[2021] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 73/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN JOSHUA JADDOO APPELLANT

AND SUGAR INDUSTRY AUTHORITY RESPONDENT

Emile Leiba and Christopher Brown instructed by DunnCox for the appellant

Miss Carol Davis for the respondent

10, 11 July 2018 and 26 February 2021

PHILLIPS JA

[1] I have read the draft judgment of my sister McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

Introduction

[2] On 25 February 2010, Mr Joshua Jaddoo ("Mr Jaddoo"), the appellant, commenced a claim in the Supreme Court against his employer, the Sugar Industry Authority ("the SIA"), seeking damages under various heads, for injury, damage and loss, he allegedly suffered during the course of his employment. He claimed, among other things, (i) damages for negligence, by reason of what he said was the SIA's

failure to provide him with a safe system of work; (ii) loss of income, consequent on the wrongful and/or unlawful termination of his contract of employment; (iii) damages in respect of the non-payment of gratuity to which he was entitled under his contract of employment; and (iv) damages in respect of the non-payment of lunch subsidy to which he was contractually entitled. There was also an alternative claim by him for damages in respect of redundancy payment, pursuant to the Employment (Termination and Redundancy Payments) Act ("the ETRPA").

[3] The SIA resisted the claim. It asserted in its defence that Mr Jaddoo was not entitled to any of the reliefs claimed. The SIA also filed a counterclaim to recover a little over $3,000,000.00 for what it contended was an overpayment made to Mr Jaddoo during the 2005-2006 contractual period, while he was absent from work due to sickness. It also sought interest and costs and an order that in the event any sum was found due to Mr Jaddoo, it be permitted to set off that sum against what was found due to it on the counterclaim.

[4] The matter was heard by P Williams J (as she then was, hereafter referred to as "the learned judge"). On 11 July 2014, having heard the evidence and the parties' submissions, the learned judge concluded that Mr Jaddoo was only successful in his claims for gratuity in the sum of $778,500.75 and lunch subsidy of $183,741.00.

[5] In respect of the counterclaim, the learned judge in her written judgment only said "judgment on the counterclaim", without indicating in whose favour the judgment was entered (there is no formal order on the record). Based on the evidence and her

reasoning, however, it is evident that judgment would have had to be entered for Mr Jaddoo because she found that the SIA had not specifically pleaded or proved the sum claimed as an overpayment.

[6] The learned judge made no order as to costs.

The appeal

[7] Mr Jaddoo now challenges aspects of the learned judge's decision. He filed four grounds of appeal:

> "1. The learned judge erred in failing to award costs to the successful claimant ([Mr Jaddoo]) in the court below;
>
> 2. The learned judge erred in law when she found that there was no breach or wrongful and/or unlawful termination of [Mr Jaddoo's] contract of employment.
>
> 3. The learned judged erred in law in concluding that [Mr Jaddoo's] dismissal cannot be said to be due to redundancy;
>
> 4. The learned Judge erred in law in her conclusion that [Mr Jaddoo] was not entitled to the sick leave claimed and that any further entitlement agreed with the employer must have been specifically provided for in the contract."

[8] At the commencement of the hearing, counsel Mr Emile Leiba, for Mr Jaddoo, sought and obtained leave to abandon grounds two and four and for ground three to be the first to be argued.

[9] The primary issues for consideration on this appeal are whether Mr Jaddoo was dismissed from his employment because of redundancy and is, therefore, entitled to

redundancy payment; and whether he was the successful party in the proceedings in the court below and entitled to the costs of those proceedings.

[10] The factual background from which these issues emanated may briefly be stated.

The background

[11] Between September 1974 and 31 October 2009, Mr Jaddoo was employed to the SIA. He was assigned to its Sugar Industry Research Institute ("the SIRI"), Factory Services Department, located at Bernard Lodge Sugar Factory, Spanish Town, in the parish of Saint Catherine ("Bernard Lodge"). There, he worked in various capacities, including Sugar Technologist and Director/Coordinator of the Factory Services Division.

[12] In 1999, the department to which Mr Jaddoo was employed was being relocated to Mandeville in the parish of Manchester. Consequently, on 24 August 1999, the Chief Executive Officer of the SIA informed him by letter that when his contract ended on 31 August 2000, his services would be required for a further period. The letter stated that he was required to remain to facilitate a smooth transition to the SIA's new location until the appointment of a replacement for him. The letter also indicated that he would be required to continue as manager of the Factory Services Division until a new appointment was made. At that time, he would assume the duties of Special Project Manager until 31 August 2000. Mr Jaddoo was also told that his services would be required, after that, "at least for another year". Therefore, this meant that it was envisaged that Mr Jaddoo would continue working with the SIA up to 31 August 2001, which he did.

[13] At the end of this period, Mr Jaddoo's employment ended by reason of redundancy but he was asked to continue his employment with the SIA. He was retained in the post of Co-ordinator of Factory Services. He subsequently entered into a series of fixed-term contracts with the SIA, the first of which commenced on 1 September 2001.

[14] By letter of 27 October 2009, Mr Derrick Heaven, the Executive Chairman of the SIA, notified Mr Jaddoo that a decision had been taken not to renew his contract when it expired on 31 October 2009. No reasons were given for the decision. However, Mr Heaven recommended that Mr Jaddoo considered having a discussion with the SIA to see "how to continue [their] relationship outside the ambit of a renewed contract".

[15] Following the non-renewal of what would have been Mr Jaddoo's final fixed-term contract with the SIA, on 25 February 2010, he filed his claim in the Supreme Court seeking the reliefs stated at paragraph [2] above. As already indicated, he met with partial success on his claim, and the SIA failed to prove he was liable on the counterclaim.

[16] The claim for redundancy payment will first be considered in keeping with the presentation of the case before this court.

Issue one: is Mr Jaddoo entitled to redundancy payment? (ground 3)

[17] Before examining this issue, it is necessary to dispose of some preliminary matters that touch and concern the determination of ground three. This ground of appeal states that "the learned judge erred in law in concluding that [Mr Jaddoo's]

dismissal cannot be said to be due to redundancy". Part of the order sought on appeal is that judgment be entered for Mr Jaddoo to the extent of the claim for, among other things, "damages as set out in paragraph 2(ii) - (iv) above".

[18] Paragraph 3 of the notice of appeal states that Mr Jaddoo now appeals from "... [d]ismissal of claims (ii) to (vi) in paragraph 2 above". The claim for damages in respect of redundancy entitlement is item (iii) of paragraph 2 of the notice of appeal. It is clear from the notice and grounds of appeal that Mr Jaddoo is challenging the learned judge's failure to grant damages on his claim for his redundancy entitlement and is asking this court to find in his favour on this issue and grant the damages he seeks under special damages in his claim form. It means, therefore, that if Mr Jaddoo succeeds on this ground, this court is empowered to grant him the remedy that the learned judge ought to have granted him at trial of the claim, provided the court has all the necessary facts before it to do so. This includes awarding him the damages (and such other reliefs) to which he would have been entitled in the court below.

[19] Accordingly, Miss Carol Davis' argument, in her response for the SIA, that Mr Jaddoo did not appeal the fact that the learned judge had failed to award damages for redundancy, does not stand on good ground. The appeal is by way of a rehearing, and so, once it is found that the learned judge erred in her findings as to redundancy entitlement, this court must grant such relief as ought to have been granted. For this reason, all questions relating to the issue of Mr Jaddoo's redundancy entitlement have to be considered. The fact that he has abandoned the appeal regarding the claim for breach of contract has no bearing on the consideration of this issue concerning

redundancy. The claims are separate and distinct and were pleaded in the alternative. They are not contingent on each other.

[20] The issue of Mr Jaddoo's redundancy entitlement will now be examined.

[21] The evidence revealed that shortly after the decision was taken in October 2009 not to renew Mr Jaddoo's contract, the two staff members who had remained with him at Bernard Lodge in 2001 were dismissed by reason of redundancy on 31 December 2009. The office at which he was posted at Bernard Lodge was closed shortly after. Mr Jaddoo's case in the court below was that since August 2001, he had been employed on a "renewable 2 year rolling contract" with the SIA, until his dismissal on 31 October 2009. As a result, he was entitled to redundancy payments for that period, being eight years and two months.

[22] The SIA's position on the issue was, for the most part, at variance with that of Mr Jaddoo. It maintained in the court below (as it continued to do in this court) that the renewal of contracts over the years had been issued by agreement between the parties. The last contract was one dated 15 July 2008, for two years retroactive to 1 November 2007 and ending 31 October 2009. There was no rolling two year contract as alleged by Mr Jaddoo. It insisted that no redundancy arose as Mr Jaddoo's contract of employment duly came to an end by effluxion of time on 31 October 2009, and the contract was not renewed. His post remained on the list of the establishment, and so, did not cease to exist. It has only remained vacant to facilitate an audit, which arose out of a Commission of Enquiry into the operations of the SIA. As a result, Mr Jaddoo was not

dismissed by reason of redundancy and, therefore, was not entitled to redundancy payment. It also maintained that, if it were found that Mr Jaddoo was entitled to those payments, there was a break in his employment for two months after his contract expired in August 2007, and so, he cannot claim to have been continuously employed since 2001.

[23] In addition, the SIA contended in the court below (but not on appeal) that even if Mr Jaddoo was entitled to redundancy payment, he had failed to make a claim for redundancy within the relevant time stipulated by section 10 of the ETRPA.

The learned judge's findings

[24] In relation to the question of whether Mr Jaddoo was dismissed by reason of redundancy, the learned judge concluded that he was not. She accepted as being unassailable, the SIA's contention that the position he occupied still exists, and so, there was no temporary cessation in the post he occupied, or otherwise, in the carrying on of the business for the purpose Mr Jaddoo was employed (paragraph [57] of the judgment). Her significant findings and conclusion on this issue were set out in paragraphs [58]-[59] of the judgment in these terms:

> "[58] Evidence emerged that operation at the location where [Mr Jaddoo] worked had been scaled down from 2001. When [Mr Jaddoo] agreed to be re-engaged by [the SIA] it was with the understanding that he would not then have to move to the main offices located in Mandeville where the majority of the other staff members had been relocated. The division he was co-ordinator for was to have been relocated to Mandeville and it was in those circumstances he had chosen not to move and was made redundant in 2001. Not many persons remained at Bernard Lodge thereafter. [Mr

> Jaddoo] admitted that he remained at Bernard Lodge with some three (3) other full-time [employees].
>
> [59] [Mr Jaddoo] accepted that part of Division he was responsible for was removed to Mandeville and it was the evidence of the [SIA] that this division remains in operation. Upon [Mr Jaddoo] being dismissed, the persons remained working at Bernard Lodge for another month before they were made redundant. One cannot help but speculate that the operations at Bernard Lodge were facilitated mainly due to the presence of [Mr Jaddoo] being there. With him being dismissed, certain workers would no longer be needed. It seems to me that the dismissal of [Mr Jaddoo] cannot be said to be due to redundancy."

[25] Having arrived at those findings, the learned judge has not revealed her reasoning and conclusion on any other issue relating to the question of whether Mr Jaddoo was entitled to redundancy. More particularly, in discussing the issue of the entitlement to redundancy, she made no cross-reference to, or relied on, any findings made by her on the claim for breach of contract with respect to the issue regarding the continuity of Mr Jaddoo's employment. This is a critical observation for the purposes of this court's treatment of the issue regarding redundancy entitlement. She also made no express finding on the point raised by the SIA that the claim was brought outside the time limited by section 10 of the ETRPA. These matters will be examined in due course.

Discussion and findings

Did the learned judge err in finding that Mr Jaddoo was not dismissed by reason of redundancy and, therefore, not entitled to redundancy payment?

a. **<u>The standard of review</u>**

[26] In considering this question, the court is mindful that the issue involves questions of fact and law. In relation to the matters, the resolution of which would have

depended on the learned judge's findings of fact and the inferences drawn from those facts, it is acknowledged that the court is not at liberty to interfere with the learned judge's decision on those facts merely because it does not agree with it. The court can only interfere with the decision on findings of fact if the learned judge was plainly wrong. In this regard, I have accepted and followed the guidance given in earlier authorities which have established the standard of review of an appellate court in treating with findings of fact of a judge at first instance. See, for instance, **Watt (Or Thomas) v Thomas** [1947] 1 ALL ER 582, **Beacon Insurance Company Limited v Maharaj Bookstore Ltd** [2014] UKPC 21, and **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25.

[27] Even more recently, in the British Virgin Islands' case of **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1, the Judicial Committee of the Privy Council was, once again, at pains to deliver a timely reminder of the well-established constraints on the review powers of an appellate court. At paragraph [20] of the judgment, their Lordships directed that, "[t]hese constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism". They noted that:

> "...The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:
>
> > '114. **Appellate courts have been repeatedly warned, by recent cases at the highest level,**

> **not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them**. ...The reasons for this approach are many...'. " (Emphasis added)

[28] One of the many reasons for appellate restraint, according to Lewison LJ in **Fage UK Ltd v Chobani UK Ltd** [2014] EWCA Civ 5, as reiterated by the Privy Council, is that in making his decision, the trial judge "will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping".

[29] It is acknowledged against this background that the appellate court must be extremely cautious, or indeed slow, in moving to disturb a conclusion arrived at by a trial judge which is based on primary findings of fact.

[30] In so far as questions of law are concerned, the court can only properly interfere with the learned judge's decision, if she applied the wrong law. It is with these caveats in mind that this impugned aspect of the learned judge's decision will now be discussed. I begin with the applicable statutory regime.

b. **The relevant statutory regime**

[31] An employee's entitlement to redundancy payment is rooted in Part III of the ETRPA, in particular section 5. In so far as is immediately relevant, the section reads in part:

> "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) ...

(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."

[32] Where a person is employed under several fixed-term contracts, which have been continuously renewed, as was the case with Mr Jaddoo, regulation 4(5) of the Employment (Termination and Redundancy Payments) Regulations ("the Regulations"), becomes relevant. Regulation 4(5)reads:

> "4. (5) If, after an interval of not more than two weeks after the ending of an employee's contract of employment, his employer renews his contract or re-engages him in accordance with paragraph (b) of subsection (6) of section 5 of the Act, the period of that interval shall count as a period of employment."

c. **Applying the relevant law to the facts**

[33] The foregoing provisions make it abundantly clear that for Mr Jaddoo to have been successful on his claim for redundancy payment, the following salient facts would have had to be established on a balance of probabilities:

i. He had been continuously employed by the SIA for a period of 104 weeks, ending on the relevant date, being 31 October 2009.

ii. He was dismissed by the SIA within the meaning of the ETRPA.

iii. His dismissal was by reason of redundancy as circumscribed by the ETRPA.

[34] These elements of the statutory regime will now be examined by reference to the available evidence that was before the learned judge.

i. *Was Mr Jaddoo continuously employed for 104 weeks?*

[35] Given that Mr Jaddoo was employed on a series of fixed-term contracts for a period spanning eight years and two months, he must place himself not only within the ambit of section 5(1) of the ETRPA to show 104 continuous weeks of employment up to 31 October 2009, but also within regulation 4(5) by showing that, at no time during the 104 weeks, ending on the 31 October 2009, was there a break in the period of his employment of more than two weeks. In investigating whether Mr Jaddoo has surmounted this first legal hurdle, it would prove useful to first consider the different contracts which were signed by him over the period under review.

[36] Mr Leiba has helpfully provided the court with an undisputed chronology of events relating to the periods of Mr Jaddoo's fixed-term contracts. The evidence reveals the following primary facts that are consistent with the chronology as presented. Mr Jaddoo's first fixed-term contract for the year 2001 was for a period of one year. Prior to the expiration of that contractual term, a second contract was signed by him for a two year period. Before the expiration of that term, a letter was sent to Mr Jaddoo, extending his term of employment for a further three months until November 2004. Eight days after the ending of this contract, and without there being any break in Mr Jaddoo's service, a letter was sent extending his term of employment to August 2005. However, before the end of this term, a memo dated 11 March 2005 was sent from Mr Peter Haley, the Director Administration and Finance of the SIA, to the Administrative

Manager of the SIRI, Mr Keith O'Gilvie, advising that Mr Jaddoo's contract had been extended for a further 12 months. Prior to the expiration of this period, a letter was sent to Mr Jaddoo on 1 September 2005, purporting to re-engage his services for a further two years. This contractual period would have ended on 31 August 2007, however at the end of this term, no written contract was immediately issued. The next contract dated 15 July 2008 was issued for a further two years. This two year contract, however, was stated to have commenced on 1 November 2007. It was scheduled to end on 31 October 2009. The letter ending the relationship between the parties was given on 27 October 2009, in which it was indicated that Mr Jaddoo's contract would not be renewed upon its expiration on 31 October 2009.

[37] In commenting on the history of Mr Jaddoo's contract with the SIA, the learned judge correctly noted at paragraph [48] of the judgment that, "[t]he first thing that became apparent ...was the somewhat haphazard manner in which the periods were documented". The contract period, she said, "...ranged from one (1) year in the very first instance to three (3) months with the two (2) year period however being acceptable as the fixed period that seemed to be desired". The learned judge also observed that for the period September to November 2007, there were no written contracts, letters or documents, confirming that Mr Jaddoo's contract continued during that interval.

[38] At the time of making these observations, the learned judge was not dealing with the issue of continuity of employment for the purposes of redundancy, but rather in relation to the claim for breach of contract. She, however, seemed to have accepted

that there was no contract in writing evidencing the continuation of Mr Jaddoo's employment for the period, September to October 2007. She formed the view that those two months could not properly have been taken as being included in the last contract dated 15 July 2008. She treated that contract as the sole operative one for determining the issue of the claim regarding unlawful termination and breach of contract. As already indicated, the learned judge's reasoning, on the question of entitlement to redundancy stated at paragraphs [57] to [59] of her judgment, has not revealed either her thought-process or conclusion regarding the continuity of employment for the period of 104 weeks ending on 31 October 2009.

[39] Mr Leiba submitted before this court that it was not in dispute that Mr Jaddoo had served continuously for 104 weeks up to his dismissal. Regrettably, I cannot entirely agree with this submission. The continuity of employment of which Mr Jaddoo spoke, and which formed the basis of his claim for redundancy payment, is from 2001 to 2009. The SIA denied that he was on rolling two year contracts and that his contract was continuous from 2001 for eight years and two months as contended by him. The learned judge did not state definitively that she found that he worked continuously for 104 weeks for any period at all. Therefore, the issue of continuity of employment for eight years and two months (or any at all, for that matter), remained a live issue on the appeal.

[40] Given that the learned judge had not demonstrably evaluated the issue within the context of the claim for redundancy payment, her findings with respect to the claim for breach of contract (against which there is no longer an appeal) cannot be accepted

by this court as being determinative of the redundancy issue on appeal, as contended by Miss Davis. Contrary to the views of Miss Davis, it is incumbent on this court to consider the issue afresh on a rehearing, and to make its own findings on the available evidence in its determination of whether the learned judge erred. To this end, this court would be obliged to consider "the sea of the evidence" as the learned judge ought to have done. This is necessary to determine whether there is anything material that has sufficiently undermined her evaluation of the evidence and her ultimate findings on the redundancy claim, thereby leading her into error as alleged by Mr Jaddoo. That is the task which has been undertaken in the following analysis.

[41] Miss Davis emphatically argued that Mr Jaddoo had failed to cross the first legal hurdle as he had failed to establish that he had been continuously employed by the SIA for a period of 104 weeks up to the date his contracted ended. According to counsel, a determination of whether Mr Jaddoo could be said to have been continuously employed is pivotal, because if he was not so employed, the fact of him being dismissed by reason of redundancy would not arise for the court's consideration. In making this submission, counsel maintained that there was a break in Mr Jaddoo's contract of employment when there was no written contract for the two months that have not been accounted for in any written contract. All that existed, she said, was a fixed-term two year contract from 1 November 2007 to 31 October 2009, which the SIA was at liberty not to renew. She maintained that once this position is accepted, then any claim for redundancy would be "dead".

[42] Counsel also submitted, that, in the alternative, the only relevant contract for the computation of redundancy, if at all any money was payable, would be in relation to Mr Jaddoo's final contract of employment from November 2007 to October 2009.

[43] This position was not accepted by Mr Jaddoo. He contended that there was no break in his contract of employment by evidence adduced in open court by way of his witness statement (which stood as his evidence-in-chief) and oral evidence adduced in cross-examination and re-examination. The primary basis of his case as set out in paragraphs 6-9 of his witness statement will be briefly outlined.

[44] Throughout the period, he worked under renewable contracts with the SIA and there was always a delay in issuing the written contracts. He gave unbroken service to the SIA without written contracts for periods as much as two years and 11 months from September 2005 to July 2008. By way of example, the 2005 - 2007 contract was not signed until 28 May 2009, when Mr Peter Haley, the Financial Controller of the SIA, asked him to sign the contract in preparation for his attendance at a Public Accounts Committee (PAC) meeting in Parliament. Similarly, the last contract dated 15 July 2008, was issued and signed retroactively in July 2008, after the Auditor-General questioned the payments made to him without there being a contract on file for both periods. Mr Haley explained to him at that time that, "the auditors are on my back".

[45] He signed the contract but after he returned to his office at Bernard Lodge that same day, he immediately read it and found that the period stated in it was inconsistent with previous contracts as it did not commence on 1 September to expire on 31 August

in two years as previous contracts had provided. He immediately contacted Mr Haley about the discrepancy and was assured by him in these terms: 'Josh nothing has changed...” He further stated that Mr Haley told him that the action and reports from the Auditor-General's Department was baseless as he was advised by the SIA's attorneys that, 'where an employee continues to work beyond the specified date of the contract, the previous contract remains in force”.

[46] At the specific request of Mr Haley, the contracts dated 1 September 2005 to 31 August 2007 and 1 September 2007 to 31 August 2009 were signed and retained by him but not dated.

[47] Under cross-examination, Mr Jaddoo maintained that he signed the last contract, which did not include the two missing months, without reading it in detail because he was forced to do so at the time (page 124 of the record of appeal, volume one).

[48] In re-examination, Mr Jaddoo expanded on this evidence, regarding the execution of the last contract, and explained what he meant by having been forced to sign it. He testified that when he was handed the contract by Mr Haley, the auditors were at the office conducting an audit and Mr Haley was in a hurry to provide them with a written contract. He noted that there was an error in the salary stated in the contract and advised Mr Haley, who corrected it by crossing out the incorrect figure and inserting the correct figure with a pen (this is seen in the contract exhibited). Mr Haley then said, "...go, go, go, the auditors are in the other room, they are on my back, please go, I need to show them this Okay”. Mr Jaddoo then left and returned to his

office. It was after returning to his office that he realised that the contract erroneously stated the period to be as at 1 November 2007 to October 2009 and he immediately brought the discrepancy to Mr Haley's attention who gave him the assurances of which he spoke (see page 240 of the record of appeal, volume one).

[49] At the end of the trial, no documentary evidence was adduced by Mr Jaddoo to substantiate his oral evidence that the months of September and October 2007 were to be included in the last contract and there was nothing in writing to support his evidence that he took any objection to the terms of the contract of 15 July 2008, with regards to the operative period. Neither did the SIA, on the other hand, produce any documentation to counter Mr Jaddoo's evidence that he was employed during the missing months. Even more interestingly, Mr Haley was not called as a witness for the SIA, and so, Mr Jaddoo's evidence as to his actions and utterances, was never challenged in cross-examination or discredited by the SIA by any evidence to the contrary on its case. Mr Jaddoo's evidence regarding the circumstances in which the final contract was presented to him for execution and in which he signed remain uncontroverted.

[50] It is to be noted that the learned judge, in treating with the issues regarding the relevant contractual period with respect to the claim for wrongful termination and breach of contract, had this to say about the continuation of the employment:

> "[49] For the period September 2007 to November [sic] 2007, there is no contract and also missing is any letter or document attesting to the fact that the employment continued. However, it remains curious that in July 2008 the

> contract [Mr Jaddoo] signed did not commence from September 2007 to fill the breach. [Mr Jaddoo] maintained that he signed without reading. [Mr Jaddoo] struck me as being a meticulous gentleman and for this to go unnoticed by him is certainly surprising.
>
> [50] It is noted that [Mr Jaddoo] said that at the specific request of the Director of Finance and Administration the contracts dated September 1, 2005 to August 31, 2007 and September 1, 2007 to August 31, 2009 were signed but not dated and retained. However, he said the copies in his possession were signed and dated. The latter contract referred to is not exhibited thus it is only from November 2007 that a contract for two (2) years is seen to be in place. Indeed this is dated by [Mr Jaddoo] as at the 20th of August 2008."

[51] The learned judge had regard to several other matters in arriving at a conclusion that the only contract showing the relevant period of employment and which would govern issues pertaining to the termination of Mr Jaddoo's employment was the final contract. One of the matters she viewed as going against Mr Jaddoo was his reliance on the contract for his entitlement to gratuity and vacation leave. She did not accept that the missing months should be factored in that contractual period.

[52] The learned judge was correct in her observation that there was no documentary evidence of any contract between Mr Jaddoo and the SIA for the months of September and October 2007. Mr Jaddoo had not pleaded *non est factum,* and so, his explanation that he had not read the last contract was one for her to reject as an unacceptable excuse. That argument did not assist Mr Jaddoo, especially given the learned judge's assessment of him as a "meticulous gentleman". That is her impression of him, which this court cannot interfere with.

[53] At first blush, or without any further analysis, it would appear reasonable to hold that he should be held bound by the contract in the light of his signature and the absence of a plea of *non est factum*. However, as one can see upon deeper consideration of the totality of the evidence, his signing of the contract, without more, cannot properly be held to be the end of the matter. The circumstances surrounding the execution of the contract are of appreciable relevance. This is especially against the background of the evidence that the final contract that was signed was to have had retrospective effect, following a course of dealing between the parties, which included Mr Jaddoo having worked for long periods without there being any written contract in place.

[54] The case for Mr Jaddoo is that although he had signed the contract, without careful attention, he read it shortly after signing it on the same day and realised that there was a discrepancy with regards to the period stated in it. He immediately brought the discrepancy to the attention of Mr Haley who gave him certain assurances. One such assurance was that whatever was in the contract did not change anything and that, based on the advice of the SIA's attorneys, when the previous contract expired and there was no new written contract in its place, then the contract would have continued for an indefinite period.

[55] What cannot be ignored is that the contract was prepared and presented to Mr Jaddoo for his signature by Mr Haley in the circumstances that he explained. The evidence as to those circumstances has not been rebutted by the SIA and the learned judge did not say that she rejected Mr Jaddoo as a reliable witness of truth. What she

did was to proffer an explanation for what Mr Haley may have meant by the assurance that nothing had changed rather than what Mr Jaddoo could reasonably have believed it meant. In any event, what was meant would have had to come from Mr Haley, himself, and he was not a witness. The learned judge also had no regard to what Mr Jaddoo said about what was told to him regarding the indefinite continuation of the previous contract when it expired. The explanation of Mr Haley was contextual. The context was the discrepancy noted by Mr Jaddoo and brought to Mr Haley's attention, regarding the operative period of the contract being for two years from 1 November 2007 and not 1 September 2007, as in Mr Jaddoo's view, it ought to have been. The learned judge did not resolve the question of what these assurances, taken together and in the context they were uttered, would have meant to Mr Jaddoo and what it would have meant to the ordinary and reasonable employee in the position of Mr Jaddoo.

[56] In my view, the assurances would have meant, subjectively and objectively, that the contract would not have affected Mr Jaddoo adversely with the two missing months not being covered by it. He had nothing to worry about because everything remained the same as the contract of employment would have been taken as continuing indefinitely during the time that there was no written contract. The issue was not whether this was right or wrong but what effect it would have had on the mind of Mr Jaddoo.

[57] Mr Jaddoo's contention is that, although he had affixed his signature to the document, the contract was not what he had intended and not what he had agreed to, especially as it relates to the operative period. Therefore, this issue of the

commencement date of 1 November 2007 was not the result of any agreement between the parties. Mr Jaddoo's unchallenged evidence was that he brought it to the attention of Mr Haley as a source of discontentment after which, assurances were given to him by Mr Haley.

[58] The acceptance by Mr Jaddoo of those assurances could not be viewed as unreasonable because the SIA, up to then, would have been in the habit of not issuing contracts immediately upon the expiration of a previous one. His failure to follow up with an objection in writing, regarding the omission of the two months, should have been viewed by the learned judge in the light of what he was told by Mr Haley and what he reasonably would have believed, given the history of the course of dealings between them. It is in the light of the assurances and the state of mind they would have generated on the part of Mr Jaddoo, that his subsequent conduct in treating with the written contract of 15 July 2008 should have been viewed and assessed by the learned judge.

[59] In my view, it would not be fair, in all the circumstances, to use the fact that Mr Jaddoo eventually treated the final contract as being applicable to his employment to deprive him of the benefit of having the two missing months taken into account as part of the period of his employment.

[60] The SIA has not explicitly and directly contradicted Mr Jaddoo's averment that he remained in its service without break from 2001. Instead, the position taken by the SIA is that it is relying on the last contract that was signed in July 2008, for its full terms

and effect, and that based on the parol evidence rule, the court ought to disallow any evidence from Mr Jaddoo that seeks to supplement, vary or contradict the terms of the contract. This, of course, raises the issue of whether Mr Jaddoo could properly use parol evidence, as he sought to do, to add to, contradict or vary the terms of the contract and to establish that his period of employment was not broken for the purposes of redundancy payment.

[61] The learned judge had allowed the evidence of Mr Jaddoo, which explained the circumstances surrounding the execution of the contract in July 2008, despite an objection taken by Miss Davis on the basis of the parol evidence rule. The learned judge was correct to do so in my view, but having done so, she did not resolve what she found was "curious" as to the reason the July 2008 contract was not made to start on 1 September 2007, but instead on 1 November 2007. That curiosity could only have been dispelled by a proper examination of the totality of the evidence that was placed before her.

[62] The parol evidence rule, taken in its purest form, is that once the parties have reduced to writing the contract that they intend to contain the final and complete statement of their agreement, then evidence to contradict, vary, add to or subtract from its terms, or the terms in which they have deliberately agreed to record any part of their contract, is not admissible. The purpose behind the rule is that the parties went to the trouble to put their agreement in a single written contract and so evidence of past agreements or terms that are not in the written contract should not be considered in interpreting it. There are, however, several recognised exceptions to this rule.

[63] As the learned authors of Chitty on Contracts, twenty-sixth edition, volume 1 at paragraph 847, explained:

> "... [T]he parol evidence rule is and has long been subject to a number of exceptions. In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement... **It cannot therefore be asserted that, in modern times, the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document. 'The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties**'." (Emphasis added)

[64] The learned author further noted at paragraph 848:

> "It follows that the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties' agreement are wholly contained in the written document. The rule 'only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement'. Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. It is therefore always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the contract."

[65] There is no contest that the written contract was unilaterally prepared and then presented to Mr Jaddoo by Mr Haley. Mr Jaddoo's evidence has established that it did not contain what both parties had conclusively discussed, intended and finally agreed

upon to be included in it. The fact that Mr Jaddoo had to point out the error in the sum stated for emoluments, which was corrected, shows that the draft presented to him for his signature was not perfect.

[66] Mr Jaddoo's conduct and discussions with Mr Haley, at the time of and shortly following the execution of the contract, coupled with Mr Haley's assurances, do give rise to the reasonable conclusion that the contract that was signed was not intended by the parties to represent a final agreement as to Mr Jaddoo's complete period of employment. The omission of the two months was recognised and accepted by the SIA (through Mr Haley) within a very short time span, which was proximately contemporaneous with the signing of the contract. There is nothing to suggest that Mr Jaddoo did anything to waive his rights to have those months factored into the calculation of his period of employment.

[67] It cannot be said then that the parties have gone through the trouble of negotiating and then reducing their final agreed terms, containing what they both intended, in a single written document. Therefore, the parol evidence rule would not be available to the SIA to be deployed as an appropriate and complete response to Mr Jaddoo's contention that his employment was continuous from 2001.

[68] Even if the contract was, rightly, to have begun on 1 September 2007 and ended on 31 October 2009, the SIA was the party which failed to correct the contract on the basis of what Mr Haley is said to have told Mr Jaddoo that nothing had changed and about the continuation of the previous contract. In the circumstances, Mr Jaddoo's

eventual acceptance of the terms of the written contract should not be used against him.

[69] Indeed, for other reasons that will now be detailed, I find it neither accurate nor reasonable to hold that the continuity of Mr Jaddoo's employment was broken because there was no written contract, evidencing his employment for the missing months. The requirement for the purposes of the law is not whether there was a 'continuous written contract', but whether there was a 'continuous period of employment'. I am fortified in this view by the ETRPA itself, which recognises that employees may continue in the service of their employer on contracts that have expired.

[70] By way of illustration, the ETRPA provides in section 3(5)(b) for a notice to be given to terminate a contract of employment in circumstances where the employment of an "...**employee whose contract of employment is for a fixed term continues for four weeks after the expiration of the term**..." (emphasis added). It stipulates that the provisions regarding the proper notice period for termination of the employment in such circumstances shall apply to the contract "as if it were a contract for an indefinite period". This provision shows that the expiration of a written contract does not, necessarily, mark the end of the employment relationship.

[71] Provided Mr Jaddoo continued working during the two months at the behest of the SIA or with its concurrence and it continued to pay him for the services rendered, the contractual relationship was not at an end and the employment would have continued until termination by proper notice or the issuance of a new contract

establishing a new operative period. From all indication on the uncontroverted evidence of Mr Jaddoo, that was the legal position in the circumstances of his case. His contract of employment would not have been broken when there was no written contract in place for the period September 2007 to July 2008.

[72] Importantly too, there is nothing to show that the SIA had communicated to Mr Jaddoo that the contract would not have been renewed on 1 September 2007 and that, instead, it would be renewed on 1 November 2007. There was no evidence of any arrangement between Mr Jaddoo and the SIA that would mark a change in their dealings upon the expiration of the previous contract. The evidence adduced by Mr Jaddoo, which remained unrefuted by the SIA to this day, points to the inescapable conclusion that the parties continued in their customary course of dealings as employer/employee from September 2001, until the contract was not renewed in October 2009.

[73] There was also other evidence before the learned judge, independent of Mr Jaddoo, which tends to support his case that his employment was never broken for two months between 2001 and 2009. Crucial evidence in this regard is to be found in the Auditor-General's report ending 31 March 2008 as well as extracts of the proceedings before the PAC in September 2009, which was exhibited on Mr Jaddoo's case. The evidence shows that observations were noted of payments to contract workers that were not approved beforehand by the Ministry of Finance and that contractual workers were working for extended periods without any written contracts. Mr Jaddoo was one of them. The Auditor-General's report indicated that salary and gratuity payments,

amounting to $3,000,000.00, were made to a contract employee and could not be substantiated by a contract. The report also indicated that monies were paid to Mr Jaddoo for the contract period 2006-2007 and in 2008, with no records presented to substantiate the payments. The Auditor-General specifically noted, "contract document was not provided" for perusal.

[74] The Auditor-General's report and the proceedings before the PAC highlighted, even more, the modus operandi of the SIA in paying Mr Jaddoo for services rendered, without there being any written contract in place. There was nothing in the Auditor-General's report or the representations by the SIA to the PAC that showed that Mr Jaddoo was not on the job at any time, other than when he was sick and on vacation leave, and that he was not paid for his services at any time in the absence of a written contract. The audited reports of the SIA and the representations before the PAC serve to strengthen Mr Jaddoo's case that the absence of a written contract is not conclusive evidence that his employment was broken.

[75] The failure of the SIA to rebut Mr Jaddoo's evidence is also evident from his cross-examination. Not once did counsel for the SIA put to him that he was not employed to the SIA during the two missing months in 2007. The gravamen of Miss Davis' suggestion, regarding the missing months, was that there was no written contract for the period 1 September 2007 to 31 August 2009. Mr Jaddoo responded that he agreed that there was no such contract "but with a different understanding" from Mr Haley (sometimes referred to as "Mr Hayden" in the notes of evidence, see page 125 of

the record of appeal, volume one). He gave evidence of what he referred to as the 'different understanding' from Mr Haley, which was never refuted.

[76] Counsel for the SIA, consistently with the pleadings, was content to rest the SIA's case on the written contract of July 2008 (that was executed after the work would already have been done) and on the parol evidence rule. Therefore, no suggestion or case was put to Mr Jaddoo that he did not work continuously since 2001 as he alleged.

[77] Finally, it is safe to say that up to the end of the case, there was no affirmative evidence from any of the witnesses called by the SIA that contradicted Mr Jaddoo's evidence, that the period of his employment with the SIA had not been broken, despite the absence of a written contract evidencing that fact.

[78] I would conclude that when the history of the parties' course of dealing, which is a relevant and important consideration, is examined against the background of the totality of the evidence as well as the applicable law, it seems to me that the SIA's position that there was a break in the period of employment must be rejected. No break relied on by the SIA during the period is viewed as genuine in the circumstances because the final written contract does not tell the whole story of Mr Jaddoo's employment history. At page 191 of the text, Commonwealth Caribbean Employment and Labour Law, the learned authors, Natalie Corthẻsy and Carla-Anne Harris-Roper, observed that, "the court will carefully examine whether the periods intervening between contracts are genuine or are generally designed only to create superficial breaks to evade payment of statutory benefit".

[79] Having examined the periods between the issuance of the two last written contracts in this case, I form the view that the written contract of July 2008 could not have altered the legal relationship of the parties that existed between September 2007 and the date of that contract. That relationship would already have been consummated by the time the contract was executed to have retroactive effect. A contract would have come into effect by conduct of the parties after the expiration of the previous contract, which, for the purposes of the law, would have had to be treated as an indefinite contract for the purposes of termination. In sharing the observation of Megaw J in **Trollope & Colls Ltd and others v Atomic Power Constructions Ltd** [1963] 1 WLR 333 at 342, I would venture to say, in the words of his Lordship that, "...this was not a case where signature of a formal agreement was a condition precedent to the coming into existence of a contractual relationship" between the parties for the period 2007-2009.

[80] On a preponderance of the probabilities, the period of Mr Jaddoo's employment with the SIA from 1 September 2001 was unbroken up to 31 October 2009. Any contrary conclusion would, in my view, be plainly wrong.

[81] In any event, even if I am wrong that he was continuously employed from September 2001, he, nevertheless, would have been employed for a continuous period of 104 weeks, commencing 1 November 2007, and ending on the relevant date, 31 October 2009. This finding would have been open to the learned judge, even if she had not accepted that there was a continuous period from 2001. She was, however, silent on that pre-condition for redundancy payment.

[82] Therefore, on either view of the facts, Mr Jaddoo would have cleared the first legal hurdle for a redundancy payment to be made to him.

[83] The next prerequisite to be satisfied is that Mr Jaddoo was dismissed within the meaning of the ETRPA. That question will now be examined.

ii. Was Mr Jaddoo dismissed?

[84] Section 5(5) of the ETRPA stipulates that where a fixed-term contract ends, and it is not renewed under the same contract, this would amount to a dismissal for the purposes of redundancy payment. It is not being challenged that Mr Jaddoo was, in fact and law, dismissed when his contract came to an end on 31 October 2009 and not renewed. Therefore, very little needs to be said regarding this second legal hurdle. It is sufficient to state that Mr Jaddoo was dismissed within the meaning of the ETRPA and for the purposes of redundancy payment.

[85] The more difficult issue remaining for consideration is whether this dismissal could be said to be due to redundancy. This is the third and final prerequisite to be satisfied to establish Mr Jaddoo's entitlement to redundancy payment. It is on this point that the learned judge explicitly rejected Mr Jaddoo's claim. This gives rise to the question of whether she erred in so doing, as contended by Mr Jaddoo.

iii. Was Mr Jaddoo's dismissal by reason of redundancy?

[86] The correct approach to be adopted in assessing whether a situation of redundancy arises is encompassed in section 5(2) of the ETRPA. The section prescribes

that in order for it to be taken as a matter of law that Mr Jaddoo's dismissal was by reason of redundancy, the following must be established:

i. the SIA had ceased or intended to cease to carry on business for the purposes for which Mr Jaddoo had been employed; or

ii. the SIA had ceased or intended to cease to carry on that business (that is, the business for which Mr Jaddoo was employed) at Bernard Lodge where he was posted; or

iii. the requirements of the SIA for Mr Jaddoo to carry out work of a particular kind in the place where he was employed had ceased or diminished or it was expected to cease or diminish.

[87] Section 2 of the ETRPA provides that, "cease" and "diminish" mean respectively, "cease or diminish either **permanently** or **temporarily** and from whatsoever cause;" (emphasis added).

[88] The factors to be considered when determining the question of whether an employee may be said to have been dismissed by reason of redundancy, was thoroughly reviewed by the learned authors of the text, Commonwealth Caribbean Employment and Labour Law. The learned authors instructed at pages 185 to 186:

> "The question of work of a particular kind is a concept that creates a myriad problems [sic] to navigate. In essence, what must be ascertained is whether the employer genuinely no longer needs the services of particular workers because of diminished work requirement, so that there is an excess

> or surplus of labour, necessitating dismissals. The courts formulated two tests to assist in determining whether cases meet this criterion for redundancy. Firstly, the job function test examined the actual work the employee undertook (that is, the functions of the job) and, if this still remained, there would be no redundancy situation. On the other hand, the contractual test examined whether the work which could possibly be performed under the contract of employment has diminished or was expected to cease and, if not, there was no redundancy. Both tests were questioned in *Safeway Stores Plc* v *Burrell*, and the court then formulated the so-called 'statutory test'. This sets out the proper questions to determine as being:
>
> - was the employee in fact dismissed? [*stage one*]
> - if so, was there a diminution or cessation in the requirements of the employer's business for the employees (not the particular employee) to carry out work of a particular kind currently or in the future? [*stage two*]
> - was the dismissal caused wholly or partly because of this state of affairs? [*stage three*]"

[89] The learned authors duly noted that to ground a successful redundancy claim, it must be shown that the employee's dismissal was either wholly or partially attributable to the state of affairs in the business and not the position in relation to the work of any particular employee (page 186).

[90] Under review in **Safeway Stores PLC v Burrell** [1997] IRLR 200 was the correct approach to be adopted in determining what is a dismissal, by reason of redundancy, within the meaning of section 139(1)(b) of the United Kingdom's Employment Rights Act 1996. That provision is similar in terms and effect to section 5(2) of our statute. At paragraphs [70] and [71] of the judgment, his Lordship usefully identified the factors that are to be considered, at what he referred to as stages two

and three of a court's assessment into whether a dismissal was due to redundancy (see the insert in the preceding paragraph):

> "(1) There may be a number of underlying causes leading to a true redundancy situation; our stage [two]. There may be a need for economies; a reorganisation in the interests of efficiency; a reduction in production requirements; unilateral changes in the employees' terms and conditions of employment. None of these factors are themselves determinative of the stage [two] question. **The only question to be asked is: was there a diminution/cessation in the employer's requirement, for employees to carry out work of a particular kind, or an expectation of such cessation/diminution in the future** [redundancy]? **At this stage it is irrelevant to consider the terms of the applicant employee's contract of employment. That will only be relevant, if at all, at stage [three] (assuming that there is a dismissal).**
>
> **(2) At stage [three] the tribunal is concerned with causation. Was the dismissal attributable wholly or mainly to the redundancy?** Thus –
>
> (a) Even if a redundancy situation arises,... if that does not cause the dismissal, the employee has not been dismissed by reason of redundancy." (Emphasis added)

[91] This reasoning is consistent with that of this court in **Computers & Controls (Jamaica) Ltd v Leonard Saddler** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 64/2005, judgment delivered 14 March 2008. In that case, Harrison JA explained at paragraph 9 that it was for an employer to prove that there was no redundancy situation or that the dismissal was neither wholly nor mainly attributable to that situation. He then directed:

> "16. ...**[I]t will be seen that it is not the actual contractual arrangement which the employee has**

> **made that section 5(2)(b) directs attention but to the requirement of the business. The 'ceased and determined' referred to in the section must relate to the requirements of the business**. It could never be said in the circumstances of this case that the work carried out by the Respondent had 'ceased and determined'." (Emphasis added)

[92] What then can be said of the state of affairs at the SIA at the time Mr Jaddoo's contract was not renewed? Mr Leiba submitted that in order to determine the state of affairs at Bernard Lodge at the time of Mr Jaddoo's dismissal, regard must be had to the evidence that was before the learned judge for consideration. He argued further that the evidence of Dr Earle Roberts, the person to whom Mr Jaddoo reported, as well as that of Mr O'Gilvie, is of importance as both witnesses gave a clear picture as to the state of affairs at the SIA at the time of Mr Jaddoo's dismissal.

[93] Dr Roberts gave evidence to the effect that he was present at the meeting where the decision was taken not to renew Mr Jaddoo's contract. He stated that the reason that had been communicated to the Board was that there was "the uncertainty involving the status of the SIA and SIRI and none of the contracts for the contract officers were being renewed at that time" (page 296 of the record of appeal, volume one). Dr Roberts further gave evidence that up to the date of the trial (some four years or so later) Mr Jaddoo's post had not been occupied. The office had not closed immediately upon Mr Jaddoo's dismissal as his secretary and office attendant were retained until December 2009. He then confirmed that after Mr Jaddoo's secretary left, the office was eventually closed down (page 271 of the record of appeal, volume 1).

[94] Mr O'Gilvie confirmed that the two persons with whom Mr Jaddoo worked at the SIA were dismissed by reason of redundancy by December 2009 and that up to the date of the trial, Mr Jaddoo's position remained vacant on the list of the establishment.

[95] According to Mr Leiba, the above evidence is of significance, as it clearly shows that operations at Bernard Lodge had been reduced and/or ceased, whether temporarily or permanently. Counsel also argued that a redundancy situation could arise in a situation where there is a temporary reduction in the need for an employee for a post. There is no requirement, he said, for there to be a permanent diminution of an employee's role in order for a situation of redundancy to arise.

[96] Miss Davis submitted, in response, that the fact that Mr Jaddoo's post had not been filled was not determinative of the issue as to whether the business had ceased or diminished for the purposes for which he had been employed. She argued that at the time Mr Jaddoo was dismissed, there were two other persons employed to the department. The fact of them having been subsequently dismissed by reason of redundancy, within a very short time of Mr Jaddoo's dismissal is, according to Miss Davis, not relevant because what must be taken into account is the situation which existed at the time of the dismissal. Miss Davis argued further that the facts are that the need for employees to carry out the work of the nature of Mr Jaddoo’s was not diminished as the post still existed on the establishment.

[97] At paragraph [57] of the judgment, the learned judge observed that there had been no cessation, temporary or otherwise, in the SIA carrying on the business for

which Mr Jaddoo was employed. She then speculated that the operations at Bernard Lodge were facilitated mainly due to the presence of Mr Jaddoo being there, and so, with him being dismissed, certain members of staff would no longer be needed. Therefore, Mr Jaddoo's dismissal could not be said to be due to redundancy.

[98] What would have led to the learned judge's speculation is not, at all, discernible from the facts but, in any event, speculation is not tantamount to a finding of fact. Therefore, no weight is due to that comment for present purposes. The conclusion of the learned judge, and the submissions of the SIA that there was no redundancy situation, cannot be accepted for reasons that will now be outlined.

[99] In the first place, the letter of 24 August 1999, from the Chief Executive Officer of the SIA to Mr Jaddoo, clearly stated that the operations at Bernard Lodge were to be relocated. The evidence was that at the time of Mr Jaddoo's dismissal, the division in which he worked was in Mandeville with the exception of Mr Jaddoo and his staff. Therefore, as the learned judge found, the operations at Bernard Lodge had started to scale down as far back as 2001, with only a skeletal staff remaining in Mr Jaddoo's department. Mr Jaddoo was the first to be dismissed and within two months after the positions of the two members of staff that worked with him were made redundant and that department at Bernard Lodge was closed.

[100] Secondly, the evidence of Dr Roberts was that Mr Jaddoo's contract was not renewed because of the uncertainty which existed regarding the status of the SIA and the SIRI.

[101] Finally, up to the date of the trial, some four years after Mr Jaddoo's dismissal, his position remained vacant, that is to say, more specifically, that no one was ever employed to carry out the tasks for which he was employed at Bernard Lodge at the time of his dismissal or, generally, in the SIA's business operations at Mandeville. The explanation that was given for the delay in appointing a replacement for Mr Jaddoo is that an audit had to be completed and it was decided not to fill any new position while the audit was ongoing.

[102] These facts point to the inescapable conclusion that the operation at the SIA at Bernard Lodge, for the purposes for which Mr Jaddoo had been employed, had ceased (stopped) or diminished (reduced), even, at least temporarily. The division to which he was assigned was not only closed almost contemporaneously with his dismissal but the positions of his support staff were also made redundant, practically, on the heels of his dismissal. Even though this redundancy of the positions of the support staff occurred after the dismissal of Mr Jaddoo, it is a primary fact from which a reasonable inference may be drawn of the intention or expectations of the SIA that there would have been a cessation or diminution in the business for which Mr Jaddoo was employed at Bernard Lodge. The dismissal of Mr Jaddoo and the support staff were so closely connected to the cessation of operations at Bernard Lodge in the department to which Mr Jaddoo was assigned, that they cannot be divorced from each other in the court's assessment of the apparent reason for Mr Jaddoo's dismissal.

[103] The facts also point, inexorably, to the conclusion that the requirement at the SIA for Mr Jaddoo (or anyone else for that matter), to carry out work of a Co-ordinator

at Bernard Lodge, had ceased or diminished, even if temporarily. Upon his dismissal, no one replaced him and that remained so up to the date of trial. This situation does raise the strong presumption, to be rebutted by the SIA, that it did not have any immediate need for someone in the position of Mr Jaddoo for the purposes of its business at the time of the dismissal.

[104] The simple response of the SIA that the post previously occupied by Mr Jaddoo still existed in the business (although not filled for four years, at least) and that an audit was being conducted, which delayed the filling of the post, was not enough to displace the statutory presumption that a situation of redundancy arose at the SIA.

[105] As was directed by his Lordship in **Safeway Stores PLC v Burrell**, the only question to be asked at stage two of the test is: was there a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such cessation/diminution in the future? Once the answer to that is in the affirmative, then a precondition for redundancy would have been satisfied. There is no question that the stage two aspect of the test is satisfied in this case as the answer to that question is in the affirmative in all the circumstances of the case.

[106] Once stage two is established, then, a consideration of stage three will involve ascertaining whether there is a causal nexus between the state of the company and the dismissal. The fulfilment of the stage three part of the test would be that Mr Jaddoo's dismissal was due to the existing state of affairs at the SIA that points to a redundancy situation. However, quite apart from the learned judge's improper treatment of the

critical facts highlighted above, with regards to stage two of the test, it is my respectful view, that she also focused on and applied the wrong legal principles in addressing the issue that ought to have been resolved at stage three.

[107] The learned judge, instead of focusing on whether the cessation and/or diminution in operation at Bernard Lodge caused Mr Jaddoo's dismissal, which is stage three of the statutory test, her focus, instead, remained on the nature of Mr Jaddoo's contractual relationship with the SIA. This led her to conclude, without any further analysis of the evidence as to what was taking place in the business operations of the SIA, that the dismissal was at the time when Mr Jaddoo's contract had come to its end as agreed between the parties. This, however, was not a relevant consideration because it is already established that the expiration of a fixed-term contract is not at all inconsistent with dismissal by reason of redundancy. This is so because the essence of a redundancy arising from an expired fixed-term contract lies not so much in the expiration of the contract but rather in the reason for the decision not to renew it. In examining the issue, therefore, the learned judge was to have investigated the reason for the non-renewal of the contract by reference to what was taking place in the business needs and operations of the SIA and whether Mr Jaddoo's dismissal was because of those prevailing circumstances. She, therefore, failed to sufficiently consider the stage two and three redundancy questions comprised in the statutory test.

[108] There is enough evidence which demonstrates that it is not accurate to say that the contract was not renewed simply because it had expired as agreed between the parties. The non-renewal of the contract was clearly connected to the operational state

and needs of the SIA at the material time. The learned judge ought properly, in my view, to have concluded that, despite the fact that the post occupied by Mr Jaddoo still existed on the books of the SIA, a redundancy situation did exist and that it wholly or partly caused Mr Jaddoo's contract not to be renewed.

[109] The statutory preconditions, therefore, existed, which, according to the ETRPA, must be taken to mean that the dismissal of Mr Jaddoo was by reason of redundancy. The SIA, on whom the burden lies to prove otherwise, has not displaced that presumption. The learned judge would have been plainly wrong in finding that Mr Jaddoo was not dismissed by reason of redundancy or that no situation of redundancy existed.

[110] It is my respectful view, therefore, that the learned judge would have erred in rejecting Mr Jaddoo's claim for redundancy payments.

[111] Since the learned judge had not gone that far as to assess the damages to which Mr Jaddoo would have been entitled on this aspect of his claim, it is now open to this court to examine that question. Before doing so, however, it is deemed necessary for completeness to settle the question of whether Mr Jaddoo had brought his claim for redundancy within the time prescribed by the ETRPA.

d. <u>Whether the claim for redundancy payment was statute-barred</u>

[112] Mr Leiba had raised the question of whether the redundancy claim was brought within the time limited by section 10 of the ETRPA because the learned judge did not discretely rule on the issue, although it was an area of dispute between the parties at

the trial. The learned judge had embarked on a consideration of Mr Jaddoo's entitlement to redundancy payment, which leads one to presume that she had accepted that the claim was commenced within time. However, for the avoidance of doubt, the question should be expressly settled before an assessment is done as to whether Mr Jaddoo is entitled to redundancy payment.

[112] In summary, section 10(1) of the ETRPA provides that a person who seeks to make a claim for redundancy payment would be deprived of the right to that payment, unless, before the end of a six-month period, beginning with the relevant date, one of the following events takes place:

i. redundancy payment is agreed (section 10(1)(a));

ii. an employee makes a claim for redundancy payment by notice in writing given to the employer (section 10(1)(b)); or

iii. proceedings have commenced for the determination of the question as to the employee's right to the payment, or the amount of the payment (section 10(1)(c)).

[113] Given that there was no dispute about this on appeal, it is not necessary to examine the issue in any detail. It suffices to say that Mr Jaddoo’s claim for redundancy payment was filed on 25 February 2010, which was approximately four months from the date of his dismissal (31 October 2009). I am satisfied that the claim for

redundancy payment was made within time in fulfilment of section 10(1)(c) of the ETRPA.

[114] Accordingly, Mr Jaddoo is entitled to have his redundancy payment quantified in accordance with the law.

e. <u>The redundancy payment to which Mr Jaddoo is entitled</u>

[115] I agree with Mr Leiba that any redundancy payment to which Mr Jaddoo would be entitled would, partly, fall outside of the statutory framework. This is because, the Staff Manual for the Sugar Industry Authority and the Sugar Industry Research Institute, ("the Manual") makes specific provision for what is to obtain when an employee of the SIA is made redundant. This regime is not prohibited by the ETRPA.

[116] The Manual refers to two payments to which an employee would be entitled upon being made redundant; they are, notice payment and severance payment. The relevant provisions read as follows:

> "3. REDUNDANCY
>
> a) ...
>
> b) Notice Pay
>
> In cases where severance payment is due to employees, the SIA/SIRI undertakes to give as long a notice as is possible, provided that under normal circumstances the period of notice shall not be less than fourteen (14) weeks. Where the period of notice falls short of the agreed fourteen-week period, then the employee shall be paid his current salary for the period that the notice falls short of the fourteen weeks. This payment is not separate and apart from the termination pay or notice due under the Law.

> c) Severance Payment
>
> The terms and conditions governing redundancy payment shall be in accordance with the Employment Termination & Redundancy Payment Act, excepting that the calculation for payment shall be 10% of the average gross remuneration for the past two years of employment multiplied by the total number of years of service or in accordance with such other variation as may be in existence at the time."

[117] The provisions of the Manual would include persons employed on a contractual basis. At page 9, it stipulates that, "[e]mployment with the [SIA/SIRI] will be either on a permanent basis, part-time basis, *temporary or a contractual* basis". No distinction is made with respect to redundancy payment, where an employee is retained on a contractual basis.

i. Notice pay

[118] No written notice of redundancy was given to Mr Jaddoo. He was simply advised by the letter of 27 October 2009 that, the decision was taken not to renew his contract, which was to expire on 31 October 2009. In the light of the provision of the Manual, Mr Jaddoo would be entitled to his current salary for the period that the notice fell short of the 14 weeks. Mr Jaddoo, having received no notice, would be entitled to the notice pay of 14 weeks.

[119] Mr Leiba submitted that in order to calculate the normal wages to form the basis of this award, regard is to be had to the gratuity to which Mr Jaddoo was entitled. Counsel contended that gratuity payments were not based on performance, instead, it was a sum that was "certain" and so, the amount Mr Jaddoo would have been granted

with respect to gratuity is to be added to his monthly salary. With respect, I am not persuaded by this line of argument.

[120] Normal wages as defined by regulation 2(1) means, "...in relation to any employee, the remuneration regularly paid to him by his employer as wages or commission, and includes any amounts regularly so paid by way of bonus as part of such remuneration..."

[121] Gratuity under Mr Jaddoo's contract of employment was "25% of the emoluments paid to him at the end of his contract".

[122] It is my respectful view that the gratuity that was payable was not part of the remuneration that was regularly paid to Mr Jaddoo as wages as is contemplated by the Regulations. It was a one-off payment made at the end of his contractual period.

[123] Taking into account Mr Jaddoo's contract of 15 July 2008, the terms of which remained the same up to his dismissal in October 2009, it is accepted that Mr Jaddoo's actual gross annual income was the sum of $3,114,000.00. This equates to a monthly sum of $259,500.00. Accordingly, Mr Jaddoo would be entitled to the sum of $908,250.00 for notice payment for 14 weeks, which is his monthly salary of $259,500.00 x 3.5 months (14 weeks).

ii. *Severance payment*

[124] The calculation of severance payment is to be in line with the formula as set out in the Manual, which is "...10% of the average gross remuneration for the past two

years of employment multiplied by the total number of years of service...". Mr Jaddoo's payment is, therefore, calculated as follows:

i. 10% percent of average salary for the last two years (1 November 2007 to 31 October 2009) being:

- 10% x $3,114,000.00 = $311,400.00

ii. 10% of average salary multiplied by the years of service (8 years and two months), being:

- $311,400.00 x 8.1666 years = $2,543,079.24

[125] The severance payment would amount to $2,543,079.24.

[126] In the circumstances, the total sum payable as redundancy payment to Mr Jaddoo would be $3,451,329.24 ($908,250.00 plus the severance payment of $2,543,079.24).

iii. Interest

[127] Interest at the rate of 25% per annum, although claimed down below by Mr Jaddoo, was never proved. This was conceded by Mr Leiba who submitted that interest at the rate of 6% per annum from 31 October 2009 up to the date of judgment, should be awarded. In accordance with the power given to the court by section 3 of the Law Reform (Miscellaneous Provisions) Act, it is believed that an award of interest at the rate of 3% per annum, from the date the cause of action arose (October 31, 2009) to the date of judgment in the court below (11 July 2014), is reasonable on the sum

awarded for redundancy payment. This is in keeping with the rate of interest awarded by the learned judge on the sums awarded for gratuity and lunch subsidy. There is every reason to believe that had she awarded the sum for redundancy payment, as she should have done, the interest would have been the same as on the other sums awarded on the claim.

[128] I would award on the sum of $3,451,329.24, interest at the rate of 3% per annum, from the date the payment ought to have been made until the date of judgment in the Supreme Court. Thereafter, Mr Jaddoo would be entitled to the statutory interest of 6% per annum on the judgment debt.

Issue two: whether Mr Jaddoo was entitled to costs in the court below as the successful party (ground one)

[129] The learned judge has not given her reasons for having not made an order for costs. The main thrust of Mr Leiba's arguments with respect to the issue of costs, was that, as the judge failed to reveal the basis for her decision not to have awarded costs, this has left the parties to speculate. He further argued that in circumstances where there was a claim and counterclaim, the principle of costs being awarded to the successful party should still apply. He noted that in this case, Mr Jaddoo had been successful with respect to some aspects of his claim and had succeeded on the counterclaim. In the circumstances, according to counsel, the better approach would have been for the learned judge to have ordered at least half of the costs or costs proportionate to success. Mr Leiba has recommended that this court find that the learned judge erred in not having adopted this course.

[130] Miss Davis submitted, in response, that the award of costs was in the discretion of the learned judge and that this court should heed the caveat as to the approach to be taken by the appellate court, regarding the exercise of the learned judge's discretion. The caveat as laid down in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, and accepted by this court in numerous decisions, is heeded. Thought is therefore given to the applicable standard of review relative to the exercise of the learned judge's discretion on the issue of costs.

[131] It is accepted that Part 64 of the Civil Procedure Rules, 2002 ("the CPR") gives a judge the power to award costs and that the usual course to adopt is for costs to be awarded to the successful party, in keeping with the general rule, that costs follow the event. It is, nevertheless, established that the award of costs is a matter of discretion for a trial judge. The discretion must, however, be exercised judicially and not capriciously. Rule 64.6 of the CPR requires reasons when there is a departure from the general rule. Therefore, it must be said that the learned judge erred, in principle, in not providing reasons for her decision, especially in the light of Mr Jaddoo's partial success on the claim and total success on the counterclaim. The duty, therefore, falls on this court to determine whether she made an appropriate order, despite the absence of reasons.

[132] The following are of importance in determining whether an award of costs should have been made in favour of Mr Jaddoo in the court below:

i. Mr Jaddoo was not successful with respect to all aspects of his claim. A substantial portion of it (breach of contract, negligence, redundancy, and loss of income under three different heads), were rejected by the learned judge.

ii. Aspects of the counterclaim were conceded by the SIA and the sum claimed was drastically reduced by the time the counterclaim was to be considered by the learned judge. In the end, the counterclaim was resolved in favour of Mr Jaddoo when the SIA failed to prove its case.

[133] It is my respectful view that when the matter was decided by the learned judge, the parties would have walked away from the proceedings almost on equal footing based on her decision. Given what was granted on the claim, Mr Jaddoo could not be said to have been the successful party although he had achieved some measure of success. The integral aspects of the claim failed. Therefore, relatively speaking, the SIA could have properly boasted to have been the successful party on the claim. Mr Jaddoo, however, succeeded on the counterclaim. Although, the issue that was resolved in his favour on the counterclaim was not as substantial as those issues the court had to explore on the claim, he, nevertheless, secured a victory. Also, the sum claimed by the SIA as an overpayment was not a trivial sum. Therefore, in keeping with the general rule, costs ought to have followed the event with respect to the counterclaim. The learned judge, however, did not award him the costs of the counterclaim, for reasons which have not been shared with this court.

[134] I would have been hesitant to interfere with the exercise of the learned judge's discretion with respect to costs on the claim in the light of the outcome as she saw it. Even though she gave no reasons, it cannot be said that the decision she arrived at, in respect of the claim, was unreasonable, irrational or aberrant. Therefore, there would have been no justification for the complaint that she erred in law in not granting costs to Mr Jaddoo on the claim on the basis that he was the successful party.

[135] The same, however, cannot be said of the decision on the counterclaim. Mr Jaddoo, even though partially successful on the claim, would have received no costs to reflect that partial success, and so, it cannot be justified to also deprive him of the costs on the counterclaim, on which he was entirely successful. There is no rational basis disclosed for depriving Mr Jaddoo of costs on the counterclaim.

[136] I am propelled to the conclusion that there is merit in the ground of appeal that the learned judge erred in not treating Mr Jaddoo as having obtained partial success in the proceedings below, thereby entitling him to a proportion of the costs of those proceedings.

[137] I must say further that, given the finding of this court that Mr Jaddoo should have succeeded on his redundancy claim, it means that had the learned judge so found, he would have had greater success on his claim. In the light of the success on appeal on the redundancy claim, the scales would be tipped a bit more in his favour in the proceedings because he would have been successful on a greater part of his claim than before, in addition to his success on the counterclaim. This court is entitled to make the

necessary order that ought to have been made by the learned judge upon the success of Mr Jaddoo on the redundancy claim. Miss Davis posited the view that if he is successful on the redundancy issue, then a proportion of the costs below could be awarded to him. I accept this position.

[138] For the reasons stated above, the appeal will have to be allowed on the issue of costs and the order of the learned judge set aside.

[139] Having taken into account the fact that the SIA has managed to defend the more substantial and critical parts of the claim, Mr Jaddoo should be allowed to recover no more than 35% of the costs of the claim. This is enough to mark, in particular, his success on the key issue relating to his redundancy entitlement, while making allowance for his losses on the significant claims for negligence, breach of contract and loss of income under various heads..

[140] He is entitled to all the costs of the counterclaim.

Conclusion

[141] Mr Jaddoo has successfully established his entitlement to redundancy payment. He succeeds on this ground of appeal and the appeal should be allowed on this basis. He is entitled to the sum of $3,451,329.24 ($908,250.00 notice pay plus the severance payment of $2,543,079.24) with interest thereon at 3% per annum from 31 October 2009 to 11 July 2014, the date of judgment in the court below.

[142] The learned judge's order that there be no award of costs on the claim would not have been unreasonable or irrational based on the outcome before her. However, because Mr Jaddoo is successful on the redundancy claim in this court, the court must make such orders as the learned judge ought to have made given his further success on the claim. She, however, failed to demonstrate the legal basis for depriving Mr Jaddoo of the costs of the counterclaim on which he succeeded. For this reason, no order for costs on the counterclaim is not justified.

[143] In the result, the court will also have to allow the appeal on costs. The learned judge's order regarding costs must be set aside and a new order substituted therefor. I would order that 35% of the costs should be awarded to Mr Jaddoo on the claim and that he be awarded the entire costs of the counterclaim in the court below.

[144] With respect to the costs of the appeal, Mr Jaddoo is entitled to a proportion of those costs, having abandoned two of the four grounds at the hearing of the appeal. Time and effort would have been lost by the SIA in preparing to meet those challenges on the appeal, which were not so trivial to be ignored. In those circumstances, Mr Jaddoo ought not to be granted all the costs of the appeal, given the nature of the grounds that were abandoned and the late stage at which they were abandoned. The Court of Appeal Rules provide for a party to withdraw all or <u>any</u> of its grounds of appeal by filing and serving a notice to that effect (see rule 2.19(1), (2) and (3)). The withdrawal of any ground of appeal would amount to a dismissal of it, upon the filing of the notice. The filing of a notice of withdrawal may attract liability in costs in favour of the opposing party. No notice of withdrawal of the grounds was filed and served in this

case, but the abandonment (withdrawal) of the two grounds should, nevertheless, be similarly treated as a dismissal of them. It is only fair then that Mr Jaddoo be deprived of a portion of his costs for the late abandonment of a substantial part (being one-half) of the appeal.

[145] I would propose that 80% of the costs of the appeal be awarded to Mr Jaddoo.

[146] In the premises, I would propose that these orders be declared as the final order of the court:

(1) The appeal is allowed.

(2) The judgment of P Williams J, made on 11 July 2014, is varied to add to the phrase, "judgment for the claimant (a) special damages" the following as item (iii):

> redundancy payments in the sum of **$3,451,329.24** with interest thereon at 3% per annum from 31 October 2009 to 11 July 2014, the date of the judgment.

(3) The "no order for costs" in the said judgment of 11 July 2014, is set aside and substituted therefor is the following order as to costs:

> 35% of the costs of the claim and the entire costs of the counterclaim in the court below to Mr Jaddoo to be agreed or taxed.

(4) 80% of the costs of the appeal to Mr Jaddoo to be agreed or taxed.

[147] It is incumbent on me to acknowledge, with sincere regret, the delay in the delivery of this judgment. There are many reasons that could be advanced by way of justification but no excuse will be proferred. I will, instead, on behalf of the court, extend profound apologies for the inconvenience and anxiety that may have been caused by the delay.

SINCLAIR-HAYNES JA

[148] I too have read the draft judgment of my sister McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing that I could usefully add.

PHILLIPS JA

ORDER

(1) The appeal is allowed.

(2) The judgment of P Williams J made on 11 July 2014, is varied to add to the phrase, "judgment for the claimant (a) special damages" the following as item (iii):

> Redundancy payments in the sum of **$3,451,329.24** with interest thereon at 3% per annum from 31 October 2009 to 11 July 2014, the date of the judgment.

(3) The "no order for costs" in the said judgment of 11 July 2014, is set aside and substituted therefor is the following order as to costs:

> 35% of the costs of the claim and the entire costs of the counterclaim in the court below to Mr Jaddoo to be agreed or taxed.

(4) 80% of the costs of the appeal to Mr Jaddoo to be agreed or taxed.