IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R 084 OF 1980

BETWEEN	V. G. ROSE	PLAINTIFF
AND	JAMAICA TIMES (PRESS) LTD.	DEFENDANT

D. Goffe insturcted by Samuda of Myers, Fletcher & Gordon, Manton and Hart for the Plaintiff
R.N.A. Henriques Q.C. instructed by D. Brandon of Livingston, Alexander and Levy for Defendant.

January 17, 18, 19, 20, 21, 1983 and June 1, 1984.

WRIGHT J.

By his writ dated 12th June, 1980 the plaintiff seeks to recover from the Defendant

> "sums due to the plaintiff pursuant to the Employment (Termination and Redundancy Payments) Act". (hereinafter referred to as The Act).

In the Statement of Claim dated 16th July, 1980 the plaintiff elaborated thus -

> The Plaintiff was at all material times an employee of the Defendant for the purposes of the Act;
>
> His employment which had extended over a period of 41 years had been terminated by letter dated 21/12/78;
>
> The Plaintiff had made a claim in writing as required by section 10 of the Act by letter dated 14/5/79 from his attorney to the Defendant but the Defendant had refused to make the payment due to him on the ground that he was not an employee.

Consequently the Plaintiff claims:

(a) A declaration that he was an employee for the purpose of the Act;

(b) Determination of the amount due to him;

(c) An order for the payment thereof;

(d) Costs;

(e) Further and other relief.

The Defence filed 16/9/80 can be summarised thus:

1. The Defendant denies that at all material times the plaintiff was an employee of the Defendant for the purposes of the Act or for any other purpose claimed or at all.

2. The Defendant admits the letter terminating services but denies that such services extended over a period of 41 years.

3. The Defendant denies that the plaintiff has made the claim in writing as alleged but admits that it refused to make any payment to the plaintiff pursuant to the Act.

4. The Defendant says that the plaintiff was at all material times an independent contractor employed in soliciting and procuring orders for its printing business and was paid for his service on a commission basis and that in addition the plaintiff was paid a retainer of $4.00 per week.

5. The Plaintiff was never employed to the defendant and consequently is not entitled to the payments under the Act or any other payment for the termination of his services which was done by the giving of reasonable and proper notice by the Defendant.

6. The Plaintiff is not entitled to the relief claimed or any other relief.

There was no Reply and it was not until 12/1/82 that the amended statement of claim on which the case came to trial was filed.

It reads:

1. The Plaintiff is a Company Director residing at 23 Manor Park Drive, Kingston 8, in the parish of Saint Andrew and was at all material times an employee of the Defendant for the purposes of the Employment (Termination and Redundancy Payments) Act.

2. The Defendant is a Company incorporated in Jamaica and carries on business as printers.

2A. The Plaintiff's contract of employment contained no stipulation as to notice of termination and the Plaintiff was accordingly entitled to reasonable notice to determine the employment which in the premises would have been 6 months' notice.

3. By letter dated 21st December, 1978 the Defendant wrongfully terminated the services of the Plaintiff with effect from 26th January, 1979, which at that time had extended over a period of some 41 years.

3A. By reason of the matter aforesaid the Plaintiff has suffered damage and was not able to obtain employment elsewhere.

PARTICULARS OF SPECIAL DAMAGE

1 month's loss of earnings at $760.00 per month	$760.00
5 months' loss of earnings at $200.00 per month	$1000.00

4. The Plaintiff has made a claim in writing as required by Section 10 of the said Act, namely, in a letter dated 14th May, 1979 from his then attorney-at-law to the Defendant but the Defendant has refused to make the payment due to him pursuant to the Act on the ground that he is not an employee.

5. In the premises, the Plaintiff claims:

   (a) A declaration that he was an employee for the purposes of the said Act.

   (b) Determination of the amount due to him.

   (c) An order for the payment thereof.

   (d) Costs.

   (e) Further and other relief.

   (f) Damages.

The resultant amended defence was filed 20/1/82 and is as follows:

1. The Defendant denies that at all material times the Plaintiff was an employee of the Defendant for the purposes of the Employment (Termination and Redundancy Payments) Act or for any other purpose as alleged in Paragraph 1 of the Amended Statement of Claim or at all.

2. The Defendant admits paragraph 2 of the Amended Statement of Claim.

2A The Defendant denies that it had or that there was a contract of employment with the Plaintiff and says that the Plaintiff was an independent contractor who was entitled to reasonable notice terminating his services and such reasonable notice was given to terminate his services and further denies that the Plaintiff was entitled to six months' notice as alleged in paragraph 2(a) of the Amended Statement of Claim.

3. The Defendant denies that it wrongfully terminated the Plaintiff's services as alleged in paragraph 3 of the Amended Statement of Claim or at all or that the Plaintiff's services extended over a period of some 41 years as alleged.

3A The Defendant denies that the Plaintiff suffered the alleged or any damage as alleged in paragraph 3(a) of the Amended Statement of Claim.

4. The Defendant denies that the Plaintiff has made a claim in writing as required by Section 10 of the Employment (Termination and Redundancy Payments) Act in a letter dated the 14th May, 1979 as alleged in paragraph 4 of the Amended Statement of Claim or at all and the Defendant admits that it has refused to make any payments to the Plaintiff pursuant to the provision of the Employment (Termination and Redundancy Payments) Act.

5. The Defendant says that at all material times the Plaintiff was an independent contractor engaged in soliciting and procuring orders for its printing business and was paid for his services on a commission basis and that in addition the plaintiff was paid a retainer of $4.00 per week.

6. The Defendant says that the Plaintiff was never employed to the Defendant and consequently is not entitled to payments under the Employment (Termination and Redundancy Payments) Act or to any other payment for the termination of his services which was done after the giving of reasonable and proper notice by the Def...

7. By reason of the matters aforesaid, the Defendant says that the Plaintiff is not entitled to the relief claimed or any other relief.

To meet an objection raised by Mr. Henriques the writ was amended by adding -

"and to recover damages for wrongful dismissal".

The Plaintiff's case was presented with two issues in mind:

1. At the time of the termination of services was the Plaintiff an employee of the defendant and, if so, for what period?

2. Were the plaintiff's services lawfully terminated and if not, to what damages is he entitled?

But the apparent simplicity of the issues is deceptive. For in order to resolve these issues a relationship of 41 years has to be investigated as well as the effect, if any, of the Act upon the termination of this relationship.

So far as is relevant to the present consideration the term "employee" is defined by The Act as follows:

> "employee" means an individual who has entered into or works (or in the case of a contract which has been terminated, worked) under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be express or implied, oral or in writing, but does not include ....."

As amended, the plaintiff's writ now embodies a claim under the Act and a claim at Common Law for wrongful dismissal, crucial to his success, quite apart from the question of the adequacy or otherwise of the notice is proof that the plaintiff was an employee of the Defendant. What cannot be overstated is that unless he comes within the definition of "employee" he cannot succeed under the Act. What his prospects are at common law will depend upon the terms of that relationship - express or implied. It follows that if he was an independent contractor he has no maintainable claim under the Act.

At the very heart of the case is a rather violent clash of contentions. The plaintiff with undisguised flair asserts he was at all material times over a period of 41 years an employee of the defendant - and no mean one at that. The defendant's business virtually revolved around and depended upon him, as an employee. He literally trumpets

it with no moderation. The defendant literally with gritted teeth and knitted brow glowers back at him and growls "No, you were not". It is patent, therefore, that, in order to determine the true status of the plaintiff the whole evidence requires a rather keen assessment independent of the ipse dixit of the parties.

That the defendant is a company incorporated in Jamaica and carries on business as printers, is not in dispute. What is also not in dispute and is of critical importance is that the defendant is a separate legal entity from Jamaica Times Ltd. or Times Store Ltd. to which the name was changed within recent years as a matter of differentiating this entity from the defendant. In 1937, which is the starting point of concern, there was Jamaica Times Limited which had as part of its operations The Jamaica Press. Then in 1943 a change occured giving rise to two separate companies - The Jamaica Times Limited and the Jamaica Times (Press) Limited. The relationship between the two companies is that there are certain shareholders who are common to both but one is not a subsidiary of the other nor does one company own shares in the other. Also, there have been directors common to both.

The plaintiff, who at the time of trial gave his occupation as an employee of Herald Limited as a director with a somewhat unspecified portfolio and at a remuneration of which he is not quite sure but at somewhere between $40,000 - $45,000 per annum, says he began his working life at age 18 or 19 (he is not quite sure) in 1937 with the Jamaica Times Ltd. as a stock clerk earning 15/- ($1.50) per week. At that time the managing director was Mr. Basil Parkes who also became the managing director of the subsequently formed Jamaica Times (Press) Ltd.

Mr. Rose's evidence continued that after a few years he was promoted to the post of shipping clerk for the Times Store at a remuneration of £1.5 ($2.50) per week. Next he rose to the post of manager of the wholesale department for which he received a weekly pay of £3.10 ($7.00) plus a commission of 2½% on sales. That was

about 1943. In 1946 he said Mr. Parkes asked him to go to the Printing Department to act as manager. His duties, he said, were to go out and solicit sales for printing as well as canvass advertisements, for the Jamaica Times newapaper published by the defendant company. He said he was based at the printery where he was provided with a desk, stationery, a telephone and secretarial services. His pay was £5 (10) per week plus 5% commission on sales. After 8 - 10 years he suggested that he be paid no salary but that he be given 10% commission. Instead the company paid him £2 ($4) weekly plus 10% commission. Arguments have ranged as to the significance of this £2 per week and it will be necessary to return to deal with it later.

One factor to be borne in mind is that at the time when Mr. Rose transferred to Times Jamaica (Press) Ltd. that company was a separate legal entity from Jamaica Times Ltd. though there were, as I have said previously, features common to both. The plaintiff's evidence ignores the distinction. He maintains that throughout he reported directly to Mr. Parkes up to the time of the latter's death and that he was not otherwise subject to any supervision.

The job as acting manager, says the plaintiff, was temporary. That post was eventually filled and about that time the advertising manager who was also in charge of printing sales walked out of the job. The plaintiff applied for that job and got it. In this new job his remuneration continued to be 10% commission on sales plus £2 ($4) and he continued to be paid in this manner for upwards of 20 years. The commission was paid separately from the $4.

The head office for the Printery had been and remained at Times Store even after the Printery had moved to 141 East Street. Accordingly, when the plaintiff prepared his claim for commission it was first submitted to the manager at the Printery and then sent to the head office from where he would receive his cheque. The defendant company kept a commission account for the plaintiff which reflected commissions earned as well as expenses incurred by him. On the debit side of this account would appear payments made in respect of the acquisition of motor cars by the plaintiff as well as

maintenance costs met from the account. Expenses incurred by the plaintiff regarding trips abroad in his capacity as Assistant Chief Commissioner and National Training Commissioner (he was a scout for 51 years) also appeared on the debit side of the account. The credit balance on account would be paid to the plaintiff at intervals.

Mr. Walter Alexander Durie (Alec) succeeded to the post of managing director of the defendant company in 1949 following the death of Mr. Parkes in 1947 and the ensuing period during which Mr. Durie functioned in the post but was not appointed thereto. The system of regular meetings on Monday mornings to discuss sales and any attendant problems continued under Mr. Durie who still occupied that post at the date of trial. Indeed, when the plaintiff went to Times Store in 1937 Mr. Durie was then employed at Jamaica Times Ltd. The result of this is that the whole period of Mr. Rose's association with the companies in question is covered by Mr. Durie's evidence. There is no hiatus in this regard.

The plaintiff lays great store by the fact that the company kept the account and paid the expenses. He also seeks support from his P.A.Y.E. certificates issued by the defendant. In the agreed bundle of documents are Certificates for the years 1976, 1977, 1978. For the year 1976 the income stated was $10,161.20 and the Income Tax deducted $2,695. The income for 1977 was given as $9,880; tax deducted $2,122.15. The 1978 figures were $9,880 and $1,866 respectively. The forms are official forms with space for "Employee's name" "Occupation" and "Employer". The three forms show the employee to be Vincent G. Rose, one only lists the occupation which was "salesman" and all are signed in the line for employer by Van Reid who the plaintiff says was the accountant at Times Store. With the aid of these certificates the plaintiff prepared his Income Tax returns. Nor is this all upon which he relies to establish his status as an employee.

He said that at the Printery he was allowed discounts as he had enjoyed in common with staff members at Times Store. Then, too, he was presented with a gold watch in recognition of "25 years of dedicated, outstanding and "something else" service to the company".

This was at a large function for the recognition of many members of staff. It is a point not without some significance that with the exception of the plaintiff all the persons so honoured were from Times Store. He was the only one from the Printery. And further still he claims that the defendant sponsored his attendance at a meeting on Sales Promotion at the Sheraton Hotel, Kingston.

Of his weekly work pattern he said -

> "I would come in at 8 a.m. like everybody else. Did not always stay in office until 4 p.m. I would leave office, see clients and then end up at home about 4 p.m. or so. Would sometimes remain in office till 4 p.m."

This is how he sums up the situation in answer to the defendant's denial that he was an employee:

> "I understand the defendant to be saying I was never an employee of theirs. When I went to Times Store in 1937 I regarded myself as an employee. When I was transferred by Parkes to Printery Department I did not regard it as a change in nature of my employment. .. .. When I went to Printing Department, terms and conditions of work remained the same - no change".

The plaintiff said he kept no record of his earnings but depended upon the record of the company at the Printery to which he had access. His income he said was roughly $10,000 per annum. It did not suit him to earn more because of the rate of Income Tax above that figure. By arrangement, therefore, said he, the defendant would pay bills for him eg. motor car expenses, insurance of motor car, entertainment etc. Those bills were actually met from his earnings. However, it is to be noted that these are expenses which he states are reflected on the debit side of his account.

Gross sales from which he would be paid 10% commission would at times be $350,000; $290;000; $280,000; $270,000. Sales declined as the company lost business, or as some clients were diverted from him. He complained that the new manager Mr. Richard Durie, without consulting him transferred some of his better accounts to a new salesman a Mr. Campbell. Among accounts which he had serviced during the past 10 years were Bank of Jamaica, their largest customer with a $100,000 per year account, Desnoes and Geddes, Bryden

and Evelyn, Livingston, Alexander and Levy, and Jamaica General. Bank of Jamaica set up their own printery "8, 10, or maybe 6 years ago" and so that account was lost. Lost too was Bryden and Evelyn which went out of business.

The plaintiff and Mr. Alec Durie are companions in age and when the plaintiff dealt directly with him relations were satisfactory. But with the ascendancy of Richard Durie, a much younger man, to the manager's desk all that changed. Indications are that relations became less than cordial and the transfer of the accounts complained of did nothing to ameliorate the bruised relationship which was assuming the nature of a festering sore. Indeed the nadir in their relationship was being approached when the plaintiff addressed a rather stiff letter to Richard on 27/11/78 in which he stated his attitude to the transfers. The letter reads:-

> Dear Mr. Durie,
>
> We are getting very formal now-a-days, so I think it is a good idea for us to put my thoughts to you in writing.
>
> In 1937 I started with the Times organisation, and eventually went over to the Printery staff in 1946, At that time the Printery had very few office customers and the monthly sales were in the region of $1,000.00. My first week's pay cheque there was exactly $3.75.
>
> Over the past 30 years, my team and I, by hard work and application, have built up a very sizeable and lucrative clientele for the Printery, to the extent that the monthly sales now average $60,000.00.
>
> During last year you took it upon yourself to transfer some of my better accounts to one Mr. Campbell, and this quite arbitrarily.
>
> As you then had no authority to do so, without first requesting my permission, I maintain that I should be adequately compensated for loss of revenue as a result.
>
> I should be glad to have your views on this at a very early date.
>
> Yours truly,
>
> V. G. Rose
>
> P.S. Two weeks ago I showed a draft of this letter to Mr. Alec Durie but never gave you the original then. I think you should have it for your files.

What are the accounts which were under reference the plaintiff did not say but a letter from Richard Durie to the plaintiff dated 25/10/78 may throw some light on the then prevailing situation. It is as follows:

Desnoes & Geddes Account

Dear Mr. Rose,

Yesterday, I pointed out to you that during the past four (4) months, the Desnoes & Geddes account had only provided us with one (1) job.

You suggested to me that it would therefore be in our best interest to ask Mr. Campbell to start to service this account especially since you regarded yourself as being in semi-retirement and no longer available to service our customers as formerly.

I have therefore made arrangements to have the Desnoes & Geddes account taken care of by Mr. Campbell. Please therefore do not call on Desnoes & Geddes in the future for printing.

Yours very truly
JAMAICA TIMES (PRESS) LTD.

Richard Durie
General Manager.

The copy of this letter which came from the defendant's files bears the signature of the plaintiff in bottom right hand corner. He admits to having agreed to the transfer of this account but he disputes the reference to his semi-retirement.

For good measure an undated circular letter put out by the defendant is relied on to show how the plaintiff was regarded by the defendant. It was in the defendant's interest to put out this letter and the reason for its issuance is clear. For my part I see nothing in it inconsistent with the plaintiff being an independent contractor as the defendant claims. Nor is it equally consistent with the plaintiff's claim. It reads:-

" Dear Customer,

As you are aware, for many years Mr. V. G. Rose has been in charge of our Sales Section and had employed to him, Mr. Kenneth (Teddy) Brown to service accounts on his behalf with authorization to contract business on behalf of Times Printery.

Mr. Rose has informed us that effective from 31st December, 1975, Mr. Brown has resigned from his employment and he is therefore no longer authorised to contract business on behalf of Mr. Rose or Times Printery with effect from that date.

We wish to assure you however, that Mr. Rose, who has many years of valuable experience in the printing business is continuing his relationship with Times Printery, and we look forward to continuing the amicable relationship which exists between ourselves and your firm. We will continue to give the same efficient service which we have endeavoured to give over the years for our mutual benefit and look forward to the continuance of your valued business.

Yours sincerely,

R. Durie,
General Manager.

At this point it may be appropriate to refer to a letter dated 7/11/70 which introduces in a measure a challenge to the plaintiff's claim that he was paid 10% commission on gross sales and also throws some light on the manner in which the commission account was operated. It is as follows:

" Dear V.G.,

I think it would be a good idea to put on record the decisions that we reached together at our meeting with Mr, Muirhead on Wednesday the 28th of October. You will remember that we were trying to arrive at a formula that would enable the Printery to go after very large jobs to feed our new four-colour Press and to be able to make keen quotations in this highly competitive but very necessary area of development for our Printing Company.

The discussions recognised that a Sales Commission of 10% on all Printing jobs would be an impossible burden for the quotation for these big jobs to carry. It was decided that there would be a sliding scale rate of commissions introduced from the 1st of November whereby all job-printing jobs up to a value of $500.00 would entitle the crediting of 10% of the value of the job to a selling expense account against which you and Mr. Brown would be able to draw your expenses and commissions. It was agreed that jobs in the range between $501.00 and $1500.00 would be paid at the rate of 10% commission on the first $500 and 5% commission on the excess up to the amount of $1500. On jobs totalling between $1501.00 and $5,000.00, the excess above the $1500 would receive a rate of commission at 2½% and on jobs of over $5,000

the excess over the $5,000 will receive commission at the rate of 1%.

It was agreed that work done for the Bank of Jamaica would receive a flat 10% rate of commission considering the particular nature of service that we do for the Bank of Jamaica.

I hope that this letter puts on record our agreed decision so that we will have it for reference in case of any need for referal back in the future.

Yours very truly,
Jamaica Times (Press) Ltd.

Alec Durie

At sometime in November, 1978 or early December, 1978 (the witness is not sure of the date) a meeting was held at the instance of Alec Durie in an apparent endeavour to smooth out matters. Great importance seems to have been attached to this meeting having regard to the persons who attended viz, the plaintiff, his wife, Mr. Esmond Kentish from the Bank of Jamaica, Mr. Alec Durie, Mr. B. St. J. Hamilton and Mr. Richard Durie. But this meeting failed of its purpose as it did not achieve much beyond an agreement to meet again. But before such a meeting could materialise matters came to a climax.

The first indications came in a letter from Alec Durie requiring immediate attention to an over-drawn account. It is dated 12/12/78 and reads -

Dear V.G.,

In going through your commission accounts from which you receive your weekly drawings and pay your expenses, I find that as at the end of November they were overdrawn to an amount of Three Thousand Six Hundred and Forty Nine Dollars, One Cent ($3,649.01).

In the circumstances where we have been paying from these accounts your N.I.S. and N.H.T. contributions, as well as Income Tax, it appears that we should rationalize payments so as not to embarrass the regular weekly drawings to yourself and Mr. Kenneth Wade.

Your immediate attention will be appreciated.

Yours very truly
JAMAICA TIMES (PRESS) LTD.

Alec Durie
Chairman

The final letter was terse, concise and unequivocal. It came from Alec Durie and bears date 21/12/78 and reads:

> Dear Mr. Rose:
>
> Please take notice that your contract for selling job printing on behalf of Jamaica Times (Press) Limited will terminate on January 26, 1979.
>
> Yours very truly
> THE JAMAICA TIMES (PRESS) LTD.
>
> Alec Durie
> Chairman

And so was brought to an end a relationship the nature of which has to be determined. Was the plaintiff an employee or an independent contractor?

After the termination of the notice, the plaintiff thinks he worked with a small company - Business Printers at Bell Road. From earnings of $26,000 - $28,000 per annum plus the $4 per week with the defendant up to the time of dismissal the plaintiff says his earnings fell to $120 per week at his new job and "from memory" so continued for the next six months until he joined Herald Printery. In the meantime the assets of Business Printers were acquired by Herald Printery.

The Plaintiff was subjected to a rather searching cross-examination and in the circumstances this was to be expected. In support of the defendant's contention that the plaintiff was an independent contractor the cross-examination revealed that he employed salesmen (eg. Walter Brown and Teddy Brown) who were answerable to him and who were paid out of the commission credited to him. He was personally responsible for all emoluments paid them and all disbursements to them - P.A.Y.E. deductions, N.I.S. and N.H.T. ("If they paid these") were treated as part of his expenses in earning his commission. The defendant says this situation is compatible with his being an independent contractor but not with his being an employee. He was unable to dispute the fact that his actual earnings for 1978 were $22,748 and not $26,000 - $28,000 as he had testified. A tendency to a lack of precision is sometimes evident. He was forced to admit that

the Printery is operated by a different company from the one which operates Times Store i.e. Jamaica Times (Press) Ltd. and Jamaica Times Ltd. respectively - an obvious challenge to the reliability of his evidence in chief.

After expressing uncertainty as to whether Mr. Parkes or Mr. Alec Durie dealt with him after 1947 he accepted the suggestion it was Mr. Durie. But he did not accept the suggestion regarding his status as put to him.

> Q: "Did Mr. Durie make it quite clear to you that you are a free agent and that your duties were to procure orders for the Printery?
>
> A: Nothing was discussed like that.
>
> I am saying everything went on as from the day I joined. The only thing changed was the method of payment".

Admittedly, this is consistent with his contention but certainly not with his own evidence-in-chief. His job as a 15/- ($1.50) per week stock clerk cannot conceivably be the same as shipping clerk acting manager, salesman or sales manager! He disagreed that his only function was to go out and get orders for printing. He said he had to deal with quotations and proofs would be submitted to him to be verified. If the company wanted anything done, he would do it. There was no change. But he admitted that his main function was to go out and get orders. The other matters he mentioned had to do with orders. This had been so from 1946.

It is noted that there was no provision for leave of any type. Also he could go to work anytime and leave anytime - because of the nature of the work. As a good scout, says he, he would attend jamborees and the company would not protest. On the contrary Mr. Durie would wish him a good time.

He attributes the assigning of "some 10-15-20 of the accounts" to the new salesman Campbell whom Richard Durie employed not to the manner in which the accounts were being serviced but to Richard's personal disatisfaction with him. This he blamed on the difference in their ages - "the two age groups just could not come together". Accordingly he saw that the parting of the ways was coming.

Despite the entry of his earnings on the Income Tax Certificates in the column -

"This Employment Gross Pay, and tax in my/our employment".

the plaintiff says he does not think the amounts there entered are his gross earnings. Says he "I don't know if I earned $10 or $10,000. The accountant prepared them and I accepted". Such a response seems much too peevish and facile to be credible. It is certainly not consistent with the position of a man who assesses himself of such great importance to the company's business. Is it not more probable that he would take steps to ensure that he was being paid what he had earned, the moreso that he had to pay his salesmen from the amount credited to his account?

On the question of the discounts he had no knowledge that everybody at the Press got them. He had the freedom of the country to procure orders. When in office he would occasionally write up orders and pass them on for someone else to prepare dockets. He had no control over the manner in which the orders were dealt with.

The Long Service Award must have been introduced to dispel any doubt about his status with the company. But his response in cross-examination on his aspect of his case was not re-assuring. This is what he said :-

> "I wouldn't know if it was Times Store which had the Long Service Award. I only know it was the company who had it. Nobody told me who had it. Yes, I did have the impression it was not the Press but the parent company who was having the Long Service Award ceremony. I don't know whether Jamaica Times Ltd. is not the parent company of Jamaica Times (Press) Ltd."

I have already referred to the relationship between the companies and it is clear that there is no parent company.

As I understand it an award for long service is not a necessary incident of being an employee. Rather, it is a courtesy extended as it were to oil the wheels of production. It is my judgment that any reliance placed on this award to prove that a person is an employee is misplaced. And it is common knowledge that there are many employees who serve for very long without the benefit of such recognition. It is

not inconceivable that a person can serve a company without being an employee of that company, e.g. an attorney-at-law.

Concerning the payment of the commission the plaintiff admitted that it was he who asked to be put completely on commission though he cannot recall the year - possibly 1955. Then followed the question -

> Q: Were you told that you would be paid a 10% commission plus a weekly retainer of $2 so as to ensure that you did remain on the company's books as an employee?
>
> A: How I could recall it is that I had a commission and a reduced salary. I would say yes to the question except to the retainer part. It was a reduced salary - that was my understanding. I understood it was not a retainer."

The final portion of the answer would imply that the question of retainer or reduced salary was discussed. Otherwise what is the meaning of

"I understood it was not a retainer".

Further answers would seem to make my view more probable. He said -

> "In court now I realize that there is a great difference between a retainer and a reduced salary. I might have gone along with the suggestion of a retainer meaning it was a reduced salary".

It is indeed open for decision whether this recently acquired appreciation of the difference accounts for the indecisiveness patent in his answer. But here again the credit of the plaintiff attracts close scrutiny. He admits to having consulted Mr. Emil George Q.C. to take up the question of his compensation for the termination of his employment. As a consequence Mr. George wrote the defendant the following letter dated 14/5/79:

> Attention Mr. Alec Burke
>
> Dear Sirs,
>
> Re: Mr. V. Rose
>
> I have been consulted by your former employee Mr. V. G. Rose concerning the termination of his employment with your company by letter dated 21st December, 1978.
>
> My instructions are that Mr. Rose was first employed by your group in September, 1937,

and was then paid a fixed salary. Subsequently he was transferred to your printery at a fixed salary plus a commission, the commission varying from 10% downwards depending on the quality and volume of the work done.

Mr. Rose informed me that he became your Sales Manager and performed the duties of that office satisfactorily. However, on the 21st December, 1978, after working with your Group for over forty-one years, Mr. Rose was given one month's notice of termination and no compensation by way of severance. I feel certain that when the matter is reviewed by you, it will be readily appreciated that Mr. Rose is entitled to reasonable compensation in the circumstances.

Please let me hear from you soon. I do hope the matter can be amicably resolved.

Yours faithfully
Emil C. George Q.C.

Messrs. Livingston, Alexander and Levy, attorneys-at-law replied on behalf of the defendant denying the plaintiff's entitlement to compensation.

Mr. George's subsequent letter dated 22/10/79 stated in part -

> "..... In 1955 Mr. Rose asked to be placed completely on commission and was told he would be paid a 10% commission plus a weekly retainer of £2 per week so as to ensure that he would remain clearly on the company's books as an employee. Your clients expressed the wish at that time that he should remain working only for them".

Unless one resorts to accusing Mr. George of fabricating what is here advanced, for which there can be no justification, it is clear that he was following his instructions. Why then is the plaintiff introducing a reduced salary when a retainer was being advanced by eminent Queen's Counsel? It may be noted that "a reduced salary" is of more certain import and presents less difficulty than "a retainer". And what is more the witness does have an understanding of a "retainer". Says he,

> "Yes, I understand that a retainer is given so as to tie up the services to the person giving the retainer. I understand such a retained person to act for me and not against me".

Further, he said that the purpose of the retainer was that he should remain working for the defendant.

Further questioning elicited the information that the plaintiff got the impression that it was felt that he was showing more favour to Business Printers than to the defendant. And indeed if this were so it would be in violation of the principle of the retainer. He denied any knowledge of one Cebert Brown or whether he worked at Business Printers. But the suggestion seems to be that this is the gentleman through whom his favours were being channelled to Business Printers. Nevertheless, the plaintiff did not believe that the charge of showing favours to the defendant's competitors led to the parting of the ways even though the relationship between himself and Richard Durie deteriorated.

He agreed that he was free to canvass anybody in Jamaica for jobs using such methods as he thought best to get orders and to encourage clients to keep orders. Further he could decide to which clients he would return as well as whether to return or not. And apart from Mr. Alec Durie making suggestions at meetings as to what he thought the plaintiff should do the plaintiff was left free. Whether the witness appreciated the purpose of the questions on this aspect of his case it is clear that the information was extracted to demonstrate that he was not subject to any of the controls characteristic of one being an employee. The suggestion that the plaintiff was never an employee of Jamaica Times (Press) Ltd. but that from he went there in 1946 it was on the basis of a commissioned salesman with a retainer of £5 per week was strongly denied. To the very end the plaintiff insisted that had his suggestion made in 1955 to be put completely on commission been accepted, there would have been no change in his work relationship - only in the method of payment.

It is worthy of note, too, that the plaintiff despite the length of time he worked with the defendant has no knowledge of any provisions for any pension in relation to his job. The plaintiff was his only witness.

Evidence for the defendant was given by Mr. Alec Durie who was a director of Jamaica Times (Press) Ltd. when the plaintiff began

working with the defendant in 1946. Further, at the time when the plaintiff commenced working at Jamaica Times Ltd. in 1937 Mr. Durie was then an employee of the said company of which he subsequently became chairman in addition to being chairman and managing director of Jamaica Times (Press) Ltd. It was his evidence that the plaintiff began as salesman of Printing for the defendant in 1946 and that he was never Advertising Manager of the newspaper, Jamaica Times when that was being published by the defendant nor was he ever manager of printing sales.

As salesman of printing the plaintiff's duties would be to make contact with potential customers, try to persuade them to give the defendant their printing jobs, and to encourage the timely production and delivery of orders to customers. He agrees that the plaintiff's remuneration was £5 per week plus 5% commission in sales per week - the £5 being paid to enable him to pay to necessary expenses of transportation and incidental expenses of making contacts with potential customers. What was expected of him was to bring in orders for printing. Allied to this was the proviso that customers are satisfied, business profitable and a minimum of bad debts.

Said he, there were two types of employees at the Times Press - management employees and production employees. The management employees were the supervisory employees. They saw to such matters as accounting. The production workers whose hours of attendance were the same as the management employees (8 a.m. - 4 p.m.) in those days had responsibility for production eg. cutting paper, setting type and printing.

The plaintiff belonged to neither of these categories. He was a free agent said the witness, so much so that if management did not see him for a week, they would still be satisfied provided printing orders came in. Whereas the two categories of employees mentioned were subject to supervision by the manager of Printing (Mr. Parkes) and the witness, though the matter of discipline fell to Mr. Parkes, the plaintiff was not similarly positioned. He had no fixed hours, no fixed duties and no supervision except in the widest sense. Then, too, his

income was unlimited. Of significance too, as gathered from Mr. Durie's evidence, is the fact that none of the leave facilities provided by the defendant applied to the plaintiff. In 1946 employees were provided with 2 weeks' vacation leave as well as sick leave which was discretionary. The terms of the plaintiff's association with the defendant had none of these provisions. Said Mr. Durie, the company would have had no means of ascertaining whether the plaintiff was on leave or was sick. It was relevant to observe that the plaintiff was unable to say anything about the leave facilities for workers at the company during the period 1946 - 1955, When life was much simpler there was no commission account. At the plaintiff's request his commission was paid to him without any expenses being deducted. He had no employees of his own then, no P.A.Y.E., N.I.S., nor N.H.T. and at his level of pay income tax hardly applied.

In 1955 when the plaintiff as salesman of Printing suggested to the witness, who was then managing director, that he be paid a 10% commission on sales the witness agreed but insisted on a £2 per week retainer as well to ensure that the plaintiff sold only for the defendant. The plaintiff agreed.

At some time during the period 1955 - 1978 an accounting system was structured to handle the plaintiff's earnings. It comprised a Commission Drawing Account and an Expense Account. He had as well a Savings Account. One half of the earnings was credited to the commission account from which the salary he allowed himself as well as for his employees was paid. The other half went to the Expense Account from which expenses would be paid at his request. Apart from the 10% commission and the £2 paid per week the company made no other payments to or on behalf of the plaintiff except bills paid at his request from his earnings. The witness maintains that the P.A.Y.E. Returns made by the company in relation to the plaintiff were made in keeping with the law. Similar returns were made in respect of the plaintiff's employees at his request. They were paid by the plaintiff through the company's books.

Mr. Durie gives a rather different picture about the Long Service Award which means so much to the plaintiff. He says that for some time Mr. Rose had been nagging him about some recognition 'for his long association with us'. As Times Store was having such a function it was convenient to include him and to present him with one of the watches paid for by Times Store. This account would explain why the plaintiff was the only person from Jamaica Press to be included in the function .

As far as discounts were concerned, "all members of the family" enjoyed them. Even Mr. Rose's employees enjoyed the facility. And so did the lawyers who did work for the company who were not in any sense of the word employees. In these circumstances such a facility cannot be relied upon to establish status as an employee.

In directing the attention of the witness to the letter terminating the association with the defendant Mr. Henriques asked the question -

> Q: What was the reason for you writing the letter dated 21/12/78 terminating the services of Mr. Rose?

to which the reply was made -

> "The culmination was the meeting attended by Mr. Rose, Mr. Kentish and other representatives - Mr. Richard Durie, B. St. J. Hamilton, Mrs. Rose, myself. Rose said he had gone with one of his salesmen to Grace Kennedy and there had met Mr. Teddy Brown, the sales manager for Business Printers canvassing the same account and as a demonstration of his loyalty to Times Press had instructed Mr. Teddy Brown to give this other Mr. Brown a chance with this account and that as far as he Mr. Rose was concerned if he saw people stealing our four-colour Press he would not lift a finger to stop it".

Mr. Goffe objected to the reception of this evidence on the ground that it was irrelevant and prejudicial in that no question relating thereto had been put to the plaintiff. However, as these were apparently only further details of the meeting about which the plaintiff had testified I ruled the evidence admissible but that the weight would be affected by the manner of introduction. And indeed the meeting did not survive the remark for long. It is relevant to note that Mr. Rose did not give details of the events at that meeting. However, I did get the impression from his evidence that it was not a pleasant meeting. Rather

it was a fruitless meeting.

In order to meet the claim for redundancy, Mr. Durie gave evidence to show that there was no redundancy because the business of job printing was still being carried on at the same location as when Mr. Rose was there and that salesmen and saleswomen were performing the same functions as Mr. Rose used to perform i.e. selling job printing on commission. Further, there had been no change in the operation of the business since the departure of Mr. Rose nor was there any intended change.

Section 5(1) of the Act imposes on an employer who by reason of redundancy dismisses an employee who had been continuously employed for 114 weeks up to the date of dismissal as well as upon any person to whom ownership of the business is transferred during the period of twelve months after such dismissal, a liability to pay to such employee redundancy payment to be calculated in such manner as shall be prescribed. Section 5(2) (a) and (b) of the Act prescribes:

> (2) "For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to -
>
> (a) the fact that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish".

It was in order to meet these presumptions against the employer that Mr. Durie gave the evidence last related. Further, in order to meet any presumptions arising on the basis of diminishing business he gave sales figures for the period 1974 - 1978 (September) as follows:

1974	-	$510,955
1975	-	$529,308
1976	-	$575,302
1977	-	$444,072
1978 (Sept)	-	$529,723

The company has lost some clients but had also gained others. Essential to the plaintiff securing any benefit under these provisions is a finding that he was an employee and that as such he comes within these provisions. Redundancy payments obviously do not come automatically on termination of employment.

With regard to the Seminar which the plaintiff testified that he attended at the defendant's expense Mr. Durie has no recollection. But, says he, he would not dispute the plaintiff's testimony on this point because, since, from the nature of the seminar it was calculated to upgrade the plaintiff's efficiency as a salesman it would be in the interest of the company that he attend. Accordingly the company would pay for his attendance. Inasmuch as the plaintiff's evidence did not put the attendance in any different context its value in supporting the plaintiff's claim is negative.

Again with reference to Mr. Rose's evidence concerning the facilities afforded him in relation to his position Mr. Durie's evidence is that a desk was provided for salesmen and was used alike by Mr. Rose and others. Accordingly, he does not support the importance which Mr. Rose attaches to such provision. On his evidence these facilities were not exclusive to Mr. Rose nor were they indicative of his standing with the company. I make the comment that even if the plaintiff were an independent contractor the provision of facilities for him to attend to his work would have been in the company's interest. Accordingly, such facilities without more are not necessarily indicative of status.

This witness on whose shoulders lay the burden of the defence was subject to a very thorough cross-examination. In his evidence-in-chief, he manifested the ability and alertness of mind which is not uncharacteristic of someone occupying the position he does in keeping alive a business begun by his father in 1898. Cross-examination was a formidable duel as he refused to yield to pressure. He agreed that the plaintiff came to work at Times Store in 1937 and that he was transferred to Times Press in 1946. But he insisted that although the managing director, Mr. Parkes, had the prerogative to transfer staff it was not in exercise of that prerogative that the plaintiff was transferred. Rather, the

transfer was at the plaintiff's request. But however the transfer was effected it would seem to me that the result would be to engage the plaintiff in a work relationship with the defendant company. What was the nature of that relationship and whether it continued unchanged up to the time of the termination of Mr. Rose's services, is the all-important question. And in the effort to resolve this issue there are two important influences which cannot be ignored. The first is that the flamboyance which may well be a prized asset in a successful salesman regrettably found its way into the witness-box and perceptibly, even if unintentionally, coloured Mr. Rose's testimony. The result is that he may well have over puffed his wares. The second influence flows from the dourness of Mr. Durie who is no novice at his calling and is well able, unless he is unquestionably honest, to deliberately blunt any thrust by Mr. Goffe even if seen as no more than an effort to gather the crumbs that fall from the table. He was alert enough to respond to Mr. Goffe -

"I am fallible, but not foolish, I hope".

He was honest enough to admit that the company's business depended largely on what business Mr. Rose was able to secure. Then too, his fallibility was revealed when he was challenged on the events at that unsuccessful meeting on 27/11/78. Pressed about the statement alleged to have been made by the plaintiff at that meeting, he conceded that the words had not in fact been used at the meeting but two days earlier and that to put everything in true perspective the words "and had said" should have preceded the statement. This was on the second of the two days he spent in the witness-box the greater part of which was spent under rather testing cross-examination. It was when the evidence of the previous day was put to him that he made the retraction. But he explained that the question with which he was dealing was "what led up to the parting of the ways".

It was put to him -

Q: Did you use the words read by the Judge?

to which he replied

> Yes, I did use the words read "I used the word culmination to convey to the court that there was a series of events".

I think the keen-ness of the witness is here amply demonstrated and I accept his explanation.

Queried as to his interest in the defendant company, which is a factor not unlikely to influence the quality of his evidence, he admitted that at one time he had held majority shares in the defendant company but had sold some of his shares to two of his sons leaving him with 9% of the shares - ordinary shares - in 1978.

About that time his son Richard, then 26 years of age, was the managing director of Jamaica Times (Press) Ltd., the defendant . He still is - and it would seem that the age difference between Richard and Mr. Rose did not conduce to the maintenance of the amicable relationship which had developed between the older Mr. Durie and the three-years-older Mr. Rose. This conclusion agrees with the testimony of Mr. Rose himself and the correspondence which passed between them notably Mr. Rose's letter dated 27/11/78 the date of the meeting at which things did not go well, at least for Mr. Rose, who as Mr. Durie testified, was seeking to obtain $100,000 from the defendant as severance pay - the fact which necessitated the meeting.

It may be worthwhile to juxtapose his perception of that meeting:

> "The purpose of the meeting was that Mr. Rose was seeking to get $100,000 out of us as severance pay and the object of Mr. Kentish's coming was to arive at a settlement, not to decide how much he was to get. We hadn't agreed to anything. The meeting was called to examine the justice of Mr. Rose's claim. The money was not mentioned at the meeting. The claim had been made before. Yes, if the justice of the case had warranted we would have decided to pay him a sum to be agreed".

But this seeming concession did not satisfy Mr. Goffe who proceeded:

> Q: Suggest that after that meeting you decided a few days later to terminate Mr. Rose's services on one month's notice so as to avoid paying him any severance at all.
>
> A: Not correct.

I think that even Mr. Goffe would, in retrospect, admit that that was not one of his better suggestions because without a severance there could be no claim to severance pay.

But he continued:

> Q: In order to assess the justice of Mr. Rose's claim you would have had to consider certain factors including his sales performance?
>
> A: The meeting never considered that. His claim was based on length of association.

In this regard it may be relevant to observe that the original statement of claim stressed the termination of "the services of the plaintiff with effect from the 26th January, 1979, which at that time had extended over a period of some 41 years". A similar claim was made in the amended statement of claim dated 12th January, 1982 with the word "wrongfully" added. I am persuaded that the length of service, even though misconceived as over 41 years instead of 32 years (1946 - 1978), was the important factor for consideration at that meeting, which would be relevant to the question of compensation.

An effort to introduce additional support for the plaintiff during cross-examination was effectively blocked. Although the plaintiff had not testified about the creation, contents or use of business cards,it was sought to extract from the witness the contents of such cards. He responded that the company did print business cards free of charge to Mr. Rose and other salesmen. But those cards were printed at Mr. Rose's request and to his specification and, what is more, the witness had not seen the cards now under query and consequently was not a party to any representation therein made. But even if such evidence were admitted it is my opinion that, however he was there styled, would be of little or no value if the weight of the probative evidence as to the nature of his office was to the contrary..

Further revealed in cross-examination was the fact that when the plaintiff started to work at the Press in 1946 he was not the only salesman. There was Mr. Dudley Bacquie who had been there for many years. Extracted also was the fact that it was after some time that the plaintiff began employing salesmen on a permanent basis. At first he gave temporary work to boy scouts (for whom the company took no responsibility) and then later he took on permanent staff.

The witness agrees that Mr. Rose was a valuable salesman, that he helped to build the company and, not unnaturally, grew with the company. It was in this context that the company undertook the expenses of the Seminar on Sales attended by the plaintiff. The witness insisted that the plaintiff managed his own employees but was not the sales manager for the company.

On the question of what was reasonable notice in the work relationship between the plaintiff and the defendant the witness was asked:

> Q: If in 1974 Rose had wished to end his association with the defendant company how much notice would you have expected him to give the defendant company?

to which he replied:

> A: "Nothing would have surprised me. A month".

Further questions were put to test the reasonableness of that answer. The witness admitted that there would be in such an event, serious dislocation in the defendant's business because it was his opinion that Mr. Rose's team would leave with him. However, said he, most of the business was repeat business and that by using his team Mr. Rose did not personally have to do much hard work. He delegated more and more of his work and so was able to avoid working as much as he used to do when he had no team. He was now able to take a back seat.

This unintended encomium must redound to the plaintiff's organising, and, may be, managerial ability but it was given in the context of explaining that Richard Durie would have been able without the assistance of Mr. Rose's team to off-set the effects of Rose's departure on his giving one month's notice. For my part, I detect an element of inconsistency here, because of the admitted level of dependence upon the sales brought in by Rose. This is really the obverse of the coin skilfully introduced. For what is claimed to be reasonable for one of the two parties must also be reasonable for the other.

Attention was turned to the degree of freedom, or the lack of it, which the plaintiff had in his association with the defendant.

Q: Could Rose decide not to do any work at all?

A: Yes, he could decide how much work he chose to do.

True the witness could indicate to the plaintiff areas where he could solicit business and this was done. Questioned as to what remedies were available to him if Rose refused he said:

> "It never happened but if it did I would say we have appeared to have come to the parting of the ways. Our mutual interests no longer seem to agree. I would have terminated the relationship".

A frank answer, indeed. But what does it im ly? If nothing else it at least implies that having the responsibility as chairman and managing director he could not stand by and allow the business for which he was responsible to be adversely affected by the dictates of anyone the moreso if that person's performance was important to the business of the company. And, indeed, to act otherwise would be inconsistent with his responsibilities. However, what was intended by the questioner was to demonstrate a level of control consistent with the plaintiff being an employee and his question may not have been in vain. But it does not follow that the power to terminate such a relationship necessarily implies an employer-employee relationship.

Mr. Goffe's parting question was obviously intended as a staggering blow which should leave Mr. Durie red in the face but his retort showed him not unequal to the fray.

> Q: Don't you feel even a tinge of embarrassment to say Mr. Rose had to nag you to give him recognition?
>
> A: My only feeling was a feeling of relief that I had got him off my back .

Such then is the evidence from which must be answered the two questions posed earlier. And, accepting as I do, the evidence of Mr. Durie regarding the discounts enjoyed by the plaintiff, the Long Service 'ward upon which the plaintiff undoubtedly places great dependence, the lone sales seminar which the plaintiff attended at the defendant's expense as well as his attendance at Jamborees it is my considered opinion that these matters can in no way contribute to the

resolution of these questions.

An appeal to authorities for assistance on the primary question whether the plaintiff was an employee of the defendant immediately provides confirmation that the solution to that question is fraught with difficulties because of the many factors which call for consideration. And this is so even where there is a written document which purports to set out the terms of the relationship in question. The problem stems from the fact that the particular words used in any contract between the parties are not conclusive - the law having regard only to the nature or substance of the contract thus created. (Chitty on Contracts 24th Edition Vol. 2 at para. 3508). At para. 3502 of the same book are set out what are to be looked for in a normal form of contract of employment.

1. Selection of employee by employer;
2. "Full-time" work as part of the employer's organisation;
3. Regular working hours;
4. Fixed place of work;
5. Equipment provided by the employer;
6. Some degree of supervision (arranged by the employer) over the method of working;
7. Fixed wage or salary paid at regular intervals;
8. Fixed holidays on full pay;
9. Security of employment in that he cannot be dismissed without notice (except for misconduct) and until the expiration of the notice of dismissal he is entitled to receive full wages or salary, whether or not his employer can actually provide him with work to do.

But it is recognised that in the cases which come before the courts some, but not all, of these normal features are present. In such instances it must be decided whether the omissions are sufficiently significant to lead to the conclusion that what is being dealt with is not an employment relationship.

Factors 1 and 9 seem related to the question whether there is any relationship at all because, if there is, then, whether there is an employment or independent contractor relationship, factor no. 1 cannot be in dispute. And although it has been said (see Pauley v. Renaldo Ltd. (1953) 1 W.L.R. 187, 191) that an independent contractor

cannot be"dismissed" then because no work relationship can be interminable there must be a power to terminate a relationship with an independent contractor. On the totality of the evidence before me it is clear that factors 3, 4, 5, and 8 are absent. The plaintiff dispite his evidence of keeping regular office hours like everybody else because of his freedom to convass the whole country certainly could not have been required to have regular working hours. Similarly no fixed place of work could be provided - all his work could not have been done or required to be done, at the office of the defendant. So far as equipment for the job was concerned, it was the plaintiff who provided his own motor car, a most essential part of his equipment enabling him to canvass orders far and wide. Admittedly, the defendant provided a desk(s) for use of salesmen as well as secretarial service and a telephone. But it would seem to me that the company's provisions were ancilliary to the work done by the use of the car, the dominant piece of equipment. Apart from the retainer he was not paid by time but by result so the factor no. 8 would not apply. The retainer seems not unrelated to factor no. 2 - "full-time" and will require further consideration when dealing with factors nos. 6 and 7 which are not obviously omitted. In the result, therefore, the exercise must now be concerned with deciding whether the omissions are sufficiently significant to indicate that what is being dealt with is not an employment relationship. But in this regard it is important to note that the list of factors mentioned above is a compendium collated from several cases as different judges have at different times and in different circumstances formulated the principles by which they were guided. Otherwise the omission of a significant number of these factors may be thought sufficiently significant to supply the answer sought. But having said that,I remind myself that the contract to be looked at is constituted not by the omissions but by the included terms which, because they have not been spelt out in any written or oral agreement, must be culled from the course of dealing between the parties.

Factors 2, 6 and 7 are interwoven and for proper perspective

are best considered together. It is not open to dispute that the retainer, which was always paid separate and apart from the commission constituted a fixed portion of his earnings - so fixed that it remained unchanged at £2 ($4) per week for 32 years. By today's values, and even by values in 1978, up to which time it was relevant, that figure might seem derisory, but, compared with the payment in the Civil Service at that time the retainer was introduced, it tells a different story. The fact that it remained unchanged for so long could only mean that it was not intended to be a significant part of the remuneration paid to the plaintiff but as evidence of the undertaking whereby he was bound to work only for the defendant - a stipulation which appears to have been honoured for 23 years. Mr. Goffe takes comfort in the words of Denning L.J. (as he then was) in Steveson (Stepheson), Jordan and Harrison Ltd. vs. McDonald and Evans (1952) 1 T.L.R. 101 at p.p. 110, 111 where in dealing with the distinction between a contract of service and a contract for services, he said:

> "..... I fully agree with all that Sir Raymond Evershed M.R. has said on all the issues in this case. It raises the troublesome question of the distinction between a contract of service and a contract for services. The test usually applied is whether the employer has the right to control the manner of doing the work. ..... But in Cassidy v. Ministry of Health, Sommerville L.J. pointed out that that test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is done as in the case of the captain of a ship ..... I respectfully agree. As Sir Raymond Evershed has said it is almost impossible to give a precise definition of the distinction. It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies ..... one feature which seems to run through the instances is that under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it".

It will be necessary to examine the relationship between the parties in the light of this suggested test. And it will be relevant to bear in mind that not only is the control test not universally correct but it does not universally enjoy the dominance which it was once accorded. See Hobbs v. Royal Arsenal Co-operative Society 10 L.T. Vol.

144 - Jan. 3, 1931 - the question is one of degree to be resolved by the Judge; Whittaker v. Minister of Pensions and National Security (1965) 3 All E.R. 531; Market Investigations Ltd. v. Minister of Social Security (1969) 2 Q.B. 173. An employee may be wholly paid by commission Hobbs v. Royal Arsenal Co-operative Society (supra). Accordingly the fact that the substantial part of the plaintiff's pay was by way of commission presents no insuperable difficulty.

But even though control is not the decisive factor it would be strange to find no control in a contract of service. Mr. Henriques argues that on the evidence not alone of the defendant's witness but from the plaintiff as well there was no control and in support cites Ready Mixed Concrete (S.E. Ltd.) vs. Minister of Pensions and National Insurance (1968) 2 W.L.R. 777. This case shows, inter alia, that even where the parties have expressly agreed on stated measures of control the relationship is not necessarily one of master and servant. It was held allowing an appeal against a finding that a contract of service existed that -

1. The inference that parties under a contract were master and servant or otherwise was a conclusion of law dependent on the rights conferred and duties imposed by the contract and if the contractural rights and duties created the relationship of master and servant, a declaration by the parties that the relationship was otherwise was irrelevant.

2. That a contract of service existed if -

   (a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master;

   (b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master; and

   (c) the other provisions of the contract were consistent with its being a contradt of service.

It is significant to observe that there is no evidence that the parties ever addressed their minds to the question of the nature of the relationship between them and but for the termination of the relationship giving rise

to this action the relationship might have continued for many more years without the question being raised. In court the plaintiff's evidence is in effect that at all material times he regarded himself as an employee of the defendant. Note the word "regarded". It was not a matter agreed between them because the necessity did not arise owing to the fact that there was no written contract which would require this to be stated. Also in court, consistent with the defence pleadings the witness for the defence states that the plaintiff was an independent contractor, as witness the fact that he had his own employees who were paid by him and answerable to him alone. But dependence on this aspect of his work to determine the nature of the relationship ignores the fact that when the relationship began, and for sometime thereafter, the plaintiff was doing the work himself unaided by any assistants. When prospects brightened it was in the mutual interest of the parties that the sales force be increased which was done by the device of the plaintiff employing assistants but without the defendant assuming any responsibility for them. It must have been with the defendant's concurrence as is evidenced by the fact that, on behalf of the plaintiff, the defendant kept records regarding these assistants. And the fact that the defendant had other salesmen who were not answerable to the plaintiff but to the defendant does not militate against nor cloud the issue of the plaintiff's status. It simply means that the job of securing orders for printing was not completely under the plaintiff's control, a course which subsequent events seem to show would have been ill-advised.

In support of his contention that there was the requisite control Mr. Goffe cited the case of Bauman v. Hilton Press Ltd. (1952) 2 All E.R. 1121. The relevant part of the headnote reads:

> "In 1948 the plaintiff, a journalist and photographer, entered into a contract with the defendants, publishers of a weekly periodical, under which he was to receive a retaining fee of £10 a week and payment at the rates provided for work done, and undertook to offer all his "ideas, stories, and so on" to the defendants first, not to accept any commission from any other British weekly periodical, and to be available to undertake commissioned work from the defendants at all reasonable times. In

> February, 1951 the defendant informed the plaintiff that they no longer required his work, that the agreement would have to come to an end, and that they proposed to terminate the payment of his retainer at the end of the month. In an action against the defendants for wrongful dismissal -
>
> > HELD: the contract was a contract of service and was determinable only after reasonable notice and six months was a reasonable notice".

The comment is appropriate that in the above-cited case the effect of the retainer was less restraining than that attached to the plaintiff's contract; because it seems to make room for Bauman to offer his work for sale, if not accepted by the defendant, as well as to sell his work in areas where the defendant did not do business. Here the plaintiff was tied up to the defendant alone for over three decades.

Further, on the question of control I cannot ignore the significance of the regular Monday morning meetings with the defendant's General Managers. Although the details of these meetings were not divulged it is to my mind clear that that is where strategy would be discussed and possible areas of business indicated. It is the evidence of Mr. Durie that the witness never refused to carry out any suggestions passed on to him. Said he, if that had happened

> "I would say we have appeared to have come to the parting of the ways. Our mutual interests no longer seem to agree. I would have terminated the relationship".

Here, to my mind, is evidence of control even if administered with subtlety. But the indications are clear that although the plaintiff felt himself free in certain regards and the defendant's witness says he was free he was not so free that he could refuse to accept the defendant's guidance and survive. And the reason I think is clear to be seen. Even though there were other salesmen their work was not as critical to the defendant's business as was the plaintiff's. The job he was doing was not related to his business but was an integral part of the defendant's business. Hence he could not be allowed to flout what may well have been termed suggestions but were in fact effectively disguised directives. From the forthright manner in which Mr. Durie

gave his evidence he demonstrated that basically he is an honest witness and had he been asked what length of notice he would have considered adequate in those circumstances he might well have been surprised with the response that in those circumstances, he would have considered the interests of the company paramount so much so that he would not have allowed any such question to hobble his conduct. The nature and amount of control to which any worker is susceptible is related to an assortment of factors not the least of which are the nature of the work itself as well as the time and place of performance. That there is evidence of control by the company here, I have no doubt nor am I in any doubt that though the defendant may have intended and even held that the plaintiff operated as an independent contractor, this view, for the reasons which I have advanced as erroneous. It follows that the omitted features, having regard to the nature of the work, are not sufficiently significant to avoid a finding that the plaintiff was an employee of the defendant. I find, accordingly, that he was an employee of the defendant.

I hasten to state that the evidence does not justify a finding in favour of a claim to redundancy payments. The requirements under the Act have not been met. But if I had to make an assessment under this head, I would have felt myself constrained to hold that Mr. George's letter on behalf of the plaintiff would meet the requirement of making a demand. I would so hold having regard to the literacy of a significant proportion of the work force in Jamaica for whose benefit the provisions in the Act were made and who could not be required, consistent with a provision in their favour, to do much more than indicating that they were not accepting termination without the relevant compensation. No sophistication could be expected of them. Otherwise the Act would be largely a Pyrrhic victory for labour. It is to the claim for wrongful dismissal that I will now turn my attention.

I have no doubt that the abrupt termination of Mr. Rose's relationship with the defendant was precipitated by his suspected relationship with Business Printers Ltd. - a suspicion which subsequent events were to show were not without some justification. For that was the haven where he wintered until he landed the much more prestigious job

at Herald Printery Ltd. But I do not think that such suspicion absolved the defendant from the requirement to act reasonably in terminating the relationship. If it might have been thought embarrassing to have given him a longer notice during which time he might well have strengthened the suspected relationship with Business Printers Ltd. to the detriment of the defendant then the reasonable thing to do was to pay him in lieu of the notice to which he was entitled. In my judgment the reasonable notice in the circumstances should be six months. He was given one month's notice, hence there is a difference of five months for which he ought to be compensated. At this point there arises a problem caused by the plaintiff's lack of precision regarding his earnings. The only figure which claims to have come from the records is that of $22,748 for his earnings up to September 1978 which when discounted by ⅓ for Income Tax etc. would yield $15,165.34 i.e. $1,685.04 per month. So for five months he would, at that rate, have earned $8,405. But during that period he earned in his new job at the rate of $120 per week or $480 per month - a total of $2,400 for five months. His real loss therefore was $8,405 - $2,400 = $6,005.

Accordingly, judgment is entered for the plaintiff in the sum of $6,005 with costs to be agreed or taxed.