[2016] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 102/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**BRANCH DEVELOPMENTS LIMITED T/A IBEROSTAR ROSE HALL BEACH AND SPA RESORT**	**APPELLANT**
AND	**CHARMAINE TAYLOR**	**RESPONDENT**

Mrs Alexis Robinson and Adrian Cotterell instructed by Myers Fletcher & Gordon for the appellant

Miss Kashina Moore instructed by Nigel Jones & Co for the respondent

18, 19 January and 19 February 2016

MORRISON P

Introduction

[1] The respondent was once an employee of the appellant. In a judgment given on 4 September 2015, Lindo J (Ag) ordered the appellant to pay damages to the respondent for breach of the employment contract. The details of the learned judge's order were as follows:

> "a) Damages for breach of contract awarded in the sum of $504,000.00 with interest at 3% from the date of service of the claim to today;
>
> b) Special damages awarded in the sum of $121,788.58 with interest at 3% from June 1, 2010 to today;
>
> c) Cost [sic] to the [respondent] to be agreed or taxed."

[2] This is an appeal from Lindo J (Ag)'s order. The question of liability for breach of contract is no longer in issue and the principal point taken by the appellant on appeal is that, in awarding damages to the respondent, the learned judge failed to apply the correct measure of damages. A secondary point taken by the appellant concerned the learned judge's order for costs. On 19 January 2016, after hearing counsel for the parties, the court announced the following result:

> "1. The appeal is allowed in part.
>
> 2. The learned trial judge's award of general damages in favour of the respondent in the sum of $504,000.00, with interest at 3% from the date of service of the claim to the date of judgment, is set aside.
>
> 3. Save as aforesaid, the judgment of the learned trial judge is affirmed in all other respects.
>
> 4. Costs of the appeal to the appellant to be agreed or taxed."

These are my reasons for concurring in this result.

The factual background

[3] This may be shortly stated. The respondent was employed to the appellant as Head Cook with effect from 30 April 2007. By letter of that date, the appellant was

obliged to give the respondent two weeks' notice of termination of her employment. Just over two years later, the respondent was promoted to the position of Pastry Chef, with effect from 6 July 2009. Apart from an upward adjustment in her annual salary (to $1,512,000.00 per annum), all other conditions of the respondent's employment remained the same.

[4] On 2 June 2010, the respondent and three other employees of the appellant were called into a meeting with representatives of the appellant's management team. The president of the staff association of which the respondent was a member was also present at the meeting. The purpose of the meeting was to investigate the finding of 14 bottles of liquor in the side panel of a commercial stove in an area supervised by the respondent. The meeting ended inconclusively and the appellant decided to lay off the respondent and the other employees involved, pending further investigation. A part of the respondent's complaint in the court below was that she was then surrounded by security officers and escorted off the property.

[5] It is clear that the respondent sought more or less immediate legal advice. However, it is an unfortunate feature of the case that the letter (dated 19 July 2010) written to the appellant by the respondent's attorneys-at-law on her behalf was not tendered in evidence at the trial. But it is common ground that the contention made on the respondent's behalf in that letter was that she had been dismissed and was seeking to claim damages accordingly. That much appears clearly from the appellant's

response, to the respondent's attorneys-at-law, dated 4 August 2010, which stated as follows:

> "Dear Sirs,
>
> **Re: Ms. Charmaine Taylor**
>
> Reference is made to your letter dated July 19th 2010 of which I am now in receipt of (I was out of office for most of July), within which you are seeking to claim for damages re the above captioned employee.
>
> First of all please be informed that to date Ms. Taylor was not dismissed but was placed on lay-off pending investigations. Our records still show this. As per the law the Company has the right to lay off any employee for a maximum of 120 days. We are therefore still within our rights as an organization. Also due to the nature of our business being seasonal, employees are laid off from time to time without formalities as there is an understanding that they may be called back at any time.
>
> Ms. Taylor was informed that she will be advised of a decision when it is made pending an investigation into the irregularities that occurred.
>
> Please note that it is our intention to abide by the labor laws and practices of Jamaica, and we solicit your understanding of the matter at hand.
>
> Best regards,
>
> G. A. Ferguson"

[6] Then, after a two month interval, the appellant again wrote to the attorneys-at-law for the respondent on 1 October 2010:

> "Dear Sirs,
>
> **Re: Ms. Charmaine Taylor**

> This serves to inform you that the Iberostar Rose Hall Suites Hotel has made repeated attempts to contact your client Ms. Charmaine Taylor prior to the end of the maximum 'lay-off' period without success.
>
> Several attempts were made to contact Ms. Taylor by her Executive Chef and several attempts were also made by the HR Department.
>
> Be reminded that Ms. Taylor was not dismissed, but was placed on lay-off pending investigations.
>
> Ms. Taylor was informed that she would have been advised of a decision pending investigations.
>
> The decision has now been made to offer Ms. Taylor a reinstatement to her previous position within the Kitchen Department.
>
> Please be reminded that it is our intention to abide by the labor [sic] laws and practices of Jamaica and we solicit your understanding with regards [sic] to the case.
>
> Best regards,
>
> G. A. Ferguson"

The pleadings

[7] The respondent's immediate response to the appellant's second letter was to commence an action in the Supreme Court. Her claim, as set out in the claim form filed on 8 October 2010, was "to recover damages for employment breach of contract in that on June 1, 2010 the [appellant] purportedly laid off the [respondent] from her job and in effect dismissed her without offering her reasonable notice, or reasonable notice to pay [sic] causing the [respondent] to suffer loss, along with damages for defamation of

character". The particulars of claim filed on the same day amplified the respondent's claim:

> "1. ...
>
> 2. The [respondent] is the former employer [sic] of the [appellant].
>
> 3. The [respondent] was at all material times employed as the Pastry Chef at Iberostar Rose Hall Beach and Spa Resort. The post of Pastry Chef was senior/ supervisorial.
>
> 4. The [respondent] was employed to the [appellant] for approximately twenty-seven (27) months prior to being dismissed.
>
> 5. After a meeting on June 1, 2010 the [appellant] dismissed the [respondent] and did not give her reasonable notice alleging that she had been laid off.
>
> 6. The [respondent's] dismissal was unreasonable having regard to her qualifications, seniority and the difficulty obtaining similar employment.
>
> 7. The [appellant's] reason for terminating the [respondent's] contract was that the [respondent] was suspected of criminal conduct.
>
> 8. The dismissal was caused by the [appellant's] breach of contract.
>
> **PARTICULARS OF BREACH OF CONTRACT**
>
> (a) purporting to lay-off the [respondent] in circumstances where the [appellant] was not allowed by the relevant employment contract or the law to do so;
>
> (b) purporting to lay-off the [respondent] in circumstances were [sic] none of the grounds for lay-

off set out in the Employment (Termination and Redundancy Payments) [sic] was applicable;

(c) failed to provide the [respondent] with reasonable notice, having regard to the [respondent's] seniority, experience and training;

(d) failed to provide the [respondent] with sufficient notice in lieu [sic] of dismissal having regard to the scarcity of available suitable employment on the market for the [respondent];

(e) failed to effect the dismissal via the process mentioned by the Employment Handbook, namely:…"

[8] The respondent therefore claimed, among other things, (i) by way of special damages, loss of income for one year totalling $1,461,462.96, plus two weeks' vacation pay totalling $60,894.29; and (ii) general damages.

[9] In its defence filed on 8 December 2010, the appellant maintained, as it had done in the preceding correspondence, that it did not dismiss the respondent; that she had been "suspended/laid off", pending further investigations; and that, upon completion of the investigations, several attempts had been made to contact the respondent to advise her to report for work, culminating in the letter to her attorneys-at-law dated 1 October 2010. The appellant further averred that it was, "entitled to suspend or lay-off its employees, without pay, during an investigation into misconduct in accordance with [its] policies and practices". The claim for damages for breach of contract and defamation was accordingly denied.

A preliminary skirmish

[10] On 8 December 2010, the same day on which the defence was filed, the appellant applied for orders that (i) the claim be transferred to the Resident Magistrate's Court of the parish of Saint James; (ii) alternatively, the respondent's statement of case be struck out; (iii) in the further alternative, that paragraph 9 of the particulars of claim be struck out for failure to disclose a reasonable ground for bringing a claim for defamation against the appellant; and (iv) the costs of the application should be the appellant's. Of the grounds for the application, it is only now relevant to note the first:

> "The claim is for breach of an employment contract in circumstances where the maximum damages recoverable from the [appellant] arising from that breach is less than $1,000,000 and therefore within the jurisdiction of the Resident Magistrate's Court pursuant to s. 17 of the **Employment (Termination and Redundancy Payments) Act**, as amended." (emphasis original)

[11] The application was heard by Morrison J and, in a written judgment given on 23 July 2013, it was refused. I am bound to say, with respect, that I have not found the learned judge's ruling on this aspect of the application particularly easy to follow. But, as I understand it, the learned judge took the view (at paragraph [14]) that the question whether the respondent could recover her special damages claim, which exceeded $1,500,000.00, was "a matter which has to be decided on the merits of the claim". Accordingly, "[t]o attempt to forestall that claim by antecedent submission that it is peremptorily disallowed is to shut out the [respondent] without a hearing on that

aspect of her claim". None of the other reliefs sought by the appellant having been granted, the matter therefore proceeded to trial in the Supreme Court.

The evidence at trial

[12] The respondent's witness statement dated 19 March 2015 was tendered and accepted at the trial as her examination-in-chief. Closely mirroring her pleadings, the statement referred to the respondent as having been "dismissed abruptly" without "reasonable notice" (paragraph 7). She stated further that, having been dismissed, she "never received any offer of reinstatement from the [appellant]" (paragraph 13). And, further still, that "when the [appellant] dismissed me on June 1, 2010…[i]t was widely known by members of staff that there was on [sic] accusation that certain members were under a suspicion of stealing alcohol" (paragraph 14).

[13] The respondent was extensively cross-examined. Among the matters she was tested about were the appellant's efforts to contact her after 2 June 2010, as well as her own disposition towards returning to work with the appellant thereafter:

> "GG: You agree that your employer told your lawyer that they were trying to get in touch with you?
>
> CT: Yes sir. They told my lawyer that they were trying to contact me.
>
> GG: Your lawyer communicated this information to you in October 2010?
>
> CT: Yes sir.

GG: So you would agree that you knew through your lawyer that [sic] employer was trying to get in touch with you?

CT: Yes sir.

GG: But you didn't want to work with [sic] Hotel any longer?

CT: Not true. Why would you say that?

GG: You wanted to work with Ibero at [sic] 2010?

CT: At that time no.

GG: Did you want to work with them September 2010?

CT: Yes sir, or even earlier.

GG: You would want to work with them in August?

CT: Yes.

GG: But wouldn't have gone back in October 2010?

CT: No sir.

GG: So Oct 1 is [sic] too late?

CT: I was at home and not hearing from [sic] employer.

GG: On September 30 you would have worked with [sic] company but on October 1 too late?

CT: I would say yes.

GG: You didn't have a job by Oct 1, 2010?

CT: No.

GG: So you weren't looking for [sic] job?

CT: From the day I stopped I was looking for another job.

GG: You agree with me that even though you were told that it was temporary, you went for a job?

CT: I wouldn't say immediately but bills have to pay. I started getting down after not working for 3-4 months.

GG: When did you start looking for a job?

CT: I don't have a date.

GG: But you were looking for a similar job?

CT: Not really a similar job, just a job.

GG: But you didn't want old job?

CT: I didn't get a call. I was sitting at home."

[14] Under further cross-examination, the respondent agreed that, at the meeting of 2 June 2010, she was told that she was being laid off pending investigations. A further exchange between counsel and the respondent then followed:

"GG: You understood it was temporary?

CT: Yes sir. I was laid off. I was waiting on them to call.

GG: So essentially, you are saying it took too long?

CT: Yes sir.

GG: Whilst you were waiting you still didn't look for a job immediately

CT: No sir. I felt I was still employed.

GG: You were still waiting?

CT: Yes

GG: And all the way up to the end of September you still considered yourself employed?

CT: Sometime in September I felt I was no longer employed. Can't recall when."

[15] In his witness statement given on behalf of the appellant and dated 20 March 2015, Mr Ferguson confirmed all that had been averred on its behalf in the defence. The witness statement was permitted to stand as his examination-in-chief and Mr Ferguson was cross-examined on the circumstances in which the respondent was laid off:

> "NJ: Tell us about [sic] circumstances which led to laying off Charmaine Taylor
>
> AF: 14 bottles were found in a stove in an area Charmaine Taylor was supervising. Security investigated [sic] said they wanted to meet with them – called them into a meeting and decided to lay off/suspend Ms. Taylor and others pending investigation.
>
> NJ: Only you alone can tell us now or can provide us with basis upon which the decision was taken to lay off Charmaine Taylor. What in the items that guide you to lay off/suspend Ms. Taylor in these circumstances. What is it that gave you the right to lay off or suspend Charmaine Taylor?
>
> AF: Considering the potential damage and danger, considering company policy we would need to conduct full investigation.
>
> NJ: And this … policy as you describe it, where do we find that?
>
> AF: Can't be specific at this point but it is company policy and practice.
>
> NJ: Which document signed by my client contains that policy?
>
> AF: Not sure she signed any policy. I know she signed a contract and employment handbook.

NJ: Where in the company's documents that she signed do we find that policy?

AF: Can't answer that question

NJ: Thought so

NJ: Do you agree with us that you may have laid off our clients in circumstances which you had no contractual right to do so?

AF: It's possible."

The judge's decision

[16] On this evidence, Lindo J (Ag) had little difficulty finding for the respondent on the claim for breach of contract. The learned judge first observed (at paragraphs [30]-[32]) that there was no provision in the Employment (Termination and Redundancy Payments) Act (the Act), the appellant's employee handbook, or in the appellant's written offer of employment to the respondent which gave to the appellant the power to lay off an employee for up to 120 days. In the light of this, the learned judge continued (at paragraph [33]):

> "[33] The [appellant's] conduct amounted to a wrongful dismissal as the [respondent] received no notice of her dismissal or payment in lieu of notice as set out in her employment contract. I find guidance in the decision in **Cocoa Industry Board and Cocoa Farmers Development Company [Limited] and F.D. Shaw v Burchell Melbourne** [(1993) 30 JLR 242]...This case concerned an employment contract which contained express provisions regarding termination, notice and the amount to be paid in lieu of notice. The Court held that:
>
> > 'where it is an express term of a contract that an employee who is dismissed without notice is

> to be paid his wages for a certain period in lieu of notice or where there is usage to that effect, the measure of damages for breach is the amount of such wages'."

[17] The learned judge then went on to award the respondent two weeks' pay, representing her unused vacation leave (about which there is no controversy), before adding the following (at paragraphs [36]-[38]):

> "[36] The [respondent] is also entitled to damages for breach of contract due to the [appellant] taking it upon itself to lay off the [respondent] even though [it] did not have the power to do so. In the case of **Hanley v Pease & Partners Ltd.** (supra), it was held that the workman was entitled to the wages he would have earned on the day he was suspended from work.
>
> [37] In the present case, the [respondent] was suspended pending investigations into the alleged misconduct. I find that there was no contractual right to do so and notwithstanding it being a policy of the [appellant], it does not validate such an action. I find that as at the date of the suspension, the [respondent] accepted that she was not dismissed. I find also that the [respondent] and the [appellant] were treating the contract as continuing but that the [respondent] was entitled to claim that she was in fact dismissed after waiting for four months to be called back to her job by the [appellant].
>
> [38] Like the case of **Hanley**, the employer had no right to lay off and as such, this was a breach of contract which resulted in the [respondent] being away from work for 120 days without pay. The [respondent] was prevented from working for the period and thereby deprived of her salary. She is entitled to the sum she would have earned during the 120 day period she was 'laid off' from work. I therefore find that the [respondent] is entitled to the sum of $504,000.00 for breach of contract." (Emphasis in the original)

[18] In addition to the award of $504,000.00 as damages for breach of contract, the learned judge also held (at para. [39]) that the respondent, having been wrongfully dismissed, "was entitled to receive two week's [sic] notice as set out in the initial letter of employment dated April 30, 2007 and referred to in the letter dated July 6, 2009 concerning her promotion".

[19] Finally, the learned judge found that the claim for defamation had not been made out and accordingly declined to make any award under that head. There has been no appeal from this finding.

The grounds of appeal and the rival submissions

[20] In grounds of appeal filed on 13 October 2015, the appellant challenged the learned judge's decision on the following grounds:

> "a) The [respondent] having claimed in her pleadings and led evidence that her employment contract was breached on June 1, 2010, the Learned Judge below ought to have awarded damages for breach of contract as of June 1, 2010;
>
> b) The award of damages for the period that the [respondent] was laid off, in addition to damages for breach of contract amounts to compensating the [respondent] twice for the same breach of contract."

[21] Based on these grounds, the appellant sought orders allowing the appeal and setting aside the learned judge's order for payment of damages of $504,000.00. The appellant also asked that the order for costs in the respondent's favour in the court

below be varied to an order that there be no order for costs in that court; and that the appellant be awarded costs in the appeal.

[22] For the appellant, Mrs Alexis Robinson submitted that, having accepted the respondent's position that she was dismissed over the appellant's position that she was laid off, the learned judge erred in principle in making an award for general damages on the basis of the latter. Pointing out further that, logically, if a lay off is, in law, a dismissal, the date of the lay off must be the date of dismissal. Mrs Robinson submitted that, in accordance with the respondent's pleaded case, the damages awarded to the respondent ought to have been limited to the two weeks' pay in lieu of notice provided for in the contract. What the learned judge did in effect, Mrs Robinson contended, was to compensate the respondent twice for the same breach, *viz*, her wrongful dismissal on 2 June 2010.

[23] As for the authorities, Mrs Robinson submitted that the learned judge's reliance on **Hanley v Pease & Partners Limited** [1915] 1 KB 698 was misplaced, on the basis that that case was distinguishable on its facts from the instant case. Instead, the Canadian case of **McLean v The Raywal Limited Partnership** 2011 ONSC 7330, to which the learned judge had also referred, was urged on us as being "precisely on point".

[24] For the respondent, Miss Kashina Moore's first point was that the learned judge's decision was based on the evidence as it emerged before her and that, in those circumstances, this court should not lightly disturb her findings. Miss Moore submitted

that it was clear from the evidence that the respondent was ready and willing to work for the appellant right up until 1 October 2010, but was prevented from doing so by the appellant. Having so found, it was submitted, the learned judge was entitled to compensate the respondent for the period when she was prevented from working, in keeping with the decision in **Hanley v Pease & Partners Limited**. While accepting that the respondent's pleaded case was that she was dismissed by the appellant on 1 June 2010, Miss Moore submitted that there was evidence before the court from which the learned judge could have treated the actual date of dismissal as 1 October 2010. In this regard, Miss Moore relied particularly on the learned judge's finding (at paragraph [37]) that the respondent and the appellant "were treating the contract as continuing". Accordingly, Miss Moore urged us to say that the learned judge's award of general damages did not amount to double compensation, as the respondent was in fact entitled to be compensated for two breaches of contract: that is (i) being sent by the appellant on "indefinite layoff"; and (ii) her dismissal by the appellant.

[25] In support of the submission that it was open to the learned judge to decide the case on the basis of the evidence as it emerged at trial, Miss Moore relied on the decision of the Supreme Court of Victoria in **Dare v Pulham** (1982) 148 CLR 658. That was a case in which the court observed (in the joint judgment of Murphy, Wilson, Brennan, Deane and Dawson JJ) that "where there is no departure during the trial from the pleaded cause of action, a disconformity between the evidence and particulars earlier furnished will not disentitle a party to a verdict based upon the evidence". In a

brief reply, Mrs Robinson pointed out that the principle of that case would only apply in a case where there was no departure from the pleaded cause of action.

[26] Both counsel also made brief submissions on the question of costs. Mrs Robinson's position was that, the appellant having won at trial on the defamation issue, there ought to have been no order as to costs in the court below. It was further submitted that, pursuant to section 131(1) of the Judicature (Resident Magistrates) Act, even if an order for costs was appropriate, such costs should have been awarded on the scale applicable to the Resident Magistrate's Court. Miss Moore naturally disagreed, contending that the claim in the court below had been properly brought and that the respondent was therefore entitled to her costs.

Discussion

The general damages award

[27] As I have already indicated, the principal issue for decision on this appeal is whether Lindo J (Ag) erred in making an award of general damages for any period after 2 June 2010, which is the date on which the respondent was laid off. In determining the legal effect of that action, the learned judge was, in my view, plainly correct in her conclusion that, absent either a statutory or contractual power to do so, the laying off of an employee amounts to a dismissal.

[28] To take the question of whether there is any statutory power first, the only section of the Act which speaks to the legal effect of a lay off is section 5A. Following

on from section 5, which sets out the circumstances in which a right to a redundancy payment will arise, section 5A(1) provides as follows:

> "For the purposes of section 5, an employee who has been laid off without pay for a period in excess of one hundred and twenty days may by notice in writing to the employer elect to be regarded as dismissed by reason of redundancy from such date (not being less than fourteen days nor more than sixty days after the date of the notice) as may be specified in the notice,..."

[29] Taken in its statutory context, it is in my view clear that this section does not, as the appellant thought, give to an employer "the right to lay off any employee for a maximum of 120 days". Rather, what it does is to give the employee an option to treat a lay off as a dismissal by reason of redundancy after a period of 120 days. Thus, in **Economy Hotels Limited T/A Hotel Montego v Doreen Harding** (1997) 34 JLR 213, this court affirmed the decision of a Resident Magistrate for the parish of Saint James that the respondent, who had been suspended "until further notification" in excess of 120 days, was entitled to regard herself as having been dismissed by reason of redundancy.

[30] The question of the true legal signification of a lay off was explored in **McLean v The Raywal Limited Partnership**. In that case, the plaintiff was laid off from her employment by the defendant and given a date upon which she should return. At the time of her employment over 12 years before, there was in existence an employee handbook which included provisions, in keeping with the cyclical nature of the defendant's business, for laying off staff. However, the plaintiff was not advised of the

provisions of the handbook in the written offer of employment given to her; nor was she provided with a copy of the handbook or required to confirm in writing that she acknowledged the existence of the handbook or that it was part of her contract of employment. Although there was a subsequent change in the terms of her employment so as to include the lay off provisions in the employee handbook in the plaintiff's contract, Whitaker J held, in keeping with previous binding authorities, that the altered terms were unenforceable against her (given that there was "no obvious or certain improvement in compensation or other terms of employment" in consideration for the change in the terms of her employment).

[31] It was therefore held that, there being no contractual basis for it, the purported lay off of the plaintiff amounted in law to a dismissal. This is how Whitaker J summarised the position (at paragraph [19] of the judgment):

> "The parties agree that a layoff will be lawful and of effect where it is based on an employment contract. In the absence of a contractual basis for layoff, the device of layoff does not exist at common law and any purported layoff will be in fact, a dismissal."

[32] To similar effect, in their notable work, Commonwealth Caribbean Employment and Labour Law[1], Mrs Natalie Corthésy and Mrs Carla-Anne Harris-Roper state (at page 202) that, "[a]t common law, there is no general right provided to employers to lay off

[1] Commonwealth Caribbean Employment and Labour Law, by Natalie G S Corthésy and Carla-Anne Harris-Roper, Routledge, 2014,

employees...and this will amount to a repudiatory breach which can be considered as dismissal".

[33] In the instant case, despite a faint attempt by Mr Ferguson to assert in cross-examination a contractual basis for suspending/laying off the respondent (see paragraph [15] above), in the end he was forced to accept — albeit reluctantly — the suggestion put to him by counsel that the appellant "may have laid off [the respondent] in circumstances [in] which [it] had no contractual right to do so".

[34] So the action of laying off the respondent without colour of legal authority, whether statutory or contractual, was, as she had claimed, and as Lindo J (Ag) correctly found, a breach of her contract of employment and as such amounted to a dismissal.

[35] In **McLean v The Raywal Limited Partnership**, having arrived at a similar finding, Whitaker J's next step was to assess the damages to which the plaintiff was entitled as a result. In the end, he settled on 10 months' pay in lieu of what was considered reasonable notice in the particular circumstances of the case. In the instant case, however, unlike in that case, the respondent's contract of employment specifically stipulated for two weeks' notice of termination. In these circumstances, it is well established that the relevant principle is that, as Brooks JA observed in **Rosmond Johnson v Restaurants of Jamaica Limited T/A Kentucky Fried Chicken** [2012] JMCA Civ 13, at paragraph [16], "the terms of the contract with respect to its termination, must be followed". It therefore seems to me that, having established the

breach of contract amounted to a dismissal of which she complained, the respondent's recoverable loss under the contract was two weeks' pay in lieu of notice.

[36] Thus far, there is no significant divergence in this analysis from that which informed Lindo J (Ag)'s award of two weeks' pay in lieu of notice to the respondent. Indeed, as has been seen (at paragraph [16] above), the learned judge justified the award on the basis that the respondent, having been dismissed, "received no notice of her dismissal or payment in lieu of notice as set out in her employment contract".

[37] But the learned judge also considered (see paragraph [17] above) that the respondent was entitled to an additional award of damages for the appellant's breach of her contract of employment in laying her off, "even though [it] did not have the power to do so". In arriving at this conclusion, the learned judge explicitly based her finding on the authority of **Hanley v Pease & Partners Limited**, which I must therefore consider in some detail.

[38] The appellant in that case had been employed at the respondent's coalyard for a period of two years, under a contract of service determinable by 14 days' notice on either side. The appellant absented himself from work without leave or excuse on a particular day and the respondent suspended him from work the following day for one day. But the respondent did not dismiss him. The appellant brought a claim before the justices under the relevant statutory provisions[2] for wrongful dismissal, claiming one

[2] Employers and Workmen Act, 1875, section 4

day's wages for the day of his suspension. The justices dismissed the claim, holding that there was no wrongful dismissal.

[39] The appellant appealed successfully to the King's Bench Division[3]. The court considered that, under the statutory provisions, the justices were fully empowered to deal with the claim as if it were a claim for damages for breach of contract, rather than for wrongful dismissal. It was held that, although the respondent might have had a right to damages against the appellant, it had no right to suspend him from work for one day. The case was accordingly remitted to the justices with a direction to award the appellant a sum representing one day's wages. Delivering the leading judgment, Lush J went on to say this (at page 705):

> "The substantial question is: Had the appellant a claim in law for damages for breach of contract or not? Whether the right of a master to dismiss a servant for misconduct or breach of duty or anything else of the kind is treated as a right arising out of the ordinary right of a contracting party to put an end to the contract when there has been a repudiation by the other party, or whether it is treated as a right which the master has on the ground that obedience to lawful orders must be treated as a condition of the contract, is wholly immaterial. I do not think it is necessary to say which is the proper way to regard it, because in either view the right of the master is merely an option. The contract has become a voidable contract. The master can determine it if he pleases. Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding the misconduct or breach of duty of the servant, then the

[3] Lush, Rowlatt and Atkin JJ

> contract is for all purposes a continuing contract subject to the master's right in that case to claim damages against the servant for his breach of contract. But in the present case after declining to dismiss the workman—after electing to treat the contract as a continuing one—the employers took upon themselves to suspend him for one day; in other words to deprive the workman of his wages for one day, thereby assessing their own damages for the servant's misconduct at the sum which would be represented by one day's wages. They have no possible right to do that. Having elected to treat the contract as continuing it was continuing. They might have had a right to claim damages against the servant, but they could not justify their act in suspending the workman for the one day and refusing to let him work and earn wages."

[40] **Hanley v Pease & Partners Limited** is therefore clear authority for saying that an employer has no implied right at common law to suspend an employee. To that extent, the decision is entirely consistent with the established learning that, in the absence of any statutory or contractual provisions to justify it, the act of suspending/laying off an employee is a breach of contract. So, in that case, in which the appellant's employment to the respondent continued after the breach, the true measure of his loss was the one day's pay of which he had been deprived as a result of the breach.

[41] In this case, on the other hand, the respondent, within a few weeks of her suspension/lay off on 2 June 2009, took the position (through her attorneys-at-law) that she regarded herself as having been dismissed by the appellant and gave notice of her intention to seek damages as a result. This was a position which the respondent was fully entitled to take in response to what was, in the language of standard contract

law analysis, a clear repudiatory breach of contract by the appellant. Consistent with this position, the respondent filed a suit against the appellant within a week of the appellant's letter of 1 October 2010, which had advised her of the appellant's decision to offer her "a reinstatement to her previous position". In the claim, as has been seen, the respondent maintained and restated her position that she had been, as the claim form put it (see paragraph [7] above), "purportedly laid off...from her job and in effect dismissed...without...reasonable notice or reasonable notice to pay [sic]". And at the trial, having heard evidence from both sides, the learned judge came to the clear conclusion that the respondent, not having received either notice of her dismissal or payment in lieu of notice as set out in her employment contract, had been wrongfully dismissed.

[42] This comparison of the circumstances of both cases makes it abundantly clear, it seems to me, that **Hanley v Pease & Partners Limited** bears only limited analogy to the instant case. It seems likely that Lindo J (Ag) may have been misled into thinking otherwise by the respondent's somewhat belated stance, well into her cross-examination, that as late as sometime in September 2009, she felt that "[she] was still employed". But, with the greatest of respect to the respondent, what she "felt" at that stage was surely completely beside the point, since the true status of her employment was purely a matter of law. By September 2009, as the learned judge found, the respondent's dismissal had already been effected as a result of all that had gone before.

Costs

[43] I must finally say something on the question of costs. Section 131(1) of the Judicature (Resident Magistrates) Act (as amended by article 15 of the Judicature (Resident Magistrates) Act (Increase in Jurisdiction) Order, 2013) provides as follows:

> "If any action or suit is commenced in the Supreme Court for any cause for which an action might have been instituted in any Court and the plaintiff—
>
> (a) in an action founded on contract or tort, recovers a sum less than eight hundred and fifty thousand dollars; or
>
> …
>
> that plaintiff shall recover no more costs than he would have been entitled to had he brought his action or suit in a [Resident Magistrate's] Court, unless in any such action, suit or proceedings a Judge of the Supreme Court certifies that there was sufficient reason for bringing the action, suit or proceedings in the Supreme Court."

[44] On the basis of that provision, Mrs Robinson's submission was therefore that, the respondent having been awarded a sum less than $850,000.00, the order for costs in the court below ought to have been limited to costs on the scale recoverable in the Resident Magistrate's Court. But I think that this submission ignores Morrison J's order, made in response to the appellant's specific request that the matter be transferred to the Resident Magistrate's Court, that the case should remain in the Supreme Court. In the light of that order, I do not think that it would have been at all just to have awarded the respondent costs on the lower scale. And, as regards the wider submission

that there should have been no order at all as to costs, I am content to say that this was purely a matter for the discretion of the learned judge. Nothing was said to us to suggest that Lindo J (Ag) acted on any erroneous principle in making an order for costs in the respondent's favour.

Conclusion

[45] It follows from all of the above that, in my respectful view, Lindo J (Ag) fell into error by making an additional award of damages to the respondent to cover the period during which she was, as the judge put it, "'laid off' from work". The single breach of contract for which the appellant became liable to the respondent was laying her off without legal authority. By doing this, the appellant effectively dismissed the respondent otherwise than in accordance with the terms stipulated for by her contract of employment. Accordingly, as the learned judge found, the respondent was entitled to damages calculated by reference to the contract, *viz*, two weeks' pay in lieu of notice.

[46] By ordering that the appellant should also pay the respondent a sum of $504,000.00 as damages for laying her off, the learned judge was in fact, as Mrs Robinson convincingly demonstrated, compensating the respondent twice for the same breach of contract. In any event, the learned judge's award under this head ran completely contrary to the pleaded basis of the respondent's case, thereby easily distinguishing this case from **Dare v Pulham**, in which it is clear that there was no departure at trial from the pleaded cause of action. It is for these reasons that I joined

with my learned sisters in ordering that that aspect of the learned judge's award should be set aside.

[47] As regards the question of costs, I have already indicated my view that this court should not disturb Lindo J (Ag)'s order for costs in the respondent's favour in the court below (see paragraph [44]) above). However, as regards the costs of this appeal, I was clearly of the view that the appellant, as the successful party in the appeal, should have its costs in this court, such costs to be taxed if not sooner agreed.

MCDONALD-BISHOP JA

[48] I have read in draft the reasons for judgment prepared by the learned President. The reasons he has advanced for the decision arrived at by this court on 19 January 2016 fully accord with my own views. I adopt those reasons and there is nothing that I can usefully add.

SINCLAIR-HAYNES JA

[49] I too have had the opportunity to read in draft the reasons for judgment of the learned President. I entirely agree with his reasoning and I have nothing further to add.