

COMMONWEALTH OF DOMINICA

IN THE EASTERN CARIBBEAN COURT OF APPEAL

CIVIL APPEAL NO. 20 OF 2004

BETWEEN:

DEXTER DUCREAY

Appellant

AND

DOMINICA WATER & SEWERAGE CO. LTD

Respondent

Before:	The Hon. Mr. Brian Alleyne S.C	Justice of Appeal
	The Hon. Mr. Michael Gordon Q.C	Justice of Appeal
	The Hon. Miss. Suzie d'Auvergne	Justice of Appeal [Ag.]

Appearances: Mrs. Francine Baron-Royer for the Appellant
Mrs. Zena Dyer for the Respondent

2004: October 14

JUDGMENT

[1] **GORDON J.A:** The Appellant was employed by the Respondent and the contract of employment was reduced to writing. After some seven (7) months in the employment of the Respondent, the Appellant's contract of employment was terminated. The Appellant sued the Respondent for wrongful termination of employment and the Respondent duly filed a defence.

[2] By consent order dated 1st of March 2004, the Respondent admitted the wrongful and repudiatory breach of the contract of employment. The contract of employment was for a term commencing on the 8th of November 1999, and ending on the 7th of November 2004.

[3] The wrongful dismissal took place on the 23rd of May 2000, so at that time there were 53 months of the term left to run. The Appellant claimed damages comprising:

- (1) loss of basic salary for 53 months;
- (2) loss of gratuity;
- (3) loss of income for 21 days accrued vacation;
- (4) refund of monies paid to income tax;
- (5) loss of allowances being 53 months at \$1,500.00; and
- (6) loss due to deprivation of use of vehicle.

[4] Before us, only loss of salary, gratuity, allowances and holiday pay was argued. The Respondent argued that the Court should imply a term for termination on notice, that is, termination without cause on notice.

[5] In our view, neither the officious bystander, nor the business efficacy, nor the repairing of an intrinsic failure of expression tests is met. If there were to be an implied term it would be the right to terminate for cause. The right to terminate upon notice without cause, would in our view, go directly against the written term of the contract or the written language of the contract being for a fixed term.

[6] By virtue of the consent Judgment, one must assume there was no legally sufficient cause for termination. In any event, *Redal et al v Flag Ltd.*, a Privy Council case deriving from Bermuda, makes it clear:

“That there is no need to imply a clause permitting termination without cause on reasonable notice where the contract is for a fixed term”

[7] Therefore, the issue left for determination is the quantum of damages. We are of the view that the allowance of \$1,500.00 per month must have been conceived as an allowance for some expenditure, and therefore, the lack of employment means that any expenditure which was meant to be covered by that allowance would not be incurred. The allowance will therefore not be given. Learned Counsel for the Appellant argued that vacation at the rate of three days per month, should be given for the duration of the contract. However, a review of the Statement of Claim claims only vacation accrued at the time of the termination, and that is granted.

[8] Therefore, the Court grants by way of damages to the Appellant, salary for 53 months, which was the remainder of the contract at \$8,500.00 per month. This comes to a total of \$450,500.00

[9] We took the view that the gratuity was merely a tax efficient form of packaging a salary, and therefore that the Appellant was entitled to the full gratuity that he might have earned had the contract not been wrongfully terminated, and that figure is \$102,000.00.

[10] As I indicated, we agreed the pleaded loss of vacation leave, which was \$8,113.64, giving a grand total of \$560,613.64. From this is to be deducted the sum of \$332,041.67 being the amount by which the Appellant mitigated his damages by way of alternative employment.

[11] We therefore find, that the learned Master was wrong in his method of calculation of damages. We allow the Appeal and order that the Respondent shall pay to the Appellant the sum of \$228,571.97. The Appellant to have his prescribed costs both here and in the Court below.

[12] This sum is a gross sum and the Appellant is responsible to the Authorities of Dominica for the Income Tax payable on that sum.

MICHAEL GORDON Q.C
Justice of Appeal

I concur

BRIAN ALLEYNE S.C
Justice of Appeal

I concur

SUZIE D'AUVERGNE
Justice of Appeal [Ag.]