so.

42) The Claimant has regrettably not established the precondition for her being awarded the incentive payment due under the terms of her contract, nor proven on a balance of probabilities that she has not received the incentive bonus if it was indeed payable. It seems that eight (8) years after she had been terminated in January 2000, the highest the Claimant can put her claim is: "I do not know if the figures presented for 1999/2000 are correct, so I do not know whether I am entitled to the incentive bonus and if so, how much". Indeed, to the extent there is any evidence, it is supplied by the witness statement of Dermot Ricketts put into evidence by the Claimant as hearsay. This was to the effect that by a "gratuitous payment" of $69,063.77 was made in a letter dated January 24, 2001. This compensated the Claimant for sales made by the Sales Department, commenced before the Claimant's departure but delivered in February and March 2000.

43) The Defendant's counsel suggests that even if the Defendant failed on the wrongful dismissal issue because of lack of notice, the Claimant must still fail. He submitted that although the Defendant had not called any evidence to support its defence which avers misconduct on the part of the Claimant, the Claimant herself has provided that evidence when she admitted putting the Charter Young funds in her personal account. That further, she admitted in cross examination that putting business related funds in a personal savings account would amount to misconduct and grounds for immediate dismissal at the Defendant company. She also agreed that funds related to the 'Charter Young' transactions were lodged in her personal savings account, yet she insists that these were not business related funds. This, he submitted, would have provided a legitimate basis for the Claimant to be summarily dismissed without notice or payment in lieu thereof.

44) According to this view, both in her evidence in the witness statement and in the witness box, the Claimant admitted that monies from Charter Young Limited were deposited in her personal account. She did assert that the arrangement between the Defendant and Charter Young was to facilitate the Defendant increasing volumes of vehicles purchased. Yet, in the same breath she says that the Charter Young arrangements had nothing to do with the Defendant. It seems to me that those propositions are irreconcilable on their face and may fairly raise concern as to whether an inference may be drawn adverse to the Claimant.

45) While I believe that the inference may indeed undermine the Claimant's credibility, I am not prepared to go so far as to say that the evidence would have been made out for summary dismissal. But, as noted above, it is not for the Defendant to prove that he has a good defence. The Claimant must make out her case on a balance of probabilities. It is clear to me that the Claimant has failed to do so and there must be judgment for the Defendant with costs to the Defendant, to be taxed if not agreed.

ROY K. ANDERSON
PUISNE JUDGE
NOVEMBER 12, 2009