

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2014/CLE/gen/FP/00173**

BETWEEN

**OLIVER MISSICK
Plaintiff**

AND

**HARMONY MANAGEMENT LIMITED
Defendant**



BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. James R. Thompson for the Plaintiff
Miss Constance McDonald, QC along with Mrs. Tashana Wilson for
the Defendant

TRIAL DATES: October 21, 2021

SUBMISSIONS: Plaintiff: December 3, 2021
Defendant: June 8, 2022

JUDGMENT

Hanna-Adderley, J

Introduction

1. The Plaintiff was formerly employed by the Defendant for 30 plus years, as a Resident Manager where he received an annual salary of \$33,000.00. The Defendant company is a non-profit entity that manages Kwan Yin Club, an apartment complex in Freeport, Grand Bahama.

2. This is an action for wrongful dismissal brought by the Plaintiff. The action was commenced by Originating Summons filed on June 3, 2014 supported by the Plaintiff's Affidavit filed on the same date. The Defendant entered an Appearance on June 16, 2014. The Court by a Directions Order dated January 28, 2021 ordered pursuant to Order 28, Rule 8 of the Rules of the Supreme Court ("RSC") the Plaintiff to file and serve a Statement of Claim and the Defendant to file and serve its Defence. The Plaintiff subsequently filed his Statement of Claim on January 29, 2021 and the Defendant filed and served its Defence on February 16, 2021 in compliance with the Directions Order.
3. The Plaintiff filed his Witness Statement on January 22, 2021 and the Witness Statement of Richard Morley on October 13, 2021. The Plaintiff also filed Skeleton Arguments on January 22, 2021 and relies on his Closing Argument undated. The Defendant filed the Witness Statement of Kelsie Ellington on September 23, 2021 and relies on its Skeleton Arguments and Supplemental Skeleton Arguments dated September 18, 2021 and June 8, 2022 respectively.
4. The issues for determination by the Court are: (1) whether the Plaintiff was terminated by the Defendant without Notice contrary to Section 29 of the Employment Act; or (2) whether the Plaintiff's agreement to retire was voluntary or conditional; and (3) whether the Plaintiff is entitled to any accrued vacation pay, commissions and loss of rental income from a unit designated his residence.
5. The Court finds that the Defendant wrongfully terminated the Plaintiff, that his agreement to retire was conditional and as such is void and that he was terminated without Notice pursuant to Section 29 of the Employment Act. Further, he is entitled to any accrued vacation pay but he has not proven his claims for commissions and the losses associated with the repossession a unit designated his residence. The following are the Court's reasons for so finding.

Statement of Facts

6. The Plaintiff in his Originating Summons seeks a Declaration that the Defendant breached his contract and acted wrongfully by terminating his employment without giving him sufficient notice. He further claims a Declaration that the Defendant is entitled to the full performance of the terms of the said contract and is entitled to

damages equivalent to 13 months' salary in the sum of \$2,750.00 per month; 13 months continuation of other entitlements under the terms of the Plaintiff's contract of employment or compensation in lieu thereof; and costs. In addition to the claims alleged in the Originating Summons, the Plaintiff in his Statement of Claim alleges that the terms of his employment included his annual salary of \$33,000.00; commission with respect to sales and rental of each apartment in Kwan Yin and that he was given residency of an apartment in Kwan Yin rent free. He also alleges that as rentee and being entitled to commission he had special consideration for notice of 24 months; that after the said termination around 2015 the Defendant wrongfully repossessed his apartment and thereby deprived him of its rent. The Plaintiff claims notice pay in excess of the Employment Act and commission of 24 months' notice; commission due up to the date of termination in the amount of \$6,000.00; severance pay for 37 years; salary for one month arrears; vacation; damages for breach of contract; damages for wrongful repossession of the apartment and costs. The Defendant accepts that the Plaintiff was employed by the Defendant but asserts that he was hired as Manager. The Defendant also accepts that the Plaintiff earned an annual salary of \$33,000.00. The Defendant however makes no admission as to the length of time the Plaintiff was employed with the Defendant and denies that the Plaintiff was entitled to the said commission as part of his employment with the Defendant; asserted that the Plaintiff never resided at Kwan Yin and was compensated for his services throughout the course of his employment; denied that the Defendant wrongfully repossessed an apartment of the Plaintiff and deprived him of its rent and denies every allegation in the general traverse.

7. The following letters are essentially the basis for the Plaintiff's claim and were not disputed by the parties.
 - a. Letter dated March 25, 2014 addressed to the attention of Mr. Ken Simons and the Board of Directors Harmony Management Ltd.
"Dear Sir
RE: PROPOSED RETIREMENT

I have been employed by Harmony Management Ltd. for more than 34 years and have served faithfully and beyond the call of duty in the position of Manager. In the process, I received death threats, bodily harm and hospitalization all paid for from my own personal expense. In addition, I performed security patrol duties during the night, hurricanes and/or adverse weather making sure the property was secure. I have brought a good reputation to the building through introduction of the Kwan Yin Annual Invitational Tennis Tournament which lasted 30 consecutive years resulting in good publicity for the building and saw the likes of Supreme court justices, eminent doctors, lawyers (foreign and international) as well as business and non-business personalities. This event was publicized on T.V. the radio and in the local newspapers. I have also saved the company exorbitant expenses in having repairs done, revenue collection which only began to climb during the last three (3) years primarily because of the recession which resulted in owner's (almost without exception) inability to pay their maintenance and ground rent the way they used to.

In accordance with your proposal to retire me and in an effort to assist you in coming to what I believe would be a fair and reasonable departure package, I would request eighteen (18) month's salary, one (1) year's vacation pay, all outstanding commissions due to me, unused sick leave, a studio apartment and an extension of employment for one (1) year.

I trust that we can come to an amicable agreement on these terms. Looking forward to your favourable consideration.

Sincerely,

Oliver J.C. Missick, Manager

Harmony Management Ltd."

- b. Letter dated March 28, 2014 from Kenneth Simons, President, Board of Directors, Harmony Management Limited. To the Plaintiff.

"RE: RETIREMENT

With reference to your letter dated March 25, 2014, the Board of Directors of Harmony Management Limited met on March 27, 2014. In the meeting the Board has agreed to your retirement effective March 31, 2014.

On behalf of the Board of Directors of Harmony Management Limited, I wish you the very best, happy and serene retirement.

With warm regards and best wishes.

Yours sincerely;

Kenneth Simons"

- c. Letter dated March 31, 2014 from the Plaintiff to Kenneth Simons, President, Board of Directors, Harmony Management Limited.

"Receipt is acknowledged of your letters delivered to me today at 5pm. Let me make it quite clear, I did not tender to Harmony Management Ltd. my resignation as manager of the company. As far as I am concerned, my contract of employment with the company continued until you demanded of me the keys to the office which I gave to you. There was never any resignation by me to be "accepted" as purported by you and you have not given me any proper NOTICE of termination as required by law, having abruptly ended my contract of employment by taking me the keys to my office workplace.

I am therefore unable to respond to your requests which are based on the false premise that I had tendered my resignation to you, and nothing is further from the truth. I was requested by the President to submit to you my proposal (which I did) as to what I felt was due to me and have received no response.

In accordance with the Employment Act, I am entitled as manager on being terminated by you, to a period of notice of not less than 52 weeks or payment in lieu thereof and also my vacation and salary to the end of the period worked. In addition I have requested payment to me of all commissions due me to date.

In view of the above I will seek my legal rights and cost associated therewith against Harmony Management Ltd. and Mr. Kenneth Simons from the Supreme Court.

Respectfully,

Oliver J.C. Missick”

- d. The Freeport News, April 1, 2014, Advertisement

“RETIREMENT

OLIVER J.C. MISSICK

I am please to announce my retirement from Harmony Management Ltd. effective 1st April 2014”

Whether the Plaintiff was terminated by the Defendant

8. There is no dispute between the parties that the Plaintiff was employed by the Defendant company for 36 years and had been paid an annual salary of \$33,000.00.
9. The Plaintiff’s Witness Statement stood as his evidence-in-chief and his evidence in part is that he was employed by the Defendant company for 36 years as the Resident Manager of Kwan Yin Apartment under the terms that he would be paid a salary of \$33,000.00 per annum, he would be paid 50% commission on all sales and rental of apartments at Kwan Yin, he would be paid vacation and termination pay and notice pay as reasonable and that he would occupy an apartment in Kwan Yin rent free. He continues that on or about March 24, 2014, he was advised by Mr. Kenneth Simons, the President of the Defendant Board that he had a choice of being terminated or agree terms of retirement by the Board of the Defendant and that he was offered to be paid three months’ salary as final settlement. Further, he states that on March 25, 2014 he responded to Mr. Simons by letter responding to his offer; that on March 28, 2014 he received a letter of termination from the Defendant company confirming termination of employment with the Defendant company and that as a result of the said termination he was not paid \$6,000.00 the balance of 6 months commission due, commission of notice period

of 24 months which equals to \$24,000.00, reasonable notice which exceeds the notice under the Employment Act as the notice period must include what is reasonable in respect of commission due and having regards to him leaving the rent free apartment at Kwan Yin and his arrears of salary due for two weeks and severance pay for 36 years. His evidence also is that there was no policy of retirement for the Defendant, that he knew of other persons who worked with the Defendant beyond the age of 65; that he turned 65 years old on March 2, 2014, and the Defendant knew that he had turned 65 years old on that date.

10. Ms. Tashana Wilson, Counsel for the Defendant put the Plaintiff's Affidavit in Support of the Originating Summons to him, which also stood as his Witness Statement. The Plaintiff's Affidavit evidence, in part, is that he is a former employee of the Defendant Company, he was employed as a Resident Manager for the past 36 years and the terms of his contract were verbal; that the terms of the agreement were he received a salary of \$33,000.00 per year, he was entitled to 50% commission on all sales and rentals at Kwan Yin, that his duties included the overall management at Kwan Yin, supervising of all staff and was responsible for the day to day operation of the complex and company. He further states that on or about March 25, 2014, Mr. Kenneth Simons, the President of the Defendant met with him and Mr. Simons indicated that he was brought on to terminate or retire him and specifically told him of the Board's intention to end his contract either by termination or retirement. He continues that Mr. Simons offered on behalf of the Defendant to pay him three months' salary and requested he consider the offer and respond accordingly; that he wrote and delivered a letter dated March 25, 2014 detailing his counter proposal; that he did not receive a response to his counter proposal but instead received a letter dated March 28, 2014 confirming that the Board had terminated his employment contract.

11. The Plaintiff's evidence on cross-examination by Mrs. Wilson, in part, is that the Defendant first approached him about his retirement in or around March 23, 2014; that in his letter dated March 25, 2014 he outlined that he was an exemplary employee; that there was no policy on retirement as he worked there for 35 plus years; that he was not fully compensated for his service; that the placing of the

advertisement announcing his retirement from the Defendant Company was not that he accepted he was retired; that by the time he had placed the ad it was on the understanding that the Defendant by its letter dated March 28, 2014 had accepted his counter proposal in his March 25, 2014 letter; that Mr. Simons came to his office and told him that they will either fire him or retire him and was giving him a package of \$3,000.00; that he told Mr. Simons that that was not acceptable and Mr. Simons told him to make a proposal and they will go from there; that it was only when Mr. Simons came to his office on March 28, 2014 at 5:00pm requesting the office keys that he realized he was fired. Further, he stated that he did not receive compensation for gas as the tradeoff was that the Defendant would pay the Plaintiff's National Insurance contributions.

12. There was no re-examination of the Plaintiff. The Defendant objected to the admission of the Witness Statement of Richard Morley. It was disallowed as the Witness Statement was not filed in compliance with the Directions Order.
13. The Defendant called one witness Ms. Kelsie Ellington whose Witness Statement was tendered as her evidence in chief. Her evidence in part is that she is employed as a Manager of the Defendant and also a unit owner at Kwan Yin Club; that in 2014 she served as the Treasurer of the Board of the Defendant; that the Plaintiff was employed by the Defendant as a Manager until March 31, 2014 when he attained the age of retirement and retired from his employment with the Defendant. She continues that the Plaintiff's contract of employment with the Defendant was never in writing but the terms of the contract was based on established practice with all employed managers of the Defendant, the established practice and policy is that all employees retire at age 65. She further states that the Plaintiff's compensation and benefits of his employment with the Defendant included an annual salary of \$33,000.00, payment of all his National Insurance Contributions and four weeks' vacation pay pursuant to the Employment Act. She states that the Plaintiff accepted his retirement and sought to have the Defendant pay him eighteen months salary, one year's vacation pay, commissions, unused sick leave, give him a studio apartment and keep him employed for one year as a separation package however based on the contract between the Plaintiff and

Defendant the Plaintiff received his full compensation during the course of his employment and was only entitled to collect his pension from National Insurance. Lastly, she states that the Plaintiff placed an advertisement in the Freeport Newspaper on April 1, 2014 announcing his retirement. Ms. Ellington also supplemented her evidence on the day of trial and stated that from a review of the records she was aware that Oliver Missick, Marlene Mackey and Gleco Campbell retired from the Defendant at the age of 65 but only Gleco Campbell came back to work. Further, that the Plaintiff was given \$700.00 annually as a gas allowance and that the payment of an employee's National Insurance contributions was done as a part of their retirement package although they were not required to provide one.

14. During cross-examination by Mr. James Thompson, Counsel for the Plaintiff Ms. Ellington stated in part that she served as Treasurer of the Defendant Board from 2011 to 2015 during the time the Plaintiff was there; that as Treasurer she had to be involved in the management because she was responsible for "cutting" the checks. She stated that her company Signature Planning manages the Defendant and she works for Signature Planning; that when the Plaintiff was retired the Board agreed to manage the property free of charge for one year from 2014 to 2015 as they did not have any funds in 2014; that since 2015 the company Signature Planning took over the job that the Plaintiff had done. She continues that her knowledge of the Plaintiff's situation came from her position as Treasurer and Director and further states that she thinks the Board, such as the President, should have been the one to give evidence not her.
15. It is also her evidence that there was no policy in writing with respect to retirement; that when she reviewed the records of other employees she saw where they retired Ms. Mackey and 'Ace'; that she reviewed the files in reference to the Plaintiff's claim but that the Plaintiff's retirement was also discussed in Board meetings along with Mr. Gleco Campbell and that the Board retired him. She continues that she was instructed by the Board's President to look back but before she looked back she knew personally of the retirement policy although it was not in writing; that she saw where the National Insurance [forms] were turned in; that

Mr. Gleco Campbell was retired and brought back after turning 65 and kept him but his National Insurance was paid and he was receiving his National Insurance benefit and his National Insurance "Retirement Form" on his file stated he retired at 65 and that she believes in the Bahamas you retire when you are 63 or 65. She also states that she did not see any evidence of Ms. Marlene Mackey working past the retirement age and she was not there when she retired as it was in or around 1985; that her conclusion that they (Mr. Campbell and Ms. Mackey) retired at 65 was based on the National Insurance "Retirement Form" being completed as found on their file. She continues that she was not there when the Plaintiff was hired so she would not know whether the issue of retirement was discussed with him; that the discussions about the Plaintiff's retirement was brought up with the Board because she believes the Board was not happy with the Plaintiff's performance and they knew he was close to the age of retirement and therefore some decisions were being made.

16. Ms. Ellington states that the Plaintiff's employment came to an end on March 31, 2014; that the locks were changed and the files were looked at; that the Plaintiff turned 65 on March 2, 2014; that he was paid monthly and the Board would have paid him out to the end of the month. She further states that she believes the Board wanted to terminate the Plaintiff from 2012 but they knew he would be 65 in two years and then could ask him to retire but between 2012 and 2014 they had numerous problems and suggests that some of those problems were the result of the Plaintiff's failure to perform his job; that from 2012 the Plaintiff was asked about retirement. Additionally, she states that the Plaintiff's entitlement on retirement was the salary paid to him and his National Insurance benefits.

Submissions

17. Mr. Thompson submits that the Defendant admits that it terminated the Plaintiff but calls it (forced) retirement and justified it with a policy of retirement. He further submits that the said policy was verbal and was only discovered after an examination of the files of other "retired" employees which contained copies of their respective National Insurance "Retirement Form"; that the said National Insurance form is purely voluntary thus there was no employee policy or condition

of retirement. Therefore, he submits that the Plaintiff's termination was wrongful and the Defendant is liable for damages and costs.

18. Ms. Wilson in response submits in part that the Defendant's established practice and policy requires an employee to retire at age 65; that in early 2014 the Plaintiff and the then President met and discussed multiple issues with the apartment complex and his retirement; that the Plaintiff acknowledged the fact of his retirement but without justification sent a counter-proposal seeking a retirement package; that the terms of the said package were excessive and "dictative" in nature and that the Plaintiff did that notwithstanding that he was aware of the Defendant's policy and practice. Further, she submits that the Defendant wrote the Plaintiff thanking him for his service and formally retiring him pursuant to its practice and agreement with effect from March 31, 2014; that the Plaintiff's conduct by his letter dated March 25, 2014 showed that he had knowledge of his retirement and accepted it; that his conduct and his subsequent act of publishing and advertising his retirement from the Defendant printed on April 1, 2014 in the Freeport News showed that the Plaintiff was effectively retired rather than terminated.
19. Ms. Wilson also submits that the Defendant's witness is credible; that Ms. Ellington clearly shed light on matters surrounding the case during cross-examination and she had intimate knowledge of the matter as she served as a Treasurer and Director of the Board since 2011. She asserts that the Defendant paid 100% of the Plaintiff's National Insurance to ensure that he would receive his full retirement benefit and that the evidence showed that the Defendant paid \$17,000.00 to National Insurance when the Plaintiff was retiring and that this was evidence to show that the Plaintiff in his capacity as manager failed to even ensure that payments were being made to National Insurance.
20. Lastly, she submits that it is clear from the evidence that the Defendant considered terminating the Plaintiff two years prior to his retirement because he was not performing his job effectively but the Defendant kept him employed until the age of retirement instead.

Findings of Fact

21. The parties accept that the Plaintiff was employed by the Defendant for 36 years, and that the Plaintiff's annual salary was \$33,000.00. They also accept that the Plaintiff turned 65 on March 2, 2014.
22. I find that the Plaintiff while in his evidence and pleadings stated that he was the Residential Manager, in his letter dated March 25, 2014 he signed as Manager and therefore find that his role with the Defendant Company was as Manager and not as Residential Manager.
23. Additionally, the evidence before the Court as adduced by the Plaintiff and the Defendant's witness is that sometime in March 2014 the Plaintiff met with the President, Mr. Ken Simons, of the Defendant Board to discuss his retirement.
24. The Plaintiff in his evidence stated that his letter dated March 25, 2014 was in response to the meeting with Mr. Simons. Further, that during the said meeting he was given a choice of being terminated or agree the terms of retirement by the Defendant Company and was offered to be paid three months' salary. Mr. Simons who would have been the person to either corroborate or dispute what was said during that meeting was not called as a witness. Therefore, I accept the Plaintiff's evidence that his choices were either to be terminated or agree terms of his retirement. I also accept that the reference in the Plaintiff's letter found in the second paragraph where he stated "In accordance with **your proposal to retire me** and in an effort to assist you in coming to what I believe would be a fair and reasonable departure package...I trust that we can come to an amicable agreement on these terms." was the Plaintiff accepting the "forced" choice of retirement on the presumption that the terms discussed during that meeting and the terms in his letter were accepted by the Defendant Company. (**emphasis mine**) Further, the Defendant's letter dated March 28, 2014 references the Plaintiff's letter dated March 25, 2014 and stated that the Board agreed to his retirement effective from March 31, 2014.
25. It is evident from these two letters that the Plaintiff's "retirement" was not voluntary as his willingness to retire from the Defendant Company was contingent on the acceptance of the terms outlined in his letter. I find that the Defendant's letter in response was vague as it failed to address the terms proposed by the

Plaintiff in his letter by way of either rejection or acceptance thereof. Further, I find that no evidence was led to show whether the terms as outlined in the Plaintiff's letter were met by the Defendant. Therefore, I find that the Plaintiff could not have accepted his retirement and/or agreed to retirement by virtue of the Defendant's letter. In essence, the Defendant sought to get the Plaintiff to "retire" and/or "resign" by its letter in response. I also accept the Plaintiff's evidence that the publishing of the advertisement in the Freeport News dated April 1, 2014 was done on the presumption that the terms outlined in the Plaintiff's letter had been accepted by the Defendant in its letter in response and that his submission of the ad was shortly after the receipt of the Defendant's letter. Further, as one of the terms of his "retirement" in his letter to the Defendant was to remain on as Manager for another year, I find that it was only after the Defendant sought to retrieve the items held by the Plaintiff that he recognized that the Defendant did not accept his terms of retirement and had in fact terminated him and it was too late to have the advertisement submission rescinded.

26. I accept from the evidence of the Plaintiff and the Defendant that the Defendant paid the entirety of the Plaintiff's National Insurance contribution, i.e. the employee and employer's portion of the contributions.
27. I accept from the evidence of the Plaintiff and the Defendant that there was no written policy relating to retirement of employees at the age of 65. The Defendant's evidence that such a policy existed due to previously "retired" employees' submission for their National Insurance benefit I find to be unsupported by any other evidence adduced on behalf of the Defendant. It is open to this Court to take judicial notice that the retirement benefit that is offered by the National Insurance Board is a monthly payment made to insured persons **who have retired from gainful employment or who have attained age 65 years and while the full benefit is payable from age 65 years, persons have the option of receiving the benefit from as early as 60 years but with a reduced rate. (emphasis mine)**. These forms found on the employee files cannot without more be accepted as establishing a policy of mandatory retirement at age 65. Ms. Ellington could not give any direct evidence of any such policy and

no former employees gave evidence for the Defendant in this regard. Therefore, I find that the Defendant has not satisfied the Court that there was a policy whether written and/or verbal making it mandatory for the retirement of employees at the age of 65.

28. Moreover, I find that in the absence of any policy (written or verbal) relating to the mandatory retirement of employees from the Defendant once attaining the age of 65, the Defendant, on March 28, 2014, terminated the Plaintiff without notice contrary to the provisions of the Employment Act.

The Law

29. The Employment Act 2001 provides as follows at Section 29:

"PART VII

TERMINATION OF EMPLOYMENT WITH NOTICE

29. (1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —

(a) where the employee has been employed for six months or more but less than twelve months —

(i) one week's notice or one week's basic pay in lieu of notice; and

(ii) one week's basic pay (or a part thereof on a pro rata basis) for the said period between six months and twelve months;

(b) where the employee has been employed for twelve months or more —

(i) two weeks' notice or two weeks' basic pay in lieu of notice; and

(ii) two weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twentyfour weeks;

(c) where the employee holds a supervisory or managerial position

—

(i) one month's notice or one month's basic pay in lieu of

notice; and

(ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to fortyeight weeks.

(2) An employee shall not terminate his employment until after the expiry of —

(a) two week's notice to the employer if the period of employment is one year or more but less than two years; or

(b) four weeks notice to the employer if the period of employment is two years or more, unless the employer has been guilty of a breach of the terms and conditions of employment.

(3) Notwithstanding subsection (1), the employer shall have the right to appropriate any monies owing to him by the employee from any monies payable under subsection (1). "

Analysis and discussion

30. I do not accept the Defendant's evidence and submission that the Plaintiff was only entitled to the remainder of his salary as at March 31, 2014. Further, the Defendant's evidence and submission alleging that the Plaintiff was ineffectively performing his job and the Defendant considered terminating the Plaintiff for that reason two years before he reached the age of 65 I find is immaterial to the action before the Court. The Defendant's Defence is predicated on the premise that the Plaintiff had reached its mandatory retirement age of 65 in March 2014 and therefore, it was entitled to retire him. I also am of the opinion that the Defendant did not plead any such allegation in its Defence and the Defendant's assertion now alleging that the Plaintiff was not performing his job satisfactorily and that this was a possible basis for termination is self-serving. As I have made a finding above that the Plaintiff was terminated from the Defendant Company, the Plaintiff is entitled to notice pay in compliance with Section 29(1)(c) of the Employment Act.

31. In **Bahamas Electricity Corporation v Cedric Dereck Smith** SCCiv App No. 58 of 2006 Osadebay, J. A. at page 14, paragraph 34 of his Judgment, referred to **East Sussex County Council v Walker** (1972) 1 TR 280 and stated:

"...the National Relations Court said that where an employee is told that he is no longer required in his employment and is expressly invited to resign, a court of law may be entitled to come to the conclusion that, as a matter of commonsense, the employee was dismissed.

But each case is dealt with in its own facts. The facts may be such that no room is left for the application of the general principle."

Wrongful Dismissal

32. I found the general principle in **East Sussex County Council v Walker (supra)** to be instructive. In my judgment this principle is likewise applicable to the instant case where, an employee is invited to retire or be terminated. The Plaintiff's "agreed retirement" (it should be noted that I have already found that there was no such agreement) as at March 31, 2014 was predicated on the acceptance of the terms outlined in the Plaintiff's letter to the Defendant Company and its subsequent response "agreeing" to his retirement amounted to dismissal. Further, as I have made a finding of fact that the Defendant by way of agreeing to his retirement in response to the Plaintiff's letter terminated the Plaintiff on March 31, 2014, I find that the Plaintiff was dismissed and the Defendant's failure to pay the Plaintiff the required (minimum) notice pay pursuant to Section 29(1)(c) of the Employment Act amounted to a breach of his employee contract and thus was wrongful.

Additional Claims

33. The Plaintiff also claimed that he was entitled to commission with respect to the sales and rental of each apartment in Kwan Yin; the said commission owed to him as at the date of the termination was \$6,000.00; and reasonable notice of 24 months as he had to find a place to live, give an account for commission of the apartment sales that were in progress.

Evidence

34. The Plaintiff in his evidence stated that the terms of his contract as Resident Manager was that he would be paid 50% commission on all sales and rental of apartments at Kwan Yin.

35. The Defendant's evidence is that the Plaintiff was paid commission however the money was not paid by the Defendant Company but paid through British International; that as it relates to the last set of commission for the Plaintiff he owes British International; that even with terminating his services the Defendant Company did not stop the Plaintiff from receiving commission as the commission was paid from British International; that if British International wanted to keep the Plaintiff to manage its properties separately they could have; that British International owns 30 plus units at Kwan Yin and if they wished for the Plaintiff to continue managing those 30 plus units and continue his commissions they could have. Further, Ms. Ellington states that where the Defendant Company provided a rental management service for its unit owners wanting to rent their apartment each participating apartment was levied a 10% commission charge on the rent collected and the commission was divided between the Plaintiff and the Defendant Company; that the Plaintiff collected the money and deposited it to his bank account and not the Defendant Company's bank account. She continues that British International bought Kwan Yin Club and made a management company, the Defendant Company what was responsible for the water, light and other bills; that it was not mandatory that the Defendant Company manage other apartments because some owners have different people and as far as she knew British International was the Plaintiff's only client; that British International would send the commission to the Defendant Company and it would divide the cheque with 5% to the Plaintiff and 5% to itself; that commission is only paid on the money received by the Defendant Company.

36. Ms. Wilson submits that the evidence shows that the Plaintiff is not entitled to any commission from the Defendant as the Defendant could only pay the Plaintiff for commission on rental of its units which he would have managed. Further, that the Plaintiff's commission came directly from British International and that during the course of the Plaintiff's employment he did not deposit funds for rental of these units on the Defendant's bank account so the Defendant would have no records of the same. Therefore, she submits the Plaintiff's claim for commission must fail and the Defendant in this action is not a proper party to make such claim from.

37. While I accept that during his tenure the Plaintiff received commission from British International for the rental of apartment units I find that the Plaintiff has not produced/adduced any evidence before the Court that supports that there is any outstanding commission owed, on which and how many apartment units and the amount of commission that is owed. He has not refuted the Defendant's evidence in this regard either. Further, I accept the submissions of Ms. Wilson that the Defendant is not the proper party which the Plaintiff can make a claim for any outstanding commission he believes he is owed. Therefore, I dismiss this part of the Plaintiff's claim.
38. The Plaintiff also claims that the terms of his contract of employment entitled him to residency at Kwan Yin Apartment rent free. However, the Plaintiff did not adduce any evidence to the Court in support of this claim and as such his claim of damages for wrongful repossession of an apartment is hereby dismissed.
39. Further, as the Plaintiff asserts that he was entitled to reasonable notice of 24 months as he had to find a place to live as a result of his dismissal, the Plaintiff has not led any evidence as to his residency at Kwan Yin Club rent-free during his term of employment. Further, I have made a finding above that the Plaintiff was entitled to the minimum notice required by the provisions of the Employment Act and in the absence of any credible evidence showing that the parties agreed to more than the minimum notice required by the Employment Act I find that the Plaintiff was not entitled to notice of 24 months.

Judgment on Admissions

40. At the commencement of the trial, Mr. Thompson made an objection; that the Defendant in its filed Defence did not deny the Plaintiff's claim for wrongful dismissal and as such Judgment should be entered against the Defendant. As the objection was only made at the start of the trial, and there being no formal application before the Court, and considering that the Defendant would not have had an opportunity to respond the Court ordered that the parties address the issue at the end of the trial in their submissions.
41. Ms. Wilson in her Supplemental Submissions contends that the Plaintiff's application for Judgment on Admissions was made at a very late stage without

filing the necessary summons and affidavit in support giving the Defendant an opportunity to respond to the application. Further, she submits that if such an application was made the Defendant having a good and plausible Defence would have put forward its resistance to the application and applied to amend its Defence if necessary.

42. I have had an opportunity to review the pleadings in this matter, that is the Statement of Claim and the Defence. Paragraph 3 of the Plaintiff's Statement of Claim states that on March 25, 2014 the Defendant wrongfully terminated the employment of the Plaintiff and refused to pay him notice and severance pay. In addition to that paragraph, the remainder is divided into sub-paragraphs as to what the Plaintiff alleged were the terms of his employment with the Defendant. The Defendant in its Defence responds with either an admission or denial to the sub-paragraphs at paragraph 3. However, the Defendant at paragraph 6 sets out the general traverse that is usually found at the end of a Defence whereby the Defendant denies each and every allegation contained in the Statement of Claim as if the same were set forth and traversed seriatim.
43. I am satisfied on the pleadings that the Defendant in its Defence did not specifically admit or deny the Plaintiff's allegation that he was wrongfully terminated by the Defendant. However, as I have already made my findings above on the evidence adduced at trial that the Plaintiff was wrongfully terminated by the Defendant Company, I find it no longer necessary to make a determination on this application for judgment on admissions.

Disposition

44. Having read the pleadings, having heard the evidence of the parties, having read the submissions and having heard Counsel and having accepted in part the submissions of Counsel for the Plaintiff and having preferred the evidence of the Plaintiff, I therefore give Judgment for the Plaintiff for wrongful dismissal in the sum of \$35,750.00 pursuant to Section 29 (1) (c) of the Act calculated as follows:
- (1) Pay in lieu of Notice $\$687.50 \times 4 \text{ weeks (4 weeks or 1 month)} = \$2,750.00$

(2) Notice pay \$687.50 x 4 weeks x 12 months (not exceeding 48 weeks) = \$33,000.00 for a total sum of \$35,750.00, together with interest at the statutory rate according to Section 3 of the Civil Procedure (Award of Interest) Act from the date that the cause of action arose to the date of Judgment.

45. The Plaintiff is also entitled to any accrued vacation pay that was owed as at the time of termination.

46. However, the Plaintiff's claims for commission due up to the date of termination in the sum of \$6,000,00.00; notice pay in excess of the Employment Act as 24 months' notice; damages for breach of contract and damages for wrongful repossession of an apartment are all hereby dismissed.

Costs

47. The Plaintiff has been successful in this action. Costs usually follow the event. I see no reason to depart from this principle. Costs are awarded in favour of the Plaintiff to be taxed if not agreed.

Dated this 14th day of June, A. D. 2022


Petra M. Hanna-Adderley
Judge

