

CA: Civil - Action for wrongful dismissal - whether appellant unlawfully dismissed - if unlawfully dismissed, what was measure ~~of~~ ~~damages~~ of damages (or judgment). Appeal allowed, judgment set aside. Obiter Comments by CA on award of damages "in deference to the industry of counsel". Cases referred to: Kaiser Bauxite Co v Vincent Cadier (unreported) JAMAICA (2) Rookes v Barne (1964) (ALLER 367 HL) (3) Addis v Gramophone Co Ltd (1909) AC 488  
SCCA 49/91 - 29/7/83??  
IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 38 of 1992

✓ comp

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)  
THE HON. MR. JUSTICE GORDON, J.A.  
THE HON. MR. JUSTICE WOLFE, J.A.

Reminded

BETWEEN COCOA INDUSTRY BOARD

AND COCOA FARMS DEVELOPMENT  
COMPANY LIMITED

AND F. D. SHAW

DEFENDANTS/APPELLANTS

AND BURCHELL MELBOURNE

PLAINTIFF/RESPONDENT

Paul Dennis for appellants

Rudyard L. Francis and Norman Harrison  
for respondent

April 26 & 27 and May 31, 1993

WOLFE, J.A.:

The first-named appellant is a Statutory Board under the Cocoa Industry Board Act and a director of the second-named appellant company. The third-named appellant was the Manager of the first-named appellant Board and Managing Director of the second appellant company.

The respondent was on the 1st April, 1985, employed as a Farm Bookkeeper by the second-named appellant at Osbourne Cocoa Farm and subsequently at Water Valley Farm in St. Mary. The terms and conditions of his employment were contained in a letter dated March 20, 1985, which is set out hereunder:

"Mr. Burchell Melbourne,  
Preston Hill P.A.,  
Hamstead P.O.,  
St. Mary.

Dear Sir,

With reference to your application to  
the Company for a position, I am pleased

"to inform you that the Board of Directors have agreed to offer you employment to fill the post of Bookkeeper on the following terms and conditions:-

- a) Your employment is with effect from the 1st of April, 1985, and will be for a probationary period of three months at the expiration of which if your service is considered satisfactory you will be considered for permanent appointment to the position;
- b) Your service will be terminable on one month's notice in writing on either side provided, however, that in its discretion, the Company may terminate the employment by payment of one month's salary in lieu of notice at the current salary rate;
- c) Your main duties will be in connection with the Osbourne and Gray's Inn Farms in St. Mary, under the directions of the Manager of the farms. The Company has the right to assign other duties to you as may be considered expedient from time to time.
- d) The salary payable to you will be \$10,400 per annum and will be paid monthly.
- e) The leave provisions attached to your post are as follows:-
  - Vacation - 2 weeks (1-5 years service)  
3 weeks (after 5 years)
  - Sick - 2 weeks per year. Periods of sick leave extending beyond 3 days are to be supported by a doctor's certificate.
- f) You will be subject to any other terms and conditions decided on by the Company from time to time for its officers and employees.

Please be good enough to indicate your acceptance of the appointment on the foregoing terms and conditions, by signing and returning the copy of this letter.

Yours faithfully,

/s/ V. V. Wright (Ms.)  
Secretary."

At the expiration of the probationary period mentioned in paragraph (a) above, the respondent's employment was confirmed as permanent in a letter dated September 16, 1985, set out herein:

"Mr. Burchell Melbourne  
Bookkeeper  
Osbourne/Gray's Inn Farms  
c/o Richmond Fermentary  
Richmond P.O.  
St. Mary

Dear Sir:

I am pleased to inform you that on the strength of a favourable report received by the Company on your work performance during the probationary period of your employment, your permanent appointment in the post of Bookkeeper, Osbourne and Gray's Inn Farms, has been approved with effect from June 1, 1985.

Yours faithfully,

/s/ F. D. Shaw  
Manager."

On June 7, 1988, the respondent was issued a letter terminating his employment with effect from June 10, 1988. The contents of the letter of dismissal are set out below:

"Mr. B. Melbourne  
Bookkeeper  
Water Valley Farm  
St. Mary

Dear Sir:

With reference to your employment with the Company, please be advised that a decision has been taken to terminate your services as Bookkeeper on the Water Valley Farm with effect from 10th June, 1988.

The decision is based on the fact that not only is your overall performance below expectations, but that you have betrayed the confidence and trust placed in you as a responsible officer.

Enclosed is the Company's cheque for \$3,234.03 representing your salary to June 10, plus payment for untaken vacation leave and one month's salary in lieu of notice, less your indebtedness to the Board/Company.

You are to arrange to vacate the house you occupy on the Farm by no later than June 30, 1988, and to hand over the

"keys to Mr. D. Williams, Farm Manager.

Yours faithfully,

F. D. Shaw  
Managing Director."

On November 8, 1989, the respondent instituted proceedings against the appellants claiming:

- (i) Damages for wrongful dismissal from his employment as a Farm Bookkeeper;
- (ii) Aggravated or Exemplary Damages;
- (iii) Any further or other relief which to the court seems just;
- (iv) Costs.

The action was heard before Marsh, J. between the 24th February, 1992, and 28th February, 1992, on which latter date he found in favour of the respondent and awarded as follows:

"(i)	SPECIAL DAMAGES	
	Nine months salary less statutory deductions for income tax	\$ 7,200.00
(ii)	EXEMPLARY DAMAGES	
	Amount awarded	20,000.00
	TOTAL	\$27,200.00
(iii)	Costs to the Plaintiff to be agreed or taxed.	
(iv)	That there be a stay of execution of the judgment for a period of four (4) weeks from the date hereof."	

It is from this judgment that the appellants have appealed.

Having heard the arguments, we allowed the appeal, set aside the judgment of the court below and entered judgment for the respondents with costs here and below to the respondents to be taxed if not agreed, and indicated that our reasons would be reduced into writing. These are our reasons.

Two grounds of appeal were argued before us. The issues raised both in the court below and before us were:

- "(i) Whether or not the appellants had unlawfully dismissed the respondent; and
- (ii) If the respondent had been unlawfully dismissed, what was the measure of damages to be awarded.

The record of appeal indicates that the learned judge gave an oral judgment as to how he arrived at his decision. A note of this judgment was made and approved by counsel appearing for the parties but was never submitted for the judge's approval, consequently we have not been made privy to the findings and reasoning of the court below.

Unlawful dismissal

Paragraph (b) of the respondent's letter of appointment (supra) states in language which is unequivocal how the contract between the parties could be terminated, viz:

"Your service will be terminable on one month's notice in writing on either side provided, however, that in its discretion, the Company may terminate the employment by payment of one month's salary in lieu of notice at the current salary rate."

[Emphasis supplied]

This paragraph makes it clear beyond the peradventure of a doubt that both parties to the agreement could terminate it on the giving of one month's notice or the company could in lieu of notice, pay to the respondent one month's salary. This is exactly what the appellant did.

The letter of dismissal dated June 7, 1933 (supra) at paragraph 3 states:

"Enclosed is the Company's cheque for \$3,234.03 representing your salary to June 10, plus payment for untaken vacation leave and one month's salary in lieu of notice, less your indebtedness to the Board/Company."

[Emphasis supplied]

In the face of such evidence, how then could it properly be concluded that the respondent had been unlawfully dismissed from his employment?

Mr. Francis for the respondent endeavoured to argue that exhibit 6, the letter of appointment, did not contain all the terms and conditions of the respondent's contract of employment. Relying on paragraph (f) of exhibit 6, he contended that the contents of exhibit 10, the Office Manual, formed part of the

terms and conditions of the respondent's contract and, therefore, had to be examined to determine whether or not he had been properly dismissed. Referring to paragraph 205 headed "TERMINATION", he contended that termination could, inter alia, be effected by reasonable notice on either side and that one month's notice stipulated in the contract was not reasonable notice considering the status of the respondent. When Mr. Francis' attention was drawn to paragraph 205.2 dealing with "Prior Notice" which states at paragraph (b) "Termination of Contract: subject to terms of contract" he retreated and abandoned this line of argument.

It was further urged that the letter of dismissal, exhibit 6, clearly demonstrated that the appellants were purporting to terminate the contract for cause. Not having established cause the dismissal was unlawful and the one month's pay in lieu of notice could not avail the appellants. This submission is flawed. The manual, exhibit 10, at paragraph 205 deals with terminations. Paragraph 205 states:

"Terminations may be effected in one of the following ways:

- a) immediately - by mutual consent
- b) by reasonable notice on either side or
- c) summarily, for adequate cause."

The letter of dismissal, exhibit 6, did purport to set out reasons for the dismissal. However, the letter clearly stated that the respondent was being paid one month's wages in lieu of notice. The relevant portions of exhibit 6 are set out hereunder:

"The decision is based on the fact that not only is your overall performance below expectations, but that you have betrayed the confidence and trust placed in you as a responsible officer."

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 appellants

were entitled to dismiss the respondent without notice or without 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 appellants, in terminating the contract, employed one of the methods permitted by the manual, exhibit 10, to terminate a contract. More particularly, the contract was terminated by the method stipulated in the letter of appointment.

In the circumstances, we are unable to conclude that the learned judge was correct in holding that the respondent was unlawfully dismissed. This conclusion is sufficient to dispose of this appeal. However, out of deference to the industry of counsel, we propose to examine the second issue raised by this appeal, namely:

The measure of damages which could properly be awarded if the respondent had been unlawfully dismissed.

It is settled law that where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is usage to that effect, the measure of damages for breach is the amount of such wages, which is to be regarded as liquidated damages. See Kaiser Bauxite Co. v. Vincent Cadien (unreported) S.C.C.A. 49/91 delivered July 29, 1983. ??

The judge's award of nine month's salary less statutory deductions for income tax, as special damages was indeed in our judgment arbitrary as there was no evidence adduced before the judge to establish that the period of nine months would have been the time it would have taken a person in the respondent's position to obtain employment. The evidence adduced before the court below to show what attempts were made by the respondent to obtain employment subsequent to his dismissal, was effective only in so far as the respondent was required to show that he had taken steps to mitigate his damages. 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.

On the question of exemplary damages, Mr. Francis was constrained to concede that exemplary damages could not have been properly awarded.

It is settled law that exemplary damages may only be awarded in actions in tort and then only in a limited category of cases. See Rookes v. Barnard (1964) 1 All E.R. 367 HL.

Finally, he contended that aggravated damages could have been properly awarded. That argument is misconceived. In Addis v. Gramophone Co. Ltd. (1909) A.C. 488, it was held, by the House of Lords, that damages for wrongful dismissal cannot include compensation for the manner of dismissal, for injured feelings or for the loss which may be sustained from the fact that dismissal of itself makes it more difficult for a person to obtain fresh employment. Clearly, Mr. Francis' claim in favour of aggravated damages could only have been based on the manner of dismissal, in that the appellants had alleged dismissal for cause, which they failed to prove.

In our view, both issues raised in the appeal could only be resolved in favour of the appellants.

CAREY, P. (Aq.):

I agree.

GORDON, J.A.:

I agree.