[2010] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 100/2006

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE M^{C}INTOSH JA (Ag)

BETWEEN	**DR MICHAEL HALEY**	**APPELLANT**
AND	**THE UNIVERSITY OF THE WEST INDIES**	**RESPONDENT**

Ms Carol Davis for the appellant

Ms Maliaca Wong and Miss Shuana-Kaye Hanson instructed by Myers Fletcher & Gordon for the respondent

31 May, 1, 2 June and 20 December 2010

HARRISON JA

[1] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and the conclusions arrived at. There is nothing further I wish to add.

PHILLIPS JA

[2] This is an appeal against the decision made on 7 November 2006 by Beckford J, who ruled on a preliminary issue raised by the appellant (claimant) and gave judgment to the respondent with costs to be agreed or taxed. Leave to appeal was granted.

[3] The claim before the court below was for damages for breach of the contract of employment, between the appellant and the respondent, on the basis that the respondent had wrongfully terminated the appellant's employment; had terminated by reason of redundancy, and failed to make redundancy payments to the appellant. In the alternative, there was also a claim for damages for breach of the Employment (Termination & Redundancy Payments) Act ("The Act").

The preliminary issue raised two questions: Whether the claimant was dismissed by reason of redundancy; or whether the claimant is entitled to redundancy and if so, how much?

[4] After hearing submissions on the above issue the learned judge gave an oral judgment in favour of the respondent, and promised written reasons within a few days. Unfortunately, these promised reasons did not materialize and at the commencement of the appeal, further efforts were made to obtain the same without success. As a consequence, both counsel, who also represented the parties in the hearing in the Supreme Court, produced an agreed note of the judgment which is set out below:

> "Judgment:
>
> Judgment for the Defendant
>
> Costs to be agreed or taxed.

> Contract ended 30 September 2003. The relevant date is 30 September 2003.
>
> Claimant had until 30 March, 2004, to make his claim for redundancy.
>
> The meeting was not notice to the employer.
>
> First Claim was April 2004
>
> Written judgment to be delivered by Friday November 10,
>
> 2006.
>
> Leave to Appeal granted to the Claimant."

[5] At the hearing below the appellant had filed particulars of claim and three affidavits, two of which were deposed by the appellant. The respondent filed its defence and also relied on three affidavits; two of which were sworn to by the respondent's campus registrar.

The pleadings

[6] In the particulars of claim the appellant set out the background of his employment with the respondent. His first contract commenced on the 9 October 1990, as a temporary lecturer in the department of zoology. It was for a period of one year. Thereafter there were successive contracts over a 13 year period, each for one year, until the final contract which ended on the 30 September 2003. From 1990–1993 covering three contracts he was employed as above. Then from 1993 – 2000, he was employed as a temporary acting director at the Discovery Bay Marine Laboratory of the respondent and from 2000–2003, he was employed as a temporary research fellow in

the biological methods of repairing coral reefs at the Discovery Bay Laboratory at the respondent's center for Marine Sciences. In all the contracts the posts were said to be temporary and the contracts were for a fixed period.

[7] The appellant claimed that he had been employed for a continuous period of 13 years and that his employment was terminated by reason of redundancy. He set out what he thought was due to him. He made mention of the fact that in 2000 he received a recommendation, due to his having distinguished himself by his record of publications, to be promoted above the bar. He also relied on certain terms of the agreement between the respondent and the West Indies Group of University Teachers, (WIGUT) which he claimed were incorporated into his contract with the respondent, namely; that where redundancy was being considered, "wherever practical an opportunity will be given for staff in posts to be made redundant to be reassigned (with re-tooling as necessary) elsewhere in the institution". It was the contention of the appellant that in breach of that clause he had been wrongfully dismissed, in that, his contract of employment had been terminated by reason of redundancy without giving him the opportunity to have been re-assigned in the institution. He also relied on a provision in the WIGUT agreement which indicated that once a staff member had served for a period in excess of 10 years, but less than 20 years, his termination benefits should be calculated by way of four weeks pay for each year of service instead of the amount set out in the Act.

[8] The respondent in the main admitted most of the facts pleaded by the appellant, made certain corrections with regard to the specific dates of the contracts, confirming that they were all for a period of one year only, agreed with the emoluments pleaded, save and except for the sums referable "to costs of passage and baggage allowance to the United States", but raised certain specific issues. The respondent accepted that the appellant was in continuous employment but stated that the appellant's employment was not terminated by reason of redundancy. The respondent pleaded that the last contract of employment with the respondent was dated 4 June 2002 which was for one year only, and which terminated on 30 September 2003, by effluxion of time, as was agreed between the parties. The respondent insisted that no redundancy arose as the appellant's sabbatical came to an end and the contract was not renewed. The respondent accepted the terms of the WIGUT agreement but denied that it was applicable to the appellant. Finally the respondent stated, that in any event, the appellant had failed to give notice in writing to the respondent of the claim for redundancy within six months of his employment coming to an end. The respondent denied that there had been any breach of the contract of employment and that any amounts were payable to the appellant.

The application

[9] The appellant's first affidavit filed in support of the application dealing with the preliminary issue recounted his history of employment with the respondent as set out above in his particulars of claim, and he attached 12 copies of his letters from the respondent. Most of these letters were written on the letterhead of the respondent, a

few were file copies and all were signed by either Barbara Christie, Mary Morgan, Winston Davis, or Deborah Smythe "for Campus Registrar". The appellant deposed to the fact that there had been no breaks in service between October 1990 and September 2003, when his contract had been terminated. He attached the letter showing that he had been recommended for a promotion above bar.

[10] In paragraph 6 of his affidavit he stated that his duties as a research fellow at the Centre for Marine Sciences involved: conducting research and producing academic papers for publication. He further stated that he concentrated on methods of repairing coral reefs, but his responsibilities included doing research and writing papers on biological life on coral reefs generally. He said that he had been granted sabbatical leave for the year 2002 to 2003, which would have relieved him of all teaching and administrative responsibilities and permitted him to attend international conferences, and conduct research outside of the country. This resulted in him attending on his offices at the university irregularly.

[11] The appellant said that although his contracts had continued unbroken, there were several times that the letter of appointment came after the expiry of the contract. He said that being concerned about his continuous employment, and since the last contract indicated that his contract was supposed to come to an end in September 2003, and wanting assurances from the authorities as to his position, he endeavoured to set up meetings but without success. In May 2003, therefore, he said he wrote to

the respondent, enquiring of the status of his continued employment. So much was said about this letter on both sides, I think it important to set it out in its entirety:

"CENTRE FOR MARINE SCIENCE

Dr. Michael Haley, Research Fellow

The University of the West Indies
Mona, Kg.7, Jamaica
Tel (876) 990 7587
Email:mphaley@uwimona.edu.jm

Ms. Deborah Smythe,
Assistant Registrar, Appointments
University of the West Indies, Mona, Kingston 7

May 11th 2003

Dear Ms. Smythe

How are you? My current contract will expire on September 30th 2003, and I write to ask the University that it be renewed, as Research Fellow.

Although I know that the University is under severe financial strain, I wish to point out that under normal circumstances academic faculty who have been employed by the University for 13 years continuously do not face the uncertainty of worrying whether they will remain employed, even in these difficult times, and that an argument can be made for treating me in the same way as other faculty who have served an equal length of time. Although I have been on temporary contracts, one cannot regard someone continuously employed for more than a decade as temporary.

I do not ask for renewal of contract as an entitlement, however, but on the basis of merit. I attach a current curriculum vitae which details my past academic accomplishments, a copy of my end of fellowship report,

a list of papers and projects that I am currently working on, and a list of projects which I wish to develop in the future. I have more than 20 publications in referred journals and have asked for promotion to the Senior Lecturer/Senior Research Fellow level; publication of the work completed under my Research Fellowship and Sabbatical will push that total to over 30 publications.

I have been successful in obtaining funds to support my research, particularly during my Research Fellowship and Sabbatical. If my fellowship is renewed, my focus will be on obtaining larger grants from the Global Environmental Facility (GEF), the United Nations Environmental Program (UNEP), and the European Union (EU) involving up to four other faculty members from other departments within Pure and Applied Sciences, and six to ten postgraduate students. Nothing is guaranteed, of course, but I have already had meetings and correspondence with both UNEP/GEF and EU personnel, who reacted positively to the project outlines, and encouraged me to start the multi-stage submission procedure.

I wish to additionally point out that the Centre for Marine Science is a research centre but that the two most senior academics (Dr. Warner and Dr. Quinn) are limited in the amount of research they can conduct due to administrative responsibilities. Maintaining me in place as a Research Fellow will, at a minimum, maintain the level of research that has been conducted over the past three years, and if the grant proposal alluded to above are successful, the amount of research will increase to substantially higher levels.

In the past many of my contract renewals have been made at the last minute, sometimes after the old contract had expired. It is my hope that the submission of this request several months in advance will result in a decision being made well in advance of the current contract expiration on September 30th.

Yours Sincerely,

Michael Haley

cc. Professor Ronald Young, Dean, Pure and Applied Sciences
Dr. George Warner, Director, Centre for Marine Sciences."

[12] The appellant did not get a response to this letter. 30 September 2003 passed and he continued to consider himself employed but requested the assistance of WIGUT in obtaining a response from the respondent. He said that he expected that his employment after 13 years would continue unless he received clear notice from the respondent that they intended to terminate his services. He indicated that he had not received any such notice from the respondent although he had received communication from the head of his department that his position would terminate. He did not consider that official communication from the respondent, as he was not directly employed to the centre of marine services, and he thought that all communication relating to employment, should come from the respondent. In his view, the head of his department could not speak to alternative employment with the respondent. Further he had been told previously that there was no position for him with the respondent and a position had later been found. This communication from his department was not attached.

[13] Three letters from WIGUT however were attached with regard to setting up a meeting on his behalf, all of which indicated that they were invoking the grievance procedure set out in clause 236 of the blue book, for the first, second and third stages. The meeting was eventually arranged with the campus principal on 6 October 2003 and although the appellant could not attend as he was attending a conference abroad, he

had sight of and relied heavily on the minutes of that meeting. The minutes were attached to his affidavit.

[14] The appellant maintained that it was his understanding of the meeting that while there was no available position for him as research fellow, at the centre for Marine Sciences, the respondent authorities would try to find an alternative position for him in another department so his contract was therefore not at an end. He was of the view that if there was no other position, he would be so informed, offered a redundancy payment and paid accordingly.

[15] There was no response from this meeting, and following communication from WIGUT a meeting was promised by the respondent, and was held on 13 January 2004, which the appellant attended. At that meeting he was advised that the respondent had no intention of continuing his employment and also no intention of giving him a redundancy payment. He obtained advice and his lawyers wrote to the respondent on 23 April 2004 requesting redress, failing which they advised that suit would follow, which it did in June 2004. The appellant maintained that he believed that the position of research fellow in the Centre for Marine Sciences which he held prior to the termination of his employment had been made redundant. He said that he had attended the centre in January 2004, and although the centre continued, "no person was employed as Research Fellow and the position had apparently ceased". He also maintained that he was entitled to increased benefits which had been negotiated by WIGUT for members of the university staff, who have served 10 years or more to

receive four weeks pay for each year of service namely 52 weeks pay. Excerpts of the WIGUT Agreement were also attached.

[16] In response Mr G.E.A. Falloon, in his affidavit filed 25 January 2006, indicated that he had been the Campus Registrar of the respondent since 1989. In paragraph 2, he stated the following:

> "Where persons are employed on a temporary basis, or on contract, the Campus Registrar and Assistant/Senior Assistant Registrar can delegate to the heads of departments of the University their duty to inform employees and contract workers of matters relating to their employment, such as, termination of employment and appointment."

He attached the letter of 26 August 2002 which he said was from the respondent to the appellant. He said that it was signed by Dr George F. Warner as the Director of the Centre for Marine Sciences, copied to the Senior Assistant Registrar and advised the appellant of the termination of his employment. Much turns on this letter and much was said about it, so I will also set it out in its entirety:

> "University of the West Indies
> Centre for Marine Sciences
> Mona Campus, Kingston 7
> Jamaica, West indies
>
> August 26, 2002
>
> Dr Michael Haley
> Centre for Marine Sciences
> UWI, Mona
>
> Dear Michael
>
> I have been advised to notify you formally that when your sabbatical year ends on the 30th September 2003, your contract of

> employment in the Centre for Marine Sciences, UWI, will terminate. As you know, there is no suitable post available in CMS and there will be no automatic renewal of contract by UWI.
>
> I therefore strongly advise you to consider your future career and to be on the lookout for possible appointments. If you wish to continue at UWI it would have to be in a newly advertised post, following the normal competitive application process.
>
> In the meantime, I wish you all the best for your sabbatical year, and look forward to hearing about the progress of your research and your published work.
>
> With best wishes.
>
> Yours sincerely,
>
> Dr George F Warner
> Director, CMS
>
> cc Professor R Young, Dean FPAS
> Mrs D Charles-Smythe, Senior Assistant Registrar."

[17] The appellant responded to the affidavit of Mr Falloon to say that the normal situation would be communication from the campus registrar and/or assistant/senior assistant registrar from the offices of the campus registrar. He also said that if there had been any delegation to the head of department, it should have been in writing, and should have been communicated to him. However, since that was not done, he did not know that the letter represented the position of the respondent. He thought it was only the view of the centre, and that the respondent would try to find alternative employment for him in the wider university.

[18] Dr Derrick Deslandes, who holds the substantive post of lecturer in the department of management studies, at the University of the West Indies, Mona and

who has been employed to the university in excess of 12 years, and was the President of WIGUT at the time of filing of the affidavit, swore an affidavit in support of the appellant. He indicated that he had previously held the position of grievance officer in the union and he was therefore familiar with the procedures relating to appointment and termination of academic staff. He indicated that he was familiar with the termination of the appellant's employment and had attended the meeting of 6 October 2003. It was the contention of this affiant that the letter of 26 August, 2002 from the head of department was inappropriate, and he had pointed that out to the meeting, and none of the senior persons there had commented on that statement. He insisted that the approach used with the appellant related to temporary employees, and not those in the position of the appellant, who had been treated by the respondent, as a permanent employee of the respondent, and therefore should have received communication from the appointments committee through the offices of the campus registrar. As a consequence, he was entitled to six months notice or payment in lieu thereof, and additionally as a permanent member of staff, "in the circumstances he would be entitled to redundancy payments". He claimed that he had been in negotiations with the respondent in which it had been orally agreed that the appellant should have been given a redundancy payment but the respondent had reneged on that agreement.

[19] He commented on the affidavit of Mr Falloon and said that the letter of 26 August 2002 would only be appropriate if given to a temporary employee but not in the case of the appellant, " since given his years of service he was entitled to be and

was treated as a permanent employee". In further response and in keeping with his knowledge of the respondent's procedures and practices he said that any correspondence adverse to the interest of any employee ought to have been placed on the employee's file. As a consequence he would have expected the authorization from Mr Falloon to Dr Warner to be in writing and on the appellant's file as the appellant had a right to inspect his file. This authorization was not on the appellant's file and so he would not have been aware that it was official correspondence from the respondent. Had he been so aware he would have been able to activate the grievance procedures, far earlier, namely from the time of receipt of the letter. He attached ordinance 8, dealing with powers of appointment, promotion and dismissal.

[20] Dr Warner swore to an affidavit and merely attached the said letter of 26 August 2002, and stated that the Centre for Marine Sciences is a section of the Faculty of Pure and Applied Science, a department of the respondent.

[21] Mr Falloon swore to an additional affidavit specifically to address the statement in the affidavit of Dr Deslandes that there was an agreement made at the meeting of 6 October 2003, to give the appellant redundancy payments. He stated that he was at the meeting and there was no such agreement, but at the meeting the principal merely indicated that the respondent was prepared to consider redundancy. Additionally, he stated that the appellant's contract terminated on 30 September 2003, he had received notice of termination from 26 August 2002, by letter which was sent with the approval and authority of the campus registrar of which the appellant was well aware. He stated

further that he knew of no rule or practice which required the campus registrar to record in writing any delegation to the head of department to inform employees or contract workers of matters relating to their employment, nor of any rule or practice to notify the employee or the contract worker of any such delegation. He pointed out that the termination letter was copied to the senior assistant registrar and that was also known to the appellant.

[22] The preliminary point was taken against the background of this evidence and the submissions made to the learned trial judge were somewhat similar to those made before this court, save for some novel points taken before us which we shall mention. The learned that judge ruled as set out in paragraph 2 and the notice and grounds of appeal were filed forthwith.

The Appeal

[23] The grounds of appeal were as follows:

> "(i) That the Learned Judge in Chambers erred in granting judgment for the Defendant on the preliminary issue.
>
> (ii) That the Learned Trial [sic] erred in that she did not properly determine the preliminary issues which were before her, which said issues were:
>
> (a) Whether the Claimant was dismissed by reason of redundancy
> (b) Whether the Claimant is entitled to redundancy payments and if so how much
>
> (iii) That the Learned Trial Judge erred in determining in all the circumstances that the relevant date was 30th September 2003
>
> (iv) That the Learned Trial Judge erred in determining that the Respondent did not make a claim for redundancy within 6 months of the relevant date."

Based on these grounds the appellant sought an order setting aside the judgment of the learned trial judge, and an order that the court ought to have determined the preliminary issue in favour of the appellant as follows: that the appellant was dismissed by reason of redundancy, and therefore entitled to redundancy payment in the sum of $2,499,536.00 with interest.

The appellant's submissions

Ground i

[24] Counsel submitted that the learned trial judge erred in granting judgment for the respondent as this was not what she had been asked to determine. She further submitted that the learned trial judge had gone beyond what had been before the court at the relevant time.

Ground ii

[25] Counsel for the appellant submitted that the learned trial judge did not determine what had been asked of her, in that, she failed to make any finding as to whether the appellant had been dismissed by reason of redundancy**.** Indeed it was submitted that she did not make any finding on the issue of dismissal at all.

[26] It was submitted however that with regard to ground of appeal (ii) b, the learned trial judge did make a determination, although not stating so expressly, as, having found that the relevant date of termination was 30 September 2003, and that the appellant had until 30 March 2004 to file his claim, but that he had not done so until

April 2004, the court had impliedly found that no redundancy payments were due to the appellant, his claim being barred pursuant to section 10 the Act. It was the appellant's contention that she had erred in this finding which forms the basis of ground of appeal (iii). The appellant maintained that redundancy payments are due to him in the amount of $2,499,536.00 with interest.

[27] Counsel therefore firstly, endeavoured to show that the appellant had been dismissed by reason of redundancy. Counsel submitted that as the appellant had been continuously employed for four weeks or more he was entitled to notice of termination of his contract of employment pursuant to section 3 of the Act, which he did not receive, as the letter of the 26 August 2002 could not be considered proper notice under the university rules and regulations. It was further submitted that although there were a series of contracts between the appellant and the respondent, there was still a period of continuous employment from the time the appellant first began work, for a period in excess of 104 weeks, and it was therefore necessary for the court to have determined whether, pursuant to the provisions section 5 of the Act, the appellant was "dismissed' and whether that dismissal was "by reason of redundancy" being attributable wholly or in part to certain factors set out in the Act.

[28] With regard to whether the appellant had been "dismissed" Counsel relied on section 5 (5) (a) and (b) of the Act, indicating that those provisions were applicable, in that the contract had been determined without notice or without any proper notice and the contract was one for a fixed term, which had expired without the contract being

renewed. Additionally, it was submitted that section 5 (2) (b) of the Act was also applicable, in that "the requirements of the business", viz the respondent for "employees to carry out work of a particular kind" namely; research fellow at the Centre for Marine Sciences "clearly had ceased or diminished or were expected to cease or diminish".

[29] It was submitted that the appellant had been in contractual relations with the respondent for several years, with recognition for good performance, and subsequent to the termination of his employment he had attended on the offices of the marine centre, and although the office continued no one was employed as the research fellow. The respondent no longer needed one, so counsel submitted in the words of the Act, the respondent no longer "required employees to carry out" that particular kind of work "in the place where he was so employed". This was a dismissal by way of redundancy and would have been so even if this was not the whole but only part of the reason for the redundancy.

[30] The appellant relied on the minutes of the 6 October 2003 to confirm that the dismissal was by way of redundancy and also that the respondent was aware of that fact. It was argued that based on the persons present at the meeting and the intervention of WIGUT, the respondent would hardly have been considering redundancy if it had not arisen on the dismissal of the appellant. The "WIGUT Redundancy Agreement" provided for the opportunity of staff members whose posts had been made redundant to be reassigned in other positions. The meeting was the first step in that

process. It was submitted, that at that meeting, two steps were identified, which were not implemented". Firstly, to endeavour to obtain an alternative position and secondly, if one was not available then a redundancy settlement would have been made. The fact that the respondent did not follow through on this, or changed its mind, did not affect the fact that the appellant was in a redundancy situation, recognized by the respondent.

Ground iii

[31] Counsel referred the court to section 2 of the Act, where the definition is given of the "relevant date" in relation to the dismissal of an employee. Counsel submitted that sub paragraph "d" was relevant in the instant case, a position which had not been adopted on behalf of the appellant in the court below. Counsel herself suggested that the approach may be novel, but was nonetheless applicable. Sub-paragraph (d) in relation to the relevant date means:

> "where he has been employed in seasonal employment and any of the events mentioned in paragraphs (b) and (c) of subsection(3) of section 5 occurs, the date on which the event occurs."

In this context the Act provides that:

> "seasonal employment" means employment provided by an employer during a specific part (commencing at approximately the same time in each year) of each of two or more consecutive years, and season shall be construed accordingly."

[32] Based on the provisions of sections 5 (3) (a), (b) and (c) of the Act, relating to seasonal employment, (set out at paragraph 45 below) counsel developed the submission that the appellant was a seasonal employee who had been dismissed by reason of redundancy. Counsel submitted that the appellant was employed in "seasonal employment" as "he was employed commencing each year on 1 October, for 13 years (thus well in excess of the two years provided for in the Act". The "relevant date" therefore would have to be determined in accordance with section 5 (3) (b) and (c) of the Act. Counsel contended that the appellant turned up every year on 1 October and he was given employment. This she said was analogous to a cane farmer. He was given work for a specific part of the year, at the same time every year. It was not important, for the purposes of the Act, what type of work he was engaged in. In counsel's view, the word "part" in the definition includes "the whole" as it is still "seasonal", as you turn up at a particular time in the year and are employed. The "relevant date", for the seasonal employee is therefore when he turns up for work and the employer informs him that he will not be provided with employment during that season, or does not so provide him with employment, which in the instant case, would have been 13 January 2004, in the second meeting, when he was formally and finally advised that his contract would not be continued. Up until that time, he had been continuously employed "on the fertile ground of research".

[33] It was submitted that the letter of 26 August 2002 could not be construed as the employer informing the appellant that he would not be providing him with work in the new season as that letter specifically referred to the provision of work in the Centre of

Marine Sciences and did not refer to the provision of work in the university as a whole, and was dated well before the expiry date of the contract in September 2003. Additionally, notice should come from the respondent and the letter was not from the respondent. The appellant did not recognize it as such, and his reading of the minutes confirmed the view, that since there were no openings at the centre other positions were being sought and so his contract was not at an end. That situation obtained, it was argued, until 13 January 2004.

[34] Counsel submitted in the alternative, that the "relevant date" could also be that as set out in (b) in the definition section, which reads;

> "(b) where his contract of employment is terminated without notice, whether by the employer or the employee, the date on which the termination takes effect."

It was argued that once the court accepts that the letter could not be construed as notice coming from the respondent and, since even if there was authority to issue the letter, that had not been communicated to the appellant, then pursuant to section 3(1)(c) of the Act he would have been entitled to six weeks notice, and the contract would have terminated in mid November 2003. This, it was submitted, was underscored by the fact that the appellant received no response to his letter of 11 May 2003 seeking clarification of his situation.

Ground iv

[35] The appellant referred to section 10 of the Act, which states clearly and with which both parties agree, that a claim for redundancy must be made within six months of the relevant date. The appellant submitted that if the relevant date is 13 January 2003 his claim was submitted in time. If the relevant date was 15 November 2004 his claim was also made well in time. The claim was submitted in April 2004. The learned trial judge therefore erred. Counsel also referred to and relied on ***In re Mack Trucks (Britain) Ltd.*** [1976] 1 WLR 780 and a extract from Harry, Industrial Relations and Employment Law p. 142 para. 1120.

[36] The appellant submitted that the appeal should be allowed as:

i. The appellant was dismissed from his employment with the respondent;

ii. The termination of his employment was by reason of redundancy;

iii. The relevant date of his dismissal was either the 13 January 2004 or in the alternative 15 November 2003;

iv. His claim for redundancy was made in April 2004;

v. The preliminary issues should have been determined in his favour; and

vi. Redundancy payment is due to him.

The respondent's submissions

Grounds i and ii

[37] Counsel for the respondent commenced her submissions in reply by pointing out to the court what she described as "undisputed facts". The contracts between the

parties, she stated, were fixed term contracts in respect of varying posts. The contracts were for a period of one year with a stated termination date, with all the positions being temporary, and containing clauses which stated that the contracts could be terminated by three months' notice by either party. The appellant received letter dated 26 August 2002, signed by the director of Centre for Marine Sciences, which was copied to Professor Young, dean, Faculty of Pure & Applied Sciences, and Mrs. D Charles-Smythe, senior assistant registrar. The appellant's notice of his claim for redundancy was made on 23 April 2004.

[38] Counsel indicated, that in the court below, her response to the preliminary issue was that if the court found that the appellant had not notified the respondent of his claim for redundancy within six months of the relevant date as required by section 10 of the Act, then the claim would have become statute barred, and the court need not have considered the question of whether or not there was in fact a redundancy. Counsel submitted however, that on the facts of this case the appellant's employment was not terminated by reason of redundancy. It was further submitted that the learned trial judge was correct in granting judgment in favour of the respondent on the preliminary issue.

[39] It was the respondent's contention that the appellant's contract of employment terminated on 30 September 2003 and that the appellant accepted this and the notice in relation thereto, also, that the renewal of his contract was not an automatic right. Counsel referred to the affidavit of the appellant, with specific reference to the letter of

11 May 2003 set out herein from the appellant. She argued that the appellant engaging WIGUT to act on his behalf to initiate the grievance procedure available to him substantiated the fact that he was aware and had accepted that the respondent had advised him that his contract would come to an end in September 2003, and was not going to be renewed. Counsel drew our attention to section 5 of the Act and submitted that there was no evidence to support the allegation that the respondent had ceased or diminished in any particular kind of work that he had been employed to do. His position, she argued, had been temporary and for a fixed period and that time had expired.

[40] **Ground iii**

Counsel for the respondent relied on the definition of "relevant date" as set out in section 2 of the Act, particularly sub paragraphs (a) (b) and (c). It was contended that regardless of which of those sub paragraphs was utilized as applicable to the appellant's contract of employment, the relevant date in relation to his dismissal would be 30 September 2003. There could in the circumstances of this matter be no other date. If the letter of 26 August 2002 was accepted as notice, pursuant to section 2 (a) then the contract would have expired on 30 September 2003. If the contract was terminated without notice the date when the termination would have taken effect was 30 September 2003. The contract however was for a fixed term and the fixed term had expired on 30 September 2003 (section 2(c)). It was further submitted that the fact that there were a series of fixed term contracts was immaterial as proper notice was

given, if required, and alternatively the term stated in the fixed term contract had expired.

[41] It was submitted that the appellant's employment was not "seasonal employment" as defined in section 2 (d) of the Act. She pointed out that the last two contracts between the appellant and the respondent each related to a full year, and not any specific part of a year. That provision in the statute she said, was drafted to protect those employees who did not fall under section 3 of the Act. Additionally, sections 5 (2) (a) (b) and (c) and section 5 (3) of the Act are separate and distinct provisions, treated differently in the Act, and the appellant cannot claim that both sections apply to him.

[42] In the letter from the appellant of 11 May 2003 set out herein, the appellant stated, "I do not ask for renewal of contract as an entitlement, however, but on the basis of merit". He also attached a curriculum vitae. This, it was submitted, was indicative of the appellant's appreciating that he needed to apply for consideration of further employment, and was also evidence of his acceptance that his contract would come to an end on 30 September 2003, and would not be renewed.

[43] Counsel said that this position taken by the respondent, is supported by the letter from WIGUT sent to the respondent on his behalf in August 2003, in respect of the renewal of his contract. Counsel challenged strongly the interpretation placed on the minutes of the meeting of 6 October 2003 by the appellant. On the respondent's case, there was no agreement to make any redundancy payment. A statement by the

principal at the meeting, recorded in the minutes, that he would abide by the laws of redundancy could not be so construed, and in any event could not bind the respondent. Additionally, at the date of the meeting the appellant's contract had already expired and he was no longer being treated as an employee of the respondent. If the appellant, it was submitted, continued to do research after 30 September 2003, he did so at his own peril. Counsel made it clear that the appellant could not be entitled to any statutory six weeks period of notice, as he had already received almost a year's notice, when his contract provided for only three months notice.

[44] Finally on this point, counsel relied on the case of ***Jackson v Wigan Metropolitan Borough Council & Another*** All England Official Transcripts (1997-2008) Employment Appeal Tribunal, 23 February 2007 relating to a series of fixed date contracts and referred to paragraph 15 of the judgment which states as follows:

> "At common law if a contract is for a fixed term period it comes to an end by reason of the effluxion of time upon the finishing date provided for in the contract of employment. Given that the end date of the fixed term contract was set out in the contract of employment there is no additional requirement imposed upon the Respondents to give any further notice of termination to the claimant."

Counsel concluded therefore that the obligation of the parties to each other ceased on 30 September 2003.

[45] Counsel argued that there was no merit in the submission of counsel for the appellant that the notice of 26 August 2002 was invalid. The letter was sent over the signature of the head of the Centre for Marine Sciences, was copied to the senior

assistant registrar, was sent with the authority of the registrar duly delegated; although the said delegation was not in writing and notice of the same was not given to the appellant. Counsel relied on this notice as being valid, if required, as, she said, the contract would have come to an end, by the effluxion of time, in any event.

Ground iv

[46] Counsel submitted that even if the court were to find that the appellant's contract of employment had been terminated and that he had been dismissed by reason of redundancy, the appellant had failed to give notice in writing of his claim for redundancy within six months of the relevant date pursuant to section 10 of the Act. The letter from the attorneys giving notice of the claim on behalf of the appellant was approximately seven months after the relevant date. The respondent was therefore entitled to judgment and the learned trial judge was correct in ruling accordingly.

[47] Counsel argued that the case of ***In re Mack Trucks (Britain) Ltd*** relied on by counsel for the appellant was not relevant as that case did not involve a fixed term contract, and the extract from **Harvey, Industrial Relations and Employment Law**, p. 147 para. 1120 also was unhelpful, as it dealt with contracts which on termination, required notice, which was not so in the instant case. In respect of the redundancy payment, counsel argued that even if the court were to find that redundancy was payable certain items would have to be deducted, namely; the book grant of $31,304.00; the housing allowance of $493,646.00; special Mona housing allowance of $164,549.00; and all sums in respect of cost of passage and baggage

being cumulatively allowances and not wages. She submitted that an amount not exceeding $1,947,161.00 was the correct sum for an award, if the court was minded to order that a payment be made.

Analysis

[48] I will deal with grounds of appeal (ii), (iii) (iv) in that order, although the discussion in grounds (ii) and (iii) may overlap, and then I will deal with ground of appeal 1 as it is dependent on my findings on the other grounds.

Ground ii - dismissed by reason of redundancy

[49] I have found that this case has some rather unusual features. In order for the appellant to be able to successfully claim an entitlement to any redundancy payment, he must fall within the provisions of Part III of the Act. For ease of reference and comprehension I think it is necessary to set out section 5 (1)-(5) of the Act.

> "5.--(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed.
>
> (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 his 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; or

(c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment.

(3) An employee who on or after the appointed day has been employed by the same employer in seasonal employment for two or more consecutive years shall, if his employment during each season is continuous, be taken to be dismissed by that employer by reason of redundancy.

(a) where he is dismissed by his employer and the dismissal is attributable wholly or partly to any of the facts specified in subsection (2); or

(b) where his employer informs him (in whatever terms) that he will not be provided with employment during any season; or

(c) where he attends the place of employment and offers himself for employment at the beginning of any season or in accordance with any instructions given, or any procedure established, by the

employer and the employer fails to provided him with employment,

and the employer shall, subject to the provisions of this Part, be liable to pay to him a redundancy payment notwithstanding that he has not been continuously employed throughout the period specified in subsection (1).

(4) The manner of determining whether an employee has been continuously employed for the period specified in subsection (1) shall be such manner as shall be prescribed.

(5) For the purposes of this section an employee shall be taken to be dismissed by his employer –

(a) if the contract under which he is employed by the employer is terminated by the employer, either by notice or without notice; or

(b) if under that contract he is employed for a fixed term and that term expires without being renewed under the same contract; or

(c) if he is compelled, by reason of the employer's conduct, to terminate that contract without notice."

[50] Pursuant to these provisions, and utilizing the facts of the instant case, it is therefore necessary for the appellant to show the following:

(a) That he was continuously employed with the respondent for a period of 104 weeks ending on the relevant date.

(b) That he was dismissed by reason of redundancy, which means: (a) that the respondent has ceased or intended to cease to carry on business for the purposes for which he was employed, which according to paragraph 6

of his affidavit sworn to on 27 September 2005, his work involved "conducting research and producing academic papers for publication". Although his focus was on the methods of repairing coral reefs, his responsibilities included: "doing research and writing papers on biological life on coral reefs generally"; or (b) that the respondent intended to cease to carry on that business at the Discovery Bay Marine Laboratory, at the Centre for Marine Sciences; or (c) that the requirements of that business for the appellant, or any other employee of the respondent, to carry out the work as mentioned above, or for the appellant and other employees to carry out that particular kind of work, at the Centre for Marine Sciences, had ceased or diminished or expected to cease or diminish.

[51] The evidence given by the appellant in support of his entitlement under the above provisions is firstly contained in paragraph 2 of his affidavit dated 26 September 2005, which reads as follows:

> "2. I was first employed by the University of the West indies in October 1990. I was initially employed for a period of 1 year. However I remained continuously employed with the University of the West Indies (hereinafter U.W.I) in varying positions until 2003."

And thereafter set out in paragraph 16, which states:

> "16. I verily believe that the position of Research Fellow in the Centre for Marine Studies where I was employed prior to the termination of my employment was made redundant. I attended the Centre in January 2004. The

> Centre continued, but no person was employed as Research Fellow, and the position had apparently ceased."

[52] The above evidence was an attempt to show that the appellant had crossed the first legal threshold of continuous employment for a period in excess of 104 weeks and then to comply with the legal hurdle that the respondent had contracted with regard to the need of his services at the place where he had been deployed. The question one must ask is, was the evidence given sufficient?

Paragraph 16 of the appellant's particulars of claim reads thus:

> "16. The Claimant says that pursuant to the contracts of employment as set out aforesaid he was continuously employed to the Defendant for a period of 13 years."

Paragraph 10 of the defence in reply is this:

> "10. Paragraph 16 is admitted."

Those pleadings should have disposed of that issue, except that before us counsel for the respondent in answer to a question specifically posed by the court denied that the appellant was in continuous employment with the respondent, as he had been employed in continuous fixed term contracts, with specific expiry dates, and he had been appointed to temporary posts. However, counsel for the appellant relied on the case of ***In re Mack Trucks (Britain) Ltd*** which, although not related to similar facts, does speak to the issue of continuous employment, and suggests that it must frequently happen in a long period of service with a single employer, that employer and employee enter into a whole succession of new contracts and the period of employment would be considered as commencing from the commencement of the first of those

contracts. Additionally, the employment would be considered continuous as the services continued to be rendered and the wages continued to be paid by the same company. In the instant case, there were successive contracts between the appellant and the respondent without any breaks and so his employment with the respondent could have been so described. It may not be necessary for me in this judgment to make any finding on that factual position. However, for the purposes of this analysis, I am prepared to accept, based on the admission in the pleadings, that the appellant was in continuous employment with the respondent. What is of greater significance is that the evidence set out in paragraph 16 of his affidavit, set out above, in my view falls far short of what would be required on a balance of probabilities to prove that the business of the respondent, with regard to the appellant, had contracted. There is mention of a visit in January 2004 to the Marine Centre. There is no evidence with regard to whether his attendance at the centre was one visit on one day or throughout the month of January, or the extent of the investigation and the discovery in light of that process. The fact that no-one was seen employed when he "attended" on the centre on that day or other days without more, could not substantiate that the position had "apparently" ceased, which is a conclusion or view arrived at by the appellant, without any expressed evidential basis therefor. The appellant himself had indicated that he had been away from the centre during his deployment, yet his post subsisted. The evidence, in my opinion is not sufficient.

[53] It is perhaps, recognizing this difficulty, why counsel for the appellant pursued an avenue not pursued before the lower court, which was to submit that the appellant was engaged in "seasonal employment" and therefore ought to be able not only to rely on the provisions in sections 5 (2) (a) and (b) of the Act, which are embraced in section 5 (3) (a), but also to rely on sections 5 (3) (b) and (c). In this instance, she attempted to show that the appellant had turned up for work, and been told that he would not be provided with employment during any season, or having attended his place of employment, that is at the centre, at the beginning of the season, presumably, in October 2003, allegedly in accordance with instructions given, or procedures established, and the respondent failed to provide him with any employment. With the greatest respect there is absolutely no evidence of this in this case.

[54] The undisputed facts of the case as set out by counsel for the respondent are that the appellant had a series of contracts. On 3 July 2001, his letter of engagement indicated that the extension of his temporary appointment as research fellow in biological methods of repairing coral reefs at the Discovery Bay Marine Laboratory, Centre for Marine Sciences, UWI Mona, was for the period 1 October 2001 to 30 September 2002. The appointment was however as previously mentioned terminable by three months notice in writing on either side. It was for a specific period. The contract that followed was in similar vein, save and except that the period was stated to be from 1 October 2002 to 30 September 2003. On any reading of these contracts there are no instructions to the appellant to attend on the respondent and no evidence that he was thereafter told that he would not be provided with any employment, or that the

respondent later failed to so provide him with any employment. As a consequence section 5 (3) (a)-(c) of the Act cannot avail him.

[55] On the basis of the above analysis, it is my view that the appellant was not dismissed by way of redundancy. The learned trial judge made no specific finding on this but found that the relevant date, with regard to the termination of his contract of employment, was the 30 September 2003, and stated that no claim for redundancy had been made by 30 March 2004, and gave judgment accordingly. Was she correct in this decision and is it necessary for me to deal with grounds (iii) and (iv) in light of my finding on ground (ii)? For clarity, and to address both counsel's detailed submissions, I set out my views summarily on the remaining grounds.

Ground iii - the "relevant date"

[56] The definition of "the relevant date" in the Act has already been set out in detail. In my view, the appellant was not engaged in "seasonal employment" as set out in the definition section for these purposes. The relevant date could not be ascertained by reference to section 5 (3) (b) for the reasons stated above. Further, I agree with counsel for the respondent that the appellant was never provided with employment during any specific part of any year for any two or more consecutive years. His employment was for the entire year. The relevant date therefore in relation to the dismissal of the appellant must be obtained by perusal of section 2 (a) – (c).

[57] In this case there is no doubt that the appellant received notice that his employment was to come to an end. He received this notice by way of the letter dated

26 August 2002 from Dr. George Warner, the head of his department. There is no merit in the argument that he thought that the letter did not relate to the respondent. The campus registrar, Mr Falloon deposed that the letter was written and sent with his authority, knowledge and consent. The appellant cannot and did not deny that the registrar had the power to delegate, he merely claimed that the delegation should have been in writing, and communicated to him, but there is no basis for this claim and he has not really sought to support that assertion.

[58] Additionally, the language of his letter of May 2003, particularly indicating that he was not asking for a renewal of his contract as an entitlement, attaching his curriculum vitae, and setting out bases for favourable consideration to be given to him in paragraphs 2, 3, and 4 thereof, and also the persons to whom it is addressed, completely disposes of any efficacy in that assertion. It is clear that he was trying to persuade the respondent to re-engage his services. What else can that mean, save and except that he was of the view, at that time, that his services with the respondent were finally coming to an end. The notice would therefore have expired on 30 September 2003. If there was no notice then the date the contract would have terminated was 30 September 2003. It is also clear that the contract was for a fixed term which expired on 30 September 2003. There really is no getting around that date as the relevant date in relation to the termination of the appellant's employment.

[59] The claim by the appellant that the "relevant date" should be 15 November 2003 was made on the basis that no notice had been given for the termination of the

contract, and therefore six weeks notice would be required under section 3 of the Act for the proper termination of the same. In my view, this argument is misconceived. The contract called for three months notice and indeed over one year was given. The claim by the appellant that the "relevant date" is 13 January 2004 was on the basis that the appellant was only made aware of the termination of his contract in the follow up meeting, but this is inaccurate. The documentation contradicts this. The meeting of the 6 October 2003 was a meeting for negotiation. It was not fruitful from the appellant's point of view. The appellant was not considered as still being employed to the respondent and was not being treated as such. His contract had been terminated several months previously. This argument could not succeed.

Ground iv-claim for redundancy time barred

[60] Very little need be said on this ground for the learned trial judge, having found that the "relevant date" was 30 September 2003, was obliged to conclude that the claim for redundancy payment made by the attorney for the appellant on 23 April 2004 was too late. The appellant's entitlement to the same if due, which I have in any event found was not, would have lapsed. Section 10 of the Act, is very clear and reads as follows:

> "10. (1) Notwithstanding anything in the preceding provisions of this Part an employee shall not be entitled to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—
>
> (a) the payment has been agreed; or

(b) the employee has made a claim for the payment by notice in writing given to the employer; or

(c) proceedings have been commenced under this Act for the determination of the right of the employee to the payment or for the determination of the amount of the payment.

(2) Where the employee dies before the end of the period of six months mentioned in subsection (1) and none of the events mentioned in paragraphs (a), (b) and (c) of that subsection occurs before his death, a claim by his personal representative for the payment shall, if it is made by notice in writing given to the employer before the end of the period of one year beginning with the relevant date, be of the same effect as if it were made by the employee in accordance with paragraph (b) of subsection (1)."

The claim was made nearly seven months after the termination of the contract.

Ground i- judgment an error on the preliminary issue

[61] I agree with counsel for the respondent that once the learned trial judge found that the "relevant date" was 30 September 2003 and that the claim was made more than six months after that date, and was therefore barred and as a consequence no redundancy payment was due, there really was no need to make a finding on whether the appellant had been dismissed by way of redundancy. Further, on a perusal of the claim and the particulars of claim there was nothing else remaining in the action. The preliminary point having been decided as set out above by the learned trial judge, then entry of judgment for the respondent was appropriate in all the circumstances, and correct in law. The learned trial judge cannot be faulted.

Conclusion

[62] The appeal is dismissed with costs to the respondent to be agreed or taxed.

McINTOSH JA

[63] I too have read the judgment of Phillips JA and agree with her reasoning and conclusions. I have nothing further to add.

HARRISON JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.