NMW

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 9/1999

BEFORE:	**THE HON MR JUSTICE HARRISON, J A** **THE HON MR JUSTICE PANTON, J A** **THE HON MR JUSTICE COOKE, J A** (Ag)	
BETWEEN	**FRANKLYN D RESORTS LIMITED**	**DEFENDANT/ APPELLANT**
AND	**FELIX GONSALVES**	**PLAINTIFF/ RESPONDENT**

Miss Hilary Phillips, Q.C. instructed by **Nesta-Claire Smith** of **Ernest A. Smith & Company** for appellant

Lord Anthony Gifford, Q.C. for respondent

July 12, 13, 14, 18, 31, 2000 and July 31, 2001

HARRISON, J A:

This is an appeal from the judgment of Theobalds, J awarding to the respondent damages for wrongful dismissal in the sum of $2,360,047.62 with interest and costs, on December 15, 1998. On July 31 2000, we allowed the appeal in part and ordered that damages be reduced to $69,299.75 with interest at 23.4% from December 27 1991, to December 15 1998, with half costs of the appeal to the appellant to be agreed or taxed. These are our reasons in writing.

The respondent commenced his employment by assuming his duties as executive chef at the appellant, Franklyn D. Resorts Limited, a hotel, on November 12 1991, at an agreed remuneration. This was so after an oral

discussion on October 11 1991 and October 13 1991, between the respondent and Franklyn Rance on behalf of the appellant when the former came to Jamaica from Canada. The dispatch of a letter from the respondent to the said Franklyn Rance on October 15 1991, accepting the offer of employment sealed the agreement. The contract was then in force. The terms of the contract were intended to be embodied in a contract in writing. After the respondent commenced his duties at the said hotel he was dissatisfied with the conditions of the kitchen and its equipment regarding the state of disrepair and he complained. The extent of his complaint was revealed in his letter dated December 21 1991, to Franklyn Rance, at page 49 of the record. It reads:

> "Dear Mr. Rance,
>
> I am pleased to inform you that as of this morning 0900 hrs, that no work has been completed or initiated in the main kitchen since our conversation of Tuesday Dec. 3rd/91.
>
> In fact another of my refrigerators has broken down, plumbing problems have accelerated, the meat slicer has burned out a Robot Coupe blender is out of commission, the Mobart Flight dishwasher is not sanitizeing, the mixer in the pastry shop is "screaming" for help or "service". I expect to hear from you immediately if I should start packing up or if I should expect some improvement in the working conditions immediately, if not sooner. I have pleaded with Mr. Williams and Ms. Cunningham for action to no avail.
>
> Mr. Rance during my interview you spoke to me about talking straight, "not beating around bush", talk to me Mr. Rance, why can't I get any of these minor maintainance problems resolved?

Sincerely,
Gonsalves
Executive Chef FDR"

The requests by the respondent were largely unattended.

On December 12 1991, previously, Franklyn Rance, on behalf of the appellant, sent to the respondent, two letters, exhibits 2 and 3, which the latter received through the hotel mail system.

The Statement of Claim in paragraph 14, (in reference to exhibit 2), reads inter alia:

> "The plaintiff will refer to the two said letters as evidence of the terms of the said oral agreement."

Exhibit 2, reciting the existence of a contract for a period of two years, contains, inter alia, the following clause,

> "Termination of this agreement will require one month's written notice by either party. This agreement will be effective for two years after your acceptance, with a review after one year. The above terms and conditions will be subject to the successful granting of a work permit by the Ministry of Labour.
>
> Please sign and return a copy of this letter in acceptance of the above."

This document was signed by Franklyn Rance on behalf of the appellant. It was never signed by the respondent. The respondent explains his reason for not signing the document. He said in evidence,

> "In relation to employment everything verbally agreed I ask Rance. I still had no contract and he said he would take care of it. I received a contract (outlining salary and benefits) on December 20, in house mail. I received both letters on 20th December, 1991 in same envelope. Exhibit 2 and did not sign, as very busy period."

In a meeting between the respondent and Franklyn Rance on December 27 1991, the respondent was dismissed by the appellant. The learned trial judge found that this dismissal, an immediate dismissal, was wrongful. With the finding of the learned trial judge we agree.

In an undated letter, exhibit 4, written by the respondent before he left Jamaica and a later letter exhibit 5 dated February 13 1992, the respondent sought the payment equivalent to one month's salary and other benefits in lieu of notice. The letter, exhibit 5, reads inter alia:

> "With respect to the above matter I, A. Felix Gonsalves feel that I have been wrongfully terminated on December 27, 1991 during our meeting at your office at 1000 hours.
>
> Under these circumstances, I would be entitled to at least one (1) months notice or "equivalent amount of severance" in lieu thereof, as stated in your letter of December 12, 1991, delivered to me on December 20, 1991.
>
> In view of my education, affiliations and experience, and the fact that I relocated from Toronto, Canada would certainly increase the amount of severance attainable under Jamaican Law."

These two letters reveal the true understanding of the parties of the terms of the agreement at the time of the making of the agreement. This understanding is consistent with what is reflected in the written document, exhibit 2, regarding the giving of one month's notice, on termination of the contract. Theobalds, J found:

> "This document exhibit 2 does in fact essentially contain the basic understanding between Plaintiff and the Managing Director of the Defendant company."

In support of eight grounds of appeal filed, Miss Phillips for the appellant argued that the learned trial judge should properly have found that it was the respondent who terminated the contract. However, having found that the letter of December 12 1991, embodied with the basic terms of the contract the learned trial judge failed to consider the other terms of the said contract and particularly, that which stated that termination would require "one month's notice by either party." Moreover, the award of damages for rental, parking, and loss of 20 months of 22 months, is inconsistent with the said contract and the respondent's letter dated February 13, 1992, requesting "one month's notice (or) equivalent amount in lieu." She concluded that the award was unsupported in that it was not specifically proven, by any evidence led, as required by law.

The respondent filed a notice in accordance with Rule 14(2) of the Court of Appeal Rules, 1962, contending that the learned trial judge erred in finding that the written documents, exhibit 2, were binding on the parties and this Court should find that the learned trial judge was correct to award damages based on the un-expired portion of the fixed contract for two years, which contract, on the evidence was made orally in October 1991.

Lord Gifford for the respondent submitted that this Court should uphold the finding of the said judge that it was the appellant which terminated the contract, which was an oral one. The document exhibit 1, the letter dated December 12, 1991, was properly not construed by the learned trial judge as the contract. That document, by reciting that it was a contract fixed for two years, is inconsistent with the termination clause requiring one

month's notice. The termination of a fixed term contract before the expiry of the term attracts damages, as in ***Cocoa Industry Board v Melbourne*** (1993) 30 JLR 242, being the wages 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. He concluded that the learned trial judge was entitled to accept the evidence of the respondent of his rent in Canada, his salary in alternative employment, and the loan taken by him in the computation of the damages recoverable by the respondent.

Every contract of employment is, prima facie, subject to termination by dismissal. However, any dismissal in breach of such contract is wrongful and subject to the payment of consequential damages, subject to the obligation of the person wronged to mitigate his damages.

The author in ***McGregor on Damages,*** 15th Edition, at paragraph 1167, describes the general rule concerning the measure of damages, in cases of wrongful dismissal:

> "The measure of damages for wrongful dismissal is prima facie the amount that the plaintiff would have earned had the employment continued according to contract subject to a deduction in respect of any amount arising from any other employment which the plaintiff, in minimizing damages either had obtained or should reasonably have obtained."

This statement is based on the full acceptance of the words of Erle, J, in ***Beckham v Drake*** (1849) 2 H.L.C. 579, 607.

However, if the contract is expressed to be terminable by notice and the employee is dismissed without notice or with notice otherwise than as stipulated in the contract, the dismissal is wrongful and the employee is

entitled to damages for the proper period of notice. If the requisite notice is given by the employer or pay in lieu, the employer has satisfied the terms of the contract and the dismissal cannot be deemed wrongful - see ***Addis v Gramaphone Co.*** (1908-10) All ER 1; note however, that the employee was also entitled to the commission that he was prevented from earning. See also ***Cocoa Industry Board v Melbourne*** (supra).

If the contract under which the employee is employed makes no provision for a notice period in the termination of the contract it is presumed that the contract can only be properly terminated on the giving of reasonable notice or the payment of damages in lieu. (***B.G. Credit Corp v DaSilva*** (1965) 7 WIR 530). The appropriate notice period cannot be less than the statutory minimum periods laid down in the Employment (Termination and Redundancy Payments) Act.

Where the contract is for a fixed term and the employee is dismissed prior to the expiry of the term, the employer is liable in damages for the wages for the unexpired portion of the said term or for so long as it takes the injured party to obtain new employment, whichever is less, subject to the obligation of the latter to mitigate his loss. The author in ***Chitty on Contract***, 26th Edition, Vol. II, relying on the decision ***in B.G. Credit Corp v DaSilva*** (supra) said, at paragraph 3989:

> "If the defendant has a right to terminate the contract before the expiry of the term, damages for the wrongful dismissal should be assessed only up to the earliest time at which the defendant could validly have terminated the contract."

and continuing at paragraph 3989 said:

> "Thus if, the contract expressly provides that it is terminable upon, e.g. a month's notice, the damages will ordinarily be a month's wages."

In the instant case, the learned trial judge found, and correctly so from the evidence, that the contract was for a fixed period of two years. The learned trial judge made no finding as to the notice period to be given in the event of termination of the contract, although that was a live issue between the parties. He did however make the expansive finding that,

> "This document exhibit 2, does in fact essentially contain the basic understanding between Plaintiff and the Managing Director of the Defendant company."

The "basic understanding" between the parties, as to the period of notice required on termination, is reflected in exhibit 2 itself from the appellant, which reads:

> "Termination of this agreement will require one month's written notice by either party." (Emphasis added)

as well as in the respondent's letters, exhibits 7 and 5, requesting "one month's salary" and " ... at least one (1) month's notice or 'equivalent amount of severance' respectively."

Because the learned trial judge failed to make a specific finding on this crucial issue of what was in fact the requisite notice period and omitted totally to construe the phrase in exhibit 2 namely, " ... one month's written notice," he was in error. Accordingly, this Court is permitted to do so, relying on the authority of ***Watt v Thomas*** [1947] 1 All E R 582, 587.

We find that the notice period agreed on by the parties for the mutual termination of the contract was one month's written notice. We agree with

the learned trial judge that the contract was made in October 1991, and as a consequence, the respondent assumed his duties as executive chef with the appellant on 13th November 1991. He received his work permit on or about November 20, 1991. The document exhibit 2 was a mere recital of the contract terms already agreed on. The respondent was dismissed by the appellant. No doubt, the respondent was dissatisfied with the state of disrepair of his working surroundings, expressed his opinion openly in the said meeting and dismissed by the appellant, with immediate effect. That act of dismissal was in breach of contract and accordingly amounted to a wrongful dismissal in that the respondent was entitled to, but did not receive the contractual one month's notice.

We disagree with counsel for the respondent that the giving of one month's notice was operative at the termination of the contract for the fixed term of two years. At the end of the two-year period, the contract would come to an end by the efluxion of time. The requirement to give notice then would be unnecessary.

The respondent is therefore entitled to receive pay and benefits in lieu of one month's notice in the sum of $69,299.75. For the above reasons we allowed the appeal, in part.