

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 2/91.

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN ALLIED STORES LIMITED APPELLANT
AND CECIL GODFREY RESPONDENT

Donald Scharschmidt, Q.C. & David Batts for Appellant

Miss Janet Nosworthy for Respondent

May 12 & June 15, 1992

WOLFE, J.A. (AG.)

The respondent was employed to the appellant's company as manager of a supermarket which was operated under the name of Lane Supermarket, at Constant Spring Road in the parish of Saint Andrew. The respondent's employment commenced in April 1979 and was terminated on the 2nd day of May 1983. At the time of termination the appellant was paid Seven Thousand One Hundred and Thirty-two Dollars and Ninety-nine cents (\$7,132.99) computed as follows:

Salary and Allowances - May 1983		\$1,874.99
Vacation pay		1,874.99
Ex Gratia Payment (3 months)		5,624.97
	Total gross	<u>\$9,374.95</u>
<u>Less Deductions</u>		
N.I.S.	\$ 15.90	
N.H.T.	74.45	
Income Tax	2151.61	2241.96
		<u>Net Pay \$7132.99</u>

The respondent commenced proceedings to recover damages for wrongful dismissal. At the trial the appellant contended that it was entitled to dismiss the respondent provided it gave him reasonable notice, which the appellant fixed at three months. The learned trial judge found that the respondent had been unlawfully dismissed and that three months pay in lieu of notice was the amount the respondent was entitled to by way of salary.

In this appeal there is no complaint against that finding by the judge. However, the judge awarded the respondent the sum of \$1,000 as the amount he would have been entitled to in respect of a motor car allowance had he not been unlawfully dismissed. It is with this award that this appeal is concerned. The grounds of appeal are as follows:

- (1) That the learned trial judge failed to evaluate the evidence given by the plaintiff to the effect that he was not owed anything for car allowance and he was not making any claim therefor.
- (2) That the learned trial judge failed to appreciate that the Plaintiff's claim was exclusively for wages normally handed to him and for an end of year bonus.
- (3) That the learned trial judge was wrong in law in finding that the plaintiff was entitled to a sum for car allowance as the plaintiff had raised no such issue in the pleadings.
- (4) That the learned trial judge failed to appreciate that the plaintiff was paid \$1,674.00 in excess of the salary to which he was entitled in lieu of Notice.

Mr. Scharschmidt, Q.C. for the appellant contended that the issues before the Court below were:

1. What was the relevant period of notice?
2. Was payment made by defendant a payment in lieu of notice?
3. Was plaintiff entitled to an end of year profit bonus?

All these issues, Mr. Scharschmidt said, were decided in favour of the appellant, hence there was no basis on which the award of \$1,000 was made to the respondent. Further, the respondent testified that he was making no claim in respect of travel allowance..

When Mr. Keith Daley, the Managing Director of the appellant's company was cross-examined he unmistakably said:

"On Exhibit 20 the figure of \$26,500 does include the \$4000.00 in lieu of car allowance. Monthly salary including the amount with respect to the car was not \$2,233.33 but \$2,208.33 in respect of year 1982 to 1983. Yes, the salary of \$1875.00 for May 1983 has nothing to do with payment in lieu of car allowance."

On the basis of this evidence Miss Nosworthy applied to amend paragraph 9 of the Statement of Claim under the Particulars of Special Damages to read:

- "(a) ...
- (b) loss of value of motor vehicle allowance \$2000.00."

The amendment was granted without objection.

Clarke, J in addressing the claim for motor vehicle allowance said:

"Turning to the claim for car allowance, the plaintiff's written contract provided that he start with remuneration of \$12,000 per annum together with a car allowance of \$2000.00. Four written pay increase advices show both his increases in remuneration and changes in the break down of his salary throughout the years. The last pay increase advice indicates that his salary at the time of his dismissal was \$26,500.00 per annum including, as Keith Daley explained, a notional amount of \$4,000.00 representing the value of his use of the company's car. When he was dismissed the Company took possession of the car, depriving him of its use. In addition to the paying the three months' salary the company was obliged to pay the plaintiff the value of his use of the company's car throughout the three months' period he would otherwise have had the use of the car.

"This the company failed to do. What it comes to then is that the plaintiff was not fully compensated before action brought, for although he was properly paid three months' salary "stricte sensu" in place of notice he should have been paid \$1,000.00 for the loss of the value of the use of the company's car for the three months period that being the period of reasonable notice under the contract."

We entirely agree with the approach of the learned trial judge. The salary paid to the plaintiff included a sum for the use of the company's car. Having unlawfully dismissed him, any payment of wages in lieu of notice must include that portion of his salary which is referred to as a notional sum for the use of the company's car. This is so, because had the appellant given the respondent three months' notice of their intention to terminate the contract he would have been entitled to the use of the car during that three month period. Having elected to dismiss him summarily he cannot be placed in a worse position than if he had been given notice. The award of \$1,000 for car allowance is unassailable.

For these reasons we dismissed the appeal and affirmed the judgment of the Court below with costs to the respondent to be taxed if not agreed.