[2018] **JMSC. Civ.112**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV05274

BETWEEN	**RYAN ANSLIP**	**CLAIMANT**
AND	**NORTH EAST REGIONAL HEALTH AUTHORITY**	**DEFENDANT**

IN OPEN COURT

Mr. Andrew Irving for the Claimant

Ms. Carla Thomas for the Defendant, instructed by the Director of State Proceedings

Heard: February 5, 6 and 16, March 2 and July 31, 2018

Employment - Dismissal – Fixed Term Contract providing for dismissal and for termination of engagement with notice or salary in lieu of notice - Claimant's employment terminated without notice – Salary in lieu of notice and additional payments given – Whether Claimant dismissed for cause

No evidence presented in support of Defence - Whether court obliged to accept Claimant's account.

LINDO, J.

[1] The Claimant, Ryan Anslip, was employed to the Defendant, the North East Regional Health Authority of the Ministry of Health, (NERHA) as Director of Finance under an agreement in writing, dated September 3, 2009.

[2] The agreement provided, *inter alia*, that it was for a period of twenty-four (24) to thirty-six (36) months commencing September 3, 2009. It also provided for dismissal and for termination of the engagement as follows:

> *"**Dismissal**. 10. If the Employee shall at any time after the signing hereof neglect or refuse or from any cause (other than ill-health not caused by his own misconduct as provided in Clause 9), to perform any of his duties, or fails to comply with lawful or reasonable order, or if he discloses any information regarding the affairs of the Authority to unauthorised persons, or shall in any manner misconduct himself, the Authority may terminate his engagement forthwith and thereupon all rights and advantages reserved to him by this Agreement shall cease. The Employee so affected may appeal to the Disciplinary Committee of the Regional Health Authority Board. The Board will ensure that its actions conform to the Labour Relations Code.*
>
> ***Termination of Engagement.** 11.(i) The Authority may at any time terminate the engagement of The Employee on giving him one (1) month's notice in writing, or paying to him one (1) month's salary in lieu of notice.*
>
> *(ii) The Employee may at any time terminate his engagement on giving the authority one (1) month's notice in writing, or on paying to the Authority one month's salary in lieu of notice."*

[3] On February 1, 2011, Ms. Suzette Morris, the Regional Director of the Defendant, wrote to Mr. Anslip, a letter consisting of three pages, in which she indicated, *inter alia*, that:

> *"… I wish to use this medium to express my dissatisfaction with your performance as Director of Finance North East Regional Health Authority… The situation has now reached a point where I have lost confidence in your abilities and commitments…to provide me with the support needed to make critical decisions to effectively run the region's affairs….I am left with no other options but to terminate your contract with immediate effect. You will be paid all outstanding benefits and one month's salary in lieu of notice subject to settlement of any outstanding liabilities."*

[4] Prior to writing to Mr. Anslip, a performance evaluation was carried out and a Performance Evaluation Report was prepared on the same day. It bears the signature of S. Morris who is described (in the report) as the Rating Officer. It also bears the signature of Mr. Anslip. In the section headed "General Comments" the following is stated, "see letter dated Feb 01, 2011…"

[5] Mr. Anslip appealed to the Disciplinary Committee of the Regional Health Authority Board. The appeal was heard on June 27, 2011 and by letter dated

August 9, 2011, addressed to Counsel for the Claimant, the findings were communicated to Mr. Anslip. All points of his appeal were dismissed.

[6] On August 23, 2011, Mr. Anslip filed the instant claim. On June 27, 2014, he filed a Further Amended Particulars of Claim. By his claim, he seeks the following:

(a) The sum of $8,391,892.00 for breach of Contract

(b) Interest thereon for such rate and for such period as this Honourable Court deems fit pursuant to the Law Reform (Miscellaneous Provisions) Act.

(c) Costs

(d) Such further and/or other relief..."

[7] In his Further Amended Particulars of Claim, he avers that the Defendant purported to terminate his contract for non-performance pursuant to clause 10 of the agreement. At paragraphs 3 to 7 of the Further Amended Particulars of Claim, he states the following:

> "3 *Before terminating the said contract the defendant carried out a Performance Evaluation Report on the 1st day of February, 2011. Pursuant to the Ministry of Health guidelines for making overall assessment the Claimant met the requirements of his job based on the grades he received on the said Performance Evaluation Report. The Defendant's method of dismissal was therefore a breach of contract.*
>
> *4. Despite the Claimant meeting the requirements of his job assessment the Defendant wrongly and in breach of the said agreement terminated the employment and wrongfully dismissed the Claimant therefrom before the date it was due to expire.*
>
> *5. Pursuant to clause 15 of the contract the Claimant was eligible for gratuity of twenty-five percent (25%) of the amount of salary drawn during the period of engagement. In breach of the contract the Claimant was not paid any gratuity although he had satisfactorily met the requirements of the job during the period of engagement.*

6. *The Claimant was paid one month's salary in lieu of notice in breach of the contract. The Claimant was entitled to 18 months salary in lieu of notice representing the unexpired portion of the fixed term contract.*

7. *By reason of the matters aforesaid, the Claimant has lost the benefit of the gratuity he would have earned and has therefore suffered loss and damage."*

[8] The Defendant by its amended defence filed on October 24, 2014, states, *inter alia*, that the letter dated February 1, 2011 terminated Mr. Anslip's engagement pursuant to clause 11(i) of the Agreement and that he was paid one month's salary in lieu of notice, and, in addition, he was also paid the following:

Outstanding salary for the last day worked (Feb.1, 2011)	$11,152.63
Travelling for February 1, 2011	$2,370.54
Payment for accumulation of 20 vacation days	$221,597.82

[9] At the trial which commenced on February 5, 2018, Mr. Anslip gave evidence on his own behalf and called no other witness. His witness statement, filed on December 18, 2014, stood as his evidence-in-chief after certain portions were struck out as hearsay.

[10] His evidence is that he was employed "under a fixed term contract commencing September 3, 2009, for a period of twenty-four (24) to thirty-six (36) months as Director of Finance" and that on February 1, 2011 he was summoned to the office of Ms. Suzette Morris who carried out a Performance Evaluation in the presence of Mrs. Gloria Fenton-Rose. He states that there was no discussion surrounding the grades given after the evaluation was done and immediately after, he was given a letter of dismissal.

[11] Mr. Anslip also states that certain allegations were made in the letter including matters relating to a weak inventory management and internal controls, the updating of signatories on the region's account, that he had not implemented basic accounting principles in the operations, did not provide guidance to the facilities in the area of financial management, utility bills not being dispatched to

the facilities and that critical projects were delayed because he did not prioritize funding for these projects.

[12] He denies these allegations and states that he met the requirements of his job as the grades he got on the Performance Evaluation Report were “6B’s, 12C’s and 1D”. He indicates that despite meeting the requirements of his job, he was wrongfully dismissed in breach of his employment contract and adds that on February 7, 2011, the Ministry of Health issued a press release stating that he was relieved of his post. He also indicates that he appealed to the Disciplinary Committee of the Regional Health Authority and his appeal was dismissed and that on being dismissed he was paid one month’s salary, 20 days’ vacation leave accumulated up to February 1, 2011 and travelling allowance amounting to $302,950.67, and that “there were 19 months and one day” left on his contract. He says he is entitled to salary from March 1, 2011 to September 2, 2012, travelling allowance and vacation leave that he would have earned during the same period, as well as gratuity.

[13] His evidence further is that Ms. Suzette Morris and Mrs. Gloria Fenton-Rose gave evidence at the hearing of his appeal and that after the appeal was dismissed, he wrote numerous letters seeking employment from several companies and in June 2013 he “finally landed a job” with Celebration Brands Limited.

[14] In cross examination, Mr. Anslip at first, admitted that when he separated from the Defendant he was paid one month’s salary in lieu of notice and agreed that the contract allowed for it to be terminated by giving one month’s notice or one month’s salary in lieu of notice. He also said that as Director of Finance, he was required to prepare financial statements on a timely basis, adhere to and comply with accounting procedures and practices, and he had responsibility for making sure the organization operated within the guidelines of the **Financial Administration and Audit Act.**

[15] He stated that he had been with the Defendant "4½ years, roughly", prior to the evaluation being done and that it was not the first one being done, so he would have seen a similar document completed. He also stated that he had not seen anything on the Reviewing Officer's Report section of the Performance Evaluation Report which shows that it is required to be completed, and added that Suzette Morris is the highest ranking officer at NERHA and, as Director of Finance, he reported directly to her. He explained that in relation to the 'memo' he said he received on April 19, 2010, he had no copies of action plans and that whatever the instructions were, based on the 'memo', he "would have fulfilled".

[16] On February 6, 2018, in further cross examination, when shown Exhibit 2, (the letter dated February 1, 2011), Mr. Anslip disagreed that the contract was terminated by one month's salary in lieu of notice and also disagreed that the termination was in keeping with Clause 11 of the contract.

[17] In seeking to clarify his evidence in relation to whether he had copies of any action plans or templates, he stated that they were all at NERHA.

[18] The following documents were agreed and admitted in evidence:

1. Agreement dated September 3, 2009
2. Letter dated February 1, 2011 from NERHA to Mr. Anslip
3. Performance Evaluation Report
4. Letter dated August 9, 2011- Result of the Appeal
5. Government of Jamaica – Guidelines for making overall assessment.

[19] The following were also admitted in evidence:

6. Article in Daily Gleaner dated January 31, 2011 under heading "'Idle Money' Bank urges hospital to collect cash from dormant account" and

7. Article in Daily Gleaner dated February 8, 2011, under the heading "Health exec sacked"

[20] The Defendant did not present any evidence in support of its defence although it had filed and served a Witness Summary of Gloria Fenton-Rose. The only evidence before the court is therefore that of Mr. Anslip, as contained in his evidence-in-chief and that which was elicited in cross examination as well as that contained in the documents admitted in evidence.

Claimant's Submissions

[21] In his written closing submissions, Counsel for the Claimant, Mr Irving, reviewed Mr. Anslip's evidence and, pointing to the provisions of **Rule 29.8(1) of the Civil Procedure Rules (CPR),** submitted that as the Defendant did not utilize the option of having the witness summary put in as hearsay, it could not be referred to and/or relied on. He expressed the view that the Defendant was under an obligation to "positively put its case to the Claimant" and this was not done. He therefore submitted that "the Claimant's account must be accepted."

[22] Mr. Irving said that based on the following: the reports in the Daily Gleaner of January 31, 2011 and February 8, 2011; the fact that the same allegations about dormant account were included as one of the reasons for the termination of the contract; the fact that a performance evaluation was done before the contract was terminated; the fact that Ms. Suzette Morris admitted to the Disciplinary Committee of the Regional Health Authority Board that she invoked clause 10 of the contract to terminate his contract and the fact that there was an appeal to the Disciplinary Committee of NERHA, which can only be done pursuant to clause 10 of the agreement, it is clear that Ms. Morris acted pursuant to Clause 10 of the contract when she terminated his contract.

[23] He also submitted that the Defendant breached Clause 10 of the agreement when it failed to follow the disciplinary procedures incorporated in the contract of employment as the Claimant was dismissed without there being sufficient cause, but, based on the performance evaluation report, he met the requirements of his job.

[24] Mr. Irving pointed out, that there is a breach of contract if an employee is wrongfully dismissed before the expiration of the term for which he is employed. He stated that two conditions must be satisfied. These he said are that the employee must be engaged for a fixed term determinable upon notice and the dismissal must have been wrongful, "that is to say without just cause or excuse on the part of the employer". He also pointed out that Mr. Anslip was employed on a fixed term contract of employment because it is a contract for a specified period of time with a defined beginning and a defined ending, and that he was dismissed without just cause or excuse "since the Defendant did not follow the correct dismissal procedure".

[25] He cited the case of **Gunton v London Borough of Richmond upon Thames** [1980] 3 All ER 577, for the proposition that an employee is entitled to damages for wrongful dismissal if the terms of a contract with respect to its termination are not followed in a case where an employer terminates a contract of employment for cause. He indicated that the principle was accepted in the Supreme Court in the case of **Lisamae Gordon v Fair Trading Commission,** Claim No. 2005HCV 2699, delivered March 28, 2008, and also in the Court of Appeal case of **Rosmond Johnson v Restaurants of Jamaica Limited t/a Kentucky Fried Chicken** [2012] JMCA Civ. 13.

[26] Mr. Irving stated that it is clear that the Defendant decided to dismiss the Claimant for cause (non-performance) and was following the procedure outlined in Clause 10 of the contract of employment. He added that the contract "incorporated the **Labour Relations and Industrial Disputes Act** and other relevant laws of Jamaica" and "Clause 2 ...provides that the Employee shall be governed by the Authority's Personnel Policies".

[27] Counsel also indicated that Clause 15(1) of the contract of employment provides that "on satisfactory completion of the terms of engagement under this Agreement The Employee will be eligible for gratuity at a rate of 25% of the amount of salary drawn during the period of engagement including any period of

approved vacation leave, and on the salary element of any terminal payment made in lieu". He expressed the view that "pursuant to the Government of Jamaica – Guidelines for Making Overall Assessment, the Claimant would meet the requirements of his job if he obtained some Bs mostly Cs and maybe 1 or 2 Ds."

[28] Counsel stated that the Claimant "therefore would have "satisfactory (sic) completed the terms of engagement under his contract of employment", based on the grades he received and that it is the grades on the Performance Evaluation Report which determine whether one meets the requirements of his job. He noted that Mr. Anslip had only one "D", which was for "understanding the proper role between the professional and the administrator", which, he suggested, had nothing to do with the letter dated February 1, 2011. He concluded that Mr. Anslip had satisfactorily completed the terms of his engagement and is therefore entitled to the 25% gratuity for 36 months.

[29] Counsel in the course of his submissions, applied for the Particulars of Claim to be amended to reflect the sums claimed on the evidence, as follows:

"a) salary from 1st March, 2011 to 2nd September 2012

	$5,499,123.00
b) three years gratuity	2, 264,439.19
c) payment in lieu of vacation leave for 19 months	228,200.00
d) 7% increase by Government (PA4 scale)	372,434.37
	$8,074,769.06 (sic)

Defendant's Submissions

[30] In the Defendant's written closing submissions, Ms. Thomas indicated that "it is clear from the pleadings in particular paragraph 5, that the claim is one for wrongful dismissal...".

[31] She examined the case of **Janice Elliott v Euro Star Motors Ltd**, Claim No. CL 2000/E024, unreported, delivered November 12, 2009, and pointed out, *inter alia*, that, in that case, R. Anderson, J. stated that "it must be remembered that the rule that 'she who alleges must prove', still requires the claimant to establish her case on a balance of probabilities" and that where the contract provides for a period of notice, payment in lieu thereof is an adequate alternative.

[32] Counsel also submitted, that there are authorities which demonstrate that where a contract of employment provides for summary dismissal with one month's notice, or one month's salary in lieu of notice, on the one hand, and dismissal for cause on the other hand, the fact that reasons for dismissal are stated in the termination letter is not conclusive that dismissal was for cause. She added, "if there is payment in lieu of notice, this is cogent evidence that the dismissal was not for cause".

[33] She made reference to the case of **Lisa Mae Gordon v Fair Trading Commission**, supra, in which Brooks. J.,(as he then was) said:

> *"The fact that the letter mentions other matters does not detract from its stated adherence to the contract". In that case the Claimant was given a letter of dismissal which stated, inter alia, that, "we have decided…to release you from your contractual obligations, with immediate effect, and to compensate you for the unexpired portion of your contract"*

[34] Ms. Thomas also cited the case of **Cocoa Industry Board and Anor. v Burchell Melbourne** (1993) 30 JLR 242, in which the employee was terminated on the basis that his performance was below expectation and that he betrayed the confidence his employers had placed in him and was paid one month's salary in lieu of notice. His claim for wrongful dismissal was successful at first instance and on appeal it was held that the contract made it clear that the employer could terminate the agreement on giving one month's notice or one month's salary in lieu of notice which is what the employer had done and there was therefore no basis on which a claim for wrongful dismissal could be upheld.

[35] Counsel noted that in **Alexander Okuonghae v University of Technology, Jamaica** [2014]JMSC Civ. 138, in addressing the issue whether the defendant employer was liable for wrongful dismissal, McDonald-Bishop, J., (as she then was) referred to, and applied the case of **Cocoa Industry Board** and found that the statement of the grounds for the dismissal in the letter of termination did not mean that the claimant was being dismissed for cause, because he had been given the contractual notice to which he was entitled.

[36] Ms. Thomas submitted further that in order to succeed on his claim, the Claimant is required to establish that his contract of employment was not terminated in accordance with its terms. She expressed the view that the gravamen of the Claimant's complaint is that he is entitled to sums representing salary and emoluments for the unexpired portion of the contract, as well as gratuity. She also submitted that as the **Cocoa Industry Board** case demonstrates, "since there was no provision for payment of sums upon dismissal for cause as provided for in Clause 10, the payment of the sum equivalent to the notice period is cogent evidence that the Claimant's contract was terminated summarily and in accordance with clause 11..."

[37] She expressed the view that "as was stated in **Alexander Okuonghae v University of Technology, Jamaica**, the 'question of wrongful dismissal is thrown out the window' in these circumstances" and pointed out that it was the defendant's contention that the fact that there was a disciplinary process which took place, does not detract from the legal position that the termination was effected in accordance with Clause 11, as the proceedings would have been after the fact, and surplus to the requirements, the contract having been terminated in a manner allowed for by the contract. She added that the fact that Ms. Morris and Mrs. Fenton-Rose "may have asserted that the Claimant was terminated in accordance with clause 10 also does not change the legal position that the claimant was terminated in accordance with clause 11."

[38] Counsel concluded that the Claimant has failed to discharge the burden of proof on him to show that the dismissal was wrongful, and, as a consequence, the claim should fail and judgment entered in favour of the defendant.

[39] The issues which I find fall to be determined are:

i) Whether the court is obliged to accept the Claimant's account in the absence of evidence from the defendant

ii) Whether the Claimant was dismissed for cause

iii) What compensation he would be entitled to, if found to have been wrongfully dismissed

Whether the court is obliged to accept the claimant's account in the absence of evidence from the defendant

[40] Arising from the failure of the Defendant to lead evidence at the trial, I must point out that since the witness summary for the Defendant was filed and served, if the Claimant wished to rely on that evidence, he could have applied to have that witness called. The parties chose not to exercise any of the options open to them by virtue of Rule 29.8 of the **Civil Procedure Rules.**

[41] Neither party was therefore able to rely on the evidence contained in the witness summary of Mrs. Gloria Fenton-Rose filed on December 19, 2014, in these proceedings and the court notes that the witness summary was filed and served apparently in breach of Rule 29.8(4) of the CPR as there is no indication that notice was given to the Claimant, and it was at the close of the Claimant's case that the court was informed that the witness would not be called.

[42] Although the Defendant has not led any evidence, the principle that "he who alleges must prove", still requires the Claimant to establish his case on a balance of probabilities. Where the Defendant has failed to provide evidence in support of its defence, and where the credibility of the Claimant has not been destroyed in cross examination, as Anderson, J said in the case of **Janice Elliott,** a case referred to by Counsel for the Defendant**,** "there would normally be a strong basis

for saying that, given that the only evidence is that of the Claimant, then the Claimant should succeed on a balance of probabilities".

[43] I do not find that the failure to lead evidence, whether by the attendance of the witness, or by way of hearsay, from the witness who provided a witness summary is sufficient to justify this court to accept the Claimant's account, or for it to be taken as automatically entitling the Claimant to judgment in his favour, in circumstances where the burden of proof lies on the Claimant who has to prove his case on a balance of probabilities.

[44] As Mr. Anslip's evidence stands alone, without any contradiction from any other evidence, this court is mindful of the need to guard against what Lord Oliver of Alymerton, in the case of **Industrial Chemicals v Ellis** (1986) 35 WIR 303 characterised as:

> *"the fallacy, sometimes propounded from the Bar, that because the sworn testimony of a witness cannot be directly contradicted by that of another witness or by contemporary documents, it must necessarily be accepted as truthful by the judge regardless of his assessment of the credibility of the witness"*

[45] I have therefore taken into consideration the fact that objects sought to be achieved by the cross examination of a party's witness would be to impeach the accuracy and credibility of the evidence given in the witness statement and/or to detect any discrepancies or elicit any suppressed evidence and I find that although the Claimant in this particular case has been denied of such an opportunity the basic facts are not in dispute.

[46] Although the Claimant was not shaken during cross examination, the fact in issue at the close of his case remained whether the Defendant is liable for wrongful dismissal and as such this court has assessed the evidence to determine if he has made out a case against the Defendant on the claim.

Whether the Claimant was dismissed for cause

[47] It is established that an employer may dismiss an employee with or without notice, and with or without cause. This principle has been stated in **Ridge v Baldwin** [1963] 2 All ER 66, at page 71, where Lord Reid said:

> *"…There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract."*

[48] Wrongful dismissal has been defined as where an employee's service has been terminated without notice or without the adequate amount of notice or where the employment is terminated contrary to the contract.

[49] **Halsbury's Laws of England**, 4th Ed., Volume 16 at paragraph 451 states:

> *"A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages two conditions must normally be fulfilled, namely:*
>
> 1. *The employee must have been engaged for a fixed period or a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and*
>
> 2. *His dismissal must have been wrongful, i.e. to say without sufficient cause to permit his employer to dismiss him summarily."*

[50] The authorities show that where a contract of employment specifies the method by which it may be terminated, the parties must adhere to it (see **Gunton v London Borough of Richmond Upon Thames,** supra). Where an employer seeks to terminate an employment contract without adhering to the provisions of the contract, it will therefore be deemed to be wrongful.

[51] An examination of the contract in the case at bar shows that it refers to "Dismissal" in Clause 10 and "Termination of Engagement" in Clause 11, as two separate heads under which the employee can be separated from the

employment. These are dismissal for cause and summary dismissal with one month's notice or one month's salary in lieu of notice.

[52] As the basic facts surrounding the circumstances in which Mr. Anslip was separated from the Defendant are not in issue, the question is whether having offered and paid Mr. Anslip "...outstanding benefits and one month's salary in lieu of notice subject to settlement of any outstanding liabilities", immediately after informing him of "dissatisfaction with [his] performance", it was a wrongful dismissal and therefore in breach of the contract.

[53] The **Cocoa Industry Board** case shows that where the contract of employment states that the employer could terminate the agreement on giving one month's notice or one month's salary in lieu of notice, once the employer gave such notice or made those payments, there is no basis on which a claim for wrongful dismissal can be upheld. The court also held that where such notice or salary in lieu is given, the statements of the employer on the employee's behaviour in the letter of dismissal is of no importance as the employee was not summarily dismissed.

[54] Following closely on the guidance of that authority, it would appear that the statements of reasons, as contained in the letter dated February 1, 2011, did not mean that he was dismissed for cause, since he was given payment in lieu of notice to which he was entitled, under the contract.

[55] However, the Claimant was also given additional sums of money said to be salary and travelling for the last day he worked, as well as "accumulation of 20 days vacation". The evidence also is that he appealed to the Disciplinary Committee of the Regional Health Authority Board which he could only do pursuant to Clause 10, in a case where he was dismissed for cause.

[56] I find that the circumstances of the instant case therefore make it distinguishable from the **Cocoa Industry Board** case, as well as the case of **Lisa Mae Gordon.** In this case, the Claimant was called to a meeting, his performance assessed

and the letter of dismissal given to him, all done on the same day, February 1, 2011. Additionally, he appealed to the Disciplinary tribunal, and there was a hearing. Although the Defendant avers to have terminated the agreement under Clause 11, I find that the overall circumstances of this case separate it from the cases referred to, in which a Claimant would not be able to sustain a case for breach of contract having been paid salary in lieu of notice.

[57] The employment agreement under the heading 'Dismissal', at Clause 10, provides that an appeal may be made thereunder, in a case where the Authority terminates the engagement of an employee forthwith, for cause. There was no provision for payment of any sums upon dismissal for cause and neither was there any provision for appeal to be made to the Disciplinary Committee of the Regional Health Authority Board where there was termination with payment of salary in lieu of notice.

[58] The Claimant was separated from his post after he was subject to a performance evaluation and was given grades, which, based on the Guidelines for making Overall Assessment, (Exhibit 5), show that he met the requirements of his job. The letter indicated that termination was with immediate effect and speaks to payment of "outstanding sums" which do not form part of the provisions of Clause 11, and speaks to payment in lieu of notice, as is provided in Clause 11 of the agreement.

[59] It is the Claimant's evidence that he performed satisfactorily based on the performance evaluation report. This evidence I find has been corroborated by the contents of the report which has been admitted in evidence. I note also that Mr. Anslip was cross examined in relation to the requirements of his job of adhering to accounting procedures, as well as on the contents of the Performance Evaluation Report and his evidence that he performed satisfactorily has not been challenged.

[60] Ms. Thomas' submissions in relation to the fact that Mr. Anslip was paid "salary in lieu of notice" and there was therefore no basis on which a claim for wrongful

dismissal could be upheld, at first blush, appear very attractive. However, they lose appeal, in my view, when one examines the employment agreement in its entirety and the overall circumstances of this case. This was a fixed term contract, which, as a general rule, cannot be terminated before the expiry date, except for cause, or, except as stipulated in the provisions of the said contract enabling either party to terminate it on giving notice **(Dixon & Anor. v British Broadcasting Corporation** [1979] 1 QB 546.)

[61] Counsel has failed to take into account the fact that Mr. Anslip was not only given one month's salary, but was paid other sums as well, in circumstances where his performance was assessed on the same day. This, certainly is not in keeping with the contract if he was being terminated under Clause 11 and neither could it properly be said to be under Clause 10, save and except for the fact that he was permitted to appeal. I therefore cannot agree that the payments made to Mr. Anslip were intended to mean or in fact meant that the Defendant was not relying on the provision in the contract relating to dismissal for cause. In any event, it is clear that the Defendant did not follow the terms of the contract relating to termination.

[62] In **Rosmond Johnson v Restaurants of Jamaica Ltd T/A Kentucky Fried Chicken** [2012] JMCA Civ 13, at paragraph [16], Brooks JA observed that;

> *"the term of the contract with respect to its termination must be followed*".

The only difficulty with applying this particular principle to the instant case, is that in the agreement, the Claimant's employment with the Defendant could be terminated under Clause 10 or Clause 11. It would therefore follow that if Clause 11 was being utilized, Mr. Anslip would have been entitled to one month's pay in lieu of notice and nothing more. This is not what was paid to him. It would also follow, in my view, that if Clause 10 was being utilized Mr. Anslip would not have been paid any sums at all but, would, as happened, be allowed to appeal.

[63] I am therefore led to the view that it is more likely than not that the Claimant was dismissed for cause, as it was just prior to his dismissal that he was subject to the evaluation exercise and after being dismissed, in keeping with the provisions of Clause 10 of the agreement, he was permitted to appeal. The entire proceedings leading up to the dismissal therefore point to a finding that this was not a simple case of a dismissal with pay in lieu of notice, but the dismissal was for cause, and it is clear that the proper procedures were not followed by the Defendant. Claiming to have adopted Clause 11 of the agreement in my view is in effect to intentionally sidestep the manner in which it carried out the entire process of terminating the employment of Mr. Anslip against whom it is clear that cause has been alleged.

[64] I bear in mind also that on the day prior to the meeting and the dismissal letter being given to Mr. Anslip, there was an article in the Gleaner newspaper (Exhibit 6.) which refers to dormant accounts relating to the St Ann's Bay Hospital. I find that that newspaper article of January 31, 2011, the convening of a meeting at which a performance appraisal was conducted, followed by the tendering of the letter of dismissal which set out extensively, reasons for the dismissal, in conjunction with the appeal to the Disciplinary Committee of Regional Health Authority, provide compelling evidence that the Claimant was in fact dismissed for cause, that is, for non-performance.

[65] The report in the Daily Gleaner of February 8, 2011, (Exhibit 7) under the heading 'Health exec sacked', that the Ministry of Health had issued a press release that Mr. Anslip had been dismissed from his post in the wake of reports of dormant accounts relating to the St Ann's Bay Hospital, also provides further clear and compelling evidence that the Claimant had been dismissed from his post, for cause. While it is unclear from the evidence presented, how the process of appeal to the Disciplinary Committee was carried out, what is clear, is that the Claimant appealed, as he could only have done pursuant to Clause 10, in a situation where he was dismissed for cause, and his appeal was dismissed.

[66] I therefore find that although the Defendant in its statement of case indicated that the Claimant was terminated in accordance with Clause 11 of the contract, and there were reasons stated in the letter of dismissal, and notwithstanding the legal position as gleaned from the authorities that having been paid a sum in lieu of notice, it would be "cogent evidence" that the Claimant's contract was terminated in accordance with Clause 11 of the contract, the Claimant has shown on a balance of probabilities, on his evidence which has been corroborated by documentary evidence, that he was wrongfully dismissed.

[67] Having examined the overall circumstances of the case, and on a critical examination of the authorities presented, and the submissions of both Counsel, I find that the Defendant did not act in accordance with the terms of the agreement dated September 3, 2009 when the Claimant's employment was terminated. I am satisfied that Mr. Anslip has established on a balance of probabilities, that the Defendant has breached the terms of the contract of employment as I find that the Defendant's conduct on February 1, 2011 constituted a wrongful dismissal.

[68] I find that the fact that the Defendant paid Mr. Anslip one month's salary, which is said to be in lieu of notice, does not negate what in reality was a clear dismissal for cause with immediate practical effect, as I do not find that the payments, in addition to the one month's salary, meant that the Defendant was not placing reliance on the provisions in the agreement which relate to dismissal for cause. The letter of dismissal, when viewed in the context of the entire circumstances, provide sufficient evidence for this court to find on a balance of probabilities that the Claimant was dismissed from his position 'for cause' as the Defendant was dissatisfied with his alleged poor performance and other reasons stated in the letter.

[69] The Claimant was not allowed to carry out his duties as Director of Finance with effect from February 1, 2011 and in view of all the foregoing, I am satisfied that Mr. Anslip has made out a case against NEHRA as I find that the conduct of the Defendant in terminating his employment in the circumstances, was a wrongful

dismissal and therefore in breach of the contract thereby making him entitled to damages.

What compensation is the Claimant entitled to

[70] Where there is a wrongful termination of a contract of employment, the usual remedy is damages and the damages payable in the case of a fixed term contract, as in the case at bar, is the equivalent of the salary which would have been due for the unexpired portion of the contract.

[71] According to **McGregor on Damages**, 18th Ed., paragraph 28-002:

> *"The measure of damages for wrongful dismissal is prima facie the amount the Claimant would have earned had the contract of employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the Claimant, in minimising damages, either had obtained or should reasonably have obtained. The rule has crystallised anomalously in this form. It is not the general rule of the contract price less the market value of the Claimant's services that applies; instead the prima facie measure of damages is the contract price, which is all the Claimant need to show. This is then subject to mitigation by the Claimant who is obliged to place his services on the market, but the onus here is on the Defendant to show that the Claimant has or should have obtained an alternative employment."*

[72] Persuaded by the above, and dicta in the case of **Egerton Chang v National Housing Trust** (1991), 28 JLR 495, which states that where there is a written contract, "resort must be had to this document in assessing damages…", I find that Mr. Anslip is entitled to a sum which is equal to his earnings and related entitlements, up to the end of the contract period.

[73] He has claimed, and on the application for an amendment to be made to the Particulars of Claim on December 16, 2018, the court has granted the amendment for the following: salary from 1st March 2011 to 2nd September 2012, three years gratuity, vacation leave payment for 19 nineteen months as well as 7% increase by government (PA4 scale).

[74] In the case of **Egerton Chang** whose services were terminated "with cause", it was held that he was entitled to gratuity based on a clause in the contract which provided as follows:

> *"...Subject to satisfactory service, be eligible on completion of service of each contract year for a gratuity at the rate of twenty-five percentum (25%) of salary earned during the contract year..."*

[75] Clause 15 of Mr. Anslip's employment agreement is similar. It states as follows:

> *"**Gratuity**. 15. (i) On the satisfactory completion of the terms of engagement under this Agreement The Employee will be eligible for gratuity at the rate of twenty- five percent (25%) of the amount of the salary drawn during the period of engagement including any period of approved vacation leave, and on the salary element of ant terminal payment made in lieu of leave...."*

[76] I agree with Counsel for the Claimant, that where a contract is for a fixed period and it is wrongfully terminated before the effluxion of time, the measure of damages is for the unexpired portion of the contract or for so long as it has taken the injured party to obtain new employment, whichever is less, subject to the requirement to mitigate.

[77] Mr. Anslip's evidence is that in June 2013 he got a job. The unexpired portion of his contract amounts to 18 months. I therefore find that he is entitled to salary for that period which amounts to $4,014,945.00. He is also entitled travelling allowance for that period amounting to $1,194,750.00, payment for vacation leave amounting to $243,903.04, and, he is entitled as well to gratuity of $2,123,847.72. This amounts to $7,577,445.76.

[78] Although he had claimed the sum of "7% increase by Government", Mr. Anslip has not provided a basis on which this court can make an award in relation to this aspect of the claim.

Disposition

[79] Judgment for the Claimant.

[80] The Defendant shall pay to the Claimant damages representing salary and other entitlements for the unexpired portion of his contract of $ 7,577,445.76..... (net any applicable taxes) (Details to be settled by Counsel)

Costs to the claimant to be taxed if not agreed.