



heading of "Duties" the respondent was to undertake the duties of a finance manager "subject to the right of either the employer or the employee to terminate the employment under the terms of clause 9 CS".

3. Clause 9 of the contract stated:

"Termination

(a) Employment may be terminated by other party to this agreement giving one month notice to the other party. Notice may be waived by the payment of a month salary in lieu by either party. Medical grounds may terminate the employee in the opinion of a doctor expressly is no longer fit to carry out full duties.

(b) Employee may be summarily dismissed if he or she is guilty of gross misconduct or breach of discipline including drinking intoxicating liquor being under the influence of liquor at his workplace during normal working hours".

4. On 14 November 2010 the respondent received a letter from the Chairman of the appellant, terminating the respondent's employment with immediate effect. No reason was given for the termination.

5. The appellant did not immediately pay the month's salary in lieu of one month's notice, evidently because it wanted to set off moneys it said the respondent owed it. At the hearing in the High Court, counsel for the appellant conceded the month's salary of \$673.86 was owing and the respondent could have picked up a cheque for

that amount. The amount is included in the sum of \$11,181.75 and this Court was advised that amount has now been paid.

6. The judgment indicated that there were two issues:

- (a) Was the respondent's employment unlawfully terminated?  
and
- (b) If so, what damages are payable.

7. On the first issue the Chief Justice found:

*With the somewhat tacit concession by the defendant, the first issue present little problem. The defendant terminated the plaintiff in breach of clause 9(a) of the contract. The termination was therefore unlawful. The second issue is very much a live one that has to be determined.*

8. The concessions made by counsel for the appellant were that the contract of employment was terminated under clause 9(a) of the contract and that the respondent was entitled to one month's notice before termination or payment in lieu of notice. He then said the respondent did not collect his cheque for the notice pay, but he should have done so.

9. The damages awarded comprised \$10,107.90 being the respondent's salary for the remainder of the two year term, the one month's salary payable in lieu of notice and \$400 for a leave benefit.

**APPELLANT'S POSITION**

10. The relevant grounds of appeal are that the Chief Justice erred in law in:

- (a) Holding that the termination is unlawful;
- (b) Holding that the concession of a delay of payment of a one month salary amounted to an unlawful termination since there was no evidence whether the Respondent had refused to take it before court proceedings or/and whether the Appellant refused to pay the said terminal pay.
- (c) The termination is lawful and no other entitlement should be given to the Respondent beside the terminal pay of a one month's salary which has now been paid to the Respondent.

**RESPONDENT'S POSITION**

11. The respondent claims the termination was unlawful as notice had not been given, nor was the payment in lieu made at the time of termination.

**DISCUSSION**

12. The employment contract was initially for two years but clearly gave each party the right to terminate at an earlier date. Clause 9 of the contract is explicit. If the provisions of clause 9 were utilised to terminate the contract, such termination was lawful. The respondent was entitled to one month's notice or one month's wages in lieu of such notice.

13. The letter of 15 November 2010 was a termination letter. It did not give the respondent one month's notice and therefore the respondent was entitled to a month's salary. The notice did not have to give reasons.
14. The issue is whether the failure to pay the one month's salary at the time of the notice renders the termination unlawful. One interpretation of clause 9 of the contract is that the notice of immediate termination is permitted by the clause and therefore the termination is lawful, albeit that it creates an obligation on the employer to pay the month's salary. In other words the employee becomes a creditor of the employer for a sum of money, but the contract is lawfully terminated.
15. An alternative interpretation, and the one applied by the Chief Justice, is that, if the month's salary is not paid at the time of the notice, the termination is unlawful.
16. In this Court's view the Chief Justice was correct. The clause provides that "notice may be waived by payment of a month's salary". There is no waiver of notice if the salary is not paid contemporaneously or almost immediately. In this case the payment had not been made twelve months later. If an employer wishes to avoid giving the one month's notice it must make the payment. It is not the responsibility of the employee to seek it.
17. This view is reinforced by the obvious reason for the payment in lieu of notice. It is to provide the employee with a month's income while the employee attempts to obtain alternative employment.

**RESULT**

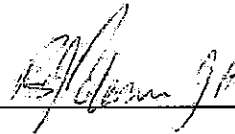
18. It follows that the Chief Justice correctly determined that there was an unlawful termination. However, it does not follow that the Respondent is entitled to the damages awarded.
19. The award of \$10,107.90 for wages was an award of special damages. Special damages must be proved. There was no evidence that the manner of dismissal caused the respondent to be out of employment for that period. This award will be set aside.
20. This is a case where this Court would allow general damages. There would be a loss to the respondent for late payment of the salary. Further, general damages can be awarded for embarrassment and distress. The circumstances are such that the respondent's claim for general damages is allowed.
21. In addition to the one month's salary, the respondent was entitled to "leave and an allowance of \$200". The Chief Justice fixed this figure at \$400. Counsel were unable to assist as to what leave or the holiday entitlement is. In the circumstances the Court does not vary this aspect of the damages award.
22. The respondent is awarded the following damages:

One month's salary (which has been paid)	\$673.86
Leave and allowance	400.00
General damages	<u>2,000.00</u>
	<u>\$3,073.86</u>

23. The appeal against the unlawful termination finding is dismissed but the appeal against the damages award succeeds and the damages are reduced to \$3,073.86.

#### **COSTS**

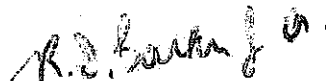
24. This is a case where costs should lie where they fall. Both parties have succeeded in part.



Paterson JA



Williams JA



Barker JA

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ayment agreement the response  
of two years from 13 January 2010. Under the

