

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C. 207/1984

BETWEEN EGERTON CHANG PLAINTIFF
AND NATIONAL HOUSING TRUST DEFENDANT

W.E. Frankson Q.C. instructed by Gaynair and Fraser for plaintiff

D. Batts and R. Gittens instructed by Livingston Alexander and Levy for defendant.

Hearing on March 30, 31, 1989 and November 12, 13, 1990 and September 25, 1991.

JUDGMENT

BINGHAM, J.

The plaintiff was from 1st April, 1982 and up to 5th April, 1984, Director of Mortgage Operations by virtue of a contract in writing the terms of which read:-

NATIONAL HOUSING TRUST

MEMORANDUM OF AGREEMENT

AGREEMENT made this 1ST day of April 1982
BETWEEN the National Housing Trust, a body corporate
established under Section 70 of the National Insurance
Amendment Act 1976 (herein-after called the Trust)

and

EGERTON CHANG

(herein-after called "the person engaged")

1. The person engaged is required to pass a medical examination as to his physical fitness within three months of the execution of this Agreement, such examination to be conducted by a Medical Officer assigned by the Trust for such purpose.
2. The person engaged undertakes that he will diligently and faithfully perform the duties of DIRECTOR OF MORTGAGE OPERATIONS - EMG I and will act in all respects according to the instructions or directions given to him by the Trust through the Executive Officer or other duly authorised officers. In this Agreement the term "Executive Officer" shall mean the person for the time being acting as Chief Executive Officer and "duly authorised officers" shall

mean officers to whom the person engages is responsible and persons acting in such capacity.

3. This Agreement is subject to the conditions set forth in the Schedule hereto annexed and the Schedule shall be read and construed as a part of the Agreement.

Witness our hands the day and year above written.

of the witness	Signed by	MORIN E. SEYMOUR	) sign across Stamp
		(Managing Director	
	On behalf of the National Housing Trust		
	in the presence of		) sign across stamp
	Signed by	EGERTON CHANG	
	in the presence of:		
	(Signature	DAPHNE NELSON	)
	(		
	(Address	16 OXFORD ROAD	
	(		
(	KINGSTON 5		
(Occupation	DIRECTOR, H.R.D.	)	

SCHEDULE

Terms of
engagement

1. Subject to the provisions of this Agreement the term of the engagement of the person engaged is for TWO YEARS (inclusive of vacation leave) commencing from the date of assumption of duty, which term may be extended as provided in Clause 8.

Duties
(Appendix 1)

2. The duties of the person engaged shall include the usual duties of the office in which he is engaged (Appendix 1) and any other suitable duties which the Trust may call upon him to perform. The person engaged shall devote the whole of his time and attention to the service of the Trust and shall use his utmost exertions to promote the interests of the Trust. He shall conform to the employment policies of the Trust which are for the time being in force.

Salary

3. (1) The emoluments of the person engaged are as follows:-

Basic Salary	\$19,200	per annum
Housing Allowance	7,000	" "
Entertainment Allowance	3,000	" "
Utilities	2,500	" "
Duty	2,000	" "
Travelling	3,000	" "
	<u>\$36,700</u>	

(2) The salary of the person engaged may be subject to deductions under Clause (3).

Ill-Health

4. (1) If the person engaged shall be compelled by reason of ill-health (not caused by his own misconduct) to resign his office or if at any time it shall be certified by a duly qualified medical officer selected by the Trust that he is incapable by reason of any infirmity of mind or body of rendering further efficient service to the Trust, the Trust shall pay his salary up to the date of such resignation or certificate and the amount of gratuity payable will be on a pro rata basis.

(2) A certificate signed by a duly qualified medical officer selected by the Trust shall be conclusive evidence on the question whether or not the person engaged was compelled to resign his office by reason of ill-health within the meaning of this clause.

Dismissal,
etc.

5. If the person engaged 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 4) become unable to perform any of his duties or to comply with any order, or shall disclose any information respecting the affairs of the Trust to any unauthorised person or shall in any manner misconduct himself, the Trust may terminate his engagement forthwith and thereupon all rights and advantages reserved to him by this Agreement shall cease.

Determina-
tion of
engagement

6. (1) The Trust may at any time determine the engagement of the person engaged on giving him three months' notice in writing or on paying him three months' salary.

(2) The person engaged may at any time after the expiration of three months from the commencement of service, determine his engagement on giving to the Trust two months' notice in writing or on paying to the Trust two months' salary.

(3) If the person engaged terminates his engagement otherwise than in accordance with this Agreement, he shall be liable to pay to the Trust as liquidated damages three months' salary.

Liability
to make
good damage

7. In the event of any pecuniary damage arising from the person engaged, disregarding or failing to comply with any order, or departmental instructions or from any neglect of duty whatsoever on his part, he may be liable to a deduction from his salary to make good the damage or any part thereof the amount of which shall be fixed by the Trust.

Further
employment

8. Three months prior to the completion of this contract the person engaged shall give notice in writing to the Trust whether he desires to remain in its employment and the Trust shall thereupon decide whether it will

offer him further employment. If the Trust offers him further employment the re-engagement will be on such terms and for such period as may be mutually agreed on.

Leave

9. Leave facilities are as follows:

Vacation - 5 Calendar weeks per year to be taken in each calendar year.

Sick - 14 Working days in each calendar year.

Casual - 10 Working days in each calendar year.

Gratuity

10. Subject to satisfactory service, the person engaged will be eligible on completion of service of each contract year for a gratuity at the rate of twenty-five per centum (25%) of salary earned during the contract year; such gratuity to be tax free.

Interpretation

11. This Agreement is to be interpreted in accordance with the Laws of Jamaica.

Marginal notes

12. The marginal notes are for convenience only and do not form a part of this Agreement.

The plaintiff was highly qualified academically for this post. He obtained a Bachelor of Science Degree with high honours and was the holder of a Masters Degree in Business Administration. Prior to joining the Trust as director of Mortgage Operations he had worked as a Commercial Credit Officer at Jamaica Citizens Bank and with the I.C.D. Group of Companies gaining invaluable experience in the latter, as Financial Controller and Director. He joined the Trust in 1982 on a two year contract which had expired on 31st March, 1984. His contract was then renewed for another two years commencing 1st April, 1984 before he was on 5th April 1984 by a letter addressed to him by the then Managing director Morin Seymour summarily dismissed from his post. The letter of dismissal reads:-

NATIONAL HOUSING TRUST

16 Oxford Road, Kingston 5, P.O. Box 5,000 Phone: 92-96500-9

APRIL 5, 1984

MR. EGERTON CHANG
86 HALF WAY TREE ROAD
KINGSTON 10

DEAR MR. CHANG:

I HEREBY TERMINATE YOUR SERVICES WITH THE NATIONAL HOUSING TRUST WITH IMMEDIATE EFFECT WITH CAUSE.

KINDLY DELIVER THE KEYS TO YOUR CAR TO MR. KEITH JOSEPHS BY 5 P.M. TODAY.

YOU ARE AUTHORIZED TO DISCUSS AMOUNTS DUE TO YOU FOR LEAVE WITH OUR PERSONNEL DEPARTMENT, AS WELL AS OTHER BENEFITS THAT MAY BE DUE TO YOU.

YOU ARE ALSO REQUIRED TO MAKE SUITABLE ARRANGEMENTS FOR ALL OUTSTANDING DEBTS DUE TO THE NATIONAL HOUSING TRUST.

YOURS TRULY,

SGD.....
MORIN M. SEYMOUR
MANAGING DIRECTOR

C.C. MR. O.E. JONES
MR. P. HALEY
MR. D. NELSON
MR. A. RAHMAN
MISS M. BAILEY

This letter had followed closely upon an exchange of correspondence between the Managing Director and the plaintiff commencing with a letter dated April 4, 1984 which read:-

NATIONAL HOUSING TRUST

16 Oxford Road, Kingston 5, P.O. Box 5,000 Phone : 92-96500-9

4th April, 1984

MR. EGERTON CHANG
DIRECTOR MORTGAGE OPERATIONS
NATIONAL HOUSING TRUST
16 OXFORD ROAD
KINGSTON 5

DEAR EGERTON:

RE: INSPECTION WORK PERFORMED BY
NATIONAL HOUSING TRUST ON
BEHALF OF THE JAMAICA MORTGAGE
BANK - BAY FARM VILLAS

AS INDICATED TO YOU IN THE MEETING YESTERDAY WITH MR. P. HALEY AND OUR EARLIER MEETING AT THE CHAIRMAN'S OFFICE, ATTENDED BY MESSRS. HALEY, SEYMOUR, RAHMAN AND YOURSELF, IT HAS BEEN BROUGHT TO OUR ATTENTION THAT THE SUM OF \$2,000 DUE FOR WORK PERFORMED BY THE NATIONAL HOUSING TRUST ON THE ABOVE MENTIONED SCHEME HAS BEEN RECEIVED BY YOU.

I WOULD APPRECIATE RECEIVING YOUR WRITTEN EXPLANATION WITHIN THE NEXT TWENTY-FOUR HOURS.

YOURS TRULY,

SGD.....
MORIN M. SEYMOUR
MANAGING DIRECTOR

66 HALF WAY TREE ROAD
KINGSTON 10

The plaintiff had responded to the two letters from the Managing Director by two letters dated 5th April, 1984 which read:-

APRIL 5, 1984

Mr. Morin M. Seymour
Managing Director
National Housing Trust
15 Oxford Road
Kingston 5.

Dear Mr. Seymour

I acknowledge receipt of your letter dated April 5, 1984.

Your purported dismissal is in breach of your contract with me and is unacceptable.

Would you please inform me without delay what is the cause for my summary dismissal. I enclose my reply to yours of April 4, 1984, which was pre-empted by the delivery of yours of April 5, 1984.

Yours sincerely

Sgd.....
Egerton Chang

Encl:

c.c. Mr. O.E. Jones
Mr. P. Haley
Mrs. D. Nelson
Mr. A. Rahman
Miss R. Bailey

NATIONAL HOUSING TRUST
16 Oxford Road, Kingston 5, P.O. Box 5,000 Phone: 92-96500-9

APRIL 5, 1984

Mr. Morin M. Seymour
Managing Director
National Housing Trust
16 Oxford Road
Kingston

Dear Mr. Seymour

In reply to your letter dated April 4, 1984, apart from acknowledging, that the sum of \$2000 passed through my hands to be applied for the purpose for which it was intended, I categorically deny any implication that I received the said sum for my own use or benefit.

Yours sincerely

Sgd.....
Egerton Chang
Director Mortgage Operations

The dismissal of the plaintiff arose out of an incident which related to a survey done by him along with other members of the staff assigned to the Mortgage Department of the Trust. The survey was carried out during the months of November to December 1983.

This work was done on behalf of the Jamaica Mortgage Bank and had to do with a Housing Scheme known as Bay Farm Villas in which both organisations were interested as Mortgagors and in respect of which a number of these units had been taken over by squatters. As both organisations had representatives on the Boards of each other, it was customary for them to pool their ideas in working out strategies to resolve common problems. This particular scheme and the problem it posed was one such matter.

At a meeting of the Jamaica Mortgage Bank held earlier in 1983 at which Mr. Morin Seymour as Managing Director of the National Housing Trust was present the situation of the "captured units" was raised and he agreed to offer the expertise available at the Housing Trust to assist the Jamaica Mortgage Bank in an attempt at resolving the problem at Bay Farm Villas.

As the National Housing Trust was reputed to have a better track record in resolving problem schemes the plaintiff was mandated to work along with Mr. Owen Smith, the then Managing Director of the Bank in devising a strategy aimed at arriving at a solution to alleviate the problems existing at the Bay Farm Villas.

A meeting was subsequently held to discuss the matter on 27th July, 1983 at the Mortgage Bank. Among the persons present at this meeting were the plaintiff from National Housing Trust and Mr. Owen Smith of the Mortgage Bank. Arriving out of the discussions the plaintiff advised the Managing Director of the Bank that before any steps could be taken to work out a strategy with regards to the particular scheme it would be necessary for a survey involving individual inspections to be carried out in respect to each of the units affected and for a report to be submitted as to the status of the occupiers. The minutes of the meeting indicate that it was agreed that the problem being that of the Jamaica Mortgage Bank they would pay a sum of \$42 dollars per unit for the ~~investigative~~ work to be done. There is a conflict, however, as to who was to carry out this field work. The plaintiff's account is that the arrangement was one in which it was agreed that the members of the staff attached to the Mortgage Department at National Housing Trust would undertake to do the work outside of normal working hours and that they were to be paid for their services upon the report being prepared and submitted to the Mortgage Bank.

Mr. Smith, the Managing Director, on the other hand, said that he understood that at all Material times he was dealing with the National Housing Trust. The report in relation to the meeting held to discuss the matter and submitted to the then Chairman of the Mortgage Bank, however, would tend to suggest that the survey

was to be done by an outside source. This is further borne out by the fact that upon receiving the interim report, Mr. Smith was only too willing and without the least objection to prepare an advance of Two Thousand Dollars (\$2,000.00), which cheque was drawn in favour of a 'company' controlled by the plaintiff, when that cheque was lost a replacement cheque was prepared also drawn in favour of the same company.

There is no issue that at all material times the amount received by the plaintiff for the work done was not utilised by him. The money was paid over to a committee of the Mortgage Department of the Trust towards funding a Christmas Party for the staff of that section. This being what had motivated the plaintiff and certain members of the staff of the Mortgage department to carry out the exercise and to furnish the report to the Jamaica Mortgage Bank in the first place. They saw this as an opportunity providing the means where by they would be able to fund their own Christmas Party. It had been the custom in the past for the Trust to grant monetary contributions to each of the departments to assist in funding their Christmas festivities. In 1983, however, because of tight financial constraints there was a cost cutting exercise which affected this practise. This resulted in the Management of the Trust funding one party for the entire staff of the Trust. As the staff of the Mortgage Department were still desirous of having their own party, they undertook the task of the survey for the Mortgage Bank and saw this as the means whereby the expenses of the Christmas Party would be met.

Mr. Morin Seymour in his evidence stated that it was his understanding that the National Housing Trust was to provide a service to the Jamaica Mortgage Bank and in return that the Mortgage Bank was to pay the Trust a fee for carrying out this assignment. This, however, is in conflict with the report submitted by Mr. Owen Smith to the Chairman of the Mortgage Bank. His understanding being that "the inspections were to be carried out by a Bailiff". He also saw the National Housing Trust as benefiting from the exercise as they had problem units in the same scheme. The amount due for the work to be carried out for and on behalf of the Mortgage Bank was to be set by

the Bank and paid over on submission of the report to the person(s) who did the survey and prepared the report. There is nothing in the evidence emanating from the accounts of either the plaintiff or Owen Smith when taken as a whole to suggest that there would be any sum due from the Jamaica Mortgage Bank to the National Housing Trust as a result of the survey done.

In the light of the evidence as to the manner in which the survey was carried out, the report prepared and the use to which the sum received was put, there existed no basis upon which the allegation of dishonesty as set out at paragraph 4 of the defence could be founded. All the evidence in the matter went towards establishing that the sum received was paid over to a Committee of the Mortgage Department of the National Housing Trust formed to plan and arrange the Christmas Party, whether it was first paid over to a 'dummy corporation' controlled by the plaintiff before eventually reaching the hands of the members of the committee is of no relevance. The fact being that the plaintiff neither sought nor obtained any pecuniary benefit from the exercise.

There being no evidence of dishonesty on the plaintiff's part the critical issue is given the fact that the money was received and not paid over to the National Housing Trust whether the plaintiff as the Director of Mortgage operations in failing to obtain prior approval from his immediate superior Mr. Peter Haley, the Deputy Managing Director, that his conduct amounted to a breach of his fiduciary duty as was to be expected from that of a departmental head. This question clearly in the light of Mr. Haley's evidence which was not seriously challenged, and is accepted, has to be answered in the affirmative. The conduct of the plaintiff may have been foolish and misguided. One should, however, consider the facts and not the labels. For a person who to borrow the words of Mr. Morin Seymour was "one of the finest management practitioners that it has been his experience to work with", is sufficient testimony of the level of the plaintiff's competence at the work place. It is clear that in the light of his conduct that the degree of confidence and trust that has to exist between the members of a Management team to ensure that the

organisational machinery of the Trust functioned efficiently this would have been gravely shaken by the incident to **such an** extent as to destroy that confidence.

It is not therefore, out of disrespect to both counsel if I do not attempt a full examination of the many authorities cited. This would be applicable in particular to learned Counsel for the defendant as most of the authorities relied on by Mr. Batts supportive as they were of a proposition which went towards establishing clear instances of fraudulent dealings on the part of the employees of such a nature as to fall within the bounds of criminality, were in the light of the fact that I have concluded that there was no evidence of dishonesty in this case on the plaintiff's part, no longer of any assistance. In this regard the cases relied on by him being:-

1. Boston Deep See Fishing and Ice Company v. Ansell [1888 - 89] ALL E.R. (Rep) 65.
2. B.I.V. Limited v. Park Royal Limited [1946] 1 ALL E.R. 350
3. Reading v. Attorney General [1951] 1 ALL E.R. 17
4. Saunders v. Parry [1967] 2 ALL E.R. 803
5. M 27/1979 Jamaica Telephone Company Limited v. National Workers Union (unreported) delivered on 20 December, 1979.
6. Griffiths v. Phoenix Building Services Limited [1975] 25 W.I.R. 32 - these cases

when examined were all instances in which the employees used the employers time and resources to make a secret profit for themselves and their conduct merited summary dismissal.

The instant case in my opinion would fall somewhere within the line of cases such as Sinclair v. Neighbour [1966] 3 ALL E.R. 988.- although the plaintiff's conduct did not extend as far as the facts in that case. His conduct I did not regard as falling within the ambit calling for summary dismissal on the plaintiff's part. His conduct though of such a nature as to affect the confidences required as between an employee in a responsible position and his superiors and would therefore be of such a nature as to result in his services being terminated, did not however in my opinion merit summary dismissal but was more in the nature of conduct calling for a reprimand. See dictum of Lord Maugham in Jupiter Insurance Company v. Shroff [1937] 3 ALL E.R. 67 at page 74 where held by Privy Council that "the immediate dismissal of any employee is a strong measure and it can be only in exceptional

circumstances that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence." This would be more so having regard to the plaintiff's good record and his proven competence prior to the incident and for that reason I would hold that his summary dismissal was in the circumstances unjustifiable.

Damages.

Clarke J. in C.L. G 134/1983 Cecil Godfrey v. Allied Stores Limited (unreported) delivered on 26th October 1990, a matter involving a claim for wrongful dismissal said: (page 11)

"Appellate Courts in England and this Country have laid it down that damages for wrongful dismissal cannot include compensation for the manner of the dismissal, for injured feelings, or for the fact that dismissal makes fresh employment difficult."
Addis and Gramophone Company Limited
[1908 - 10] ALL E.R. Rep I (H O L) and
Kaiser Bauxite Company v. Vincent Cadeen
S.C.C.A. No. 49/81 (unreported).

I adopt the above Statement by Clarke J. and the cases cited as correctly stating the law to be applied in determining the measure of damages in this case. In the latter case the Court of Appeal referred to the dictum of Lord Loreburn L.C. in the former case in which the learned Lord Chancellor said:- (page 3)

"I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge C.J. (Mae v. Jones 25 Q.B.D. at p. 108) has been quoted as authority to the contrary. I doubt if the learned Lord Chief Justice so intended it. If he did, I cannot agree with him. If there be a dismissal without notice the employer must pay an indemnity; but, that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

I would therefore resort to the written Contract (Exhibit I) as governing the plaintiff's conditions of service in determining the sum due to him. For although Mr. Frankson had contended that a finding that the plaintiff's services were wrongfully terminated would in effect mean that he ought to be entitled to his remuneration for the remainder of the life of the contract, he conceded that this had to take into consideration any alternative employment obtained by the plaintiff in the interim.

Having combed carefully through the plaintiff's testimony, there was no evidence led as to whether he was at the time of the hearing gainfully employed, and if so when he obtained such employment. That being so a Court cannot speculate as to what the factual situation was in the absence of any evidence adduced in support of such a fact.

Having regard to this lacuna in the plaintiff's case I am left to resort to the conditions as set out at Clause 3 of the Schedule in the Contract (Exhibit 1). This allows for termination of the Contract by three months notice in writing or the payment of three months salary and allowances in lieu thereof. To this would be added the plaintiff's salary and allowances for the week up to the date of the receipt of the letter of dismissal which when pro-rated amounts to Five Hundred and Forty One Dollars Seventy Four cents (\$541.74). This would when quantified amount to Nine Thousand, Seven Hundred and Sixteen Dollars Seventy Four cents (\$9,716.74). To this would be added a sum of Four Thousand, One Hundred and Eighty Three Dollars Eighty Five Cents (\$4,183.85) being vacation leave due to the plaintiff.

Apart from this sum the plaintiff has claimed Six Thousand, Seven Hundred Dollars (\$6,700.00) as being gratuity for the years 1983 - 1984. Under the Contract, Clause 10 of the Schedule, the plaintiff would, "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."

The plaintiff would be entitled to gratuity for 1983, having completed satisfactory service for that contract year. As his services were terminated before completing the contract year in 1984 he would not be entitled to gratuity for that year. As his basic salary was Nineteen Thousand, Two Hundred Dollars (\$19,200.00) per annum, his gratuity for 1983 would therefore amount to Four Thousand, Eight Hundred Dollars (\$4,800.00). The total amount due to the plaintiff would accordingly be Nineteen Thousand, Three Hundred and Thirty Two Dollars, Eighty Nine cents (\$19,332.89).

It was admitted by the plaintiff under cross examination that there was a loan of One Thousand, One Hundred and Seven Dollars, Seventy Two cents (\$1,107.72) due from him to the Trust at the date of the termination of his services. This sum was the

subject of a Counter Claim by the Defendant.

The plaintiff has, however, in his Reply to the Defence and Counter Claim admitted owing the said sum of One Thousand, One Hundred and Seven Dollars, Seventy Two cents (\$1,107.72) and sought in the Reply to set off that sum against the amount of his Claim. When this amount is deducted from the sum recoverable by the plaintiff, this would result in the balance remaining as due to him being Eighteen Thousand, Two Hundred and Twenty-five Dollars, Seventeen cents (\$18,225.17). To this extent the plaintiff succeeds on the Claim and judgment is entered for him in the sum of Eighteen Thousand, Two Hundred and Twenty-five Dollars, Seventeen cents (\$18,225.17) with costs to be agreed or taxed.

There will be no order as to costs in respect of the Defence and Counter Claim.