IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G. 134 of 1983.

BETWEEN	CECIL GODFREY	PLAINTIFF
A N D	ALLIED STORES LIMITED	DEFENDANT

Janet Nosworthy for the Plaintiff.

Donald Scharschmidt and David Batts instructed by Douglas Brandon of Livingston Alexander and Levy for the Defendant.

September 29,30, 1987; October 1, 1987, July 17, 18,19 20, 21, 1989; February 26, 1990; March 2, 6, 7, 1990; and October 26, 1990.

CLARKE, J:

For four years until he was dismissed by the defendant company (the company) the plaintiff, Cecil Godfrey, was employed as manager of Lane Supermarket in Constant Spring, St. Andrew, one of the company's five supermarkets.

The plaintiff admits that at the time of his dismissal he was in receipt of a salary of $1,874.99 a month. His annual remuneration comprising salary and allowance was $26,500. The allowance was not paid to him in money. It was a notional sum of $4,000 which represented the value the company placed on the use he had of the car it had assigned to him. Upon dismissing him the company took the car from him and paid him nothing by way of car allowance on regard to any subsequent period.

The plaintiff claims damages alleging that he was wrongfully dismissed. The letter of dismissal delivered to the plaintiff and dated the 2nd day of May, 1983, reads as follows:-

" Dear Sir,

> Please be advised that after careful consideration, the company has decided to terminate your contract of employment for just cause. This decision has been unanimously endorsed by the Board of Director.
>
> We set out below the amount which shall be paid to you on your termination.
>
> Notwithstanding, that we do not consider that there is any obligation on the company to give you paid notice, it has been decided on humanitarian grounds to pay you your salary for May 1983, and an additional three months salary.

We have also included your vacation leave pay of one month as follows:

Salary & Allowances - May 1983		$1,874.99
Vacation pay		1,874.99
Ex Gratia Payment (3 months)		5,624.97
	Total Gross	$9,374.95
Less Deductions:		
N.I.S.	$ 15.90	
N.H.T.	74.45	
Income Tax	2,151.62	
Total Deductions	2,241.96	
Net Pay	7,123.99	

Youre faithfully,
ALLIED STORES LIMITED

Sgd. Keith I. Daley
Managing Director".

The plaintiff asks me to say that by the terms of that letter the company summarily dismissed him, that is to say, it dismissed him without giving him such notice or salary in place of notice as the contract required. He urges me to hold as well that the dismissal was wrongful. He contends that the company has failed to justify his dismissal even though as well as pleading "bad management" on his part, it pleaded the following grounds in the alternative:

> "a. The defendant says that the plaintiff was dismissed for just cause particulars of which are that the plaintiff persistently ignored the instructions given to him by the managing director of the defendant's company regarding over purchasing, bounced cheques and shrinkage;
>
> b. In the further alternative the defendant says that plaintiff was negligent in the performance of his duties in that he failed to act on the instructions of the managing director of the defendant's company in relation to over purchasing, bounced cheques and shrinkage".

As to the question of dismissal for just cause I see nothing in the evidence, oral or documentary, from which I ought to hold that the plaintiff's conduct complained of was such as to show him to have disregarded the essential conditions of his contract of service. So far from being incompetent as a store manager, his performance was generally good and compared favourably with the

performance of any of the other store managers in the company. The high volume of sales which he achieved over the years exceeded budgetary targets. He would from time to time make recommendations for improving the stores operation especially in areas relating to shrinkage and security. He took proper and adequate steps to control or reduce shrinkage, the incidence of bounced cheques and over purchasing of goods. Even the exhibited correspondence from the managing director of the company reflect no breach of duty by the plaintiff as to "preclude the satisfactory continuance of the relationship of [employer and employee] and to justify the [company] in electing to treat the contract as repudiated by the [plaintiff]": per McCardie, J. in Re Rubel Bronze and Metal Company [1918] 1K.B. 315 at page 321.

As the company did not have just cause to summarily dismiss the plaintiff he was entitled under the contract to reasonable notice of termination of his employment. The plaintiff avers that six months' notice was the reasonable notice required. The company on the other hand contends that three months' notice under the contract was reasonable and that what was paid to the plaintiff, apart from vacation pay and salary for May 1983, was in fact three months' salary in lieu of notice which was all that he was entitled to.

If the company's contention is correct the fact that the plaintiff was dismissed without justification would not avail him. A court of justice in a case of this sort seeks where warranted to compensate the employee for loss of wages or salary, not to punish the employer for wrongful dismissal. So the critical question that I must determine at the end of the day is this: Has the company fully compensated the plaintiff before action brought? To resolve that question I must answer the following subsidiary questions:

1. What constituted reasonable notice under the plaintiff's contract of employment?
2. Was the ex gratia payment of three months' salary payment in lieu of notice and, if so, was it accepted?
3. Was the plaintiff on dismissal entitled as he pleads to an end of year profit payment as part of his salary and/or to the value of a car allowance for the period of proper notice under the contract?

To answer those questions I must first of all determine whether the contract was oral or in writing. Paragraph 3 of the statement o claim states:

> " By an oral agreement entered into on or about the month April 1979 between the plaintiff and the defendant, the plaintiff entered the employment of the defendant as a supermarket manager....."

Paragraph 2 of the company's statement of defence reads in part:

> " Paragraph 3 of the statement of claim is denied. The contract of employment between the plaintiff and defendant was in writing dated 28th March 1979 and the defendant will refer to it at trial for its full terms and effect".

Paragraph 3 of the plaintiff's reply is emphatic:

> " The plaintiff denies that the contract of employment herein was in writing or that its terms were ever reduced into writing".

The plaintiff deposed in examination in chief that the contract was oral. He said that after he had served three months' probation as 'acting manager' he was appointed Manager. He said he thereupon had a conversation with Keith Daley, the managing director of the company, about the terms of his appointment as manager. He agreed that the starting salary would be $18,000 per year, that he would receive a car allowance of $200 per month and that he would receive a bonus at the end of each year. He said that Mr. Daley gave an undertaking that at the end of the financial year he would receive two percent of the net profits of Lane Supermarket, Constant Spring. He however, admitted under cross-examination that:

(a) he had on 27th March 1989 applied in writing to the company for employment as a supermarket manager; and

(b) that subsequent to that he commenced work as manager on the basis of a letter he received from the company.

That letter incorporating the plaintiff's agreement to its terms reads thus:

> " Dear Sir,
>
> Subject to your acceptance of the terms and conditions set out below, your employment will begin as from 2nd April, 1979 and you will be paid a salary of $12,000.00 per annum.
>
> You will be on probation for a period of not less than 3 months, during which time, the Company reserves the right to terminate your service without notice.

The Company also reserves the right to extend the probationary period.

Yours faithfully,
ALLIED STORES LIMITED,

Sgd. Keith Daley

I agree to the above terms and conditions of employment : Sgd. Cecil Godfrey

NAME : Cecil Godfrey

POSITION : Manager

DATE : 28/3/79

Car allowance $200.00".

He agreed that he was on three months' probation after the date of the letter and that the salary stated therein was the salary with which he started.

Keith Daley confirmed in his evidence that the plaintiff applied in writing to the company for the post of supermarket manager. He said the company subsequently employed the plaintiff on the terms of the self same letter of 28th March, 1979. The evidence makes it abundantly clear that the contract of employment was in writing and I find that the aforesaid letter was indeed the contract of employment. It contains express terms relating to the post the plaintiff would hold, the date his employment would begin, starting salary, motor vehicle allowance and the period of probation. The plaintiff's period of probation lasted three months, for the company confirmed in writing his appointment as manager with effect from 1st July, 1979. During the probation period the company could terminate his service without notice but once he was confirmed as manager the contract made no express provision as to the length of notice required to determine it.

The parties clearly intended as revealed in the implied terms of the contract that the plaintiff's employment after he had served his period of probation would be for an indefinate period determinable upon reasonable notice.

The question of what constituted reasonable notice

Where there is no just cause for summary dismissal statute merely prescribes minimum periods of notice required to terminate a contract of employment for an indefinite period. As the plaintiff was dismissed after being

employed for a continuous period of four years the minimum period of notice required by statute was two weeks: See section 3 of the Employment (Termination and Redundancy Payments) Act.

The common law rules applicable to the facts and circumstances of this case require a longer period of notice. The general rule is that the length of notice depends on the intention of the parties as revealed in their contract. As this contract has no express provision as to notice beyond the probationary period, the court will imply a term, as both parties agree I ought to do, that the employment could be terminated by reasonable notice by either party.

As Mr. Scharschmidt submitted notice is a reciprocal right: if the plaintiff was entitled to notice so would have been the company if the plaintiff had wished to leave its employ; and what would have been reasonable notice to the plaintiff from the company would equally have been reasonable notice to the company if the plaintiff was giving notice.

The only evidence on the question of notice came from Keith Daley. He testified in examination in chief that in his years as managing director of the company five managers apart from the plaintiff have been dismissed. Before the plaintiff was dismissed three managers were dismissed and were each paid one month's salary in place of notice. He further said that the two managers dismissed after the plaintiff were each paid three months' salary in place of notice. It was not suggested to Mr. Daley that any custom in the supermarket industry required six months' notice or, at all events, more than three months' notice. Indeed counsel for the plaintiff did not suggest that three months' notice or three months' pay in lieu of notice was unreasonable.

In fixing what amounts to reasonable notice under the contract I have looked at all the circumstances which include the responsibilities involved in the job, the nature of the employment and its degree of importance and the length of time the plaintiff held it before he was dismissed.

Counsel on both sides cited a number of cases on the question of reasonable length of notice but those cases do not lay down my rule of law and are merely guides to enable me to say what is reasonable notice in the different circumstances of this case. Miss. Nosworthy urged me to hold that six months' notice was reasonable in this case. She referred to a foot note

at page 490 of Halsbury's Law of England 3rd Ed. to the effect that a National Commissioner in England held that six months' notice was reasonable to terminate the employment of a general sales manager. That short foot note without more is unhelpful. She also cited Adams v. Union Cinemas Limited [1939] 3 All E.R. 136.

There the respondent under an oral agreement held the position of controller of cinemas in the appellant company. His employment was determined upon one month's notice. The English Court of Appeal in affirming the decision of the judge below held, so far as is relevant to this case:

(a) that it was an implied term of the agreement that reasonable notice to terminate the agreement should be given either party;

(b) that because of the nature and importance of the plaintiff's employment six months' notice was reasonable.

It was the court's view that the respondent was employed to discharge most responsible duties in as much as he was controller of some 120 cinemas, a position of much importance for which he was paid over some 50 years ago the then large salary of $2,000.00 per annum.

In the case before me the plaintiff was a manager of one of the company's five supermarkets. As manager of a supermarket operated as part of a chain of stores, the plaintiff like the other four store manager was required to follow certain rules and regulations laid down by the top management. Above the plaintiff in rank were the operations manager who would monitor the day to day operations of the supermarkets and the managing director who had the overall responsibility for the supermarkets. Bearing in mind all that as well as the other circumstances of this case I hold that three month' notice was reasonable.

It is of course common ground that the company dismissed the plaintiff without notice. The company contends, however, that it paid the plaintiff three months' salary in lieu of three months' notice. The plaintiff disputes this.

Issue of Payment in lieu of Notice

The law allows an employer to pay a dismissed employee salary in place of proper notice. Put another way, the employer may in exercising his

extra-judicial remedy dismiss the employee at once and without notice on payment of the remuneration / which the employee would have earned during the period in which notice should have run under the contract. Where an employer does so the dismissal is not wrongful; see page 29 of Batts' "The law of Master and Servant" 5th Edition, where the law on the point is correctly stated. The employer would thus have compensated the employer for loss arising from the employer's failure to give adequate notice.

Miss Nosworthy submitted that the company made no tender of payment of salary in lieu of notice but that it made a gift instead. She argued that the parties did not intend to create legal relations because the company stated that it was making payment on humanitarian grounds.

Now, so far from admitting in the letter of dismissal that it was liable pay the plaintiff three months' salary upon dismissal, the company asserted in that letter that it was not obliged to give the plaintiff "paid notice" (erroneous in the result) and that it was paying him three months' salary on humanitarian grounds. By further indicating that the payment of three months' salary was 'ex gratia' the company was in my judgment reiterating that payment was being made without admission of liability, that is to say, without admitting any pre-existing liability on its part.

I adopt the approach of Megaw J. in Edwards v. Skyways Limited [1964] 1 All E.R. 494 where he ascribes that same meaning and effect to the words 'ex gratia', albeit in a case where the defendant sought to resile from an agreement to make an ex gratia payment to the plaintiff. At page 500 E-H that learned judge said:

> " It is, I think, common experience amongst practitioners of the law that litigation or threatened litigation is frequently compromised on the terms that one party shall make to the other a payment described in express terms as 'ex gratia' or 'without admission of liability'. The two phrases are, I think, synonymous. No one would imagine that a settlement, so made, is unenforceable at law. The words 'ex gratia' or 'without admission of liability' are used simply to indicate - it may be ... that the party agreeing to pay does not admit any pre-existing liability on his part; but he is certainly not seeking to preclude the legal enforceability to the settlement itself by describing the contemplated payment as 'ex-gratia'. So here, there are obvious reasons why the phrase might have been used by the defendant company in just such a way, desired to avoid conceding that any such payment was due under the employer's contract of service."

.....9/.....

> They might have
> / wished - perhaps ironically in the event - to show, by using the phrase, their generosity in making a payment beyond what was required by the contract of service. I see nothing in the mere use of the words "ex gratia", unless in the circumstances some very special meaning has to be given to them, to warrant the conclusion that this promise, duly made and accepted, for valid consideration, was not intended by the parties to be enforceable in law".

I hold that the company did not make a gift of three months' salary to the plaintiff. The parties must have contemplated that their legal relations would be affected if the plaintiff accepted the payment. In my view the effect of the letter is that the company tendered payment of three months' salary in place of notice and it was up to the plaintiff to accept or reject the payment tendered. The plaintiff purported to accept the payment 'under protest', for the letter from the plaintiff's attorney dated May 12, 1983 in response to the letter of dismissal is in these terms:

> "Mr. Keith I. Daley,
> Managing Director
> Allied Stores Limited
> New Kingston
> Kingston 10.
>
> Dear Sir,
>
> Re: Cecil Godfrey - Unlawful Dismissal
>
> I act for and on behalf of the above-captioned, Mr. Cecil Godfrey who up to the 2nd day of May 1983 was Manager of Lane Supermarket, Constant Spring Road in the parish of Saint Andrew.
>
> My client instructs me that by letter dated the 2nd day of May, 1983 you purported to terminate his employment, without notice, citing "just cause" as your reason for termination.
>
> It is my professional opinion that you have no lawful grounds for termination of Mr. Godfrey's services and that he has be unlawfully dismissed.
>
> You are hereby requested to revoke and withdraw the purported letter of termination above referred to and re-instate Mr. Godfrey forthwith in the office of Manager of Lane Supermarket, Constant Spring Branch which he previously enjoyed before the said unlawful termination.
>
> It is regretted that should I not get a favourable response hereto within ten (10) days from the date hereof I am instructed by my client to file suit against you herein in the Supreme Court of Judicature of Jamaica for unlawful dismissal.
>
> Please take notice that the cheque in the sum of Nine Thousand Three Hundred and Seventy-four dollars and Ninety-five Cents (9,374.95) delivered to my client along with the letter of determination has been accepted "under protest".
>
> Yours truly,
>
> Sgd. Janet M. Nosworthy.
> cc. Mr. Cecil Godfrey".

Although the plaintiff charged that he was wrongfully dismissed and requested that the company reinstate him he accepted the payment. I find that the words "under protest" used in this context do not in themselves have legal significance; see Re Massey 8 B.E.A. 462 and Stroud's Judicial Dictionary of Words and Phrases 4th Edition, Vol. 5 at p. 2855.

Having accepted three months' salary in place of three months' notice the plaintiff would be fully compensated unless at the time of his dismissal he was legally entitled to the value of the use of the company's motor vehicle for the three months' period of notice and/or, as he claims, to an end of year profit payment or bonus.

The question of entitlement to an end of year profit payment and/or to value of use of car.

While it is true that the company admitted that it made bonus payments to the plaintiff for financial years 1979-1980, 1980-1981, 1981-1982 calculated on the basis of 2/3 of 2% of the audited net profit for the supermarket in question neither his written contract of employment nor his pay increase advices mention or provide for payment to him of any bonus or end of year profit payment. In any case, although the plaintiff received a bonus payment of $2,000.00 in December, 1982 the company had not notified to the plaintiff before he was dismissed the amount of any bonus payment for the financial year 1982-1983. In fact, up to the time of his dismissal the profits for that financial year had not been ascertained. The plaintiff cannot therefore claim to recover the loss of any expected end of year profit payment or any portion thereof because that was not a benefit that the company was contractually bound to give him. As Diplock, L.J. said in Lavarack v. Woods of Colchester Limited [1966] 3 ALL E.R. 683 at p. 696 F-H (C.A.):-

> "The general rule as stated by Scrutton, L.J. in Abrahams v. Herbert Reiach, Limited [1922] 1 K.B. 477, that in an action for breach of contract a defendant is not liable for not doing that which he is not bound to do, has been generally accepted as correct ... The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors - not with the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do."

Moreover, even where, as in the Lavarack case, a contract does provide for the payment of "such bonus, if any, as the directors of the company shall from time to time determine", events extraneous to the contract itself such as the lawful abolition of the bonus system could determine whether or not a bonus was payable thereafter.

Turning to the claim for car allowance, the plaintiff's written contract provided that he start with remuneration of $12,000 per annum together with a car allowance of $2000.00. . Four written pay increase advices show both his increases in remuneration and changes in the break down of his salary throughout the years. The last pay increase advice indicates that his salary at the time of his dismissal was $26,500.00 per annum including, as Keith Daley explained, a notional amount of $4,000.00 representing the value of his use of the company's car. When he was dismissed the Company took possession of the car, depriving him of its use. In addition to paying the three months' salary the company was obliged to pay the plaintiff the value of his use of the company's car throughout the three months' period he would otherwise have had the use of the car. This the company failed to do.

What it comes to then is that the plaintiff was not fully compensated before action brought, for although he was properly paid three months' salary "stricto sensu" in place of notice he should have been paid $1,000.00 for the loss of the value of the use of the company's car for the three months period that being the period of reasonable notice under the contract. He is however, entitled to nothing else.

I will therefore deal briefly with Miss Nosworthy's submission that the plaintiff is entitled in an action of this nature to damages for his hurt feelings and his difficulty in obtaining future employment both resulting from the wholly unjustified manner in which he was dismissed. Appellate courts both in England and this country have laid it down that damages for wrongful dismissal cannot include compensation for the manner of dismissal, for injured feelings, or for the fact that dismissal makes fresh employment more difficult: see Addis and Gramophone Company Limited [1908-10] All E.R. Rep. 1 (H of L) and Kaiser Bauxite Company v. Vincent Cadien S.C.C. Appeal No. 49/81 as yet unre-

ported. Our Court of Appeal in the latter case adopted the following statement of principle enunciated by Lord Loreburn L.C. at page 3 in the former case:

> "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. An expression of Lord Colebridge C.J. (Mae v. Jones 25 Q.B.D. at p. 108) has been quoted as authority to the contrary. I doubt if the learned Lord Chief Justice so intended it. If he did, I cannot agree with him. If there be a dismissal without notice the employer must pay an indemnity; but, that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

Accordingly, I award judgment to the plaintoff limited to $1,000 as aforesaid with costs to be taxed if not agreed.