JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 46/06

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN	**AIR JAMAICA LIMITED**	**APPELLANT**
A N D	**NEIL COLLMAN**	**RESPONDENT**

Miss Annaliesa Lindsay, instructed by **John G. Graham & Co.,** for the appellant

Mr. Gordon Robinson instructed by **Mrs. Winsome Marsh,** for the Respondent

3rd October, and 9th November, 2007

PANTON, P.:

I have read in draft the judgment of Cooke, J.A. I agree with his reasons and conclusions and there is nothing further I wish to add.

COOKE, J.A.:

1. In this case, there is an appeal as well as a Counter-Notice of Appeal. Both parties are dissatisfied with the quantum of the award for general damages

ordered by the Court on June 27, 2006 following an assessment hearing. The award was for $1,500,000.00. The appellant contends the award should not have exceeded $500,000.00. The respondent, by his counter-notice seeks an award in the vicinity of $10,000,000.00.

2. The respondent brought an action seeking damages for negligence/breach of contract. He was on November 5, 2000 employed to the appellant as an aircraft technician. He was based in Jamaica but had been assigned to Philadelphia in the United States of America to do relief work. The appellant had not secured for the respondent the appropriate visa which would have allowed him to legally perform his task that he had been ordered to undertake. The respondent had a B1 visa when he should have had an H1 visa which would have allowed him to work in the United States. While at his job the respondent was summoned to the customs office at the airport where he was informed that he would be detained and returned to Jamaica on the next available flight. Then agents of the Immigration Naturalization Services took charge of him and he was held in detention for some eighteen hours. Although the action was framed in both negligence and breach of contract, in essence the assessment hearing as well as the appellate hearing concentrated on the proper award which should have been made consequent upon the breach of the duty of the appellant to provide the respondent with the appropriate visa to enable him to perform his assigned work.

3. I now turn to the findings of the learned trial judge, Sinclair-Haynes, J.:

(i) The respondent was manacled and shackled to his waist.

(ii) In his shackled state he "suffered the ignominy" of being marched through the lobby of the Renaissance Hotel to the room he occupied.

(iii) He was taken to the office of Immigration Naturalization Services where "he suffered the indignity of being stripped of his belongings.

(iv) He was placed in a cell from which "he was removed to be finger printed, photographed as a criminal and felt forced to give an affidavit."

(v) He was removed to a central jail where "he was further disgraced and humiliated by being tagged with a red arm band which bore his name, number and the letters FED's".

(vi) In the central jail he shared a cell with two others. This cell had dimensions of 5" x 6". There was no bed, only a stainless steel projection. This cell had no light. He had to lay on the unclean concrete floor. He could not sleep as "he felt vulnerable and exposed to his cell mates".

(vii) The learned trial judge accepted that the respondent felt rejected, humiliated, angry, petrified and embarrassed at his situation. He felt abandoned by Air Jamaica whom he felt "could have secured an attorney to assist him".

(viii) It was her view that the respondent from the time of his detention had been "transformed into a common criminal who was at high risk of feeling the consequence of some outrageously evil crime he had committed.

(ix) She accepted the evidence of the respondent that as a result of the incident he was totally traumatized; that his ability to sleep was affected; that he was depressed and anxious and that at the date of the trial he still suffered from "bouts of anxiety, sleeplessness, depression and anger". She further accepted that he went to Dr. Allen, a consultant who prescribed medication to calm him and make him sleep.

(x) She further accepted that his detention had occasioned added scrutiny by the United States authorities when he sought to enter the United States.

(xi) Finally she found that he suffered from "depression anxiety".

4. The learned trial judge listed the following factors as providing the basis for her award.

(a) His imprisonment

(b) Feelings of humiliations suffered

(c) Injury to dignity

(d) Mental suffering

(e) Feelings of disgrace

(f) Subsequent harassment and anxiety; and

(g) Depression

The appellant in this Court challenged the correctness of taking into consideration factors (d), (f) and (g). The submission as to factors (d) and (g) was that there was no medical evidence to substantiate any findings of mental suffering or depression and therefore these alleged injuries were irrelevant to the assessment of damages. It is to be observed that factors (b), (c) and (e), although itemised separately, speak to the same type of injury. It is my view that factors (d) and (g) likewise pertain to the same phenomenon. It is my view that the word depression when used in ordinary and common parlance is readily understood in our society. This is not a case where the respondent is asserting that he became psychotic. He was describing the effect of the detention on his

being. It was for the learned trial judge to determine his credibility in this regard. The witness statement of the respondent makes it clear that he visited Dr. Anthony Allen, a consultant psychiatrist on two occasions in December, 2000. Since then there is no evidence that he has sought medical help. The reasonable inference to be drawn from this is that his depression was no more after that time or at least of negligible significance. I therefore have great difficulty in appreciating the finding of the learned trial judge that the respondent, some five years after his detention still suffered from the depression brought about by his confinement. There is no basis for the finding that, the respondent, at the date of the trial, was suffering from what the learned trial judge termed "depression anxiety".

5. Factor (f) concerns the evidence of the respondent accepted by the learned trial judge that on "one subsequent occasion he attempted to enter the U.S. and was turned back. On other occasions he was subjected to hours of interrogation by U.S. authorities". It would appear that after December 5, 2000, the respondent's name was placed on a computer data base which put U.S. Immigration personnel on alert. The appellant contends that this factor is not supported by evidence. It was pointed out that a letter dated January 15, 2002 from the U.S. Customs Service to the respondent's sister exonerated him. He had visited the United States four times in 2001. Since 2004 he has not renewed his visa to travel to the United States. I think that the fact that he has travelled

four times to the United States does not mean he did not encounter some difficulty in his travelling. It is my view that the learned trial judge has overstated factor (f). I would put it no higher than that the respondent has suffered some inconvenience when he travelled to the United States. This is a factor to which no great weight should be attached.

6. In the Counter-Notice of Appeal it was submitted that the learned trial judge wrongly refused to admit into evidence a medical report of Dr. Allen. Various sections of the Civil Procedure Rules 2002 were canvassed by both parties. However, I do not think it is incumbent on me, at this time to express a view as regards this aspect of the debate. It is unnecessary, because having perused the report which was sought to be tendered, I am of the view that the potential evidential significance of that report could not have in any way enhanced the position of the respondent *vis-à-vis* the conclusions of the learned trial judge in this area.

7. In challenging the award both parties sought to rely on awards which pertained to false imprisonment. For the appellant, the main case was that of **Inasu Everald Ellis v. The Attorney General and Ransford A. Fraser** (SSCA 34/2001). For the respondent it was **Celma Pinnock v. Attorney General** (suit No. C.L.P. 188 of 1993: Ursula Khan vol. 5 page 289). I will not discuss these, nor any of the other cases in which awards have been made for

false imprisonment as it is my view that those cases are not helpful. I say so for the following reasons. Firstly, this was not a case of false imprisonment. The respondent was legally detained under the relevant legislation in the United States. Secondly, this detention was in a foreign country. Thirdly, the detention was as a consequence of the respondent dutifully carrying out the instructions of his employer. Although the learned trial judge in her judgment discussed cases on false imprisonment and regarded them as "good guides" for the making of an appropriate award, the sum $1,500,000.00 does not seem to bear any relationship to previous awards for false imprisonment.

8. I will now deal shortly with two submissions made in respect of the counter-notice of appeal. The first is that the court below wrongly refused to make an award for aggravated damages. The contention that aggravated damages ought to have been awarded is grounded on:

(a) the uncaring attitude of the appellant displayed to the respondent after he returned home. There was, it was argued "no offer of comfort or compensation".

(b) after the suit was instituted the appellant "filed a sham defence in order to delay the respondent's remedies".

In rejecting the claim for aggravated damages the learned trial judge relied on a passage in the judgment of Lord Devlin in **Rookes v. Bernard** [1964] 1 All E.R. 367 at page 407 F – G.

> "Moreover it is very well established that in cases where damages are at large, the jury (or the judge) if the award is left to them can take into account the

> motives and conduct of the defendant where they aggravated the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong maybe such as to ignore the plaintiff's proper feelings of dignity and pride. They are matters which the jury can take into account in assessing the appropriate compensation."

The learned judge concluded that there was no evidence that the appellant was malevolent or spiteful in not securing the correct visa. Accordingly there should be no award for aggravated damages. I respectfully agree with her approach.

9. The other submission was that the learned trial judge should have made an award for handicap on the labour market. The respondent left the employment of the appellant in December, 2002. Since then he migrated to Canada and between 2002 and 2005 he worked as an aircraft technician with four different airlines including his present job. It is therefore impossible to contemplate any award for handicap on the labour market. The evidence roundly refutes any assertion that because of detention in Philadelphia there is a substantial or real risk that the respondent would be unable to work as an aircraft technician again. I respectfully agree with the learned trial judge in refusing to make an award under this head.

10. I agree with the description of this case by Mr. Robinson as being "unprecedented" in the sense that the like instant circumstances, as far as can be ascertained, have not been before now subject to judicial assessment in

respect of damages. I have previously expressed the view that references to cases on false imprisonment are unhelpful. Since there are no comparable awards pertinent to the predicament of the respondent, it follows that the usual approach of an appellate court to the consideration of whether the award in the court below is "inordinately high" or "inordinately low" is inapplicable. The task of this court is to determine the adequacy of the award made in the court below.

11. I approach this task by firstly having regard to the findings of fact which I consider grounded on the evidence and secondly the compartmentalization of the injuries which I find justifiable. I have already expressed my views as to these two aspects. This case is not "unprecedented" in that from time to time a court is faced with circumstances which had not hitherto received judicial attention. It is then for the court to grapple with this new problem. At such time, perhaps the court's most useful resource is its experience. In arriving at a figure which I think is adequate I am not unmindful that awards in damages should be tempered with moderation. Further, I am fully aware, that the purpose of the award of damages is compensatory. In this case the respondent was detained for some eighteen hours. He was held incommunicado. This was in a foreign land. The respondent at the relevant time was carrying out his function as a dutiful employee. The loss of his liberty ought not to be treated lightly. The respondent was in the words of the learned trial judge treated as "a common criminal". Besides the injury to his liberty I have to consider the

disgrace and the humiliation he suffered (see para. 3 supra). Then there was the resultant depression. I have a very difficult task. I suspect I may be criticised for "plucking a figure from the air". However, after giving this matter anxious consideration, I would make an award of $2,500,000.00. This is the sum that I think is adequate compensation.

12. I would dismiss the appeal and allow the Counter-Notice of Appeal. I would vary the award of $1,500,000.00 ordered in the Court below by substituting $2,500,000.00. The respondent in the appeal should have his costs agreed or taxed.

DUKHARAN, J.A. (Ag.):

I agree.

PANTON, P.

ORDER:

The appeal is dismissed. The Counter-Notice of Appeal is allowed in part. The award of $1,500,000.00 ordered in the Court below is varied and the sum of $2,500,000.00 substituted therefor. Costs are awarded to the respondent to be agreed or taxed.